A Sampling of Recent (Non-Delaware) Partnership and LLC Cases

2017 Spring Meeting
ABA Business Law Section
LLCs, Partnerships and Unincorporated Entities Committee
New Orleans, LA
April 7, 2017

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Limited Liability Partnerships

Mortgage Grader, Inc. v. Ward & Olivo, L.L.P., 139 A.3d 30 (N.J. 2016).

The court concluded that the disciplinary rule requiring an LLP law firm in New Jersey to maintain malpractice insurance does not apply during the firm's winding up if no legal services are being provided, and an LLP is not required to maintain tail coverage. Further, the failure to comply with the insurance requirement imposed by the disciplinary rule would provide grounds for the New Jersey Supreme Court to terminate the LLP's right to practice law or otherwise discipline the LLP but did not authorize the trial court to convert the LLP to a non-LLP general partnership. Conversion of the LLP to a non-LLP was not authorized by the New Jersey partnership statute either.

The plaintiff asserted a malpractice claim against an LLP law firm and its two partners. The LLP was winding up and no longer carried malpractice insurance although the firm carried insurance at the time the services were rendered. The plaintiff argued that the firm's failure to maintain insurance during winding up allowed the trial court to convert the firm from an LLP to a non-LLP general partnership so that the partner who did not commit malpractice would have vicarious liability.

The supreme court analyzed the disciplinary rule at issue, which required insurance against damages from the performance of "professional services." The court found no indication that the administrative activities in a winding up are included within that term. Because the disciplinary rule also requires compliance with New Jersey's UPA (which is based on the Revised Uniform Partnership Act (1997) or "RUPA"), the court proceeded to examine the statutory provisions addressing winding up. After examining the provisions of New Jersey's UPA, the court concluded that the administrative activities conducted during winding up are not the transacting of business for which an LLP law firm is created, and an LLP law firm that is winding up and has ceased to provide any legal services is not practicing law and could not commit malpractice during that period. Thus, the disciplinary rule does not require such a law firm to maintain professional liability insurance. Relying on a comment to Section 306 of RUPA, the court also found the date on which the firm incurred its obligation to the plaintiff to be dispositive. The comment states that partnership obligations under or relating to a contract generally are incurred when the contract is made, and obligations under or relating to a tort generally are incurred when the tortious conduct occurs as opposed to the time of the injury or harm. The court thus held that an LLP law firm incurs its obligation to a client on the date that the alleged malpractice occurs. In this case, the firm was a valid LLP with professional liability insurance coverage at the time of the alleged malpractice.

The court further concluded that neither the disciplinary rules nor the New Jersey UPA provided any basis for the trial court to convert the LLP in this case to a non-LLP general partnership. The disciplinary rule confers authority on the New Jersey Supreme Court to discipline an LLP law firm for failure to comply with the rules. The trial court had no such authority. As for the provisions of New Jersey's UPA, they provide that the status of an LLP remains effective until the LLP cancels its status under the statute or the State Treasurer revokes its status for failure to file an annual report when due or pay the required filing fee. The court noted that the statutory provisions are protective of the liability shield by providing cure provisions in the event of non-compliance with the annual filing requirements. Those provisions along with the absence of any language in the statute giving a court authority to convert a properly recognized LLP into a non-LLP general

partnership led the court to conclude that the UPA provides no support for the trial court to convert the LLP to a non-LLP.

Next the court analyzed whether the disciplinary rule requires tail insurance after dissolution. The court noted that the insurance requirement for LLPs is a departure from the general rule that malpractice insurance is not required for attorneys in New Jersey. The rules do not require tail coverage for professional corporations or general partnerships that are not LLPs, nor are solo practitioners required to carry any insurance, including tail coverage. The court decided against imposing a tail requirement on attorneys who choose to practice as LLPs, noting that a mandate to purchase tail coverage still would not fully protect the public from uninsured risks.

One justice wrote an opinion concurring in the judgment but dissenting from the majority's conclusion that an LLP does not have to maintain liability insurance during the LLP's winding up. This justice also urged amendment of the disciplinary rule to require lawyers engaging in the practice of law as an LLP to secure tail coverage for a six-year period after the LLP's dissolution, if such coverage is reasonably available.

1301 Properties Owner LP v. Abelson, No. 653342/2013, 2016 WL 1367908 (Sup. Ct. NY Cty. April 1, 2016).

Judge Scarpulla held that a provision in Dewey LeBouef's lease that provided the partners would have personal liability was not enforceable to hold the partners personally liable because the firm registered as a limited liability partnership after execution of the original lease, and the New York LLP statute provides that the partners are not personally liable for the obligations of the partnership unless otherwise agreed by a majority of the partners. The lease, which had been amended numerous times over the years, was not approved by a majority of the partners after the firm's registration as an LLP, and the court thus held that the landlord could not rely on the provision of the lease imposing personal liability on the partners.

Dewey Lebouef's landlord sued several hundred partners of Dewey LeBouef and its predecessor firms to hold the partners personally liable on a lease entered into in 1989. The lease contained a provision stating that the partners would be personally liable in the event of a breach. In 1997, Dewey Ballantine registered as a New York LLP. The lease was amended 12 times over the years, including 8 times after the firm registered as an LLP. The New York LLP statute provides that partners do not have personal liability for the debts of the partnership except to the extent that a majority of the partners agree otherwise or as provided in any agreement of the partners. According to the court, "While there may have been a reasonable time period following Dewey Ballantine's conversion to a limited liability partnership during which the parties may have continued to rely on the personal liability provisions in the lease, that time has long since elapsed. After Dewey Ballantine's conversion to a limited liability partnership in 1997, the contracting parties had ample opportunity to update the lease and comply with Partnership Law § 26 by securing a majority or other agreement among the partners to be personally liable." The court thus concluded that the lease was not enforceable to hold the partners personally liable due to failure to comply with the New York LLP statute.

Personal Liability of LLC Member or Manager Under Agency Principles or Other Law

Morello v. State, No. 03–15–00428–CV, 2016 WL 2742380 (Tex. App. May 6, 2016).

The court of appeals held that the State of Texas did not establish that the manager and operator of an LLC was personally liable for civil money penalties under the Texas Water Code arising from the LLC's violations of rules promulgated by the Texas Commission on Environmental

Quality. The State relied on the principle that an officer or other agent of a corporation is personally liable when he knowingly participates in a tortious or fraudulent act even though the act was performed as an agent; however, the State did not allege that the manager in this case engaged in a tortious or fraudulent act. The State argued that this principle of personal liability covers "wrongful acts" and that an individual corporate officer may be held liable for his own violations when a statute provides for individual liability as does the Water Code. The court concluded that the conduct in this case did not precisely align with the kind of statutory violation likened to an "environmental tort" by a sister court of appeals in another case and that the other case was not binding on the court in any event. Thus, the court held that the trial court erred in granting the State summary judgment against the individual manager.

The State of Texas filed suit against Morello and White Lion Holdings, L.L.C. ("White Lion"), an LLC formed and managed by Morello, alleging violations of rules promulgated by the Texas Commission on Environmental Quality and seeking injunctive relief and civil penalties. White Lion purchased property out of a bankruptcy estate and was transferred a hazardous-waste permit and compliance plan associated with the property. A few years later, the State of Texas filed suit against White Lion alleging that it did not meet the requirements of the compliance plan, including requirements to continue corrective action to clean up contamination, monitor groundwater, file reports, and provide financial assurance for operation of corrective programs. Although the obligations that were imposed on the previous owner of the property were transferred to the LLC, the State amended its petition and named Morello in its suit, alleging that Morello was individually liable as well as the LLC. After the district court granted the State's motion for summary judgment against White Lion and severed the claims against Morello, the State moved for summary judgment against Morello. The district court granted the State's motion for summary judgment and ordered Morello to pay $367,250 in civil penalties. Morello appealed, arguing that he could not be held individually liable because the State was not attempting to pierce the veil of the LLC and did not allege the type of conduct for which an agent of an LLC may be held individually liable for actions taken on behalf of the company.

The court of appeals first explained that the Texas LLC statutes have always provided that a member or manager of an LLC is not liable for the debts, liabilities, or obligations of the LLC except to the extent the LLC agreement provides otherwise. Further, the statutes provide that a member may only be named as a party in an action by or against the LLC if the suit is brought to enforce the member's right against or liability to the LLC. The court noted that the Texas LLC statutes at the time this suit was filed did not mention veil-piercing principles as an exception to the liability protection provided by an LLC or how such remedies might be applied in the LLC context. The court pointed out that it considered veil-piercing principles in a previous case without deciding whether veil-piercing concepts apply in the LLC context. In this case, the court stated that it was again not necessary to reach the question of whether veil-piercing concepts apply in the LLC context because the State did not assert that it was attempting to pierce White Lion's veil.

The State acknowledged that the structure of an LLC is intended to shield its members from the liabilities and obligations of the LLC but argued that the statutory shield does not deflect liability for the conduct at issue. Rather than relying on veil-piercing principles to hold Morello personally liable, the State relied on the common-law principle that a corporate officer may be held individually liable when the officer knowingly participates in tortious or fraudulent acts even though the officer is acting on behalf of the corporation. However, the State did not allege that Morello engaged in any fraudulent or tortious activity. The State acknowledged that this was not a tort action but was "a statutory enforcement action brought against Morello as operator and sole decision maker of White Lion." Instead of arguing that Morello engaged in fraudulent or tortious conduct, the State contended

that this principle of law also covers "wrongful acts." The State asserted that Morello could be held individually liable for the failure to adhere to the terms of the compliance agreement that was transferred to White Lion and for the failure to provide financial assurance because of Sections 7.101 and 7.102 of the Water Code. Section 7.101 of the Water Code provides that "[a] person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute," and Section 7.102 of the Water Code authorizes the assessment of a penalty on "[a] person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit." The State pointed to Morello's control over the operations and decisions of White Lion as sole manager and officer and argued that he could be held individually liable for the "wrongful acts" which he directed, participated in, knew of, or assented to. Relatedly, the State argued that since Morello was the sole member, owner, and decision maker of White Lion, he was a person that caused, allowed, and/or permitted White Lion to violate the compliance agreement and administrative rules.

As it began its discussion of whether the State established as a matter of law that Morello could be held individually liable, the court noted that all of the cases that the State cited in its summary judgment motion recite the longstanding rule that a corporate employee may be held liable for his "tortious" or his "fraudulent" acts when acting as an agent; the cases do not indicate that conduct falling outside of those types of misconduct may also serve as a basis for individual liability. Additionally, the court distinguished the cases relied on by the State as support for the proposition that the legislature intended to allow for individual liability to be imposed on an agent of an LLC even in the absence of fraudulent or tortious conduct through the passage of Sections 7.101 and 7.102 of the Water Code. In *Miller v. Keyser,* 90 S.W.3d 712 (Tex. 2002), in which the Texas Supreme Court determined that an agent of a corporation may be held liable under the Deceptive Trade Practices Act, the court equated the claims brought under the Deceptive Trade Practices Act to "torts." In the instant case, the court of appeals stated that there was no showing that the alleged failures to satisfy the terms of the compliance plan and failure to provide financial assurance were tortious or fraudulent conduct of Morello individually or that those failures to comply should be treated as if they were. Here, the State did not allege any fraudulent conduct and specifically stated that the violations at issue are not torts. The court of appeals was also unpersuaded by the decision of a sister court of appeals in *State v. Malone Service Co.,* 853 S.W.2d 82, 84–85 (Tex. App.–Houston [14th Dist.] 1993, writ denied). In *Malone,* the court of appeals concluded that the president of a company and the plant manager could be held individually liable under a former provision of the Water Code, which provided for civil money penalties to be imposed on a person who violated a provision of a permit. The court in *Malone* likened the conduct at issue in the case to "an environmental tort" for purposes of the rule that a corporate officer can be held individually liable for participating in or directing the commission of a tort. The court of appeals stated that the conduct at issue in *Malone* was consistent with what the legislature had described as an environmental tort in a former provision of the Civil Practice and Remedies Code relating to proportionate responsibility. That provision addressed injury, damage, or death "caused by depositing, discharge, or release into the environment of any hazardous or harmful substances." The court stated that the conduct alleged by the State in the instant case did not align as easily with the description of an environmental tort because there was no allegation that Morello deposited or discharged any hazardous substances. In any event, the analysis from *Malone* did not bind the Austin Court of Appeals. Thus, the court concluded that the State failed to establish as a matter of law that Morello could be held individually liable for the alleged violations and that the district court thus erred by granting the State's motion for summary judgment.

LLC Veil Piercing

***Griffith v. SSC Pueblo Belmont Operating Company LLC*,** 381 P.3d 308 (Colo. 2016).

The Colorado Supreme court held that a trial court did not properly analyze the relationship between a subsidiary LLC and its parent companies when it determined that it would be appropriate to pierce the subsidiary's veil to impute the residency of the subsidiary to its parent companies in a personal jurisdiction analysis. The correct analysis is a two-part test where a court first determines whether it may pierce the corporate veil to impute the subsidiary's contacts to the parent. If the resident subsidiary's contacts may be imputed, the court must then determine if those contacts in combination with the parent's own contacts are sufficient to support personal jurisdiction. The trial court applied an "extraordinary remedy" when it found that the LLC form could be pierced. The supreme court held that collective control and financial benefit alone are not enough to disregard the LLC form.

The plaintiff filed suit against the LLC nursing home where her father was staying when he died. The plaintiff included multiple entities as defendants, including three upstream LLCs and the ultimate parent corporation. Five of these upstream entities filed a motion to dismiss for lack of personal jurisdiction. Each of the upstream entities was a Delaware entity with its principal place of business in either Georgia or Tennessee.

The trial court conducted an evidentiary hearing on the motion to dismiss. The court found that the upstream entities had never registered to do business in Colorado, had never had a registered agent in Colorado, and had never transacted business in Colorado. Despite these findings, the court held that because the upstream entities "operated the Colorado nursing home as one business in which they collectively controlled the operations, planning, management, and budget of [Belmont Lodge] in Colorado" the alleged tort could be imputed to the upstream entities. The trial court relied on *Bolger v. Dial-A-Style Leasing Corp.*, 409 P.2d 517 (Colo. 1966) for the proposition that a wholly owned subsidiary can shield its out-of-state parent company from jurisdiction in Colorado only where the two companies are operated as distinct entities. Because of the collective control and the direct or indirect financial benefit upon the upstream entities, the trial court found that the companies were not operated as distinct entities and thus imputed the nursing home's contacts to the entities.

On appeal, the court began its analysis by noting that Colorado's LLC statute instructs a court to apply corporate veil piercing case law to LLCs. The standard in Colorado for corporate veil piercing is: (1) the entity is "merely the alter ego" of the member, (2) the LLC form is used to perpetuate a wrong, and (3) disregarding the legal entity would achieve an equitable result. The court then identified the factors that a court should analyze when determining whether there is an alter-ego relationship between an entity and its parent: (1) the parent owns all the stock; (2) both have common directors and officers; (3) the parent finances the subsidiary; (4) the parent causes the subsidiary's incorporation; (5) the subsidiary has grossly inadequate capital; (6) the parent pays salaries or expenses of the subsidiary; (7) the subsidiary has no business except with its parent or subsidiary corporation or no assets except those transferred by its parent or subsidiary; (8) directors and officers do not act independently in the interests of the subsidiary; (9) formal legal requirements of the subsidiary such as keeping corporate minutes are not observed; (10) distinctions between the parent and subsidiary are disregarded or confused; and (11) the subsidiaries do not have full boards of directors.

The court then addressed the findings by the trial court. It noted that disregarding the LLC form is an extraordinary remedy and that it cannot be justified simply because a parent company receives a financial benefit from its subsidiaries. Further, the court criticized the trial court's reliance

on a single case over fifty years of case law. The court held that the reliance on *Bolger* alone was not appropriate and the trial court should review all case law on remand.

Sky Cable, LLC v. Coley, Civ. Action No. 5:11cv00048, 2016 WL 3926492 (W.D. Va. July 18, 2016).

The court applied Delaware law to reverse pierce the veil of three Delaware LLCs to satisfy a judgment against the individual member of the LLCs. The court held that the "egregious" facts warranted reverse piercing under Delaware law and appointment of a receiver. The court further concluded that the court could invoke its inherent sanction power to reverse pierce under the circumstances presented in this case even if the court was incorrect about Delaware law.

After several years of litigation, DIRECTV obtained a $2.4 million judgment against Gary Coley and East Coast Cablevision, LLC, for the receipt and unauthorized distribution of satellite programming at a resort in Virginia. In this post-judgment collection proceeding, DIRECTV asked the court to reverse pierce the veil of three other LLCs owned by Coley and declare that Coley was the alter ego of the LLCs and that the assets of those LLCs were subject to the judgment in this case. DIRECTV also sought appointment of a receiver over the assets of Coley and his LLCs to prevent fraud during the execution process. The court granted the requested relief.

After reviewing the evidence relating to the ownership and operation of Coley's LLCs and setting forth "but a few examples of Coley's commingling of assets established by the record in this case," the court discussed outsider reverse veil-piercing theory and concluded that "[t]here could not be a more appropriate set of circumstances justifying application of the reverse veil-piercing theory than those presented in the instant case." The court agreed with Coley that it was required to look to Delaware law, as the law of the "state of incorporation," in determining whether to disregard the corporate form and subject the assets held by Coley's LLCs to execution of the judgment against Coley in this case. The court acknowledged that Delaware appellate courts have never expressly recognized the remedy DIRECTV sought, and the court was not aware of any authority applying an outsider reverse veil-piercing theory under Delaware law. However, the court noted that no court has held that outsider reverse veil piercing would be prohibited under Delaware law, and the court pointed out that the Delaware Chancery Court has hinted, in a case affirmed by the Delaware Supreme Court, that a reverse piercing claim may be viable under Delaware law if properly presented (citing *Cancan Development, LLC v. Manno*). The court also pointed out that numerous other jurisdictions, including North Carolina (where the LLCs at issue operated and their assets were located) and Virginia (the forum state in this case), recognize the concept of outsider reverse veil piercing. The court further discussed the evidence in this case to illustrate that "[t]he record is replete with evidence of Randy Coley's misdeeds" so as to warrant reverse piercing his LLCs.

Coley argued that the court must consider the effect reverse veil piercing would have on innocent third parties. While the court acknowledged that this is ordinarily a concern, the court was not concerned about that issue in this case because there either was no innocent third party or Coley was equitably estopped from asserting the presence of an innocent third party. In the post-judgment proceeding, Coley argued that his wife held a membership interest in the LLCs, but the court stated that it could not "make heads or tails of whether the Coley entities are single member LLCs or whether both Coley and his wife Kimberli have membership interests" given conflicting evidence on the point. In any event, the court stated that the Coleys were equitably estopped from asserting that Kimberli held any membership interest in the LLCs because their position in the post-judgment proceeding was flatly inconsistent with the position they took throughout the underlying litigation. If Coley's claims in the post-judgment proceeding about the membership interest of the LLC were true, then "he and his wife plainly misled the parties (and the court) about the nature of Kimberli's

interest in Coley's LLCs in order to gain unfair advantage in the prior proceedings" because DIRECTV dismissed its claims against Kimberli in reliance on their previous representations.

Coley also argued that the court could not grant the relief requested because Coley's LLCs were not parties to the case and their due process rights would be violated. The court rejected this argument, stating that case law suggests that proof of alter ego satisfies due process concerns with respect to the exercise of personal jurisdiction and agreeing with DIRECTV that the LLCs were embodied in the form of Coley, who was a party, throughout the litigation.

The court stated that justice would require the court to apply reverse veil piercing under its inherent sanction power even if Delaware law does not recognize the theory.

Finally, the court agreed with DIRECTV that the extraordinary remedy of appointment of a receiver was warranted in this case given Coley's history of deception and efforts to evade judgment.

The case is on appeal to the Fourth Circuit Court of Appeals.

A.G. Dillard, Inc. v. Stonehaus Construction, LLC, No. 151182, 2016 WL 3213630 (Va. June 2, 2016).

The plaintiff sought to satisfy a judgment against an LLC by reaching the assets of the LLC's member, the member's spouse, and other entities owned or controlled by the member. The plaintiff relied on veil piercing (both traditional and reverse) and fraudulent conveyance claims. The Virginia Supreme Court made clear that the same standards that apply for veil piercing in the corporate context apply in the LLC context and held that the plaintiff had alleged sufficient facts to state its claims except for the veil-piercing claim against the member's spouse.

With respect to the veil-piercing claims, the court first recognized the general rule that a person with a claim against an LLC may only pursue that claim against the LLC itself and not its members, but the court stated that an LLC's "corporate veil" may be pierced "in rare instances" to hold a member personally liable. Under Virginia case law, the corporate veil may be pierced "'when the unity of interest and ownership is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice. '" However, "'[a] corporate entity cannot be disregarded unless it is proved that the corporation is the alter ego, alias, stooge, or dummy of the individuals sought to be held personally accountable and that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime.'" The court stated that this same standard applies in the LLC context. The court acknowledged that it has recognized reverse veil piercing, in which a company is held liable for a shareholder's personal liabilities, in addition to traditional veil piercing, in which a member may be held personally liable for a company's liabilities. The court stated that courts generally should consider the same factors in deciding whether to apply either doctrine.

With respect to the plaintiff's claim to pierce the LLC's veil to reach its member, the complaint alleged that the LLC had no bank account, held no assets, and had been legally insolvent for several years. It alleged that the member had siphoned the LLC's funds and that the member owed the LLC more than $160,000, which the LLC made no effort to collect. The court said these allegations raised an implication that the LLC and its member were not separate personalities. Further, the complaint implicitly alleged that recognizing the separate existence of the LLC and its member would cause an injustice to the plaintiff in that the plaintiff would not receive the benefit of its judgment against the LLC. Thus, the plaintiff's complaint stated a claim to pierce the LLC's veil to reach the member.

Because the complaint alleged a claim to pierce the LLC's veil to reach its member, the court turned to the question of whether the plaintiff alleged a claim to reverse pierce the veils of the related entity defendants through the member. Viewing the allegations in the light most favorable to the

plaintiff, the complaint alleged that the LLC's member was also a member of each of the related entity defendants. The complaint stated that the LLC and the related entity defendants did not operate as separate personalities because they advertised to the public as a single entity and the funds and employees of each entity were used as the funds and employees of every entity. Viewing these allegations in the light most favorable to the plaintiff, the complaint raised an implication that the LLC's member, through his control over the LLC, also controlled the LLC's entity alter egos, the related entity defendants. Thus, the plaintiff stated a claim to reach the assets of the related entity defendants by piercing the LLC's veil to reach the member and then reverse piercing the related entity defendants' veils through the member. In a footnote, the court pointed out that a court considering a reverse veil-piercing claim should consider the impact of reverse piercing on innocent investors and innocent creditors as well as the availability of other remedies the creditor may pursue. The complaint in this case did not have any allegations involving these issues, and the court did not consider them.

With regard to the member's wife, the plaintiff did not allege that she had any relationship with the LLC other than indirectly through her husband. Therefore, the court concluded that her assets could not be reached by piercing the LLC's veil.

The trial court dismissed the fraudulent conveyance claim on the basis that a claim for fraudulent conveyance must be pled with the same level of specificity as common law fraud. The supreme court stated that the plaintiff was not required to state its claim with specificity, and its general allegations of a fraudulent conveyance scheme were sufficient. The plaintiff alleged facts that, if true, would show that conveyances from the LLC to the LLC's member and his wife and to the related entity defendants involved at least one badge of fraud.

McBeth v. Porges, 171 F.Supp.3d 216 (S.D.N.Y. 2016).

The court held that an investor in a hedge fund alleged a plausible alter-ego claim against the individual who controlled the two Delaware LLCs that served as managing member and investment manager of the hedge fund. The court concluded that the investor's allegations were sufficient to allege that the individual and the LLCs operated as a "single entity" and that there was an "overall element of injustice and unfairness."

The plaintiff invested $5 million in a hedge fund, and the fund lost the entire investment within ten months. The plaintiff sued a Delaware LLC that served as the managing member of the fund and a Delaware LLC that served as investment manager. The plaintiff also sued Porges, the CEO and principal of these two LLCs. The plaintiff sought to hold Porges liable for breach of contract and breach of fiduciary duty by piercing the veil of the LLCs. Porges sought dismissal of the claims, but the court concluded that the plaintiff's allegations were sufficient to allege an alter-ego claim against Porges under Delaware law.

In an alter-ego inquiry under Delaware law, the court must determine whether the relevant parties operated as a "single entity" by considering various factors (adequate capitalization, solvency, corporate formalities, siphoning of company funds, and whether the company functioned as a facade for the controlling owner). Additionally, a Delaware alter-ego claim requires an element of fraudulent intent. The Second Circuit has stated that the plaintiff need not prove actual fraud, but must show a mingling of the operations of the entity and its owner and an overall element of injustice and unfairness. The court noted that the pleading requirement under the federal rules is not one of particularity if the alter-ego claim does not sound in fraud. Here, the plaintiff alleged that Porges created the LLCs "as a personal trading vehicle," that Porges commingled personal and corporate assets, and that Porges and his entities shared the same office address. The plaintiff also alleged that

the entities were grossly undercapitalized. The court said these allegations were sufficient to allege a "single entity" as well as "an overall element of unfairness or injustice."

Fiduciary Duties in LLCs

Griffin v. Jones, 170 F.Supp.3d 956 (W.D. Ky. 2016).

The court examined the roles of two individuals with respect to two Kentucky LLCs, a Wyoming LLC, and a Kentucky corporation. The court concluded that one of the individuals did not owe the other individual any fiduciary duty arising out of any of the entities.

Jones and Griffin started a venture to buy and sell college textbooks. They formed Blackrock Investments, LLC ("Blackrock"), of which they were each 50% owners. Blackrock created a subsidiary, SE Book Company, LLC ("SE Book"). Jones and Griffin also formed College Book Rental Company, LLC ("College Book Rental"), which was owned by a trust of which Jones and Griffin were beneficiaries. Finally, Jones bought a 50% interest in Integrated Computer Solutions, Inc. ("ICS"), a corporation founded by Griffin. The business relationship of Jones and Griffin deteriorated, and they asserted various claims against each other in this lawsuit, including claims by Jones that Griffin breached his fiduciary duties to Jones. Griffin argued that he did not owe any fiduciary duties to Jones, and the court examined their relationship with respect to each of the entities in which they were involved and concluded that Griffin did not owe Jones a fiduciary duty arising out of any of the entities.

First, the court analyzed the relationship of Griffin and Jones with respect to ICS, a Kentucky corporation formed in 1993 by Griffin. Griffin was a stockholder of ICS but had never been an officer or director. Jones acquired 50% of ICS's stock from another stockholder in 2008 and was the CEO of ICS. In Kentucky, a stockholder does not owe another stockholder a fiduciary duty, even in a closely held corporation. Thus, the court held that Griffin did not owe Jones a fiduciary duty as an ICS stockholder.

Next, the court analyzed the relationship of Griffin and Jones with respect to Blackrock, a Kentucky LLC. Griffin and Jones each owned 50% of Blackrock. Blackrock was originally organized as a member-managed LLC but was changed to a manager-managed LLC. Jones was the manager. Under Kentucky law, the members of a member-managed LLC have fiduciary duties. In a manager-managed LLC, the managers owe fiduciary duties, but the members do not. Thus, the court held that Griffin, a member of a manager-managed LLC of which Jones was the manager, did not owe a fiduciary duty to Jones as a member.

Jones argued that the court had previously held that Griffin owed a fiduciary duty to Jones when the court stated that "a member of a limited liability company owes a duty of loyalty to fellow members." The court said that it was speaking in the context of whether Jones, the manager-member of Blackrock, owed a fiduciary duty to a member, Griffin. The court characterized its language as "over-inclusive" and stated that other courts have made similarly overbroad statements, which would appear to support Jones's position when taken out of context. As an example, the court pointed to a statement by the Kentucky Court of Appeals in *Patmon v. Hobbs,* 280 S.W.3d 589, 594 (Ky. Ct. App. 2009) as follows: "'Kentucky limited liability companies, being similar to Kentucky partnerships and corporations, impose a common-law fiduciary duty on their officers and members in the absence of contrary provisions in the limited liability company operating agreement.'" The court stated that the issue in *Patmon* was the fiduciary duties of a manager-member and that the statements should be viewed in that context.

Next, the court analyzed the relationship of Griffin and Jones with respect to SE Book, a Kentucky LLC. SE Book was owned by Blackrock, so neither Griffin nor Jones had an ownership

interest in SE Books. SE Book was originally organized as a member-managed LLC but was changed to a manager-managed LLC. Jones was the manager. The court held that Griffin did not owe Jones a fiduciary duty arising out of SE Book because Griffin was not a manager of SE Book.

Finally, the court analyzed the relationship of Griffin and Jones with respect to College Book Rental, a Wyoming LLC. College Book Rental was manager-managed, and Jones was the manager. The Wyoming LLC statute imposes fiduciary duties of loyalty and care on a member of a member-managed LLC and a manager of a manager-managed LLC. Griffin was neither a member nor a manager of College Book Rental. Thus, the court held that Griffin did not owe Jones a fiduciary duty arising out of College Book Rental.

Griffin also argued that, even if he owed a fiduciary duty to Jones, none of his alleged conduct constituted a breach of fiduciary duty. Jones claimed Griffin breached his fiduciary duties by purchasing secured debt behind Jones's back and then suing Jones and his wife on their guarantees. Neither party cited Kentucky case law on whether the purchase of a shared debt by one of the debtors may constitute a breach of fiduciary duty, but the court discussed case law in the partnership context that provides support for the general proposition that the purchase of partnership debt by one partner may breach a fiduciary duty in certain circumstances. Whether Griffin actually breached a fiduciary duty required additional factual determinations. Similarly, additional factual findings were necessary before the court could address whether Griffin's initiation of litigation constituted a breach of fiduciary duties. Because the court had already found that Griffin did not owe a fiduciary duty to Jones, the court declined to make factual findings as to whether Griffin's actions violated a hypothetical fiduciary duty. The court concluded that Griffin was entitled to summary judgment on Jones's breach-of-fiduciary-duty claims because Griffin owed Jones no fiduciary duties.

McBeth v. Porges, 171 F.Supp.3d 216 (S.D.N.Y. 2016).

The plaintiff invested $5 million in a hedge fund, and the fund lost the entire investment within ten months. The plaintiff sued a Delaware LLC that served as the managing member of the fund and a Delaware LLC that served as investment manager. The plaintiff also sued Porges, the CEO and principal of these two LLCs. The plaintiff's claims included claims for breach of contract and breach of fiduciary duty. The court held that the plaintiff's breach-of-fiduciary duty claims generally were not duplicative of the breach-of-contract claims, but were potentially duplicative in one respect. The court also concluded that the breach of fiduciary-duty-claims were either direct claims or derivative claims that Delaware law might allow to be asserted directly under the particular circumstances of the case.

The defendants argued that the plaintiff's claims for breach of fiduciary duty should be dismissed as duplicative of the claims for breach of contract. The court acknowledged that both claims were based on the same underlying facts, but that is not the test. The test under Delaware law is whether there exists an independent basis for the fiduciary claims apart from the contractual claims. The court said that the breach-of-fiduciary duty claims were not generally duplicative under that standard. The court said that the offering memorandum contemplated suits alleging breach of fiduciary duty for gross negligence (based on an exculpatory clause that stated the managing member would not be liable "for mistakes of judgment or for losses due to such mistakes, unless caused by gross negligence, fraud, or willful misconduct") and that a fact finder could determine that the defendants made such mistakes, thereby breaching their fiduciary duties, while not necessarily breaching their contractual duties because of broad discretion afforded the defendants in the contract. In one respect, the court stated that the plaintiff's claim for breach of fiduciary appeared to be duplicative. To the extent that the plaintiff's allegation of breach of fiduciary duty based on

concealment of information was based on a failure to provide the periodic reports that were required under the governing agreements, this claim would be duplicative of the claim for breach of contract.

The defendants also complained that the fiduciary-duty claims belonged to the fund and were derivative. The court stated that the plaintiff's claim that he would have withdrawn his money had he received adequate information from the defendants (other than from the reports that were covered by the contract claim) was direct rather than derivative. The court acknowledged that claims for fund mismanagement are ordinarily derivative under Delaware law, but here the fund had dissolved, and the only two members were adversaries. The court pointed out that there is case law in the partnership context where similar circumstances led a Delaware court to hold that "the justifications for requiring partners to bring derivative claims—consolidation of lawsuits and a preference for intra-partnership dispute resolution—[are] inapplicable." It was somewhat unclear to the court whether Delaware courts would apply that holding in the LLC context, but the court was inclined to believe they would and was not prepared to hold otherwise based on the briefing to date. In a footnote, the court elaborated on arguments the defendants asserted under Delaware law to convince the court that the partnership case law mentioned by the court would not apply in this LLC context, but the court was not convinced by the defendants' arguments. Unanswered questions raised by the court included whether and to what extent certain provisions of the Delaware LLC statute regarding defunct LLCs apply in a federal diversity case given that the provisions expressly refer to "the Court of Chancery," and why a defunct LLC must be joined as a necessary party to an action between its only two members. Thus, the court declined to dismiss the claims for breach of fiduciary duty.

Johnson v. King (In re King), 541 B.R. 404 (Bankr. N.D. Tex. 2015).

A judgment in favor of a member of an LLC against his co-member in a lawsuit in state court in which the judgment creditor sued for breach of fiduciary duty did not have preclusive effect for purposes of the judgment creditor's objection to discharge of the debtor for a debt arising from fraud or defalcation in a fiduciary capacity where the state court made no findings of fact or conclusions of law. The bankruptcy court found it unnecessary to decide any issues of fraud or defalcation with respect to fiduciary duties owed by the debtor to the LLC since the LLC was not a plaintiff and the other member did not have standing to pursue the LLC's claims. Assuming without deciding that the debtor owed his fellow member a fiduciary duty (which the debtor did not concede), there was insufficient evidence of moral turpitude, intentional wrongdoing, or willful blindness by the debtor with respect to the matters about which the other member complained to constitute fraud or defalcation.

Johnson and King formed Earl's Deli, LLC, a Texas LLC, to operate a sandwich shop. The certificate of formation provided that the LLC was member-managed, and the company agreement likewise provided for management by the members, in proportion to the percentage interests of the members, which were 51% for Johnson and 49% for King. Notwithstanding the provision for management in proportion to their percentage interests, Johnson chose to be a passive owner, and King managed the LLC for the first year and a half until King informed Johnson that the LLC was out of money and would have to close. Johnson did not want to close the deli, so he took over the day-to-day operations. After doing so and reviewing the books, Johnson discovered alleged improprieties on the part of King. Johnson managed the deli for the next 3 ½ years until the deli's landlord, a corporation owned by Johnson, changed the locks and evicted the LLC for failure to pay the rent for the previous four years.

Johnson sued King in state court and obtained a judgment after a non-jury trial in which the court made no findings of fact or conclusions of law. King then filed a Chapter 7 petition, and Johnson filed this adversary proceeding objecting to discharge of King's debt to him under Section

523(a)(4) (fraud or defalcation in a fiduciary capacity) and (a)(6) (willful and malicious injury to an entity or the property of an entity).

The bankruptcy court rejected the suggestion made by Johnson's counsel at trial that both Johnson and the LLC were plaintiffs in the adversary proceeding. Based on the filings made in the bankruptcy, the court concluded that only Johnson was a plaintiff in the adversary proceeding. Johnson, even though he owned 51% of the LLC, did not have standing to assert injuries to the LLC. Thus, the court did not have to decide any issues of fraud or defalcation in a fiduciary capacity owed to the LLC under Section 523(a)(4) or willful or malicious injury to the LLC or its property under Section 523(a)(6). The court noted that the LLC would not have prevailed even if it had been a plaintiff for the reasons set forth below.

Johnson first argued that the judgment he obtained in state court established a breach of fiduciary duty within the meaning of Section 523(a)(4), but the court pointed out that Section 523(a)(4) requires more than a breach of fiduciary duty. Section 523(a)(4) requires fraud or defalcation while acting in a fiduciary capacity. Because the state court made no findings of fact or conclusions of law, the bankruptcy court did not have a sufficient record from the state court to give preclusive effect to the judgment. Thus, the court proceeded to assess the evidence to determine whether to except King from discharge based on fraud or defalcation in a fiduciary capacity. The court stated in a footnote that King did not concede that he owed Johnson a fiduciary duty "as opposed to the unquestionable fiduciary duty he owed to the LLC." Assuming, without deciding, that King owed a fiduciary duty to Johnson, the court went on to conclude that Johnson did not prove fraud or defalcation.

The court found that the evidence did not show that King committed "fraud" while acting in a fiduciary capacity because there was insufficient evidence of moral turpitude or intentional wrong. The court stated that allegedly unauthorized gas purchases made on the LLC credit card as well as $2,000 in distributions made to King during the time he managed the LLC were fully disclosed in the records of the LLC, to which Johnson always had access, and these transactions thus were not done "secretly" as alleged by Johnson. With respect to the gas purchases, it was necessary for the LLC to use the car of a member or employee since the LLC had no car. Although some of the gas purchases were for King's personal use, there was no evidence that the LLC helped King pay a portion of his car insurance or maintenance, or that the total transaction—King's providing a car and paying all maintenance and insurance in exchange for purchasing gas with the LLC's credit card—was unfair to the LLC. With respect to the $2,000 in distributions, the company agreement provided that distributions of excess cash were to be made to the members in proportion to their percentage interests. While it was true that King made distributions only to himself and not to Johnson while King was managing and operating the deli, the court pointed out that Johnson chose not to share management responsibilities in proportion to their percentage interests as provided in their company agreement and that King's calculation of excess-cash determinations appeared to have been proper. Furthermore, Johnson allowed similar distributions to be made to King even after Johnson took control of the day-to-day management and operation of the deli. Given provisions in the company agreement that allowed a member to exercise remedies against a defaulting member who has committed fraud or theft or gross negligence, the court found disingenuous Johnson's claim that he did not want to "wrestle" with King over the distributions and did not know how to stop him. The court stated that the distributions did not suggest moral turpitude or intentional wrong by King, but instead both parties' recognition that King was entitled to some type of return for his sweat equity or that King needed the distributions for living expenses.

The evidence did not show that King committed a "defalcation" while acting in a fiduciary capacity because a defalcation requires a culpable state of mind involving knowledge of, or gross

recklessness with respect to, the improper behavior. The court found that King did not have actual knowledge of any wrongdoing with respect to use of the LLC credit card or distributions because there was none, and he was not willfully blind to breaches of fiduciary duty because there were no such breaches. The evidence also did not show that King committed embezzlement or larceny within the meaning of Section 523(a)(4).

See also ***In re Lake Michigan Beach Pottawattamie Resort LLC***, 547 B.R. 899 (Bankr. N.D. Ill. 2016), summarized below under the heading "Interpretation and Enforcement of Operating Agreement 'Blocking' Provisions for Consent to Bankruptcy Filing."

Admission of Member

Perez v. Le Prive Enterprises, L.L.C., No. 14-15-00291-CV, 2016 WL 3634298 (Tex. App. 2016).

Two brothers relied on a "Partnership Dissolution Agreement" that recited their interests in an LLC to establish their ownership in the LLC. The LLC had no written operating agreement and its certificate of formation identified another individual as the only member. Although the individual identified as the LLC's member in the certificate of formation was a party to the Partnership Dissolution Agreement along with the two brothers, the court stated that the agreement was not a company record reflecting admission of the two brothers to the LLC and the agreement was irrelevant to their status as members of the LLC.

Two brothers and their cousin agreed to open a nightclub together. One of the brothers filed a certificate of formation for an LLC. The certificate of formation identified the cousin as the organizer, managing member, and registered agent of the LLC. The brothers were not named in the certificate of formation. Later, the certificate of formation was amended to identify another individual who had become involved in the management of the nightclub as the sole manager of the LLC. The brothers claimed that they had entered into a partnership with their cousin regarding the nightclub and that they were all owners of the LLC in the same percentages as their ownership in the partnership. The trial court found that the cousin was the sole owner of the LLC, and the brothers challenged this finding on appeal.

The court of appeals stated that the brothers appeared to confuse the nature of partnerships and LLCs, which are distinct entities. The brothers asserted that they each had "ownership interests [as] partner[s] in the company" and argued that the "totality of the circumstances point[s] to the existence of a partnership" with their cousin under which one brother was entitled to a 35% share of the profits and the other brother was entitled to a 30% share of the profits. The brothers admitted that they had no written agreement regarding this profit-sharing and ownership-interest scheme prior to the start of their business venture; however, the brothers argued that the court should hold that there was a partnership under which the brothers each owned a portion of the LLC. The court stated that the brothers "relied on a set of unrelated statements of the law governing business organizations and contracts." The brothers argued that their arrangement was valid despite the absence of written documentation because: (1) the Texas Business Organizations Code permits oral operating agreements among members of an LLC; (2) the Texas Business Organizations Code permits people to become members of an LLC after the LLC's certificate of formation is filed; (3) a partnership that is indefinite in duration falls outside of the Statute of Frauds; and (4) partial performance takes a partnership agreement outside the Statute of Frauds. Based on the procedural posture of the case and the applicable standard of review, the brothers had to conclusively establish that they were co-owners of the LLC to prevail.

The court stated that the brothers had to establish that they were members in order to conclusively establish that they were co-owners of the LLC. A "member" of an LLC is defined in the Texas statute as "a person who has been admitted as a member in the limited liability company under its governing documents." The court stated that the brothers did not argue that they became members of the LLC by admission under the LLC's governing documents; instead the brothers relied on the statute to argue that there was no statutory requirement that the membership be recorded in writing to be effective.

Assuming the Texas Business Organizations Code requires a writing, the brothers argued that their Partnership Dissolution Agreement with their cousin satisfied any writing requirement. The brothers argued that "[t]he December 4, 2013 contract makes clear that the Perez brothers are members, and the document can reasonably be read to mean that the Perez brothers joined the limited liability company on the day the contract was signed. In fact, the four corners of the document make clear that the parties had a partnership before the corporation was formed and that said partnership is incorporated as Le Prive Enterprises, LLC."

The Partnership Dissolution Agreement provided:

> This document is an agreement between partners Manuel Arellano, Erick [sic] E. Perez, and Edmundo Perez (said partnership is incorporated as Le Prive Enterprises, LLC, and is doing business as Mekano Live). Manuel Arellano owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, Erick E. Perez owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, and Edmundo Perez owns 30% of Le Prive Enterprises, LLC doing business as Mekano Live. There are no other persons who own an interest in said partnership. The partners agree to dissolve the partnership as follows:
>
> Erick E. Perez and Edmundo Perez hereby transfer all of their interest in the partnership known as Le Prive Enterprises, LLC doing business as Mekano Live to Manuel Arellano. Erick E. Perez and Edmundo Perez agree to return all the property that was removed from the business premises of Mekano Live to Manuel Arellano. Each partner agrees to release each partner from any and all civil liability concerning the partnership. Manuel Arellano does not want Erick E. Perez or Edmundo Perez prosecuted criminally.

The court stated that the brothers' argument "conflate[d] three distinct business organizational forms—partnership, limited liability company, and corporation." The court also said that the Partnership Dissolution Agreement was irrelevant to the issue of whether the defendants were members because it was not a company record reflecting the brothers' admission to the LLC. Because this document was the only specific evidence the brothers offered of their membership in the LLC, the court concluded that the brothers failed to conclusively establish that they were members, and their challenge to the trial court's finding that they had no ownership in the LLC failed.

See also ***Kilpatrick v. White Hall on MS River, LLC***, 2016 WL 743667, __ So. 3d __ (Miss. 2016), summarized below under the heading "Adoption of Operating Agreement After Formation of LLC.".

Adoption of Operating Agreement After Formation of LLC

Kilpatrick v. White Hall on MS River, LLC, 2016 WL 743667, __ So. 3d __ (Miss. 2016).

The court held that the plaintiff was not a member of an LLC despite having made an initial capital contribution of $186,500 and being listed as a member in an exhibit to the operating agreement and on tax returns. The operating agreement, which was executed by only three of the five men who made capital contributions, required payment of a $500,000 capital contribution in order to become a member. The plaintiff did not satisfy the $500,000 contribution obligation, and the court held that he thus did not become a member. The court also held that neither a constructive trust nor an equitable lien would be imposed to enable the plaintiff to recover his $186,500 contribution.

Five men reached an informal gentlemen's agreement to form an LLC to purchase land and to contribute $500,000 each toward purchase of the land. A certificate of formation was filed, and the land was purchased, but only three of the men made their agreed contributions. Kilpatrick paid only $100,000 at closing. Several months later, the three men who had made $500,000 contributions signed an operating agreement that recited that Kilpatrick contributed $100,000 and stated that he had zero membership shares and was not a member until meeting the $500,000 contribution obligation. Kilpatrick contributed a total of $84,500 for quarterly interest payments in addition to the initial $100,000 but never tendered his $400,000 balance owed toward the purchase price of the land. Tax records showed Kilpatrick as a member with varying percentages of ownership over three years. Kilpatrick alleged that he was a member and sought return of his capital contribution of $186,500 on the theory that the LLC was unjustly enriched by retaining his contribution. Kilpatrick claimed that the operating agreement was invalid because it was not signed by all members and that he was a member based on tax records and capital account ledgers. The court stated that Kilpatrick's argument that the agreement was not valid because it was not signed by all members failed if Kilpatrick was never a member. The court stated that the records would have weight if the agreement was ambiguous, but the agreement unambiguously required a contribution of $500,00 to become a member. The court held that Kilpatrick was not a member of the LLC and he was not entitled to the return of his $186,500 contribution because the members relied to their detriment on his unfulfilled promise to contribute the balance owed and "he who seeks equity must do equity."

The Chief Justice dissented and would have held that Kilpatrick was a member and that the agreement was invalid. He would have thus remanded for determination of the fair value of Kilpatrick's interest at the time of his dissociation from the LLC (based on statutory default rules that apply in the absence of an agreement). The Mississippi LLC statute provides that an operating agreement must initially be agreed to by all of the members and a promise to make a contribution must be in a writing signed by the member. The statute also provides that a person becomes a member on the later of the date of filing of the certificate of formation or the date stated in the records of the LLC. In the Chief Justice's view, three of the members could not decide sometime after formation what the rules of the LLC are, particularly that a contribution less than $500,000 would be forfeited.

Shapiro v. Ettenson, No. 653571/2014, 2015 WL 5096026 (Sup. Ct. NY Cty. Aug. 16, 2015), aff'd and modified, 146 A.D.3d 650 (App. Div. 1st Dept. 2017).

Under the provisions of the New York LLC statute, the court held that two members of a three-member LLC were able to adopt an operating agreement permitting them to eliminate the salary of the third member, issue a capital call, and reduce the third member's interest upon failure to satisfy the capital call notwithstanding the third member's claim that they orally agreed when they formed the LLC to make all decisions by a unanimous vote and not to dilute a member's interest in

the event of a failure to contribute. The Appellate Division affirmed except with respect to the reduction of the plaintiff's salary to zero, which the court said was precluded by a particular provision of the operating agreement.

Three individuals filed articles of organization for a member-managed LLC with each member holding a 1/3 membership interest. The LLC had no written operating agreement for almost two years. Two of the members voted to amend the articles of organization designating the LLC as manager-managed, and they signed an operating agreement authorizing capital calls by approval of a majority interest of the members and adjustment to a member's percentage interest in the event of a failure to make a requested contribution. The two members who signed the operating agreement voted to eliminate the third member's salary and make a capital call, and the third member filed suit. The third member alleged that the members orally agreed when they formed the LLC to maintain the LLC as member-managed, to make all decisions by unanimous vote, and not to dilute the interest of any member in the event of a failure to contribute upon an authorized capital call. The New York LLC statute provides for member-management as a default rule, and the provisions addressing voting in a member-managed LLC state that, except as provided in the operating agreement, the articles of organization and operating agreement may be adopted or amended by vote of a majority interest of the members. The New York LLC statute defines the operating agreement as a *written* agreement of the members concerning the business of the LLC and the conduct of its affairs, and the statute states that the members "shall adopt a written operating agreement." The statute also provides that an operating agreement may be entered into before, at the time of, or within ninety days after the filing of the articles of organization. The court held that the operating agreement adopted by the two members was valid under the New York LLC statute. The court noted that the statute requires a written operating agreement but does not require "all" of the members to enter into an operating agreement. The court also stated that the statute permits an operating agreement to be entered into within ninety days after the filing of the articles of organization but does not mandate that it be entered into within that time.

Limitations on Power of Majority to Amend LLC Operating Agreement Under Provision Permitting Amendment by Majority

Leight v. Osteosymbionics, L.L.C., No. 102869, 2016 WL 193511 (Ohio App. Jan. 14, 2016).

The 55% member of an LLC amended the operating agreement in numerous respects including adding an arbitration clause to the operating agreement. The court held that the members could not be compelled to arbitrate their disputes under the arbitration clause added by the amendment adopted by the 55% member, even though the operating agreement provided that the operating agreement could be amended by a vote of members holding more than 50% of the LLC units. A party cannot be compelled to arbitrate unless the party agrees to arbitrate, and the court did not interpret the operating agreement to be clear that the members agreed ahead of time to allow the 55% member to make any amendment he chose to make. There was thus no meeting of the minds on arbitration as a binding method of dispute resolution.

Under the operating agreement of a three-member LLC, the managers were authorized to adopt certain amendments, and the members could adopt any other amendments by a vote of members holding more than 50% of the LLC units. The 55% member signed an amended and restated operating agreement that eliminated the board of managers, named the 55% member as the sole manager, and added an arbitration clause. The other two members sued the 55% member for mismanagement and improper exercise of control over the LLC, and the 55% member sought to

compel arbitration under the arbitration clause in the amended agreement. Whether the claims were subject to arbitration depended on whether the 55% member could validly amend the operating agreement to add the arbitration clause. A party cannot be compelled to arbitrate a claim unless the party agreed to arbitrate. The court analogized to a case involving a credit card agreement in which the card issuer was given sole authority to amend the agreement and the court held that the card issuer's exercise of the power to amend the agreement to add an arbitration clause was not contemplated by the parties when they entered into the agreement. The court stated that interpreting the operating agreement to give the 55% member unfettered authority to amend the agreement amounts to an assumption that the members agreed ahead of time to be bound by any change the 55% member decided to make. The court held that there was no meeting of the minds regarding arbitration as the binding method of dispute resolution, and the clause was unenforceable. (The court did not address whether the other amendments were valid.)

Interpretation and Enforcement of LLC Operating Agreement: Unenforceability of "Blocking" Provisions for Consent to Bankruptcy Filing

In re Intervention Energy Holdings, LLC, 553 B.R. 258 (Bankr. D. Del. 2016).

The bankruptcy court held that a provision in a Delaware LLC's operating agreement that required the LLC's secured lender, as the holder of one unit of the LLC, to consent to a bankruptcy filing was void because the provision was against public policy as a matter of federal bankruptcy law. (This decision of a Delaware bankruptcy court is included in this survey of "non-Delaware cases" because the Delaware bar often confines its view of Delaware case law to the opinions of Delaware state courts.)

Pursuant to a forbearance agreement with its primary secured lender, the lender was issued one equity unit in the LLC, and the operating agreement was amended to require the consent of all equity holders for the LLC to file a bankruptcy petition. The LLC filed for Chapter 11 bankruptcy, and the lender sought dismissal on the basis the filing was not authorized because the lender did not consent to the filing. The court noted conflicting decisions addressing the validity of these sort of "blocking" provisions under state law and stated that it was not necessary to determine whether state law allowed the provision in question because the provision was invalid under federal bankruptcy law as a disguised waiver of a debtor's rights under the Bankruptcy Code. The court stated:

> A provision in a limited liability company governance document obtained by contract, the sole purpose and effect of which is to place into the hands of a single, minority equity holder the ultimate authority to eviscerate the right of that entity to seek federal bankruptcy relief, and the nature and substance of whose primary relationship with the debtor is that of creditor—not equity holder—and which owes no duty to anyone but itself in connection with an LLC's decision to seek federal bankruptcy relief, is tantamount to an absolute waiver of that right, and, even if arguably permitted by state law, is void as contrary to federal public policy.[footnote omitted] Under the undisputed facts before me, to characterize the Consent Provision here as anything but an absolute waiver by the LLC of its right to seek federal bankruptcy relief would directly contradict the unequivocal intention of [the lender] to reserve for itself the decision of whether the LLC should seek federal bankruptcy relief. Federal courts have consistently refused to enforce waivers of federal bankruptcy rights.

The court joined the other courts that have refused to enforce waivers of federal bankruptcy rights and held that the LLC had the authority to commence the Chapter 11 bankruptcy proceeding.

In re Lake Michigan Beach Pottawattamie Resort LLC, 547 B.R. 899 (Bankr. N.D. Ill. 2016).

A Michigan LLC filed bankruptcy on the eve of foreclosure of the LLC's principal asset. The LLC's secured lender sought dismissal of the bankruptcy on the grounds that it was filed in bad faith or without the consent of the lender, whose consent was required as "special member" under the operating agreement. The court concluded that the bankruptcy was not filed in bad faith and that the provision of the operating agreement requiring consent of the "special member" was unenforceable. Thus, the court denied the creditor's motion to dismiss the bankruptcy.

The LLC debtor in this case owned a vacation resort in Michigan. After the LLC defaulted on its loan, the lender agreed to forbear from pursuing its remedies in exchange for an amendment to the LLC operating agreement that established the lender as a member (the "special member") whose approval was required to take "material action," which included filing a bankruptcy petition. The lender, as special member of the LLC, had no interest in the profits or losses of the LLC, no right to distributions or tax consequences, and no obligation to make capital contributions to the LLC. In essence, the only relationship between the special member and the LLC was the special member's authority to block the LLC from petitioning for bankruptcy relief. Further, when exercising its rights under the this provision, the special member was not obligated to consider any interests or desires other than its own and had "no duty or obligation to give any consideration to any interest of or factors affecting the Company or the Members." Shortly after the execution of this amendment to the LLC operating agreement, the LLC defaulted again, and the lender began foreclosure proceedings. The LLC filed a bankruptcy petition under Chapter 11. The members of the LLC other than the special member consented to the LLC's bankruptcy filing, but the special member did not consent to the bankruptcy petition. The lender sought to dismiss the bankruptcy petition on the basis that it was filed in bad faith or that it was not authorized because the special member did not approve it.

The court first analyzed whether the bankruptcy filing was made in bad faith and concluded that it was not. The court examined numerous factors relied on by the lender and found that those that were satisfied were not sufficient to establish bad faith. The court found the case at hand to be similar to a Georgia case in which the debtor's single asset was real estate and the case was filed on the eve of foreclosure. There, the court did not dismiss the case because the presence of equity provided a sound basis for reorganization and substantial evidence of the debtor's good faith intent to reorganize. Here, the lender did not dispute that there was equity in the LLC's property.

The court then analyzed the lender's argument that the bankruptcy was not authorized because the consent of the special lender was not obtained as required by the LLC operating agreement. The court analyzed the provision requiring consent of the special lender and concluded that it was unenforceable under Michigan LLC law and federal bankruptcy law. Because the LLC was formed in Michigan, the court looked to "Michigan corporate governance law" to determine whether the filing was a valid corporate action. Under the terms of the original operating agreement, the consent of members with a majority of the sharing ratios was required for all matters. Because the four members who approved the bankruptcy held 100% of the sharing ratios, their approval would have sufficed under the original voting provisions; however, the amendment adopted after the LLC's default on its obligations to the lender superseded the other voting provisions and required the approval of the lender as special member for the LLC to file a bankruptcy petition. The Michigan LLC statute allows the operating agreement to override the default statutory voting requirement, and

the bankruptcy petition was not approved by the special member; therefore, application of the requirement of the amendment to the operating agreement would result in the bankruptcy petition being infirm. The court stated that it must thus analyze whether the prohibition adopted in the amendment of the operating agreement was valid in order to determine the validity of the bankruptcy filing.

The court explained that the lender's argument was based on "the well-established commercial practice of using 'blocking directors.'" The court characterized the "blocking director" as the "lynchpin" of a bankruptcy-remote, special-purpose entity. The court described the typical structure of a special-purpose entity and concluded by stating that "[t]he import of such a structure is readily apparent. One specific director, chosen by the secured creditor, may withhold its vote and thus block, hence the name, a voluntary bankruptcy petition. Further, given the limited operations, an involuntary petition against the entity is highly unlikely." The court further explained that this roundabout approach is required because a simple, absolute prohibition against filing for bankruptcy would likely violate public policy and be void. Just as individuals may not contract away their bankruptcy rights, corporations are similarly constrained. The court acknowledged, however, that "corporate formalities and state corporate law must also be satisfied in commencing a bankruptcy case." Although the long-standing policy against contracting away bankruptcy rights is not necessarily controlling when a corporate control document defeats the right in question rather than a contract, the court stated that "common wisdom dictates that the corporate control documents should not include an absolute prohibition against bankruptcy filing." According to the court, the "saving grace" of a blocking director is that the blocking director must always adhere to the director's general fiduciary duties to the debtor in fulfilling the director's role. Thus, at least theoretically, there will be situations where the blocking director will vote in favor of a bankruptcy filing, even if in so doing the director acts contrary to the purpose of the secured creditor at whose behest the director serves. The court cited *In re General Growth Properties, Inc.,* 409 B.R. 43, 64 (Bankr.S.D.N.Y.2009) and *In re Kingston Square Associates,* 214 B.R. 713, 735–36 (Bankr.S.D.N.Y.1997) with regard to the fiduciary duties constraining blocking directors and concluded that "[t]he consideration of fiduciary duties and public policy concerns further extends to situations where the blocking position is a member of a limited liability company because the member of a limited liability company, such as the Debtor in this case, maintains the power to consent or block a bankruptcy petition." According to the court, in order for a blocking structure to be valid, the blocking director must be subject to "normal director fiduciary duties" such that the director would in some circumstances vote in favor of a bankruptcy filing, even if the bankruptcy was not in the best interests of the creditor that chose the blocking director. This feature was missing from the structure in this case.

The amendment to the operating agreement in this case limited the lender's duties as special member to the rights and duties expressly set forth in the agreement. The agreement limited the special member's rights and duties as follows:

> Notwithstanding anything provided in the Agreement (or other provision of law or equity) to the contrary, in exercising its rights under this Section, the Special Member shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall to the fullest extent permitted by applicable law, have no duty or obligation to give any consideration to any interests of or factors affecting the Company or the Members.

The court stated that this language resulted in the special member having no duties to the LLC, but the court stated that members of an LLC have a duty under Michigan law to consider the interests of the entity and not only their own interests. The court quoted the Michigan Limited Liability Company Act as requiring that:

> (1) A manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company.

Based on this provision, the court concluded that the lender, as a member of a Michigan LLC, was required to consider the interests of the LLC, but the language of the amendment excluded the LLC's interest from consideration and allowed the lender to consider only its own interests. In so doing, the language "expressly eliminates the only redeeming factor that permits the blocking director/member construct." The court thus concluded that the blocking member provision in this case was unenforceable both as a matter of Michigan corporate governance and bankruptcy law. The court stated that the remaining corporate governance provisions governing the LLC resulted in a valid consent to bankruptcy when analyzed under Michigan law.

The court commented on the inclusion of the language "to the fullest extent permitted by applicable law" in the provision in question and referred to it as a "savings clause" that "might cure the invalidity of the prohibition, but only by rendering it meaningless." The court stated that the "prohibition has no application other that which is impermissible under Michigan law." By excluding the LLC's interests from consideration when the lender acted as the special member and allowing the special member to consider only its own interests, the court stated that the provision expressly eliminated the "only redeeming factor that permits the blocking director member construct." As a result, the court concluded that the provision requiring the special member's consent was void, and the remaining governance provisions of the LLC resulted in a valid consent to bankruptcy in this case. In a footnote, the court noted that Michigan was one of the "rare states" that does not extend fiduciary duties to creditors of a corporation once the corporation is insolvent; however, the court stated that the duty that was important for purposes of the instant analysis was the duty to the debtor and its equity holders, and the court stated that Michigan law, like the law of other jurisdictions, imposes such a duty and that it "may not be forsworn."

Interpretation and Enforcement of LLC Operating Agreement: Statutory Power of Majority to Continue LLC After Dissolution Caused by Expiration of Agreed Term of LLC

***McDonough v. McDonough*,** 2016 WL 7436667, __ A.3d __ (N.H. 2016).

The court concluded that the New Hampshire LLC statute allows a majority of the members to revoke a dissolution and that this provision was not overridden by provisions in an LLC's operating agreement and certificate of formation that provided for a 20-year term.

Three brothers converted a corporation into an LLC in September of 1995. The operating agreement for the new LLC provided: "The Company shall have a term beginning on the date the Certificate of Formation is filed ... and shall continue in full force and effect for a term of twenty (20) years, unless sooner terminated or continued pursuant to the further terms of this Agreement." The LLC's certificate of formation stated that "[t]he latest date on which the limited liability company is to dissolve is September 30, 2015." After the brothers had a falling out in 2015, one brother sued the other two seeking a declaration that the LLC must dissolve by September 30, 2015, pursuant to

the operating agreement and certificate of formation. In response, in August of 2015, the other two members voted to dissolve the LLC and then immediately voted to revoke the dissolution. The trial court concluded that the LLC was not required to dissolve because the New Hampshire LLC statute allows a majority of the members to continue the company, and the operating agreement in this case did not preclude application of that provision. The plaintiff appealed.

The court first acknowledged that the New Hampshire LLC statute requires an LLC to be dissolved as provided in the LLC's operating agreement. The operating agreement here stated that the LLC would continue for 20 years "unless sooner terminated or continued pursuant to the further terms of this Agreement." The plaintiff argued that the only way that the defendants could modify this provision was by amending this provision of the operating agreement (which would require a unanimous vote of the members), but the court pointed out that the agreement did not explicitly state that the only means to continue the LLC was by amendment of the operating agreement. Furthermore, the operating agreement stated that the LLC had all powers conferred by the New Hampshire LLC statute. The court stated that those powers include the power to revoke a dissolution under the statutory provision. The New Hampshire LLC statute allows "the members" to revoke a dissolution at any time before completion of winding up of the LLC. Thus, the defendants could have avoided the dissolution either by amendment of the term provision of the operating agreement or under the statutory provision. The defendants relied on the statutory provision.

The court examined the statute to determine what vote is required to revoke a dissolution. The statute provides for dissolution by the members without specifying what vote is required (i.e., whether majority or unanimous). The plaintiff argued that the legislative intent was for the phrase "the members" to refer to all members. The court declined to adopt this argument, holding that accepting this interpretation would require the court to ignore the plain language of the statute and add a unanimity requirement not expressly found in the text. The court pointed out that some provisions of the New Hampshire LLC statute specify that decisions must be made by a majority vote while others specify that a unanimous vote is required. Some provisions do not specify whether the member decision at issue must be made by majority or unanimous vote. The statute has a provision specifying that a decision to be made by the members under the statute requires a majority vote unless the operating agreement or certain other provisions of the statute otherwise provide. Revocation of dissolution is not a matter that is addressed in any of the cross-referenced statutory provisions that would take the matter outside of the scope of the general requirement of a majority vote; therefore, the court concluded that the statute requires a majority vote unless otherwise provided by the operating agreement. The operating agreement here was silent regarding the revocation of dissolution. Thus, the court concluded that the statute controlled, and a majority of the members could revoke dissolution.

Because the trial court found that the August 7 vote to dissolve and to revoke that dissolution did not affect the governing documents of the LLC, the plaintiff argued that the LLC was still required to dissolve as of September 30, 2015 under its governing documents. Because the two defendant members represented that they intended to revoke the September 30, 2015 dissolution and still had time to do so (as winding up of the LLC had not been completed), the court held that the trial court did not err in granting summary judgment to the defendant members.

Finally, the court rejected the plaintiff's argument that the certificate of formation required dissolution after twenty years. The certificate of formation provided that "[t]he latest date on which the limited liability company is to dissolve is September 30, 2015." The plaintiff argued that the plain language of the certificate required dissolution and that allowing continuation of the LLC without amendment of the certificate rendered the certificate meaningless. The court explained that the certificate of formation and operating agreement are distinct documents with distinct purposes

under the statute. The primary purpose of the operating agreement is to govern how the parties will manage the internal affairs of the business. The primary purpose of the certificate of formation is to serve notice to the secretary of state and the public that the company is operating as a New Hampshire LLC. The statute does not require an LLC to dissolve when its duration as specified in the certificate of formation has expired; the statute requires an LLC to dissolve only as provided in the operating agreement. Thus, there was no requirement that the LLC dissolve after expiration of the 20-year duration set forth in the certificate of formation. The court stated that the certificate of formation is not rendered superfluous simply because the statute looks to the operating agreement rather than the certificate of formation to determine when the members must dissolve the LLC.

The plaintiff failed to preserve for appeal his argument relating to unfairness of the trial court's decision and the financial consequences of a voluntary dissociation by the plaintiff.

Access to Books and Records of LLC by Former Member

Davis v. Highland Coryell Ranch, LLC, No. 07–15–00269–CV, 2016 WL 1238175 (Tex. App. Mar. 28, 2016).

The court reversed a summary judgment in favor of an LLC on a former member's claim to inspect the books and records created by the LLC during the former member's time as a member because the absence of the governing documents in the summary judgment record precluded the LLC from establishing as a matter of law that the former member was not entitled to view the records. The court focused on the statutory definition of a member and noted that it includes "a person who has been admitted as a member in a limited liability company under its governing documents." The court also addressed arguments made by the LLC based on the statute of limitations and a release agreement that was signed by the former member and the remaining member but did not identify the LLC as a party. Neither of these arguments entitled the LLC to judgment as a matter of law.

Davis was a former member of an LLC who relinquished his membership and later sought to inspect the books and records created or developed by the LLC during his time as a member. Because the LLC refused his request for access to the books and records, Davis sued the LLC and requested a declaration entitling him to inspect the desired documents. The trial court granted summary judgment in favor of the LLC, and Davis appealed, arguing that the trial court misconstrued the applicable statutes.

The court identified two relevant provisions in the Texas Business Organizations Code (BOC) under which an "owner or member" or a "member or an assignee of a membership interest" have a right of access to books and records of the LLC. The dispute between Davis and the LLC related to the words "member" and "owner." Davis argued that these words encompass both present and former members and owners of the entity. The LLC apparently convinced the trial court that they referred to only current members and owners.

The court found it odd that neither party cited the statutory definitions to the trial court or in their respective appellate briefs. Nevertheless, the court stated that the definitions controlled the outcome. According to Section 1.002(53) of the BOC, a "member" of an LLC is "a person who *is* a member *or has been admitted as a member in the limited liability company under its governing documents.*" Tex. Bus. Orgs. Code § 1.002(53)(A)(emphasis added). In a different paragraph of that same section, "owner" of an LLC is defined as "a member." *Id.* § 1.002(63). Thus, the definitions of "owner" and "member" contain at least two components, one of which depends on the verbiage of the LLC's "governing documents, " but the summary judgment record did not contain the governing documents of the LLC. Without them, the court of appeals said that the trial court could not find that the LLC established, as a matter of law, that Davis was not entitled to view the LLC's

records. In other words, the trial court could not hold, as a matter of law, that Davis was not a member without knowing whether Davis "ha[d] been admitted as a member" under the LLC's governing documents.

The court of appeals next addressed two other grounds asserted by the LLC: limitations and release. The LLC relied on the residual four-year statute of limitations. Based on Davis's requests for documents, the LLC argued that Davis was required to sue no later than April of 2012, and he did not file until July of 2012. But the court of appeals concluded that the LLC's analysis was flawed. Section 101.502(a) of the BOC provides that a member may review and copy records "on written request and for a proper purpose." The court stated that this language led to the logical conclusion that any duty to disclose would not arise until such a written request was made and then refused. The summary judgment record revealed several written requests from Davis, the earliest being dated April 25, 2008, and sent by an attorney named Matheson. An affidavit attached to the motion for summary judgment stated that documents were sent to Mr. Matheson in response to that request and that copies of those documents had previously been provided to Davis. The court stated that the act of sending documents could hardly be interpreted as a refusal to comply with Section 101.502(a) in April of 2008, or, at the very least, a fact issue existed in that regard. The next written request appearing in the record was sent on behalf of Davis in February of 2012. Apparently, the LLC complied with that request in part. Assuming the partial failure to comply constituted a breach of the statutory duty in question, Davis filed suit for a declaration of his rights on July 25, 2012, less than four years from February 2012. Thus, the LLC failed to prove, as a matter of law, its entitlement to summary judgment on the affirmative defense of limitations.

As for its defense of release, the LLC argued that Davis executed an agreement releasing his causes of action against the LLC. The document relied upon by the LLC referred to a release and discharge of all claims by "the parties" and their "agents, employees and representatives," but the document did not define the term "parties." The document opened by stating that the agreement was by and between Davis and Byron Cook, but the LLC was not mentioned in that passage or in the paragraph referencing the release and discharge of claims. Also significant was the absence of conditioning language from the signatures of both Davis and Cook indicating that they intended to act individually and/or as a representative of the LLC. Although the record indicated that Cook was the sole remaining member of the LLC once Davis left, the LLC did not argue that it and Cook were one and the same. Because someone unnamed in a release (or otherwise omitted from the category of persons released) is not released, the summary judgment record failed to provide the trial court a basis to hold that the LLC was entitled to judgment as a matter of law on the affirmative defense of release.

Consequences of Assignment of LLC Membership Interest

MFB Realty LLC v. Eichner, No. 653549/2014, 2016 WL 3541398 (Sup. Ct. NY Cty. June 24, 2016).

A derivative action brought against the controlling members of an LLC was dismissed because the court held that the plaintiff was an assignee who had not been admitted as a member and thus lacked standing to bring the derivative action. Although the members had given consent to the assignment of the interest to the plaintiff as required by the operating agreement, the members had not consented to the admission of the assignee as a member as required by the operating agreement.

The plaintiff acquired a 10% interest in the LLC in 2006 from Furman and Birdoff, two of the original members of the LLC. The plaintiff was an entity owned by Furman and Birdoff and certain descendants of Furman and Birdoff. The plaintiff brought numerous claims for misuse and

diversion of the LLC's assets. Although the plaintiff asserted the claims individually and derivatively, the court stated that the claims belonged solely to the LLC and must be asserted derivatively. Under New York LLC law, only a member has standing to assert a derivative claim, and the court pointed out the distinction drawn between members and assignees under the New York LLC statute. Additionally, the operating agreement in this case contained provisions on assignments and admission of members. Article 7 of the operating agreement imposed certain restrictions on the transfer of membership interests and distinguished between transferees and permitted transferees, who held only economic rights, and substituted members, who held full rights under the agreement and applicable law. Section 7.1 of the operating agreement provided that no member may transfer an interest without the prior written consent of members owning 95% of the membership interests. Section 7.2 of the operating agreement provided that, "[n]otwithstanding anything contained in this Agreement to the contrary, no Permitted Transferee or any other transferee shall become a Member without the written consent of Members owning . . . 95% . . . of the Membership Interests, which may be arbitrarily withheld." The court pointed out that these provisions imposed a two-step process to obtain member status.

The plaintiff alleged that it became a member in 2006 when Furman and Birdoff assigned their combined 10% membership interest to the plaintiff pursuant to an agreement entitled "Assignment and Assumption of Limited Liability Company Interests Agreement." The court stated that the record included written consent for the plaintiff to become a transferee but did not contain any evidence that the plaintiff ever obtained the written consent required by Section 7.2 of the operating agreement to become a substituted member. The consent letter consented to a transfer of the 10% interest held by the transferring members, but the letter did not reference consent to transfer of membership. Thus, the court held that the plaintiff did not become a substituted member and lacked standing to assert the derivative claims.

Styslinger v. Brewster Park, LLC, 138 A.3d 257 (Conn. 2016).

After the trial court determined that the assignee of a membership interest lacked standing to seek judicial dissolution and winding up of the LLC, the assignee argued on appeal that the LLC statute granted him standing to seek a winding up of the LLC even in the absence of dissolution. The court held that the statute does not confer standing on an assignee to seek winding up of the affairs of an LLC in the absence of a dissolution, and the statute displaced any equitable principle that would otherwise grant an assignee standing to seek winding up.

The plaintiff was assigned his wife's membership interest in an LLC pursuant to a divorce settlement agreement. After the assignment, the plaintiff's wife continued to be a member of the LLC. The plaintiff requested membership status, but the wife's co-member did not consent. The plaintiff demanded distributions from the LLC, but no distributions were made to the plaintiff. The plaintiff brought an action against the LLC seeking judicial dissolution and winding up of the LLC, and the trial court dismissed the action on the basis that the Connecticut LLC statute does not confer standing on an assignee to obtain
judicial dissolution and winding up. On appeal, the plaintiff no longer argued that he had standing to seek dissolution but that the Connecticut LLC statute conferred on him standing to seek a winding up of the LLC in the absence of dissolution.

The Connecticut Supreme Court generally discussed the nature of Connecticut LLCs and their governing law and then addressed provisions of the Connecticut LLC statute specifically relating to winding up. The court explained that the provisions on winding up were inextricably linked to dissolution and concluded that the only event triggering winding up under the statute is an event of dissolution. The statute provides for three events of dissolution: (1) any event of dissolution

specified in the LLC's articles of organization or operating agreement; (2) a vote to dissolve by the majority of the LLC's members; or (3) the entry of a decree of judicial dissolution under the statute. Under the statute, only a member or someone on the member's behalf may apply for a decree of dissolution, and a decree may be entered only if the court determines that "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." Additionally, the provisions of the statute governing the process of winding up presuppose that the LLC has dissolved before winding up its affairs. Because an event of dissolution had not occurred, the plaintiff could not trigger a winding up of the LLC's affairs. The plaintiff relied upon a statutory provision permitting a member or assignee to request a court to carry out the winding up process when the members or managers have engaged in wrongful conduct or for other cause shown. The court explained that this provision applies once a dissolution has occurred but does not permit an assignee to apply for a forced winding up absent a dissolution.

The court also discussed the relative rights, roles, and liabilities of members and assignees and concluded that allowing an assignee to force a winding up of affairs without a dissolution of the LLC would undermine the statutory scheme for LLCs. The court explained that an assignee is a passive recipient of the economic benefit of a membership interest who is barred by the statute from participating in the management of the LLC's business or exercising any right of membership unless and until the assignee is admitted as a member. "Recognizing that assignees have no role to play in managing the LLC's affairs, the act shields them from any liabilities that a member might have [citation omitted]; including, for example, for capital contributions." The rights and duties of membership remain vested in the assignor until the assignee is admitted to membership, and "[t]he assignor member continues to hold the obligations of membership, including for capital contributions, and continues to owe a duty of good faith to the LLC." The court stated that the plaintiff's interpretation "would exalt rights of assignees to a level on par with those of members in the face of the act's clear intention to the contrary." The only provision of the statute that places assignees on a par with members is the provision allowing an assignee to request a court-supervised winding up once dissolution has occurred.

The court thus concluded that the LLC statute does not provide an assignee such as the plaintiff with standing to seek the winding up of the affairs of an LLC in the absence of a dissolution of the LLC. In a footnote, the court rejected the plaintiff's argument that he was classically aggrieved under the common law or principles of equity. While the statute provides that "principles of law and equity supplement" the statute, those principles supplement the statute only to the extent that they are not "displaced" by provisions of the statute. Thus, assuming for the sake of argument that common law or equitable principles would otherwise grant an assignee standing to seek a winding up of an LLC's affairs, the court concluded that these principles are displaced by the provisions of the statute that expressly limit an assignee's role and prevent an assignee from forcing the dissolution or winding up of the LLC. The plaintiff cited the Delaware Chancery Court's decision in *In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015), but the court found that decision inapposite because of differences between Delaware law and Connecticut law concerning assignments of membership interests. The court pointed out that an assignment under Delaware law leaves both the member and the assignee without the power to exercise the rights of a member at issue unless and until the assignee is admitted as a member. "The court in *In re Carlisle Etcetera LLC* resolved this lacuna by granting equitable standing to the assignee.[citation omitted] Connecticut law, by contrast, does not result in a similar void because the assignor continues to hold the exclusive power to exercise the rights of membership until the assignee becomes a member."

Bongiorno v. J & G Realty, LLC, 131 A.3d 1230 (Conn. App. 2016).

A divorcing member's purported transfers to his wife of his 50% interests in three LLCs and a general partnership were ineffective because the documents were held by the wife's attorney and were never delivered to the LLCs and partnership. Because notice of the assignments was not provided to the LLCs and partnership, the court held that the wife did not have an ownership interest in the entities when she commenced this suit for judicial dissolution, and dismissal of the suit was proper because she did not have standing.

The plaintiff in this action sought judicial dissolution and winding up of three LLCs and a partnership in which her husband had transferred to her his entire interests during their divorce. The assignment instruments were never delivered to any representatives of the entities, and the plaintiff's lawyer retained the instruments in her files. The entities' representatives (the son and son-in-law of the transferor member/partner and the plaintiff) testified that the first time they learned of the assignments was when they were produced by the plaintiff as part of the discovery in this case. The trial court dismissed the plaintiff's case on the basis that she could not prove a membership or partnership interest in any of the entities, and the court of appeals held that dismissal of the case was proper.

The court of appeals stated that the LLC and partnership statutes require that a party have some ownership interest in an LLC or partnership to have standing to bring an action to dissolve the entity. The operating agreements for two of the LLCs required that a transfer of interest was only effective when the LLC received notice. The third LLC had no operating agreement, but the court pointed out that, even if notice had been provided, the wife would not have become a member unless and until a majority in interest of the other members consented pursuant to the Connecticut LLC statute. The general partnership also did not have an agreement in effect, and the court pointed out that the partnership statute provides that a partnership need not give effect to a transferee's rights under the statute until it has notice of the transfer. Relying on the operating agreements and these statutory provisions, the court concluded that the plaintiff did not have an ownership interest in any of the entities when she commenced the case. Thus, the court held that the trial court properly granted the motion to dismiss.

Expulsion of Member

David Mortuary, LLC v. David, 194 So. 3d 826 (La. Ct. App. 2016).

The court held that a member may not be expelled from a Louisiana LLC absent expulsion provisions in the operating agreement. There is no statutory provision governing expulsion of a member in the Louisiana LLC statute, and the court rejected the argument that a provision in the LLC statute that gives LLCs all the "powers, rights, and privileges" of corporations and partnerships permits application of the expulsion provisions in the partnership statute.

A family corporation converted to an LLC. After the conversion, three siblings (Danny Sr., Richard, and Royal) each held a 33.083% interest in the LLC, and Danny Sr.'s son (Danny Jr.) and Richard's daughter (Kelly) each held a .3755% interest. The articles of organization provided for Danny Sr. and Richard to be co-managers. The LLC did not have any written operating agreement. In 2014, Richard, Royal, and Kelly met and voted to remove Danny Sr. and Danny Jr. as members and to remove Danny Sr. as co-manager of the LLC. At this meeting, Richard, Royal, and Kelly also voted to admit Richard's son (Lance) as a member. In 2015, Richard, Kelly, and Lance met and voted to remove Royal as a member. A couple days after that meeting, Royal, Danny Sr., and Danny Jr. met and adopted certain resolutions on behalf of the LLC.

The LLC, Richard, Kelly, and Lance filed an action seeking a declaratory judgment as to the validity of the actions taken by them and an injunction precluding Danny Sr., Royal, and Danny Jr. from taking actions on behalf of the LLC. The trial court concluded that Danny Sr., Danny Jr., and Royal were not validly removed or expelled from the LLC as members, that Danny Sr. was not validly removed as co-manager, and that Lance was not validly admitted as a member.

The court of appeals examined the Louisiana statutes to resolve the dispute. The Louisiana LLC statute provides that "[a]ll limited liability companies, regardless of date of organization, shall have the powers, rights, and privileges provided for a corporation organized under the Business Corporation Law (R.S. 12:1 et seq.), and provided for a partnership organized under Title XI of Book III of the Louisiana Civil Code." Louisiana partnership law allows for a partnership to expel a partner for just cause if a majority of the partners agree on expulsion. The court of appeals declined to apply the partnership expulsion provisions in the LLC context. The court pointed out various problems that would arise (such as resolving conflicting provisions between the corporate and partnership statutes and determining whether to classify an LLC member as a director, shareholder, officer, partner, etc.) if supplementation of the LLC statute by the corporate and partnership statutes were taken to its logical conclusion. The court concluded that the provision on which the plaintiffs relied refers to the separate legal existence of the LLC and its rights, powers, and duties apart from its members. The court stated that there is no place in the law for "cherry picking" certain statutes applicable to a litigant's claim. The court noted that LLC members may include expulsion provisions in the operating agreement if they desire. Absent contractual expulsion provisions, however, the members of an LLC have no ability to expel another member under Louisiana law.

The court next addressed arguments about the propriety of the removal of Danny Sr. as co-manager of the LLC, admission of Lance as a new member, and the validity of the meeting held by Danny Sr., Royal, and Danny Jr. after their purported removal as members. The court concluded that the removal of Danny Sr. as co-manager was ineffective because notice of the meeting was not sent. According to the articles of organization, a manager would serve until his resignation or removal, and the Louisiana LLC statute provides that a manager may be removed by a vote of a majority of the members at a meeting called expressly for that purpose. Because no notice was sent, the meeting was not called "expressly for that purpose."

The court of appeals concluded that the trial court did not err in finding that Lance, who served as the funeral director of the LLC, was not added as a member of the LLC. The minutes of the meeting at which Lance was purportedly added as a member reflect that a suggestion was made to add Lance as a member and that Richard, Royal, and Kelly voted to approve this suggestion. There was testimony that Lance had received a share of his father's membership interest by gift, but the court pointed out that the Louisiana statute provides that an assignee of an LLC interest shall not become a member unless the other members unanimously consent in writing. Because the vote to admit Lance was oral, the court said it was ineffective to admit him as a member. Furthermore, the court determined that unanimous consent was lacking because the removal of Danny Sr. and Danny Jr. as members was ineffective, and they were not present at the meeting.

Finally, the court concluded that a meeting in 2015 for which notice was given and at which Danny Sr., Royal, and Danny Jr. were in attendance was valid. Because the removal of Danny Sr., Royal, and Danny Jr. was invalid and the addition of Lance as a member was also invalid, Danny Sr., Royal, and Danny Jr. constituted a majority of the five members, and their meeting was valid. The court also held that Royal's removal at a meeting of Richard, Kelly, and Lance in 2015 was invalid because notice of that meeting was not given and a majority of members was not present.

__**Judicial Dissolution of LLC and Judicial Dissociation of Member**__

IE Test, LLC v. Carroll, 140 A.3d 1268 (N.J. 2016).

Two members of a three-member LLC sought to expel the third member after the members were unable to agree to the terms of an operating agreement for the LLC. The lower courts concluded that expulsion was warranted under the New Jersey LLC Act on the basis that it was no longer "reasonably practicable" for the three members to carry on the LLC business together. The New Jersey Supreme Court set forth a series of factors for courts to consider when determining whether the statutory standard for expulsion is met and held that the facts did not warrant expulsion in this case because the LLC could continue to function under majority rule and the LLC continued to be financially successful.

After Carroll, Cupo, and James were involved in an LLC that filed for bankruptcy, resulting in Carroll losing approximately $2.5 million, the three men entered into a new venture, IE Test, LLC. In connection with the second LLC, the three men entered into a preliminary agreement in which they agreed as to their percentage interests–Carroll 33%, Cupo 34%, and James 33%–and stated their intention to enter into an operating agreement. The members were assigned different roles in the LLC, with Cupo and James involved in the day-to-day business and Carroll not expected to be involved in the day-to-day business. The LLC was increasingly successful, and Cupo and James drew salaries and received bonuses. Carroll's claim that the previous LLC owed him a substantial amount of money became a point of contention in the new LLC. Although Carroll acknowledged that the new LLC was not legally obligated on the losses from the previous LLC, Carroll pressed for compensation for some of his lost investment by proposing that the operating agreement for the new LLC provide for certain increased payments to Carroll. The relationship between Carroll and the other two members broke down, and the LLC filed this action asserting claims against Carroll for breach of fiduciary duty and breach of contract and to expel Carroll as a member under the original New Jersey LLC Act (which applied in this case but was replaced by New Jersey RULLCA in 2013). The judicial expulsion provision under the New Jersey LLC Act provided for dissociation of a member as follows:

> [O]n application by the limited liability company or another member, the member's expulsion by judicial determination because:
>
> (a) the member engaged in wrongful conduct that adversely and materially affected the limited liability company's business;
>
> (b) the member willfully or persistently committed a material breach of the operating agreement; or
>
> (c) the member engaged in conduct relating to the limited liability company business which makes it not reasonably practicable to carry on the business with the member as a member of the limited liability company[.]

The court noted that subsection (c) of the New Jersey LLC Act closely tracked the judicial expulsion provision of the Uniform Limited Liability Company Act and that New Jersey retained this judicial expulsion provision in New Jersey RULLCA with only minor changes. In particular, the court commented that the two statutes are identical with respect to the "not reasonably practicable" standard of judicial expulsion analyzed in this case.

The trial court focused on problems that could arise in the future and found that the LLC had established that Carroll could be expelled under subsection (c) , i.e., that it was no longer reasonably practicable for the LLC to continue with Carroll involved. The trial court granted partial summary judgment expelling Carroll, and the court of appeals affirmed.

Noting that the phrase "not reasonably practicable" was not defined in either the original New Jersey LLC Act or New Jersey RULLCA, the New Jersey Supreme Court found it useful in discerning the legislature's intent to compare subsections (a) and (c). Unlike subsection (a), subsection (c) did not require "wrongful" conduct, so subsection (c) was broader in that regard. A second distinction noted by the court was the requirement in subsection (a) that the wrongful conduct "adversely and materially" affect the LLC's business, whereas subsection (c) considers only conduct by the member "relating to" the LLC's business. Subsection (a) focuses on the impact of conduct in the past, and subsection (c) focuses on the impact of the member's conduct on the LLC's future.

The court stated that subsection (c) did not authorize expulsion on a finding that it would be more challenging or complicated for the other members to run the business with the member than without him or in order to avoid sharing profits with him. The court was satisfied that subsection (c) was not necessarily met based on the mere existence of conflict among the members. The court characterized subsection (c) as creating a "high bar," and the court set forth the following list of factors, among others, that may be relevant to a particular case: (1) the nature of the LLC member's conduct relating to the LLC's business; (2) whether with the member remaining as a member the LLC may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals; (4) whether there is a deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the LLC's financial position, there is still a business to operate; and (7) whether continuing the LLC with the LLC member remaining as a member is financially feasible. The court said that a trial court should consider all relevant factors, with no single factor being outcome determinative and no requirement that all factors support expulsion.

In this case, the record did not show that Carroll actively interfered with the LLC's business or used the impasse over the compensation issue to undermine the business. He sought no role in management and did not interfere with the LLC's relationships with third parties. Thus, the first factor did not weigh in favor of finding that continuing the LLC with Carroll as a member was not reasonably practicable. The court found genuine issues of material fact as to the second and third factors because the parties disputed whether Carroll's insistence on being compensated (which prevented them from entering into a written operating agreement) prevented successful management of their business by making it impossible to secure a line of credit or bank financing. The fourth and fifth factors, which deal with deadlock, also weighed against expulsion because the LLC was being effectively managed by majority rule under the statutory default rules. Finally, the sixth and seventh factors weighed against the trial court's summary judgment of expulsion because the LLC not only continued to operate, but its revenue had apparently increased despite Carroll's continued involvement. In sum, the court held that the record did not support the trial court's finding that it was "not reasonably practicable" to carry on the LLC's business with Carroll remaining as a member.

Reese v. Newman, 131 A.3d 880 (D.C. App. 2016).

Under the District of Columbia LLC statute, the court had discretion to grant either judicial dissolution of the LLC or judicial expulsion of a member when the jury's findings satisfied the grounds specified by statute for judicial dissolution as well as judicial expulsion. The court rejected

the argument that the statutory language required the court to grant judicial expulsion when the grounds for judicial expulsion were present.

After disputes developed between Newman and Reese with regard to the management of their LLC, Newman provided written notice to Reese that Newman intended to withdraw from, dissolve, and wind up their business. Reese did not want to wind up the LLC and preferred that Newman simply be dissociated so that Reese could continue the business. Newman filed an action for judicial dissolution along with other claims, and Reese counterclaimed for Newman's dissociation in addition to other claims. The jury awarded Newman damages on one of her claims and found grounds for both judicial dissolution of the LLC and judicial dissociation of Newman. The trial court ordered judicial dissolution of the LLC.

On appeal, Reese argued that the D.C. LLC statute required the court to order dissociation of Newman based on the jury's findings. Section 29-806.02(5) of the D.C. LLC statute provides as follows:

> A person shall be dissociated as a member from a limited liability company when:
> ...
> (5) On application by the company, the person is expelled as a member by judicial order because the person has:
> (A) Engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities and affairs;
> (B) Willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under § 29–804.09; or
> (C) Engaged in, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member....

The court of appeals pointed out that Section 29-806.02 contains a list of fifteen different events on which a person shall be dissociated as a member. Although the statute states that a person "shall" be dissociated as a member on the occurrence on any of these events, the language does not require a trial judge to order dissociation under subsection (5) when the grounds for doing so are present, but instead provides that a member shall be dissociated when the judge has decided to expel a member for any of the reasons enumerated. Reese pointed out that the judicial dissolution provision expressly permits a court to order a remedy other than dissolution while there is no comparable provision in the judicial dissociation provision. The court did not view the absence of such a provision in the judicial dissociation provision as indicative that the court lacked discretion in judicially expelling a member. The court noted that the word "shall" does not appear in subsection (5) of Section 29-806.02. The word "shall" is only in the introductory language to the judicial dissociation provision, and the word "shall" is located in the same place in the dissolution section: Section 29-807(a)(1) provides that "[a] limited liability company is dissolved, and its activities and affairs shall be wound up, upon the occurrence of any of the following...."

The court found persuasive authority for its view in the comments to the Revised Uniform Limited Liability Company Act (2013) (RULLCA). The court pointed out that the D.C. law contains language almost identical to RULLCA § 602, and the comments to that section state that a court has discretion to choose between dissociation and dissolution where grounds for both exist.

In sum, the court concluded that a trial judge may (i.e., has discretion to) expel a member by judicial order when any of the events in Section 29-806.02(5)(A)-(C) have taken place, and when

a judge does so, the member shall be dissociated. Additionally, when grounds for both dissociation of a member and dissolution of the LLC exist, the trial judge has discretion to choose either alternative. The court of appeals found no reason to disturb the trial court's order dissolving the LLC where the jury found that both statutory bases for judicial dissolution were met (i.e., that Reese acted or is acting in a manner that is illegal or fraudulent, and that she was acting in a manner that was or would be directly harmful to Newman). Although the jury did make findings that would allow the trial judge to order the dissociation of Newman, the jury also found that Newman did not willfully or persistently commit a breach of the "partnership agreement" or of her duty of loyalty to the LLC. Thus, the trial court did not think it was appropriate to expel Newman and leave Reese (who was found to have been acting in a manner that was illegal or fraudulent) in control of winding up the LLC. The trial court found it more equitable to decline to expel Newman so that both parties would be on equal footing during the winding up of the LLC.

Crumpton v. Vick's Mobile Homes, LLC, 779 S.E.2d 136 (Ga. App. 2015).

The court held that a member of two LLCs who filed a petition seeking dissolution of the LLCs did not cease to be a member in the LLCs under a provision of the LLC statute that provides that a member ceases to be a member upon the filing of a petition seeking "for the member" various types of relief including a dissolution. The statutory provision applies when the member seeks its own dissolution or similar relief, not when the member seeks dissolution or similar relief for the LLC.

A brother and sister inherited a mobile home park from their father, and two LLCs were formed in connection with the ownership and management of the park. The siblings did not get along, and the sister accused her brother of mismanaging the finances of the mobile home park. The sister filed this action against the LLCs and her brother, asking for equitable relief including dissolution. The brother alleged that his sister was interfering with the park manager that was appointed by the trial court pending resolution of the dispute. The brother submitted affidavits of tenants describing threatening and strange behavior of the sister, including that the sister "danc[ed] backward in a Michael Jackson moon-walking manner along the streets of [the mobile home park], wearing a belly dancer costume, in an inappropriate and bizarre manner."

The brother argued, and the trial court agreed, that the petition for dissolution of the LLCs dissociated the sister as a member under the Georgia LLC statute, which provides as follows:

> A person ceases to be a member of a limited liability company upon the occurrence of any of the following events:
> ...
> (4) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, the member (A) makes an assignment for the benefit of creditors; (B) files a voluntary petition in bankruptcy; (C) is adjudicated a bankrupt or insolvent; (D) *files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;* (E) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of this nature; or (F) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the member or of all or any substantial part of the member's properties[.]
> (Emphasis added.)

The trial court concluded that the phrase "for the member" in subsection (b)(4)(D) applies whenever a member has filed a petition or answer in an action against an LLC that seeks, in a general sense, relief or some other benefit for the member rather than for the LLC itself. However, the court of appeals concluded that rules of statutory construction (as well as relevant case law) compel the conclusion that this subsection applies when the member has filed a separate action seeking *its own* "reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief," and the statute does not cause the dissociation of a member who files a petition for dissolution of the LLC of which the member is a member. The trial court thus erred in determining that the sister's petition to dissolve the LLCs caused her to cease to be a member of those LLCs.

Charging Order

Law v. Zemp, 368 P.3d 821 (Or. App. 2016).

Based on a provision in the Revised Uniform Partnership Act (RUPA) that supplements the charging order provision in the Revised Uniform Limited Partnership Act (RULPA), the court concluded that the trial court had authority to issue certain ancillary orders against four limited partnerships in aid of enforcement of charging orders entered by the trial court. In contrast, the trial court did not have authority to issue any ancillary order against an LLC in aid of a charging order issued by the trial court against a membership interest in the LLC because the LLC statute does not contain any provision authorizing a court to issue ancillary orders.

The plaintiff obtained a judgment and asked the trial court to charge the interests of the defendant in four limited partnerships in which the defendant was a partner and an LLC in which the defendant was a member. The trial court entered an order directing the limited partnerships and LLC (collectively, "the companies") to pay to the plaintiff "any and all distributions, credits, drawings, or payments due to" the defendant. In addition, the trial court's order imposed other obligations on the companies. The companies were prohibited from making any loans, and the companies and their members were prohibited from transferring, modifying, or encumbering any partnership or membership interest without approval from the court or from the plaintiff until the judgment was paid. The companies were also required to open their books and certain tax records for inspection by the plaintiff and to provide future financial statements to the plaintiff. The order also permitted the plaintiff to seek modification of the order to allow for the appointment of a receiver and the foreclosure on the defendant's interests in the companies.

On appeal, the companies argued that the trial court exceeded the scope of its statutory authority under the charging order statutes when it imposed the additional obligations on the companies. The court discussed the history of the charging order going back to the adoption of a provision by the British Parliament in 1891 and inclusion of provisions in the uniform partnership statutes promulgated by the National Conference of Commissioners on Uniform State Laws. The court then turned to the history of charging orders in Oregon, which adopted the Uniform Partnership Act in 1939, the Uniform Limited Partnership Act in 1971, the Revised Uniform Limited Partnership Act (RULPA) in 1985, and the Revised Uniform Partnership Act (RUPA) in 1997. The Oregon Limited Liability Company Act (OLLCA) also contains charging order provisions. The companies argued that the provisions of RULPA and OLLCA that allow a court to charge the partnership or membership interests of a judgment debtor limit the scope of the judgment creditor's rights to the rights of an assignee. Ultimately, the court of appeals held that the trial court was authorized to require the limited partnerships to disclose financial information to the plaintiff, but the trial court exceeded its authority by imposing the restrictions on loans and on the transfer or encumbrance of

partnership interests. With respect to the charging order against the LLC, the court concluded that the trial court was not authorized to impose any of the additional obligations.

With respect to the trial court's authority in the case of the limited partnership, the companies pointed out that RULPA does not state that a trial court may make additional orders in aid of enforcement of a charging order, in contrast to RUPA, which does so provide. According to the companies, the absence of that provision in RULPA indicated that the legislature did not confer upon a trial court the same authority to enforce a charging order against a limited partnership by ancillary orders that it conferred upon a trial court with respect to charging orders against general partnerships. The court relied on the gapfilling provision of RULPA (which provides that "[i]n any case governing limited partnerships that is not provided for in [Oregon's version of RULPA], the provisions of [Oregon's version of RUPA] govern") and case law from other jurisdictions to conclude that the remedies provided in the charging order provisions of RUPA supplement the provisions of RULPA. Those remedy provisions confer on a court that issues a charging order the authority to "make all other orders, directions, accounts and inquiries the judgment debtor might have made or that the circumstances of the case may require." Thus, the court determined that the trial court had the authority to enter ancillary orders in aid of the enforcement of the charging order to the extent those ancillary orders were ones that "the judgment debtor might have made or that the circumstances of the case may require." The court then considered whether the challenged provisions either were directives that the judgment debtor partner could have made and, if not, were ones "that the circumstances of the case may require." The court found nothing in the partnership statutes or the record in this case that indicated the judgment debtor partner would have the authority to restrict the limited partnerships from making loans or restrict the limited partners from encumbering or transferring their interests. Furthermore, the trial court apparently did not determine that those provisions were required by the particular circumstances of this case. Those restrictions were thus beyond the court's discretion, and the court vacated those provisions as to the limited partnerships. The court did not disturb the provisions granting access to information.

With respect to the trial court's authority in the case of the LLC, the court pointed out that OLLCA does not itself provide any authority to enforce a charging order by issuing other ancillary orders, and OLLCA does not have a gapfilling provision directing the court to look to RUPA to supplement its provisions. The court also pointed out that OLLCA is not a uniform act, and the legislature has not instructed the courts to construe it to promote uniformity among the states, as it has with respect to the RUPA and the RULPA. The court thus concluded that the legislature did not authorize a trial court to enforce a charging order in the LLC context through ancillary orders like the ones the legislature authorized in the partnership context. Accordingly, the court vacated the challenged provisions as they applied to the LLC.

See also ***Merrill Ranch Properties, LLC v. Austell***, 784 S.E.2d 125 (Ga. App. 2016); ***Sargeant v. Al Saleh***, 2016 WL 362772, __ S.W.3d __ (Tex. App. 2016); ***DeVoll v. Demonbreun***, No. 04–14–00331–CV, 2016 WL 4538805, opinion withdrawn after settlement, 2016 WL 6775598 (Tex. App. 2016), summarized under the heading "Fraudulent Transfer" below.

Fraudulent Transfer

Merrill Ranch Properties, LLC v. Austell, 784 S.E.2d 125 (Ga. App. 2016).

The court of appeals held that a judgment creditor of members of several LLCs did not have standing to assert fraudulent transfer claims under the Georgia Uniform Fraudulent Transfer Act with

respect to transfers made by the LLCs of the LLCs' property because the LLCs were not "debtors" of the judgment creditor.

A judgment against the guarantors of a bank loan was entered in Arizona in favor of an entity that had purchased the loan from the bank, and the judgment creditor domesticated the judgment in Georgia. The judgment creditor obtained charging orders against the membership interests of various judgment debtors in various LLCs, and the judgment creditor alleged fraudulent transfer claims with respect to transfers of property of by several of those LLCs. The trial court concluded that the judgment creditor lacked standing to assert the fraudulent transfer claims, and the court of appeals agreed.

The court of appeals quoted the actual-fraud provision of the Georgia Uniform Fraudulent Transfer Act (UFTA) at the relevant time, which provided that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor...if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay, or defraud any creditor of the debtor." The court pointed out that "a *creditor* is entitled to seek relief[footnote omitted] under the UFTA for t*ransfers* made, or obligations incurred, by a *debtor* with actual intent to hinder, delay, or defraud *any* creditor of the debtor." Thus, a fraudulent transfer claim can only be brought by a "creditor" against a "debtor." The UFTA defines the term "creditor" as "a person who has a claim" and a "debtor" as "a person who is liable on a claim." "Claim" is broadly defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." A "transfer" includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance," and an "asset" is defined as "property of a debtor" with certain exceptions. The question was whether the judgment creditor was a creditor with standing to seek relief under the UFTA with respect to transfers made by non-judgment debtor LLCs.

According to the judgment creditor, it became a creditor of the non-judgment debtor LLC transferors by virtue of the charging orders against the judgment debtor members' interests. The judgment creditor argued that the charging orders created a "right to payment" from, and thus a "claim" against, any LLC entity named in the charging orders. The court of appeals stated that the judgment creditor misunderstood the nature of a charging order, which is only a statutory mechanism to redirect to the judgment creditor any distributions from the LLC otherwise due to the judgment debtor member. The charging order does not create any direct remedy against the LLC's property, and the court stated that a charging order clearly does not create a debtor-creditor relationship between the judgment creditor who obtained the charging order and the LLC whose member's interest is being charged. "[W]here, as in this case, a creditor of a member of the LLC does not also have a debtor-creditor relationship with the LLC, the creditor does not also become a creditor of the LLC by obtaining a charging order against the LLC. Accordingly, the creditor does not have standing under the UFTA to set aside a transfer of assets made by the LLC solely by obtaining a charging order against the LLC."

The judgment creditor also argued that it had standing under the UFTA to set aside a transfer by one of the LLCs because judgment debtors participated in the transfer by ordering the transfer to be made and executing the necessary documents. A transfer is broadly defined under the UFTA to include both direct and indirect transfers of an asset or an interest in an asset, but an "asset" is defined as property of the "debtor." Thus, the court held that, under the plain language of the UFTA, participating in or directing a transfer of property has no consequence unless the asset was property of the debtor, which it was not in this case.

Additionally, the court stated that the judgment creditor, although it denied that it was proceeding under an "alter ego" theory, was essentially asking the court to disregard the corporate form and find that a creditor of a member of an LLC was also a creditor of the LLC for purposes of attaching the LLC's assets and preventing their transfer. The court noted that the Georgia Supreme Court, in a somewhat different context, held that a creditor may not reach the assets of a corporation or LLC to satisfy a debt of one of its shareholders or members. The court also cited other case law rejecting reverse veil piercing.

As an additional basis to reject the judgment creditor's standing to assert some of the fraudulent transfer claims, the court concluded that an assignee of a debt does not under Georgia law have standing to assert fraudulent transfers occurring before the assignment of the debt. Thus, the judgment creditor did not have standing to assert fraudulent transfer claims that were based on transfers predating the judgment creditor's purchase of the loan.

Sargeant v. Al Saleh, 2016 WL 362772, __ S.W.3d __ (Tex. App. 2016).

In a proceeding by a judgment creditor against the judgment debtor and his wholly owned LLC, the court of appeals held that the trial court did not abuse its discretion in issuing a temporary injunction prohibiting the LLC from transferring its assets pending trial. The judgment creditor asserted that assets had been fraudulently transferred to and by the LLC, and the Texas Uniform Fraudulent Transfer Act (TUFTA) provides for injunctive relief. The LLC argued that the court could not enjoin it under TUFTA because the plaintiff did not have a judgment against the LLC. The court held that the judgment creditor was a "creditor" of the LLC under TUFTA because he had a "claim," which can be equitable and need not be matured or reduced to judgment. The court said the judgment creditor's claim need not be against the debtor only, but may also be against the transferee or person for whose benefit the transfer was made.

Al Saleh obtained a $28 million judgment against Sargeant in Florida. BTB Refining LLC ("BTB") was a Florida LLC wholly owned by Sargeant that was converted to a Texas LLC two days before entry of the judgment against Sargeant in Florida. In the Florida collection proceeding, Al Saleh asserted: (1) a claim for constructive trust over BTB's primary asset, a $29 million note purchased with the proceeds of fuel contracts that were the subject of Al Saleh's lawsuit against Sargeant in Florida; (2) a claim that BTB was the alter ego of Sargeant; and (3) a claim that BTB was fraudulently re-domiciled to Texas just before entry of the verdict and should be re-domiciled to Florida to allow foreclosure of Sargeant's interest under Florida law. Al Saleh's collection efforts in Florida were fruitless, and he domesticated the Florida judgment in Texas.

In the Texas collection proceeding, Al Saleh filed an agreed motion and obtained an agreed order charging Sargeant's member interest in BTB with the judgment debt. Al Saleh then filed an amended petition in which he stated that a sales transaction involving BTB was about to close in which Sargeant, as BTB's alter ego, would ultimately receive approximately $52 million. Al Saleh requested the court's assistance in ensuring that a portion of these funds was distributed to Al Saleh to satisfy the judgment against Sargeant. Al Saleh's causes of action included claims relating to turnover, fraudulent transfer under TUFTA, and fraud, and Al Saleh also alleged theories of vicarious liability and disregard of the corporate form. The claims for disregard of the corporate form included allegations that BTB and a Bahamas corporation, Sargeant Marine, Ltd. ("Sargeant Marine"), were mere alter egos of Sargeant.

In support of his claims, Al Saleh alleged and provided evidence that Sargeant had settled litigation in which he released valuable claims but received no consideration under the settlement agreement. Instead, the settlement proceeds were paid solely to Sargeant's entities, including over $52,000,000 to BTB. Al Saleh also alleged that BTB had entered into a "Zero Coupon Promissory

Note" with Sargent Marine obligating BTB to pay Sargeant Marine more than $55,000,000. In seeking the temporary injunction at issue in this appeal, Al Saleh urged that injunctive relief was necessary to prevent Sargeant, Sargeant Marine, and BTB from transferring or moving the settlement proceeds "beyond reach." The trial court granted a temporary injunction ordering that "Sargeant, BTB, and the officers, agents, servants, employees, attorneys, principals, members, manager and other persons in active concert or participation with them, be and hereby are, commanded forthwith to desist and refrain from using or transferring to any person or entity $21,828,446.65 or transferring such amount out of the jurisdiction of this Court, from the date of this Order until further Order of this Court."

The fundamental question on appeal was whether the trial court abused its discretion in entering an injunction freezing millions of dollars of assets of BTB until trial. BTB framed its argument as follows: Al Saleh, with no judgment against BTB, brought this lawsuit to attempt to hold BTB liable for Al Saleh's money judgment against Sargeant under theories of alter ego and fraudulent conveyance, and the district court abused its discretion in ruling that a temporary injunction was available to preserve BTB's cash as security for a potential money judgment against BTB in Al Saleh's favor.

Because Al Saleh alleged a fraudulent conveyance in violation of TUFTA, which provides for injunctive relief, the court analyzed the validity of the temporary injunction in this case under TUFTA. BTB argued that TUFTA requires the plaintiff to establish that he is a creditor of the transferor—here BTB. BTB reasoned that Al Saleh was not a creditor of BTB because Al Saleh did not have a judgment against that entity. The court distinguished cases relied on by BTB and concluded that Al Saleh was a "creditor" under the express terms of TUFTA because he "has a claim," which can be equitable and need not be matured or reduced to judgment. Further, the court said that a creditor's claim need not be against the debtor only, but can also be against the transferee of an asset or the person for whose benefit the transfer was made. The court said that TUFTA expressly provides for an injunction under the circumstances and facts alleged, and the trial court exercised its discretion to grant that injunction. The court rejected BTB's argument that the trial court lacked discretion to issue a temporary injunction based on cases that have disapproved of temporary injunctions freezing assets unrelated to the subject matter of the suit. But the court concluded that these cases did not control the analysis in this case because: (1) Al Saleh brought claims under TUFTA, which expressly provides that a plaintiff may obtain an injunction against further disposition of "the asset transferred or of other property"; and (2) Al Saleh presented evidence from which the trial court could have concluded that BTB's assets were related to the subject of the suit, i.e., Al Saleh's affidavit linking BTB's assets, including the promissory note with Sargeant Marine, to the funds at issue in the Florida dispute and the subject of the already-obtained Florida judgment. Thus, the court of appeals affirmed the temporary injunction.

DeVoll v. Demonbreun, No. 04–14–00331–CV, 2016 WL 4538805, opinion withdrawn after settlement, 2016 WL 6775598 (Tex. App. 2016).

The court of appeals discussed how the general partnership charging order provisions in Texas interact with TUFTA's remedies for a judgment creditor and whether the two statutes conflict. The court concluded that the charging order statute's prohibition against a creditor exercising legal or equitable remedies against partnership property to satisfy a judgment does not prevent a court from granting an injunction under TUFTA prohibiting transfer of partnership property in order to preserve the value of a partnership interest of a judgment debtor. In this case, the judgment creditor alleged that the purchase by a non-defaulting partner of a defaulting partner's interest in the partnership was a fraudulent transfer orchestrated to prevent the judgment creditor of the spouse of

the defaulting partner from pursuing collection remedies against the community property interest of the judgment debtor in her spouse's partnership interest. The trial court issued a temporary injunction prohibiting the partnership (which at this point apparently had only one remaining partner) from transferring or encumbering its real property pending resolution of the fraudulent transfer claim. The court of appeals concluded that the injunction was proper.

To obtain injunctive relief against partnership property in a TUFTA suit, the court of appeals stated that the applicant must plead and prove all the required elements for injunctive relief, and the trial court must consider, at a minimum, the following factors: (1) the amount of the unpaid balance of the judgment; (2) the value of the partnership assets sought to be enjoined; and (3) the burden on the partnership's operations and management any relief granted would impose. "Exercising applicable principles of equity, the trial court may order relief to protect partnership assets from sale, transfer, encumbrance, etc., but must grant only the minimum reasonable restraint necessary to protect the partnership interest from being dissipated pending resolution of the TUFTA claim."

A dissenting justice construed the plain language of the charging order statute as an absolute bar to a trial court's ability to grant injunctive relief to protect a judgment creditor's potential interest in an asset underlying a judgment debtor's partnership interest, but the majority concluded that the provisions of the charging order statute and TUFTA could be harmonized as described by the majority.

Key v. Richards, No. 03–14–00116–CV, 2016 WL 240773 (Tex. App. Jan. 13, 2016).

The court held that the trial court did not improperly apply veil-piercing principles to hold the owners of LLCs personally liable for a fraudulent transfer by one of the LLCs to the other and that the evidence showed that the individuals were directly liable (i.e., separate and apart from veil-piercing principles) for their own role in the fraudulent transfer.

After Adams was unable to collect on a judgment that she obtained against Centex Freight Lines, L.L.C. (Centex) in a previous lawsuit, she and the court-appointed receiver for Centex filed this lawsuit alleging a fraudulent transfer of Centex's assets to a commonly controlled company, PJC Properties, LLC ("PJC Properties") for the unlawful purpose of evading payment of the judgment. The owners of Centex and PJC Properties were Steve Key and Pat Curry. The challenged transaction was a foreclosure and sale of Centex's assets to PJC Properties after default on a loan purportedly secured by all of Centex's assets. The jury found that PJC Properties did not have an enforceable security interest in Centex's assets and that the transfer was thus a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act because Centex did not receive "reasonably equivalent value" in exchange for the assets. The jury also found that Key, Curry, and PJC Properties were "responsible" for the unfair conduct of Centex and PJC Properties and that holding only Centex responsible for liability on the Adams judgment would result in injustice. The trial court thus awarded Adams damages in the full amount of her prior judgment jointly and severally against Key, Curry, and PJC Properties, as well as attorney's fees, and awarded the receiver possession and title of all assets owned or held by Centex as of the date of the Adams judgment.

After finding that there was sufficient evidence to support the jury's finding that the transfer of Centex's assets was fraudulent due to the absence of an enforceable security interest, the court turned to the defendants' challenges to the application of veil-piercing principles to hold Key and Curry individually liable. The court began by noting the longstanding common law of Texas regarding corporate veil piercing and pointing out several cases noting statutory developments and applying corporate veil-piercing principles to LLCs. The court also noted the well-established rule that an entity's agent is personally liable for the agent's own fraudulent or tortious acts without the necessity of piercing the entity's veil.

The court rejected challenges to the jury questions and sufficiency of the evidence regarding the liability of Key and Curry based on veil piercing. The court stated that the court's instructions were derived from applicable case law and were accurate statements of the law regarding veil piercing, but the court also stated that it was not necessary for the trial court to employ the equitable doctrine of veil piercing to impose individual liability on Key and Curry in light of the jury's findings and the evidence because Key and Curry were individually liable for their own tortious conduct in participating and directing the fraudulent transfer

In a concurring opinion, one member of the 3-judge panel disagreed with the majority that the issue of personal liability of Curry or Key for direct tort liability was properly before the court.

Governing Law

Sky Cable, LLC v. Coley, Civ. Action No. 5:11cv00048, 2016 WL 3926492 (W.D. Va. July 18, 2016).

The court applied Delaware law to reverse pierce the veil of three Delaware LLCs to satisfy a judgment against the individual member of the LLCs. The court held that the "egregious" facts warranted reverse piercing under Delaware law and appointment of a receiver. The court further concluded that the court could invoke its inherent sanction power to reverse pierce under the circumstances presented in this case even if the court was incorrect about Delaware law.

After several years of litigation, DIRECTV obtained a $2.4 million judgment against Gary Coley and East Coast Cablevision, LLC, for the receipt and unauthorized distribution of satellite programming at a resort in Virginia. In this post-judgment collection proceeding, DIRECTV asked the court to reverse pierce the veil of three other LLCs owned by Coley and declare that Coley was the alter ego of the LLCs and that the assets of those LLCs were subject to the judgment in this case. DIRECTV also sought appointment of a receiver over the assets of Coley and his LLCs to prevent fraud during the execution process. The court granted the requested relief.

After reviewing the evidence relating to the ownership and operation of Coley's LLCs and providing "but a few examples of Coley's commingling of assets established by the record in this case," the court discussed outsider reverse veil-piercing theory and concluded that "[t]here could not be a more appropriate set of circumstances justifying application of the reverse veil-piercing theory than those presented in the instant case." The court agreed with Coley that it was required to look to Delaware law, as the law of the "state of incorporation," in determining whether to disregard the corporate form and subject the assets held by Coley's LLCs to execution of the judgment against Coley in this case. The court acknowledged that Delaware appellate courts have never expressly recognized the remedy DIRECTV sought, and the court was not aware of any authority applying an outsider reverse veil-piercing theory under Delaware law. However, the court noted that no court has held that outsider reverse veil piercing would be prohibited under Delaware law, and the court pointed out that the Delaware Chancery Court has hinted, in a case affirmed by the Delaware Supreme Court, that a reverse piercing claim may be viable under Delaware law if properly presented (citing *Cancan Development, LLC v. Manno*). The court also pointed out that numerous other jurisdictions, including North Carolina (where the LLCs at issue operated and their assets were located) and Virginia (the forum state in this case), recognize the concept of outsider reverse veil piercing. The court further discussed the evidence in this case to illustrate that "[t]he record is replete with evidence of Randy Coley's misdeeds" so as to warrant reverse piercing his LLCs.

The court stated that justice would require the court to apply reverse veil piercing under its inherent sanction power even if Delaware law does not recognize the theory.

The case is on appeal to the Fourth Circuit Court of Appeals.

McBeth v. Porges, 171 F.Supp.3d 216 (S.D.N.Y. 2016).

The plaintiff invested $5 million in a hedge fund, and the fund lost the entire investment within ten months. The plaintiff sued a Delaware LLC that served as the managing member of the fund and a Delaware LLC that served as investment manager. The plaintiff also sued Porges, the CEO and principal of these two LLCs. The plaintiff's claims included claims for fraudulent and negligent misrepresentation, breach of contract, breach of fiduciary duty, and veil piercing. The LLC agreement for the fund and the subscription documents contained Delaware choice-of-law provisions, and the parties agreed that the contract claims and the breach-of-fiduciary duty claims were governed by Delaware law. (The court also applied Delaware law to the plaintiff's claims to pierce the veil of the Delaware LLCs without any explicit choice-of-law analysis.) The parties disagreed as to whether the choice-of-law provisions in the LLC agreement and subscription documents governed the plaintiff's misrepresentation claims. Applying New York choice-of-law rules, the court concluded that choice-of-law provisions did not cover the misrepresentation claims. Under New York law, "'for a choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be sufficiently broad as to encompass the entire relationship between the contracting parties.'" The LLC agreement provided that Delaware law "shall govern the validity of this Agreement, the construction of its terms and interpretation of the rights and duties of the Members," and the subscription documents stated that they "shall be deemed to have been made under, and shall be governed by, and construed in accordance with, the internal laws of the State of Delaware (excluding the law thereof which requires the application of or reference to the law of any other jurisdiction)." The court concluded that these did not cover the plaintiff's claims for fraudulent and negligent misrepresentation because the provisions did not "encompass the entire relationship between the contracting parties" and were similar to provisions that courts have held do not encompass such tort claims.

Applying New York law to the misrepresentation claims, the court concluded that the claims failed as a matter of law based on the non-reliance clause in the documents and the plaintiff's sophistication.

Diversity Jurisdiction

Grynberg v. Kinder Morgan Energy Partners, L.P., 805 F.3d 901 (10th Cir. 2015).

The plaintiffs, citizens of Colorado, sued Kinder Morgan Energy Partners, L.P. ("KMEP") and Kinder Morgan CO2 Company, L.P. ("KMCO2") in federal district court to vacate an arbitration award. The plaintiffs invoked diversity jurisdiction, and the district court dismissed the action for lack of jurisdiction because KMEP, a Delaware master limited partnership, had unitholders who were citizens of Colorado. The plaintiffs argued that *Carden v. Arkoma Associates*, under which the citizenship of a limited partnership is determined by the citizenship of all of its partners, does not apply to master limited partnerships, but the court of appeals rejected that argument.

Characterizing the issue as an "issue of first impression," the court of appeals held that "the citizenship of an MLP consists of its unitholders' citizenship." The court described KMEP as a Delaware master limited partnership and KMCO2 as "a Texas limited partnership with one partner, KMEP. The court further noted that, "[b]ecause KMEP was the sole partner of KMCO2, KMCO2's citizenship included KMEP's citizenship." The court provided the following explanation of MLPs:

> MLPs are limited partnerships or limited liability companies whose ownership interests, called "common units," are publicly traded. John Goodgame, *New Developments in Master Limited Partnership Governance*, 68 Bus. L. 81, 82 (2012);

> *Wood v. Walton*, No. WDQ–09–3398, 2010 WL 458574, at *1 n. 3 (D.Md. Feb. 2, 2010) (unpublished).[footnote omitted] MLPs are similar to limited partnerships in that they have general partners who manage the partnership's affairs and limited partners (called "unitholders") who provide capital. *Trafigura AG v. Enter. Prods. Operating LLC*, 995 F.Supp.2d 641, 643 n. 1 (S.D.Tex.2014). MLPs are classified as partnerships for federal taxation purposes, which allows them to benefit from "pass-through" taxation. *Id.* They are similar to corporations, however, in that MLPs are publicly traded. *See id.* Although MLPs are organized under state law, federal law permits federal pass-through taxation for MLPs engaged predominately in the "exploration, development, mining, or production, processing, refining, [or] transportation ... of any mineral or natural resource." 26 U.S.C. § 7704(d)(1)(E).

The court explained that there are generally two types of business organizations for purposes of jurisdictional citizenship: corporations and unincorporated associations. The court discussed a long line of Supreme Court decisions, beginning with *Chapman v. Barney*, an 1889 opinion, in which the Supreme Court has held that an unincorporated entity's citizenship is determined by its members' citizenship. The court of appeals stated that this "rule applies to MLPs because they are unincorporated associations (1) formed under state law as limited partnerships or limited liability companies and (2) classified as partnerships for federal income tax purposes." The plaintiff argued that MLPs qualify for an exception similar to that applied by the Supreme Court in *Puerto Rico v. Russell & Co.* In that case, the Supreme Court determined that a sociedad en comandita—an entity created under Puerto Rico law—was a citizen of Puerto Rico for diversity purposes. The plaintiffs argued that the corporate characteristics of an MLP warranted application of a similar analysis. The court of appeals disagreed because the Supreme Court has declined to extend the exception in *Russell* and has stated that it likely only applies to a sociedad in comandita. The court of appeals went on to state that the MLP's characteristics did not support treating an MLP like a corporation. The court stated that an MLP's similarities to a corporation are limited to being publicly traded, having centralized management, and having freely transferable units. The court pointed out that MLPs are formed as unincorporated entities under state law and that the partnership agreement can modify the fiduciary duties owed by partners whereas corporate law disallows modifying or restricting the fiduciary duties owed by the board of directors.

The court concluded by stating that the plaintiffs' policy argument should be addressed to Congress rather than the courts.

Alphonse v. Arch Bay Holdings, L.L.C., 618 Fed. App'x 765 (5th Cir. 2015).

The court rejected the contention that the citizenship of a passive investor who was a member of a member of a member of the defendant LLC could be disregarded for purposes of the LLC's citizenship. The plaintiff argued that the standard established in *Harvey v. Grey Wolf Drilling Co.,* 542 F.3d 1077, 1079–80 (5th Cir.2008)(applying *Carden v. Arkoma Associates* to limited liability companies) would be stretched to an illogical absurdity in this case because the member whose citizenship would destroy diversity was in fact a member of a member of one of the plaintiff's members and was a limited partner who had no managerial responsibilities and was difficult to locate. The court found these arguments unpersuasive because the Supreme Court has explicitly rejected the contention that a court may consult the citizenship of less than all of an unincorporated entity's members to determine citizenship for diversity purposes. Additionally, there is no case law suggesting that an exception may be made when one of the LLC's members is an artificial entity whose members are also entities. To the contrary, the Fifth Circuit has observed that testing

citizenship involves tracing the citizenship of entities through the various organizations and layers when necessary. Accordingly, the court rejected the plaintiff's contention that the court could consider less than all of the defendant LLC's members when determining its citizenship.