

**More Than a Decade of LLP and LLC Case Law:  
A Cumulative Survey of Cases Dealing With  
Limited Liability Partnerships and  
Limited Liability Companies**

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**I. Introduction**

This paper summarizes cases that deal with limited liability company (LLC) and limited liability partnership (LLP) issues. The first LLP and LLC cases appeared in late 1994, and the popularity of these relatively new forms of business is reflected by a growing body of case law addressing issues associated with these entities. LLC cases have appeared with greater frequency, and there are more than a few cases in some significant areas such as veil piercing and fiduciary duties. Many of the opinions included below are unpublished and thus have limited precedential value. They are included, however, to illustrate the types of issues that have arisen and how the courts have dealt with them. Predictably, courts tend to analogize to corporations and partnerships when faced with LLC issues, and the results in the cases are generally not too surprising. In some cases, the courts do not appear to realize that they are dealing with an entity other than a corporation. In a few cases, the courts have not only recognized that an LLC is a distinct type of entity, but have, therefore, refused to find corporate or partnership cases persuasive with respect to a particular issue.

One thing that becomes clear in reading the cases is that litigants, courts, and headnote writers are struggling with the terminology and nature of LLCs and LLPs. For a number of years after the LLC case law began to develop, there was no "Limited Liability Company" digest topic, and published LLC cases were digested under the "Corporations" (most often) or "Partnerships" (occasionally) topics of the West digest system. Headnotes sometimes fail to indicate that a case involves an LLC. Mistaken references to limited partnerships as LLPs and vice versa, to LLCs as corporations (or "limited liability corporations"), to members as shareholders or partners, etc. appear with disturbing frequency. The development of a clear, well-reasoned body of case law dealing with the newer types of unincorporated entities will depend in large part on how effectively litigants educate courts as these cases arise.

**II. Cases Involving Limited Liability Partnerships**

There are as of yet relatively few decisions dealing with limited liability partnership issues. Set forth below is a summary of cases that have appeared to date.

**A. Suits By and Against Foreign LLPs: Personal Jurisdiction, Venue, etc.**

*Ng v. BDO Seidman*, No. A109677, 2006 WL 864448 (Cal. App. 1 Dist April 5, 2006); *Cowan v. BDO Seidman*, No. A107681, 2006 WL 864483 (Cal. App. 1 Dist April 5, 2006); *Mathewson v. BDO Seidman*, No. A109708, 2006 WL 864522 (Cal. App. 1 Dist. April 5, 2006); *Balwani v. BDO Seidman*, No. A108973, 2006 WL 864531 (Cal. App. 1 Dist. April 5, 2006) (stating that fact LLP was New York registered limited liability partnership provided New York with "substantial relationship" to parties and "reasonable basis" for New York choice of law clause in consulting agreement, which contained arbitration clause, between LLP and client).

*Cadlerock Properties Joint Venture, L.P. v. Schilberg*, 30 Conn. L. Rptr. 85, 2001 WL 950233 (Conn. Super. July 17, 2001)(holding that factual dispute regarding foreign LLP's transaction of business in Connecticut precluded summary judgment on ground that failure to register as foreign limited liability partnership precluded maintenance of suit).

*Liberty Mutual Insurance Company v. Gardere & Wynne, L.L.P.*, Civ. A. No. 94-10609-MLW, 1994 WL 707133 (D. Mass. Dec. 6, 1994). Issues discussed in this case include the capacity of an LLP to be sued, jurisdiction over partners of the LLP, the treatment and status of various partners of the LLP, and choice of law. The court addressed these issues as they related to the court's consideration of the defendants' motion to transfer venue from Massachusetts to Texas. The case was brought by Liberty Mutual Insurance Company ("Liberty Mutual") in federal district court in

Massachusetts against a Dallas law firm, Gardere & Wynne, L.L.P. (Gardere & Wynne), a Texas registered limited liability partnership, and two Gardere & Wynne attorneys.

Gardere & Wynne frequently represented Liberty Mutual in litigation involving Liberty Mutual and its insureds. Two attorneys, Nabors and Woods, left another Texas law firm to join Gardere & Wynne (Nabors as a partner and Woods as an associate), bringing with them a client whose interests were adverse to Liberty Mutual in some pending litigation. Liberty Mutual sued Gardere & Wynne, Nabors, and Woods in Massachusetts for breach of fiduciary duty in connection with the handling of a conflict of interest. The defendants moved for dismissal or transfer of the case to Texas. The court pointed out that a number of thorny issues would be avoided or best resolved if the case were litigated in Texas. Thus, the court concluded that the litigation should be transferred to Texas under 28 U.S.C. § 1404(a).

Under the rule governing suits against general partnerships in Massachusetts, Liberty Mutual would have had to name and serve each partner individually. In contrast, Texas law permits a partnership to sue and be sued in the partnership name (and service upon one partner will constitute service on the partnership). The court noted that a plaintiff may sue a limited partnership in Massachusetts by naming only the general partners and speculated that it might be possible to characterize an LLP as a limited partnership and bring suit by naming only those partners that would be personally liable for the claims Liberty Mutual was asserting. However, this would have required the court to determine whether a breach of fiduciary duty claim fell within the liability protection provided by the Texas statute at the time and, if so, whether some or all of the partners would nevertheless be liable under certain other provisions of the act. The court was reluctant to delve into these unsettled questions of Texas law, especially in the preliminary context of a motion to dismiss. Transfer of the suit to Texas, where suit could be maintained against the partnership in its common name and without joining all partners, obviated the need for such a determination as a threshold matter.

Nabors and Woods sought to dismiss the Massachusetts lawsuit brought by Liberty Mutual based upon lack of personal jurisdiction. Though there had been other partners of Gardere & Wynne who had visited Liberty Mutual at its Boston office over the years, the court observed that it would not have jurisdiction over either Nabors or Woods based solely on their own personal contacts with Massachusetts. Jurisdiction over them would have to be based upon the contacts by other partners, who, by operation of partnership law, were acting as agents of Nabors and Woods. The court noted that personal jurisdiction over a person may be based upon acts of the person's agent or business partner but noted a number of factors complicating the analysis in this case, including whether Woods had become a partner at all, whether jurisdictional contacts of partners could be used to maintain jurisdiction over other partners who were admitted after those contacts occurred, and whether jurisdiction could be predicated on contacts of partners of an LLP who may not be vicariously liable on the underlying claim. None of these questions had to be decided upon transfer of the case to Texas because the Texas district court would unquestionably have jurisdiction over all the defendants.

The court noted that there would ultimately be difficult issues of Texas law involved in litigation of the merits of the case, and a Texas court would be best suited to determine these. The court as well as the parties evidently assumed that the Texas LLP statute would be given effect and that Texas law would govern the extent to which damages and injunctive relief could be granted against partners other than those directly involved in the alleged wrongdoing. The court noted, however, that the issues involving Gardere & Wynne's conflicts of interest and compliance with rules of ethics might be governed by national standards.

*UOP v. Andersen Consulting*, No. CV 95014753S, 1995 WL 784971 (Conn. Super. 1995). Defendant Andersen Consulting, L.L.P. ("AC LLP"), an Illinois registered limited liability partnership, argued that it was a foreign partnership within the meaning of the Connecticut long arm statute and that the long arm statute did not authorize personal jurisdiction over AC LLP because the suit did not arise out of the transaction of any business in Connecticut. The plaintiff argued that, because AC LLP had partners who resided in Connecticut, AC LLP was a citizen of Connecticut and not a "foreign partnership" under the long arm statute. Since the long arm statute did not define "foreign partnership," the court looked at other definitions. It looked at the definition of a foreign limited partnership and the definition of a foreign registered limited liability partnership in the partnership statutes and concluded that AC LLP was a foreign partnership under the long arm statute. However, the court concluded that the requirements of the long arm statute had been met.

## **B. Diversity Jurisdiction**

The courts have held that the citizenship of an LLP for diversity jurisdiction purposes depends upon the citizenship of all of its partners. In other words, an LLP is a citizen of each state in which a partner resides. This rule follows from the United States Supreme Court case of *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In *Carden*, the Court reiterated the rule that the citizenship of an unincorporated association is determined based upon the citizenship



of all of its members. Specifically, the Court held that a limited partnership is a citizen of every state in which a general or limited partner resides. Cases applying this rule to LLPs include:

*Koetters v. Ernst & Young LLP*, No. Civ.A. 3:05-19-JMH, 2005 WL 1475533 (E.D. Ky. June 21, 2005).

*Burton v. Coburn*, No. Civ.A. 04-965(RBW), 2005 WL 607912 (D. D.C. March 16, 2005) (but see *Wigfall v. Wolpoff & Abramson, LLP*, No.Civ.A. 05-591 (JR), 2005 WL 3213955 (D.D.C. Nov. 1, 2005), in which the plaintiff's assertion of diversity jurisdiction was unchallenged, and the court assumed without deciding that, "unlike common law partnerships, limited liability partnerships do not reside wherever their partners reside").

*Schlichtmann v. Ivey & Ragsdale*, 352 F.Supp.2d 6 (D. Me. 2005).

*Conk v. Richards & O'Neil, LLP*, 77 F. Supp.2d 956 (S.D. Ind. 1999).

*Cohen v. Kurtzman*, 45 F. Supp.2d 423 (D.C. N.J. 1999). In this case, the presence of diversity jurisdiction turned upon whether the defendant law firm was a sole proprietorship or a limited liability partnership. The plaintiff argued that the law firm's registration as an LLP was a fraud and that the firm was in fact and substance a sole proprietorship. However, the court found that the evidence overwhelmingly established that the firm was a New York LLP. Diversity was thus lacking because one of the partners was domiciled in the plaintiff's state of domicile, New Jersey. The court imposed Rule 11 sanctions against the plaintiff for failing to make a good faith effort to determine the status of the LLP law firm.

*ALMS, Ltd., L.L.P. v. Barnes*, No. Civ. A. 3:98-CV-1784-P, 1998 WL 907034 (N.D. Tex. Dec. 16, 1998).

*ALMS, Ltd., L.L.P. v. Guzman*, No. Civ. A. 3:98-CV-1798G, 1998 WL 684245 (N.D. Tex. Sept. 25, 1998).

*Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F. Supp.2d 449 (S.D. N.Y. 1998). After concluding that a registered limited liability partnership is a citizen of every state of which any of its partners is a citizen for diversity jurisdiction purposes, the court discussed the effect of the resignation of partners and dissolution of the partnership. The court concluded that, since a dissolved partnership continues to exist until winding up is completed, the partnership continues to exist and is a citizen of every state of which any of its partners was a citizen at the time the action was commenced. In the course of its discussion, the court commented by way of footnote that the New York "statute clearly enunciates that a general partnership that is registered as a RLLP is for all purposes the same entity that existed before registration and continues to be a general partnership under the laws of New York."

*Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165 (D. Mass. 1997). Relying on *Carden v. Arkoma Associates*, the court rejected the plaintiff's argument that the citizenship of partners in an LLP who are not potentially liable should not be considered in determining the LLP's citizenship. The court stated that it was "particularly troubled that a Big Six accounting firm which operates offices within every state in the United States has effectively immunized itself from the reach of the diversity jurisdiction of the federal courts simply by organizing itself as a limited liability partnership rather than a corporation. Nevertheless, until Congress addresses the jurisdictional implications of this new class of business entities, this Court can reach no other result." The court noted by way of footnote that Peat Marwick might have "won" more than it bargained for because it would now be judicially estopped from advancing a contrary argument in any other court and "the doors of the federal courts ought now to be closed to Peat Marwick save in cases that involve a federal litigant or which pose a federal question." The court estimated that Peat Marwick was currently a litigant in approximately 93 diversity cases that ought not to be pending and stated that, if it had the database to determine all such cases, it would notify every court in which such a case was pending.

### **C. Service of Process**

*Murphy v. Del Sole & Del Sole, LLP*, No. CV054007244S, 2005 WL 3370365 (Conn. Super. Nov. 14, 2005) (holding service of process on LLP must be accomplished under statute providing that partnership is served by serving any partner, and serving person in charge of business as provided under statute applicable to corporations is inadequate).

#### **D. Venue**

*Haynes Downard Andra & Jones, LLP v. Southeastern Commercial Finance*, 924 So.2d 687 (Ala. 2005) (stating LLP is “for all purposes... the same entity that existed before registration,” and method for determining venue in action against corporation is not applicable to determination of venue in action against partnership).

*Maupin v. Meadow Park Manor*, 125 P.3d 611 (Mont. 2005) (stating venue rules for LLP do not differ from those of general partnerships because LLP is “same entity that existed before registration” for all purposes).

#### **E. Pro Se Representation**

*Mutual Assignment and Indem. Co. v. Lind-Waldock & Co., LLC*, 364 F.3d 858 (7th Cir. 2004) (stating that individual who was not licensed attorney could not represent LLP).

*Verizon Yellow Pages Co. v. Sims & Sims, P.C.*, No. 02-00961, 2003 WL 836087 (Mass.Super. Feb. 24, 2003) (concluding that lawyer partner in law firm LLP could not appear for partnership pro se because partner in LLP has limited liability and is legally distinct from LLP).

#### **F. Limited Liability of Partners**

*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal.App.4th 384 (Cal. App. 2 Dist. 2007) (commenting that individual partners in LLP are not vicariously liable for partnership obligations that do not arise from their personal misconduct or guarantees).

*City of Bridgeport v. C.J. Fucci, Inc.*, No. X03CV065008250S, 2007 WL 1120537 (Conn. Super. March 28, 2007) (stating that partner in LLP may be held liable for his or her own negligence but other partners may not be held liable for that partner’s negligence simply because they are both members of partnership).

*Campbell v. Lichtenfels*, No. CV44005066S, 2007 WL 447919 (Conn. Super. Jan. 26, 2007) (imposing personal liability on partner for malpractice claim against partnership in absence of proof that partnership filed certificate of limited liability partnership with Secretary of State).

*Software Publishers Association v. Scott & Scott, LLP*, Civil Action No. 3:06-CV-0949- G, 2007 WL 92391 (N.D. Tex. Jan. 11, 2007). The court declined to dismiss claims against the managing partner of an LLP law firm that allegedly engaged in cybersquatting and copyright and trademark infringement and dilution. The court noted that the Texas LLP statute provides for liability of a partner who is directly involved in the specific activity in which the negligence or malfeasance of another occurred or who had notice or knowledge of negligence or malfeasance at the time of the occurrence and failed to take reasonable steps to prevent or cure the negligence or malfeasance. In addition, the statute specifies that it does not affect the liability of a partner independent of his partner status. The plaintiff alleged that the managing partner “controlled” the activities of the law firm complained of in the complaint. This allegation was sufficient to survive a motion to dismiss because the allegation supported recovery under the theory that the managing partner was directly involved in the wrongful conduct or had knowledge of the wrongful conduct but failed to take reasonable steps to prevent it. In the course of its discussion, the court commented that no limited liability partnership law in any state extends so far as to shield a partner from his own wrongful conduct.

*Edward B. Elmer, M.D., P.A. v. Santa Fe Properties, Inc.*, No. 04-05-00821-CV, 2006 WL 3612359 (Tex.App. Dec. 13, 2006). Two professional associations were partners in a partnership that was sued for breach of a commercial lease. The plaintiff sued the partnership and its two partners. The plaintiff obtained a judgment against the partnership, and that judgment was severed and became final. After the plaintiff was not able to collect the judgment from the partnership, the plaintiff obtained a summary judgment against one of the partners. The partner appealed arguing that the plaintiff’s suit against the partner was barred because the plaintiff initially obtained judgment against the partnership alleging it was an LLP. The court held that the partner was not protected from individual liability because the partnership was not a properly registered limited liability partnership under the Texas Revised Partnership Act at the time it incurred the lease obligations. The Texas LLP provisions require that an LLP carry insurance or meet certain financial responsibility requirements. The court noted that, unlike the limited partnership statute, the LLP provisions contain no substantial compliance language. Therefore, the court concluded that strict compliance with the statute is

required. Although the partner itself carried errors and omissions insurance, the court pointed out that the policy did not appear to cover the partnership or the other partner. Because the partnership did not have the required insurance or other forms of financial responsibility designated by the statute, it was not a properly registered LLP, and the partner was not protected from liability.

*Ederer v. Gursky*, 826 N.Y.S.2d 210 (N.Y. A. D. 1 Dept. 2006) (stating NY LLP statute does not exempt partners from liability to account to withdrawing partner, and does not exempt partners for liability to withdrawing partner for breach of firm-related agreements between them).

*Regency Foundation v. Robson*, No. 101615/06, 14 Misc.3d 1209(A), 2006 WL 3833656 (N.Y. Sup. 2006) (dismissing claims against individual partners of LLPs, citing New York LLC (rather than LLP) statute in support of proposition that partners did not have personal liability).

*Chamberlain v. Irving*, No. 4001394, 2006 WL 3290446 (Conn. Super. Oct. 26, 2006) (stating that partners in LLP have limited liability even if designator is not used and third party does not know partnership is LLP).

*Cordier v. Tkach*, No. B179095, 2006 WL 2407051 (Cal. App. 2 Dist. Aug. 22, 2006) (holding that partner in LLP could not be held liable on contract of firm entered while partnership was registered as LLP because partner was not party in his individual capacity and California LLP provisions insulated partner from liability under agreement).

*Connolly v. Napoli, Kaiser & Bern, LLP*, 817 N.Y.S.2d 872 (N.Y. Sup. 2006) (noting potential liability of LLP partners for personal participation in alleged wrongdoing).

*Groth v. Ace Cash Express, Inc.*, 623 S.E.2d 208 (Ga. App. 2005) (concluding signatures of LLP partners on behalf of partnership did not bind them individually as guarantors).

*Colliers, Dow and Condon, Inc. v. Schwartz*, 871 A.2d 373 (Conn. App. 2005). The court held that a partner in an LLP did not have personal liability on an agreement executed by the partner on behalf of the LLP. The court rejected the plaintiff's arguments that the trial court improperly disregarded the law of the case, ignored the judicial admission of the partner, and failed to impose liability on the partner as a general partner of a partnership. The language in the prior opinion relied upon by the plaintiff as the law of the case did not dispose of the issue of the partner's liability, and the language alleged to be a judicial admission merely indicated that the partner executed a contract between the plaintiff and the partnership. The alleged admission was a response to an allegation in the complaint that stated the LLP entered an agreement with the plaintiff *through* the partner; it did not admit personal liability because an LLP can only act through its general partner. Finally, the plaintiff argued that the partner should be held individually liable because the agreement was entered on behalf of K.F. Associates rather than K.F. Associates, LLP, and the plaintiff did not know the partner was signing on behalf of an LLP. The plaintiff's argument failed because the plaintiff only alleged a cause of action against K.F. Associates, LLP, and the argument defied the plaintiff's allegations that the partner signed as owner, partner, and duly authorized corporate agent of K.F. Associates, LLP.

*Apcar Investment Partners VI, Ltd. v. Gaus*, 161 S.W.3d 137 (Tex.App. 2005). A lessor brought suit against Smith & West, LLP (the "partnership") and its individual partners Gaus and West to recover rent owed under a lease agreement with the partnership. The lease was entered in 1999, and Gaus and West signed a personal guaranty of the lease guaranteeing performance during the first 24 months of the lease term. The partnership registered as a Texas LLP in 1995 but did not renew its registration. The Texas LLP provisions require an LLP to renew the registration annually in order to continue the LLP's status as an LLP. The trial court granted the partners summary judgment based on limited partnership cases in which limited partners were not deprived of their liability protection though the statutory filing requirement for the limited partnerships had not been met. The court of appeals distinguished the limited partnership cases from the LLP context because the clear language of the LLP statute provides that partners in an LLP are protected from liability only for debts and obligations incurred while the partnership is an LLP, and the registration of an LLP expires in one year unless it is renewed prior to the expiration date. While the limited partnership statute specifies a "substantial compliance" standard for formation of a limited partnership, the LLP statute does not contain a "substantial compliance" standard nor does it contain a grace period for filing a renewal. Since the lease was signed over three years after the partnership's LLP registration expired, the partners were not protected from personal liability under the LLP statute. The court rejected the argument that the partners' guaranty limited their liability by providing that the guaranty terminated after 24 months. The court stated the issue of the partners' liability under the guaranty was different from

their liability as partners for the lease obligation, and the guaranty did not limit the partners' liability as partners. The court thus reversed the summary judgment in favor of the partners.

*Skidmore Energy, Inc. v. KPMG*, No. Civ.A.3:03CV2138-B, 2004 WL 3019097 (N.D. Tex. Dec. 28, 2004) (citing Texas limited partnership case, in which court declined to apply alter ego theory to limited partnership because there is always a general partner with liability, in support of court's statement that alter ego theory of liability was inapplicable to the relationship between KPMG LLP and its Moroccan member firm because KPMG is not a corporate entity but an LLP organized under Delaware law).

*Dean Foods Company v. Pappathanasi*, No. Civ.A. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. Dec. 3, 2004). Dean Foods Company and related entities ("Dean Foods") sued the law firm of Ruben and Rudman, LLP ("the firm") and three of its partners for negligence and negligent misrepresentation based on an opinion letter issued by the firm in connection with the sale of West Lynn Creamery, Inc. ("West Lynn") to Dean Foods. The firm represented the sellers, and the opinion letter contained a "no litigation" opinion in which the firm stated that it had no knowledge of any investigation against West Lynn and that nothing had come to its attention to cause the firm to doubt the accuracy of the disclosure schedule to the acquisition agreement. Prior to the time of the opinion letter, the firm opened a file in connection with a grand jury subpoena issued to West Lynn. The grand jury investigation was not disclosed in the disclosure schedule because the principal shareholder feared it might incite other family members who frequently disagreed with him to interfere with the sale. The grand jury investigation involved certain loans and rebates made to a West Lynn customer. After the acquisition of West Lynn by Dean Foods, a criminal information was returned against West Lynn, and the charge was settled by a plea agreement under which West Lynn paid a \$7,000,000 fine. The court reviewed the factual background and manner in which the opinion letter was issued at length and concluded there was a significant breakdown in the careful process established at the firm for opinion letters. Though Altman, the lawyer handling the grand jury investigation, was consulted on the status of the matter at one point, he was not told that it was for purposes of the firm's legal opinion, and he stated that it was his "guesstimate" at that point that the investigation had gone away. The court found Altman's response would have been below the standard of a reasonably competent white-collar defense lawyer had he known the information he was providing was for an opinion. The court also concluded that Barton, the lawyer handling the sale, did not carry his investigation far enough, and Sokolov, the lawyer overseeing the issuance of the opinion letter, did not follow the firm's policy on opinion letters. Dean Foods sued Altman, Barton, and Spoleotis, the West Creamery originating and billing attorney, individually, but the court found that the partners were not individually liable because the firm was an LLP. The court observed that the opinion letter was that of the firm and not the individual attorneys. The court assumed the firm was an LLP based on the inclusion of the designator in its name. The court noted that Massachusetts rules applicable to law firms provide that "[e]ach owner of the entity shall be personally liable for damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission." The court concluded that the firm as an entity was liable for negligent misrepresentation and negligence, but not the three individual lawyers. The court characterized the misrepresentations and negligence as the "collective act or failure to act of the entity" and stated that "[n]o individual act or failure to act of any of the individual owners, standing alone, was directed at the plaintiffs or caused the plaintiffs harm." The court concluded that "it was the firm itself that had the duty and acted collectively" with regard to Dean Foods.

*United States v. 175 Inwood Associates LLP*, 330 F.Supp.2d 213 (E.D. N.Y. 2004). In this CERCLA case against a real estate partnership, the court interpreted the New York LLP provisions and concluded that the LLP provisions do not protect general partners from personal liability if the assets of the partnership are insufficient to satisfy a judgment. In support of this obviously erroneous conclusion, the court cited three New York cases which it characterized as addressing LLPs; however, the cases cited by the court were not LLP cases. Additionally, it appears that the partnership in issue was mischaracterized as an LLP since it was formed in 1988 (prior to the advent of LLPs in the law) and partnerships other than professional partnerships are not permitted to be LLPs under New York law.

*Mantell v. Samuelson*, 4 Misc.3d 134(A), 2004 WL 1587555 (N.Y. Sup. App. Term July 7, 2004) (dismissing complaint against partners of LLP law firm in suit by court reporter to recover fees because partners in LLP are not liable for partnership debts).

*Colliers, Dow & Condon, Inc. v. Schwartz*, No. CV000594954, 2004 WL 1246004 (Conn. Super. May 24, 2004), aff'd, 871 A.2d 373 (Conn. App. 2005) (concluding plaintiff was not entitled to judgment against LLP partner because partners in an LLP are clearly protected from personal liability).

**Borjas v. Cagle's-Keystone Foods, LLC**, No. EP-02-CA-415(KC), 2004 WL 569520 (W.D. Tex. March 9, 2004) (stating that mere fact an entity is referred to as a “partnership” does little to define the nature of liability of its “partners,” as there are partnerships, such as LLPs, where partners are not jointly and severally liable for partnership obligations).

**Dow v. Jones**, 311 F.Supp.2d 461 (D.Md. 2004). Dow sued a District of Columbia LLP and its partners for legal malpractice in connection with representation of Dow in a criminal matter. Prior to removal of the action from state to federal court, the state court granted the individual partners other than Jones summary judgment but denied the LLP’s motion for summary judgment. After removal of the case, the LLP sought summary judgment once again. The LLP claimed that it was never a party to the retainer agreement and never formed an attorney-client relationship with Dow. The LLP also argued that it could not be held liable because it had dissolved at the time of the alleged malpractice. The court concluded there were genuine issues of material fact on these issues. The LLP also argued that the attempt to hold it liable was a “thinly disguised attempt to circumvent the statutory shield under the RLLPA and hold the individual partners of [the LLP] liable for another partner’s misconduct.” Since the LLP had no assets, it argued that the only purpose that would be served by winning a judgment against the firm would be to provide grounds for “piercing the veil” of the former LLP and pursuing the assets of the individual partners. The court stated, however, that the action against the LLP served a legitimate purpose because the firm was required to maintain an insurance policy, and Dow was attempting to establish that his claim was covered under the policy.

**Rashti v. Miod**, No. B164954, 2003 WL 22995264 (Cal.App. Dec. 22, 2003) (stating that issue of whether an individual partner of an LLP can be held liable for discriminatory action in which he or she personally participated would appear to be unsettled in view of statutory language indicating individual partners may be held liable in some situations and thus action seeking to hold partners of LLP liable for employment discrimination claims could not be deemed frivolous where action was based upon decision to terminate plaintiff in which partners reputedly participated).

**Bennett v. Cochran**, No. 14-00-01160-CV, 2004 WL 852298 (Tex.App. April 22, 2004). Bennett and Cochran were partners in a law firm LLP with no written partnership agreement. Bennett argued that Cochran orally agreed to pay half of all expenses and overhead of the partnership. The court noted that partners in a registered limited liability partnership ordinarily have no personal liability for the debts and obligations of the partnership. The court concluded there was no evidence the partners agreed to be personally liable for the expenses and overhead of the partnership as opposed to merely having their partnership interests equally burdened by the financial obligations of the partnership.

**Damaska v. Kandemir**, 760 N.Y.S.2d 842, withdrawn 2004 WL 852298 (N.Y.A.D. 1 Dept. 2003) (stating that “[a] partner in a limited liability partnership may be held liable for tortious conduct committed by another partner or individual working for the entity if the partner participates in the control of the business [citing *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, and thereby perpetuating the confusion between a limited partnership and limited liability partnership] or if the person for whose conduct the partner is called upon to answer was, at the time of the misconduct, rendering professional services on behalf of the partnership under the partner’s direct supervision and control” and concluding that complaint seeking to impose liability upon LLP partner stated cause of action against the partner since complaint alleged that she participated in the control and operation of the business and was aware of prior similar acts of misconduct committed by her husband-partner).

**Griffin v. Fowler**, 579 S.E.2d 848 (Ga.App. 2003) (denying LLP partners’ motion for summary judgment regarding liability for another partner’s alleged malpractice and breach of fiduciary duty on the basis that there were legal services performed prior to the partnership’s registration as an LLP and partners thus could not escape potential liability).

**Verizon Yellow Pages Co. v. Sims & Sims, P.C.**, No. 02-00961, 2003 WL 836087 (Mass.Super. Feb. 24, 2003)(distinguishing partner in LLP from partner in traditional general partnership for purposes of pro se representation on basis that partner in LLP has limited liability and is legally separate and distinct from LLP).

**Megadyne Information Systems v. Rosner, Owens & Nunziato**, No. B213137, 2002 WL 31112563 (Cal. App. Sept. 21, 2002). The plaintiff sued a law firm LLP and its partners for malpractice and breach of fiduciary duty. The court granted the defendants summary judgment on the malpractice claim but determined there were fact issues regarding a breach of fiduciary duty claim. The breach of fiduciary duty claim was premised on alleged misrepresentations by the firm to the plaintiff that the plaintiff had a viable claim against the Orange County Transportation Authority (OCTA) when the firm knew that limitations had run on the claim. The plaintiff also complained of the firm’s continued

representation and receipt of fees for worthless legal representation. The court determined that there were fact issues relating to the personal liability of the partners. The court cited the California LLP provisions for the proposition that partners in an LLP do not have vicarious liability for the torts of another partner, and the court stated that the plaintiff could only hold a partner liable who was “involved in the handling of the matter.” All three partners claimed that one of them was the “sole attorney” who handled the matter and that the other two had no involvement. However, the court found there were fact issues as to the involvement of the other two. The fact issues were raised by the admittedly-involved attorney’s testimony that “there might have been discussions” with the other two partners that the plaintiff had a viable malpractice claim against the lawyers that had previously represented the plaintiff on their claim against OCTA. The court said these discussions could support an inference that the partners knew the plaintiff’s claim against OCTA was time-barred and that they participated in the decision not to tell the plaintiff while the firm continued its representation. In addition, the name of one of the partners who claimed he was not involved appeared on the caption page of the claim filed with OCTA, suggesting his involvement in the case.

*Schaufler v. Mengel, Metzger, Barr & Company, LLP*, 745 N.Y.S.2d 291 (N.Y. Sup. 2002) (apparently confusing LLP with limited partnership in stating that defendants had submitted insufficient evidence to establish that managing partner of accounting firm had no liability as a matter of law on buy-out agreement negotiated with plaintiff partner because the limited partnership act imposes joint and several personal liability on a general partner and on a limited partner who participates in the control of the business).

*Foxchase, LLLP v. Cliatt*, 562 S.E.2d 221 (Ga. App. 2002)(holding that partners in limited liability partnership could be held liable based on evidence of damages that occurred when individuals owned property prior to time it was conveyed to partnership).

*Dow v. Donovan*, 150 F. Supp.2d 249 (D. Mass. 2001). The court held that an associate attorney who was terminated by her Massachusetts LLP law firm employer could not hold individual partners vicariously liable for Title VII gender discrimination claims, but would have to establish that an individual partner was negligent or committed some other kind of wrongful act, error or omission in order to hold the partner liable. The court refrained from deciding the “unsettled” questions regarding what proof would be required to hold individual partners liable if the plaintiff prevailed on her discrimination claim. The plaintiff was terminated after a meeting at which the partners considered and rejected admission of the plaintiff as a partner. The firm followed the statutory default rule that requires unanimity for admission of a partner. The firm claimed that no one spoke in favor of admitting the plaintiff. The plaintiff argued that each individual partner contributed to the decision to deny her partnership and that each partner’s negligence or wrongful act thus contributed to her injury. The court rejected this approach because it would “vastly expand the scope of relief beyond that provided in the statutes and precedents regarding Limited Liability Partnerships.” The defendants argued that, unless the plaintiff sued each partner for individual liability (which she might not be able to do under governing discrimination statutes), all of the partners were protected by the LLP statute and by the partnership’s “single vote” rule. (The firm argued that a single vote that was not discriminatory would preclude liability because there would be no damage resulting from any discriminatory intent on the part of any other partners.) The court balked at this approach as being too restrictive. The court stated that it need not decide the unsettled questions regarding the proof required of the plaintiff to reach individual partners’ assets because it would only be necessary if the plaintiff prevailed on her claims against the firm. The court, however, did go on to discuss the purpose of the LLP statute and its protection of partners from vicarious liability. The court recognized that individuals are not ordinarily liable under Title VII and state anti-discrimination statutes, the liability being, at least primarily, a partnership liability. The court recognized the protection from vicarious liability under the LLP statute but stated that the statute did not mean that partners in an LLP can never be liable in a discrimination suit. According to the court, the plaintiff must demonstrate some negligent or other wrongful act, error, or omission on the part of an individual partner that produced discrimination against the plaintiff. The court indicated that trial of these issues should be in a separate phase from the trial on the partnership’s liability because of the confusion and potential conflict of interest issues that would be likely to arise when dealing with individual partners’ liability. The court concluded that separate counsel was not necessary for each partner in a trial limited to the liability of the partnership. The court engaged in a lengthy discussion of professionalism and conflict of interest.

*Lewis v. Rosenfeld*, 138 F. Supp.2d 466 (S.D. N.Y. 2001), dismissed on other grounds on reconsideration, 145 F. Supp.2d 341 (S.D. N.Y. 2001). The court acknowledged that two defendants who were partners in a New York LLP could not be held vicariously liable for the liabilities of the partnership when the plaintiff had not alleged that any of the tortious acts were committed by the defendants or any individual acting under their control. However, the plaintiff also asserted claims arising out of the actions of a second partnership that was not registered as an LLP, and the defendants

did have potential vicarious liability based upon their status as partners in that partnership. (On reconsideration, the court determined that the claims were time barred.)

**Schuman v. Gallet, Dreyer & Berkey, L.L.P.**, 719 N.Y.S.2d 864 (N.Y. A.D. 1 Dept. 2001). The court affirmed the decision of the lower court (*see Schuman v. Gallet, Dreyer and Berkey, L.L.P.*, 689 N.Y.S.2d 628 (N.Y. Sup. 1999)) determining that the plaintiff's general release of the defendant law firm and its partners did not release Berkey in his individual capacity because, under the New York LLP provisions, each partner is liable for any negligent or wrongful act committed by him or her or under his or her direct supervision or control. The complaint alleged claims against Berkey individually for negligence, breach of fiduciary duty, and legal malpractice in the supervision of the firm's escrow account. While the release was sufficient to release Berkey from his vicarious liability as a partner, it was not specific enough to release him for his own acts.

**Kus v. Irving**, 736 A.2d 946 (Conn. Super. 1999). A client sought to hold the three partners of a law firm LLP liable in connection with the acts of one of the partners, Irving, in collecting a fee that exceeded that to which the client had agreed. The other two partners filed affidavits stating that they had no knowledge of Irving's dealings with the client until after the matter was concluded, that they did not have any supervision or control of Irving, and that Irving retained all fees from his activities and did not share them with the other partners. The Connecticut LLP statute protects partners from liability for any debts, obligations, or liabilities of the partnership except for the partner's own negligence, wrongful acts, or misconduct or that of any person under his direct supervision or control. The client claimed the other two partners were guilty of wrongful acts, negligence, and misconduct but produced no summary judgment evidence to that effect. The client also claimed that the other two partners violated provisions of Rule 5.1 of the rules of professional conduct. The court stated that even if there was evidence of a violation of Rule 5.1, the LLP statute supersedes the rule except where the other person is under the partners' "direct supervision and control." Since the other two partners shared no benefit, did not have supervision or control over Irving, and did not know of the matter until after it occurred, the court found that the other two partners were protected from liability.

**Cruz v. Benine**, 984 P.2d 1173 (Colo. 1999). This case deals with issues of privity and claim preclusion in the context of a suit by a general partnership and its partners against Empire Enterprises Unlimited ("Empire"), two Empire partners, and an Empire employee. Throughout the opinion, the court referred to Empire as a limited partnership. In a prior suit, a partner in the general partnership plaintiff sued Empire and one of Empire's partners. The court held that the plaintiff in the prior suit was in privity with both the partnership in which she was a partner and her partner so as to bar them from suing Empire and the Empire partner who had settled the prior suit. However, the court held that suit against Empire's other partner and Empire's employee was not barred because they were not parties in the prior suit. At this juncture in the opinion, the court makes a point about the "different liability standards [that apply] to general partnerships. . . and to limited partnerships." Specifically, the court stated, "the UPL [Uniform Partnership Law] no longer provides for joint and several liability in a limited partnership." The court then quoted Section 7-60-115(2), the provision on registered limited liability partnerships. Thus, the court appeared to exhibit a type of confusion that has been reflected in a number of cases — that is, the distinction between a limited partnership and a limited liability partnership. Of course, it is possible under Colorado law for a limited partnership to register as a limited liability partnership, but it is certainly not clear that this was the situation to which the court was referring.

**Middlemist v. BDO Seidman, LLP**, 958 P.2d 486 (Colo. App. 1997). The plaintiff, a CPA, sued her employer, BDO Seidman, LLP, and one of its partners for wrongful termination. The court, applying Colorado law, found that the partner was protected by the LLP shield. "A party seeking to hold a partner of a limited liability partnership personally liable for alleged improper actions of the partnership must proceed as if attempting to pierce the corporate veil," according to the court.

**Liberty Mutual Insurance Company v. Gardere & Wynne, L.L.P.**, Civ.A. No. 94-10609-MLW, 1994 WL 707133 (D.Mass. Dec. 6, 1994) (noting unsettled questions about scope of coverage of Texas partial LLP shield and implying that Texas LLP statute would be given effect in Massachusetts litigation and that Texas law would govern extent to which damages and injunctive relief could be granted against partners other than those directly involved in the alleged wrongdoing).

### **G. Effect of Registration on Partnership/Nature of Limited Liability Partnership**

*United States v. Stein*, 463 F.Supp.2d 459 (S.D. N.Y. 2006) (stating that partner of KPMG had not sustained burden of establishing that she should be treated as other than employee of partnership for purposes of analyzing whether privilege extended to communications between partner and lawyer for KPMG, noting that KPMG is LLP with over one thousand partners who probably are not exposed to unlimited liability for partnership obligations and that firm is entity distinct from its members under Delaware law).

*Ng v. BDO Seidman*, No. A109677, 2006 WL 864448 (Cal. App. 1 Dist April 5, 2006); *Cowan v. BDO Seidman*, No. A107681, 2006 WL 864483 (Cal. App. 1 Dist April 5, 2006); *Mathewson v. BDO Seidman*, No. A109708, 2006 WL 864522 (Cal. App. 1 Dist. April 5, 2006); *Balwani v. BDO Seidman*, No. A108973, 2006 WL 864531 (Cal. App. 1 Dist. April 5, 2006) (stating that fact LLP was New York registered limited liability partnership provided New York with “substantial relationship” to parties and “reasonable basis” for New York choice of law clause in consulting agreement, which contained arbitration clause, between LLP and client).

*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 137 Cal.App.4th 579, 40 Cal.Rptr.3d 446 (Cal. App. 2006) (discussing privacy rights of LLP and permitting discovery of insurance policies, filings with Secretary of State, and financial records of non-party LLP in malpractice action against firm arising out of firm’s representation of plaintiff in previous malpractice action against LLP).

*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 137 Cal.App.4th 579, 40 Cal.Rptr.3d 446 (Cal. App. 2006) (discussing privacy rights of LLP and permitting discovery of insurance policies, filings with Secretary of State, and financial records of non-party LLP in malpractice action against firm arising out of firm’s representation of plaintiff in previous malpractice action against LLP).

*Haynes Downard Andra & Jones, LLP v. Southeastern Commercial Finance*, 924 So.2d 687 (Ala. 2005) (stating LLP is “for all purposes... the same entity that existed before registration,” and method for determining venue in action against corporation is not applicable to determination of venue in action against partnership).

*Maupin v. Meadow Park Manor*, 125 P.3d 611 (Mont. 2005) (stating venue rules for LLP do not differ from those of general partnerships because LLP is “same entity that existed before registration” for all purposes).

*Hart v. Theus, Grisham, Davis & Leigh, L.L.P.*, 877 So.2d 1157 (La. App. 2004). A law firm’s registration as an LLP did not terminate the existing partnership and create a new partnership; therefore, the partnership agreement in effect at the time, which contained an arbitration clause, continued to be binding after the firm’s registration and required the plaintiff, a partner who later withdrew, to submit to arbitration.

*Dow v. Jones*, 311 F.Supp.2d 461 (D.Md. 2004). Dow sued a District of Columbia LLP and its partners for legal malpractice in connection with representation of Dow in a criminal matter, and the court applied general principles of District of Columbia partnership law in concluding that the LLP was not entitled to summary judgment. Dow paid a retainer to Jones and executed a retainer agreement on LLP letterhead. The retainer agreement stated that Dow agreed “to retain the legal services of Attorney James Benny Jones to provide representation” in his criminal case. Prior to removal of the action from state to federal court, the state court granted the individual partners other than Jones summary judgment but denied the LLP’s motion for summary judgment. After removal of the case, the LLP sought summary judgment once again. The LLP claimed that it was never a party to the retainer agreement and never formed an attorney-client relationship with Dow. The LLP also argued that it could not be held liable because it had dissolved at the time of the alleged malpractice. The court rejected the LLP’s argument that a different standard should apply to an LLP than a partnership that is not registered as an LLP when determining whether an attorney-client relationship was formed with the LLP. The court stated that general principles of agency and partnership law continue to govern LLPs, and that Dow raised genuine issues of material fact as to whether Jones had apparent authority to enter a retainer agreement on behalf of the LLP under District of Columbia partnership law and agency principles. Further, even if Jones was not a partner, the court found that Dow raised genuine factual issues as to whether the LLP made public representations sufficient to confer on Jones the power to bind the LLP as if he were a partner. The court also found that Dow raised genuine factual issues regarding the LLP’s liability for post-dissolution malpractice. The court pointed out that an LLP does not terminate immediately upon dissolution, but instead continues until winding up is completed. The court stated that Dow could argue that his representation was a pending client matter that must be wound up following dissolution.



Additionally, Dow could argue that Jones's power to bind the partnership under ordinary agency and partnership law continued after dissolution as to Dow because he did not receive notice of the firm's dissolution.

***Brown Rudnick Berlack Israels LLP v. Brooks***, 311 F.Supp.2d 131 (D.Mass. 2004) (holding LLP may bring suit in its own name under Massachusetts law, relying on prior Massachusetts Superior Court decision that stated only LLP need be named as defendant in suit on business debt against LLP since recovery is limited to LLP's assets).

***Moxness v. Hart***, 131 S.W.3d 441 (Mo.App. 2004) (noting LLP may sue in its own name but general partnership may not).

***Joachim v. Flanzig***, 773 N.Y.S.2d 767 (N.Y.Sup. 2004) (stating that failure to file LLP certificate and publish notice did not preclude formation of partnership, the agreement of which contemplated partnership would be LLP, and did not affect rights of parties to partnership agreement).

***Institute of Physical Medicine & Rehabilitation, LLP v. Country-Wide Insurance***, 752 N.Y.S.2d 232 (N.Y.City Civ.Ct. 2002) (stating that LLP may sue and be sued as if it were a partnership formed pursuant to the general provisions of the partnership law except for the limitation on liability of the partners because, under New York law, an LLP is a partnership even though the partners have limited liability).

***Pytko v. Hannah LLP***, 15 Mass.L.Rptr. 429 (Mass.Super. 2002) (noting that LLP status does not protect the partnership itself from liability for actions of its employees in the service of performance for the partnership).

***Hager v. Amiri***, No. 05-97-02046-CV, 2001 WL 533806 (Tex. App. May 21, 2001). It appears that the court erroneously referred to an LLP as an LLC in this case. In reciting the facts of the case, the court stated that a judgment based on legal malpractice was entered against Hager, an individual attorney, and his former law firm Nichols, Jackson, Kirk and Dillard, as well as Nichols, Jackson, Dillard, Hager & Smith, L.L.P. The style of the case also refers to Nichols, Jackson, Dillard, Hager and Smith, L.L.P. On appeal, the court held that the malpractice occurred after the law firm "registered as a limited liability company." The court sustained the contention that the trial court improperly held the "dissolved firm" of Nichols, Jackson, Kirk and Dillard liable. According to the court, since the firm had registered as a "limited liability company" prior to the time of the particular act that damaged the client, Hager "alone" was responsible for the damages. It is not clear whether the court was actually saying that the LLC or LLP law firm would not be liable. In reversing the judgment based upon various errors in the trial court, the court of appeals specifically decreed that the plaintiff take nothing against Nichols, Jackson, Kirk and Dillard but did not mention the judgment against Nichols, Jackson, Dillard, Hager & Smith, L.L.P.

***Levine v. Bayne, Snell & Krause, Ltd.***, 92 S.W.3d 1 (Tex.App. 1999), rev'd on other grounds, 40 S.W.3d 92 (Tex. 2001). A law firm sued to recover under a contingency fee contract with the Levines. The law firm was organized as a professional corporation when it was engaged by the Levines, and it subsequently reorganized as an LLP and then a limited partnership. The Levines argued the contract was a personal services contract that was not assignable without their consent and that Bayne, Snell & Krause, Ltd. was not a proper party. The court rejected the argument on the basis that attorneys can assign their accounts receivable and that the assignment involved the contractual right to payment.

***Canada Life Assurance Company v. Estate of Lebowitz***, 185 F.3d 231 (4<sup>th</sup> Cir. 1999). In this case involving whether benefits were due the estate of a deceased partner of an LLP under an ERISA life insurance policy, the court noted in a footnote that the partnership is a limited liability partnership "incorporated" in Maryland. The court explained that, "[a]lthough WTP is a limited liability partnership, under Maryland law it is still liable for the representations of its agent partners." The court went on to cite provisions of the Maryland RUPA applicable to the question of the partnership's position on coverage under the policy in issue.

***In re Metropolitan Metals, Inc.***, 228 B.R. 355 (M.D. Penn. 1998). The issue in this case was whether the original order of the bankruptcy court appointing Main, Hurdman & Cranstoun as accountants for the Trustee was sufficient to authorize a final allowance to KPMG Peat Marwick LLP. Between the order appointing Main, Hurdman & Cranstoun and the application for allowance in issue the following events occurred: (i) Main, Hurdman & Cranstoun changed its name to Main Hurdman, (ii) Main Hurdman merged with Peat Marwick Mitchell & Co. to form a partnership known as Peat Marwick Main & Co., (iii) Peat Marwick Main & Co. changed its name to KPMG Peat Marwick, and (iv) KPMG Peat Marwick became a limited liability partnership and changed its name to KPMG Peat Marwick LLP. The

court declined to see the transition from Main, Hurdman & Cranstoun to KPMG Peat Marwick LLP as merely an evolution of one entity from one era to another. “While the rules contemplate that partners and associates will come and go, the rules do not contemplate that entire entities can be gobbled up by other entities and retain their privilege to perform services to a bankrupt estate. . . . I see no alternative but that a new application be filed for the superseding entity.” The court concluded, under the circumstances, that it should grant retroactive relief and approve compensation for KPMG; however, the court stated that its “holding serves as fair warning of the need, in the future, for professionals to reapply for appointment should the character of their firm change in any but a nominal character.”

*Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 11 F.Supp.2d 449 (S.D. N.Y. 1998) (commenting in footnote that the New York LLP statute “clearly enunciates that a general partnership that is registered as a RLLP is for all purposes the same entity that existed before registration and continues to be a general partnership under the laws of New York”).

*Sasaki v. McKinnon*, 707 N.E.2d 9 (Ohio App.1997). This opinion addressed whether a shareholder derivative action that included claims against the corporation's outside auditor should be stayed based on an arbitration clause in a letter agreement between Ernst & Young, LLP and the corporation. In the course of its discussion, the court referred to Ernst & Young, LLP as Ernst & Young's "successor" and stated that "the two entities. . . are, but for the corporate change to a limited liability partnership designation, the same entities for all practical intents and purposes."

*Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D. N.Y. 1997), aff'd, 173 F.3d 844 (2d Cir. 1999). In this employment discrimination case, the court noted in passing that the defendant KPMG Peat Marwick became a limited liability partnership and amended its Articles of Partnership to add the suffix “LLP” to its name in August 1994. The court explained that the partnership “was not dissolved and continued without interruption with the same partners, principals, employees, assets, rights, obligations, liabilities and operations as maintained prior to the change.” The court continued, “Peat Marwick LLP is in all respects the successor in interest to Peat Marwick.”

*UOP v. Andersen Consulting*, No. CV 95014753, 1997 WL 219820 (Conn. Super. April 24, 1997). Confusion regarding the nature of an LLP is apparent in the court’s opinion on the defendant's motion to strike in this case. The defendant asked the court to strike a number of specific counts of the plaintiff's complaint on various grounds and to strike the entire complaint as to Andersen Consulting, the general partnership, on the grounds that the entity by that name did not exist. The defendant claimed that the plaintiff could not assert a cause of action against both Andersen Consulting, the general partnership, and Andersen Consulting, LLP, because the plaintiff alleged that Andersen Consulting, LLP, was the successor in interest to Andersen Consulting, the general partnership. The plaintiff argued that the defendant was "merely trying to absolve the liability of the general partners of Andersen Consulting by limiting the plaintiff's target to the limited liability company only." After this mistaken reference to Andersen Consulting, LLP, as a "limited liability company," the court rejected the defendant's motion to strike. The court gave as reasons the fact that Andersen Consulting, LLP, had not stated that it had assumed all of the liabilities of Andersen Consulting, the general partnership, and the fact that individual partners need not be named to commence a civil action against a general partnership.

*Medical Designs, Inc. v. Shannon, Gracey, Ratliff & Miller, L.L.P.*, 922 S.W.2d 626 (Tex. App.--Fort Worth 1996). The law firm of Shannon, Gracey, Ratliff & Miller, L.L.P. was sued for malpractice and obtained a summary judgment that was upheld on appeal on the basis that a “successor partnership” is *not liable* for the torts of a predecessor partnership. It is not clear from the opinion whether the partnership’s registration as an LLP, which apparently took place after the malpractice suit was filed, was alone enough to make the partnership a “successor partnership” as that term was used by the court, but it seems unlikely. It is unfortunate, however, that the court did not provide greater insight into what it deemed a “successor partnership.” The law firm involved had, subsequent to the time the alleged malpractice occurred, merged and unmerged with another law firm, and the plaintiff alleged that Shannon, Gracey, Ratliff & Miller, L.L.P. was liable as the successor partnership of the Shannon, Gracey, Ratliff & Miller firm that had represented the plaintiff in the matter giving rise to the malpractice claim. (The plaintiff’s pleadings alleged that the firm was previously known as Reynolds, Shannon, Miller, Blinn, White & Cook, and, prior to that, as Shannon, Gracey, Ratliff, & Miller, and that the plaintiff’s suit was against the firm in its current form and all of its predecessors.)

The court of appeals upheld the trial court’s summary judgment on the basis that “even if Shannon, Gracey, Ratliff, & Miller, L.L.P. is a successor law firm, Texas does not recognize that successor partnerships are liable for the tortious conduct of predecessor partnerships.” The court’s opinion is brief and explores neither the factual background of the changes in the Shannon, Gracey firm nor the rationale for distinguishing between tort and contract claims when

it comes to successor partnership liability. If the court's opinion stands for the proposition that registration as an LLP is enough to make the partnership a different "successor" partnership, and thus cut off the entity's liability for pre-registration tort claims, the opinion obviously has profound implications. It is unlikely, however, that this was the basis for the court's opinion. (Such a view is inconsistent, in this writer's opinion, with the underlying premise of the LLP statutes that an LLP is the *same* partnership as prior to registration.) Based upon the cases relied upon by the court, it appears that the court may have concluded that a dissolution results in a successor partnership which is not liable for the pre-dissolution torts of its predecessor. In view of the UPA approach to dissolution, under which any change in membership results in a technical dissolution, this proposition itself has significant implications. Query whether this approach suggests that the departure of a partner in a UPA partnership would, in some states, require a new LLP registration to preserve the liability limitation of the partners in the "new" partnership? Such a result obviously seems absurd and points to the wisdom of the clearer entity approach under RUPA.

In a subsequent decision by another Texas court of appeals, the court addressed the possibility that a professional corporation might be liable for the malpractice of the predecessor partnership. The court pointed out in dicta that the lawyer who committed the malpractice in the *Shannon, Gracey* case was not employed by the successor law firms whereas a principal of both the earlier partnership and the successor professional corporation was alleged to have acted negligently in the case before the court. The court suggested, but did not decide, that this distinction might be outcome determinative. See *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646 (Tex. App.--El Paso 1997, writ denied).

## **H. Liability Insurance Coverage**

*First American Title Ins. Co. v. Lawson*, 827 A.2d 230 (N.J. 2003). Two partners (Wheeler and Lawson) in a three man LLP law partnership essentially engaged in a kiting scheme involving client trust accounts. The third partner (Snyder) practiced in an office in another city and apparently knew nothing of the scheme. As managing partner of the firm, Wheeler made material misrepresentations to the firm's professional liability carrier when applying for coverage. As a result of the numerous defalcations of Wheeler and Lawson, two title insurers paid claims to various individuals and sought recovery from the firm and its partners. The malpractice carrier sought a declaratory judgment that the firm's policy was void by reason of the material representations, and one of the title insurers amended its complaint to assert that the firm's LLP status should be declared void for failure to maintain professional liability insurance as required by New Jersey Rules of Court. The three actions were eventually consolidated, and the court of appeals held that the professional liability policy was void for all purposes. The New Jersey Supreme Court determined that the policy was void as to Wheeler, Lawson, and the firm, but that the equities did not warrant rescission of Snyder's coverage. The court reviewed the substance of, and the policy underlying, the LLP provisions and the requirements that LLPs carry professional liability coverage under New Jersey Rules of Court. The court had no trouble concluding that the insurer had the right to rescind Wheeler's coverage based on his blatant misrepresentations. The court acknowledged that Lawson's role in furnishing the misinformation was less clear but concluded that Lawson knew or should have known that the forms submitted to the insurer were false or misleading. Thus, the court held the policy was void as to Lawson, as well. The court concluded that the insurer was entitled to rescind coverage with respect to the firm as an entity because two of the firm's three partners had engaged in wrongful conduct and the managing partner himself knowingly made the misrepresentations to the carrier. The court stated that the issue of Snyder's coverage was the most difficult. The court stressed the fact that Snyder was not engaged in the fraudulent conduct of his partners. The court also pointed out that Snyder was a "distant partner in the sense that he did not share offices with Lawson and Wheeler, but instead conducted his practice in a separate Manhattan office that he alone maintained." The court thus considered Snyder an "innocent partner" for purposes of balancing the equities in the case. The court stated that "by organizing the firm as a limited liability partnership, Snyder had every reason to expect that his exposure to liability would be circumscribed in accordance with the Uniform Partnership Law" and that "voiding Snyder's coverage solely because of his partners' wrongful conduct would expose Snyder to uninsured liability in a manner inconsistent with his expectations under the UPL." The court pointed out that it was expressing no opinion on Snyder's actual liability to any party or any allegation that an exclusion from coverage under the terms of the policy applied; rather, the sole task undertaken by the court was determining whether the policy itself was void as to Snyder. The court also was concerned that voiding the policy would mean Snyder no longer would possess coverage for any of his actions in unrelated matters, including simple malpractice, for which he expected to be covered. The court was concerned that it would be a "harsh and sweeping result ... contrary to the public interest" to leave members of the public whom Snyder had represented throughout the policy period unprotected when Snyder himself committed no fraud. The court concluded its opinion by acknowledging that the result reached involved a "certain amount of line drawing" but stated that it was convinced its disposition was consistent with rescission as an equitable remedy taking into account the totality of the circumstances.

## I. Securities Laws

*Securities and Exchange Commission v. Merchant Capital, LLC*, 483 F.3d 747 (11<sup>th</sup> Cir. 2007). In this securities enforcement action brought by the SEC against the managing general partner (and its two individual principals) of 28 Colorado LLPs formed to purchase and collect debt pools of charged-off consumer debt, the Eleventh Circuit Court of Appeals reversed the district court and held that the general partnership interests sold to the investors were securities under the federal securities laws. The district court applied the *Howey* test and concluded that the partners had legal powers to control the partnership and were not so inexperienced or unknowledgeable in business affairs as to be incapable of intelligently exercising their partnership powers. The court of appeals also applied the *Howey* test, but reached a different conclusion. The court described in detail the structure and operations of the partnerships. Each LLP was limited to 20 partners. The investors all had a net worth of at least \$250,000, and more than three-fourths of the partners reported a net worth in excess of \$500,000. Though none of the partners had demonstrated experience in the debt purchasing business, ninety percent of the partners self-reported their business experience between “average” and “excellent.” The partnership materials told the partners that they were expected to have an active role in managing the partnership, and the agreement reserved a number of powers to the partners, including the ability to select and remove the managing general partner. In practice, however, the partners exercised little control over the operations. The managing general partner had sole authority to bind the partnership and made the key business decisions. Applying the *Howey* test and relying on the *Williamson* case, the court concluded that the LLP interests were investment contracts. The court avoided deciding whether the *Williamson* presumption that general partnership interests are not securities applies in the case of LLPs since it found that the interests were securities under the *Williamson* criteria. Noting that the powers in an LLP cannot exceed those in a regular general partnership, and commenting that an LLP interest may be somewhat more likely to be an investment contract because of the incentive against exercising control produced by the liability shield, the court stated that it need not decide the general applicability of the *Williamson* presumption to LLP interests if any of the *Williamson* tests were met. Under *Williamson*, a general partnership interest is an investment contract if (1) the agreement between the parties leaves so little power in the hands of the partner that the arrangement in fact distributes power as would a limited partnership, (2) the partner is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership powers, or (3) the partner is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager or otherwise exercise meaningful partnership powers. The court analyzed each of these tests and concluded that all three were met. The court found that the arrangement distributed power as if the partnerships were limited partnerships because the power to name the managing partner was not significant, the power to remove the managing partner was illusory, and the voting procedures giving partners the ability to approve all obligations over \$5,000 were a sham and did not give the partners any meaningful control. The court discounted the fact that one of the partnerships had actually removed the managing partner because the removal occurred in a liquidation context when the managing partner would receive no more fees and did not oppose removal, and the promoters had an active interest at that time in encouraging removal because the SEC investigation was in progress. The court did not view the partners’ remaining powers—the right to inspect books and records, participate in committees, and hold meetings—as providing the partners the ability to control management of the business. The court went on to conclude that the partners were so inexperienced and unknowledgeable in business affairs that they were incapable of intelligently exercising their partnership powers because the investors had no experience in the debt purchasing business. The court stated that the district court had erroneously focused on the general business experience of the investors rather than their experience in the particular enterprise. The court rejected the defendants’ argument that anyone with general business experience could easily learn to be successful in the debt purchasing business, characterizing the debt purchasing business as a complicated and sophisticated business that could not be quickly or easily learned. Finally, the court concluded that the partners were so dependent upon the managing partner that they could not replace it or otherwise exercise meaningful control. The court determined that the partners had no realistic alternative to the managing partner’s management (in addition to having no practical ability to remove the managing partner) because the assets of all the LLPs were combined and invested in pools of accounts owned by a third party servicer. The partnerships had no contractual right to demand the return of the debtor accounts; therefore, even if an individual partnership had replaced the managing partner it would find its major assets were still tied up in fractional form in a third party’s debt pool. The court gave no weight to procedures intended to assist the partnerships in removing their assets from the debt pools, noting that these procedures were not devised until after the SEC investigation began and that there were still practical barriers to obtaining the accounts.

*Securities and Exchange Commission v. Shiner*, 268 F.Supp.2d 1333 (S.D. Fla. 2003). The court concluded that the partnership interests in LLP general partnerships formed ostensibly to operate competitive local telephone exchange carriers in Western states were securities. The court stated the general rule that units in a general partnership

are not investment securities but noted that there are exceptions. Applying *Williamson v. Tucker*, the court found that the economic reality of the LLPs was that the individual defendants monopolized both the money and information necessary to operate the telephone companies, that the investors were unable to exercise any meaningful control over the LLPs due to the defendants' behavior, that the investors were wholly dependent upon the defendants for the success or failure of the LLPs, and that the efforts of the defendants were the significant ones. The court acknowledged that the investors exercised certain powers and did, in fact, remove the management of certain LLPs; however, the court concluded that this fact did not establish that the investors were not dependent on the defendants for the success or failure of the LLPs. The court stated that by the time the investors were able to remove the management of certain LLPs, the vast majority of the proceeds were in the hands of the defendants, and the businesses had disintegrated. The court found that the power to replace the telephone company manager was thus illusory and did not establish that the investors were not dependent on the defendants for the success or failure of the LLPs.

*Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo.App. 2002). The plaintiffs asserted various causes of action in connection with defendants' role in the sale of interests in fifty-three LLPs formed to sell pre-paid cellular phone services. The interests were sold by phone solicitation to approximately 5,000 investors. At issue for purposes of class certification was the analysis involved in determining whether the LLP interests were securities under the Colorado Securities Act. The trial court relied upon Colorado case law adopting the rationale of *Williamson v. Tucker* in concluding that common questions did not predominate over individual questions because whether the interests were securities would require analysis of each individual investor in relation to each partnership. The court of appeals held that the presumption of *Williamson v. Tucker* that a general partnership interest is not an investment contract security is not applicable to an LLP interest. The court discussed the rationale for presuming that the interest of a general partner (who has a legal right to participate in the management of the partnership and is personally liable for partnership obligations) is not an investment contract and for not applying such a presumption to the interest of a limited partner (who is a passive investor with no personal liability for the obligations of the business). The court concluded that an LLP interest cannot be analogized to either general partnership or limited partnership interests. The court was persuaded by cases in the LLC area that have declined to adopt a presumption that an LLC interest is not an investment contract. The court held that the relevant inquiry for the trial court was not to apply the *Williamson* examples related to general partnership interests but rather to determine whether the investors expected profits from the managerial efforts of someone else and whether the investors had a substantial power to affect the success of the enterprise.

#### **J. Bankruptcy**

*In re Mahoney Hawkes, LLP*, 289 B.R. 285 (Bankr. D. Mass. 2002) (analyzing proposed release of LLP debtor's partners under plan of reorganization providing for contribution of \$200,000 per partner and partners' relinquishment of claims for indemnity and defense under insurance policy and concluding that proposed release of partners was not proper under multi-factor test applied by court).

#### **K. Status of LLP Partners Under Family Medical Leave Act**

*Siko v. Kassab, Archbold & O'Brien, L.L.P.*, 77 Fair Empl. Prac. Cas. (BNA) 1032, 4 Wage & Hour Cas. 2d (BNA) 1547, 1998 WL 464900 (E.D. Pa. Aug. 5, 1998). The court refused to accept an LLP law firm's summary judgment argument that its partners were not employees for purposes of the Family Medical Leave Act (FMLA). Siko, an employee of an LLP law firm, brought an employment discrimination case alleging various violations of state law and Title VII, ERISA, and the FMLA. With respect to the FMLA claim, the firm argued that it was not subject to the FMLA because it did not have 50 employees. Siko argued that the firm's partners should be treated as employees under the FMLA, which would cause the firm to be subject to the statute. The court concluded that there was insufficient evidence to support the firm's claim that its partners were not employees. The court's analysis is somewhat confusing because it mixes corporate and partnership terminology, but the court apparently concluded that LLP partners are distinguishable from both shareholders of a professional corporation and general partners of a traditional general partnership. The court distinguished cases holding that partners are not employees under federal anti-discrimination statutes on the basis that those cases "are limited to general partnerships where the partner is either a shareholder or subject to unlimited liability." By footnote, the court noted that the cases cited by the firm "involve general partners who are subject to unlimited liability of the corporation. As such, those partners, unlike those at Defendant's law firm, are accountable for all the benefits and pitfalls attributable to the corporation." The court went on to note that the "partners of Defendant's law firm are neither shareholders nor subject to unlimited liability, but, rather part of a limited liability partnership." Thus, the court concluded that the facts did not support the legal conclusion that the firm's partners were not employees.

### III. Cases Involving Limited Liability Companies

Litigation involving limited liability companies is resulting in reported cases as well as unpublished opinions that are picked up by online legal research services. Such cases are appearing at a steadily increasing rate. Set forth below are brief synopses of LLC cases around the country to date.

#### A. Personal Jurisdiction Over Members, Managers, and Agents

*Graymore, LLC v. Gray*, Civil Action No. 06-cv-00638-EWN-CBS, 2007 WL 1059004 (D. Colo. April 6, 2007) (holding that founder and “initial consulting manager” of Colorado LLC had insufficient contacts to support exercise of personal jurisdiction in Colorado).

*Romanowski v. RNI, LLC*, No. C 06-6575 PJH, 2007 WL 323019 (N.D. Cal. Jan. 31, 2007) (holding mere status as sole managing member was insufficient to support jurisdiction over individual with respect to certain claims, but individual could not rely on fiduciary shield doctrine with respect to claims because of individual’s own alleged wrongdoing).

*Wolf v. Summers-Wood, L.P.*, 214 S.W.3d 783 (Tex. App. 2007) (holding that fiduciary shield doctrine precluded exercise of jurisdiction over non-resident officers of LLC where contacts were in representative capacity and were not systematic or continuous, and evidence did not show LLC was used to perpetrate fraud, was fiction or sham, or was operated in manner indistinguishable from officers’ personal affairs or in manner calculated to mislead those dealing with them).

*Silver Knight Sales & Marketing, Ltd. v. Globex International, Inc.*, No. 2:06-cv-123, 2006 WL 3230770 (S.D. Ohio Nov. 6, 2006) (commenting that finding of identity of interest or alter ego for purposes of exercising personal jurisdiction over individual agent of corporation or LLC does not equate to finding that individual is personally liable for entity’s acts because alter ego test for attribution of contacts is less stringent than that for liability).

*EraGen Biosciences, Inc. v. Nucleic Acids Licensing, LLC*, 447 F.Supp.2d 930 (W.D. Wis. 2006) (holding that actions of sole member of LLC taken prior to formation of LLC could not be attributed to LLC for purposes of establishing personal jurisdiction over LLC).

*Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.*, 455 F.Supp.2d 236 (W.D. N.Y. 2006) (holding that evidence did not support piercing of LLC veil to exercise personal jurisdiction over member (commenting that fact individual was single member and manager of LLC was not in itself enough to establish alter ego)).

*In re Teknek, LLC (Levey v. Hamilton)*, 354 B.R. 181 (Bankr. N.D. Ill. 2006). The court concluded it could exercise personal jurisdiction over two U.K. citizens who were the LLC debtor’s only members on the basis that they formed an Illinois LLC, used the LLC to generate profits, used American banks as a focal point for the funds, and transferred all the funds to themselves as individuals leaving the LLC without money or assets to satisfy its creditors. The fiduciary shield doctrine did not protect the members because initiation and acceptance of a member distribution from an LLC located in the U.S. was a personal act connected to the forum and not merely an act of the business entity. Such distributions related to the causes of action and furnished a factual basis precluding dismissal of fraudulent transfer, veil piercing, breach of fiduciary duty, and wrongful distribution claims.

*Sims v. O’Leary*, 933 So.2d 1214 (Fla. App. 2006) (applying corporate shield doctrine and finding non-resident member of Washington LLC was not subject to court’s personal jurisdiction).

*Mountain Funding, LLC v. Blackwater Crossing, LLC*, No. 3:05CV513-MU, 2006 WL1582403 (W.D. N.C. June 5, 2006) (stating membership in business entity is not alone sufficient for exercise of personal jurisdiction and rejecting “aggregate” theory of establishing personal jurisdiction over LLC member).

*Vertrue Inc. v. Meshkin*, 429 F.Supp.2d 479 (D. Conn. 2006) (declining to apply fiduciary shield doctrine where LLC member’s own conduct allegedly violated Connecticut statutes).

**Carter v. Estate of Rambo**, 925 So.2d 353 (Fla. App. 2006) (applying corporate shield doctrine and holding court lacked personal jurisdiction over LLC managing member in case based on negligent operation of nursing home where there was no evidence member personally operated nursing home or engaged in tortious acts and only contact with Florida was signing business reports in representative capacity as managing member).

**Clockwork Home Services, Inc. v. Robinson**, 423 F.Supp.2d 984 (E.D. Mo. 2006) (holding court had personal jurisdiction over member and president of Missouri LLC in majority member's breach of fiduciary duty and fraudulent concealment action where defendant member executed agreements with majority member containing Missouri choice of law or forum selection clauses, signed operating agreement in Missouri, made multiple trips to Missouri to conduct business on LLC's behalf, and regularly communicated with majority member in Missouri).

**Fields v. Excel Investments, Inc.**, No.1:05CV00093 JLH, 2006 WL 335359 (E.D. Ark. Feb. 13, 2006) (concluding court could exercise personal jurisdiction over LLC members whose contact with Arkansas went beyond "mere ownership" of Arkansas LLCs and included at least some amount of control and direction of the LLCs).

**Atwal v. Atwal**, 807 N.Y.S.2d 776 (N.Y. A.D. 4 Dept. 2005) (holding defendant's acquisition of 99% interest in New York LLC was sufficient to confer personal jurisdiction over defendant because proof of one transaction in New York is sufficient to invoke jurisdiction even though defendant never entered New York so long as act was purposeful and has substantial relationship to claim asserted).

**Paolino v. Argyll Equities, L.L.C.**, 401 F.Supp.2d 712 (W.D.Tex. 2005) (holding court lacked personal jurisdiction over individual who formed two Texas LLCs and made occasional visits to Texas where the LLCs had never maintained a principal place of business in Texas and conducted little business in Texas).

**White Family Harmony Investment, Ltd. v. Transwestern West Valley, LLC**, No. 2:05CV495 DAK, 2005 WL 2893784 (D. Utah Oct. 31, 2005) (holding evidence was sufficient to treat LLCs under common ownership as alter egos and impute forum contacts of one to other for purposes of exercise of personal jurisdiction).

**Newman v. Sherman**, No. C05-2989 SBA, 2005 WL 2739299 (N.D. Cal. Oct. 24, 2005) (holding non-resident managing director and substantial investor in California LLCs was subject to personal jurisdiction in California, but transferring venue to Florida based on convenience of parties and witnesses).

**Milford Paintball, LLC v. Wampus Milford Assoc., LLC**, No. CV0540075S, 2005 WL 2363793 (Conn. Super. Aug. 25, 2005) (rejecting claim of LLC members/representatives that fiduciary shield doctrine precluded exercise of personal jurisdiction over them in suit based on alleged misrepresentations made in representative capacities, relying on principle that corporate officer who commits tort is personally liable regardless of whether corporation itself is liable).

**Easywalker USA, LLC v. Immler**, No. 04C863, 2005 WL 1750409 (W.D. Wis. July 26, 2005) (concluding court had personal jurisdiction over Georgia resident in dispute involving Georgia LLC of which defendant and two Wisconsin residents were members, where defendant solicited and maintained relationship with Wisconsin co-members through telephone calls and emails, and set up website and engaged in other efforts to promote sales and continuing business in state).

**Horniatko v. Riverfront Assoc., LLC**, No. CV044000332S, 2005 WL 1671543 (Conn. Super. June 21, 2005) (concluding court had personal jurisdiction over non-resident LLC and its manager in suit based on misrepresentation in connection with sale of time-share interests in Rhode Island property to Connecticut residents who were solicited by telephone prior to visiting the property in Rhode Island and making the purchase).

**Norwood v. Teather**, No. Civ.A. 3:04-CV-861-K, 2005 WL 723863 (N.D. Tex. March 26, 2005) (concluding court lacked personal jurisdiction over Florida LLC and its managing members).

**In re Silver Leaf, LLC**, No. Civ.A. 20611, 2004 WL 1517127 (Del. Ch. June 29, 2004) (holding sole shareholder/director/officer of Illinois corporation that was 50% member of Delaware LLC was estopped to contest jurisdiction of Delaware court where shareholder had represented to New Jersey court in prior action that New Jersey action should be dismissed because Delaware was the appropriate forum to resolve all disputes among the members, and

finding exercise of personal jurisdiction consistent with due process because shareholder was responsible for Delaware action and held himself out as LLC's manager).

***Morris v. Powell***, 150 S.W.3d 212 (Tex.App. 2004) (holding evidence was insufficient to support trial court's finding that Missouri LLC was alter ego of its members (noting that failure to follow formalities is no longer a factor in considering alter ego under Texas corporate law), but evidence supported exercise of specific jurisdiction over one of LLC's members based on alleged torts committed by member in Texas).

***Fisher v. Blackmore***, 325 F.Supp.2d 810 (E.D. Mich. 2004) (holding court had personal jurisdiction over Massachusetts citizen who was purported member of Michigan LLC where it was alleged that purported member entered Michigan to conduct LLC's business, took advantage of financial benefits associated with operation of Michigan LLC, etc.).

***Greystone Tribeca Acquisition, L.L.C. v. Ronstrom***, 863 So.2d 473 (Fla. App. 2004) (concluding LLC and its members were not subject to jurisdiction by virtue of presence of subsidiary LLC in state).

***Hagerty Partners Partnership v. Livingston***, 128 S.W.3d 416 (Tex.App. 2004) (holding non-resident managers of Texas LLC were subject to personal jurisdiction of court because they attended several board meetings in Dallas and claims against them were based upon their roles as managers of a Texas LLC, specifically as alleged "control persons" and "aiders" under the Texas Securities Act and by engaging in negligent conduct as managers).

***Toro Marketing, LLC v. Scheidle***, No. 3:03-CV 611-R, 2004 WL 330701 (N.D. Tex. Feb. 20, 2004) (rejecting argument that individual who received interest in LLC pursuant to agreement to sell individual's business to LLC was subject to personal jurisdiction in Texas based on forum selection clause in agreement and LLC regulations, and holding allegations that individual was alter ego of corporate signatory to agreement were merely conclusory and, though individual signed LLC regulations in individual capacity, forum selection clause is but one factor in determining minimum contacts).

***XL Vision, LLC v. Holloway***, 856 So.2d 1063 (Fla. App. 2003) (exercising personal jurisdiction over LLC's foreign parent and LLC's president where complaint alleged that parent and president formed, operated, and manipulated the LLC to defraud creditors, that they commingled funds, that they failed to maintain other corporate formalities, that the parent directly paid for liabilities of the LLC, and that the LLC was run by the parent and president for their benefit).

***LaSalle Bank N.A. v. Mobile Hotel Properties, LLC***, 274 F.Supp.2d 1293 (S.D. Ala. 2003) (concluding that plaintiff had not alleged sufficient facts for the court to find that LLC which entered the transaction in question was the alter ego of its parent LLC for purposes of holding the parent responsible for the contacts of the subsidiary LLC).

***Boissiere v. Nova Capital, LLC***, 106 S.W.3d 897 (Tex.App. 2003). The plaintiff sued a Delaware LLC and its agents individually in Texas. The individual defendants claimed the court lacked jurisdiction over them. The plaintiff alleged that the individuals committed the torts of fraud and negligent misrepresentation. The court stated that the individuals may have been acting on behalf of the LLC but that corporate agents are liable for fraudulent or tortious acts committed while in the service of their corporation. The alleged misrepresentations occurred in telephone calls from California to Texas. The court found that the tort occurred in Texas because that is where reliance took place. The court determined that the Texas long-arm statute authorized the exercise of personal jurisdiction over the individuals and held that the exercise of jurisdiction satisfied due process requirements.

***Benson v. City Finance Co.***, No. 1:02CV242-D-D, 2003 WL 21517998 (N.D. Miss. May 16, 2003) (concluding that, under Mississippi LLC act, Delaware law controlled determination of whether plaintiffs could pierce the veil of Delaware LLC in order to exercise personal jurisdiction over LLC's member based on LLC's contacts with the state of Mississippi, and holding that plaintiffs failed to allege sufficient facts to show deliberate and purposeful misuse of the LLC's corporate form resulting in unfairness, injustice, and injury to plaintiffs as required under Delaware veil piercing test).

***Cornerstone Technologies, LLC v. Conrad***, No.Civ.A. 19712-NC, 2003 WL 1787959 (Del.Ch. March 31, 2003). In this dispute regarding two Delaware LLCs operating in Pennsylvania, the two defendants, Unger and Conrad, moved to dismiss for lack of personal jurisdiction. The court granted Unger's motion because the court found that Unger



did not transact any business in Delaware under § 3104(c)(1) of the Delaware long-arm statute. The plaintiffs argued that the formation of the LLCs in Delaware was the transaction of business in Delaware; however, Unger did not become a member (if he became a member at all) until well after the formation of the LLCs. The court rejected the argument that the acts of the original founders of the LLCs could be attributed to Unger when he later became a member of the LLCs. The court held that it had personal jurisdiction over Conrad (who was a founding member, manager, and high level officer of the LLCs) pursuant to 6 Del. C. §§ 18-109(a) and 18-110(a) and thus avoided analysis of whether the formation of the Delaware LLCs would constitute the transaction of business under § 3104(c)(1) and whether the claims would have a sufficient nexus to those acts. Section 18-110(a) sustained jurisdiction with respect to claims involving removal and replacement of Conrad as a manager, and § 18-109 provided a basis for jurisdiction with respect to all of the claims, including disputes related to a buy-out provision. Section 18-110 provides that service on the LLC constitutes service on “the person or persons whose right to serve as a manager is contested and upon the persons, if any, claiming to be a manager or claiming the right to be a manager.” Although Conrad argued that the LLCs never had managers, the court noted that the plaintiffs had produced evidence that Conrad had previously claimed to be a manager, and the court concluded that the disputes over governance and management fell within the scope of § 18-110(a). The court went on to find that § 18-109 provided a basis for jurisdiction because it permits the exercise of personal jurisdiction over a manager “in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager ... of a duty to the limited liability company, or any member of the limited liability company.” The court also determined that the exercise of jurisdiction satisfied due process. Finally, the court determined that it should stay the litigation in Delaware pending the outcome of litigation between the parties in Pennsylvania.

*Caldwell-Baker Co. v. Southern Illinois Co.*, 225 F.Supp.2d 1243 (D. Kan. 2002) (granting Illinois LLC’s motion to dismiss for lack of jurisdiction where plaintiff failed to allege facts to indicate necessary minimum contacts, failed to address LLC’s argument that it was not alter ego of corporate member as alleged by plaintiff, and failed to show any partnership agreement or other contract whereby LLC agreed to assume responsibilities of corporation in issue).

*Stomar, Inc. v. Lucky Seven Riverboat Company, L.L.C.*, 821 So.2d 1183 (Fla. App. 2002)(upholding application of “corporate shield”doctrine to preclude exercise of personal jurisdiction over individuals acting in representative capacity for LLC in executing brokerage agreement, but remanding for reconsideration, in light of recent judicial development, the possibility of exercise of jurisdiction over individuals based on fraudulent inducement of the contract).

*International Bancorp, L.L.C. v. Societe des Bains de Mer et du Cercle des Entrangers a Monaco*, 192 F.Supp.2d 467 (E.D. Va. 2002)(holding that record did not support piercing LLC veil to subject member to court’s personal jurisdiction under “stringent” Virginia veil piercing standard requiring “proof that the alleged alter ego used the corporation to disguise some legal wrong”).

*Chase Manhattan Bank v. Iridium Africa Corporation*, No. 00-0564-RRM(JJF)(MPT), 2002 WL 732070 (D. Del. April 5, 2002)(setting aside default judgment against Taiwanese corporation based upon reserve capital call obligations as member of Iridium LLC on showing that member presented potentially meritorious defense based upon its alleged transfer of interest and its good faith belief that it was no longer a member of the LLC, beyond the jurisdiction of the court, and not properly served).

*Palmer v. Moffatt*, No. 01C-03-114-JEB, 2001 WL 1221749 (Del. Super. Oct. 10, 2001). In this dispute between the members and managers of an LLC, several defendants moved for dismissal based upon lack of personal jurisdiction. The court interpreted the Delaware implied consent statute which establishes jurisdiction over (i) a manager designated as such in, or pursuant to, the LLC agreement or (ii) a person who materially participates in the management of the LLC though not designated as a manager. While the LLC agreement conferred broad authority to members, the court determined that it actually vested management in a management committee. The court held the defendants who did not serve on that committee were not subject to service under the implied consent statute. The court also determined that an individual who was a member of the committee when many of the disputed events occurred was subject to the implied consent statute.

*Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810 (Tex.App. 2001)(holding that individual failed to negate plaintiff’s theory that individual was alter ego of a Wisconsin LLC for purposes of court’s exercise of personal jurisdiction over individual).

**77388 Ontario Limited v. Lencore Acoustics Corp.**, 142 F. Supp.2d 309 (E.D. N.Y. 2001)(finding individuals who jointly owned and directed partnership and LLC were subject to personal jurisdiction based upon agency relationships).

**Rubinbaum LLP v. Related Corporate Partners V, LP**, 154 F. Supp.2d 481 (S.D. N.Y. 2001) (finding New York court had jurisdiction over managers and officers of Florida LLC).

**Origins Natural Resources, Inc. v. Kotler**, 133 F. Supp.2d 1232 (D. N.M. 2001). The court in this trademark infringement action determined that it lacked jurisdiction over a nonresident LLC and its indirect owner who licensed the trademark to the LLC, the only contact with New Mexico being the fulfillment of an order placed over the Internet by an individual in New Mexico.

**Hill v. Shell Oil Company**, 140 F. Supp.2d 911(N.D. Ill. 2001), order vacated in part on reconsideration, 149 F. Supp.2d 416 (concluding personal jurisdiction over a Delaware LLC with no direct presence in Illinois could not be sustained based upon jurisdiction over one of the LLC's members, but if a joint venture between the LLC and co-venturers over whom the court had jurisdiction could be established, the minimum contacts of the co-venturers would be attributed to the LLC).

**M.G. Incentives v. J.J. Marchand**, No. C6-00-962, 2001 WL 96223 (Minn. App. Feb. 6, 2001) (finding it unnecessary to decide whether the fiduciary shield doctrine should apply in Minnesota so as to protect an individual acting on behalf of an LLC where the plaintiff alleged facts sufficient to pierce the veil, the distinction between the individual and LLC was blurry, and the plaintiff alleged fraud against individual).

**Royal Mortgage Corporation v. Montague**, 41 S.W.3d 721 (Tex. App. 2001) (finding that an individual and corporation were acting as agents of a foreign LLC so as to support the exercise of personal jurisdiction over the LLC but concluding that there was no evidence the LLC was acting as alter ego of its members for purposes of personal jurisdiction over the members).

**Assist Stock Management L.L.C. v. Rosheim**, 753 A.2d 974 (Del. Ch. 2000). In this case, the court interpreted and applied Delaware's implied consent statute for obtaining personal jurisdiction over managers of Delaware LLCs. The case involved a dispute between two members/managers of a Delaware LLC with its principal place of business in Florida. All parties agreed that the defendant Rosheim had no contact with Delaware beyond his involvement as a founder and manager of the LLC. The court discussed the precise statutory language of Section 18-109 and noted differences between it and the provision addressing jurisdiction over corporate directors. Ultimately, the court concluded that Section 18-109 supported the exercise of jurisdiction over Rosheim regardless of whether the claims against him alleged a breach of fiduciary duty because the claims involved disputes regarding the parties' rights under the LLC agreement and Delaware statutory and case law. The court concluded that Delaware has a compelling interest in the resolution of disagreements of this sort. Specifically, the court concluded that exercise of jurisdiction was proper in this case because: (1) the allegations against Rosheim centered on his "rights, duties and obligations" as a manager of a Delaware LLC; (2) resolution of the matter was "inextricably bound up in Delaware law;" and (3) Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of a Delaware LLC to discharge their respective managerial functions.

**New England National LLC v. Kabro of East Lyme LLC**, No. 550014, 2000 WL 254590 (Conn. Super. Feb. 23, 2000). The plaintiffs sued Kabro of East Lyme, LLC ("East Lyme, LLC"), a New York LLC, for breach of a contract to purchase real estate from the defendants. Additionally, the plaintiffs sought to pierce the veil of the LLC and hold several other non-resident parties personally liable under veil piercing theories. The court's opinion dealt with its jurisdiction over the parties. The court found that East Lyme, LLC had transacted business in Connecticut so as to justify the court's exercise of specific personal jurisdiction over the LLC. The court also concluded it had jurisdiction over one LLC member who was instrumental in the negotiations of the real estate transaction in issue. The plaintiffs sought to obtain personal jurisdiction over the other non-resident parties by piercing the veil of East Lyme, LLC, but the court concluded that the plaintiffs had not alleged sufficient facts to pierce the veil to obtain jurisdiction over the other members of the LLC nor to obtain jurisdiction over another New York LLC that allegedly provided funds to East Lyme, LLC.

***Solow v. Century Assets Corporation***, 12 S.W.3d 512 (Tex. App. 1999). Two members of an LLC argued that they were not subject to personal jurisdiction in Texas in an action against the members for breach of contract and breach of fiduciary duty. The members argued that their contacts with Texas were made in their official capacities on behalf of the LLC and were thus insufficient to support jurisdiction over them individually. The court equated an LLC to an corporation in this context, stating that “[j]urisdiction over an individual generally cannot be based on jurisdiction over a corporation with which he is associated unless the corporation is the alter ego of the individual.” The court examined the record, however, and found that the defendants’ purposefully established minimum contacts with Texas in their individual capacities by negotiating personal rights in certain transactions and by breaching their contractual and fiduciary duties. The court further concluded that assertion of personal jurisdiction would comport with fair play and substantial justice.

***Lawson v. Tax Lien Resources Group, LLC***, No. 98 C 245, 1998 WL 957331 (N.D. Ill. Dec. 15, 1998). An LLC member sued two other members and the LLC in Illinois for an accounting of compensation and LLC profits allegedly owed. The plaintiff resided in Illinois, but the LLC was organized in Delaware and the two other members were citizens of Minnesota. The LLC agreement listed the LLC’s principal place of business as the address of one of the Minnesota members. The defendants moved to dismiss for lack of personal jurisdiction. The court reviewed the business of the LLC conducted in Illinois through the plaintiff and concluded that it had personal jurisdiction over the LLC and its members. The fiduciary shield doctrine did not avail the two Minnesota members inasmuch as they came to Illinois to meet with the plaintiff and discuss the formation of their business. The court also denied the defendants’ motion to transfer venue to a more convenient forum. (Interestingly, diversity jurisdiction was not questioned. If the plaintiff was indeed a member of the defendant LLC, diversity would be lacking under the line of cases noted below.)

***MCNC Oil & Gas Company v. IBEX Resources Company, L.L.C.***, 23 F. Supp.2d 729 (E.D. Mich. 1998). The court determined that the court had personal jurisdiction over three defendants who challenged the court’s jurisdiction. First, the court determined that it had jurisdiction over the defendant Oklahoma LLC. The court applied the Michigan long-arm statute regarding specific jurisdiction over unincorporated associations. Next, the court concluded that it had personal jurisdiction over the individual who signed various agreements on behalf of the LLC as its president. The court found that signing the agreements in his capacity as an officer rather than his individual capacity did not defeat the court’s jurisdiction because Michigan courts have not adopted the fiduciary shield doctrine. Finally, the court determined that it had personal jurisdiction over a corporation to which the LLC delegated its tasks under its contracts with the plaintiff. The court found that the individual who signed the agreements on behalf of the LLC represented the corporation in the pre-contract negotiations and at the last minute signed as president of the LLC.

***ING (U.S.) Securities, Futures & Options, Inc. v. Bingham Investment Fund, L.L.C.***, 934 F. Supp. 987 (N.D. Ill. 1996). A futures commission merchant sued an LLC and two of its members to collect the deficit balance in the LLC’s trading account. The court determined that it lacked personal jurisdiction over the LLC members based upon the fiduciary shield doctrine (described by the court as prohibiting the exercise of personal jurisdiction over a nonresident whose only contacts with the forum state were “solely on behalf of his employer or other principal”). The plaintiff attempted to avoid the effect of the fiduciary shield doctrine by relying on the corporate alter ego doctrine. The defendants countered with an affidavit reciting that the LLC’s assets were not treated as the assets of the individual defendants, that the LLC maintained necessary corporate records, that the LLC did not commingle its assets with those of the individual defendants, and that the LLC maintained a separate banking account. The affidavit was uncontradicted, and the court rejected the alter ego argument.

***Worms v. WGB Partners, L.L.C.***, No. CV 950149182S, 1996 WL 571464 (Conn. Super. Sept. 26, 1996). This case involved personal jurisdiction over nonresident individuals who were members of an LLC. The plaintiff was a fellow member of the LLC asserting various causes of action arising from an agreement to form and operate a partnership and LLC. The plaintiff and two defendants formed a Georgia LLC to provide investment banking services in both Atlanta and Greenwich, Connecticut, but never came to an agreement on the terms of the operating agreement. They subsequently terminated their relationship. (The plaintiff claimed that the parties actually formed a general partnership which they then changed to an LLC. The court referred to the business relationship in varied terms throughout the opinion, including a “partnership,” “limited liability company,” and “limited liability corporation”). The defendants apparently resided in Georgia and contended that their only dealings with the plaintiff consisted of negotiations by correspondence and telephone between Connecticut and Georgia about the operating agreement. The defendants argued that they did not transact business in Connecticut for purposes of a Connecticut statute granting personal jurisdiction. The court found that the defendants had transacted business in Connecticut and thus were subject to the court’s

jurisdiction. The court additionally concluded that the situation did not involve a claim against the LLC itself; the claim that the defendants breached their agreement to operate the business was a claim that could be asserted against them in their individual capacities.

***Cornerstone Orthopedic Hospital v. Marquez***, 944 F. Supp. 451 (W.D. N.C. 1996). The defendant in this case was a doctor who was a limited partner in a limited partnership formed under North Carolina law to operate a hospital in McAllen, Texas. The limited partnership was formed as the result of a conversion from an LLC formed by the defendant and others. The parties involved in the creation of the LLC and limited partnership had a falling out, and the defendant was sued by the limited partnership in North Carolina. The defendant, who emphasized that he had never visited North Carolina, challenged the court's personal jurisdiction. The court found that the defendant had the requisite minimum contacts under North Carolina's long arm statute and the Constitution to warrant the exercise of jurisdiction. The court relied on the fact that the defendant played an active role in creating the limited partnership and assumed obligations to North Carolina business entities. In particular, the court stressed his participation in forming the LLC that was the predecessor to the limited partnership. The court pointed out that all of the business entities created by the parties were created under North Carolina law and that the defendant participated in the decisions regarding formation of the entities. (The court at one point mentioned that he signed the "articles of incorporation" of the LLC. This is in keeping with the court's later reference to another LLC as a "North Carolina corporation.") In connection with formation of the LLC, the defendant executed an operating agreement and a subscription agreement governed by North Carolina law. The defendant argued that status as a limited partner is not enough to create personal jurisdiction; however, the court distinguished the defendant from the type of passive investor that is a limited partner in a large limited partnership and is comparable to a shareholder in a large corporation. The defendant was more than a passive investor, according to the court, because he was one of the parties involved in forming the limited partnership and he undertook obligations that differed from those assumed by passive investors. The court concluded that the defendant was more akin to a general partner than a shareholder.

## **B. Diversity Jurisdiction**

There is a growing body of case law adhering to the rule that the citizenship of an LLC is determined by the citizenship of each of its members for purposes of diversity jurisdiction. Under this rule, an LLC is a citizen of each state in which a member resides. This rule follows from the United States Supreme Court case of *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In *Carden*, the Supreme Court held that a limited partnership is a citizen of every state in which a general or limited partner resides based upon the rule that citizenship of an unincorporated association is determined by the citizenship of all of its members. In one of the first cases to address the issue of an LLC's citizenship, *Carlos v. Adamy*, No. 95 C 50264, 1996 WL 210019 (N.D. Ill. April 17, 1996), the court concluded that the corporate "nerve center" test would apply to an LLC, but the subsequent case law has embraced the *Carden* approach. The First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have applied this rule to LLCs (see cases cited below). The district courts addressing the issue have overwhelmingly followed this approach and are too numerous to list in this paper; however, there are a few cases in which courts have applied the corporate rule for determining citizenship (basing citizenship upon state of incorporation and principal place of business). This approach typically appears to result from a failure to recognize that an LLC is a type of entity distinct from a corporation.

***Camico Mutual Insurance Company v. Citizens Bank***, 474 F.3d 989 (7<sup>th</sup> Cir. 2007).

***Intec USA, LLC v. Engle***, 467 F.3d 1038 (7<sup>th</sup> Cir. 2006).

***Synfuel Technologies, Inc. v. DHL Express (USA), Inc.***, 463 F.3d 646 (7<sup>th</sup> Cir. 2006).

***Wise v. Wachovia Securities, LLC***, 450 F.3d 265 (7<sup>th</sup> Cir. 2006).

***Hicklin Engineering, L.C. v. Bartell***, 439 F.3d 346 (7<sup>th</sup> Cir. 2006).

***Johnson v. Columbia Properties Anchorage, LP***, 437 F.3d 894 (9<sup>th</sup> Cir. 2006).

***Pramco, LLC v. San Juan Bay Marina, Inc.***, 435 F.3d 51 (1<sup>st</sup> Cir. 2006).

***Saxon Fibers, LLC v. Wood***, 118 Fed.Appx. 750 (4<sup>th</sup> Cir. 2005).

*Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879 (7<sup>th</sup> Cir. 2004).

*Factory Mutual Insurance Company v. Bobst Group USA, Inc.*, 392 F.3d 922 (7<sup>th</sup> Cir. 2004).

*General Technology Applications, Inc. v. Exro Ltda*, 388 F.3d 114 (4<sup>th</sup> Cir. 2004).

*Unity Communications Inc. v. Unity Communications of Colorado LLC*, 105 Fed.Appx. 546 (5<sup>th</sup> Cir. 2004) (expressing no opinion as to whether LLC has the citizenship of each of its members for diversity purposes).

*Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020 (11<sup>th</sup> Cir. 2004).

*Mutual Assignment and Indemnity Co. v. Lind-Waldock & Co., LLC*, 364 F.3d 858 (7<sup>th</sup> Cir. 2004) (noting that LLC is citizen of every state of which any member is citizen, and that citizenship may have to be traced through several members if any of its members is itself a partnership or LLC).

*GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.*, 357 F.3d 827 (8<sup>th</sup> Cir. 2004).

*Belleville Catering Co. v. Champaign Marketing Place, L.L.C.*, 350 F.3d 691 (7<sup>th</sup> Cir. 2003) (criticizing counsel for the parties in scathing terms for treating LLC as corporation for purposes of diversity jurisdiction and ordering counsel to perform remaining services required to resolve dispute without charging the parties any attorney's fees).

*Provident Energy Assocs. of Montana v. Bullington*, 77 Fed.Appx. 427 (9<sup>th</sup> Cir. Oct. 7, 2003).

*Homfield II, L.L.C. v. Comair Holdings, Inc.*, 54 Fed.Appx. 731(6<sup>th</sup> Cir. 2002).

*Handelsman v. Bedford Village Associates, L.L.C.*, 213 F.3d 48 (2<sup>nd</sup> Cir. 2000).

*Cosgrove v. Bartolotta*, 150 F.3d 729 (7<sup>th</sup> Cir. 1998) (applying *Carden* in concluding that citizenship of single member LLC is citizenship of its sole member).

A somewhat unusual application of diversity jurisdiction principles occurred in *ConnectU LLC v. Zuckerberg*, 482 F.Supp.2d 3 (D. Mass. 2007) (concluding that LLC plaintiff had no members for purposes of diversity jurisdiction at time suit was filed and that LLC was thus "stateless" and destroyed diversity jurisdiction).

### **C. Service of Process**

*Wayland v. Suffield Village, LLC*, No. CV054009738S, 2007 WL 1470856 (Conn. Super. May 9, 2007) (dismissing action against LLC for failure to properly serve LLC because place at which agent was served was neither his abode (as specified by statute addressing service on LLC) nor place of business of LLC (as specified by statute addressing service on corporation)).

*126 Spruce Street, LLC v. Club Central, LLC*, 830 N.Y.S.2d 506 (N.Y. Dist. Ct. 2007) (holding service of process on individual identified as "managing agent of corporation and authorized to accept service" satisfied statutory requirement for service on LLC).

*Thompson v. Colonial Court Apartments, LLC*, C.A. No. 05C-09-126-RRC, 2006 WL 3174767 (Del. Super. Nov. 1, 2006) (holding that defendant LLC did not establish excusable neglect to set aside default judgment where service was made on registered agent of LLC that neglected in winding up its affairs to terminate authority of its registered agent).

*Burke v. Centrix Management Company, LLC*, No. 7445, 2006 WL 2988940 (Conn. Super. Oct. 16, 2006). The court held that service on an individual identified as the LLC's registered agent on the records of the Secretary of State was effective even though a change of registered agent had been filed several days earlier. The Secretary of State's

records had not yet been updated to reflect the change at the time the marshal inquired of the Secretary of State regarding the identity of the registered agent and proper service was made on the agent listed in the Secretary of State's records.

***Mattera v. Toll Gate Land Co., LLC***, No. HHBCV030519486S, 2006 WL 2053648 (Conn. Super. July 6, 2006) (concluding that court lacked jurisdiction over LLC where LLC's agent for service was not served and only manner of service alleged was service of LLC's prior agent for service).

***Perez v. L-3 Communications Corp.***, No EP-06-CA-22-PRM, 2006 WL 1788182 (W.D. Tex. June 26, 2006) (finding attempted service of Delaware LLC failed to comply with requirements of Texas long-arm statute permitting service on "person in charge," assuming *arguendo* that LLC's activities did not subject it to Texas Limited Liability Company Act requirement to maintain registered agent in Texas).

***Lenhard v. U.S. Filter Operation***, No. CV06-5000775S, 2006 WL 1611260 (Conn. Super. May 26, 2006) (holding service on Secretary of State was proper in suit against withdrawn foreign corporation that converted to LLC because plaintiff sued withdrawn corporation rather than LLC).

***Screen Tech, Inc. v. Carolina Precision Plastics, LLC***, No. 3:05CV975(SRU), 2006 WL 197360 (D. Conn. Jan. 25, 2006) (applying Connecticut foreign partnership long arm statute to foreign LLCs).

***Schimweg v. Teitelbaum***, No. 4:05CV416MIM, 2005 WL 3797364 (E.D. Mo. 2005) (dismissing case against LLC because individual served was not registered agent, authorized person, or organizer as required by Missouri statute governing service of process on LLCs).

***Boatfloat LLC v. Golia***, 915 So.2d 288 (Fla. App. 2005). The plaintiff was unable to serve the defendant LLC because the LLC's address was in a residential gated community with no regular business hours. The plaintiff thus served the Secretary of State and took a default judgment when the LLC did not answer. The LLC sought to set aside the default judgment on the basis that an LLC may not be served via the Secretary of State. The court analyzed the Florida statute providing for service of process on LLCs and concluded it did not provide for service on the Secretary of State. The statute addressing service of process on LLCs provides that service on an LLC should be completed as if the LLC were a partnership. The court examined the statute addressing service of process on partnerships and noted that the first subsection addresses service on a partnership while the following two subsections address service on domestic limited partnerships and foreign limited partnerships. The plaintiff urged the court to apply the provisions for service on the Secretary of State applicable to domestic limited partnerships, but the court determined the LLC provision permitted the court to look only to the first subsection on partnerships, which does not provide for service on the Secretary of State. The court acknowledged the unfortunate position in which the plaintiff was put since the LLC had no regular business hours open to the public, and the court encouraged the Legislature to review the situation.

***Lawrence v. Great Oaks, Inc.***, No. CV040525308S, 2005 WL 3112825 (Conn. Super. Oct. 26, 2005) (holding proper service on LLC was not accomplished under statutes providing for service of process on LLCs and corporations where undisputed affidavits showed individuals served were not agents or representatives of LLC).

***Grand Slam Stores, LLC v. L & P Builders, Inc.***, 212 S.W.3d 6 (Ark. App. 2005) (setting aside default judgment based on failure to properly address summons and complaint served by mail under rule governing service of process by mail on LLC).

***SNET Information Services, Inc. v. Milner***, No. CV044003000S, 2005 WL 1760196 (Conn. Super. June 24, 2005) (concluding one copy of writ, summons, and complaint left at door of sole member's home and found by sole member lying on ground outside his house was sufficient service on LLC).

***Horniatko v. Riverfront Assoc., LLC***, No. CV044000332S, 2005 WL 1671543 (Conn. Super. June 21, 2005) (concluding LLC may be served under statute permitting service on corporation by service on "general or managing agent" in addition to means of service provided under statute specifically applicable to foreign LLC).

***Smith v. Trojan, LLC***, No. 252244, 2005 WL 839499 (Mich. App. April 12, 2005). The court concluded service of process on an LLC was sufficient where the LLC's resident agent was served by certified mail. Though Michigan has no rule specifically addressing the proper manner of service on LLCs, the Michigan LLC statute requires

an LLC to have a resident agent and defines the resident agent as an agent for purposes of service of process, and service by certified mail is permitted for individuals.

**Russo v. Master**, No. Civ.A. 02-3303, 2005 WL 757351 (E.D. La. 2005) (noting distinction between LLCs and corporations and finding plaintiff failed to properly serve LLC under rules applicable to LLCs, which are similar to rules applicable to corporations).

**Creditors Trade Association, Inc. v. Elibrium, LLC**, No. A105953, 2005 WL 419715 (Cal. App. 1 Dist. Feb. 23, 2005) (affirming default judgment against LLC and its member, finding substantial evidence of proper service of process, and concluding member did not have standing to raise argument that LLC shield protected her from personal liability because default judgment had been taken and action was not reinstated).

**Advanced Wall Systems, Inc. v. Highlande Builders, LLC**, 605 S.E.2d 728 (N.C. App. 2004) (holding substituted service on secretary of state was effective service on foreign LLC that failed to maintain registered agent regardless of address to which secretary of state forwarded summons because service was effective as of date of service on secretary of state).

**Keystone Building Systems, Inc. v. Skarphol Construction Group, Inc.**, No. A03-1649, 2004 WL 1098712 (Minn. App. May 18, 2004) (holding service of process on LLC was not accomplished by leaving copy with manager's daughter at his home after unsuccessful attempts to serve manager).

**Washington v. Premiere Automotive, L.L.C.**, 872 So.2d 1187 (La. App. 2004) (finding service of process on LLC was improper, relying on cases in corporate context because of similarity in provisions applicable to corporations and LLCs).

**Tahoma School District v. S & S Enterprises of Maple Valley, LLC**, No. 51839-9-I, 2004 WL 295108 (Wash. App. Feb. 17, 2004) (holding argument that LLC was not properly served was waived).

**Kopff v. World Research Group, LLC**, 298 F.Supp.2d 50 (D. D.C. 2003) (concluding plaintiff's proof of service was ineffective under D.C. law because it failed to indicate any person who accepted service was proper individual to accept service for LLC).

**Carus & Manniello, P.C. v. MLG Capital Assets LLC**, No. CV 1129/02, 2003 WL 1093402 (N.Y. City Civ. Ct. March 4, 2003) (denying motion for default judgment against foreign LLC because of non-compliance with additional notice provision in statute authorizing service on foreign corporation by service upon Secretary of State).

**Redwood Group, LLC v. Louiseau**, 113 S.W.3d 866 (Tex.App. 2003) (holding record did not show compliance with statutory requirements for serving foreign LLC by serving Secretary of State).

**CB Ellis, Buffalo, NY, LLC v. JLC Holdings, LLC**, 761 N.Y.S.2d 899 (N.Y. A.D. 4 Dept. 2003) (holding that service was properly effected pursuant to New York LLC act and defendant did not establish reasonable excuse for delay in timely filing answer).

**Stuyvesant Fuel Service Corp. v. 99-105 3<sup>rd</sup> Avenue Realty LLC**, 745 N.Y.S.2d 680 (N.Y. City Civ. Ct. 2002)(service on LLC did not comply with New York statute because individual served was not a member or manager of the LLC and statute does not authorize service on a "managing agent").

**Hovde Acquisition LLC v. Thomas**, No. Civ.A. 19032, 2002 WL 1271681 (Del. Ch. June 5, 2002)(discussing improper and unsuccessful attempts to serve non-resident member and manager of Delaware LLC and allowing additional time to effectuate service that would relate back to the filing date of the lawsuit).

**NCO Teleservices, Inc. v. Northeast Mortgage, L.L.C.**, 28 Conn. L. Rptr. 192, 2000 WL 1528900 (Conn. Super. Sept. 21, 2000)(discussing Connecticut statute providing for service of process on LLC).

**Bursey v. Black Rock Enterprises**, No. CV98 035 65 18 S, 1999 WL 74026 (Conn. Super. Feb. 4, 1999). The defendant LLC moved to dismiss for failure to serve the LLC's statutory agent. The plaintiff argued that the Connecticut

statute providing for service on the statutory agent provides but one permissible method of service and that service on an LLC member fulfilled the requirements of the service statutes. The court agreed that the statute permitting service on the statutory agent was not exclusive and denied the motion to dismiss.

*Scharmann's Inc. v. 388 West Broadway, LLC*, 685 N.Y.S.2d 33 (N.Y. A.D. 1 Dept. 1999)(dismissing case due to improper service on LLC defendant).

*Summit Bank v. Taylor*, No. 96 Civ. 7229(BSJ), 1997 WL 811526 (S.D. N.Y. Nov. 12, 1997). The LLC issue in this case was the effectiveness of an attempt to serve a subpoena on an LLC. The attempted service in this case was ineffective under the New York Limited Liability Company Act because service was attempted by delivery of the subpoena to an individual who was neither a manager nor a registered agent of the LLC.

#### **D. Venue**

*United States v. Heide*, No. 04 MS-5609, 2007 WL 581601 (D. Idaho Feb. 20, 2007) (declining to transfer venue of government action against non-resident for writ of execution with respect to ownership of LLC registered to transact business in Idaho).

*Dusa Pharmaceuticals, Inc. v. River's Edge Pharmaceuticals, LLC*, No. Civ. 06-1843(SRC), 2006 WL 1320049 (D. N.J. May 15, 2006) (treating LLC like corporation for purposes of venue in federal patent infringement action).

*Ex parte Miller, Hamilton, Snider & Odom, LLC*, 942 So.2d 334 (Ala. 2006) (holding LLC was partnership for venue purposes, and statute governing suits against individual defendants governed suit against LLC).

*Newman v. Sherman*, No. C05-2989 SBA, 2005 WL 2739299 (N.D. Cal. Oct. 24, 2005) (holding non-resident managing director and substantial investor in California LLCs was subject to personal jurisdiction in California, but transferring venue to Florida based on convenience of parties and witnesses).

*SRU Biosystems, Inc. v. Hobbs*, No. Civ. 05-201-SLR, 2005 WL 2216889 (D. Del. Sept. 13, 2005). An LLC, its president, and its manager moved to transfer this patent dispute to Massachusetts on forum non conveniens grounds, and the court denied the request. The plaintiff corporation and defendant LLC were both Delaware entities, but the principal place of business for both was Massachusetts, and the individual defendants resided in Massachusetts. The LLC had no place of business in Delaware and did no business in Delaware. Massachusetts was the locale of the witnesses, and all events underlying the litigation occurred in Massachusetts. Other litigation was pending between the parties in Massachusetts. Nevertheless, the court stated that the defendants' complaints about litigating in Delaware were outweighed by the fact that the LLC enjoyed the benefits and protections of a Delaware LLC, and the state had an interest in litigation regarding companies like the plaintiff that are incorporated in Delaware.

*Intuition Consolidated Group, Inc. v. Dick Davis Publishing Company*, No. 03 Civ.5063 PKC, 2004 WL 594651 (S.D. N.Y. March 25, 2004) (holding venue as to LLC and corporation was proper where corporation was inextricably linked to LLC organized in New York with residence in district).

*Argos v. Orthotec LLC*, 304 F.Supp.2d 591 (D. Del. 2004) (denying LLC's motion to transfer venue of cybersquatting suit brought by French corporation to California, even though LLC's principal place of business was in California, since LLC was organized as Delaware LLC and thus voluntarily exposed itself to the possibility of litigation in Delaware).

*Crestman v. Independent Radiology Assoc., P.L.C.*, No. Civ.A. 03-1583, 2003 WL 22990413 (E.D.La. Dec. 17, 2003) (granting motion to dismiss for improper venue and holding that forum selection clause in LLC operating agreement was not against Louisiana public policy inasmuch as it was contained in an operating agreement for a professional LLC rather than an employment contract).

*Cunningham v. Chalmette Medical Center*, 859 So.2d 832 (La.App. 2003) (holding venue as to LLC was proper in parish where registered office of LLC is located, and venue as to other parties was proper in such parish as well because all of the parties were potentially jointly and solidarily liable).



***Graziuso v. 2060 Hylan Blvd. Restaurant Corp.***, 753 N.Y.S.2d 103 (N.Y.A.D. 2 Dept. 2002) (transferring venue to county in which LLC's principal office was located as evidenced by articles of organization in absence of showing that articles had been amended to change principal office).

***Hospicomm, Inc. v. International Senior Development, LLC***, 2001 WL 1808026 (Pa. Com. Pl. Jan. 9, 2001)(concluding that LLC is "corporation or similar entity" rather than "partnership" or "association" for purposes of rules of civil procedure on venue).

***Meterologic, Inc. v. Copier Solutions, Inc.***, 185 F.Supp.2d 1292 (S.D. Fla. 2002)(discussing piercing allegations in context of forum non conveniens motion).

***ZPC 2000, Inc. v. The SCA Group, Inc.***, 86 F. Supp.2d 274 (S.D. N.Y. 2000) (concluding that venue of this case involving disputes between members of an Illinois LLC should be transferred to Illinois and rejecting argument that the forum selection clause of a non-disclosure agreement allegedly entered into between the members of the LLC should control).

#### **E. Pro Se Representation**

The cases thus far dealing with whether an LLC may appear *pro se* almost universally stand for the proposition that an LLC must appear through a licensed attorney. Some of the cases in this area are noted below.

***Michael Reilly Design, Inc. v. Houraney***, 835 N.Y.S.2d 640 (N.Y. A.D. 2 Dept. 2007) (holding that LLC, as legal entity distinct from its members, must be represented by attorney and may not be represented by one of its members who is not licensed to practice law).

***Senna v. Judyski***, 2007 WL 987157 (N.J. Super. A.D. April 4, 2007) (holding that LLC must be represented in court by licensed attorney).

***Lattanzio v. Comta***, 481 F.3d 137 (2<sup>nd</sup> Cir. 2007) (holding that LLC, like partnership or corporation, may appear in federal court only through licensed attorney).

***Hart v. Hart***, No. 18 MS 0302, 2007 WL 187690 (S.D. N.Y. Jan. 22, 2007) (noting that LLC could not proceed *pro se*).

***Villager Franchise Systems, Inc. v. Vaver***, No. 04-CV-517, 2006 WL 3377916 (E.D. Wis. Nov. 20, 2006) (stating LLC must be represented in federal court by licensed attorney).

***Senna v. City of Wildwood***, No. 6655-2005, 6656-2005, 2006 WL 2068770 (N.J. Super. A.D. July 27, 2006) (affirming dismissal of complaints of LLC filed *pro se* because lay representation of LLC is not permitted).

***Sterling, Winchester & Long, LLC v. Loyd***, 634 S.E.2d 188 (Ga. App. 2006) (holding that LLC must be represented in court by attorney).

***Martin v. Directors Guild of America***, No. 06-cv-00609-REB-MJW, 2006 WL 1351650 (D. Colo. May 16, 2006) (stating LLC must be represented by attorney to proceed in court, and non-attorney sole owner/registered agent/managing member of LLC plaintiffs thus could not represent LLCs).

***Disciplinary Counsel v. Kafele***, 843 N.E.2d 169 (Ohio 2006) (holding LLC member, who was not licensed attorney, engaged in unauthorized practice of law by preparing and filing legal papers in court on behalf of LLC).

***Winzer v. EHCA Dunwoody, LLC***, 627 S.E.2d 426 (Ga. App. 2006).

***Alderson v. Manuel***, No. A107652, 2005 WL 3114161 (Cal. App. 1 Dist. Nov. 22, 2005) (holding court did not err in permitting representation *in propria persona* where complaint was filed by "Mike Manuel, doing business as Mare Island Sales, a Limited Liability Company qualified to do business in the State of California," stating complaint designated Mare Island Sales, LLC as fictitious name of individual and did not create entity distinct from individual).

**Cleveland Bar Ass'n v. Pearlman**, 832 N.E.2d 1193 (Ohio 2005) (holding that layperson who presents claim or defense in small claims court on behalf of LLC as an LLC officer does not engage in unauthorized practice of law, provided layperson does not engage in cross-examination, argument or other advocacy).

**In re 1103 Norwalk Street, L.L.C.**, No. 01-10059C-7G, 2004 WL 3502654 (Bankr. M.D. N.C. May 14, 2004) (finding notice of appeal not signed by attorney constituted *pro se* pleading and thus failed to comply with bankruptcy and local rules because LLC may not appear or seek relief *pro se*).

**Roscoe v. United States**, No. 04-2267, 2005 WL 995733 (10th Cir. April 29, 2005).

**Energy Lighting Management, LLC v. Kinder**, 363 F.Supp.2d 1331 (M.D. Fla. 2005).

**HB Management, LLC v. Brooks**, No. 04-LT-37313, 2005 WL 225993 (D.C. Super. Feb. 1, 2005).

**Gilley v. Shoffner**, 345 F.Supp.2d 563 (M.D. N.C. 2004).

**In re 1103 Norwalk Street, L.L.C.**, No. 01-10059C-7G, 2003 WL 23211564 (Bankr. M.D. N.C. Nov. 26, 2003).

**Carlo, L.L.C. v. Yorro**, No. SP1147/03, 2003 WL 32091320 (N.Y. Dist. Ct. April 30, 2003).

**Board of Education v. Franklin County Board of Revision**, Nos. 01AP-878, 01AP-879, 2002 WL 416953 (Ohio App. March 19, 2002) (distinguishing LLC from partnership, an aggregate of individuals, and characterizing LLC as separate legal entity like corporation for purposes of requirement that it be represented by attorney in property tax valuation dispute, and holding statute permitting LLC member to file a complaint on behalf of LLC unconstitutional insofar as it permits persons who are not attorneys or owners of property to file a complaint before a board of revision on behalf of the owner).

**Kipp v. Royal & Son Alliance Personal Ins. Co.**, 209 F.Supp.2d 962 (E.D. Wisc. 2002).

**Collier v. Cobalt, LLC**, No. CIV.A. 01-2007, 2002 WL 726640 (E.D. La. April 22, 2002).

**In re ICLNDS Notes Acquisition, LLC**, 259 B.R. 289 (Bankr. N.D. Ohio 2001) (holding that LLC may not file bankruptcy petition without being represented by counsel).

**Martinez v. Roscoe**, 33 P.3d 887 (N.M. App. 2001) (holding that provisions of New Mexico LLC act allowing authorized members to bring suit on behalf of the LLC do not permit members or managers who are not licensed attorneys to bring *pro se* claims on behalf of the LLC, but merely provide a mechanism for determining who may make the decision for the LLC to bring a lawsuit).

**Strother v. Harte**, 171 F.Supp.2d 203 (S.D. N.Y. 2001).

**Paton v. Old Mill Builders, LLC**, No. CV000339895S, 2000 WL 1912695 (Conn. Super. Dec. 14, 2000).

**Valentine L.L.C. v. Flexible Business Solutions, L.L.C.**, 27 Conn.L.Rptr. 378, 2000 WL 960901 (Conn. Super. June 22, 2000).

**Banco Popular North America v. Austin Bagel Company, L.L.C.**, No. 99 CIV. 11252 SAS, 2000 WL 669644 (S.D. N.Y. May 23, 2000).

**International Association of Sheet Metal Workers Local 16 v. A J Mechanical**, No. CIV. 99-451-FR, 1999 WL 447459 (D. Or. June 16, 1999).

**Valiant Insurance Co. v. Nurse Network, LLC**, No. CV 980578083, 1998 WL 712359 (Conn. Super. Sept. 25, 1998). One member of a two-member LLC attempted to represent the LLC *pro se*. The court struck the appearance

because only one of the members was before the court. The court stated that it would have jurisdiction if both members filed pro se appearances.

*Poore v. Fox Hollow Enterprises*, No. C.A. 93A-09-005, 1994 WL 150872 (Del. Super. March 29, 1994).

#### **F. Standing/Authority to Sue**

(See also certain cases under the heading “Derivative Suits.”)

*Kranz v. Koenig*, 484 F.Supp.2d 997 (D. Minn. 2007) (holding that LLC’s judgment creditors lacked standing to assert illegal distribution claims under Minnesota LLC Act, which provides that member who receives distribution in violation of statute is liable “to the limited liability company, its receiver or other person winding up its affairs”).

*Michael Reilly Design, Inc. v. Houraney*, 835 N.Y.S.2d 640 (N.Y. A.D. 2 Dept. 2007) (holding that LLC member was not aggrieved by judgment entered against LLC and did not have standing to appeal).

*Gear v. Public Utility District No. 2 of Grant County*, No. 25071-7-III, 2007 WL 1129580 (Wash. App. April 17, 2007) (holding that former owners of LLC did not have standing to assert claim that defendant entered contracts illegally giving preference to LLC’s competitors, noting that plaintiffs did not attempt to join LLC, which court characterized as real party in interest, or LLC’s current member, which court characterized as necessary party).

*Truck America Training, LLC v. City of Hillview*, No. 2006-CA-000727-MR, 2007 WL 866694 (Ky. App. March 23, 2007) (holding that contract signed by individuals indicating representative capacity but without naming represented LLC was deemed binding on individuals rather than LLC by virtue of individuals’ failure to respond to request for admissions, but fact issue remained as to whether LLC had standing to sue on contract as third party beneficiary).

*AMP Management, LLC v. Scottsdale Insurance Company*, No. 06-4079-SAC, 2007 WL 677633 (D. Kan. Feb. 28, 2007) (citing foreign corporation provisions and holding foreign LLC lacked standing to sue because of its failure to qualify to do business in Kansas).

*GxG Management LLC v. Young Brothers and Co., Inc.*, Civil No. 05-162-B-K, 2007 WL 551761 (D. Me. Feb. 21, 2007), amended, 2007 WL 1702872 (holding LLC had standing to bring breach of contract and related claims as real party in interest even though series held nominal ownership of boat that was subject of contract, noting that Delaware statute does not address standing of LLC to pursue litigation on behalf of its series or standing of series to pursue litigation in its own behalf, and concluding that series is not separate and independent entity with capacity to sue).

*Garfield v. Suntrust Bank*, 477 F.Supp.2d 1181 (S.D. Fla. 2006) (holding that plaintiffs did not have standing to sue depository bank for losses related to unauthorized withdrawals from LLC’s account where plaintiffs were trustees for partnerships and trusts that were members of LLC but were not individually members, rejecting plaintiff’s arguments that they suffered direct damages, and noting that, under either Florida or Nevada law, only LLC members may sue derivatively on behalf of LLC).

*Magten Asset Management Corporation v. Paul Hastings Janofsky & Walker*, No. Civ.A.04-1256-JJF, 2007 WL 129003 (D. Del. Jan. 12, 2007). A creditor asserted various derivative claims on behalf of a Montana LLC. The court concluded that the creditor did not have standing to bring the derivative claims because the Montana LLC statute only authorizes derivative claims brought by a member. Furthermore, the statute provides that the member bringing the derivative claim must have been a member at the time of the transaction in issue. The court stated that the creditor had not demonstrated that it was a creditor at the time of the transaction in issue; therefore, even if it could bring the claim as a creditor, it did not satisfy the contemporaneous ownership requirement of the LLC statute.

*Zipp v. Florian*, No. CVN03101980, 2006 WL 3719373 (Conn. Super. Nov. 13, 2006) (holding that member of LLC did not have standing to bring suit based on damage to property owned by LLC).

***HMMH Holdings, LLC v. Hallenborg***, No. CV065001446S, 2006 WL 2411476 (Conn. Super. Aug. 1, 2006) (granting motion to dismiss against foreign LLC on basis LLC lacked standing to maintain suit because it failed to register to transact business).

***Morgan Howard (United States), LLC v. Lewis***, No. FSTCV054006343S, 2006 WL 2348892 (Conn. Super. July 14, 2006) (stating Delaware law governs rights of member of Delaware LLC but Connecticut law governs standing, and concluding member lacked standing to bring claims as direct claims under either Connecticut or Delaware law).

***Trident-Brambleton, L.L.C. v. PPR No. 1, L.L.C.***, No. 1:05cv1423, 2006 WL 1880986 (E.D. Va. July 5, 2006). A minority member of a Michigan LLC alleged that the LLC's managing member breached various common law, statutory, and contractual duties and obligations by selling the LLC's options to buy adjacent properties to an affiliate for less than fair market value. The managing member sought summary judgment on the ground that the minority member lacked standing to raise the claims. The court agreed with the managing member's argument that the minority member's claims for breach of common law fiduciary duties and breach of a manager's statutory duties of good faith and due care were required to be brought derivatively under procedures that were not followed by the minority member, but found that the Michigan LLC statute clearly confers standing on an individual member to bring a cause of action for willfully unfair and oppressive conduct. The court also stated that the minority member had standing to bring claims that were based on breach of the operating agreement.

***Hub, LLC v. Braunstein & Todisco, LLC***, No. CV020394375, 2006 WL 2053772 (Conn. Super. July 7, 2006) (concluding that individual who failed to establish status as member or manager at time of suit lacked standing to bring legal malpractice claim on behalf of LLC but alleged direct injury as prior member and manager sufficient to establish standing as individual).

***At the Airport v. ISATA, LLC***, 438 F.Supp.2d 55 (E.D. N.Y. 2006) (concluding plaintiff member of LLC had failed to allege direct injury sufficient for standing under RICO; permitting leave to file amended complaint in form of derivative action, but refraining from determining availability of derivative action under New York law).

***Burant Associates v. Alamar Associates***, No. CV054009081, 2006 WL 1681087, 2006 WL 1681092 (Conn. Super. June 5, 2006) (holding that LLC suffered direct injury and had standing to bring breach of fiduciary duty claims against member and malpractice claim against lawyers even though LLC's other members also suffered injury and had parallel claims).

***Lakes Gas Co. v. Terminal Properties, Inc.***, No. 05-1266, 2006 WL 1229934 (Iowa App. April 26, 2006). A minority member of an Iowa LLC sought to intervene in a suit against the LLC and its largest member. The suit was brought to collect on a promissory note of the defendant member and to foreclose a security interest granted in the assets of the LLC to secure that member's indebtedness under the note. The trial court granted the minority member's motion to intervene, and the plaintiff appealed. The court of appeals found that the trial court did not err in permitting the intervention. The right of an LLC member to intervene in a proceeding to defend the interest of the LLC was a matter of first impression in Iowa, and the court looked to federal case law in the corporate context for guidance. The court noted that federal courts have found a shareholder's interest insufficient to grant intervention when the interest was a purely economic or financial interest derivative of the corporation's interest. The court found the reasoning of the federal cases consistent with Iowa's law on shareholder derivative actions and applicable to the context of the case even though the case involved an LLC rather than a corporation and an intervention to defend the company's interest rather than an action to assert a claim for an injury to the company. The court noted that the Iowa LLC statute provides for derivative actions by LLC members, and the court saw little distinction between a right to bring a claim on behalf of the company and a right to defend the company against the claim of another. Because the minority member alleged that it sought to protect the assets of the LLC and the value of the members' interests (allegations which addressed an economic injury common to all members), the member lacked standing to intervene in its individual capacity under the reasoning of the federal intervention case law. The court concluded, however, that the member was entitled to intervene in its own right under the unique circumstances of the case. The court observed that there was a split of authority regarding the right of a shareholder in a closely held corporation to bring an action in the shareholder's individual capacity when the claim belongs to the corporation. The court discussed the American Law Institute's discretionary approach and found it consistent with Iowa policy on shareholder derivative suits. The court determined that permitting the minority member to intervene in defense of the LLC advanced the policy concerns underlying the rule on derivative actions. Because the

LLC was closely held and the remaining members were working, either actively or passively, against the LLC's interests, the court found the intervening minority member's interest sufficient to intervene.

*Finley v. Takisaki*, No. C05-1118JLR, 2006 WL 1169794 (W.D. Wash. April 28, 2006) (holding members lacked standing to assert claim for LLC's injury).

*Carey v. Howard*, 950 So.2d 1131 (Ala. 2006) (holding LLC members lacked standing to sue for declaratory relief with respect to option agreement affecting LLC property).

*Video Ocean Group, LLC v. Balaji Management Inc.*, No. Civ.A. H-03-1311, 2006 WL 964565 (S.D. Tex. April 12, 2006) (holding LLC that was reinstated after forfeiture for failure to pay franchise taxes could maintain action, and member lacked standing to assert claim belonging to LLC).

*Lourdes Medical Pavilion, LLC v. Catholic Healthcare Partners, Inc.*, No. Civ.A. 5:03CV231M, 2006 WL 753080 (W.D. Ky. March 22, 2006). The court found that an LLC member was not permitted to bring a derivative suit on behalf of the LLC under the derivative suit provisions of the Kentucky LLC act. The court pointed out that the derivative suit provisions of the Kentucky LLC statute may be varied in a written operating agreement, and the court concluded that the statutory provisions were overridden by the provisions of the LLC operating agreement requiring "any act" of the LLC to be authorized by a majority vote of the board of directors. The court, however, refused to dismiss the case even though it found it was not authorized, relying on a provision of the Kentucky LLC statute stating that lack of authority of a member or manager to file suit on behalf of an LLC may not be used as a defense to an action filed by the LLC.

*Northeast Realty, L.L.C. v. Misty Bayou, L.L.C.*, 920 So.2d 938 (La. App. 2006) (holding members had no standing to intervene in action against LLC to quiet tax title because claim to ownership of property in dispute belonged to LLC).

*Echelon Photography, LLC v. Dara Partners, L.P.*, 11 Misc.3d 1064(A), 2006 WL 685029 (N.Y. City Civ. Ct. Jan. 25, 2006) (holding failure of LLC to comply with publication requirement, consequence of which is prohibition on maintaining suit until compliance with requirement, is not jurisdictional defect warranting dismissal).

*Lio v. Zhong*, 10 Misc.3d 1068(A), No. 600455/05, 2006 WL 37044 (N.Y. Sup. Jan. 6, 2006). The plaintiff, a member of a New York LLC, sued the other two members alleging claims of breach of fiduciary duty, waste, mismanagement, conversion, and an accounting. The plaintiff also sued the spouse of one of the members for tortious interference with prospective economic advantage and sued an attorney for conversion and aiding and abetting a breach of fiduciary duty. The court first discussed the failure of the New York LLC statute to address derivative actions and concluded that the omission was deliberate and precludes member derivative suits. The court held, however, that managing members owe statutory and common law fiduciary duties that give rise to a personal claim on the part of a member. The court found that the plaintiff's claim for usurpation of a business opportunity supported a breach of fiduciary duty claim by the plaintiff. The court recognized the plaintiff's right as a member to bring an action for an accounting based on the alleged breach of fiduciary duty of the managing members, but dismissed the plaintiff's other claims. The court concluded that the plaintiff's cause of action for waste was subsumed within the plaintiff's first cause of action for breach of fiduciary duty to the extent it was a personal claim, and it could not be derivatively asserted by the plaintiff to the extent it represented rights of the LLC. The court found the plaintiff's claim for gross mismanagement was a breach of fiduciary duty claim subsumed in the plaintiff's cause of action for breach of fiduciary duty. The court concluded the plaintiff's claims for conversion and tortious interference with prospective economic advantage related to rights belonging to the LLC and could not be asserted by the plaintiff.

*In re JNS Aviation, LLC*, 334 B.R. 202 (Bankr. N.D. Tex. 2005) (holding LLC members were "parties in interest" with standing to object to claim, but judgment against LLC barred members from contesting validity of judgment under federal doctrine of res judicata).

*Cortelleso v. Town of Smithfield Zoning Board of Review*, 888 A.2d 979 (R.I. 2005) (holding sole member of LLC lacked standing to appeal zoning decision on property conveyed by member to LLC).

***Swift Freedom Aviation, LLC v. R.H. Aero***, No. 1:04-CV-90, 2005 WL 2246256 (E.D. Tenn. Sept. 13, 2005). Members of a North Carolina LLC that purchased an airplane had standing to assert claims based on mechanical problems with the airplane even though the plane was LLC property. As members, they had no interest in specific LLC property, but the members were personally liable for the financing and repairs for the plane, and the court concluded the members were injured separately from the LLC when the plane was unavailable for business travel.

***Legal Aid Society of Cleveland v. W&D Partners I, L.L.C.***, 834 N.E.2d 850 (Ohio App. 2005) (holding member of lessee LLC lacked standing in forcible entry and detainer action to bring motion to disqualify attorney representing LLC officer, though attorney had previously represented LLC, where member had no attorney client relationship with officer's attorney and member did not file derivative action on behalf of LLC).

***The Real Estate Network, LLC v. Gateway Ventures, LLC***, No. 4:05-CV-422-CAS, 2005 WL 1668194 (E.D. Mo. July 12, 2005). The court rejected the defendant's claim that the plaintiff, a Delaware LLC formed on March 26, 2004, was not in good standing and lacked capacity to sue based on failure to pay taxes. The court concluded the LLC's first annual use tax payment was not due until June 1, 2005; therefore, the tax was not due when suit was filed on March 15, 2005, and the record did not show the LLC was not in good standing at that time.

***SMLL, L.L.C. v. Daly***, 128 P.3d 266 (Colo. App. 2005). An LLC's complaint was dismissed without prejudice because the LLC, having been suspended by the Secretary of State for failure to file its annual report, lacked capacity to bring a lawsuit in state court. After a series of motions, the plaintiff filed a notice of appeal, which was held to be untimely. When the trial court dismissed the LLC's complaint without prejudice, the limitations period had expired, and the dismissal had the finality of a judgment. The judgment was not final for purposes of appeal, however, because it was not reduced to writing at that time. A later written order constituted a final judgment for appeal. After applying all applicable tolling and extensions provisions, the court concluded the appeal was not timely and must be dismissed with prejudice for lack of jurisdiction.

***Direct Marketing Services, LLC v. Bluegreen Corp.***, No. 3:04-CV-508, 2005 WL 1594543 (E.D. Tenn. July 6, 2005). The court concluded that an administratively dissolved LLC lacked capacity to sue for damages arising out of a sublease because the Tennessee LLC statute confined the authority of an administratively dissolved LLC to actions necessary to wind up and liquidate its business. Assuming the LLC's suit fell within a provision permitting collection of debts owing to the LLC, the court found that the LLC's senior vice president could not prosecute the suit in the LLC's name as the real party in interest because those authorized to take winding up actions under the Tennessee statute are specified as the board of governors of a board-managed LLC, the members of a member-managed LLC, or the managers acting under the direction of the members or board of governors. Additionally, the senior vice president, though he signed the contract, was not himself a real party in interest because neither a mere agent nor an incidental beneficiary can maintain an action on a contract.

***Monroe v. Baron One, L.L.C.***, 902 So.2d 529 (La. App. 2005) (concluding guarantor members' claim for breach of fiduciary duty against other members who were payees on LLC note guaranteed by members was direct right of action, but concluding payee members did not breach their fiduciary duties by calling note and guaranties after default).

***Tessmer v. Steinberg***, No. 251474, 2005 WL 736514 (Mich. App. March 31, 2005) (holding suit was not authorized because operating agreement vested management in managers, and plaintiff neither obtained vote of other manager nor made written demand as required by statute).

***Solutia Inc. v. FMC Corp.***, No. 04 Civ. 2842(WHP), 2005 WL 711971 (S.D. N.Y. March 29, 2005) (relying on rules from corporate context to analyze whether member of Delaware "joint venture" LLC had standing to sue other member and concluding member's tort claims alleged harm distinct from any harm to LLC and implicated independent duty owed by other member, but concluding member lacked standing to bring certain claims against other member for breach of provisions of joint venture agreement and assignment and transfer agreement).

***SMLL, L.L.C. v. Peak National Bank***, 111 P.3d 563 (Colo. App. 2005). After an LLC's action was dismissed because it had been suspended for failure to file its annual report, the LLC was reinstated by the Colorado Secretary of State, and the LLC commenced the action again. The second action was dismissed because the statute of limitations had

run and tolling did not apply; the first dismissal was not a dismissal for lack of jurisdiction or improper venue where a tolling statute would have applied.

***Building Traditions, LLC v. Panek***, No. CV010811412S, 2005 WL 1023148 (Conn. Super. March 23, 2005) (holding LLC's breach of contract claim failed because fact LLC rather than individual with whom defendants were dealing would be contracting as real estate developer and home builder was material term of contract, and purported acceptance on behalf of LLC that could at most be offer to defendants did not result in formation of enforceable contract).

***Riverside Surgery Center, LLC v. Methodist Health Systems, Inc.***, No. W2004-01195-COA-R3-CV, 2005 WL 588224 (Tenn. App. March 14, 2005). The court rejected the argument that an LLC that was not a party to the operating agreement had no standing to sue to enforce a right of first refusal provision in the operating agreement. The court concluded that the LLC had the authority to sue in its name to enforce the operating agreement based on provisions of the Tennessee LLC statute. The court pointed out that the LLC statute provides that an LLC is bound by an operating agreement that has been adopted or agreed to by all the members and confers on an LLC the power to "do all things necessary or convenient to carry out its business and affairs" as well the power to "sue and be sued" in its LLC name. Because the LLC and its members are bound by the operating agreement, the court believed a breach of the operating agreement would constitute the LLC's "business and affairs."

***Stoker v. Bellemeade, LLC***, 615 S.E.2d 1 (Ga. App. 2005) (concluding LLC members had standing to bring breach of fiduciary duty claims against other members as direct actions, relying on cases involving closely held corporations).

***Van Meter v. Gutierrez***, 897 So.2d 781 (La. App. 2005) (holding LLCs were proper parties to bring claims belonging to LLCs and members could not bring claims personally on behalf of LLCs, but members stated fraud claim against attorney arising out of investments made by LLCs where members alleged they sustained personal damages, separate and distinct from that of LLCs, due to attorney's misrepresentations).

***Maile v. Webster Bank, N.A.***, No. CV040527763, 2005 WL 590403 (Conn. Super. Feb. 10, 2005) (concluding LLC rather than plaintiff member was proper party to assert claims against bank based upon unauthorized withdrawals from LLC account by other member).

***Lenticular Europe, LLC v. Cunnally***, 693 N.W.2d 302 (Wis. App. 2005). The one-third minority member of a two-member LLC brought an action on behalf of the LLC against the sole shareholder and president of the two-thirds member. The defendant claimed the action was not authorized because the operating agreement required more than 50% in interest to decide a matter connected with the business of the LLC. The court interpreted the Wisconsin LLC act to require that an operating agreement must specifically override the statutory default rule excluding from the vote required to authorize a proposed action the vote of a member with an interest in the outcome of the action. Thus, the minority member was authorized to bring the action because the two-thirds owner had an interest in the outcome adverse to the LLC at the time the action was commenced, and the operating agreement's general provision requiring more than 50% in interest to decide any matter did not specifically override the statute in this regard.

***Connors v. Evans***, No. CV030284821S, 2005 WL 469261 (Conn. Super. Jan. 21, 2005) (holding LLC members were individually liable for taxes on property for years prior to transfer of property to LLC and thus suit by one member against other for contribution was not improper for failure to bring it against LLC).

***Area Plan Comm'n of Evansville-Vanderburgh County v. Hatfield***, 820 N.E.2d 696 (Ind. App. 2005) (LLC members who contracted individually to purchase property were aggrieved by decision denying plat application and had standing to challenge it although LLC itself submitted plat application).

***Gottier's Furniture, LLC v. LaPointe***, No. CV040084606, 2004 WL 3130541 (Conn. Super. Dec. 21, 2004) (holding member's allegations against another member would support action by LLC but not member individually, and rejecting member's argument that he was authorized to sue on behalf of LLC based on meeting at which members voted to hire attorney and investigate taking action because other members later voted not to retain attorney or take action).

***Guiliano v. Piontkowski***, 819 N.E.2d 985 (Mass. App. Ct. 2004) (denying motion of LLC's minority members to intervene in non-member's action to enforce option to purchase majority member's LLC interest even though operating agreement contained right of first refusal in favor of minority members because more than thirty months of litigation and discovery were adequate to inform minority members of the non-member's claims and there was strong reason to believe minority members' interests were aligned with majority member's since they were represented by the same counsel).

***Mercado Azteca, L.L.C. v. City of Dallas***, No.Civ.A.3:03-CV-1145-B, 2004 WL 2058791 (N.D. Tex. 2004) (noting courts have found that a corporation can have imputed racial identity, and concluding that LLC had standing to assert § 1983 action if it suffered harm from discrimination regardless of whether it was found to have a racial identity).

***Denevi v. LGCC***, 121 Cal.App. 4<sup>th</sup> 1211, 18 Cal.Rptr.3d 276 (Cal. App. 2004) (concluding LLC member's prior successful derivative action was not an election of remedies that barred pursuit of individual claims in the instant action where individual's fraud claim was entirely personal and temporally distinct from the derivative claims).

***Blickenstaff v. Clegg***, 97 P.3d 439 (Idaho 2004) (holding LLC member was not intended beneficiary of agreement between two other members).

***Board of County Commissioners of County of Laramie v. City of Cheyenne***, 85 P.3d 999 (Wyo. 2004) (holding owners of parent LLC of LLC that owned land in city had standing to challenge city's annexation of nearby subdivision).

***Hoffman v. Unterberg***, 780 N.Y.S.2d 617 (N.Y. A.D. 2 Dept. 2004) (concluding plaintiff member's claim for breach of a contract between the LLC and a third party failed because plaintiff was not a party to the contract, plaintiff's claim for diversion and misappropriation of LLC funds failed because an LLC member does not have a right to bring a derivative action under New York law, and plaintiff's claim against parties who had no ownership interest in the LLC failed because only the rights of the plaintiff and his co-member were in issue in that cause of action). See also ***Hoffman v. Unterberg***, 780 N.Y.S.2d 620 (N.Y.A.D. 2 Dept. 2004).

***In the Matter of the Estate of Bender***, 806 N.E.2d 59 (Ind. App. 2004) (holding optionor did not have standing to assert that LLC's option to purchase property, which was signed in individual's capacity as member rather than manager, was improperly exercised because optionor was not injured; only other members and managers would have standing to challenge the exercise of the option as improper under Indiana LLC act and other fiduciary duties applicable to business entities).

***Moxness v. Hart***, 131 S.W.3d 441 (Mo.App. 2004) (allowing individual to intervene in garnishment of account held in name of "Northland Auto Brokers, LLC" on which individual and judgment debtors were signatories where there was no evidence in Secretary of State's records that Northland Auto Brokers, LLC existed as an LLC and individual was allegedly doing business under the LLC name; however, Northland Auto Brokers, LLC could not intervene as an LLC nor could it intervene as a partnership because partners' names were not set forth in its pleading).

***LCA-Vision, Inc. v. New York Refractive Eye Associates, P.C.***, No. 98 Civ.8387 DC, 2004 WL 213027 (S.D. N.Y. Feb. 3, 2004) (holding member had standing to assert breach of contract and promissory estoppel claims arising out of alleged failure by defendant member to meet its capital contribution requirement, but dismissing claims because record established defendant met its capital contribution requirements).

***Meriden Concerned Citizens, LLC v. City of Meriden***, No. CV030284428, 2003 WL 22708667 (Conn.Super. Nov. 3, 2003) (holding that not-for-profit LLC, while separate entity from its members, must satisfy associational standing test and failed to establish that any of its individual members would have standing to sue).

***In re Securities Investor Protection Corp. v. Consolidated Investment Services, Inc. (Snyder v. Floworks, Inc.)***, Nos. 95-1645 ABC(SIPA), 02-1547 ABC, 2003 WL 21383648 (Bankr.D.Colo. June 9, 2003). The appointed fiduciary in a Securities Investor Protection Act winding up (the "Trustee") created an LLC to receive assets in settlement of a claim asserted by the Trustee. The Trustee later filed an adversary proceeding seeking injunctive relief with respect to the assets received in the settlement by the LLC. The Trustee sought to cure deficiencies in the Trustee's standing and questions as to the court's jurisdiction by adding the LLC as a plaintiff, filing articles of dissolution pursuant to which the assets of the LLC (including the claims in the suit) were distributed to the Trustee, and dropping the LLC from



the suit. The court concluded that these actions did not cure the standing and jurisdiction problems. The court stated that jurisdiction is determined at the time of the filing of the action, and the action did not involve the Trustee in that capacity or property of the estate. When the Trustee chose to take the property rights he received in the settlement and place them in a separate entity, only the ownership interest in the LLC remained property of the estate. Thus, the Trustee lacked standing, and the court lacked jurisdiction.

***Pawnee Petroleum Products, LLC v. Crawford***, No. 01-1314-WEB, 2003 WL 21659665 (D. Kan. April 18, 2003) (holding that plaintiff lacked standing to bring various claims arising out of agreements with corporations and LLCs under which plaintiff was not an intended third party beneficiary and which rightfully belonged to the corporations and LLCs, but that plaintiff's fraud claims were personal to plaintiff and plaintiff had standing to assert them).

***Geysler v. Excel Legacy Corp.***, No. B159194, 2003 WL 21054762 (Cal.App. 2 Dist. May 12, 2003) (holding that trial court erred when it found individual was not a party to or third party beneficiary of LLC operating agreement and lacked standing to sue; fact issues existed with respect to whether operating agreement had been amended in connection with change in ownership of member of LLC, and individual's tort claims were not dependent on existence of standing under the agreement).

***Liker v. Ryder Systems, Inc.***, No. Civ.A. 01-3754, 2003 WL 1751462 (E.D. La. 2003) (holding that individuals were not proper plaintiffs to sue for breach of contract in name of LLC but that there were fact issues as to what entity was represented by LLC that entered contract).

***Yew Prospect, LLC v. Szulman***, 759 N.Y.S.2d 351(N.Y.A.D. 2 Dept. 2003) (holding that executor for deceased sole member of LLC plaintiff should be joined as plaintiff because executor of deceased sole member was authorized to wind up the affairs of the LLC pursuant to the New York LLC act and the terms of the LLC operating agreement).

***Block v. Block***, No. CV20078857S, 2002 WL 31888203 (Conn.Super. Dec. 10, 2002). A fifty-percent member of an LLC brought suit, individually and on behalf of the LLC, against the other member of the LLC alleging that the defendant member breached his fiduciary duty and committed waste by mismanagement and theft. The defendant argued that the other member did not have authority to bring the suit on behalf of the LLC because the suit was not authorized by a majority in interest of the members. The court rejected the defendant's argument based on the Connecticut LLC act. The court pointed out that the Connecticut LLC statutes generally require a majority in interest of the members to authorize a suit in the name of the LLC but exclude the vote of any member who has an interest in the outcome of the suit that is adverse to the interest of the LLC. Based on that provision, the court found that the plaintiff was the only member with a voting interest and had authority to bring the suit on behalf of the LLC.

***Kogut v. Church Homes, Inc.***, No. CV000436717S, 2002 WL 31662388 (Conn.Super. Nov. 6, 2002)(noting entity nature of LLC and concluding that member did not have standing to bring suit on LLC's contract in absence of any allegation that member was bringing action as third party beneficiary).

***Starr v. Levin***, No.02 C 2258, 2002 WL1941375 (N.D. Ill. Aug. 21, 2002)(staying fraud, breach of fiduciary duty, and breach of contract action by one LLC member against another pending resolution of concurrent derivative suit pending in Florida state court).

***McGee v. Best***, 106 S.W.3d 48 (Tenn.Ct.App. 2002)(dismissing member's fraud claim against other members on the basis that the allegations stated a claim that was essentially derivative and thus member did not have standing to pursue it individually).

***NSJ Investors, LLC v. TH/North San Jose, LLC***, No. CIV. O1-1932PAMSRN, 2002 WL 1347588 (D. Minn. June 17, 2002)(finding subsequent action filed by LLC members in Southern District of New York alleging breach of fiduciary duty and breach of operating agreement did not violate court's injunction against instituting litigation involving interpleaded funds (as to which there was disagreement regarding distribution) in another forum).

***Ward v. Hornik***, No. 02.944, 2002 WL1199249 (E.D. Pa. June 3, 2002)(interpreting Pennsylvania LLC act and quorum and voting provisions of LLC operating agreement and concluding that suit brought on behalf of LLC was not authorized).

**Giuliano v. Pastina**, 793 A.2d 1035 (R.I. 2002)(dismissing plaintiff's claims that actions of defendant agent/employee of LLC damaged plaintiff's ownership interest in the LLC because such claims were derivative claims and plaintiff had not complied with procedural requirements for a derivative suit).

**Holmes Development, LLC v. Cook**, 48 P.3d 895 (Utah 2002)(stating in footnote that, although LLC claimant and related LLC may have the same management and be practically indistinguishable, they are legally separate entities, and court would not treat the LLCs as the same entity for purposes of standing to sue on a contract).

**ME Corp., S.A. v. Cohen Brothers LLC**, 739 N.Y.S.2d 133 (N.Y. A.D. 1 Dept. 2002)(holding that whether LLC had been dissolved and liquidated was disputed and thus it was premature to dismiss causes of action brought directly by individual members that were derivative in nature on basis that LLC had not been dissolved prior to commencement of the action).

**Forum Financial Group v. President and Fellows of Harvard College**, 173 F. Supp.2d 72 (D. Maine 2001)(questioning standing of individual member of LLC in case brought by LLC and member arising out of failed business transaction, but making no disposition on issue since it had not been raised).

**Association of Merger Dealers, LLC v. Tosco Corporation**, 167 F. Supp.2d 65 (D. D.C. 2001)(finding non-profit LLC formed to promote interests of Mobil retail service station dealers in Mobil-Exxon merger did not have standing to sue on its own behalf and lacked associational standing to sue as a representative under state law).

**Dawson v. Atlanta Design Associates, Inc.**, 551 S.E.2d 877 (N.C. App. 2001). A member of an LLC appealed an order to substitute the LLC as party plaintiff in a case arising out of the defendant's alleged breach of a contract with the plaintiff for the construction of a facility on property owned by the LLC. The court concluded that the individual member was a real party in interest because the claims did not allege injury to the LLC and, even assuming the LLC suffered injuries, the plaintiff's individual contract with the defendants created a "special duty" to the plaintiff.

**Denley Rentals, LLC v. Etheridge**, No. W2000-00189-COA-R3-CV, 2001 WL 792646 (Tenn. App. July 11, 2001). Two LLCs and the individual who was the member and manager of both sued the defendants for breach of contract and fraud for failing to disclose a landfill on property bought by the LLC. The individual had entered the contract of sale but assigned his interest under the contract to an LLC. After the sale, the first LLC transferred the property to the second LLC, and the member made a "mental assignment" of the chose in action from the first LLC to the second. The court analyzed whether a single individual authorized on behalf of two separate entities may make a "mental assignment" of a chose in action from the first to the second. The court recognized the validity of the mental assignment because it said that mutual assent is undisputed where there is a "mental assignment" by a single individual, and the claims asserted were legally assignable.

**Randolph Foundation v. Appeal from Probate Court of Westport**, No. X05CV980167903S, 2001 WL 418059 (Conn. Super. April 3, 2001)(noting in dicta that an LLC is an entity with capacity to sue and be sued and that individual members may not bring LLC claims in their individual names).

**St. Raymond v. City of New Orleans**, 775 So.2d 31 (La. App. 2000)(permitting sole member of LLC that owned property that was subject matter of suit to amend petition filed in member's own name to make LLC a plaintiff in the case).

**In re Heartland Food and Dairy Distributors, Inc. (Land-O-Sun Dairies, L.L.C. v. Heartland Food and Dairy Distributors, Inc.)**, 253 B.R. 32 (Bankr. S.D. Ill. 2000). A suit was mistakenly filed in the name of a corporation rather than an affiliated LLC. The suit was dismissed due to the corporation's lack of capacity, and (after various missed opportunities to cure) the LLC ended up being barred by res judicata from pursuing the complaint refiled in its name because the LLC was in privity with the corporation that filed the initial complaint. In finding privity, the court relied in part upon the failure of the LLC and the corporation to comply with the formalities necessary to maintain separate existences. The court commented that the LLC's own counsel was confused about which entity was his client.

**Crozier v. Gattoni**, 28 Conn. L. Rptr. 320, 2000 WL 1682616 (Conn. Super. Oct. 5, 2000) (holding that LLC member did not have standing to bring suit for breach of contract and other claims arising out of LLC's contract).

***Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group, Inc.***, 215 F.3d 677 (7<sup>th</sup> Cir. 2000). The plaintiff and seven other companies, including the defendant iPower Distribution Group, Inc. (iPower), formed an LLC to develop an integrated marketing and distribution consortium using iPower software. Once the LLC was formed, it entered a franchise agreement with iPower to allow the LLC to purchase, install, and use the iPower software. The franchise agreement contained an arbitration clause, but the LLC agreement did not. When the plaintiff later sued iPower alleging that iPower had made material misrepresentations to induce the plaintiff to join the LLC, iPower argued that the claim was subject to the arbitration clause in the franchise agreement. The court acknowledged that an LLC cannot bind its members or subject them to liability through contracts between the LLC and third parties but said that this principle did not resolve the case. The court explained that the plaintiff was like a corporate shareholder who would not have standing to sue or enforce a contract of the corporation; however, the court went on to address the possibility that the plaintiff was a third party beneficiary of the franchise agreement. The court did not have to resolve this issue because it determined that the injuries alleged did not arise under or relate to the franchise agreement. The alleged fraud related to the inducement of the plaintiff to join the LLC by entering the LLC agreement, and the arbitration provision in the franchise agreement did not affect disputes arising out of the LLC agreement.

***Roger Boc, L.L.C. v. Weigel, RTG, Inc.***, 744 So.2d 731 (La. App. 1999). Four individuals purchased some realty and one week later transferred ownership of the property to an LLC wholly owned by them. Later, the individuals and the LLC filed suit to rescind the purchase based upon fraudulent misrepresentations made during negotiations for the purchase of the property. The defendants argued that the individuals had no right to rescission because they transferred the property to the LLC. The court concluded that the individuals, but not the LLC, could maintain the action for fraud. According to the court, the legal effect of the fraud was to vitiate the formation of the contract of sale, and the domino effect rendered the transfer to the LLC a nullity. As for the LLC's standing, the court noted that the LLC was a "separate and distinct legal entity" that did not participate in the negotiations with the defendants leading to the sale of the property. Only the individual plaintiffs contracted with the defendants; the LLC, a legal entity that they owned, acquired the property by subsequent transfer. Thus, the court concluded the right of action arising out of the fraud was personal to the individuals.

***Park Place Entertainment v. Simmons***, No. Civ.A. 99-595, 1999 WL 1049828 (E.D. La. Nov. 18, 1999). In this declaratory judgment action over a consulting agreement and an LLC operating agreement, the court held that a justiciable controversy did not exist and that, even if it did, the plaintiff would not have standing to bring the suit because the plaintiff was not a party to either agreement.

***Ark Entertainment, L.L.C. v. C.J. Gayfer & Co., Inc.***, No. CIV.A. 99-1929, 1999 WL 717631 (E.D. La. Sept. 14, 1999). An LLC and its two members filed suit alleging breach of a lease agreement. The court held that the members were not parties to the lease agreement and thus could not recover individually. The members' names appeared on the lease only on the signature page where they signed on behalf of the LLC, and they acknowledged that they negotiated the lease on behalf of the LLC. The court rejected the members' argument that they were entitled to recover individually on a detrimental reliance theory.

***Midland Food Services, LLC v. Castle Holdings V, LLC***, 792 A.2d 920 (Del. Ch. 1999). Several LLCs sued their previous member and principal operating officer for breach of the fiduciary duties of care and loyalty, alleging that the member caused the LLC to enter leases on commercially unreasonable terms so as to advantage the member and other entities owned by him. Ownership of the LLCs had been transferred by the original member to certain creditors after the LLCs got into financial difficulty. The court held that the *Bangor Punta* doctrine barred the claims since the current owner of the LLCs acquired the LLCs after the alleged wrongdoing occurred. As explained by the court, "[t]he *Bangor Punta* doctrine ensures that a purchaser who obtains a controlling interest in a corporation after potential claims arose against those persons from whom the purchaser obtained his shares cannot use his control of the corporate machinery to cause the corporation to assert those claims directly." The purpose of the doctrine, according to the court, is to prevent persons from being able to re-trade arms-length transactions by using the corporation to sue the parties from whom they obtained their shares. The court found the doctrine applicable in this case. In a footnote, the court expressed doubt that the prior member could breach fiduciary duties owed to companies he wholly owned.

***Matter of Roller***, 689 N.Y.S.2d 897 (N.Y. A.D. 4<sup>th</sup> Dept. 1999). The court stated that the petitioners owned membership interests in the LLCs that were the subject of a proceeding for judicial dissolution, thus they had standing to bring the proceeding under New York law.

**McConnell v. Hunt Sport Enterprises**, 725 N.E.2d 1193 (Ohio App. 1999)(finding member's breach of operating agreement by unilaterally bringing suit on behalf of LLC without requisite member approval was willful misconduct).

**Cowboy Mouth L.L.C. v. Monkey Hill Productions, Inc.**, No. Civ. A. 98-2615, 1999 WL 35303 (E.D. La. Jan. 21, 1999). The court in this case ordered the plaintiffs to file a Second Amended Complaint to address certain deficiencies in their pleadings. The case involved a dispute over proceeds from the sale of albums, but the facts of the case apparently were far from clear from the pleadings. The court noted that members of an LLC had sued in their individual capacities notwithstanding the Louisiana statutory provision that a member of an LLC is not a proper party in a case by or against an LLC except when the object is to enforce rights against or liability to the LLC. The court stated that it was unclear how the individuals had a cause of action for breach of contract, and the court admonished the parties to make clear, with respect to each claim, which party asserts liability and upon what basis of law. Apparently, the LLC was a successor to an LLP which was a party to the contracts in issue, and the court also ordered the plaintiffs to provide a clear chronology of events, including how and when the LLP became an LLC.

**Walker v. Virtual Packaging, LLC**, 493 S.E.2d 551 (Ga. App. 1997). Members of an LLC sued the LLC and other members asking for dissolution and damages for breach of fiduciary duty and violation of a non-competition agreement. The parties entered a consent order dissolving the company and reserving the issues involving breach of fiduciary duty and breach of the non-competition agreement. The trial court rendered summary judgment in favor of the defendants. The court first determined that the trial court had erred in implicitly rendering summary judgment on the breach of fiduciary duty claims because the claims were not properly raised in the summary judgment motions. The court next determined that the LLC's claim for breach of the non-competition agreement was not assigned to the members in the consent order dissolving the LLC. While the court agreed with the trial court that the members were not third party beneficiaries of the non-competition agreement, the court found that the members had standing to sue on the agreement because they were parties individually to the contract. Finally, the court found that the trial court had erred in ruling on the issue of whether the breach of non-competition agreement claim was derivative in nature because the parties had not had a full opportunity to be heard on the issue.

**JM Avalon Investments, LLC v. Nischan**, No. CV 960330010, 1997 WL 133939 (Conn. Super. March 7, 1997). JM Avalon Investments, LLC and one of its members, Gaspero, sued Nischan, the other member of the LLC, and her husband for conversion, fraud, negligence, breach of contract, and unjust enrichment. Nischan sought to have the case dismissed on the basis that the LLC lacked standing to sue. Nischan argued first that the LLC was not authorized to bring the suit because Nischan, a fifty percent owner of the LLC, had not consented to the suit. The Connecticut LLC act provides that suit may be brought in the name of an LLC by any member or members who are authorized to sue by the vote of a majority in interest of the members. However, the court relied on another provision of the act that states that the vote of any member who has an interest in the outcome of the suit that is adverse to the LLC shall be excluded. Since the suit alleged wrongdoing by Nischan, the court determined that the remaining member, Gaspero, had authority to bring the suit in the name of the LLC without the vote of Nischan. Nischan next argued that her resignation as a member of the LLC dissolved the LLC and left it without standing to sue. The court relied on various provisions of the LLC act in concluding that the remaining member, Gaspero, had authority to wind up the LLC, which included bringing suit on its behalf.

**Taurus Advisory Group, Inc. v. Sector Management, Inc.**, No. CV 960150830, 1996 WL 502187 (Conn. Super. Aug. 29, 1996). The plaintiffs, Taurus Advisory Group, Inc. ("TAG") and Taurus Advisory Group, LLC ("Taurus LLC"), sued several parties for breach of contract, negligent misrepresentation, breach of the duty of good faith and fiduciary relationship, and other claims arising from an agreement among TAG and the defendants to form Taurus LLC. The defendants sought dismissal of the case on the grounds that the complaint asserted derivative claims that TAG attempted to bring individually and that TAG lacked the authority to commence an action in the name of Taurus LLC. The court first noted that Delaware law applied since the LLC was formed under Delaware law (citing Restatement (Second) of Conflict of Laws § 302). The court then accepted the parties' analogy of an LLC to a corporation, finding members to be similar to stockholders. The court accepted this analogy based on case law analogizing limited partners in a limited partnership (which the court referred to as a limited liability partnership) to corporate shareholders. The court determined that TAG's claims relating to the defendants' failure to make agreed contributions of capital and services alleged a direct injury and TAG could bring the suit on its own behalf. The court further decided that the complaint did not state an individual cause of action in favor of TAG for breach of fiduciary relationship because the only articulated harm was to the LLC (which the court mistakenly referred to at that point as a corporation), and because the complaint

did not set out a relationship comparable to that involving a majority shareholder's duties toward the minority shareholders since the capital contributions were in equal amounts. Subsequent related decisions appear at 1997 WL 241153, 1998 WL 381883 and 1998 WL 199353.

### **G. Derivative Suits**

*Heer v. Price*, No. 1:06CV-114-R, 2007 WL 1100693 (W.D. Ky. April 11, 2007) (holding that North Carolina LLC Act did not preclude court from asserting jurisdiction of action brought by member of North Carolina LLC against manager of LLC for fraud and breach of fiduciary duty regardless of whether suit was characterized as direct or derivative suit).

*Rizzo v. Joseph Rizzo and Sons Construction Company, Inc.*, No. Civ.A. 2551-VCS, 2007 WL 1114079 (Del. Ch. April 10, 2007) (holding ejection claim becomes creature of equity when brought derivatively, and court had jurisdiction to hear LLC member's ejection claim where it was brought derivatively on behalf of LLC, rested on alleged breach of fiduciary duty, and was ancillary to remainder of plaintiff's claims, all of which sounded in equity).

*Bischoff v. Boar's Head Provisions Co., Inc.*, 834 N.Y.S.2d 22 (N.Y. A.D. 1 Dept. 2007) (holding that LLC member retains common law right to bring derivative suit on behalf of LLC and thus rejecting assertion that plaintiff lacked standing to assert derivative claim on behalf of LLC).

*Kasten v. MOA Investments, LLC*, Nos. 2006AP386, 2006AP1405, 2006 AP1510, 2007 WL 677804 (Wis. App. March 7, 2007). A minority member of an LLC brought suit individually and on behalf of the LLC asserting that the corporate member holding the largest interest in the LLC and the corporate member's shareholders breached fiduciary duties and acted unfairly in transferring assets and business opportunities away from the LLC. The court held that the plaintiff member was disqualified from asserting claims on behalf of the LLC because the suit was not authorized by a vote of the members. The court found that the plaintiff member was disqualified from voting because she sought judicial dissolution and thus had an interest in the outcome of the suit that was adverse to the interests of the LLC. The court concluded that the corporate primary injury rule applies to LLCs and that the member's claims alleging diversion of the LLC's assets, inappropriate payments of LLC funds, and diversion of business opportunities were derivative claims that she was not authorized to bring. The plaintiff's individual claims that she was improperly denied voting rights were without merit because the LLC's manager or a supermajority of members controlled the LLC and the plaintiff was not damaged by any lost opportunity to vote. The court stated that a claim for minority oppression is not itself a cause of action but merely a standard for judicial dissolution, and the plaintiff's claim for judicial dissolution was abandoned by repeated assertions in the lower court that the plaintiff did not want to dissolve the LLC. The court upheld amendments to the operating agreement permitting members with a financial interest in the outcome of a pending action to vote to dismiss, requiring members asserting or maintaining a derivative action without approval to indemnify the LLC, and imposing a one year limitation on claims asserted by a member against the LLC or other members. The court found the consent resolution adopting the amendments was valid because it was adopted by a supermajority of members and it was not unfair for the LLC or its members to take action to preserve its business against a complaint for dissolution, particularly when the plaintiff's derivative claims were not properly authorized.

*Southwest Health and Wellness, L.L.C. v. Work*, 282 Ga.App. 619 (Ga. App. 2006) (holding minority members' claims for breach of operating agreement and breach of fiduciary duty must be brought derivatively because plaintiffs failed to allege separate and distinct injury and exception permitting direct action in context of closely held LLC was not satisfied because all shareholders were not parties).

*Brownstone Investment Group, LLC v. Levey*, 468 F.Supp.2d 654 (S.D. N.Y. 2007) (dismissing claim for aiding and abetting fiduciary duty because plaintiff's injury was not direct and claim must be brought by LLC or derivatively).

*Garfield v. Suntrust Bank*, 477 F.Supp.2d 1181 (S.D. Fla. 2006) (noting that, under either Florida or Nevada law, only LLC members may sue derivatively on behalf of an LLC).

*In re Wells (Andrews v. Wells)*, \_\_ B.R. \_\_, 2006 WL 4526426 (Bankr. M.D. La. 2006) (holding that member of LLC who contributed all of LLC's capital had standing to sue managing member who depleted capital because

member who contributed capital suffered loss and requiring member to sue on behalf of defunct LLC would exalt form over substance).

*Oviedo v. Grace*, No. B188018, 2007 WL 316519 (Cal. App. 2 Dist. Feb. 5, 2007) (applying arbitration clause in LLC operating agreement to LLC derivative action notwithstanding LLC did not sign agreement).

*Tzolis v. Wolff*, 829 N.Y.S.2d 488 (N.Y. A.D. 1 Dept. 2007). Creating a split in the New York state courts, the court held that New York law permits an LLC member to sue derivatively on behalf of the LLC notwithstanding the absence of language authorizing derivative suits in the LLC statute. Declining to follow the contrary conclusion reached by the Second Department, the First Department based its decision on: (1) the historic recognition of a common law right to bring a derivative action on behalf of a limited partnership and corporation, both of which share many of the LLC's characteristics, (2) principles of statutory construction providing that only a clear statement of legislative intent may override the common law, (3) the fact that most states provide a statutory right to bring a derivative claim, and (4) the unpersuasive rationale of decisions rejecting derivative claims for LLC members.

*Pennacchio v. Powers*, No. 05-CV-0985 (JFB)(SMG), 2007 WL 446355 (E.D. N.Y. Feb. 5, 2007). The court disagreed with other federal district courts in New York and followed state court decisions holding that a member of an LLC may not bring a derivative claim on behalf of the LLC because of the absence of language in the New York LLC statute authorizing derivative suits. The court noted that the New York Court of Appeals has yet to address this issue, but that lower courts in New York had uniformly held that there is no right to bring a derivative action on behalf of an LLC. (The First Department's decision summarized above was issued three days after this decision). The court concluded that the non-binding lower court decisions should be given proper regard and that these decisions are the best indicator of how the New York Court of Appeals will decide the issue. The court acknowledged federal district court decisions recognizing the right to bring a derivative action on behalf of an LLC under New York law, but found the lower court decisions rejecting a right to sue derivatively to be fully supported by the plain language of the LLC statute and the deliberate rejection by the legislature of a provision authorizing such actions.

*Magten Asset Management Corporation v. Paul Hastings Janofsky & Walker*, No. Civ.A.04-1256-JJF, 2007 WL 129003 (D. Del. Jan. 12, 2007). A creditor asserted various derivative claims on behalf of a Montana LLC. The court concluded that the creditor did not have standing to bring the derivative claims because the Montana LLC statute only authorizes derivative claims brought by a member. Furthermore, the statute provides that the member bringing the derivative claim must have been a member at the time of the transaction in issue. The court stated that the creditor had not demonstrated that it was a creditor at the time of the transaction in issue; therefore, even if it could bring the claim as a creditor, it did not satisfy the contemporaneous ownership requirement of the LLC statute.

*Mastromatteo v. Mastromatteo*, 21 Mass.L.Rptr. 705, 2006 WL 3759512 (Mass. Super. Nov. 28, 2006) (finding that Rule 23.1 applied to closely held LLC and dismissing declaratory judgment, conversion, and breach of contract claims brought by LLC member because member was required to pursue claims derivatively and failed to comply with procedural requirements applicable to derivative action, but concluding that dismissal of LLC member's direct claim for breach of fiduciary duty and accounting was inappropriate).

*Shamrock Holdings v. Arenson*, 456 F.Supp.2d 59 (D. Del. 2006) (concluding that minority members of LLC could bring direct action arising out of sale of LLC's assets against controlling member and others where LLC was effectively dissolved and there was no entity to whom recovery could be paid).

*Caprer v. Nussbaum*, 825 N.Y.S.2d 55 (N.Y. Sup. 2006) (commenting that LLCs appear to be sole exception to judicial recognition of authority to bring derivative suit under New York law and noting provision permitting derivative actions in LLC context was deleted by Legislature, whereas no such legislative history indicated intent by Legislature to withhold capacity to bring derivative action from condominium owners).

*Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844-N, 2006 WL 3927242 (Del. Ch. Oct. 16, 2006). A 5% member of an LLC brought direct and derivative claims arising out of the sale of the LLC's assets. The LLC was a non-wholly owned subsidiary, and the plaintiff (who was chief legal counsel for the parent of the LLC) and several other individuals owned membership interests they had received in exchange for their work in organizing the LLC. The transaction giving rise to the suit was a multi-billion dollar sale of the vodka business of the parent and its three subsidiaries. The LLC's operating agreement required unanimous consent of the members for any sale of all or

substantially all of the LLC's business or assets, and the plaintiff claimed that his consent was coerced. The plaintiff also claimed that the defendant members and managers breached their fiduciary duty in approving of the allocation of most of the proceeds of the transaction to the parent. The court applied the demand futility test developed in the corporate context in *Aronson v. Lewis* and determined that the plaintiff's pleadings were sufficient to establish that demand on the managers of the LLC was excused. Specifically, the court found that the plaintiff's complaint contained particularized facts creating a reasonable doubt as to the disinterestedness and independence of the managers and as to whether the transaction was the product of a valid exercise of business judgment. The court also rejected the defendants' challenge to the adequacy of the plaintiff's derivative representation. The court found that the plaintiff's role as legal counsel for the parent did not disqualify him from serving as a derivative plaintiff in this case, and the court concluded that the plaintiff could be an adequate representative even if the other 95% of the ownership interests did not support the lawsuit because the plaintiff might be the only member disadvantaged by the low allocation to the LLC. The court declined to dismiss the plaintiff's derivative claim for breach of fiduciary duty, and found that the plaintiff could pursue direct claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing. The court dismissed the plaintiff's derivative claim for unjust enrichment because the complaint alleged an express, enforceable contract (the operating agreement) that controlled the parties' relationship. The court also dismissed the plaintiff's tortious interference claim because the defendants were parties to the contract (the operating agreement) with which they allegedly interfered.

***Marsh v. Billington Farms, LLC***, No. 04-3123, 2006 WL 2555911 (R.I. Super. Aug. 31, 2006) (relying upon Delaware case law to conclude that breach of fiduciary duty claim was derivative in nature, but adopting the American Law Institute rule allowing court to treat derivative action as direct action in context of closely held corporation and finding claim was thus properly alleged as direct cause of action).

***Finkelstein v. Warner Music Group Inc.***, 820 N.Y.S.2d 264 (N.Y. A.D. 1 Dept. 2006) (stating Delaware law governs question of whether claims asserted on behalf of Delaware LLC are derivative).

***Kira, Inc. v. All Star Maintenance***, No. A-03-CA-950 LY, 2006 WL 2193006 (W.D. Tex. July 31, 2006) (holding defendant members were judicially estopped from asserting that plaintiff member could not establish direct damage because defendant members previously convinced court to dismiss numerous derivative claims by arguing that plaintiffs' direct and derivative claims overlapped, that LLC had no interest in lawsuit, and that any damages would flow directly to members).

***Morgan Howard (United States), LLC v. Lewis***, No. FSTCV054006343S, 2006 WL 2348892 (Conn. Super. July 14, 2006) (stating Delaware law governs rights of member of Delaware LLC but Connecticut law governs standing, and concluding member lacked standing to bring claims as direct claims under either Connecticut or Delaware law).

***Trident-Brambleton, L.L.C. v. PPR No. 1, L.L.C.***, No. 1:05cv1423, 2006 WL 1880986 (E.D. Va. July 5, 2006). A minority member of a Michigan LLC alleged that the LLC's managing member breached various common law, statutory, and contractual duties and obligations by selling the LLC's options to buy adjacent properties to an affiliate for less than fair market value. The managing member sought summary judgment on the ground that the minority member lacked standing to raise the claims. The court agreed with the managing member's argument that the minority member's claims for breach of common law fiduciary duties and breach of a manager's statutory duties of good faith and due care were required to be brought derivatively under procedures that were not followed by the minority member, but found that the Michigan LLC statute clearly confers standing on an individual member to bring a cause of action for willfully unfair and oppressive conduct. The court also stated that the minority member had standing to bring claims that were based on breach of the operating agreement.

***At the Airport v. ISATA, LLC***, 438 F.Supp.2d 55 (E.D. N.Y. 2006) (concluding plaintiff member of LLC had failed to allege direct injury sufficient for standing under RICO; permitting leave to file amended complaint in form of derivative action, but refraining from determining availability of derivative action under New York law).

***Bischoff v. Boar's Head Provisions Co., Inc.***, 436 F.Supp.2d 626 (S.D. N.Y. 2006). The principal issue in this case was whether a member of a New York LLC may bring a derivative action on behalf of the LLC. The New York LLC statute is silent regarding derivative actions, and the federal district court for the Southern District of New York, relying on an opinion of the federal district court for the Eastern District, had previously held that the silence of the statute did not preclude recognition of a common law right to sue derivatively. Subsequently, several New York state

courts (three trial courts and one appellate court) concluded that derivative actions are not permitted under state law in the LLC context. The court in this case reviewed and discussed the various available resources on the issue (the common law, the text and history of the New York LLC statute, similarities between LLCs and other corporate forms, federal cases construing state law, and state court decisions) and held that a member of a New York LLC may bring a derivative suit on behalf of the LLC. The court remanded the case to state court because the citizenship of an LLC is determined by that of each of its members, and diversity jurisdiction was lacking since the LLC was a defendant that shared its citizenship with the plaintiff member.

***Purcell v. Southern Hills Investments, LLC***, 847 N.E.2d 991 (Ind. App. 2006). One of the members of a two-member Indiana LLC sued the manager appointed by the other member for breach of fiduciary duty and acts of self-dealing. After a bench trial, the trial court issued findings and entered a judgment for damages against the manager. The court of appeals held that “common law fiduciary duties, similar to the ones imposed on partnerships and corporations, are applicable to Indiana LLCs,” and found that the evidence supported the trial court’s findings. The court also rejected the manager’s claim that the plaintiff member did not have standing to assert its claims in a direct action. The court discussed the distinction between a direct and a derivative claim and pointed out that Indiana case law in the closely held corporation context has recognized that shareholders in a close corporation may sometimes bring derivative claims in a direct action. The court ultimately concluded, however, that it need not investigate whether this type of exception was applicable because the court characterized the plaintiff member’s claim as a direct claim in its own name for breach of fiduciary duties owed to it as a member of the LLC rather than a derivative claim of corporate harm in the name of the LLC under the guise of direct harm. The court also concluded that the statutory language supported a direct claim based on willful misconduct and recklessness.

***ERA Franchise Systems, Inc. v. Mathis***, 931 So.2d 1278 (Miss. 2006) (concluding LLC member was pursuing direct rather than derivative action where member sought to exclude other member from sharing in any recovery).

***Alliance Associates, L.C. v. Alliance Shippers, Inc.***, No. 265101, 2006 WL 1506687 (Mich. App. June 1, 2006) (rejecting LLC member’s argument that demand was excused as futile where Michigan LLC statute did not provide for any futility exception, and dismissing suit brought by member in LLC’s name for failure to comply with demand requirement in LLC statute).

***Lakes Gas Co. v. Terminal Properties, Inc.***, No. 05-1266, 2006 WL 1229934 (Iowa App. April 26, 2006). A minority member of an Iowa LLC sought to intervene in a suit against the LLC and its largest member. The suit was brought to collect on a promissory note of the defendant member and to foreclose a security interest granted in the assets of the LLC to secure that member’s indebtedness under the note. The trial court granted the minority member’s motion to intervene, and the plaintiff appealed. The court of appeals found that the trial court did not err in permitting the intervention. The right of an LLC member to intervene in a proceeding to defend the interest of the LLC was a matter of first impression in Iowa, and the court looked to federal case law in the corporate context for guidance. The court noted that federal courts have found a shareholder’s interest insufficient to grant intervention when the interest was a purely economic or financial interest derivative of the corporation’s interest. The court found the reasoning of the federal cases consistent with Iowa’s law on shareholder derivative actions and applicable to the context of the case even though the case involved an LLC rather than a corporation and an intervention to defend the company’s interest rather than an action to assert a claim for an injury to the company. The court noted that the Iowa LLC statute provides for derivative actions by LLC members, and the court saw little distinction between a right to bring a claim on behalf of the company and a right to defend the company against the claim of another. Because the minority member alleged that it sought to protect the assets of the LLC and the value of the members’ interests (allegations which addressed an economic injury common to all members), the member lacked standing to intervene in its individual capacity under the reasoning of the federal intervention case law. The court concluded, however, that the member was entitled to intervene in its own right under the unique circumstances of the case. The court observed that there was a split of authority regarding the right of a shareholder in a closely held corporation to bring an action in the shareholder’s individual capacity when the claim belongs to the corporation. The court discussed the American Law Institute’s discretionary approach and found it consistent with Iowa policy on shareholder derivative suits. The court determined that permitting the minority member to intervene in defense of the LLC advanced the policy concerns underlying the rule on derivative actions. Because the LLC was closely held and the remaining members were working, either actively or passively, against the LLC’s interests, the court found the intervening minority member’s interest sufficient to intervene.



***Sotomayor v. Medifast, Inc.***, 814 N.Y.S.2d 103 (N.Y. A.D. 1 Dept. 2006) (dismissing derivative claims asserted on behalf of Delaware LLC not authorized to do business in New York and no longer in existence and good standing in Delaware).

***Bhana v. Patel***, No. Civ.A. 3:05-CV-585BS, 2006 WL 1050519 (S.D. Miss. April 20, 2006) (holding demand in derivative suit brought by one member against other member was excused as futile under Delaware law because reasonable doubt existed as to whether defendant member could be disinterested in deciding whether to pursue action against himself).

***Clockwork Home Services, Inc. v. Robinson***, 423 F.Supp.2d 984 (E.D. Mo. 2006) (concluding majority member's breach of fiduciary duty and fraudulent concealment claims did not involve direct individual injury and must be brought derivatively).

***Lourdes Medical Pavilion, LLC v. Catholic Healthcare Partners, Inc.***, No. Civ.A. 5:03CV231M, 2006 WL 753080 (W.D. Ky. March 22, 2006). The court found that an LLC member was not permitted to bring a derivative suit on behalf of the LLC under the derivative suit provisions of the Kentucky LLC act. The court pointed out that the derivative suit provisions of the Kentucky LLC statute may be varied in a written operating agreement, and the court concluded that the statutory provisions were overridden by the provisions of the LLC operating agreement requiring "any act" of the LLC to be authorized by a majority vote of the board of directors. The court, however, refused to dismiss the case even though it found it was not authorized, relying on a provision of the Kentucky LLC statute stating that lack of authority of a member or manager to file suit on behalf of an LLC may not be used as a defense to an action filed by the LLC.

***First Taunton Financial Corp. v. Arlington Land Acquisition-99, LLC***, No. 034449BLS, 2006 WL 696689 (Mass. Super. Feb. 27, 2006) (concluding that derivative actions are permitted in LLC context because Rule 23.1 suggests broader scope than corporations and nothing in Massachusetts LLC statute precludes derivative actions absent contrary provision in operating agreement, and member thus should have complied with Rule 23.1 and proceeded derivatively on behalf of LLC rather than directly on its own behalf in asserting claims for mismanagement and financial improprieties).

***Lio v. Zhong***, 10 Misc.3d 1068(A), No. 600455/05, 2006 WL 37044 (N.Y. Sup. Jan. 6, 2006) (holding omission of derivative suit provisions from New York LLC was deliberate and precludes member derivative suits).

***Foster-Thompson, LLC v. Thompson***, No. 8:04-CV-2128T30EAJ, 2005 WL 3093510 (M.D. Fla. Nov. 18, 2005) (dismissing member's claim against other members for conversion and breach of fiduciary duty because claims sought recovery for LLC and thus had to be brought as derivative claims).

***Blanton v. Prins***, 938 So.2d 847 (Miss. App. 2005) (affirming trial court's conclusion that plaintiff had no standing to assert derivative claim on behalf of LLC because plaintiff failed to make demand as required by Mississippi LLC statute).

***Ishimaru v. Fung***, No. Civ.A. 929, 2005 WL 2899680 (Del. Ch. Oct. 26, 2005). An LLC member sought to prosecute a derivative claim against an entity (Ivy Asset Management Corp. or "Ivy Asset") on the basis that the LLC's managing/majority member would not fairly consider whether to pursue the claim. Applying the same demand futility test that is applied in the corporate context, the court held that the plaintiff member was entitled to pursue the derivative claim because her complaint articulated particularized facts demonstrating that the managing member was incapable of disinterestedly determining whether to pursue the claim. The court rejected the managing member's claim that the LLC agreement precluded the derivative plaintiff's claim. Neither the authority conferred on the managing member to decide whether to sue nor the exculpation provisions, which permitted the managing member to consider his own interests in making certain decisions, precluded the plaintiff from pursuing the claim. The LLC agreement did not exculpate the managing member from fraud, gross negligence, willful misconduct, or intentional breach of the agreement, and the plaintiff alleged willful misconduct that was not exculpated (i.e., the managing member's attempt to use financial products developed for the LLC for his own benefit and sacrifice the interests of the LLC to secure concessions from Ivy Asset that would personally benefit him). The court commented by footnote that it considered the claim a double derivative claim since the LLC was a member of a joint venture that suffered the direct injury, but noted that the other joint venture member would block the joint venture from pressing the claim and could not impartially decide whether

the joint venture should sue Ivy Asset. Ultimately, the court determined that the LLC's claim against Ivy Asset was subject to an arbitration clause in the joint venture agreement, and the court thus granted Ivy Asset's motion to dismiss.

*Wright v. Herman*, 230 F.R.D. 1 (D. D.C. 2005) (holding majority of statutory violations alleged by LLC member constituted individual injuries rather than injuries to LLC, and nature of plaintiff's claims as direct versus derivative required factual development).

*Godfrey v. LaFavour*, No. J05-005 CV JWS, 2005 WL 2340714 (D. Alaska Sept. 16, 2005) (finding it premature to rule on summary judgment where it was unclear whether claims were alleged as direct or derivative claims).

*DDH Aviation, L.L.C. v. Holly*, No. Civ.A.3:02-CV-2598-P, 2005 WL 770595 (N.D. Tex. March 31, 2005). DDH Aviation, L.L.C. ("DDH") brought suit against two individuals and several corporations for claims arising primarily out of the individuals' alleged wrongdoing as DDH employees. DDH brought suit as "DDH Aviation, L.L.C., f/k/a DDH, Inc.," and the opinion states that DDH was initially "formed as a corporation but later altered its business form to become a limited liability company." The court does not indicate when the change in form took place or what events took place while DDH was a corporation versus an LLC. At one point in the opinion, the court identifies DDH as a "limited liability corporation." The defendants filed counterclaims against DDH as well as third party claims against another entity and several individuals affiliated with DDH. The claims asserted in the third party complaint revolved around the alleged pillaging of DDH by a wealthy businessman who supplied the capital to form DDH and served as its chairman of the board. The standing of the third party plaintiffs was challenged on the basis that the claims were really derivative claims and that the demand requirement had not been met. The court observed that the nature of the claims and styling of the third party action strongly suggested that some portion of the claims were derivative. Many of the claims, most notably those for breach of fiduciary duty, involved duties owed to DDH rather than the third party plaintiffs, and the third party complaint was entitled "DDH Aviation, L.L.C. f/k/a DDH Aviation, Inc.'s Supplemental Complaint Against Darwin Deason, Dennis Debo, Star Chen, William Deckelman, Jr. and ACS, Inc." The third party plaintiffs characterized the claims as direct based on DDH's status as a closely held corporation under the derivative suit provisions of the Texas Business Corporation Act, but the court stated that the third party plaintiffs clearly appeared to be pursuing their claims in a derivative fashion. Though the Texas Business Corporation Act states that "a derivative proceeding brought by a shareholder of a closely held corporation *may be treated* by a court *as a direct action* brought by a shareholder for his own benefit," the court stated that the statute does not mean the action is no longer a derivative proceeding. Having determined that the claims were derivative, the court turned to the question of whether DDH was a closely held corporation such that the statute exempted the third party plaintiffs from the usual demand requirement. For purposes of the derivative suit provisions of the Texas Business Corporation Act, a corporation is a closely held corporation if it has less than 35 shareholders and has no shares listed on a national securities exchange or regularly quoted in an over-the-counter market. The third party plaintiffs claimed that DDH was closely held in their briefing but did not allege it in their pleadings. The court thus dismissed the derivative claims but gave the third party plaintiffs leave to amend their complaint. (The court applied the derivative suit provisions of the Texas Business Corporation Act without discussing their applicability to an LLC, DDH's entity type at the time of the suit. Under the Texas Limited Liability Company Act, the derivative suit provisions of the Texas Business Corporation Act are, in fact, applicable to LLCs.)

*Solutia Inc. v. FMC Corp.*, No. 04 Civ. 2842(WHP), 2005 WL 711971 (S.D. N.Y. March 29, 2005) (relying on rules from corporate context to analyze whether member of Delaware "joint venture" LLC had standing to sue other member and concluding member's tort claims alleged harm distinct from any harm to LLC and implicated independent duty owed by other member, but concluding member lacked standing to bring certain claims against other member for breach of provisions of joint venture agreement and assignment and transfer agreement).

*Stoker v. Bellemeade, LLC*, 615 S.E.2d 1 (Ga. App. 2005) (concluding LLC members had standing to bring breach of fiduciary duty claims against other members as direct actions, relying on cases involving closely held corporations, and dismissing counterclaims asserted in LLC name since counterclaims were not authorized by requisite majority vote of members and could only be asserted as derivative claims or, if permitted by special circumstances, in direct action by member).

*Denevi v. Green Valley Corp.*, Nos. H024089, H024374, H024292, H025206, H024293, 2005 WL 236386 (Cal. App. 6 Dist. Jan. 21, 2005) (stating principles of derivative lawsuits applicable to corporations apply to LLCs).

**Gottier's Furniture, LLC v. LaPointe**, No. CV040084606, 2004 WL 3130541 (Conn. Super. Dec. 21, 2004). A member of a three-member LLC sued one of the other members for breach of fiduciary duty arguing he had standing individually or acting on behalf of the LLC in a derivative action. The court relied upon corporate case law holding that individual shareholders of a corporation ordinarily cannot sue the officers for damages based on mismanagement because the injury is to the corporation rather than individual shareholders. The court found the allegations supported only an action by the LLC, not the member acting individually. With respect to the derivative claim, the court concluded the member did not fairly and adequately represent the interests of the other members because there were only three members, and the other non-defendant member did not vote to authorize the plaintiff to bring suit against the defendant member and stated she had no reason to believe the defendant stole funds from the LLC as alleged. Finally, the court rejected the plaintiff's claim that he was authorized to sue on behalf of the LLC based on a meeting at which the members voted to hire an attorney and investigate an action. Assuming such action constituted authority to commence suit, it was later rescinded when the other two members voted not to retain an attorney or take action. The court suggested the plaintiff was not without recourse, as he could pursue judicial winding up of the LLC.

**Ayres v. AG Processing Inc.**, 345 F.Supp.2d 1200 (D. Kan. 2004). The plaintiffs, minority members and former managers of a Nebraska LLC, brought this action against the majority member and three managers. The plaintiffs sought damages for various claims, including breach of fiduciary duty and minority oppression. The court determined that these claims involved "internal affairs" and were governed by Nebraska law because the Kansas LLC statute provides that the laws of the state of organization govern the internal affairs of a foreign LLC and the liability of its members and managers. The court then determined that the claims could be brought directly under Nebraska law because the plaintiffs alleged that they had been damaged in their individual capacities by the termination of their status as employees, managers, and members of the LLC and the defendants' failure to pay equity bonuses to which the plaintiffs claimed they were entitled. The court discussed Nebraska law regarding corporations and noted that the law does not permit a corporate shareholder to bring an action in his or her own name to recover for wrongs to the corporation even in the case of a closely held corporation. The court stated that it was not convinced that this rule should apply in the case of an LLC, but declined to speculate on the issue because the plaintiffs were permitted to sue in their own names even if Nebraska's corporate rule applied based on the exception permitting direct claims where a shareholder alleges injury that is separate and distinct from that of other shareholders and the corporation.

**General Technology Applications, Inc. v. Exro Ltda**, 388 F.3d 114 (4th Cir. 2004). The claims asserted by a member of a Virginia LLC were derivative because they were based on a patent license allegedly held by the LLC. An LLC has a separate legal existence from its members, and it was the LLC's property that gave rise to the claim. The court stated that Virginia strictly adheres to the derivative claim rule, citing a Virginia case in which the court refused to create an exception for direct claims in cases of closely held corporations. The member therefore had no standing to assert the LLC's claim for money recovered by the other member in connection with infringement of the patent. The "wrinkle" in the case was that the LLC's certificate of organization had been cancelled by the state for failure to pay its annual registration fee. Once the certificate was cancelled, the LLC was automatically dissolved and obligated to wind up. Under the Virginia LLC act, when the certificate of a manager-managed LLC is cancelled, the property and affairs of the LLC automatically pass to the managers as liquidating trustees. Thus, the member was still without standing to pursue the claim. The court said that a derivative action was not necessarily barred during the post-dissolution winding up process, but the legal rights were not the member's to assert individually.

**Vertical Computer Systems, Inc. v. Ross Systems, Inc.**, 784 N.Y.S.2d 499 (N.Y. A.D. 1 Dept. 2004) (applying Delaware law and holding LLC member could maintain derivative action to enforce LLC's rights under purchase agreement, although consent of 75% of members to commence litigation was not obtained as required under LLC agreement, because complaint detailed the impropriety of minority member's refusal to give consent and the futility of further demands).

**Hoffman v. Unterberg**, 780 N.Y.S.2d 617 (N.Y. A.D. 2 Dept. 2004) (dismissing plaintiff's claim for diversion and misappropriation of LLC funds because the New York LLC act does not include provisions conferring an LLC member the right to bring a derivative action). See also **Hoffman v. Unterberg**, 780 N.Y.S.2d 620 (N.Y. A.D. 2 Dept. 2004).

**Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.**, 845 A.2d 121 (Del.Ch. 2004) (treating claims based on allegedly improper distributions as derivative based on facts in pleadings indicating

demand was excused, but stating claims that survived Rule 12(b)(6) motion should be pled again in proper form as derivative claims with formal allegation of demand futility).

*Albers v. Guthy-Renker Corp.*, 92 Fed.Appx. 497 (9th Cir. 2004) (applying Texas law and holding that members of Texas LLC did not have standing in their individual capacities to sue for injuries to LLC, that LLC did not have capacity to sue in California because it was a foreign LLC transacting business in California and was not registered to do so, and that members must first make demand under Texas law before bringing derivative action on behalf of LLC).

*Denevi v. Los Gatos Country Club*, No. H025401, 2004 WL 363313 (Cal. App. Feb. 27, 2004). The plaintiffs had previously sued derivatively on behalf of their LLC and were awarded judgment in that action. They then sought to recover on individual claims. The court stated that maintenance of a derivative action is not in the abstract inconsistent with maintenance of an individual action, but concluded that the injury from the derivative action and individual action in this case were the same. Thus, the prior judgment in the derivative action precluded recovery in the individual action.

*Schindler v. Niche Media Holdings, LLC*, 772 N.Y.S.2d 781 (N.Y.Sup. 2003). A minority member of a New York LLC filed suit asserting various “personal” and “derivative” claims and asking for injunctive relief. The court concluded that the New York LLC statute does not permit derivative actions because it does not contain any provision authorizing such actions.

*Glod v. Baker*, 851 So.2d 1255 (La.App. 2003) (dismissing various claims asserted by individual members of LLCs because claims belonged to LLCs and members had no right to bring the claims in a direct action).

*Mills v. Baugher*, No. 21528-8-III, 2003 WL 21761817 (Wash.App. July 31, 2003) (finding allegation that defendant member holds the majority of the LLC membership interests and would not allow LLC to pursue the action against the defendant member was sufficient to meet the statutory requirement that a derivative plaintiff plead the reasons for not making a demand, and concluding that it is not always necessary to name the LLC as a party in a derivative action enforcing the LLC’s rights).

*Leshine v. Goodrich*, No. CV010448323, 2003 WL 21235483 (Conn.Super. May 15, 2003). Two members of an LLC sued the LLC’s chairman for breach of fiduciary duty, and the chairman argued that the plaintiffs did not have standing because the claims were derivative in nature. The court found that the allegations, construed liberally in favor of the plaintiffs, alleged personal, rather than derivative, injuries. The court found that the facts alleged in the complaint alleged a scheme to strip the plaintiffs of their personal interests and rights, apart from the rights of the LLC. The complaint alleged that the chairman caused the LLC to purport to terminate various LLC agreements to which the plaintiffs were parties, improperly purported to terminate for cause one of the plaintiffs as president, improperly purported to terminate a license agreement that was to be the LLC’s core asset, embarked on a business venture with a third party to use the LLC’s product and related information and trade secrets, and schemed “to take complete control of [the LLC] and strip [the plaintiffs] of their contract and common-law rights in and to [the LLC], its governance and its income, its assets, its business opportunities and its business operations.”

*VGS, Inc. v. Castiel*, No. C.A. 17995, 2003 WL 723285 (Del.Ch. Feb. 28, 2003) (stating that case law governing corporate derivative suits is equally applicable to LLCs and concluding that breach of fiduciary duty claims (based on waste, mismanagement, and self-dealing) failed because they were derivative in nature and no demand had been made on LLC’s board nor had plaintiff demonstrated futility of demand).

*Sumlin Construction Co., L.L.C. v. Taylor*, 850 So.2d 303 (Ala. 2002) (holding that plaintiff, who was divested of member status by virtue of prior bankruptcy, did not have standing to bring derivative suit on behalf of LLC).

*Excimer Associates, Inc. v. LCA Vision, Inc.*, 292 F.3d 134 (2d Cir. 2002) (granting opportunity to amend to plead claims of direct injury with greater particularity where complaint could be construed to indicate existence of direct claim by LLC member based upon direct injury incurred as a result of additional contributions required after breach of operating agreement by other member).

*McLeod v. Albanese*, 815 So.2d 472 (Miss. App. 2002) (noting that statute determining who is proper plaintiff in LLC derivative suit requires that plaintiff be member at the time of the act or omission complained of (thus termination of member’s membership by subsequent bankruptcy would not deprive member of standing to pursue derivative claim)

and that fair and adequate representation requirement would likely be satisfied if all remaining members are alleged wrongdoers).

***Giuliano v. Pastina***, 793 A.2d 1035 (R.I. 2002) (dismissing plaintiff's claims that actions of defendant agent/employee of LLC damaged plaintiff's ownership interest in the LLC because such claims were derivative claims and plaintiff had not complied with procedural requirements for a derivative suit).

***McGee v. Best***, 106 S.W.3d 48 (Tenn.Ct.App. 2002) (dismissing fraud claim because the allegations stated a claim that was essentially derivative and the plaintiff thus did not have standing to pursue it individually).

***ME Corp., S.A. v. Cohen Brothers LLC***, 739 N.Y.S.2d 133 (N.Y. A.D. 1 Dept. 2002)(holding that whether LLC had been dissolved and liquidated was disputed and thus it was premature to dismiss causes of action brought directly by individual members that were derivative in nature on basis that LLC had not been dissolved prior to commencement of the action).

***Paclink Communications, Inc. v. Superior Court***, 90 Cal. App. 4<sup>th</sup> 958, 109 Cal.Rptr.2d. 436 (Cal.App. 2 Dist. 2001). Three members of an eight-member LLC sued in their individual capacities alleging various causes of action arising out of the transfer of the LLC's assets without their knowledge or consent and for no consideration. The court held that the claims belonged to the LLC and that the plaintiffs lacked standing to bring the claims in their individual capacities because the gravamen of the complaint was injury to the LLC based upon the fraudulent transfer of the LLC's assets. Thus, the claims must be brought by the LLC or derivatively by the members.

***Halley v. Barnabe***, 24 P.3d 140 (Kan. 2001). In this consolidated appeal of three actions between two 50% members of an LLC, the Kansas Supreme Court held that the provisions of the new Kansas LLC act authorizing member derivative suits are procedural in nature and thus retroactive in effect such that they apply to litigation initiated prior to the effective date of the new act. The court noted the effective date provisions of the new Kansas LLC act, which took effect January 1, 2000, and provide that the new act is applicable to all LLCs whether formed before or after the effective date. The court also noted the Kansas Bar Association's commentary contrasting the effective date provisions of the new LLC act with the transition provisions of the Kansas Revised Uniform Partnership Act. Finding the provisions relating to derivative suits to be completely procedural in nature, the court concluded they applied to the actions pending in the three appealed cases. The court rejected the argument that the statutory provision in the old LLC act providing for limited liability of members and managers precludes derivative suits against members or managers. The court stated that the provision is not a shield from liability of a member or manager who commits actionable conduct against the LLC, but is a codification of the limited liability of managers and members for debts owed by the LLC. The court pointed out that the same limitation on liability was included in the new act along with the derivative suit provisions.

***Safety Technologies, L.C. v. Biotronix 2000, Inc.***, 136 F. Supp.2d 1169 (D. Kan. 2001) (finding that Kansas precedent precluding corporate shareholders from suing in their individual capacities where the harm is derivative would apply to LLCs).

***Harbor Hospital Services, Inc. v. GEM Laundry Services, L.L.C.***, Nos. 4830, 0207, 2001 WL 1808556 (Pa. Com. Pl. July 18, 2001)(stating that the court could treat as direct a derivative claim by the complaining member since they were the only two members of the LLC but concluding that the complaining member's principal was too far removed to bring a breach of fiduciary duty claim against the other member because the duty, if any, would be between the members of the LLC, not individual shareholders of the members).

***Carson v. Lynch Multimedia Corporation***, 123 F. Supp.2d 1254 (D. Kan. 2000). The court concluded that a minority member's breach of fiduciary duty claim against the majority member, managers, and individual who allegedly controlled the managers was derivative and that the complaint must therefore address the demand requirement under Federal Rule 23.1 The court found that futility of demand was adequately reflected in the complaint.

***Cabrini Development Council v. LCA Vision, Inc.***, 197 F.R.D. 90 (S.D. N.Y. 2000) judgment vacated, appeal dismissed, 292 F.3d 134 (2d Cir. 2002) (following *Weber v. King* (E.D. N.Y. 2000) and concluding that members of a New York LLC have a common law right to bring a derivative action and that the LLC is an indispensable party in such a suit).

*Weber v. King*, 110 F. Supp.2d 124 (E.D. N.Y. 2000). Two members of Kathleen’s Bake Shop, LLC sued the third member alleging various acts of past and ongoing breach of contract, unfair competition, and interference with the LLC’s business. The court concluded that the LLC was a necessary and indispensable party whose joinder was not feasible because it would destroy diversity jurisdiction. Additionally, the court recognized a common law right to bring a derivative action even though the New York LLC law does not include provisions expressly permitting derivative lawsuits. The court then concluded that many of the plaintiffs’ claims were more appropriately characterized as claims of the LLC that should be brought derivatively. In the course of its analysis, the court discussed the nature of an LLC as a separate entity and the analogies that should be made to partnerships and corporations.

*Walker v. Virtual Packaging, LLC*, 493 S.E.2d 551 (Ga. App. 1997) (finding that the trial court erred in ruling on the issue of whether a claim based on the breach of a non-competition agreement was derivative in nature because the parties had not had a full opportunity to be heard on the issue).

*Taurus Advisory Group, Inc. v. Sector Management, Inc.*, No. CV 960150830, 1996 WL 502187 (Conn. Super. Aug. 29, 1996). The plaintiffs, Taurus Advisory Group, Inc. (“TAG”) and Taurus Advisory Group, LLC (“Taurus LLC”), sued several parties for breach of contract, negligent misrepresentation, breach of the duty of good faith and fiduciary relationship, and other claims arising from an agreement among TAG and the defendants to form Taurus LLC. The defendants sought dismissal of the case on the grounds that the complaint asserted derivative claims that TAG attempted to bring individually and that TAG lacked the authority to commence an action in the name of Taurus LLC. The court first noted that Delaware law applied since the LLC was formed under Delaware law (citing Restatement (Second) of Conflict of Laws § 302). The court then accepted the parties’ analogy of an LLC to a corporation, finding members to be similar to stockholders. The court accepted this analogy based on case law analogizing limited partners in a limited partnership (which the court referred to as a limited liability partnership) to corporate shareholders. The court determined that TAG’s claims relating to the defendants’ failure to make agreed contributions of capital and services alleged a direct injury and TAG could bring the suit on its own behalf. The court further decided that the complaint did not state an individual cause of action in favor of TAG for breach of fiduciary relationship because the only articulated harm was to the LLC (which the court mistakenly referred to at that point as a corporation), and because the complaint did not set out a relationship comparable to that involving a majority shareholder’s duties toward the minority shareholders since the capital contributions were in equal amounts. Subsequent related decisions appear at 1997 WL 241153, 1998 WL 381883 and 1998 WL 199353.

#### **H. Indispensable Parties**

*NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417 (Del. Ch. 2007). The plaintiff, an indirect owner of a Delaware LLC, sued the LLC and one of its two members, seeking to enforce provisions of the LLC’s operating agreement as to which the plaintiff was an explicit third party beneficiary. The plaintiff sought specific performance of a provision requiring the defendant member to segregate funds when a dispute arose regarding the amount of certain payments and fees to various related entities. The defendants argued that these other entities were necessary parties because the requested relief might deprive them of funds to which they were due, but the court found that the non-parties would not be deprived of their rights to ultimately protect their interests in the segregated funds and thus were not necessary parties.

*Vertrue Inc. v. Meshkin*, 429 F.Supp.2d 479 (D. Conn. 2006) (holding LLC was not necessary party even though it might be joint tortfeasor with member and even though veil piercing relief was requested).

*Symes v. Harris*, No. Civ.A. 03CV02272RPM, 2005 WL 3358848 (D. Colo. Dec. 9. 2005) (holding LLC was indispensable party to action to determine its members).

*Wright v. Herman*, 230 F.R.D. 1 (D. D.C. 2005) (holding LLC was not indispensable party in suit by one member against other two members seeking damages for alleged injuries arising out of parties’ dealings as member of Virginia LLC).

*Trident-Allied Associates, LLC v. Cypress Creek Associates, LLC*, 317 F.Supp.2d 752 (E.D. Mich. 2004) (finding LLCs were indispensable parties and that citizenship of members destroyed diversity).

*Sykes v. Hengel*, 220 F.R.D.593 (S.D. Iowa 2004) (concluding LLC was not indispensable party in ex-employee's defamation case against LLC's managers, even though LLC might be obligated to indemnify managers, because LLC's interests were sufficiently identical to managers that managers could represent LLC's interests and there was no risk that LLC's absence might impair its interests).

*Holland v. Fahnestock & Co., Inc.*, 210 F.R.D. 487 (S.D. N.Y. 2002) (adopting magistrate's report (*see Holland v. Fahnestock & Co., Inc.*, No. 01CIV.2462RMBJP, 2002 WL 1774230 (S.D. N.Y. Aug. 2, 2002) finding that LLC was not indispensable party because its interest was adequately represented by defendant and LLC was no more than co-obligor and joint tortfeasor with respect to pre-organization contract assigned to LLC by defendant).

*Kennett v. The Carlyle Johnson Machine Co.*, No. CIV.A. 18690-NC, 2002 WL 1358755 (Del. Ch. June 17, 2002). One of two founding members of an LLC alleged that the other member unilaterally caused membership interests to be transferred to two individuals, reducing the interests of the founding members and adding the two individuals as new members, without the approval required under the operating agreement. The plaintiff also complained of modifications of his employment relationship with the LLC. The court determined that the individuals to whom the membership interests were transferred, who were residents of Connecticut without any connection to Delaware other than their disputed ownership in a Delaware LLC, were necessary and indispensable parties with respect to the issue of their ownership in the LLC. The parties did not dispute the court's lack of personal jurisdiction over these parties. Most of the issues in the suit were dependent, directly or indirectly, on resolution of the dispute regarding ownership, and the court dismissed the claims involving these issues. The remaining two claims that did not turn on resolution of the ownership dispute were dismissed for other reasons.

*Trademark Retail, Inc. v. Apple Glen Investors, LP*, 196 F.R.D. 535 (N.D. Ind. 2000) (holding that LLC was an indispensable party in a suit by one member against another for breach of fiduciary duty and interference with contractual and business relations).

*Cabrini Development Council v. LCA Vision, Inc.*, 197 F.R.D. 90 (S.D. N.Y. 2000), judgment vacated, appeal dismissed, 292 F.3d 134 (2d Cir. 2002) (following *Weber v. King* (E.D. N.Y. 2000) in concluding that members of New York LLC have a common law right to bring a derivative action and that LLC is an indispensable party in such a suit).

*Weber v. King*, 110 F. Supp.2d 124 (E.D. N.Y. 2000). Two members of Kathleen's Bake Shop, LLC sued the third member alleging various acts of past and ongoing breach of contract, unfair competition, and interference with the LLC's business. The court concluded that the LLC was a necessary and indispensable party whose joinder was not feasible because it would destroy diversity jurisdiction. Additionally, the court recognized a common law right to bring a derivative action even though the New York LLC law does not include provisions expressly permitting derivative lawsuits. The court then concluded that many of the plaintiffs' claims were more appropriately characterized as claims of the LLC that should be brought derivatively. In the course of its analysis, the court discussed the nature of an LLC as a separate entity and the analogies that should be made to partnerships and corporations.

## **I. Scope of Discovery, Expert Testimony, Evidentiary Matters**

*1924 Leonard Road, L.L.C. v. Van Roedel*, 636 S.E.2d 378 (Va. 2006) (observing that LLC is a legal entity distinct from its members and had no relationship to trust or estate of deceased individual whose statements LLC sought to admit under dead man's statute, and LLC was not entitled to rely on hearsay exception provided in dead man's statute).

*Securities and Exchange Comm'n v. Capital Consultants, LLC*, 397 F.3d 733 (9th Cir. 2005) (holding interpretation of legal effect of LLC operating agreements and related documents regarding authority of manager to transfer LLC properties was issue of law for court and not proper subject of expert testimony).

*Dana Johno, LLC v. Centennial Insurance Company*, 891 So.2d 32 (La. App. 2004) (holding that court did not abuse its discretion in ordering production of bank records of non-party sole member of insured LLC because personal financial records might be needed in order to determine damages or valuation).

*Rubin v. Hirschfeld*, No. Civ. 3:00CV1657(PCD), 2002 WL 32503669 and 2002 WL 32503670 (D. Conn. Jan. 15, 2002) (addressing scope of discovery requests in member's case against LLC manager for breach of fiduciary duty).

and breach of operating agreement and granting in part plaintiff member's motion for protective order regarding third party business relationships of plaintiff and her husband).

*Amster v. River Capital Int'l Group LLC*, No. 00 Civ. 9708(DC), 2003 WL 1571593 (S.D.N.Y. March 26, 2003). In this dispute related to an LLC dissolution, the court addressed the permitted scope of the testimony of the plaintiff's expert. The court said the expert would not be permitted to make "findings of fact," to opine as to the intent or credibility of the parties or witnesses, to opine as to what the law is, or to interpret provisions of the LLC agreement. The court said the expert would be allowed to explain the terms of the LLC agreement and to explain concepts applicable to partnerships and LLCs. The court said the expert would also be permitted to testify as to "indicia" or "badges" of fraud and as to tax matters.

#### **J. Claim Preclusion**

*Nautilus Insurance Company v. Wadsworth*, No. 2:05-CV-64, 2006 WL 2452949 (D. Vt. Aug. 23, 2006) (finding no basis on which LLC and member would be liable for each other's liabilities and thus no basis to conclude member and LLC were in privity such that prior state court action against LLC would be bar against instant action against member).

*Gottlieb v. Kest*, 141 Cal.App.4th 110, 46 Cal.Rptr.3d 7 (Cal. App. 2 Dist. 2006) (analyzing effect of default judgment against managing member's LLC with respect to member's claims and concluding neither judicial estoppel nor collateral estoppel barred member's action).

*S & B Construction, LLC v. Old Fort, LLC*, 826 N.E.2d 32 (Ind. App. 2005) (LLC members were judicially estopped to contradict LLC's allegation in prior bankruptcy proceeding because of identity of interests between members and LLC).

*Mancuso v. Kinchla*, 806 N.E.2d 427 (Mass. App. Ct. 2004) (holding non-mutual claim preclusion barred claims of former members against remaining member of LLC where claim could have been resolved in prior action between LLC and former members arising out of same nucleus of operative facts, and remaining member, who assumed total control of LLC by virtue of redemption of former members' interests, had requisite "close and significant relationship" to support claim preclusion).

*Maxemus Entertainment, LLC v. Josey*, No. CV030822764, 2003 WL 22205931 (Conn.Super. Sept. 10, 2003) (finding LLC and its sole member were in privity for purposes of collateral estoppel and res judicata analysis, and LLC was thus barred from relitigating issues that were litigated or could have been litigated in prior suit to which member was a party).

*Direct Marketing Concepts, Inc. v. Trudeau*, 266 F.Supp.2d 794 (N.D. Ill. 2003) (characterizing as "disingenuous" the effort of individual to separate himself from the manager-managed LLCs of which he was the designated manager and in which he held direct or indirect ownership interests, and concluding that the LLCs were in privity with the individual for purposes of claim preclusion stemming from individual's earlier lawsuit).

#### **K. Arbitration**

*NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417 (Del. Ch. 2007). The plaintiff, an indirect owner of a Delaware LLC, sued the LLC and one of the LLC's two members, seeking to enforce provisions of the LLC's operating agreement as to which the plaintiff was an explicit third party beneficiary. The plaintiff sought access to the LLC's books and records and specific performance of a provision requiring the defendant member to segregate funds when a dispute arose regarding the amount of certain payments and fees to various related entities. The defendants moved for dismissal of the claims on the basis that the claims were subject to arbitration. The court held that the claims were not subject to arbitration because the arbitration clause relied upon by the defendants merely permitted, but did not require, the parties to the operating agreement to jointly consent to arbitrate disputes between themselves that were not otherwise required to be arbitrated. The court stated that it would be inequitable and illogical to hold that an arbitration clause acts more broadly on a third party beneficiary than upon one of its signatories. The court concluded that a second arbitration clause pertaining to disputes over certain exhibits did not apply to the plaintiff's claims either. The plaintiff, as a third party beneficiary who was not a signatory of the agreement, only had standing to bring claims



based on rights found in certain provisions of the agreement, and the inspection right did not turn on the exhibits referenced in the arbitration clause. The court also rejected the defendants' argument that arbitration was required under an arbitration clause in another agreement to which the defendants were not parties.

***Duke v. Graham***, 158 P.3d 540 (Utah 2007). The court concluded that provisions of the Utah Limited Liability Company Act providing for judicial expulsion of members and judicial removal of managers did not strip arbitrators of the authority to remove members and managers. Because the statute also contains provisions authorizing expulsion of members and removal of managers as provided in an operating agreement, the court concluded that expulsion of members and removal of managers may be accomplished through mechanisms described in an LLC's operating agreement, including an agreement to arbitrate. Thus, an arbitration award expelling members of an LLC and removing one of them as a manager in an arbitration proceeding brought pursuant to an arbitration clause in the operating agreement did not exceed the arbitrator's power. The court stated that its conclusion that the legislature did not limit the mechanism for expulsion and removal to a judicial decree is also consistent with the Utah Arbitration Act.

***Santa Monica Properties v. A/R Capital, LLC***, No. B190712, 2007 WL 466828 (Cal. App. 2 Dist. Feb. 14, 2007) (holding operating agreement provision entitling prevailing party in arbitration to attorney's fees applied only to arbitrations and thus did not apply to action brought in court).

***Oviedo v. Grace***, No. B188018, 2007 WL 316519 (Cal. App. 2 Dist. Feb. 5, 2007) (applying arbitration clause in LLC operating agreement to LLC derivative action notwithstanding LLC did not sign agreement).

***Simbabeer, LLC v. Muskat***, 944 So.2d 457 (Fla. App. 2006) (addressing scope of arbitration clause in membership agreement).

***Dillon v. Typaldos***, 2006 WL 1381625 (N.J. Super. Ch. May 19, 2006) (granting motion to compel arbitration of claims for accounting and distribution based on mandatory arbitration clause in operating agreement of Delaware LLC where clause encompassed "[a]ny claim, controversy, or dispute among the parties with respect to the construction, application, interpretation, or enforcement of this Agreement or arising out of a breach hereof").

***Connective Tissue Imagineering v. Mitts***, No. F046902, 2006 WL 1163817 (Cal. App. 5 Dist. May 3, 2006) (addressing effect of operating agreement arbitration provision as to non-signatories and relying on court's authority not to enforce arbitration clause to avoid potential inconsistency in outcome and duplication of effort).

***James & Jackson, LLC v. Willie Gary, LLC***, 906 A.2d 76 (Del. 2006). The Delaware Supreme Court affirmed the Court of Chancery's interpretation of the scope of an arbitration clause in an LLC agreement, agreeing with the Court of Chancery's conclusion that provisions in the LLC agreement addressing injunctive relief and judicial dissolution permitted recourse to the courts in such cases. While the LLC agreement generally required arbitration of any controversy arising out of the LLC agreement in accordance with AAA rules, the agreement went on to state that a non-breaching member was entitled to injunctive relief to prevent breaches of the agreement and to obtain specific enforcement of its terms in "any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof." The agreement also provided for dissolution upon a "judicial determination" that an event had occurred making it unlawful, impossible, or impracticable to carry on the LLC's business, and the agreement referred to the involvement of a "court of competent jurisdiction." In view of these provisions, the Supreme Court agreed with the Chancery Court that the plaintiff member was not required to arbitrate its claims against the other member for injunctive relief, specific performance, and judicial dissolution. The Supreme Court disagreed with the Chancery Court's rejection of a line of cases holding that incorporation of the AAA rules serves as clear and unmistakable evidence that the parties intended substantive arbitrability to be decided by an arbitrator. As a matter of policy, the court adopted the majority federal view that reference to AAA rules evidences a clear and unmistakable intent to submit arbitrability to an arbitrator. The court stated, however, that this view did not require an arbitrator to decide arbitrability in all cases where an arbitration clause incorporates the AAA rules, but rather only in those cases where the arbitration clause generally provides for arbitration of all disputes and incorporates a set of arbitration rules that empower an arbitrator to decide arbitrability. The court thus affirmed the lower court's substantive arbitrability decision. The Court of Chancery's opinion by Vice Chancellor Strine is found at 2006 WL 75309.

***Phillipps v. Portosan Company, LLC***, No. BC249322, 2006 WL 772884 (Cal. App. 2 Dist. March 28, 2006) (rejecting argument that arbitration clause in operating agreement did not apply to LLC itself and finding arbitration

provisions in operating agreement evidenced clear intent to arbitrate disputes regarding defendant LLC's acquisition of members' interests and arbitrator should determine arbitrability of dispute in first instance).

***LS Development Enterprises, Inc. v. Forest City Commercial Group, Inc.***, No. 05-CV-02418-RPM, 2006 WL 771218 (D. Colo. March 24, 2006) (granting motion to compel arbitration of claims for breach of fiduciary duty, breach of duty of good faith and fair dealing, and fraud in inducement of operating agreement where operating agreement arbitration clause provided for arbitration of "any dispute arising under this Agreement," stating that plaintiff's arguments regarding scope of arbitration agreement and contentions regarding procedural defects or delay were matters to be determined in arbitration proceeding).

***Kingston Trading & Transportation Ltd. v. Embarques Golfo, LLC***, No. CivA. 05-6337, 2006 WL 861065 (E.D. La. March 24, 2006) (concluding that signatories of operating agreement containing arbitration clause could compel other signatories to arbitrate claims, but parties who were not signatories of operating agreement had no right to compel arbitration, and LLC, which was not party to its operating agreement, could not be compelled to arbitrate).

***Bradshaw v. Harker***, No. 2:03-CV-00714 PGC, 2006 WL 538201 (D. Utah March 1, 2006) (finding compensation levels and distributions were within scope of operating agreement's arbitration clause and panel did not exceed its authority by ordering managing member to cause LLC, a non-party, to make distributions and pay attorney's fees).

***Douzinas v. American Bureau of Shipping, Inc.***, 888 A.2d 1146 (Del. Ch. 2006). The minority members of a Delaware LLC sued the majority member and its affiliates for diverting assets of the LLC to the majority member's affiliates without compensation to the LLC. The defendants sought to compel the minority members to arbitrate their claims pursuant to a broad arbitration clause in the LLC agreement, and the court found the arbitration clause encompassed the minority members' claims. The court first observed that a Texas choice of law clause in the operating agreement created "the odd situation where the parties to an LLC domiciled in Delaware chose to have their LLC Agreement governed by another state's law, except when the Delaware LLC Act requires the application of Delaware law." The court concluded the choice of law provision was valid because Delaware respects choice of law provisions when the chosen law has a material relationship to the matter at issue, a requirement that was satisfied because the LLC operated in Texas. The court did not attempt to parse the differences between Texas and Delaware law because the parties agreed there was no material difference between the two states' laws regarding the issues before the court. The court relied upon the Delaware Supreme Court's decision in *Elf Atochem North America, Inc. v. Jaffari* in concluding the arbitration clause encompassed the minority members' claims. In that case, the court held that a broad arbitration clause in an LLC agreement could encompass breach of fiduciary duty claims. The court distinguished Delaware case law from the corporate context and noted that it is frequently impossible to decide fiduciary duty claims in alternative entity cases without close examination and interpretation of the governing instrument because the Delaware alternative entity statutes permit the contracting parties to expand or restrict fiduciary duties. The LLC agreement in the instant case contained a provision stating that the relationship was strictly contractual and that no member owed the LLC or any other member a fiduciary duty. The minority members argued the clause was not relevant to their claims against the majority member acting as manager, but the court disagreed. The court looked at the governance provisions to determine that provisions of the LLC agreement would need to be carefully considered and interpreted in connection with the minority members' claims. The court also pointed out provisions addressing confidentiality of information and proscriptions on competition. The minority members' claims were thus within the scope of the arbitration clause, which encompassed "any dispute arising under or related to" the LLC agreement. The court held the non-signatory affiliates of the majority member were entitled to enforce the arbitration clause under an equitable estoppel theory.

***Kaufman v. Maresca***, Mon-C-335-04, 2005 WL 3577701 (N.J. Super. A.D. Jan. 3, 2006) (declining to compel arbitration sought under arbitration clause in LLC operating agreement because member seeking arbitration had unclean hands, arbitration would not fully resolve entire controversy, and equity jurisprudence was particularly adapted to do complete justice).

***Wallace v. Hayes***, 124 P.3d 110 (Mont. 2005) (holding, as matter of first impression under Wyoming law, that arbitrators have authority to award punitive damages and that arbitration clause in operating agreement, which was silent as to remedies, did not preclude award of exemplary damages merely because it did not specifically authorize them).

***Pisgah Labs, Inc. v. Pharmaforce, Inc.***, No. Civ. 1:05CV334, 2005 WL 3116584 (W.D. N.C. Nov. 22, 2005) (applying Ohio law and denying requested injunctive relief because LLC agreement provided for arbitration, and injunctive relief would not merely preserve status quo but would moot arbitration by handing plaintiff victory prior to arbitration).

***Terex Corporation v. STV USA, Inc.***, No. Civ.A. 1614-N, 2005 WL 2810717 (Del. Ch. Oct. 20, 2005) (concluding arbitration clause in LLC agreement encompassed judicial dissolution).

***Palao v. Letson***, 611 S.E.2d 787 (Ga. App. 2005) (holding LLC member implicitly agreed to arbitrate issue of arbitrator's jurisdiction and affirming dismissal of declaratory judgment action requesting declaration that certain claims were not subject to arbitration under operating agreement).

***Nevada Gold & Casinos, Inc. v. American Heritage, Inc.***, 110 P.3d 481 (Nev. 2005) (majority member of LLC waived right to compel arbitration of minority member's action for rescission of operating agreement, dissolution, and other claims by pursuing litigation in Texas for eighteen months before seeking order compelling arbitration).

***CAPROC Manager, Inc. v. Policemen's & Firemen's Retirement System of the City of Pontiac***, No. Civ.A. 1059-N, 2005 WL 937613 (Del. Ch. April 18, 2005) (holding dispute regarding removal of manager arose under LLC agreement and was within scope of arbitration clause of LLC agreement).

***White Mountain Mining Company, L.L.C. (Phillips v. Congelton, L.L.C.)***, 403 F.3d 164 (4th Cir. 2005) (upholding bankruptcy court's denial of investor's motion to compel arbitration of action to determine whether pre-petition advances to LLC debtor were debt or equity because action was core proceeding and arbitration presented inherent conflict with purposes of Bankruptcy Code to centralize disputes and facilitate reorganization of LLC).

***Hoffman v. Finger Lakes Instrumentation, LLC***, 789 N.Y.S.2d 410 (N.Y. Sup. 2005). The court held that a broad arbitration clause in an LLC operating agreement was enforceable by the LLC in a dissolution action even though the LLC was not a signatory to the operating agreement. The court pointed out that the statutory requirement of a written agreement to submit future claims to arbitration does not include a signature as a necessary component. The members treated the operating agreement as governing the parties' relationship, and there was no evidence the LLC acted inconsistently with its provisions. The signatory members were estopped from avoiding arbitration with the nonsignatory LLC because the issues raised by the signatory members were intertwined with the agreement.

***KC Investments, LLC v. Wynia***, 125 Wash.App. 1020, 2005 WL 138908 (Wash. App. 2005) (holding arbitration clause in LLC operating agreement encompassed action by member who made contributions for non-contributing members upon additional capital call because arbitration clause was broad in scope and operating agreement's exception to arbitration clause for suits to enforce contributions on LLC's behalf did not apply to member's action on its own behalf to collect amounts contributed for non-contributing members).

***Braham v. Barton of Redlands, Inc.***, Nos. B168121, B168883, 2004 WL 886889 (Cal.App. April 27, 2004) (holding arbitrator's interpretation of LLC operating agreement was not subject to judicial review, and removal of manager and decision that LLC's business had come to an end was not a decree of dissolution).

***In re XO Communications, Inc. (XO Communications, Inc. v. Start Investments, Inc.)***, No. 02-12947 (AJG), 03 Civ. 1898(DC), 2004 WL 360437 (S.D. N.Y. Feb. 26, 2004) (concluding bankruptcy judge's order abstaining from determining severability of put provision in LLC agreement in favor of ADR procedure in LLC agreement was interlocutory order not subject to immediate appeal).

***Williams v. Litton***, 865 So.2d. 838 (La.App. 2003) (holding that plaintiffs failed to allege facts sufficient to support claim that their agreement to arbitrate was fraudulently induced and further holding that plaintiffs' claims for return of capital contributions, loans, and lost profits, as well as claims based upon alleged breach of fiduciary duty of LLC manager, were sufficiently related to the LLC operating agreement to be subject to the arbitration clause in the operating agreement which encompassed "[a]ny controversy or claim arising out of or relating to this Agreement").

**Clement Contracting Group, Inc. v. Coating Systems, L.L.C.**, 881 So.2d 971 (Ala. 2003) (holding that sole member of LLC who signed contract with third party in his capacity as member of the LLC was not individually subject to arbitration clause contained in contract).

**Sloan Financial Group, Inc. v. Beckett**, 593 S.E.2d 583 (N.C. App. 2003) (concluding that various claims against LLC general partner of private equity fund arose out of alleged violations of the fund's limited partnership agreement, which did not contain an arbitration clause, rather than the operating agreement of the LLC general partner).

**Cambio Health Solutions, LLC v. Sloate**, No. 02-6392, 2003 WL 21698883 (6th Cir. July 17, 2003) (affirming district court's decision that arbitration clause in LLC agreement did not apply to dispute under severance agreement and that, in any event, plaintiff waived its right to arbitration).

**Alexander v. Minton**, 855 So.2d 94 (Fla.App. 2003) (holding that dispute regarding member's right to inspect LLC books and records was arbitrable under arbitration clause of LLC operating agreement and that member did not waive right to compel arbitration).

**Karish v. SI Int'l, Inc.**, C.A. No. 19501, 2002 WL 1402303 (Del. Ch. June 24, 2002) (holding that dispute regarding valuation of terminated manager's interest in LLC for purposes of buy-out under management agreement fell within scope of arbitration clause in LLC agreement).

**In re Application of Donald J. Trump**, 755 N.Y.S.2d 618 (N.Y.A.D. 1 Dept. 2003) (stating that "artificial distinction" sought to be drawn between individual petitioner and his wholly-owned LLC did not preclude arbitration under arbitration clause in agreement to which LLC was a party).

**River Links at Deer Creek, LLC v. Melz**, 108 S.W.3d 855 (Tenn.Ct.App. 2002). The appeals court held that the trial court should retain jurisdiction over an LLC issue of first impression notwithstanding the arbitration clause in the operating agreement. "An arbitrator dealing with the complex facts of this case would have no guidance on the proper interpretation of the Limited Liability Company Act, and would have to expend a great deal of time and energy to reach a well-considered conclusion, but his ultimate decision would have no precedential value." It thus appeared reasonable to the court for the trial court to retain jurisdiction over the declaratory judgment claim relating to the retroactive effect of reinstatement after administrative dissolution of an LLC that was a member of another LLC.

**Cambio Health Solutions, LLC v. Reardon**, 228 F.Supp.2d 883 (M.D. Tenn. 2002)(holding that appeal of order, insofar as it denied motion to compel arbitration, divested district court of jurisdiction pending appeal in case where district court granted order compelling arbitration as to claims related to LLC agreement but declined to order arbitration of claims related to separate consulting agreement).

**Prescott-Follett & Associates v. Delasa/Prescott Follett & Associates**, No. Civ.A. 01-3178, 2002 WL 31528463 (E.D. La. Nov. 8, 2002)(compelling arbitration of dispute among LLC and its members under arbitration clauses contained in original and subsequent operating agreements, notwithstanding fraud in the inducement claim, where there was no assertion of fraud in the inducement relative to the arbitration clause alone).

**MTS Communications Company, Inc. v. Mosaic Capital**, No. B141818, 2002 WL 1788948 (Cal.App. 2 Dist. Aug. 5, 2002)(reviewing arbitration award based on sale of business opportunity by LLC that did not hold required license on basis that entire transaction was alleged to be illegal and therefore could not be sanctioned by court even in context of confirmation of arbitration award).

**Addison v. Everest Connections Corporation**, 37 Fed.Appx. 841 (8<sup>th</sup> Cir. June 20, 2002)(affirming denial of motion to compel arbitration in suit by former employees of LLC because employees were not parties to LLC agreement containing arbitration clause).

**Mississippi Fleet Card, L.L.C. v. Bilstat, Inc.**, 175 F.Supp.2d 894 (S.D. Miss. 2001)(holding that members of LLC were bound by arbitration clause in processing agreement entered by LLC where members were third party beneficiaries of agreement and asserted claims arising under or related to the agreement).

***Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.***, 817 So.2d 1275 (La. App. 2002)(affirming trial court's grant of preliminary injunction where arbitration clause permitted one member to invoke arbitration without vote of membership in dispute over cash call and alleged transfer of interest inasmuch as penalty for refusal to arbitrate was forced sale of member's interest, which would constitute irreparable injury).

***Alternative Financial Solutions, LLC v. Colburn***, 821 So.2d 981(Ala. 2001). Two LLCs in the business of making payday loans were sued by borrowers who asserted that the loans violated state lending laws. The LLCs moved to enforce arbitration provisions in the contracts with the borrowers. The court did not find relevant the fact that the LLCs were organized under the law of another state or the fact that the LLC's owners resided in another state for purposes of determining whether the payday loan transactions substantially affected interstate commerce under the Federal Arbitration Act.

***Rice v. Piney Ridge Management, LLC***, No. C8-01-763, 2001 WL 1569894 (Minn. App. Dec. 11, 2001). Rice entered into a Subscription Agreement with an LLC that contained an arbitration clause. Rice also entered a Member Control Agreement that provided for repurchase of membership units under certain circumstances on specified terms. The Subscription Agreement incorporated by reference the Member Control Agreement. Rice filed suit seeking dissolution of the LLC as well as equitable relief against two LLC officers for misapplication of LLC assets and fraud. The officers demanded arbitration although they were not parties to the Subscription Agreement. The arbitrator awarded Rice an amount for his interest in the LLC, for which the LLC and one of the officers were made jointly and severally liable, and the arbitrator also awarded fees and expenses to Rice, for which he made the LLC and the two officers jointly and severally liable. The district court upheld the arbitrator's award, and the two officers appealed, claiming that the arbitrator exceeded the scope of his authority. The court of appeals held that the arbitrator did not exceed his authority based upon the broad language of the arbitration clause, Rice's allegations and claims, and the content of the officers' demand for arbitration.

***Yazdani-Beioky v. Bhandara***, No. 14-00-01509-CV, 2001 WL 1429414 (Tex. App. Nov. 15, 2001). The court held that the arbitration clause in a two-member LLC's operating agreement did not require arbitration of claims against a separate corporation that contracted to manage the apartment complex owned by the LLC even though the corporation was owned by the members of the LLC and its only activity was managing the sole asset of the LLC.

***Raspet v. Buck***, 554 S.E.2d 676 (N.C. App. 2001). The court held that the plaintiff's claims against the defendant were not within the scope of the arbitration clause in the operating agreement of an LLC they formed together because the plaintiff's claims related to the plaintiff's and defendant's employment in another investment firm.

***Sordoni Skanska Construction Company, Inc. v. Swanson***, 30 Conn.L.Rptr. 188, 2001 WL 985056 (Conn. Super. 2001)(holding that arbitration clause in construction management agreement between plaintiff and LLC required arbitration of claims against LLC and its members.)

***Plinke v. PNE Media, LLC***, No. Civ.A. 00-1817, 2001 WL 360788 (E.D. Penn. April 3, 2001). The plaintiff sought to avoid arbitration required by an arbitration clause in an Amended and Restated LLC Agreement on the basis that the plaintiff did not intend a separate signature page that was subsequently attached to the Amended and Restated LLC Agreement to be an execution of that agreement. Various documents were involved in the acquisition of one LLC by another LLC. The plaintiff argued that he was misled into believing that the signature page referred to an earlier executed LLC agreement or to the operating agreement. The court rejected these arguments and found that the evidence indicated the plaintiff understood what he executed to be the signature page to the Amended and Restated LLC Agreement.

***Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group, Inc.***, 215 F.3d 677 (7<sup>th</sup> Cir. 2000). The plaintiff and seven other companies, including the defendant iPower Distribution Group, Inc. (iPower), formed an LLC to develop an integrated marketing and distribution consortium using iPower software. Once the LLC was formed, it entered a franchise agreement with iPower to allow the LLC to purchase, install and use the iPower software. The franchise agreement contained an arbitration clause, but the LLC agreement did not. When the plaintiff later sued iPower alleging that iPower had made material misrepresentations to induce the plaintiff to join the LLC, iPower argued that the claim was subject to the arbitration clause in the franchise agreement. The court determined that the injuries alleged did not arise under or relate to the franchise agreement. The alleged fraud related to the inducement of the plaintiff to

join the LLC by entering the LLC agreement, and the arbitration provision in the franchise agreement did not affect disputes arising out of the LLC agreement.

*In the Matter of the Application of Proto*, No. 99 Civ. 3056 (CBM), 2000 WL 1593350 (S.D. N.Y. Oct. 24, 2000)(refusing to vacate arbitration award upholding expulsion of LLC member and application of alleged oral no net deficit rule because misapplication of rules of contract interpretation does not arise to manifest disregard of law).

*Staenberg v. Adams*, 103 Wash. App. 1028, 2000 WL 1700132 (Wash. App. 2000)(granting LLC member trial de novo after arbitration between members pursuant to arbitration clause in LLC operating agreements and stipulation under certain provisions of Washington law).

*Beaver Construction Company, Inc. v. Lakehouse, L.L.C.*, 742 So.2d 159 (Ala. 1999)(dealing with scope of arbitration clause in contract between LLC, members of LLC, and third party).

*Maas Technologies, Inc. v. Henning*, No. 98 01751, 1999 WL 269109 (La. App. 3 Cir. March 31, 1999). The opinion in this case was originally available on Westlaw but was removed and is now only referenced in a table at 744 So.2d 238. Two members of an LLC sued the other two members and a third party alleging that a merger of the LLC into one of the defendant members and then into the third party constituted a conversion of the plaintiffs' assets. The LLC operating agreement had an arbitration clause that required "a dispute arising between the Members concerning the operation, management or buyout of the interest of the LLC" to be submitted to arbitration. The court held that the plaintiffs' claim fell within the scope of the arbitration clause. The court also found that the dispute must be arbitrated even though one of the defendants was not a party to the operating agreement. The court stated that the plaintiffs' allegations were directed primarily against the member who controlled the entities with which the LLC merged. The court concluded that the first merger (between the LLC and one of its members) was certainly arbitrable and, if found improper, would make any complaint against the company involved in the second merger moot.

*Mid-America Surgery Center, L.L.C. v. Schooler*, 719 N.E.2d 1267 (Ind. App. 1999). Two former members of an LLC sued the LLC to enforce the terms of the operating agreement entitling them to be bought out after they resigned as members, and the remaining members voted to continue the operation of the LLC. After the former members filed suit, the LLC sought to require the matter to be submitted to arbitration. The operating agreement had a clause requiring "any dispute, controversy or claim arising out of or in connection with or relating to" the operating agreement to be submitted to arbitration. The former members argued that the arbitration clause was unenforceable because of the LLC's breach of the agreement or, alternatively, because the LLC had waived its right to arbitration. The court rejected both arguments and held that the trial court erred in denying the application for arbitration.

*Nuclear Medicine Consultants of Texas v. Bunick*, No. 05-99-00570, 1999 WL 998041 (Tex. App. Nov. 4, 1999). An LLC operating agreement contained an arbitration clause the validity of which was not disputed. The issue in the case was whether the right to arbitrate had been waived. The court held that it had not and ordered the trial court to compel arbitration.

*Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999). One member of a two-member LLC brought suit against the other member, individually and derivatively on behalf of the LLC, seeking equitable damages for breach of fiduciary duty and various other claims. The Chancery Court dismissed the case for lack of subject matter jurisdiction because the LLC agreement contained a choice of forum provision directing that disputes be arbitrated or litigated in California. The Delaware Supreme Court addressed the following questions: (1) whether the LLC, which did not itself execute the LLC agreement, was bound by the provisions of the agreement, and (2) whether contractual provisions requiring all disputes be resolved by arbitration or litigation in California were valid under the Delaware LLC act. The court held that the LLC agreement was binding upon the LLC as well as its members and that the contractual forum selection provisions were valid. The court's opinion goes into the background and policy of the Delaware LLC act and the principle of freedom of contract under the act. The court rejected the argument that, because the LLC itself had not signed the LLC agreement, the LLC was not bound by the provisions of the agreement. According to the court, "It is the members who are the real parties in interest. The LLC is simply their joint business vehicle." The court also held that the Delaware LLC act permits parties to agree to vest exclusive jurisdiction of disputes (including derivative claims) in courts outside Delaware. The act expressly permits LLC members or managers to consent to the nonexclusive jurisdiction of litigation or arbitration in a state other than Delaware, to the exclusive jurisdiction of litigation in Delaware, or to the exclusivity of arbitration in a state other than Delaware. The court noted that the act is silent with

regard to agreements vesting exclusive jurisdiction of litigation in courts outside of Delaware and concluded that the General Assembly would have prohibited such provisions if it had desired to do so.

*Simitar Entertainment, Inc. v. Silva Entertainment, Inc.*, 44 F. Supp.2d 986 (D. Minn. 1999). Simitar Entertainment, Inc. (“Simitar”) and Silva Entertainment, Inc. (“Silva Entertainment”) formed a Minnesota LLC for the purpose of producing and promoting Tejano music. Simitar and the LLC sued Silva Entertainment and Silva, an individual, alleging breach of contract and numerous other causes of action such as RICO violations, deceptive trade practices, fraud, and breach of fiduciary duty. In a Member Control Agreement governing management of the LLC, an arbitration provision required “any controversy or claim arising out of this Agreement” to be resolved through arbitration. An Employment Agreement between the LLC and Silva also contained an arbitration clause. That clause required arbitration of disputes “of any nature” between Silva and the LLC that “may arise under” the Employment Agreement. The powers of the arbitrator differed under the two agreements in that the Employment Agreement empowered the arbitrator to offer the same degree of relief available through the courts while the Member Control Agreement did not apply to claims involving injunctive relief and only empowered the arbitrator to interpret and apply the provisions of the Member Control Agreement. The Employment Agreement stated that the Member Control Agreement would control any conflict between the two agreements. At the outset, the court noted that it addressed only the motion of Silva, the individual, to compel arbitration, because no motion had effectively been filed on behalf of Silva Entertainment. The court found the scope of the arbitration provisions was limited to damages for breach of contract claims. Thus, only the plaintiffs’ breach of contract claim against Silva was referred to arbitration. The court did not question whether the LLC itself was bound by the arbitration provisions in the Member Control Agreement, which was apparently executed by only the two members, Simitar and Silva Entertainment. The court did note in a footnote that the standing of Silva (an individual who was officer, director, and majority shareholder of Silva Entertainment) to enforce the Member Control Agreement was not entirely clear. The court concluded that Silva was entitled to enforce the Member Control Agreement arbitration provision because of his close relationship to Silva Entertainment and because the Complaint alleged that the misconduct of Silva and Silva Entertainment was not only intertwined but imputed from Silva to Silva Entertainment.

*Metro Riverboat Associates, Inc. v. Bally’s Louisiana, Inc.*, 706 So.2d 553 (La. App. 1998). This case involved the interpretation of arbitration, change of control, and non-competition provisions of an LLC operating agreement. Two corporations, Metro Riverboat Associates, Inc. (“Metro”) and Bally’s Louisiana, Inc. (“Bally’s”), were the members of an LLC formed to own and operate a gambling riverboat. Although Metro had a majority interest, the LLC operating agreement essentially required consent of both members for significant business decisions. When Bally’s merged with Hilton Hotels Corporation, Metro claimed there was a “change of control” under the operating agreement that permitted most decisions to be made by a simple majority in interest. In addition, Metro claimed that Bally’s was in violation of the non-competition provision of the operating agreement because Hilton Hotels had an ownership interest in another riverboat casino. Eventually, Bally’s made demand on Metro for binding arbitration of their disputes, claiming that arbitration was required by the operating agreement. Metro filed suit asking for injunctive relief against Bally’s. The court examined the arbitration provision of the operating agreement and concluded that the parties’ disagreement was not within the scope of the arbitration clause covering “a dispute. . .with respect to the management and operation of the Company.” Rather, their disagreement was over interpretation of contractual provisions that affected their respective management rights. The court next considered the meaning of the change in control and non-competition provisions and concluded that the limited evidence failed to meet the heightened burden of proof imposed on Metro to obtain injunctive relief.

*Bubbles & Bleach, LLC v. Becker*, No. 97 C 1320, 1997 WL 285938 (N.D. Ill. May 23, 1997). The court determined that an arbitration clause in an LLC’s operating agreement was not binding on the individual members of the LLC. Faye Becker (“Becker”), the managing member of Bubbles & Bleach, LLC (“B & B”), misappropriated funds of B & B. B & B brought suit in Illinois against Becker under the authority of one of its members for conversion, breach of fiduciary duty, and fraud. The Operating Agreement of B & B and the First Amended and Restated Limited Liability Company Agreement of B & B each contained an arbitration clause that required that arbitration of “any matters arising out of the terms and conditions of the underlying agreement” take place in Wisconsin and be governed by Wisconsin law. Becker moved for dismissal based upon the arbitration clause. The court concluded that neither the Operating Agreement nor the Amended and Restated Limited Liability Company Agreement of B & B was binding upon B & B. The agreements provided that they were binding upon the “parties” to such agreement; however, the term “parties” was not defined. The court noted that the LLC Agreement provided that it was by and among the members of the LLC and that the signatories to each agreement were the members. Further, it noted that the Wisconsin LLC statute defines the term “operating agreement” as a written agreement among the members. The court found that there was no indication that

the legislature intended to bind LLCs as entities distinct from their constituent members. According to the court, the fact that B & B was a beneficiary of and subordinate to some of the terms of the agreements did not bind B & B under the arbitration clause. Rather, the arbitration clause was binding only upon the parties to the agreement.

**L. Nature of LLC; Mischaracterization of LLC (What's In A Name?)**

*In re Grosman (Bar-Am v. Grosman)*, Bankruptcy No. 6:05-bk-10450-KSJ, Adversary No. 6:05-ap-328, 2007 WL 1526701 (Bankr. M.D. Fla. May 22, 2007) (characterizing LLC as joint venture whose members owed one another fiduciary duties as joint venturers).

*Colle v. Goldman*, No. 05 CV 3981(JG), 2007 WL 1395561 (E.D. N.Y. May 14, 2007) (concluding that formation of LLC to hold title to real property was not necessarily inconsistent with agreement to form larger joint venture for purchase, development, and resale of property).

*Cathcart v. Magruder*, \_\_ So.2d \_\_, 2007 WL 1299447 (La. App. 2007) (discussing permissible purposes for which LLC may be organized, holding that LLC's ownership of property did not necessarily violate restrictive covenant confining property to residential, recreational, or other non-commercial use where there was no showing that property was used for anything other than recreational or residential use of members, and commenting that, if "business" of LLC is maintenance and management of property for recreational and residential use of members, such does not equate to "commercial" use of property).

*Ginsberg v. Bistriceer*, 2007 WL 987162 (N.J. Super. A.D. April 4, 2007) (distinguishing LLC from partnership and pointing out that Uniform Partnership Act does not govern LLCs).

*Didion Milling, Inc. v. Agro Distribution, LLC*, No. 05-C-227, 2007 WL 702808 (E.D. Wis. March 2, 2007) (interpreting net cash flow term of contract with corporate buyer that had subsidiaries where contract was subsequently assigned to LLC disregarded entity owned by corporate members and finding that parties would have intended that calculation of net cash flow for earn-out purposes include deduction of taxes at tax rate applied to member companies' subsidiaries or divisions).

*Fluornoy Construction Co., LLC v. Slidella, LLC*, Civil Action No. 04-3098, 2006 WL 2414221 (E.D. La. Aug. 18, 2006) (holding that New Homes Warranty Act was not applicable to LLC apartment complex owner, pointing out that concept of occupying home as owner did not apply to LLC, that LLC had commercial property and general liability insurance rather than homeowner's insurance, and that terms of statute did not appear to contemplate business entities as purchasers covered by statute).

*Wright v. Herman*, 230 F.R.D. 1 (D. D.C. 2005) (finding plaintiff met pleading burden to maintain claim that valid partnership existed between plaintiff and defendant although they chose defendant's existing LLC as vehicle to carry out their business).

*Family Mortgage Corp. No. 15 v. Greiner*, No. C-03-01380RMW, 2004 WL 2254195 (N.D. Cal. Oct. 7, 2004). After defaulting on a real estate note, Greiner and a subsidiary of the lender (FMC) entered into an LLC agreement for the purpose of selling or developing the property. Greiner contributed the property, and FMC's contribution was causing the lender to forbear from foreclosure and to forgive the loan upon the sale of the property. FMC argued the LLC agreement was enforceable as a matter of law and sought to enforce its rights under the agreement where the property was not sold prior to a specified date. Greiner argued the LLC agreement was a hidden security device and its relationship with FMC was thus subject to the rules applicable to a secured creditor and debtor. The court reviewed the terms of the LLC agreement and the circumstances under which it was entered and concluded that it could not state as a matter of law that the contribution of the property was not a hidden security device.

*Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004) (holding LLC cannot suffer emotional distress).

*DeGeorge v. Warheit*, No. 231953, 2003 WL 1879934 (Mich.App. April 15, 2003) (upholding sanctions imposed on plaintiff for asserting frivolous claims without reasonable basis to believe facts in complaint were true, citing as an example the drafting of the complaint as though "T & T Land Clearing, L.L.C., were a corporation, representing



to the court the plaintiff and defendant Philip Warheit formed a corporation and filed its articles of incorporation with a state department, when in fact no such document exists for a limited liability company”).

***First National Bank of Chicago v. Maynard***, 815 A.2d 1244 (Conn.App. 2003) (finding that issuance of bond for deed to LLC rather than individual member who was qualified bidder was irregularity in foreclosure sale because the LLC and its sole member are not the same legal entity, but concluding that irregularity did not cause any harm).

***Locascio v. Erie Insurance Group***, No. 2002CA00317, 2003 WL 746437 (Ohio App. March 3, 2003) (concluding that insurance policy insured LLC notwithstanding erroneous reference to LLC as partnership where it was clear policy was intended to insure LLC).

***The Cafaro Company v. LaserLine Corporation***, No. 01-CA-68, 2002 WL 31163738 (Ohio App. Sept. 26, 2002). Fact issues regarding the type of business entity the parties to an agreement intended to form when they agreed to discharge a corporation’s obligations by forming a “limited liability corporation” precluded summary judgment to recover on the corporation’s obligations. The court found that the erroneous term did not render the agreement invalid or unenforceable, but it did create an ambiguity and a fact question.

***Charpentier v. R&R Resort, Inc.***, 112 Wash. App. 1017, 2002 WL 1316232 (Wash. App. 2002). The plaintiff sued her employer for hostile work environment and related claims. The complaint inaccurately identified the employer as a partnership rather than an LLC. The LLC’s lawyer contacted the plaintiff’s lawyer informing her of the mistake and offering to accept service of an amended complaint. The complaint was not amended, and the court dismissed it. A year and half later, an amended complaint was filed. In the new complaint, the plaintiff misidentified the LLC as a corporation. Two months later, after limitations had run, the defendant moved to dismiss the complaint, and the plaintiff moved to amend. The trial court denied the motion to amend and granted the motion to dismiss. The plaintiff appealed, arguing the trial court abused its discretion in finding inexcusable neglect on the part of the plaintiff. The plaintiff’s lawyer explained that her files had been moved to off-site storage during the time the plaintiff was deciding whether to pursue a second lawsuit, and she did not have access to the documents showing the defendant was an LLC. The court took issue with this argument, stating that the plaintiff’s lawyer chose not to access her files and to use the Washington Secretary of State’s web site instead. The court acknowledged that the information in the web site is confusing in that LLC information is contained in the corporations database and refers to the “state of incorporation” and “date of incorporation.” Under “category,” the site indicated the defendant was a “limited liability regular.” The plaintiff’s lawyer assumed that LLC meant limited liability corporation. The court stated that the plaintiff’s lawyer had no justification for assuming that the defendant was a corporation given the notice she received in the first lawsuit, the information obtained in the database search, and the availability of the LLC statute. The court concluded the failure to name the defendant as an LLC was inexcusable neglect and that the trial court’s dismissal of the suit and award of attorney’s fees to the defendant was proper.

***Housing 21, L.L.C. v. Atlantic Home Builders Company***, 289 F.3d 1050 (8<sup>th</sup> Cir. 2002)(holding that identities of LLC investors, among which were several charities, were irrelevant in suit where LLC, a distinct legal entity, was the sole plaintiff, and informing jurors of identities in response to inquiry from jury during deliberations was reversible error).

***Board of Education v. Franklin County Board of Revision***, Nos. 01AP-878, 01AP-879, 2002 WL 416953 (Ohio App. March 19, 2002)(distinguishing LLC from partnership, an aggregate of individuals, and characterizing LLC as separate legal entity like corporation for purposes of requirement that it be represented by attorney in property tax valuation dispute, and holding statute permitting LLC member to file a complaint on behalf of LLC unconstitutional insofar as it permits persons who are not attorneys or owners of property to file a complaint before a board of revision on behalf of the owner).

***Cogniplex, Inc. v. Hubbard Ross, L.L.C.***, No. 00 C 7463, 00 C 7933, 2001 WL 436210 (N.D. Ill. April 27, 2001). When the relationship between three members of an LLC soured, two of the members sued the third for various breaches of duty and violations of law. One of the claims was for breach of contract. The three members had failed to agree upon and execute an operating agreement, and the defendant argued that the relationship was thus not contractual. The court, however, determined that the claim withstood dismissal at the preliminary stage of the litigation based upon the permissive provisions of the Illinois Act regarding actions by members. The court cited the provision of the Illinois Act that authorizes members to bring an action against the LLC or other members to enforce their rights under the

operating agreement or the Act or other rights and interests. The court noted that the statutory provision might not be directly on point but suggested that the breach of contract claim would not offend the spirit of the Act. The court indicated that whether the claim was ultimately viable would depend upon the specifics of how the LLC was structured, i.e., whether it was more like a corporation or a partnership. The court indicated that co-shareholders are not ordinarily contractually bound to each other while partners are bound by a contract of mutual agency. The court stated that it did not have sufficient information regarding the organizational structure to determine which principle would apply.

***General Electric Company v. County of Cook***, No. 00 C 6587, 2001 WL 417321 (N.D. Ill. March 5, 2001). The court found that a Delaware LLC falsely represented itself as a joint venture in a bid proposal submitted in connection with construction of a county hospital. The ordinances and the instructions to bidders apparently addressed partnerships and/or joint ventures and corporations but not LLCs. The LLC identified itself as a joint venture and submitted the execution form for a joint venture. The court found that the LLC was not a joint venture for purposes of meeting certain requirements regarding participation in minority and women's business enterprises and failed to meet certain other requirements. The court stated that the LLC, as a corporate entity, failed to comply with the requirements for corporate bidders. The court found that the LLC encouraged the county to believe that one of the LLC members would be personally responsible as a member of a joint venture when in fact the member would have no liability for the LLC's obligations.

***Royal Mortgage Corporation v. Montague***, 41 S.W.3d 721 (Tex. App. 2001) (rejecting the argument that an LLC's partnership returns established that the LLC was a partnership and pointing out that the K-1's as well as other documentation indicated the company was an LLC).

***Morelli v. Morelli***, No. 2:00-CV-988, 2001 WL 99859 (S.D. Ohio Feb. 1, 2001). In this action between two brothers for dissolution of a partnership and partition, the spouse of the plaintiff brother was allowed to intervene for the purpose of asserting that the partnership was actually an LLC. The two brothers had purchased several parcels of real estate and conveyed title to Morelli Properties, LLC. Although the plaintiff's spouse produced evidence that articles of organization had been filed with the Ohio Secretary of State, her husband alleged that the articles of organization were never filed, that the LLC had never operated as an LLC, and that it had no separate existence apart from the brothers as an implied-in-fact partnership. The brothers argued that the plaintiff's spouse had at best a dower interest in the properties allegedly transferred to the LLC. The court concluded that the spouse had the right to intervene because she possessed a significantly protectable interest, a decision on the merits would impact her interest, and her interest would not be adequately protected by the existing parties. Additionally, the court concluded that the spouse met the standards governing permissive intervention.

***Frontier Traylor Shea, LLC v. Metropolitan Airports Commission***, 132 F. Supp.2d 1193 (D. Minn. 2000). Three members of an LLC submitted a statement during the pre-qualification process associated with bidding on an airport construction project. In the statement, the members identified their entity as "Frontier/Traylor/Shea joint venture" and identified it as a "joint-and-several joint partnership." Subsequently, the LLC submitted the lowest bid, but the airport commission rejected the bid on the basis that the entity was not pre-qualified since it was an LLC rather than a joint venture partnership, the status indicated by the Frontier entity that was pre-qualified. The LLC sought injunctive relief and argued that it was a joint venture, citing a treatise and some cases referring to an LLC as a joint venture. The airport argued that a joint venture is a form of partnership and cannot take the form of an LLC. The court concluded that the airport commission's decision was not illegal, arbitrary, capricious, or unreasonable "[g]iven the lack of clarity in the status of when a limited liability corporation [sic] is legally a joint venture and the conflicting documents presented" to the airport commission.

***All Comp Construction Company, LLC v. Ford***, 999 P.2d 1122 (Okla. App. 2000) (stating that an LLC is a fictional "person" for legal purposes and, as such, is not entitled to recover damages for mental stress and anguish as a natural person would).

***Abner Realty, Inc. v. Administrator of General Services Administration***, No. 97 Civ. 3075(RWS), 1998 WL 410958 (S.D. N.Y. July 22, 1998). An LLC defendant was awarded Rule 11 sanctions against the plaintiff and its lawyer based upon their failure to make the reasonable inquiry required under Rule 11. The plaintiff's repeated erroneous references to the LLC as a limited partnership were among numerous factors the court felt demonstrated the plaintiff's lack of reasonable inquiry. The court pointed out that certificates of formation and certificates of limited partnership are public records. Furthermore, the plaintiff continued to refer to the LLC as a limited partnership even after the LLC

filed motions making it clear it was an LLC. The court gave various other examples of erroneous or unsubstantiated allegations and ordered both the plaintiff and the plaintiff's lawyers to pay monetary sanctions and write letters of apology.

**M. Limited Liability of Members and Managers; Personal Liability Under Agency or Other Law**

*McNamee v. Dept. of Treasury*, 488 F.3d 100 (2<sup>nd</sup> Cir. 2007). The Second Circuit joined the Sixth Circuit in upholding the validity of the check-the-box regulations and affirming the ability of the IRS to hold a single member of a disregarded LLC personally liable for unpaid employment taxes. McNamee was the owner of a single member LLC that had not elected to be treated as a corporation under the check-the-box regulations. The LLC failed to pay any required payroll taxes (i.e., unemployment, social security and Medicare as well as withheld employee income taxes and employee FICA contributions) for a year and a half. The IRS assessed the taxes against McNamee personally and placed a lien on his property. McNamee argued that the IRS did not have authority to pierce the veil of an LLC and that the check-the-box regulations conflicted with the Internal Revenue Code. The court of appeals held that the check-the-box regulations are eminently reasonable in light of the emergence of LLCs and the ambiguous statutory treatment under the Internal Revenue Code. The court also rejected McNamee's argument that proposed changes to the regulations, under which a disregarded LLC's owner would not be liable for payroll taxes, indicate that the current regulations are wrong. The court held that the proposed changes provide no basis for finding the existing regulations unreasonable. Finally, the court rejected McNamee's argument that the IRS's attempt to collect the LLC's unpaid payroll taxes from him violates state law. The court concluded that single member LLCs are entitled to whatever advantages state law provides, but state law cannot abrogate the owner's federal tax liability.

*Belden v. Thorkildsen*, 156 P.3d 320 (Wyo. 2007). An individual who signed a note in his capacity as LLC member argued he was not liable because members have no personal liability for LLC debts, but the Wyoming Supreme Court held that the trial court improperly failed to consider evidence of an alleged oral side agreement that the member would reimburse the LLC for payments made on the note. The note paid off and refinanced an original note executed by the individual to finance the individual's purchase of a partnership interest in the predecessor partnership of the LLC, and the oral side agreement was not barred by the parol evidence rule because the agreement to reimburse the LLC and co-member was not inconsistent with the terms of the notes.

*Babb v. Bynum & Murphrey, PLLC*, 643 S.E.2d 55 (N.C. App. 2007). The plaintiffs sued Bynum and Murphrey, two members of a law firm LLC, alleging that Bynum engaged in numerous acts of fiduciary fraud in connection with the handling of a trust. The plaintiffs alleged claims against Murphrey for negligence, negligent supervision, and breach of fiduciary duty. The plaintiff argued that Murphrey had a duty to them under the North Carolina Limited Liability Act and the firm's operating agreement. First, the court cited the statutory provision protecting a member from liability for the obligation of the LLC but providing that a member may become liable for the member's own acts or conduct. Though the plaintiffs claimed that they were seeking to hold Murphrey liable for his own acts and omissions, the court concluded that the plaintiffs failed to allege any direct acts by Murphrey and were relying on Murphrey's failure to act. The court concluded that the LLC statute did not impose a duty on Murphrey to investigate Bynum if Murphrey did not have any actual knowledge. The court also rejected the plaintiffs' claim that the operating agreement created a duty on the part of Murphrey. Although the operating agreement stated that a member shall be liable for his own professional negligence and that a member must comply with the rules of professional conduct, the court concluded that the plaintiffs were not third party beneficiaries of the agreement. The court said that the intent of the parties was to benefit the law firm and its members, not to directly benefit the plaintiffs. Thus, the plaintiffs were at most incidental beneficiaries and not third party beneficiaries with standing to sue.

*Littriello v. United States*, 484 F.3d 372 (6<sup>th</sup> Cir. 2007). The plaintiff, the sole member of several disregarded LLCs, was deemed to be the sole proprietor of the businesses under Internal Revenue Code Section 7701, and the IRS sought to levy on the plaintiff's property in connection with unpaid employment taxes arising from the LLCs' operations. The plaintiff challenged the check-the-box regulations on several grounds. The court rejected the plaintiffs' challenges, holding that the check-the-box regulations are a reasonable interpretation of ambiguous provisions of Section 7701 and a valid exercise of agency authority by the Treasury. The court also concluded that the plaintiff's failure to make an election under the check-the-box regulations dictated that the LLCs be treated as disregarded entities under the regulations and prevented them from being treated as corporations; therefore, the plaintiff was deemed to be the sole proprietor of the businesses under Section 7701 and had personal liability for the employment taxes arising from the businesses. Finally, the court rejected the plaintiff's claim that the regulations impermissibly altered the legal status of

the LLCs as separate entities under state law. While the plaintiff's LLCs were entitled to whatever advantages state law provided, the court concluded that state law could not abrogate his tax liability. The court noted that, after the plaintiff filed his notice of appeal in this case, the IRS proposed amendments to its entity classification regulations that would shield individuals in the plaintiff's circumstances from personal liability, but the court rejected the argument that the proposed regulations should be deemed to reflect the Treasury's current policy and applied to the plaintiff's case. The court concluded that the proposed regulations did not in any way undermine the determination that the current regulations are reasonable and valid.

*Van Meter v. Calpac*, Civil No. 05-00037, 2007 WL 1129198 (D. Guam April 10, 2007) (characterizing member of member-managed LLC as a managerial employee under Title VII, and holding member as well as LLC's general manager were sued in their capacities as supervisors and were not liable under Title VII because there is no personal liability of individual supervisors under Title VII).

*Harada v. Doiron*, No. 2:04-CV-1320-PMP-RJJ, 2007 WL 983843 (D. Nev. March 30, 2007) (granting member's motion for summary judgment as to liability on loan based on limited liability of members under Nevada LLC statute).

*Truck America Training, LLC v. City of Hillview*, No. 2006-CA-000727-MR, 2007 WL 866694 (Ky. App. March 23, 2007) (holding that contract signed by individuals indicating representative capacity but without naming represented LLC was deemed binding on individuals rather than LLC by virtue of individuals' failure to respond to request for admissions).

*McFarland v. Virginia Retirement Services of Chesterfield, L.L.C.*, 477 F.Supp.2d 727 (E.D. Va. 2007) (acknowledging general rule of limited liability of LLC members under Virginia LLC statute but concluding member who personally participates in tortious conduct of LLC may be held personally liable).

*Ledy v. Wilson*, 831 N.Y.S.2d 61 (N.Y. A.D. 1 Dept. 2007) (recognizing potential personal liability of LLC officers for LLC's breach of contract if officers acted on LLC's behalf and breach involved bad faith misrepresentations).

*Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246 (Ind. App. 2007) (noting that members of LLC were not liable for payables of LLC because members have no personal liability for debts and obligations of LLC).

*Miller v. Sabilia*, No. CV065002162S, 2007 WL 706740 (Conn. Super. Feb. 15, 2007) (stating LLC member cannot be sued simply by reason of membership in LLC because statute specifies member is not proper party in suit against LLC solely by reason of being member).

*Archer v. Permanent Spray On Siding, LLC*, No. CV064004785S, 2007 WL 586846 (Conn. Super. Feb. 1, 2007) (dismissing negligence claim against individual LLC agent who negotiated contract but was not involved in alleged faulty installation of product, but declining to dismiss unfair practices claim against individual because claim was based on individual's personal involvement in negotiating contract and selling product).

*Optowave Co., Ltd. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2007 WL 129009 (M.D. Fla. Jan. 13, 2007) . The court denied an LLC officer's motion for summary judgment on the plaintiff's claim against the officer individually because the officer signed a contract without identifying the business as an LLC. The member signed the contract as President and CEO of "Precision Technology Group (PTG)." The officer claimed that PTG was PTG, Industries, LLC, a properly registered LLC and pointed to evidence indicating that the plaintiff knew the identity of the LLC. The officer argued the contract was ambiguous and that the extrinsic evidence did not violate the parol evidence rule. The court disagreed that the contract was ambiguous and relied upon a provision of the Florida LLC statute that provides omission of an LLC designator in the use of an LLC name renders a person who knowingly participates or acquiesces in the omission liable for any indebtedness, damage, or liability caused by the omission.

*Brew City Redevelopment Group, LLC v. Ferchill Group*, 724 N.W.2d 879 (Wis. 2006) (discussing personal liability of members or managers for acts of tortious interference in individual capacity).

*Raspanti v. Litchfield*, 946 So.2d 234 (La. App. 2006) (holding attorney's oral agreement was made in capacity as member of LLC law firm and attorney thus was not personally obligated under agreement).

**Kew Gardens Hills Apartment Owners, Inc. v. Horing Welikson & Rosen, P.C.**, 828 N.Y.S.2d 98 (N.Y. A.D. 2 Dept. 2006) (commenting that allegations against individual were sufficient to support claim that she participated in tort in furtherance of company business and that individual thus was not insulated by New York LLC law).

**Pfeifer v. Legault & Son Construction**, No. CV054002595, 2006 WL 3290545 (Conn. Super. Oct. 26, 2006) (finding no basis to pierce LLC veil and no evidence individual engaged in tortious acts or CUTPA violations for which personal liability could be imposed).

**Nola Realty LLC v. DM & M Holdings L.L.C.**, 823 N.Y.S.2d 137 (N.Y. A.D. 1 Dept. 2006) (discussing personal liability of members for down payment under LLC contract to purchase real estate based on NSF personal checks).

**Smith v. Preston Gates Ellis, LLP**, 147 P.3d 600 (Wash. App. 2006) (recognizing that individual who contracted with LLC could not recover against LLC member absent personal guaranty).

**Pepler v. Coyne**, 822 N.Y.S.2d 516 (N.Y. A.D. 1 Dept. 2006) (discussing personal liability of LLC co-founder and managing member under state employment discrimination law based on status as “employer”).

**J.R. Simplot Company v. Bosen**, \_\_ P.3d \_\_, 2006 WL 3409103 (Idaho 2006). An individual, Bosen, was held liable under a commercial sales agreement he claimed he signed on behalf of an LLC. Bosen purchased land with another individual, Achs, and Achs formed an LLC to operate a hog farm on the property. Bosen completed a form commercial sales agreement to obtain services and products for chemical and fertilizer applications to the farm property. In completing the sales agreement, Bosen listed the LLC’s name as the “customer account name” and checked the box designated “LLC” to indicate the “type of ownership.” He listed the “principals names & titles” as Achs and Bosen. He listed “5100” acres in the box entitled “acres owned.” Since the LLC did not own any real property, the 5,100 acres could only refer to the property purchased by Bosen and Achs. At the bottom of the sales agreement was a paragraph entitled “agricultural business agreement” in which the “applicant” agreed to pay the total amount due on each invoice. The form did not specify whether the applicant was also the customer. In the box for “applicant’s signature,” Bosen wrote his name without indicating that he was signing in a representative capacity. Bosen also signed a security agreement and financing statement without designating any representative capacity. The security agreement and financing statement listed both Bosen and the LLC as debtors. The security agreement granted a security interest in the crops grown on the real property. The Idaho Supreme Court upheld the district court’s summary judgment against Bosen on the basis that Bosen signed the commercial sales agreement in his individual capacity. Bosen claimed that there was a material fact issue as to his status as a member of the LLC and, as such, his protection from liability under the Idaho LLC statute. The court stated that it was immaterial whether Bosen was a member of the LLC because he was being held liable for a debt he personally incurred rather than as a member of the LLC. The court also found that Bosen’s subjective intent to sign on behalf of the LLC and not as an individual did not raise a genuine issue of material fact because he never verbalized his intent not to be personally obligated under the contract. The court agreed with the district court that any ambiguity created by the manner in which Bosen filled out the form sales agreement should be construed against him on the basis that a contract is construed against the party preparing it or employing the words in doubt. In a lengthy dissent, the dissenting justice complained that one of the lessons that can be drawn from the majority’s decision is that “a seller of goods need no longer obtain a personal guarantee or pierce the protective veil of a limited liability entity in order to hold a representative of the entity personally liable. The seller needs only to get the representative to sign a confusing, one-size-fits-all contract, doing away with the bother of asking for a personal guarantee or the tedious business of proving the entity’s shield of liability should be disregarded.”

**Puleo v. Topel**, 856 N.E.2d 1152 (Ill. App. 2006). The plaintiffs sought to hold the sole member and manager of an LLC personally liable for a debt incurred by the LLC after the LLC was involuntarily dissolved and before it was reinstated. The plaintiffs argued that the managing member should be liable just as an officer or director of an Illinois corporation would be liable for a debt incurred by a dissolved corporation. The court examined the provisions of the Illinois LLC statute and found that they differed from the corporate statute. The court pointed out that the LLC statute expressly provides that a member or manager is not liable for debts of the LLC unless the articles of organization provide for personal liability and the member has consented in writing to the provision. Additionally, the LLC statute only addresses liability to the LLC for unauthorized acts during winding up and does not contain a provision like that in the corporate statute which imposes liability on a person who assumes to exercise corporate powers without authority. Finally, the court found it significant that the legislature removed from the LLC statute a provision that provided for

personal liability of members and managers to the extent a shareholder or director in an Illinois corporation would be personally liable under analogous circumstances.

***D’Elia v. Rice Development, Inc.***, 147 P.3d 515 (Utah App. 2006). A limited partner sued the corporate and LLC general partners of two limited partnerships and sought to hold the individual owner of the entities personally liable for breaches of fiduciary duty of the general partners. The court first addressed the argument that the individual owner of the corporation and LLC was liable for the entities’ actions under the alter ego theory. The court affirmed the trial court’s determination that the evidence did not support piercing the veil of the entities because the plaintiff encouraged many of the informal and lax practices that the plaintiff claimed justified piercing the veils. The court went on to conclude that the LLC’s member participated in the activities that were a breach of fiduciary duty on the part of the LLC and that the member could be held personally liable on the basis of such participation. Though the Utah LLC statute states that members and managers do not have personal liability for the debts and liabilities of the LLC, the plaintiff relied upon Utah case law holding that an officer or director of a corporation may be held personally liable for participating in wrongful activity of the corporation. The court noted that several state courts have imposed personal liability on LLC members or managers on the basis that the LLC statutes expressly provided for liability where the member or manager participates in the LLC’s tortious conduct. Utah’s statute is silent in such respect, but the court was persuaded by case law in other states in which LLC statutes are similarly silent and the courts nevertheless concluded that LLC members or managers can be personally liable for participating in torts of the LLC under the same principles that apply to corporate officers who participate in tortious conduct. Because the LLC’s member exercised total control over the LLC and participated in the LLC’s breaches of fiduciary duty and acts of constructive fraud, the member was personally liable for the breaches of duty and acts of constructive fraud.

***Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.***, 455 F.Supp.2d 236 (W.D. N.Y. 2006) (holding that LLC member who signed on behalf of “Harsha & Associates” rather than “Harsha Associates, LLC” was not personally liable under rule imposing liability on one who signs for non-existent entity inasmuch as variance in LLC name was slight and there was no showing third party was misled about identity of contracting party).

***Bordieri v. Nelson***, No. CV040834274, 2006 WL 2948081 (Conn. Super. Sept. 28, 2006). The court held that use of a nonexistent entity name and failure to file the trade name violated the Connecticut Unfair Trade Practices Act but was not a basis of liability under the statute where the plaintiffs failed to prove any ascertainable loss caused by use of the fictitious name. The party who contracted under the LLC name had revealed that he could not yet afford to file papers to form the LLC, and the parties understood they were contracting as individuals.

***Waan v. Universal Coin Laundry Machine, LLC***, No. 267954, 2006 WL 2742007 (Mich. App. Sept 26, 2006) (holding LLC members were protected from personal liability on LLC’s contract, but members could be held personally liable for participation in tortious acts, even if acting in capacity as agent of LLC, under principles applicable to corporate agents).

***W. J. Spano Company, Inc. v. Mitchell***, 943 So.2d 1131 (La. App. 2006). The Mitchells sought to hold an LLC and its member liable for faulty landscape architecture services. The member argued that he was not liable based on the provision of the Louisiana LLC statute that insulates members, managers, and employees from liability for a debt or obligation of the LLC. The court acknowledged the liability protection provided by the LLC statute, but stated that the member could be liable in his capacity as a professional landscape architect for negligence in performing his professional duties. The court stated that the LLC statute clearly provides for a cause of action against a member, manager, or employee of an LLC for breach of professional duty, as well as for any fraud or other negligent or wrongful act. The court distinguished another Louisiana case, *Curole v. Oschner*, in which the court concluded that an LLC member could not be personally liable for the alleged wrongful termination of an LLC employee because the act was undertaken in his capacity as a member of the LLC. The court stated that the member in the instant case was engaged in the practice of a profession and that the Louisiana statutes are not intended to shield professionals from liability for personal negligence.

***Petch v. Humble***, 939 So.2d 499 (La. App. 2006). The plaintiffs sued an LLC and its individual members for negligence in failing to obtain a stormwater permit and in failing to employ a stormwater pollution prevention plan in connection with excavation work performed on property being developed as a subdivision by the LLC. The court found no merit to the plaintiffs’ contention that the plaintiffs had adequately alleged negligence on the part of the individual defendants by alleging that the LLC acted negligently and that the individuals were members with the authority to act

on behalf of the LLC. The court relied upon the statutory limitation of liability of LLC members and others and concluded that, to have meaning within the statute, the “negligent or wrongful act” of a person that can be the basis for personal liability must refer to acts done outside one’s capacity as a member, manager, employee, or agent of an LLC, or acts done in such a capacity that also violate some personal duty owed to the injured party. The court granted summary judgment in favor of the individual defendants because the plaintiffs did not allege personal acts of negligence by the individual defendants.

***Harper v. Coates-Clark Orthopedic Surgery & Sports Medicine Center, LLC***, Case No. 3:05-cv-166-J-MCR, 2006 WL 2523135 (M.D. Fla. Aug. 30, 2006) (concluding allegations that defendant owner/officer of LLC acted directly or indirectly in interest of LLC employer and was substantially in control of terms and conditions of plaintiff’s work stated claim against individual as “employer” under Fair Labor Standards Act).

***Nautilus Insurance Company v. Wadsworth***, No. 2:05-CV-64, 2006 WL 2452949 (D. Vt. Aug. 23, 2006) (noting, in course of concluding LLC and its member were not in privity for purposes of claim preclusion analysis, that any liability of member of Vermont LLC would stem from conduct in personal capacity given liability protection of members from debts and obligations of LLC provided under Vermont LLC statute).

***Haynes v. B & B Realty Group, LLC***, 633 S.E.2d 691 (N.C. App. 2006) (holding LLC member could not be held individually liable because plaintiff did not allege facts to support claim of tortious conduct by member).

***Milk v. Total Pay and HR Solutions, Inc.***, 634 S.E.2d 208 (Ga. App. 2006). The plaintiff sued an LLC and its managing member for amounts owed under a contract to provide payroll services to the LLC. A default judgment was entered against the LLC, and the plaintiff sought summary judgment holding the managing member personally liable. The court denied the plaintiff’s motion for summary judgment, pointing out that the filing of the articles of organization served as conclusive proof that all conditions for formation had been satisfied and that the LLC’s existence thus began on that date. By statute, a member is separate from the LLC and is ordinarily not a proper party to a proceeding by or against an LLC. The court also pointed out that the member’s signature did not appear on the agreement in any capacity nor was there any evidence the member guaranteed payment under the contract. The court went on to specifically reject numerous arguments raised by the plaintiff. The plaintiff first argued that it was entitled to summary judgment against the managing member because the LLC dissolved before an operating agreement was entered. The managing member denied that the LLC had dissolved, but the court commented that the plaintiff would not be entitled to summary judgment on this ground in any event because dissolution alone does not cause an LLC to cease to exist or render its members personally liable for the LLC’s debts. Furthermore, the court said that the formation of an LLC as an entity separate from its members is predicated on the public filing of the LLC’s articles of organization, not on whether or when an operating agreement is executed. The court next rejected the plaintiff’s argument that the LLC veil should be pierced. Finally, the court acknowledged that an LLC member may be personally liable if he or she personally participates in or directs a tort committed by the LLC, but the court found the evidence did not establish a fraud or conversion.

***Freer v. Bishop***, No. CV044000775S, 2006 WL 2053714 (Conn. Super. July 6, 2006) (finding no evidence to hold individual member who signed proposal on behalf of LLC personally liable).

***Team EJP Racing, LLP v. Dollar***, No. 5:06-CV-17-V, 2006 WL 1875333 (W.D. N.C. July 5, 2006) (relying on provisions of Arkansas LLC statute protecting LLC members from personal liability and finding allegations insufficient to indicate any grounds to hold member personally liable).

***HWB, Inc. v. MetalPro Industries, LLC***, Civil Action No. 05-6665, 2006 WL 1581329 (E.D. La. June 7, 2006). The plaintiffs sued an LLC and its managing member for patent infringement, conversion, and negligence in connection with the LLC’s refusal to return a piece of equipment lent to the LLC by the plaintiffs. The plaintiffs argued that the managing member was liable in his individual capacity for his individual tortious and infringing conduct. The Louisiana LLC statute provides that a member, manager, employee, or agent is not liable “in such capacity” for a debt, obligation, or liability of the LLC, and the court stated that this language implies that the law may not protect an LLC member against personal liability for his own tortious conduct. In addition, the statute goes on to provide that the statute does not affect the rights a person may have against a member or manager based on any fraud, breach of professional duty, or other negligent or wrongful act of the member or manager. Relying on a Louisiana Court of Appeals decision interpreting the statutory provision in issue, the court held that an LLC member may be liable for his individual negligent or wrongful conduct only if the conduct was outside his capacity as a member. The court concluded that the allegations

were insufficient to support a finding or fair inference that the managing member acted outside his capacity as a managing member in a manner subjecting him to liability in an individual capacity. The complaint explicitly stated that the plaintiffs dealt with the managing member in his capacity as managing member, and the complaint implied that the managing member was authorized to use the borrowed piece of equipment in the same capacity as the LLC. Furthermore, the claims alleged against the managing member arose from acts attributed by the plaintiffs to both the LLC and the managing member, and the plaintiffs did not suggest how the managing member acted in a capacity exceeding that of the LLC. The court noted, but did not address substantively, the possibility that an independent basis for dismissal of the plaintiffs' claims might be found in the statutory provision prohibiting claims against an LLC and any of its members in a single lawsuit.

***Rosenlicht v. Bradley***, No. HHBCV05400301S, 2006 WL 1680047 (Conn. Super. May 17, 2006) (denying plaintiff's motion for prejudgment remedy against individual who signed agreement as member of LLC and served as president of another LLC where allegations did not establish probable cause for liability of individual).

***Thornton v. Meridian Consulting Engineers***, C.A. 04C-01-001-RFS, 2006 WL 1174186 (Del. Super. Feb. 13, 2006) (stating that performance of professional services through LLC does not protect engineer from personal responsibility for inadequate professional services).

***Continental Casualty Co. v. Duckson-Carlson, LLC***, No. A05-1173, 2006 WL 1073075 (Minn. App. April 25, 2006) (holding LLC member liable to insurer for deductible in connection with settlement paid by insurer on malpractice claim under policy covering LLC and member).

***Baraby v. Swords***, 851 N.E.2d 559 (Ohio App. 2006) (holding that limited liability of LLC member is affirmative defense which is waived if not properly raised).

***Arista Records, Inc. v. Flea World, Inc.***, Civ. Action No. 03-2670 (JBS), 2006 WL 842883 (D. N.J. March 31, 2006) (discussing potential personal liability of LLC members for participation in LLC's copyright infringement).

***Gray Printing Company v. Blushing Brides, LLC***, No. 05AP-646, 2006 WL 832587 (Ohio App. March 31, 2006) (concluding LLC member/manager had no liability on credit agreement clearly designating LLC as purchaser).

***MaryCLE, LLC v. First Choice Internet, Inc.***, 890 A.2d 818 (Md. App. 2006) (holding that violations of Maryland Commercial Electronic Mail Act, like violations of Maryland Consumer Protection Act, are "in the nature of a tort" and that LLC officers and agents may thus be personally liable for participating in such violations even where participation was not "hands on" at every step).

***Brew City Redevelopment Group, LLC v. Ferchill Group***, 714 N.W.2d 582 (Wis. App. 2006) (recognizing limited liability of LLC members and managers under Wisconsin LLC statute and dismissing tortious interference claim against LLC member where no conduct other than as member or manager was alleged).

***Vasudevan v. Pragosa***, No. HHDCV054012416, 2006 WL 328367 (Conn. Super. Jan. 23, 2006) (stating that allegations of ownership and control are insufficient to impose personal liability on LLC's sole member and manager for alleged tortious acts of LLC's employees).

***Kandi v. United States***, No. C05-0840C, 2006 WL 83463 (W.D. Wash. Jan. 11, 2006). A single member LLC incurred employment taxes, and the IRS sought to collect payment of the taxes from the sole member of the LLC. The IRS argued that the member was the employer for employment tax purposes because the LLC was a disregarded entity under the check-the-box regulations. After the parties had submitted their original motions and cross motions for summary judgment, the IRS issued proposed regulations reversing its position that an owner of a single member LLC is personally liable for the LLC's employment tax liability. The IRS proposal specifically provided that the change would not take effect until the regulations became final, but the petitioner argued that not applying the regulation retroactively would be an abuse of discretion. The court found that the refusal to apply the regulations retroactively was not an abuse of discretion and that the current regulations rather than the proposed regulations governed the petitioner's case. The court agreed with the IRS's position that disregarding the separate existence of a single member LLC for "federal tax purposes" includes employment tax purposes and makes the employment taxes a member liability that is properly assessable against the member. The court found no textual support for the petitioner's argument that the check-



the-box regulations affect only the assessment of income taxes. The court also rejected the argument that the IRS's interpretation strips the sole member of an LLC of the limited liability provided under state law. The court concluded that the employment tax liability in the case of a disregarded LLC is the member's liability *ab initio* and is never attributable to the LLC. The court noted that the sole member has an election regarding its treatment and that any personal tax liabilities resulting from the failure to elect corporate treatment are attributable to the member's choice rather than any attempt by the IRS to pierce the LLC veil.

*Walker v. Maddox*, No. CV020391455S, 2006 WL 224112 (Conn. Super. Jan. 4, 2006) (finding genuine issues of material fact with respect to extent of LLC law firm member's involvement in alleged professional negligence of other member).

*Allen v. Greenville Hotel Partners, Inc.*, 405 F.Supp.2d 653 (D. S.C. 2005) (finding fact issue existed as to whether LLC owner who signed hotel franchise agreement in individual as well as representative capacity was franchisee who could be held liable to guests injured or killed in hotel fire).

*In re Bradley*, No. 04-11645, 2005 WL 4122834 (Bankr. D. Vt. Dec. 21, 2005) (holding LLC member was not personally liable on contract for accounting services although contract did not reference LLC, relying on statutory protection of LLC members, provision in articles of organization providing members would have no personal liability for LLC debts, and accountant's invoices showing accountant considered LLC to be client).

*Ney v. Murray*, No. B174255, 2005 WL 3220269 (Cal. App. 2 Dist. Dec. 1, 2005). The court of appeals upheld the trial court's grant of an LLC member's motion for nonsuit as to the plaintiffs' fraud claim against the member. Although there was no evidence of any misrepresentations by the movant (Murray) to the plaintiffs, the plaintiffs argued Murray inferentially ratified the fraud by accepting the fruits of the fraud knowing that the fraud was perpetrated by the LLC and another LLC member. The court concluded the plaintiffs had not presented sufficient evidence of Murray's knowledge of the fraud to submit the claim to the jury. The plaintiffs argued that Murray must have known about the fraud based on his status as an LLC member who wrote checks for the LLC and saw other members regularly, but the court pointed out that the California LLC act provides that a member has no personal liability for any debt, obligation, or liability of the LLC solely by reason of being a member.

*Mussen v. Franklin Square Assocs., V, LLC*, 22 A.D.3d 1022, 803 N.Y.S.2d 252 (N.Y. Sup. Ct. 2005) (dismissing foreclosure action against individual "managing partner" of LLC landowner inasmuch as individual never had ownership interest in property and signed contract with plaintiff in representative capacity and not individually).

*Peters v. Astrazeneca, LP*, No. 05-C-649-C, 2005 WL 3071242 (W.D. Wisc. Nov. 14, 2005) (dismissing complaint against individuals (who were sued as CEOs of entity defendants) on basis of Wisconsin LLC statutory provisions protecting LLC members and managers from personal liability (although caption of case indicates at least one entity defendant was limited partnership, and court refers to entity defendants as corporations)).

*In re Inselman*, 334 B.R. 267 (Bankr. D. Ariz. 2005) (holding LLC member/manager was not personally liable for LLC's unpaid privilege tax, interpreting provisions of Arizona privilege tax imposing personal liability on any "person who fails to remit any additional charge made to cover the tax or truthfully account for and pay over such amount" as imposing liability only on merchant/taxpayer, not its officers, employees, or agents).

*State v. NCCS Loans, Inc.*, 620 S.E.2d 697 (N.C. App. 2005) (holding allegations were sufficient to allow addition of LLC managing member as party in usury case against LLC based on provision in North Carolina LLC statute indicating member may be held personally liable for member's own acts or conduct).

*Ventres v. Goodspeed Airport, LLC*, 881 A.2d 937 (Conn. 2005) (finding ample evidence that LLC member personally directed improper clear-cutting of trees by independent contractor of LLC airport and thus had personal liability for such, relying on principle that agent or officer who participates in commission of tort is liable whether or not acting on behalf of principal or corporation, applying responsible corporate officer doctrine, and rejecting argument that statutory provisions protecting LLC members and managers from personal liability preclude holding LLC members and managers liable for participation in tortious conduct).

**Connecticut Plywood Corporation v. Custom Cabinets & Refacing, LLC**, No. CV44001660S, 2005 WL 2857505 (Conn. Super. Oct. 13, 2005) (defendant member who guaranteed LLC indebtedness to supplier was not liable on debt incurred by LLC after defendant member ceased his association with LLC and LLC was being conducted as sole proprietorship by remaining member, where defendant member informed plaintiff of change in LLC's business and made separate agreement regarding payment of LLC's then existing indebtedness).

**Sykes v. Hengel**, 394 F.Supp.2d 1062 (S.D. Iowa 2005) (holding members of LLC's board of managers were not personally liable for any libelous statements in letter to unit holders regarding termination of CEO because there was no evidence they were doing anything other than performing administrative duty).

**Swift Freedom Aviation, LLC v. R.H. Aero**, No. 1:04-CV-90, 2005 WL 2246256 (E.D. Tenn. Sept. 13, 2005) (finding fact issues as to personal liability that may arise under agency principles precluded summary judgment in favor of defendant individual who was sole owner of seller of plane, regardless of whether seller was Delaware LLC or corporation, but allegations were insufficient to pierce veil).

**SNET Information Services, Inc. v. Milner**, No. CV044003000S, 2005 WL 1760196 (Conn. Super. June 24, 2005) (recognizing separate existence of corporations and LLCs and dismissing complaint against individual member of LLC who was sued "doing business as" LLC and corporation).

**Horniatko v. Riverfront Assoc., LLC**, No. CV044000332S, 2005 WL 1671543 (Conn. Super. June 21, 2005) (concluding rule that corporate officer who commits or participates in tort has personal liability is equally applicable to LLC manager).

**People v. Pacific Landmark**, 129 Cal.App.4th 1203, 29 Cal.Rptr.3d 193 (Cal. App. 2 Dist. 2005). In this red light abatement action, the court held that LLC managers may not be held liable for the wrongful conduct of the LLC merely because of their manager status, but may be held liable for their personal participation in tortious or criminal conduct of the LLC, even when performing their duties as manager. Thus, the manager of the LLC lessor of the premises where prostitution was being conducted could be held personally liable for his role in allowing the nuisance to persist. The court pointed out that the manager occupied a prominent and influential position with the LLC, that his name appeared as the agent of the LLC on the lease with the occupant of the premises, and that he had the right to inspect the premises and determine compliance with the lease and all laws and ordinances but failed to inspect and ascertain whether there was compliance.

**Salzano v. Goulet**, No. CV040287567S, 2005 WL 1154225 (Conn. Super. April 18, 2005) (recognizing LLC members and managers are protected by statute from vicarious liability for debts and obligations of LLC, but holding LLC manager is liable for his own torts, and allegations were sufficient to state claim against manager for manager's own negligence in rendering professional services).

**Ioerger v. Reiner**, 114 P.3d 1028 (Mont. 2005) (holding judgment creditor of LLC (which creditor learned in post-judgment proceedings had been involuntarily dissolved nine days prior to trial) could not join LLC's sole member as party solely for purposes of executing on judgment because LLC is separate legal entity distinct from its members rather than informal business association).

**Morris v. Cee Dee, LLC**, 877 A.2d. 899 (Conn. App. 2005) (holding evidence did not support piercing LLC veil, but prejudgment attachment of LLC member's personal assets was supported by probable cause to believe that member himself was negligent in connection with plaintiffs' claim arising from defective grate in bathroom floor of mobile home owned by LLC and leased to plaintiffs).

**Thomas v. Hobbs**, No. C.A. 04C-02-010 RFS, 2005 WL 1653947 (Del. Super. April 27, 2005) (dismissing breach of contract claim against sole member of LLC because contract was signed by member in representative capacity and there was no evidence member agreed to be personally liable on the contract).

**Dickens v. Alliance Analytical Laboratories, LLC**, 111 P.3d 889 (Wash. App. 2005) (finding LLC that was member/manager/director of another LLC was "employer" for purposes of liability under wage statute but individual sole member of LLC manager did not have liability unless LLC veil could be pierced, which involved unresolved fact issues).

***RAF Enterprises LLC v. Trident LLC***, No. A098529, 2005 WL 348955 (Cal. App. 1 Dist. Feb. 14, 2005) (finding substantial evidence to support holding nonmanaging, minority LLC member personally liable for participation in conduct constituting tortious interference with contract).

***Jana L. v. West 129th Street Realty Co., LLC***, No. 106722/01, 2005 WL 430092 (N.Y. Sup. Feb. 22, 2005) (plaintiff failed to raise triable issue as to personal liability of individual who was president of corporation that was managing member of LLC that was managing member of defendant LLC).

***Sliman's Printing, Inc. v. Velo International***, No. 2004CA00095, 2005 WL 100963 (Ohio App. Jan. 18, 2005) (holding president of LLC who assured plaintiff it would receive full payment of amount owed by LLC to plaintiff was not liable under agency or veil piercing theories because there was no evidence president guaranteed LLC debt in writing as required by statute of frauds).

***Hufnagle v. Provident Foundation, Inc.***, No. 4:03-CV-883-A, 2005 WL 65626 (N.D. Tex. Jan. 10, 2005) (recognizing that LLC member has limited liability under either Texas or Delaware law but holding that Delaware LLC's member had not shown that there was no basis for liability to plaintiff (who was suing on behalf of decedent's estate for injuries decedent suffered in nursing home owned by LLC) where member did not show it acted solely in the capacity of an LLC member).

***Avihod v. Daystar Development Inc.***, No. B167837, 2004 WL 2980296 (Cal. App. Dec. 27, 2004) (holding LLC manager was not liable under oral contract to repay member's investment in a failed LLC based on conclusion that "written" modifies both "guarantee" and "other contractual obligation" in statutory exception to LLC manager's limited liability where manager is obligated personally "[p]ursuant to the terms of a written guarantee or other contractual obligation entered into by the manager").

***In re Environmental Textiles, L.L.C. (Industrial Controls of Oklahoma, Inc. v. American Renewable Resources, L.L.C.)***, No. 03-00655-R, 03-0153-R, 2004 WL 2952664 (Bankr. N.D. Okla. Dec. 6, 2004) [no longer available on Westlaw] (holding plaintiffs failed to establish that LLC members were liable on the LLC's contract on an agency or ratification theory).

***Malone v. D and R, LLC***, No. CV040834225S, 2004 WL 2943111 (Conn. Super. Nov. 10, 2004). The court dismissed plaintiffs' claims against an LLC manager because the plaintiffs failed to sufficiently plead a basis to hold the manager liable. The plaintiffs claimed that the manager was liable for committing or participating in a tort because the manager assured the plaintiffs that he was in charge and would personally take care of them in connection with the construction and purchase of a condominium unit that turned out to be plagued with problems. The court agreed with the plaintiffs that an LLC manager, like a corporate officer, can be held personally liable for committing or participating in a tort, but the court found that the plaintiffs failed to sufficiently plead a basis to hold the manager liable for negligence or fraudulent misrepresentation. The plaintiffs did not allege that the manager approved, directed, actively participated, or cooperated in the allegedly defective construction. The plaintiffs also failed to state a claim for fraudulent misrepresentation, pleading only that the manager assured them he would make sure they were satisfied, and characterizing these statements as "material statements." The plaintiffs also did not plead a basis to hold the manager liable under the identity or instrumentality veil piercing tests.

***Wachovia Securities, LLC v. Neuhauser***, No. 04 C 3082, 2004 WL 2526390 (N.D. Ill. Nov. 5, 2004). Wachovia asserted various claims against four individuals arising out of the use of margin accounts opened under the names of two entities, Loop Corp. and NOLA, LLC. One of the claims arose out of a representation in the NOLA account agreement that one of the defendants was the general partner of NOLA, LLC. The court noted the difference between the liability of a general partner and an LLC member; however, even assuming the allegation was false (there was no allegation that NOLA actually was an LLC, only that it was purportedly an LLC), the court concluded the reliance element required for a fraudulent misrepresentation claim was not satisfied because there was no allegation Wachovia relied on the individual's personal creditworthiness in opening the account. Furthermore, Wachovia's pleadings alleged that the individual signed a document in which he promised to personally pay liabilities on the account, in which case Wachovia would have the same protection it would have had if he had been a general partner. The court rejected the individual's challenge to the sufficiency of Wachovia's allegations that he was personally liable based on the documents he signed. The individual argued he could not be liable as a partner by estoppel under the account agreement in which he represented he was a general partner because the LLC designator made it clear the entity was not a partnership. The

court pointed out that the allegations stated only that the entity purported to be an LLC; the entity may have been a de facto partnership if articles of organization were never filed. In addition, the court noted that there was no indication in the complaint that the individual signed only in a representative capacity when he signed another agreement in which he promised to pay any margin call.

***Law Offices of Gary Oberst, PC v. Omerta, LLC***, No. CV030197379, 2004 WL 2757633 (Conn. Super. Nov. 4, 2004) (holding plaintiff who sought to hold LLC's sole member and officer liable did not need to invoke veil piercing to hold the individual liable for her misrepresentations, whether made in her individual capacity or acting on behalf of the LLC, because an officer of a corporation who commits a tort is personally liable to the victim regardless of whether the corporation itself is liable).

***Strouch v. 72 Degrees Heating and Air Conditioning, LLC***, No. 568119, 2004 WL 2397279 (Conn. Super. Sept. 24, 2004) (assuming, in the absence of evidence regarding entity structure, that entity with which plaintiff contracted was Connecticut LLC, and finding that individual with whom plaintiff dealt could not be held personally liable where there were no allegations or proof of fraud, grounds to pierce veil, or conduct on the part of individual to indicate individual was assuming personal liability under contract with LLC).

***JB Contracting, Inc. v. Bierman***, 147 S.W.3d 814 (Mo. App. 2004) (holding plaintiff failed to allege and prove a basis for holding an LLC's sole member liable for the LLC's actions on the basis of unjust enrichment inasmuch as the member was protected from liability by statute and there was no showing that the member benefitted individually and not as a member of an LLC).

***Keszenheimer v. Boyd***, 897 So.2d 190 (Miss. App. 2004) (affirming dismissal of member of professional LLC where record did not show that member either personally participated in alleged legal malpractice or directly supervised a person who committed wrongful conduct).

***RD & J Properties v. Lauralea-Dilton Enterprises, LLC***, 600 S.E.2d 492 (N.C. App. 2004) (holding individual who signed purchase agreement for LLC vendor could not be held personally liable for breach of contract since the individual signed the agreement only once on behalf of the LLC and not individually).

***Lazard Debt Recovery, GP, LLC v. Weinstock***, 864 A.2d 955 (Del. Ch. 2004) (stating that LLC's directors, if any, are not personally liable for the debts and obligations of the LLC and that any contractual obligations assumed by the LLC are the LLC's and not its principals).

***Geresy v. Dommert***, No. 243468, 2004 WL 1222991 (Mich. App. June 3, 2004). The members of an LLC signed an operating agreement which stated that each of the members agreed to be personally liable for one-fifth of certain obligations and that they would execute guaranties. The operating agreement was signed on behalf of the LLC and by each member under the heading "Members." The court held that the individual members could not be held personally liable because they signed "only as members and not as individuals." The court relied on the rule that "an individual stockholder or officer is not liable for the corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and again as an individual." The court noted that the members signed only once in their "capacities as members." The court stated that its conclusion was buttressed by the fact that the individuals never signed the guaranties.

***Estate of Sestito v. Silk, LLC***, No. X04CV010103522S, 2004 WL 574517 (Conn. Super. March 9, 2004); ***Estate of Ridgeway v. Silk, LLC***, No. X04CV010103518S, 2004 WL 574526 (Conn. Super. March 9, 2004) (acknowledging that LLC members/managers could not be liable in dram shop action based solely on their membership in the LLC that served the alcoholic beverages, but refusing to grant summary judgment to those members who were present and participating in the business operations of the LLC on the night in question because an officer or agent who commits or participates in the commission of a tort is liable to third parties injured thereby whether or not the agent was acting on behalf of another).

***Estate of Countryman v. Farmers Cooperative Association***, 679 N.W.2d 598 (Iowa 2004). The court held that a member or manager of an LLC is not protected from liability for tortious conduct of the LLC if the member or manager participates in the tortious conduct of the LLC. The plaintiffs brought suit for damages arising out of an explosion that killed seven people and injured several others. The LLC supplied the propane gas, and the plaintiffs

claimed the LLC's 95% member, a cooperative association that provided management services under a management agreement with the LLC, participated in the LLC's wrongdoing through decisions it made in consumer safety matters. Specifically, the plaintiffs claimed that the member/manager's supervising employee was negligent in various respects. The court concluded that the LLC statute clearly imposes liability on members and managers who participate in tortious conduct. The court compared this approach to the "longstanding approach to liability in corporate settings, where, under general agency principals, corporate officers and directors can be liable for their torts even when committed in their capacity as officer." The court rejected the argument that an LLC member or manager is liable only for conduct outside the member's or manager's role, stating that such an approach is contrary to the corporate model and agency principles upon which the liability of LLC members and managers is based and cannot be found in the language of the statute. The court also distinguished the Louisiana case of *Curole v. Ochsner Clinic LLC* (summarized below) on the basis that the Iowa statute differs substantially from the Louisiana statute.

***IPO II v. Comm'r of Internal Revenue***, 122 T.C. No. 17, 2004 WL 870256 (U.S. Tax Ct. April 23, 2004) (interpreting Illinois LLC act and finding that it does not impose on LLC member any obligation to contribute towards LLC liability absent provision in articles of organization or written agreement).

***Stanley Weiss Associates, LLC v. Energy Management Inc.***, No. Civ. A. 02-1794, 2004 WL 877540 (R.I. Super. April 7, 2004) (concluding that sophisticated businessman, who was aware that tenant was LLC and that there were no guarantors, could not have reasonably relied upon alleged representations and assurances regarding defendants' liability under lease).

***Briga v. D'Amico***, No. CV040083317S, 2004 WL 772065 (Conn. Super. March 24, 2004). The court granted a pre-judgment remedy based on a showing of probable cause that the individual defendant was personally liable for breach of an agreement with the plaintiff. The individual argued that he had no personal liability, stating that he believed he had formed an LLC and that he took immediate corrective action to properly form the LLC when, after the lawsuit commenced, he found it had not been done. The court pointed out that the agreement was on a form headed by the name of an LLC but designating the individual as the "owner" within the body. Further, the agreement was signed by the individual without any designation that he was a member of the LLC, and the plaintiff was under the impression that he was dealing with the individual.

***County Electric Construction, Inc. v. Zakkar***, No. CV040408889, 2004 WL 970656 (Conn. Super. March 31, 2004) (finding probable cause to sustain pre-judgment remedy against individual who claimed to have made agreement on behalf of LLC where plaintiff presented evidence of bona fide belief that agreement was made with individual defendant rather than LLC).

***Gelinas v. Fuss***, No. CV030070629, 2004 WL 728536 (Conn. Super. March 19, 2004) (stating individual sole member of LLC would not be liable on LLC contracts but may be held liable for his own negligent acts while working on behalf of the LLC).

***Wood v. Hampton-Porter Inv. Bankers***, No. C-02-5367 MMC, 2004 WL 546888 (N.D. Cal. March 11, 2004) (refusing to enter judgment against LLC officers in action to confirm arbitration award because arbitration award was against LLC only, officers were not identified as respondents in petition, and LLC officers are not personally liable for LLC debts and obligations under California law).

***Dygart v. Collier***, No. 20020878-CA, 2004 WL 253554 (Utah App. Feb. 12, 2004) (holding members who acted on behalf of LLC in sale of property by LLC were not personally liable for such acts where plaintiff did not attempt to pierce veil and there was no factual basis for any individual tort liability).

***County of Washington v. City of Bristol***, Nos. CL 98-185-01, CL03-11, 2003 WL 23146220 (Va. Cir. Ct. Dec. 18, 2003) (dismissing individual principal owner of Virginia LLC as defendant (based on provision of LLC statute protecting members, managers, and agents from personal liability for debts and obligations of the LLC) because plaintiff failed to allege any facts from which court could conclude that "corporate veil" could be pierced).

***American Realty Trust Inc. v. Matisse Capital Partners LLC***, No. 02-1148, 2003 WL 22965577 (5th Cir. Dec. 17, 2003) (holding that, under Texas law, truism that business entity may only breach contract through actions of its

officers, employees, and agents does not create individual liability on part of those agents nor does it make the agents parties to the contract where party to the contract was LLC).

***Hoang v. Arbess***, 80 P.3d 863 (Col.App. 2003)(holding that LLC manager’s personal liability for his own negligence or violation of the Colorado Consumer Protection Act in connection with LLC’s construction of residence were issues for the jury, that statutes requiring information disclosure to home purchasers applied to manager personally while manager was acting on behalf of LLC, and that standard of care established by home purchasers applied to manager personally).

***Damaska v. Kandemir***, 767 N.Y.S.2d 569 (N.Y. App. Div. 1st Dept. 2003) (stating that it could not be determined at pre-discovery stage whether defendant’s role in LLC and/or knowledge or conduct with regard to the alleged sexual harassment and abuse might result in personal liability even though LLC form would generally preclude personal liability).

***Young v. Hamilton***, No. 01-56557, 01-56573, D.C. No. CV-97-01962-RMB, 2003 WL 22508213 (9th Cir. Oct. 31, 2003) (stating that manager of Utah LLC who relied upon provisions of Utah LLC act limiting liability of LLC managers offered no explanation as to why Utah law would apply in a suit in federal court in California, but that, assuming Utah law applied, Utah courts have imposed personal tort liability on corporate directors and officers for fraudulent acts committed in furtherance of corporate business).

***Zukel v. Great West Managers, LLC***, 78 P.3d 480 (Kan.App. 2003) (holding that form of execution of contract by LLC manager, which was “curious” in that it did not have either the clear characteristics of an individual execution nor those of a representative execution, unambiguously obligated manager as guarantor considering all the provisions of the contract in a manner to provide consistency and harmony).

***Algorithms for Behavioral Care, Inc. v. Reisinger***, No. Civ. 3:02CV23 (PCD), 2002 WL 32255507 (D.Conn. July 8, 2002) (noting that a member or manager is not generally liable for the acts of the LLC nor a proper party to an action against an LLC, but further noting that the complaint alleged conduct on the part of the individual defendants creative of liability on their part individually).

***Dugan v. Quanstrom***, No. 03 C 0254, 2003 WL 22326581 (N.D. Ill. Oct. 9, 2003) (holding that defendant who operated business as sole proprietorship and then as LLC may be held personally liable for acts occurring before formation of LLC pursuant to contract entered by predecessor business and on which he and the LLC became successors, but could not be held liable for acts after formation of the LLC inasmuch as there were no allegations that the member was the alter ego of the LLC).

***Nielsen-Allen v. Industrial Maintenance Corp.***, 285 F.Supp.2d 671 (D.Virgin Islands 2002) (granting LLC member’s motion to dismiss plaintiff’s claims against LLC member based on alleged discrimination and wrongful discharge by LLC because Uniform Limited Liability Company Act protects LLC members and managers from personal liability based solely on status as a member or manager).

***Clement Contracting Group, Inc. v. Coating Systems, L.L.C.***, 881 So.2d 971 (Ala. 2003) (holding that sole member/manager of LLC who signed contract with third party in his capacity as member was not personally liable on the contract though he should have signed in his capacity as manager since the LLC was manager-managed).

***Glydon v. Conway***, No. 01-P-1414, 2003 WL 21665004 (Mass.App. July 16, 2003) (stating that Delaware LLC act governed liability of members of Delaware LLC and holding that members of LLC were shielded from potential liability of LLC as general partner of limited partnership which allegedly breached its fiduciary duty as majority shareholder to minority shareholder of closely held corporation).

***Longview Aluminum, L.L.C. v. Industrial General, L.L.C.***, No. 02 C 0168, 2003 WL 21518585 (N.D. Ill. July 2, 2003) (holding members of LLC were not liable under partnership by estoppel theory, and individual member of LLC who signed contracts as “Chairman” or “Authorized Principal” was not personally liable under LLC or agency law, even though contracts and correspondence failed to identify the LLC as an LLC, because biography of individual furnished to plaintiff identified the LLC as an LLC and articles of organization provide notice under Illinois law).

***Mossy Motors, Inc. v. Cameras America***, 851 So.2d 336 (La.App. 2003) (holding that plaintiff who contracted with LLC offered no proof of any agreement with or duty owed by individual defendants (who were alleged to be “agents and/or officers and/or principals” of an LLC), and it was thus error to include the individual defendants in the default judgment entered when the defendants failed to answer).

***Chaz Concrete Company, LLC v. Lechner***, No. 2002-CA-001555-MR, 2003 WL 21361580 (Ky.App. June 13, 2003) (concluding that individual defendants were not entitled to summary judgment because there were fact issues as to whether the individuals acted in such a way as to incur personal liability for materials supplied to their LLCs).

***Triple Rock, LLC v. Rainey***, No. M2000-01115-COA-R3-CV, 2003 WL 21338702 (Tenn.Ct.App. June 10, 2003) (holding that, in keeping with concept of limited liability of LLC members, member was not required to contribute to LLC for losses absent provision in operating agreement regarding additional capital contributions).

***Kobrine, L.L.C. v. Metzger***, 824 A.2d 1031 (Md.App. 2003) (reversing lower court’s order that LLC member pay cost of removing rip rap erected by LLC landowner because court has no power to enforce a judgment against a non-party).

***Simms v. First Management, Inc.***, No. Civ.A. 01-2574-CM, 2003 WL 21313928 (D. Kan. May 20, 2003) (granting summary judgment in favor of individual defendant whose only connection to plaintiff’s Fair Housing Act claims was his status as an investor in the LLC that owned the apartment complex, citing case law holding that the Fair Housing Act “imposes liability without fault upon the employer in accordance with traditional agency principles, i.e., it normally imposes vicarious liability upon the corporation but not upon its officers or owners”).

***Evans v. Testa Development Assoc.***, No. CV010806425, 2003 WL 21101307 (Conn.Super. April 24, 2003) (holding that individual who acted only in his capacity as manager/member of LLC was not personally liable for LLC’s wrongful prosecution of prior lawsuit and stating that elementary principle of corporate law that corporation and its stockholders are separate entities also applies to LLCs).

***Hoang v. Arbess***, 80 P.2d 863 (Colo.App. 2003) (holding that LLC manager, like officer of a corporation, may be held personally liable for approving, directing, actively participating in, or cooperating in negligent conduct and that there was evidence sufficient to hold manager liable so that directed verdict in favor of manager was improper).

***Black v. Bruner***, No. 04-02-00733-CV, 2003 WL 724312 (Tex.App. March 5, 2003) (concluding that LLC member was not personally liable for LLC’s contractual indemnity obligation in the absence of any evidence that the regulations provided that its members were individually liable for the LLC’s debts).

***Imperial Trading Co., Inc. v. Uter***, 837 So.2d 663 (La.App. 2002) (affirming trial court’s finding that supplier knew or reasonably should have known that LLC managers were acting in representative capacity and that members had refuted claim of undisclosed agency).

***Rothstein v. Equity Ventures, LLC***, 750 N.Y.S.2d 625 (N.Y. A.D. 2 Dept. 2002) (stating that LLC members may be held liable if they personally participate in the commission of a tort in furtherance of company business, but finding that allegations did not state viable claim because there were no allegations that defendants knowingly made any false representations inducing plaintiffs to purchase house and allegations regarding improper construction sounded in breach of contract rather than tort).

***J. C. Compton Co. v. Brewster***, 59 P.3d 1288 (Or.App. 2002) (finding evidence that LLC member contracted to pay debts of LLC and its predecessor).

***Lexington Land Company, LLC v. Howell***, 567 S.E.2d 654 (W. Va. 2002)(referring to LLC and its member interchangeably, but acknowledging in footnote that LLC is separate from its members and that creation of LLC offers its members liability protection).

***Cooper v. Creative Homes of Distinction, L.L.C.***, No. COA01-1138, 2002 WL 2004298 (N.C. App. Sept. 3, 2002). The plaintiffs, employees of an LLC, sued the LLC, its manager, and certain transferees of the LLC’s property for unpaid wages and losses from unlawful distributions. The plaintiffs obtained a judgment holding the manager liable

on these claims. The court of appeals cited the statutory provisions regarding the limited liability of members and managers and reversed the judgment because the manager was merely an agent of the LLC and not a party to the employment contracts with the plaintiffs. The trial court made no findings that the manager itself had agreed to be bound by the employment contracts with the plaintiffs or that the manager employed, terminated, failed to make wage payments to, or was indebted to the plaintiffs. Rather, it was the LLC that employed, failed to pay wages to, and was indebted to the plaintiffs. The trial court also made no findings that the manager was involved in the unlawful distribution of assets so as to support imposing liability based on the distributions.

***Stuyvesant Fuel Service Corp. v. 99-105 3<sup>rd</sup> Avenue Realty LLC***, 745 N.Y.S.2d 680 (N.Y. City Civ. Ct. 2002). Members of an LLC who were sued individually moved to dismiss on the basis that the building in question was owned by the LLC, that any contracts with the plaintiff were with the LLC, that the members did not sign any contracts in their individual capacity or guarantee any of the LLC's debts to plaintiff, and the New York LLC law provides that members are not personally liable for LLC debts. The court denied the motion to dismiss because the statute provides that the articles of organization may provide for personal liability of members, and the members failed to provide a certified copy of the articles organization from which the court could ascertain whether the members had personal liability.

***Warren Supply Company v. Lyle's Plumbing, L.L.C.***, 74 S.W.3d 816 (Mo. App. 2002). A member of an LLC appealed a judgment holding him personally liable for the LLC's debt. The basis of the judgment against the member was that he had signed a credit application in the guaranty portion with the designation "member" after the signature. The member argued that the guaranty was ambiguous for various reasons, including the fact that the document was only signed in one place (the credit application portion itself was not signed) and the signature was qualified with the notation "member." The court held that the document was not ambiguous because the member did not disclose his principal, and the court upheld the trial court's imposition of personal liability without considering parol evidence.

***Neato, LLC v. Soundview Partners***, 32 Conn.L.Rptr. 219, 2002 WL 145579 (Conn.Super.2002)(construing complaint as alleging fraudulent conduct on part of member individually (for which member would have personal liability regardless of liability protection provided by LLC) rather than an attempt to pierce the veil).

***Fleet One, LLC v. Cook***, No. 4618, 2002 WL 1189559 (Tenn. Ct. App. June 5, 2002)(analyzing agency principles and language of contract in concluding that individual who signed credit application as "operations manager" of LLC did not have personal liability as guarantor).

***Way v. Andries***, 819 So.2d 465 (La. App. 2002)(holding that statutes did not impose personal liability on LLC members or managers for parish taxes).

***Alexander Company, Inc. v. Bensaid***, No. 01-1309, 2002 WL 1034037 (Wis. App. May 23, 2002)(affirming judgment imposing personal liability on member of two-member LLC on basis that members were partnership by estoppel where LLC members did not disclose form of their business to creditor, members used phrases such as "we are going to do this" and "we are going to do that" in meeting with creditor, payment required by creditor before beginning work was check drawn on personal account of member, and letter regarding financial capability from bank indicated that individual member had been approved for loan).

***Christensen v. Rostand Associates***, No.CV010075818S, 2002 WL 1042149 (Conn. Super. May 2, 2002)(denying summary judgment in favor of LLC members with regard to injury occurring on premises owned by LLC because material fact of members' possession, maintenance, or control of property was disputed).

***Kline v. Keystar One. L.L.C.***, No. 99-1649, 2002 WL 681237 (Iowa App. April 24, 2002)(affirming judgment imposing personal liability on LLC member because issue was not preserved for review).

***Quantum Color Graphics, LLC v. The Fan Association Event Photo GmbH***, 185 F.Supp.2d 897 (N.D. Ill. 2002)(holding that allegations were sufficient to state claim for personal liability of individual owner of German companies and California LLC on basis that individual acted for partially disclosed principals).

***Ehle v. Williams & Boshea, L.L.C.***, No. Civ.A. 01-3757, 2002 WL 373271 (E.D. La. March 7, 2002)(finding joinder of individual who claimed he could not be liable because he was member of LLC was not fraudulent where there was evidence LLC was never formed and plaintiff asserted claims based upon negotiations to form LLC).



***Curole v. Ochsner Clinic, LLC***, 811 So.2d 92 (La. App. 2002). The plaintiff, a doctor employed by an LLC clinic, sued the LLC and several doctors affiliated with the clinic after the plaintiff was terminated, alleging various claims based on tortious interference with business relationship, unfair competition, and defamation. The plaintiff argued that the CEO of the LLC was personally liable for these acts. The court found the CEO was protected under the statutory provision protecting an LLC member, manager, employee, or agent from personal liability. The plaintiff argued that liability could be premised on the language of the statute preserving liability for any negligent or wrongful act of a member, manager, employee, or agent. The court stated that, to give the statute meaning, the phrase would have to refer to acts done outside one's capacity as a member, manager, employee, or agent, and the allegations did not set forth facts showing the CEO acted outside his capacity as an LLC officer.

***First Fairfield Funding, LLC v. SSMLN, LLC***, No. X06CV000167489S, 2002 WL 194538 (Conn. Super. Jan. 15, 2002)(seeking to hold LLC manager and member liable based on individual's own participation in commission of tort rather than status as a member or manager).

***F & G Investments, L.L.C. v. 1313 Hickory, Ltd.***, 807 So.2d 1004 (La. App. 2002). The lessor of premises occupied by an LLC sought to hold the individual who signed the lease on behalf of an LLC personally liable on the lease, arguing that the individual signed the lease in his personal capacity. Though the signature form was somewhat ambiguous, the court found the lease as a whole did not indicate that the individual was signing in his personal capacity. The lease stated that it was between two LLCs, a space for the individual to sign as surety was left blank, and the court construed the ambiguity against the plaintiff since the words under the signature lines were provided by the plaintiff.

***Wirthman-Tag Construction Company, L.L.C. v. Hotard***, 804 So.2d 856 (La. App. 2001). Two individuals signed a construction contract on behalf of a business that was not designated as an LLC. The individuals claimed that the other parties knew of the agency relationship and understood the individuals were signing in a representative capacity. The court found that there was a triable issue of fact in this regard.

***Magara v. Pepitone***, No. CV000441504S, 2001 WL 1420664 (Conn. Super. Oct. 26, 2001) (refusing to allow collateral attack on default judgment against individuals who claimed that they were members of an LLC and not personally liable to the plaintiff).

***Baumstein v. Myklebust***, No. 01-0614, 2001 WL 869506 (Wis.App. Aug. 2, 2001). An LLC member appealed a judgment against him personally in the amount of the plaintiff's earnest money down payment on the purchase of a lot. The court stated that the judgment was proper because the defendant had signed documents relating to the sale without indicating that he was acting as an agent of the LLC.

***Harold Cohn & Co., Inc. v. Harco International, LLC***, No. CV990089169, 2001 WL 523540 (Conn. Super. May 2, 2001) (relying upon cases in the corporate context holding that an officer or shareholder who commits a tort is liable regardless of whether the corporation is liable and stating that it was unnecessary to pierce the veil of the LLC because the individual himself committed the fraud).

***Matjasich v. State of Kansas Dept. of Human Resources***, 21 P.3d 985 (Kan. 2001). The Kansas Supreme Court held that a member of a Utah LLC was personally liable for unpaid wages under Utah's wage payment laws, which provided for such personal liability. The court analyzed the Kansas Wage Payment Law and concluded that it did not provide for personal liability of LLC members because the definition of employer had not been amended to include LLCs along with corporations, partnerships, etc.; however, the court concluded that the Utah wage payment law rather than the Kansas law governed the liability of the members of the Utah LLC for unpaid wages arising out of its business in Kansas. With respect to the interpretation of Kansas law, the court acknowledged that a corporate officer who knowingly permits the corporation to violate the wage payment law would have personal liability under the Kansas Wage Payment Law, but the court pointed out that the wage payment law did not address LLCs, and the Kansas LLC Act not only provided for limited liability of members and managers but specifically provided that an LLC was not to be construed as a corporation. The court concluded, however, that the Utah wage payment law (which is more broadly drafted and under which the LLC member would have liability for unpaid wages) applied even though the LLC was an employer in Kansas because the Kansas LLC Act provides that the laws of the jurisdiction of organization govern the internal affairs and the liability of members. The court construed these provisions to include not only the LLC act but other laws bearing on member liability.

**Rodale Press, Inc. v. Salm**, No. CV000374983S, 2001 WL 496895 (Conn. Super. April 25, 2001) (holding that a member of an LLC was personally liable on the basis that the LLC did business under a trade name without filing a trade name certificate as required by Connecticut law).

**Dornfried v. Granquist**, No. CV000502628S, 2001 WL 306851 (Conn. Super. March 13, 2001). The plaintiff sought to hold the individual owner and manager of an LLC liable for breach of contract, but the court determined that the plaintiff's contract was with the LLC and that the contract adequately disclosed the representative capacity of the individual who signed as "manager." The court emphasized that the LLC statutes give the term "manager" a special connotation and protect managers from liability to third parties. The court rejected the plaintiff's arguments that the court should disregard the liability shield of the LLC under the instrumentality or identity rule because the plaintiff failed to plead either theory.

**450 West 14<sup>th</sup> St. Corp. v. 40-56 Tenth Ave. L.L.C.**, 724 N.Y.S.2d 273 (N.Y. Sup. 2001) (dismissing executrix of the deceased sole member of the LLC on the basis that a member of an LLC is not a proper party to an action against the LLC).

**Harmon Building Associates v. Weinmann**, No. 23021, 2000 WL 33146961 (Va. Cir. Ct. Sept. 27, 2000). Two individuals who signed a lease on behalf of an LLC argued that the lessor should not recover against them personally because the name of the LLC was incorrect. It is unclear why the defendants thought that the discrepancy in the name protected them from personal liability. It is also unclear whether the discrepancy in the name turned out to be the basis on which they were held liable. In any event, the court refused to modify the lease and entered judgment in the amount of the balance due on the lease.

**Whitmore v. Hawkins**, No. 99-1443, 2000 WL 828285 (4<sup>th</sup> Cir. June 27, 2000). Whitmore was employed to be the chief operating officer of an LLC. Hawkins, an individual, recruited Whitmore and signed the employment agreement on behalf of the LLC. Hawkins did not sign in an individual capacity, but the employment agreement's initial paragraph recited that the parties were the LLC, Whitmore and Hawkins. When Whitmore was later terminated, he sought to hold Hawkins personally liable for the severance pay to which he was entitled under the contract. The court found that the agreement was ambiguous with respect to the liability of Hawkins since he did not sign in an individual capacity but was referred to as a party in the contract. The court examined the extrinsic evidence and concluded it was sufficient to create an issue for the jury as to personal liability of Hawkins under the contract. Thus, the court reversed the trial court's dismissal of Hawkins from the case.

**United States v. Washington Mint, L.L.C.**, 115 F. Supp.2d 1089 (D. Minn. 2000). Referring to an LLC member as a controlling shareholder of the LLC's stock, the court concluded that such status was not alone sufficient to impose liability on the LLC member for the LLC's copyright or trademark infringement. The court also found that ownership of a significant interest in the controlling member and a position on what the court referred to as the board of directors of the LLC did not amount to a showing of any direct participation and control over the LLC's activities sufficient to impose liability for the copyright and trademark violations. A corporation that leased employees to the LLC and certain individual officers of the corporation as well as the CEO of the LLC were found to have sufficient involvement in the LLC's activities to be liable for some or all of the violations.

**ABC, LLC v. State Ethics Commission**, No. CV 00-0504071S, 2000 WL 1701226 (Conn. Super. Oct. 11, 2000) (mentioning Commission ruling that individual members of an LLC can be subjected to civil penalties with respect to prohibited contingent fee lobbying agreements entered by the LLC).

**Addy v. Myers**, 616 N.W.2d 359 (N.D. 2000). The court rejected the plaintiffs' claim that a member of an LLC agreed to assume personal liability for the LLC's debt. The LLC involved had four members, consisting of two individuals and two entities. Informally, the group consisted of four families. When the LLC experienced financial difficulties, two individuals in the group personally signed for several lines of credit over a period of months. These individuals argued that the defendant member of the LLC and her husband agreed to assume personal liability for a portion of the debt. The court concluded that the defendant was not liable as a guarantor because she did not sign a written guaranty (as required by the North Dakota Statute of Frauds to enforce a guaranty). The plaintiffs argued that the defendant was liable as a member of the LLC because a majority of the members voted to borrow the funds for the LLC and to assume equally the debt. The court discussed the principle that an LLC is a separate legal entity whose members are not liable for its debts and obligations and concluded that the defendant member was not liable because she

did not agree to be liable for any part of the loan. The court of appeals also upheld the trial court's dismissal of the member's husband because there was no evidence that he was a named owner or manager of the LLC or had done anything to personally obligate himself on the borrowing in issue.

***The Color Bar Printing Company v. Litt***, No. 76715, 2000 WL 193251 (Ohio App. Feb. 17, 2000). The plaintiff sued two individuals for breach of contract, and the individuals asserted that they were not personally liable because they were "limited liability partners in an entity known as Windstar Publications, Ltd." Later in the opinion, Windstar Publications, Ltd. is identified as an Ohio limited liability company. The court noted that the plaintiff had named the individuals as parties, not the LLC, and that the complaint alleged that the individuals had breached their contract with the plaintiff. The court concluded that the complaint stated a claim against the individuals.

***Harris v. Guetersloh***, No. 07-99-0046-CV, 2000 WL 12523 (Tex. App. Jan. 6, 2000). The defendants, three individuals, were held personally liable on a contract executed on behalf of "Reo Harvest" without any language or abbreviation indicating that Reo Harvest was an LLC. On appeal, the defendant complained of the trial court's exclusion of evidence that Reo Harvest was a New Mexico LLC and that the plaintiff had notice of that fact prior to the signing of the contract. The appeals court held that it was not error to exclude the evidence because the defendants had failed to properly plead the defenses that would support their claim of non-liability as members of an LLC. The applicable defenses required verified pleas which the defendants failed to present.

***Hosale v. Warren***, No. 01A01-9810-CV-00523, 1999 WL 548538 (Tenn. App. July 29, 1999). A creditor sued a member of an LLC construction company for payment on a project, and the trial court found in the creditor's favor. On appeal, the court held that the defendant's statement of the issues was inadequate, but the court went on to note that the evidence did not preponderate against the trial judge's findings. The opinion gives little insight into the facts but does note the creditor's contentions that the creditor was never told of the LLC, that the defendant represented the entity as a joint venture, and that the defendant told the creditor that he and the other LLC member were involved in a partnership.

***Anthony v. Blum***, No. CV 960336878S, 1999 WL 259726 (Conn. Super. April 23, 1999). The plaintiff sought to hold a member of an LLC law firm liable on a promissory note executed by the LLC. The promissory note was executed to repay the plaintiff for negligent legal services provided by the member. The court acknowledged statutory provisions making clear that a member is liable for his own negligent or wrongful acts; however the member in this case was not liable since the action was a breach of contract action for payment of the note and not a malpractice action against the member. The member signed the note as a member of the LLC and on behalf of the LLC, and the contractual obligation represented by the note was an LLC debt from which the member was protected by the statutory limitation of liability of members.

***Creative Resource Management, Inc. v. Soskin***, No. 01A01-9808-CH-00016, 1998 WL 813420 (Tenn. App. Nov. 25, 1998). An individual signed a contract as president of an LLC. The court recognized that personal liability of LLC officers, members, and other agents is limited by the Tennessee LLC act and that ordinarily a signature of a corporate officer preceded by the corporation's name and followed by a designation of corporate capacity is a signature in a representative rather than individual capacity. However, the contract in question contained personal guarantee language, and the court concluded that the language could not refer to the LLC. According to the court, the language had to reflect the personal guarantee of the individual who signed the agreement.

***Michaud v. Quinn***, No. CVNH 97108476, 1998 WL 667162 (Conn. Super. July 9, 1998). The plaintiff sued the defendant, an individual, for past due rent the plaintiff claimed was owed under an oral agreement for the sublease of office space from the plaintiff. The same month the defendant arranged for the use of the office space and moved into the space, the defendant formed an LLC. The defendant gave the plaintiff business cards for the LLC and showed the plaintiff his new stationery. The defendant denied that any rent was owed and argued that, if any rent was owed, it was owed by the LLC. The court stated that whether the agreement was entered into by the defendant in his individual or representative capacity was a question of fact, and the court found that the agreement was entered by the defendant individually. The court noted the defendant's testimony that he did not specifically say he would be renting as an LLC. That the plaintiff may have known the defendant was forming an LLC was insufficient to charge the plaintiff with knowledge that he was dealing with an LLC. As an aside, the court indicated that an LLC could become liable for pre-formation debts just as a corporation may become liable for pre-incorporation debts by acceptance of the benefits of a transaction.

*Page v. Roscoe, LLC*, 497 S.E.2d 422 (N.C. App. 1998). In this case, the court found that the plaintiffs naming of an individual member of an LLC in a nuisance suit was improper and was a basis for sanctions under Rule 11 of the North Carolina Rules of Civil Procedure. The plaintiffs brought a nuisance action against an LLC and a member of the LLC based upon the LLC's plan to build a gas storage facility. The plaintiffs eventually dismissed all of their claims, and the LLC and its member sought Rule 11 sanctions. The court found that the plaintiffs' allegations against the LLC were sufficient to avoid Rule 11 sanctions; however, the court found that the allegations against the individual member were not well-grounded in law and violated Rule 11. The court cited provisions of the North Carolina LLC act providing that an LLC member is not liable for the obligations of the LLC solely by reason of being a member and that a member is not a proper party to a proceeding against an LLC. Since the plaintiffs' complaint did not allege any acts on the part of the member individually, the naming of the individual member was not well-grounded in law and violated Rule 11.

*Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo.1998). In this case, two individuals who were members and managers of an LLC were held personally liable on a contract with a third party under the partially-disclosed principal doctrine. Under well established common law agency principles, if an agent contracts for a partially-disclosed principal (i.e., the third party knows of the existence of the principal but does not know the principal's identity), the agent is personally liable on the contract as a general rule. In this case, Preferred Income Investors, L.L.C. was identified only as P.I.I. to the third party. The court rejected the argument that the constructive notice provisions of the Colorado LLC act protected the individuals from liability since they failed to adequately identify the LLC principal.

*In re National Credit Management Group, L.L.C.*, 21 F. Supp.2d 424 (D. N.J. 1998). The FTC and State of New Jersey brought an action against an LLC and its member/officers for violation of federal and state consumer protection laws. The court found that the individual defendants were liable under provisions of the Federal Trade Commission Act that make individuals liable for acts of a corporation where the individuals exercise certain control or authority related to the violations. The court concluded that the same standard should apply to determine the liability of LLC members.

*Bayside Tire & Exhaust LLC v. Alabama Dept. of Revenue*, Ala. Admin. Law Division, No. 98-272 (Oct. 13, 1998) (noted in BNA Business Law Advisor Vol. 1, No. 6). An administrative law judge decided that a member of an LLC had personal liability for the tax liability of the LLC, but the Alabama Department of Revenue was not entitled to collect the LLC's outstanding tax assessment from the member because the member was not assessed in his individual capacity. The Department had twice contacted the LLC about outstanding W-2 forms. When the LLC failed to respond, the Department issued a penalty assessment for each missing W-2. The judge stated that an LLC is treated as a partnership for tax purposes in Alabama, and a member is thus individually liable for the tax (citing the partnership act provision on partner joint and several liability). However, the member was not liable because he was not assessed in his individual capacity (citing the partnership act provision that a judgment against a partnership is not itself a judgment against a partner).

*Zaugg & Zaugg Architects v. Wagner*, No. 96-CA-117-2, 1997 Ohio App. LEXIS 3987 (Ohio App. Aug. 8, 1997). Six parties agreed to enter a venture to build a residential golf course development. Two of the parties, John Zaugg and Marion Zaugg, had an architectural partnership. At the initial meeting of the group, the Zauggs were employed to do architectural work for the project. Part of their payment was to be in the form of an ownership interest in the venture, but no written agreement was entered, and details regarding the arrangement were left unresolved. Ultimately, about a year after the Zauggs began working on the venture, the parties formed an LLC. When the Zauggs submitted their bill to the LLC a few months later, it was a source of contention. The Zauggs and two other members of the LLC signed a statement of understanding in which they agreed that the Zauggs would accept a specified amount in payment for their services. The court upheld the trial court's judgment imposing personal liability for the Zauggs' architectural fees upon the other two members who signed the statement of understanding. The court noted that the document did not indicate that the debt was owed by the LLC, and the members signed the document without indicating representative capacity.

## **N. Veil Piercing**

### **1. Piercing to Impose Liability**

*Tzvolos v. Wiseman*, No. CV040488839, 2007 WL 1532760 (Conn. Super. May 3, 2007) (stating that corporate veil piercing theories apply to Connecticut LLCs and concluding that commonly owned LLCs and corporation should

be pierced under instrumentality theory because evidenced established failure to follow formalities (citing failure to comply with LLC operating agreement requirement that affiliated transactions be approved by majority vote of members), overlapping ownership and management, common office space, lack of arms length dealing, preferences exercised in favor of family owned entities, unity of interest, lack of independence, and injustice and inequity).

***Bronstein v. Crowell, Weedon & Co.***, No. B191738, 2007 WL 969559 (Cal. App. 2 Dist. April 3, 2007). The plaintiffs sought to pierce the veil of a Delaware LLC and hold a 30% owner liable under the alter ego doctrine. The court noted the application of the alter ego doctrine to LLCs under the California LLC statute and stated that the alter ego doctrine is also applicable to Delaware LLCs. The court stated that the liability of members of a foreign LLC is governed by the law of the state of formation under California law. The court concluded that the plaintiffs failed to present evidence raising a triable issue of fact as to whether the 30% owner of the LLC was liable under the alter ego doctrine, finding that the owner's alleged concealment of his ownership in the LLC was insignificant inasmuch as a 30% interest is insufficient to make a controlling decision in a Delaware LLC. The court acknowledged the limited liability of members in a Delaware LLC (noting as well the comparable provision under California law) and concluded that the plaintiffs failed to raise a triable issue of fact as to whether the owner of the LLC should be liable on a theory that the LLC was a joint venture, stating that any joint venture or partnership terminated upon the LLC's formation.

***Butler v. Adoption Media, LLC***, 486 F.Supp.2d 1022 (N.D. Cal. 2007). After a general partnership refused to post the profile of a gay couple on the partnership's website facilitating adoption, the couple sued the partnership, its two individual partners, two Arizona LLCs subsequently formed by the individuals, and two corporations formed by the individuals to serve as members of the LLCs. The plaintiffs argued that the LLCs were liable as successors of the partnership and that the LLCs and other entity defendants were all alter egos of the individuals. After the partnership refused to post the plaintiffs' profile on its web site, the individual partners formed the two LLCs, transferred assets from the partnership to the LLCs, formed two corporations (one owned by each of the individuals) to serve as members of the LLCs, and transferred their membership interests in the LLCs to the corporations. Applying California successor liability rules to the analysis of whether the LLCs were liable as successors of the partnership, the court concluded that there was no basis for successor liability because there was no express or implied assumption, the requirements of the de facto merger and mere continuation doctrines were not met (since the partnership continued to exist), and there was no evidence that the partnership transferred assets to the LLCs for a fraudulent purpose. Applying California law to the analysis of whether the LLCs and other entity defendants were alter egos of the individuals and one another, the court granted summary judgment to the defendants. The plaintiffs argued that the business entity defendants were all alter egos of the two individuals because they failed to maintain their separateness and confused the various entities. The plaintiffs also contended that it was the individuals' intent to create a business structure in which no single entity or individual could be held liable for the discriminatory practice of not allowing same-sex couples to post on the adoption profile web site. The court reviewed the parties' arguments regarding the evidence bearing on the alter ego issue and concluded that the plaintiffs provided some evidence of a material dispute with regard to a unity of interest and ownership among the individuals and entity defendants; however, the court characterized the evidence of the individuals' occasional disregard of corporate formalities and distinctions among the entities as "not particularly compelling," stating that the interests of management and ownership generally collide in a closely held corporation and that lack of formality is not unusual in a closely held corporation. More important, the court said, was the plaintiffs' failure to provide any evidence of bad faith or that the LLCs were created to avoid the operation of a statute. The plaintiffs failed to rebut the defendants' evidence of legitimate business and estate planning reasons to form the LLCs and corporations. Finally, to the extent triable issues were raised, the court stated that they were not material inasmuch as the plaintiffs had argued that an inquiry into alter ego liability would be superfluous.

***Meneo v. Patrick***, No. CV065004523, 2007 WL 1053511 (Conn. Super. March 23, 2007) (finding insufficient grounds to pierce veil of single member LLC; acknowledging that manager/sole member could have personal liability for his own participation in wrongful acts, but finding evidence did not support claims).

***Wellman v. Dow Chemical Company***, Civ. No. 05-280-SLR, 2007 WL 842084 (D. Del. March 20, 2007) (stating that LLC formed under Delaware law is treated for liability purposes like corporation and that record did not support proposition that corporate member of LLC joint venture was involved in operations of LLC to any extent, let alone to extent necessary to pierce veil and treat member as employer of LLC's employee in context of discrimination claim).

***Gaskey v. Fulton Bellows, LLC***, No. 3:05-CV-540, 2007 WL 869621 (E.D. Tenn. March 20, 2007) (concluding that plaintiffs alleging age discrimination claims failed to show LLC general partner of limited partnership that owned 96% of LLC ever made or participated in hiring decisions and presented no factual support for allegations that LLC general partner of member was alter ego of LLC).

***Sundance Rehabilitation Corporation v. New Vision Care Associates II, Inc.***, No. 04-3571-CV-S-FJG, 2007 WL 709014 (W.D. Mo. March 5, 2007) (holding that plaintiff did not establish grounds to pierce veil of corporate and LLC entities, stating that criteria necessary to satisfy corporate continuation doctrine differs significantly from test to pierce corporate veil).

***Scribner v. McMillan***, Civil No. 06-4460 (DWF/RLE), 2007 WL 685048 (D. Minn. March 2, 2007) (holding plaintiff in sexual harassment action alleged sufficient facts to support piercing LLC veil to hold commonly owned entity and individual owners liable under single employer and veil piercing theories).

***Ledy v. Wilson***, 831 N.Y.S.2d 61 (N.Y. A.D. 1 Dept. 2007) (holding summary judgment evidence was sufficient to raise fact issue regarding piercing of LLC).

***In re Gilbert (Teasck v. Gilbert)***, Bankruptcy No. 06-10119-JMD, Adversary No. 06-1142-JMD, 2007 WL 397018 (Bankr. D. N.H. Feb. 1, 2007). The court concluded that New Hampshire courts would apply corporate veil piercing principles to New Hampshire LLCs, but the court rejected the plaintiff's theory that the veil of an LLC could be pierced to hold the debtor liable simply because the debtor was the sole managing member and owner of the LLC and all of the plaintiff's dealings with the LLC were through the debtor. The court stated that the plaintiffs must show that the LLC was used by the debtor to promote his own private business and to promote an injustice or fraud. The court pointed out that the record did not show that the creditor was misled about the status of LLC, nor did it show that the debtor conducted personal business through LLC. Additionally, the record did not show that the debtor commingled personal and LLC assets or used assets of the LLC to pay any obligations other than those of LLC. The court also rejected the plaintiff's undercapitalization argument and stated that business failure alone does not constitute the type of unfairness that is sufficient to pierce the veil.

***Truckstop.Net, L.L.C. v. Spring Communications Company, L.P.***, Nos. CV-04-561-S-BLW, CV-05-138-S-BLW, 2007 WL 1366546 (D. Idaho Jan. 12, 2007). The plaintiff, a Delaware LLC, provided wireless internet access to subscribers through access points at truck stops. The plaintiff sued Sprint for losses allegedly caused by faulty networks installed by Sprint that led to the cancellation of subscriptions by many of plaintiff's customers. Sprint counterclaimed for fees owed by the plaintiff for installation of the networks. After the deadline for amendments had passed, Sprint sought to amend its counterclaim to pierce the veil of the plaintiff and hold investors liable. The court noted that Sprint did not identify any Delaware decision that expressly applies veil piercing doctrines to LLCs, but the court agreed with the author of a law review article cited by Sprint that Delaware courts would apply corporate veil piercing or some variation to LLCs. Sprint advanced two veil piercing arguments. The first was that the investors hid the LLC's inadequate capitalization and insolvency from Sprint, refused to fund the LLC, and chose to put the LLC out of business. The court concluded that Sprint knew of the LLC's financial condition and that the investors were refusing to bail it out long before it sought to amend its pleadings, and there was no good cause for the delay in amending. Sprint's second argument for piercing the LLC veil was based on more recent deposition testimony by investors that they stood ready to invest additional capital if the networks were installed properly. The court stated that this argument could not form the basis to pierce the veil. The court stated that evidence of co-mingling assets could support piercing, but Sprint offered no evidence of co-mingling. According to the court, if the proposed investment could only have been accomplished by co-mingling, Sprint might have had a stronger position, but no evidence supported such speculation. The court stated that the LLC agreement contemplated non-obligatory loans or capital contributions under certain conditions, signaling that an investor could make a non-obligatory investment without disregarding the separate structure of the LLC.

***In re Valley X-Ray Co. (Shapiro v. VPA, P.C.)***, 360 B.R.254 (E.D. Mich. 2007) (stating principles to disregard limited liability of LLC are same as for corporation and concluding LLC and former 51% member were not alter egos).

***In re Kilroy***, 357 B.R. 411 (Bankr. S.D. Tex. 2006). The plaintiffs sought to pierce the veil of a Delaware LLC and treat the LLC as the alter ego of the debtor in order to attribute to the debtor false representations made by the LLC in a private placement memorandum and pursue certain other claims for fraud, embezzlement, and breach of fiduciary

duty that depended upon the disregard of the LLC's separate existence. Applying Texas conflict of laws principles (citing the Texas Business Corporation Act), the court stated that Delaware substantive law determined whether the veil of a Delaware LLC should be pierced. In a previous suit, a Texas state court had found the LLC in question to be the alter ego of the debtor, and the court found that Delaware law dictated that the law of collateral estoppel of the state where a judgment was rendered determines the scope of collateral estoppel in the second case. Applying Texas offensive collateral estoppel principles, the court concluded that it could pierce the veil of the LLC based on the finding in state court that the LLC was the alter ego of the debtor. Alternatively, the court found that the same result could be achieved using Delaware offensive collateral estoppel. Additionally, even if offensive collateral estoppel under Texas or Delaware law could not be applied to prevent the debtor from denying that the LLC was his alter ego, the court concluded that the LLC's veil could be pierced by directly relying on the alter ego doctrine under Delaware law. The court discussed the factors relevant to an alter ego determination under Delaware law and concluded that the plaintiff's allegations were sufficient to support such a claim. The court acknowledged the dearth of Delaware case law on the issue of whether an LLC's veil may be pierced using corporate veil piercing principles, but concluded that the Delaware Chancery Court has conceptually endorsed the application of corporate veil piercing principles to LLCs.

***BLD Products, LTC v. Technical Plastics of Oregon, LLC***, Civil Case No. 05-556-KI, 2006 WL 3628062 (D. Or. Dec. 11, 2006). The court acknowledged the provision of the Oregon LLC statute providing that failure to follow usual formalities is not a ground to impose liability on members of LLC but stated that the statute did not address the improper conduct or causation prongs of the piercing doctrine. The court concluded that the common law "piercing doctrine may be applied to LLCs under the same circumstances in which it is applied to corporations." The court granted partial summary judgment entitling the plaintiff to pierce the LLC veil based on the sole member's control of the LLC and improper conduct (commingling of assets and general disregard of the LLC form and status as a separate legal entity by frequently paying personal expenses from the LLC account and failing to document transactions), but the court left for the jury the determination of damages caused by the improper conduct.

***Connecticut Light & Power Company v. Westview Carlton Group, LLC***, No. CV020469715S, 2006 WL 3719484 (Conn. Super. Dec. 6, 2006) (applying corporate instrumentality veil piercing doctrine and finding single member personally liable for LLC's \$46,000 unpaid electric bill on basis member exercised complete domination and used his total control to perpetrate injustice by causing LLC to sell its property without notice to plaintiff and personally receiving proceeds from LLC that could have been used to pay plaintiff's bill).

***UMG Recordings, Inc. v. FUBU Records, LLC***, 824 N.Y.S.2d 83 (N.Y. A.D. 1 Dept. 2006) (affirming dismissal of veil piercing claim against corporate and LLC member of LLC because allegations were conclusory and unaccompanied by allegations of consequent wrongs).

***Pfeifer v. Legault & Son Construction***, No. CV054002595, 2006 WL 3290545 (Conn. Super. Oct. 26, 2006) (finding no basis to pierce LLC veil and no evidence individual engaged in tortious acts or CUTPA violations for which personal liability could be imposed).

***Cognex Corporation v. VCode Holdings, Inc.***, Civ. No. 06-1040 (JNE/JJG), 2006 WL 3043129 (D. Minn. Oct. 24, 2006) (applying Illinois law to question of whether parent and Illinois LLC were alter egos, and pointing out that corporate formalities are less relevant in LLC context, but finding parent's control of LLC was such that parent and LLC were indistinguishable).

***D'Elia v. Rice Development, Inc.***, 147 P.3d 515 (Utah App. 2006). A limited partner sued the corporate and LLC general partners of two limited partnerships and sought to hold the individual owner of the entities personally liable for breaches of fiduciary duty of the general partners. The court first addressed the argument that the individual owner of the corporation and LLC was liable for the entities' actions under the alter ego theory. The court noted that California veil piercing principles applied to the corporation and Utah veil piercing principles applied to the LLC based on the conflict of laws rule that the law of the state of formation governs the liability of the owners of the entity. The court stated, however, that the law of the two states differed little in this area and presented no need to bifurcate the analysis. The court concluded that it was appropriate for the trial court to consider the fact that the plaintiff voluntarily contracted with the entities and noted that courts are more reluctant to pierce the veil in such cases. The court affirmed the trial court's determination that the evidence did not support piercing the veil of the entities because the plaintiff encouraged many of the informal and lax practices that the plaintiff claimed justified piercing the veils. While there was evidence of certain clearly inappropriate actions, such as failing to account for missing monies, overcharging for work performed

by the LLC, and misuse of certain funds, the court agreed with the trial court that such wrongs were more appropriately remedied as breaches of fiduciary duty. The court went on to conclude that the LLC's member participated in the activities that were a breach of fiduciary duty on the part of the LLC and that the member could be held personally liable on the basis of such participation.

***Troutwine Estates Development Company, LLC v. Comsub Design and Engineering, Inc.***, 854 N.E.2d 890 (Ind. App. 2006) (concluding corporate veil piercing principles apply to Indiana LLCs and discussing such principles but remanding because trial court did not state findings of fact supporting personal liability of LLC members).

***NEFT, LLC v. Border States Energy, LLC***, Nos. 3:04-CV-536, 3:04-CV-570, 2006 WL 2714837 (E. D. Tenn. Sept. 22, 2006) (holding individual defendant members of LLC were immune from personal liability for LLC's debt under Kentucky LLC statute, disagreeing with plaintiff's argument that LLC was operated as partnership under Kentucky law given that Kentucky LLC statute permits member managed LLCs, does not require officers, permits written or oral operating agreement, and requires no formal minutes).

***Travelers Indemnity Co. v. Employers Co., Inc.***, No. 04-CV-71494, 2006 WL 2457478 (E.D. Mich. Aug. 23, 2006) (holding corporate veil piercing theory should be applied to LLCs in same manner as corporations and finding evidence that entities were mere instrumentalities of individual defendants and were used to commit fraud).

***In re Drew (Smith v. MAK Investments, LLC)***, Bankruptcy No. 05-12604-JMD, Adversary No. 05-1137-JMD, 2006 WL 2403416 (Bankr. D. N.H. Aug. 17, 2006) (stating that trustee would have to prove elements required to pierce veil to hold managing member personally liable on claims against LLC, and finding member was not liable because no evidence was presented).

***Colodonato v. Hanson***, No. CV044004755S, 2006 WL 2556349 (Conn. Super. Aug. 11, 2006) (stating members did not properly run or maintain LLC as separate entity but finding for defendants on veil piercing claim because plaintiffs did not prevail on their causes of action in dispute over real property transaction).

***Milk v. Total Pay and HR Solutions, Inc.***, 634 S.E.2d 208 (Ga. App. 2006). The plaintiff sued an LLC and its managing member for amounts owed under a contract to provide payroll services to the LLC. A default judgment was entered against the LLC, and the plaintiff sought summary judgment holding the managing member personally liable. The court rejected the plaintiff's argument that the LLC veil should be pierced because the member undercapitalized the LLC. The court stated that undercapitalization is a basis to pierce the veil when it is coupled with evidence of an intent, at the time of capitalization, to avoid payment of future debts of the LLC. The court found there was a lack of evidence of such intent, concluding that the evidence did not establish that certain withdrawals and alleged payments were used for improper purposes.

***Team EJP Racing, LLP v. Dollar***, No. 5:06-CV-17-V, 2006 WL 1875333 (W.D. N.C. July 5, 2006) (applying Arkansas law to issue of liability of LLC's sole member and president and finding allegations insufficient to support veil piercing or other grounds to hold member personally liable for LLC's obligation).

***NetJets Aviation, Inc. v. LHC Communications LLC***, No. 02 Civ.7441 (DAB), 2006 WL 1627899 (S.D. N.Y. June 12, 2006) (holding Delaware law governed piercing of Delaware LLC under New York choice of law principles and finding evidence established single economic unit requirement of alter ego liability but failed to establish injustice requirement).

***Platinum Links Entertainment v. Atlantic City Surf Professional Baseball Club, Inc.***, No. Civ.A. 02-4106(FLW), 2006 WL 1459986 (D. N.J. May 23, 2006) (citing and applying corporate piercing principles and granting summary judgment in favor of individual principal of LLC to extent third party complaint suggested piercing claim because third party plaintiff failed to establish factual issue as to claim).

***Canter v. Ebersole***, No. E2005-02388-COA-R3-CV, 2006 WL 1627288 (Tenn. Ct. App. May 13, 2006). The plaintiff sought to pierce the veil of a Tennessee LLC and require the LLC's member to pay a judgment on a sales contract against the LLC. The court of appeals affirmed the trial court's ruling that the evidence did not support piercing the veil. The plaintiff argued that the LLC's separate existence should be disregarded based on its administrative dissolution, failure to follow formalities, gross undercapitalization, domination by the member, and handling of its debts.



In response to the plaintiff's argument that the LLC's administrative dissolution supported disregarding its separate existence (the LLC was administratively dissolved before the prior lawsuit resulting in the plaintiff's judgment and was not reinstated until after the judgment was awarded), the court pointed out that the Tennessee LLC statute provides for continuation of an LLC member's right to limited liability regardless of dissolution, winding up, and termination. The plaintiff also relied upon evidence that the member conducted informal discussions with his former co-member rather than holding formal meetings, that the LLC was administratively dissolved for failure to file its annual report, and that there were no promissory notes (merely notations in accounting records) documenting numerous loans to the LLC from the member and other entities controlled by him. The court found these facts irrelevant because the Tennessee LLC statute provides that failure to follow usual company formalities is not a ground for imposing personal liability on the LLC's members. The plaintiff argued that the LLC was grossly undercapitalized because its initial capitalization was only \$1,000 while it received a \$3.2 million bank loan guaranteed by the member and additional loans by the member and entities controlled by the member. The court cited the trial court's response that loans were made by members as needed but that unfortunate increases in costs and the LLC's inability to sell two townhomes as expected prevented the LLC from realizing its anticipated profits. The plaintiff also argued that the member should be liable for all the LLC's debts because the member personally paid some of the debts, but the court pointed out that the member only paid those debts that he had guaranteed and that the case is an example of why creditors want a personal guaranty or adequate security. The court also rejected the argument that the member's domination of the LLC was a basis to hold the member personally liable. After the withdrawal of the other initial member, the defendant member ran the LLC as the sole member and had exclusive ownership and control, operating the LLC out of his home and using his personal cell phone for LLC business, but the court stated that this dominance did not equate to dominance to defraud or conduct an illegal operation. Finally, the court rejected the argument that the member's handling of LLC debts supported piercing the LLC veil. In the court's view, the member's repayment of debts for which the member was personally liable did not establish an ulterior motive on the part of the member to defraud creditors, nor did the LLC's partial repayment of loans from the member to the LLC support piercing the LLC's veil. The trial court found that the member treated his entities as separate from himself, documented the loans, and kept records of the transactions, and the court concluded there was no evidence that the member diverted assets to prevent the plaintiff from being paid.

*Schwan v. CNH America, LLC*, No. 4:04CV3384, 2006 WL 1215395 (D. Neb. May 4, 2006). The plaintiffs sought to hold parent companies of a manufacturing facility liable for the conduct of the facility on various grounds, including on the basis that the subsidiary was the alter ego of the defendants. The facility was first operated by a Delaware corporation, then by another Delaware corporation, and finally by an LLC. The defendants argued that Delaware law applied to the veil piercing claim based on the internal affairs doctrine. The court, however, stated that different conflicts principles apply where the rights of third parties external to the corporation are at issue, and the court concluded that Nebraska's interest in applying its law to citizens injured by foreign corporations outweighs the interests of the state of incorporation. The court discussed and applied Nebraska veil piercing principles and concluded that the pleadings were minimally sufficient to allege domination insofar as they alleged that the defendants blurred the lines of the independent corporate forms and controlled the day to day operations at the manufacturing facility. The court noted that the issue of whether corporate veil piercing principles apply to LLCs was not discussed by the parties, and the court assumed for the time being that such principles apply. The court also noted that the parties did not discuss whether the shareholder of the corporate member of the LLC could be held liable for the LLC's actions without piercing the veil of the corporate member. The court assumed, without deciding, that such a result was possible.

*In re Teknek, LLC (Fisher v. Hamilton)*, 343 B.R. 850 (Bankr. N.D. Ill. 2006) (commenting that LLCs may be subject to veil piercing in manner similar to piercing of corporate veil under corporate alter ego doctrine).

*Anderson, LLC v. Stewart*, \_\_ S.W.3d \_\_, 2006 WL 1118892 (Ark. 2006). The court of appeals certified this appeal to the Arkansas Supreme Court, asking the supreme court to determine whether the trial court erred in applying the doctrine of piercing the corporate veil to hold the owners of an LLC liable. The court of appeals suggested that the court should decide the extent of the statutory protection of LLC members, but the supreme court stated that it did not address the issue because the appellants did not raise it in their brief. The court analyzed the case using corporate veil piercing principles and concluded that the trial court's decision to pierce the veil was not clearly erroneous. The LLC and its owners failed to comply with state statutes on check cashers by failing to properly maintain business records, and one of the members withdrew the LLC's letters of credit and cancelled its bond (action the plaintiff contended was intended to ensure the LLC would not have sufficient assets to satisfy any judgment). Furthermore, the owners operated the same business under another name after the LLC closed.

***Woldeyohannes v. K & K Hartford, LLC***, No. 7276, 2006 WL 1133891 (Conn. Super. April 24, 2006) (discussing application of corporate veil piercing principles to LLCs and concluding plaintiff neither pleaded sufficient factual basis nor put forth evidentiary foundation to withstand summary judgment in favor of LLC members on issue of members' personal liability).

***New Era Enterprises, Inc. v. Kacos***, No. 1:03-CV-873, 2006 WL 763185 (W.D. Mich. March 24, 2006) (disregarding separate identities of two LLCs on basis they were mere instrumentalities of third entity and finding that consideration paid to third entity was thus consideration to LLCs for assignments of notes made by LLCs).

***International Brotherhood of Electrical Workers Local Union 159 v. Circuit Electric, L.L.C.***, No. 05-C-613-S, 2006 WL 623792 (W.D. Wis. March 10, 2006) (holding LLC and its successor LLC that did not simultaneously operate were not "single employer," fact issues existed as to whether LLC and its successor LLC were alter egos, and evidence was insufficient to pierce veils of LLCs to impose liability on individual defendants).

***Metcalf v. Lincoln Logs International, LLC***, No. 2:03-CV-332, 2006 WL 335595 (E.D. Tenn. Feb. 13, 2006) (holding corporation that owned building and equipment used by LLC was jointly and severally liable with LLC on joint venture basis where LLC owned virtually nothing and paid all its rents and payments to corporation, and corporation must answer to extent LLC was intentionally undercapitalized, there being no basis to hold individual officer and spouse liable as LLC's alter ego).

***Sakata v. Cook***, No. F046552, 2006 WL 164915 (Cal. App. Jan. 24, 2006). The plaintiff sought to hold Cook, one of the members of a two-member LLC, personally liable for payment for services rendered by the plaintiff to the LLC. Cook provided most of the LLC's initial \$5,000 in capital, and the other member managed the LLC. The plaintiff alleged that the LLC was undercapitalized and that Cook was therefore liable under the alter ego doctrine. The court discussed the application of the common law corporate alter ego doctrine under the California LLC act, which provides that an LLC member shall be "subject to liability under the common law governing alter ego liability." The court discussed the conditions that must be met to impose alter ego liability and the factors to be considered in applying the doctrine and concluded that Cook was entitled to summary judgment. The court stated that there was no evidence Cook ever disregarded the separate existence of the LLC in any way. Furthermore, the mere fact that the plaintiff remained unpaid did not support application of the alter ego doctrine. There was no evidence Cook authorized or was even aware of alleged representations made by the other member to the plaintiff, and the managing member did not communicate with Cook about the details when the LLC encountered financial difficulties. Cook chose not to invest additional amounts in the LLC after he learned it was losing money, but the court rejected the plaintiff's suggested inference that Cook knew the plaintiff could not possibly be paid.

***Jackson v. Corporategear, LLC***, No. 04 Civ. 10132(DC), 2005 WL 3527148 (S.D. N.Y. Dec. 21, 2005). The plaintiff sued an LLC for breach of contract, and the LLC subsequently filed a Chapter 7 bankruptcy petition. The lawsuit against the LLC was stayed until a final order was issued in the bankruptcy. The bankruptcy court's order decreed that the LLC's estate had been fully administered. The plaintiff's claim was not paid or otherwise administered in the bankruptcy proceedings, and the plaintiff resumed his case and took a judgment against the LLC. The plaintiff then filed this suit asserting an alter ego claim against the owners of the LLC. The defendants argued that the plaintiff lacked standing to pursue the alter ego claim because only a bankruptcy trustee has standing to pierce the corporate veil of a bankrupt corporation until the claim has been abandoned. The issue in this case was the application of this principle once the bankruptcy proceedings are closed. The court phrased the issue as follows: "In a Chapter 7 case, once the estate is fully administered, the trustee is discharged, and the case is closed, may a creditor assert an alter ego claim against the owner of the debtor corporation based on pre-petition events, even where the claim was not 'abandoned' by the trustee because it was not listed in the debtor's schedule of assets?" The court concluded the answer was yes, although the court characterized the law as far from clear. The court cited several considerations. First, once the bankruptcy proceedings are concluded, there is no longer an estate, and the trustee is no longer available to pursue the alter ego claim. Second, even where an alter ego claim was not listed in the schedule of assets and thus not deemed abandoned, the claim logically can be deemed property of the estate only if there is an estate. Third, in a Chapter 7 case, a corporate debtor cannot be discharged, and the corporation continues to exist; therefore, if a claim against a corporate debtor was not administered, it survives and can be pursued after the Chapter 7 case is closed. The court declined to grant summary judgment in favor of the defendants based on the plaintiff's failure to properly allege an alter ego claim. Though the court acknowledged that the complaint alleged the claim in conclusory terms, the court stated that the issue of the sufficiency of the pleadings

could not be raised on a motion for summary judgment, and the court would have permitted the plaintiff to replead even if it had granted the motion.

***Mall at IV Group Properties, LLC v. Roberts***, No. Civ.A. 02-4692 (WHW), 2005 WL 3338369 (D. N.J. Dec. 8, 2005). The plaintiff sought summary judgment piercing the veil of an LLC to hold individuals who owned and managed the LLC liable for a judgment obtained against the LLC. The LLC operated a health club, and the judgment against the LLC was based on amounts owed under a lease executed by the LLC. The plaintiffs relied upon the following undisputed facts: (1) the books for all the clubs owned or controlled by Bob and Lucille Roberts were maintained at their central office/personal residence; (2) all of the clubs were insured under the same umbrella insurance policy; (3) Bob and Lucille Roberts made the ultimate decisions for all the clubs; (4) receipts for all the clubs were held in the Roberts Paymaster account; and (5) the clubs shared numerous operating expenses. The plaintiffs also alleged, but the defendants disputed, that funds were taken from the Roberts Paymaster account to pay personal expenses of the defendants, that loans were issued to defendants without proper documentation, and that the club was undercapitalized. The court concluded that the undisputed facts were insufficient to satisfy the unity of interest and lack of separateness prong of the veil piercing analysis and that additional evidence of the details regarding the extent, nature and impact of defendants' withdrawal of funds would be particularly important. The court also examined a non-recourse provision in the lease between the plaintiff and the LLC. The lease provided that there would be no recourse on the tenant's obligations against any incorporator, subscriber, shareholder, officer or director of any "corporation or partnership or joint venturer." The plaintiffs argued the provision did not apply to the LLC since it was not included in the language "corporation or partnership or joint venturer;" however, the court stated the language was plainly intended to limit liability and that the scope seemed to cover an LLC, noting that the New Jersey LLC statute is located in Title 42, "Partnerships and Partnership Associations." The court also found the non-recourse provision relevant to its analysis insofar as it supported the defendants' assertion that the plaintiffs were fully aware they were conducting business with limited liability entities. The court concluded that unresolved fact issues precluded summary judgment on the veil piercing claim and stated that the non-recourse provision did not dispose of the issue and would not prevent individual liability if the veil is pierced.

***Ney v. Murray***, No. B174255, 2005 WL 3220269 (Cal. App. 2 Dist. Dec. 1, 2005). The court of appeals upheld the trial court's refusal to pierce the veil of a California LLC and hold one of the LLC's members (Murray) liable for the LLC's fraud committed by another member. Because the court found sufficient evidence to support the trial court's finding, the court stated it need not determine whether veil piercing applied to LLCs prior to amendment of the California LLC act to expressly provide for application of corporate veil piercing principles. The court relied upon the following evidence supporting the trial court's finding that Murray should not be liable under the alter ego theory: the LLC was adequately capitalized; Murray did not take a salary; Murray was responsible for oversight of LLC expenditures but otherwise acted only as an investor and was not involved in the day to day operation of the LLC; Murray maintained detailed financial records for the LLC; the LLC was properly formed, had an operating agreement, issued certificates of membership interest, had tax returns prepared, and segregated its records and funds from three other related entities that were formed at the same time and never became active; Murray refuted claims of commingling by explaining transactions involving the repayment of loans from Murray to the LLC. In view of this evidence, the unity of interest requirement of the alter ego theory was not met. In addition, Murray did not participate in or have knowledge of the fraud perpetrated by another member on the plaintiffs; therefore, the court concluded no injustice would be promoted in declining to hold Murray personally liable.

***In re Brentwood Golf Club, LLC***, 329 B.R. 802 (Bankr. E.D. Mich. 2005). The court determined that the LLC debtor and a related LLC were alter egos and that the veil of the related LLC would thus be pierced so that the assets of the related LLC were property of the bankruptcy estate. The debtor LLC, Brentwood Golf Club, LLC (Brentwood Golf), was formed to acquire a golf course. The Moore Family Limited Partnership (Moore FLP) owned a 98% interest in Brentwood Golf, and Barrie Moore owned a 2% interest. Barrie Moore held a 25% interest in the Moore FLP, and the general partner was an LLC controlled by Farrell Moore (Barrie Moore's father). Farrell Moore was the sole member of Brentwood Tavern, an LLC that operated a tavern in clubhouse space leased from Brentwood Golf. The court determined that Brentwood Tavern was the alter ego of Brentwood Golf, characterizing them as "inextricably intertwined" and noting that "all of the corporate formalities [had] been disregarded." The court based its conclusion on the following evidence: the two LLCs shared some assets, employees, and creditors; loan proceeds were used by Brentwood Golf to acquire the golf course and personal property to be used by Brentwood Tavern; Barrie Moore was the manager of both LLCs; Brentwood Tavern leased space from Brentwood Golf at a rate well below market rate; Brentwood Tavern failed to pay the rent for several months; Brentwood Tavern did not pay its share of the taxes nor did it purchase the insurance required by the lease; Barrie Moore testified as to his confusion regarding financial transactions

between the two LLCs; the two LLCs shared a bank account; the financial records of the two LLCs were inextricably intertwined; and the two LLCs were reliant on each other for profitability. Additionally, the court concluded that the two LLCs should be substantively consolidated even if they were not alter egos.

***White Family Harmony Investment, Ltd. v. Transwestern West Valley, LLC***, No. 2:05CV495 DAK, 2005 WL 2893784 (D. Utah Oct. 31, 2005) (holding allegations in complaint were sufficient to support claim to hold parent LLC liable for subsidiary LLC's obligations on basis of alter ego, and evidence was sufficient to treat LLCs under common ownership as alter egos and to impute forum contacts of one to other for purposes of exercise of personal jurisdiction).

***Swift Freedom Aviation, LLC v. R.H. Aero***, No. 1:04-CV-90, 2005 WL 2246256 (E.D. Tenn. Sept. 13, 2005) (finding allegations were insufficient to pierce veil of entity, whether it was Delaware corporation or LLC).

***D.R. Horton Inc.-New Jersey v. Dynastar Development, L.L.C.***, No. MER-L-1808-00, 2005 WL 1939778 (N.J. Super. L. Aug. 10, 2005). The plaintiff was unsuccessful in piercing the veil of a New Jersey LLC in this breach of contract action. The opinion contains a lengthy discussion and analysis of veil piercing as applicable to LLCs, and the court concluded that the traditional approach to veil piercing in the corporate context should not be mechanically applied to LLCs. In particular, the court decided that adherence to corporate formalities and owners' domination and control should be viewed in a different light in LLC cases. Although the parties did not dispute that New Jersey law determined whether to pierce the veil of the LLC, the court first discussed the choice of law issue. The court noted various arguments and approaches and ultimately stated that it need not resolve the issue of whether the state of formation, governmental interest, or most significant contacts test determined the applicable law because the LLC in question was formed under New Jersey law and maintained its most significant contacts in New Jersey, and New Jersey had a sufficient interest in the case to apply its veil piercing law. The court next discussed the standard of proof and concluded that the clear and convincing standard of proof applies to veil piercing claims. (The court found insufficient evidence to pierce the veil even if the preponderance of the evidence standard applied.) Finally, the court discussed the traditional corporate veil piercing test and concluded that its application to LLCs must be modified. The court described the traditional corporate veil piercing test as a two-part test requiring proof that (1) the entity is a mere instrumentality or alter ego of its owner (that is, it has no separate existence and is a mere conduit), and (2) the owner has abused the business form to perpetrate a fraud, injustice, or otherwise circumvent the law. The court also described the factors that are examined in connection with each of these parts of the test. The court stressed that, in a contract case, causation is an important, if not essential, element in determining that an owner's domination of an entity has been used as an instrument of fraud or injustice or to circumvent the law. After noting the absence of New Jersey case law expressly addressing how corporate veil piercing principles apply to LLCs, the court reviewed the statutory and judicial treatment of LLC veil piercing in other states. Since the New Jersey LLC statute does not address veil piercing of LLCs, the court concluded the statute endorses the evolution of court-made rules tailored to the LLC's special attributes. The court agreed with judicial opinions and commentators that have concluded LLC veil piercing law should be adapted to the special characteristics of LLCs. The court identified adherence to corporate formalities, dominion and control by the owner, and undercapitalization as factors that should be weighed differently in the LLC context. Though the court declined to formulate a generally-applicable standard for LLCs, the court concluded that these factors "should not loom as large" in this case as in the case of a corporation. In rejecting the plaintiff's attempt to hold an individual member/manager of an LLC member of a New Jersey LLC personally liable for the breach of contract of the New Jersey LLC, the court noted that the individual did not intentionally mislead the plaintiff or hide the LLC's role, and the court pointed out the plaintiff made no effort to inquire regarding the LLC's role in the transaction. Given the lesser weight assigned to formalities and dominion and control, the court did not find the individual's inattention to detail (e.g., misuse of stationery) and operational efficiencies (such as use of a central office for his various business entities) justified piercing the LLC's veil. The court also concluded there was no evidence that the failure to correct the plaintiff's confusion caused the plaintiff to act to its detriment or that the LLC form was used to perpetrate any injustice.

***Lily Transportation Corp. v. Royal Institutional Services, Inc.***, 832 N.E.2d 666 (Mass. App. Ct. 2005). The plaintiff sought to pierce the veil of a Pennsylvania LLC with whom the plaintiff contracted because the plaintiff was misled regarding the corporate entity with which it was dealing. Although one of the individual members and the related entity whom the plaintiff believed it was dealing were held liable for violating the Massachusetts consumer protection statute, the court found the misleading conduct by the member and related entity was not a basis to pierce the LLC's veil. The court pointed out that the other two members, who were not involved in misleading the plaintiff, could not be held liable on a veil piercing basis in any event, relying on corporate case law and other authorities that have concluded

stockholders who have not been involved in the abuse of the corporate form are not liable when the corporate veil is pierced.

*Morris v. Cee Dee, LLC*, 877 A.2d. 899 (Conn. App. 2005) (holding evidence did not support piercing LLC veil, but prejudgment attachment of LLC member's personal assets was supported by probable cause to believe that member himself was negligent in connection with plaintiffs' claim arising from defective grate in bathroom floor of mobile home owned by LLC and leased to plaintiffs).

*Merrell-Benco Agency, LLC v. HSBC Bank USA*, 799 N.Y.S.2d 590 (N.Y. A.D. 3 Dept. 2005) (stating that LLC that was currently sole owner of another LLC would not be liable for LLC subsidiary's debt, even if parent LLC had been in existence at time debt was incurred, because a parent company generally will not be liable for obligations of its subsidiary unless it can be shown parent exercised complete domination and control, which record did not establish).

*Milistar (NY) Inc. v. Natasha Diamond Jewelry Manufacturers, LLC*, 797 N.Y.S.2d 10 (N.Y. A. D. 1 Dept. 2005) (stating evidence in record established that LLC was "not a legal corporation, but rather a mere alter ego of [individual defendant] and the corporation's debt should thus be imputed to [defendant] individually").

*Milliken & Co. v. Duro Textiles, LLC*, 19 Mass.L.Rptr. 509, 2005 WL 1791562 (June 10, 2005) (denying summary judgment request of members/controlling persons of LLC, citing corporate veil piercing principles and concluding defendants failed to establish plaintiff had no reasonable expectation of proving veil piercing claim at trial).

*Pompilli v. Pro-Line Painting*, No. CV044001774, 2005 WL 1433185 (Conn. Super. May 13, 2005) (plaintiff failed to plead sufficient facts to pierce LLC veil under instrumentality or identity theory because alleged single instance of commingling, even if true, would be insufficient to demonstrate requisite dominion and control).

*McKeon v. Rinaldi*, No. CV044001110S, 2005 WL 1331641 (Conn. Super. May 11, 2005) (describing exceptional circumstances required to pierce corporate veil and concluding allegations were insufficient to pierce veil of LLC to hold individual who was "officer, partner and/or subcontractor" of LLC liable on LLC's construction contract).

*S.R. International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC*, 375 F.Supp.2d 238 (S.D. N.Y. 2005) (concluding Delaware veil piercing law would apply to question of whether Delaware LLC's veil should be pierced and discussing veil piercing standard under Delaware alter ego theory, but finding it unnecessary to pierce LLC's veil because sale of special purpose LLC, a retail lessee, amounted to sale of retail leasehold itself and assignment of lessee's loss claim).

*DDH Aviation, L.L.C. v. Holly*, No. Civ.A.3:02-CV-2598-P, 2005 WL 770595 (N.D. Tex. March 31, 2005). DDH Aviation, L.L.C. ("DDH") brought suit against two individuals and several corporations for claims arising primarily out of the individuals' alleged wrongdoing as DDH employees. DDH brought suit as "DDH Aviation, L.L.C., f/k/a DDH, Inc.," and the opinion states that DDH was initially "formed as a corporation but later altered its business form to become a limited liability company." The court does not indicate when the change in form took place or what events took place while DDH was a corporation versus an LLC. At one point in the opinion, the court identifies DDH as a "limited liability corporation." The defendants filed counterclaims against DDH as well as third party claims against another entity and several individuals affiliated with DDH. Many of the third party claims were based on the single business enterprise and alter ego veil piercing theories. The court dismissed the claims that were based on the single business enterprise theory. Describing the "single business enterprise" theory as an equitable doctrine applied to reflect partnership-type liability principles when corporations integrate their resources to achieve a common business purpose, the court concluded that the doctrine did not apply because the two entities alleged to constitute a single business enterprise did not share a common business purpose. Because the court concluded the entities did not share a common business purpose, the court did not find it necessary to reach an analysis of whether the entities integrated their resources. As to the alter ego claims, relying on provisions of the Texas Business Corporation Act addressing veil piercing, the court stated that the third party plaintiffs were required to demonstrate that the third party defendants used DDH to perpetrate an actual fraud in addition to establishing the application of the alter ego doctrine. The court found that the allegations relating to the alter ego liability of an individual shareholder/owner of DDH (the crux of which was that the shareholder pillaged DDH to provide for his lavish personal lifestyle) were sufficient to survive a motion to dismiss because the allegations showed unity between the shareholder/owner and DDH and met the statutory actual fraud standard under the

Texas Business Corporation Act. The court found the third party plaintiffs failed to show that DDH was the alter ego of the other entity sued by the third party plaintiffs. The court stated that the allegations demonstrated, at most, a situation similar to a parent/subsidiary relationship, but not that of absolute control of DDH by the other entity. Having found the third party plaintiffs failed to alleged sufficient facts to establish alter ego, the court found it unnecessary to reach the question of whether the allegations met the statutory actual fraud requirement.

*U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C.*, No. Civ.A. 112-N, 2005 WL 2093694 (Del. Ch. March 30, 2005) (denying motion for leave to amend complaint to add veil piercing claims in suit against various LLCs and individuals because addition of such fact-intensive inquiry would involve substantial discovery and would be unreasonably prejudicial given that litigation was at relatively late stage).

*Triple "R" Service v. Watson*, No. G033798, 2005 WL 1023236 (Cal. App. 4 Dist. May 3, 2005). The court found sufficient grounds to pierce the LLC veil and hold two individuals liable as alter egos based on evidence the individuals duped the plaintiff into transferring possession of certain equipment to the LLC prior to execution of the written purchase agreement, fabricated an evolving series of reasons for failing to make the contractually required payments, and treated the equipment as if it were their own property as opposed to an asset of the LLC. The court stated the transfer of the equipment to another entity without benefit to the LLC constituted evidence of several factors justifying piercing: commingling of assets, unauthorized diversion of corporate assets to other than entity purposes, treatment by a stockholder of corporate assets as his own, failure to maintain adequate records, use of the corporation as a mere conduit for an individual's business, and disregard of formalities and failure to maintain arm's length transactions with the corporation. Additionally, there was evidence of undercapitalization. The court held that the fact that the individuals did not directly own an interest in the LLC, but rather were members of the sole member of the LLC, did not preclude holding them liable on the basis of alter ego. The court stated that the test was not one of direct ownership, but equitable ownership. Further, the fact that the appellant's indirect interest was a minority interest of only 18% did not preclude alter ego liability. According to the court, "[t]he ownership of even a single share in the corporate entity is sufficient to qualify one for alter ego liability."

*Retropolis, Inc. v. 14th Street Development LLC*, 797 N.Y.S.2d 1 (N.Y. A.D. 1 Dept. 2005) (concluding allegations were insufficient to support claim to pierce LLC veil where only three out of more than 70 checks tendered by plaintiff were mistakenly deposited into wrong entity's account and were immediately transferred to proper account upon discovery of error, and there was no instance of any check being deposited in member's personal account).

*Rokni v. Mostadim*, No. B173905, 2005 WL 250314 (Cal. App. 2 Dist. Feb. 3, 2005) (holding demurrer to "cause of action" to pierce LLC veil was properly sustained because LLC veil piercing is a remedy rather than a cause of action).

*Allison v. Danilovic*, No. B163363, 2004 WL 2797988 (Cal. App. 2 Dist. Dec. 7, 2004) (affirming lower court decision holding individual who was CEO, director, and 66% owner of LLC liable for unpaid wage claim under alter ego theory (whether it be California or Delaware law that applied to the Delaware LLC operating in California) where the individual never held formal board meetings, never executed an operating agreement, never executed bylaws, never issued stock, had the authority to make the business decisions for the LLC, was responsible for hiring and supervising the employee, and made the decision not to pay the employee her wages though the LLC had \$500,000 in a bank account and funds were used to pay investors instead).

*In re Environmental Textiles, L.L.C. (Industrial Controls of Oklahoma, Inc. v. American Renewable Resources, L.L.C.)*, No. 03-00655-R, 03-0153-R, 2004 WL 2952664 (Bankr. N.D. Okla. Dec. 6, 2004) [no longer available on Westlaw]. The plaintiffs sought to establish that three companies (a Delaware LLC, an Oklahoma corporation, and a "management company") were the alter egos of their owners, the Hirsches. The court noted the lack of Oklahoma case law on the question of piercing the LLC veil and the likelihood that Oklahoma courts will rely on corporate veil piercing principles, with perhaps less emphasis given to the failure to hold meetings or comply with other formalities. The court examined the dealings between the Hirsches and the three entities and concluded that the plaintiff failed to establish a prima facie case that the entities were alter egos of the Hirsches. The court found that the plaintiff presented no evidence that the entities failed to maintain adequate corporate records, that there was any diversion of corporate funds or assets to noncorporate uses, that the Hirsches used any of the entities as a mere shell or instrumentality (such as using corporate funds as a personal bank account), or that there was any element of injustice or fundamental

unfairness. The plaintiffs also failed to establish that the Hirsches were liable on the LLC's contract on an agency or ratification theory.

***Kalashian v. Krebs***, No. G032397, 2004 WL 2700618 (Cal. App. 4 Dist. Nov. 29, 2004) (holding there was sufficient evidence to hold LLC member personally liable as alter ego of LLC based on undercapitalization of LLC, use of LLC account to pay personal expenses, payment of LLC debts with personal funds, failure to observe LLC formalities (by failing to keep financial statements, signing documents on behalf of LLC before it came into existence, and personally executing lease agreement for LLC subsidiary's space), and member's use of position with LLC and its subsidiary to accomplish the wrongful purpose of seizing an account that belonged to the plaintiffs).

***In re Giampietro (AE Restaurant Associates, LLC v. Giampietro)***, 317 B.R. 841 (Bankr. D. Nev. 2004). Mr. Giampietro formed a Nevada LLC as the acquisition vehicle for the purchase of the assets of a restaurant. The LLC signed a contract to purchase the assets for \$200,000, and \$20,000 was placed in escrow pending closing. The deal never closed, and the seller eventually obtained a judgment against the LLC in state court. After Mr. Giampietro filed a Chapter 7 bankruptcy petition, the seller sought to assert its claim against Mr. Giampietro and deny his discharge. The bankruptcy court analyzed whether Nevada law would recognize the alter ego doctrine with respect to LLCs and concluded that it would. The court reviewed the development of Nevada veil piercing in the corporate context and rejected the argument that Nevada's codification of the principles of alter ego piercing for corporations in 2001 created a negative inference that the Nevada legislature intended to abrogate the doctrine with respect to LLCs or any other limited liability entity. The court concluded the Nevada courts would apply the same common law standards of alter ego liability to LLC members that they have applied to corporate shareholders. The court commented by way of a footnote, however, that the factors may carry different weight and that domination by an owner may not justify piercing because LLC statutes allow members to manage and illustrate a legislative intent to allow small, one-person and family-owned businesses the freedom to operate their companies themselves and still enjoy protection from personal liability. After concluding the Nevada courts would apply corporate alter ego piercing principles to LLCs, the court discussed the requirements for alter ego liability under Nevada law. To pierce a corporation's veil under Nevada law requires that (1) the corporation be influenced and governed by the shareholder, director, or officer to be held liable, (2) there be such unity of interest and ownership that the corporation and shareholder, director, or officer are inseparable, and (3) adherence to the corporate fiction of a separate entity would sanction fraud or promote injustice. Applying these principles, the court determined that Mr. Giampietro and his LLC were not alter egos. Although there was no question that Mr. Giampietro influenced and governed the LLC and that there was a unity of interest (at least from the standpoint of the LLC, in that it was wholly owned by the member), the court found no injustice in the claimant's accepting a contract that the claimant knew was to be signed only by the LLC when the claimant also knew the landlord had requested and would receive a separate guaranty. The fact that Mr. Giampietro himself, rather than the LLC, deposited a cashier's check into escrow for the earnest money was not a lack of formality that the court found significant. The court stated that "[s]uch informal contributions to capital are to be expected in the formation stages of a business, and Mr. Giampietro testified he intended to document formalities as soon as he had taken possession and opened up the business. What matters here is not so much that Mr. Giampietro did not assiduously and contemporaneously document each act taken on behalf of [the LLC] – what matters is that [the claimant] did not rely upon, or even care about, the lack of formality."

***Lee v. Clinical Research Center of Florida, L.C.***, 889 So.2d 317 (La. App. 2004). After his employment was terminated, Lee filed suit against Clinical Research Center of Florida, L.C. (CRC Florida) and various other LLCs for breach of his employment contract with CRC Florida. Lee argued all of the defendant entities were part of a "single business enterprise" with CRC Florida and were therefore liable for the alleged breach of CRC Florida's contract with him. The court discussed the single business enterprise doctrine, under which a court may disregard the corporate separateness of affiliated corporations when they integrate their resources to achieve a common business purpose and do not operate as separate entities. All of the defendant entities in the case were LLCs, and the court analyzed CRC Florida's relationship with each other entity and concluded that CRC Florida was not doing business as a single business enterprise with any of the other defendant LLCs. Some of the court's conclusions are noted here. The use of a centralized accounting system by two LLCs was insufficient to constitute a single business enterprise where the LLCs maintained a separate financial identity, had their own books, maintained separate bank accounts, earned their own income, paid their own expenses, and filed separate tax returns. Web site advertising that two LLCs were affiliated was insufficient to establish the two LLCs were a single business enterprise where the two LLCs conducted different types of research, did not use the same standard operating procedures, and did not use the same institutional review boards. Common membership in LLCs was insufficient to establish a single business enterprise where the common members did

not have sufficient controlling interests to amount to substantial identity of ownership. Loans by one LLC to another were insufficient to establish a single business enterprise where the loans were documented, arms length transactions.

***Wachovia Securities, LLC v. Neuhauser***, No. 04 C 3082, 2004 WL 2526390 (N.D. Ill. Nov. 5, 2004) (rejecting argument that veil piercing claims could not be brought until LLC and corporation were found liable and unable to pay a judgment, finding pleadings were sufficient to allege veil piercing claims, and noting that failure to follow company formalities would not be pertinent to piercing veil of Illinois LLC).

***Strouch v. 72 Degrees Heating and Air Conditioning, LLC***, No. 568119, 2004 WL 2397279 (Conn. Super. Sept. 24, 2004) (assuming, in the absence of evidence regarding entity structure, that entity with which plaintiff contracted was Connecticut LLC, and finding that individual with whom plaintiff dealt could not be held personally liable where there were no allegations or proof of fraud, grounds to pierce veil, or conduct on the part of individual to indicate individual was assuming personal liability under contract with LLC).

***Kyle v. Tagliaferi***, No. CV010095174, 2004 WL 2284079 (Conn. Super. Sept. 9, 2004) (concluding that existence of LLC should be disregarded and plaintiffs' contract with LLC was actually with individual member where proposal presented to plaintiffs did not refer to LLC, all plaintiffs' checks were made out to individual, the checks were endorsed by the individual, and there was no indication the checks were ever deposited to the account of the LLC).

***Stinky Love, Inc. v. Lacy***, No. B163377, 2004 WL 1803273 (Cal. App. Aug. 13, 2004). The court of appeals upheld the trial court's judgment piercing an LLC's veil and holding Lacy, the LLC's founder and CEO, personally liable on a judgment against the LLC. The LLC contracted with Stinky Love, Inc. ("Stinky") to distribute Stinky's movie "Love Stinks." Various representatives of the LLC represented to Stinky on more than one occasion that Lacy had committed \$30 million in capital to the LLC. Lacy tried to raise \$30 million but was unsuccessful and instead capitalized the LLC with \$1,000,000 of his own money and \$150,000 from another company he controlled. Lacy and his family controlled 100% of the LLC, and Lacy closely managed the details of the LLC's business and its expenditures. The distribution agreement between Stinky and the LLC required the LLC to spend \$8,000,000 on prints and advertising and to pay \$4.3 million, plus a portion of the gross receipts, for the distribution rights to the movie. The movie fared poorly, and Stinky never received any of the purchase price. Stinky obtained an arbitration award against the LLC for breach of contract in the amount of \$4.3 million, and the award was confirmed by a judgment. Lacy filed bankruptcy, but the stay was lifted to allow Stinky to pursue Lacy. Following a bench trial, the court found Lacy was the alter ego of the LLC and amended the arbitration judgment to add Lacy as a debtor. The court of appeals noted that the alter ego doctrine applies to members of an LLC and stated that two conditions must be met to invoke the doctrine: (1) there is such unity of interest between the corporation and its equitable owner that the separate personalities of the corporation and its shareholder do not really exist, and (2) it would be inequitable to treat the acts in question as those of the corporation alone. The court listed various factors that are considered in applying the alter ego doctrine and concluded the evidence was sufficient to support the trial court's finding of alter ego. The court pointed to evidence of unity of interest and ownership based on the Lacy's family's control of the LLC and use of its assets for their own benefit (including paying off personal credit cards and other debts and maintaining family-owned realty). Stinky's accountant identified 750 related party disbursements totaling millions of dollars. The court found ample evidence of inadequate capitalization based on the minimal amount of capital committed to the LLC relative to its obligations under the distributorship agreement. Finally, the court found it unjust and inequitable that the LLC convinced Stinky to enter the distribution agreement based on repeated assurances of adequate capitalization and resources. The court stated that actual fraud is not required to invoke the alter ego doctrine and that the doctrine is not limited to tort cases.

***FILO America, Inc. v. Olhoss Trading Company, LLC***, 321 F.Supp.2d 1266 (M.D. Ala. 2004). The court concluded the plaintiff stated a claim to pierce the defendant LLC's veil by alleging that the members had a fraudulent purpose in the conception of their business. The court did not find any cases addressing the question of whether corporate veil piercing principles apply to an LLC under Alabama law; however, the court concluded that it is possible to pierce the veil of an LLC under Alabama law. The court listed the factors considered by courts in deciding whether to pierce the veil of a corporation and stated that some of the factors may not apply to LLCs in the same way they apply to corporations, but the court concluded that a fraudulent purpose in the conception or operation of the LLC should certainly be a valid reason to pierce the LLC veil.



***Bricklayers and Allied Craftworkers Local 2 v. Yantch***, 316 F.Supp.2d 130 (N.D. N.Y. 2003) (holding commonly owned corporation and LLC were single employer and alter egos for purposes of liability under collective bargaining agreement).

***Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC***, 846 A.2d 1264 (Pa. Super. 2004). The plaintiff sought to pierce the LLC veil of a Delaware LLC and hold its members liable in a breach of contract action. The court held that the question of whether the plaintiff was entitled to a jury trial on the alter ego veil piercing issue was governed by Pennsylvania law. The court concluded that there is no constitutional right to a jury trial on a piercing claim under Pennsylvania law, and it rejected the plaintiff's argument that the trial court abused its discretion in deciding the piercing claim rather than submitting it to a jury. Finally, the court determined that the trial court did not abuse its discretion in refusing to pierce the LLC veil. The court noted that there was some evidence of lack of formalities, but stated that the lack of formalities must lead to some misuse of the corporate form to justify piercing. The court adopted certain statements by the trial court noting that the plaintiff knew it was dealing with an LLC and failed to obtain any guaranties.

***In re Crowe Rope Industries, LLC (Turner v. JPB Enterprises, Inc.)***, 307 B.R. 1 (D. Me. 2004) (noting standard for piercing LLC veil under Maine law is same as for corporation, and concluding Maine law would not permit corporation to pierce its own veil (based on Maine Supreme Court's rejection of "reverse piercing" by shareholder of corporation to assert corporation's rights) and thus Trustee could not assert alter ego claim on behalf of estate).

***Bowen v. 707 On Main***, No. CV020282643S, 2004 WL 424501 (Conn.Super. Feb. 24, 2004) (finding plaintiffs neither pleaded nor put forth evidentiary foundation for piercing veil of LLC).

***F.G. Bruscheiler (Antiques) Ltd. v. GBA Great British Antiques, L.L.C.***, 860 So.2d 644 (La.App. 2003). The consignor of an antique table brought an action against the consignee LLC and two of its members. The court held that the consignor failed to prove that the members disregarded "corporate formalities" to such an extent that the entity should be disregarded. The court noted that the trial court found that "some of the corporate formalities were not strictly followed, such as formal Board of Directors meetings and the keeping of minutes. However, there was evidence that other corporate formalities were followed, like filing corporate papers, making corporate loans, having a corporate bank account and operating in the corporate name."

***County of Washington v. City of Bristol***, Nos. CL 98-185-01, CL03-11, 2003 WL 23146220 (Va. Cir. Ct. Dec. 18, 2003)(dismissing individual principal owner of Virginia LLC as defendant because plaintiff failed to allege any facts from which court could conclude that "corporate veil" could be pierced).

***Bateson v. Ogalin***, No. CV020398077, 2003 WL 22481012 (Conn.Super. Oct. 16, 2003) (concluding that debt of LLC had not been discharged in bankruptcy and allowing veil piercing claims against various individuals and related LLCs to proceed).

***Lester Associates, LLC v. Entertainment Group Fund, Inc.***, No.00 Civ.3759 LTS MHD, 2003 WL 21750211 (S.D. N.Y. July 29, 2003) (applying Delaware alter ego doctrine to Delaware LLCs and concluding that there were fact issues as to whether the LLCs were alter egos during the events at issue in the case based on evidence of lack of formalities and commingling of funds).

***Bonner v. Brunson***, 585 S.E.2d 917 (Ga.App. 2003) (holding that evidence did not support piercing LLC veil to hold member personally liable because payments to member, member's wife, and member's corporation did not amount to abuse of LLC form by commingling or confusing LLC business with member's personal affairs).

***Rowland v. Franklin Career Services, LLC***, 272 F.Supp.2d 1188 (D. Kan. 2003) (holding that plaintiff's evidence of interrelated operations, centralized control of labor relations, common management, and common ownership gave rise to fact issue as to whether LLC was part of an integrated enterprise with LLC that employed plaintiff so as to constitute a "single employer" for purposes of plaintiff's Title VII discrimination claim).

***Longview Aluminum, L.L.C. v. Industrial General, L.L.C.***, No. 02 C 0168, 2003 WL 21518585 (N.D. Ill. July 2, 2003) (characterizing failure to use LLC designator as a failure to follow company formalities that does not result in loss of protection of limited liability).

**Long v. Pannell**, No. E-2002-01792-COA-R3-CV, 2003 WL 21276540 (Tenn.Ct.App. May 30, 2003) (holding that Long and Pannell, individuals who were each limited partners and owned single-member LLC general partners of a limited partnership, dealt with each other through their LLCs and as limited partners and that Long was thus not liable for debts of the limited partnership, apparently rejecting Pannell's allegations that Long had personal liability on the basis that Long's LLC was a sham, that the LLC was grossly undercapitalized, that the LLC had the sole purpose of shielding Long from liability, and that Long failed to observe necessary requirements as an officer or agent of the LLC).

**In re Trexler (Trexler v. I.P., L.L.C.)**, 259 B.R.573 (Bankr.D. S.C. 2003) (holding that allegation that LLC filed annual reports with Secretary of State and evidence of minutes of meetings indicated that LLC adhered to some formalities and established meritorious defense to veil piercing allegations for purposes of challenge to default judgment, but affirming default judgment because defendants failed to show excusable neglect or other equitable basis for relief).

**McGovern Capital, LLC v. Papic**, No. CV020190931S, 2003 WL 21267436 (Conn.Super. May 21, 2003) (holding that managing members were not liable under identity or instrumentality rules where members "followed the corporate rules," did not mingle their funds with the LLC's, did not borrow or use LLC assets for their own purposes, and did not exercise any greater control than any managing members of an LLC).

**KLM Industries, Inc. v. Tylutki**, 815 A.2d 688 (Conn.App. 2003) (noting that trial court's reference to corporate defendant as LLC was incorrect and disagreeing with trial court's decision to pierce the corporate veil, but agreeing with trial court that the determination of whether to pierce the corporate veil of a stock corporation or to disregard the LLC requires the same analysis).

**Advanced Telephone Systems Inc. v. Com-Net Professional Mobile Radio LLC**, 59 Pa. D & C.4th 286 (Pa.Ct.Com.Pl. May 15, 2003) (concluding that plaintiff in breach of contract action was not entitled to pierce the veil of an LLC where plaintiff (which was run by sophisticated businessmen) knew it was dealing with an LLC and sought no guaranties).

**Dornfried v. Granquist**, No. CV000502628, 2003 WL 1996024 (Conn.Super. March 27, 2003) (holding that evidence was not sufficient to pierce veil of single-member LLC and hold member liable for LLC's breach of contract).

**Imperial Trading Co., Inc. v. Uter**, 837 So.2d 663 (La.App. 2002) (affirming trial court's finding that plaintiff failed to prove LLCs were disregarded to extent that they were indistinguishable from their members under corporate veil-piercing standards, and noting that such ruling did not constitute any opinion as to whether veil piercing is available in the case of LLCs as it is in the case of corporations).

**Warburton/Buttner v. Superior Court (Tunica-Biloxi Tribe of Louisiana, real party in interest)**, 127 Cal.Rptr.2d 706 (Cal.App. 2002). The plaintiff, a casino developer, contracted with a Delaware LLC controlled by the Tunica-Biloxi Tribe. The Tribe was a 51% member of the LLC when the suit was filed and subsequently became 100% member. The plaintiff sued the LLC for breach of contract and alleged that the Tribe was the LLC's alter ego. Whether the Tribe had waived its sovereign immunity was in dispute in the case. The trial court denied the plaintiff's motion to compel discovery and granted the Tribe's motion for summary judgment on the basis of Tribal sovereign immunity. The appellate court granted the plaintiff's petition for mandamus, finding that the plaintiff was entitled to proceed with discovery on matters bearing on subject matter jurisdiction/Tribal sovereign immunity. In setting forth the rules regarding liability of LLC members, the court relied upon California law, noting that it had not been provided with any references to how Delaware law may differ from California law in this respect. The court cited the provisions of the California LLC act that provide for limited liability of members and that adopt the common law of alter ego liability. The court appeared to accept the possibility that alter ego liability might be established in reaching its conclusion that discovery should be allowed to proceed. The court referred to allegations of commingling of funds, lack of corporate formalities, and undercapitalization of the corporate entity.

**J. C. Compton Co. v. Brewster**, 59 P.3d 1288 (Or.App. 2002). The plaintiff sought to hold an LLC's member liable for attorney's fees for breach of a contract between the plaintiff and the LLC. While the jury found that improper undercapitalization of the LLC caused the LLC to breach its contract, the jury found no damages from the undercapitalization. According to the court, the damages resulted from the member's own breach of its separate contract with the plaintiff (under which the member assumed payment of the LLC's debts) not from a breach of contract by the LLC for which it might be responsible as an alter ego.

**Hunter v. Youthstream Media Networks, Inc.**, 241 F.Supp.2d 52 (D. Mass. 2002). The plaintiff moved for pre-trial equitable attachment of the assets of an LLC member, alleging that the LLC member was liable for the LLC's breach of contract based on veil-piercing principles. The court denied the motion. The court found that the plaintiff failed to establish he was likely to prevail on the piercing claim. The court cited corporate veil-piercing cases and set forth the following factors considered in a corporate veil-piercing case: insufficient capitalization, non-observance of corporate formalities, nonpayment of dividends, insolvency of the corporation at the time of the litigated transactions, siphoning of corporate funds by dominant shareholders, non-functioning officers and directors other than shareholders, absence of corporate records, use of the corporation for transactions of dominant shareholders, and use of the corporation in promoting fraud. The court acknowledged that the plaintiff's evidence portended some indicia of control by the member over the LLC but pointed to a dearth of evidence with respect to most of the factors listed above.

**Emma Rosina, LLC v. Bilides Building & Excavating, LLC**, No. CV020462976S, 2002 WL 31898066 (Conn.Super. Dec. 10, 2002)(striking conclusory allegations of unity of interest, lack of separateness, alter ego, and instrumentality because complaint did not set forth factual basis to support such allegations where plaintiff sought to pierce LLC veil and hold member personally liable).

**Iron Workers Local 58 v. Citizens Bank**, No. Civ.A. 02-1848, 2002 WL 31427329 (E.D. La. Oct. 25, 2002)(holding allegations that LLC was formed to evade paying plaintiffs moneys owed under collective bargaining agreement, when liberally construed, were sufficient to avoid motion Rule 12(b)(6) motion to dismiss, and individual organizer of LLC might have personal liability under alter ego or successor liability theories).

**Mowles v. Predictive Control Systems, LLC**, Nos. Civ.A. CV-02-355, CV 02-356, 2002 WL 31546164 (Me.Super. Oct. 22, 2002)(finding veil-piercing allegations were sufficient to state a cause of action against LLC's 75% member where plaintiff alleged that member "dominates the managerial and financial affairs of [the LLC] in such a way that makes it unjust for him to benefit from [the LLC's] limited liability").

**Westmoreland Associates, LLC v. Kispert**, No. 082774/99, 2002 WL 50474 (N.Y.City Civ.Ct. Sept. 20, 2002)(stating that formation of LLC to avoid personal liability is perfectly legal, and refusing to pierce veil of LLC landlord and hold members liable for overcharge because corporate status or nature of the business organization must be used to perpetrate fraud, and LLC status of landlord was irrelevant to tenant's payment of rent).

**Leber v. Universal Music and Video Distribution, Inc.**, 225 F.Supp.2d 928 (S.D. Ill. 2002). The plaintiffs sued for breach of a collective bargaining agreement of Universal Music and Video Distribution, Inc. ("Universal") and sought to hold an LLC in which Universal was a member and the LLC's other corporate member ("Panasonic") liable under various theories, including alter ego. The court applied the alter ego doctrine as it has developed in the labor law context and concluded that neither the LLC nor Panasonic were the alter egos of Universal.

**United Automobile, Aerospace & Agricultural Implement Workers of America Local v. OEM/Erie Westland, LLC**, 203 F.Supp.2d 825 (E.D. Mich. 2002)(applying DOL five-factor list and factors from case law regarding corporate "sameness" to determine genuine issues of fact existed with respect to whether LLC and member constituted "single employer" for purposes of WARN Act and breach of collective bargaining agreement claims).

**Pinebrook Properties, LTD. v. Brookhaven Lake Property Owners Association**, 77 S.W.3d 487 (Tex.App. 2002). This was a dispute regarding land use, and Pinebrook Properties, Ltd., a Texas limited partnership, owned the lake, dam, roadways, and recreational areas at issue in the case. Pinebrook Properties Management, L.L.C., a Texas limited liability company, was the general partner. The court identified Musgrave, an individual, as the "president and general managing partner" of the LLC. The trial court found that the LLC and the partnership were alter egos of Musgrave and entered judgment against Musgrave individually. The court held that the alter ego doctrine is inapplicable to a partnership, stating that "there is no veil that needs piercing, even when dealing with a limited partnership, because the general partner is always liable for the debts and obligations of the partnership to third parties." With regard to the finding that the LLC was the alter ego of Musgrave, the court acknowledged that an LLC is a legal entity separate from its members and managers, who are by statute protected from personal liability for the liabilities of the LLC. However, the court did not question the application of the alter ego doctrine to the LLC. The court cited a Texas corporate veil-piercing case in declaring that it would examine the evidence to see if there is such unity between Musgrave and the LLC that separateness had ceased to exist and holding only the LLC as the general partner liable would result in injustice. The evidence of alter ego presented was that the LLC had no checking account, had not filed a tax return, and that

Musgrave had sent a letter under his own signature without designating that he signed it in any other capacity. A second letter signed without any designation of a representative capacity was also argued to show lack of regard for the “corporate” structure. However, the court cited the Texas Business Corporation Act and Texas corporate veil-piercing cases for the principle that failure to follow corporate formalities is no longer a factor in determining alter ego under Texas law. The court concluded that there was no evidence of alter ego, pointing to the fact that there was no evidence of commingling of funds or that Musgrave disregarded the corporate structure. The court noted that the evidence revealed that Musgrave was not the sole manager of the LLC (there being two other managers involved) and that there was no evidence that Musgrave used the LLC for personal purposes.

***Kaycee Land and Livestock v. Flahive***, 46 P.3d 323 (Wyo. 2002). The Wyoming Supreme Court addressed a certified question from the district court in an LLC veil piercing case asking if, in the absence of fraud, the remedy of piercing the LLC veil is available in the same manner as piercing the corporate veil under Wyoming law. The court first reviewed the circumstances under which the corporate veil may be pierced under Wyoming law. The court then turned to the Wyoming LLC act, which states that the members and managers of an LLC do not have liability for the LLC’s debts, obligations, or liabilities, but is silent as to veil piercing. The court concluded that applying veil-piercing principles would not run counter to legislative intent. The court could discern no policy or legal reason to treat LLCs differently from corporations in this regard although the court did note that the various factors which would justify piercing an LLC veil would not be identical to the corporate situation for the “obvious reason that many of the organizational formalities applicable to corporations do not apply to LLCs.” The court found it inadvisable in the absence of a complete factual context to articulate all possible factors to be applied to Wyoming LLCs in the future. The court concluded by clarifying that fraud or an intent to defraud is not required to disregard a corporate or LLC entity.

***In re Securities Investor Protection Corporation v. R.D. Kushnir & Co. (R.D. Kushnir & Co. v. Adler Drobny Fischer LLC)***, 274 B.R. 768 (Bankr. N.D. Ill. 2002)(concluding that, while Illinois LLC act precludes piercing LLC veil to hold members and managers liable based on failure to observe formalities, nothing in statute bars piercing the LLC veil on other grounds applicable to corporations).

***Collins v. E-magine, LLC***, 739 N.Y.S.2d 15 (N.Y. A.D. 1 Dept. 2002)(recognizing statutory liability protection of LLC members and managers and holding plaintiff failed to raise triable issue on alter ego theory in view of “heavy burden to be met if the corporate veil is to be pierced”).

***Curole v. Ochsner Clinic, LLC***, 811 So.2d 92 (La. App. 2002)(finding allegations insufficient to require an inquiry into whether LLC veil should be pierced to hold CEO of LLC personally liable).

***Jackson v. Carlos Supermarket, LLC***, No. CV000599734, 2002 WL 378317 (Conn. Super. Feb. 14, 2002)(finding insufficient evidence to hold LLC member liable under either instrumentality or identity rule for LLC supermarket’s false imprisonment of customer).

***Hesni v. Williams & Boshea, L.L.C.***, No. Civ.A. 01-3745, 2002 WL 373273 (E.D. La. March 7, 2002)(in context of considering fraudulent joinder assertion, court could not conclude that there was no possibility of personal liability of LLC member given evidence of commingling of funds and failure to follow statutory formalities required for formation).

***ABC, LLC v. State Ethics Commission***, No. CV 00-0504071S, 2001 WL 1669371 (Conn. Super. Dec. 12, 2001) rev’d for lack of jurisdiction, 826 A.2d 1077 (Conn. 2003) (acknowledging that there are circumstances under which Connecticut law allows disregard of the separate identity of a corporation or LLC but finding no evidence that would permit disregard of the separate LLC existence in this case).

***Andrews v. Kerr McGee Corp.***, No. 1:00CV158-D-A, 2001 WL 1704144 (N.D. Miss. Dec. 5, 2001). The plaintiffs in this environmental tort action sought to pierce the veil of a Delaware LLC wholly owned by a Delaware corporation. The court looked to the Delaware law on veil piercing because the Mississippi LLC act provides that liability of an LLC member is governed by the law of the state of organization. The court stated that two elements were required under Delaware law to disregard the separate legal existence of the LLC: (1) complete domination and control by the member such that the LLC and its parent operated as a single economic entity, and (2) deliberate and purposeful misuse of the corporate form that results in unfairness, injustice, and injury to the plaintiff. The court found that the plaintiffs had made no allegations regarding the second element. The court stated that intentional undercapitalization

is one of the primary ways to satisfy the second element and noted that the plaintiffs had not raised any issue in this regard. Thus, the court granted the defendant's motion for summary judgment on the veil-piercing claim.

*Wisconsin Gas Company v. Bauer*, No. 01-0369, 2001 WL 1510625 (Wis. App. Nov. 20, 2001)(rejecting argument that LLC and corporation were actually one company on basis of several common owners and alleged fraudulent concealment of relationship between companies).

*Peinado v. Barnett*, No. A093923, 2001 WL 1380441 (Cal. App. Nov. 6, 2001). The court affirmed an administrative law judge's conclusion that the alter ego doctrine applied to a single member LLC that acted as a contractor without the required license. The evidence relied upon by the court to establish alter ego included the fact that the California LLC was required to have at least two members and only had one. The court stated that the LLC was thus not legally constituted when it was formed. In addition, the court characterized the LLC's failure to file the required statement of information with the Secretary of State as a disregard of legal formalities and a failure to maintain adequate records. The court pointed to a unity of interest based upon the sole ownership and control of the member. Finally, the court noted that the member and LLC used the same address.

*NetTech Solutions, LLC v. Zippark.com*, No. 01 CIV. 2683(SAS), 2001 WL 1111966 (S.D. N.Y. Sept. 20, 2001). The plaintiff brought breach of contract, copyright infringement, and unfair competition claims against an LLC and the individual who was president and a member of the LLC. The plaintiff sought to pierce the LLC's veil to hold the individual personally liable, and the individual sought to have these claims dismissed. The court discussed the corporate alter ego doctrine under New York law and concluded that there were facts to suggest that the individual exercised complete domination and control over all matters concerning the LLC and that such domination was used to commit a wrong. The court noted that the other members of the LLC were the individual's wife and two daughters, and there were no employees. The LLC's sole business was to invest the proceeds from business with one of the plaintiffs. The court stated that if the LLC did breach the agreement it had with the plaintiff by misappropriating confidential and proprietary information, there was little doubt that the individual used his control over the LLC to commit the wrong. Thus, the court declined to dismiss the breach of contract claim against the individual. With respect to the copyright infringement and unfair competition claims, the court stated that the test was whether a corporate officer is a moving, active, conscious force behind the infringement. Characterizing the individual as a corporate officer of the LLC, the court found the plaintiffs had alleged sufficient facts to avoid dismissal of the copyright infringement and unfair competition claims against the individual.

*Bastan v. RJM & Associates, LLC*, 29 Conn. L. Rptr. 646, 2001 WL 1006661 (Conn. Super. June 4, 2001). The individual sole member of an LLC argued that there can be no equitable piercing in the context of a member-managed LLC. The defendant relied on the statutory authorization of member-managed LLCs and several law review articles stating that it would be difficult to pierce member-managed LLCs. The court rejected the defendant's argument, stating that the argument overlooked the "considerable structure" required in the formation and operation of LLCs. The court concluded that the plaintiff had alleged facts that would support a conclusion that the limitation on a member's liability would not apply in this case.

*Stone v. Frederick Hobby Associates II*, No. CV000181620S, 2001 WL 861822 (Conn. Super. July 10, 2001). The court found that there was sufficient evidence to allow the plaintiffs to pursue their alter ego and instrumentality veil-piercing claims against the members of an LLC and a commonly owned LLC. The court discussed various examples of failure to follow corporate formalities and concluded that the standard under Connecticut law did not require any actual fraud to pierce the veil of the LLC on a breach of contract claim. One piece of evidence the court noted in support of the contention that the LLC form was improperly used as a shield to avoid responsibility for contractual obligations was the statement of an attorney for the defendants during a meeting between the parties in which the attorney told the plaintiffs to "go ahead and sue [the LLC]. There is no money in [the LLC]. Why do you think we set it up as an LLC in the first place?"

*Jordan v. Commonwealth*, 549 S.E.2d 621 (Va. App. 2001). The members of an LLC that owned property that created a public nuisance were convicted of maintaining a public nuisance. The Commonwealth acknowledged that title to the property was held in the LLC but argued that the defendants should be deemed the owners of the property because they were the sole members in the LLC, shared its profits, and represented themselves to be the owners. The court of appeals recognized the status of the LLC as a separate legal entity and found that the public nuisance offense, placed in its ancient common law context, only authorizes prosecution of the person or entity that holds actual title to the property

on which a nuisance continues. Since the evidence established that the LLC and not the individual members were the owners of the property, the convictions were reversed.

***Berwyn Capital Investments, Inc. v. Shore Venture Group, LLC***, No. CIV.A. A. 01-691, 2001 WL 883278 (E.D. Pa. June 14, 2001). The plaintiff sued two LLCs and individuals who were “officers and directors” for breach of contract and conversion. The individual defendants alleged that they were not liable because they executed the contracts as officers and directors of the LLCs. The plaintiff claimed that it would be able to prove that the “corporate” veils should be pierced. The court held that the individual defendants were probably correct in their contention that the complaint failed to allege enough facts to warrant veil piercing, but that the complaints contained adequate allegations that the individuals breached the contracts and had personal liability for conversion, which the court characterized as a possible predicate to veil piercing.

***Rafferty v. Noto Brothers Construction, L.L.C.***, No. CV000082596, 2001 WL 459073 (Conn. Super. April 17, 2001). The court stated that the protection afforded by the LLC is not absolute and may be disregarded, as in the case of a corporation, when the LLC is the alter ego or business conduit of individuals. The defendants’ motion to strike on the basis that the action could not be maintained against individuals who were not parties to the contract in issue was denied because the plaintiffs had pleaded alter ego.

***Dornfried v. Granquist***, No. CV000502628S, 2001 WL 306851 (Conn. Super. March 13, 2001) (rejecting plaintiff’s argument that court should disregard LLC liability shield under instrumentality or identity rule because plaintiff failed to plead either theory).

***Hollowell v. Orleans Regional Hospital LLC***, 217 F.3d 379 (5<sup>th</sup> Cir. 2000). The district court’s opinion denying summary judgment in this case is summarized *infra*. In this WARN Act case, the plaintiffs sued an LLC and various other individuals and entities seeking to pierce the veil of the LLC as well as two corporate members of the LLC on alter ego grounds. The plaintiffs also sought to establish that the LLC and various related entities constituted a single business enterprise. The jury found for the plaintiffs on both the alter ego and single business enterprise issues. On appeal, the defendants argued that there was insufficient evidence to support these findings. The court of appeals noted that neither party challenged the district court’s conclusion that Louisiana would treat an LLC in the same manner as a corporation for veil-piercing purposes. (In an earlier footnote, the court described LLCs as “essentially corporations which the Louisiana tax code taxes as partnerships.”) The court rejected the defendants’ attack on the jury’s findings. With respect to the alter ego finding, the defendants’ challenged the jury’s findings of undercapitalization of the LLC and commingling of funds. The court stated that, even if the court were to accept the defendants’ arguments, the defendants had failed to present a challenge to the jury’s finding of alter ego based upon the “totality of the circumstances.” The court of appeals also rejected a challenge to the jury’s finding of single business enterprise, citing evidence of common ownership, common management, a unified employment policy, and disregard for corporate separateness of the entities.

***Leisure Resort Technology, Inc. v. Trading Cove Associates***, No. CV000091180, 2000 WL 1682535 (Conn. Super. Oct. 13, 2000). The court granted a motion to strike allegations that two LLC members and two individuals referred to as directors of the LLC were personally liable under veil-piercing alter ego theories because the allegations were mere conclusions of law rather than facts that would demonstrate the veil should be pierced if proven true.

***Hamilton v. AAI Ventures, L.L.C.***, 768 So.2d 298 (La. App. 2000) (applying corporate veil-piercing principles and upholding the trial court’s piercing of the LLC veil to impose personal liability on an LLC member for breach of the LLC’s contract).

***Bass v. Lifecare Holdings, Inc.***, No. Civ.A. 99-1864, 2000 WL 377815 (E.D. La. April 12, 2000). In this employment discrimination case, the plaintiffs sued their employer, a Louisiana LLC. The plaintiffs also sought to hold liable the sole owner of the LLC, a corporation, and an affiliated LLC that served as the manager of the employer LLC. The plaintiffs argued that the three entities satisfied the “single employer” test for Title VII purposes. The court concluded that the plaintiffs failed to demonstrate a sufficient departure from the ordinary relationship between a parent and subsidiary to meet the “single employer” standard. The court listed a number of factors it deemed relevant and concluded that the plaintiffs had not demonstrated that the three entities were “so interrelated, without observing ordinary formalities” or that the LLC was “so dominated, particularly as to its employment decisions” as to justify treating either or both of the affiliates as a single employer with the LLC employer. The court specifically went on to conclude that

performance of administrative services and duties by the LLC that served as manager of the employer LLC was not irregular and did not evidence single employer status by the manager LLC.

*Trustees of the Village of Arden v. Unity Construction Company*, No. C.A. 15025, 2000 WL 130627 (Del. Ch. Jan. 26, 2000) (discussing the possibility of piercing the “corporate” veils of an LLC and related corporation on alter ego grounds and finding that similar ownership was insufficient to justify disregarding the business forms).

*GMAC Commercial Mortgage Corp. v. Gleichman*, 84 F. Supp.2d 127 (D. Me. 1999). GMAC sued a real estate development LLC and its sole member for breach of a loan contract. GMAC sought to hold the individual member liable under corporate veil piercing theories. The court referred to the LLC and its member in corporate terms throughout most of the opinion and applied corporate veil piercing principles. The court concluded that GMAC’s pleadings were sufficient to allege a “misuse of corporate form” and an “inequitable outcome if the Court recognizes [the LLC’s] corporate form.” Thus, GMAC survived the member’s Rule 12(c) motion to dismiss the claim. The alleged misuse of “corporate form” was the member’s announced intent to dissolve the LLC after repudiation of the contract. GMAC alleged that a dissolution would deprive it of its ability to recover damages, which the court found to satisfy the requirement that GMAC allege that an “inequitable result” would flow from recognition of the “corporate form.” GMAC also survived the member’s motion for summary judgment. The court said that some of the evidence GMAC produced to show the member’s improper use of the LLC’s “corporate form” included: undercapitalization of the LLC on formation, payment of a deposit by a related company controlled by the member, and methods by which the LLC distributed funds.

*People v. Garban, LLC f/k/a Garban Ltd.*, 80 Fair Empl. Prac. Cas. (BNA) 351, 1999 WL 496182 (N. Y. Sup. June 17, 1999). In this sexual harassment case against two LLC stock brokerage firms, the plaintiff sought to hold two corporations alleged to be controlling members of the LLCs as well as the ultimate parent and another affiliate liable for the conduct of the LLCs. The court discussed corporate veil-piercing principles and concluded that the plaintiff had failed to plead facts warranting a “piercing of the corporate shield.” The court thus dismissed the action as to the defendants other than the LLCs.

*Masinter v. Salem Road Assoc., L.L.C.*, 522 S.E.2d 562 (Ga. App. 1999) (holding that plaintiff failed to establish breach of contract, thus arguments regarding veil piercing to make LLC members personally liable were moot).

*New Horizons Supply Cooperative v. Haack*, No. 98-1865, 1999 WL 33499 (Wis. App. Jan. 28, 1999). The trial court in this case held a member of an LLC personally liable for a debt of the LLC. On appeal, the court reversed. The trial court’s comments are worth noting. The judge started out by stating that it was a problem that no one had filed any documents to show what the LLC agreement stated. The court went on to note that “the rules of dissolution apparently were not followed” because creditors were not notified and articles of dissolution were not filed. In awarding the plaintiff judgment on its claim, the judge stated:

Haack signed . . . an agreement for Kickapoo Valley Freight LLC, but it would appear to me that the corporation was just a shell around which there were no real intentions to operate like a corporation because there was no intent even to dissolve the corporation, and the court’s going to find that the corporate veil is pierced by the fact that the people were acting like a partnership, being taxed like a partnership, and haven’t even dissolved the—

. . .

. . . I’m treating this as a partnership and assessing liability to the remaining partner. . . . That’s the evidence that’s before me, and unless I would have some other evidence that was not presented, I have to treat this matter as a partnership and assume that the limited liability agreement did not alter the normal partnership liability situation.

(The opinion refers to the judgment as a “small claims judgment,” and presumably the individual was not represented by counsel at the trial.) On appeal, the court first noted that the Wisconsin LLC act imports corporate veil-piercing principles. However, the appeals court found that there was insufficient evidence to pierce the veil of the LLC. The appeals court stated that the trial court’s comments implied that it “erroneously deemed Kickapoo Valley’s treatment as a partnership for tax purposes to be conclusive.” The court noted the lack of evidence to support a conclusion that the member dominated the LLC such that it had no separate existence or was an instrumentality for injustice. The court of appeals upheld the judgment against the member, however, on the basis that she did not take appropriate steps to

shield herself from liability upon dissolution and distribution of the LLC's assets. The court noted that filing articles of dissolution and notifying creditors are apparently optional under the Wisconsin statute, but the rules for distribution of assets on dissolution and the priority of creditors are fixed by statute. LLC creditors whose claims are not otherwise barred under the statute may pursue LLC members to the extent of the member's proportionate share of the claim or the assets of the LLC distributed to the member in liquidation. Since the member did not prove that the plaintiff's claim exceeded the value of any assets she received, the court affirmed the judgment.

***Tom Thumb Food Markets, Inc. v. TLH Properties, LLC***, No. C9-98-1277, 1999 WL 31168 (Minn. App. Jan. 26, 1999). The plaintiff sued its LLC landlord and sought to pierce the LLC veil to hold liable the member who signed the lease on behalf of the LLC. The trial court concluded that the member was personally liable. The court of appeals reversed. The court of appeals first noted that the Minnesota LLC act makes the corporate veil-piercing cases applicable to LLCs. After reciting the conditions under which Minnesota courts will pierce the corporate veil, the court concluded that the record did not establish the injustice or fundamental unfairness required to pierce the veil. The member did not intentionally mislead the plaintiff, and the plaintiff did not come with clean hands because its own conduct contributed to the breach of the lease.

***In re Sanner (Birdsell v. Fort McDowell Sand and Gravel)***, 218 B.R. 941 (D.Ariz. 1998). The bankruptcy court cited Arizona corporate veil-piercing cases in concluding that the founder and manager of the LLC defendant had no personal liability on the claims against the LLC. The bankruptcy trustee argued that it was not necessary to pierce the veil of the LLC because the individual was a party to a plan to engage in collusive bidding under Section 363(n) and was liable for his own conduct. However, the court characterized this argument as "an attempt to make an end run around the protections afforded shareholders, directors, and officers by the corporate form" and as unsupported by the evidence. In addition, the agreement in question was signed on behalf of the LLC in a representative capacity rather than an individual capacity.

***Marina, LLC v. Burton***, No. CA 97-1013, 1998 WL 240364 (Ark. App. May 6, 1998). In this breach of contract action by Burton against an LLC and its sole member, the appeals court upheld the trial court's refusal to pierce the LLC veil. The appeals court also found no error in the trial court's refusal to hold the member liable for misrepresenting that a number of other individuals were also members of the LLC. Burton argued that the LLC's veil should be pierced because the LLC was undercapitalized and inadequately financed. However, the court noted that Burton was aware the LLC was a new entity and that the financing of the project was to be accomplished through a bank loan. The court was not convinced under these facts that it should disturb the trial court's ruling. The court found that Burton's misrepresentation claim against the member failed because there was evidence to support the trial court's finding that Burton had not reasonably relied on the member's misrepresentations regarding membership in the LLC. In this regard, the court pointed out that Burton acknowledged that he was aware LLCs were designed to limit an investor's liability. Further, apparently satisfied with having a mortgage on the land that was the subject of the contract, Burton testified that the financial capability of the individuals listed as members was none of his business.

***Hollowell v. Orleans Regional Hospital***, 14 IER Cases 225, 1998 WL 283298 (E.D. La. May 29, 1998). In this WARN Act class action against various individuals and health care organizations, the court discussed veil piercing under Louisiana limited liability company law. After discussing corporate veil piercing and citing numerous commentators on LLC veil piercing, the court concluded that the veil of the defendant LLC could be pierced if the LLC acted as the "alter ego" of its members or if the LLC's members committed fraud or deceit on third parties through the LLC. The court concluded that there were fact issues precluding summary judgment on the veil-piercing claims. The court also discussed the application of the WARN Act single business enterprise doctrine to the LLC and related co-defendants. The court recognized that the analysis overlapped somewhat with that involved in veil piercing and concluded that summary judgment was inappropriate on this claim as well.

***United States v. Johnston***, 13 F. Supp.2d 1316 (M.D. Fla. 1998). The court considered the United States' "Motion to Set Aside as Fraudulent Conveyance Forfeited Property or in the Alternative a Determination That K & J Limited Liability Company is the Alter Ego of the Defendant Beryle Johnston." The court concluded that a transfer of certain real property from a partnership to an LLC was fraudulent and thus did not reach the alter ego question.

***Ditty v. Checkrite, Ltd., Inc.***, 973 F. Supp. 1320 (D. Utah 1997). In this Fair Debt Collection Practices Act suit, the plaintiffs attempted to hold Mr. Deloney, who was apparently the sole member and manager of an LLC law firm (the plaintiff alleged that Deloney was the "sole shareholder, sole director and president"), personally liable for the



actions of his firm on the basis that he was the alter ego of the LLC. The court noted that most commentators assume that veil-piercing theories apply to LLCs, and the court analyzed the claim applying the traditional corporate alter ego doctrine. The court concluded that the plaintiffs had not produced sufficient evidence at the summary judgment stage to pierce the LLC veil and hold Deloney liable as a matter of law.

*In re Multimedia Communications Group Wireless Assocs. of Liberty County (Mills v. Webster)*, 212 B.R. 1006 (Bankr. M.D. Fla. 1997). Two individuals formed a corporation and an LLC to offer Direct TV services to rural areas. Later, the LLC filed a Chapter 7 bankruptcy petition. The trustee filed a complaint against the individuals and several related corporations and LLCs, seeking a declaratory judgment that the affiliated companies were alter egos and instrumentalities of one another. The court discussed and applied corporate veil piercing principles but concluded that the circumstances did not warrant piercing the veil in this case.

*Northern Tankers (Cyprus) Ltd. v. Backstrom*, 967 F. Supp. 1391 (D. Conn. 1997). In this federal maritime veil piercing case, the court pierced the veil of a number of entities, but it is unclear whether the LLCs mentioned in the case were among these entities. The plaintiff in the case sought to hold two individuals, Backstrom and Lindholm, and various related entities liable for a judgment the plaintiff had obtained against a shipping company controlled by Backstrom and Lindholm. The court identified "53 individual, corporate, partnership and trust defendants." In fact, two of the defendants were Colorado LLCs. The court applied federal common law to pierce the corporate veil of numerous shipping and real estate corporations, holding that these corporations were merely alter egos of Backstrom and Lindholm. Additionally, the court stated that it was piercing the "corporate veil of various other entities" that were fraudulently created for Lindholm personally. This is an apparent reference to part or all of a group of entities that owned substantial real and personal property in Colorado. This group consisted of a grantor trust, two corporations, a limited partnership and two LLCs. These entities were not directly part of the shipping and real estate enterprise operated by Backstrom and Lindholm but were personal investment vehicles of Lindholm. Although the two LLC defendants were identified by the court as part of this latter group of entities, it is unclear from the opinion whether the LLC veils were actually pierced. The court specifically found that the limited partnership and its corporate general partner were alter egos of Lindholm and expressly disregarded their "corporate" existence. The court did not specifically address the LLCs in this way. The opinion does not indicate the basis for exercising jurisdiction over the LLCs, but it appears that jurisdiction may have been premised upon the fact that the LLCs were alter egos of Lindholm. The court noted that the LLCs were among defendants that had contested jurisdiction, and the court adopted a special master's recommended ruling that jurisdiction was present. In an earlier reported decision, the court had postponed deciding whether the LLCs and certain other defendants were subject to jurisdiction based upon their alter ego status to provide the plaintiff an opportunity to engage in discovery on the alter ego issue. See *Northern Tankers (Cyprus), Ltd. v. Backstrom*, 901 F. Supp. 72 (D. Conn. 1995).

## **2. Reverse Piercing**

*Flentye v. Kathrein*, 485 F.Supp.2d 903 (N.D. Ill. 2007) (stating plaintiffs could rely on corporate veil piercing principles to pierce LLC veil, stating that "reverse piercing" was potentially applicable, and finding allegations sufficient to state alter ego claim).

*In re Bianchini (Bianchini v. Ryan)*, 346 B.R. 593 (Bankr. D. Conn. 2006). In a prior lawsuit against the debtor in New Jersey, a judgment was entered against entities owned by the debtor, including an LLC, based in part on the jury's findings that the entities were the debtor's alter egos created to shield assets or for other unjust purposes, and that the assets of any of them should be used to satisfy debts of any other. A judgment lien was recorded on property owned by the LLC, and the property was later conveyed to the debtor subject to the lien. In this bankruptcy proceeding, the debtor sought to treat the LLC's property as his own at the time the judgment lien was recorded in order to claim his interest in the property as exempt under Section 522(b)(2). The court declined to do so, stating that it did not construe the New Jersey judgment as declaring that the debtor was the owner of the LLC's property at that time, but rather as permitting the judgment creditor to disregard the state of record title to the extent necessary to satisfy the judgment. The court noted that the debtor was attempting to "reverse pierce" the LLC's veil to treat the LLC's assets as his own and observed that many jurisdictions recognize both offensive and defensive reverse piercing. The court stated that equitable principles govern veil piercing in Connecticut and concluded that Connecticut courts would not pierce the veil between the debtor and the LLC to allow the debtor to benefit by disregarding record title to the property when the debtor had placed record title to the property in the LLC for unjust purposes. The court commented in a footnote that if record title

to the property were still in the LLC as of the petition date and the trustee sought to pierce the LLC's veil for the benefit of the debtor's creditors, that would have been a different matter.

***In re Turner (Kendall v. Turner)***, 335 B.R. 140 (Bankr. N.D. Cal. 2005). After attending a seminar on asset protection, the debtor and his wife, assisted in part by an asset protection attorney and the individual who conducted the seminar, engaged in a series of transactions involving the transfer of their home. This series of transactions included transfer of the home to a Bahamian trust, execution of a transmutation agreement purporting to change the character of the home to the wife's separate property, creation of a Nevada LLC and a Nevada corporation, transfer of the home to the Nevada LLC, encumbrance of the home in favor of the Nevada corporation, and transfer of the home to the wife. The court set aside the transfer of the home as actually and constructively fraudulent and held that the Nevada LLC and Nevada corporation created by the debtor were the alter egos of the debtor. (The Bahamian trust established by the debtor and his wife was identified as the 99% owner of the LLC, and the Nevada corporation was identified as owning the remaining 1%.) In addressing the alter ego finding, the court commented as follows: "'Asset protection' is not illegal and is honored if done for a legitimate purpose. For example, an individual may do business through a corporation or limited liability company and will not be held personally liable for the debts of the entity. The assets of the corporation or limited liability company will not be considered the assets of the individual interest holder. However, an entity or series of entities may not be created with no business purpose and personal assets transferred to them with no relationship to any business purpose, simply as a means of shielding them from creditors. Under such circumstances, the law views the entity as the alter ego of the individual debtor and will disregard it to prevent injustice."

***In re Crowe Rope Industries, LLC (Turner v. JPB Enterprises, Inc.)***, 307 B.R. 1 (D. Me. 2004) (noting standard for piercing LLC veil under Maine law is same as for corporation, and concluding Maine law would not permit corporation to pierce its own veil (based on Maine Supreme Court's rejection of "reverse piercing" by shareholder of corporation to assert corporation's rights) and thus Trustee could not assert alter ego claim on behalf of estate).

***Devan Lowe, Inc. v. Stephens***, 842 So.2d 703 (Ala.Civ.App. June 14, 2002)(permitting garnishment of payments to LLC to satisfy judgment against member on basis that LLC was sham established for fraudulent and illegal purpose of evading judgment creditor).

***Litchfield Asset Management Corporation v. Howell***, 799 A.2d 298 (Conn. App. 2002). The court upheld the trial court's reverse piercing of the LLC veil of two LLCs under the instrumentality and identity theories. After a default judgment was taken against Mary Ann Howell, she reorganized her business into two new LLCs. Howell's husband and daughters had small interests in the parent LLC, but the evidence showed that only Howell was active in the business. The evidence also showed that Howell never drew a salary or regular distributions, but she used LLC funds to pay personal expenses and provide substantial, interest-free loans to family members. The court reviewed policy arguments for and against reverse piercing and concluded that reverse piercing to allow the judgment creditor to reach the assets of the LLCs was appropriate. The court rejected the argument that the plaintiff was required to prove fraud to pierce the LLC veil. The court found that Howell had used her control of the LLCs to unjustly avoid her personal debt to the plaintiff because the LLC's payment of her personal expenses directly rather than paying salary or regular distributions deprived the plaintiff of any means of collecting the judgment against Howell.

***Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC***, 37 P.3d 485 (Colo. App. 2001). A judgment creditor garnished the bank account of an LLC after obtaining a judgment against two corporations affiliated with the LLC. The LLC was formed after the creditor initiated its lawsuit against the corporations. The LLC was funded by all of the assets of one of the corporations, which became the sole member of the LLC, and the revenues from the business that had been operated by the corporation thereafter went to the LLC. The court found that the LLC and related corporations were alter egos of one another, that fraudulent conveyances had occurred, and that the judgment debtors and related parties had acted in concert to insulate assets from the judgment. The entities were set up in a tiered structure, but one individual was the ultimate owner and was the president or manager of all the entities. The court noted that assets were moved "gymnastically" among the entities for what were claimed to be tax reasons unsupported by the evidence. Since the LLC was the alter ego of an entity named in the garnishment, the court held that the garnishment of the LLC's account was proper.

***Trans Union LLC v. Credit Research Inc.***, No. 00 C 3885, 2001 WL 648953 (N.D. Ill. June 4, 2001). The defendants filed several counterclaims against Trans Union LLC and Acxiom Corporation. The defendants sought to hold Acxiom liable for the acts of Trans Union, Acxiom's largest shareholder, on the basis that Acxiom was Trans

Union's alter ego. The court noted that recovering from a subsidiary for a parent's wrong is somewhat unorthodox, but, because the court ultimately found that alter ego was not sufficiently pled, the court stated that it expressed no opinion on whether such a reverse-piercing is tenable. The court discussed and applied corporate veil piercing principles, equating an LLC to a corporation for these purposes. (After stating that both Acxiom and Trans Union were Delaware corporations, the court explained in a footnote that "Trans Union is technically a limited liability company, not a corporation, but the corporate form is still defined by Delaware law.") The only allegations to support the conclusory allegation of alter ego in the complaint were that Trans Union was the largest shareholder of Acxiom and that Trans Union placed two directors on Acxiom's board. The court stated that these allegations were insufficient to support a veil piercing claim. The court pointed to the absence of any allegations about corporate formalities, capitalization, solvency, or how there was any facade.

### **3. Piercing to Enable LLC to Enforce Contract of Member or Another**

*Holmes Development, LLC v. Cook*, 48 P.3d 895 (Utah 2002)(stating in footnote that, although LLC claimant and related LLC may have the same management and be practically indistinguishable, they are legally separate entities, and court would not treat the LLCs as the same entity for purposes of standing to sue on a contract).

*C & J Builders & Remodelers, LLC v. Geisenheimer*, No. CV 97-0405555S, 1998 WL 203400 (Conn. Super. April 17, 1998), aff'd, 733 A.2d 193 (Conn. 1999). In this case, a construction contractor operating as a sole proprietor entered a construction contract with an arbitration clause. During the course of the construction work, the sole proprietor reorganized as an LLC. The contract contained a clause prohibiting assignment of any monies due under the contract without consent of the owner. The court held that the LLC could enforce the arbitration clause of the contract because the individual sole proprietor and the LLC were "practically identical." The court began its discussion of the "identity rule" with references to the concept of piercing the corporate veil. The court recognized that the rule "is more often applied in cases where an individual attempts to hide behind the corporate veil to avoid his legal obligations;" however, the court then stated that "there is no conceptual reason not to apply the rule to avoid injustice here." (The Connecticut Supreme Court affirmed the result in this case but did so by treating the organization of the LLC as a conversion rather than relying on veil piercing principles.)

### **4. Piercing to Obtain Jurisdiction Over Members or LLC**

*Kowalski v. Integral Seafood LLC*, Civ. Nos. 05-00679 BMK, 06-00182 BMK, 2007 WL 1376378 (D. Hawaii May 4, 2007) (referring to LLC as corporation and recognizing that standard to pierce veil on alter ego grounds for personal jurisdiction purposes is lower than for purposes of determining liability, but finding plaintiffs failed to meet lower standard).

*Wolf v. Summers-Wood, L.P.*, 214 S.W.3d 783 (Tex. App. 2007) (holding that fiduciary shield doctrine precluded exercise of jurisdiction over non-resident officers of LLC where contacts were in representative capacity and were not systematic or continuous, and evidence did not show LLC was used to perpetrate fraud, was fiction or sham, or was operated in manner indistinguishable from officers' personal affairs or in manner calculated to mislead those dealing with them).

*Silver Knight Sales & Marketing, Ltd. v. Globex International, Inc.*, No. 2:06-cv-123, 2006 WL 3230770 (S.D. Ohio Nov. 6, 2006) (commenting that finding of identity of interest or alter ego for purposes of exercising personal jurisdiction over individual agent of corporation or LLC does not equate to finding that individual is personally liable for entity's acts because alter ego test for attribution of contacts is less stringent than that for liability).

*Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.*, 455 F.Supp.2d 236 (W.D. N.Y. 2006) (stating that corporate alter ego doctrine applies to LLCs but holding that evidence did not support piercing of LLC veil to exercise personal jurisdiction over member (commenting that fact individual was single member and manager of LLC was not in itself enough to establish alter ego)).

*Morris v. Powell*, 150 S.W.3d 212 (Tex.App. 2004) (holding evidence was insufficient to support trial court's finding that Missouri LLC was alter ego of its members, noting that failure to follow formalities is no longer a factor in considering alter ego under Texas corporate law).

***LaSalle Bank N.A. v. Mobile Hotel Properties, LLC***, 274 F.Supp.2d 1293 (S.D. Ala. 2003) (concluding that plaintiff had not alleged sufficient facts for the court to find that LLC which entered the transaction in question was the alter ego of its parent LLC for purposes of holding the parent responsible for the contacts of the subsidiary LLC).

***XL Vision, LLC v. Holloway***, 856 So.2d 1063 (Fla. App. 2003) (exercising personal jurisdiction over LLC's president and foreign parent where complaint alleged that parent and president were personally liable as alter egos of LLC and that they formed, operated, and manipulated the LLC to defraud creditors, that they commingled funds, that they failed to maintain other corporate formalities, that the parent directly paid for liabilities of the LLC, and that the LLC was run by the parent and president for their benefit).

***Benson v. City Finance Co.***, No. 1:02CV242-D-D, 2003 WL 21517998 (N.D. Miss. May 16, 2003) (concluding that, under Mississippi LLC act, Delaware law controlled determination of whether the plaintiffs could pierce the veil of a Delaware LLC to exercise personal jurisdiction over the LLC's member based on the LLC's contacts with the state of Mississippi, and holding that the plaintiffs failed to allege sufficient facts to show deliberate and purposeful misuse of the LLC's corporate form resulting in unfairness, injustice, and injury to the plaintiffs as required under Delaware veil piercing test).

***Nadler v. Grayson Construction Co., Inc.***, 34 Conn. L. Rptr. 482, 2003 WL 1963158 (Conn.Super. 2003) (concluding that allegations that LLCs and various affiliates, members, and managers were alter egos of one another supported subject matter jurisdiction over the parties).

***Yukon Partners, Inc. v. The Lodge Keeper Group, Inc.***, 572 S.E.2d 647 (Ga. App. 2002)(holding, in context of challenge to personal jurisdiction, that existence of unspecified affiliation was insufficient to pierce veil of numerous hotel LLCs in absence of showing that entities were sham or used to defeat public convenience, justify wrong, protect fraud, defend crime or any other reason which would in equity or good conscience justify disregard of entities).

***International Bancorp, L.L.C. v. Societe des Bains de Mer et du Cercle des Entrangers a Monaco***, 192 F.Supp.2d 467 (E.D. Va. 2002)(holding that record did not support piercing LLC veil to subject member to court's personal jurisdiction under "stringent" Virginia veil piercing standard requiring "proof that the alleged alter ego used the corporation to disguise some legal wrong").

***Quantum Color Graphics, LLC v. The Fan Association Event Photo GmbH***, 185 F.Supp.2d 897 (N.D. Ill. 2002)(holding that claims against two German companies and California LLC may be aggregated for jurisdictional purposes, and contacts could be imputed among defendants, on basis of allegations that companies were all alter egos of one another and individual defendant owner).

***Stauffacher v. Lone Star Mud, Inc.***, 54 S.W.3d 810 (Tex.App. 2001)(holding that individual failed to negate plaintiff's theory that individual was alter ego of a Wisconsin LLC for purposes of court's exercise of personal jurisdiction over individual).

***M.G. Incentives v. J.J. Marchand***, No. C6-00-962, 2001 WL 96223 (Minn. App. Feb. 6, 2001). The court stated it need not decide whether the fiduciary shield doctrine should apply in Minnesota so as to protect the sole owner and president of an LLC from the court's exercise of personal jurisdiction because the actions of the individual fell outside the protections of the doctrine. In this regard, the court concluded that the plaintiff alleged facts sufficient to pierce the veil of the LLC.

***Royal Mortgage Corporation v. Montague***, 41 S.W.3d 721 (Tex. App. 2001)(concluding there was no evidence that LLC was acting as alter ego of its members for purposes of personal jurisdiction over members).

***Oliver v. Boston University***, No. 16570, 2000 WL 1038197 (Del. Ch. July 18, 2000)(concluding that LLC was Boston University's alter ego for purposes of personal jurisdiction assuming truth of allegations that LLC was formed by BU solely to serve its interest and was completely dominated by BU).

***New England National LLC v. Kabro of East Lyme LLC***, No. 550014, 2000 WL 254590 (Conn. Super. Feb. 23, 2000). The plaintiffs sued Kabro of East Lyme, LLC ("East Lyme, LLC"), a New York LLC, for breach of a contract to purchase real estate from the defendants. Additionally, the plaintiffs sought to pierce the veil of East Lyme, LLC and

hold several other non-resident parties personally liable under veil piercing theories. Initially, the plaintiffs relied upon veil-piercing principles to give the court personal jurisdiction over the other non-resident parties. The court concluded it had jurisdiction over one LLC member who was instrumental in the negotiations of the real estate transaction in issue but found that the plaintiffs had not alleged sufficient facts to pierce the veil to obtain jurisdiction over the other members of the LLC under either the instrumentality or identity test. The plaintiffs also failed to convince the court that it had jurisdiction over another New York LLC that allegedly provided funds to East Lyme, LLC.

*Sinopac International Co. v. Southwestern Bell Telecommunications, Inc.*, No. 14-98-00116-CV, 1999 WL 418365 (Tex. App. June 24, 1999). The court described the defendants as limited liability companies organized under the laws of Hong Kong and the People's Republic of China. The court found the companies lacked sufficient contacts with the State of Texas to support general or specific jurisdiction. The court also rejected the plaintiff's argument that the companies were alter egos of one another and of a Texas corporation such that the Texas corporation's contacts should be imputed to the foreign companies. The court noted both a lack of evidence and a lack of cited authority for the alter ego argument.

*ING (U.S.) Securities, Futures & Options, Inc. v. Bingham Investment Fund, L.L.C.*, 934 F. Supp. 987 (N.D. Ill. 1996). The court determined that it lacked personal jurisdiction over LLC members based upon the fiduciary shield doctrine (described by the court as prohibiting the exercise of personal jurisdiction over a nonresident whose only contacts with the forum state were "solely on behalf of his employer or other principal"). The plaintiff attempted to avoid the effect of the fiduciary shield doctrine by relying on the corporate alter ego doctrine. The defendants countered with an affidavit reciting that the LLC's assets were not treated as the assets of the individual defendants, that the LLC maintained necessary corporate records, that the LLC did not commingle its assets with those of the individual defendants, and that the LLC maintained a separate banking account. The affidavit was uncontradicted, and the court rejected the alter ego argument.

## 5. Piercing in Other Contexts

*Union County Improvement Authority v. Artaki, LLC*, 920 A.2d 125 (N.J. Super. A.D. 2007) (analyzing "unity of ownership" concept with respect to question of court's authority to consolidate condemnation proceedings involving tracts owned by LLC and tracts owned individually by members of LLC).

*Global Diagnostic Development, LLC v. Diagnostic Imaging of Atlanta*, 643 S.E.2d 338 (Ga. App. 2007) (holding that common ownership of corporation and LLC was not sufficient to disregard separate existence of LLC and treat it as single entity with corporation for purposes of certificate of need awarded to LLC after denial to corporation and transfer of corporation's assets to LLC).

*Kreisler v. Goldberg*, 478 F.3d 209 (4<sup>th</sup> Cir. 2007) (applying Maryland law and concluding there existed no basis to conclude that wholly owned LLC subsidiary of LLC debtor should not be recognized as separate legal entity and that automatic stay did not protect debtor's LLC subsidiary nor did debtor have any direct interest in assets of LLC subsidiary).

*RLS Associates, LLC v. United Bank of Kuwait PLC*, 464 F.Supp.2d 206 (S.D. N.Y. 2006) (holding LLC's bond requirement may take into account assets of LLC's member).

*Brew City Redevelopment Group, LLC v. Ferchill Group*, 724 N.W.2d 879 (Wis. 2006) (holding that intracorporate conspiracy doctrine did not bar conspiracy claims where allegations did not indicate unity of interest among defendant LLC and its members, officers, and affiliates).

*In re Weddle (Elsaesser v. Cougar Crest Lodge, LLC)*, 353 B.R. 892 (Bankr. D. Idaho 2006). The plaintiff in this adversarial proceeding alleged that the defendant LLC received a preferential transfer when it recorded judgments it recovered against the debtors and obtained a lien on the debtors' real property. The debtors were members of the transferee LLC, each holding a 5% interest in the LLC. The only other member (Manning) was the father of Terri Weddle, one of the debtors. The LLC operated a lodge, and the debtors were employees of the LLC and managed the daily operations until their employment was terminated by Manning, who was designated in the operating agreement and articles of organizations as the sole manager of the LLC. The LLC obtained a judgment on a note executed by the debtors and a separate judgment for fees and costs. The LLC recorded the judgments, and the debtors filed bankruptcy

several months later. Since the judgments were recorded more than 90 days prior to the bankruptcy petition, the plaintiff had to prove the LLC was an insider to prevail on the preference claim. The court rejected the plaintiff's claim that the debtors were statutory insiders as defined under Section 101(31)(A) of the Bankruptcy Code, but the plaintiff argued in the alternative that the LLC was an insider on the basis that the LLC and Manning were alter egos. Since Manning was the father of Terri Weddle and was a *per se* insider, the plaintiff argued that the LLC, as Manning's alter ego, was an insider. The court concluded that Idaho courts would apply corporate veil piercing principles to LLCs, but the court granted the LLC summary judgment on this claim. The court concluded that the plaintiff's slim showing of unity of interest, which was based on Manning's alleged operation of the LLC without regard to formalities, might be sufficient to raise a disputed issue of material fact, although the court pointed out that the type of total control exercised by Manning was allowed by law. The court granted summary judgment for the LLC, however, because the plaintiff provided no support for the allegation that failure to treat Manning and the LLC as alter egos would lead to inequitable results. The fact that general unsecured creditors would receive a smaller distribution was insufficient to support this prong of the alter ego analysis.

*In re JNS Aviation, LLC (Nick Corp. v. JNS Aviation, Inc.)*, 350 B.R. 283 (Bankr. N.D. Tex. 2006) (addressing LLC veil piercing, analyzing whether piercing claims were property of estate, and declining to approve settlement relating to fraudulent transfer and breach of fiduciary duty claims where settlement purported to encompass piercing claims).

*New Era Enterprises, Inc. v. Kacos*, No. 1:03-CV-873, 2006 WL 763185 (W.D. Mich. March 24, 2006) (disregarding separate identities of two LLCs on basis they were mere instrumentalities of third entity and finding that consideration paid to third entity was thus consideration to LLCs for assignments of notes made by LLCs).

*In re Global Service Group LLC (Kittay v. Atlantic Bank of New York)*, 316 B.R. 451 (Bankr. S.D. N.Y. 2004) (holding that LLC Chapter 7 trustee failed to plead a basis to pierce the veil of the LLC so as to treat the LLC and its members/managers as alter egos for purposes of marshaling doctrine).

*In re Jarvis (Jarvis v. Wells Fargo Financial)*, 310 B.R. 330 (Bankr. N.D. Ohio 2004) (stating that for all practicable purposes debtors and their LLC had no separate existence in context of analyzing effectiveness of notice under UCC filing).

*In re Application of Donald J. Trump*, 755 N.Y.S.2d 618 (N.Y.A.D. 1 Dept. 2003) (stating that "artificial distinction" sought to be drawn between individual petitioner and his wholly-owned LLC did not preclude arbitration under arbitration clause in agreement to which LLC was a party).

*Somerville S Trust v. USV Partners, LLC*, No. Civ.A. 19446-NC, 2002 WL1832830 (Del. Ch. Aug. 2, 2002) (finding credible evidence of mismanagement of LLC in action to inspect books and records of LLC based in part on evidence that individual who was sole member of LLC's manager used LLC as his alter ego).

*UCA, L.L.C. v. Landsdowne Community Development*, 215 F.Supp.2d 742 (E.D. Va. 2002)(refusing to disregard separate existence of LLC for purposes of easement issue under federal Pole Act).

*Abraham & Sons Enterprises v. Equilon Enterprises, LLC*, 292 F.3d 958 (9<sup>th</sup> Cir. 2002)(rejecting argument of franchisors that LLC jointly owned by franchisors was not separate entity for purposes of California franchise law that gives right of first refusal to franchisees before franchisor may sell or transfer to another person premises leased to franchisee).

*Egle v. Egle*, 817 So.2d 136 (La. App. 2002) (finding ex-wife raised possibility that defendants were solidarily liable with ex-husband so as to interrupt prescription in case where ex-wife alleged ex-husband hid community assets and diverted them to a number of corporations and LLCs owned and controlled by him as a single business enterprise).

*Robinson v. Geo Licensing Company, LLC*, 173 F. Supp.2d 419 (D. Md. 2001) (rejecting attempt to treat majority member and LLC as a single entity and recognizing member's ability to sue LLC on contract made with LLC).

*In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309 (Bankr. S.D. N.Y. 2001). In this Chapter 11 case in which a mortgageholder sought relief from the automatic stay to foreclose a mortgage, the court found as facts the

mortgageholder's unchallenged assertions that the debtor LLC and a related corporation were "for all intents and purposes one entity."

*In re Lake Country Investments, L.L.C. (Agnicourt, L.L.C. v. Stewart)*, Nos. 99-20287, 00-6064, 2001 WL 267475 (Bankr. D. Idaho March 19, 2001) (stating that there were fact issues regarding whether the managing and majority member of an LLC was the alter ego of the LLC in the context of an equitable subordination claim).

*Holden v. Connex-Metalna*, No. Civ.A. 98-3326, 2000 WL 1801844 (E.D. La. Dec. 6, 2000) (relying on Louisiana state law to recognize the separate legal existence of two related LLCs for purposes of applying the Robins Dry Dock doctrine in federal maritime context).

*In re Heartland Food and Dairy Distributors, Inc. (Land-O-Sun Dairies, L.L.C. v. Heartland Food and Dairy Distributors, Inc.)*, 253 B.R. 32 (Bankr. S.D. Ill. 2000). A suit was mistakenly filed in the name of a corporation rather than an affiliated LLC. The suit was dismissed due to the corporation's lack of capacity, and (after various missed opportunities to cure) the LLC ended up being barred by res judicata from pursuing the complaint refiled in its name because the LLC was in privity with the corporation that filed the initial complaint. In finding privity, the court relied in part upon the failure of the LLC and the corporation to comply with the formalities necessary to maintain separate existences. The court commented that the LLC's own counsel was confused about which entity was his client.

*In re Fawell (Davis, Mannix & McGrath v. Fawell)*, Nos. 98 B 01274, Adv. 98 A 01306, 1999 WL 569449 (Bankr. N. D. Ill. July 26, 1999). In the course of responding to a creditor's complaint regarding the debtor's valuation of stocks and interests in incorporated and unincorporated businesses, the court noted that there was no evidence to pierce the respective "corporate veils" of the separate corporate, partnership, and limited liability company entities involved.

#### **O. Publication Requirement**

*Acquisition America VI, LLC v. Lamadore*, 784 N.Y.S.2d 329 (N.Y. City Civ. Ct. 2004) (concluding that LLC's failure to comply with publication requirement prior to bringing suit could be cured and dismissal thus was not required).

*Barklee Realty Company LLC v. Pataki*, 765 N.Y.S.2d 599 (N.Y. A.D. 1 Dept. Oct. 16, 2003) (reversing trial court and holding that New York statutory publication requirement does not violate federal and state Constitutional due process and equal protection rights nor state Constitutional right of access to courts).

#### **P. Formation of (or Failure to Form) LLC**

*Stein v. Gelfand*, 476 F.Supp.2d 427 (S.D. N.Y. 2007) (holding that parties who never reached agreement on terms of LLC did not intend to be bound by alleged oral partnership agreement based on brief and incomplete telephone conversation).

*Yassky v. Meltzer, Lippe, Goldstein & Schlissel*, 828 N.Y.S.2d 313 (N.Y. A.D. 1 Dept. 2007) (stating that attorney hired to represent LLC in eviction proceeding was not responsible for failure to publish notice of LLC's formation).

*Milk v. Total Pay and HR Solutions, Inc.*, 634 S.E.2d 208 (Ga. App. 2006). The plaintiff sued an LLC and its managing member for amounts owed under a contract to provide payroll services to the LLC. A default judgment was entered against the LLC, and the plaintiff sought summary judgment holding the managing member personally liable. The court denied the plaintiff's motion for summary judgment, pointing out that the filing of the articles of organization served as conclusive proof that all conditions for formation had been satisfied and that the LLC's existence thus began on that date. By statute, a member is separate from the LLC and is ordinarily not a proper party to a proceeding by or against an LLC. The court went on to specifically reject numerous arguments raised by the plaintiff. The plaintiff argued that it was entitled to summary judgment against the managing member because the LLC dissolved before an operating agreement was entered. The managing member denied that the LLC had dissolved, but the court commented that the plaintiff would not be entitled to summary judgment on this ground in any event because dissolution alone does not cause an LLC to cease to exist or render its members personally liable for the LLC's debts. Furthermore, the court

said that the formation of an LLC as an entity separate from its members is predicated on the public filing of the LLC's articles of organization, not on whether or when an operating agreement is executed.

***Gomi Investors, LLC v. Schimmell Holdings, Inc.***, Civil Action No. 2278-N, 2006 WL 2304035 (Del. Ch. July 27, 2006) (denying motion to expedite in action challenging unauthorized formation of LLC; stating protective measures or expedited action should be pursued in California to extent harm was threatened by other party's action in California seeking specific performance of transfer of property to LLC).

***Clarke v. Newell***, No. 1:05CV1013 (JCC), 2006 WL 1390572 (E.D. Va. May 17, 2006) (finding disputed terms of oral agreement regarding formation and operation of LLC precluded plaintiff's summary judgment for breach of contract, accounting, and related claims).

***Atlantic St. John, LLC v. Yeomans***, 810 N.Y.S.2d 154 (N.Y.A.D. 1 Dept. 2006) (stating that Delaware LLC statute, while providing LLC is formed upon filing of certificate of formation, contemplates as a whole that LLC agreement designating members and managers will be entered, and rejecting plaintiffs' claim for breach of fiduciary duty where operating agreement was never entered due to failure to sell equity interests in LLC needed to finance LLC's purchase of shopping center).

***Connors v. Evans***, No. CV030284821S, 2005 WL 469261 (Conn. Super. Jan. 21, 2005) (holding member's claim for fraud against other member based on other member's failure to prepare statutorily required writing identifying initial members of LLC failed because parties intended that they both be members and failure to prepare required document affected both members equally).

***Spires v. Casterline***, 778 N.Y.S.2d 259 (N.Y. Sup. 2004). Articles of organization for a New York LLC were filed, but the members did not sign any document entitled "Operating Agreement." The court held that an LLC's failure to adopt a written operating agreement as required by the New York LLC act does not result in an entity that is instead a partnership. The court determined that certain documents did not constitute an operating agreement of the LLC, but a document entitled "LHS Partner's Interim Voting Agreement" did satisfy the definition of an operating agreement. Since the Interim Voting Agreement covered only certain matters, however, the LLC was governed by the statutory default rules in most respects. The court viewed the statutory default provisions as the "operating agreement" of the LLC for purposes of the court's analysis of whether judicial dissolution was warranted (i.e., whether it was not reasonably practicable to carry on the business in conformity with the operating agreement).

***Compton v. Kirby***, 577 S.E.2d 905 (N.C.App. 2003). Three individuals agreed that the business they were forming would be an LLC but never finalized a draft operating agreement and never signed any written agreement. One of the individuals wrote a letter confirming the terms of the partnership agreement that he alleged existed among them, and the defendant called this individual the same day and expressly recognized the terms of the partnership agreement set out in the letter were correct. There was other evidence that the parties carried on the business as a partnership. The defendant claimed, however, that he was the sole owner of the business. The jury found that a partnership existed between the two plaintiffs and that the defendant's failure to acknowledge the partnership was a breach of fiduciary duty. The trial court entered judgment for the plaintiffs, and the court of appeals affirmed the judgment.

***Lester Associates v. Commonwealth***, 816 A.2d 394 (Pa.Cmwlth.Ct. 2003) (concluding that there was no legal transfer of title on which transfer tax could be imposed based on deeds into and out of LLC where LLC did not exist at the time of the purported conveyance to it).

***Ehle v. Williams & Boshea, L.L.C.***, No. Civ.A. 01-3757, 2002 WL 373271 (E.D. La. March 7, 2002)(finding that joinder of individual who claimed he could not be liable because he was member of LLC was not fraudulent where there was evidence the LLC was never formed and plaintiff stated claims based upon negotiations to form LLC).

***Flores v. Gutschow***, No. 13-00-556-CV, 2001 WL 1590510 (Tex. App. Dec. 13, 2001). Two parties signed a "Pre Organization Agreement" in which they agreed to form an LLC and then to form an S corporation or LLP within 60 days of the contract. The contract stated that the LLC would pay specified sums to the S corporation or LLP, and the sums were set out by the names of each party and referred to as "contributions." Each party was to be issued a certificate to reflect a specified percentage of ownership in the new S corporation or LLP. The contract had a "pullout" clause allowing any member to withdraw and be reimbursed his initial capital contribution. The contract also provided for



reorganization of the S corporation or LLP to reflect equal ownership when all initial capital contributions were refunded. The court held that this contract unambiguously obligated the parties to contribute the sums specified to the LLC.

***Chimblo v. Hutter***, No. X01CV990162957, 2001 WL 357919 (Conn. Super. March 29, 2001). This dispute arose out of an agreement between the parties to refinance, renovate, sell, and divide the proceeds of the residence of one of the parties. The original agreement contemplated that an LLC would be formed to hold the property, with ownership of the LLC equally divided between the parties in “shares of stock.” Title to the property was transferred to the party who obtained the financing but was not transferred to an LLC. The court found that the failure to transfer title to the property to the LLC did not involve any fraud or unjust enrichment. The court found that the party who took title and obtained the financing had intended to convey title to an LLC, but the parties abandoned this plan when they discovered that the transfer would involve another transfer tax. The court went on to find that the parties owed each other only limited fiduciary duties in connection with their partnership or joint venture arrangement.

***Harvey v. Covington***, No. M2000-01184-COA-R3-CV, 2001 WL 120733 (Tenn. App. Feb. 14, 2001). Two individuals signed a letter of intent to create an LLC. Each of them took certain steps toward operating the business such as applying for a credit card, requesting an employer identification number, and opening a bank account, but the LLC was never formed. The court concluded that the business was a partnership and that the defendant’s fraud in failing to organize the LLC as promised, converting business funds, and defrauding the plaintiff out of the funds entitled the plaintiff to rescission of the partnership.

***Nystrom v. Servus Robots, L.L.C.***, No. LF-1517-3, 2000 WL 249246 (Va. Cir. Ct. March 2, 2000). According to the plaintiff Nystrom, in February 1998, Nystrom and Ward agreed to form an LLC to which Nystrom would devote 75% of his time acting as “President” and in which Nystrom would receive in exchange for his services a 25% ownership interest. In October 1998, articles of organization were prepared (and apparently filed). An operating agreement was also prepared, but Ward repudiated the agreement and denied promising a 25% interest to Nystrom. In December 1998, Ward, acting as “chairman” of the LLC, fired Nystrom as president. The court concluded that the facts as pled by Nystrom stated a cause of action for fraud in the inducement, breach of contract, and quantum meruit.

***Marrett v. Scott***, No. CIV.A. 299cv244-D-B, 2000 WL 491857 (N.D. Miss. April 10, 2000). The issue in this case was whether the court should grant injunctive relief requiring removal of a lis pendens obtained by the plaintiff in the case. The underlying dispute involved breach of contract, breach of fiduciary, and related claims based upon the plaintiff’s contention that the defendants refused to sign a proposed operating agreement that would have formed an LLC to develop certain real property. The court did not address the plaintiff’s contention that the parties had a joint venture agreement that was violated when the defendants refused to sign the operating agreement. The court only examined whether the standard for the preliminary injunctive relief sought by the defendants had been met, and the court determined that it had.

***Holmes v. Lerner***, 74 Cal.App.4th 442, 88 Cal. Rptr. 2d 130 (Cal. App. 1 Dist. 1999). Two individuals, Holmes and Lerner, came up with a novel idea for cosmetics and agreed to go into business together to develop and market their “Urban Decay” line of cosmetics. Without informing Holmes or including her in the ownership, however, Lerner and her business consultant, Soward, formed an LLC to produce and market Urban Decay. Holmes was included in periodic “board meetings” of the business both before and after formation of the LLC, and she worked in the business on a day to day basis, but her inquiries regarding her role in the business were met with vague answers. Eventually, Holmes learned that the business was being conducted as an LLC. She continued to participate in the business for a few months after learning of the LLC, but the relationship finally went completely sour, and Soward told her she was no longer welcome. The case was tried and decided under partnership law, and the court only mentions the LLC in the course of discussing the facts. Holmes sued Lerner and Soward and prevailed on various causes of action including breach of an oral partnership agreement between Holmes and Lerner. The appeals court upheld the trial court’s determination that a partnership was formed between Lerner and Soward. The court discussed the Uniform Partnership Act and case law relevant to formation of partnerships and concluded that no express agreement to share profits is necessary to form a partnership. According to the court, an understanding to share in profits and losses was implicit in the Holmes-Lerner agreement. The court also found that the agreement was sufficiently definite. Soward was found liable for conspiracy and aiding and abetting fraud and breach of fiduciary duty. Holmes was awarded compensatory damages for the loss of her partnership interest. In this regard, the jury was instructed that the appropriate measure of damages was half the value of Urban Decay at the date of the breach of the agreement. The case was apparently tried

under the theory that the date of the breach was the date on which Holmes was told she was no longer welcome. The jury also awarded punitive damages.

*Lloyd v. Horn, Inc.*, No. 97-3074, 1998 WL 939493 (10<sup>th</sup> Cir. Aug. 21, 1998). The court of appeals affirmed the decision of the district court rescinding an operating agreement on the basis of unilateral mistake and constructive fraud. A partnership converted to an LLC, but the managing partner did not inform the others that he did not intend to continue in his management role after the conversion. The LLC operating agreement did not appoint the individual as managing member, but the other members assumed he would take on the position consistent with his role in the partnership. The court found the concealment amounted to constructive fraud because it breached the fiduciary duty of the managing partner to disclose material information. Thus, the court upheld the trial court's rescission of the LLC operating agreement. (The district court's opinion is available at 1997 WL 150052 (D. Kan. Jan. 29, 1997)).

*Medical Waste Technologies, L.L.C. v. Alexian Brothers Medical Center, Inc.*, No. 97 C 3805, 1998 WL 387705 (N.D. Ill. June 24, 1998). In litigation involving an alleged breach of a joint venture agreement, the court held that the attorney-client privilege as to documents relevant to the formation of an LLC had been waived when the client injected as a new issue in the case the argument that formation of the LLC was a condition precedent to formation of the joint venture. Two businesses allegedly agreed to enter into a joint venture agreement which involved formation of a new LLC. One of the prospective members brought suit. The LLC was never created, and the other prospective member argued that formation of the LLC was a condition precedent to the formation of the joint venture. Ruling on a discovery dispute, the court held that documents relevant to formation of the LLC were not protected by the attorney-client privilege and must be produced. Because it had already ordered the documents produced, the court did not find it necessary to address the plaintiff's argument that the law firm which undertook the responsibility of filing the articles of organization (referred to by the court as "articles of incorporation") owed the plaintiff, as a prospective one-half owner, a duty of full disclosure of all instructions and communications relating to the endeavor.

*Advanced Orthopedics, L.L.C. v. Moon*, 656 So.2d 1103 (La. App. 1995). Two individuals, Heath and Moon, established a business called "Advanced Orthopedics, L.L.C." Heath filed LLC articles of organization and an initial report with the Secretary of State's office, and a certificate of organization for Advanced Orthopedics, L.L.C. ("Advanced") was issued. Heath and Moon had a falling out. Moon established his own competitive business and then resigned from Advanced. The specific issues addressed by the court in this opinion were essentially (1) whether Advanced constituted a legally formed LLC and (2) whether Moon had made a capital contribution which should be returned.

Moon argued that he did not have the subjective intent to form an LLC, that he did not adequately understand the concept of an LLC and that, because he did not sign an operating agreement, he rejected the formation of an LLC. The court rejected these arguments. The court noted that Moon did not question the viability of the LLC during the year of its operation and observed that the statute provides that a certificate of organization is conclusive evidence that an LLC has been duly organized. The court stated that "[a]ttaining a certain level of understanding regarding L.L.C.s is not a prerequisite to the formation of and participation in one." Further, the court stated that it was aware of no requirement in the law that an LLC have an operating agreement to be viable.

Moon also argued that he was entitled to reimbursement for a capital contribution. Moon contended that he made his agreed upon \$10,000 capital contribution in the form of past experience, good will, services rendered, and equipment. While the court acknowledged that capital contributions do not have to be in cash, it concluded that there was no evidence that Moon made a non-cash capital contribution.

#### **Q. Pre-Formation Contracts or Dealings**

*BRJM, LLC v. Output Systems, Inc.*, 917 A.2d 605 (Conn. App. 2007) (applying law of agency and corporations to contract signed by individual as member of non-existent LLC and holding contract was valid contract personally binding individual who executed contract).

*EraGen Biosciences, Inc. v. Nucleic Acids Licensing, LLC*, 447 F.Supp.2d 930 (W.D. Wis. 2006) (holding that actions of sole member of LLC taken prior to formation of LLC could not be attributed to LLC for purposes of establishing personal jurisdiction over LLC).

*Solutia Inc. v. FMC Corporation*, 456 F.Supp.2d 429 (S.D. N.Y. 2006) (discussing pre-formation duties in connection with agreement to form "joint venture" Delaware LLC, recognizing freedom of parties in non-fiduciary

relationships to waive or alter prospective fiduciary duties, and concluding no duties were owed between co-venturers until formation of LLC).

***Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.***, 632 S.E.2d 296 (W. Va. May 12, 2006) (holding that deed to LLC grantee would not be invalidated on basis LLC was not yet formed at time of execution where deed was executed in anticipation of LLC's formation, LLC was thereafter formed in compliance with legal requirements, and executed deed was properly delivered to LLC after its creation).

***United States v. Kilashee Contracting Corp.***, No. CV 05-0785-PCT-JAT, 2006 WL 1305243 (D. Ariz. May 10, 2006) (permitting plaintiff, which had filed suit based on subcontract entered by individuals who later formed LLC, to amend to add LLC because defendants did not establish amendment would create undue delay, and commenting that addition of LLC did not add a "new party" in true sense because LLC was merely different legal form of prior sole proprietorship).

***Ramone v. Lang***, No. Civ.A. 1592-N, 2006 WL 905347 (Del. Ch. April 3, 2006). For six months, the plaintiff and the defendant discussed and negotiated the formation of an LLC to purchase and operate an indoor swimming and fitness facility, but the parties never finalized their arrangement. Ultimately, the defendant purchased the property. The plaintiff argued that the defendant used the plaintiff's good name and reputation to the defendant's advantage and then cut the plaintiff out of the deal, and the plaintiff alleged claims based upon breach of fiduciary duty, breach of contract, and promissory estoppel. The defendant claimed it was the plaintiff's repeated delays, changing desires, and inability to commit to the terms of the deal that made finalizing the transaction impossible. The court analyzed the dealings between the parties at length and concluded that the plaintiff was entitled only to limited relief on the basis of promissory estoppel. The court rejected the plaintiff's argument that the parties formed a partnership through their conduct and owed one another fiduciary as well as contractual duties. The court reviewed the description of a partnership under the Delaware Revised Uniform Partnership Act and Delaware case law and concluded that the absence of a written agreement, while not always dispositive of the existence of a partnership, was conclusive in this case. Putting it in romantic terms, the court characterized the parties as "engaged 'to get engaged,'" and stated this type of agreement was insufficient to form a general partnership. The court emphasized that the parties intended to form an LLC and never agreed on their obligations. The court acknowledged that a partnership might result if two parties intended to form an LLC, reached an agreement on the material terms, and conducted business under such terms for a time, but one of the parties later refused to sign the LLC agreement. In this case, however, the court stated that it would be "inequitable and unprincipled" to find that the failure of the parties to reach an accord on the LLC agreement left them as general partners. The court found that promissory estoppel supported limited relief for the plaintiff's reasonable reliance on the defendant's promise that the pool would be leased to the plaintiff regardless of what happened with the LLC structure.

***Genn v. Santella***, No. FSTCV040200008S, 2006 WL 722021 (Conn. Super. March 10, 2006). The court found probable cause to grant prejudgment relief against an LLC, its predecessor partnership, and the individual partners. A construction contract was executed on behalf of Southern Connecticut Construction, a partnership with two partners, Louis and Kristine Santella. After the contract was signed, the partnership was reorganized as an LLC with Kristine Santella as the sole member. The court found that the LLC impliedly assumed the contract obligations and that the LLC was liable under the contract and for any tort liabilities flowing from its activities while working on the project. There was no evidence that the partnership was released from the contract, and the court found it remained jointly and severally liable with the LLC on the contract. To the extent the partnership and not the LLC continued to perform services after the LLC was formed, the partnership was also liable for its own tortious conduct. The individual partners were jointly and severally liable for the obligations of the partnership, but not for the obligations or torts of the LLC.

***Prime RX, LLC v. McKendree, Inc.***, 917 So.2d 791 (Miss. 2005) (affirming summary judgment for plaintiff on open account in action against LLC and its sole member who operated business as sole proprietor prior to formation of LLC).

***Blue Paper, Inc. v. Provost***, 914 So.2d 1048 (Fla. App. 2005) (concluding individual who signed contract on behalf of LLC to be formed was liable in his individual capacity under principles applicable to corporate promoters, and contract thus did not lack mutuality of remedy).

***In re 4 WHIP, LLC***, 332 B.R. 670 (Bankr. D. Conn. 2005). The trustee and a creditor sought to dismiss or convert this Chapter 11 case on the basis that the LLC debtor was a non-existent entity and therefore not a "person"

qualified to be a debtor under the Bankruptcy Code. The court held that a “person” eligible to be a debtor under the Bankruptcy Code includes a de facto LLC so long as the entity has a bona fide business existence prior to the petition date. The debtor in this case claimed to have conducted business in good faith under the name “4 Whip, LLC” on the mistaken belief that formation documents had been submitted to and approved by the Connecticut Secretary of State. The debtor argued that Connecticut law would regard the entity as a de facto LLC under principles established for corporations. The uncontested record established that the debtor transacted business under its LLC name prior to filing bankruptcy relief. Specifically, the record showed that the debtor prepared and believed it had filed articles of organization, obtained an employer identification number from the IRS, and was carried on the city tax rolls as the owner of real property which it managed. Thus, the court found the LLC to be an eligible debtor. The court noted that the property rights which comprise the bankruptcy estate are determined by state law, and that, under such law, the property the debtor purported to own might in fact be owned by some other entity due to the LLC’s lack of formal organization at the time of the relevant transactions. The court stated that such questions were not currently before the court.

*Foreman v. Grammar*, No. Civ.A. 6:04-820, 2005 WL 1657132 (W.D. La. July 13, 2005). A corporation leased a piece of property from another entity for hunting club purposes, and the two entities intended to form an LLC named “Belle Isle, LLC, Hunt Club” to operate a the property for hunting club activities. The LLC was never formally organized, however. The hunting club was operated under the name “Belle Isle, LLC, Hunt Club” and an insurance policy was purchased under that name. The corporation that leased the property claimed that it was covered under the policy, but the insurer maintained that the policy covered only hunting clubs and not a business corporation. The corporation asserted that the claim was covered because the policy covered unincorporated associations as well as partnerships and LLCs, and the corporation argued that the insurer knew the corporation was the actual insured because the corporation paid the premiums with corporation checks. The court concluded that the corporation must establish a right to equitable reformation of the policy in order to be covered by the policy, and the court found there were genuine issues of material fact as to whether the corporation was the intended insured under the policy.

*Geographic Network Affiliates-Int’l, Inc. v. Enterprise for Empowerment Foundation at Norfolk State University*, No. CH05-263, 2005 WL 1514432 (Va. Cir. Ct. June 27, 2005) (holding Virginia does not recognize de facto LLC doctrine but LLC may adopt pre-formation contract after its de jure existence commences).

*BRJM LLC v. Output Systems, Inc.*, No. 125652, 2005 WL 1805305 (Conn. Super. May 25, 2005) (applying de facto corporation doctrine and finding purchaser under real estate purchase and sale agreement was de facto LLC and had capacity as such to enter contract and assign its rights to properly formed LLC which could initiate litigation under the contract).

*Nelson’s Minnesota Farms, LLC v. Logan*, No. A04-758, 2005 WL 354006 (Minn. App. Feb. 15, 2005) (LLC formed for purpose of buying business could hold liable individual who contracted as buyer and paid himself undisclosed broker fee although purchase contract was entered prior to LLC’s formation and LLC was not a party since contract stated that buyers represented for themselves and LLC to be formed by them that LLC when formed would have full power and authority to consummate transaction).

*442 Decatur Street, LLC v. Spheres Realty, Inc.*, 787 N.Y.S.2d 669 (N Y. A.D. 2 Dept. 2005) (holding that LLC did not acquire rights under contract entered one month before the LLC’s articles of organization were filed since the LLC did not exist and was only “purported entity”at time of contract).

*T.G. Slater & Son, Inc. v. The Donald P. and Patricia Brennan LLC*, 385 F.3d 836 (4th Cir. 2004) (finding complaint stated claim for breach of contract against LLC even if LLC had not been legally formed until after agreement was signed because “Virginia law allows an agent or promoter of a business entity to bind the entity to contracts even before the entity is formed”).

*Shelter Mortgage Corp. v. Castle Mortgage Co., L.C.*, 117 Fed.Appx. 6, 2004 WL 2107710 (10th Cir. 2004). The court interpreted provisions of the Utah Limited Liability Company Act addressing pre-organization activities and concluded an LLC’s founder/manager had personal liability for the losses arising out of a joint venture agreement entered by the LLC prior to the filing of its articles of organization. The court analogized to Utah corporate law and noted that the Utah court of appeals has held that both the de facto corporation and corporation by estoppel doctrines have been abrogated by statute. The court also rejected the argument that the organizer’s personal liability was limited to joint venture losses incurred prior to the filing of the articles of organization. A dissenting justice argued that language in the

LLC statute indicates that the organizer's liability should have been limited to the time period prior to the date the articles of organization were filed.

*Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*, No. CV040834190S, 2004 WL 2094933 (Conn. Super. Aug. 20, 2004) (finding analogy to de facto corporation doctrine compelling in the LLC context and concluding LLC could maintain action where there had been a good faith attempt to file articles of organization prior to the date suit was filed, defect of missing addresses was immediately corrected, and LLC was duly formed at the time the defendant was served).

*JMK, Inc. v. Lee Imported Cars, Inc.*, 17 Mass.L.Rptr. 743, 2004 WL 1427155 (Mass. Super. 2004) (stating that LLC did not exist as legal entity until articles of organization were filed on December 30, 2003, and thus could not have exercised petitioning rights at hearings conducted earlier in December).

*Briga v. D'Amico*, No. CV040083317S, 2004 WL 772065 (Conn. Super. March 24, 2004). The court granted a pre-judgment remedy based on a showing of probable cause that the individual defendant was personally liable for breach of an agreement with the plaintiff. The individual argued that he had no personal liability, stating that he believed he had formed an LLC and that he took immediate corrective action to properly form the LLC when, after the lawsuit commenced, he found it had not been done. The court pointed out that the agreement was on a form headed by the name of an LLC but designating the individual as the "owner" within the body. Further, the agreement was signed by the individual without any designation that he was a member of the LLC, and the plaintiff was under the impression that he was dealing with the individual.

*Balmer v. Anderson Creek, Inc.*, No. COA02-1620, 2003 WL 22845367 (N.C.App. 2003) (holding that individual who signed as agent for nonexistent LLC rendered himself personally liable on the contract and, in turn, had right to maintain suit to enforce the contract).

*Sysco Food Services of Austin, Inc. v. Miller*, No. 03-03-00078-CV, 2003 WL 21940009 (Tex.App. 2003) (holding that member of LLC who did not sign pre-formation credit application with supplier was not personally liable to supplier as general partner of implied partnership or otherwise).

*Lester Associates, LLC v. Entertainment Group Fund, Inc.*, No.00 Civ.3759 LTS MHD, 2003 WL 21750211 (S.D. N.Y. July 29, 2003) (holding that merely instructing attorney to form LLC did not constitute a colorable attempt to comply with statutory formation requirements for purposes of establishing de facto existence of LLC under Delaware de facto corporation doctrine, but fact issues precluded determination of whether defendants should be estopped to deny the existence of LLC which was attempting to enforce claims arising under pre-formation contract).

*Urda v. Sahl*, No. CV020468800S, 2003 WL 21007160 (Conn. Super. April 17, 2003) (concluding that the defendant promised to convey a 50% interest in real estate, rather than an interest in an LLC later formed to hold the real estate, in exchange for the plaintiff's management of the real estate, and thus the oral agreement was subject to the Statute of Frauds).

*Schawk, Inc. v. City Brewing Co., LLC*, No. 02-1833, 2003 WL 1563767 (Wis.App. March 27, 2003) (questioning the import of an alleged offer made on behalf of an as-yet-unformed LLC).

*Holland v. Fahnestock & Co., Inc.*, 210 F.R.D. 487 (S.D. N.Y. 2002) (adopting magistrate's report finding LLC was not indispensable party because its interest was adequately represented by defendant, and LLC was no more than co-obligor and joint tortfeasor with respect to pre-organization contract assigned to LLC by defendant).

*Holland v. Fahnestock & Co., Inc.*, No. 01CIV.2462RMBJP, 2002 WL 1774230 (S.D. N.Y. Aug. 2, 2002) (finding that individual sole proprietor was not discharged from liability when LLC was formed and succeeded to liability on pre-formation contract and that individual and LLC were thereafter joint obligors on the contract).

*Johnson v. King Media, Inc.*, No. Civ.A. 01-2311, 2002 WL 1372363 (E.D. Pa. June 24, 2002). King Media sued on a contract with Zebra Marketing.com. King Media alleged that Zebra Marketing.com was a partnership, and it sued the partnership and its three alleged partners. One of the alleged partners sought dismissal on the basis that Zebra Marketing.com was an LLC, and the contract was not with the individual personally. The court denied the motion to

dismiss, stating that the contract was entered four months prior to formation of the LLC and the subsequent formation of the LLC could not protect the partners from personal liability arising out of the contract with the partnership.

*In re Rickel & Associates, Inc. (Rickel & Associates, Inc. v. Smith)*, 272 B.R. 74 (Bankr. S.D. N.Y. 2002)(holding that pre-formation securities fraud was ratified by LLC after its formation).

*Ehle v. Williams & Boshea, L.L.C.*, No. Civ.A. 01-3757, 2002 WL 373271 (E.D. La. March 7, 2002)(finding that joinder of individual who claimed he could not be liable because he was member of LLC was not fraudulent where there was evidence the LLC was never formed and plaintiff stated claims based upon negotiations to form LLC).

*Shampton v. City of Springboro*, No. CA2000-08-080, CA2000-09-081, 2001 WL 1403051 (Ohio App. Nov. 13, 2001). A short-term lease was signed by an individual on behalf of an LLC shortly after the LLC was formed. The LLC asserted promissory estoppel claims based upon promises made before the LLC was formed. The defendant argued that the LLC was a third party to the lease and without standing to assert promissory estoppel. The court applied principles applied to corporate promoters to conclude that the LLC could assert promissory estoppel even though it did not exist at the time of the promises.

*Breka v. Falcon Electric Corporation*, No. C8-00-1434, 2001 WL 641524 (Minn. App. June 12, 2001). Four individuals formed a business (ADA Engineering, L.L.C. or “ADA”) they intended to be an LLC. Their attorney failed to file the articles of organization, and the failure was not discovered until after a corporation agreed to acquire ADA. A memo written on the acquiring corporation’s stationery stated that because the secretary of state had no record of ADA as an LLC, the corporation would treat ADA as a partnership and purchase its assets and assume its liabilities as a partnership. One of the owners of ADA was an officer and major shareholder of the acquiring corporation. Although the assets of ADA were transferred and its business assumed by the acquiring corporation, the terms of the acquisition were never finalized, no consideration was paid, and litigation against the acquiring corporation and the majority shareholder who was also an owner of ADA ensued. Among the issues addressed in this appeal was whether the trial court erred in finding that ADA was a partnership and not a de facto LLC. The court of appeals relied upon case law dealing with defective incorporation as well as the common law and statutory definition of a partnership to conclude that ADA was a partnership. The court also held that the other owners were not estopped to deny ADA’s status as an LLC.

*The Pepsi-Cola Bottling Company of Salisbury, Maryland v. Handy*, No. 1973-S, 2000 WL 364199 (Del. Ch. March 15, 2000). The court determined that the members of an LLC were not protected from liability by the Delaware LLC act because the claims against the members were based upon fraudulent acts committed by the members before the LLC was formed. The court phrased the issue as follows: “if a person makes material misrepresentations to induce a purchaser to purchase a parcel of land at a price far above the fair market value, and thereafter forms an LLC to purchase and hold the land, can that person later claim that his status as an LLC member protects him from liability to the purchaser under § 18-303 [of the Delaware LLC Act]?” Not surprisingly, the court answered the question in the negative. The court did not find it necessary to reach the argument that veil piercing is the only way to hold an LLC member liable other than a claim based upon an improper distribution under § 18-607 of the Delaware LLC Act since the members were being sued for conduct that occurred before the formation of the LLC and thus were not being sued in their capacities as members of an LLC.

*Ruggio v. Vining*, 755 So.2d 792 (Fla. App. 2000). Prior to the filing of articles of organization for an LLC, Ruggio signed a \$100,000 promissory note on behalf of the LLC payable to Vining. Ruggio claimed that Vining knew the LLC had not yet been formed, but Vining claimed that Ruggio represented the LLC had already been formed. The note was somewhat unusual in that it provided for the issuance of a 1% ownership interest in the LLC (referred to as “1% of all shares of stock authorized to be issued by the articles of incorporation filed in the State of Florida by the obligor”) in lieu of payment at the election of the holder. At the time the note was executed, the Florida LLC act provided that “[a]ll persons who assume to act as a limited liability company without authority to do so shall be jointly and severally liable for all debts and liabilities.” (Later the act was amended to add an exception for any liability to a person who also had actual knowledge that there was no organization of an LLC.) The act also provides that an LLC shall not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until the articles of organization have been filed. The court explained the purpose of provisions like this as protection of innocent third parties who have dealings with an entity that does not exist and never becomes adequately capitalized. The court ultimately determined that fact issues remained. The court questioned whether Vining himself might have been assuming to act as the LLC. The court stated that the record did not establish

whether the unusual note was “incidental” to the LLC’s organization or a “subscription” or a “contribution.” In a footnote the court chastised Ruggio’s counsel for continued reliance on provisions from the corporation statute and limited argument regarding the applicable provision in the LLC act.

*In re Bernstein (Bernstein Ranch, LLC v. U.S.)*, 230 B.R. 144 (Bankr. D. N.D. 1999). An LLC claimed an agricultural lien on cattle proceeds by virtue of feed and care provided the cattle. Two brothers who owned the cattle executed a bill of sale to the LLC, in which they were members, and the LLC later reconveyed the cattle to the brothers. The lien was challenged with respect to the period of time during which title to the cattle was held by the LLC on the basis that, under North Dakota law, an owner of crops or livestock cannot claim a supplier’s lien for inputs the owner himself provides to the crop or livestock. The court compared the transfer to the LLC to a case in which a family created a partnership for the purpose of raising potatoes. A company owned by the mother provided services and claimed a lien, but it was disallowed on the basis that the mother, as a participant in the joint venture, had an interest in the crops themselves, and the expenses for which she claimed a lien constituted a contribution to the common undertaking of the joint venture. The court stated that the circumstances surrounding the LLC were similar to those in that case. If the cattle were owned by the LLC during the time in question, said the court, the logic of that case would preclude recognition of the lien. The court analyzed the circumstances of the transfer to the LLC and determined that the sale was absolute and effective upon the signing of the bill of sale. Since the cattle were owned by the LLC, it could not claim a lien for its expenses for feed and services.

*Heritage National Associates Limited Partnership v. 21 St Investment Group L.L.C.*, No. 05-99-00317-CV, 2000 WL 426437 (Tex. App. April 19, 2000). An LLC sought to enforce an agreement to purchase and sell property that was executed on behalf of the LLC prior to the filing of articles of organization with the Oklahoma Secretary of State. The court applied an Oklahoma statute that provided that a person or corporation may not deny the validity of a contract relating to real property if the person or corporation has knowingly received and accepted benefits under the contract. The court concluded that the seller was estopped under this provision to assert the LLC’s lack of capacity. In a subsequent opinion on rehearing, the court concluded that there had been no fraud on the part of the individual who represented that the LLC was in existence.

*P.D.2000, L.L.C. v. First Financial Planners, Inc.*, 998 S.W.2d 108 (Mo. App. 1999). The plaintiff LLC sought to bring suit on a contract entered on the LLC’s behalf prior to the LLC’s formation, and the defendant defended on the basis that the LLC lacked capacity to enter and enforce the contract. The contract was signed by the organizer as president of the LLC and, upon its formation, the LLC ratified or adopted the organizer’s pre-formation activities. In the contract, the defendant acknowledged that the LLC was in the process of being formed as a Nevada LLC. The defendant argued that it was not bound because it withdrew prior to the LLC’s ratification of the contract. The court held, however, that under the circumstances in this case the defendant was estopped to deny the existence of the LLC.

#### **R. Fraudulent Inducement in Formation of LLC**

*Brownstone Investment Group, LLC v. Levey*, 468 F.Supp.2d 654 (S.D. N.Y. 2007) (dismissing fraud claims relating to formation of LLC against individuals where allegations did not specify misrepresentations made by individuals prior to litigation; recognizing possibility of conspiracy claim against individuals but finding allegations conclusory and insufficient).

*Midwest Swim & Active, LLC v. McFall*, No. 05-0312-CV-W-FJG, 2006 WL 2808628 (W.D. Mo. Sept. 28, 2006) (rejecting member’s claim that he was fraudulently induced to enter into operating agreement and guaranties by misrepresentations regarding rights and obligations under documents because member was presumed to know contents of documents he signed and had no right to rely on other representations and fact that parties had known one another for many years did not relieve member of obligation to read documents he signed).

*Thorpe v. Levenfeld*, No. 04 C 3040, 2005 WL 2420373 (N.D. Ill. Sept. 29, 2005) (granting defendant’s motion to dismiss fraudulent inducement claim in connection with execution of operating agreement, concluding reliance on representations contrary to or not included in operating agreement, which included integration clause, was unreasonable as matter of law).

*Alimenta (USA), Inc. v. Oil Seed South, LLC*, 622 S.E.2d 363 (Ga. App. 2005) (rejecting self-dealing of member/manager occurring prior to execution of operating agreement as basis for fraudulent inducement claim by other

member because operating agreement contained merger clause as well as specific provisions authorizing conflict of interest transactions, competition, and change in LLC's purpose with consent of 51% of members, which defendant member constituted).

*Flores v. Matthews & Branscomb*, No. 04-04-00690-CV, 2005 WL 763310 (Tex. App. April 6, 2005) (holding that finding of fraud in inducement against members precluded them from relying on provision in LLC regulations as defense).

*Merovich v. Huzenman*, 911 So.2d 125 (Fla. App. 2005) (dismissing LLC members' fraudulent inducement claim because claim was waived by execution of operating agreement containing provisions clearly contradicting prior representation of defendant members regarding capital contributions).

*Kaufman v. Guest Capital, L.L.C.*, No. 03 Civ. 1509(RJH), 2005 WL 167602 (S.D. N.Y. Jan. 25, 2005) (rejecting member's fraud claims in connection with investment in LLC fund because investor had full access to information in subscription documents (which he did not read) to alert him to the alleged fraud).

*VGS, Inc. v. Castiel*, No. C.A. 17995, 2003 WL 723285 (Del.Ch. Feb. 28, 2003) (applying New York law pursuant to choice of law clauses in agreements and rejecting claim of misrepresentation and fraudulent inducement relating to investment in LLC where the transaction was a multi-million dollar transaction executed following negotiations among sophisticated parties and the complaining party had the opportunity to discover information making reliance unwarranted).

*Lloyd v. Horn, Inc.*, No. Civ.A. 95-2549-KHV, 1997 WL 150052 (D. Kan. Jan. 29, 1997), *aff'd*, 1998 WL 939493 (10<sup>th</sup> Cir. Aug. 21, 1998). The court rescinded an operating agreement of an LLC on the grounds that Lloyd, one of the members, committed fraud in the formation of the LLC, and the court concluded that Lloyd's rights were governed by the partnership agreement under which the parties had operated before organizing as an LLC. However, the court concluded that it could not determine Lloyd's rights under the partnership agreement by summary judgment and scheduled the matter for trial. The court referred to confusion between the terms "capital account" and "capital contribution" and as to whether Lloyd should be treated as a withdrawing or expelled partner under the provisions of the partnership agreement.

*Gee v. Bullock*, 1996 R.I. Super. 941, 1996 WL 937009 (R.I. Super. Nov. 16, 1996). Two members of an LLC sued the third member, Bullock, seeking injunctive relief barring Bullock from operating the LLC and permitting them to carry on the business. Bullock sought dissolution and an accounting. The court found that Bullock made fraudulent representations when she claimed to have sole ownership of an existing business into which she induced the plaintiffs to invest and when she promised to sign an operating agreement giving the plaintiffs a fifty-one percent controlling interest in their newly formed LLC. In fact, another individual had a substantial interest in the business Bullock claimed to own, and Bullock later refused to sign the operating agreement for the new LLC. Ultimately, Bullock locked the other two members out of the business premises and transferred the assets of the LLC to a new corporation formed by Bullock and yet another investor. The court concluded that the LLC dissolved when Bullock wrongfully excluded/expelled the other two members from the business and that the LLC could only continue for winding up purposes. Thus, the court denied the plaintiffs' requested injunctive relief. The court went on to discuss the fraudulent nature of the transfer of the LLC's assets to Bullock's new corporation under Rhode Island's Uniform Fraudulent Transfer Act. Finally, the court appointed an attorney to conduct the winding up of the LLC because Bullock, having wrongfully caused the dissolution of the LLC, was not entitled to participate in the winding up of the LLC's affairs.

## **S. LLC Property and Interest of Members**

*Yonaty v. Glauber*, 834 N.Y.S.2d 744 (N.Y. A.D. 3 Dept. 2007) (relying on principle that membership interest constitutes personal property and member has no interest in specific property of LLC and cancelling notices of pendency because plaintiff's action to enforce defendant's promise to convey 20% interest in LLC was not action involving real property since plaintiff did not assert interest in real property acquired by LLC but only claimed right to obtain interest in LLC).



*Valley/50th Avenue, L.L.C. v. Stewart*, 153 P.3d 186 (Wash. 2007) (holding that member and LLC were separate entities both of whom were owed duty by attorneys who took deed of trust on LLC's property to secure payment of legal fees owed by member, and concluding that fact issues as to firm's compliance with ethical obligations precluded summary judgment foreclosing deed of trust).

*Kreisler v. Goldberg*, 478 F.3d 209 (4<sup>th</sup> Cir. 2007) (applying Maryland law and concluding there existed no basis to conclude that wholly owned LLC subsidiary of LLC debtor should not be recognized as separate legal entity and that automatic stay did not protect debtor's LLC subsidiary nor did debtor have any direct interest in assets of LLC subsidiary).

*United States v. Heide*, No. 04 MS-5609, 2007 WL 581601 (D. Idaho Feb. 20, 2007) (declining to transfer venue of government action against non-resident for writ of execution with respect to ownership of LLC registered to transact business in Idaho).

*Brownstone Investment Group, LLC v. Levey*, 468 F.Supp.2d 654 (S.D. N.Y. 2007) (declining to dismiss declaratory judgment claim seeking declaration that plaintiff owned software if plaintiff was not member who contributed software to LLC).

*Bermant v. Broadbent*, Civil No. 2:05 CV 466, 2006 WL 3692661 (D. Utah Dec. 12, 2006) (commenting, in concluding mutuality of debts did not exist for set off purposes, that an LLC member or assignee has no interest in specific LLC property under California law).

*Chuang v. Ming Ter Chen*, No. B185791, 2006 WL 3518228 (Cal. App. 2 Dist. Dec. 7, 2006) (noting that members do not have interest in LLC property).

*Zipp v. Florian*, No. CVN03101980, 2006 WL 3719373 (Conn. Super. Nov. 13, 2006) (holding that member of LLC did not have standing to bring suit based on damage to property owned by LLC).

*Budtel Associates, LP v. Continental Casualty Company*, 915 A.2d 640 (Pa. Super. 2006) (stating that, under both New Jersey and Pennsylvania law, LLC member has no interest in specific LLC property, and member thus did not own LLC's right to use LLC's warehouse).

*In re HSM Kennewick, L.P.*, 347 B.R. 569 (Bankr. N.D. Tex. 2006) (holding that LLC member lacked interest in specific LLC property under Washington LLC law and automatic stay in member's bankruptcy thus did not preclude other member from seeking receivership of LLC).

*DeShazo v. Estate of Clayton*, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (finding member did not acquire real property on behalf of LLC formed for development of property or have obligation to contribute property where fully integrated operating agreement did not reference contribution of real property in question and oral promise to contribute property would be unenforceable under Idaho LLC statute and Idaho statute of frauds).

*In re McCabe (Braunstein v. Panagiotou)*, 345 B.R. 1 (D. Mass 2006). The debtor filed bankruptcy and listed a 50% interest in a Delaware LLC as part of his property. The trustee brought an action against the LLC's other member, Panagiotou, based on Panagiotou's post-petition unilateral amendment of the LLC agreement to reduce the debtor's interest to 5% and increase Panagiotou's interest to 95%. Panagiotou also reduced the LLC's 100% interest in two other LLC's to 5% and gave himself a 95% interest in those LLCs. Panagiotou argued that the reallocations of membership interests were in accordance with the LLC agreements, which permitted additional capital contributions with the agreement of all members and required amendment of the agreements to reflect the additional contributions. The debtor did not dispute that Panagiotou had made additional capital contributions, but claimed that he never assented to the amendments formally reallocating the membership interests. The trustee sought summary judgment that Panagiotou violated the automatic stay, and Panagiotou argued that his conduct did not violate the automatic stay because no "property" of the debtor's estate was affected and Panagiotou's actions were "purely ministerial." Panagiotou argued that his actions merely formalized the pre-existing status and that the membership interests were altered by the additional capital contributions rather than the subsequent written documentation of the reallocation. According to Panagiotou, the debtor consented to the additional capital contributions and the amendments were automatic and mandatory. The court rejected these arguments and stated that the proper course of action for Panagiotou would have been to move for relief

from the stay rather than engage in self-help. The court stated that it could not conclude the debtor's legal interest was not affected even if the debtor lacked an equitable interest in the LLC. Further, Panagiotou's efforts were not in accordance with the LLC agreement because it required that the amendment be duly executed by all members. That the members were mandated to amend the agreement did not make amendment "automatic." The court also rejected Panagiotou's argument that his conduct was proper based on the debtor's authorization, in a letter six months prior to the bankruptcy, of Panagiotou's exercise of the debtor's ownership rights. The court said that Panagiotou's reliance on the letter to justify amending the agreement violated the automatic stay provision prohibiting acts to enforce a lien. The court addressed several other arguments in addition to those related to violation of the automatic stay. Pointing out that an LLC interest is personal property under the laws of Massachusetts (the forum state), Delaware (the LLC's state of formation), and Idaho (the state in which the LLC's real property was located), the court rejected Panagiotou's argument that the debtor's estate lacked a property interest that could be subject to turnover and avoidance of post-petition transfer. Similarly, the court held that the debtor's LLC interest was personal property that could be the subject of a conversion claim. The court found that there was a basis for the trustee's accounting claim against Panagiotou but not against the LLC because the existence of a fiduciary relationship is a pre-requisite to an accounting claim under Massachusetts law. The defendants did not deny that Panagiotou owed fiduciary obligations to the debtor (a fellow member), but the trustee provided no evidence that the LLC owed a fiduciary duty to the debtor (a member of the LLC).

***Bryan Brothers Cattle Co. v. Glenbrook Cattle Company, LLC***, No. 2:4CV139SAA, 2:4CV145SAA, 2006 WL 1233069 (N.D. Miss. May 1, 2006) (holding that financing statement was not effective as to cattle owned by LLC where financing statement did not name LLC but only two individuals who were members, one of whom was also its registered agent).

***Finley v. Takisaki***, No. C05-1118JLR, 2006 WL 1169794 (W.D. Wash. April 28, 2006) (stating LLC members have no interest in LLC property just as corporate shareholders have no interest in corporate property).

***Carey v. Howard***, 950 So.2d 1131 (Ala. 2006) (holding LLC members lacked standing to sue for declaratory relief with respect to option agreement affecting LLC property because LLC members have no interest in specific LLC property).

***Northeast Realty, L.L.C. v. Misty Bayou, L.L.C.***, 920 So.2d 938 (La. App. 2006) (holding members had no standing to intervene in action against LLC to quiet tax title because claim to ownership of property in dispute belonged to LLC).

***Cortelleso v. Town of Smithfield Zoning Board of Review***, 888 A.2d 979 (R.I. 2005) (holding sole member of LLC lacked standing to appeal zoning decision on property conveyed by member to LLC).

***Steele v. Rosenfeld, LLC***, 936 So.2d 488 (Ala. 2005). Elkins agreed to sell the second and third floors of a building to Steele and Glover, respectively. Steele paid \$20,000 of the \$70,000 price for the third floor, and Glover paid the entire \$40,000 price for the second floor. Elkins and Glover formed an LLC to hold title to the building after they received legal advice that it was impossible to do what they intended without a condominium declaration and concluded it was not feasible to do so. The LLC was formed with Elkins owning 2/3 of the membership and Glover owning 1/3 of the membership. Elkins presented Steele with a promissory note for the purchase of a 1/3 interest, but Steele never signed the note. Steele paid Elkins \$37,775 of the \$70,000 due under their oral arrangement for the purchase of the third floor, but Steele's name did not appear on the articles of organization or operating agreement. The building was destroyed by fire, and the LLC received the proceeds of two insurance policies. Subsequently, the LLC sold the building. Elkins and Steele could not agree on the resolution of Steele's rights, and the LLC and Elkins filed a declaratory judgment action to determine the interests of the parties in the LLC and the appropriate disbursement of the insurance and sale proceeds. Steele argued that he obtained a financial interest in the LLC when it was formed, and that he had a contract to obtain full membership, i.e., governance rights, when he completed his payments to Elkins. The court rejected Steele's argument that he acquired any part of an interest, either financial or governance, in the absence of written consent of the other members, relying on the Alabama LLC statute and the LLC's articles of organization and operating agreement, which all required written consent to the admission of a member. The court also rejected Steele's argument that he was entitled to 1/3 of the insurance proceeds on an equitable conversion theory. The court pointed out that an LLC interest is personal property and held that the doctrine of equitable conversion did not apply because the doctrine only applies to real estate contracts that are specifically enforceable. The court declined to entertain Steele's argument that the court should disregard the LLC entity and treat Elkins, Glover, and Steele as owners of the building

because the argument was raised for the first time in a post-trial motion. The court also rejected Steele's argument that Elkins should be estopped to deny Steele's status as a member.

*Wright v. Herman*, 230 F.R.D. 1 (D. D.C. 2005) (holding plaintiff's claim for conversion of LLC membership interest was not futile because LLC membership interest is personal property).

*Grand Street Realty, LLC v. McCord*, No. 04-CV-4738, 2005 WL 2436214 (E.D. N.Y. Sept. 30, 2005) (commenting on nature of LLC ownership interest under New York LLC statute and concluding bankruptcy trustee would have right of access to property of LLC in which debtor was member in order to evaluate membership interest that was property of bankruptcy estate).

*Ross v. National Center for Employment of the Disabled*, 170 S.W.3d 635 (Tex.App. 2005), reversed on other grounds, 201 S.W.3d 694 (Tex. 2006). A \$10 million default judgment was taken in Texas state court against Ross, the sole member of two Arizona LLCs. The plaintiff sought a turnover order requiring Ross to turn over a \$1.2 million letter of credit owned by the LLCs. The plaintiff claimed that Ross, as owner of the LLCs, controlled the \$1.2 million letter of credit, and that the statutory criteria for a turnover order were met: (1) the property could not be readily attached or levied upon by ordinary legal process, and (2) the property was not exempt from attachment, execution, or other seizure. The LLCs were not joined as parties nor was it alleged that the LLCs were the alter ego of Ross. Ross argued that the turnover order could not issue without initiation of proceedings against the LLCs. The court of appeals reviewed the case law dealing with turnover proceedings and non-judgment debtors and found no abuse of discretion in the trial court's issuance of the turnover order for the letter of credit. Although the Texas and Arizona LLC acts contain charging order provisions, the court did not mention these provisions in the case, nor did the court discuss the difference between an LLC interest and corporate stock when relying on cases dealing with corporate stock ownership.

*Wilcox v. Schmidt*, No. CV044001126, 2005 WL 2082745 (Conn. Super. Aug. 2, 2005) (stating LLC minority member sufficiently alleged cause of action against majority member for conversion of LLC assets where minority member alleged that he had ownership interest in converted property as member of LLC and that majority member's use was unauthorized).

*In re LaVelle*, 350 B.R. 505 (D. Idaho 2005) (relying on principles of LLC property to conclude that debtors could not assert homestead exemption in property owned by LLC).

*Bensen Apartments, LLC v. Douglas County Assessor*, No. TC-MD 040518C, TC-MD 040519C, 2005 WL 1804412 (Or. Tax Magistrate Div. 2005) (recognizing that LLC member is not co-owner of specific LLC property and rejecting tax assessor's contention that individual member should be considered "taxpayer" with respect to property owned by various LLCs for purposes of determining whether value of taxpayer's property fell below statutory exemption amount).

*Collie Concessions, Inc. v. Bruce*, 612 S.E.2d 900 (Ga. App. 2005) (stating sole member of LLC does not own property owned by LLC and holding sole member's control of parking lot owned by LLC was insufficient to invoke "parking lot" exception to rule that worker's compensation benefits do not cover employees while traveling to and from work).

*Magill v. Schwartz*, 105 P.3d 867 (Or. 2005) (member of Washington LLC that was party to litigation had no rights in proceeds of litigation because an LLC member has no interest in specific LLC property under Washington law).

*Tikosky v. Yehuda*, No. B170534, 2005 WL 590830 (Cal. App. 2 Dist. March 15, 2005) (rejecting defendant's challenge to that portion of judgment that awarded plaintiff a one-half interest in property defendant had sold to an LLC prior to commencement of the lawsuit, stating that whether the LLC could collaterally attack the judgment was not before the court, and the defendant, who was not a member of the LLC, lacked standing to raise the issue on behalf of the LLC, which was not a party).

*Rogers v. Brooks*, 122 Fed.Appx. 729, 2004 WL 2977452 (5th Cir. 2004) (applying Louisiana law and recognizing that sale of interest in LLC owning oil and gas lease need not generally be in writing, though sale of oil and gas lease must be in writing, but holding that sale of LLC interest in this case must be in writing because parties clearly anticipated entering into written agreement).

***The Cadle Co. v. Terrell***, No. 3–03-CV-0400-BD(L), 2004 WL 833681 (N.D. Tex. April 16, 2004). A judgment creditor of the husband of an LLC member sought to reach the LLC interest of the wife. The creditor argued the LLC interest was joint management community property that could be levied on to satisfy her husband’s debts. The wife argued the LLC interest was sole management community property and thus not subject to the husband’s non-tortious liabilities incurred during marriage. The wife relied upon the inception of title rule and claimed her interest was sole management community property because she purchased it with funds from her personal bank account. The creditor urged the court to look at the totality of the circumstances, noting various ways in which the husband was involved in the formation and operation of the LLC. The court concluded that fact issues precluded summary judgment.

***In re Ealy***, 307 B.R. 653 (Bankr. E.D. Ark. 2004) (acknowledging that property of LLC is not property of member under Arkansas law, but finding debtor had equitable interest in property held by debtor’s LLC, and automatic stay thus protected property, where creation of LLC resulted from misunderstanding and intent was for debtor to own property).

***In re Mulder (Baker Dev. Corp. v. Mulder)***, 307 B.R. 637 (Bankr. N.D. Ill. 2004) (stating in footnote that, even if debtor owned interest in LLC that allegedly fraudulently conveyed property, only LLC interest would be property of bankruptcy estate and not property of LLC itself).

***Ricatto v. Ricatto***, 772 N.Y.S.2d 705 (N.Y.A.D. 2 Dept. 2004). The court upheld a TRO that restrained an LLC in which a divorcing spouse was a 50% member from disposing of real property of the LLC. The court relied on a domestic relations statute permitting a court to issue an order concerning the possession of real or personal property to prevent the disposition or dissipation of marital assets pending a matrimonial action. The court acknowledged that LLC members have no interest in specific real property of the LLC but stated that non-parties to a matrimonial action may be bound by an injunction if they act in collusion or combination with a party. The court stated there was sufficient evidence that the divorcing spouse and the LLC and its other member were acting in combination. The court found the members failed to establish that the LLC operated independently of the divorcing spouse with respect to the disposition of the LLC’s assets since a majority of the members was required for the LLC to take certain action, including the sale or disposition of

***McCleary v. McCleary***, 822 A.2d 460 (Md.App. 2002) (agreeing with trial court that spouse’s LLC was marital property, but holding that trial court erred in characterizing the LLC’s debt as spouse’s non-marital debt, thus overstating the value of spouse’s marital property by the amount of the debt).

***Parking Deck LLC v. Anvil Corp.***, 576 S.E.2d 24 (Ga.App. 2002) (imputing sole member’s knowledge of easement to LLC notwithstanding subsequent sale of member’s interest because property owner was LLC, not the members of the LLC).

***First Union National Bank v. Clark***, No. Civ. 02-05-P-H, 2002 WL 1585529 (D. Me. July 17, 2002). A judgment creditor argued that the bank account of an LLC was subject to attachment to satisfy the judgment against the individuals who were members of the LLC. The court cited the provisions of the Maine LLC act that specify that property transferred to or acquired by an LLC becomes LLC property and that a member has no specific interest in LLC property. The judgment creditor argued that the account was a joint account because it was used for personal expenses and the bank treated the account as a joint account. The court rejected this argument, pointing out that the account was in the name of the LLC only and that various aspects of the documentation indicated the account was a commercial or business account.

***Hutson v. Young***, 564 S.E.2d 780 (Ga. App. 2002)(stating that an action to compel specific performance of two LLCs which own land involves the sale of personalty, and such a suit indirectly involving land does not permit the filing of a lis pendens).

***Brown Wood Products, Inc. v. Interlab Robotics, Inc.***, No. H22232, 2002 WL 660452 (Cal. App. April 22, 2002). The plaintiff obtained a default judgment against the defendant (Interlab Robotics, Inc.), and pursued money in a bank account in the name of H-Square Engraving Systems, which was allegedly a fictitious name under which the defendant and its president did business as a joint venture. The plaintiff obtained the funds after obtaining a partnership charging order and an order freezing the bank account of H-Square Engraving Systems (“H-Square”) followed by appointment of a receiver who was directed to seize the assets of H-Square, determine the interest of the defendant in

the assets, and distribute the assets. H-Square then apparently argued (the court characterized its briefing as “less than clear”) that it was an LLC and it was not liable for the judgment because it was not the judgment debtor. The court acknowledged that, if H-Square was an LLC, it was “arguably correct” that it was not the judgment debtor and could not be charged with the defendant’s debt to the plaintiff. However, the court stated that if H-Square was a joint venture, its argument was to no avail because the defendant’s interest in it could be charged to satisfy the defendant’s debt to the plaintiff. (The court cited the charging order provisions of the partnership statute and equated a joint venture to a partnership, but did not explain how these provisions would entitle the receiver to directly reach the assets of the alleged joint venture.) The court cited conflicting evidence as to whether H-Square was an LLC, a joint venture, or a fictitious name. Ultimately, the court found that the evidence supported the receiver’s implicit conclusions that H-Square was a fictitious business name for the defendant and no allocation of the money in the bank account was necessary.

***Premier Van Schaack Realty, Inc. v. Sieg***, 51 P.3d 24 (Utah App. 2002). A real estate listing agent sought to collect its commission under its brokerage agreement when the owner of the property conveyed the property to a newly formed LLC in which the owner of the property and three other individuals were the members. The member who contributed the property received a 40% membership interest and a 9% preferential return on the future profits from the property. Further, the property could not be encumbered without the consent of the member who contributed the property to the LLC. The court determined that the contribution of the property was not a sale or exchange under the brokerage agreement. The court reasoned that the owner of the property retained an ownership interest in the property that caused him to assume the risks of an investor rather than the risks of a seller. The court stated that whether a sale or exchange for consideration occurred is a fact-intensive inquiry that requires more than a mere showing that an owner transferred his property to a separate legal entity. “Where the owner retains essentially the same ownership interest in the property as he had prior to the conveyance, with plans to develop the property by improving it with the possibility of future gains or losses, and can prevent the record owner from encumbering the property without his permission, such a transaction is not a sale or exchange,” said the court. Under this test, the court concluded that the conveyance to the LLC was not a sale or exchange.

***In re Rodio (Associates Commercial Corp. v. Rodio)***, 257 B.R. 699 (Bankr. D. Conn. 2001). The debtor in this bankruptcy proceeding claimed that he had equitable rights in a tractor owned by an LLC of which he was a member. The court rejected this argument, finding it clear that the debtor’s membership interest was property of the estate but the LLC’s property was not. Thus, the holder of a security interest in the tractor was allowed to foreclose its interest.

***Gebhardt Family Investment, L.L.C. v. Nations Title Insurance of New York, Inc.***, 752 A.2d 1222 (Md.App. 2000). The issue in this case was whether a title insurance policy continued in effect for property transferred by a husband and wife to their wholly owned LLC. The court held that the transfer terminated the policy. The Gebhardts conveyed the real property to a Virginia LLC of which they were the only members. The deed recited that the LLC paid \$160,990 for the property, but Mr. Gebhardt testified that this recitation was for transfer tax purposes and that the LLC did not pay anything for the property. The Gebhardts argued that the conveyance was in effect a conveyance to themselves because they were the sole members of the LLC. The court, however, stressed that an LLC is a separate entity and that there was indeed a transfer from one entity or person to another. The court stated that there was a real conveyance even if no money changed hands because the Gebhardts obtained benefits conferred by a Virginia LLC, including limited liability and estate planning benefits. Finally, the court rejected the argument that, because they had already reported the cloud on the title before the transfer to the LLC, the Gebhardts should be able to recover under the title policy. The court rejected this argument on the basis that any loss suffered by virtue of the cloud on the title would be suffered by the LLC, not the Gebhardts, because the Gebhardts successfully conveyed the entire property under a special warranty deed.

***Warren Davis Properties V, L.L.C. v. United Fire and Casualty Co.***, 4 S.W.3d 167 (Mo. App. 1999). The court held that the manager of an LLC is competent to testify as to the value of LLC property even though the manager is not an expert so long as the manager is in fact familiar with the value of the realty. The court reached this conclusion based upon Missouri case law recognizing that a managing officer of a corporation is competent to testify on the value of corporate property.

***Jennette v. Jennette***, No. 01-A-01-9810-CH-00549, 1999 WL 732519 (Tenn. App. Sept. 21, 1999). In this divorce action, Mr. Jennette claimed that he had no interest in an LLC he formed, but the court found that he did have an interest. Although Mr. Jennette was the organizer of the LLC, chose the lawyers and accountants for the company, and signed the operating agreement as one of the members, Mr. Jennette claimed that he was only an employee of the

LLC. The LLC did not withhold taxes on the money he drew, however, and the court pointed out, as “the most telling piece of circumstantial evidence,” that Mr. Jennette had listed a 49% interest in the LLC, valued at \$450,000, in a financial statement he provided a bank. The trial court concluded that Mr. Jennette’s testimony was not truthful and viewed the paper trail as indicating that Mr. Jennette owned a valuable interest in the LLC. The court of appeals upheld the trial court’s conclusion.

***March Trading, Inc. v. Sloan***, 25 Conn.L.Rptr. 339, 1999 WL 732955 (Conn. Super. Aug. 30, 1999). The plaintiff brought a bill of discovery action against a member of an LLC seeking sworn copies of the member’s membership certificate giving notice of a pledge of the membership interest. Under an agreement between the member and the plaintiff, the member was to pledge a 20% LLC interest as partial security for a promissory note. The agreement also required the member to place a legend on the certificate indicating that the interest had been pledged. When the member refused to provide the plaintiff proof that the language had been placed on the certificate, the plaintiff brought this action. The court found that the plaintiff was entitled to maintain the bill of discovery seeking proof of compliance with the agreement.

***Graves v. Graves***, 967 S.W.2d 632 (Mo. App. 1998). This divorce action included an issue as to the propriety of the trial court's order that one spouse, who was awarded all interest in the couple's LLC, execute a lease on behalf of the LLC. Mr. and Mrs. Graves owned an LLC which operated on a tract of land it leased from the Graves. The trial court awarded Mr. Graves all right, title and interest in the LLC and awarded Mrs. Graves the land on which the LLC operated. The court also ordered Mr. and Mrs. Graves to sign a twelve month lease of the land to the LLC at a specified rent. The lease included a signature line for the LLC to be signed by Mr. Graves as president. Mr. Graves complained that the court did not have jurisdiction over the LLC and that the order to execute the lease was thus improper. The court acknowledged the difference between a member's interest in an LLC and property of the LLC itself, but analogized the situation to that of a sole shareholder corporation where a court may order the shareholder spouse to cause the corporation to undertake certain acts. The court concluded that the trial court was within its authority to cause the LLC to lease the property from Mrs. Graves since it did not order the LLC to distribute any property and did not directly order the LLC to sign the lease.

***In re Welty***, 217 B.R. 907 (Bankr. D. Wyo. 1998). The debtor in this bankruptcy case claimed that his interest in an LLC was exempt because it was held in a tenancy by the entirety. The court noted that an ownership interest in an LLC is intangible personal property. The court stated that there must be a clear manifestation of intent on the face of the instrument of conveyance to support the existence of a tenancy by the entirety. The court concluded that the articles of organization, the only evidence of the ownership interests of the debtor and his spouse, did not demonstrate an intent to hold ownership in the LLC in a tenancy by the entirety.

***Hagan v. Adams Property Associates, Inc.***, 482 S.E.2d 805 (Va. 1997). In this case, the plaintiffs, Ralph and Maureen Hagan (the Hagans), executed an agreement with the defendant, Adams Property Associates, Inc. (Adams), giving Adams the exclusive right to sell the Hagans' apartment complex for \$1,600,000. The agreement provided that if the property was "sold or exchanged" within one year, with or without Adams' assistance, the Hagans would pay Adams a fee of six percent of the "gross sales amount." Before the year had expired, the Hagans and two other parties formed an LLC, and Hagan transferred the property to the LLC in exchange for an interest in the LLC, the LLC's assumption of debt on the property, and a promissory note from the LLC secured by a second deed of trust on the property. Adams sought its commission on the basis that the transfer of property to the LLC constituted a sale of the property. The Hagans argued that transfer of legal title to the property represented their contribution to the capitalization of a new company, and not a sale of the property. The Hagans added that they did not receive any present valuable consideration for the contribution. The Virginia Supreme Court found that the benefits received by the Hagans by virtue of the transfer of the property constituted valid consideration. It further distinguished the cases cited by the Hagans for the proposition that the transfer was capitalization on the basis that those cases involved the capitalization of a partnership rather than an LLC. The court stated that a partnership is not an entity separate from its partners, thus a partner's transfer of property to the partnership is "only a change in the form of ownership." The court characterized an LLC as an entity separate from its members and concluded that the member's transfer of the property to the LLC thus amounted to a sale.

***Gattoni v. Zaccaro***, No. CV 970396081, 1997 WL 139410 (Conn. Super. March 13, 1997). This proceeding arose out of a dispute between Gattoni and Zaccaro, 49% and 51% members, respectively, of an LLC. Gattoni alleged various misdeeds and breaches of contract by Zaccaro and sought an accounting and judicial dissolution of the LLC.

The specific matter before the court was the request of Zaccaro and the LLC for discharge of a *lis pendens* filed by Gattoni on real property owned by the LLC. The court granted the request inasmuch as the claims did not involve the real property within the meaning of the relevant Connecticut statute. The court pointed out that Gattoni did not have an interest in specific LLC property. Rather, Gattoni had a membership interest in the LLC, and the membership interest was personal property. The court rejected the argument that his claim for dissolution involved a claim for partition of the real property owned by the LLC. The court also addressed a request by Gattoni for a preliminary injunction that would essentially order preservation of the real property and prohibit its transfer. The court denied the request for injunctive relief based upon its conclusions that Gattoni failed to establish likelihood of success on the merits of his claims and did not show that Zaccaro was likely to dispose of the property in a way that would thwart winding up and dissolution of the LLC. A subsequent related opinion is published at 727 A.2d 706 (Conn. App. 1999).

*Reid v. Town of Hebron*, No. CV 9354384S, 1996 WL 634254 (Conn. Super. Oct. 22, 1996). The plaintiff was denied a building permit to build a house on a lot he owned. He appealed the decision of the Hebron Conservation Commission, claiming that the decision deprived him of any reasonable use or practical value of his property and amounted to a taking of the property without just compensation. During the course of the appeal, the plaintiff transferred his interest in the lot to an LLC in which he owned a fifty percent interest. The defendant argued that the plaintiff was not a party aggrieved by the denial of the permit and thus could not pursue the appeal because he did not sustain his interest in the property at issue throughout the course of the proceedings. The plaintiff relied on his ownership in the LLC to establish his aggrievement. The court quoted the LLC statute to the effect that property transferred to or otherwise acquired by an LLC is property of the LLC and not of the members individually. The court held that, because the property was transferred to another party who was not a party before the Commission and not a party to the appeal, the plaintiff was not aggrieved and had no standing to appeal. (Had the plaintiff been the sole member of the LLC, it appears the court would have treated him as the beneficial owner of the property based upon a prior case in which the court treated the sole stockholder of a corporation as beneficial owner of land owned by the corporation.)

*Diaz v. Fernandez*, 910 P.2d 96 (Colo. App. 1995). This case involved the application of Colorado receivership law in the context of an LLC. The court allowed an LLC member to pursue appointment of a receiver for the LLC because an LLC member has a personal property interest in the LLC and thus may satisfy the Colorado rule which provides for the appointment of a receiver when the moving party establishes "a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its . . . profits are in danger of being lost. . . or materially injured or impaired."

#### **T. Authority of Members and Managers**

*Estate of E.A. Collins v. Geist*, 153 P.3d 1167 (Idaho 2007). Two individuals, Michael Collins and Russell Purcell, formed an Idaho LLC. The articles of organization stated that management was vested in the managers and listed each as a manager. Purcell testified that he had nothing further to do with the LLC after signing the articles of organization and that he was not a member. Michael Collins later amended the articles of organization to change the name of the LLC, remove Purcell as a manager, and add Michael's father as a manager. A corporation owned by Michael's father transferred various improved and unimproved lots and a model home to the LLC, and the LLC's sole purpose at that point was to develop and sell that property. After Michael's father died, his estate sought to set aside deeds executed by Michael on behalf of the LLC conveying various lots. The court first found that there was no genuine issue of fact as to whether Michael was a manager of the LLC. The estate argued that Michael could not have been a manager because the Idaho Limited Liability Company Act states that management is vested in the members unless an operating agreement vests management in one or more managers. The estate contended there was no operating agreement, but the court pointed out that, under Idaho law, an operating agreement is any agreement, written or oral, among all the members as to the conduct of the business and affairs of the LLC. The court concluded that Michael was a member of the LLC, even though he did not provide any capital (i.e., money or assets) to the LLC, because his use of credit to obtain construction loans was sufficient consideration for issuance of an LLC interest under the Idaho LLC statute. Since Purcell did not provide any consideration to the LLC and testified that he had no further involvement after signing the articles of organization, the court concluded that Michael was the sole member of the LLC and that there was an operating agreement if Michael was in agreement regarding the business and affairs of the LLC. The court stated that Michael obviously agreed that he would conduct the business and affairs of the LLC. Thus, there was an operating agreement, and Michael qualified as a manager. After Michael amended the articles of organization to remove Purcell as a manager and add his father, it was unclear whether his father became a member. Assuming his father became a member, the court concluded that Michael and his father agreed that Michael would manage the LLC. Although Michael

testified in his deposition that they had no operating agreement, the court accepted Michael's explanation that he thought the question referred to a written operating agreement. The court concluded that the conduct of Michael and his father clearly showed that they had agreed that Michael would conduct the business and affairs of the LLC, and Michael thus qualified as a manager. The court then rejected the estate's argument that Michael's authority to convey real estate on behalf of the LLC must be in writing under the provisions of an Idaho statute that requires conveyance of an estate in real property to be made by a written instrument that is signed by the conveyer or the conveyer's agent authorized in writing. The court relied upon provisions of the Idaho LLC statute conferring apparent authority on a manager when apparently carrying on the business of the LLC in the usual way and providing that title to LLC property may be transferred by an instrument of transfer executed by a manager in the name of the LLC. The court noted that an LLC may only act through its agents and concluded that the specific provisions of the LLC statute control over the more general statute requiring an agent's authority to be in writing when a conveyance of real property is involved.

*Bloom v. Danbury Sports, LLC*, No. CV065000685S, 2007 WL 706758 (Conn. Super. Feb. 16, 2007) (holding that contract signed by member was binding on LLC notwithstanding limitation on authority in operating agreement because statute specifies that every member is LLC's agent for purpose of LLC's business and member's act binds LLC unless person with whom member is dealing has knowledge that member lacks authority).

*In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (holding that party removed as manager prior to bankruptcy filing of LLC had no standing to assert bankruptcy filing was not authorized, but creditor was "party in interest" with standing to challenge bankruptcy on basis all members did not consent as required by operating agreement; dismissing bankruptcy because bankruptcy was filed without consent of all members as required under Washington law and operating agreement).

*Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corporation*, 368 B.R. 679 (N.D. Ill. 2006) (finding that plaintiff made a cognizable argument that withdrawal agreement containing release of claims was ineffective because agreement was executed by LLC's president rather than manager who was vested with exclusive authority to enter agreements on behalf of LLC under operating agreement).

*Countrywide Home Loans, Inc. v. Wright*, No. 266937, 2006 WL 1691128 (Mich. App. June 20, 2006) (affirming trial court's conclusion that neither of two members who constituted "managing members" of LLC had authority acting alone to convey real estate of LLC).

*Teitlebaum v. Halleck St. Properties, LLC*, 2005 WL 4022328 (N.J. Super. A.D. May 22, 2006) (concluding 50% member had authority to transfer LLC's real estate based on authority of members in member-managed LLC notwithstanding lis pendens filed at or about time of closing).

*Trage v. 311 Meridian*, 924 So.2d 925 (Fla. App. 2006) (holding non-managing member who executed assignment of LLC's interest in real estate contract lacked authority to act on behalf of LLC).

*In re Grupo Dos Chiles, LLC*, No. Civ.A. 1447-N, 2006 WL 668443 (Del. Ch. March 10, 2006). In February 2000, a certificate of formation for a Delaware LLC was filed. The certificate of formation named Rivera as the initial member. The following month Shriver and Martinez (Rivera's mother) executed a brief LLC agreement naming themselves as managing partners. In 2003, the LLC lost its good standing in Delaware because of a failure to pay Delaware taxes, and Shriver filed an action in Virginia, where the LLC was operating a restaurant, seeking a judicial winding up. In 2005, Martinez paid the LLC's back taxes and had its good standing reinstated. Shriver then filed this action in Delaware claiming that the LLC's membership could not be changed without an amendment to its certificate of formation since the certificate listed Rivera as the sole member. Shriver also asserted that the payment of the LLC's back taxes and restoration of its good standing were not authorized since the action was taken without a vote of the LLC's membership. The court stated that it need not decide whether the certificate of formation was correct in listing Rivera as the sole member when filed, finding it was immaterial whether Rivera was the initial member. The court said it was clear that Shriver and Martinez were the members under the LLC agreement, which superseded the certificate of formation. The court characterized the certificate of formation as the first statutory step in creating an LLC and stated that the Delaware LLC statute contemplates the certificate will be complemented by an agreement. The court found that the agreement made it clear that Martinez and Shriver were to be the members even though it referred to them as the managing partners. The court also pointed to other documentary evidence (loan documents, correspondence, and other documents) indicating Martinez and Shriver were the members. The court found no obligation to amend the certificate



of formation, stating that there was no indication that the identification of Rivera as the initial member was not accurate when filed, and pointing out that the Delaware statute does not require that the members be set out in the certificate of formation. With respect to the payment of the LLC's back taxes and restoration of its good standing, the court found that the act was not proper under the unique circumstances in this case. The court stated that it need not determine whether restoring the good standing of an LLC that has been cancelled for failure to pay its taxes is a ministerial act that any member or manager may take without a vote of the members. The court characterized the narrow issue in this case as follows: "The issue is whether once an LLC has lost its good standing for nonpayment of taxes and the member attempting to restore good standing represents less than a majority of the voting power of the LLC and knows there is a dispute as to whether the LLC should continue and where another co-member of the LLC has initiated litigation to dissolve the company, the member with that knowledge can unilaterally restore the LLC to good standing." The court held the LLC was not in good standing because it was not proper for Martinez to restore its good standing without Shriver's consent.

***Lourdes Medical Pavilion, LLC v. Catholic Healthcare Partners, Inc.***, No. Civ.A. 5:03CV231M, 2006 WL 753080 (W.D. Ky. March 22, 2006). A non-profit hospital and a group of corporate entities each owned 50% of a Kentucky LLC engaged in health care services. The LLC's operating agreement contained a non-competition provision, and a separate non-competition agreement between the LLC and the hospital's sole member prohibited the hospital's member and its affiliates from engaging in competition with the LLC. The LLC filed a lawsuit against the hospital's sole member (Catholic Healthcare Partners, Inc. or "CHP"), alleging breach of the non-competition agreement based on CHP's plans to build new medical offices for outpatient surgery services. CHP sought dismissal of the suit on the grounds the LLC did not have the corporate authority to bring the suit. The court reviewed the operating agreement and concluded that the LLC was not authorized to file suit because the decision did not receive the vote of a majority of the board of directors of the LLC as required for such a decision under the operating agreement. The LLC argued that it did not need a majority vote of the board of directors because the operating agreement permitted a member to authorize a suit based on the breach of another member. The court rejected this argument because CHP was not itself a member; rather it was the sole member of a member of the LLC. Finally, the court rejected the argument that a member could bring a derivative suit on behalf of the LLC under the derivative suit provisions of the Kentucky LLC act. The court pointed out that the derivative suit provisions of the Kentucky LLC statute may be varied in a written operating agreement. The court found the statutory provisions were overridden by the provisions of the LLC operating agreement requiring "any act" of the LLC to be authorized by a majority vote of the board of directors. The court, however, refused to dismiss the case even though it found it was not authorized, relying on a provision of the Kentucky LLC statute stating that lack of authority of a member or manager to file suit on behalf of an LLC may not be used as a defense to an action filed by the LLC.

***Community Bank v. Cooper***, No. Civ.A. 202CV251PA, 2006 WL 645404 (N.D. Miss. March 13, 2006). Both members of an LLC executed and furnished a resolution to the LLC's bank authorizing any manager or member to take various actions and stating that checks, drafts, or other withdrawal orders may be signed by either one of the members. The minority member alleged that he and a bank loan officer orally agreed to modify the resolution to limit the authority of the majority member to draw on funds from the LLC's line of credit. The LLC and minority member (who guaranteed the loan) argued they were not obligated to pay back the loan since the officer allowed the other member to draw on the line of credit after the alleged oral agreement. The court held that the oral modification was not effective. The resolution provided that it continued in effect until the bank was given express written notice of its rescission or modification, and there was no written notice of modification. Furthermore, the majority member was unaware of the agreement, and the court said that it was obvious that one member, especially a minority member, cannot unilaterally alter an agreement between the LLC and a third party without the consent of the other. Even assuming there was a modification of the resolution, the court stated that it would have no effect on the other loan documents, i.e., the promissory note, guaranties, and collateral documents.

***In re A-Z Electronics, LLC***, 350 B.R. 886 (Bankr. D. Idaho 2006) (holding bankrupt managing member of single member LLC had no authority to file Chapter 11 bankruptcy petition for LLC because interests of member and member's spouse in LLC had become property of their Chapter 7 estate and (relying on *In re Albright*) were subject to sole and exclusive authority of Chapter 7 trustee who was only one entitled to manage LLC and decide whether LLC would file bankruptcy).

***In re Delta Star Broadcasting, L.L.C.***, No. Civ.A. 05-2783, 2006 WL 285974 (E.D. La. Feb. 6, 2006). Three individuals each owned a 1/3 membership interest in a Louisiana LLC, and one of the members (Bruno) filed a voluntary Chapter 11 bankruptcy petition on behalf of the LLC. Bruno argued he was authorized to file the petition because his action was approved by two of the three members (Bruno and Treen). Treen's approval was evidenced by a consent signed by Treen the day before the bankruptcy filing. The third member (Starr) argued that Treen had transferred his membership interest to an entity controlled by Starr eleven days prior to the filing of the bankruptcy and that Treen's consent to the bankruptcy filing was thus ineffective. Starr further argued that the bankruptcy filing was ineffective even if Treen remained a member after the transfer of his interest because the bankruptcy filing was not approved at a properly-noticed meeting of the LLC's members. The bankruptcy court held that the filing was not authorized because it was not approved by a formal resolution at a meeting of the members. The district court held that the bankruptcy judge erred in finding the bankruptcy filing was not properly authorized. The court first discussed the effect of the transfer of Treen's membership interest and concluded that Treen retained his right to vote as a member after the transfer of his membership interest because the Louisiana LLC statute provides that the assignor remains a member unless and until the assignee is admitted as a member, which requires unanimous consent of the other members. The court next considered the validity of the authorization of the bankruptcy filing and concluded that an LLC's petition in bankruptcy must be authorized by a majority of the members unless the articles of organization or operating agreement provide otherwise. The court relied upon the statutory provision requiring a majority of the members to authorize "the sale, exchange, lease, mortgage, pledge, or transfer of all or substantially all of the assets of the limited liability company." The court noted that neither the statute nor the LLC's governing documents contained any express requirement that member decisions be made by resolution or at formal meetings. The court noted the paucity of case law interpreting the Louisiana LLC statute but pointed to secondary authorities emphasizing the flexibility and informality of the LLC as compared to a traditional business corporation. The court concluded the Louisiana legislature could easily have imposed more formal decision making procedures on LLCs if it had intended to impose such requirements. The court observed that the legislature had done just that in providing for removal of a manager only "at a meeting expressly called for that purpose." According to the court, that provision suggested that the omission of formal requirements elsewhere in the statute was intentional.

***Lakes of Gum Cove Hunting & Fishing L.L.C. v. Weeks Marine, Inc.***, 154 Fed.Appx. 949, 2005 WL 2008165 (5<sup>th</sup> Cir. 2005). In this trespass case stemming from the deposit of dredged material on an LLC's property, the main issue at trial was whether the LLC consented to the defendants' entry onto the LLC's property. One of the LLC's two members signed a right of entry, and the trial court concluded the right of entry did not constitute an encumbrance on the property so as to remove it from the scope of the member's power to bind the LLC under the Louisiana LLC statute, which provides that an individual member can bind the LLC for all matters "in the ordinary course of business other than the alienation, lease, or encumbrance of its immovables" unless otherwise provided in the articles of organization. The court of appeals concluded the evidence established that both members consented to the defendants' entry on the property, making it unnecessary to determine whether the right of entry was an encumbrance under Louisiana law.

***In re Tri-River Trading, LLC (DeBold v. Case)***, 329 B.R. 252 (8<sup>th</sup> Cir. BAP 2005). A managing member had no authority to unilaterally allocate the settlement proceeds of a lawsuit in which the manager and the LLC were plaintiffs because the Missouri LLC act requires a majority of the disinterested members to approve a transaction involving such a conflict of interest. In addition, the operating agreement conferred unilateral authority on the manager only with respect to decisions in the ordinary course of business. The operating agreement required consent of both members for decisions outside the ordinary course of business, and the court characterized the settlement of the LLC's claims of over \$2.6 million in alleged damages to be outside the ordinary course.

***Merrell-Benco Agency, LLC v. HSBC Bank USA***, 799 N.Y.S.2d 590 (N.Y. A.D. 3 Dept. 2005) (stating that lender may assume, in absence of operating agreement, that member of member-managed LLC has authority to bind LLC, and holding member of member-managed LLC clothed manager with apparent authority to bind LLC on loan transaction where member permitted manager to hold himself out to world as president/member/managing member or owner of the LLC insurance agency and allowed manager to file official documents for LLC and become sole signatory on account).

***Valley/50th Ave., L.L.C. v. Stewart***, 128 Wash.App. 1014, 2005 WL 1502021 (Wash. App. June 21, 2005). An LLC's sole member executed a deed of trust on LLC property in favor of a law firm to secure a note for outstanding legal fees owed the firm by the member on other matters. The firm had formed the LLC for the member two years prior to execution of the deed of trust. Shortly after the LLC was formed, the member conveyed 98% of the economic units

to his sons, but the firm claimed it was unaware of this transfer. When the law firm sought to foreclose on the LLC's property, the LLC challenged the enforceability of the deed of trust on various grounds. The court held that the member's signature was sufficient to bind the LLC, even though the operating agreement specified no member had the power or authority to bind the LLC unless authorized by the manager or the agreement, because the member was also the manager. The court rejected the argument that the defective acknowledgment, which did not state that the member was signing in a representative capacity and did not comply with the requirements for a signature in a representative capacity, precluded the firm from enforcing the deed of trust. The court also held the manager had actual authority to sign the deed of trust although the operating agreement limited the management powers of the manager to those "customary or incident to the management of the Company's business" and the property was encumbered to secure the member's personal debt. The court pointed out that the operating agreement gave the manager the authority to "encumber...any real or personal property of the Company." The court acknowledged that this paragraph was subject to a provision requiring the approval of the "holders of a Majority Interest" but stated that the member's sons, to whom the member transferred 98% of the economic units in the LLC shortly after the LLC was formed, did not qualify as majority interest holders because the member conveyed each of them 49% of his economic interest and retained all management rights. The court also pointed out that the member did not sell the property, but merely granted the firm a security interest in the property.

***Lenticular Europe, LLC v. Cunnally***, 693 N.W.2d 302 (Wis. App. 2005). The one-third minority member of a two-member LLC brought an action on behalf of the LLC against the sole shareholder and president of the two-thirds member. The defendant claimed the action was not authorized because the operating agreement required more than 50% in interest to decide a matter connected with the business of the LLC. The court interpreted the Wisconsin LLC act to require that an operating agreement must specifically override the statutory default rule excluding from the vote required to authorize a proposed action the vote of a member with an interest in the outcome of the action. Thus, the minority member was authorized to bring the action because the two-thirds owner had an interest in the outcome adverse to the LLC at the time the action was commenced, and the operating agreement's general provision requiring more than 50% in interest to decide any matter did not specifically override the statute in this regard.

***Securities and Exchange Comm'n v. Capital Consultants, LLC***, 397 F.3d 733 (9th Cir. 2005) (holding interpretation of legal effect of LLC operating agreements and related documents regarding authority of manager to transfer LLC properties was issue of law for court and not proper subject of expert testimony and observing that agreements which appeared to require member's approval to manager's sale of properties did not necessarily confer authority on the members to sell the properties because the agreements provided that a non-manager member had no authority to act as an agent for the LLCs).

***Gowin v. Granite Depot, L.L.C.***, No. 22828, 2005 WL 900307 (Va. Cir. Ct. April 1, 2005) (reconsidering prior finding that LLC manager waived LLC's right to insist on payment of capital contribution by member in light of statutory provisions requiring consent of all members to compromise member's obligation to contribute and permitting members to take action by written consent, noting articles of organization and operating agreement did not vary statutory provisions and record contained no evidence of written consents).

***Innovare Logistics, L.L.C. v. Parish National Bank***, 890 So.2d 643 (La. App. 2004) (holding manager who unilaterally signed resolution removing other manager and directed banks to remove other manager as authorized signatory acted in contravention of LLC operating agreement, and manager who was not properly removed retained all powers under LLC deposit agreement with bank to authorize transfers from LLC account).

***Badger State Bank v. Taylor***, 688 N.W.2d 439 (Wis. 2004). The plaintiff bank made loans to a corporation owned by Al Vogt and sought to set aside as a fraudulent transfer the cancellation by the corporation of certain indebtedness owed to the corporation. The Taylors were indebted to the corporation, and an LLC in which Vogt was a member was indebted to the Taylors. Vogt and the Taylors agreed to cancel the receivables, and the bank sought to set aside the cancellation of the receivable to the corporation on the basis that the corporation was insolvent and did not receive reasonably equivalent value. The Taylors argued that they dealt with Vogt personally and that they did not know that he was acting as an agent for any other entity. The court stated that under agency principals, Vogt was acting on behalf of the corporation and the LLC even if the principals were undisclosed. Vogt, the corporation, and the LLC were separate legal entities, and Vogt's actions inured to the benefit of and were binding upon the entities. The court cited provisions of the Wisconsin LLC act stating that a member is an agent of the LLC for the purpose of its business and the acts of a member bind the LLC. Because the transactions involved separate entities, the forgiveness of the indebtedness

to the corporation in exchange for the forgiveness of the LLC's indebtedness did not result in any benefit to the corporation and was made without receiving reasonably equivalent value.

***Old Saybrook Golf v. Plant***, No. CV044000240S, 2004 WL 2166322 (Conn. Super. Sept. 3, 2004) (finding member's action removing managers (who had violated operating agreement by entering into "special consent events" without member's approval) were rightful and consistent with terms of the agreement, and enjoining managers who had been removed from acting as managers and from interfering with newly appointed managers of the LLC).

***Capital Salvage v. Chicago Title Company***, No. B167757, 2004 WL 1753213 (Cal. App. 2004) (holding escrow agent had no duty to verify LLC manager's authority to execute escrow documents).

***Chase Manhattan Bank v. Iridium Africa Corporation***, 324 F.Supp.2d 540 (D. Del. 2004) (holding substantial grounds for difference of opinion existed with respect to binding effect of LLC Assistant Secretary's certificate presented to lender and thus interlocutory appeal was warranted).

***Rollar Construction and Demolition, Inc. v. Granite Rock Associates, LLC***, 2004 WL 1615922 (Conn. Super. June 25, 2004); ***Gretchyn v. Granite Rock Associates, LLC***, 2004 WL 1615929 (Conn. Super. June 25, 2004) (finding LLC member had authority to sign promissory note on behalf of LLC).

***BP Land & Cattle LLC v. Balcom & Moe, Inc.***, 86 P.3d 788 (Wash. App. 2004). An LLC entered a contract to sell potatoes, and the buyer issued a check to a member of the LLC. The member deposited the check into his personal account and subsequently declared bankruptcy. The court looked to partnership law for guidance on interpretation of the Washington LLC act regarding authority of the LLC member as agent of the LLC and concluded that fact issues precluded summary judgment in favor of the buyer. Specifically, the court concluded there were fact issues regarding the buyer's reasonable reliance on the member's authority to accept payment on a debt to the LLC by a check made out to the member.

***Kuhn v. Tumminelli***, 841 A.2d 496 (N.J. App. 2004). The court concluded that an LLC member who embezzled funds by cashing customer checks was authorized under the New Jersey LLC act to endorse checks. The court distinguished the partnership context, noting that limitations on the authority of partners under the Uniform Partnership Act were not included in the broadly worded provisions of the LLC statute. Furthermore, even if the member did not have actual authority, the court concluded the member had apparent authority as a member and general manager.

***Chase Manhattan Bank v. Iridium Africa Corp.***, 307 F.Supp.2d 608 (D.Del. 2004) (finding representations in LLC assistant secretary's certificate to bank were made on behalf of LLC and its members, and LLC members were thus estopped from denying representations in certificate that LLC agreement attached to certificate was "true and correct").

***Triple Rock, LLC v. Rainey***, No. M2000-01115-COA-R3-CV, 2003 WL 21338702 (Tenn.Ct.App. June 10, 2003) (stating that member of member-managed LLC engaged in real estate business had at least apparent authority to deal with disbursement of commissions).

***Apple Glen Crossing, LLC v. Trademark Retail, Inc.***, 784 N.E.2d 484 (Ind. 2003) (stating that a principal who honors an obligation wrongfully incurred by its agent may nevertheless enforce its remedies against the agent for the wrongful action, but holding that "change orders" approved by LLC manager did not constitute "Major Decisions" requiring unanimous consent of members under LLC operating agreement and thus change orders were not a basis for the majority member to remove the minority member as manager).

***Connecticut Car Rental, Inc. v. Prime One Capital Co., LLC***, 247 F.Supp.2d 158 (D.Conn. 2003) (holding that member had actual authority to assign car lease agreements pursuant to the LLC formation agreement (under which the assignments were not "major decisions"), and that, alternatively, even assuming actual authority was lacking, the assignments were binding under the Washington LLC act (as acts of a member of a member-managed LLC apparently acting in the usual way of business) and common law apparent authority).

***TIC Holdings, LLC v. HR Software Acquisitions Group, Inc.***, 750 N.Y.S.2d 425 (N.Y. Sup. 2002), *aff'd*, 2003 WL 116115 (N.Y. A.D. 1 Dept., Jan. 13, 2003) (concluding LLC manager did not have authority under New York

LLC act or operating agreement to execute agreement obligating LLC to transfer assets that constituted all or substantially all of the LLC's assets inasmuch as operating agreement's broad grant of authority was "subject ... to the requirements of applicable law" and the failure of the other members to object did not satisfy the requisite "affirmative vote" of a majority in interest of the members).

***Cooper v. Creative Homes of Distinction, L.L.C.***, No. COA01-1138, 2002 WL 2004298 (N.C. App. Sept. 3, 2002). After the individual who was manager of an LLC was terminated as manager, the LLC designated a new manager, but the individual continued to operate the LLC with the knowledge of the members, who took no steps to stop the individual from doing so. The court held under these circumstances that the terminated manager was acting with apparent authority.

***EZ Auto, L.L.C. v. H.M. Jr. Auto Sales***, No. 04-01-00820-CV, 2002 WL 1758315 (Tex.App. July 31, 2002). The plaintiff sought to hold an LLC liable on a transaction by the manager (Marks) on the LLC's behalf. The LLC argued that Marks had been removed as manager at a meeting of the members and lacked authority to bind the LLC. The LLC was designated as manager-managed in its articles of organization and Marks was named the initial manager in the articles of organization. The court reviewed the statutory provisions dealing with actual and apparent authority of managers of manager-managed LLCs as well as the provisions of the articles of organization and regulations of the LLC and concluded that the evidence conclusively established that Marks was the initial manager with actual authority to act for the LLC. The question was whether Marks continued to have actual authority at the time in question. The court noted that there was evidence that proper notice required under the regulations had not been given to all members of the meeting at which Marks was removed. The court stated that the plaintiff did not have standing to directly challenge the irregularity in the meeting, but the failure to give notice of the meeting to Marks, who was also a member of the LLC, did impact the analysis of his authority. The court stated that an agent has actual authority where a principal intentionally confers it or intentionally or negligently allows the agent to believe he has authority. Since the evidence did not show that Marks was dispossessed of the belief that he was authorized to continue to act on the LLC's behalf, he continued to have actual authority to bind the LLC.

***Taghipour v. Jerez***, 52 P.3d 1252 (Utah 2002). The Utah Supreme Court affirmed the holding of the court of appeals that a loan agreement signed by the manager of an LLC was binding on the LLC under the provisions of the Utah LLC act in effect at the time. Although the loan agreement was signed by the manager without approval of the members as required by the operating agreement, the court held that the loan agreement was binding on the LLC because the Utah act provided: "Instruments and documents providing for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers." The court concluded this specific provision controlled over a more general statutory provision stating that a manager has authority to bind the LLC unless otherwise provided in the articles of organization or operating agreement. The manager was identified as such in the articles of organization, and, though the operating agreement limited his authority, the lender did not have a due diligence obligation to determine the manager's authority and was not responsible for the fact that the manager absconded with the funds.

***Ward v. Hornik***, No. 02.944, 2002 WL 1199249 (E.D. Pa. June 3, 2002)(interpreting Pennsylvania LLC act and quorum and voting provisions of LLC operating agreement and concluding that suit brought on behalf of LLC was not authorized).

***Construction and Environmental Management, LLC v. R & R Landholding, LLC***, 746 So.2d 817 (La.App. 1999). This case involved a dispute as to the authority of Stephen Bandi to obligate R & R Landholding, LLC ("R & R") on certain transactions. Michael and Darlene Reed owned 50% of R & R. The other 50% of R & R was owned by another LLC, Regatta Investment Group, LLC ("Regatta"). Bandi was the managing member of Regatta. Regatta also owned a 50% interest in Construction and Environmental Management, LLC ("CEM"), which was the general contractor for R & R's project to renovate an apartment complex. The dispute involved Bandi's authority to approve change orders and borrowing on behalf of R & R. The Reeds claimed that Bandi was not the managing member of R & R and that, in any event, all decisions required an oral or written vote of a majority of all members. The court found that there were no such votes taken at any time, no meetings held, and no minutes recorded. Michael Reed testified that he left decisions regarding the construction project to Bandi. The Reeds did not object to the work performed. Based on such evidence, the court refused to disturb the trial court's finding that Bandi had actual or apparent authority to approve the change orders. In the course of reaching this conclusion, the appeals court dismissed R & R's argument that the Louisiana LLC statute's interested member/manager provision nullified Bandi's execution of the change orders to CEM. While the trial

court found that Bandi had authority to obligate R & R on the change orders, it concluded that Bandi did not have authority to obligate R & R on a \$32,000 loan. There was no testimony that decisions regarding financial obligations were delegated to Bandi; thus, the appeals court upheld this finding as well.

*J.M. Equipment and Transportation, Inc. v. Gemstone, L.L.C.*, No. CV9662031, 1998 WL 573255 (Conn. Super. Aug. 25, 1998). The plaintiff relied upon the agency power of an LLC member to bind the LLC to the plaintiff for parts and labor in connection with the repair of a bulldozer. The charges in question were incurred at the request of one member of a two member LLC. The court relied upon the provisions of the Connecticut LLC act that make members of an LLC agents of the LLC for any act apparently carrying on in the usual way the business of the LLC absent a lack of authority known to the third party. The court examined the facts surrounding the transaction and concluded that the member had apparent authority to bind the LLC.

*In re D&B Countryside, L.L.C. (D&B Countryside, L.L.C. v. Newell)*, Case No. 95-11946-SSM, Adv. Proceeding No. 96-1110 (February 24, 1997). This opinion is unpublished and is not available on Westlaw or Lexis. The issue in the proceeding was the authority or apparent authority of LLC managers to execute deeds of trust against the LLC's assets and obligate the LLC for repayment of certain loans to the managers. Robert and Marilyn DeLuca were members and managers of D&B Countryside, L.L.C., a Virginia LLC. Newell loaned the DeLucas substantial amounts of money secured by various deeds of trust on property owned by the LLC. Eventually, the DeLucas also executed a note on behalf of the LLC. The deeds of trust and note were executed by the DeLucas without the consent of the other members of the LLC. The court examined the operating agreement of the LLC and concluded that it did not confer actual authority on the DeLucas to execute the deeds of trust or the note. The court then considered whether the DeLucas had apparent authority to bind the LLC. Relying on common law principles and provisions of the Virginia LLC act, the court concluded that the DeLucas did not have apparent authority to execute the deeds of trust or the note.

#### **U. Admission of Members**

*Bobrow v. Liebman*, No. 061132/04, 2007 WL 1139417 (N.Y. Sup. April 16, 2007) (discussing New York law regarding admission to membership in dispute regarding plaintiff's status as member and amount of plaintiff's membership interest).

*ConnectU LLC v. Zuckerberg*, 482 F.Supp.2d 3 (D. Mass. 2007). The court analyzed the membership of a Delaware LLC in order to determine whether diversity jurisdiction existed and concluded that the LLC plaintiff had no members for purposes of diversity jurisdiction at the time the suit was filed; therefore, the LLC was "stateless" and destroyed diversity jurisdiction. In the course of its opinion, the court engaged in a lengthy analysis and discussion of the provisions of the Delaware LLC Act relating to formation of an LLC and admission of members. Because an LLC has the citizenship of each of its members, and one of the defendants was a citizen of New York, a principal focus of the court's analysis was whether a New York citizen, who was admitted as a member under the LLC's retroactive operating agreement entered eleven months after the complaint was filed and more than a year after the LLC was formed, was a member of the LLC when the suit was filed for purposes of determining diversity jurisdiction. Although the court acknowledged that the Delaware LLC Act permits an LLC agreement to have retroactive effect (i.e., the statute permits an LLC agreement to be entered after the filing of a certificate of formation and to be effective as of the formation of the LLC), the court concluded that the analysis must turn on the facts as they existed at the time the complaint was filed without reference to the later executed operating agreement. Thus, the court proceeded to determine who, if anyone, was a member of the LLC under Delaware law at the time the suit was filed on September 2, 2004. The court looked to the statutory definition of a "member" and the provisions addressing admission of members in connection with the formation of an LLC. The court stated that the documentary evidence made clear, and the parties did not appear to dispute, that no one became a member of the LLC at the time the certificate of formation was filed on April 6, 2004. The court observed that this was "perfectly acceptable" under Delaware law and did not in any way implicate the validity of the LLC. The court acknowledged that the individuals named in the subsequently executed operating agreement eventually became members in connection with the formation of the LLC, but the court's concern was with what occurred prior to the time the suit was filed. The court stressed that "there simply is no requirement under Delaware law that there be members of an LLC at formation" and concluded that there were none for purposes of the diversity jurisdiction question. Moving on to consider membership subsequent to formation of the LLC, the court examined whether the statutory conditions for admission of any members had been met at the time the suit was filed. The court stated that, since there were no members of the LLC at formation, there were no members to consent to the admission of a member, and there were no records reflecting the admission of members before the date the complaint was filed. The court

examined evidence of the parties' intentions and course of conduct and found that the record did not establish that the LLC had any members on the date the complaint was filed. The testimony of the individuals who ultimately became members under the operating agreement reflected that they gave little, if any, thought to who the members were at the time the LLC was formed because they were concentrating on getting the business going. The court refused to consider tax returns identifying the members since they were prepared after the suit was filed. The court also found unpersuasive two documents that identified members of the LLC prior to the date the suit was filed. One of the documents was a bank signature card, and it was unclear who printed the word "member" on the card and whether it was there when the card was signed by those identified as members. The other document was an application to do business in Connecticut that was prepared and signed by someone other than the members identified. (The court's opinion referred to testimony that indicated there may have been an understanding at the time of formation regarding who was a member and who was not, but the court apparently found the intentions too vague to warrant a conclusion that the LLC had members at the time.) Though the court commented that the parties had struggled valiantly to establish that the LLC had members on the date the complaint was filed, the court concluded that, "in the snapshot of Delaware law, there were none."

*Man Choi Chiu v. Chiu*, 832 N.Y.S.2d 89 (N.Y. A.D. 2 Dept. 2007) (reversing lower court's determination that defendant was never member of LLC, noting opinion letter of LLC's counsel attesting to valid and binding nature of loan documents signed by defendant as member and stating determination of membership should have been based primarily on LLC's own records which included tax returns listing defendant as member with 25% ownership).

*Moise v. Moise*, 956 So.2d 9 (La. App. 2007) (concluding that wife of LLC's member was manager, not member, of LLC despite being identified on lease as member and despite sharing in profits inasmuch as equal share in profits did not necessarily indicate membership because profits of LLC are community property).

*In re Bayou Group, L.L.C., (Adams v. Marwil)*, 363 B.R. 674 (S.D. N.Y. 2007). Ten affiliated hedge fund LLCs (consisting of six Delaware LLCs, three New York LLCs, and one Connecticut LLC) were operated by their principals as a fraudulent Ponzi scheme, and a group of creditors of the LLCs filed a lawsuit in federal court seeking appointment of a "federal equity receiver" for the LLCs. The district court appointed a receiver pursuant to its powers under Section 10b of the Exchange Act and Rule 10b-5 and its inherent equity power. The order appointed Jeff Marwil as "non-bankruptcy federal equity receiver and exclusive managing member" of the LLCs. Marwil ultimately filed bankruptcy petitions for the LLCs and signed each petition as "sole managing member." The United States trustee asked the bankruptcy court to appoint a Chapter 11 trustee, and the bankruptcy court denied the request. The district court affirmed the bankruptcy court's denial because the court concluded that Marwil was not merely a custodian or receiver, but was the new exclusive managing member of the LLCs. The court stated that the order appointing Marwil was made pursuant to federal securities laws and its inherent equity power, and the corporate management powers conferred were not merely derivative of the receivership appointment. Thus, his corporate management role did not cease when he caused the LLCs to file bankruptcy. The court noted that it could have appointed Marwil as manager pursuant to federal receivership statutes alone, and, in that case, the corporate management powers would have ceased when the LLCs filed for bankruptcy. The court, however, stressed that it appointed Marwil as manager pursuant to federal securities laws and the court's inherent equity authority. In view of the criminal violations of the federal securities laws committed by the principals of the LLCs, the court concluded that both the federal securities laws and the court's equity jurisdiction provided a basis for appointment of Marwil as managing member. The court commented that the state law of Delaware, New York, and Connecticut would have provided a basis to appoint Marwil as a receiver to manage the LLCs, but the court noted that the state law issues were not briefed and that the court did not appoint Marwil pursuant to state law. The court concluded that Marwil, as managing member of the LLCs, could act as debtor-in-possession, and the court observed that the proceedings exposed a loophole in the Bankruptcy Code insofar as the creditors had essentially been able to appoint their own bankruptcy "trustee" by having a district judge appoint corporate governance of the LLCs prior to filing of any bankruptcy.

*Estate of E.A. Collins v. Geist*, 153 P.3d 1167 (Idaho 2007). Two individuals, Michael Collins and Russell Purcell, formed an Idaho LLC. The articles of organization stated that management was vested in the managers and listed each as a manager. Purcell testified that he had nothing further to do with the LLC after signing the articles of organization and that he was not a member. Michael Collins later amended the articles of organization to change the name of the LLC, remove Purcell as a manager, and add Michael's father as a manager. A corporation owned by Michael's father transferred various improved and unimproved lots and a model home to the LLC, and the LLC's sole purpose at that point was to develop and sell that property. After Michael's father died, his estate sought to set aside deeds executed by Michael on behalf of the LLC conveying various lots. The estate contended there was no operating

agreement, but the court pointed out that, under Idaho law, an operating agreement is any agreement, written or oral, among all the members as to the conduct of the business and affairs of the LLC. The court concluded that Michael was a member of the LLC, even though he did not provide any capital (i.e., money or assets) to the LLC, because his use of credit to obtain construction loans was sufficient consideration for issuance of an LLC interest under the Idaho LLC statute. Since Purcell did not provide any consideration to the LLC and testified that he had no further involvement after signing the articles of organization, the court concluded that Michael was the sole member of the LLC and that there was an operating agreement if Michael was in agreement regarding the business and affairs of the LLC. The court stated that Michael obviously agreed that he would conduct the business and affairs of the LLC. Thus, there was an operating agreement, and Michael qualified as a manager. After Michael amended the articles of organization to remove Purcell as a manager and add his father, it was unclear whether his father became a member. Assuming his father became a member, the court concluded that Michael and his father agreed that Michael would manage the LLC. Although Michael testified in his deposition that they had no operating agreement, the court accepted Michael's explanation that he thought the question referred to a written operating agreement. The court concluded that the conduct of Michael and his father clearly showed that they had agreed that Michael would conduct the business and affairs of the LLC, and Michael thus qualified as a manager.

*Matthews v. D'Amore*, No. 05AP-1318, 2006 WL 3095817 (Ohio App. Nov. 2, 2006). In this dispute over the membership of an Ohio LLC, the court concluded that the members were determined by the operating agreement rather than the articles of organization and appointment of statutory agent. McDonald and Crow met on many occasions and agreed to form an LLC to develop real property owned by Crow. Crow prepared articles of organization and an appointment of statutory agent using preprinted forms of the Secretary of State. Three other individuals (the defendants) signed and filed these documents. The appointment of agent appointed Crow as agent and stated that the defendants as the "undersigned," were "at least a majority of the members" of the LLC. The pre-printed word "member" appeared beneath the signatures of each of the defendants, and the pre-printed instructions stated that "[a]n original appointment of agent form must be signed by at least a majority of the members of the limited liability company." McDonald and Crow signed an operating agreement as members, and a separate agreement that was incorporated by reference in the operating agreement detailed the duties and responsibilities of Crow and McDonald as members and set forth how the profits would be distributed to Crow and McDonald. These agreements did not list the defendants as members and were not signed by the defendants. Several years after the LLC was formed, Crow transferred his interest in the LLC to a trust. Crow died a few months later. After Crow died, the defendants' attorney filed a statutory agent update naming the defendants' attorney as the new statutory agent of the LLC. The defendants' attorney also wrote the LLC's attorney asserting that the defendants were the only members of the LLC. McDonald claimed that the defendants' only role was to procure tenants (for the property contributed by Crow to the LLC) in exchange for a commission. The court of appeals upheld the trial court's summary judgment in favor of McDonald and the trustee of Crow's trust on the issue of the membership of the LLC. The court relied upon the statutory definition of a "member" as "a person whose name appears on the records of the limited liability company as the owner of a membership interest in the company" and "membership interest" as "a member's share of the profits and losses of a limited liability company and the right to receive distributions from that company." The court pointed out that the only persons whose names appeared in the LLC's records as sharing in the LLC's profits and losses and having a right to receive distributions were Crow and McDonald. The defendants argued that the articles of organization and appointment of agent were LLC records that at least established a genuine issue of material fact regarding the identity of the members, but the court pointed out that these documents did not state that the defendants had a right to share in the LLC's profits or losses or receive distributions. Furthermore, the court pointed out that the statute does not require that the persons forming an LLC be members, but merely requires the person who signs and files the articles of organization to be an "authorized representative" of the LLC. The court also noted that the forms used to form the LLC were out of date and that the appointment of agent was not required to be signed by a majority of the members at the time the LLC was formed. In addition, the court found unreasonable the defendants' contention that neither McDonald, who contributed \$25,000 cash, nor Crow, who contributed a \$7 million piece of real estate, would be considered members of the LLC. The court also relied upon and discussed two previous opinions in which it had looked to the operating agreement rather than the articles of organization to determine the membership in an LLC and the rights, responsibilities, and liabilities of members.

*In re Modanlo (Modanlo v. Mead)*, Civil Action No. DKC 2006-1168, 2006 WL 4486537 (D. Md. Oct. 26, 2006). The sole member of a Delaware LLC filed bankruptcy, and the trustee took several steps in order to take control of the LLC and a corporation owned by the LLC. The steps taken by the trustee in this regard included a "Written Consent of and Agreement Regarding Admission of Personal Representative of Last Remaining Member" under Section 18-806 of the Delaware LLC Act. In that document, the trustee consented to the continuation of the LLC effective as



of the date of the occurrence of an event described in Section 18-801(a)(4) of the Delaware LLC Act (i.e., the bankruptcy of the last remaining member) and, as personal representative of the last remaining member, agreed to the admission of the trustee as a member as of that date. The court agreed with the trustee that the LLC was dissolved upon the bankruptcy of the sole member because, under Section 18-304(1) of the Delaware LLC Act, a person ceases to be a member upon the person's bankruptcy, and, under Section 18-801(a), an LLC is dissolved if it has no remaining members. Under Section 18-801(a)(4), there is an exception to dissolution upon the termination of the last remaining member if a successor member is appointed within 90 days, but the trustee was not appointed until more than 90 days after the filing of the member's bankruptcy; therefore, this exception was not available to the trustee. The LLC was resuscitated under Section 18-806, however, which permits the personal representative of the last remaining member of an LLC to avoid the dissolution and winding up of an LLC by consenting in writing to the continuation of the LLC and agreeing to become a member of the LLC. The court found that the bankruptcy trustee's consent met these requirements. The court analyzed the definition of a "personal representative" under the Delaware LLC Act and concluded that a bankruptcy trustee falls within the definition. Section 18-101(13) defines a "personal representative" broadly to include "as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof...." Because the scope of the term "other legal representative" is not clear on its face, the court looked to decisions analyzing the same language in other contexts and examined the policy rationale behind other sections of the Delaware LLC Act. The court concluded that the Delaware Supreme Court would likely hold that a bankruptcy trustee meets the statutory definition of a "personal representative." The court rejected the debtor's argument that the bankruptcy estate held only an economic interest and that the trustee could not become a member or participate in the LLC's management. The court stated that the debtor's argument ignored the effect of Section 18-806, and the court distinguished other Delaware cases in which the bankruptcy of a member occurred in the context of an LLC that had other remaining members.

*In re Grupo Dos Chiles, LLC*, Civil Action No. 1447-N, 2006 WL 2507044 (Del. Ch. Aug. 17, 2006). The court awarded attorney's fees in an LLC dispute based on the bad faith exception to the American Rule. The court concluded that the respondents, Martinez and her son Rivera, acted in bad faith in arguing that Rivera, who was named as the initial member in the certificate of formation, was the sole member of the LLC at all relevant times. Martinez had previously stated on multiple occasions (in deposition testimony in the Delaware litigation and in pleadings and requests for admission in related litigation in Virginia), that she and the petitioner were the members of the LLC. Only just before trial did Martinez and Rivera squarely begin to rely on the certificate of formation for the proposition that Rivera was the sole member of the LLC. The court recognized that there are few cases addressing LLCs and that there was no controlling precedent on the question of who was a member under the facts in this case. The court concluded, however, that Martinez and Rivera were in bad faith because their position was so strained and wholly at odds with the operative reality as to fall outside the bounds of good faith advocacy, and they could not in good faith aver, under oath, facts directly contradictory to what they had averred in the Virginia litigation. The court concluded that bad faith was not established with respect to the argument that Martinez, acting alone, had authority to return the LLC to good standing in Delaware.

*Friedman v. Superior Court*, No. B188701, 2006 WL 2497981 (Cal. App. 2 Dist. Aug. 29, 2006) (holding limited partner in family limited partnership was not client of attorneys working for affiliated LLCs, and therefore was not holder of attorney-client privilege, because admission of member of LLC requires consent of all members and status of member cannot be conferred by court or other parties without consent of members).

*611, LLC v. U.S. Lubes, LLC*, Civil No. CCB-05-3417, 2006 WL 2038615 (D. Md. July 18, 2006) (examining conduct of parties and operating agreement provisions on substitute member and finding reasonable grounds to conclude that party was admitted as substitute member).

*In the Matter of Estate of Davis*, No. 05-0230, 2006 WL 1278733 (Iowa App. May 10, 2006) (reviewing provisions of LLC statute and operating agreement regarding admission of member and finding no evidence LLC's sole member consented to admit individual who claimed to have become co-member and that references to individual as "owner" in letter and credit application did not create fact issue because ownership does not equate to membership).

*Bhana v. Patel*, No. Civ.A. 3:05-CV-585BS, 2006 WL 1050519 (S.D. Miss. April 20, 2006) (finding plaintiff was member because LLC agreement clearly reflected plaintiff's status as member and stating that failure to make initial capital contribution contemplated in agreement had no bearing on status as member).

***In re Delta Star Broadcasting, L.L.C.***, No. Civ.A. 05-2783, 2006 WL 285974 (E.D. La. Feb. 6, 2006). Three individuals each owned a 1/3 membership interest in a Louisiana LLC, and one of the members (Bruno) filed a voluntary Chapter 11 bankruptcy petition on behalf of the LLC. Bruno argued he was authorized to file the petition because his action was approved by two of the three members (Bruno and Treen) based on a consent signed by Treen the day before the bankruptcy filing. The third member (Starr) argued that Treen had transferred his membership interest to an entity controlled by Starr eleven days prior to the filing of the bankruptcy and that Treen's consent to the bankruptcy filing was thus ineffective. Starr further argued that the bankruptcy filing was ineffective even if Treen remained a member after the transfer of his interest because the bankruptcy filing was not approved at a properly-noticed meeting of the LLC's members. The court first discussed the effect of the transfer of Treen's membership interest and pointed out that the Louisiana LLC statute provides that the assignee of a membership interest is not entitled to exercise the rights of a member until admitted by unanimous consent of the other members. Under the statute, the assignor member remains a member unless and until the assignee becomes a member. Starr argued that, because of his control of the assignee, it was not really a "new" member and was entitled to exercise the membership rights associated with the membership interest transferred. Starr also argued that if the entity that was the assignee was not entitled to exercise the membership rights, Starr was entitled to do so when the entity later transferred the interest to him. The court rejected these arguments and concluded Treen retained his membership, including his right to vote, because the entity to which Treen assigned his interest was not admitted as a member. The court did not need to reach the issue of whether Starr later acquired Treen's membership rights when the entity transferred the interest to Starr because that transfer did not occur until after the bankruptcy filing. Ultimately, the court determined that the action taken by Bruno and Treen was sufficient to authorize the bankruptcy filing.

***Steele v. Rosenfeld, LLC***, 936 So.2d 488 (Ala. 2005). Elkins agreed to sell the second and third floors of a building to Steele and Glover, respectively. Steele paid \$20,000 of the \$70,000 price for the third floor, and Glover paid the entire \$40,000 price for the second floor. Elkins and Glover formed an LLC to hold title to the building after they received legal advice that it was impossible to do what they intended without a condominium declaration and concluded it was not feasible to do so. The LLC was formed with Elkins owning 2/3 of the membership and Glover owning 1/3 of the membership. Elkins presented Steele with a promissory note for the purchase of a 1/3 interest, but Steele never signed the note. Steele paid Elkins \$37,775 of the \$70,000 due under their oral arrangement for the purchase of the third floor, but Steele's name did not appear on the articles of organization or operating agreement. The building was destroyed by fire, and the LLC received the proceeds of two insurance policies. Subsequently, the LLC sold the building. Elkins and Steele could not agree on the resolution of Steele's rights, and the LLC and Elkins filed a declaratory judgment action to determine the interests of the parties in the LLC and the appropriate disbursement of the insurance and sale proceeds. Steele argued that he obtained a financial interest in the LLC when it was formed, and that he had a contract to obtain full membership, i.e., governance rights, when he completed his payments to Elkins. The court rejected Steele's argument that he acquired any part of an interest, either financial or governance, in the absence of written consent of the other members, relying on the Alabama LLC statute and the LLC's articles of organization and operating agreement, which all required written consent to the admission of a member. The court also rejected Steele's argument that he was entitled to 1/3 of the insurance proceeds on an equitable conversion theory because an LLC interest is personal property and the doctrine applies only to real estate contracts that are specifically enforceable. In addition, the court rejected Steele's argument that Elkins should be estopped to deny Steele's status as a member. The court relied upon Alabama partnership case law rejecting estoppel as a basis to allege or deny partner status as among the parties themselves.

***Holdeman v. Epperson***, No. Civ. A. 2004-CA-49, 2005 WL 1714210 (Ohio App. July 22, 2005) (holding executrix of deceased member was entitled to exercise all rights possessed by deceased member prior to his death under Ohio LLC act provision that states "[i]f a member who is an individual dies or is adjudged an incompetent, his executor, administrator, guardian or other legal representative may exercise all of his rights as a member for the purpose of settling the estate or administering his property, including any authority that he had to give an assignee the right to become a member," although operating agreement provided successor in interest of deceased member would succeed to interest of member but would not become member unless admitted in accordance with agreement).

***Tessmer v. Steinberg***, No. 251474, 2005 WL 736514 (Mich. App. March 31, 2005) (concluding individual who failed to pay initial capital contribution was nevertheless a member because he signed the initial operating agreement and the Michigan LLC statute states that a person becomes a member upon formation by signing the initial operating agreement).

**Schott v. Animagic Studios, LLC**, No. E2003-02287-COA-R3CV, 2004 WL 1813280 (Tenn. Ct. App. Aug. 16, 2004). The plaintiff asserted that he was a member of the defendant LLC and was owed salary and commissions by the LLC. The plaintiff sought a receiver to wind up and liquidate the LLC. The court reviewed the evidence regarding the plaintiff's negotiations with the LLC and upheld the trial court's finding that the plaintiff was not a member of the LLC because there was no agreement reached on the essential terms. The court also upheld the trial court's finding that the plaintiff was not a creditor of the LLC, concluding that the trial court essentially found that any back wages owed to the plaintiff were not owed by the LLC. Since the plaintiff was not a member or a creditor, the plaintiff did not have standing to seek a court supervised winding up under the Tennessee LLC statute.

**Jundt v. Jurassic Resources Development North America, L.L.C.**, 677 N.W.2d 209 (N.D. 2004) (holding trial court's finding as to when member's membership began was law of the case because it was not challenged in prior appeal).

**Sosa v. Shearform Manufacturing**, 784 So.2d 609(Fla. App. 2001). Sosa agreed to loan money to an LLC in two installments in exchange for a 1/3 membership in the LLC. Sosa made an initial advance to the LLC but did not make the second advance. The trial court concluded that Sosa first breached the agreement by failing to pay the second installment, but the court of appeals held that it was the other parties to the agreement who first breached by failing to take immediate action to admit Sosa as a member in accordance with the agreement.

**McDonald v. Miller**, No. 00AP-994, 2001 WL 300736 (Ohio App. March 29, 2001). Four individuals entered an operating agreement for an LLC that listed them as members and required that each of them contribute \$5,000 as an initial capital contribution. One of the individuals did not make the required contribution. The issue addressed by the court was whether the individual who failed to make the contribution was a member, and the court held that he was. The other members argued that he never became a member because of his failure to make the required contribution. The court, however, found that he was a member under the clear and unambiguous language of the operating agreement. The court pointed out that the operating agreement listed the individual as a member and presupposed that the person required to make the capital contribution was a member when it provided that "each Member shall contribute \$5,000 as the initial Capital Contribution."

**Prefer v. Pharmnetrx, LLC**, 18 P.3d 844 (Colo. App. 2000). In this suit by a member to challenge the member's termination as employee and manager of the LLC, the court refused to disturb the finding that the member's written consent to admission of new members required by the Colorado LLC Act was established by various writings, taken together, including a proxy request sent to investors by the member.

## V. Fiduciary Duties of Members and Managers

**In re Regional Diagnostics, LLC (Morris v. Zelch)**, \_\_ B.R. \_\_, 2007 WL 1587256 (Bankr. N.D. Ohio 2007). Defendant managers of an LLC argued that the trustee failed to state a claim against them under Delaware law for breach of fiduciary duty. The court reviewed the duties of loyalty and care of a director of a Delaware corporation and stated that Delaware courts have applied the business judgment rule in the LLC context. The court noted that fiduciary duties of LLC managers may be altered by agreement and quoted a recent article by Justice Steele for the proposition that "[t]here is an assumed default to traditional corporate governance fiduciary duties where the agreement is silent, or at least not inconsistent with the common law fiduciary duties." The court rejected several arguments advanced by the manager defendants regarding the sufficiency of the trustee's pleading. The defendants argued that the LLC agreement eliminated liability for breach of the duty of loyalty, but the court rejected this argument because the provision did not restrict or limit the managers' fiduciary obligations; it only limited their liability to the extent they acted in good faith. Since a breach of the duty of loyalty can be premised on a failure to act in good faith the agreement did not eliminate potential liability for breach of the duty of loyalty. The managers next argued that the complaint failed to state a claim because it did not contain specific facts to overcome the business judgment rule. The court stated that the heightened pleading standard required by Delaware courts does not apply in federal courts where notice pleading is the standard. Thus, the trustee was not required to plead specific facts to overcome the business judgment rule. To the extent the business judgment rule is an affirmative defense, the court found the complaint did not show on its face that relief was barred since the trustee pled that the defendants were not protected by the rule by virtue of their financial interests in the LLC and the leveraged buyout in issue. Finally, the court concluded that the trustee stated a claim for breach of the managers' duty of loyalty by their intentional failure to exercise oversight responsibilities. The facts alleged in the

complaint, viewed in the light most favorable to the plaintiff, raised a reasonable expectation that discovery would reveal evidence of a lack of good faith and conscious lack of oversight.

***Westbard Apartments, LLC v. Westwood Joint Venture, LLC***, \_\_ A.2d \_\_, 2007 WL 1518992 (Md. App. 2007). The court interpreted the fiduciary duty provisions of the LLC agreement of a Delaware LLC formed to invest in and develop certain real estate in Bethesda. The two members of the LLC were a large pension fund (National Electrical Benefit Fund or “NEBF”) and an entity owned and controlled by a real estate developer named Cohen. Cohen’s entity was the managing member of the LLC. Cohen was designated as the managing member’s representative, and Cohen provided a personal guaranty of the managing member’s fiduciary duties to the other member. The LLC agreement provided that the managing member was required to exercise the power and authority granted under the agreement and to perform its duties as managing member in good faith, in a manner reasonably believed to be in the best interest of the LLC, and with the care of a prudent real estate professional in a like position under similar circumstances. This section of the agreement went on to provide that the managing member owed the fiduciary duties that a “general partner undertakes to a limited partnership and its limited partners under the statutes and case law of the State of Delaware applicable to the limited partnership form of business organization.” The next section of the LLC agreement required the managing member to manage the LLC as its exclusive function and prohibited it from having any business interests or activities other than those relating to the LLC. This provision permitted other members to have other business interests and activities in addition to those relating to the LLC even if such other ventures were competitive with the LLC. With NEBF’s knowledge and consent, Cohen negotiated an agreement under which an entity owned by Cohen would purchase the property that was leased by the LLC. Cohen waived on behalf of the LLC certain rights of first refusal held by the LLC under the lease. NEBF’s managing director for real estate testified that he presumed Cohen was negotiating the purchase on behalf of the LLC since he would not be permitted under the LLC agreement to take the deal for himself. After Cohen and NEBF failed to agree on terms for a new joint venture to purchase the property, Cohen informed NEBF that he believed the LLC agreement permitted him to pursue the transaction in his individual capacity. NEBF and the LLC filed suit against Cohen and various Cohen-controlled entities, and the trial court found that the fiduciary duty provisions of the LLC agreement were ambiguous and that NEBF could not complain about Cohen’s conduct because it encouraged him to pursue the deal. The trial court found the testimony by the NEBF representative to be incredible and untruthful. The court of appeals discussed fiduciary duties under Delaware law and the contractual freedom to vary such duties. The court perceived no ambiguity in the fiduciary duty provisions and stated that the parties, who were “sophisticated real estate developers,” were bound by the terms of the agreement. The court concluded that the wide latitude given to non-managing members and affiliates of members (including affiliates of the managing member) to pursue business opportunities was confined to ventures *other than those relating to the LLC*. The purchase of the property was a business interest related to the LLC and did not qualify as an “other venture or activity.” The court of appeals concluded that the trial court’s erroneous interpretation of the LLC agreement led to erroneous fact-finding with regard to the truthfulness of statements by NEBF’s representative regarding his understanding of Cohen’s actions in pursuing the purchase of the property. The court of appeals vacated the lower court’s decision and remanded for a new trial on the issue of whether NEBF waived or was estopped to object to Cohen’s purchase of the property.

***Trebilcock v. Elinsky***, No. 1:05 CV 2428, 2007 WL 1567710 (N.D. Ohio May 25, 2007) (rejecting member’s breach of fiduciary duty claim based on failure to show damages, stating that allegation that member would not have invested in LLC had he known of its management and ownership structure may establish causation but did not itself establish damages, and commenting that member would not be permitted to do end-run around agreement to sell interest for particular sum under guise of breach of fiduciary duty claim).

***In re Grosman (Bar-Am v. Grosman)***, Bankruptcy No. 6:05-bk-10450-KSJ, Adversary No. 6:05-ap-328, 2007 WL 1526701 (Bankr. M.D. Fla. May 22, 2007) (characterizing LLC as joint venture whose members owed one another fiduciary duties as joint venturers, discussing fiduciary duties of managing member under Florida LLC statute, and concluding that managing member’s statutory fiduciary duties of loyalty and care did not amount to express or technical trust required to constitute fiduciary duty under Bankruptcy Code Section 523(a)(4) exception from discharge for defalcation in fiduciary capacity, but holding managing member’s transfer of LLC assets to himself, entities he controlled, and family members without distributing any assets to co-member was willful and malicious injury of another entity or its property satisfying exception to discharge under Section 523(a)(6)).

***Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC***, 158 P.3d 1183 (Wash. App. 2007). The court of appeals concluded that a member’s failure to make mortgage payments on behalf of the LLC and its subsequent actions taken in connection with the LLC real estate venture did not breach the member’s fiduciary duty or

contract in this case. Joseph Finley (“Finley”) and the Bishop of Victoria Corporation Sole (“BV”) formed a real estate development LLC. The members testified that Finley agreed to contribute his labor and expertise and BV agreed to contribute financially. There was no evidence that either party’s obligation to contribute was quantified, and the operating agreement did not specify a time in which Finley was required to sell the property. After the proceeds of the first financing and a refinancing of the property were exhausted, BV made the monthly mortgage payments for a time, but BV stopped making payments after a change in leadership of BV. The new leadership’s priority was the sale of the property and satisfaction of the debt even if it meant the LLC forfeited any profit. After BV stopped making the payments, the lender instituted foreclosure proceedings on the property. BV began exploring options to satisfy the foreclosure judgment. Ultimately, BV sold debentures to parishioners of the Victorian Diocese to raise funds it intended to use to reach a settlement with the lender or take over the lender’s position and sell the property. The funds raised were transferred to Fisgard Asset Management (Fisgard), a trustee set up on behalf of the parishioners, and Fisgard negotiated with the lender for the purchase of its judgment and decree of foreclosure at a discount. Eventually, Finley and BV reached an impasse and BV obtained appointment of a receiver for the LLC. The court ordered the receiver to enter into a partial settlement with Fisgard in which Fisgard agreed to stay foreclosure for one year to allow the receiver to sell the property. The receiver was not able to sell the property, and the property was quit-claimed to Fisgard pursuant to the settlement agreement. Finley sued BV and received a favorable verdict on breach of contract and breach of fiduciary duty claims, but the court of appeals reversed. Finley argued that BV breached its fiduciary duties when it defaulted on the mortgage and embarked on a course of action adverse to Finley and the LLC. The court pointed out that an LLC may be manager-managed or member-managed under Washington law, and concluded that the LLC in this case was member-managed because the operating agreement specified that both BV and Finley were managers. The court stated that the fiduciary duties imposed in member-managed and manager-managed LLCs are the same in Washington. The court next noted that a member is obligated to perform a promise to contribute, and an obligation to contribute arises from the parties’ contractual agreement. Because the LLC operating agreement did not require a member to make additional contributions, the court concluded that BV did not breach any contractual obligation by ceasing to make mortgage payments and causing the LLC to default on the mortgage. Stating that the role of members in a member-managed LLC is analogous to that of partners in a general partnership, the court described the fiduciary duties of partners; however, the court concluded that a member’s obligation to contribute cannot be expanded beyond the members’ agreements by reference to a general fiduciary duty of loyalty. The court also rejected Finley’s arguments that BV’s actions to satisfy the foreclosure judgment breached its fiduciary duty. The court found that a settlement offer that would have released BV but not the LLC did not breach BV’s duty, even though it was in BV’s interest, because it was not adverse to the LLC’s interest. The court relied upon the principle that a partner does not violate a duty or obligation merely because the partner’s conduct furthers its own interest. The court also found that BV’s sale of the debentures without informing Finley was not a material non-disclosure and did not provide a basis for breach of fiduciary duty. Finally, the court rejected Finley’s complaints that BV obtained an interest in the property of the venture to the exclusion of Finley. The court stated that the receiver had the right to deed the property to Fisgard under the trial court’s order, to which Finley had agreed. The court also rejected the argument that the sale to Fisgard, which eliminated the one-year period in which a party may reclaim property after foreclosure, was adverse to the LLC because there was no evidence the LLC would have been able to obtain financing to purchase the property.

***Hofmesiter Family Trust v. FGH Industries, LLC***, No. 06-CV-13984-DT, 2007 WL 1106144 (E.D. Mich. April 12, 2007) (concluding minority members of LLC holding company stated claim for oppression based on allegations that majority members caused corporate subsidiary to cease making distributions to plaintiffs under purchase agreement and failed to cause LLC to make distributions to plaintiffs).

***In re Senior Cottages of America, LLC (Moratzka v. Morris)***, 482 F.3d 997 (8<sup>th</sup> Cir. 2007) (holding that trustee had standing to bring claim against attorneys for aiding and abetting breach of fiduciary duty of manager/majority owner of debtor LLC because debtor could have asserted claim prior to filing of bankruptcy, and trustee adequately stated claim for aiding and abetting breach of duty where trustee alleged manager/majority owner stripped LLC’s assets without reasonable compensation, attorneys knew action was in breach of owner’s fiduciary duty, and attorneys provided substantial assistance and advised LLC to conclude transaction).

***Kasten v. MOA Investments, LLC***, Nos. 2006AP386, 2006AP1405, 2006 AP1510, 2007 WL 677804 (Wis. App. March 7, 2007). A minority member of an LLC brought suit individually and on behalf of the LLC asserting that the corporate member holding the largest interest in the LLC and the corporate member’s shareholders breached fiduciary duties and acted unfairly in transferring assets and business opportunities away from the LLC. The court held that the plaintiff member was disqualified from asserting claims on behalf of the LLC because the suit was not authorized by a

vote of the members. The court found that the plaintiff member was disqualified from voting because she sought judicial dissolution and thus had an interest in the outcome of the suit that was adverse to the interests of the LLC. The court concluded that the corporate primary injury rule applies to LLCs and that the member's claims alleging diversion of the LLC's assets, inappropriate payments of LLC funds, and diversion of business opportunities were derivative claims that she was not authorized to bring. The plaintiff's individual claims that she was improperly denied voting rights were without merit because the LLC's manager or a supermajority of members controlled the LLC and the plaintiff was not damaged by any lost opportunity to vote. The court stated that a claim for minority oppression is not itself a cause of action but merely a standard for judicial dissolution, and the plaintiff's claim for judicial dissolution was abandoned by repeated assertions in the lower court that the plaintiff did not want to dissolve the LLC. The court upheld amendments to the operating agreement permitting members with a financial interest in the outcome of a pending action to vote to dismiss, requiring members asserting or maintaining a derivative action without approval to indemnify the LLC, and imposing a one year limitation on claims asserted by a member against the LLC or other members. The court found the consent resolution adopting the amendments was valid because it was adopted by a supermajority of members and it was not unfair for the LLC or its members to take action to preserve its business against a complaint for dissolution, particularly when the plaintiff's derivative claims were not properly authorized.

*In re Lowry (Lowry Food Products, Inc. v. Alto Dairy Cooperative)*, Bankruptcy No. 03-33950 HDH-7, Adversary No. 05-3108, 2007 WL 738144 (Bankr. N.D. Tex. March 7, 2007). The debtor and the defendant formed a Wisconsin LLC under a formation agreement that provided Wisconsin law would govern. Applying Texas choice of law rules and using a "most significant relationship" analysis, the court concluded that Wisconsin law applied to breach of contract and breach of duty claims brought by the trustee against the defendant member. The court rejected the breach of contract and breach of duty claims. With respect to the breach of duty claim, the court stated that the exclusive standard for duties under Wisconsin law is the statutory standard that provides that a member must not willfully fail to deal fairly in matters in which the member has a material conflict of interest. The court found that the trustee failed to present substantial or persuasive evidence of conduct violating the statutory standard. The court stated that Wisconsin law emphasizes freedom of contract in the conduct of LLC affairs and concluded that no action of the defendant undertaken consistent with its contractual rights under the formation or operating agreements constituted a violation of fiduciary duties recognized under the Wisconsin LLC statute.

*Zanker Group, LLC v. Summerville at Litchfield Hills, LLC*, Nos. UWY(X10)CV044010223S, UWY(X10)CV044010567S, 2007 WL 865904 (Conn. Super. March 6, 2007). The court interpreted an operating agreement provision addressing transactions with affiliates and concluded that the transaction in issue was within the scope of the provision. Although the transaction did not receive the required approval of 90% of members, it fell within an exception for arm's length transactions. The court considered breach of fiduciary duty claims in the context of liquidation and stated that the statutory obligation of a manager or member is the same as that under common law. The court concluded that the operating agreement provision requiring 90% approval of transactions with affiliates was inapplicable after dissolution, that the managers were authorized to liquidate the LLCs, and that fair value was paid in a transaction where property interests of the LLCs were transferred to wholly owned entities of one of the members.

*In re Allentown Ambassadors, Inc. (Allentown Ambassadors, Inc. v. Northeast American Baseball, LLC)*, 361 B.R. 422 (Bankr. E.D. Pa. 2007). The court addressed several issues in a lengthy opinion dealing with the debtor corporation's rights and status as a member of a dissolved LLC. The debtor corporation operated a minor league baseball team and was a member of a baseball league organized as a North Carolina LLC. The debtor's primary claim was that the other members of the LLC exercised control over property of the estate, in violation of the automatic stay provision of Section 362(a)(3) of the Bankruptcy Code, when the members dissolved the LLC and formed a new league without the debtor. The debtor also claimed that an individual manager of the LLC breached his fiduciary duty to the debtor. With respect to the individual manager's fiduciary duty claim, the court examined provisions of the North Carolina LLC Act as well as the operating agreement and rejected the manager's argument that his duty was owed solely to the LLC and not to individual members. The court predicted that North Carolina appellate courts would extend to LLCs the principles developed in the case law of closely held corporations. The court thus concluded that majority members of an LLC owe a fiduciary duty to minority members (based on the duty owed by majority shareholders to minority shareholders) and that the defendant manager would also owe a duty to the individual members because the manager's powers were derived from and delegated to the manager by the member-managers of the LLC. While the court acknowledged that the debtor might have a difficult time proving that the manager breached his duty, the court perceived the possibility that the challenged conduct was part of a pattern to "oppress" the debtor. Thus, the manager was not entitled to summary judgment.

*Slyter & Slyter, LLC v. Ryland*, 953 So.2d 1000 (La. App. 2007) (holding office manager/controller who was not “manager” under LLC organizational documents was officer who owed fiduciary duty to LLC under Louisiana law).

*Gottsacker v. Monnier*, No. 2006AP766, 2007 WL 259836 (Wis. App. Jan. 31, 2007). This is the third appellate opinion in a case arising from a dispute among three members of a Wisconsin LLC. The plaintiff sued his two co-members who voted to transfer the LLC’s real estate (the LLC’s sole asset) to their newly formed LLC without advising the plaintiff. The Wisconsin Court of Appeals held that the conflict of interest of the two members did not preclude them from voting, but held that the members had acted unfairly. The Wisconsin Supreme Court agreed with the court of appeals that the two members possessed the majority interest necessary to authorize the transfer of the LLC’s property, but remanded for a determination of whether the two members willfully failed to deal fairly with the other member or the LLC. The supreme court concluded that properly authorized members with a material conflict of interest can vote their ownership interests unless their act or failure to act constitutes a “willful failure to deal fairly” with the LLC or its members. The court relied upon a provision of the Wisconsin LLC statute that states that, unless otherwise provided in the operating agreement, no member or manager shall act or fail to act in a manner that constitutes a willful failure to deal fairly with the LLC or its members in connection with a matter in which the member or manager has a material conflict of interest. The members had no agreement relieving them of the statutory obligation, and the trial court on remand examined the actions of the majority members. The court found that certain actions could be construed as unfair (lack of notice to the third member or an opportunity to vote or be heard, no effort to market the property, no arm’s length transaction, no third party appraisal, and no assets left in the LLC). However, the court found that the sale price was not unfair based on all the evidence, and the sale was not adverse to the LLC. Although the trial court found that the majority’s actions were not “appropriate,” they fell short of a willful failure to deal fairly. The court of appeals affirmed the trial court’s decision, noting that the supreme court had explained that a determination of “willful unfairness” necessitated both unfairness (conduct) and injury (end result). The court concluded that the evidence supported the trial court’s determination that the plaintiff had not demonstrated the requisite injury.

*Tzolis v. Wolff*, 829 N.Y.S.2d 488 (N.Y. A.D. 1 Dept. 2007) (declining to dismiss claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty arising out of alleged below market lease and sale of LLC’s sole asset to entities owned by friends and family of defendant members of LLC and challenging approval of sale because certain members were interested parties).

*Fazzone, Baillie, Ryan & Seadale, LLC v. Baillie, Hall & Hershman, P.C.*, No. CV040833143S, 2007 WL 155161 (Conn. Super. Jan. 2, 2007) (discussing attorney member’s breach of fiduciary duty in connection with withdrawal from LLC law firm and formation of new firm).

*Ptasynski v. CO2 Claims Coalition, LLC*, Civil Action No. 02-cv-00830-WDM-MEH, 2006 WL 3746122 (D. Colo. Dec. 15, 2006) (noting immunity of managers provided under Colorado LLC statute with respect to good faith performance of duties in manner reasonably believed to be in best interests of LLC and with care of ordinarily prudent person and granting summary judgment in favor of manager who produced evidence that he met statute’s requirements in connection with LLC’s determination that plaintiff had withdrawn from LLC and was not entitled to share in proceeds of settlement obtained by LLC).

*Federal Alpha Steel LLC Creditors’ Trust v. Federal Pipe & Steel Corporation*, 368 B.R. 679 (N.D. Ill. 2006). A creditors’ trust asserted a number of claims against one of the members of a bankrupt Illinois LLC. The LLC had two corporate members, and the operating agreement designated a third corporation to manage the LLC and provided that neither member was an agent of the LLC or had any authority to act for the LLC. The court first addressed the management structure of the LLC because the defendant member relied upon differences between manager-managed and member-managed LLCs under Illinois law in arguing that certain claims should be dismissed on the basis that the LLC was manager-managed. Under the Illinois LLC statute, a manager in a manager-managed LLC owes certain duties to the LLC, but a non-manager member of a manager-managed LLC owes no duties solely by reason of being a member. The court stated that it could not determine at this stage of the litigation whether the LLC was manager-managed because, while the operating agreement gave sole control of the LLC’s affairs to a manager, one of the provisions of the operating agreement referred to a section of the Illinois LLC statute that addressed dissociation from a member-managed LLC. The court said this reference could suggest that the members considered the LLC to be member-managed or not entirely manager-managed. Additionally, the court stated that the articles of organization, which had not been provided to the court, would also be relevant to determining whether the LLC was manager-managed because the statute defines a

manager-managed LLC as an LLC which is so designated in the articles of organization. Finally, taking as true allegations by the plaintiff that the LLC was actually run as a joint venture or partnership and that the defendant member exercised de facto management authority over the LLC, the court stated that the LLC could be viewed as a de facto member-managed LLC. The court addressed the defendants' motion to dismiss various claims, including several claims based on breach of fiduciary duty. The court found that the plaintiff had stated a claim for wrongful dissociation against the defendant member in violation of the operating agreement and that the alleged wrongful dissociation could form the basis of a breach of fiduciary duty claim. The court declined to dismiss breach of fiduciary duty claims against two directors of the corporate manager of the LLC because the LLC was a shareholder of the corporate manager, and the court stated that the directors owed the LLC duties by virtue of the LLC's status as a shareholder of the corporation. The court also declined to dismiss a claim for inducement of breach of fiduciary duty against a corporation that sought to acquire the defendant member's parent and allegedly directed the defendant member to withdraw from the LLC.

*Chuang v. Ming Ter Chen*, No. B185791, 2006 WL 3518228 (Cal. App. 2 Dist. Dec. 7, 2006). A judgment against the Chens was obtained by their co-members in an LLC. Based on unauthorized withdrawals of LLC funds by the Chens, the judgment reduced the interest of the Chens in the LLC to zero and awarded damages against the Chens. Judgment creditors of the Chens who had intervened to represent the interest of the Chens appealed the judgment and claimed the trial court had failed to conduct a complete accounting by considering only checks paid out of the LLC to the Chens and ignoring checks paid into the LLC by the Chens. The court stated that managers of an LLC owe the same fiduciary duties as partners in a partnership and are held to the standards and duties of trustees. As such, the Chens were obligated to keep full and accurate records and to account for their use of LLC funds, which they did not do. The court concluded that the trial court correctly determined that any doubts arising from the failure of the Chens to keep proper records or their inability or unwillingness to establish items of their accounts must be resolved against them. The court also concluded that it was proper for the court to reduce the interest of the Chens based on their unauthorized withdrawals from the LLC and to award damages in the amount of the negative balance of their capital account.

*Mastromatteo v. Mastromatteo*, 21 Mass.L.Rptr. 705, 2006 WL 3759512 (Mass. Super. Nov. 28, 2006) (relying on case law in closely held corporation context that imposes on shareholders in close corporation same duties owed by partners in partnership, and concluding dismissal of LLC member's direct claim for breach of fiduciary duty and accounting was inappropriate; finding deceptive trade practices statute did not apply to internal private dispute between members of LLC).

*All Star Land Title Agency, Inc. v. Surewin Investment, Inc.*, No. 87569, 2006 WL 3095701 (Ohio App. Nov. 2, 2006). Two corporations, All Star and Surewin, formed an Ohio LLC to operate a title agency. The operating agreement permitted the members to compete with each other and the LLC, and the operating agreement stated that no member was required to perform services for the LLC. After Surewin's owner formed a title agency with another person and requested winding up of the LLC, All Star sued Surewin alleging breach of contract and breach of fiduciary duty. The court stated that the fiduciary relationship involved in an LLC would ordinarily prevent direct competition between members of the LLC, but the court concluded that there was no duty not to compete in this case because the operating agreement specifically allowed competition.

*Shamrock Holdings v. Arenson*, 456 F.Supp.2d 59 (D. Del. 2006). The court held that an exculpation clause in an LLC agreement did not provide independent grounds to impose breach of contract liability for bad faith or grossly negligent conduct. The court found that the minority members sufficiently alleged breach of fiduciary duty claims arising out of the sale of the LLC against the controlling member and employees of the controlling member who served on the LLC's supervisory board. The court held that the minority members were not required to plead around the business judgment rule to avoid dismissal on a Rule 12(b)(6) motion. The court also declined to dismiss a claim against a consultant to the LLC for aiding and abetting breach of fiduciary duty.

*First Hand Communications, LLC v. Schwalbach*, No. 1:05cv1281, 2006 WL 3500901 (E.D. Va. Dec. 4, 2006) (dismissing member's abuse of power of attorney and embezzlement claims against co-member because such causes of action do not exist under Virginia law, and granting summary judgment in favor of counterdefendant member because actions were protected by business judgment rule).

*Systrends, Inc. v. Group 8760, LLC*, \_\_\_ So.2d \_\_\_, 2006 WL 2925323 (Ala. 2006) (rejecting LLC employee's argument that, because Alabama LLC statute only specifies duties of members and managers, only members and



managers owe fiduciary duties to LLC, stating that case law imposes on agent duty to act in good faith and loyalty with due regard for principal's interests).

*In re Kilroy (Guerriero v. Kilroy)*, 354 B.R. 476 (Bankr. S.D. Tex. 2006) (concluding that debtor, who was majority member and manager of LLC that served as general partner of limited partnership, exercised sufficient control over Delaware LLC and limited partnership to establish fiduciary relationship with individual who was minority member of LLC and limited partner of limited partnership for purposes of dischargeability exception for fraud or defalcation in fiduciary capacity).

*Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844-N, 2006 WL 3927242 (Del. Ch.Oct. 16, 2006). A 5% member of an LLC brought direct and derivative claims arising out of the sale of the LLC's assets. The LLC was a non-wholly owned subsidiary, and the plaintiff (who was chief legal counsel for the parent of the LLC) and several other individuals owned membership interests they had received in exchange for their work in organizing the LLC. The transaction giving rise to the suit was a multi-billion dollar sale of the vodka business of the parent and its three subsidiaries. The LLC's operating agreement required unanimous consent of the members for any sale of all or substantially all of the LLC's business or assets, and the plaintiff claimed that his consent was coerced. The plaintiff also claimed that the defendant members and managers breached their fiduciary duty in approving of the allocation of most of the proceeds of the transaction to the parent. The court applied the demand futility test developed in the corporate context in *Aronson v. Lewis* and determined that the plaintiff's pleadings were sufficient to establish that demand on the managers of the LLC was excused. Specifically, the court found that the plaintiff's complaint contained particularized facts creating a reasonable doubt as to the disinterestedness and independence of the managers and as to whether the transaction was the product of a valid exercise of business judgment. The court also rejected the defendants' challenge to the adequacy of the plaintiff's derivative representation. The court declined to dismiss the plaintiff's derivative claim for breach of fiduciary duty, which was based on three grounds: (i) artificial suppression of transfer pricing in vodka sales between the LLC and its parent prior to the sale transaction; (ii) misallocation of the purchase price in the sale transaction; and (iii) failure to disclose conflicts of interest related to the allocation. The court found that the plaintiff's allegations were sufficient to infer that (i) the plaintiff was not aware of the transfer pricing and thus did not acquiesce in or ratify it, (ii) the plaintiff was coerced into approving the sale transaction, and (iii) the plaintiff was unaware of the managers' holdings in the parent and resulting conflict of interest. The court found that the plaintiff could pursue direct claims for breach of the operating agreement and breach of the implied covenant of good faith and fair dealing.

*Dickey v. Bull Mountain Development Co.*, No. 3:05-CV-574, 2006 WL 2927440 (E.D. Tenn. Oct. 11, 2006) (finding genuine issues of material fact precluded summary judgment in favor of Delaware LLC's president and member who was required to exercise candor and honesty under duty of good faith owed under Delaware law).

*DIRECTV Group, Inc. v. Darlene Investments, LLC*, No. 05 CIV. 5819(WHP), 2006 WL 2773024 (S.D. N.Y. Sept. 27, 2006). The two members of an LLC which filed Chapter 11 bankruptcy executed a mutual release and covenant not to sue as part of the LLC's reorganization. One of the members asserted a claim for fraudulent inducement of the mutual release. Applying New York law as specified in the choice of law provision of the mutual release, the court held that the mutual release barred the fraudulent inducement claim. The member argued in the alternative that its fraudulent inducement claim was actionable based on the other member's breach of a fiduciary duty arising from the parties' amended LLC agreement. The court found, however, that a second amended LLC agreement executed at the time of the mutual release eliminated fiduciary duties. The court stated that the second amended LLC agreement omitted the fiduciary duty provision contained in the amended LLC agreement and that the mutual release and second amended LLC agreement superseded all previous agreements. The court applied Delaware law to the interpretation of the LLC agreement pursuant to the choice of law clause in the second amended LLC agreement. Citing Delaware case law, the court stated that "[c]ontracting parties are free to eliminate fiduciary duties in a limited liability company agreement" and that LLC members "can be virtually certain" that their agreements will be enforced in accordance with their terms. The court went on to state that, even if a fiduciary relationship could be established, it would not be a means to avoid the preclusive impact of the mutual release because a party that releases a fraud claim may not subsequently assert that its fraudulent inducement claim is actionable based on an independent duty to disclose fraud.

*Healthcare Management and Investment Holdings, LLC v. Feldman*, Nos. 1:03CV0323, 1:04CV0883, 2006 WL 2660628 (N.D. Ohio Sept. 15, 2006). A Delaware LLC sought summary judgment that its terminated CEO was not entitled to indemnification under the operating agreement, and the CEO sought summary judgment that the operating agreement and the business judgment rule protected him from liability. The LLC asserted claims for breach of contract,

breach of duty, misappropriation of trade secrets, tortious interference, and unfair competition against the CEO and argued that the CEO was not entitled to indemnification under the terms of the operating agreement because he was not being sued “by reason of having been” an officer of the LLC. The court applied Delaware law and concluded there was no nexus or causal connection between the proceedings and the CEO’s official capacity with respect to the claims based on breach of the CEO’s separate employment contract, but there was such a nexus with respect to the breach of fiduciary duty, misappropriation of trade secrets, tortious interference, and unfair competition claims. The CEO argued that an exculpatory provision in the operating agreement limited his liability because he was acting within the scope of his authority as CEO of the LLC. The provision limited liability of an officer acting within the scope of his authority conferred by the operating agreement except for breaches of the duty of loyalty, acts or omissions not in good faith, or acts or omissions involving gross negligence, intentional misconduct, or a knowing violation of law. Applying Delaware law pursuant to the choice of law clause in the operating agreement, the court applied case law from the indemnification context to conclude that the exculpatory provision did not limit liability for the claims arising from breach of the CEO’s employment contract. The limitation on liability also did not encompass several alleged breaches of the duty of loyalty and instances of self-dealing. With respect to alleged duty of care breaches, the court concluded that there was a basis for a trier of fact to conclude that the CEO engaged in gross negligence and was not protected by the operating agreement. Similarly, the CEO’s motion for summary judgment based on the business judgment rule (which the court discussed relying on Delaware corporate case law) was denied because there was a material issue of fact as to whether the CEO engaged in gross negligence.

*Marsh v. Billington Farms, LLC*, No. 04-3123, 2006 WL 2555911 (R.I. Super. Aug. 31, 2006). Two individuals, Marsh and Despres, and their spouses, formed an LLC for the development of certain real estate. Marsh was appointed sole manager by the terms of the operating agreement. The operating agreement permitted the LLC to enter into contracts or other arrangements with “affiliated persons” as defined by the operating agreement. The LLC contracted with a corporation owned and operated by Mr. and Mrs. Marsh (the “Marsh corporation”) and a corporation owned and operated by Mr. and Mrs. Despres (the “Despres corporation”). The Marshes filed suit alleging that Despres breached his fiduciary duty by engaging in oppressive behavior and self-dealing in transactions with the Marsh corporation and the Despres corporation. The Marshes alleged that Despres, as manager of the LLC, failed to pay fees owed to the Marsh corporation, and the Marshes disputed billings made by the Despres corporation and alleged that certain discounts received by the Despres corporation were not passed on to the LLC. The Marshes also complained of certain other transactions. Despres relied upon the provision of the operating agreement permitting transactions with affiliates and the business judgment rule as defenses. The court stated that Despres owed the LLC and the Marshes a fiduciary duty of the utmost care and loyalty by virtue of his position as the controlling manager. The court described the duties of corporate directors and partners and noted that the Rhode Island Supreme Court has not yet expounded upon the “quality and scope” of the fiduciary duty owed by managers of an LLC. The court noted that Rhode Island courts have looked to Delaware law in the past when faced with a dearth of authority on corporate law, and the court concluded that, under Delaware law, managers of an LLC are held to the same fiduciary duties as directors of a corporation. Furthermore, because the Rhode Island Supreme Court has held that shareholders in a closely held corporation may owe a duty to one another similar to that owed by partners, the court concluded that the members of the LLC assumed a heightened fiduciary duty to the LLC and one another. The court relied upon the close relationship among the four members and their active participation in the business to reach this conclusion. The court found, however, that neither party established as a matter of law that Despres did or did not breach his strict duty of loyalty, care, and good faith. The court described “oppressive conduct” as conduct that substantially defeats the reasonable expectations held by minority shareholders in investing in a close corporation, and the court found that genuine issues remained as to whether the reasonable expectations of the Marshes were defeated. The court also concluded that fact issues remained with respect to the fairness of the self-dealing transactions. The provisions in the operating agreement permitting transactions with affiliates did not alter the court’s conclusion because, while the operating agreement authorized the initial contracts with the related corporations, the court did not view the provisions as diluting the ongoing duty owed by Despres to the LLC and its members. The court stated that the business judgment rule acts as a rebuttable presumption that corporate directors or LLC managers have acted with due care, in good faith, and in the best interest of the corporation or LLC, but concluded that the business judgment rule did not apply to the actions of Despres because the alleged breaches stemmed from actions taken by Despres as an interested manager. The court relied upon Delaware case law to conclude that the Marshes claim was derivative in nature, but the court adopted the American Law Institute rule allowing a court to treat a derivative action as a direct action in the context of a closely held corporation. Employing the ALI approach, the court found the claim was properly alleged as a direct cause of action. The court found that a prior consent order in which the parties agreed to a buy-out of the Marshes’ interest as an alternative to dissolution did not preclude litigation of the issues addressed in this case.

*Roemmich v. Eagle Eye Development, LLC*, No. 1:04-cv-079, 2006 WL 2433410 (D. N.D. Aug. 16, 2006).

In litigation resulting from a falling out between members of a North Dakota LLC, the court declined to order a buy-out in favor of the minority member because the minority member breached his duty to act in an honest, fair, and reasonable manner; however, the court fashioned relief for the minority member to the extent the court concluded that the majority member acted unreasonably by failing to fulfill the minority member's expectation that basic financial information would be provided without demand. In a lengthy opinion, the court set forth findings of fact and conclusions of law in connection with the minority member's claims of wrongdoing on the part of those in control. The court concluded that a number of the minority member's specific claims were barred by the statute of limitations based on the dates on which a reasonable person would have been on notice of the claims; however, with respect to the minority member's claim for equitable relief based on unfairly prejudicial conduct under the North Dakota LLC Act, the court concluded that once there is some proof of actionable conduct within the limitations period, evidence of conduct occurring outside the limitations period may be considered for other purposes, such as background. The court found acts within the limitations period that raised an issue with respect to whether the controlling member acted in an unfairly prejudicial manner. These acts included the failure to hold meetings, the practice of sending no information other than K-1's to the minority member, and the failure to maintain records of decision-making. In analyzing the minority member's claim that he was shut out of decision-making and management and that unauthorized actions took place, the court reviewed the authority of the LLC's president, the history of the LLC's compliance with its governing documents and the North Dakota statute, the obligations of members as governors in self-dealing transactions, and the duties owed in closely held companies. The court noted the broad authority of the president of an LLC under the North Dakota LLC Act and the LLC's operating agreement, but pointed out that the LLC's governing agreements constrained the authority of the president in certain respects by requiring approval of the governors for certain transactions. Although the court recognized that the failure to follow these formalities was merely a "technical" violation given the ultimate control exercised by the majority member, the court stated that persons who ignore corporate formalities in operating an LLC do so at their peril, particularly when there are dissenting minority owners. The court stated that these matters were relevant in the court's consideration of the claims of unfairly prejudicial conduct. With respect to numerous self-dealing claims, the court concluded that the transactions were fair and reasonable and therefore complied with the North Dakota LLC statute. The court discussed provisions of the North Dakota LLC statute authorizing a court to grant equitable relief under various circumstances, including "unfairly prejudicial" conduct. The court considered the meaning of the term "unfairly prejudicial" and concluded that the term should be given a broad reading consistent with the broad approach taken by the North Dakota Supreme Court when interpreting the term "oppressive." According to the court, the term "unfairly prejudicial" should be "construed liberally to cover virtually any form of unreasonable conduct that has an unfair impact, even though the conduct may not have been fraudulent or illegal and regardless of whether there has been bad faith." The court stated that the term includes conduct that amounts to a freeze out and conduct that breaches the duty to act honestly, fairly and reasonably, as well as conduct that deprives minority members of their "reasonable expectations." Based on what the minority member could reasonably expect in connection with the LLC's business, the court rejected the minority member's claim that he had been frozen out by not receiving financial benefits in the form of employment or distributions. The court also concluded that the minority member had not been improperly squeezed out of participating in the active management, finding that the minority member forfeited any right or expectation of active participation due to his own inequitable conduct and breach of fiduciary duty to act fairly and reasonably. Although the court found the controlling member's reluctance to send the minority member information without specific demand understandable, the court concluded that the minority member had a reasonable expectation of being furnished basic information on a periodic basis without demand. The court concluded that the equities did not favor dissolution of the LLC or a buy-out of the minority member's interest because the minority member's inequitable conduct substantially outweighed any inequitable or unreasonable conduct on the part of the controlling member, but the court fashioned remedies to address the controlling member's failure to provide information to the minority member on an ongoing basis, failure to document decision-making, and failure to hold member meetings. The court recognized that the majority member's conduct was not illegal and, for the most part, complied with the governing documents, but the court concluded that the obligation of a member in a closely held company goes beyond minimal compliance with state law and the governing documents. The court's order imposed certain restrictions and requirements on the operations of the LLC and required the LLC and its members and governors to take the following actions: hold at least one members' meeting per year (to discuss, at a minimum, operating results, tax returns for the prior year, an operating budget for the next year, and decisions regarding distributions); provide to each member, on an annual basis, copies of financial information for the prior calendar year; and prepare minutes reflecting action taken at all meetings and send copies to all members within ten days of the meeting.

**Gowin v. Granite Depot, LLC**, 634 S.E.2d 714 (Va. 2006). An individual (Gowin) was admitted as a 20% member of an LLC and executed a promissory note in the amount of \$12,500 for his capital contribution. Gowin claimed that the other member (Stathis) told him that the note was something the LLC's lawyer said had to be done, that Gowin should not worry about it, and that the LLC would take care of it. Gowin never paid the note. After the relationship between Stathis and Gowin deteriorated, Stathis amended the articles of organization to provide that the members by majority vote may eliminate another member who fails to make a required capital contribution. Stathis, as majority member, then executed a written consent of members eliminating Gowin as a member. Gowin filed a derivative suit against Stathis alleging various acts of wrongdoing and requesting an accounting and judicial expulsion of Stathis. The trial court dismissed the suit on the basis that Gowin's membership had been properly terminated and that Gowin was without standing to prosecute a derivative suit. Gowin appealed, and the Virginia Supreme Court concluded that the oral waiver by Stathis's oral waiver of payment of the note did not bind the LLC. In addition, the supreme court rejected Gowin's argument that the trial court erred in finding that Stathis did not breach a fiduciary duty to the LLC by adopting the amendment to the articles of organization. The court stated that whether an act constitutes a breach of fiduciary duty will depend upon the facts of each case, and the court found the record in this case supported the trial court's conclusion. The court stated that the purpose of the amendment was to ensure the LLC received capital contributions to which it was entitled and to preclude a member from realizing a benefit from membership without satisfying his financial obligation to the LLC. Stathis testified that he adopted the amendment both to benefit the LLC and to eliminate Gowin's interest. The court concluded that there was no evidence that adoption of the amendment alone had any impact on the LLC or was otherwise a breach of fiduciary duty. The court held that Gowin remained a member of the LLC, however, because the court determined that the promissory note executed by Gowin was a demand note upon which demand was never made. Because the note never became overdue, Gowin never failed to make a payment he was obligated to make, and termination of his membership was improper. The case was accordingly remanded for further proceedings consistent with the court's opinion.

**Haynes v. B & B Realty Group, LLC**, 633 S.E.2d 691 (N.C. App. 2006) (stating LLC member owed no fiduciary duty to plaintiff who was not a member, but only assignee or potential assignee).

**Kira, Inc. v. All Star Maintenance**, No. A-03-CA-950 LY, 2006 WL 2193006 (W.D. Tex. July 31, 2006). In a suit by one member of a Nevada LLC against the other two members, a magistrate analyzed provisions of the operating agreement waiving or limiting fiduciary duties and made recommendations regarding the parties' motions for summary judgment. The court concluded that the defendants' motion for summary judgment on the plaintiff's breach of implied covenant of good faith and fair dealing claim should be denied because the court could not determine whether a provision on approval of affiliate compensation was breached. With respect to the plaintiff's breach of fiduciary duty claims, the defendants' argued that the operating agreement defined all the duties owed between the parties. The court, however, concluded that the operating agreement did not disavow all duties and that material fact issues remained. The operating agreement provided for a duty of care limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. Other provisions of the operating agreement permitted the members to engage in other businesses and stated that the entity was not a partnership, but the court pointed out that the agreement disavowed only the business opportunity rule and not all aspects of a party's fiduciary duty. The court characterized a fiduciary duty as encompassing both a duty of care and a duty of loyalty, and the court stated that the duty of care provision purported only to define the duty of care and did not address the duty of loyalty. Furthermore, the court commented that intentionally paying an affiliate fees not permitted by the agreement may well fall within "intentional misconduct." The court also recommended denial of the managing member's motion for summary judgment on the plaintiff's claims for gross negligence and waste based on material facts in dispute. The court relied on Nevada case law to define "gross negligence" but noted that there is a dearth of Nevada case law on waste of corporate assets.

**Burkle v. Burkle**, 141 Cal.App.4th 1029, 46 Cal.Rptr.3d 562 (Cal. App. 2 Dist. 2006). Carrie Burkle's father, Ronald Burkle, formed a Delaware LLC when Carrie was 19 years old. Ronald owned 99% of the LLC and provided the funds for Carrie's 1% interest in the LLC. Carrie filed suit seeking declaratory relief and an accounting after learning of her 1% interest in the LLC. Carrie sought access to the LLC's books and records through discovery requests and based on California statutory provisions. Ronald sought summary judgment and asserted that the capital contributions he made to the LLC were loans to Carrie and that he drew down Carrie's capital account to repay himself for the prior loans plus accrued interest on the loans. The trial court denied Carrie's request for access to the LLC's financial records, granted Ronald's motion for summary judgment, and denied Carrie's request to amend her complaint to add conversion and breach of fiduciary duty claims based upon her father's appropriation of her capital account. On appeal, the court reversed the trial court's summary judgment. The court stated that characterizing a transfer of funds as a gift or a loan

often presents questions of fact. The court reviewed the evidence raising a fact question in this case, including the absence of any documentation of a loan and the fact that Ronald was asserting that Carrie owed him over \$14,000 after repaying himself with the balance of her capital account. The court stated, “[W]e do not see how a parent can unilaterally determine the terms of a loan to an adult child, and assert his entitlement to unpaid interest, without the knowledge or agreement of the borrower.” The court also addressed Ronald’s argument that the transfer of funds could not have been a gift because a transfer of money does not constitute a gift unless the donor relinquishes control over the money. The court pointed out that Ronald necessarily relinquished control over the funds when he invested them in the LLC because he had no title to or interest in Carrie’s interest. Any control Ronald retained flowed from his position as manager of the LLC, not from his position as provider of the funds. The court next determined that Carrie had inspection rights under the California LLC statute. Finally, the court found that Carrie should be permitted to amend her complaint to seek damages for conversion and breach of fiduciary duty based on her father’s appropriation of her capital account.

*Argentum International, LLC v. Woods*, 634 S.E.2d 195 (Ga. App. 2006) (commenting that member of LLC’s board of managers owed fiduciary duty to equity interest owners, citing provisions of Georgia LLC statute imposing duty to act in good faith and with ordinary care, and pointing out that LLC’s operating agreement did not vary duties and could not in any event limit liability for intentional misconduct).

*Trident-Brambleton, L.L.C. v. PPR No. 1, L.L.C.*, No. 1:05cv1423, 2006 WL 1880986 (E.D. Va. July 5, 2006). A minority member of a Michigan LLC alleged that the LLC’s managing member breached various common law, statutory, and contractual duties and obligations by selling the LLC’s options to buy adjacent properties to an affiliate for less than fair market value. The managing member sought summary judgment on the grounds that the minority member lacked standing to raise the claims, that the claims were barred by the applicable statutes of limitations, and that the managing member did not breach any duties because the operating agreement authorized the managing member’s action. The court agreed with the managing member’s argument that the minority member’s claims for breach of common law fiduciary duties and breach of a manager’s statutory duties of good faith and due care were required to be brought derivatively under procedures that were not followed by the minority member, but found that the Michigan LLC statute clearly confers standing on an individual member to bring a cause of action for willfully unfair and oppressive conduct. The court also stated that the minority member had standing to bring claims that were based on breach of the operating agreement. With respect to the limitations defense, the court agreed with the managing member’s argument that the statutory duty and oppression claims were barred by the applicable limitations provisions in the Michigan LLC statute. The limitations provisions required that the claims be brought within three years after the cause of action accrued or within two years after the cause of action was discovered or reasonably should have been discovered, whichever occurred first. The court relied upon case law addressing a similar limitations provision in the Michigan corporate context and concluded that the three year provision is both a statute of limitations and a statute of repose and thus cannot be tolled by fraudulent concealment. Claims based on the sale of two of the options were barred because the sales took place more than three years prior to the filing of the minority member’s claims. One of the options was sold within three years of the filing of the claim, and the court thus examined when the minority member knew or should have known of that claim. Giving the minority member the benefit of the doubt, the court did not treat the two year provision as a statute of repose, but rather considered it a traditional statute of limitations that can be tolled under the fraudulent concealment statute. The court found, however, that the minority member’s claim was time-barred because the minority member had notice of its claim more than two years prior to the filing of the claim. The court applied Virginia’s two year “catch all” statute of limitations to the common law breach of fiduciary duty claim and determined that the managing member’s failure to disclose the transfer of the options to an affiliate in the financial statement notes describing related party transactions was mere silence and not an affirmative act of fraudulent concealment that would toll the statute of limitations. The court next analyzed the impact of provisions in the operating agreement on the managing member’s common law and statutory duties. Although the operating agreement gave the managing member unilateral authority over the day to day operations of the LLC, including authority to sell property to affiliates, the court pointed out that the agreement did not explicitly release the managing member from the duty to act in good faith and in the best interests of the LLC, nor did it protect the managing member from claims of oppressive conduct toward non-managing members. The court found the exculpation language in the agreement, which exculpated the managing member from liability except for willful misconduct, gross negligence, fraud or bad faith, to be consistent with a duty to act in good faith. The agreement specifically abrogated the common law fiduciary duty not to usurp opportunities of the LLC; therefore, the court found that the parties agreed to bypass statutory or common law fiduciary duties with respect to competing ventures. In view of these provisions, the court concluded that the minority member could not rest its claim on usurpation of opportunity but could argue that the managing member breached its duty of good faith by selling an asset of the LLC at below market value. This argument failed, however, because the court concluded that the minority member was not

entitled to recover lost profits, which would in effect allow recovery for usurpation of an opportunity when the operating agreement permitted the managing member to usurp opportunities. The harm for which the minority member was entitled to recover was the difference in the price at which the options were sold and their market value. The minority member produced insufficient evidence of the market value of the options, while the managing member provided valuations showing the property to be worth less than the purchase price specified in the options.

*DeShazo v. Estate of Clayton*, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (finding member did not breach fiduciary duty to other members by transferring real property held in member's name to member's trust, even though LLC was formed for purpose of developing property in question, because operating agreement addressed contributions and did not reflect contribution of property by member or obligation to contribute property, and parol evidence of member's prior agreement to hold property for benefit of LLC was inadmissible).

*DeBold v. Case*, 452 F.3d 756 (8<sup>th</sup> Cir. 2006) (applying Missouri law and affirming decision of Bankruptcy Appellate Panel awarding settlement proceeds to LLC member rather than LLC, agreeing with BAP that LLC could not have prevailed on its claims against LLC member for breach of contract and breach of fiduciary duty because member was immunized by Missouri's business judgment rule and operating agreement).

*Minnesota Invco of RSA #7, Inc. v. Midwest Wireless Holdings, LLC*, 903 A.2d 786 (Del. Ch. 2006). The minority interest holders of a Delaware LLC sued the majority holder for specific performance of a broad right of first refusal provision in the LLC agreement. The minority interest holders also sued the individuals serving on the LLC's board of managers for breach of fiduciary duty based on the board's amendment of the LLC agreement to eliminate the right of first refusal provision. The plaintiff argued that the right of first refusal provision was triggered by the approval of the acquisition of the majority member in the form of a sale of substantially all of its assets (including its units in the LLC). The court agreed with the defendant, however, that a subsequent restructuring agreement giving the majority member drag along rights conflicted with the right of first refusal provision and that the restructuring agreement controlled because it contained a clause specifying that the restructuring agreement governed in the event of any conflict with the LLC agreement. The court also rejected the plaintiff's challenge to the amendment of the LLC agreement removing the right of first refusal provision. The board of the LLC amended the agreement in order to facilitate bidding for the acquisition of the majority member, and the majority member voted its LLC units in favor of the amendment. The court rejected the plaintiff's argument that the majority member was an "acquiring person" under the LLC agreement and as such precluded by the agreement from exercising majority voting power. The court refused to read the LLC agreement's "acquiring person" clause as encompassing the majority member because doing so would turn the arrangement crafted by the restructuring agreement on its head. The court also concluded that the LLC's board did not breach its fiduciary duty in approving the amendment. The court recited the business judgment rule as it applies to corporate directors, stating: "[T]he directors of a corporation are presumed to act on an informed basis, in good faith, and in the honest belief that the action taken is in the best interest of the company. [footnote omitted] However, 'to invoke the rule's protection, directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.'" The court found that the LLC's board members did not breach their duty of care because they were fully informed and acted in the best interest of the LLC's unit holders. The evidence showed the board members acted on advice of counsel and the LLC's investment banker, and in the good faith belief that, by clarifying that the right of first refusal did not apply, the amendment would help maximize the sale price of the majority member and get the best possible value for its unit holders and for the plaintiff. The court also rejected the plaintiff's "formulaic" argument that the board breached its duty of loyalty by acting as a rubber stamp for the majority member. The court did not find that the board was dominated or controlled by the majority member or lacked independent judgment when it approved the amendment.

*Purcell v. Southern Hills Investments, LLC*, 847 N.E.2d 991 (Ind. App. 2006). One of the members of a two-member Indiana LLC sued the manager appointed by the other member for breach of fiduciary duty and acts of self-dealing. After a bench trial, the trial court issued findings and entered a judgment for damages against the manager. The manager appealed. The court of appeals agreed with a federal district court's opinion imposing common law fiduciary duties on officers and members of Indiana LLCs in the absence of contrary provisions in the operating agreement and held that "common law fiduciary duties, similar to the ones imposed on partnerships and corporations, are applicable to Indiana LLCs." The court proceeded to analyze whether the evidence supported the trial court's findings that the manager breached his fiduciary duty. The court of appeals found that the trial court could reasonably infer from the evidence that the manager knowingly failed to forward payments to which the LLC was entitled and instead retained the moneys in the entity member owned by the manager. Additionally, even if the manager did not know that the LLC was

entitled to the payments at the time he retained the money, the evidence showed that he was not forthcoming when he was told to forward the amounts due the LLC. Thus, the court did not find that the manager acted “fairly, honestly, and openly” (the fiduciary standard applied by the court based on Indiana case law in the corporate context) with the LLC and the plaintiff member. The court of appeals also rejected the manager’s challenge to the trial court’s conclusion that the manager acted willfully and recklessly within the meaning of the Indiana LLC statute. The Indiana LLC statute specifies that, unless otherwise provided in a written operating agreement, a member or manager is not liable for damages to the LLC or its members for any action taken or failure to act on behalf of the LLC unless the act or omission constitutes “willful misconduct or recklessness.” The court explained that willful misconduct or recklessness requires knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury and indifference to the consequences of the conduct. The court found that the manager exhibited indifference to the consequences of his conduct by using funds rightfully belonging to the LLC to repay a personal loan made by the manager to the entity member owned by the manager. Finally, the court rejected the manager’s claim that the plaintiff member did not have standing to assert its claims in a direct action. The court characterized the plaintiff member’s claim as a direct claim in its own name for breach of fiduciary duties owed to it as a member of the LLC rather than a derivative claim of corporate harm in the name of the LLC under the guise of direct harm. The court also concluded that the statutory language supported a direct claim based on willful misconduct and recklessness.

*In re McCabe (Braunstein v. Panagiotou)*, 345 B.R. 1 (D. Mass 2006) (finding basis for trustee’s accounting claim against debtor’s co-member based on fiduciary relationship between members, but not against LLC because existence of fiduciary relationship is pre-requisite to accounting claim under Massachusetts law, and trustee provided no evidence that fiduciary duty was owed by LLC to debtor member of LLC).

*Amphibious Attractions, L.L.C. v. Trolley Boats, L.L.C.*, No. 05-CV-29-B, 05-CV-122-B, 2006 WL 1075231 (D. Wyo. April 18, 2006) (finding loan from manager to LLC was valid under Florida interested manager statute, and manager’s mismanagement was not grossly negligent, willful, or fraudulent).

*Johnson v. Songwriter Collective, LLC*, No. 3:05-0320, 2006 WL 861490 (M.D. Tenn. March 28, 2006). The plaintiff alleged that the managers of the LLC in which he invested breached their duties to operate the LLC in the best interest of the LLC and its members, to deal with the members in good faith, and to give members true and correct information concerning the LLC, its operations, and viability. The plaintiff identified the source of the managers’ duties as the Tennessee statute (although the LLC was a Delaware LLC) or, alternatively, the operating agreement. The operating agreement contained an exculpation clause, but the plaintiff argued the clause did not apply to the plaintiff’s negligence claim because the clause expressly did not cover a transaction in which the officer received a personal benefit in violation of the agreement, certificate of formation, or Delaware act. The managers argued the proper remedy for the alleged improper performance or failure to perform under the contract remained in contract, but the court concluded the plaintiff could proceed on negligence and breach of fiduciary theories. The court stated that the standard of care in the Tennessee LLC statute – the “care an ordinarily prudent person in a like position would exercise under similar circumstances” – is a “classic negligence standard with its source in a statute squarely applicable to this case,” and found the plaintiff had alleged sufficient facts to support the elements of a negligence claim. With respect to the plaintiff’s breach of fiduciary claim, the court pointed to provisions in the Tennessee LLC statute providing that LLC managers shall discharge the duties of an office in good faith, in a manner the manager reasonably believes to be in the best interests of the LLC. The court cited case law in which the Tennessee Court of Appeals “at least implicitly recognized that a manager of a limited liability company bears a fiduciary duty to the limited liability company and its members.” Further, the defendants did not dispute that a manager has a fiduciary duty to act in good faith under Delaware law. The court thus concluded the plaintiff had alleged sufficient facts to support a breach of fiduciary duty under Tennessee or Delaware law.

*Douzinis v. American Bureau of Shipping, Inc.*, 888 A.2d 1146 (Del. Ch. 2006). The minority members of a Delaware LLC sued the majority member and its affiliates for diverting assets of the LLC to the majority member’s affiliates without compensation to the LLC. The defendants sought to compel the minority members to arbitrate their claims pursuant to a broad arbitration clause in the LLC agreement, and the court found the arbitration clause encompassed the minority members’ claims. The court relied upon the Delaware Supreme Court’s decision in *Elf Atochem North America, Inc. v. Jaffari* in concluding the arbitration clause encompassed the minority members’ claims. In that case, the court held that a broad arbitration clause in an LLC agreement could encompass breach of fiduciary duty claims. The court distinguished the case of *Parfi Holding AB v. Mirror Image Inernet, Inc.* because it arose in the corporate context and the arbitration clause appeared in an underwriting agreement that did not bind all the shareholders

of the corporation. The court noted that it is frequently impossible to decide fiduciary duty claims in alternative entity cases without close examination and interpretation of the governing instrument because the Delaware alternative entity statutes permit the contracting parties to expand or restrict fiduciary duties. The LLC agreement in the instant case contained a provision stating that the relationship was strictly contractual and that no member owed the LLC or any other member a fiduciary duty. The minority members argued the clause was not relevant to their claims against the majority member acting as manager, but the court disagreed. The court looked at the governance provisions to determine that provisions of the LLC agreement would need to be carefully considered and interpreted in connection with the minority members' claims. The court also pointed out provisions addressing confidentiality of information and proscriptions on competition. The minority members' claims were thus within the scope of the arbitration clause, which encompassed "any dispute arising under or related to" the LLC agreement.

*First Taunton Financial Corp. v. Arlington Land Acquisition-99, LLC*, No. 034449BLS, 2006 WL 696689 (Mass. Super. Feb. 27, 2006) (dismissing claims against member because allegations were negligible and exculpatory clause in operating agreement relieved member from liability on all claims other than matters of gross negligence or willful misconduct, finding factual disputes requiring trial to resolve whether managers and affiliates "acted in good faith in the reasonable belief that his or her action was in the best interest of the LLC" as issue related to question of indemnification of managers and affiliates).

*Kent Tillman, LLC v. Tillman Construction Co.*, No. 263232, 2006 WL 143289 (Mich. App. Jan. 19, 2006) (holding evidence did not raise fact issue as to member's alleged "willfully unfair and oppressive conduct" (as defined by Michigan LLC statute) where expert testified that member did not violate operating agreement and that member's treatment of other member, while not fair, was not inconsistent with provisions of operating agreement).

*Lio v. Zhong*, 10 Misc.3d 1068(A), No. 600455/05, 2006 WL 37044 (N.Y. Sup. Jan. 6, 2006). The plaintiff, a member of a New York LLC, sued the other two members alleging claims of breach of fiduciary duty, waste, mismanagement, conversion, and an accounting. The plaintiff also sued the spouse of one of the members for tortious interference with prospective economic advantage and sued an attorney for conversion and aiding and abetting a breach of fiduciary duty. The court first discussed the failure of the New York LLC statute to address derivative actions and concluded that the omission was deliberate and precludes member derivative suits. The court held, however, that managing members owe statutory and common law fiduciary duties that give rise to a personal claim on the part of a member. The court found that the plaintiff's claim for usurpation of a business opportunity supported a breach of fiduciary duty claim by the plaintiff. The operating agreement identified the purpose of the LLC as the development of a specific piece of property, and the defendant members argued their purchase of another piece of property was not within the LLC's purpose. The court pointed out that the operating agreement gave the LLC the power to purchase other real estate that may be "necessary, convenient, desirable or incidental" to accomplish its purpose. Further, the operating agreement contained restrictions on competition and conflicting business ventures. The court also pointed to the fiduciary duties traditionally applied in other business contexts with respect to business opportunities, citing *Meinhard v. Salmon*. The court found no basis for a breach of a fiduciary duty claim in connection with failed buy-out negotiations among the members, concluding the negotiations were simply an attempt to settle the differences that had arisen. The plaintiff's mismanagement claims withstood dismissal notwithstanding the defendants' argument that they were protected by the business judgment rule. The court acknowledged that the business judgment rule may ultimately provide the defendants protection, but stated the rule did not require dismissal at the pleading stage. The court noted that the allegations referred to conduct outside the scope of protection of the business judgment rule, such as the allegation that one of the defendants hired employees away from the LLC for her own business dealings. The court recognized the plaintiff's right as a member to bring an action for an accounting based on the alleged breach of fiduciary duty of the managing members, but dismissed the plaintiff's other claims. The court concluded that the plaintiff's cause of action for waste was subsumed within the plaintiff's first cause of action for breach of fiduciary duty to the extent it was a personal claim, and it could not be derivatively asserted by the plaintiff to the extent it represented rights of the LLC. The court found the plaintiff's claim for gross mismanagement was a breach of fiduciary duty claim subsumed in the plaintiff's cause of action for breach of fiduciary duty. The court concluded the plaintiff's claims for conversion and tortious interference with prospective economic advantage related to rights belonging to the LLC and could not be asserted by the plaintiff. The court also dismissed the plaintiff's claims against an attorney. The attorney had represented the LLC, one of the defendant members, and the defendant member's spouse at various points, but the attorney never represented the plaintiff and did not have a duty to the plaintiff personally. The court acknowledged that a third party may have aiding and abetting liability where the third party knowingly participates in a breach of fiduciary duty by



providing substantial assistance to the violator; however, the court held the plaintiff's allegations against the attorney did not state a claim in this regard.

*Mayeux v. Winder*, 131 P.3d 85 (N. M. App. 2005). Two couples formed an LLC to purchase and develop real estate. The plaintiffs, Mr. and Mrs. Mayeux, filed this suit alleging that the defendant, the sole managing member, breached his fiduciary duty by misappropriating funds and that he breached the covenant of good faith and fair dealing. After a bench trial, the trial court found for the defendant on these claims. On appeal, the plaintiffs argued that the trial court incorrectly placed the burden of proof on the plaintiffs on their breach of fiduciary duty claim and applied an incorrect substantive standard to their claim. The plaintiffs argued that the burden of proof was on the defendant to show that his dealings were proper based on case law in other jurisdictions imposing the burden on the defendant in breach of fiduciary duty cases. The court stated that imposing the burden on the defendant might be appropriate when there is a facial showing of self-dealing, but the court did not characterize most of the expenditures challenged by the plaintiffs in this case as presumptively suspect. The court stated that the plaintiffs' allegations involved a series of relatively small expenditures benefitting other companies owned by the defendant, and most of the expenditures were of a type that were presumptively legitimate. The court said the defendant's testimony explained how the expenses were allocated and reimbursed among his several companies. The court also found it significant that Mrs. Mayeux was involved in the LLC's record keeping and aware of its financial affairs. In sum, the court held that the burden of proof remains on the plaintiff in a case where the challenged expenditures themselves do not create a presumption of self-dealing, and the plaintiff is involved in the financial affairs of the company such that the plaintiff has access to the entity's records. The court also concluded that the trial court did not apply an incorrect substantive standard to the plaintiffs' breach of fiduciary duty claim. The plaintiffs argued that the trial court's finding that the plaintiff performed his job in good faith and in the best interest of the company indicated that the trial court was unaware of the higher standard applicable to fiduciary relationships. The court agreed that a fiduciary relationship imposes a duty higher than the duty of good faith and fair dealing implied in all contractual relationships, but disagreed that the court's statement that the defendant satisfied that obligation indicated that the court did not apply the correct fiduciary duty standard. The court pointed out that the plaintiff had also alleged a breach of the covenant of good faith and fair dealing, and it was thus not surprising the court would make a finding in such terms. The court concluded the trial court was aware of the distinction between the breach of contract and breach of fiduciary duty theories because the trial court mentioned both theories when it stated that it was satisfied that the defendant did not breach his fiduciary duty to the plaintiffs or breach his contract with them. The court concluded the evidence did not show the trial court erred in finding no breach of fiduciary duty under either a substantial evidence or abuse of discretion standard of review.

*Mroz v. Hoaloha Na Eha, Inc.*, 410 F.Supp.2d 919 (D. Hawaii 2005) (holding that individuals who collectively controlled corporation and LLC owed fiduciary duties to plaintiff, a minority owner of such entities, based on defendants' status as "majority shareholders" and that plaintiff stated claim for breach of fiduciary duty based on allegations of use of corporate funds for personal benefit, exclusion of plaintiff from participation in funds, wrongful termination of plaintiff, failure to allow reasonable inspection of corporate records, and failure to provide proper accounting of corporate funds).

*Katris v. Carroll*, 842 N.E.2d 221 (Ill. App. 2005). The court granted summary judgment in favor of two defendants sued for colluding with a non-manager member of an Illinois LLC to breach the member's fiduciary duty. The court relied upon provisions of the Illinois LLC act specifying that a member who is not also a manager owes no duties to the LLC or the other members solely by reason of being a member and that fiduciary duties are owed by a member of a manager-managed LLC only where the member exercises some or all of the authority of a manager pursuant to the operating agreement. The plaintiff, a member and manager of the LLC, alleged that Doherty, an LLC member who had developed the Viper software marketed by the LLC, usurped an opportunity of the LLC by working in secret with two other parties to develop a software program that was functionally similar to the Viper software. The court concluded, however, that Doherty did not exercise any authority of a manager pursuant to the operating agreement and thus did not owe any fiduciary duties to the LLC or its members. The court examined the LLC operating agreement and pointed out that the plaintiff and another individual were the "sole managers." The operating agreement enumerated the powers of the managers and the rights and obligations of the members and did not specify any managerial authority of the members in the provisions setting forth their rights and obligations. Although Doherty was designated "Director of Technical Services" in a written consent of the managers and given "sole management responsibility for developing, writing, revising and implementing the Viper software" for the LLC, the court concluded the written consent of managers did not constitute an amendment of the operating agreement because the two managers held only a combined 50% interest in the LLC, and an amendment of the operating agreement required the vote of members holding a majority in interest.

Further, the court found that the written consent, even if viewed as an amendment to the operating agreement, did not change its terms. The written consent, which was executed the same date as the operating agreement, reaffirmed the operating agreement. In the consent, the managers resolved to adopt the operating agreement signed by the members, and the signature lines on the written consent identified the two managers as “all of the managers.” The court stressed that the statutory provision imposing fiduciary duties on a non-manager member applies only where the member exercises some or all of the authority of a manager *pursuant to the operating agreement*.

***Direct Reimbursement Administrative Services Ltd v. Vitek***, No. 20996, 2005 WL 3446277 (Ohio App. Dec. 16, 2005) (holding trial court erred in granting majority member summary judgment on minority member’s breach of fiduciary duty claim in view of majority member’s admission that he violated operating agreement, transferred LLC’s assets and customer lists to his own LLC, and asserted right to unilaterally make decisions such as firing minority member, and minority member’s assertions that majority member turned potential profit into loss and engaged in self-dealing).

***Foster-Thompson, LLC v. Thompson***, No. 8:04-CV-2128T30EAJ, 2005 WL 3093510 (M.D. Fla. Nov. 18, 2005) (relying on Florida LLC statute’s provisions imposing on managers and managing members a “duty of care and loyalty to the LLC and all other members” and concluding member’s pleading that other members breached their “fiduciary” duties to him was sufficient notice to other members that they owed duty to him as member even though statute was not referenced in complaint).

***Ishimaru v. Fung***, No. Civ.A. 929, 2005 WL 2899680 (Del. Ch. Oct. 26, 2005). An LLC member sought to prosecute a derivative claim against an entity (Ivy Asset Management Corp. or “Ivy Asset”) on the basis that the LLC’s managing/majority member would not fairly consider whether to pursue the claim. Applying the same demand futility test that is applied in the corporate context, the court held that the plaintiff member was entitled to pursue the derivative claim because her complaint articulated particularized facts demonstrating that the managing member was incapable of disinterestedly determining whether to pursue the claim. The court rejected the managing member’s claim that the LLC agreement precluded the derivative plaintiff’s claim. Neither the authority conferred on the managing member to decide whether to sue nor the exculpation provisions, which permitted the managing member to consider his own interests in making certain decisions, precluded the plaintiff from pursuing the claim. The LLC agreement did not exculpate the managing member from fraud, gross negligence, willful misconduct, or intentional breach of the agreement, and the plaintiff alleged willful misconduct that was not exculpated (i.e., the managing member’s attempt to use financial products developed for the LLC for his own benefit and sacrifice the interests of the LLC to secure concessions from Ivy Asset that would personally benefit him). The court commented by footnote that it considered the claim a double derivative claim since the LLC was a member of a joint venture that suffered the direct injury, but noted that the other joint venture member would block the joint venture from pressing the claim and could not impartially decide whether the joint venture should sue Ivy Asset. Ultimately, the court determined that the LLC’s claim against Ivy Asset was subject to an arbitration clause in the joint venture agreement, and the court thus granted Ivy Asset’s motion to dismiss.

***Zanker Group, LLC v. Summerville at Litchfield Hills, LLC***, No. NNH-CV-04-4015239S, 2005 WL 3047268 (Conn. Super. Oct. 24, 2005) (finding material issue of fact as to whether concealment of usurpation of opportunity tolled three year statute of limitations based on continuing course of conduct doctrine or statutory fraudulent concealment tolling provision, stating that members and managers generally owe a fiduciary duty to other members and that continuing duty of full disclosure is, as general matter, part and parcel of fiduciary relationship).

***Blackmore Partners, L.P. v. Link Energy LLC***, No. Civ.A. 454-N, 2005 WL 2709639 (Del. Ch. Oct. 14, 2005). In an earlier opinion in this case (published at 864 A.2d 80 and summarized below), the Chancery Court denied the defendants’ motion to dismiss. This opinion addresses the defendants’ motion for summary judgment. The case was brought by a former unit holder of an LLC against the LLC and its directors for breach of fiduciary duty in connection with the sale of substantially all of the LLC’s assets. The complaint alleged that the sale proceeds were all distributed to creditors and that the creditors received more than the total amount of their claims while the equity units were rendered worthless. The complaint also alleged that there were alternative transactions that would have provided a better result for the equity holders. The defendants presented summary judgment evidence that the LLC was insolvent under the balance sheet, cash flow, and unreasonably small capital tests, and the plaintiff produced no contradictory evidence. The court thus found the LLC was insolvent at the time of the relevant transaction and that the directors owed the note holders fiduciary duties. The court stated that the board owed a duty to the creditors (including the note holders) as well as the unit holders, noting that “ultimately, the board of directors of an insolvent company may take into account the interests

of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies.” The court rejected the plaintiff’s argument that the LLC board’s actions were subject to enhanced scrutiny and found that the board met an enhanced standard even if it applied. The court disagreed with the plaintiff’s argument that the transaction was tainted by the presence of a managing director of a note holder and unit holder on the board. The court pointed out that a special committee had been formed to approve the transaction and concluded that the committee operated with sufficient independence to merit protection under the business judgment rule. The court also concluded that there was insufficient evidence relating to the duty of care claims to overcome the LLC agreement’s exculpation clause protecting the directors from liability for damages for violations of the duty of care. The plaintiff argued that the directors’ bad faith should not be protected, but the court found no evidence that the directors acted in bad faith.

***Roemmich v. Eagle Eye Development, LLC***, 386 F.Supp.2d 1089 (D. N.D. 2005). Roemmich, a 30% member of a North Dakota LLC, was removed as a governor and treasurer of the LLC and brought a suit alleging unfairly prejudicial conduct, breach of fiduciary duty and duty to act in good faith, and dissenter’s rights. The court concluded the alleged acts of breach of fiduciary duty spanning 1995-2004 were distinct claims accruing as they occurred and not part of a continuing tort; therefore, the claims accruing more than six years prior to the filing of the suit were barred by the six-year statute of limitations. The court also concluded that the defendants’ counterclaim for breach of contract against the member, which was based on the member’s failure to perform promised services to the LLC in exchange for receipt of his membership interest, was barred by limitations. With respect to the member’s dissenter’s rights claim, the defendants argued the member had no basis for such a claim because the statutory basis for the exercise of dissenter’s rights, an amendment to the articles of organization that materially and adversely affects the rights or preferences of the dissenting member, had not occurred. Though the LLC’s articles of organization had not been amended so as to trigger statutory dissenter’s rights, the court concluded that the statute would permit the member’s requested relief of a buy-out for fair market value if he established his claim that his right to vote had been improperly restricted because the statute authorizes broad equitable relief under circumstances such as deadlock and waste. In response to the defendants’ argument that the individually-named defendants could not be held liable for their actions as members or officers, the court stated that LLC governors may be personally liable where the veil is pierced, for illegal distributions, and for failure to comply with statutory standards of conduct notwithstanding the general rule of limited liability of members and officers.

***Consolidated Lint, LLC v. Waller***, No. BER-C-293-05, 2005 WL 2483375 (N.J. Super. Ch. Oct. 3, 2005) (denying request for interim relief in dispute between LLC members involving alleged breach of fiduciary duties, breach of operating agreement, and improper financial transactions, finding plaintiff failed to make sufficient showing of irreparable harm and likelihood of success on merits).

***Thorpe v. Levenfeld***, No. 04 C 3040, 2005 WL 2420373 (N.D. Ill. Sept. 29, 2005) (rejecting defendants’ argument that plaintiff must allege that operating agreement is “manifestly unreasonable” to plead breach of fiduciary duty claim where defendants did not direct court to any provision of operating agreement setting out “specific types or categories of activities” that do not violate fiduciary duties).

***Godfrey v. LaFavour***, No. J05-005 CV JWS, 2005 WL 2340714 (D. Alaska Sept. 16, 2005). The plaintiff and defendant were each 50% shareholders in a corporation and 50% members of an LLC. The defendant managed the finances and day to day operations of the corporation and the LLC. The plaintiff sued the defendant alleging breach of fiduciary duty, fraud, usurpation of corporate opportunity, and breach of the covenant of good faith and fair dealing. The events underlying the plaintiff’s claim involved the purchase of some property by an entity affiliated with the defendant without notice to the plaintiff that a right of first refusal in favor of the corporation or the LLC had been triggered. The defendant argued that Alaska law does not impose fiduciary duties on a managing member of an LLC. The court stated that it was unclear whether the breach of fiduciary duty claim was asserted on the basis of the defendant’s status as an officer and 50% shareholder of the corporation or his status as a managing member of the LLC. Further, it was unclear whether it was the corporation or the LLC that had entered the lease on the property underlying the plaintiff’s claim. The plaintiff suggested that a managing member of an LLC has statutory and common law fiduciary duties to the LLC and the members, and the plaintiff offered to amend his complaint to include the statutory standard of care for a managing member of an LLC. The court denied the defendant’s motion for judgment on the pleadings and stated that the plaintiff should seek leave to amend if he desired to amend his complaint. The defendants argued that the plaintiff could not recover for breach of the covenant of good faith and fair dealing because there was no contract between the parties containing such a covenant. The plaintiff alleged that he had not yet located the shareholder

agreement for the corporation or an executed operating agreement for the LLC. The court found it premature to conclude that there was no contractual relationship. The court noted that the plaintiff alleged a covenant arising from implied contracts even if discovery should yield no fully executed contracts. The court concluded that the defendants failed to establish from the face of the pleadings that no material issues of fact remained regarding the existence of a contract.

***Flight Options Int'l, Inc. v. Flight Options, LLC***, No. Civ.A. 1459-N, 2005 WL 2335353 (Del. Ch. July 11, 2005). The minority member of an LLC sought to enjoin the majority member from consummating an equity investment in the LLC pending arbitration of the dispute, and the court granted the injunction based on the probability that the plaintiff would prevail in establishing that the process followed by the LLC's managers in approving the terms of the investment did not meet the arms' length standard required with respect to transactions with affiliates under the terms of the LLC operating agreement. The LLC agreement provided that each manager had the same fiduciary duties in managing the affairs of the LLC as the directors of a Delaware corporation have to its shareholders and others under applicable law, but the court found that a provision addressing the standard for transactions with affiliates controlled over the general fiduciary duty provision. The agreement provided that a transaction between the LLC and any affiliate must be on arms' length terms and conditions, including fair market values and prices equivalent to those that would be charged or paid between parties at arms' length, unless otherwise approved by a majority of disinterested managers. The court concluded that the informality of the process by which the managers determined the price of the new common units to be issued to the majority member substantially undermined the ability of the managers to show it was equivalent to the result of an arms' length transaction.

***In re Holcomb Health Care Services, LLC (Holcomb Health Care Services, LLC v. Quart Limited, LLC)***, 329 B.R. 622 (Bankr. M.D. Tenn. 2004). The bankruptcy court interpreted the employment contract between the debtor and one of the LLC's founding members, Dr. Holcomb, who was employed as Chief Scientific Officer, and concluded that the LLC owned the patents and provisional patent applications filed during Holcomb's employment based on the terms of the agreement. In addition, the court found that the LLC was the rightful owner of the patents based upon Holcomb's duty of loyalty. Although it is clear from the opinion that the debtor was an LLC (the court quoted from provisions of the operating agreement, including provisions detailing the organization of the entity as a Tennessee LLC), the court apparently assumed that Holcomb was an officer of a corporation and relied exclusively upon corporate case law and the Tennessee corporation statute in analyzing Holcomb's duty of loyalty.

***In re Tri-River Trading, LLC (DeBold v. Case)***, 329 B.R. 252 (8<sup>th</sup> Cir. BAP 2005). A member/manager of a Chapter 7 debtor LLC appealed from the bankruptcy court's decision awarding the LLC all of the settlement proceeds from a pre-petition lawsuit brought by the LLC and its managing member (DeBold). DeBold and Jersey Grain, Inc. (Jersey) were the members of the LLC, and there was an oral agreement that Jersey would use the LLC for all of Jersey's shipping needs. Jersey did not honor the agreement, and DeBold and the LLC filed a lawsuit against Jersey and two of its officers alleging various claims. The case settled, but the settlement agreement failed to make an allocation of the proceeds between DeBold and the LLC. As manager of the LLC, DeBold allocated the settlement proceeds 1/8 to the LLC and 7/8 to herself. She claimed that she had authority to do so as manager of the LLC, and that, because the allocation occurred prior to the bankruptcy case, only the portion allocated to the LLC became property of the bankruptcy estate. The bankruptcy court held that the settlement proceeds were property of the bankruptcy estate and awarded all the proceeds to the LLC. The court of appeals concluded that the trustee met her initial burden of showing that the estate had an interest in the settlement proceeds since the check named the LLC as a joint payee and the funds could not be released without the LLC's consent. The burden thus shifted to DeBold to establish that she owned the money. The court concluded that DeBold did not have authority under the Missouri LLC statute to allocate the settlement proceeds because the transaction involved self-dealing and required the approval of a majority of the members. The court characterized the statutory provision requiring a member or manager to account to the LLC for any benefit derived without the informed consent of more than one-half of the disinterested members as codifying the duty of loyalty and its attendant prohibition of self-dealing. Because the operating agreement limited DeBold's unilateral decision making authority to decisions in the ordinary course of business, the court rejected her claim that the operating agreement authorized her to make the allocation. Since DeBold was not authorized to make the allocation, the proper allocation was an issue for the court to determine. The court analyzed the strength of the claims belonging to DeBold and the claims belonging to the LLC and concluded the bankruptcy court erred in allocating all the proceeds to the LLC. The court concluded that DeBold's claims on liability and damages were strong while the LLC had little chance of succeeding on its claims. DeBold asserted a claim for misrepresentation based on statements about the viability of the business and commitments that Jersey would deal exclusively with the LLC. DeBold's damages from the collapse of the LLC included the amount of her initial investment, lost income during the years she operated the LLC after Jersey pulled its business,

and lost future wages. In the course of discussing the merits of DeBold's claim and the possible reasons the bankruptcy court denied DeBold any portion of the settlement proceeds, the court commented that it knew of no principle of law that would suggest that a manager of a company is required to give up an agreed upon salary to pay creditors when business turns bad. The court also commented upon the possibility that DeBold may have owed a duty to creditors in settling the lawsuit because the LLC was insolvent. The court did not decide whether such a duty would apply to LLC managers, but concluded that the record did not show DeBold accepted less than a reasonable settlement on behalf of the LLC assuming she owed a duty to creditors. The LLC's claims, in contrast to DeBold's, were weak according to the court. The court stated that the breach of contract and tortious interference claims belonged to the LLC since all contracts involved were the LLC's. The court concluded the Missouri LLC statute and the operating agreement rendered Jersey and its agents immune from liability. The court cited the statutory provisions specifying a manager's duty of care, permitting good faith reliance on provisions of the operating agreement, and permitting reasonable reliance on the opinions of professionals. The court pointed out that members can embellish upon the statutory provisions or agree otherwise, and the operating agreement in this case insulated members from liability for acts in connection with the LLC except to the extent the acts were based on gross negligence or misconduct. The operating agreement further provided that an act or omission was conclusively presumed not to constitute misconduct or gross negligence if the member acted on advice of counsel. The court concluded Jersey and its agents were shielded from liability to the LLC because they received an opinion of counsel that Jersey had no legal obligation to deal exclusively with the LLC. With respect to the breach of fiduciary duty claim alleged by DeBold and the LLC, the court concluded that neither DeBold nor the LLC had a claim. The court relied upon the Missouri LLC act, which provides that a non-manager member has no duty other than the duty of loyalty solely by reason of acting in the capacity of member, and the provision of the operating agreement specifying that no member would be liable with respect to an action taken in connection with the LLC absent actual fraud, gross negligence, or willful misconduct. Based on the strength of DeBold's claim and the weakness of the LLC's claims, the court indicated it would be appropriate to award the full amount of the settlement proceeds to DeBold; however, the court granted the relief requested by DeBold, who had conceded that the LLC might be entitled to some portion and had only requested 7/8 of the settlement proceeds.

*ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1 (Tenn. Ct. App. 2005). Two corporations formed an LLC to supply the pharmaceutical needs of assisted living centers owned by one of the members. The other member (AMC-TN), which was a large retail pharmacy, was the manager of the LLC pursuant to a management agreement. Later a third corporation, which was engaged in the nursing home business, invested in the LLC and was admitted as a member. AMC-TN continued to manage the LLC under the management agreement previously entered. The LLC operated for a limited period of time before it was dissolved due to financial difficulties. Somewhat complex business missteps involving difficulties in inventory control and inflated valuation of collectible accounts receivable formed the basis of claims against AMC-TN by the LLC and the other two members for breach of contract, breach of fiduciary duty, and negligent and fraudulent misrepresentation. The complaint alleged that AMC-TN did not have the expertise and ability to manage the type of pharmacy venture in which the parties were engaged and detailed various aspects of mismanagement by AMC-TN involving failure to properly manage receivables and inventory and production of misleading financial statements for the LLC. The court reviewed the evidence and decided that it supported the trial court's finding that AMC-TN materially breached the management agreement. The court found that the breach of fiduciary duty claims failed, however. The court relied on *McGee v. Best*, in which the Tennessee Court of Appeals held that members' fiduciary duties are ordinarily owed to the LLC because the Tennessee LLC act describes the fiduciary duties of a member as owing to the LLC, not to individual members. (Although the LLC was a Delaware LLC, the court applied Tennessee law throughout its analysis. No mention was made of any choice of law issue.) Although the court in *Anderson v. Wilder* distinguished *McGee* and imposed a fiduciary duty upon a majority member to a minority member based on partnership and closely-held corporation principles, the court found the instant case to be more like the *McGee* case, which involved a mere employment dispute controlled by an employment agreement and operating agreement. The court stated that the case at bar likewise involved "uncomplicated contractual duties under an operating agreement and a management agreement and not a factual situation involving oppression by a majority shareholder of minority shareholders." The court noted that the parties did not dispute the existence of a fiduciary duty owed by the managing member to the LLC, but stated that the question of whether or not a fiduciary duty was owed by the managing member to the other members was of little consequence because the factual allegations constituted repeated breaches of the management contract resulting in damages to the LLC. The court said the plaintiffs asserted no damages to themselves personally, only such damages as flowed from the breach of the management contract with the LLC. The court also relied upon *McGee* in concluding the members failed to offer any proof they suffered damages from misrepresentations by AMC-TN independent of damages to the LLC. The court stated the misrepresentations asserted were the same misrepresentations that constituted the breach of contract.

**Gottsacker v. Monnier**, 697 N.W.2d 436 (Wis. 2005). Two members of a Wisconsin LLC who constituted a majority in interest of the LLC caused the LLC to transfer its sole asset to a newly created LLC owned by the two members. The majority members transferred the property for the same price that the LLC had paid three years earlier, without obtaining a new appraisal, and without the knowledge of the other member. The Wisconsin Supreme Court held that the conveyance involved a material conflict of interest, but concluded the conflict of interest did not prevent the majority members from voting on the transaction so long as they dealt fairly with the LLC. The court relied on statutory provisions prohibiting a member or manager from acting or failing to act in a manner that constitutes a willful failure to deal fairly with the LLC or its members in connection with a matter in which the member or manager has a material conflict of interest. The court noted that the statutory duties may be modified, limited, or expanded by the members' agreement and suggested that LLC members may wish to impose greater protections to obviate future problems of this type. The supreme court interpreted the statutory standard as precluding willful action or failure to act in a manner that will have the effect of injuring the LLC or its members. The court stated that the inquiry contemplates both the conduct and the end result, which the court viewed as intertwined, as well as a determination of the purpose of the LLC and the justified expectations of the parties. The court of appeals found that the transaction in this case was unfair because the sale was not at arm's length and it was impractical for the LLC to carry on with its intended business after the transfer of the property, but the supreme court concluded the court of appeals exceeded its constitutional power by making findings of fact. Thus, the supreme court remanded the case to the trial court for further findings and application of the standard pronounced by the court. (Though the court of appeals expressly stated that LLC members have a fiduciary duty to the LLC and other members, the supreme court confined its analysis to the statutory standard imposed on members and did not refer to "fiduciary" duties. In a concurring opinion, two of the justices expressed the view that the rights and obligations of LLC members to the LLC and each other are set by statute and that common law concepts such as the fiduciary duty of a majority shareholder of a corporation to a minority shareholder are replaced by statutory obligations. In their view, "[t]he court of appeals improperly engrafted a common law fiduciary duty" on the defendant members.)

**Salm v. Feldstein**, 799 N.Y.S.2d 104 (N.Y. A.D. 2 Dept. 2005) (holding managing member owed co-member fiduciary duty to make full disclosure of all material facts, disclaimer in redemption/settlement agreement pursuant to which managing member bought out co-member did not waive duty, and fact issues existed regarding sufficiency of disclosure in connection with sale of LLC's business two days after purchase by managing member of co-member's interest).

**Ledford v. Smith**, 618 S.E.2d 627 (Ga. App. 2005). An LLC's ownership was divided between three individuals (the "Active Members") and an entity owned by five other individuals ("Dyna-Vision"). The Active Members bought out Dyna-Vision's interest pursuant to a push-pull provision in the operating agreement and then sold the assets of the LLC to a third party who had financed the purchase by the Active Members of Dyna-Vision's interest. Dyna-Vision sued the Active Members based on the Active Members' failure to disclose that their purchase of Dyna-Vision's interest was being financed by a third party to whom they planned to sell the LLC. The court first found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with the third party under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered by the third party's agreement with the Active Members to make a loan to finance the Active Members' purchase of Dyna-Vision's interest and to purchase the LLC's assets after the Active Members' purchase of the Dyna-Vision interest. The court also rejected Dyna-Vision's fraud claim, finding that the involvement of the third party in financing the buy-out of Dyna-Vision's interest was not material to Dyna-Vision's decision whether to buy or sell under the push-pull provision. Finally, the court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members' freedom to restrict and eliminate fiduciary duties under the Georgia LLC act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with the LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.

**Doonan v. Wood**, 224 S.W.3d 271 (Tex.App. 2005) (rejecting LLC breach of fiduciary duty claim of minority member's spouse against investment company limited partnership that made loan to LLC and acquired membership interest, stating that member's spouse did not establish existence of fiduciary relationship and, assuming fiduciary relationship existed, the various acts alleged, including foreclosure on LLC assets and enforcement of personal guaranty against minority member, did not raise any genuine issue of material fact as to breach of fiduciary duty because the actions were taken for legitimate business reasons rather than for fiduciary to profit by taking advantage of its position).

*Nathanson v. Nathanson*, 799 N.Y.S.2d 83 (N.Y. A.D. 2 Dept. 2005) (holding member's allegations that managing member engaged in self-dealing by deferring certain priority distributions so that interest could accrue at 12% interest rate were sufficient to state cause of action for breach of fiduciary duty).

*Salkind v. Danilovic*, No. B167257, 2005 WL 1273958 (Cal. App. 2 Dist. May 31, 2005). The plaintiff, a one-third member of a Delaware LLC, paid \$50,000 to purchase a convertible preferred interest in the LLC (in addition to its one-third membership interest) pursuant to an agreement that entitled the plaintiff to return of the \$50,000 if subscriptions of \$1,000,000 were not received by a certain date. The plaintiff demanded return of the \$50,000 when \$1,000,000 in subscriptions was not raised by the specified date. The trial court found that Danilovic, a director of the LLC and owner of a two-thirds membership interest, was the alter ego of the LLC and was personally liable on breach of contract and breach of fiduciary duty claims. The court of appeals found it unnecessary to address the alter ego finding because it concluded Danilovic was liable on the basis of breach of fiduciary duty. The court relied upon the fiduciary duty provisions of the California LLC act, which provide that an LLC manager owes to the LLC and the members the duties owed by a partner to the partnership and the partners. The court cited partnership case law to describe the fiduciary duties imposed and concluded there was substantial evidence Danilovic breached her fiduciary duty to the plaintiff by failing to return the \$50,000 investment.

*U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930 (Del. Ch. 2004), vacated, 875 A.2d 632 (Del. 2005). An indenture trustee, acting on behalf of unsecured noteholders, brought an action against the issuer of the indenture (a Delaware LLC) and related entities and parties, including the manager of the issuer (another Delaware LLC), and the directors of the manager. The indenture trustee alleged that certain transactions between the issuer and related third parties violated provisions of the indenture and constituted a breach of fiduciary duty on the part of the defendants. The defendants argued that the factual allegations in the complaint failed to establish the defendants owed a fiduciary duty to the noteholders. The court acknowledged that the directors of a debtor company do not generally owe the creditors any duty beyond the relevant contractual terms. Though the defendants admitted that the fiduciary duties of those managing a debtor enterprise extend to the interests of creditors when the debtor is insolvent, the defendants argued the complaint did not sufficiently allege insolvency. The court reviewed the allegations of the complaint and concluded that they at least raised an issue of material fact as to whether the issuer was insolvent or in the zone of insolvency at the time of the transactions challenged in the complaint. The court next addressed the defendants' argument that the breach of fiduciary duty claims should be dismissed on the basis that the issuer's operating agreement deemed them not to constitute a breach of any duty. The operating agreement provided that a transaction between the issuer and its manager or affiliates would be deemed fair and reasonable if approved by a majority of a three person conflicts committee. The complaint alleged that two of the individual defendants were members of the conflicts committee and that these individuals approved the transactions. Thus, argued the defendants, the conflicts committee approved the transactions, and the transactions were fair and reasonable. The court rejected this characterization as too simplistic, stating that the defendants would have to show that the conflicts committee actually met and authorized the transactions, which was not specifically alleged and could not be assumed on a motion to dismiss. The Delaware Supreme Court subsequently vacated this decision, in which the Chancery Court granted the indenture partial summary judgment, and remanded all the issues in the case for trial without addressing the court's reasoning on the fiduciary duty claims.

*Dickens v. Alliance Analytical Laboratories, LLC*, 111 P.3d 889 (Wash. App. 2005) (stating that a manager is entitled to rely in good faith on other managers and that there exists a fiduciary duty between the company, its members, and managers).

*Monroe v. Baron One, L.L.C.*, 902 So.2d 529 (La. App. 2005) (La. App. 2005) (citing partnership law on fiduciary duty and concluding payee members did not breach their fiduciary duties to guarantor members by calling LLC note and guaranties after default).

*In re Adelpia Communications Corp. (Adelpia Communications Corp. v. Rigas)*, 323 B.R. 345 (Bankr. S.D. N.Y. 2005). The court analyzed the advancement and indemnification obligations of various entities, including two Florida LLCs, and concluded, after examining the Florida LLC statute and the operating agreements, that there was no obligation by statute or contract to advance expenses to individual management persons who had been tried on criminal charges. The court found that obligatory indemnification provisions of the operating agreements would not apply to certain charges, i.e., wire fraud charges that did not arise "by reason of" being in a management position with the managed entities. As to individuals who were convicted of some charges and acquitted of others, the court refused to

order indemnification at this juncture of the case. As to one of the individuals who was not convicted of any charges because of a hung jury, the court concluded indemnification was required. With respect to whether appropriate action was taken to authorize permissive indemnification and advancement, the court concluded that statutory provisions disqualifying a recipient from indemnification in the event of willful misconduct, bad faith, or fraud precluded indemnification with respect to the criminal convictions. Though the court found no authority as to whether the “entire fairness” doctrine would apply to decisions to advance expenses under Florida law, the court declined to order advancement because it found it inconceivable that Florida would tolerate interested parties to authorize benefits for themselves at the expense of their companies where requirements substantially similar to those of the “entire fairness” doctrine had not been satisfied.

*In re Die Fliedermas, LLC (O’Connell v. Shallo)*, 323 B.R. 101 (Bankr. S.D. N.Y. 2005) (finding defendants who had right to manage and control LLC were in prima facie fiduciary relationship with LLC under New York law and were also properly characterized as insiders under Bankruptcy Code).

*In re Stonecraft, LLC*, 322 B.R. 623 (Bankr. S.D. Miss. 2005). The court held that the manager of a Michigan LLC was in a fiduciary relationship with the LLC and was not entitled to retain the benefit of a patent conceived of by the manager but reduced to practice by another employee of the LLC at the LLC’s expense. The court stated that the Michigan LLC statute expressly incorporates a duty of loyalty on the part of a manager by virtue of its provision requiring discharge of the manager’s duties “in good faith, with the care an ordinary prudent person would exercise under similar circumstances, and in a manner he reasonably believes to be in the best interest of the limited liability company.” The court also cited provisions imposing a duty to account and hold as trustee any profit or benefit derived by the manager in the conduct or winding up of the LLC and requiring approval of interested manager transactions by disinterested members after full disclosure. The court concluded that the ownership of the patent was not disposed of by the failure to mention the patent in a second amended operating agreement containing a merger and no oral modification clause. The manager claimed that the members had acquiesced in his ownership since they knew he was designated as the inventor when the agreement was executed. The court found, however, that the issue of patent ownership or assignment was not discussed during the mediation leading up to execution of the agreement and that the agreement did not contemplate the issue. Thus, there was no meeting of the minds on the issue, and it was not resolved by the merger clause. The court also noted that the Michigan LLC act does not permit the articles of organization or operating agreement to eliminate or limit a manager’s liability for the receipt of a financial benefit to which the manager is not entitled.

*Gill v. Gill*, 895 So.2d 807 (La. App. 2005) (recognizing member/managers stand in fiduciary relationship with other members who may bring an action for breach of fiduciary duty).

*In re McCook Metals, L.L.C. (Baldi v. Lynch)*, 319 B.R. 570 (Bankr. N.D. Ill. 2005). The trustee of the debtor LLC sued Lynch, a manager and the chairman and chief operating officer of the LLC, for breach of fiduciary duty based on the transfer of the LLC’s right to acquire a smelting plant to another LLC owned by the managers of the debtor LLC. The court held that principles of corporate law regarding usurpation of corporate opportunities and fiduciary duties of directors of an insolvent corporation to creditors apply to LLC managers. Applying such principles, the court found that the transfer of the debtor LLC’s right to acquire the smelting plant breached the fiduciary duty Lynch and the other managers owed to the debtor LLC’s creditors. The court applied three principles of the business opportunity doctrine and concluded that (1) the smelting plant was in the line of business of the debtor LLC, (2) Lynch failed to establish that the debtor LLC lacked the ability to acquire the smelter, and (3) Lynch was estopped to assert that the acquisition was a business opportunity of the debtor LLC because the debtor LLC’s own assets were used to acquire the smelter. The court rejected the argument that the consent of the members of the debtor LLC to the transfer relieved Lynch from liability for breach of fiduciary duty because the duty was owed to the LLC’s creditors rather than the members. The court stated that the consent of the members to the transfer made them jointly and severally liable for the breach rather than excusing the breach. (That the transfer was authorized, however, precluded a conversion claim based on the transfer.) Finally, the court rejected the argument that Lynch was not liable because he did not personally take the opportunity, stating that Illinois law draws no distinction between fiduciaries who acquire corporate opportunities in their own name and fiduciaries who acquire opportunities through entities they own. The court found no basis to award lost profits or punitive damages, but ordered Lynch to forfeit salary received from the debtor LLC as well as benefits received from the related LLC transferee.



*In re OODC, LLC (Rosener v. Majestic Management, Inc.)*, 321 B.R. 128 (Bankr. D. Del. 2005) (holding trustee's allegations were sufficient to support claims for individual's breach of fiduciary duties of loyalty and good faith to LLC debtor, even though individual was not "an officer, director or majority shareholder" of the LLC, because trustee pled facts showing individual's actual control of LLC).

*Merovich v. Huzenman*, 911 So.2d 125 (Fla. App. 2005) (recognizing fiduciary duties owed under Florida law and stating that allegations that defendant members wrongfully retained revenues and profits might support breach of fiduciary duty claim if appropriately pled and finding allegations of complaint stated cause of action to enforce rights to obtain information).

*RSN Properties, Inc. v. Jones*, 609 S.E.2d 498 (N.C. App. 2005) (recognizing North Carolina LLC allows a written operating agreement to alter an LLC manager's duty to account as trustee, but finding question of fact existed as to whether operating agreement provision permitting activities that were in competition or conflict with LLC's business waived duty to account for secret profit obtained by member in transaction with LLC).

*Stoker v. Bellemeade, LLC*, 615 S.E.2d 1 (Ga. App. 2005). The plaintiff was a 50% member of several two-member real estate development LLCs. The plaintiff sued the other members of the LLCs for breach of fiduciary duty, alleging the defendant members usurped LLC opportunities and improperly competed with the LLCs by participating in developments of other properties. The court concluded that the defendants did not breach their fiduciary duties even if they participated in competing real estate developments because, subject to certain limitations, the Georgia LLC statute permits an LLC operating agreement to expand, restrict, or eliminate duties and liabilities of members, and the operating agreements permitted members to conduct any other business or activity even if the business or activity competed with the LLC. The plaintiff also alleged that the LLCs incurred excessive development costs as a result of the defendants' breach of contractual and fiduciary duties. The operating agreements provided that a member would not be liable, responsible, or accountable to another member for any act performed by the member with respect to LLC matters except for fraud, gross negligence, or an intentional breach of the agreement, and the LLC joint venture agreements provided that the defendant members had the primary responsibility to supervise the development construction. The court again noted the freedom of contract enjoyed by members to vary duties under the Georgia LLC statute and rejected the plaintiff's argument that the excessive costs resulted from the gross negligence of the defendant members. The court pointed out that the members shared equally in management, with each member owning a 50% interest and the majority rule of decision making under the LLC agreements requiring each member to authorize management decisions. The plaintiff did not fault the other member for the decision to hire the contractor or for the terms of the cost-plus development contract, and the court found no evidence the costs, assuming they were excessive, occurred because a defendant member breached any provision of the LLC agreement or was grossly negligent.

*Warren v. Weber and Warren Anesthesia Services, LLC*, 612 S.E.2d 17 (Ga. App. 2005). The court distinguished case law imposing a duty to wind up unfinished business in the partnership dissolution context and held that the evidence supported the jury's finding that a member who resigned from an LLC did not breach a fiduciary duty to the LLC by performing services for a surgical center with which the LLC had contracted to provide services. The court stated that the Georgia LLC statute and the LLC operating agreement contemplate resignation, and the act of resignation is not a breach of fiduciary duty. Furthermore, the surgical center terminated its contract with the LLC, and the operating agreement did not prohibit members who resigned from forming a competing business or soliciting customers of the LLC. The court also held that the trial court did not err in refusing to give an instruction describing wrongful dissolution because the instruction was based on case law decided under the Georgia Uniform Partnership Act and did not accurately state LLC law.

*Yavarone v. Jim Moroni's Oil Service, LLC*, No. CV030102318S, 2005 WL 737010 (Conn. Super. Feb. 18, 2005) (noting LLC member's fiduciary duty under Connecticut LLC statute appears to equate to that of partner in partnership and finding misappropriation of funds and interference with business constituted breach of fiduciary duty).

*Nelson's Minnesota Farms, LLC v. Logan*, No. A04-758, 2005 WL 354006 (Minn. App. Feb. 15, 2005) (intentional misappropriation of funds which was subject of criminal indictment was breach of fiduciary duty under operating agreement providing LLC governors would be liable for an "act or omission that involves intentional misconduct or known violation of the law").

***Shamrock Holdings of California, Inc. v. Arenson***, No. Civ. 04-1339-SLR, 2005 WL 400198 (D. Del. Jan. 27, 2005). This dispute involved a failed Delaware LLC that was not a party to the action. The plaintiffs, which included supervisory board members/employees of the failed LLC, brought a declaratory judgment action against dissatisfied investors who threatened to sue the plaintiffs for breach of fiduciary duty, self-interest, and wrongful conduct. The action was removed from the Delaware Chancery Court to federal district court on the basis of diversity jurisdiction. In the course of determining the citizenship of the various parties, the court analyzed whether the citizenship of an individual plaintiff, who was an employee and board member of the failed LLC, should be analyzed on the basis of his individual or representative capacity. The individual represented the class D members (the only class D member being another LLC) on the supervisory board of the LLC. The court concluded that the individual's citizenship must be determined based on his individual rather than representative capacity because the operating agreement provided that a manager, representative, or deputy representative would not be liable to the LLC or its members for any failure to take action or the taking of any action within the scope of authority conferred by the agreement made in good faith, but would be liable to the LLC or its members in cases of their own fraud, criminal action, bad faith, or gross negligence. The court stated that the individual could only bring suit or be sued in his individual capacity because he was only liable for his own actions under the operating agreement; therefore, his citizenship for diversity jurisdiction purposes was his individual citizenship not that of the entity he represented on the LLC board. In the course of its analysis, the court stated that "Delaware law prohibits individual liability of members or managers of limited liability companies, to other members or managers, unless such liability is provided for in the operating agreement," citing Section 18-1101(d) of the Delaware LLC act. (The statement is a somewhat overly broad characterization of the effect of Section 18-1101(d), which states: "Unless otherwise provided in a limited liability company agreement, a member or manager or other person shall not be liable to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement.")

***Denevi v. Green Valley Corp.***, Nos. H024089, H024374, H024292, H025206, H024293, 2005 WL 236386 (Cal. App. 6 Dist. Jan. 21, 2005). Green Valley Corporation (Green Valley) was the managing member of an LLC formed to acquire property and develop a golf course and country club. The initial capital contributions consisted of a total of \$400,000 cash and the contractual right to buy the property, which included the right to be paid a consulting fee by the seller. The operating agreement provided that the LLC was member-managed and authorized Green Valley, as managing member, to manage and control the LLC's affairs. The agreement absolved Green Valley from liability for loss to the LLC unless the loss resulted from "fraud, deceit, gross negligence, reckless or intentional misconduct, or a knowing violation of law." The purchase of the property fell through when Green Valley failed to renegotiate the terms of the down payment and refused to deliver the balance of the \$750,000 down payment. In a subsequent lawsuit, the jury found the LLC liable for breach of contract, and found Green Valley and its principal, Barry Swenson, personally liable based on tortious conduct involving malice or oppression. The lawsuit was settled before punitive damages were fixed by the jury. The plaintiff in this case, an investor in the LLC, filed a derivative suit on behalf of the LLC against Green Valley and Swenson for breach of fiduciary duty. The trial court found Green Valley and Swenson liable for breach of their duties of loyalty and care in two respects: acting with an adverse interest to the LLC and engaging in grossly negligent or reckless conduct (which the court said encompassed failing to discharge duties and rights consistent with good faith and fair dealing). The appellate court found there was no substantial evidence supporting the adverse interest basis of liability because the trial court stated in its decision that the plaintiff did not establish its theory that the defendants intentionally caused the LLC to breach the contract in order to appropriate the purchase opportunity for themselves. The finding of gross negligence, however, was supported by the evidence according to the appellate court. The defendants argued that the basic premise of the LLC was to purchase the property with the capital and credit contributed by the members and that the operating agreement required no further capital contributions. Based on provisions of the operating agreement requiring Green Valley to (1) proceed with due diligence and without delay to commence and complete the project, and (2) cause to be paid all amounts owed to the LLC, the court stated the operating agreement could be reasonably understood to obligate Green Valley to (1) make a good faith determination of the amount of capital required to perform the purchase contract, (2) communicate that determination to the members, and (3) seek to obtain that amount by supplemental capital contributions or borrowing. Instead the defendants made the decision against putting up the entire amount of the down payment so as to avoid having the funds trapped in escrow while demands of the seller and the manner of paying the down payment were being resolved. The court found that the defendants did not establish their affirmative defenses of estoppel, ratification, or business-judgment-rule-bar (indicating in a cryptic parenthetical that the business judgment rule did not apply since the defendants engaged in gross negligence).

**Jordan v. Holt**, 608 S.E.2d 129 (N.C. 2005) (holding evidence was sufficient to support award of punitive damages against LLC members for breach of fiduciary duty where they ousted other members from management, ignored requests for financial information and meetings, used LLC funds for payment of personal debts, engaged in self-dealing, and pocketed proceeds of LLC property they disposed of without knowledge or consent of LLC).

**Van Der Lande v. Stout**, 786 N.Y.S.2d 515 (N.Y. A.D. 1 Dept. 2004). The court upheld the denial of an LLC member's application for preliminary injunction against the defendants' use of LLC funds in defense of the action and from compelling the plaintiff to make additional contributions to the LLC for the legal expenses. The court pointed to the provisions of the New York LLC act allowing advancement of members' legal expenses where there has been no final adjudication that the defendants acted in bad faith, were dishonest, or personally gained profit to which there were not entitled. The court said the plaintiff was required to make the additional contribution because it was approved by a vote of the defendants who constituted a quorum of the LLC, and the fact that the plaintiff initiated the lawsuit causing the need for the additional contribution did not constitute an exception to the plaintiff's obligations to the LLC. The court also upheld a summary judgment granted as to certain claims on the basis that the allegations reflected mere business disagreements with respect to how property was managed, and such decisions should not be questioned by the courts where there is no evidence of bad faith or self-dealing on the part of the defendants.

**USAT Reorganization LLC v. Writer**, No. D043230, 2004 WL 2538848 (Cal. App. 4 Dist. Nov. 10, 2004). An LLC member (Krintzman) brought suit personally and on behalf of the LLC alleging the other member (Writer) breached his fiduciary duty by causing the LLC's corporate subsidiary to issue shares making Writer the majority shareholder of the corporation. The LLC was formed to obtain control of the corporation, and Writer instead obtained control and elected two individuals of his choosing as directors of the corporation. The court characterized the issuance of the shares as a usurpation of the LLC's opportunity, relying on partnership and corporate opportunity cases. The court held the LLC, as a shareholder in the corporation, had standing to bring an action challenging the validity of the election of directors under section 709 of the California Corporations Code.

**In re Global Service Group LLC (Kittay v. Atlantic Bank of New York)**, 316 B.R. 451 (Bankr. S.D. N.Y. 2004). Rejecting the LLC Chapter 7 trustee's "deepening insolvency" claims against the LLC's lender, the court said the managers of an insolvent LLC are not under an absolute duty to liquidate the LLC. According to the court, to state a claim based on "deepening insolvency," the claimant must show that a company's life was prolonged in breach of a separate duty or through commission of an actionable tort. Thus, the trustee's allegation that Atlantic Bank made a loan to the LLC that it knew or should have known the LLC could never repay may have been bad banking, but was not a tort. The court stated that the unspoken premise of the trustee's "deepening insolvency" theory was that the managers of an insolvent LLC are under an absolute duty to liquidate the company and that one who knowingly extends credit to the insolvent company breaches a duty in the nature of aiding and abetting the managers' wrongdoing. The court rejected this assumption. The court relied on case law addressing the fiduciary duties of corporate officers and directors in the context of insolvency, noting that the duties are owed to multiple constituencies (the corporation, its shareholders, and its creditors) once insolvency ensues. At that point, said the court, there is "'an obligation. . .to exercise judgment in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity.'" There is no absolute duty to shut down and liquidate an insolvent corporation, and a complaint must overcome the business judgment rule with specific allegations that the fiduciaries acted in bad faith or with fraudulent intent. Because the complaint did not suggest that Atlantic Bank could have foreseen that insiders would misappropriate the loan proceeds or operate the insolvent LLC for an improper purpose, the court concluded the complaint failed to state a claim against the bank. The court also rejected the aiding and abetting claim against Atlantic Bank because it wrongly implied that the mere continuation of the LLC's operations violated a legal duty. The court stated that the fraudulent transfer claims against insider members and managers stated a claim for breach of fiduciary duty, but the mere allegation that the LLC continued to do business and incur indebtedness while insolvent did not. The trustee argued that it appeared the insiders continued to operate the LLC as a means of siphoning the LLC's funds for their individual benefit, and the court said this allegation might be legally sufficient to open up recovery under the "deepening insolvency" theory because the prolongation of the LLC's life would "smack of self-dealing" and constitute a breach of fiduciary duty. Because the complaint did not expressly include this allegation, but did include allegations of self-dealing and fraudulent transfer, the court allowed the trustee an opportunity to plead.

**Blackmore Partners, L.P. v. Link Energy LLC**, 864 A.2d 80 (Del. Ch. 2004). A former unit holder of an LLC brought an action against the LLC and its directors for breach of fiduciary duty in connection with the sale of substantially all of the LLC's assets. The complaint alleged that the sale proceeds were all distributed to the creditors

and that the creditors received more than the total amount of their claims while the equity units were rendered worthless. The complaint also alleged that there were alternative transactions that would have provided a better result for the equity holders. The defendants relied upon a provision in the operating agreement based on Section 102(b)(7) of the Delaware corporate law that barred claims for breach of the duty of care. They argued that the plaintiffs failed to plead facts sufficient to infer the decision of the board was motivated by self-interest, lack of independence, or bad faith. The court held that the allegations in the complaint, if true, could support an allegation of disloyal conduct, and the complaint survived the motion to dismiss even though it did not contain specific allegations that a majority of the board was either interested or lacked independence. There was a sufficient basis in the complaint to infer that the value of the LLC's assets exceeded its liabilities by a substantial amount and that the LLC was neither insolvent nor on the brink of bankruptcy. The court said the allegation that the directors approved a sale of substantially all of the assets and a resultant distribution of proceeds exclusively to the LLC's creditors raised an inference of disloyalty or intentional conduct.

***Harbison v. Strickland***, 900 So. 2d 385 (Ala. 2004). Mr. and Mrs. Strickland formed an LLC as part of their estate plan, and the Stricklands transferred 83% of the equity shares to their daughter (Harbison) and retained 17%. After Mr. Strickland died, Mrs. Strickland became the sole manager and retained the 17% share she had held with her husband. Mrs. Strickland conveyed LLC real estate to her son for an amount Harbison believed was less than fair market value, and Harbison sued Mrs. Strickland for breach of fiduciary duty. Mrs. Strickland relied upon provisions of the operating agreement that stated the managers did not guarantee a profit for the owners and had no obligation to maximize financial gain or make the LLC property productive. The trial court granted summary judgment in favor of Mrs. Strickland based on the terms of the operating agreement and her testimony that, regardless of the terms of the operating agreement, her intent was to give each of the two children one-half of what was left of the estate. The trial court found that Mrs. Strickland had the authority under the operating agreement to dispose of LLC property in any way she saw fit, including by gift. The Alabama Supreme Court held that the LLC act imposed fiduciary obligations that could not be eliminated or unreasonably reduced and that the trial court erred in failing to look past the "four corners" of the document because the provisions of the statute were part of the agreement. Furthermore, the court pointed out the operating agreement stated that the LLC was organized to make a profit and authorized the manager to make decisions for the LLC based on the best interest of the LLC and the owners. The court remanded for a determination of whether Mrs. Strickland violated her duties as manager of the LLC.

***Bartfield v. RMTS Associates, LLC***, 783 N.Y.S.2d 560 (N.Y. A.D. 1 Dept. 2004) (affirming dismissal of breach of fiduciary duty claims against LLC members based on steps taken to form competing company where there was no evidence members made improper use of LLC's time or facilities, disseminated confidential information, or otherwise usurped its business opportunities).

***Lazard Debt Recovery, GP, LLC v. Weinstock***, 864 A.2d 955 (Del. Ch. 2004) (stating that individuals who exercised investment discretion in their capacities as employees of limited partnership fund's LLC general partner and LLC investment manager were not liable for breach of fiduciary duty in connection with their departure and establishment of a similar fund at another firm and were not bound to the same contractual standards as the general partner and investment manager LLCs).

***Shell v. King***, No. E2003-02124-COA-R3-CV, 2004 WL 1749186 (Tenn. Ct. App. Aug. 5, 2004). The court of appeals interpreted Tennessee's MBCA-based articulation of an LLC manager's duty of care in the context of allegations against an LLC's "Chief Manager" arising out of missing funds entrusted to the LLC's bookkeeper. Although the manager argued he was protected by provisions permitting delegation of duties and reliance on financial information prepared by others, the court concluded that the chief manager's wholesale delegation of financial matters to another individual without taking any steps to verify the individual was performing these responsibilities correctly was negligence and a breach of the manager's fiduciary obligations to the LLC.

***Potter v. GMP, L.L.C.***, 141 S.W.3d 698 (Tex. App. 2004) (concluding that member who prevailed on breach of fiduciary duty claim was not entitled to recover attorney's fees under statute providing for recovery by prevailing party in breach of contract action because claims for breach of fiduciary duty were not founded on the operating agreement).

***Bishop of Victoria Corporation Sole v. Finley***, 121 Wash.App. 1041, 2004 WL 1053215 (Wash. App. 2004) (stating that the role of members in a member-managed LLC is analogous to partners in a general partnership and that

partners are accountable to each other and the partnership, but declining to rule on breach of fiduciary duty claim because trial court did not rule on it).

***Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.***, 854 A.2d 121 (Del.Ch. 2004). A former member of a dissolved LLC sued the LLC, its other former members, its managers, and a related corporate entity alleging, *inter alia*, common law fraud, equitable fraud, and breach of fiduciary duty. The LLC was formed to invest in the South American telecommunications industry, and the plaintiff lost most of its investment after bribery of Brazilian officials by LLC employees came to light. The essence of the plaintiff's theory was that all of the defendants either participated in or knew about the bribery scheme and were not candid with the plaintiff about the bribery or its effect on the LLC's business. The plaintiff claimed that it was not sufficiently informed about the bribery scandal and its consequences until it had already responded to numerous capital calls and poured millions of additional dollars into the LLC. Based on alleged non-disclosure and misrepresentation of material information regarding the bribery scheme, the plaintiff asserted common law and equitable fraud claims against all the defendants and breach of fiduciary duty claims against the LLC managers.

In a lengthy opinion, Vice Chancellor Strine analyzed the plaintiff's claims and found that the plaintiff's pleadings were sufficient to state claims for common law fraud and breach of the fiduciary duties of disclosure and loyalty, but not equitable fraud. The court analyzed these claims in light of *Malone v. Brincat*, which the court stated "applies when individuals on the governing board of a Delaware entity 'knowingly disseminate false information that results in corporate injury or damage to an individual [owner].'" The court concluded that the complaint stated claims for common law fraud based on alleged misrepresentations and non-disclosure in the face of a duty to speak. Since common law fraud requires scienter, the court carefully differentiated the sufficiency of the pleadings with respect to the various defendants based on when the allegations indicated the defendants learned of the bribery scheme.

In considering the tort non-disclosure and breach of fiduciary duty claims, the court relied upon the allegation that the plaintiff's original co-members remained managers of the LLC even after a reorganization that the defendants claimed terminated their membership. Since their positions as managers imposed on them fiduciary duties, the court did not have to consider the effect of the reorganization. The court rejected the argument that the requests for capital calls constituted a request for owner action that triggered a disclosure requirement upon each capital call, but the court found that the provisions of the LLC agreement requiring the LLC to make affirmative disclosures of material information supported claims against the managers for breach of fiduciary duty as well as the tort of non-disclosure in the face of a duty to speak. The court stated that a manager's duties of loyalty and care to the LLC obviously included the requirement to make good faith efforts to ensure the LLC fulfilled its contractual duties of disclosure to the members. More importantly, said the court, the managers' fiduciary duties included the duty under *Malone* not to knowingly mislead the plaintiff. The court observed that the non-disclosure common law fraud claims and breach of fiduciary duty claims were "inextricably linked" and questioned whether it really makes sense for an LLC member to be able to sue for both, but the court did not pursue the issue since the defendants did not raise it.

The court concluded that permitting the claims for equitable fraud to proceed would undercut the policy choice made by the Delaware Supreme Court in *Malone v. Brincat* because equitable fraud does not require scienter. Outside the context of a request for owner action, the court explained, *Malone* sets a very high bar for breach of fiduciary duty claims based on misleading disclosures. Permitting claims for equitable fraud would "threaten the *Malone* policy choice in a major way," according to the court. Applying the *Malone* standard, the court concluded that the plaintiff's pleadings contained sufficient allegations with respect to certain defendants but not others.

Finally, the court concluded that allegations certain managers participated in the bribery scheme were sufficient to state a claim for breach of the fiduciary duty of loyalty.

***First American Real Estate Information Services, Inc. v. Consumer Benefit Services, Inc.***, No. 03CV0633 BNLs, 2004 WL 5203206 (S.D. Cal. April 23, 2004). The court concluded that members of an LLC have fiduciary duties under California law regardless of whether they choose to turn control of the LLC over to managers, and the court found that the provisions of an LLC operating agreement limiting fiduciary duties of the LLC's managers did not change the fiduciary duties that the members may have owed the LLC. The operating agreement provided that the parties waived the fiduciary duty owed by managers to the LLC as long as the manager acted in the best interest of the member it represented. The court stated that the parties, who were "sophisticated players in the market place," could have limited the fiduciary duties owed as members, but chose not to do so. The court thus rejected the defendant member's claim that the provision of the operating agreement addressing the duty of the managers waived the duty owed to the LLC as a member.

**Leisher v. Alfred**, No. D041303, 2004 WL 693207 (Cal. App. April 3, 2004) (noting that California LLC act imposes on LLC manager fiduciary obligations to members that are the same as those of partner to other partners, and concluding there was ample evidence that LLC member and manager breached his duties to other member by paying his personal expenses out of LLC funds).

**Gonzalez v. Ward**, No. 253,2003, 2004 WL 77862 (Del. 2004). The court found that LLC members who acted as operating managers during the winding up of the LLC acted properly in increasing their compensation inasmuch as their workload increased substantially in the winding up and they applied and stayed within the parameters of the compensation formula approved by the LLC's initial managers. The court concluded the managers acted fairly even if the entire fairness standard applied.

**Vaughn v. Electronic Technologies International, LLC**, 695 N.W.2d 810 (Wis. App. 2004). An LLC member asserted that he agreed to sell his membership interest back to the LLC under economic duress because the LLC threatened to terminate a manufacturer's representative agreement under which the member acted as the LLC's representative in the southeast. The court concluded the LLC had the legal right to terminate the manufacturer's representative agreement, and the pressure applied by threatening to do so was not wrongful. The plaintiff member argued that the president and CEO of the LLC breached a fiduciary duty owed to the plaintiff as a minority member by coercing him to sell his interest at an inadequate price without regard to the valuation formula under buy-out provisions in the operating agreement. (The plaintiff did not actually bring a breach of fiduciary duty claim, but relied on breach of fiduciary duty to satisfy the wrongful conduct element of economic duress.) The court characterized the breach of fiduciary argument as "not fully developed" but noted that, to the extent the claim rested on the threat to terminate the manufacturer's representative agreement, the court had already concluded that it was not wrongful conduct on the part of the LLC to do so. The plaintiff member offered no argument for a different conclusion with respect to the president and CEO, who was acting on behalf of the LLC in the transaction. While the court acknowledged that there were fact issues regarding the adequacy of the consideration, the court could not see how the inadequacy of the consideration satisfied the first two elements of economic duress – a wrongful act that deprived the plaintiff of his unfettered free will and so compelled him to accept the inadequate consideration.

**Froelich v. Senior Campus Living LLC**, 355 F.3d 802 (4th Cir. 2004) (noting determination that LLC's board was protected by business judgment rule was not a determination that the board's decision was correct; rather, the business judgment rule merely requires deference to a board's decision absent fraud, bad faith, or gross negligence).

**Yavarone v. Jim Moroni's Oil Service, LLC**, No. CV30102318S, 2004 WL 616109 (Conn.Super. March 15, 2004) (finding probable cause to grant pre-judgment remedy in favor of LLC member against co-member based on co-member's appropriation of LLC assets).

**LGB Group, LLC v. Booty**, Nos. CAL 03-00088, CAE 02-00408, CAL 03-08305, 2004 WL 1058958 (Md.Cir.Ct. Jan. 28, 2004). An LLC member who had been removed as president of the LLC asserted that the amendments to the operating agreement effecting his removal should be rescinded. The court stated that the LLC and its members "made the legitimate decision to eliminate the office of the presidency and their decision was protected by the 'business judgment rule.'" Discussing and applying the corporate business judgment rule, the court concluded that the request to rescind the amendments to the operating agreement should be denied under the business judgment rule absent fraud or bad faith. The court pointed out that the member had not even alleged fraud and that the court had found cause to remove him as president because he was stealing from the LLC.

**Grace v. Morgan**, No. Civ.A. 03C05260JEB, 2004 WL 26858 (Del.Super. Jan. 6, 2004) (concluding that breach of fiduciary duty claims against LLC manager were subject to exclusive jurisdiction of Chancery Court, but Superior Court could retain jurisdiction over breach of contract and unjust enrichment claims for money damages).

**Anderson v. Wilder**, No.E2003-00460-COA-R3-CV, 2003 WL 22768666 (Tenn.Ct.App. Nov. 21, 2003). The plaintiffs, expelled members of an LLC, alleged that the defendant members, who owned 53% of the LLC units, breached their fiduciary duty and duty of good faith to the plaintiffs. After their expulsion, the plaintiffs were bought out at a price of \$150 per unit pursuant to the terms of the operating agreement. Shortly after that, the defendants sold 49.9% of the LLC to a third party at a price of \$250 per unit. The defendants argued that their actions were expressly permitted by the operating agreement and that they acted in good faith in expelling the plaintiffs, and the trial court granted summary judgment in favor of the defendants. The court of appeals first addressed whether the majority members owed a fiduciary

duty to the minority. The defendants argued that the majority members owed no fiduciary duty to the minority because the LLC is a “creature of statute,” and the Tennessee LLC act prescribes a fiduciary duty by members of a member-managed LLC to the LLC itself but is silent as to any fiduciary duty among members. The court relied upon cases involving closely held corporations to conclude that the majority members of an LLC owe a fiduciary duty to the minority, and the court distinguished another Tennessee LLC case, *McGee v. Best*, as “in essence an employment dispute” not involving “an allegation of oppression by a majority shareholder group.” The court then analyzed the question of whether the defendants’ actions, viewed in the light most favorable to the plaintiffs under the summary judgment standard, could reasonably be said to have violated their fiduciary duty of dealing fairly and honestly with, and in good faith towards, the plaintiffs. The court concluded that there was a genuine issue of material fact as to whether the expulsion of the plaintiffs was in good faith or whether it was done solely to force the acquisition of their membership units at a price of \$150 per unit in order to sell them at \$250 per unit.

*Venditti v. Giansiracusa*, No. CV030825283S, 2003 WL 22853874 (Conn.Super. Nov. 6, 2003) (stating that Connecticut LLC act sets forth the fiduciary duties in regard to an LLC and finding sufficient grounds to issue temporary injunction in suit by two LLC members against third member for breach of fiduciary duty based upon alleged diversion of LLC funds and assets, conflict of interest, and dissolution of LLC without consent of other members).

*In re Provenza*, 316 B.R. 225 (Bankr. E.D. La. 2003). Dr. Provenza and two other physicians formed a manager-managed Louisiana LLC. Dr. Provenza filed a voluntary bankruptcy petition under Chapter 11, and the case was later converted to a Chapter 7 proceeding. One of the other members of the LLC filed a proof of claim against Provenza alleging that Provenza breached his fiduciary duty to the members of the LLC by failing to inform them of his financial problems before the members guaranteed certain indebtedness of the LLC. The trustee objected to the claim. The court reviewed provisions of the Louisiana LLC act to determine whether Provenza owed a fiduciary duty to his co-member. The LLC act provides that a manager or managing member owes the LLC and its members a fiduciary duty and must discharge his duties in good faith, with the diligence, care, judgment, and skill which an ordinary prudent person in a like position would exercise under similar circumstances. The articles of organization or written operating agreement may eliminate or limit the personal liability of members or managers for monetary damages for breach of such duty. Relying on the statute, the court stated that the courts employ, at minimum, a gross negligence standard and the business judgment rule. “Gross negligence” is defined in the statute as “a reckless disregard of or a carelessness amounting to indifference to the best interests of the limited liability company or the members thereof.” Under the statute, an actionable breach of fiduciary duty also includes intentional tortious conduct and intentional breaches of the duty of loyalty. The court concluded that, because Provenza was a manager of a manager-managed LLC, he owed a fiduciary duty to the LLC and its members, but the claimant failed to meet his burden of proving a breach of fiduciary duty. The claimant argued that Provenza failed to inform him, prior to the incurrence of LLC indebtedness guaranteed by the members, that Provenza had or anticipated certain financial difficulties. The court stated that a cause of action for breach of fiduciary duty requires proof of fraud, breach of trust, or actions outside the limits of the fiduciary’s authority and that none of the actions complained of amounted to a breach of fiduciary duty to the LLC or its members. The impact of Provenza’s circumstances on his financial situation at the time in question was unknown. Furthermore, the court held that an exculpatory clause in the articles of organization eliminated liability for damages by Provenza even if the court determined that a breach of fiduciary duty occurred. The provision eliminated the liability of a member to the LLC or other members for monetary damages for breach of fiduciary duty as a member except for (1) liability for the amount of financial benefit received by the member to which the member was not entitled, or (2) an intentional violation of criminal law. The court rejected the claimant’s argument that Provenza was liable for receiving a financial benefit to which he was not entitled. The claimant argued that he had paid more than his share of the bank debt based on an alleged change in the agreement regarding the allocation of losses. The court found there was insufficient evidence to conclude that the claimant’s liability had been limited in the way that he asserted. Provenza’s bankruptcy estate had paid more than its share of the indebtedness; therefore, Provenza had not received a financial benefit to which he was not entitled, and the claimant failed to prove damages.

*Russell/Packard Development, Inc. v. Carson*, 78 P.3d 616 (Utah App. 2003) (holding that fraud claim belonging to LLC was assignable to minority member and that minority member’s allegations of fraud and breach of fiduciary duty against agent who participated with LLC manager and another agent in fraudulent land “flip purchase and sale” were sufficient to survive motion to dismiss).

*Carlyle Johnson Machine Co., LLC v. Kennett*, No. CV020079835, 2003 WL 22413433 (Conn.Super. Oct. 7, 2003). An LLC and several members brought suit against a member and former manager alleging various claims,

including breach of the covenant of good faith and fair dealing. In this regard, the plaintiffs alleged that the defendant failed to meet his obligations to the LLC by failing to conform to the covenant of good faith and fair dealing implied in the LLC's operational and organizational documents and that he breached the covenant in a number of ways. The defendant moved to strike this claim on the basis that the covenant of good faith and fair dealing is one implied in a contract and the existence of a contract must thus be alleged in the complaint to support the claim. The court agreed and granted the motion to strike. The court stated: "The complaint alleges simply that Carlyle is a limited liability company organized under the laws of Delaware and that the Defendant is a member of Carlyle. The complaint does not set forth the obligations, if any, of a member of such a company either to the company or the other members under either Delaware law or the Company's organizational and operational documents." In the absence of such allegations, the court concluded that the claim should be stricken.

***Schindler v. Niche Media Holdings, LLC***, 772 N.Y.S.2d 781 (N.Y.Sup. 2003) (declining to enjoin LLC's payment of LLC manager's legal expenses in defending against minority member's claims, including claim for dissolution, where operating agreement indemnification provision required indemnification of LLC manager to the maximum extent permitted by the New York LLC act and there had been no final adjudication establishing that manager acted in bad faith, was dishonest, or personally gained a financial profit to which he was not entitled as the LLC's CEO).

***DeSarbo v. Reichert***, No. CV010456013S, 2003 WL 22245426 (Conn.Super. Sept. 24, 2003) (concluding that dominant member failed to prove his claim that the other members appropriated an LLC opportunity (stating that LLC member has no individual, personal duty to sacrifice individual economic interests in another arena to promote a sale of the LLC business), and holding that dominant member owed a fiduciary obligation to the other two members and that he put his self-interest ahead of the LLC and its other members, but concluding that the other members proved no damages resulting from the conduct).

***Landskroner v. Landskroner***, 797 N.E.2d 1002 (Ohio App. 2003) (acknowledging that parties owed one another fiduciary duties during the period they were both members of the LLC, but holding that current member did not owe former minority member any fiduciary duty).

***Zoren v. Genesis Energy, L.P.***, No. Civ.A. 19694, 2003 WL 21743510 (Del.Ch. July 28, 2003) (equating duties owed to limited partners by board of LLC general partner to the duties owed by directors of a corporate general partner).

***Lynch v. Carriage Ridge, LLC***, No. 02-0528, 2003 WL 21706305 (Wis.App. July 24, 2003) (concluding that transactions alleged to be improper self-dealing by the defendant LLC members were "fair" to the LLC and thus not improper, but concluding that action by the defendant members in making capital call against plaintiffs was "a subterfuge by a managing member intended to influence a minority member to sell" and thus violated the "rules of 'fair play'" and amounted to "oppressive" conduct).

***Maillet v. Frontpoint Partners, L.L.C.***, No. 02-Civ. 7865(GBD), 2003 WL 21355218 (S.D. N.Y. June 10, 2003). The plaintiff sued three individuals who, along with the plaintiff, were members of an LLC. The court referred to the LLC operating agreement and two related agreements collectively as a "partnership agreement" and referred to the members of the LLC as "partners." Relying on Delaware LLC cases and New York partnership cases, the court rejected the individual defendants' argument that they owed a duty only to the LLC and not to each other member. The court stated that it is well-settled that "a partner in an organization owes a fiduciary duty of loyalty to fellow partners in that organization" and that the "partners of [the LLC] owe each other a fiduciary duty."

***Triple Rock, LLC v. Rainey***, No. M2000-01115-COA-R3-CV, 2003 WL 21338702 (Tenn.Ct.App. June 10, 2003) (holding that, while payment of LLC commissions to LLC member's spouse in repayment of loan might raise a preference issue, there was no evidence of breach of fiduciary duty by member where LLC and remaining members did not dispute that they received a receipt for the full value of the notes paid and could show no loss or present injury, and failure to contribute toward losses of LLC did not constitute a breach of fiduciary duty where the operating agreement did not provide for additional capital contributions).

***Brazil v. Rickerson***, 268 F.Supp.2d 1091 (W.D. Mo. 2003) (stating that under Missouri law all LLC members owe a duty of good faith in conducting LLC affairs, and majority interest owners owe a fiduciary duty to minority, but finding that fact issues precluded summary judgment for expelled minority member).



**Leshine v. Goodrich**, No. CV010448323, 2003 WL 21235483 (Conn.Super. May 15, 2003). Two members of an LLC sued Goodrich, the LLC's chairman, for breach of fiduciary duty. The court found that the allegations stated a claim for breach of fiduciary duty. The court stated that Goodrich did not contest that as chairman he owed the plaintiffs a fiduciary duty. The court pointed to allegations that Goodrich was beginning a business venture with a third party in which he planned to divulge LLC trade secrets and manufacture the LLC's product for his own benefit to the exclusion of the plaintiffs. The court also pointed to the allegation that Goodrich schemed "to take complete control of [the LLC] and strip [the plaintiffs] of their contract and common-law rights in and to [the LLC], its governance and its income, its assets, its business opportunities and its business operations." The court stated that these allegations would establish a breach of the duty of honesty and a breach of the duty of loyalty to the plaintiffs.

**Kronemyer v. Philadelphia Indemnity Insurance Co.**, No. B161586, 2003 WL 21213243 (Cal.App. May 27, 2003). In the context of a dispute over the coverage provided by an "Executive Safeguard" insurance policy providing "Directors and Officers Liability & Company Reimbursement Insurance," the president of two South Dakota LLCs argued that South Dakota and California law, as well as the LLC operating agreement, required the LLCs to indemnify him. The court stated that South Dakota law permits South Dakota LLCs to indemnify officers and agents but does not mandate indemnification. Similarly, the court said California law permits, but does not require, LLCs to indemnify officers. The court pointed out that California law prohibits LLCs from indemnifying officers for breach of fiduciary duty. The court also determined that the terms of the operating agreement did not require indemnity because the LLC was required to do so only on advice of counsel and only after approving such an action.

**Weissberg v. Peinado**, Nos. A097102, A097232, 2003 WL 1849243 (Cal.App. April 10, 2003) (discussing proper measure of damages in context of LLC member's liability for conversion, breach of fiduciary duty, fraud, breach of contract, and breach of the duty of good faith and fair dealing).

**Pinnacle Data Services, Inc. v. Gillen**, 104 S.W.3d 188 (Tex.App. 2003). Four individuals formed a Texas LLC designated as member-managed by its articles of organization. Two of the individuals, Gillen and Baldrige, each owned a 25% interest, and an entity owned and operated by the other two individuals (Max and Morris Horton) owned the other 50% of the LLC. (The court noted in a footnote that the Hortons were apparently under the impression that they had the right to participate in management although they were not technically members of the LLC.) Disagreements over management developed, and Gillen proposed amending the LLC's articles of organization to change it to a manager-managed LLC and electing Gillen as manager. The regulations (the Texas equivalent of an operating agreement) provided that amendment of the articles of organization required the affirmative vote of at least 66 2/3% of the ownership interest while the articles of organization provided for amendment by the affirmative vote of two-thirds of the members. Gillen and Baldrige voted for the proposed changes and relieved the Hortons of their duties with the LLC. The entity member brought suit for declaratory relief, unjust enrichment, and member oppression. The trial court granted summary judgment to Gillen, Baldrige, and the LLC. The declaratory relief hinged on the determination of whether the voting provisions of the articles of organization or the regulations controlled. Under the Texas LLC act, the regulations may contain any provisions for the regulation or management of the LLC not inconsistent with law or the articles of organization. Thus, the court determined that the articles of organization controlled, and the amendment received the requisite vote. The entity member claimed that it was not given a copy of the articles until two years after the regulations were signed, but the court stated that there was no evidence that it sought to obtain a copy (even though it signed regulations that were expressly subordinate to the articles of organization), and the articles were on file with the Secretary of State. The court stated that the regulations, the articles of organization, and the Texas LLC act are not rendered inoperative by the failure to exercise diligence in obtaining a copy of the articles before agreeing to their terms. The court also found that the entity member had not set forth any evidence that Gillen, Baldrige, or the LLC obtained any benefit through fraud, duress, or taking undue advantage of the entity, and thus the trial court did not err in granting summary judgment on the unjust enrichment claim. The court cited shareholder oppression cases for the definition of "member oppression," but held that the entity did not set forth any evidence in support of its member oppression claim. The court found the determination that the articles of organization control disposed of the breach of contract claim but not the remaining reformation and breach of fiduciary duty-based claims. The defendants claimed that the claim for breach of fiduciary duty was without merit because the action taken complied with the articles of organization, but the court concluded that compliance with the articles was not dispositive of such claims. The court's opinion implies that the duties of the LLC members equate to those of corporate officers and directors, but the opinion is not entirely clear in this regard.

***In re Brentwood Lexford Partners, L.L.C.***, 292 B.R. 255 (Bankr. N.D. Tex. 2003). The Chapter 7 trustee brought an adversary proceeding to set aside alleged fraudulent transfers. The court held that certain distributions to the members were fraudulent transfers. The court also addressed breach of fiduciary duty claims against members of the LLC who were officers. The court discussed the fiduciary duties of the LLC's officers as if they were officers of a corporation. The court stated that the officers of a corporation owe a fiduciary duty to the corporation and its shareholders. Further, the court stated that the officers owe a fiduciary duty to the creditors of the corporation when the corporation is insolvent. According to the court, "[o]fficers of an insolvent corporation breach their fiduciary duty by transferring funds to themselves, in effect, as equity holders, to the detriment of the corporation's creditors." The court determined, however, that the trustee and the LLC's major creditor were estopped from pursuing the breach of fiduciary duty claim. The noteholder was a "sophisticated player" and understood companies in the LLC's business. It conducted its own assessment of the LLC's assets and concluded that the LLC's assets supported its debt structure. The excess cash distributions were permitted under the terms of the note. The court thus applied the equitable estoppel doctrine to the fiduciary duty claim related to the excess cash distributions. The court also concluded that the officers of the LLC did not breach a fiduciary duty when they resigned from the LLC, formed another LLC, and transferred some business to the new LLC. The court stressed that the officers did not have a non-competition or non-solicitation agreement. Additionally, the agreement under which the LLC was acquired from the noteholder recognized that the officers had fiduciary duties to other interest holders in the real estate they controlled and permitted the officers to exercise discretion regarding property management contracts when their fiduciary duty to other interest holders required. (This case is further summarized below under the headings "Distributions" and "Fraudulent Transfer.")

***VGS, Inc. v. Castiel***, No. C.A. 17995, 2003 WL 723285 (Del.Ch. Feb. 28, 2003) (applying "law of the case" doctrine and entering summary judgment on breach of fiduciary duty claim against two managers who orchestrated clandestine written consent to merger for purpose of eliminating majority control by third manager inasmuch as prior trial on corporate governance issue had already determined that the two managers owed a duty of loyalty to majority member and fellow manager and that attempted merger constituted a breach of that duty).

***Jundt v. Jurassic Resources Development, North America, L.L.C.***, 656 N.W.2d 15 (N.D. 2003). An LLC member asserted that other members breached their fiduciary duty to the LLC by diverting an LLC business opportunity to an entity owned by the defendant members. The court noted that it had not previously ruled on the corporate opportunity doctrine but identified four tests established as standards for identifying a corporate opportunity: the "line of business" test, the "interest or expectancy test," the "fairness" test, and the "ALI" test. The court concluded that the plaintiff failed to meet his burden under any of the theories because the defendants owned two-thirds of the LLC membership interests and controlled business decisions under the operating agreement. According to the court, "[t]he majority owners impliedly disclosed to themselves and to [the LLC] all of the relevant facts about [the LLC's] asserted corporate opportunity ... and elected to forego the opportunity." The court also stated that financial inability justifies a corporation in rejecting an opportunity. The court found the plaintiff had made no showing that the LLC had the financial ability to take advantage of the opportunity and that there was evidence supporting the trial court's finding that the LLC's debts exceeded the appraised value of its assets.

***Bio-Septic Systems, LLC v. Weiss***, 60 P.3d 943 (Mont. 2002). Weiss, Cullinan, and others formed an LLC to market a device invented by Weiss. Acrimonious relations developed between Cullinan and the other members. The LLC eventually collapsed, and Weiss ultimately assumed management. Weiss informed Cullinan that he intended to dissolve the LLC and disburse the assets as required by law. Cullinan accused Weiss of wrongdoing in connection with certain payments and Weiss's commencing work for a company with which the LLC had previously contracted for marketing of the device. Cullinan brought suit for dissolution of the LLC and accused Weiss of breach of fiduciary duty. Weiss counterclaimed and joined in the request for dissolution. Cullinan filed an amended complaint alleging sole ownership of the LLC and waiving any further winding up. The court upheld the lower court's finding that Cullinan acted arbitrarily, vexatiously, or not in good faith on the basis of various actions disruptive to the LLC's business. The court also upheld the lower court's determination that Weiss did not breach his fiduciary duties to the LLC. Cullinan offered no evidence that Weiss's handling of payments was improper, and the court held that a resolution authorizing Weiss to make certain disbursements that was allegedly signed by one of the members after his withdrawal from the LLC was not deceptive and indicated a good faith attempt to formalize an arrangement in the midst of confusing circumstances. Finally, the court did not agree with Cullinan that Weiss had breached his fiduciary duty by forming a sole proprietorship and competing with the LLC. The court said the LLC was breaking up and the contract between the LLC and the company with whom Weiss subsequently contracted had expired. Weiss contracted with the company as an independent contractor after disclosing his intentions to the other members of the LLC. The court concluded that

payments to Weiss were payments to him as an independent contractor, and Weiss did not convert property of the LLC. The court also upheld the accounting made by Weiss to the members in connection with the winding up of the LLC.

***Credentials Plus, LLC v. Calderone***, 230 F.Supp.2d 890 (N.D. Ind. 2002). Calderone was a member and the sole officer and operating employee of an Indiana LLC providing physician credentialing services. Prior to her departure from the LLC, she registered a domain name for a competing company. After her departure, while she was still a member in the LLC, she incorporated her new business and solicited customers. A few months later she sold her interest in the LLC to her father. The court addressed the LLC's breach of fiduciary duty claims under both contract and common law principles. The court determined that Calderone violated a covenant not to compete contained in a letter agreement between the members. The agreement prohibited a "shareholder" from competing with the business of the LLC without approval of the other "shareholders." The court concluded that Calderone's activities before she sold her "shares" to her father violated the agreement. The court also concluded that Calderone's conduct violated common law fiduciary duties. The court discussed fiduciary duties in partnerships and close corporations and concluded that "Indiana LLCs, being similar to Indiana partnerships and corporations, impose a common law fiduciary duty on their officers and members in the absence of contrary provisions in LLC operating agreements." The court found that Calderone owed a fiduciary duty even though she herself was not a member but owned her interest in the LLC through a single-member LLC. The court said she would nevertheless owe a duty not to seize business opportunities as the LLC's sole officer and operating employee and she had admitted in responses filed with the court that she owed a duty to the other members "to deal fairly, honestly and openly with them."

***Blue Chip Emerald LLC v. Allied Partners Inc.***, 750 N.Y.S.2d 291 (N.Y.A.D. 1 Dept. Nov. 26, 2002). The plaintiff sold its 50% interest in a venture (the sole asset of which was a building) to the defendants, who controlled the managing member/remaining 50% owner, based on an \$80 million valuation of the venture's property. Two weeks later, the defendants contracted to sell the property to a third party for \$200 million. The "venture" involved in this case was apparently an LLC (it is identified in the case as Ceppetto Enterprises, LLC), but the court referred to it throughout as a venture or joint venture. The court noted that the venture was organized under Delaware law but did not refer to a specific statute. The court relied on case law on the fiduciary duties of "venturers" and "managing co-venturers" (including *Meinhard v. Salmon*) and concluded that the contractual disclaimers relied upon would be voidable as the fruit of the fiduciary's breach of its obligation to make full disclosure in the context of a buy-out. The court stated: "Defendants have not brought to our attention any authority, from either New York or Delaware (the state under whose law the Venture was organized), that would give effect to a waiver of a fiduciary's duty of full disclosure that the fiduciary obtained by means of its breach of that very duty, even where the party that gave the waiver was ... commercially sophisticated and advised by its own counsel." The provisions in issue were provisions of the buy-out agreement in which the plaintiff acknowledged that it had been afforded an opportunity to conduct its own due diligence and was satisfied with the information made available to it in conducting the due diligence and provisions in which the plaintiff disclaimed any profits realized by the defendants on the future sale of the venture property and any claim for fraud, breach of loyalty, or fiduciary duty arising out of the venture with one specific exception. The court stated that "a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract." The court refused to dismiss the claim

***TIC Holdings, LLC v. HR Software Acquisitions Group, Inc.***, 750 N.Y.S.2d 425 (N.Y. Sup. 2002), *aff'd*, 755 N.Y.S.2d 19 (N.Y.A.D. 1 Dept. 2003). The manager of a New York LLC executed an agreement obligating the LLC to transfer the LLC's assets to a new company being formed by one of the LLC's members. After rejecting the argument that the manager was authorized to take the action under the operating agreement, the court addressed the claims of the manager and member that they were entitled to summary judgment under release and indemnification provisions of the operating agreement. The member relied upon a release relating to actions involving conflict of interests and breach of fiduciary duty. The court found, however, that the language indicated the scope of the release was confined to matters related to actions taken in connection with the member's dual involvement in the LLC and a specified company in which the LLC invested. Further, the court found the release would be ineffective if it was intended to release the member from *all* actions taken in his self-interest. For example, the court said, a release cannot reach willful and intentional misconduct. The court noted that certain alleged misconduct of the member might fall within this realm, e.g., alleged breaches of fiduciary duty, intentional interference with the LLC's ability to obtain financing, and attempted misappropriation of an LLC business opportunity. With respect to the manager's release claim, the court found that the complaint alleged liability based on actions outside the scope of the operating agreement's release of the manager because it involved conduct not properly within the capacity of manager (e.g., his attempt to bind the LLC to transfer

its assets without authority). Further, the New York LLC act provides that an operating agreement may not eliminate or limit liability if a judgment establishes bad faith, intentional misconduct, or a knowing violation of law, which the allegations indicated. The court stated that the manager's alleged breaches of fiduciary duty involved misconduct that might result in a judgment based on bad faith, intentional misconduct, or knowing violations of the LLC act. The manager's summary judgment claim for indemnification was rejected for similar reasons. The operating agreement provided for indemnification of the manager to the fullest extent permitted by law, but the New York LLC act precludes indemnification if a judgment establishes bad faith or deliberate dishonesty. The member's claim for indemnification was rejected because he cited no provision of the operating agreement providing for his indemnification.

*Anest v. Audino*, 773 N.E.2d 202 (Ill. App. 2002). Through a series of transactions, Anest invested in an insolvent LLC and became a member. At the time of his investment, the management structure was changed from manager-management to member-management. The LLC sold a beer line cleaning device called the BLM 2000. The LLC exhausted its capital infusion, and an emergency meeting of the LLC's members was called, the stated purpose of which was "to discuss changing the business relationship of the company from a non-exclusive distributor to an importer and the ramifications thereof." The notice was faxed three days before the meeting. The operating agreement required five days' notice of a meeting and did not address facsimile notice. Four of the five members attended the meeting. Audino, a 5% member, did not attend. At the meeting, the members discussed an offer for a five-year exclusive distributorship of the BLM 2000 from the patent holder of the device. The members at the meeting voted not to make the substantial capital contributions that would be required to secure the exclusive distributorship offer. After the meeting, these four members formed a new LLC to obtain the exclusive distributorship offer. When Anest, one of these four members, sued Audino to recover on another debt, Audino counterclaimed against Anest for breach of fiduciary duty and tortious interference with Audino's business expectancy. The trial court granted Anest's motion for directed findings. The trial court held that Anest did not owe Audino a fiduciary duty because Anest did not have control over the daily operations of the LLC or otherwise have management-like responsibilities. The trial court also held that, even if there was a duty owed, Anest did not breach it because the LLC did not have the financial ability to act upon the business opportunity in issue. The appeals court reversed. The appeals court held that the Illinois LLC act in effect at the time required the court to look to the law of corporations to determine the existence of any fiduciary duties. The court cited *Hagshenas v. Gaylord*, which held that shareholders in a closely held Illinois corporation owe one another partner-type fiduciary duties. The court stated that Anest's capacity as a 12% member in a member-managed LLC made him more than a minority shareholder; rather, he was akin to an officer or director of a corporation who owes fiduciary duties to shareholders and the corporation. The court found that the BLM 2000 distributorship opportunity was a business opportunity of the LLC and that the financial inability of the LLC was not controlling since the assets of the LLC were used to develop it. The court also noted that the opportunity was not properly disclosed and tendered to the LLC because the notice violated the requirements of the operating agreement.

*McGee v. Best*, 106 S.W.3d 48 (Tenn.Ct.App. 2002). The plaintiff was a one-third member and the Chief Manager of a Tennessee LLC. After disagreements arose, the members of the LLC other than the plaintiff took action by written consent to terminate the employment of the plaintiff and to exercise a buy-out right on the part of the LLC triggered by the termination of employment of a member. The plaintiff brought suit alleging various causes of action, including breach of fiduciary duty, fraud, breach of the operating agreement, and breach of the duty of good faith and fair dealing. The court of appeals upheld the trial court's conclusion that members of a member-managed LLC do not owe one another fiduciary duties under the Tennessee LLC act. The Tennessee act provides that members of a member-managed LLC must account to the LLC for any benefit, and hold as trustee for it any profits derived by the member without consent of the other members, from any transaction connected with the formation, conduct, or liquidation of the LLC or any use of its property. The act goes on to provide that a member's duties must be discharged in good faith, with the care of an ordinarily prudent person in a like position under similar circumstances, and in a manner the member reasonably believes to be in the best interest of the LLC. The court stated that the statute defines the fiduciary duty of a member of a member-managed LLC as one owing to the LLC, not to individual members. The court stated that it could not "contravene the intent of the Legislature." The court also dismissed the fraud claim on the basis that the allegations stated a claim that was essentially derivative, and thus the plaintiff did not have standing to pursue it individually. The court stated that the general rule of at-will employment in Tennessee was not altered by the operating agreement and that there is no implied covenant of good faith and fair dealing in an employment at will contract. (The trial court based its dismissal of the good faith and fair dealing claim on its conclusion that "performance of a contract by its terms cannot be characterized as bad faith" and its assessment that the operating agreement allowed the very actions taken in terminating the plaintiff's employment.) The court found that the plaintiff waived his argument that there had been a breach of contract based upon a conflict of interest in violation of the operating agreement. The court did conclude that

there was a fact issue as to whether there was “cause” to terminate the employment of the plaintiff under the operating agreement, an issue that was relevant to the valuation of the plaintiff’s membership interest under the terms of the operating agreement.

***Ault v. Brady***, 37 Fed.Appx. 222 (8<sup>th</sup> Cir. 2002). In this dispute between the members of an Arkansas LLC, a member whose employment was terminated alleged that the managing member breached his fiduciary duty in terminating the member and attempting to force the terminated member to sell his units back to the LLC under a repurchase provision in the operating agreement. The managing member terminated the member “for cause” and notified the member that the LLC would exercise its option to buy the member’s units. Under the operating agreement, a member terminated for cause was entitled only to the value of the member’s capital account. Ultimately, the district court found that the managing member was within his authority to terminate the member’s services but that the termination was without cause. Thus, the member was entitled to the fair market value of his units rather than the value of his capital account. The terminated member argued that the repurchase provision in the operating agreement did not apply to his situation, but the district court and the court of appeals determined that the repurchase provision was applicable. In response to the terminated member’s argument that the managing member breached his fiduciary duty, the court of appeals stated that, under Arkansas law, a manager of an LLC is not liable to the LLC or another member unless he engages in gross negligence or willful misconduct. The court stated that the operating agreement gave the managing member broad authority to make all decisions regarding the management of the LLC and responsibility for all administrative matters; thus, the managing member acted well within his authority in terminating Ault. Moreover, said the court, the managing member’s conduct in attempting to reacquire the terminated member’s units was permissible under the operating agreement.

***Disola Development, LLC v. Mancuso***, 291 F.3d 83 (1<sup>st</sup> Cir. 2002)(construing Massachusetts prejudgment interest statute in context of judgment against former members of LLC for conversion, breach of fiduciary duty, and wrongful distribution).

***Schroeder v. HB Associates, L.L.C.***, No. 05-01-00183-CV, 2002 WL 1494351 (Tex.App. July 15, 2002). The plaintiff LLC obtained a default judgment against one of its members for injunctive relief and damages for breach of fiduciary duty. The pleadings alleged that the defendant instructed an LLC customer to make payments totaling \$70,000 to the member rather than to the LLC’s lender as required by the LLC’s loan agreement. The LLC alleged that such action would irreparably damage the goodwill of the LLC, prevent the LLC from fulfilling its obligations to its customer, impair the LLC’s ability to finance the acquisition of additional goods to fill future orders, and impair the LLC’s ability to obtain or satisfy future orders. The petition further alleged that the member, “as a director” of the LLC, owed the LLC fiduciary duties which were breached by the acts described above. The court held that the petition was sufficient to put the member on fair notice that the LLC claimed a breach of fiduciary duty, and there was no error in entering a default judgment for breach of fiduciary duty. The court reversed and remanded for a new trial on the issue of unliquidated damages because the record lacked evidence to support the trial court’s award of damages.

***Solar Cells, Inc. v. True North Partners, LLC***, No. Civ.A. 19477, 2002 WL 749163 (Del. Ch. April 25, 2002). A member of an LLC whose interest would decrease from 50% of the voting units to 5% of the voting units in a proposed merger of the LLC sought a preliminary injunction on the basis that the other member and managers appointed by it acted in bad faith in approving the proposed merger and that the defendants would be unable to prove the entire fairness of the merger. First Solar, LLC (the “LLC”), a Delaware LLC, was formed by True North Partners, LLC (“True North”) and Solar Cells, Inc. (“Solar Cells”) to commercialize solar power technology. Solar Cell contributed the technology, and True North contributed and loaned money to the LLC. Solar Cells and True North each received 50% of the voting membership units, and True North received 100% of the non-voting units. True North had the right to elect three of the five managers, and Solar Cells had the right to elect the other two. The LLC’s initial funding was depleted, and the members unsuccessfully negotiated various alternatives for financing and restructuring. Without notice to Solar Cells, the True North managers executed a written consent approving the proposed merger of the LLC into an LLC wholly owned by True North. Solar Cells received notice of the proposed merger four days before it was to close. Under the terms of the merger, the balance of True North’s loan to the LLC would be converted into equity, and Solar Cells would end up with 5% of the voting units in the surviving LLC. The court found that there was a reasonable likelihood that Solar Cells would prevail on the merits, that is, that True North would be required to establish the entire fairness of the merger and would be unable to do so. True North argued that the actions taken to authorize the merger were clearly authorized by the operating agreement and that the operating agreement limited fiduciary duties owed by the True North managers. The court noted that the provisions of the operating agreement limited liability stemming from a conflict of interest but that the limitation on the managers’ liability did not bear on the request for injunctive relief. Further, the

provisions of the operating agreement protected the managers so long as they acted in good faith. With respect to fair dealing, the court was critical of the lack of an independent bargaining mechanism and failure to give Solar Cells advance notice. (“[I]t is not an unassailable defense to say that what was done was in technical compliance with the law. . . . The fact that the Operating Agreement permits action by written consent of a majority of the Managers and permits interested transactions free from personal liability does not give a fiduciary free reign to approve any transaction he sees fit regardless of the impact on those to whom he owes a fiduciary duty.”) The court also found that the valuation used to establish the price was likely not fair because it was irreconcilable with valuations only a few months before True North decided to proceed with the merger. Finally, the court found that irreparable harm was threatened because of the dilution of the equity and voting position of Solar Cells, the difficulty in valuing the LLC, and the limitation of True North’s liability for conflicts arising from its fiduciary obligations.

***In re Bigmar, Inc., Section 225 Litigation***, No. Civ.A. 19289-NC, 2002 WL 550469 (Del. Ch. April 5, 2002). The Chancery Court addressed the fiduciary duties of members of a Michigan LLC in order to determine the validity of the actions of one of the members in voting the LLC’s shares of stock in a Delaware corporation. Citing the Michigan LLC act, the court stated that members of the LLC owed the LLC and one another fiduciary duties. More specifically, the court referred to a duty of complete candor and an obligation to provide full and fair disclosure of all material facts relating to any matter involving the LLC. With respect to the delegation of authority to vote the shares of stock in issue, the court stated the member seeking to enforce her rights must show all material facts relating to its execution were disclosed. The court cited two Delaware cases involving corporations, *Malone v. Brincat* and *Rosenblatt v. Getty Oil Co.*, in support of the duty of full candor and disclosure. The court concluded that the member had obtained the delegation of authority to vote the shares by a breach of her fiduciary duty, if not outright fraud, and that the delegation was thus invalid.

***RT Gilbane Corp. v. Neighborhood House, LLC***, No. 00-1973, 2002 WL774992 (Mass. Super. Feb. 15, 2002)(granting summary judgment in favor of members of LLC who were not active in LLC’s management on breach of fiduciary duty claim by non-member project manager who claimed that the LLC and project manager were “joint venturers” and sought to characterize the individual LLC members as partners/fiduciaries of the project manager)

***Fine v. Bork***, No. CV010808586, 2002 WL 207538 (Conn. Super. Jan. 15, 2002). The court held that the obligations of LLC members and managers are clearly established by the Connecticut LLC act, citing a provision requiring a member or manager to discharge his duties in good faith, with the care of an ordinarily prudent person under similar circumstances, and in a manner he reasonably believes to be in the best interests of the LLC. The court also cited provisions requiring a member or manager to account for any benefit received without disinterested manager or member approval. The court concluded that the defendant breached his fiduciary duties when the defendant unilaterally amended the LLC operating agreement of Tower Business Center, LLC (“Center”) to permit it to have only one member, and dissolved Associates, LLC (“Associates”), Center’s 99% member. The defendant owned the other 1% of Center and was the majority member of Associates. The plaintiff was the minority member of Associates. At the time Center was formed, Connecticut law required an LLC to have two or more members, and the operating agreement required Center to have two members. The court stated that by dissolving Associates and empowering Center to have only one member, the defendant averted dissolution of Center by dissociation of Associates and became the sole member of Center, a single purpose LLC owning a parcel of commercial real estate. The court characterized the defendant’s conduct as a “scheme to obtain sole ownership of the subject property to the exclusion of the plaintiff.”

***In re Woods (Cundy v. Woods)***, 284 B.R. 282 (D. Colo. 2001). The plaintiffs and the debtor were investors who entered a joint venture agreement and formed an LLC to secure financing and manage a real estate project. The debtor was also the attorney for the LLC (referred to in the case as the joint venture) and a member of the management committee. The plaintiffs alleged that the debtor owed them a fiduciary duty as a co-venturer, management committee member, and attorney for the venture, and that his liability for the venture’s debt was non-dischargeable because it arose from a defalcation of fiduciary duty when he obligated the venture to loan amounts in excess of borrowing authorizations. The court found that there must be an express or technical trust, not merely a general fiduciary relationship like that arising out of an attorney-client, joint venture, or partnership relationship in order for a fiduciary relationship to exist under section 523(a)(4) (the dischargeability exception for defalcation in a fiduciary capacity). Additionally, the court found that the bankruptcy court was in error in concluding a defalcation had occurred.

***In re C.R. Amusements, LLC (Acropolis Enterprises, Inc. v. C.R. Amusements, LLC)***, 259 B.R. 523 (Bankr. D. R.I. 2001). The minority interest holders of an LLC claimed that the 51% interest holder (“Moneta”) breached its

fiduciary duty to the minority by scheming to financially cripple the LLC so that the LLC would default on its loan and its assets could be acquired and developed by Moneta. Although provisions of the operating agreement quoted in one footnote of the opinion indicate that it was a manager-managed LLC and that Moneta was the manager, the court couched the fiduciary duty of Moneta in terms of its majority ownership. The court referred to Moneta as the “Majority Shareholder” and the minority members as the “Minority Shareholders” and stated that Moneta, as a majority shareholder, owed a duty to the minority under Rhode Island law. The court quoted a Rhode Island Supreme Court opinion in which the court held that shareholders in a closely held (“less-than-thirty-shareholder”) corporation assume fiduciary duties to one another and the corporation when they act as partners, noting that this duty was imposed on the basis of the small number of shareholders, active participation of shareholders in management, close and intimate working relations, and the fact that the shareholders acted as if they were partners. When the court analyzed the evidence regarding the conduct of Moneta, however, it concluded that the minority owners had failed to prove their allegations that Moneta breached its fiduciary duty.

*Harbor Hospital Services, Inc. v. GEM Laundry Services, L.L.C.*, Nos. 4830, 0207, 2001 WL 1808556 (Pa. Com. Pl. July 18, 2001). The dispute in this case related to the affairs of a Pennsylvania LLC formed to provide laundry services to the hospital customers of one of the members of the LLC. The parties to the litigation included the LLC, its two members, and various individuals and entities affiliated with the members. The court interpreted various provisions of the Pennsylvania LLC law as authorizing the court to look to principles of partnership and/or corporate law in analyzing fiduciary duties of LLC members. The operating agreement of the LLC in issue provided for management of the LLC to be vested in the members. Therefore, the court concluded that it should treat the members like partners and that a member who failed to properly run the daily operations of the LLC may ultimately be liable for breach of fiduciary duty as a co-member of the LLC. In the course of its decision, the court quoted from commentary to the Pennsylvania LLC law stating that members who do not act as managers, like corporate shareholders or limited partners, would not have the fiduciary duty of managers. The quoted comment went on to note, however, that a non-managing member would have no right to appropriate LLC property for personal use, and that courts should fashion rules in appropriate circumstances by analogy to corporate or partnership law principles to deal with situations such as oppression of minority members, actions taken in bad faith, etc. With respect to standing, the court stated that if the complaining member’s claim against the other member were construed as a derivative claim, the court could treat it as direct since they were the only two members of the LLC. However, the court concluded that the complaining member’s principal was too far removed to bring a breach of fiduciary duty claim against the other member. The duty, if any, said the court, would be between the members of the LLC, not individual shareholders of the members. Similarly, the shareholders of the allegedly breaching member could not be held liable for breach of fiduciary duty.

*In re McKnew (KMK Factoring, L.L.C. v. McKnew)*, 270 B.R. 593 (Bankr. E.D. Va. 2001). The issue in this adversary proceeding was whether, for purposes of § 523(a)(4) of the Bankruptcy Code, the debtor was acting in a fiduciary capacity in his role as manager of a Virginia LLC. The court recognized that an LLC manager has a fiduciary duty to the LLC based upon statutory provisions obligating the manager to exercise good faith business judgment, but found that an LLC manager is not a fiduciary for purposes of § 523(a)(4). The court ultimately determined that the manager’s excess withdrawals from the LLC amounted to a non-dischargeable claim for embezzlement. The court concluded that this conduct was “willful misconduct” such that the Virginia \$100,000 liability cap was not applicable. The case is further discussed below under the heading “Bankruptcy.”

*VGS, Inc. v. Castiel*, No. CIV.A. 17995, 2001 WL 1154430 (Del. Ch. Sept. 25, 2001). The court found that the breach of fiduciary duty by two managers to Castiel in pursuing a merger eliminating Castiel’s control without prior notice to Castiel (the subject of a prior opinion summarized below) was not so egregious as to justify awarding Castiel attorney’s fees. The court noted that the process followed by the two managers (which was held to be a breach of the managers’ duty of loyalty in the prior opinion) complied with the LLC’s operating agreement and the Delaware LLC act. Further, the court noted that the prior opinion did not reflect any conclusion that the two managers were not motivated by an honestly held view that Castiel’s continued control threatened the interests of the LLC. (The court went on to find that the repeated failure of one of the managers to appear for deposition justified a partial award of expenses and attorney’s fees.)

*Coady v. Martin*, 784 A.2d 897 (Conn. App. 2001). The court in this case held that there were no fiduciary duties owed by one member of an LLC to the other member, and the court of appeals upheld this conclusion because the LLC agreement on which the plaintiff based the breach of fiduciary duty argument was found to be unenforceable due to lack of an essential term. On appeal, the court noted that the plaintiff had relied solely on the terms of the written

agreement in asserting his breach of fiduciary duty claims. Although the plaintiff attempted to raise a joint venture theory on appeal to argue that fiduciary duties were owed independently of the written agreement, the court restricted its review to the theory relied upon by the plaintiff at trial. The court of appeals found no error in the trial court's conclusion that the membership agreement was unenforceable for lack of an essential term.

***Robinson v. Geo Licensing Company, LLC***, 173 F. Supp.2d 419 (D. Md. 2001). In this case involving a Delaware LLC, breach of fiduciary duty was not an issue, but the court made the passing comment that the majority interest holder of an LLC owes a fiduciary duty to the LLC's minority interest holder. The court cited *Froelich v. Erickson* (a case summarized below). In *Froelich v. Erickson*, the governing documents of the LLC used corporate terms and expressly incorporated Maryland law regarding corporate fiduciary duties.

***Flippo v. CSC Associates III, L.L.C.***, 547 S.E.2d 216 (Va. 2001). The Virginia Supreme Court affirmed a trial court judgment holding the manager of Flippo Land & Timber Co., LLC, a family-owned LLC (Flippo LLC) liable for breach of fiduciary duty to the LLC and barring the manager and his brother from serving as managers. Flippo LLC held timberlands and had three members: Carter Flippo, who was also manager, Carter's brother Arthur Flippo, and CSC Associates III, L.L.C. ("CSC"), an LLC owned by the three children of Carter's and Arthur's sister. In response to the refusal of CSC to allow Carter and Arthur to transfer their interests in Flippo LLC to individual LLCs for estate planning purposes, Carter consulted a law firm and chose a course of action suggested by the law firm that would allow Carter and Arthur to satisfy their estate planning goals by holding their interests in the timberland business in LLCs. Pursuant to the advice received by Carter from his lawyers, Carter, as manager of Flippo LLC, caused the LLC to transfer all of its non-cash assets to a new LLC. The transfer of Flippo LLC's assets dissolved Flippo LLC under the operating agreement, and CSC was given the option of joining the new LLC if it agreed to the terms of its operating agreement, under which Carter and Arthur could hold their interests through LLCs. (Prior to trial, the new LLC dissolved and returned the assets to Flippo LLC, rendering claims against the new LLC moot.) Carter was found liable for breach of fiduciary duty based upon his orchestration of the transfer of Flippo LLC's assets to the new LLC. He appealed, arguing that he was entitled to a defense based upon his reliance on the law firm's advice. His defense was based upon a provision of the Virginia LLC act protecting a manager who acts in good faith reliance on legal counsel or other professionals. The court found that this provision was not applicable in the instant case. The court pointed out that a manager, like a corporate director, is required by statute to discharge his duties in accordance with his good faith business judgment in the best interests of the LLC. Additionally, the LLC and corporate statutes contain nearly identical provisions protecting managers and corporate directors from liability in the exercise of that judgment under certain circumstances. The court found, however, that Carter was receiving advice in his personal capacity for his own personal interests when he consulted with the law firm, and he was therefore not protected by these provisions. Further, the court rejected the argument that reliance on advice of counsel was a defense to punitive damages, and the award of punitive damages was upheld. The court also upheld the removal of Carter as manager and the prohibition of his brother Arthur's serving as manager on the basis that this point was not properly preserved for appeal. The court finally rejected the claims of Carter and Arthur for dissolution of Flippo LLC and for rescission of the operating agreement based on fraud and mutual mistake, and the court upheld sanctions against Carter and Arthur based upon their allegations of mutual mistake and fraud.

***International Paper Company v. Androscoggin Energy LLC***, No. 00C 6215, 2001 WL 503058 (N.D. Ill. May 10, 2001). The plaintiff, the parent company of a member of an LLC with two other entity members, sued the LLC and its other two members for breach of contract and negligent misrepresentation based upon certain representations and warranties in the LLC operating agreement and an energy services agreement between the LLC and the plaintiff. The court had occasion to briefly address fiduciary duties between the plaintiff and the two defendant members of the LLC in connection with the negligent misrepresentation claim. The plaintiff's allegations relating to fiduciary duties were vague, but the court made the point that fiduciary duties generally are owed by LLC members to one another. The plaintiff had not relied upon this principle, but the court noted that this principle alone would not have been enough because the plaintiff was not itself a member of the LLC. It was not at all apparent to the court that fiduciary duties would flow from the defendant members of the LLC to the parent of the other member, and the plaintiff failed to pursue the argument.

***In re Larry's Apartment, L.L.C. (Galam v. Carmel)***, 249 F.3d 832 (9<sup>th</sup> Cir. 2001). An LLC member was found liable for breach of fiduciary duty to the LLC for his actions in purchasing a parking lot adjacent to the LLC's business and refusing to allow the LLC to continue its use of the lot. The court imposed a constructive trust on the lot for the benefit of the LLC without compensation to the member because the member had improperly caused the LLC to pay



personal expenses exceeding the amount he paid for the land. The issue was whether an award of attorney's fees, based upon an Arizona statute providing for recovery of attorney's fees in an action arising out of a contract, was proper. The court concluded that this action did not arise out of a contract. The only contract the court identified as being related to the action was the peripheral contract the LLC member entered into with the seller of the land. The relationship of that contract to the action was insufficient to support the fee award.

*In re Lake Country Investments, L.L.C. (Agincourt, L.L.C. v. Stewart)*, Nos. 99-20287, 00-6064, 2001 WL 267475 (Bankr. D. Idaho March 19, 2001). The court rejected the argument that a 50% member of an LLC breached its fiduciary duties by purchasing a note and secured position on real estate of the LLC rather than making an additional capital contribution to the LLC so the LLC could discharge the obligation. The Chapter 11 debtor in this case was Lake Country Investments, LLC ("Lake Country, LLC"). Agincourt, LLC was one of two 50% members of Lake Country, LLC. The managing and majority member of Agincourt, LLC was West Wood Investments, Inc. ("West Wood"). Noyes, a creditor of Lake Country, LLC, argued that West Wood and Agincourt, LLC were alter egos so that the conduct of West Wood was attributable to Agincourt, LLC. Noyes claimed that West Wood's secured claim against Lake Country, LLC should be equitably subordinated because the failure of Agincourt, LLC to advance funds to Lake Country, LLC and the purchase of the note and secured position by West Wood breached the fiduciary duties of West Wood/Agincourt, LLC. The court stated there were genuine issues of material fact on the alter ego contention, but the breach of fiduciary duty allegation was rejected as a matter of law, thus the court granted summary judgment dismissing the equitable subordination claim. The court noted that, under the operating agreement, neither member was obligated to contribute additional capital or make loans to the LLC. The court said that Noyes did not show how a member of an LLC breaches a fiduciary duty by acting (or not acting) in a manner specifically permitted by the operating agreement. Further, the court rejected the argument that statutory law created a fiduciary duty between the members. Noyes relied upon the provision of the Idaho LLC act requiring a member to account to an LLC for any benefit received without consent of a majority of disinterested members or managers. The court stated that an LLC is distinct from a corporation or partnership and viewed the case law applicable to partnerships as having "limited utility." Further, the court noted that the Idaho LLC act recognizes the primacy of the structural and organizational documents and concluded that nothing in the statutory provision relied upon by Noyes required that the court ignore the limits the parties themselves structured in the operating agreement. In a footnote, the court indicated that it considered significant the fact that the dispute involved "a close quarters fight among those who were most intimately involved with the LLC" rather than the interests of the LLC or its unsecured creditors. The court noted that the parties were all sophisticated and assisted by expert counsel and that the causes of action sought to recharacterize or alter the effect of prior transactions.

*Cimarron Feeders v. Bolle*, 17 P.3d 957 (Kan. App. 2001). A trial court used the language of Section 404 of the Kansas Revised Uniform Partnership Act to define for the jury the fiduciary duties of LLC members. The court of appeals concluded that the trial court's use of language from the partnership statute was not error. The court stated that the trial court did not apply the partnership act but merely utilized the language for guidance on the breach of fiduciary duty issue.

*Carson v. Lynch Multimedia Corporation*, 123 F. Supp.2d 1254 (D. Kan. 2000). The Robert C. Carson Revocable Trust (the "Carson Trust") owned a 20% interest in an LLC, and Robert C. Carson was the president and general manager of the LLC. The LLC was retained under a management agreement to manage Carson Communications. After a dispute over whether Carson took a business opportunity without first offering it to the LLC, the LLC's board of managers voted to terminate Robert Carson as president and general manager. The new president and general manager then terminated the management agreement between the LLC and Carson Communications. Carson and the Carson Trust sued the majority member, the three individual managers appointed by the majority member, and an individual who allegedly influenced and controlled the managers for breach of fiduciary duty in terminating Carson and the management agreement. The defendants moved to dismiss on the basis that the plaintiffs failed to state a claim. The court refused to dismiss the breach of fiduciary duty claim against Gabelli, the individual who allegedly influenced and controlled a majority of the managers, concluding that the allegations of influence and control over a majority of the LLC managers was sufficient to permit the plaintiffs to go forward in their attempt to prove an implied or imputed fiduciary duty. The court also rejected the defendants' argument that the business judgment rule required dismissal. The court stated that the business judgment rule presupposes that directors act on an informed basis and in the honest belief that their actions are in the best interest of the company, and the court pointed out that the complaint alleged that the actions were taken for reasons wholly unrelated to the business of the LLC. The court also rejected the defendant's argument that the LLC act protected the defendants from liability for breach of fiduciary duty or minority oppression because of the provision that no member or manager is liable for the debts and obligations of the LLC. Contrary to the defendants' assertion that

the operating agreement must provide for any remedy for breach of fiduciary duty, the court stated that the act recognizes that a manager or member may owe fiduciary duties and allows the operating agreement to expand or restrict those duties. The court distinguished liability for the debts and obligations of the LLC from liability for breach of fiduciary duty.

***VGS, Inc. v. Castiel***, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000) aff'd, 781 A.2d 696 (Del. 2001). An LLC with three entities as members and three individuals as managers entered a merger approved by two of the three managers pursuant to the operating agreement. In the merger, two members with a combined 75% in the LLC were relegated to a 37.5% minority interest in the surviving corporation, and Castiel, the individual who controlled the two members with the 75% interest, was excluded from management. Castiel appointed two of the three managers of the LLC (these managers consisted of Castiel and another appointee), but the third manager (the owner of the 25% member) convinced Castiel's appointee to join him in a written consent to merge the LLC without notice to Castiel. The court determined that the LLC agreement permitted a merger to be approved by a vote of a majority of the managers and that Section 18-404(d) of the Delaware LLC act literally permits written majority consents without notice to other managers, but the court concluded that the two managers breached their duty of loyalty to Castiel by failing to give him notice. The following comment by the court regarding the application of Section 18-404(d) is representative of the court's tone throughout the opinion: "The General Assembly never intended, I am quite confident, to enable two managers to deprive, clandestinely and surreptitiously, a third manager representing the majority interest in the LLC of an opportunity to protect that interest by taking an action that the third manager's member would surely have opposed if he had knowledge of it. My reading of Section 18-404(d) is grounded in a classic maxim of equity -- 'Equity looks to the intent rather than to the form.'" The court stated that the two managers who took the action to merge owed a duty of loyalty to the LLC, its investors and Castiel, their fellow manager. The court observed that the LLC agreement allowed the action to merge to be taken by a simple majority of managers (rather than following the default member approval requirement) because all parties understood that Castiel had the right to appoint and remove a majority of the managers. Had notice been given, Castiel of course would have attempted to remove his appointee and block the action. The court rejected the argument that the managers were protected by the business judgment rule. The court said the managers owed Castiel a duty to give him prior notice even if he would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC. If Castiel was not suited to run the company, as claimed by the other two managers, this was an issue to be determined in board meetings with all managers present or in future litigation, if necessary.

***Walker v. Resource Development Company Limited, L.L.C.***, 791 A.2d 799 (Del. Ch. 2000). Walker, a first cousin of former President Bush, was brought in as a member of a Delaware LLC in order to utilize his connections and reputation to help the LLC secure needed financing. After Walker failed to secure financing and the other members became concerned about Walker's drinking problem, financial irresponsibility, and other matters, he was relieved of his official duties for a period of time. He was later given his job back, and the members entered into a formal operating agreement designating Walker as an 18% member. Ultimately, however, the relationship soured completely, and the other members purported to remove him as a member and terminate his ownership interest. The members referred to Walker's poor performance and misconduct in the written notice of his removal, but there was also a dispute over whether Walker had a side deal that constituted a conflict of interest. The court concluded that the other members had no authority to remove Walker as a member either under the Delaware LLC act or the operating agreement. The court rejected the argument that the members had the inherent power to remove Walker and deprive him of his ownership interest based upon his alleged breach of fiduciary duty. Although the court recognized that there was a relationship of sufficient trust and confidence to impose on Walker a duty to disclose a material fact such as a conflict of interest, the court concluded that the members did not rely on any understanding that Walker was independent in entering into the operating agreement. Thus, the court rejected the members' misrepresentation claim against Walker. The court also rejected the members' claim that they were protected from liability for their effort to appropriate Walker's interest based upon a good faith reliance on the operating agreement. After purporting to remove Walker, a series of financing transactions led to the exchange of the members' membership interests in the LLC into shares of a Canadian corporation. Walker failed to prove the value of his 18% interest in the LLC, thus there was no basis for an award of damages; however, the court imposed a constructive trust in Walker's favor upon 18% of the shares the other members had received in the Canadian corporation.

***In re Garrison-Ashburn, L.C.***, 253 B.R. 700 (Bankr. E.D. Va. 2000). In the course of discussing whether the operating agreement of an LLC was an executory contract for purposes of the Bankruptcy Code provisions preventing enforcement of certain ipso facto clauses, the court made some observations about fiduciary duties. The court described the provisions of the operating agreement regarding management and noted that a member was not obligated to

participate in management or provide any personal expertise or service to the LLC, and a member was permitted to resign from all offices and committee positions without breaching the operating agreement. In such a case, the court said, the member would be analogous to a shareholder in a corporation. In a footnote, the court stated that, unlike partnerships, there are no fiduciary obligations among members of an LLC. The court noted that the Virginia LLC act imposes a duty of good faith business judgment on managers but is silent as to members. (In fact, the Virginia LLC act imposes this duty on any member who is participating in management.) The court went on to cite the provision of the Virginia LLC act permitting a member to transact business with the LLC on the same basis as a non-member. The court found the absence of statutory provisions imposing fiduciary obligations on one member to another or the LLC significant, noting that LLCs are statutory creations, not common law creations like partnerships, and pointing to the express provisions on fiduciary duties in the Virginia partnership statutes.

*Suntech Processing Systems, L.L.C. v. Sun Communications, Inc.*, No. 05-99-00213-CV, 2000 WL 1780236 (Tex.App. Dec. 5, 2000). The minority member of a Texas LLC claimed that the majority member owed it a fiduciary duty as a matter of law. The case does not state whether the LLC was member-managed or manager-managed, but the articles of organization provided as follows: “Members of this Company have a duty of undivided loyalty to this Company in all matters affecting this Company’s interest.” The Texas LLC act provides: “To the extent that at law or in equity, a member, manager, officer, or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager, such duties and liabilities may be expanded or restricted by provisions in the regulations.” The court noted the absence of Texas case law on fiduciary duties of LLC members and looked to case law regarding fiduciary duties of shareholders of a closely held corporation. In prior cases, the court had held that co-shareholders of closely held corporations are not necessarily in a fiduciary relationship. Rather, the existence of a fiduciary relationship is a question of fact. The court applied the same reasoning and stated that its conclusion was not affected by the fact that the defendant was the majority member. The court pointed out the provision in the LLC’s articles of organization provided for a duty of loyalty to the LLC rather than between the members. The court said that neither the statute nor the provision in the articles authorized the court to find that there was a fiduciary relationship between the members as a matter of law, and the issue was remanded for determination by the factfinder.

*Lynch Multimedia Corp. v. Carson Communications, L.L.C.*, 102 F. Supp.2d 1261 (D. Kan. 2000). One of the members of a Kansas LLC sued another member and the member’s owners and agent for breach of the operating agreement and breach of fiduciary duty when they acquired other cable franchises rather than securing them for the LLC. The LLC operated a television cable system, and the operating agreement specified that if an opportunity to purchase certain cable television systems came to the attention of a member, the opportunity must first be offered to the LLC. Another provision in the operating agreement stated that any member or manager was permitted to engage in other business ventures, and the LLC would have no rights in such regard. Robert Carson was trustee of the Robert Carson Trust, a 20% member of the LLC, as well as president and a manager of the LLC. In 1997, Carson informed representatives of Lynch Multimedia Corporation (Lynch), a 60% owner of the LLC, of the potential availability of certain cable systems. Lynch was receptive to exploring the opportunities. Over the next year, discussions and negotiations continued. At one point, a Lynch representative rejected the acquisition of the cable systems, but a couple of proposals were made a few months later in the fall of 1998. In the spring of 1999, Carson acquired the cable systems through his own entity. Lynch sued for breach of the operating agreement and breach of fiduciary duty. The court held that the operating agreement’s requirement that certain opportunities be “offered” to the LLC contemplated only that the LLC be made aware of such opportunities, not that a formal offer be presented. The court concluded that Carson satisfied this requirement by making Lynch aware of the opportunities. The court rejected Lynch’s claims that a formal meeting was required, noting that the LLC at all times operated on an informal basis with Lynch’s acquiescence. The court also stated that the operating agreement’s requirement that certain opportunities be offered to the LLC must be read in conjunction with the provision permitting members to engage in other ventures; therefore, it plainly was directed at permitting members to enter separate and additional business relations in the cable TV industry. The court thus granted summary judgment in favor of the defendants on both the breach of operating agreement and breach of fiduciary duty claims. The court said that Lynch had not articulated how the breach of fiduciary duty claims were distinguishable from the breach of operating agreement claims. The court cited the provision of the Kansas LLC act that permits members of an LLC to expand or restrict their duties and liabilities by agreement. Lynch argued this provision did not apply because it was passed after the LLC in this case was formed, but the court held otherwise, citing the legislature’s intent that from January 1, 2000, the act shall apply to all LLCs formed in Kansas, whether formed before or after that date.

*Froelich v. Erickson*, 96 F. Supp.2d 507 (D. Md. 2000), aff'd, 5 Fed.Appx. 287 (4<sup>th</sup> Cir. 2001). The factual background of this case is rather complicated, but the claims involved assertions of fraud, breach of fiduciary duty, and breach of contract by Froelich, an ousted CEO and board member of a Maryland LLC. Froelich was also a member of the LLC who, along with other minority members, was cashed out in a squeeze-out merger following a reclassification of interests of the LLC approved by all members except Froelich. Two documents primarily governed the LLC's operations as an LLC. These documents were an Operating Agreement, which the court characterized as the LLC equivalent of a corporate charter, and a Members Agreement, which the court described as the equivalent of a stockholders' agreement. The operating agreement defined classes of preferred and common interests, the role and responsibility of the board, and the rights and duties of the members. The member agreement supplemented the operating agreement by specifically defining rights of members and restrictions on alienation of interests. The court summed up Froelich's claims as a challenge to "a handful of corporate actions taken by [the LLC's] Board and its Members." The court summed up the key issues in the case as follows: "(i) Did the corporate documents or Maryland corporate law authorize the Board to take the actions that Froelich challenges? (ii) If the Board or the Members had the power to act, by what standard (e.g., business judgment rule or fiduciary duty) should the Court review the Board's exercise of that power? and (iii) Did the Board meet the appropriate standard?" The court characterized the case as arising in the context of corporate decisions by the LLC's board of directors and applied the business judgment rule. The court noted that the LLC's operating agreement stated that the LLC's directors "are subject to the duties of a corporate fiduciary as defined by Maryland law;" thus, the court continued, the LLC board's decisions are measured against the business judgment rule "just as if [the LLC] were a traditional corporation, rather than an LLC." The court found no evidence that the board had acted in bad faith and concluded that the board's actions were protected by the business judgment rule. The court also concluded as follows: the LLC and majority member did not breach a duty of good faith and fair dealing (noting uncertainty under Maryland law as to whether there is a separate cause of action in this regard and stating that the duty in any event only prohibits a party from preventing the other party from performing under the contract); the majority member did not breach a fiduciary duty to Froelich by usurping a business opportunity (stating that a majority interest holder clearly owes the minority a fiduciary duty but finding no breach in view of the board's independent approval of the transaction); the reclassification did not breach the operating agreement or the member agreement (finding that the transaction fell outside a provision in the member agreement restricting redemptions and was governed by the operating agreement, which was amended in accordance with its terms to permit the reclassification). In Froelich's favor, the court found that the LLC owed Froelich severance pay under an employment agreement between the LLC and Froelich and that the reclassification and squeeze-out were related parts of a transaction in which Froelich had properly preserved his statutory right to an appraisal. The court explained that the Maryland LLC statute grants a member the same appraisal rights as an objecting stockholder under corporate law. Maryland corporate law provides appraisal rights in connection with a parent-subsidary merger, and Froelich properly objected to the squeeze-out merger. The court viewed the reclassification and subsequent squeeze-out merger as a single transaction rather than separate events such that Froelich was entitled to appraisal of his interests immediately prior to the reclassification rather than appraisal of his reclassified interests immediately prior to the merger that occurred five months later.

*McConnell v. Hunt Sports Enterprises*, 725 N.E.2d 1193 (Ohio App. 1999). This was the first case to address the fiduciary duties of members of an LLC to any significant degree. In this case, the court stated that members of an LLC are in a fiduciary relationship that would generally prohibit competition with the business of the LLC. (The court did not directly address the management structure, but it appears that the LLC was member-managed. The opinion notes at one point that the operating agreement did not name any person or entity the operating or managing member of the LLC.) The court concluded, however, that members may contractually limit or define the scope of the fiduciary duties. Specifically, the court recognized the validity of a provision in the operating agreement of an Ohio LLC that permitted members to compete with the LLC. When some of the members of an LLC formed to obtain a hockey franchise objected to the terms of a lease that was necessary to obtain the franchise, other members formed a separate group that agreed to the lease and obtained the franchise. The court found the operating agreement clearly and unambiguously permitted members to compete against the LLC and thus obtaining the franchise did not breach a fiduciary duty. The court indicated that "the method of competing" might constitute a breach of fiduciary duty if it amounted to "dirty pool" but found no willful misconduct, misrepresentation, or concealment by the members who formed the other group. Further, the court found that the non-competing member breached the operating agreement by unilaterally undertaking litigation on behalf of the LLC without the requisite approval of the members. The member argued his actions did not constitute willful misconduct and that his actions were protected under the exculpation and indemnity provisions of the operating agreement. The court, however, found that the exculpation and indemnity provisions applied in the context of members' carrying out their duties under the operating agreement and that there was no duty to unilaterally bring the litigation. The court concluded that the member engaged in willful misconduct in filing the suit without asking even one other

member for permission when the agreement required a majority vote. The member argued that the litigation was undertaken upon advice of counsel and therefore in good faith. The court stated that the evidence did not show that the member relied upon advice that the member was acting within the scope of authority conferred by the agreement. The evidence showed only that the member caused the suit to be filed and that the member's general counsel had responsibility for the litigation.

#### **W. Inspection Rights and Access to Information**

*Fogarty v. Parker, Poe, Adams, and Bernstein, L.L.P.*, \_\_ So.2d \_\_, 2007 WL 80794 (Ala. 2007). The Alabama Supreme Court issued this modified opinion replacing its prior opinion of August 18, 2006. The modified opinion is almost identical to its prior opinion, and the court reached the same conclusions regarding the claims asserted by minority members of an Alabama LLC against a North Carolina law firm and two of its attorneys based on the attorneys' role in denying them access to the books and records of the LLC. The plaintiffs alleged that the attorneys threatened legal action against them if they continued to seek access to the LLC's records, misrepresented Alabama law by stating that Alabama law did not entitle them to access to the LLC's books and records, and removed the books and records from Alabama to prevent the plaintiffs from having access to them. The court held that the Alabama Legal Services Liability Act (ALSLA) was not the exclusive remedy for the minority members' claims because the ALSLA applies only to allegations of legal malpractice, i.e., claims against legal services providers that arise from the performance of legal services. The court stopped short of saying, as it had in its original opinion, that the ALSLA applies only to claims brought by the one who receives legal services; however, the court stated, as it had in its original opinion, that it appeared the ALSLA did not apply to the plaintiffs' claims because the plaintiffs' complaint did not allege tortious conduct resulting from the receipt of legal services from the attorneys and because the attorneys expressly stated that they never provided legal services to the plaintiffs. Furthermore, the ALSLA did not apply to the attorneys because they were not licensed to practice law in Alabama, and the ALSLA applies only to attorneys licensed in Alabama. The court next held that Alabama recognizes a private cause of action for the unauthorized practice of law in Alabama and concluded that the plaintiffs stated a claim for relief by alleging that the attorneys were not licensed in Alabama and that the plaintiffs were injured as a result of representations made concerning Alabama law for the majority owners and the LLC itself. The court also found that the plaintiffs had stated a claim against the attorneys based on the statutory inspection provisions of the Alabama Limited Liability Company Act. The court pointed out that the statute provides for personal liability of "any agent, member, or manager" of an LLC who refuses to permit a member to inspect the books and records without reasonable cause. The plaintiffs alleged that the attorneys were acting as the LLC's agent and that they refused to permit the plaintiffs to inspect certain records without reasonable cause; therefore, the allegations supported a claim for relief under the statute, which provides for a penalty in an amount up to 10% of the fair market value of the membership interest of the member in addition to other damages.

*Burkle v. Burkle*, 141 Cal.App.4th 1029, 46 Cal.Rptr.3d 562 (Cal. App. 2 Dist. 2006). Carrie Burkle's father, Ronald Burkle, formed a Delaware LLC when Carrie was 19 years old. Ronald owned 99% of the LLC and provided the funds for Carrie's 1% interest in the LLC. Carrie filed suit seeking declaratory relief and an accounting after learning of her 1% interest in the LLC. Carrie sought access to the LLC's books and records through discovery requests and based on California statutory provisions. Ronald sought summary judgment and asserted that the capital contributions he made to the LLC were loans to Carrie and that he drew down Carrie's capital account to repay himself for the prior loans plus accrued interest on the loans. The court of appeals determined that Carrie had inspection rights under Section 17453 of the Corporations Code, which states: "If the members of a foreign limited liability company residing in this state represent 25 percent or more of the voting interests of members of that limited liability company, those members shall be entitled to all information and inspection rights provided in Section 17106." (Section 17106 provides members of a California LLC access to records for purposes reasonably related to the member's interest.) Ronald argued that "those members" entitled to inspection rights are only those California members with a 25% or greater interest; however, the court of appeals had no difficulty concluding that once the interest of California residents in an LLC reaches the 25% threshold, any California member is entitled to the benefits of California law on inspection of LLC records. According to the court, "'those members' unambiguously refers to California members, and merely distinguishes members residing in California from members residing elsewhere, who are not entitled to inspection rights under California law." Since all the members of the LLC – Carrie with a 1% interest and Ronald with a 99% interest – resided in California, Carrie was entitled to inspection rights.

**Galaz v. Oshita**, Nos. B181278, B187428, 2006 WL 1461134 (Cal. App. 2 Dist. May 30, 2006) (reversing award of attorney's fees because plaintiff member failed to establish amount of fees attributable to efforts to enforce inspection rights).

**Kasten v. Doral Dental USA, LLC**, No. 2005AP995, 2006 WL 861382 (Wis. App. April 5, 2006). Addressing an issue of first impression in Wisconsin, the court of appeals certified to the Wisconsin Supreme Court the following issues: (1) whether the Wisconsin Limited Liability Company Act (as in effect in 2003-2004) grants members a broad right of access to LLC records that, absent contrary language in the operating agreement, embraces informal and non-financial records, and (2) if the statute grants a broad inspection right, whether e-mails may be classified as "records" that are subject to a member's inspection. An LLC member sought access to e-mails and drafts of certain documents, and the LLC opposed the member's access. The trial court held that the member was not entitled to inspect the drafts and e-mails. The court of appeals discussed the arguments made by each side and appeared to lean toward a broad reading of the statute consistent with the member's position, but the court did not reach a conclusion, deferring instead to the supreme court as the proper judicial authority to decide such a novel and significant issue. The court examined the provisions of the Wisconsin LLC statute and the operating agreement of the LLC in question and observed that the operating agreement appeared to grant inspection rights similar to the statute. The court stated that the LLC's argument that the statute limited member inspection rights to the enumerated records required to be kept under the statute seemed inconsistent with the statute, which goes further and provides that, unless otherwise stated in the operating agreement, a member's right to inspect and copy records extends to "any other records" of the LLC. The court acknowledged that the LLC statute borrowed liberally from the corporate and limited partnership statutes, which limit inspection rights to specified formal documents. The court pointed out, however, that the LLC statute, unlike the limited partnership and corporate statutes, explicitly refers to "any other limited liability company record" and states that a member may inspect such other records unless otherwise provided in the operating agreement. The court also commented that courts have tended to define the scope of the inspection right broadly in corporate and partnership cases. With regard to the possible status of e-mails as "records," the court observed that cases suggesting a broad right of access extending to "correspondence" were decided before e-mail became a primary source of business communication. The court noted that e-mail correspondence is often more frank and unguarded than written correspondence and that it thus may not be appropriate to characterize an e-mail message as a company record. On the other hand, the court stated that distinguishing between e-mail and other informal records, such as correspondence, may be a distinction without a difference. The court noted that e-mail has been admitted into evidence as "records" or "documents" in other contexts and that the Uniform Limited Liability Company Act defines records broadly to include information stored in an electronic form.

**Mata v. Mata**, No. SOM-C-012086-05, 2005 WL 3312943 (N.J. Super. Ch. Dec. 6, 2005) (citing statutory provision granting LLC members information rights and access to LLC books and records and denying defendants' request to vacate prior temporary restraint ordering that LLC's books and records be made available to 50% owner and restraining defendants from destroying books and records relevant to subject matter of complaint).

**Sachs v. Adeli**, 804 N.Y.S.2d 731 (N.Y. A.D. 1 Dept. 2005) (holding minority member of Delaware LLC had right to obtain state sales tax records based on statutory inspection rights of LLC members under New York LLC statute and case law holding tax records are discoverable if necessary to litigation and unavailable from any other source, and noting outcome would not change if Delaware law controlled based on statutory inspection rights of LLC members under Delaware law).

**Merovich v. Huzenman**, 911 So.2d 125 (Fla. App. 2005) (finding allegations of complaint stated cause of action to enforce rights to obtain information).

**Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.**, 854 A.2d 121 (Del.Ch. 2004) (finding plaintiff stated claim against LLC and certain managers for breach of provisions of LLC agreement requiring disclosure of material adverse events, access to books and records, and access to LLC managers and officers).

**Alexander v. Minton**, 855 So.2d 94 (Fla.App. 2003) (holding that operating agreement did not "unreasonably restrict" member's right to information or access to records and that statutory inspection right did not trump operating agreement or render dispute over member's right to inspect LLC books and records non-arbitrable under arbitration clause of LLC operating agreement).

*Somerville S Trust v. USV Partners, LLC*, No. Civ.A. 19446-NC, 2002 WL1832830 (Del. Ch. Aug. 2, 2002)(concluding that member’s stated purposes (to investigate allegations of wrongdoing and mismanagement of the LLC and to value its membership interest) were proper purposes for books and records inspection, that plaintiff proffered credible evidence of mismanagement that would adversely affect the member’s interest, and that various specified documents and records were subject to inspection).

*Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, No. Civ.A. 18928, 2002 WL 205681 (Del. Ch. Jan. 29, 2002). A member of two Delaware LLCs sought to inspect the books and records of the LLCs, and the managing member of the LLC argued it need only produce the LLC’s general ledger accounts transactions histories, continuity schedules, annual reports, bank account ledger cards, and trial balances. The court interpreted the Delaware LLC act and LLC agreements (which gave access to “all books and records” of the LLCs) and concluded that the member also had the right to inspect the tax returns and member lists of the LLC. The court rejected the argument that disclosure of the member lists would violate the privacy provisions of the Gramm-Leach-Bliley Act because there is an exception to the prohibition on disclosure where disclosure is necessary to comply with other laws and legal requirements, and the court found disclosure was required to comply with Delaware law and other legal requirements. The LLC members also sought access to records of two Cayman Island corporations that were investment funds in which the LLCs invested member funds, but the court rejected this request on the basis that the members were not shareholders in the corporations and there was no basis to disregard the separate existence of the entities.

*Degennaro v. Midtown Bridge, LLC*, No. A-6209-99T2 (N.J. App. Oct. 26, 2001). A member of a New Jersey LLC sought to inspect the LLC’s financial records. The LLC’s operating agreement contained provisions requiring the LLC to maintain books and records and permitting members to visit the properties of the LLC and discuss the business and affairs of the LLC with the managers. The operating agreement also required the managers to prepare and provide to LLC members certain financial reports. The operating agreement did not recite that the members had any right to inspect the LLC’s financial records. The court found that furnishing the reports was all that was required (and thus the member did not have the right to inspect the LLC’s financial records) since the New Jersey LLC act states that a member may obtain “true and full information regarding the status of the business and financial condition” of the LLC “subject to such reasonable standards ... as may be set forth in an operating agreement.”

## **X. Interpretation of Operating Agreement, Articles of Organization**

*NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417 (Del. Ch. 2007). The plaintiff, an indirect owner of a Delaware LLC, sued the LLC and one of the LLC’s two members, seeking to enforce provisions of the LLC’s operating agreement as to which the plaintiff was an explicit third party beneficiary. The plaintiff sought access to the LLC’s books and records and specific performance of a provision requiring the defendant member to segregate funds when a dispute arose regarding the amount of certain payments and fees to various related entities. The defendants moved for dismissal of the claims on the basis that the claims were subject to arbitration, and on various other grounds including that the plaintiff had an adequate remedy at law. The court held that the claims were not subject to arbitration because the arbitration clause relied upon by the defendants merely permitted, but did not require, the parties to the operating agreement to jointly consent to arbitrate disputes between themselves that were not otherwise required to be arbitrated. The court stated that it would be inequitable and illogical to hold that an arbitration clause acts more broadly on a third party beneficiary than upon one of its signatories. The court concluded that a second arbitration clause pertaining to disputes over certain exhibits did not apply to the plaintiff’s claims either. The plaintiff, as a third party beneficiary who was not a signatory of the agreement, only had standing to bring claims based on rights found in certain provisions of the agreement, and the inspection right did not turn on the exhibits referenced in the arbitration clause. The court also rejected the defendants’ argument that arbitration was required under an arbitration clause in another agreement to which the defendants were not parties. After analyzing and rejecting several other arguments for dismissal of the specific performance action, the court concluded that the plaintiff did not have an adequate remedy at law because money damages for the failure to comply with the operating agreement might not be available. The operating agreement provided that the defendant member’s duties were ministerial and that the member would have no liability for any action taken or omitted except for willful misconduct, gross negligence, or bad faith, so long as the member acted in good faith. Thus, even if the plaintiff proved non-compliance by the other member, the plaintiff would be left without a remedy if the non-compliance occurred only negligently and in good faith. Furthermore, the court stated that money damages would not provide a complete and efficient remedy such as that provided in the contractual covenant the plaintiff sought to enforce. The court stated that it could not put a meaningful dollar value on the unique economic bargaining power conferred on the plaintiff under the provision requiring the segregation of funds.

*In re Regional Diagnostics, LLC (Morris v. Zelch)*, \_\_ B.R. \_\_, 2007 WL 1587256 (Bankr. N.D. Ohio 2007). Defendant managers of an LLC argued that the trustee failed to state a claim against them under Delaware law for breach of fiduciary duty. The court reviewed the duties of loyalty and care of a director of a Delaware corporation and stated that Delaware courts have applied the business judgment rule in the LLC context. The court noted that fiduciary duties of LLC managers may be altered by agreement and quoted a recent article by Justice Steele for the proposition that “[t]here is an assumed default to traditional corporate governance fiduciary duties where the agreement is silent, or at least not inconsistent with the common law fiduciary duties.” The agreement contained an exculpatory provision that provided that a covered person shall not be liable to the LLC or any other covered person for any loss, damage, or claim incurred by reason of any act or omission performed or omitted in good faith on behalf of the LLC and in a manner reasonably believed to be within the scope of authority conferred on the covered person by the agreement, except that a covered person shall be liable for any such loss, damage, or claim incurred by reason of such covered person’s gross negligence or willful misconduct. The defendants argued that the LLC agreement eliminated liability for breach of the duty of loyalty, but the court rejected this argument because the provision did not restrict or limit the managers’ fiduciary obligations; it only limited their liability to the extent they acted in good faith. The court thus concluded that, since a breach of the duty of loyalty can be premised on a failure to act in good faith, “an agreement that does not alter a manager’s duty of loyalty and only restricts liability to the extent of actions performed and omissions made in good faith, does not eliminate potential liability for breach of the duty of loyalty.”

*Westbard Apartments, LLC v. Westwood Joint Venture, LLC*, \_\_ A.2d \_\_, 2007 WL 1518992 (Md. App. 2007). This suit arose out of a dispute between two members of a Delaware LLC formed to invest in and develop certain real estate in Bethesda. The LLC leased the property, and the lease conferred on the LLC various rights, including a right of first refusal on the property. The two members of the LLC were a large pension fund (National Electrical Benefit Fund or “NEBF”) and an entity owned and controlled by a real estate developer named Cohen. Cohen’s entity was the managing member of the LLC, and Cohen was designated as the representative to act on behalf of the managing member. A couple years after NEBF entered the venture, NEBF and Cohen began discussing the possible purchase of the property. With NEBF’s knowledge and consent, Cohen negotiated an agreement under which an entity owned by Cohen would purchase the property that was leased by the LLC. Cohen waived on behalf of the LLC certain rights of first refusal held by the LLC under the lease. NEBF’s managing director for real estate testified that he presumed Cohen was negotiating the purchase on behalf of the LLC since he did not believe Cohen would be permitted under the LLC agreement to take the deal for himself. After Cohen and NEBF failed to agree on terms for a new joint venture to purchase the property, Cohen informed NEBF that he believed the LLC agreement permitted him to pursue the transaction in his individual capacity. NEBF and the LLC filed suit against Cohen, various Cohen-controlled entities, and the seller of the property. The court first analyzed waivers of jury trial contained in the LLC agreement and the lease and concluded that the LLC and NEBF were bound by the waivers and could not demand a jury trial in NEBF’s derivative suit brought against the managing member, Cohen, Cohen-controlled entities, and the seller of the property. The court next interpreted the fiduciary duty provisions of the LLC agreement. The LLC agreement provided that the managing member was required to exercise the power and authority granted under the agreement and to perform its duties as managing member in good faith, in a manner reasonably believed to be in the best interest of the LLC, and with the care of a prudent real estate professional in a like position under similar circumstances. This section of the agreement went on to provide that the managing member owed the fiduciary duties that a “general partner undertakes to a limited partnership and its limited partners under the statutes and case law of the State of Delaware applicable to the limited partnership form of business organization.” The next section of the LLC agreement required the managing member to manage the LLC as its exclusive function and prohibited it from having any business interests or activities other than those relating to the LLC. This provision permitted other members to have other business interests and activities in addition to those relating to the LLC even if such other ventures were competitive with the LLC. The trial court found that the fiduciary duty provisions of the LLC agreement were ambiguous and that NEBF could not complain about Cohen’s conduct because it encouraged him to pursue the deal. The trial court found the testimony by the NEBF representative to be incredible and untruthful. The court of appeals discussed fiduciary duties under Delaware law and the contractual freedom to vary such duties. The court perceived no ambiguity in the fiduciary duty provisions and stated that the parties, who were “sophisticated real estate developers,” were bound by the terms of the agreement. The court concluded that the wide latitude given to non-managing members and affiliates of members (including affiliates of the managing member) to pursue business opportunities was confined to ventures *other than those relating to the LLC*. The purchase of the property was a business interest related to the LLC and did not qualify as an “other venture or activity.” The court of appeals concluded that the trial court’s erroneous interpretation of the LLC agreement led to erroneous fact-finding with regard to the truthfulness of statements by NEBF’s representative regarding his understanding of Cohen’s actions in pursuing the purchase of the



property. The court of appeals vacated the lower court's decision and remanded for a new trial on the issue of whether NEBF waived or was estopped to object to Cohen's purchase of the property.

*Darwin Limes, LLC v. Limes*, No. WD-06-049, 2007 WL 1378357 (Ohio App. May 11, 2007). Disputes arose in a family farm organized as an LLC. The LLC was owned by four siblings, Charles, Dale, Donald, and Betty Limes. Charles, Dale, and Donald each owned 32.667%, and Betty owned 2%. Under the original operating agreement, they were each managing members, but the parties agreed in an addendum that Betty was no longer a managing member, although she was still a non-voting member. Donald had traditionally farmed the land on a cash rent basis under an alleged oral lease. The other members decided to terminate any lease arrangement with Donald, and litigation involving claims for receivership, judicial dissolution, and declaratory judgment ensued. While the litigation was pending, Charles and Dale voted to remove Donald as a managing member. They also voted to take bids on a lease of the land from Dale and Donald. Donald won the bid and retained the lease for another year. Donald argued that the LLC was dissolved automatically when both Donald and Dale filed for judicial dissolution and there was no agreement to continue. The court interpreted a provision of the Ohio LLC statute which provides that it is an event of withdrawal of a member if the member "files a petition or answer in any reorganization, ...dissolution, or similar relief proceeding under any law or rule that seeks for himself any of those types of relief." Relying on this provision, which was also included in the dissociation provisions of the operating agreement, Donald argued that Dale ceased to be a member (thus causing dissolution of the LLC) upon Dale's filing of a claim for judicial dissolution of the LLC. The court pointed out, however, that dissociation occurs when a member seeks dissolution for himself or itself. Thus, no member was dissociated when Dale or Donald filed claims for judicial dissolution of the LLC. Additionally, the court concluded that, even if it agreed with Donald's interpretation that Dale was dissociated, dissolution did not occur under the dissolution provision of the operating agreement, which listed the types of dissociation that would trigger dissolution but did not include the filing of a dissolution proceeding in the list of dissociation events dissolving the LLC. The court next interpreted the standard for judicial dissolution – that it is not reasonably practicable to carry on the business of the LLC in conformity with its articles of organization and operating agreement – and concluded that judicial dissolution was not appropriate. The court pointed out that the business of the LLC was farming, the operating agreement provided for continuation of the LLC even if Donald dissociated, and the LLC was in fact carrying on its business based on the award of the farming lease under the newly instituted bidding procedure. Finally, the court concluded that Donald was properly removed as a managing member. The operating agreement provided that a managing member could be removed for cause by the affirmative vote of all the other members. Donald argued that Betty's vote was required and not just the vote of the managing members, but the court relied upon the addendum that provided Betty was no longer a voting member to conclude that only the vote of Charles and Dale was required to remove Donald. The court noted that "for cause" was not defined, but the court pointed to the standard of care of a managing member in the operating agreement (good faith discharge of duties in a manner reasonably believed to be in the best interests of the LLC) and concluded that the trial court did not err in considering Donald's refusal to entertain the possibility of someone other than himself farming the land as cause for removal.

*Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC*, 158 P.3d 1183 (Wash. App. 2007). The court of appeals concluded that a member's failure to make mortgage payments on behalf of the LLC and its subsequent actions taken in connection with the LLC real estate venture did not breach the member's fiduciary duty or contract in this case. Joseph Finley ("Finley") and the Bishop of Victoria Corporation Sole ("BV") formed a real estate development LLC. The members testified that Finley agreed to contribute his labor and expertise and BV agreed to contribute financially. There was no evidence that either party's obligation to contribute was quantified, and the operating agreement did not specify a time in which Finley was required to sell the property. After the proceeds of the first financing and a refinancing of the property were exhausted, BV made the monthly mortgage payments for a time, but BV stopped making payments after a change in leadership of BV. The new leadership's priority was the sale of the property and satisfaction of the debt even if it meant the LLC forfeited any profit. After BV stopped making the payments, the lender instituted foreclosure proceedings on the property. BV began exploring options to satisfy the foreclosure judgment. Ultimately, BV sold debentures to parishioners of the Victorian Diocese to raise funds it intended to use to reach a settlement with the lender or take over the lender's position and sell the property. The funds raised were transferred to an entity to act as trustee on behalf of the parishioners, and the entity negotiated with the lender for the purchase of its judgment and decree of foreclosure at a discount. Finley sued BV and received a favorable verdict on breach of contract and breach of fiduciary duty claims, but the court of appeals reversed. The court noted that a member is obligated to perform a promise to contribute, and an obligation to contribute arises from the parties' contractual agreement. Because the LLC operating agreement did not require a member to make additional contributions, the court concluded that BV did not breach any contractual obligation by ceasing to make mortgage payments and causing the LLC

to default on the mortgage. Stating that the role of members in a member-managed LLC is analogous to that of partners in a general partnership, the court described the fiduciary duties of partners; however, the court concluded that a member's obligation to contribute cannot be expanded beyond the members' agreements by reference to a general fiduciary duty of loyalty. The court also rejected Finley's arguments that BV breached its contractual duties to Finley by defaulting on the mortgage payment to the lender, desiring to liquidate the property, and developing an expectation that the property would sell quickly. Because the operating agreement did not state that BV was obligated to make payments for the LLC, and the trial court had ruled that parol evidence was inadmissible to alter the terms of the agreement, the court rejected Finley's claim that BV breached a contractual duty by defaulting on the mortgage payment. When the new leadership of BV determined that it no longer wished to make payments on behalf of the LLC, it entered an addendum with Finley regarding the amounts it had advanced and stating that BV was not obligated to make further advances. The operating agreement provided that the LLC would be "engaged solely in the business of investing in, developing and marketing real property located in the State of Washington." The agreement also contained a provision under which the members agreed that it was unreasonable for the parties to have or rely on an expectation not reflected in the agreement and that a member would immediately inform the managers and other members and seek an amendment of the agreement if a member developed an expectation contrary to or in addition to the contents of the agreement. The court stated that the desire not to make payments on behalf of the LLC may have been an expectation contrary to the contents of the operating agreement, but the amendment after the change in BV's leadership complied with the operating agreement. The court concluded that BV's desire to liquidate the property to satisfy the foreclosure judgment was reasonable and that BV did not develop an unreasonable expectation in violation of the operating agreement.

*Morris v. Younis*, Civil Action No. 06-CV-2576, 2007 WL 1314633 (E.D. Pa. May 3, 2007) (rejecting defendant's argument that Pennsylvania statutory default rule providing for equal division of ownership of LLC applied in absence of written operating agreement because fact issues existed regarding terms of unwritten operating agreement).

*Babb v. Bynum & Murphrey, PLLC*, 643 S.E.2d 55 (N.C. App. 2007). The plaintiffs sued Bynum and Murphrey, two members of a law firm LLC, alleging that Bynum engaged in numerous acts of fiduciary fraud in connection with the handling of a trust. The plaintiffs alleged claims against Murphrey for negligence, negligent supervision, and breach of fiduciary duty. The plaintiff argued that Murphrey had a duty to them under the North Carolina Limited Liability Act and the firm's operating agreement. Though the plaintiffs claimed that they were seeking to hold Murphrey liable for his own acts and omissions, the court concluded that the plaintiffs failed to allege any direct acts by Murphrey and were relying on Murphrey's failure to act. The court concluded that the LLC statute did not impose a duty on Murphrey to investigate Bynum if Murphrey did not have any actual knowledge. The court also rejected the plaintiffs' claim that the operating agreement created a duty on the part of Murphrey. Although the operating agreement stated that a member shall be liable for his own professional negligence and that a member must comply with the rules of professional conduct, the court concluded that the plaintiffs were not third party beneficiaries of the agreement. The court said that the intent of the parties was to benefit the law firm and its members, not to directly benefit the plaintiffs. Thus, the plaintiffs were at most incidental beneficiaries and not third party beneficiaries with standing to sue.

*Aryian v. Marottoli*, No. CV065001934S, 2007 WL 1196461 (Conn. Super. April 10, 2007) (denying motion to strike allegations against LLC, its managing member, and accountant complaining of LLC's failure to distribute to plaintiff amounts to which plaintiff was allegedly entitled under operating agreement or LLC statute).

*Estate of E.A. Collins v. Geist*, 153 P.3d 1167 (Idaho 2007). Two individuals, Michael Collins and Russell Purcell, formed an Idaho LLC. The articles of organization stated that management was vested in the managers and listed each as a manager. Purcell testified that he had nothing further to do with the LLC after signing the articles of organization and that he was not a member. Michael Collins later amended the articles of organization to change the name of the LLC, remove Purcell as a manager, and add Michael's father as a manager. A corporation owned by Michael's father transferred various improved and unimproved lots and a model home to the LLC, and the LLC's sole purpose at that point was to develop and sell that property. After Michael's father died, his estate sought to set aside deeds executed by Michael on behalf of the LLC conveying various lots. The court first found that there was no genuine issue of fact as to whether Michael was a manager of the LLC. The estate argued that Michael could not have been a manager because the Idaho Limited Liability Company Act states that management is vested in the members unless an operating agreement vests management in one or more managers. The estate contended there was no operating agreement, but the court pointed out that, under Idaho law, an operating agreement is any agreement, written or oral, among all the members as to the conduct of the business and affairs of the LLC. The court concluded that Michael was

a member of the LLC, even though he did not provide any capital (i.e., money or assets) to the LLC, because his use of credit to obtain construction loans was sufficient consideration for issuance of an LLC interest under the Idaho LLC statute. Since Purcell did not provide any consideration to the LLC and testified that he had no further involvement after signing the articles of organization, the court concluded that Michael was the sole member of the LLC and that there was an operating agreement if Michael was in agreement regarding the business and affairs of the LLC. The court stated that Michael obviously agreed that he would conduct the business and affairs of the LLC. Thus, there was an operating agreement, and Michael qualified as a manager. After Michael amended the articles of organization to remove Purcell as a manager and add his father, it was unclear whether his father became a member. Assuming his father became a member, the court concluded that Michael and his father agreed that Michael would manage the LLC. Although Michael testified in his deposition that they had no operating agreement, the court accepted Michael's explanation that he thought the question referred to a written operating agreement. The court concluded that the conduct of Michael and his father clearly showed that they had agreed that Michael would conduct the business and affairs of the LLC, and Michael thus qualified as a manager.

***Kasten v. MOA Investments, LLC***, Nos. 2006AP386, 2006AP1405, 2006 AP1510, 2007 WL 677804 (Wis. App. March 7, 2007). A minority member of an LLC brought suit individually and on behalf of the LLC asserting that the corporate member holding the largest interest in the LLC and the corporate member's shareholders breached fiduciary duties and acted unfairly in transferring assets and business opportunities away from the LLC. The court held that the plaintiff member was disqualified from asserting claims on behalf of the LLC because the suit was not authorized by a vote of the members. The court found that the plaintiff member was disqualified from voting because she sought judicial dissolution and thus had an interest in the outcome of the suit that was adverse to the interests of the LLC. The court concluded that the corporate primary injury rule applies to LLCs and that the member's claims alleging diversion of the LLC's assets, inappropriate payments of LLC funds, and diversion of business opportunities were derivative claims that she was not authorized to bring. The plaintiff's individual claims that she was improperly denied voting rights were without merit because the LLC's manager or a supermajority of members controlled the LLC and the plaintiff was not damaged by any lost opportunity to vote. The court stated that a claim for minority oppression is not itself a cause of action but merely a standard for judicial dissolution, and the plaintiff's claim for judicial dissolution was abandoned by repeated assertions in the lower court that the plaintiff did not want to dissolve the LLC. The court upheld amendments to the operating agreement permitting members with a financial interest in the outcome of a pending action to vote to dismiss, requiring members asserting or maintaining a derivative action without approval to indemnify the LLC, and imposing a one year limitation on claims asserted by a member against the LLC or other members. The court found the consent resolution adopting the amendments was valid because it was adopted by a supermajority of members and it was not unfair for the LLC or its members to take action to preserve its business against a complaint for dissolution, particularly when the plaintiff's derivative claims were not properly authorized.

***In re Lowry (Lowry Food Products, Inc. v. Alto Dairy Cooperative)***, Bankruptcy No. 03-33950 HDH-7, Adversary No. 05-3108, 2007 WL 738144 (Bankr. N.D. Tex. March 7, 2007). The debtor and the defendant formed a Wisconsin LLC under a formation agreement that provided Wisconsin law would govern. Applying Texas choice of law rules and using a "most significant relationship" analysis, the court concluded that Wisconsin law applied to breach of contract and breach of duty claims brought by the trustee against the defendant member. The court rejected the trustee's claim that the defendant materially breached the terms of the LLC agreements with respect to operation and management of the LLC. The court also found that breach of the arbitration clause by seeking judicial relief did not damage the debtor member. Finally, the court rejected the trustee's breach of duty claim. The court stated that the exclusive standard for duties under Wisconsin law is the statutory standard that provides that a member must not willfully fail to deal fairly in matters in which the member has a material conflict of interest. The court found that the trustee failed to present substantial or persuasive evidence of conduct violating the statutory standard. The court stated that Wisconsin law emphasizes freedom of contract in the conduct of LLC affairs and concluded that no action of the defendant undertaken consistent with its contractual rights under the formation or operating agreements constituted a violation of fiduciary duties recognized under the Wisconsin LLC statute.

***Zanker Group, LLC v. Summerville at Litchfield Hills, LLC***, Nos. UWY(X10)CV044010223S, UWY(X10)CV044010567S, 2007 WL 865904 (Conn. Super. March 6, 2007). The court interpreted an operating agreement provision addressing transactions with affiliates and concluded that the transaction in issue was within the scope of the provision. Although the transaction did not receive the required approval of 90% of members, it fell within an exception for arm's length transactions. The court considered breach of fiduciary duty claims in the context of liquidation and stated that the statutory obligation of a manager or member is the same as that under common law. The

court concluded that the operating agreement provision requiring 90% approval of transactions with affiliates was inapplicable after dissolution, that the managers were authorized to liquidate the LLCs, and that fair value was paid in a transaction where property interests of the LLCs were transferred to wholly owned entities of one of the members.

***Chase Manhattan Bank v. Iridium Africa Corp.***, 474 F.Supp.2d 613 (D. Del. 2007) (holding that members were precluded from raising defenses in regard to capital contribution obligations because LLC agreement provided obligations were absolute and unconditional and waived members' defenses regarding obligations; lender to whom LLC pledged right to recover attorney's fees under operating agreement in event of default in capital contribution obligation was entitled to recover attorney's fees incurred in pursuing remedies).

***Santa Monica Properties v. A/R Capital, LLC***, No. B190712, 2007 WL 466828 (Cal. App. 2 Dist. Feb. 14, 2007) (holding operating agreement provision entitling prevailing party in arbitration to attorney's fees applied only to arbitrations and thus did not apply to action brought in court).

***Smith v. Davis Surgical Center, LLC***, 472 F.Supp.2d 1316 (D. Utah 2007) (interpreting "provided, however, that, except" clause of buy-sell provision of operating agreement).

***Management VI Properties v. Greenberg-Gale***, No. G036833, 2007 WL 264782 (Cal. App. 4 Dist. Jan. 31, 2007) (holding that attorneys' fees provision of operating agreement was not applicable to LLC's successful slander of title action against member because LLC was not party to operating agreement).

***Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corporation***, 368 B.R. 679 (N.D. Ill. 2006). A creditors' trust asserted a number of claims against one of the members of a bankrupt Illinois LLC. The LLC had two corporate members, and the operating agreement designated a third corporation to manage the LLC and provided that neither member was an agent of the LLC or had any authority to act for the LLC. The court first addressed the management structure of the LLC because the defendant member relied upon differences between manager-managed and member-managed LLCs under Illinois law in arguing that certain claims should be dismissed on the basis that the LLC was manager-managed. Under the Illinois LLC statute, a manager in a manager-managed LLC owes certain duties to the LLC, but a non-manager member of a manager-managed LLC owes no duties solely by reason of being a member. The court stated that it could not determine at this stage of the litigation whether the LLC was manager-managed because, while the operating agreement gave sole control of the LLC's affairs to a manager, one of the provisions of the operating agreement referred to a section of the Illinois LLC statute that addressed dissociation from a member-managed LLC. The court said this reference could suggest that the members considered the LLC to be member-managed or not entirely manager-managed. Additionally, the court stated that the articles of organization, which had not been provided to the court, would also be relevant to determining whether the LLC was manager-managed because the statute defines a manager-managed LLC as an LLC which is so designated in the articles of organization. Finally, taking as true allegations by the plaintiff that the LLC was actually run as a joint venture or partnership and that the defendant member exercised de facto management authority over the LLC, the court stated that the LLC could be viewed as a de facto member-managed LLC. The court also declined to dismiss claims that the defendant member argued were released in a withdrawal agreement between the LLC and the member. The court found that the plaintiff made a cognizable argument that the withdrawal agreement (and the release of claims in that agreement) was ineffective because the agreement was executed by the president of the LLC rather than the manager who was vested with exclusive authority to enter agreements on behalf of the LLC under the operating agreement. The court dismissed a claim by the plaintiff that the defendant member failed to make required contributions, finding no provision in the operating agreement that imposed a contribution obligation and holding that the provisions of the Illinois LLC statute do not impose a legal obligation to contribute, but simply provide that a contribution obligation is not excused by a member's death or disability if a member has such an obligation. The court found that the plaintiff had stated a claim for wrongful dissociation against the defendant member (the operating agreement prohibited voluntary withdrawal and provided that such a withdrawal would be considered a wrongful dissociation) based on the defendant member's alleged de facto withdrawal and subsequent formal withdrawal pursuant to a withdrawal agreement. The court also found that the alleged wrongful dissociation could form the basis of a breach of fiduciary duty claim. The court declined to dismiss breach of fiduciary duty claims against two directors of the corporate manager of the LLC as well as a claim for inducement of breach of fiduciary duty against a corporation that sought to acquire the defendant member's parent and allegedly directed the defendant member to withdraw from the LLC. The court addressed several other claims, including a claim that the defendant member breached a non-competition clause in the operating agreement. The court found that the LLC was a third party beneficiary of the

non-competition provision of the operating agreement and the plaintiff thus had standing to pursue this claim even though the LLC was not a party to the operating agreement.

***Chuang v. Ming Ter Chen***, No. B185791, 2006 WL 3518228 (Cal. App. 2 Dist. Dec. 7, 2006). A judgment against the Chens was obtained by their co-members in an LLC. Based on unauthorized withdrawals of LLC funds by the Chens, the judgment reduced the interest of the Chens in the LLC to zero and awarded damages against the Chens. The court of appeals concluded that it was proper for the court to reduce the interest of the Chens to zero and to award damages in the amount of the negative balance of their capital account. The court concluded that the members had agreed that their interests would be determined in proportion to their capital contributions. The court also relied upon provisions of the operating agreement stating that members had no right to withdraw their capital contributions and calling for a decrease in a member's account for cash distributed to a member.

***Majkowski v. American Imaging Management Services, LLC***, 913 A.2d 572 (Del. Ch. 2006). The court rejected an individual's argument that advancement of expenses was required under an indemnification provision in an LLC agreement that required the LLC to "indemnify and hold harmless" members and various other persons. The plaintiff argued that the phrase "hold harmless" included an advancement right. The court analyzed the meaning of this phrase at length and concluded it was an unambiguous term of art that did not encompass a right to advancement as it functions within the rubric of Delaware LLC law. An LLC is only obligated to advance litigation expenses when its agreement expressly states the intention to mandate advancement.

***O'Neal v. Blackerby***, 950 So.2d 424 (Fla. App. 2006). The court held that language in an LLC operating agreement that provided for dissolution upon "sale or other disposition of all or substantially all of [the LLC's] property and assets" was ambiguous with respect to the effect of the sale of the LLC's real property. The agreement also provided that the LLC's net cash flow, after payment of taxes, was to be reinvested or held for reinvestment unless the members elected to distribute the cash. After its formation, the LLC had purchased several parcels of real property. The parcels were later sold for a substantial profit, and some of the members argued that the sale of the LLC's property effected a dissolution. The remaining members argued the proceeds of the sale were being held for reinvestment in accordance with the agreement and thus constituted a substantial remaining asset. The court concluded that there clearly would have been no event of dissolution if the operating agreement had referred only to the "disposition" of all or substantially all the assets because the LLC held substantial remaining cash assets. Conversely, if the agreement had referred only to the "sale" of all or substantially all the assets, the argument that the LLC was dissolved would have been more compelling. As written, the court found the agreement ambiguous; therefore, its meaning could not be resolved at the summary judgment stage.

***Ptasynski v. CO2 Claims Coalition, LLC***, Civil Action No. 02-cv-00830-WDM-MEH, 2006 WL 3746122 (D. Colo. Dec. 15, 2006). An LLC member asserted various claims against the managers of an LLC in connection with their actions in treating him as a withdrawn member and denying him a share of the proceeds of a settlement obtained by the LLC. The court interpreted the 2001 version of the Colorado LLC statute with respect to setting the number of managers of an LLC in order to address the question of whether two of the defendants were properly elected managers and thus entitled to the protection afforded managers under the Colorado statute with regard to performance of their duties. The plaintiff claimed that the number of managers was improperly increased from two to three by a vote of 59% of the members and that two of the defendants were never properly elected managers. The 2001 Colorado statute provided that the articles of organization shall fix the number constituting the initial manager or managers and that the number of managers shall be the same as that provided for in the articles of organization. Neither the articles of organization nor the operating agreement of the LLC specifically stated a number of managers, but the articles of organization listed two managers. Under the statute, articles of organization could only be amended as provided in the operating agreement or by written consent of all members. The court stated that the 59% vote to increase the managers would have been sufficient to amend the articles of organization pursuant to the voting provisions in the operating agreement, but there was no indication articles of amendment were ever filed as required by the statute and there was consequently a genuine issue as to whether two of the defendants were entitled to the protection afforded managers under the statute.

***Dialogo, LLC v. Bauza***, 467 F.Supp.2d 115 (D. Mass. 2006) (interpreting operating agreement capital contribution provision stating that member "has contributed or is deemed to have contributed" \$50,000 and concluding provision did not obligate member to make contribution of \$50,000 in future).

**Decker v. Decker**, 726 N.W.2d 664 (Wis. App. 2006). The court of appeals withdrew an earlier opinion in this matter and issued this opinion in which it interpreted the buy-sell and dissolution provisions of an LLC operating agreement and sought to clarify the trial court's order in the case. Two brothers who operated an investment real estate business through a number of LLCs had reorganized the business by entering an operating agreement and forming a new LLC. Pursuant to the operating agreement, one of the brothers, David, sent a letter to the other brother, Frederick, declaring that a deadlock existed. Frederick did not believe that a deadlock existed and requested that David rescind the letter, but David refused. Frederick then made an offer under the operating agreement to buy David's interest in the business for \$7,000,000, approximately two to three times what the interest was worth. David accepted the offer, but Frederick never closed on the purchase. David brought an action asserting, among other claims, a claim for damages for breach of contract based on Frederick's failure to buy his interest. The court found that Frederick's offer and David's acceptance did not amount to an enforceable contract because the operating agreement provided for the consequences of a failure to close. Upon Frederick's failure to close, David had an opportunity to purchase Frederick's interest for the same amount, and if David did not do so, the operating agreement provided for dissolution of the LLC. The court found that Frederick "sabotaged" the buy-out provisions of the operating agreement by making an outrageous offer of \$7,000,000 with no intention of closing on the purchase and knowing David would not be inclined to pay that amount, leaving dissolution as the specified remedy under the operating agreement when a purchase and sale of one of their interests did not occur. Frederick argued that the LLC's properties must then be sold on the open market and that the court-appointed receiver was not authorized to accept an offer by David. The court, however, concluded that the receiver was authorized to accept David's offer because it was no different from any third party offer except that it was for "all the property interests held by Frederick and it eliminated costly real estate commissions and other miscellaneous costs." The trial court's order stated that the receiver was authorized to assign to David all *interests* in the LLC not already owned by David, but the court of appeals stated that only a sale of *assets* would be consistent with the dissolution procedure specified in the operating agreement. Therefore, the court of appeals ordered that the trial court's order be corrected to refer to a sale of the LLC's assets. The court stated that a sale of assets would presumably have negative tax consequences for David, but the court found that the operating agreement permitted no other result. The court said that a sale of LLC interests could only occur under the operating agreement when the LLC was to continue to exist as a viable company. Under the circumstances, the operating agreement mandated dissolution and a sale of the assets. Furthermore, the court concluded that the trial court had statutory authority to order the sale to David under the judicial dissolution provisions of the Wisconsin LLC statute. These provisions authorize a court decree of dissolution when a controlling member engages in "oppressive" conduct, and the court found Frederick's "obstructionist" tactics showed a lack of good faith and constituted oppression.

**Wakefield v. Seattle Chocolate Company, LLC**, No. 56146-4-I, 2006 WL 3404796 (Wash. App. Nov. 27, 2006) (interpreting operating agreement regarding issuance of units to retire debt of LLC).

**All Star Land Title Agency, Inc. v. Surewin Investment, Inc.**, No. 87569, 2006 WL 3095701 (Ohio App. Nov. 2, 2006). Two corporations, All Star and Surewin, formed an Ohio LLC to operate a title agency. The operating agreement permitted the members to compete with each other and the LLC, and the operating agreement stated that no member was required to perform services for the LLC. After Surewin's owner formed a title agency with another person and requested winding up of the LLC, All Star sued Surewin alleging breach of contract and breach of fiduciary duty. All Star argued that Surewin breached the terms of the operating agreement by withdrawing from the LLC, but the court rejected this argument because the operating agreement provided that the LLC was dissolved upon the unanimous written agreement of the members, and both members agreed in email correspondence to dissolve the LLC. All Star argued that Surewin breached an oral agreement that it would refer customers of its real estate business to the LLC, but the court found that the oral agreement was unenforceable based on the statute of frauds. The court stated that the agreement could not be performed within one year because the LLC's term was thirty years. The court rejected All Star's argument that the doctrine of part performance removed the agreement from the statute of frauds, citing the Ohio Supreme Court's holding that the doctrine of part performance applies in the sale or leasing of real estate, not to contracts of personal services. The court stated that the fiduciary relationship involved in an LLC would ordinarily prevent direct competition between members of the LLC, but the court concluded that there was no duty not to compete in this case because the operating agreement specifically allowed competition. The court also rejected tortious interference and promissory estoppel claims of Surewin.

**Matthews v. D'Amore**, No. 05AP-1318, 2006 WL 3095817 (Ohio App. Nov. 2, 2006). In this dispute over the membership of an Ohio LLC, the court concluded that the members were determined by the operating agreement rather than the articles of organization and appointment of statutory agent. McDonald and Crow met on many occasions

and agreed to form an LLC to develop real property owned by Crow. Crow prepared articles of organization and an appointment of statutory agent using preprinted forms of the Secretary of State. Three other individuals (the defendants) signed and filed these documents. The appointment of agent appointed Crow as agent and stated that the defendants as the “undersigned,” were “at least a majority of the members” of the LLC. The pre-printed word “member” appeared beneath the signatures of each of the defendants, and the pre-printed instructions stated that “[a]n original appointment of agent form must be signed by at least a majority of the members of the limited liability company.” McDonald and Crow signed an operating agreement as members, and a separate agreement that was incorporated by reference in the operating agreement detailed the duties and responsibilities of Crow and McDonald as members and set forth how the profits would be distributed to Crow and McDonald. These agreements did not list the defendants as members and were not signed by the defendants. Several years after the LLC was formed, Crow transferred his interest in the LLC to a trust. Crow died a few months later. After Crow died, the defendants’ attorney filed a statutory agent update naming the defendants’ attorney as the new statutory agent of the LLC. The defendants’ attorney also wrote the LLC’s attorney asserting that the defendants were the only members of the LLC. McDonald claimed that the defendants’ only role was to procure tenants (for the property contributed by Crow to the LLC) in exchange for a commission. The court of appeals upheld the trial court’s summary judgment in favor of McDonald and the trustee of Crow’s trust on the issue of the membership of the LLC. The court relied upon the statutory definition of a “member” as “a person whose name appears on the records of the limited liability company as the owner of a membership interest in the company” and “membership interest” as “a member’s share of the profits and losses of a limited liability company and the right to receive distributions from that company.” The court pointed out that the only persons whose names appeared in the LLC’s records as sharing in the LLC’s profits and losses and having a right to receive distributions were Crow and McDonald. The defendants argued that the articles of organization and appointment of agent were LLC records that at least established a genuine issue of material fact regarding the identity of the members, but the court pointed out that these documents did not state that the defendants had a right to share in the LLC’s profits or losses or receive distributions. Furthermore, the court pointed out that the statute does not require that the persons forming an LLC be members, but merely requires the person who signs and files the articles of organization to be an “authorized representative” of the LLC. The court also noted that the forms used to form the LLC were out of date and that the appointment of agent was not required to be signed by a majority of the members at the time the LLC was formed. In addition, the court found unreasonable the defendants’ contention that neither McDonald, who contributed \$25,000 cash, nor Crow, who contributed a \$7 million piece of real estate, would be considered members of the LLC. The court also relied upon and discussed two previous opinions in which it had looked to the operating agreement rather than the articles of organization to determine the membership in an LLC and the rights, responsibilities, and liabilities of members.

*Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844-N, 2006 WL 3927242 (Del. Ch.Oct. 16, 2006) (dismissing minority member’s derivative claim for unjust enrichment because complaint alleged express, enforceable contract (operating agreement) that controlled parties’ relationship).

*Shamrock Holdings v. Arenson*, 456 F.Supp.2d 59 (D. Del. 2006). The court held that an exculpation clause in an LLC operating agreement did not provide independent grounds to impose breach of contract liability for bad faith or grossly negligent conduct. The operating agreement provided that fiduciaries were not protected from liability for acts or omissions involving bad faith or gross negligence. The court characterized the provision as merely discussing the circumstances under which fiduciaries are protected from liability and rejected the assertion that the provision constituted a contractual obligation in and of itself which could be violated by an action done in bad faith or with gross negligence.

*DIRECTV Group, Inc. v. Darlene Investments, LLC*, No. 05 CIV. 5819(WHP), 2006 WL 2773024 (S.D. N.Y. Sept. 27, 2006). The two members of an LLC which filed Chapter 11 bankruptcy executed a mutual release and covenant not to sue as part of the LLC’s reorganization. One of the members asserted a claim for fraudulent inducement of the mutual release. Applying New York law as specified in the choice of law provision of the mutual release, the court held that the mutual release barred the fraudulent inducement claim. The member argued in the alternative that its fraudulent inducement claim was actionable based on the other member’s breach of a fiduciary duty arising from the parties’ amended LLC agreement. The court found, however, that a second amended LLC agreement executed at the time of the mutual release eliminated fiduciary duties. The court stated that the second amended LLC agreement omitted the fiduciary duty provision contained in the amended LLC agreement and that the mutual release and second amended LLC agreement superseded all previous agreements. The court applied Delaware law to the interpretation of the LLC agreement pursuant to the choice of law clause in the second amended LLC agreement. Citing Delaware case law, the court stated that “[c]ontracting parties are free to eliminate fiduciary duties in a limited liability company agreement”

and that LLC members “can be virtually certain” that their agreements will be enforced in accordance with their terms. The court went on to state that, even if a fiduciary relationship could be established, it would not be a means to avoid the preclusive impact of the mutual release because a party that releases a fraud claim may not subsequently assert that its fraudulent inducement claim is actionable based on an independent duty to disclose fraud.

***Healthcare Management and Investment Holdings, LLC v. Feldman***, Nos. 1:03CV0323, 1:04CV0883, 2006 WL 2660628 (N.D. Ohio Sept. 15, 2006). A Delaware LLC sought summary judgment that its terminated CEO was not entitled to indemnification under the operating agreement, and the CEO sought summary judgment that the operating agreement and the business judgment rule protected him from liability. The LLC asserted claims for breach of contract, breach of duty, misappropriation of trade secrets, tortious interference, and unfair competition against the CEO and argued that the CEO was not entitled to indemnification under the terms of the operating agreement because he was not being sued “by reason of having been” an officer of the LLC. The court applied Delaware law and concluded there was no nexus or causal connection between the proceedings and the CEO’s official capacity with respect to the claims based on breach of the CEO’s separate employment contract, but there was such a nexus with respect to the breach of fiduciary duty, misappropriation of trade secrets, tortious interference, and unfair competition claims. The CEO argued that an exculpatory provision in the operating agreement limited his liability because he was acting within the scope of his authority as CEO of the LLC. The provision limited liability of an officer acting within the scope of his authority conferred by the operating agreement except for breaches of the duty of loyalty, acts or omissions not in good faith, or acts or omissions involving gross negligence, intentional misconduct, or a knowing violation of law. Applying Delaware law pursuant to the choice of law clause in the operating agreement, the court applied case law from the indemnification context to conclude that the exculpatory provision did not limit liability for the claims arising from breach of the CEO’s employment contract. The limitation on liability also did not encompass several alleged breaches of the duty of loyalty and instances of self-dealing. With respect to alleged duty of care breaches, the court concluded that there was a basis for a trier of fact to conclude that the CEO engaged in gross negligence and was not protected by the operating agreement. Similarly, the CEO’s motion for summary judgment based on the business judgment rule (which the court discussed relying on Delaware corporate case law) was denied because there was a material issue of fact as to whether the CEO engaged in gross negligence.

***Ramco Oil & Gas, Ltd. v. Anglo-Dutch (Tenge) L.L.C.***, 207 S.W.3d 801 (Tex. App. 2006) (interpreting LLC operating agreement transfer restrictions requiring unanimous member approval for transfer of interest).

***Citrin v. International Airport Centers LLC***, C.A. No. 2005-N, 2006 WL 2576977 (Del. Ch. Sept. 7, 2006) (enforcing mandatory advancement provisions of LLC operating agreement).

***Marsh v. Billington Farms, LLC***, No. 04-3123, 2006 WL 2555911 (R.I. Super. Aug. 31, 2006) (finding genuine fact issues remained as to oppressive nature and fairness of transactions with affiliates of members notwithstanding provisions in operating agreement permitting transactions with affiliates because, while agreement’s provisions authorized contracts with affiliates, provisions did not dilute ongoing duty owed by member to LLC and other members).

***Russo v. Estate of Rieger***, 2006 WL 2347881 (N.J. Super. Ch. Aug. 14, 2006) (denying preliminary relief in action seeking rescission and reformation of operating agreements that allegedly contained buy out provisions contrary to parties’ agreement).

***Martin v. JBS Technologies, LLC***, 443 F.Supp.2d 962 (S.D. Ohio 2006). The operating agreement of a Delaware LLC provided that “[t]he Company shall indemnify and hold harmless its Members, its Directors, and any other employee or agent of the Company” subject to certain standards. Martin, a former employee, asserted a right of indemnification against the LLC in connection with an earlier lawsuit in which she and the LLC and various other individuals related to the LLC were defendants, and in which all the claims were ultimately dismissed. The LLC sought summary judgment on Martin’s indemnification claim, arguing that the operating agreement was a contract between the LLC and the state and that Martin could not recover because she was not a party. The court noted the broad statutory authority conferred upon Delaware LLCs to provide for indemnification by contract in their operating agreements. The court also mentioned the policy of freedom of contract underlying the Delaware LLC statute and the Delaware policy concerns supporting indemnification coverage under contracts. The court examined the indemnification provision in the operating agreement and found that it unambiguously applied to Martin because she was an “employee or agent” at all relevant times. The court concluded that there was at least an issue of material fact as to whether Martin’s conduct



was taken reasonably and in good faith so as to make her eligible for indemnification, and the LLC did not demonstrate that she was ineligible to receive indemnification.

***Facchina v. Malley***, No. Civ.A. 783-N, 2006 WL 2328228 (Del. Ch. Aug. 1, 2006). The court applied the statutory default rules to resolve a dispute over who was the managing member of a Delaware LLC, concluding that the LLC did not have an LLC agreement and that members constituting more than 50% in interest had authority to remove the defendants as managing members and replace them with another individual who became the managing member. The defendants argued that a shareholder's agreement in effect for a predecessor corporation constituted the operating agreement of the LLC, but the court rejected that argument. The members of the LLC had begun their business as shareholders of a California corporation but discovered that they could not achieve the S corporation status they desired because one of the shareholders was a foreign national. The corporation then merged into a newly formed Delaware LLC, but the members of the LLC never executed an operating agreement. The defendants argued that the shareholder's agreement governing the corporation became the operating agreement of the surviving LLC, and the defendants challenged the validity of various actions taken after the merger, including the removal of the defendants and designation of another individual as managing member, on the basis that they were not accomplished in compliance with the shareholder's agreement. The court stated that the shareholder's agreement did not automatically take on the role of the operating agreement because the corporation ceased to exist in the merger, and the court concluded that the defendants failed to establish any agreement that the shareholder's agreement became the LLC's operating agreement. The defendants relied upon a provision in the merger agreement reciting that the operating agreement of the LLC would be the one "in effect immediately prior to the effective time;" however, the court did not read this provision to constitute an adoption of the shareholder's agreement as the operating agreement after the merger. The court pointed out that the provision simply established that the LLC's operating agreement before the merger would be the operating agreement of the surviving LLC after the merger; however, the LLC never had an operating agreement. The defendants claimed that everyone understood the shareholder's agreement would serve as the operating agreement because the LLC was intended to be a continuation of the enterprise governed by the shareholder's agreement. The court acknowledged that such an agreement might have made sense, but the defendants failed to prove such an agreement (which the court noted could have been reached orally) by all the members. The testimony only established an understanding by two of the members (the defendants), not an agreement of all the members. The statutory default rules thus applied, and the action taken was effective. The defendants challenged the use of a written consent to appoint the managing member, claiming that a meeting was required under California law. The court rejected the argument that California law governed the internal affairs of a Delaware LLC with its principal (and in this case, only) place of business in California and stated that Delaware law governs the internal affairs of a Delaware LLC regardless of its place of operations. The action was valid under Delaware law, which permits the use of written consents, whether California law permits action by written consent or not.

***Trent v. River Place, LLC***, 632 S.E.2d 529 (N.C. App. 2006). Boyce, Trent, and three other individuals were each 20% members of an LLC. When Trent was unable to satisfy a capital call, Boyce paid it for him and Trent signed a promissory note secured by Trent's interest in the LLC. Trent did not pay the note when due, and Boyce eventually demanded payment. Trent was not able to repay the note. Boyce then wrote the LLC and purportedly cancelled the note and requested reallocation of the percentage interests to give Boyce credit for paying Trent's capital call. The operating agreement contained a provision providing that if a member defaults in paying a required capital contribution, the manager shall request the other members to pay and the percentages shall be reallocated to reflect payment by the other members. The agreement also contained restrictions on transfer, including pledges. Based on the transfer restrictions, Trent's attorney wrote the LLC and informed it that Trent's pledge to Boyce was invalid. Boyce and his attorney responded that the promissory note was an effective assignment. Trent then filed an action for a declaratory ruling that the purported pledge of Trent's interest to Boyce was invalid. At the hearing on Boyce's motion to dismiss, Boyce conceded that the restrictions on transfer precluded assignment of Trent's interest, stated that the note was rescinded and was not being enforced, and argued that the provision on paying a defaulting member's capital contribution controlled. The court dismissed the action with prejudice. Trent appealed the dismissal with prejudice, and the court of appeals held that the trial court did not abuse its discretion by dismissing with prejudice rather than without prejudice because the note and the transfer restrictions of the operating agreement were no longer in issue.

***Kira, Inc. v. All Star Maintenance***, No. A-03-CA-950 LY, 2006 WL 2193006 (W.D. Tex. July 31, 2006). In a suit by one member of a Nevada LLC against the other two members, a magistrate analyzed provisions of the operating agreement requiring action to be "agreed upon by members" as well as provisions waiving or limiting fiduciary duties and made recommendations regarding the parties' motions for summary judgment. The magistrate applied Nevada

law based on the parties' position that Nevada law should apply, the choice of law provision in the operating agreement, and the internal affairs doctrine. The court first addressed provisions of the operating agreement dealing with the payment of management fees to an affiliate. The operating agreement provided that the LLC could contract with an affiliate and that the affiliate would be compensated in an amount "agreed upon by the Members." The members disagreed as to whether the phrase "agreed upon by the Members" referred to the consent of all members or a majority vote of the members. The operating agreement specifically identified three situations in which consent of all members was required: amendment of the articles of organization or operating agreement, approval of the transfer of a member's interest, and continuation of the business after dissolution. The agreement stated that in all other matters in which a "vote" of the members was required, a vote of a majority of the members was sufficient. The court concluded that the agreement was ambiguous as to what was required for the members to agree regarding affiliate compensation and that summary judgment on the issue was thus inappropriate. The court also examined the meaning of the term "affiliate" as used in the operating agreement and concluded that a member was not also an affiliate; therefore, payments to a member were governed by provisions authorizing transaction of business between the LLC and a member, and not the standards applicable to transactions with an affiliate. The court recommended summary judgment in favor of the defendant members with respect to the plaintiff's claim that the defendants improperly used the LLC's assets, goodwill, name, mark, and employees because the operating agreement permitted members and their employees to engage in other businesses and nothing in the operating agreement restricted use of the name and goodwill, which existed long before the LLC was created. The court concluded that the defendants' motion for summary judgment on the plaintiff's breach of implied covenant of good faith and fair dealing claim should be denied because the court could not determine if the provision on approval of affiliate compensation was breached. With respect to the plaintiff's breach of fiduciary duty claims, the defendants' argued that the operating agreement defined all the duties owed between the parties. The court, however, concluded that the operating agreement did not disavow all duties and that material fact issues remained. The operating agreement provided for a duty of care limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. Other provisions of the operating agreement permitted the members to engage in other businesses and stated that the entity was not a partnership, but the court pointed out that the agreement disavowed only the business opportunity rule and not all aspects of a party's fiduciary duty. The court characterized a fiduciary duty as encompassing both a duty of care and a duty of loyalty, and the court stated that the duty of care provision purported only to define the duty of care and did not address the duty of loyalty. Furthermore, the court commented that intentionally paying an affiliate fees not permitted by the agreement may well fall within "intentional misconduct." The court also recommended denial of the managing member's motion for summary judgment on the plaintiff's claims for gross negligence and waste based on material facts in dispute. The court relied on Nevada case law to define "gross negligence" but noted that there is a dearth of Nevada case law on waste of corporate assets.

*United States v. Payment Processing Center, LLC*, 439 F.Supp.2d 435 (E.D. Pa. 2006). The court discussed an LLC's power to indemnify its agents under Pennsylvania law in the context of an LLC's request to release restrained assets to permit it to advance expenses to managers, members, and employees in a mail fraud injunction action. The court stated that an LLC has the statutory power to indemnify any member, manager, or other person from and against any and all claims. The LLC relied upon statutory provisions permitting advancement of expenses upon a signed pledge of the defendants to repay the advanced expenses if it is ultimately determined that they are not entitled to be indemnified. The court noted that the LLC's right to indemnify is not absolute, but is subject to such standards and restrictions, if any, as are set forth in the operating agreement. Furthermore, indemnification is not permitted in any case where the act giving rise to the claim for indemnification is determined by a court to constitute willful misconduct or recklessness. The government argued that these provisions precluded indemnification because the LLC's operating agreement was silent on indemnification and there was probable cause to believe the restrained property related to fraud. The court stated that the failure to adopt an indemnification provision – despite its inclusion in a draft of the operating agreement – did not mean that the LLC affirmatively opted against indemnification. The mere lack of an indemnification provision in the operating agreement was insufficient to prove an intent to restrict the LLC's broad statutory authority to indemnify, and the judge's finding of probable cause to support an anti-fraud injunction was not the type of judicial determination precluding indemnification. The court concluded that the LLC had established its state law right to indemnify its agents and advance legal fees and costs based on the agents' pledge to repay the funds if indemnity should later be found improper, e.g., if the government prevails on the merits and the conduct is deemed willful misconduct or recklessness.

*Argentum International, LLC v. Woods*, 634 S.E.2d 195 (Ga. App. 2006) (commenting that member of LLC's board of managers owed fiduciary duty to equity interest owners, citing provisions of Georgia LLC statute imposing duty to act in good faith and with ordinary care, and pointing out that LLC's operating agreement did not vary duties and could not in any event limit liability for intentional misconduct).

**611, LLC v. U.S. Lubes, LLC**, Civil No. CCB-05-3417, 2006 WL 2038615 (D. Md. July 18, 2006) (examining operating agreement provisions on substitute member and conduct of parties and finding reasonable grounds to conclude that party was admitted as substitute member).

**Schrager v. Isquith**, No. CH05-272, 2006 WL 2022185 (Va. Cir. Ct. July 18, 2006) (analyzing alleged improprieties in member's financial transactions and responsibility for accountant's fees under attorney's fees and costs provision of operating agreement).

**Trident-Brambleton, L.L.C. v. PPR No. 1, L.L.C.**, No. 1:05cv1423, 2006 WL 1880986 (E.D. Va. July 5, 2006). A minority member of a Michigan LLC alleged that the LLC's managing member breached various common law, statutory, and contractual duties and obligations by selling the LLC's options to buy adjacent properties to an affiliate for less than fair market value. The managing member sought summary judgment on the basis that the operating agreement authorized the managing member's action. The court thus analyzed the impact of provisions in the operating agreement on the managing member's common law and statutory duties. Although the operating agreement gave the managing member unilateral authority over the day to day operations of the LLC, including authority to sell property to affiliates, the court pointed out that the agreement did not explicitly release the managing member from the duty to act in good faith and in the best interests of the LLC, nor did it protect the managing member from claims of oppressive conduct toward non-managing members. The court found the exculpation language in the agreement, which exculpated the managing member from liability except for willful misconduct, gross negligence, fraud or bad faith, to be consistent with a duty to act in good faith. The agreement specifically abrogated the common law fiduciary duty not to usurp opportunities of the LLC; therefore, the court found that the parties agreed to bypass statutory or common law fiduciary duties with respect to competing ventures. In view of these provisions, the court concluded that the minority member could not rest its claim on usurpation of opportunity but could argue that the managing member breached its duty of good faith by selling an asset of the LLC at below market value. This argument failed, however, because the court concluded that the minority member was not entitled to recover lost profits, which would in effect allow recovery for usurpation of an opportunity when the operating agreement permitted the managing member to usurp opportunities. The harm for which the minority member was entitled to recover was the difference in the price at which the options were sold and their market value. The minority member produced insufficient evidence of the market value of the options, while the managing member provided valuations showing the property to be worth less than the purchase price specified in the options.

**DeBold v. Case**, 452 F.3d 756 (8<sup>th</sup> Cir. 2006) (applying Missouri law and affirming decision of Bankruptcy Appellate Panel awarding settlement proceeds to LLC member rather than LLC, agreeing with BAP that LLC could not have prevailed on its claims against LLC member for breach of contract and breach of fiduciary duty because member was immunized by Missouri's business judgment rule and operating agreement).

**DeShazo v. Estate of Clayton**, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006). This opinion contains a magistrate's recommendations in a dispute involving an LLC formed by the plaintiffs and Clayton for the purpose of developing certain real property. The real property was acquired by Clayton in his name three months prior to formation of the LLC. About three years later, Clayton conveyed the property to a trust he created. A few months after he transferred the property to the trust, Clayton died. The plaintiffs brought suit against Clayton's estate and the trust, asserting various breach of contract, tortious interference, and equitable claims. The plaintiffs' claims hinged on their allegation that Clayton purchased the property on behalf of the LLC or was otherwise obligated to contribute the property to the LLC. The LLC operating agreement contained a merger clause, specified that the members' capital contributions were \$1.00 each, required LLC property to be held in the LLC's name, and did not reference contribution of the real property. The court held that parol evidence of the member's prior oral agreement to acquire the property in trust for the other members or the LLC to be created was inadmissible because evidence of a capital contribution structure other than that set forth in the operating agreement would impermissibly vary, alter, or add to the integrated agreement. Since Clayton owned the property individually, the court concluded his conveyance of the property to a trust he created did not breach a fiduciary duty to the plaintiffs. Additionally, because the transfer of the property to the trust and the trust's development of the property did not violate any term of the operating agreement, the court concluded summary judgment should be granted in favor of the defendants on the plaintiffs' tortious interference claims. The court stated that, although the LLC was organized for the purpose of developing the real estate, there was no written agreement between Clayton and the plaintiffs regarding the exclusive right to develop the property or requiring Clayton to contribute the property or profits from the property to the LLC. Thus, the transfer and disposition of the property did not interfere with the plaintiffs' contractual rights. The court also went on to point out that a member's oral

promise to contribute property to an LLC is unenforceable under the Idaho LLC statute, and that an oral promise to transfer real property is not enforceable under the Idaho statute of frauds. Further, the court stated that Clayton's alleged oral agreement to hold the property for the benefit of the LLC and the plaintiffs was inadmissible under the Idaho Dead Man's Statute. The court recommended summary judgment in favor of the defendants on various equitable and contract based claims, but did acknowledge that none of the defendants' arguments would preclude plaintiffs from recovering restitution damages under an unjust enrichment theory with respect to funds expended to secure the right to purchase and develop the property, as well as taxes, insurance and other incidental fees and expenses incurred in connection with development of the property.

*Max Arnold & Sons, LLC v. W.L. Hailey & Company, Inc.*, 452 F.3d 494 (6<sup>th</sup> Cir. 2006) (interpreting cash flow and distribution provisions of operating agreement of Tennessee LLC).

*Countrywide Home Loans, Inc. v. Wright*, No. 266937, 2006 WL 1691128 (Mich. App. June 20, 2006) (concluding unsigned operating agreement was effective and affirming trial court's conclusion that neither of two members who constituted "managing members" under operating agreement of LLC had authority acting alone to convey real estate of LLC).

*Minnesota Invco of RSA #7, Inc. v. Midwest Wireless Holdings, LLC*, 903 A.2d 786 (Del. Ch. 2006). The minority interest holders of a Delaware LLC sued the majority holder for specific performance of a broad right of first refusal provision in the LLC agreement. The minority interest holders also sued the individuals serving on the LLC's board of managers for breach of fiduciary duty based on the board's amendment of the LLC agreement to eliminate the right of first refusal provision. The plaintiff argued that the right of first refusal provision was triggered by the approval of the acquisition of the majority member in the form of a sale of substantially all of its assets (including its units in the LLC). The court agreed with the defendant, however, that a subsequent restructuring agreement giving the majority member drag along rights conflicted with the right of first refusal provision and that the restructuring agreement controlled because it contained a clause specifying that the restructuring agreement governed in the event of any conflict with the LLC agreement. The court also rejected the plaintiff's challenge to the amendment of the LLC agreement removing the right of first refusal provision. The board of the LLC amended the agreement in order to facilitate bidding for the acquisition of the majority member, and the majority member voted its LLC units in favor of the amendment. The court rejected the plaintiff's argument that the majority member was an "acquiring person" under the LLC agreement and as such precluded by the agreement from exercising majority voting power. The court refused to read the LLC agreement's "acquiring person" clause as encompassing the majority member because doing so would turn the arrangement crafted by the restructuring agreement on its head. The court also concluded that the LLC's board did not breach its fiduciary duty in approving the amendment.

*Eureka VII LLC v. Niagra Falls Holdings LLC*, 899 A.2d 95 (Del. Ch. 2006). The plaintiff, a 50% member of a Delaware LLC, sought a declaration that the other member had relinquished its membership and retained only economic rights based on the defendant's alleged material breaches of the LLC agreement. The court determined that the defendant breached the LLC agreement in at least four instances and that the defendant's breaches resulted in a creditor of the defendant's owner gaining ownership and control of the defendant in violation of anti-transfer provisions in the LLC agreement. The LLC agreement was silent as to the remedy for breach, and the plaintiff suggested a remedy inspired by Section 18-702(b)(3) of the Delaware Limited Liability Company Act, which provides that a member ceases to be a member upon assignment of all the member's LLC interest. Although the statutory provision did not literally apply to the case, the court found that the requested remedy was entirely fitting and proportionate because the defendant's breaches implicated a clear contractual goal reflected in the LLC agreement (i.e., to ensure that the plaintiff did not find itself owning the LLC with a partner it did not approve), and the breaches led to the very situation the agreement was designed to prevent. The court also noted that the defendant's breaches ultimately had the same effect as a complete assignment for the benefit of creditors, a type of assignment that results in the divestiture of membership under the Delaware LLC statute. The court clarified that the remedy it crafted left the defendant with the rights of an assignee, which do not include the right to participate actively in management, but do include the right to bring a derivative action if the plaintiff were to breach a contractual or fiduciary duty to the LLC. The court dismissed the defendant's counterclaims, which were based on the plaintiff's failure to close on the purchase of the defendant's interest after the defendant invoked a buy/sell provision. The court concluded that the defendant was in no equitable position to invoke the buy/sell provision because the defendant had committed an undisclosed material breach of the LLC agreement prior to invoking the buy/sell provision. Furthermore, there was no evidence that the defendant was able to buy out the plaintiff at the price set by the defendant. Finally, the court dismissed the defendant's claim for dissolution. According

to the court, the only plausible basis for dissolution was that continuation of the LLC was impracticable because the plaintiff and the party controlling the defendant did not get along. The impasse no longer existed, however, because the defendant was left with only the rights of an assignee, and the plaintiff had authority to act as the sole member.

***Brennan v. Lehn***, Nos. X10UWYCV054010237S(CLD), X10UWYCV054010238S(CLD), 2006 WL 1577598 (Conn. Super. May 17, 2006). In 1997, two individuals entered an operating agreement and formed an LLC for the purpose of operating and managing certain real property. The individuals, Brennan and Aiello, were equal members, and they operated the LLC until the death of Aiello in 2001. Brennan and the administrator of Aiello's estate, Lehn, disagreed regarding the disposition of Aiello's interest in the LLC. Brennan sought a declaration that he was entitled under the operating agreement to purchase Aiello's interest, and Lehn sought a declaration that Aiello's death constituted a dissolution of the LLC and that Brennan was not entitled to purchase Aiello's interest. Brennan relied upon Section 5.02 of the operating agreement, which provided that the LLC was entitled to purchase the interest of a member upon the member's death. Lehn relied upon Section 7.01 of the operating agreement, which provided that the LLC shall be dissolved and wound up upon an event of dissociation unless there are at least two remaining members and the business is continued by consent of a majority in interest of the remaining members. Another section of the operating agreement defined an event of dissociation as an event that causes a person to cease to be a member. The death of a member is an event of dissociation under the Connecticut Limited Liability Company Act unless otherwise provided in the operating agreement. Brennan argued that the buy-out provision would be rendered a nullity if it did not control because the LLC only had two members. The court concluded that Aiello's death triggered the dissolution provision and that applying the agreement in this manner allowed Sections 5.02 and 7.01 to co-exist harmoniously. Applying the dissolution provision did not render the buy-out provision a nullity because, although the LLC always had only two members, it was not restricted to having only two members. The buy-out provision could have come into play, explained the court, if two or more members remained after the death of a member and agreed to continue the business. The court went on to comment that, even if Brennan's construction of the agreement prevailed, the LLC would be dissolved by operation of law under the provisions of the Connecticut LLC Act in effect at the time the operating agreement was executed. At that time, the statute required that an LLC have at least two members. Although the statute was amended to permit single member LLCs shortly after the operating agreement was executed, the court said that the amendment was substantive and did not have retroactive effect; therefore, the LLC continued to be governed by the version of the LLC statute in effect when the agreement was entered. The court stated that the amendment authorizing single member LLCs must be given prospective application unless the legislature clearly expressed an intention to the contrary, and the court discerned no contrary intention.

***Clarke v. Newell***, No. 1:05CV1013 (JCC), 2006 WL 1390572 (E.D. Va. May 17, 2006) (finding disputed terms of oral agreement regarding formation and operation of LLC precluded plaintiff's summary judgment for breach of contract, accounting, and related claims).

***Pointer v. Castellani***, 21 Mass. L. Rptr. 199, 2006 WL 2006127 (Mass. Super. May 11, 2006) (discussing indemnification and advancement obligations under indemnification and exculpation provisions of operating agreement and declining to order advancement because advancement is discretionary, rather than mandatory, and is business judgment to be made by appropriate persons or board and not by judge).

***Maryville Hotel Associates I, LLC v. IHC/Maryville Hotel Corp.***, No. 4:05 CV 1493 DDN, 2006 WL 1237264 (E.D. Mo. May 5, 2006) (interpreting right of first refusal provision in operating agreement and concluding acquisition of corporate grandparent of member did not violate provision as indirect transfer by member).

***In re McCabe (Braunstein v. Panagiotou)***, 345 B.R. 1 (D. Mass 2006). The debtor filed bankruptcy and listed a 50% interest in a Delaware LLC as part of his property. The trustee brought an action against the LLC's other member, Panagiotou, based on Panagiotou's post-petition unilateral amendment of the LLC agreement to reduce the debtor's interest to 5% and increase Panagiotou's interest to 95%. Panagiotou also reduced the LLC's 100% interest in two other LLC's to 5% and gave himself a 95% interest in those LLCs. Panagiotou argued that the reallocations of membership interests were in accordance with the LLC agreements, which permitted additional capital contributions with the agreement of all members and required amendment of the agreements to reflect the additional contributions. The debtor did not dispute that Panagiotou had made additional capital contributions, but claimed that he never assented to the amendments formally reallocating the membership interests. The trustee sought summary judgment that Panagiotou violated the automatic stay, and Panagiotou argued that his conduct did not violate the automatic stay because no "property" of the debtor's estate was affected and Panagiotou's actions were "purely ministerial." Panagiotou argued

that his actions merely formalized the pre-existing status and that the membership interests were altered by the additional capital contributions rather than the subsequent written documentation of the reallocation. According to Panagiotou, the debtor consented to the additional capital contributions and the amendments were automatic and mandatory. The court rejected these arguments and stated that the proper course of action for Panagiotou would have been to move for relief from the stay rather than engage in self-help. The court stated that it could not conclude the debtor's legal interest was not affected even if the debtor lacked an equitable interest in the LLC. Further, Panagiotou's efforts were not in accordance with the LLC agreement because it required that the amendment be duly executed by all members. That the members were mandated to amend the agreement did not make amendment "automatic." The court also rejected Panagiotou's argument that his conduct was proper based on the debtor's authorization, in a letter six months prior to the bankruptcy, of Panagiotou's exercise of the debtor's ownership rights. The court said that Panagiotou's reliance on the letter to justify amending the agreement violated the automatic stay provision prohibiting acts to enforce a lien.

***James & Jackson, LLC v. Willie Gary, LLC***, 906 A.2d 76 (Del. 2006). The Delaware Supreme Court affirmed the Court of Chancery's interpretation of the scope of an arbitration clause in an LLC agreement, agreeing with the Court of Chancery's conclusion that provisions in the LLC agreement addressing injunctive relief and judicial dissolution permitted recourse to the courts in such cases. While the LLC agreement generally required arbitration of any controversy arising out of the LLC agreement in accordance with AAA rules, the agreement went on to state that a non-breaching member was entitled to injunctive relief to prevent breaches of the agreement and to obtain specific enforcement of its terms in "any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof." The agreement also provided for dissolution upon a "judicial determination" that an event had occurred making it unlawful, impossible, or impracticable to carry on the LLC's business, and the agreement referred to the involvement of a "court of competent jurisdiction." In view of these provisions, the Supreme Court agreed with the Chancery Court that the plaintiff member was not required to arbitrate its claims against the other member for injunctive relief, specific performance, and judicial dissolution. The Supreme Court disagreed with the Chancery Court's rejection of a line of cases holding that incorporation of the AAA rules serves as clear and unmistakable evidence that the parties intended substantive arbitrability to be decided by an arbitrator. As a matter of policy, the court adopted the majority federal view that reference to AAA rules evidences a clear and unmistakable intent to submit arbitrability to an arbitrator. The court stated, however, that this view did not require an arbitrator to decide arbitrability in all cases where an arbitration clause incorporates the AAA rules, but rather only in those cases where the arbitration clause generally provides for arbitration of all disputes and incorporates a set of arbitration rules that empower an arbitrator to decide arbitrability. The court thus affirmed the lower court's substantive arbitrability decision. The Court of Chancery's opinion by Vice Chancellor Strine is found at 2006 WL 75309.

***Phillipps v. Portosan Company, LLC***, No. BC249322, 2006 WL 772884 (Cal. App. 2 Dist. March 28, 2006) (rejecting argument that arbitration clause in operating agreement did not apply to LLC itself and finding arbitration provisions in operating agreement evidenced clear intent to arbitrate disputes regarding defendant LLC's acquisition of members' interests if members left LLC's employment during first five years of LLC's existence).

***LS Development Enterprises, Inc. v. Forest City Commercial Group, Inc.***, No. 05-CV-02418-RPM, 2006 WL 771218 (D. Colo. March 24, 2006) (granting motion to compel arbitration of claims for breach of fiduciary duty, breach of duty of good faith and fair dealing, and fraud in inducement of operating agreement where operating agreement arbitration clause provided for arbitration of "any dispute arising under this Agreement," stating that plaintiff's arguments regarding scope of arbitration agreement and contentions regarding procedural defects or delay were matters to be determined in arbitration proceeding).

***Kingston Trading & Transportation Ltd. v. Embarques Golfo, LLC***, No. CivA. 05-6337, 2006 WL 861065 (E.D. La. March 24, 2006) (concluding that signatories of operating agreement containing arbitration clause could compel other signatories to arbitrate claims, but parties who were not signatories of operating agreement had no right to compel arbitration, and LLC, which was not signatory of its operating agreement, could not be compelled to arbitrate).

***Lourdes Medical Pavilion, LLC v. Catholic Healthcare Partners, Inc.***, No. Civ.A. 5:03CV231M, 2006 WL 753080 (W.D. Ky. March 22, 2006). A non-profit hospital and a group of corporate entities each owned 50% of a Kentucky LLC engaged in health care services. The LLC's operating agreement contained a non-competition provision, and a separate non-competition agreement between the LLC and the hospital's sole member prohibited the hospital's member and its affiliates from engaging in competition with the LLC. The LLC filed a lawsuit against the hospital's sole member (Catholic Healthcare Partners, Inc. or "CHP"), alleging breach of the non-competition agreement based on

CHP's plans to build new medical offices for outpatient surgery services. CHP sought dismissal of the suit on the grounds the LLC did not have the corporate authority to bring the suit. The court reviewed the operating agreement and concluded that the LLC was not authorized to file suit because the decision did not receive the vote of a majority of the board of directors of the LLC as required for such a decision under the operating agreement. The LLC argued that it did not need a majority vote of the board of directors because the operating agreement permitted a member to authorize a suit based on the breach of another member. The court rejected this argument because CHP was not itself a member; rather it was the sole member of a member of the LLC. Finally, the court rejected the argument that a member could bring a derivative suit on behalf of the LLC under the derivative suit provisions of the Kentucky LLC act. The court pointed out that the derivative suit provisions of the Kentucky LLC statute may be varied in a written operating agreement. The court found the statutory provisions were overridden by the provisions of the LLC operating agreement requiring "any act" of the LLC to be authorized by a majority vote of the board of directors. The court, however, refused to dismiss the case even though it found it was not authorized, relying on a provision of the Kentucky LLC statute stating that lack of authority of a member or manager to file suit on behalf of an LLC may not be used as a defense to an action filed by the LLC.

*Douzinis v. American Bureau of Shipping, Inc.*, 888 A.2d 1146 (Del. Ch. 2006). The minority members of a Delaware LLC sued the majority member and its affiliates for diverting assets of the LLC to the majority member's affiliates without compensation to the LLC. The defendants sought to compel the minority members to arbitrate their claims pursuant to a broad arbitration clause in the LLC agreement, and the court found the arbitration clause encompassed the minority members' claims. The court first observed that a Texas choice of law clause in the operating agreement created "the odd situation where the parties to an LLC domiciled in Delaware chose to have their LLC Agreement governed by another state's law, except when the Delaware LLC Act requires the application of Delaware law." The court concluded the choice of law provision was valid because Delaware respects choice of law provisions when the chosen law has a material relationship to the matter at issue, a requirement that was satisfied because the LLC operated in Texas. The court did not attempt to parse the differences between Texas and Delaware law because the parties agreed there was no material difference between the two states' laws regarding the issues before the court. The court relied upon the Delaware Supreme Court's decision in *Elf Atochem North America, Inc. v. Jaffari* in concluding the arbitration clause encompassed the minority members' claims. In that case, the court held that a broad arbitration clause in an LLC agreement could encompass breach of fiduciary duty claims. The court distinguished Delaware case law from the corporate context and noted that it is frequently impossible to decide fiduciary duty claims in alternative entity cases without close examination and interpretation of the governing instrument because the Delaware alternative entity statutes permit the contracting parties to expand or restrict fiduciary duties. The LLC agreement in the instant case contained a provision stating that the relationship was strictly contractual and that no member owed the LLC or any other member a fiduciary duty. The minority members argued the clause was not relevant to their claims against the majority member acting as manager, but the court disagreed. The court looked at the governance provisions to determine that provisions of the LLC agreement would need to be carefully considered and interpreted in connection with the minority members' claims. The court also pointed out provisions addressing confidentiality of information and proscriptions on competition. The minority members' claims were thus within the scope of the arbitration clause, which encompassed "any dispute arising under or related to" the LLC agreement. The court held the non-signatory affiliates of the majority member were entitled to enforce the arbitration clause under an equitable estoppel theory.

*DeLucca v. KKAT Management, L.L.C.*, No. Civ.A. 1384-N, 2006 WL 224058 (Del. Ch. Jan. 23, 2006). The court determined that the broadly worded advancement provisions contained in the operating agreements of several Delaware LLCs (the "KKAT Companies") required advancement of DeLucca's expenses in litigation brought against DeLucca by affiliates of the KKAT Companies. DeLucca was a former employee and principal of an LLC ("Katonah") that acted as investment manager of structured investment funds (the "Katonah Funds") in which the KKAT Companies invested. The controlling owner of Katonah was yet another LLC ("Kohlberg"). In the KKAT Companies' operating agreements, the KKAT Companies agreed to indemnify affiliates of Kohlberg for any loss "in connection with or arising out of or related to" the operating agreement, the operations or affairs of a KKAT Company or Katonah Fund, or the operations or affairs of Kohlberg if the loss was attributable to a KKAT Company or Katonah Fund, so long as the affiliate did not act with fraud or gross negligence or willfully violate the law. The KKAT Companies promised advancement as to any claim that might give rise to indemnification. In a lengthy opinion that analyzes the provisions of the operating agreements in detail, the court rejected the arguments of the KKAT Companies that they were not obligated to advance expenses to DeLucca. The court characterized the dispute over advancement as "yet another case in which defendants in an advancement case seek to escape the consequences of their own contractual freedom." The complaint against DeLucca alleged that she engaged in various acts of misconduct in pursuit of a scheme to seize control

of Katonah's assets for her own benefit. The court noted that the provisions of the operating agreements differed from the typical advancement clause in the corporate context because the corporate provisions typically track the corporate statutes, which provide for advancement where the corporate official is being sued by reason of the fact that he or she took action in an official capacity. The provisions in the operating agreements in this case did not contain language limiting advancement to cases in which the indemnified person is sued by reason of having acted in an official capacity. The court analyzed the terms of the operating agreements to determine whether DeLuca was an "Indemnified Person" and found that she clearly fell within the scope of that term as defined in the operating agreements. The court next concluded DeLuca was incurring legal expenses and that her losses were being incurred in connection with claims for which advancement was owed. The right to advancement extended to any matter that may result in indemnification, and indemnification was broadly provided for losses "in connection with or arising out of or related to" the operating agreements. The court rejected the argument that the scope of the indemnification clause was limited by an exculpation clause in the operating agreements. The court also rejected the argument that a broad interpretation of the indemnification and advancement provision was absurd and could not have been intended by the KKAT Companies. The court discussed why a rational controller of an investment fund complex might find such a broad indemnification and advancement clause prudent and noted that DeLuca would, under the terms of the operating agreements, be obligated to return the advanced funds if a court determined in a final decision that her losses were the result of fraud, gross negligence, or willful violation of law. The court also addressed language that required an indemnified person to first seek indemnification from the Katonah Funds and concluded that DeLuca was not required to assert the discrete right of advancement against the Katonah Funds when there was no explicit requirement to that effect or any indication that DeLuca had any right of advancement from the Katonah Funds. Finally, the court concluded that DeLuca was entitled to an award of fees on fees incurred in enforcing her right to advancement.

*JTL Consulting, L.L.C. v. Shanahan*, 190 S.W.3d 389 (Mo. App. 2006) (holding member who executed Additional Member Agreement upon member's admission to Delaware LLC in 1995 was bound by terms of operating agreement executed by original members in 1993 because Additional Member Agreement expressly provided member would be bound by operating agreement, but nonsolicitation clause in operating agreement was not enforceable by LLC with no protectable interest in its members' customer contacts or by insurance brokerage firm that failed to show it was intended beneficiary of operating agreement that stated its provisions were not for the benefit of or enforceable by any third parties).

*First Taunton Financial Corp. v. Arlington Land Acquisition-99, LLC*, No. 034449BLS, 2006 WL 696689 (Mass. Super. Feb. 27, 2006) (dismissing claims against member because exculpatory clause in operating agreement relieved member from liability on all claims other than matters of gross negligence or willful misconduct; permitting claim for dissolution notwithstanding provision of operating agreement prohibiting member from petitioning for dissolution because member relied upon another provision mandating dissolution after sale of all or substantially all of LLC's assets; finding factual disputes requiring trial to resolve whether managers and affiliates "acted in good faith in the reasonable belief that his or her action was in the best interest of the LLC" as issue related to question of indemnification of managers and affiliates).

*Kent Tillman, LLC v. Tillman Construction Co.*, No. 263232, 2006 WL 143289 (Mich. App. Jan. 19, 2006) (interpreting provisions of operating agreement, which contained integration clause, and concluding parol evidence could not be relied upon to vary complete and unambiguous provisions on profit and loss allocation, resort to parol evidence was proper with respect to obviously incomplete provisions regarding reimbursement, dismissal of fraudulent misrepresentation claim was proper in view of merger clause in operating agreement, and trial court's decision that neither member was entitled to indemnification of attorney's fees under terms of operating agreement was not clear error).

*Lio v. Zhong*, 10 Misc.3d 1068(A), No. 600455/05, 2006 WL 37044 (N.Y. Sup. Jan. 6, 2006). The court found that the plaintiff's claim for usurpation of a business opportunity supported a breach of fiduciary duty claim by the plaintiff. The operating agreement identified the purpose of the LLC as the development of a specific piece of property, and the defendant members argued their purchase of another piece of property was not within the LLC's purpose. The court pointed out that the operating agreement gave the LLC the power to purchase other real estate that may be "necessary, convenient, desirable or incidental" to accomplish its purpose. Further, the operating agreement contained restrictions on competition and conflicting business ventures. The court also pointed to the fiduciary duties traditionally applied in other business contexts with respect to business opportunities, citing *Meinhard v. Salmon*.



***Melcher v. Apollo Medical Fund Management, L.L.C.***, 808 N.Y.S.2d 207 (N.Y. A.D. 1 Dept. 2006) (holding Delaware limitations period was not imported by virtue of Delaware choice of law clause in LLC agreement; concluding complaint stated claim for wrongful removal of manager under circumstances where member included removal provision in agreement without pointing out changes from prior draft; finding provision that manager shall serve until removal by other managers was ambiguous where LLC had only two managers; finding allegations of bad faith were sufficient to raise issue as to coverage of indemnification clause; concluding breach of fiduciary duty claim was not barred by clause providing member does not violate duty merely because member's conduct furthers own interest since clause did not appear to absolve members of duty of loyalty and Delaware law recognizes that exculpation may be barred with respect to certain breaches of fiduciary duty).

***Overhoff v. Scarp, Inc.***, 812 N.Y.S.2d 809 (N.Y. Sup. 2005). Two members of a three-member LLC took the following actions by a written consent: termination of the LLC's lease of its premises, termination of the employment of all the LLC's employees, and acceptance of an alleged notice of default on a promissory note from the LLC. The third member claimed that the action was invalid because the operating agreement's quorum provision required all members to be present at a meeting and another provision stated that no action may be taken or voted upon unless all members, in person or represented by proxy, are present to vote. The third member argued that these provisions precluded non-unanimous written consents. The two members who executed the written consent relied upon the default provisions of the New York LLC statute regarding written consents, arguing that the operating agreement only addressed meetings and was silent concerning the validity of action taken by written consent. The New York LLC statute provides that, unless otherwise provided by the operating agreement, members of an LLC may take action without a meeting by a written consent signed by members who hold voting interests having not less than the minimum number of votes that would be necessary to authorize the action at a meeting at which all members were present and voted. The LLC's operating agreement stated that each member entitled to vote at any meeting was entitled to one vote and that any LLC action shall be authorized by a majority of votes cast except as otherwise provided by statute, the articles of organization, or the operating agreement. The court examined the written consent provision of the LLC statute (comparing and contrasting it to the shareholder consent provision of the business corporation law) and the provisions of the operating agreement and concluded that the operating agreement did not alter the default provisions of the statute generally permitting a majority in interest of the members to act by written consent. The court, however, turned its attention to a provision of the operating agreement requiring approval of all members for certain actions. Expressing concern that neither side directed the court's attention to what the court considered the dispositive provision, the court pointed out that the actions taken in the written consent fell within the following categories of action requiring unanimous consent under the operating agreement: transferring any interest in property, confessing any judgment on behalf of the LLC, or doing any act making it impossible to carry on the ordinary business of the LLC. The court considered the termination of the lease a transfer of an interest in property and an action making it impossible to carry on the ordinary business of the LLC. The termination of all the LLC's employees likewise made it impossible to carry on the LLC's ordinary business, and the acceptance of the notice of default on the LLC's promissory note was akin to a confession of judgment according to the court. The court commented that had the two members simply removed the third member from his employment by written consent rather than terminating all the employees, the action presumably would have been valid under the LLC statute and the operating agreement, but terminating all employees caused the action to fall under the provision requiring consent of all members.

***Wallace v. Hayes***, 124 P.3d 110 (Mont. 2005) (holding that arbitration clause of operating agreement, which was silent as to remedies, did not preclude award of exemplary damages merely because it did not specifically authorize them).

***Vision Information Services, LLC v. Tocco***, No. 258422, 2005 WL 3479839 (Mich. App. Dec. 20, 2005). An LLC member lent a co-member \$100,000 to purchase a house. The lending member subsequently assigned to the LLC her right to receive repayment of the indebtedness in exchange for payment of \$100,000 from the LLC. The LLC sued the member who borrowed the \$100,000, and the member claimed the assignment was invalid because it was contrary to the LLC's purposes as stated in its operating agreement. The operating agreement specified that the LLC's purposes "are to provide services that are required or appropriate to manage a direct-to-retail program and/or retail inventory management, including, by way of illustration only, information management and field service management, and to engage in all activities and transactions as may be necessary or desirable in connection with the achievement of the foregoing purposes." The court stated that the LLC, which was organized under the Michigan LLC statute, had the authority to loan money to the defendant given its broad discretion under the operating agreement to enter into any transaction that is "necessary or desirable" and because the Michigan LLC statute grants a Michigan LLC all the powers

granted to corporations in the business corporation act, which include broad discretion to lend money to officers and employees.

**Consolidated Lint, LLC v. Waller**, No. Civ.A. BER-C-293-05, 2005 WL 3416174 (N.J. Super. A.D. Dec. 2, 2005). This litigation arose out of a dispute between the members of two residential real estate LLCs. Each LLC was managed by an entity controlled by an individual named Waller. The plaintiff, a Class A (non-managing) member of the LLCs, became unhappy with the manner in which Waller was managing the LLCs and acquired proxies that were exercised to remove the managing member of each LLC and appoint plaintiff as the managing member. The managing members argued that the removal was improper and refused to give up control, and the plaintiff sued Waller and the managing members. This opinion addressed a claim for indemnification and payment of legal fees incurred by Waller and the entity managing members of the two LLCs. In addition, the opinion addresses a request by the plaintiff that the court prohibit the managing member of one of the LLCs from transferring the LLC's real property or taking other action on behalf of the LLC. The court analyzed the indemnification provision of the LLC operating agreements, each of which provided that "[t]he LLC shall indemnify and hold the Managing Member and its principals ... harmless from any third party claims brought against them or any of them for any act or omission taken on behalf of the LLC so long as the Managing Member or its principals have not acted illegally." The court determined that the provision did not authorize indemnification in this case because indemnification was limited to "third party actions" and the suit was an internal dispute. Since, on this basis alone, the indemnification was not permitted, the court did not need to decide the timing issues, but the court noted that it was not clear whether the conditional language ("so long as the Managing Member ... [has] not acted illegally") meant that a member must be indemnified until there is a finding of illegality or whether a member is permitted to be indemnified only after a finding that the member has not acted illegally. Additionally, the court noted that the defendants had provided no basis for their suggestion that the court had authority to grant costs *pendente lite*, and the court commented that it knew of no basis for the exercise of such authority. The court next addressed the plaintiff's motion to bar the managing member from transferring the property of one of the LLCs or entering into any related transaction pending an adjudication as to which entity was the lawful managing member of the LLC. The plaintiff argued that such relief was justified on the basis that the managing member had been properly removed and was not authorized to transact business for the LLC. The court reviewed the provisions of the operating agreement regarding removal of the managing member and concluded the plaintiff had not presented a sufficiently detailed account of the removal process to permit the court to determine its validity. The removal provision of the operating agreement permitted removal of the managing member based on "grossly negligent, fraudulent or dishonest conduct," but the plaintiff presented only conclusory assertions of wrongdoing. Additionally, the plaintiff did not establish that it had complied with an amendment to the operating agreement that required the lender to approve the organizational documents of a substituted managing member. Finally, the court stated that it would be reluctant to grant plaintiff's requested relief even if the removal was valid because the court felt the plaintiff's failure to secure approval from the lender for the substitution could jeopardize the LLC's \$32 million loan, and the substitution seemed unfair to Waller, who had personally guaranteed \$2.5 million of the loan. From an equitable point of view, the court said it was reluctant to restrain Waller, through the entity managing member, from managing the LLC where the plaintiff had not agreed to assume the guaranty and Waller's release by the lender was not certain.

**Clarke v. Newell**, No. 1:05CV1013 (JCC), 2005 WL 3157570 (E.D. Va. Nov. 23, 2005). Newell and Clarke formed an LLC and orally agreed as to its terms. Newell told Clarke that she wanted to leave the LLC, and asked Clarke to buy out her interest. The parties attempted to negotiate the terms of a buy-out until Newell abruptly left the area without leaving any means of contacting her. Newell also removed Clarke as signatory to the LLC bank account. Clarke filed suit alleging various claims and seeking various types of relief. Newell argued Clarke's breach of contract claim was barred by Virginia's three year statute of limitations applicable to oral contracts. The court held the claim was not barred because it was based on the breakdown in negotiations for the purchase of Newell's interest and Newell's taking control of the LLC rather than the LLC's failure to keep a written list naming each member as required by the LLC statute.

**Steele v. Rosenfeld, LLC**, 936 So.2d 488 (Ala. 2005) (holding individual did not acquire any part of membership interest, whether financial or governance, absent compliance with requirement of articles of organization and operating agreement that members consent to admission of member in writing).

**Triangle Equities, LLC v. Whitestone-Triangle, L.P.**, No. 601659/05, 2005 WL 3076317 (N.Y. Sup. Oct. 28, 2005) (interpreting right of first refusal provision in LLC operating agreement and concluding contract was formed when

one member elected to exercise its right to purchase other member's interest, and rejecting selling member's request to reform purchase price).

***Ishimaru v. Fung***, No. Civ.A. 929, 2005 WL 2899680 (Del. Ch. Oct. 26, 2005). An LLC member sought to prosecute a derivative claim against an entity (Ivy Asset Management Corp. or "Ivy Asset") on the basis that the LLC's managing/majority member would not fairly consider whether to pursue the claim. Applying the same demand futility test that is applied in the corporate context, the court held that the plaintiff member was entitled to pursue the derivative claim because her complaint articulated particularized facts demonstrating that the managing member was incapable of disinterestedly determining whether to pursue the claim. The court rejected the managing member's claim that the LLC agreement precluded the derivative plaintiff's claim. Neither the authority conferred on the managing member to decide whether to sue nor the exculpation provisions, which permitted the managing member to consider his own interests in making certain decisions, precluded the plaintiff from pursuing the claim. The court commented, "As is common in LLC Agreements these days, the provisions of the LLC Agreement dealing with the managing member's rights and duties can be read as contradictory and confusing." The LLC agreement did not, however, exculpate the managing member from fraud, gross negligence, willful misconduct, or intentional breach of the agreement, and the plaintiff alleged willful misconduct that was not exculpated (i.e., the managing member's attempt to use financial products developed for the LLC for his own benefit and sacrifice the interests of the LLC to secure concessions from Ivy Asset that would personally benefit him).

***Blackmore Partners, L.P. v. Link Energy LLC***, No. Civ.A. 454-N, 2005 WL 2709639 (Del. Ch. Oct. 14, 2005). The court granted the defendants summary judgment in case brought by a former unit holder of an LLC against the LLC's directors for breach of fiduciary duty in connection with the sale of substantially all of the LLC's assets. The complaint alleged that the sale proceeds were all distributed to creditors and that the creditors received more than the total amount of their claims while the equity units were rendered worthless. The complaint also alleged that there were alternative transactions that would have provided a better result for the equity holders. The defendants presented summary judgment evidence that the LLC was insolvent under the balance sheet, cash flow, and unreasonably small capital tests, and the plaintiff produced no contradictory evidence. The court pointed out that a special committee had been formed to approve the transaction and concluded that the committee operated with sufficient independence to merit protection under the business judgment rule. The court also concluded that there was insufficient evidence relating to the duty of care claims to overcome the LLC agreement's exculpation clause protecting the directors from liability for damages for violations of the duty of care. The plaintiff argued that the directors' bad faith should not be protected, but the court found no evidence that the directors acted in bad faith.

***In re Paul J. Ferrigan Revocable Trust***, No. 254772, 2005 WL 2372082 (Mich. App. Sept. 27, 2005). The sole member of an LLC died, and the court held that the operating agreement, which was entered prior to amendment of the Michigan LLC statute to permit single member LLCs, was invalid. The court found that the amendment permitting single member LLCs and operating agreements did not have retroactive effect, and the provision of the statute stating that LLCs are bound by changes to the statute did not validate the agreement. The court also rejected the argument that the operating agreement should be viewed as a valid governing document akin to bylaws even if not a valid statutory operating agreement.

***Alimenta (USA), Inc. v. Oil Seed South, LLC***, 622 S.E.2d 363 (Ga. App. 2005) (interpreting operating agreement provisions dealing with capital contributions, member loans, member guaranties, and indemnity, and concluding member was not entitled to indemnity in connection with its loans to LLC; rejecting self-dealing of member/manager occurring prior to execution of operating agreement as basis for fraudulent inducement claim by other member because operating agreement contained merger clause as well as specific provisions authorizing conflict of interest transactions, competition, and change in LLC's purpose with consent of 51% of members, which defendant member constituted).

***Tran v. Vuong***, No. 03CV0355 ARR/KAM, 2005 WL 2043515 (E.D. N.Y. Aug. 25, 2005) (concluding plaintiffs who failed to thoroughly read and understand LLC operating agreement due to language barrier failed to allege shared erroneous belief as to particular material fact sufficient to support mutual mistake claim, but fact question remained as to alleged fraudulent misrepresentation supporting unilateral mistake claim).

***In re Silver Leaf, L.L.C.***, No. Civ. A. 20611, 2005 WL 2045641 (Del. Ch. Aug. 18, 2005). The court decreed judicial dissolution of a Delaware LLC on the basis that it was not reasonably practicable to carry on the business in

conformity with the LLC agreement because the members were deadlocked and the business purpose was moot. The LLC's three members were split into two factions owning 50% each. The court concluded that the deadlock among the members made it impossible to take the actions necessary to continue functioning as a business because important business decisions required approval of a majority in interest of the members and the LLC agreement provided no mechanism to break the impasse. The court rejected the argument that the operating agreement precluded the 50% member from voting its interest. The other members argued the 50% member could not vote its interest because it was in "default" and the operating agreement purported to allow members to vote their interests only if they were "not in default of [their] obligations." The agreement did not define "default," and there were no apparent financial obligations that the member had failed to perform, just various alleged instances of misconduct. Furthermore, there was evidence of conduct violating the operating agreement on the part of one of the other members. Under the circumstances, the court refused to construe the operating agreement to limit the voting rights of the LLC members.

*In re Tri-River Trading, LLC (DeBold v. Case)*, 329 B.R. 252 (8<sup>th</sup> Cir. BAP 2005). The court interpreted provisions of an LLC's operating agreement immunizing members from liability for actions taken in connection with the LLC. One provision of the operating agreement provided that no member or manager would be liable to the LLC or the other members for actions taken in good faith in the absence of some proof of gross negligence or misconduct and went on to state that any act or omission of a member or manager shall be conclusively presumed not to constitute misconduct or gross negligence if done pursuant to the advice of legal or accounting counsel. The court concluded a member and its agents were shielded from liability in connection with the member's breach of an agreement to use the LLC for all the member's shipping needs because they received an opinion of counsel that the member had no legal obligation to deal exclusively with the LLC. With respect to a breach of fiduciary duty claim alleged against the member, the court similarly found that the member had no liability. The court relied upon the Missouri LLC act, which provides that a non-manager member has no duty other than the duty of loyalty solely by reason of acting in the capacity of member, along with a provision of the operating agreement specifying that no member would be liable with respect to an action taken in connection with the LLC absent actual fraud, gross negligence, or willful misconduct.

*Lighthouse Brands, Ltd. v. Ideas Concepts and Insights Merchandise Group*, No. 3:04 CV 7634, 2005 WL 1703224 (N.D. Ohio July 20, 2005). An Ohio LLC admitted a Minnesota corporation (ICI) as a member to assist in developing its business in Minnesota, and the LLC employed Weisz, ICI's sole shareholder, as vice president of sales of the LLC. Weisz eventually resigned as vice president of the LLC and went to work for a competitor. He claimed that he had no business activity with ICI after he left the LLC. The LLC sought to enjoin ICI and Weisz from soliciting customers and prospective customers of the LLC. The court examined the operating agreement, which included a provision stating that "nothing in this Agreement shall be deemed to restrict in any way the rights of any Member, or of any Affiliate of any Member, to conduct any other business or activity whatsoever, and the Member shall not be accountable to the Company or to any other Member with respect to that business or activity; provided, however, a Member shall not participate in any business or activity, directly or indirectly, which competes with the business of the Company." The court pointed out that this provision permitted *members and their affiliates* to engage in other ventures and activities, while the clause prohibiting competition referred only to *members* and was silent as to affiliates. Thus, concluded the court, the agreement not to compete clearly and unambiguously applied only to members and did not apply to Weisz. (Though the court's description of the facts of the case include a statement that Weisz received a 10% interest in the LLC, Weisz apparently was not admitted as a member.) Another provision of the operating agreement dealing with non-solicitation, intellectual property, and confidentiality also applied only to members. A third provision of the operating agreement regarding confidential information likewise applied only to members. The court found one occasion where Weisz may have made a disclosure as president of ICI in violation of the confidential information provision, but the court questioned whether the disclosure caused irreparable harm. The court also examined whether the actions of another individual employed by ICI were the basis of a violation of provisions of the operating agreement and found the facts did not indicate any violations. Finally, the court examined the provisions of an employment contract between Weisz and the LLC, but the employment agreement did not include a non-competition clause, and the court found Weisz was not in violation of the other restrictions in the employment agreement.

*Flight Options Int'l, Inc. v. Flight Options, LLC*, No. Civ.A. 1459-N, 2005 WL 2335353 (Del. Ch. July 11, 2005). The minority member of an LLC sought to enjoin the majority member from consummating an equity investment in the LLC pending arbitration of the dispute, and the court granted the injunction based on the probability that the plaintiff would prevail in establishing that the process followed by the LLC's managers in approving the terms of the investment did not meet the arms' length standard required with respect to transactions with affiliates under the terms of the LLC operating agreement. The LLC agreement provided that each manager had the same fiduciary duties in

managing the affairs of the LLC as the directors of a Delaware corporation have to its shareholders and others under applicable law, but the court found that a provision addressing the standard for transactions with affiliates controlled over the general fiduciary duty provision. The agreement provided that a transaction between the LLC and any affiliate must be on arms' length terms and conditions, including fair market values and prices equivalent to those that would be charged or paid between parties at arms' length, unless otherwise approved by a majority of disinterested managers. The court concluded that the informality of the process by which the managers determined the price of the new common units to be issued to the majority member substantially undermined the ability of the managers to show it was equivalent to the result of an arms' length transaction.

**CCD, L.C. v. Millsap**, 116 P.3d 366 (Utah 2005). An LLC had the right to seek statutory expulsion of a member notwithstanding the member's attempt to block the expulsion by first retiring under the terms of the operating agreement. Although the operating agreement stated that a member could not be expelled, the court found that the prohibition on expulsion was superseded by provisions of the Utah LLC statute that specified grounds for judicial expulsion and prohibited the operating agreement from varying the statutory right to expel a member. The member claimed that he had retired pursuant to the terms of the operating agreement and that the retirement terminated his membership and rendered the attempt to expel him a nullity since he was no longer a member. The court relied upon policy considerations to reject the member's claim and concluded the statute authorized the LLC to expel the member. The court recognized the logic of the member's argument, but stated there was no legal principle that required legislative enactments to be "leashed to Aristotelian logic." The court stated that the legitimate policy aims of the statute would be frustrated if a member whose conduct made him eligible for expulsion could block expulsion by voluntarily ceasing to be a member, which, under the terms of the operating agreement in issue, threatened a forced liquidation of the LLC. The court found sufficient grounds to expel the member where the member had been given a second chance after a first incident involving misappropriation of \$625,000. The member's second instance of misconduct involved misappropriation of \$11,540. The court found the second incident was sufficient grounds to expel the member and concluded the LLC's waiver of its right to expel the member for the first instance did not limit its right to expel the member for the subsequent misconduct.

**Merrell-Benco Agency, LLC v. HSBC Bank USA**, 799 N.Y.S.2d 590 (N.Y. A.D. 3 Dept. 2005) (stating that there is no requirement for an LLC to have an operating agreement to operate as an LLC).

**Gottsacker v. Monnier**, 697 N.W.2d 436 (Wis. 2005). The Wisconsin Supreme Court interpreted ambiguous language in an LLC operating agreement and decided that two LLC members had the requisite majority to authorize the transfer of the LLC's sole asset. The LLC in issue was initially wholly owned by Monnier. Later the Gottsacker brothers, Paul and Gregory, became members, and the members entered into a "Members' Agreement" that stated that Monnier had 50% of the voting rights and that Paul and Gregory "collectively" had 50% of the voting rights. After a falling out between Paul and Gregory, Monnier and Paul, without the knowledge of Gregory, caused the LLC to transfer real estate constituting the sole asset of the LLC to a newly formed LLC owned by Monnier and Paul. Gregory claimed that Monnier and Paul did not constitute the majority necessary to authorize the transfer because the Gottsackers' interest was a "collective" interest that could not be voted by Paul alone. The court discussed at some length the background of LLCs and the adoption of the Wisconsin LLC statute and concluded that the ambiguous term "collectively" referred to the sum of the brothers' individual 25% interests. The court concluded that construing the members' agreement to allow one minority member to deadlock the LLC would be unreasonable absent express language. Thus, Paul could vote his 25% interest independently of Gregory, and Monnier and Paul had the requisite majority to authorize the conveyance of the property. The court went on to conclude that Monnier and Paul had a material conflict of interest that required the case to be remanded for a determination as to whether they complied with the statutory standard applicable in such cases. A dissenting judge concluded that the term "collectively" required the brothers to vote together as one interest and that the conveyance thus was not properly authorized.

**Ledford v. Smith**, 618 S.E.2d 627 (Ga. App. 2005). An LLC's ownership was divided between three individuals (the "Active Members") and an entity owned by five other individuals ("Dyna-Vision"). The Active Members bought out Dyna-Vision's interest pursuant to a push-pull provision in the operating agreement and then sold the assets of the LLC to a third party who had financed the purchase by the Active Members of Dyna-Vision's interest. Dyna-Vision sued the Active Members based on the Active Members' failure to disclose that their purchase of Dyna-Vision's interest was being financed by a third party to whom they planned to sell the LLC. The court first found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with the third party under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered

by the third party's agreement with the Active Members to make a loan to finance the Active Members' purchase of Dyna-Vision's interest and to purchase the LLC's assets after the Active Members' purchase of the Dyna-Vision interest. The court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members' freedom to restrict and eliminate fiduciary duties under the Georgia LLC Act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.

***Historic Charleston Holdings, LLC v. Mallon***, 617 S.E.2d 388 (S.C. App. 2005) (finding master in equity erred in denying accounting in connection with dissolution and final distributions where operating agreement required accounting in connection with liquidation).

***American Anglian Environmental Technologies, L.P. v. Environmental Management Corp.***, 412 F.3d 956 (8<sup>th</sup> Cir. 2005). A 50% member of a Missouri LLC (EMT), invoked a push-pull buy-sell provision in the LLC operating agreement, and the other member (AAET) opted to buy EMC's interest. Before closing, EMC (which managed the day-to-day business of the LLC), caused the LLC to make a \$500,000 cash distribution to the members. AAET demanded that EMC return the distribution, and EMC refused. After the closing, AAET sued EMC seeking relief based on the distribution and discrepancies revealed by a post-closing audit. The district court granted summary judgment for EMC on all counts. The court reversed the district court's summary judgment for EMC with respect to the distribution because the distribution was not authorized under the operating agreement. The operating agreement generally prohibited distributions, other than distributions of net cash from operations, and provided that any act in contravention of the agreement required unanimous consent of the management committee, which was made up of two representatives from each member. The parties agreed that the management committee did not approve the distribution. The court rejected the argument that the management committee had delegated the authority to determine the timing and amount of distributions. The fact that EMC had determined in the past that net cash was available for distribution without a formal meeting of the management committee did not indicate how the management committee acted with respect to distributions. The court affirmed the summary judgment for EMC on AAET's other claim for relief, which was based on an audit conducted after the closing of the purchase of EMC's interest. Based on the audit, AAET claimed that the LLC's books had not been maintained in accordance with GAAP and that the LLC had been overvalued. AAET sought to recover one-half of the overvaluation, alleging that it would have demanded that the books be adjusted and the price recalculated, considered selling its interest, or taken other steps if it had known of the discrepancies. The court concluded that the operating agreement prohibited adjustment to the LLC's books and recalculation of its purchase price after a member's buy-sell offer to another member because the agreement provided that the buy-sell offer was "irrevocable," "shall not be conditioned on anything," and required "no representations and warranties." The court pointed out that AAET did not allege that its decision would have been to sell rather than buy if it had known of the discrepancies and that Missouri's policy as expressed in its LLC statute is to give maximum effect to the freedom of contract and enforceability of operating agreements.

***Nathanson v. Nathanson***, 799 N.Y.S.2d 83 (N.Y. A.D. 2 Dept. 2005) (holding LLC operating agreement validly granted management authority to one member even though articles of organization vested management in LLC's members, and member's allegations that managing member engaged in self-dealing by deferring certain priority distributions so that interest could accrue at 12% interest rate were sufficient to state cause of action for breach of fiduciary duty).

***The Planing Mill, L.L.C. v. Hays Planing Mill, Inc.***, No. Civ. 05-1051-WEB, 2005 WL 1319144 (D. Kan. June 2, 2005) (holding LLC that was formed to conduct mill business previously conducted by corporation failed to meet standard for preliminary injunction against former member who resumed conduct of mill business using trademarks LLC claimed were acquired by LLC because operating agreement provision that precluded corporation from competing with LLC while shareholder was member did not reflect any conveyance of assets from corporation to LLC nor was there other evidence sufficient to support LLC's claim that it acquired the corporation's trademarks).

***P & O Ports Florida, Inc. v. Continental Stevedoring & Terminals, Inc.***, 904 So.2d 507 (Fla. App. 2005). An LLC member made an offer to buy the other member's interest for \$7.2 million under a push-pull provision of the operating agreement that provided the offer "shall be at such price and upon on such terms and conditions as the Offering Member deems appropriate." One of the terms of the offering member's offer was that the parties would waive a non-

compete provision in the operating agreement. The non-compete provision in the operating agreement provided that it would “survive any transfer or other disposition by any member of its Membership Interest” and would terminate upon the first to occur of three years after the purchase of the membership interest or the dissolution of the LLC. The offeree member did not want to sell its interest for only \$7.2 million dollars and did not want to pay the other member that amount without the protection of the non-compete provision. The offeree member brought a declaratory judgment action to have the condition waiving the non-compete provision declared void. A special master was appointed and heard evidence after determining the provisions of the operating agreement were ambiguous with regard to whether an offer could include a condition waiving the non-compete provision. The special master heard conflicting testimony and concluded the parties did not intend to permit an offer to be conditioned on the waiver of the non-compete provision. The special master recommended that the trial court declare the offer valid and find that the non-compete provision would survive the sale. The trial court entered a judgment based on that recommendation, and the plaintiff quickly accepted the judicially modified offer. The appellate court agreed with the trial court that the operating agreement was ambiguous and concluded that the special master’s finding that the parties intended the non-compete provision to survive a sale was supported by the evidence. The appellate court concluded, however, that the offer eliminating the non-compete clause was void, and that it was error for the trial court to judicially modify material terms of the offer in order to turn an otherwise invalid offer into a valid one.

***CAPROC Manager, Inc. v. Policemen’s & Firemen’s Retirement System of the City of Pontiac***, No. Civ.A. 1059-N, 2005 WL 937613 (Del. Ch. April 18, 2005). The court held a dispute regarding removal of the manager of an LLC arose under the LLC agreement and was thus within the scope of an arbitration clause of the LLC agreement. The manager argued that the purported removal did not “arise under” the LLC agreement because it did not contain a removal provision. The manager also argued the agreement strongly evidenced a purpose to exclude removal from arbitration. The court found the validity of the removal necessarily depended upon interpretation of the parties’ rights and obligations under the LLC agreement and that the arguments arose under the LLC agreement because they necessitated determination of the intent of the parties when they entered into the agreement. The court did not find the absence of a removal provision in the agreement to be strong evidence that the parties intended to exclude removal issues from arbitration. Accepting the manager’s argument that the parties intended the manager to be permanent would necessitate a determination of aspects of the merits of the case. Further, even if the parties had expressly prohibited the manager’s removal, such a provision would not necessarily exclude removal from the scope of a broad arbitration clause.

***KBL Properties, LLC v. Bellin***, 900 So.2d 1160 (Miss. 2005). The court found that the fact that an LLC operating agreement did not contain a specific provision on raising additional capital did not preclude a request for additional capital, and a call for additional capital by two of the three members (constituting 70% in governance interest) was valid under the general voting provision of the operating agreement permitting action by 51% in governance interest of the members. The resulting reduction of the non-contributing member’s financial interest was proper because the operating agreement provided each member’s interest was his own contributed capital divided by the aggregate contributed capital. The court rejected the argument that the capital call and reduction of the non-contributing member’s interest were amendments of the operating agreement requiring unanimous consent of the members. The court also found that the buy-sell offer of one of the members to the non-contributing member complied with the terms of a push-pull provision in the operating agreement. The offeree member challenged the offeror member’s offer under the push-pull provision based on another provision of the operating agreement prohibiting the offering member from conveying any interest in the LLC without consent of the other members. The court found that the consent provision did not apply to the offer itself under the push-pull provision and that, if the offeree member agreed to purchase the offering member’s interest, such acceptance would satisfy the consent requirement.

***Securities and Exchange Comm’n v. Capital Consultants, LLC***, 397 F.3d 733 (9th Cir. 2005) (holding interpretation of legal effect of LLC operating agreements and related documents regarding authority of manager to transfer LLC properties was issue of law for court and not proper subject of expert testimony and observing that agreements which appeared to require member’s approval of manager’s sale of properties did not necessarily confer authority on the members to sell the properties because the agreements provided that a non-manager member had no authority to act as an agent for the LLCs).

***Riverside Surgery Center, LLC v. Methodist Health Systems, Inc.***, No. W2004-01195-COA-R3-CV, 2005 WL 588224 (Tenn. App. March 14, 2005). The court interpreted a right of first refusal provision in an LLC operating agreement and concluded the provision was triggered when a member possessed the “intent to transfer” its interest. The court acknowledged that discerning a member’s “intent to transfer” might be difficult in some cases, but found no

difficulty making that determination in this case because a member had entered an option/first refusal agreement with a third party. The court characterized the agreement with the third party as unequivocal evidence of intent to transfer, and the member was thus obligated to offer its LLC interest to the other members under the terms of the operating agreement. The court rejected the argument that the LLC had no standing to sue because it was not a party to the operating agreement. The court concluded that the LLC had the authority to sue in its name to enforce the operating agreement based on provisions of the Tennessee LLC statute. The court pointed out that the LLC statute provides that an LLC is bound by an operating agreement that has been adopted or agreed to by all the members and confers on an LLC the power to “do all things necessary or convenient to carry out its business and affairs” as well the power to “sue and be sued” in its LLC name. Because the LLC and its members are bound by the operating agreement, the court believed a breach of the operating agreement would constitute the LLC’s “business and affairs.”

*In re Adelpia Communications Corp. (Adelpia Communications Corp. v. Rigas)*, 323 B.R. 345 (Bankr. S.D. N.Y. 2005). The court analyzed the advancement and indemnification obligations of various entities, including two Florida LLCs, and concluded, after examining the Florida LLC statute and the operating agreements, that there was no obligation by statute or contract to advance expenses to individual management persons who had been tried on criminal charges. The court found that obligatory indemnification provisions of the operating agreements would not apply to certain charges, i.e., wire fraud charges that did not arise “by reason of” being in a management position with the managed entities. As to individuals who were convicted of some charges and acquitted of others, the court refused to order indemnification at this juncture of the case. As to one of the individuals who was not convicted of any charges because of a hung jury, the court concluded indemnification was required.

*In re Stonecraft, LLC*, 322 B.R. 623 (Bankr. S.D. Miss. 2005). The court held that the manager of a Michigan LLC was in a fiduciary relationship with the LLC and was not entitled to retain the benefit of a patent conceived of by the manager but reduced to practice by another employee of the LLC at the LLC’s expense. The court concluded that the ownership of the patent was not disposed of by the failure to mention the patent in a second amended operating agreement containing a merger clause. The manager claimed that the members had acquiesced in his ownership since they knew he was designated as the inventor when the agreement was executed. The court found, however, that the issue of patent ownership or assignment was not discussed during the mediation leading up to execution of the agreement and that the agreement did not contemplate the issue. Thus, there was no meeting of the minds on the issue, and it was not resolved by the merger clause. The court also noted that the Michigan LLC act does not permit the articles of organization or operating agreement to eliminate or limit a manager’s liability for the receipt of a financial benefit to which the manager is not entitled.

*RSN Properties, Inc. v. Jones*, 609 S.E.2d 498 (N.C. App. 2005) (recognizing North Carolina LLC allows a written operating agreement to alter an LLC manager’s duty to account as trustee, but finding question of fact existed as to whether operating agreement provision permitting activities that were in competition or conflict with LLC’s business waived duty to account for secret profit obtained by member in transaction with LLC).

*Stoker v. Bellemeade, LLC*, 615 S.E.2d 1 (Ga. App. 2005). The court concluded the defendant members of several real estate development LLCs did not breach their fiduciary duties even if they participated in competing real estate developments because the Georgia LLC statute permits an LLC operating agreement to expand, restrict, or eliminate duties and liabilities of members, and the operating agreements permitted members to conduct any other business or activity even if the business or activity competed with the LLC. The court also found no evidence that the defendant members breached their contractual or fiduciary duties in connection with alleged excessive development costs incurred by the LLCs. The operating agreements provided a member would have no liability to any other member or the LLC absent fraud, gross negligence, or an intentional breach of the agreement. While the defendant members had the primary responsibility to supervise development construction, the court pointed out that the members shared equally in management, with each member owning a 50% interest and the majority rule of decision making under the LLC agreements requiring each member to authorize management decisions. The plaintiff did not fault the other member for the decision to hire the contractor or for the terms of the cost-plus development contract, and the court found no evidence the costs, assuming they were excessive, occurred because a defendant member breached any provision of the LLC agreement or was grossly negligent.

*Howard v. Perry*, 106 P.3d 465 (Id. 2005). The court concluded the operating agreement of a professional LLC was an integrated contract based on the merger clause contained in the agreement; thus, parol evidence was not admissible to vary its terms. Article 5 of the operating agreement provided that each member was entitled to receive



monthly draws and quarterly bonuses based on fees collected on that member's files. The provisions of the operating agreement addressing distributions in winding up specified the following order of payment: (1) to creditors, including members, in satisfaction of liabilities of the firm, (2) to members in satisfaction of liabilities under Article 5, (3) to members for the return of their capital contributions, and (4) to members in equal shares. The court found that fees collected after dissolution were assets of the firm to be distributed equally to members rather than liabilities as distributions to be paid as monthly draws and quarterly bonuses to the member who generated the fees under Article 5 because draws and bonuses had been paid through the date of dissolution, and the operating agreement made no provision for distributing uncollected fees to the member who generated the fees. Thus, the receivables attributable to the slower paying clients were assets of the firm that were shared equally among the members rather than being paid primarily to the plaintiffs as they would have been if distributed under Article 5 of the operating agreement. Though this result might be unfair, the court stated that courts do not possess the "roving power to rewrite contracts in order to make them more equitable."

*KC Investments, LLC v. Wynia*, 125 Wash.App. 1020, 2005 WL 138908 (Wash. App. 2005) (holding arbitration clause in LLC operating agreement encompassed action by member who made contributions for non-contributing members upon additional capital call because arbitration clause was broad in scope and operating agreement's exception to arbitration clause for suits to enforce contributions on LLC's behalf did not apply to member's action on its own behalf to collect amounts contributed for non-contributing members).

*Lenticular Europe, LLC v. Cunnally*, 693 N.W.2d 302 (Wis. App. 2005). The one-third minority member of a two-member LLC brought an action on behalf of the LLC against the sole shareholder and president of the two-thirds member. The defendant claimed the action was not authorized because the operating agreement required more than 50% in interest to decide a matter connected with the business of the LLC. The court interpreted the Wisconsin LLC act to require that an operating agreement must specifically override the statutory default rule excluding a member with an interest in the outcome of a proposed action from the vote required to authorize the action. Thus, the minority member was authorized to bring the action because the two-thirds owner had an interest in the outcome adverse to the LLC at the time the action was commenced, and the operating agreement's general provision requiring more than 50% in interest to decide any matter did not specifically override the statute in this regard.

*Shamrock Holdings of California, Inc. v. Arenson*, No. Civ. 04-1339-SLR, 2005 WL 400198 (D. Del. Jan. 27, 2005). This dispute involved a failed Delaware LLC that was not a party to the action. The plaintiffs, which included supervisory board members/employees of the failed LLC, brought a declaratory judgment action against dissatisfied investors who threatened to sue the plaintiffs for breach of fiduciary duty, self-interest, and wrongful conduct. The action was removed from the Delaware Chancery Court to federal district court on the basis of diversity jurisdiction. In the course of determining the citizenship of the various parties, the court analyzed whether the citizenship of an individual plaintiff, who was an employee and board member of the failed LLC, should be analyzed on the basis of his individual or representative capacity. The individual represented the class D members (the only class D member being another LLC) on the supervisory board of the LLC. The court concluded that the individual's citizenship must be determined based on his individual rather than representative capacity because the operating agreement provided that a manager, representative, or deputy representative would not be liable to the LLC or its members for any failure to take action or the taking of any action within the scope of authority conferred by the agreement made in good faith, but would be liable to the LLC or its members in cases of their own fraud, criminal action, bad faith, or gross negligence. The court stated that the individual could only bring suit or be sued in his individual capacity because he was only liable for his own actions under the operating agreement; therefore, his citizenship for diversity jurisdiction purposes was his individual citizenship not that of the entity he represented on the LLC board. In the course of its analysis, the court stated that "Delaware law prohibits individual liability of members or managers of limited liability companies, to other members or managers, unless such liability is provided for in the operating agreement," citing Section 18-1101(d) of the Delaware LLC act. (The statement is a somewhat overly broad characterization of the effect of Section 18-1101(d), which states: "Unless otherwise provided in a limited liability company agreement, a member or manager or other person shall not be liable to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement.")

*Denevi v. Green Valley Corp.*, Nos. H024089, H024374, H024292, H025206, H024293, 2005 WL 236386 (Cal. App. 6 Dist. Jan. 21, 2005). Green Valley Corporation (Green Valley) was the managing member of an LLC formed to acquire property and develop a golf course and country club. The initial capital contributions consisted of a

total of \$400,000 cash and the contractual right to buy the property, which included the right to be paid a consulting fee by the seller. The operating agreement provided that the LLC was member-managed and authorized Green Valley, as managing member, to manage and control the LLC's affairs. The agreement absolved Green Valley from liability for loss to the LLC unless the loss resulted from "fraud, deceit, gross negligence, reckless or intentional misconduct, or a knowing violation of law." The purchase of the property fell through when Green Valley failed to renegotiate the terms of the down payment and refused to deliver the balance of the \$750,000 down payment. The plaintiff in this case, an investor in the LLC, filed a derivative suit on behalf of the LLC against Green Valley and Swenson for breach of fiduciary duty. The appellate court found there was no substantial evidence supporting the plaintiff's theory that the defendants intentionally caused the LLC to breach the contract in order to appropriate the purchase opportunity for themselves. The finding of gross negligence, however, was supported by the evidence according to the appellate court. The defendants argued that the basic premise of the LLC was to purchase the property with the capital and credit contributed by the members and that the operating agreement required no further capital contributions. Based on provisions of the operating agreement requiring Green Valley to (1) proceed with due diligence and without delay to commence and complete the project, and (2) cause to be paid all amounts owed to the LLC, the court stated the operating agreement could be reasonably understood to obligate Green Valley to (1) make a good faith determination of the amount of capital required to perform the purchase contract, (2) communicate that determination to the members, and (3) seek to obtain that amount by supplemental capital contributions or borrowing. Instead the defendants made the decision against putting up the entire amount of the down payment so as to avoid having the funds trapped in escrow while demands of the seller and the manner of paying the down payment were being resolved, thereby engaging in grossly negligent conduct that was not protected by the business judgment rule.

***Kinkle v. R.D.C., L.L.C.***, 889 So.2d 405 (La. App. 2004). A deceased LLC member's personal representative brought an action to establish the estate was entitled to its proportionate share of distributions of surplus income since the death of the member and to an accounting. Prior to the member's death, he received monthly distributions from the LLC, but following his death the LLC did not make distributions to his estate. The LLC countered that the estate was merely an assignee, the LLC was not required to admit the personal representative as a member, and the estate was only entitled to receive the value of the deceased member's interest as of the date of his death. The court examined the terms of the operating agreement (which the court characterized as contractual in nature and subject to rules of contract interpretation). The operating agreement provided that the death of a member would not dissolve the LLC as to the other members if two-thirds of the voting interest of the remaining members approved the reconstitution and continuation of the LLC. Upon dissolution, the operating agreement required the LLC to execute and file a statement of intent to dissolve and liquidate as set forth in the operating agreement. The court found that the LLC did not dissolve because the remaining members voted to continue and did not file a statement of intent to dissolve. The court found no provision or procedures in the operating agreement for the liquidation of a deceased member's interest outside the dissolution context. The court stated the members could have easily so provided, but did not and were bound by the agreement. The court concluded that the deceased member's personal representative was an assignee pursuant to the provisions of the LLC statute, and was entitled only to receive such distributions, to share in such profits or losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled and to the extent assigned. The court held the personal representative was thus entitled to annual allocations and distributions as provided in the operating agreement. If the members voted to make the distributions monthly, rather than annually, she was entitled to the monthly distributions. The court denied the personal representative's request for an accounting because the statute does not confer information and inspection rights on an assignee.

***Ayres v. AG Processing Inc.***, 345 F.Supp.2d 1200 (D. Kan. 2004). The plaintiffs, minority members and former managers of a Nebraska LLC, sought to hold several individuals liable for breach of the articles of organization and/or operating agreement. The individual defendants were executive officers of a corporate LLC member and served as managers of the LLC, but there was no indication they were themselves members. The court stated that the individuals would not be liable in their capacities as officers of the corporate member and that the plaintiffs had not alleged any legal theories to support holding LLC managers liable for breach of contract. In the absence of any allegation that the individuals were parties to the operating agreement or were liable in some other capacity for breach of the operating agreement, the plaintiffs failed to state a claim against the individuals for breach of contract.

***Blackmore Partners, L.P. v. Link Energy LLC***, 864 A.2d 80 (Del. Ch. 2004). A former unit holder of an LLC brought an action against the LLC and its directors for breach of fiduciary duty in connection with the sale of substantially all of the LLC's assets. The complaint alleged that the sale proceeds were all distributed to the creditors and that the creditors received more than the total amount of their claims while the equity units were rendered worthless.

The defendants relied upon a provision in the operating agreement based on Section 102(b)(7) of the Delaware corporate law that barred claims for breach of the duty of care. The court thus examined the complaint to determine whether it contained facts sufficient to infer a breach of the duty of loyalty. Noting that the complaint alleged facts sufficient to infer that the value of its assets exceeded its liabilities by a significant amount, the court found the allegation that the directors approved a sale of substantially all of the assets and a resultant distribution of proceeds exclusively to the LLC's creditors raised an inference of disloyalty or intentional conduct.

***Butterfield v. Moyer***, No. 8-04-04, 2004 WL 2496846 (Ohio App. Nov. 8, 2004) (holding there was no evidence to support trial court's finding that LLC member's investment was a loan, and failure to award pre-judgment interest on other member's claim for back salary owed under provisions of operating agreement was improper because prejudgment interest is provided by Ohio statute with respect to judgment on a contract).

***Harbison v. Strickland***, 900 So. 2d 386 (Ala. 2004). Mr. and Mrs. Strickland formed an LLC as part of their estate plan, and the Stricklands transferred 83% of the equity shares to their daughter (Harbison) and retained 17%. After Mr. Strickland died, Mrs. Strickland became the sole manager and retained the 17% share she had held with her husband. Mrs. Strickland conveyed LLC real estate to her son for an amount Harbison believed was less than fair market value, and Harbison sued Mrs. Strickland for breach of fiduciary duty. Mrs. Strickland relied upon provisions of the operating agreement that stated the managers did not guarantee a profit for the owners and had no obligation to maximize financial gain or make the LLC property productive. The trial court granted summary judgment in favor of Mrs. Strickland based on the terms of the operating agreement and her testimony that, regardless of the terms of the operating agreement, her intent was to give each of the two children one-half of what was left of the estate. The trial court concluded that Mrs. Strickland had the authority to dispose of the LLC property in any way she saw fit, including by gift. The Alabama Supreme Court held that the LLC act imposed fiduciary obligations that could not be eliminated or unreasonably reduced and that the trial court erred in failing to look past the "four corners" of the document because the provisions of the statute were part of the agreement. The court stated that LLC operating agreements are contracts, and courts must give effect to the clear and plain meaning. The court pointed out the operating agreement stated that the LLC was organized to make a profit and authorized the manager to make decisions for the LLC based on the best interest of the LLC and the owners. The court remanded for a determination of whether Mrs. Strickland violated her duties as manager of the LLC under the plain language of the operating agreement.

***Family Mortgage Corp. No. 15 v. Greiner***, No. C-03-01380RMW, 2004 WL 2254195 (N.D. Cal. Oct. 7, 2004). After defaulting on a real estate note, Greiner and a subsidiary of the lender (FMC) entered into an LLC agreement for the purpose of selling or developing the property. Greiner contributed the property, and FMC's contribution was causing the lender to forbear from foreclosure and to forgive the loan upon the sale of the property. FMC argued the LLC agreement was enforceable as a matter of law and sought to enforce its rights under the agreement where the property was not sold prior to a specified date. Greiner argued the LLC agreement was a hidden security device and its relationship with FMC was thus subject to the rules applicable to a secured creditor and debtor. The court reviewed the terms of the LLC agreement and the circumstances under which it was entered and concluded that it could not state as a matter of law that the contribution of the property was not a hidden security device.

***Old Saybrook Golf v. Plant***, No. CV044000240S, 2004 WL 2166322 (Conn. Super. Sept. 3, 2004) (finding member's action removing managers (who had violated operating agreement by entering into "special consent events" without member's approval) were rightful and consistent with terms of the agreement, and enjoining managers who had been removed from acting as managers and from interfering with newly appointed managers of the LLC).

***One to One Interactive, LLC v. Landrith***, 18 Mass.L.Rptr. 85, 2004 WL 1689790 (Mass. Super. 2004) (finding term sheet regarding redemption of LLC interest was a contract that was breached and was not superseded by Amended and Restated Limited Liability Company Agreement).

***Geresy v. Dommert***, No. 243468, 2004 WL 1222991 (Mich. App. June 3, 2004). The members of an LLC signed an operating agreement which stated that each of the members agreed to be personally liable for one-fifth of certain obligations and that they would execute guaranties. The operating agreement was signed on behalf of the LLC and by each member under the heading "Members." The court held that the individual members could not be held personally liable because they signed "only as members and not as individuals." The court relied on the rule that "an individual stockholder or officer is not liable for the corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and

again as an individual.” The court noted that the members signed only once in their “capacities as members.” The court stated that its conclusion was buttressed by the fact that the individuals never signed the guaranties.

**Potter v. GMP, L.L.C.**, 141 S.W.3d 698 (Tex. App. 2004). An LLC sued Potter, one of its members, to enforce a capital call. Potter argued that the LLC regulations (operating agreement) did not obligate him to make additional capital contributions without his consent. The jury found Potter was obligated to make the capital contribution. The court of appeals examined the provisions of the regulations and concluded they were susceptible to two interpretations regarding additional capital contributions. On the one hand, they could be read to require a member to contribute if requested by the manager and agreed to by a majority in interest of the members. On the other hand, as Potter argued, they could be read as providing that additional contributions were not mandatory on members who objected. Since the provisions were ambiguous, the trial court properly submitted the issue of their interpretation to the jury. The court reviewed the evidence and found there was sufficient evidence to support the jury’s finding that the regulations obligated Potter to make the contribution that the other two members had approved. Additionally, the court concluded that the amount of damages found by the jury was supported by the evidence because it fell within the range of damages presented. Potter argued that the LLC was not entitled to recover attorney’s fees on its claim that he failed to make the required capital call, but the court of appeals concluded that the LLC’s regulations were a contract and that the LLC’s claim was precisely the type of claim for which attorney’s fees are recoverable under a Texas statute that permits the prevailing party in a breach of contract action to recover attorney’s fees.

**Kronenberg v. Katz**, C.A. No. 19964, 2004 WL 1152282 (Del.Ch. May 19, 2004). The plaintiffs’ fraud claims in this case were not barred by the integration clause in the LLC agreement, and the plaintiffs were not liable for breach of a confidentiality clause in the LLC agreement based on their filing of the lawsuit without seeking to place it under seal.

The plaintiffs invested in a Delaware LLC promoted by Katz, the mayor of Philadelphia. The LLC was run by Robins, whom Katz represented was a trusted employee with a good business track record. In fact, Robins had a history of criminal convictions and bankruptcies, but these facts were not disclosed to the plaintiffs. Within a couple of years after the LLC agreement was signed, Robins had burned through most of the \$2 million the plaintiffs invested, and it came to light that he had diverted several hundred thousand dollars of the LLC’s funds to himself. In addition, it turned out the “independent feasibility studies” that had been shown to the plaintiffs were mostly written by Katz and Robins.

The plaintiffs sued for rescission alleging fraud in the inducement and securities fraud under the Pennsylvania Securities Act. The court was inclined to conclude that Delaware law governed the common law and equitable fraud claims in the case, but sidestepped the issue by accepting the parties’ view that Delaware and Pennsylvania law are the same for all relevant purposes. The court concluded that the integration clause in the LLC agreement did not bar the plaintiffs’ fraud claims. The clause provided as follows: “This Agreement ... constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements, understandings, inducements, or conditions, oral or written, express or implied.” The court pointed out that the clause was a standard integration clause of the type incorporated into various forms and model agreements. The court relied upon the commentary to these model agreements as well as authorities on the law of contracts to conclude that this type of clause does not bar a fraud claim. According to the court, to bar a fraud in the inducement claim, a contract must contain clear anti-reliance language by which a party contractually promises that he has not relied upon statements outside the contract’s four corners. The court was satisfied that this approach appropriately balances the competing policy concerns presented by the law’s intolerance of fraud and the freedom of parties to contract under both Delaware and Pennsylvania law. The court granted the plaintiffs’ motion for summary judgment on the fraud claims, holding that the plaintiff had conclusively established a right to rescission based on fraud in the inducement and the anti-fraud provision of the Pennsylvania Securities Act.

The other clause of the LLC agreement that was in issue was a broadly-worded confidentiality clause. Katz claimed that the plaintiffs violated the clause by filing the lawsuit without seeking to place it under seal. The court rejected Katz’ claim for several reasons. First, Katz himself was not a party to the LLC agreement, but rather an entity controlled by Katz. The LLC agreement provided that it did not confer any third party rights, and the court concluded Katz did not have standing to assert a breach of the confidentiality provision. Katz’s entity also asserted a claim for breach of the confidentiality provision, but the court concluded there was no evidence of any cognizable damages. The court called the confidentiality clause “facially absurd” inasmuch as it purported to make even the existence of a dispute of any nature “Sensitive Information” that the parties must endeavor to conceal from the public. “[A] court ... cannot indulge the desire of private parties to be self-created ‘secret citizens’ who can litigate in courts of public record behind a judicially enforced screen,” said the court. Because the dispute did not involve truly sensitive and confidential information, the court would not have permitted the case to remain under seal even if it had been sought. In addition,

Katz and his entity failed to provide relevant discovery regarding their damages claim and asserted wholly conclusory and speculative allegations of injury. The court thus granted the plaintiffs' motion for summary judgment on this claim.

*Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.*, 854 A.2d 121 (Del.Ch. 2004). A former member of a dissolved LLC sued the LLC, its other former members, its managers, and a related corporate entity alleging various claims of fraud, breach of the LLC agreement, and breach of fiduciary duty. The LLC was formed to invest in the South American telecommunications industry, and the plaintiff lost most of its investment after bribery of Brazilian officials by LLC employees came to light. The essence of the plaintiff's theory was that all of the defendants either participated in or knew about the bribery scheme and were not candid with the plaintiff about the bribery or its effect on the LLC's business.

The breach of LLC agreement claims were based on information and inspection provisions of the LLC agreement. Section 5(e) of the LLC agreement required the LLC to provide prompt notice and a description of any event which could reasonably be expected to have a material adverse effect upon the LLC. The court held the complaint stated a claim against the LLC based on its failure to inform the plaintiff of the bribery. Section 5(f) required the LLC to permit the members' representatives to inspect and copy books and records and to discuss the LLC's affairs with the LLC's officers, managers, and independent accountants. The court held that the complaint was sufficient to state a claim against the LLC based on allegations of instances in which the plaintiff was denied access to company information and prohibited from contacting LLC executives.

The court also found the complaint stated potentially viable contract claims against the plaintiff's original co-members, who were parties to the LLC agreement and were also managers of the LLC. Although these parties claimed they were no longer members of the LLC after a reorganization of the LLC, the plaintiff alleged, and the court assumed, that they continued to act as managers. The plaintiff alleged that these managers knowingly caused the LLC to violate Sections 5(e) and (f). (The court noted that the breach of contract claims were not asserted against other managers who were not parties to the LLC agreement.) The managers argued the breach of contract claim against them failed because Sections 5(e) and (f) only mentioned the LLC. In concluding the complaint stated potentially viable breach of contract claims against the managers as well as the LLC, the court relied upon an "oddly written" introductory provision of Section 5 of the agreement, which provided "[e]xcept as otherwise specifically provided herein ... the Company and each Member and Manager shall comply with the covenants set forth in Section 5." The court rejected the argument that provisions of the LLC agreement and the Delaware LLC act protecting members and managers from personal liability for liabilities and obligations of the LLC precluded holding the managers personally liable for breach of the LLC agreement. The court read the term "comply" to incorporate a knowledge requirement in the sense that a manager would be culpable if it knew the LLC was taking action inconsistent with a covenant in Section 5 and did not act to ensure compliance. The court thus recognized the claims against the managers from the time they were alleged to have known of the bribery scheme. The court rejected the plaintiff's breach of implied covenant of good faith and fair dealing claim because the introductory clause of Section 5 left no room for the implied covenant to apply if the effect of the clause is to make the managers directly liable. On the other hand, if the introductory clause does not have that effect, the failure of Sections 5(e) and (f) to mention managers precludes application of any contractual theory of recovery against the managers.

The court rejected several other claims that the defendants breached specific provisions of the LLC agreement as well as the plaintiff's claim that the defendants breached an implied contractual duty by operating the LLC in an illegal manner. The court indicated that knowingly operating the LLC in an illegal manner would constitute a breach of fiduciary duty and stated that the public policy purpose that would be served by replicating that recognized fiduciary duty as a contractual duty inherent in every LLC agreement would be minimal. The court stated its understanding that this fiduciary principle cannot be contracted away by private parties since it involves an important public interest.

*Investcorp, L.P. v. Simpson Investment Co., LLC*, 85 P.3d 1140 (Kan. 2004). After an LLC dissolved by virtue of the withdrawal of one faction of members, the withdrawing members claimed that they were not required to share in post-dissolution expenses incurred by the LLC. In a prior opinion, the court interpreted the LLC operating agreement to provide that the withdrawing members remained members during the winding up of the LLC. In the instant case, the withdrawing members argued that post-dissolution expenses should be charged against the share of the assets to be distributed to the remaining members. The court examined various provisions of the operating agreement on which the withdrawing members relied. The withdrawing members argued that the operating agreement indicated that they did not have to share in the post-dissolution expenses because the expenses were ultra vires. The court rejected the ultra vires argument for several reasons. First, the withdrawing members did not dispute that the expenses were binding on the LLC. Additionally, the withdrawing members did not argue the LLC was without the power to incur the expenses, merely that they were not authorized. The withdrawing members argued that the operating agreement required members,

including managers, to indemnify the LLC for obligations incurred without authority, but the court pointed out that another provision of the operating agreement required managers to indemnify the LLC or members only when the managers were guilty of fraud, gross negligence, misconduct, or reckless disregard of duty. The withdrawing members made no such claim, and there was no evidence to support such a claim. Further, there was no evidence to indicate the remaining members acted outside the scope of their authority. The court also rejected the withdrawing members' argument that fairness and equity required the remaining members to bear all of the post-dissolution expenses. The court stressed the freedom of contract the members had under the Kansas LLC act to deal with the specific situation, and the court refused to "rewrite the agreement for the withdrawing members or otherwise save them from their own agreement." The members, including the withdrawing members, were bound by their operating agreement, which dictated how liquidation proceeds should be applied and distributed.

***First American Real Estate Information Services, Inc. v. Consumer Benefit Services, Inc.***, No. 03CV0633 BNLS, 2004 WL 5203206 (S.D. Cal. April 23, 2004). The court concluded that members of an LLC have fiduciary duties under California law regardless of whether they choose to turn control of the LLC over to managers, and the court found that the provisions of an LLC operating agreement limiting fiduciary duties of the LLC's managers did not change the fiduciary duties that the members may have owed the LLC. The operating agreement provided that the parties waived the fiduciary duty owed by managers to the LLC as long as the manager acted in the best interest of the member it represented. The court stated that the parties, who were "sophisticated players in the market place," could have limited the fiduciary duties owed as members, but chose not to do so. The court thus rejected the defendant member's claim that the provision of the operating agreement addressing the duty of the managers waived the duty owed to the LLC as a member.

***TriState Courier and Carriage, Inc. v. Berryman***, No. C.A. 20574-NC, 2004 WL 835886 (Del.Ch. April 15, 2004) (noting difficulty of determining ownership of LLC in absence of written operating agreement, and concluding evidence showed that individual whose ownership was in question had at most a future equity interest in LLC).

***Leisher v. Alfred***, No. D041303, 2004 WL 693207 (Cal. App. April 3, 2004). Leisher and Alfred formed an LLC with Alfred as the manager. Alfred paid himself unauthorized commissions and used LLC funds to pay personal expenses. The LLC's bank account became overdrawn and Leisher removed Alfred as manager. As a result of adverse developments in the business in which the LLC was engaged (viatical settlements), Leisher ultimately filed suit to dissolve the LLC. Leisher also sought an accounting and damages from Alfred. Alfred asserted various cross-claims against Leisher. The court interpreted the operating agreement in various respects. The court held that the removal of Alfred did not dissolve the LLC because neither the California LLC act nor the operating agreement provided for dissolution in the event of the expulsion of a member. The court held that Leisher was justified in removing Alfred as manager because the evidence supported the conclusion that Alfred breached his fiduciary duties and the operating agreement by taking excess compensation and paying personal expenses with LLC funds. In addition to being subject to statutory fiduciary duties comparable to a partner's duties, Alfred was required by the operating agreement to perform his duties as the LLC's manager "in good faith, in a manner [he] reasonably believe[d] to be in the best interest of the [the LLC], and with such care as an ordinarily prudent person in a like position would use under similar circumstances." The court also applied the operating agreement to resolve disputes over various distributions and payments.

***Gonzalez v. Ward***, No. 253,2003, 2004 WL 77862 (Del. 2004). The court found that LLC members who acted as operating managers during the winding up of the LLC acted properly in increasing their compensation inasmuch as their workload increased substantially in the winding up and they applied and stayed within the parameters of the compensation formula approved by the LLC's initial managers. The court concluded the managers acted fairly even if the entire fairness standard applied.

***Senior Tour Players 207 Management Co., LLC v. Golftown 207 Holding Co., LLC***, No. Civ.A. 20116-NC, 2004 WL 440465 (Del.Ch. March 10, 2004) (interpreting advancement of expenses provision of LLC operating agreement and concluding no written undertaking to repay was required because none was specified in operating agreement, but indicating that repayment would in fact be required if defendant is ultimately adjudged to be unindemnifiable).

***Lehmer v. Rockefeller***, Nos. G030523, G030985, 2004 WL 925759 (Cal.App. April 29, 2004) (rejecting members' claims for contribution and equitable indemnity against co-member and granting prevailing member's claim

for attorney's fees without apportionment under provision of operating agreement awarding attorney's fees to the prevailing party in any dispute among the members).

*Derges v. Hellweg*, 128 S.W.3d 186 (Mo. App. 2004) (finding trial court erred in declaring rights and obligations of members under member guaranties based on operating agreement rather than guaranties, which were not before the court).

*Palmer v. Moffat*, No. Civ.A.01-C-03-114JEB, 2004 WL 397051 (Del. Super. Feb. 27, 2004) (granting summary judgment to managers on member's claims for breach of operating agreement and related acts of wrongdoing because plaintiff was not able to show loss or damages).

*LCA-Vision, Inc. v. New York Refractive Eye Associates, P.C.*, No. 98 Civ.8387 DC, 2004 WL 213027 (S.D. N.Y. Feb. 3, 2004) (holding that defendant member met its capital contribution requirement under clear language of operating agreement where member made initial required contribution, operating agreement required unanimous consent of members to create additional capital contribution obligations, and there was no evidence member consented to making additional contributions).

*LGB Group, LLC v. Booty*, Nos. CAL 03-00088, CAE 02-00408, CAL 03-08305, 2004 WL 1058958 (Md.Cir.Ct. Jan. 28, 2004). After an attempt to remove the LLC's president (who was stealing money from the LLC) failed because it did not comply with the LLC's operating agreement, the members sought advice of counsel and amended the operating agreement to eliminate the office of president. All of the members except the member who was president (Booty) and his wife approved the amendment, and the court found that the requisite vote to amend the operating agreement was obtained. The members made a number of changes to the operating agreement in addition to doing away with the office of president. Booty argued that his consent was required to amend the operating agreement based on general unanimous written consent provisions of the agreement. The court stated that the specific provision permitting the operating agreement to be amended upon written consent of 75% of the members controlled over the more general provision. The court also stated that the members had a common law right to remove Booty as a member and an officer, irrespective of the operating agreement, in order to protect the LLC from his theft. The court relied on the principle of corporate law that "a corporation possess[es] the power to remove a member, officer, or director for cause regardless of the existence of a provision in the charter or bylaws providing for such removal." The court interpreted the indemnification provisions of the operating agreement and concluded that Booty was not entitled to indemnification for numerous reasons. The court also found Booty was not entitled to reimbursement under other provisions of the operating agreement providing for reimbursement of legitimate business expenses because he had not followed the LLC's process for submitting claims for reimbursement. Additionally, some of the expenses were not business expenses associated with the LLC. Finally, Booty was not entitled to reimbursement for amounts he admitted represented his initial capital contribution because the operating agreement stated that members were not entitled to a return of any capital contribution.

*Lieberman v. Wyoming.com LLC*, 82 P.3d. 274 (Wyo. 2004). A withdrawn member of a Wyoming LLC demanded payment of the value of his share of the current value of the LLC. Because the Wyoming LLC act does not provide for the fate of a withdrawn member's equity interest in an LLC, the court looked to the operating agreement to determine if it contained provisions relevant to the withdrawn member's interest. The court reviewed provisions addressing capital accounts, distributions, membership certificates, transfer, and voting and concluded that there simply was no provision mandating a liquidation or buy-out of a withdrawn member's interest. The court noted that the transfer provisions in the operating agreement clearly contemplated a situation where a person could be an equity owner but not a member and found no reason to treat a withdrawing member any differently. Thus, the withdrawn member was no longer a member but retained his equity interest in the LLC.

*In re Provenza*, 316 B.R. 225 (Bankr. E.D. La. 2003). Dr. Provenza and two other physicians formed a manager-managed Louisiana LLC. The court reviewed provisions of the Louisiana LLC act to determine whether Provenza owed a fiduciary duty to his co-member. The court concluded that Provenza owed a fiduciary duty to the LLC and its members since he was a manager of a manager-managed LLC. However, the claimant failed to meet his burden of proving a breach of fiduciary duty. The claimant argued that Provenza failed to inform him, prior to the incurrence of LLC indebtedness guaranteed by the members, that Provenza had or anticipated certain financial difficulties. The court stated that none of the actions complained of amounted to a breach of fiduciary duty to the LLC or its members. The impact of Provenza's circumstances on his financial situation at the time in question was unknown. Furthermore,

the court held that an exculpatory clause in the articles of organization eliminated liability for damages by Provenza even if the court determined that a breach of fiduciary duty occurred. The provision eliminated the liability of a member to the LLC or other members for monetary damages for breach of fiduciary duty as a member except for (1) liability for the amount of financial benefit received by the member to which the member was not entitled, or (2) an intentional violation of criminal law. The court rejected the claimant's argument that Provenza was liable for receiving a financial benefit to which he was not entitled. The claimant argued that he had paid more than his share of the bank debt based on an alleged change in the agreement regarding the allocation of losses. The court found there was insufficient evidence to conclude that the claimant's liability had been limited in the way that he asserted. Provenza's bankruptcy estate had paid more than its share of the indebtedness; therefore, Provenza had not received a financial benefit to which he was not entitled, and the claimant failed to prove damages.

*Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co. Ltd.*, 339 F.3d 101 (2d Cir. 2003) (interpreting supermajority provision of LLC operating agreement to encompass related-party, self-dealing agreements outside core issues of corporate structure or governance and granting injunctive relief on the basis that the only adequate remedy for denial of the minority's contractual veto power was undoing the breach and restoring the member to a pre-breach posture).

*Williams v. Litton*, 865 So.2d. 838 (La.App. 2003) (addressing scope of arbitration clause in LLC operating agreement which encompassed "[a]ny controversy or claim arising out of or relating to this Agreement" and rejecting argument that operating agreement was void as against public policy because it eliminated rights of LLC members afforded by statute, pointing out that rights provided by statute are merely default rights and thus, even assuming the operating agreement eliminated or restricted all of the rights granted to members by statute, it would not violate public policy).

*Crestman v. Independent Radiology Assoc., P. L.C.*, No. Civ.A. 03-1583, 2003 WL 22990413 (E.D.La. Dec. 17, 2003) (granting motion to dismiss for improper venue and holding that forum selection clause in LLC operating agreement was not against Louisiana public policy inasmuch as it was contained in an operating agreement for a professional LLC rather than an employment contract).

*Anderson v. Wilder*, No.E2003-00460-COA-R3-CV, 2003 WL 22768666 (Tenn.Ct.App. Nov. 21, 2003)(concluding that there was genuine issue of material fact as to whether transfer of members' LLC units violated right of first refusal provision in LLC operating agreement).

*In re Avalon Hotel Partners, LLC*, 302 B.R. 377 (Bankr.D.Or. 2003). The court determined that the chapter 11 bankruptcy of an Oregon LLC was outside the ordinary course of business, even for an entity in dissolution; therefore, the decision to file bankruptcy was a "Major Decision" requiring approval of members holding "in excess of 75% of the Ownership Interests" under the operating agreement. The adoption of a resolution by the LLC's manager was thus insufficient to authorize the filing. The bankruptcy filing was ratified, however, by a subsequent consent resolution approved by members holding more than 75% in interest. (The operating agreement originally provided that consent resolutions must be approved by all members to be effective, but the agreement was subject to amendment by the written consent of 75% in interest of the members, and it was so amended to authorize LLC action by consent resolutions approved by the appropriate percentage of members required for action under the operating agreement.) The court rejected the argument that the members had lost their voting rights under the operating agreement based upon their failure to make capital contributions. The court stated that "losing the right to vote on LLC governance issues is such a draconian penalty to impose on LLC members that its imposition must be based on the application of clear standards, with adequate notice." Under the operating agreement, loss of voting rights was tied to a failure to make agreed capital contributions "60 days after the Contribution Date." There was no evidence of any written notice setting a specific Contribution Date. Furthermore, the court pointed out that the party who argued that the members lost their voting rights had assumed that the members retained their voting rights on several occasions. The court was unwilling to find that the members lost their voting rights under such circumstances.

*Morgan v. Grace*, No. Civ.A. 20430, 2003 WL 22461916 (Del.Ch. Oct. 29, 2003). Members of two LLCs sought a determination that they were entitled to advancement of legal fees in connection with a pending civil action brought against them by another member in Delaware Superior Court. The court noted that the Delaware statute broadly enables LLCs to indemnify members and allows the contracting parties to address the extent of indemnification in their agreements. The court found the operating agreements to be clear and unambiguous. The court concluded that the



operating agreement of one of the LLCs clearly provided for the advancement of expenses. The provision required advancement to the “fullest extent permitted by applicable law” upon receipt of an undertaking to repay the amounts advanced if it were later determined that the person was not entitled to be indemnified. Thus, the LLC was required to advance the fees although it claimed that the members would not be entitled to indemnification if the allegations in the Superior Court action were eventually proven to be true. The operating agreement had an unusual provision requiring a plaintiff member to bear all the litigation costs of both sides in a suit brought against another member, but the court rejected the argument that the member who was the plaintiff in the Superior Court action was personally liable for the advancement of expenses. The operating agreement of the second LLC contained indemnification provisions but was silent on advancement; therefore, the court held that there was no obligation to advance expenses under that operating agreement.

***Schindler v. Niche Media Holdings, LLC***, 772 N.Y.S.2d 781 (N.Y.Sup. 2003) (declining to enjoin LLC’s payment of LLC manager’s legal expenses in defending against minority member’s claims, including claim for dissolution, where operating agreement indemnification provision required indemnification of LLC manager to the maximum extent permitted by the New York LLC act and there had been no final adjudication establishing that manager acted in bad faith, was dishonest, or personally gained a financial profit to which he was not entitled as the LLC’s CEO).

***Peters v. Milton Hall Surgical Associates, L.L.C.***, No. Civ.A. 03-1254, 2003 WL 22174274 (E.D. La. Sept. 11, 2003) (enforcing Georgia LLC operating agreement forum selection clause against Louisiana member and transferring case to Georgia).

***Love v. Fleetway Air Freight & Delivery Service, L.L.C.***, 875 So.2d 285 (Ala. 2003) (interpreting term “withdrawal” in LLC member agreement and LLC operating agreement and concluding that termination of manager’s employment did not constitute withdrawal as a member).

***Wisdom Import Sales Co., LLC v. Labatt Brewing Co., Ltd.***, 339 F.3d 101 (2d Cir. 2003) (upholding injunctive relief in favor of minority member of Delaware LLC based upon provision of LLC agreement granting veto power with respect to certain fundamental matters).

***Weinstock v. Lazard Debt Recovery GP, LLC***, No.Civ.A. 20048, 2003 WL 21843254 (Del.Ch. Aug. 8, 2003) (interpreting indemnification and advancement of expenses provisions of LLC agreements of LLC general partner of limited partnership fund and LLC investment manager and concluding that individual former managers were entitled to advancement under both agreements).

***Lamprecht v. Jordan, LLC***, 75 P.3d 743 (Idaho 2003) (interpreting withdrawal and buy-out provisions in operating agreement and concluding that former member was entitled only to the balance in his capital account as of the date his employment with the LLC terminated, but concluding LLC was not entitled to recover attorney’s fees from former member who did not prevail because operating agreement provided for recovery of attorney’s fees in suits between members rather than between the LLC and a member).

***Mills v. Baugher***, No. 21528-8-III, 2003 WL 21761817 (Wash.App. July 31, 2003) (holding that express terms of LLC operating agreement precluded separate implied in fact employment contract for additional payment for services rendered by member to LLC).

***Lynch v. Carriage Ridge, LLC***, No. 02-0528, 2003 WL 21706305 (Wis.App. July 24, 2003) (concluding that Management Fee Agreement did not violate provisions of LLC operating agreement prohibiting payment of compensation for management to managing members because Management Fee Agreement did not provide for compensation for management but rather provided for payment of commissions for development and sale of lots consistent with listing agreement referred to in operating agreement).

***Brazil v. Rickerson***, 268 F.Supp.2d 1091 (W.D. Mo. 2003). Brazil was a member of three LLCs, two of which were governed by identical operating agreements. The third LLC was governed by a slightly different operating agreement. Although there was some overlap in ownership, the members and ownership interests in the three LLCs varied. The defendants sent a notice of termination of Brazil’s membership in the LLCs pursuant to Article 7 of each operating agreement. The provisions of Article 7 of each agreement were not identical. Article 7 of two of the operating agreements provided for expulsion of a member, when, in the opinion of a majority in interest of the members, a member

has been “guilty of misconduct or act in any manner inconsistent with the good faith observable between Members to such an extent as to render it impracticable for the then members to carry on the Company business together.” Although an early draft of the third operating agreement contained identical language, that language was removed, and Article 7 of the third operating agreement only provided for expulsion of a “Designated Managing Member.” Brazil filed suit alleging various causes of action based on what he alleged was his wrongful expulsion from the LLCs. The court determined that the members had the power to expel Brazil under two of the operating agreements and that the requisite determination by the majority interest did not require a meeting or a vote. However, the court concluded that fact questions remained as to whether the majority in interest believed it was “impracticable” to continue to operate with Brazil; therefore, the court could not determine as a matter of law that the expulsion was wrongful or that fiduciary duties were breached. With respect to the third LLC, the court determined that the members did not have the power to expel Brazil. The operating agreement did not confer the power to expel a member in Brazil’s position, and the court concluded that oblique references to expulsion of a member in another agreement were not sufficient to provide for the affirmative power to expel members. Thus, the court concluded that Brazil’s expulsion from that LLC was wrongful.

*Alexander v. Minton*, 855 So.2d 94 (Fla.App. 2003) (holding that operating agreement did not “unreasonably restrict” member’s right to information or access to records and that dispute regarding member’s right to inspect LLC books and records was arbitrable under arbitration clause of LLC operating agreement providing for arbitration of “any controversy or dispute arising out of or relating to this Agreement or the breach thereof”).

*Radding v. Freedom Choice Mortgage, LLC*, 820 A.2d 317 (Conn.App. 2003). An LLC established a production bonus and profit-sharing program for certain of its employees including the plaintiff. The plaintiff executed certain documents in connection with the program and was provided copies of the LLC operating agreement and an amendment to the operating agreement listing the plaintiff and five other new members. The operating agreement stated that no member would be entitled to receive income from the production bonus or profit-sharing programs until the member had been a member for one full calendar year. The amendment to the operating agreement listing the plaintiff as a member was dated December 12, 1995, and the plaintiff signed other related documents in late December, 1995. On December 13, 1996, the plaintiff and the LLC’s principal owner had an argument that resulted in plaintiff’s termination of employment. The plaintiff’s right to remuneration under the bonus and profit-sharing program hinged on the effective date of the plaintiff’s admission as a member. The court analyzed the statutory provisions regarding admission of LLC members, the terms of the operating agreement, and the documents signed by the plaintiff and rejected the argument that the plaintiff’s admission was not effective until the plaintiff signed the documents related to his admission. The court held that the plaintiff became a member as of the date of the amendment to the operating agreement reflecting plaintiff’s admission as a member. The court also concluded that the plaintiff did not cease to be a member when his employment was terminated. The court examined the operating agreement and the statutory provisions regarding cessation of membership and concluded that the majority member’s removal of the plaintiff’s name from the operating agreement schedule of members did not constitute a vote by the majority member because it was not done in accordance with the voting procedures set forth in the operating agreement.

*KSI Rockville, LLC v. Eichengrun*, 760 N.Y.S.2d 520 (N.Y.A.D. 2 Dept. 2003). In an action for an accounting and dissolution of an LLC, the court determined that the managing member, who contributed only services rather than cash to the LLC, had no proprietary or financial interest in the LLC because the operating agreement required the members’ initial contributions to be made in the form of cash. The court construed ambiguities in the agreement regarding contributions against the managing member because he drafted the agreement. The managing member argued that he was to be compensated for his services and that such amount would be credited to his initial capital contribution; however, the operating agreement stated that the managing member was to be compensated in an amount to be determined from time to time by the members, and the record contained no evidence that the members consented to compensation at any time or in any amount.

*Pinnacle Data Services, Inc. v. Gillen*, 104 S.W.3d 188 (Tex.App. 2003). The articles of organization of a Texas LLC provided that the articles of organization (which provided for member-management) could be amended by the vote of two-thirds of the members while the regulations (operating agreement) provided that amendment of the articles of organization required the vote of 66 2/3% in interest. Two of the three members (constituting 50% in interest) voted to amend the articles of organization to change the LLC to a manager-managed LLC. The court held that the provision in the articles of organization controlled because the Texas LLC act provides that the regulations may contain any provisions for the regulation or management of the LLC not inconsistent with law or the articles of organization.

**Fillmore LLC v. Fillmore Machine & Tool Co.**, 783 N.E.2d 1169 (Ind.App. 2003) (concluding that there was no agreement that member transfer equipment and other assets to LLC, even though accountant prepared tax returns reflecting such transfer, where terms of written agreements, including operating agreement, made no mention of such transfer and reflected contributions of members consisting only of cash and accounts receivable).

**Cunningham Group Development Services, L.L.C. v. Richardson**, No. Civ. 03-2233 MJD/JGL, 2003 WL 1572010 (D.Minn. March 19, 2003) (concluding that plaintiffs had shown reasonable probability that they would prevail on merits of claims involving struggle for control of LLC and buy-out of interests of defaulting members under terms of operating agreement, but that plaintiffs had not shown imminent and irreparable harm so as to satisfy standard for injunctive relief).

**Apple Glen Crossing, LLC v. Trademark Retail, Inc.**, 784 N.E.2d 484 (Ind. 2003) (holding that “change orders” approved by LLC manager did not constitute “Major Decisions” requiring unanimous consent of members under LLC operating agreement).

**Connecticut Car Rental, Inc. v. Prime One Capital Co., LLC**, 247 F.Supp.2d 158 (D.Conn. 2003) (holding that member had actual authority to assign car lease agreements pursuant to the LLC formation agreement because the assignments did not fall within types of decisions requiring governing board approval).

**Jundt v. Jurassic Resources Development, North America, L.L.C.**, 656 N.W.2d 15 (N.D. 2003) (concluding that trial court erred in interpreting member control agreement when it found that member who invested no money in LLC was not entitled to any tax write-offs and that money investors were entitled to all the tax write-offs).

**Seed v. Astra Genstar Partnership**, No. C2-02-1143, 2003 WL 178790 (Minn.App. Jan. 28, 2003) (holding that change in ownership of 100% of membership interests in LLC which was member of second LLC was not “change in direct ownership of 50% or more of the voting and equity interests” of second LLC so as to trigger option under change in control clause of agreement because the owner of the membership interest in the second LLC did not change).

**Dover Place, LLC v. Coffey**, No. A098399, 2003 WL 178832 (Cal.App. Jan. 28, 2003) (concluding that member was not required to return distribution because it did not violate statutory restrictions and operating agreement could not reasonably be interpreted to impose greater restrictions than statute).

**Chase Manhattan Bank v. Iridium Africa Corp.**, 239 F.Supp.2d 402 (D. Del. 2002) (holding that lender could not sue members of an LLC on the basis that there were implied-in-fact contracts between the members and the LLC to make additional capital contributions upon lender’s demand when there was an express contract in the LLC agreement between the LLC and the members allegedly imposing the same obligation on the members).

**Imprimis Investors, LLC v. Insight Venture Management, Inc.**, 752 N.Y.S.2d 26 (N.Y.A.D. 1 Dept. 2002) (concluding that denial of summary judgment was proper because there were fact issues as to whether member’s right to profits under LLC agreement was dependent upon compliance by related entity (which was alleged to be alter ego of member) with consulting agreement).

**Hopson v. Bank of North Georgia**, 574 S.E.2d 411 (Ga.App. 2002). A member of a Georgia LLC pledged all of his interest as an LLC member to secure a bank loan. When the bank attempted to foreclose its security interest, the member argued that the operating agreement required consent of the other members for transfer of an interest in the LLC and that the bank had no security interest because of the bank’s failure to obtain consent of the other members. The operating agreement was quoted by the court as follows:

11.01 *General*. Except as otherwise provided herein, neither a Member nor an Economic Interest Owner shall have a right to:

(a) sell, assign, pledge, hypothecate, transfer, exchange or otherwise transfer for consideration, (collectively, “Sale”) ...

11.02 *Transferee Not Member in Absence of Unanimous Consent*.

(a) Notwithstanding anything contained herein to the contrary, if all of the remaining Members do not approve by unanimous written consent the proposed Sale or Gift of the Transferring Member’s Membership Interest or Economic Interest to a transferee or donee which is not a Member immediately prior to the Sale or Gift, then the proposed transferee or donee shall have no right to participate in the management of the business and affairs

of the Company or to become a Member. The transferee or donee shall be merely an Economic Interest Owner. No transfer of a Member's interest in the Company (including any transfer of an Economic Interest or any other transfer which has not been approved by unanimous written consent of the Members) shall be effective unless and until written notice ... has been provided to the Company and the non-transferring Member.

The court concluded that the operating agreement permitted the transfer of the economic interest and that the bank obtained a security interest in the member's economic interest which it was entitled to foreclose.

***TIC Holdings, LLC v. HR Software Acquisitions Group, Inc.***, 750 N.Y.S.2d 425 (N.Y. Sup. 2002), *aff'd*, 2003 WL 116115 (N.Y.A.D. 1 Dept. Jan. 14, 2003). The manager of a New York LLC executed an agreement obligating the LLC to transfer the LLC's assets to a new company being formed by one of the LLC's members. The manager took the position that he was authorized to execute the agreement based on the authority conferred in the operating agreement and the fact that he had e-mailed the members of the LLC that he would execute such an agreement if the members did not object in writing by a specified date. (The e-mail was sent on December 22, 2000, the Friday before a Christmas holiday weekend, and the deadline for objecting was December 28, 2000. The 87% member had advised the manager that he would be away on a family vacation and could not be reached between December 20th and 30<sup>th</sup>.) The court rejected the argument that the broad authority conferred in the operating agreement authorized the manager to transfer the assets because the manager's authority under the operating agreement was "subject in all cases to ... the requirements of applicable law." The New York LLC act requires a majority in interest of the members to approve a transfer of all or substantially all of an LLC's assets unless otherwise provided in the operating agreement. The only specific authority to transfer assets under the operating agreement was to dispose of assets in the ordinary course of business, and the transfer agreement in question was not in the ordinary course. The court rejected the argument that the manager was authorized to act by virtue of the failure of the members to object to the transfer. The court said the members' failure to object did not satisfy the provision of the operating agreement that approval for any matter coming before the members required the "affirmative vote" of a majority in interest of the members. Finally, the court rejected the argument of the manager and the member who sought to acquire the LLC assets through a new company that the operating agreement released them from any liability related to their action as a matter of law. The member relied upon a release relating to actions involving conflict of interests and breach of fiduciary duty. The court found, however, that the language indicated the scope of the release was confined to matters related to actions taken in connection with the member's dual involvement in the LLC and a specified company in which the LLC invested. Further, the court found the release would be ineffective if it was intended to release the member from all actions taken in his self-interest. For example, the court said, a release cannot reach willful and intentional misconduct. With respect to the manager's release claim, the court found that the manager's alleged misconduct fell outside the scope of the operating agreement's release of the manager because it involved conduct not properly within the capacity of manager (e.g., his attempt to bind the LLC to transfer its assets without authority). Further, the New York LLC act provides that an operating agreement may not eliminate or limit liability if a judgment establishes bad faith, intentional misconduct, or a knowing violation of law, which the allegations indicated. The manager's summary judgment claim for indemnification was rejected for similar reasons. The member's claim for indemnification was rejected because he cited no provision of the operating agreement providing for indemnification.

***Zanker Group, LLC v. Summerville at South Windsor***, No. CV00044637S, 2002 WL 31303566 (Conn.Super. Sept. 19, 2002). Zanker sought to enforce rights under the operating agreements of two LLCs formed to develop and operate managed care facilities. The court first found that LLC common units issued to Zanker subject to forfeiture in the event additional projects were not identified by Zanker became fully vested because Zanker identified such projects or was excused from doing so by the other member's repudiation of its agreement with Zanker. The court next determined that Zanker was entitled to a placement distribution based on the number of its vested common units. The operating agreement provided for the distribution "through an appropriate withdrawal from the funds of the Facility," and the facilities had operated at a loss. The court stated that Zanker was not entitled to payment if there were no available funds but would be entitled to a distribution based on its vested units when funds were available. Finally, the court interpreted a provision of the operating and development agreements that entitled Zanker to a distribution of 1% of the gross revenues in return for the provision of consulting services. The other member argued that a sentence describing consulting services as "professional consultation, marketing, and other clinical and administrative services, *as requested* by [the other member]" limited payment to requested services. The court disagreed and found that the fee was owed whether services were requested or not.

***Valinote v. Ballis***, 295 F.3d 666 (7<sup>th</sup> Cir. 2002). The Seventh Circuit Court of Appeals affirmed the district court's interpretation of the buy-sell provisions of an LLC's operating agreement. (The district court's opinion is found

at 2001 WL 1135871.) In brief, Valinote exited the LLC pursuant to a push-pull buy-sell provision under which Ballis, the other member of the LLC, set the price of the 50% interest that each held at a negative \$79,064. At the time, the LLC owed Valinote exactly that amount so that no money changed hands, and Ballis became the sole member of the LLC. When a bank pursued Valinote on his guaranty of LLC indebtedness, Valinote argued that he should be indemnified by Ballis. The court cited and discussed at length the terms of the operating agreement, contrasting the push-pull buy-sell provisions with provisions dealing with buy-out upon resignation of a member, and concluded that Valinote had no implied right of indemnification against Ballis. Valinote had a right against the LLC, but not against the other member. The court concluded that Valinote, as a former member, was not covered by a clause in the operating agreement that imposed cross-indemnity obligations between the members (interpreting “members” to include only current members). The court explained the negative price in terms of the increased risk each took by giving up the right of indemnification against the other.

*McGee v. Best*, 106 S.W.3d 48 (Tenn.Ct.App. 2002). The plaintiff was a one-third member and the Chief Manager of a Tennessee LLC. After disagreements arose, the members of the LLC other than the plaintiff took action by written consent to terminate the employment of the plaintiff and to exercise a buy-out right on the part of the LLC triggered by the termination of employment of a member. The members relied on a provision of the operating agreement under which a member’s employment could be terminated for “cause” (as defined in the agreement) and asserted the LLC’s right to repurchase the member’s interest under a valuation that applied when employment was terminated for cause. The plaintiff brought suit alleging various causes of action, including breach of fiduciary duty, fraud, breach of the operating agreement, and breach of the duty of good faith and fair dealing. The plaintiff alleged that the other members breached the operating agreement and the covenant of good faith and fair dealing by purporting to terminate him for cause when no cause existed and by attempting to acquire his membership interest. The court examined provisions of the LLC operating agreement and an employment agreement between the plaintiff and the LLC and concluded that these agreements did not alter the general rule of at-will employment in Tennessee. The court also noted that there is no implied covenant of good faith and fair dealing in an at-will employment contract in Tennessee. Thus, the court granted the defendants summary judgment on these claims. (The trial court based its dismissal of the good faith and fair dealing claim on its conclusion that “performance of a contract by its terms cannot be characterized as bad faith” and its assessment that the operating agreement allowed the very actions taken in terminating the plaintiff’s employment.) The court found that the plaintiff waived his argument that there had been a breach of contract based upon a conflict of interest in violation of the operating agreement. The court did conclude that there was a fact issue as to whether there was “cause” to terminate the employment of the plaintiff under the operating agreement, an issue that was relevant to the valuation of the plaintiff’s membership interest under the terms of the operating agreement.

*Ault v. Brady*, 37 Fed.Appx. 222, 2002 WL 1301520 (8<sup>th</sup> Cir. 2002). In this dispute between the members of an Arkansas LLC, the court interpreted provisions of the operating agreement regarding transfer of units and buy-out in connection with the termination of employment of the member. The three members of the LLC were Brady, Pierce, Ault, and an entity owned by Brady and Pierce. In the course of a power struggle between Brady and Pierce, Pierce transferred his units to Ault. Subsequent to the transfer, Brady notified Pierce that he was terminated and the LLC would exercise its option to purchase his units. When Ault revealed to Brady that he now owned Pierce’s units, Brady demanded Ault turn the units over to the LLC. Ault refused, and Brady terminated Ault and informed him that the LLC would buy back his units pursuant to the operating agreement. Ault took the position that the repurchase provision in the operating agreement did not apply to him because he was an independent contractor rather than an employee. The operating agreement provided that the LLC had the option to purchase a member’s units “upon the termination of employment” of a member. Ault also argued that the transfer of Pierce’s units to Ault was not subject to a provision of the operating agreement that restricted transfer and provided that a transferee who received units in violation of the restriction was not a “substituted member” and had only economic rights. Ault argued that, since he was already a member, the provision was inapplicable. The court of appeals held that the provision applied to any transfer, and the term “substituted member” could only logically be viewed in terms of units, i.e., a substituted member with respect to particular units. The court of appeals also rejected Ault’s interpretation of the repurchase provision. The court stated that whether Ault was an independent contractor rather than an employee was irrelevant to the application of the provision. In either case, he was “employed” by the LLC, and the provision applied whenever the “employment” of a member was terminated. Finally, the court rejected Ault’s challenge to the valuation of his units. Following the district court’s decision that the LLC had the right to purchase Ault’s units, the parties stipulated to a procedure for valuation. The procedure specified that each party would select a CPA, and the two CPAs chosen by the parties would select a third. The appraisal most different from the other two would be disregarded, and the value would be an average of the remaining two. Two of the CPAs valued Ault’s units at zero, and the CPA chosen by Ault valued his units at \$2 million.

Ault conceded that he was bound by the stipulation but argued the agreement carried with it an implied duty of good faith and fair dealing, which included the duty to follow customary and usual accounting standards. The court characterized Ault's argument as nothing more than an attack on the CPAs' methodology and concluded that Ault was bound by the stipulation under both contract and estoppel principles.

*Ward v. Hornik*, No. 02.944, 2002 WL 1199249 (E.D. Pa. June 3, 2002) (interpreting Pennsylvania LLC act and quorum and voting provisions of LLC operating agreement and concluding that suit brought on behalf of LLC was not authorized).

*Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 817 So.2d 1275 (La. App. 2002) (affirming trial court's grant of preliminary injunction where arbitration clause permitted one member to invoke arbitration without vote of membership in dispute over cash call and alleged transfer of interest inasmuch as penalty for refusal to arbitrate was forced sale of member's interest, which would constitute irreparable injury).

*Chase Manhattan Bank v. Iridium Africa Corporation*, 197 F.Supp.2d 120 (D. Del. 2002) (finding fact questions precluding summary judgment regarding the validity of amendment to and assignment of rights under reserve capital call provisions of Iridium LLC agreement).

*Estate of Murray*, No. 2000-T-0152, 2002 WL 550071 (Ohio App. April 12, 2002) (interpreting provisions of operating agreement governing buy-out of deceased member's interest and concluding that date of withdrawal was date of personal representative's distribution of the estate's interest in the LLC and that valuation of interest as recorded in "last regular accounting period" should be based on last monthly record preceding withdrawal, as phrase was ambiguous and extrinsic evidence indicated books were kept on monthly basis).

*Chase Manhattan Bank v. Iridium Africa Corporation*, No. 00-564-RRM(JJF)(MPT), 2002 WL 732070 (D. Del. April 5, 2002) (discussing reserve capital call provisions and provisions waiving objections to jurisdiction contained in Iridium LLC agreement in context of member's motion to set aside default judgment).

*Weinmann v. Duhon*, 818 So.2d 206 (La. App. 2002) (finding nothing unlawful in provision admitting persons as members on condition that they not vote to expel original members, provision that transfer of interest to spouse automatically conveys membership in LLC, provision requiring unanimous vote for expulsion, or provisions that effectively permitted one faction of members to fire general manager while other faction could re-hire him, but concluding that impasse created by such provisions justified judicial dissolution).

*NSJ Investors, LLC v. TH/North San Jose, LLC*, No. CIV. 01-1932PAMSRN, 2002 WL 334413 (D. Minn. Feb. 22, 2002) (interpreting provisions of operating agreement regarding approval required for commencement of litigation and employment of counsel and concluding that interpleader action to determine how to make distributions was in "ordinary course of business" thus not requiring approval of non-managing members to hire lawyer to pursue suit even though employment of counsel generally required approval of non-managing members under agreement).

*Concrete Company, Inc. v. MMC Holdings, Inc.*, 201 F.Supp.2d 1192 (M.D. Ala. 2001) (denying LLC member's requested stay of judgment pending appeal of court's interpretation of buy/sell provision, finding no indication that refusal to stay judgment would inflict irreparable harm on member).

*Coady v. Martin*, 784 A.2d 897 (Conn. App. 2001). The court held that the membership agreement on which the plaintiff based his claims was unenforceable due to lack of an essential term. The defendant (Martin) filed documentation with the Connecticut Secretary of State to establish an LLC, and the plaintiff (Coady) and Martin entered a written membership and subscription agreement. Under the agreement, Coady received a 50% interest in the LLC from Martin, but the agreement acknowledged that two other individuals involved in the project would receive interests in a lesser proportion at a later date. Prior to the agreement, discussions had been held, but the parties had been unable to agree on the precise percentages to which the other two individuals were entitled based upon their prior role in the project. The trial court held that the membership agreement was unenforceable because there had been no meeting of the minds and there was a lack of consideration. The court of appeals upheld the trial court's conclusion that the membership agreement was unenforceable for lack of an essential term, that is, delineation of the percentage of ownership interests of all of the parties. (Having upheld this conclusion, the court of appeals did not reach the issue of lack of consideration.)

***Pine Creek, LLC v. Pine Mount, LLC***, 558 S.E.2d 44 (Ga. App. 2001) (examining transfer restrictions in LLC operating agreement and concluding that there were fact issues as to whether operating agreement was violated).

***ESCA of Baltimore, LLC v. Colkitt***, 164 F. Supp.2d 584 (D. Md. 2001) (finding that there were fact issues as to whether an LLC member made a transfer of his membership interest for consideration in violation of transfer restrictions contained in the operating agreement).

***Stark v. Fuchs***, 764 N.E.2d 446 (Ohio App. 2001). Members representing 60% of the interests in an LLC attempted to remove the member who was serving as manager and appoint a new manager. The operating agreement (and Ohio LLC act) did not address the vote required to remove the manager. The incumbent manager argued that his removal required a unanimous vote of the members because the operating agreement appointed him as manager. The incumbent manager based his position on contract principles, arguing that the operating agreement was a contract that could only be modified with unanimous assent. The members who were trying to remove the manager argued that interpreting the agreement to require unanimous consent would defeat the provisions of the operating agreement that contemplated and referred to removal and election of managers and officers. The agreement had a provision that required the doctrine of cy pres to be applied to give effect as near as possible to the intent of the parties, and the court concluded that the only reasonable voting method that would give effect to the provisions on removal and election was a simple majority vote rule. The court also construed the agreement against the manager because he was the drafter.

***In re Utilimax.com, Inc.***, 265 B.R. 63 (Bankr. E.D. Pa. 2001). The debtor was one of approximately 180 members of an LLC that operated as a conduit for its members and was responsible for the bulk electric power system in a multi-state area. The LLC filed an involuntary petition of bankruptcy against the debtor based upon an unpaid obligation for goods sold and delivered. Issues included whether the claim asserted by the LLC was subject to a bona fide dispute and whether fellow members of the LLC could qualify as holders of claims against the debtor. The court discussed provisions of the LLC operating agreement regarding enforcement of obligations and concluded that the joining petitioners did not have “claims” and that conversations at a members committee meeting did not amount to a de facto amendment of the operating agreement.

***Flippo v. CSC Associates III, L.L.C.***, 547 S.E.2d 216 (Va. 2001). In addition to addressing breach of fiduciary duty and other issues in this case, the Virginia Supreme Court examined the meaning of two provisions in an LLC operating agreement relating to dissolution, continuation, and purchase of a member’s interest. Article 13 of the operating agreement provided for dissolution on the death, resignation, bankruptcy, or dissolution of a member unless the procedures of Article 9 were followed resulting in an election to continue the LLC. Article 9 provided that, on the death of a member, the remaining members could elect to purchase the interest of the deceased member or elect to continue the LLC. If the remaining members did not make “either of these elections” the LLC was dissolved. The court rejected the defendants’ argument that the “election” referred to in Article 13 referred only to the election to continue and did not include the election to buy the departed member’s interest. The supreme court rejected this argument and agreed with the trial court that either of the two elections referred to in Article 9 resulted in continuation of the LLC. The court relied upon general rules of contract construction and considered the purposes of the parties and the circumstances surrounding execution of the operating agreement, including the terms of a restated partnership agreement drafted for the partnership that was the predecessor to the LLC. (The court went on to uphold sanctions imposed upon the parties who alleged fraud and mutual mistake with respect to the inclusion of these terms in the operating agreement. The sanctions were based upon the fact that the parties who claimed they were misled had the assistance of “experienced” and “sophisticated” attorneys who specialize in this type of work. According to the trial court, it was “ridiculous” to say that the plaintiff could mislead such attorneys.)

***International Paper Company v. Androscoggin Energy LLC***, No. 00C 6215, 2001 WL 503058 (N.D. Ill. May 10, 2001). The plaintiff contracted with the defendant LLC for the defendant to provide an electric power facility at plaintiff’s mill, and the plaintiff argued that certain representations and warranties contained in the LLC operating agreement as well as a separate energy services agreement between the plaintiff and the LLC were false. The plaintiff, which was the parent company of one of three entity members of the LLC, sought to hold the other two members of the LLC liable for the alleged misrepresentations. The representations and warranties related to pending and threatened legal proceedings and compliance with laws and contracts. The court concluded that the representations and warranties in the operating agreement were not false, and the plaintiff could not rely on the LLC’s representations and obligations under the separate agreement to hold the other two members of the LLC liable under the operating agreement.

***Baker v. Jones & Henry Engineers, LTD***, No. L-00-1198, 2001 WL 304088 (Ohio App. March 30, 2001). A member of an engineering firm LLC sued for wrongful termination after the other members voted to terminate his employment and demanded he resell his membership interest. The plaintiff argued that termination of his employment was wrongful because the operating agreement and membership interest subscription agreement contractually obligated the LLC to retain him. The member based this argument on the inclusion of the phrase “long-term investment” in each of these agreements, which the member asserted was evidence that a member was entitled to employment until he voluntarily left the firm or retired. The court concluded that there was no evidence of an express or implied contract in this regard. The court also rejected other arguments based upon promissory estoppel, public policy and fraud.

***McDonald v. Miller***, No. 00AP-994, 2001 WL 300736 (Ohio App. March 29, 2001). Four individuals entered an operating agreement for an LLC that listed them as members and required that each of them contribute \$5,000 as an initial capital contribution. One of the individuals did not make the required contribution. The issue addressed by the court was whether the individual who failed to make the contribution was a member, and the court held that he was. The other members argued that he never became a member because of his failure to make the required contribution. The court, however, found that he was a member under the clear and unambiguous language of the operating agreement. The court pointed out that the operating agreement listed the individual as a member and presupposed that the person required to make the capital contribution was a member when it provided that “each Member shall contribute \$5,000 as the initial Capital Contribution.”

***Lieberman v. Wyoming.com LLC***, 11 P.3d 353 (Wyo. 2000). The court interpreted the Wyoming LLC act and the operating agreement of a Wyoming LLC to determine the rights of Lieberman, a dissociated member. Lieberman’s contribution upon formation of the LLC was documented at \$20,000, consisting of services rendered and to be rendered. When Lieberman was terminated as vice-president of the LLC, he served a notice of withdrawal and demand for the return of his share of the current value of the company, which he estimated at \$400,000. The remaining members avoided dissolution of the LLC by electing to continue the LLC and approved the return of Lieberman’s \$20,000 capital contribution. The court discussed a provision of the Wyoming LLC act that entitles a member to demand the return of the member’s capital contribution if the operating agreement does not prohibit or restrict the right. Since the LLC operating agreement did not restrict this right, Lieberman was entitled to the return of his \$20,000 contribution. The question remained whether he was entitled to receive any further distribution. A provision permitting a member to compel dissolution upon an unsuccessful demand for the return of the member’s contribution was not applicable since the LLC agreed to return Lieberman’s contribution. Noting the absence of a provision in the Wyoming LLC act governing dissociation, the court turned to various provisions of the operating agreement dealing with membership certificates, transfer of interest, quorum and voting and concluded that it remained unclear what became of Lieberman’s ownership interest beyond his capital contribution. Thus, the court remanded for a further determination in this regard.

***Suntech Processing Systems, L.L.C. v. Sun Communications, Inc.***, No. 05-99-00213-CV, 2000 WL 1780236 (Tex.App. Dec. 5, 2000). The minority member of a Texas LLC claimed that the majority member owed it a fiduciary duty as a matter of law. The case does not state whether the LLC was member-managed or manager-managed, but the articles of organization provided as follows: “Members of this Company have a duty of undivided loyalty to this Company in all matters affecting this Company’s interest.” The Texas LLC act provides: “To the extent that at law or in equity, a member, manager, officer, or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager, such duties and liabilities may be expanded or restricted by provisions in the regulations.” The court noted the absence of Texas case law on fiduciary duties of LLC members and looked to case law regarding fiduciary duties of shareholders of a closely held corporation. In prior cases, the court had held that co-shareholders of closely held corporations are not necessarily in a fiduciary relationship. Rather, the existence of a fiduciary relationship is a question of fact. The court applied the same reasoning and stated that it made no difference that the defendant was the majority member. The court pointed out the provision in the LLC’s articles of organization provided for a duty of loyalty to the LLC rather than between the members. The court said that neither the statute nor the provision in the articles authorized the court to find that there was a fiduciary relationship between the members as a matter of law, and the issue was remanded for determination by the factfinder.

***Lynch Multimedia Corp. v. Carson Communications, L.L.C.***, 102 F. Supp.2d 1261 (D. Kan. 2000). One of the members of a Kansas LLC sued another member and the member’s owners and agent for breach of the operating agreement and breach of fiduciary duty when they acquired other cable franchises rather than securing them for the LLC. The LLC operated a television cable system, and the operating agreement specified that if an opportunity to purchase certain cable television systems came to the attention of a member, the opportunity must first be offered to the LLC.



Another provision in the operating agreement stated that any member or manager was permitted to engage in other business ventures, and the LLC would have no rights in such regard. Robert Carson was trustee of the Robert Carson Trust, a 20% member of the LLC, as well as president and a manager of the LLC. In 1997, Carson informed representatives of Lynch Multimedia Corporation (Lynch), a 60% owner of the LLC, of the potential availability of certain cable systems. Lynch was receptive to exploring the opportunities. Over the next year, discussions and negotiations continued. At one point, a Lynch representative rejected the acquisition of the cable systems, but a couple of proposals were made a few months later in the fall of 1998. In the spring of 1999, Carson acquired the cable systems through his own entity. Lynch sued for breach of the operating agreement and breach of fiduciary duty. The court held that the operating agreement's requirement that certain opportunities be "offered" to the LLC contemplated only that the LLC be made aware of such opportunities, not that a formal offer be presented. The court concluded that Carson satisfied this requirement by making Lynch aware of the opportunities. The court rejected Lynch's claims that a formal meeting was required, noting that the LLC at all times operated on an informal basis with Lynch's acquiescence. The court also stated that the operating agreement's requirement that certain opportunities be offered to the LLC must be read in conjunction with the provision permitting members to engage in other ventures; therefore, it plainly was directed at permitting members to enter separate and additional business relations in the cable TV industry. The court thus granted summary judgment in favor of the defendants on both the breach of operating agreement and breach of fiduciary duty claims. The court said that Lynch had not articulated how the breach of fiduciary duty claims were distinguishable from the breach of operating agreement claims. The court cited the provision of the Kansas LLC act that permits members of an LLC to expand or restrict their duties and liabilities by agreement. Lynch argued this provision did not apply because it was passed after the LLC in this case was formed, but the court held otherwise, citing the legislature's intent that from January 1, 2000, the act shall apply to all LLCs formed in Kansas, whether formed before or after that date.

*Froelich v. Erickson*, 96 F. Supp.2d 507 (D. Md. 2000), aff'd, 5 Fed.Appx. 287 (4<sup>th</sup> Cir. 2001). The factual background of this case is rather complicated, but the claims involved assertions of fraud, breach of fiduciary duty, and breach of contract by Froelich, an ousted CEO and board member of a Maryland LLC. Froelich was also a member of the LLC who, along with other minority members, was cashed out in a squeeze-out merger following a reclassification of interests of the LLC approved by all members except Froelich. Two documents primarily governed the LLC's operations as an LLC. These documents were an Operating Agreement, which the court characterized as the LLC equivalent of a corporate charter, and a Members Agreement, which the court described as the equivalent of a stockholders' agreement. The operating agreement defined classes of preferred and common interests, the role and responsibility of the board, and the rights and duties of the members. The member agreement supplemented the operating agreement by specifically defining rights of members and restrictions on alienation of interests. The court summed up Froelich's claims as a challenge to "a handful of corporate actions taken by [the LLC's] Board and its Members." The court summed up the key issues in the case as follows: "(i) Did the corporate documents or Maryland corporate law authorize the Board to take the actions that Froelich challenges? (ii) If the Board or the Members had the power to act, by what standard (e.g., business judgment rule or fiduciary duty) should the Court review the Board's exercise of that power? and (iii) Did the Board meet the appropriate standard?" The court characterized the case as arising in the context of corporate decisions by the LLC's board of directors and applied the business judgment rule. The court noted that the LLC's operating agreement stated that the LLC's directors "are subject to the duties of a corporate fiduciary as defined by Maryland law;" thus, the court continued, the LLC board's decisions are measured against the business judgment rule "just as if [the LLC] were a traditional corporation, rather than an LLC." The court found no evidence that the board had acted in bad faith and concluded that the board's actions were protected by the business judgment rule. The court also concluded as follows: the LLC and majority member did not breach a duty of good faith and fair dealing (noting uncertainty under Maryland law as to whether there is a separate cause of action in this regard and stating that the duty in any event only prohibits a party from preventing the other party from performing under the contract); the majority member did not breach a fiduciary duty to Froelich by usurping a business opportunity (stating that a majority interest holder clearly owes the minority a fiduciary duty but finding no breach in view of the board's independent approval of the transaction); the reclassification did not breach the operating agreement or the member agreement (finding that the transaction fell outside a provision in the member agreement restricting redemptions and was governed by the operating agreement, which was amended in accordance with its terms to permit the reclassification). In Froelich's favor, the court found that the LLC owed Froelich severance pay under an employment agreement between the LLC and Froelich and that the reclassification and squeeze-out were related parts of a transaction in which Froelich had properly preserved his statutory right to an appraisal.

*VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000), aff'd, 781 A.2d 696 (Del. 2001). The court interpreted the provisions of an LLC agreement to determine what vote of the managers was required

to authorize a merger. The LLC agreement did not expressly state whether the managers must act unanimously or by majority vote. Under the LLC agreement the initial board of managers consisted of three managers, one of which the minority member had the right to appoint. The individual controlling the members owning a majority of the membership units had the right to appoint the other two managers. The agreement had language addressing how many managers the minority member could appoint if the size of the board was increased. The court noted that, if unanimity were required, the number of managers appointed by the minority member would be irrelevant because just one would suffice to veto any action. Further, the court noted that the agreement contained provisions requiring the consent of the minority member for certain transactions, a provision that would be unnecessary if unanimity of managers were required. The court also considered a provision permitting dissolution by vote of the managers or members holding 2/3 of the units. The court said it seemed unlikely the members designed the LLC agreement to permit members holding 2/3 of the units to dissolve the LLC but denied their appointed managers the power to reach the same result unless the minority manager agreed. The court rejected the argument that the members could generally act by majority vote while unanimity of managers was required. The practical effect of such an arrangement would have been that any matter on which the minority member disagreed would then be approved by a vote of the members. The court was confident such a result was not intended. Ultimately, the court determined, however, that the merger approved by a majority of managers should be rescinded because, while the merger was approved in accordance with the procedures required by the LLC agreement, it was in breach of the managers' fiduciary duties.

*Whitmore v. Hawkins*, No. 99-1443, 2000 WL 828285 (4<sup>th</sup> Cir. June 27, 2000). Whitmore was hired as chief operating officer of an LLC that operated fast food restaurants. He also received a 5% membership interest in the LLC and a 5% interest in a second LLC that was being formed to acquire additional fast food franchises. When Whitmore's employment was terminated, he claimed that he was entitled to receive the value of his membership interests under provisions of the Maryland LLC act in effect at the time. The court pointed out that the statutory provisions relied upon by Whitmore were default provisions and that the operating agreements of the two LLCs had provisions addressing withdrawal and buy-out. The court concluded that the termination of Whitmore's employment did not amount to a withdrawal or entitle Whitmore to receive the value of his interest under either of the operating agreements, thus Whitmore was not entitled to be bought out.

*Signal Capital Corporation v. Signal One, LLC*, No. E2000-00140-COA-R3-CV, 2000 WL 1281322 (Tenn. App. Sept. 7, 2000) (construing Acquisition Agreement, Employment Agreement, and LLC Agreement of Delaware LLC as interrelated and enforcing North Carolina forum selection clause in the Acquisition Agreement with respect to all the plaintiff's claims).

*Oil and Grease on Wheels, Inc. v. Medicare Supply Co. of New England*, No. C.A. 96-1789, 2000 WL 622584 (R.I. Super. April 26, 2000). A receiver was appointed for Medicare Supply Co. of New England ("Medicare"), a member of a Rhode Island LLC. Medicare argued that appointment of the receiver constituted an event of dissociation under the LLC agreement which in turn entitled Medicare to be bought out under the agreement. Events of dissociation included a change in control of a member of the LLC. Control was defined under the agreement as an ownership interest sufficient to carry any motion, the right to elect or appoint directors or managers, or the right to manage. The court concluded that a change in control had occurred because the shareholders, directors, and officers of Medicare no longer controlled Medicare. The court stated that control did not have to shift to the receiver for a change in control to occur; it was sufficient that those formerly in control no longer had control. The court rejected the argument that the receiver was an assignee but did accept that the receiver was analogous to a judgment or lien creditor of Medicare. As a type of lien creditor, the court said the receiver succeeded to the rights of the dissociated member to be bought out.

*Lindsay, Marcel, Harris & Pugh, L.L.C. v. Harris*, 752 So.2d 335 (La. App. 2000). Harris and Pugh gave notice of their withdrawal from their four-member law firm LLC and formed their own law firm. When the LLC filed suit against the withdrawn members, the withdrawn members answered and sought dissolution. The court of appeals determined that the withdrawn members had no right to seek judicial dissolution because the statute conferred no such right on former members. In addition, the court found no basis in the operating agreement for the withdrawn members to obtain dissolution. Included among the causes of dissolution listed in the operating agreement was "reduction in the number of Members to 1," but the court pointed out that two members remained after the withdrawal of the other members.

*McConnell v. Hunt Sports Enterprises*, 725 N.E.2d 1193 (Ohio App. 1999). This was the first case to address the fiduciary duties of members of an LLC to any significant degree. In this case, the court stated that members of an

LLC are in a fiduciary relationship that would generally prohibit competition with the business of the LLC. (The court did not directly address the management structure, but it appears that the LLC was member-managed. The opinion notes at one point that the operating agreement did not name any person or entity the operating or managing member of the LLC.) The court concluded, however, that members may contractually limit or define the scope of the fiduciary duties. Specifically, the court recognized the validity of a provision in the operating agreement of an Ohio LLC that permitted members to compete with the LLC. The court found support for its conclusion in the case law regarding partnerships and close corporations. The case involved a dispute between members of an LLC formed to pursue a professional hockey franchise for Columbus, Ohio. When some of the members objected to the proposed terms of a lease that was necessary to obtain ownership of the franchise, other members formed a separate ownership group that agreed to the lease and obtained the franchise. The court found the operating agreement clearly and unambiguously allowed the members to compete against the LLC and obtain the hockey franchise. The court rejected the argument that the provision in issue only allowed members to engage in other types of businesses. The court did indicate at a couple of points that action related to obtaining the franchise or “the method of competing” could constitute a breach of fiduciary duty if it amounted to “dirty pool,” but the court noted the trial court’s finding that the competing members had not engaged in any kind of willful misconduct, misrepresentation, or concealment. The court discussed several other provisions of the operating agreement as noted below.

The court concluded that the competing member’s conduct did not breach a provision of the operating agreement requiring unanimous consent of the members to do any act “that would make it impossible to carry on the ordinary business of the Company” because the provision only applied to actions taken “on behalf of the Company.” Forming the competing ownership group was not an action taken on behalf of the LLC.

The court also addressed provisions of the operating agreement regarding additional capital contributions. The operating agreement required consent of all members to call for additional capital and stated that members would have the opportunity, but not the obligation, to contribute if the members determined that additional capital was required to preserve and maintain the business. The court found that the competing member’s actions, including allegedly stating that he would attempt to block an effort to raise additional capital, did not breach the agreement.

The court found that the non-competing member breached the operating agreement by unilaterally undertaking litigation on behalf of the LLC without the requisite approval of the members. The member argued that his actions did not constitute willful misconduct and that the exculpation and indemnity provisions of the LLC protected him. However, the court found that the exculpation and indemnity provisions applied in the context of members carrying out their duties under the operating agreement and that there was no duty on the member’s part to unilaterally file the actions at issue. Furthermore, the court found the evidence indicated willful misconduct on the member’s part.

Finally, the court determined that the judicial dissolution of the LLC on the basis that it was no longer reasonably practicable to carry on the business in conformity with the LLC’s articles of organization and operating agreement was not “wrongfully caused” by the member who acted wrongfully in breaching the operating agreement and usurping control of the LLC. The reason it was no longer practicable to carry on the business was the LLC’s failure to obtain the hockey franchise rather than the wrongful conduct of a member. Thus, no member was precluded from participating in the winding up by the terms of the operating agreement that allowed only members who have not wrongfully caused dissolution to participate in winding up. The issue was moot, however, because there was a liquidating trustee appointed by the court.

*Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612 (Iowa 1999). JRJ Enterprises, Inc. (“JRJ”), a member of a Wyoming LLC involved in a Colorado casino operation, sued for anticipatory breach of a contract for the sale of JRJ’s membership interest in the LLC. The contract for the sale of the membership interest was captioned “Agreement for Sale of Stock” (“Stock Agreement”), and it contained a provision wherein JRJ warranted its membership units were not subject to any restrictions on transfer other than those set forth in the operating agreement or articles of organization of the LLC. This, the court concluded, incorporated by reference the provisions of the operating agreement restricting transfer of JRJ’s membership interest. Thus, interpretation of the Stock Agreement required the court to interpret restrictions on transfer in the LLC operating agreement as well. At issue were timing requirements of right of first refusal provisions in the operating agreement and requirements in the Stock Agreement regarding approval of the Colorado Gaming Division and closing of the sale. The court concluded that the deadline for closing the sale under the right of first refusal provisions did not constitute a deadline for purposes of the Stock Agreement because failure to close by that date would simply require that the membership interest would have to be offered to the LLC and remaining members again under the right of first refusal provision. Since the trial court had viewed the deadline under the right of first refusal provisions as the final deadline for performance of the sale under the Stock Agreement, the court remanded for further determinations relating to the anticipatory breach claim.

***Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenbaum and Walker, P.L.C.***, 599 N.W.2d 677 (Iowa 1999). A lawyer left his firm (a professional LLC) and went to another firm, and there was a dispute over the provision of the operating agreement dealing with benefits to be paid to a retiring member. The specific issue on appeal was whether the “continuation payments” under the operating agreement qualified as “retirement benefits” under Iowa DR 2-108(A). The payments were conditioned on the lawyer’s termination of the private practice of law in Iowa. The lawyer argued that this was an impermissible covenant not to compete. The court concluded that the provisions in this case (requiring ten years of service and sixty years of age or twenty-five years of service) clearly constituted a retirement plan, and the restriction on future practice was therefore valid, even though the plan applied to situations involving less than full retirement.

***Lusk v. Elliott***, No. Civ. A. 16326, 1999 WL 644739 (Del. Ch. Aug. 13, 1999). An LLC member (“Elliott”) assigned his 99% interest in the LLC to a family trust, and the 1% member (“Lusk”) claimed that he was the sole remaining member and manager on the basis that the assignment was not effective to transfer membership rights. The court determined that the assignment transferred Elliott’s membership along with his 99% financial interest. The operating agreement prohibited assignment of a member’s interest other than to another member; however, both members signed a consent to the transfer of Elliott’s 99% membership interest and agreed that the assignment would not constitute a prohibited assignment under the operating agreement. The parties agreed that the consent amended the prohibition on transfer in the operating agreement but disagreed as to whether the consent authorized the conveyance of Elliott’s membership along with the financial interest. Lusk relied upon the Delaware LLC act provisions that characterize an assignment as carrying only the financial interest of the member. Since the operating agreement did not define “assignment,” Lusk argued the court should look to the Delaware act for the effect of an assignment. The court disagreed. The court said that the consent and assignment indicated what was meant by the term “assignment” since the instruments referred to assignment of Elliott’s “entire undivided membership interest.” The court concluded that this language encompassed Elliott’s membership as well as his 99% ownership interest.

***Sherrets v. The Lund Company***, No. A-97-1350, 1999 WL 502138 (Neb. App. July 6, 1999). An LLC member who was bought out pursuant to a push-pull provision in the LLC operating agreement claimed that he was entitled to a portion of net rental income held by a third party under a property management agreement at the time of the closing of the sale of the member’s interest. The court examined the provisions of the operating agreement and the property management agreement and agreed that the member was entitled to recover a portion of the net rental. The court viewed the member as a third party beneficiary of the property management contract executed by the LLC and disagreed with the defendant’s argument that the member assigned his interest in the disputed funds when he sold his interest in the LLC.

***Clark v. Kelly***, No. C.A. 16780, 1999 WL 458625 (Del. Ch. June 24, 1999). This case was a dispute over who were the managers of a Delaware LLC, and the determinative issue was whether the transfer of all of the shares of a corporate member of the LLC to a trust was a “transfer” of an LLC interest within the meaning of the operating agreement. Plaintiff Clark, the sole shareholder of one of the members of the LLC claimed to be the sole manager of the LLC. The other member of the LLC was La Empresa De La Mar D’Oro, Inc. (“La Empresa”), a California corporation. The stock of La Empresa was titled in Danis at the time La Empresa became a member of the LLC. After formation of the LLC, Danis transferred the stock of La Empresa to a living trust of which Danis and his wife were the trustors and co-trustees. The issue was whether the transfer of the shares to the trust triggered a provision of the operating agreement requiring consent. If the transfer requiring consent occurred without such consent, the transferee’s status was that of a mere assignee. The definition of “transfer” under the operating agreement included a transaction whereby the equity owners of a member as of the date of the member’s admission to the LLC own less than 90% of the equity securities of the member after the transaction. The court determined that the transfer of the shares of La Empresa to the trust did not fall within the definition of a transfer under the operating agreement because the shares were community property under California law and Danis’s wife therefore had a 50% equitable interest in the shares before the transfer to the trust. The court rejected the plaintiff’s argument that the Delaware choice of law clause in the operating agreement, together with the internal affairs doctrine, required Delaware law to apply to the determination of ownership of the shares of La Empresa. According to the court, “Even if the choice of law provision in the Operating Agreement were found to govern, the internal affairs doctrine – which is a well-established principle of Delaware substantive law – requires this Court to look to the law of the state of incorporation to determine the relationships between the corporate entity and its directors, officers, and stockholders. . . . Because La Empresa is a California corporation, . . . this Court would be required to look to California law in all events to determine who are the equity owners of La Empresa.”

*Investcorp, LP v. Simpson Investment Company, L.C.*, 983 P.2d 265 (Kan. 1999). The members of a family-held Kansas LLC deadlocked on important management issues, and several members withdrew to effect a dissolution of the LLC. The withdrawing members claimed that they were entitled to participate in the LLC's winding up under the operating agreement. The LLC's remaining members argued that the withdrawing members were no longer members and thus had no right to participate in the LLC's winding up. Both factions relied on the operating agreement, which provided for the "members" to wind up and liquidate the LLC and defined "members" as "those persons who are members of the Company from time to time, including any Substitute Members." The district court found that the withdrawing members were not entitled to participate in the dissolution process. The Kansas Supreme Court, however, examined the use of the term "member" and "remaining member" in other provisions of the operating agreement and concluded that "[t]he many references to 'member' in the Act when coupled with the operating agreement suggest that the better view is that, in dissolution, 'member' includes a withdrawing member having a financial interest in the Company's assets." The court went on to state that control of the dissolution process resided in the managers of the LLC under the operating agreement and the Kansas act.

*Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999). One member of a two-member LLC brought suit against the other member, individually and derivatively on behalf of the LLC, seeking equitable damages for breach of fiduciary duty and various other claims. The Chancery Court dismissed the case for lack of subject matter jurisdiction because the LLC agreement contained a choice of forum provision directing that disputes be arbitrated or litigated in California. The Delaware Supreme Court addressed the following questions: (1) whether the LLC, which did not itself execute the LLC agreement, is bound by the provisions of the agreement, and (2) whether contractual provisions requiring all disputes be resolved by arbitration or litigation in California are valid under the Delaware LLC act. The court held that the LLC agreement was binding upon the LLC as well as its members and that the contractual forum selection provisions were valid. The court's opinion goes into the background and policy of the Delaware LLC act and the principle of freedom of contract under the act. The court rejected the argument that, because the LLC itself had not signed the LLC agreement, the LLC was not bound by the provisions of the agreement. According to the court, "It is the members who are the real parties in interest. The LLC is simply their joint business vehicle." The court also held that the Delaware LLC act permits parties to agree to vest exclusive jurisdiction of disputes (including derivative claims) in courts outside Delaware. The act expressly permits LLC members or managers to consent to the nonexclusive jurisdiction of litigation or arbitration in a state other than Delaware, to the exclusive jurisdiction of litigation in Delaware, or to the exclusivity of arbitration in a state other than Delaware. The court noted that the act is silent with regard to agreements vesting exclusive jurisdiction of litigation in courts outside of Delaware and concluded that the General Assembly would have prohibited such provisions if it had desired to do so.

*American Teletronics Long Distance, Inc. v. Equalnet Corporation*, No. 97 C 2842, 1999 WL 35787 (N.D. Ill. Jan. 13, 1999). Several parties entered various agreements concerning the sale and marketing of long distance services. It was contemplated that two of the parties would enter a purchase and sale agreement, but one of the parties decided against consummating the acquisition. The parties had executed an LLC operating agreement that referred to a letter of intent regarding the purchase and sale agreement. The issue was whether the plaintiff had alleged a valid and enforceable contract in order to state a valid claim for breach of contract. The answer essentially depended upon whether the LLC agreement incorporated by reference the purchase and sale agreement or was at least ambiguous in such respect. Considering the pleadings at an early stage in the proceedings, the court concluded that it was possible that the LLC agreement incorporated by reference the purchase and sale agreement or was ambiguous regarding the scope of the parties' contractual relationship; therefore, the court denied the defendant's motion to dismiss for failure to state a claim.

*Metro Riverboat Associates, Inc. v. Bally's Louisiana, Inc.*, 706 So.2d 553 (La. App. 1998). This case involved the interpretation of arbitration, change of control, and non-competition provisions of an LLC operating agreement. Two corporations, Metro Riverboat Associates, Inc. ("Metro") and Bally's Louisiana, Inc. ("Bally's"), were the members of an LLC formed to own and operate a gambling riverboat. Although Metro had a majority interest, the LLC operating agreement essentially required consent of both members for significant business decisions. When Bally's merged with Hilton Hotels Corporation, Metro claimed there was a "change of control" under the operating agreement that permitted most decisions to be made by a simple majority in interest. In addition, Metro claimed that Bally's was in violation of the non-competition provision of the operating agreement because Hilton Hotels had an ownership interest in another riverboat casino. Eventually, Bally's made demand on Metro for binding arbitration of their disputes, claiming that arbitration was required by the operating agreement. Metro filed suit asking for injunctive relief against Bally's. The court examined the arbitration provision of the operating agreement and concluded that the parties' disagreement was not within the scope of the arbitration clause covering "a dispute. . . with respect to the management and operation

of the Company.” Rather, their disagreement was over interpretation of contractual provisions that affected their respective management rights. The court next considered the meaning of the change in control and non-competition provisions and concluded that the limited evidence failed to meet the heightened burden of proof imposed on Metro to obtain injunctive relief. On appeal after remand, the court of appeals upheld the trial court’s grant of preliminary injunctive relief. *Metro Riverboat Associates, Inc. v. Bally’s Louisiana, Inc.*, 777 So.2d 578 (La. App. 2000). The Louisiana Supreme Court reversed, holding that Metro had failed to establish its injury could not be compensated by money damages. *Metro Riverboat Associates, Inc. v. Bally’s Louisiana, Inc.*, 789 So.2d 565 (La. 2001).

***Five Star Concrete, L.L.C. v. Klink***, 693 N.E.2d 583 (Ind. App. 1998). The court in this case determined that a dissociating member of an LLC had no right under the LLC’s operating agreement or the Indiana LLC act to receive a distribution of income allocated to the member for tax purposes, but the court refused to render summary judgment on the issue of whether the buy-out of the dissociating member divested the member of its entire economic interest in the LLC, in part because the meaning of the term “units” was not clear under the operating agreement. Klink, Inc. (“Klink”) and four other corporations formed an LLC. Klink withdrew from the LLC, and the remaining members decided to purchase Klink’s ownership units and continue the business. The members agreed that Klink would receive \$61,047.22 for the value of Klink’s “units.” After the end of Klink’s fiscal year, Klink was allocated its share of the LLC’s income for the portion of the year that Klink was a member. Klink asserted that it was entitled to a distribution in this amount. The court concluded that neither Indiana law nor the operating agreement gave a member a right to a distribution of income allocated to the member for income tax purposes. The remaining issue involved the meaning of the term “units” inasmuch as Klink’s units were bought out on its withdrawal. The LLC contended that Klink divested itself of its entire interest when it sold its units to the LLC. Klink argued that it sold less than all of its economic rights. Klink pointed to the operating agreement reference to a unit as “an interest in the Company representing a contribution to capital.” The LLC pointed out, however, that the operating agreement generally entitled each unit to a vote and a proportionate share of the LLC’s net income, gains, losses, deductions, and credits. The court concluded that fact issues precluded resolution of this issue by summary judgment. The court addressed as a separate issue the valuation method and whether it represented the fair market value of Klink’s entire interest. The court concluded that summary judgment was not appropriate on this issue either.

***Child Care of Irvine, L.L.C. v. Facchina***, No. Civ. A. 16227, 1998 WL 409363 (Del. Ch. July 15, 1998). This case involved a dispute between LLC members in which it was unclear whether the parties’ rights were governed by the shareholder agreement of the predecessor corporation, the default provisions of the Delaware LLC act, the merger agreement by which the predecessor corporation was converted to an LLC, or a draft LLC agreement never signed by the members. The plaintiff members of the LLC sought to remove the defendant member, Facchina, as manager of the LLC. The parties had originally formed the business as a Delaware corporation. The corporation was subsequently converted into an LLC by virtue of a merger of the corporation into a newly formed Delaware LLC which survived the merger. An LLC agreement for the new LLC was never signed. The plaintiffs claimed that the shareholder agreement of the predecessor corporation reflected the terms of the members’ agreement for the operation of the LLC. Alternatively, the plaintiffs relied upon the default right to remove a manager under the Delaware LLC act. Facchina claimed that a draft LLC agreement never signed by the members governed their relationship. Alternatively, Facchina claimed that the merger agreement itself was the LLC agreement. The court concluded that summary judgment for either side was inappropriate because there were sharply disputed facts and insufficient undisputed facts to support a legal ruling on the issues before the court. The court noted that both the shareholder agreement and the draft LLC agreement contained arbitration provisions and encouraged the parties to pursue arbitration in California.

***Goldstein and Price, L.C. v. Tonkin & Mondl, L.C.***, 974 S.W.2d 543 (Mo. App. 1998). This case involved interpretation of an LLC law firm’s operating agreement in order to resolve a dispute over the effective date of a member’s withdrawal and the withdrawn member’s rights with respect to certain fees received by the firm after the member’s withdrawal. The LLC in this case converted from a partnership in January 1994 and adopted the partnership agreement as the operating agreement until a new operating agreement could be prepared. In November 1994, before a new operating agreement was adopted, one of the members, Tonkin, advised other members of the firm that he intended to withdraw. He provided a written notice of withdrawal stating an effective date of December 31, 1994. The managing members concluded that the partnership agreement that served as the LLC’s operating agreement required Tonkin’s withdrawal on November 30, 1994. The agreement stated that “withdrawal shall become effective on the last day of the calendar month after service of the withdrawal notice. . .” The court found this language by itself to be ambiguous but interpreted it with reference to other parts of the agreement and concluded that withdrawal was effective November 30, 1994. The parties also had a disagreement as to the withdrawn member’s share of certain fees received by the firm after

Tonkin's withdrawal. The court looked to the operating agreement as controlling but found no provision addressing work in progress in the withdrawal context. Thus, under the terms of the written agreement, Tonkin was not entitled to any portion of the disputed fee. However, the court concluded that the parties orally modified the operating agreement regarding the fee in question by agreeing to treat the fee as an account receivable. The agreement provided for allocation of accounts receivable, and Tonkin was awarded his share under the agreement. The court rejected Tonkin's claims against the firm for breach of fiduciary duty. The court stated that the record supported the trial court's findings that the firm did not conceal assets, interfere with client relationships, defame members of the withdrawing member's new firm, or "act in other ways that would warrant a finding of breach of fiduciary duty."

*Zaugg & Zaugg Architects v. Wagner*, No. 96-CA-117-2, 1997 Ohio App. LEXIS 3987 (Ohio App. Aug. 8, 1997). Six parties embarked on a venture to build a residential golf course development. Two of the parties, John Zaugg and Marion Zaugg, had an architectural partnership and rendered substantial architectural services toward development of the project. About a year after the Zauggs began working on the venture, the group decided to form an LLC, and articles of organization were filed. A draft operating agreement was circulated among the members but was not signed. A few months later, the parties met to sign the latest draft of the operating agreement, but only three members signed it. The Zauggs' bill for architectural services became a source of contention, and the Zauggs withdrew from the LLC. The LLC claimed that the withdrawal was wrongful under the terms of the operating agreement. The Zauggs were among the members who signed the operating agreement, thus the LLC argued the Zauggs were bound. The court found, however, that the agreement was not a final, binding agreement since all of the members had not agreed to its terms. Thus, the Zauggs were permitted to withdraw by the default provisions of the Ohio LLC act.

*Bubbles & Bleach, LLC v. Becker*, No. 97 C 1320, 1997 WL 285938 (N.D. Ill. May 23, 1997). The court determined that an arbitration clause in an LLC's operating agreement was not binding on the individual members of the LLC. Faye Becker ("Becker"), the managing member of Bubbles & Bleach, LLC ("B & B"), misappropriated funds of B & B. B & B brought suit in Illinois against Becker under the authority of one of its members for conversion, breach of fiduciary duty, and fraud. The Operating Agreement of B & B and the First Amended and Restated Limited Liability Company Agreement of B & B each contained an arbitration clause that required that arbitration of "any matters arising out of the terms and conditions of the underlying agreement" take place in Wisconsin and be governed by Wisconsin law. Becker moved for dismissal based upon the arbitration clause. The court concluded that neither the Operating Agreement nor the Amended and Restated Limited Liability Company Agreement of B & B was binding upon B & B. The agreements provided that they were binding upon the "parties" to such agreement; however, the term "parties" was not defined. The court noted that the LLC Agreement provided that it was by and among the members of the LLC and that the signatories to each agreement were the members. Further, it noted that the Wisconsin LLC act defines the term "operating agreement" as a written agreement among the members. The court found that there was no indication that the legislature intended to bind LLCs as entities distinct from their constituent members. According to the court, the fact that B & B was a beneficiary of and subordinate to some of the terms of the agreements did not bind B & B under the arbitration clause. Rather, the arbitration clause was binding only upon the parties to the agreement.

*MHM/LLC, Inc. v. Horizon Mental Health Management, Inc.*, No. 14465, 1996 WL 592719 (Del. Ch. Oct. 3, 1996), *aff'd*, 694 A.2d 844 (Del. 1997). The plaintiff sold its interest in an LLC to the parent company of the other member of the LLC. The plaintiff claimed that the terms of the LLC agreement and another agreement regarding the LLC entitled it to a pro rata payment of LLC funds for the portion of the month before the close of the sale of its interest in the LLC. The defendant claimed that the terms of the agreements precluded such a distribution. The court examined various provisions of the agreements and concluded that one of the provisions required a distribution to be made to the plaintiff for its pro rata share of the LLC's net cash flow for the month at issue.

#### **Y. Transfer of Interest; Buy-Out of Member**

*Trebilcock v. Elinsky*, No. 1:05 CV 2428, 2007 WL 1567710 (N.D. Ohio May 25, 2007) (rejecting member's claim that he was owed "market value" for his interest in LLC where member contracted to sell his interest for specific purchase price, and commenting that member would not be permitted to do end-run around agreement to sell interest for particular sum under guise of breach of fiduciary duty claim).

*Meyercord v. Curry*, 832 N.Y.S.2d 29 (N.Y. A.D. 1 Dept. 2007) (holding employee could not show detrimental reliance in connection with alleged fraudulent inducement to sign agreement to sell interest in LLC where he had

previously signed and was bound by operating agreement requiring him to sell his interest upon termination of employment).

***Smith v. Davis Surgical Center, LLC***, 472 F.Supp.2d 1316 (D. Utah 2007) (interpreting “provided, however, that, except” clause of buy-sell provision of operating agreement).

***Fausak’s Tire Center, Inc. v. Blanchard***, \_\_ So.2d \_\_, 2006 WL 3526744 (Ala. Civ. App. 2006) (holding that oral buy-sell agreement regarding LLC interest was not unenforceable under statute of frauds even though LLC’s sole asset was real property because LLC interest is personal property).

***Decker v. Decker***, 726 N.W.2d 664 (Wis. App. 2006). The court of appeals withdrew an earlier opinion in this matter and issued this opinion in which it interpreted the buy-sell and dissolution provisions of an LLC operating agreement and sought to clarify the trial court’s order in the case. Two brothers who operated an investment real estate business through a number of LLCs had reorganized the business by entering an operating agreement and forming a new LLC. Pursuant to the operating agreement, one of the brothers, David, sent a letter to the other brother, Frederick, declaring that a deadlock existed. Frederick did not believe that a deadlock existed and requested that David rescind the letter, but David refused. Frederick then made an offer under the operating agreement to buy David’s interest in the business for \$7,000,000, approximately two to three times what the interest was worth. David accepted the offer, but Frederick never closed on the purchase. David brought an action asserting, among other claims, a claim for damages for breach of contract based on Frederick’s failure to buy his interest. The court found that Frederick’s offer and David’s acceptance did not amount to an enforceable contract because the operating agreement provided for the consequences of a failure to close. Upon Frederick’s failure to close, David had an opportunity to purchase Frederick’s interest for the same amount, and if David did not do so, the operating agreement provided for dissolution of the LLC. The court found that Frederick “sabotaged” the buy-out provisions of the operating agreement by making an outrageous offer of \$7,000,000 with no intention of closing on the purchase and knowing David would not be inclined to pay that amount, leaving dissolution as the specified remedy under the operating agreement when a purchase and sale of one of their interests did not occur. Frederick argued that the LLC’s properties must then be sold on the open market and that the court-appointed receiver was not authorized to accept an offer by David. The court, however, concluded that the receiver was authorized to accept David’s offer because it was no different from any third party offer except that it was for “all the property interests held by Frederick and it eliminated costly real estate commissions and other miscellaneous costs.” The trial court’s order stated that the receiver was authorized to assign to David all *interests* in the LLC not already owned by David, but the court of appeals stated that only a sale of *assets* would be consistent with the dissolution procedure specified in the operating agreement. Therefore, the court of appeals ordered that the trial court’s order be corrected to refer to a sale of the LLC’s assets. The court stated that a sale of assets would presumably have negative tax consequences for David, but the court found that the operating agreement permitted no other result. The court said that a sale of LLC interests could only occur under the operating agreement when the LLC was to continue to exist as a viable company. Under the circumstances, the operating agreement mandated dissolution and a sale of the assets. Furthermore, the court concluded that the trial court had statutory authority to order the sale to David under the judicial dissolution provisions of the Wisconsin LLC statute. These provisions authorize a court decree of dissolution when a controlling member engages in “oppressive” conduct, and the court found Frederick’s “obstructionist” tactics showed a lack of good faith and constituted oppression.

***Ramco Oil & Gas, Ltd. v. Anglo-Dutch (Tenge) L.L.C.***, 207 S.W.3d 801 (Tex. App. 2006) (interpreting LLC operating agreement transfer restrictions requiring unanimous member approval for transfer of interest).

***Actives International, LLC v. Reitz***, 2006 WL 1688144 (N.J. Super. Ch. June 16, 2006) (enforcing agreement of counsel setting date of dissociation as valuation date for determining “fair value” in buy out of dissociated member of LLC).

***Minnesota Invco of RSA #7, Inc. v. Midwest Wireless Holdings, LLC***, 903 A.2d 786 (Del. Ch. 2006) (holding right of first refusal provision was not triggered by purchase of member’s LLC interest because drag along rights in another agreement controlled over right of first refusal provision and right of first refusal provision was eliminated from operating agreement by valid amendment of operating agreement).

***Eureka VII LLC v. Niagra Falls Holdings LLC***, 899 A.2d 95 (Del. Ch. 2006). The plaintiff, a 50% member of a Delaware LLC, sought a declaration that the other member had relinquished its membership and retained only



economic rights based on the defendant's alleged material breaches of the LLC agreement. The court determined that the defendant breached the LLC agreement in at least four instances and that the defendant's breaches resulted in a creditor of the defendant's owner gaining ownership and control of the defendant in violation of anti-transfer provisions in the LLC agreement. The LLC agreement was silent as to the remedy for breach, and the plaintiff suggested a remedy inspired by Section 18-702(b)(3) of the Delaware Limited Liability Company Act, which provides that a member ceases to be a member upon assignment of all the member's LLC interest. Although the statutory provision did not literally apply to the case, the court found that the requested remedy was entirely fitting and proportionate because the defendant's breaches implicated a clear contractual goal reflected in the LLC agreement (i.e., to ensure that the plaintiff did not find itself owning the LLC with a partner it did not approve), and the breaches led to the very situation the agreement was designed to prevent. The court also noted that the defendant's breaches ultimately had the same effect as a complete assignment for the benefit of creditors, a type of assignment that results in the divestiture of membership under the Delaware LLC statute. The court clarified that the remedy it crafted left the defendant with the rights of an assignee, which do not include the right to participate actively in management, but do include the right to bring a derivative action if the plaintiff were to breach a contractual or fiduciary duty to the LLC. The court dismissed the defendant's counterclaims, which were based on the plaintiff's failure to close on the purchase of the defendant's interest after the defendant invoked a buy/sell provision. The court concluded that the defendant was in no equitable position to invoke the buy/sell provision because the defendant had committed an undisclosed material breach of the LLC agreement prior to invoking the buy/sell provision. Furthermore, there was no evidence that the defendant was able to buy out the plaintiff at the price set by the defendant. Finally, the court dismissed the defendant's claim for dissolution. According to the court, the only plausible basis for dissolution was that continuation of the LLC was impracticable because the plaintiff and the party controlling the defendant did not get along. The impasse no longer existed, however, because the defendant was left with only the rights of an assignee, and the plaintiff had authority to act as the sole member.

*Maryville Hotel Associates I, LLC v. IHC/Maryville Hotel Corp.*, No. 4:05 CV 1493 DDN, 2006 WL 1237264 (E.D. Mo. May 5, 2006) (interpreting right of first refusal provision in operating agreement and concluding acquisition of corporate grandparent of member did not violate provision as indirect transfer by member).

*In re First Connecticut Consulting Group, Inc.*, 340 B.R. 210 (D. Vt. 2006) (concluding that failure to transfer certificates to individuals who claimed to be LLC owners did not defeat their ownership in absence of provisions in operating agreement or statute specifying procedures for transfer of ownership and based on analogy to closely held corporation context in which stock certificate is not required to establish ownership).

*Galaz v. Oshita*, Nos. B181278, B187428, 2006 WL 1461134 (Cal. App. 2 Dist. May 30, 2006) (affirming trial court's rescission of agreement transferring member's membership interests in two LLCs on ground of lack of consideration where purchase price was to be paid out of amounts owed purchaser by LLC, and purchaser misrepresented amount owed her by LLC).

*In re Delta Star Broadcasting, L.L.C.*, No. Civ.A. 05-2783, 2006 WL 285974 (E.D. La. Feb. 6, 2006). Three individuals each owned a 1/3 membership interest in a Louisiana LLC, and one of the members (Bruno) filed a voluntary Chapter 11 bankruptcy petition on behalf of the LLC. Bruno argued he was authorized to file the petition because his action was approved by two of the three members (Bruno and Treen) based on a consent signed by Treen the day before the bankruptcy filing. The third member (Starr) argued that Treen had transferred his membership interest to an entity controlled by Starr eleven days prior to the filing of the bankruptcy and that Treen's consent to the bankruptcy filing was thus ineffective. The court discussed the effect of the transfer of Treen's membership interest and pointed out that the Louisiana LLC statute provides that the assignee of a membership interest is not entitled to exercise the rights of a member until admitted by unanimous consent of the other members. Under the statute, the assignor member remains a member unless and until the assignee becomes a member. Starr argued that, because of his control of the assignee, it was not really a "new" member and was entitled to exercise the membership rights associated with the membership interest transferred. Starr also argued that if the entity that was the assignee was not entitled to exercise the membership rights, Starr was entitled to do so when the entity later transferred the interest to him. The court rejected these arguments and concluded Treen retained his membership, including his right to vote, because the entity to which Treen assigned his interest was not admitted as a member. The court did not need to reach the issue of whether Starr later acquired Treen's membership rights when the entity transferred the interest to Starr because that transfer did not occur until after the bankruptcy filing.

**Lazard Freres & Co., LLC v. West\*Group Properties, LLC**, 799 N.Y.S.2d 437 (N.Y. A.D. 1st Dept. 2005) (interpreting agreement for marketing of interests in LLC to cover redemption of interests after termination of agreement and concluding investment bank was not entitled to recover transaction fee from LLC but was entitled to recover partial transaction fee from member).

**American Anglian Environmental Technologies, L.P. v. Environmental Management Corp.**, 412 F.3d 956 (8<sup>th</sup> Cir. 2005) (concluding distribution ordered by selling member prior to closing of push-pull buy-sell transaction was not authorized by operating agreement and rejecting purchasing member's claim that discrepancies revealed in audit performed after closing of purchase entitled purchasing member to adjustment of purchase price).

**P & O Ports Florida, Inc. v. Continental Stevedoring & Terminals, Inc.**, 904 So.2d 507 (Fla. App. 2005). An LLC member made an offer to buy the other member's interest for \$7.2 million under a push-pull provision of the operating agreement that provided the offer "shall be at such price and upon on such terms and conditions as the Offering Member deems appropriate." One of the terms of the offering member's offer was that the parties would waive a non-compete provision in the operating agreement. The non-compete provision in the operating agreement provided that it would "survive any transfer or other disposition by any member of its Membership Interest" and would terminate upon the first to occur of three years after the purchase of the membership interest or the dissolution of the LLC. The offeree member did not want to sell its interest for only \$7.2 million dollars and did not want to pay the other member that amount without the protection of the non-compete provision. The offeree member brought a declaratory judgment action to have the condition waiving the non-compete provision declared void. The court of appeals determined there was evidence to support the lower court's finding that the parties did not intend to permit an offer to be conditioned on the waiver of the non-compete provision. Though the trial court resolved the issue by striking the improper condition and declaring the offer valid without the condition, the court of appeals concluded the offer was void, and it was error to judicially modify material terms of the offer in order to turn an otherwise invalid offer into a valid one.

**Larkin v. Della Ratta**, No. C-2002-80480.BC., 2005 WL 914372 (Md. Cr. Ct. March 24, 2005) (noting "fair value" buyout in Maryland limited partnership statute was added to parallel LLC statute and concluding minority and marketability discounts should not apply to calculation of "fair value" under limited partnership act).

**Riverside Surgery Center, LLC v. Methodist Health Systems, Inc.**, No. W2004-01195-COA-R3-CV, 2005 WL 588224 (Tenn. App. March 14, 2005) (interpreting right of first refusal provision in LLC operating agreement and concluding provision was triggered by intent on part of member to transfer its interest, thus member who entered option/first refusal agreement with third party evidenced its intent to transfer interest and was obligated to offer the interest to the other member under the operating agreement).

**KBL Properties, LLC v. Bellin**, 900 So.2d 1160 (Miss. 2005). The court found that the buy-sell offer of one of the members to another member complied with the terms of a push-pull provision in the operating agreement. The offeree member challenged the offeror member's offer under the push-pull provision based on another provision of the operating agreement prohibiting the offering member from conveying any interest in the LLC without consent of the other members. The court found that the consent provision did not apply to the offer itself under the push-pull provision and that, if the offeree member agreed to purchase the offering member's interest, such acceptance would satisfy the consent requirement.

**RAF Enterprises LLC v. Trident LLC**, No. A098529, 2005 WL 348955 (Cal. App. 1 Dist. Feb. 14, 2005) (concluding trial court did not err in submitting instruction that LLC member may not unreasonably or arbitrarily withhold consent to transfer where operating agreement provided for transfer of member's ownership interest only with consent of the non-transferring member).

**RTS Landfill, Inc. v. Appalachian Waste Systems, LLC**, 598 S.E.2d 798 (Ga. App. 2004) (holding right of first refusal in purchase agreement permitting seller of LLC to repurchase LLC if third-party offered to buy LLC or membership interest was unenforceable because its duration was unlimited discount of \$500,000 below third-party offer was not supported by legitimate business purpose).

**Kinkle v. R.D.C., L.L.C.**, 889 So.2d 405 (La. App. 2004). A deceased LLC member's personal representative brought an action to establish the estate was entitled to its proportionate share of distributions of surplus income since the death of the member and to an accounting. Prior to the member's death, he received monthly distributions from the

LLC, but following his death the LLC did not make distributions to his estate. The LLC countered that the estate was merely an assignee, the LLC was not required to admit the personal representative as a member, and the estate was only entitled to receive the value of the deceased member's interest as of the date of his death. The court examined the terms of the operating agreement, which provided that the death of a member would not dissolve the LLC as to the other members if two-thirds of the voting interest of the remaining members approved the reconstitution and continuation of the LLC. Upon dissolution, the operating agreement required the LLC to execute and file a statement of intent to dissolve and liquidate as set forth in the operating agreement. The court found that the LLC did not dissolve because the remaining members voted to continue and did not file a statement of intent to dissolve. The court found no provision or procedures in the operating agreement for the liquidation of a deceased member's interest outside the dissolution context. The court stated the members could have easily so provided, but did not and were bound by the agreement. The court further noted that the default provisions of the statute in effect in 1996 when the LLC was organized did not provide for the liquidation of a deceased member's interest. The court concluded that the deceased member's personal representative was an assignee pursuant to the provisions of the LLC statute, and was entitled only to receive such distributions, to share in such profits or losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled and to the extent assigned. The court held the personal representative was thus entitled to annual allocations and distributions as provided in the operating agreement. If the members voted to make the distributions monthly, rather than annually, she was entitled to the monthly distributions. The court denied the personal representative's request for an accounting because the statute does not confer information and inspection rights on an assignee.

***Bartfield v. RMTS Associates, LLC***, 783 N.Y.S.2d 560 (N.Y. A.D. 1 Dept. 2004) (affirming trial court's conclusion that assignment of LLC member's interest to his wife was valid where there was no operating agreement in place prohibiting assignment and the assignment was otherwise permitted by statute).

***One to One Interactive, LLC v. Landrith***, 18 Mass.L.Rptr. 85, 2004 WL 1689790 (Mass. Super. 2004) (finding term sheet regarding redemption of LLC interest was a contract that was breached and was not superseded by Amended and Restated Limited Liability Company Agreement).

***Vaughn v. Electronic Technologies International, LLC***, 675 N.W.2d 810 (Wis. App. 2004). An LLC member asserted that he agreed to sell his membership interest back to the LLC under economic duress because the LLC threatened to terminate a manufacturer's representative agreement under which the member acted as the LLC's representative in the southeast. The court concluded the LLC had the legal right to terminate the manufacturer's representative agreement, and the pressure applied by threatening to do so was not wrongful. Whether the operating agreement conferred the right to redeem the member's interest was not material to the member's claim of duress because the member testified his reason for selling his membership interest was the threat of termination of the manufacturer's representative agreement. The involuntary redemption provision of the operating agreement thus never became applicable.

***Lieberman v. Wyoming.Com LLC***, 82 P.3d. 274 (Wyo. 2004). A withdrawn member of a Wyoming LLC demanded payment of the value of his share of the current value of the LLC. Because the Wyoming LLC act does not provide for the fate of a withdrawn member's equity interest in an LLC, the court looked to the operating agreement to determine if it contained provisions relevant to the withdrawn member's interest. The court reviewed provisions addressing capital accounts, distributions, membership certificates, transfer, and voting and concluded that there simply was no provision mandating a liquidation or buy-out of a withdrawn member's interest. The court noted that the transfer provisions in the operating agreement clearly contemplated a situation where a person could be an equity owner but not a member and found no reason to treat a withdrawing member any differently. Thus, the withdrawn member was no longer a member but retained his equity interest in the LLC.

***In re The IT Group, Inc., Co. (The IT Group, Inc., Co. v. The Shaw Group Inc.)***, 302 B.R. 483 (D.Del. 2003). After filing bankruptcy, the debtors, members of a Delaware LLC, attempted to transfer their rights under the LLC operating agreement to another member. The court upheld the bankruptcy court's conclusion that the debtors could not transfer their membership rights without the consent of the other members, that the debtors could assign their economic rights subject to a right of first refusal of the members in the operating agreement, and that a default provision under the operating agreement was unenforceable as an ipso facto clause. The default provision in issue affected the debtors' economic interest in the LLC. If the clause providing that the debtors' bankruptcy constituted a default was enforceable, another member was entitled to buy out the debtors' interest at an amount equivalent to the value of their accrued capital

account on the date of their bankruptcy petition. If the debtors were not in default, the other member was not entitled to exercise its buy out rights, and the debtors' economic interest would be their ongoing rights to profits and losses from the LLC. The court rejected the argument that the default provision was enforceable under Section 365(e)(2)(A). Because the Delaware LLC act permits the assignment of a member's economic interest and does not excuse the members from rendering performance to an assignee, the court concluded that Section 365(e)(2)(a) did not apply and the default provision was unenforceable as an ipso facto clause. The court concluded that the right of first refusal provision was enforceable and was not an ipso facto clause because it was triggered by a transfer and not by bankruptcy. The court also rejected the argument that the right of first refusal was an unenforceable restraint on assignment under Section 365(f). Finally, the court rejected the argument that public policy militated against enforcement of the right of first refusal because the procedures implicated by the right of first refusal were too onerous. The court did not regard the issues related to allocation of the purchase price of the debtors' economic interest as rendering the right of first refusal unenforceable.

*Anderson v. Wilder*, No.E2003-00460-COA-R3-CV, 2003 WL 22768666 (Tenn.Ct.App. Nov. 21, 2003)(concluding that there was genuine issue of material fact as to whether transfer of members' LLC units violated right of first refusal provision in LLC operating agreement).

*Lamprecht v. Jordan, LLC*, 75 P.3d 743 (Idaho 2003) (interpreting withdrawal and buy-out provisions in operating agreement and concluding that former member was entitled only to the balance in his capital account as of the date his employment with the LLC terminated).

*Eikon Street Manager, L.L.C. v. LSF King Street Manager, L.L.C.*, 109 S.W.3d 762 (Tex.App 2003). Two groups of entities, Lone Star and Eikon, were members of an LLC with a push-pull buy-sell provision. Either party could invoke the provision by notice to the other member in which the invoking member set forth an amount (the "Stated Amount") which represented the price at which the invoking member would be willing to purchase all the assets of the LLC as if the invoking member were a hypothetical third party proposing to purchase the assets of the LLC. The agreement set forth a formula for calculating the value of each member's interest based on the Stated Amount. After the invoking member gave notice to the other member, the other member could elect to buy the invoking member's interest or sell its own interest to the invoking member. Eikon invoked the buy-sell provision, and Lone Star accepted the Stated Amount proffered by Eikon but believed that Eikon had miscalculated the price. Lone Star agreed to buy Eikon's interest and tendered a check for the full amount claimed by Eikon for its interest, but reserved its right to contest the amount. While the LLC agreement required Lone Star to provide a 10% cash deposit on acceptance of the offer, Lone Star placed a cashier's check in escrow for a portion of the deposit and a letter of credit for the remainder of the deposit. Eikon brought suit alleging that Lone Star had breached the agreement by failing to deliver the cash deposit and seeking liquidated damages under the agreement and attorney's fees. Lone Star counterclaimed for declaratory judgment requiring Eikon to sell its interest pursuant to the agreement. The court concluded that Lone Star's interpretation of the purchase price provisions of the agreement was correct and that Lone Star had the right to accept the offer and reserve its rights as it had done. The court concluded that Eikon did not have the right to liquidated damages. With respect to the deposit requirement, the court determined that questions regarding compliance with this requirement were only relevant in the event that the purchase of the interest did not close. Since the closing occurred, the question did not need to be addressed.

*Seed v. Astra Genstar Partnership*, No. C2-02-1143, 2003 WL 178790 (Minn.App. Jan. 28, 2003) (holding that change in ownership of 100% of membership interests in LLC which was member of second LLC was not "change in direct ownership of 50% or more of the voting and equity interests" of second LLC so as to trigger option under change in control clause of agreement because the owner of the membership interest in the second LLC did not change).

*Jundt v. Jurassic Resources Development, North America, L.L.C.*, 656 N.W.2d 15 (N.D. 2003). In the context of certain disputes among the members of an LLC the members told the trial court that they wanted to sever their relationship. At a hearing, an attorney for one of the defendants stated that the members did not want the LLC liquidated because it would cause tax problems for all the members. The trial court found that the members could no longer work together and that liquidation and partition were not appropriate equitable remedies. The court concluded that cancellation of the plaintiff's minority interest in the LLC in exchange for payment of \$300,000 by the defendant members was the appropriate equitable remedy. The defendants appealed the judgment requiring them to buy out the plaintiff. The court of appeals reversed, holding that none of the statutory grounds for equitable relief or court-ordered sale of membership interests had been established and the trial court was thus without authority to grant such relief.

**Cogniplex, Inc. v. Hubbard Ross, L.L.C.**, No. 00 C 7463, 2002 WL 31834895 (N.D. Ill. Dec. 17, 2002) (finding disputed facts precluded summary judgment on parties' claims relating to dissociation and buyout agreement).

**Sage v. Radiology and Diagnostic Services, L.L.C.**, 831 So.2d 1053 (La.App. 2002). Three radiologists who had been practicing together formed a Louisiana LLC and apparently continued their practice in the LLC. The court stated that the LLC adopted no operating agreement, and the members paid nothing for their interests. The members received monthly distributions based on a number of factors. Several years later, one of the members withdrew and demanded a distribution in the amount of the fair market value of his interest, which was the default statutory measure of the distribution owed a withdrawing member at the time of the member's withdrawal. However, on the date the LLC was formed, the LLC act provided that a withdrawing member was entitled to a distribution in the amount of the "fair market value as of the date contributed of the member's capital contribution." The LLC argued that the law in effect at the time the LLC was formed governed the amount of the withdrawing member's distribution and that the member was not entitled to any distribution because his contribution was zero. The court agreed that the law in effect at the time of the formation of the LLC controlled. The court reasoned that the amendment was a substantive change that should be given prospective effect only because it changed the existing rights and interests of a withdrawing member. Further, the court concluded that application of the amended law would impair the obligations created under the contract entered by the members when they formed the LLC, and the Louisiana LLC act provides that amendments will not impair the obligations of any contract existing when the amendment goes into effect.

**Hopson v. Bank of North Georgia**, 574 S.E.2d 411 (Ga.App. 2002). A member of a Georgia LLC pledged all of his interest as an LLC member to secure a bank loan. When the bank attempted to foreclose its security interest, the member argued that the operating agreement required consent of the other members for transfer of an interest in the LLC and that the bank had no security interest because of the bank's failure to obtain consent of the other members. The operating agreement was quoted by the court as follows:

11.01 *General*. Except as otherwise provided herein, neither a Member nor an Economic Interest Owner shall have a right to:

(a) sell, assign, pledge, hypothecate, transfer, exchange or otherwise transfer for consideration, (collectively, "Sale") ...

11.02 *Transferee Not Member in Absence of Unanimous Consent*.

(a) Notwithstanding anything contained herein to the contrary, if all of the remaining Members do not approve by unanimous written consent the proposed Sale or Gift of the Transferring Member's Membership Interest or Economic Interest to a transferee or donee which is not a Member immediately prior to the Sale or Gift, then the proposed transferee or donee shall have no right to participate in the management of the business and affairs of the Company or to become a Member. The transferee or donee shall be merely an Economic Interest Owner. No transfer of a Member's interest in the Company (including any transfer of an Economic Interest or any other transfer which has not been approved by unanimous written consent of the Members) shall be effective unless and until written notice ... has been provided to the Company and the non-transferring Member.

The court found that the operating agreement permitted the transfer of the economic interest and concluded that the bank obtained a security interest in the member's economic interest which it was entitled to foreclose.

**Schwegman v. Howard**, 2002 WL 31247084 (Tenn.Ct.App. Oct. 8, 2002). Schwegman sued Howard for breach of an agreement to assign 10% of Howard's interest in an Indiana LLC to Schwegman. Howard executed an assignment of 10% of his interest in the LLC to Schwegman, and Schwegman received a copy of the LLC operating agreement and a consent to membership. The consent to membership was signed by Howard but not the other two members of the LLC. The operating agreement did not alter the Indiana default rule requiring unanimous consent to admit an assignee as a member. Howard argued that the contemporaneous documents rule required the assignment and consent be read together and that unanimous consent of the members was a condition precedent for Schwegman to receive an interest in the LLC. Schwegman argued that there is a difference between assignment (pursuant to which an assignee is entitled only to receive distributions) and transfer of an LLC interest (pursuant to which the transferee is admitted as a member) and that assignment is allowed under the Indiana LLC act unless prohibited by the operating agreement. The court concluded that whether the agreement was an assignment or transfer could only be determined after a hearing on the merits.

**Kosoy v. Kieselstein-Cord**, No. 01 CIV. 7102(HB), 2002 WL 24313 (S.D. N.Y. Jan. 9, 2002). An LLC member (Kosoy) sued a third party (Kieselstein-Cord) who allegedly orally agreed that he would purchase a membership interest from Kosoy and assume responsibility for managing the LLC's business. The LLC operating agreement had a push-pull

buy-sell provision, and Keiselstein-Cord allegedly agreed that if Kosoy would buy the membership interest of the other member, Keiselstein-Cord would then purchase the interest from Kosoy. The court concluded the agreement lacked essential terms, in particular, a purchase price or a mechanism for its determination. (As put by the court, the agreement was no more than an offer to purchase what was formerly the other member's interest "at an unspecified time, in an unspecified manner, and for an unspecified price, and then at an unspecified time, assume responsibility for operating the boutique" operated by the LLC.)

**Pettit v. HFP, LLC**, No. 231078, 2002 WL 31188479 (Mich. App. Oct. 1, 2002). Pettit worked at Burns Clinic Medical Center, P.C. (the "P.C.") and was a member of an LLC that owned the real property where the clinic operated. Pettit sued the LLC for amounts he claimed were owed for the buy-back of his interest in the LLC and compensation for the discounting of his interest in the LLC's predecessor partnership. The court upheld summary judgment in favor of Pettit. First, the court determined that, while there was evidence of financial difficulties of the LLC at a later date, there was no evidence that the buy-out payment would have violated the statutory restriction on distributions at the time it was owed. Next the court interpreted an arrangement whereby the P.C. made two of three payments recommended by the LLC to compensate physicians who had bought into the LLC at a greater price than physicians who were subsequently admitted. The court interpreted this arrangement to involve a legal obligation on the part of the LLC to make the payments.

**Ault v. Brady**, 37 Fed.Appx. 222 (8<sup>th</sup> Cir. 2002). In this dispute between the members of an Arkansas LLC, the court interpreted provisions of the operating agreement regarding transfer of units and buy-out in connection with the termination of employment of the member. The three members of the LLC were Brady, Pierce, Ault, and an entity owned by Brady and Pierce. In the course of a power struggle between Brady and Pierce, Pierce transferred his units to Ault. Subsequent to the transfer, Brady notified Pierce that he was terminated and that the LLC would exercise its option to purchase his units. When Ault revealed to Brady that he now owned Pierce's units, Brady demanded Ault turn the units over to the LLC. Ault refused, and Brady terminated Ault and informed him that the LLC would buy back his units pursuant to the operating agreement. Ault took the position that the repurchase provision in the operating agreement did not apply to him because he was an independent contractor rather than an employee. The operating agreement provided that the LLC had the option to purchase a member's units "upon the termination of employment" of a member. Ault also argued that the transfer of Pierce's units to Ault was not subject to a provision of the operating agreement that restricted transfer and provided that a transferee who received units in violation of the restriction was not a "substituted member" and had only economic rights. Ault argued that, since he was already a member, the provision was inapplicable. The court of appeals held that the provision applied to any transfer, and the term "substituted member" could only logically be viewed in terms of units, i.e., a substituted member with respect to particular units. The court of appeals also rejected Ault's interpretation of the repurchase provision. The court stated that whether Ault was an independent contractor rather than an employee was irrelevant to the application of the provision. In either case, he was "employed" by the LLC, and the provision applied whenever the "employment" of a member was terminated. Finally, the court rejected Ault's challenge to the valuation of his units. Following the district court's decision that the LLC had the right to purchase Ault's units, the parties stipulated to a procedure for valuation. The procedure specified that each party would select a CPA, and the two CPAs chosen by the parties would select a third. The appraisal most different from the other two would be disregarded, and the value would be an average of the remaining two. Two of the CPAs valued Ault's units at zero, and the CPA chosen by Ault valued his units at \$2 million. Ault conceded that he was bound by the stipulation but argued the agreement carried with it an implied duty of good faith and fair dealing, which included the duty to follow customary and usual accounting standards. The court characterized Ault's argument as nothing more than an attack on the CPAs' methodology and concluded that Ault was bound by the stipulation under both contract and estoppel principles.

**Valinote v. Ballis**, 295 F.3d 666 (7<sup>th</sup> Cir. 2002). The Seventh Circuit Court of Appeals affirmed the district court's interpretation of the buy-sell provisions of an LLC's operating agreement. In brief, Valinote exited the LLC pursuant to a push-pull buy-sell provision under which Ballis, the other member of the LLC, set the price of the 50% interest that each held at a negative \$79,064. At the time, the LLC owed Valinote exactly that amount so that no money changed hands, and Ballis became the sole member of the LLC. When a bank pursued Valinote on his guaranty of LLC indebtedness, Valinote argued that he should be indemnified by Ballis. The court cited and discussed at length the terms of the operating agreement, contrasting the push-pull buy-sell provisions with provisions dealing with buy-out upon resignation of a member, and concluded that Valinote had no implied right of indemnification against Ballis. Valinote had a right against the LLC, but not against the other member. The court concluded that Valinote, as a former member, was not covered by a clause in the operating agreement that imposed cross-indemnity obligations between the members

(interpreting “members” to include only current members). The court explained the negative price in terms of the increased risk each took by giving up the right of indemnification against the other.

*Pine Creek, LLC v. Pine Mount, LLC*, 558 S.E.2d 44 (Ga. App. 2001). In this dissent and appraisal proceeding, the court examined the transfer restrictions in an LLC operating agreement and concluded that there were fact issues as to whether the operating agreement was violated.

*ESCA of Baltimore, LLC v. Colkitt*, 164 F. Supp.2d 584 (D. Md. 2001) (finding that there were fact issues as to whether an LLC member made a transfer of his membership interest for consideration in violation of transfer restrictions contained in the operating agreement).

*Flippo v. CSC Associates III, L.L.C.*, 547 S.E.2d 216 (Va. 2001). In addition to addressing breach of fiduciary duty and other issues in this case, the Virginia Supreme Court examined the meaning of two provisions in an LLC operating agreement relating to dissolution, continuation and purchase of a member’s interest. Article 13 of the operating agreement provided for dissolution on the death, resignation, bankruptcy, or dissolution of a member unless the procedures of Article 9 were followed resulting in an election to continue the LLC. Article 9 provided that, on the death of a member, the remaining members could elect to purchase the interest of the deceased member or elect to continue the LLC. If the remaining members did not make “either of these elections” the LLC was dissolved. The court rejected the defendants’ argument that the “election” referred to in Article 13 referred only to the election to continue and did not include the election to buy the departed member’s interest. The court agreed with the trial court that either of the two elections referred to in Article 9 would result in continuation of the LLC. The court relied upon general rules of contract construction and considered the purposes of the parties and the circumstances surrounding execution of the operating agreement, including the terms of a restated partnership agreement drafted for the partnership that was the predecessor to the LLC. (The court went on to uphold sanctions imposed upon the parties who alleged fraud and mutual mistake with respect to the inclusion of these terms in the operating agreement. The sanctions were based upon the fact that the parties who claimed they were misled had the assistance of “experienced” and “sophisticated” attorneys who specialize in this type of work. According to the trial court, it was “ridiculous” to say that the plaintiff could mislead such attorneys.)

*Whitmore v. Hawkins*, No. 99-1443, 2000 WL 828285 (4<sup>th</sup> Cir. June 27, 2000). Whitmore was hired as chief operating officer of an LLC that operated fast food restaurants. He also received a 5% membership interest in the LLC and a 5% interest in a second LLC that was being formed to acquire additional fast food franchises. When Whitmore’s employment was terminated, he claimed that he was entitled to receive the value of his membership interests under provisions of the Maryland LLC act in effect at the time. The court pointed out that the statutory provisions relied upon by Whitmore were default provisions and that the operating agreements of the two LLCs had provisions addressing withdrawal and buy-out. The court concluded that the termination of Whitmore’s employment did not amount to a withdrawal or entitle Whitmore to receive the value of his interest under either of the operating agreements; therefore, Whitmore was not entitled to be bought out.

*Oil and Grease on Wheels, Inc. v. Medicare Supply Co. of New England*, No. C.A. 96-1789, 2000 WL 622584 (R.I. Super. April 26, 2000). A receiver was appointed for Medicare Supply Co. of New England (“Medicare”), a member of a Rhode Island LLC. Medicare argued that appointment of the receiver constituted an event of dissociation under the LLC agreement which in turn entitled Medicare to be bought out under the agreement. Events of dissociation included a change in control of a member of the LLC. Control was defined under the agreement as an ownership interest sufficient to carry any motion, the right to elect or appoint directors or managers, or the right to manage. The court concluded that a change in control had occurred because the shareholders, directors, and officers of Medicare no longer controlled Medicare. The court stated that control did not have to shift to the receiver for a change in control to occur; it was sufficient that those formerly in control no longer had control. The court rejected the argument that the receiver was an assignee but did accept that the receiver was analogous to a judgment or lien creditor of Medicare. As a type of lien creditor, the court said the receiver succeeded to the rights of the dissociated member to be bought out.

*Fausel v. JRJ Enterprises, Inc.*, 603 N.W.2d 612 (Iowa 1999). JRJ Enterprises, Inc. (“JRJ”), a member of a Wyoming LLC involved in a Colorado casino operation, sued for anticipatory breach of a contract for the sale of JRJ’s membership interest in the LLC. The contract for the sale of the membership interest was captioned “Agreement for Sale of Stock” (“Stock Agreement”) and it contained a provision wherein JRJ warranted its membership units were not subject to any restrictions on transfer other than those set forth in the operating agreement or articles of organization of the LLC.

This, the court concluded, incorporated by reference the provisions of the operating agreement restricting transfer of JRJ's membership interest. Thus, interpretation of the Stock Agreement required the court to interpret restrictions on transfer in the LLC operating agreement as well. At issue were timing requirements of right of first refusal provisions in the operating agreement and requirements in the Stock Agreement regarding approval of the Colorado Gaming Division and closing of the sale. The court concluded that the deadline for closing the sale under the right of first refusal provisions did not constitute a deadline for purposes of the Stock Agreement because failure to close by that date would simply require that the membership interest would have to be offered to the LLC and remaining members again under the right of first refusal provision. Since the trial court had viewed the deadline under the right of first refusal provisions as the final deadline for performance of the sale under the Stock Agreement, the court remanded for further determinations relating to the anticipatory breach claim.

***Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenbaum and Walker, P.L.C.***, 599 N.W.2d 677 (Iowa 1999). A lawyer left his firm (a professional LLC) and went to another firm, and there was a dispute over the provision of the operating agreement dealing with benefits to be paid to a retiring member. The specific issue on appeal was whether the "continuation payments" under the operating agreement qualified as "retirement benefits" under Iowa DR 2-108(A). The payments were conditioned on the lawyer's termination of the private practice of law in Iowa. The lawyer argued that this was an impermissible covenant not to compete. The court concluded that the provisions in this case (requiring ten years of service and sixty years of age or twenty-five years of service) clearly constituted a retirement plan, and the restriction on future practice was therefore valid, even though the plan applied to situations involving less than full retirement.

***Lusk v. Elliott***, No. Civ. A. 16326, 1999 WL 644739 (Del. Ch. Aug. 13, 1999). An LLC member ("Elliott") assigned his 99% interest in the LLC to a family trust, and the 1% member ("Lusk") claimed that he was the sole remaining member and manager on the basis that the assignment was not effective to transfer membership rights. The court determined that the assignment transferred Elliott's membership along with his 99% financial interest. The operating agreement prohibited assignment of a member's interest other than to another member; however, both members signed a consent to the transfer of Elliott's 99% membership interest and agreed that the assignment would not constitute a prohibited assignment under the operating agreement. The parties agreed that the consent amended the prohibition on transfer in the operating agreement but disagreed as to whether the consent authorized the conveyance of Elliott's membership along with the financial interest. Lusk relied upon the Delaware LLC act provisions that characterize an assignment as carrying only the financial interest of the member. Since the operating agreement did not define "assignment," Lusk argued the court should look to the Delaware act for the effect of an assignment. The court disagreed. The court said that the consent and assignment indicated what was meant by the term "assignment" since the instruments referred to assignment of Elliott's "entire undivided membership interest." The court concluded that this language encompassed Elliott's membership as well as his 99% ownership interest.

***Sherrets v. The Lund Company***, No. A-97-1350, 1999 WL 502138 (Neb. App. July 6, 1999). An LLC member who was bought out pursuant to a push-pull provision in the LLC operating agreement claimed that he was entitled to a portion of net rental income held by a third party under a property management agreement at the time of the closing of the sale of the member's interest. The court examined the provisions of the operating agreement and the property management agreement and agreed that the member was entitled to recover a portion of the net rental. The court viewed the member as a third party beneficiary of the property management contract executed by the LLC and disagreed with the defendant's argument that the member assigned his interest in the disputed funds when he sold his interest in the LLC.

***Clark v. Kelly***, No. C.A. 16780, 1999 WL 458625 (Del. Ch. June 24, 1999). This case was a dispute over who were the managers of a Delaware LLC, and the determinative issue was whether the transfer of all of the shares of a corporate member of the LLC to a trust was a "transfer" of an LLC interest within the meaning of the operating agreement. Plaintiff Clark, the sole shareholder of one of the members of the LLC claimed to be the sole manager of the LLC. The other member of the LLC was La Empresa De La Mar D'Oro, Inc. ("La Empresa"), a California corporation. The stock of La Empresa was titled in Danis at the time La Empresa became a member of the LLC. After formation of the LLC, Danis transferred the stock of La Empresa to a living trust of which Danis and his wife were the trustors and co-trustees. The issue was whether the transfer of the shares to the trust triggered a provision of the operating agreement requiring consent. If the transfer requiring consent occurred without such consent, the transferee's status was that of a mere assignee. The definition of "transfer" under the operating agreement included a transaction whereby the equity owners of a member as of the date of the member's admission to the LLC own less than 90% of the equity securities of the member after the transaction. The court determined that the transfer of the shares of La Empresa



to the trust did not fall within the definition of a transfer under the operating agreement because the shares were community property under California law and Danis's wife therefore had a 50% equitable interest in the shares before the transfer to the trust. The court rejected the plaintiff's argument that the Delaware choice of law clause in the operating agreement, together with the internal affairs doctrine, required Delaware law to apply to the determination of ownership of the shares of La Empresa. According to the court, "Even if the choice of law provision in the Operating Agreement were found to govern, the internal affairs doctrine – which is a well-established principle of Delaware substantive law – requires this Court to look to the law of the state of incorporation to determine the relationships between the corporate entity and its directors, officers, and stockholders. . . . Because La Empresa is a California corporation, . . . this Court would be required to look to California law in all events to determine who are the equity owners of La Empresa."

*March Trading, Inc. v. Sloan*, 25 Conn.L.Rptr. 339, 1999 WL 732955 (Conn. Super. Aug. 30, 1999). The plaintiff brought a bill of discovery action against a member of an LLC seeking sworn copies of the member's membership certificate giving notice of a pledge of the membership interest. Under an agreement between the member and the plaintiff, the member was to pledge a 20% LLC interest as partial security for a promissory note. The agreement also required the member to place a legend on the certificate indicating that the interest had been pledged. When the member refused to provide the plaintiff proof that the language had been placed on the certificate, the plaintiff brought this action. The court found that the plaintiff was entitled to maintain the bill of discovery seeking proof of compliance with the agreement.

*Five Star Concrete, L.L.C. v. Klink*, 693 N.E.2d 583 (Ind. App. 1998). The court determined that a dissociating member of an LLC had no right under the LLC's operating agreement or the Indiana LLC act to receive a distribution of income allocated to the member for tax purposes, but the court refused to render summary judgment on the issue of whether the buy-out of the dissociating member divested the member of its entire economic interest in the LLC, in part because the meaning of the term "units" was not clear under the operating agreement. Klink, Inc. ("Klink") and four other corporations formed an LLC. Klink withdrew from the LLC, and the remaining members decided to purchase Klink's ownership units and continue the business. The members agreed that Klink would receive \$61,047.22 for the value of Klink's "units." After the end of Klink's fiscal year, Klink was allocated its share of the LLC's income for the portion of the year that Klink was a member. Klink asserted that it was entitled to a distribution in this amount. The court concluded that neither Indiana law nor the operating agreement gave a member a right to a distribution of income allocated to the member for income tax purposes. The remaining issue involved the meaning of the term "units" inasmuch as Klink's units were bought out on its withdrawal. The LLC contended that Klink divested itself of its entire interest when it sold its units to the LLC. Klink argued that it sold less than all of its economic rights. Klink pointed to the operating agreement reference to a unit as "an interest in the Company representing a contribution to capital." The LLC pointed out, however, that the operating agreement generally entitled each unit to a vote and a proportionate share of the LLC's net income, gains, losses, deductions, and credits. The court concluded that fact issues precluded resolution of this issue by summary judgment. The court addressed as a separate issue the valuation method and whether it represented the fair market value of Klink's entire interest. The court concluded that summary judgment was not appropriate on this issue either.

#### **Z. Improper Distribution or Failure to Distribute**

*Kranz v. Koenig*, 484 F.Supp.2d 997 (D. Minn. 2007) (holding that LLC's judgment creditors lacked standing to assert illegal distribution claims under Minnesota LLC Act, which provides that member who receives distribution in violation of statute is liable "to the limited liability company, its receiver or other person winding up its affairs").

*Hofmesiter Family Trust v. FGH Industries, LLC*, No. 06-CV-13984-DT, 2007 WL 1106144 (E.D. Mich. April 12, 2007) (concluding minority members of LLC holding company stated claim for oppression based on allegations that majority members caused corporate subsidiary to cease making distributions to plaintiffs under a purchase agreement and failed to cause the LLC to make distributions to plaintiffs).

*Aryian v. Marottoli*, No. CV065001934S, 2007 WL 1196461 (Conn. Super. April 10, 2007) (denying motion to strike allegations against LLC, its managing member, and accountant complaining of LLC's failure to distribute to plaintiff amounts to which plaintiff was allegedly entitled under operating agreement or LLC statute).

***In re Teknek, LLC (Levey v. Hamilton)***, 351 B.R. 181 (Bankr. N.D. Ill. 2006). The court concluded it could exercise personal jurisdiction over two U.K. citizens who were the LLC debtor's only members on the basis that they formed an Illinois LLC, used the LLC to generate profits, used American banks as a focal point for the funds, and transferred all the funds to themselves as individuals leaving the LLC without money or assets to satisfy its creditors. The fiduciary shield doctrine did not protect the members because initiation and acceptance of a member distribution from an LLC located in the U.S. was a personal act connected to the forum and not merely an act of the business entity. Such distributions related to the causes of action and furnished a factual basis precluding dismissal of fraudulent transfer, veil piercing, breach of fiduciary duty, and wrongful distribution claims.

***In re Teknek, LLC (Fisher v. Hamilton)***, 343 B.R. 850 (Bankr. N.D. Ill. 2006) (stating that distribution of profits to LLC members that is not compensation for services is not transfer for reasonably equivalent value under fraudulent transfer statute).

***American Anglian Environmental Technologies, L.P. v. Environmental Management Corp.***, 412 F.3d 956 (8<sup>th</sup> Cir. 2005) (applying Missouri law and holding LLC's distribution of cash violated LLC operating agreement, prior determinations of LLC member that net cash was available for distribution without formal meeting of management committee did not establish that authority had been delegated to member, and operating agreement prohibited adjustment to LLC's books and recalculation of its purchase price after a member's buy/sell offer to another member).

***In re Die Fliedermas, LLC (O'Connell v. Shallo)***, 323 B.R. 101 (Bankr. S.D. N.Y. 2005). The court interpreted the New York LLC statute's provision regarding return of improper distributions and concluded that the three year limitations period applies to other actions under state law to force return of a distribution, such as a fraudulent transfer action. The court based its conclusion on the language of Section 508(b), a savings clause which states that the LLC statute does not affect any obligation of a member for the amount of a distribution under the operating agreement or "other applicable law." Because this savings clause is prefaced by the language "[s]ubject to subdivision (c) of this section" (the three year limitations period), the court concluded the look-back period under "other applicable law" was limited to three years as well. The court rejected the argument that New York LLC law elevates a member entitled to a distribution to the status of a creditor taking for value.

***Innovare Logistics, L.L.C. v. Parish National Bank***, 890 So.2d 643 (La. App. 2004) (holding that bank which followed instruction of LLC manager to transfer funds from LLC account to pay off personal loan to members could have no liability under wrongful distribution provision of Louisiana LLC statute because the statutory provision imposes liability on the LLC's members, not the bank, for a distribution made in violation of the statute).

***Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.***, 854 A.2d 121 (Del.Ch. 2004) (refusing to dismiss derivative claim under Section 18-804 of Delaware LLC act for improper winding up distribution to entity that became sole member of LLC and received all of LLC's assets in connection with reorganization and dissolution of LLC, but dismissing derivative claims based on improper distributions to original members because (i) claims were barred by limitations provision of Section 18-804, (ii) distributions in issue did not occur during LLC's winding up, and (iii) complaint did not allege distributions were received from LLC itself, but rather alleged that members received shares in another entity pursuant to a plan of reorganization).

***In re IDS Holding Co., LLC (IDS Holding Co., LLC v. Madsen)***, 292 B.R.233 (Bankr. D. Conn. 2003). A bankrupt LLC, in its capacity as debtor-in-possession, sought to recover a distribution made to its dominant member (Madsen) in connection with the sale of substantially all of the LLC's assets. The LLC was insolvent at the time of the sale, and all of the proceeds of the sale (consisting of shares of stock in the purchaser) were distributed to the members in accordance with their interests. The LLC's members had an agreement about the distribution of the proceeds of the sale whereby the members pledged some of the shares they received for the benefit of certain LLC creditors and Madsen agreed to dismiss a pending lawsuit against one of the LLC's suppliers and another member. The LLC claimed that the distribution violated the Connecticut LLC act, was a fraudulent transfer under the Bankruptcy Code and the Connecticut Uniform Fraudulent Transfer Act, was a voidable preference under the Bankruptcy Code, and was a breach of Madsen's fiduciary duty as a member of the LLC to its creditors. Madsen argued the transfer was supported by consideration and that he was entitled to summary judgment. The LLC argued that Madsen's receipt of the shares violated the provisions of the Connecticut LLC act regarding the distribution of assets on a winding up. However, the court found this provision inapplicable because the LLC had not dissolved and was not in the process of winding up. The LLC conceded that the Connecticut LLC act does not prohibit an insolvent LLC from distributing its assets to its members, but the LLC argued

that the court was permitted to apply corporate law restrictions under the provision of the LLC act that provides the principles of law and equity supplement the act. The court concluded that it need not address this argument because the LLC conceded that it had never actually dissolved. Thus, the court granted Madsen summary judgment on the claim that the distribution violated the Connecticut LLC statutes. The court found that there were fact issues regarding whether the distributions were made with intent to hinder or delay LLC creditors and whether Madsen gave reasonably equivalent value. Madsen argued that the distribution could not be a voidable preference because he was only an equity owner and not a creditor or claim holder. The court concluded that Madsen was a creditor by virtue of the distribution agreement and the Connecticut LLC act, which states that a member has the status of a creditor at the time a member becomes entitled to a distribution. Finally, the court applied case law from the corporate context to conclude that Madsen owed a fiduciary duty to LLC creditors when the LLC became insolvent.

***In re Brentwood Lexford Partners, L.L.C.***, 292 B.R. 255 (Bankr. N.D. Tex. 2003). The Chapter 7 trustee brought an adversary proceeding to set aside alleged fraudulent transfers. The court held that certain excess cash flow distributions to the members of an LLC engaged in the property management business were fraudulent transfers because they were made with the intent to hinder and delay collection of a note owed by the LLC. The court rejected the argument that the distributions were in the nature of compensation for services of the members. The court noted that there were no employment contracts providing that excess cash flow distributions would be part of their salary or bonus, no funds withheld from the distributions for income tax purposes, and no board resolutions treating the excess cash flow as salary or bonus. The LLC's major creditor, which held a note permitting the excess cash flow distributions, did not consider the distributions as compensation, but rather considered the distributions to be dividends or payments on account of the equity interests of the members. The court thus concluded that the LLC did not receive reasonably equivalent value for the distributions. (This case is further summarized above under the heading "Fiduciary Duties" and below under the heading "Fraudulent Transfer.")

***Dover Place, LLC v. Coffey***, No. A098399, 2003 WL 178832 (Cal.App. Jan. 28, 2003) (concluding that member was not required to return distribution because it did not violate statutory restrictions and operating agreement could not reasonably be interpreted to impose greater restrictions than statute).

***Imperial Trading Co., Inc. v. Uter***, 837 So.2d 663 (La.App. 2002) (affirming trial court's finding that manager was personally liable, along with member, for assenting, without reasonable care or inquiry, to distribution to member while LLC was unable to pay its debts as they came due and that other manager was not liable where evidence supported his lack of knowledge of the distribution, but reversing trial court's finding on other payments on basis record did not support imposing liability for checks payable to manager without evidence that they were distributions or that such a distribution violated the statutory restrictions).

***In re Chicago Trading Group, Inc. (Fogel v. Spike Trading, L.L.C.)***, Nos. 97 B 19843, 99 A 00410, 2001 WL 40071 (Bankr. N.D. Ill. Jan. 17, 2001). A bankruptcy trustee sued an LLC and its members seeking to recover from the members improper distributions made during the winding up of the LLC. The parties agreed that under Illinois law an LLC member may be liable for a dissolved LLC's debts to the extent of any improper distributions received. The trustee argued that he had a direct cause of action against the LLC members resulting from improper distributions, but the court agreed with one of the LLC members that the trustee could only recover in supplementary proceedings after obtaining a judgment against the LLC. Since the trustee had not obtained a judgment against the LLC, the claim against the member failed. Additionally, the court stated that the trustee would have to identify property of the debtor held by the member and the value of the property.

***The Pepsi-Cola Bottling Co. of Salisbury, Md. v. Handy***, C.A. No. 1973-S, 2000 WL 364199 (Del. Ch. Mar. 15, 2000) (rejecting the argument that the Delaware LLC act limitation on distributions protected the defendant member against any type of claim absent piercing of the LLC veil).

***New Horizons Supply Cooperative v. Haack***, No. 98-1865, 1999 WL 33499 (Wis. App. Jan. 28, 1999). The trial court pierced the veil of a Wisconsin LLC and held the member personally liable for an LLC debt. The appeals court found there was insufficient evidence to pierce the veil of the LLC. The court of appeals upheld the judgment against the member, however, on the basis that she did not take appropriate steps to shield herself from liability upon dissolution and distribution of the LLC's assets. The court noted that filing articles of dissolution and notifying creditors are apparently optional under the Wisconsin statute, but the rules for distribution of assets on dissolution and the priority of creditors are fixed by statute. LLC creditors whose claims are not otherwise barred under the statute may pursue LLC

members to the extent of the member's proportionate share of the claim or the assets of the LLC distributed to the member in liquidation. Since the member did not prove that the plaintiff's claim exceeded the value of any assets she received, the court affirmed the judgment.

#### **AA. Capital Contributions and Contribution Obligations**

*Chase Manhattan Bank v. Iridium Africa Corp.*, 474 F.Supp.2d 613 (D. Del. 2007) (holding that members were precluded from raising defenses in regard to capital contribution obligations because LLC agreement provided obligations were absolute and unconditional and waived members' defenses regarding obligations).

*Brownstone Investment Group, LLC v. Levey*, 468 F.Supp.2d 654 (S.D. N.Y. 2007) (declining to dismiss declaratory judgment claim seeking declaration that plaintiff owned software if plaintiff was not member who contributed software to LLC).

*Bishop of Victoria Corporation Sole v. Corporate Business Park, LLC*, 158 P.3d 1183 (Wash. App. 2007). The court noted that a member is obligated to perform a promise to contribute, and an obligation to contribute arises from the parties' contractual agreement. Because the LLC operating agreement in this case did not require a member to make additional contributions, the court concluded that no contractual obligation was breached when a member ceased to make mortgage payments for the LLC and caused the LLC to default on the mortgage. The court concluded that a member's obligation to contribute cannot be expanded beyond the members' agreements by reference to a general fiduciary duty of loyalty.

*Dialogo, LLC v. Bauza*, 467 F.Supp.2d 115 (D. Mass. 2006) (interpreting operating agreement capital contribution provision stating that member "has contributed or is deemed to have contributed" \$50,000 and concluding provision did not obligate member to make contribution of \$50,000 in future).

*Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corporation*, 368 B.R. 679 (N.D. Ill. 2006) (dismissing plaintiff's claim that defendant member failed to make required contributions, finding no provision in the operating agreement that imposed contribution obligation and holding that the Illinois LLC statute does not impose a legal obligation to contribute but simply provides that contribution obligation is not excused by member's death or disability if member has such obligation).

*Gowin v. Granite Depot, LLC*, 634 S.E.2d 714 (Va. 2006). An individual (Gowin) was admitted as a 20% member of an LLC and executed a promissory note in the amount of \$12,500 for his capital contribution. Gowin claimed that the other member (Stathis) told him that the note was something the LLC's lawyer said had to be done, that Gowin should not worry about it, and that the LLC would take care of it. Gowin never paid the note. After the relationship between Stathis and Gowin deteriorated, Stathis amended the articles of organization to provide that the members by majority vote may eliminate another member who fails to make a required capital contribution. Stathis, as majority member, executed a written consent of members eliminating Gowin as a member for failure to make his required contribution by defaulting on the note. Gowin filed a derivative suit against Stathis alleging various acts of wrongdoing and requesting an accounting and judicial expulsion of Stathis. The trial court dismissed the suit on the basis that Gowin's membership had been properly terminated and that Gowin was thus without standing to prosecute a derivative suit. Gowin appealed, and the Virginia Supreme Court held that informal action in the LLC context may bind an LLC just as informal action in the closely held corporation context may bind a corporation, but the court concluded that the LLC in this case was not bound by Stathis's oral waiver of payment of the note because Stathis, as manager and controlling member, did not generally conduct the affairs of the LLC in an informal manner. Furthermore, the court held that Stathis did not breach a fiduciary duty to the LLC by adopting the amendment to the articles of organization. The court determined, however, that the promissory note signed by Gowin was a demand note on which demand was never made; therefore, the note never became overdue, and Gowin remained a member because termination of his membership for non-payment of the note was improper. With respect to the oral waiver issue, the court began by reviewing the provisions of the Virginia LLC statute addressing compromise of a contribution obligation. The statute provides that a member's obligation to make a contribution may be compromised only by consent of all members unless the operating agreement or articles of organization provide otherwise. Neither the LLC's operating agreement nor its articles of organization addressed capital contributions. The court stated that the LLC statute allows actions to be taken outside the context of a meeting only when the requisite number of members sign a written consent, and the LLC's articles of organization authorized action by written consent in lieu of a meeting. The court decided as a matter of first impression

that the principles permitting informal action to bind a corporation in the close corporation context should apply as well in the LLC context; however, the court determined that an oral waiver by Stathis regarding payment of the note would not bind the LLC in this case because there was no evidence that Stathis generally conducted the business of the LLC in an informal manner. Gowin pointed to a number of transactions or practices as evidence of a disregard for formalities, but the court found that Stathis did not act outside his authority as manager or controlling member and did not show a disregard for the LLC statute, articles of organization, or operating agreement. Gowin argued that the oral waiver occurred at a meeting of the members at which both Gowin and Stathis were present, but the court stated that the oral waiver was insufficient to bind the LLC, even if it occurred at such a meeting, in the absence of written documentation reflecting consent of the members. The court also rejected Gowin's argument that delivery of the note itself was his capital contribution and that he thus could not be removed for failure to satisfy his capital contribution. The court stated that failure to pay the note would be a failure to meet a capital contribution requirement for which a member may be removed under the Virginia LLC statute. The court also rejected Gowin's argument that Stathis breached his fiduciary duty to the LLC by amending the articles of organization to provide for elimination of Gowin's membership interest upon nonpayment of a capital contribution. The court stated that the purpose of the amendment was to ensure the LLC received capital contributions to which it was entitled and to preclude a member from realizing a benefit from membership without satisfying his financial obligation to the LLC. Stathis testified that he adopted the amendment both to benefit the LLC and to eliminate Gowin's interest. The court concluded that there was no evidence that adoption of the amendment alone had any impact on the LLC or was otherwise a breach of fiduciary duty. The court concluded that Gowin remained a member of the LLC, however, because the court determined that the promissory note executed by Gowin was a demand note upon which demand was never made. Because the note never became overdue, Gowin never defaulted on a payment obligation, and termination of his membership was improper. The case was accordingly remanded for further proceedings consistent with the court's opinion.

***Burkle v. Burkle***, 141 Cal.App.4th 1029, 46 Cal.Rptr.3d 562 (Cal. App. 2 Dist. 2006). Carrie Burkle's father, Ronald Burkle, formed a Delaware LLC when Carrie was 19 years old. Ronald owned 99% of the LLC and provided the funds for Carrie's 1% interest in the LLC. Carrie filed suit seeking declaratory relief and an accounting after learning of her 1% interest in the LLC. Carrie sought access to the LLC's books and records through discovery requests and based on California statutory provisions. Ronald sought summary judgment and asserted that the capital contributions he made to the LLC were loans to Carrie and that he drew down Carrie's capital account to repay himself for the prior loans plus accrued interest on the loans. The trial court denied Carrie's request for access to the LLC's financial records, granted Ronald's motion for summary judgment, and denied Carrie's request to amend her complaint to add conversion and breach of fiduciary duty claims based upon her father's appropriation of her capital account. On appeal, the court reversed the trial court's summary judgment. The court stated that characterizing a transfer of funds as a gift or a loan often presents questions of fact. The court reviewed the evidence raising a fact question in this case, including the absence of any documentation of a loan and the fact that Ronald was asserting that Carrie owed him over \$14,000 after repaying himself with the balance of her capital account. The court stated, "[W]e do not see how a parent can unilaterally determine the terms of a loan to an adult child, and assert his entitlement to unpaid interest, without the knowledge or agreement of the borrower." The court also addressed Ronald's argument that the transfer of funds could not have been a gift because a transfer of money does not constitute a gift unless the donor relinquishes control over the money. The court pointed out that Ronald necessarily relinquished control over the funds when he invested them in the LLC because he had no title to or interest in Carrie's interest. Any control Ronald retained flowed from his position as manager of the LLC, not from his position as provider of the funds. The court next determined that Carrie had inspection rights under the California LLC statute. Finally, the court found that Carrie should be permitted to amend her complaint to seek damages for conversion and breach of fiduciary duty based on her father's appropriation of her capital account.

***DeShazo v. Estate of Clayton***, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (finding member was not obligated to contribute real property to LLC based on plain language of Idaho Limited Liability Company Act, which provides that LLC member's promise to contribute property to LLC is not enforceable unless promise is in writing and signed by member).

***In re McCabe (Braunstein v. Panagiotou)***, 345 B.R. 1 (D. Mass 2006). The debtor filed bankruptcy and listed a 50% interest in a Delaware LLC as part of his property. The trustee brought an action against the LLC's other member, Panagiotou, based on Panagiotou's post-petition unilateral amendment of the LLC agreement to reduce the debtor's interest to 5% and increase Panagiotou's interest to 95%. Panagiotou also reduced the LLC's 100% interest in two other LLC's to 5% and gave himself a 95% interest in those LLCs. Panagiotou argued that the reallocations of membership interests were in accordance with the LLC agreements, which permitted additional capital contributions with the

agreement of all members and required amendment of the agreements to reflect the additional contributions. The debtor did not dispute that Panagiotou had made additional capital contributions, but claimed that he never assented to the amendments formally reallocating the membership interests. The trustee sought summary judgment that Panagiotou violated the automatic stay, and Panagiotou argued that his conduct did not violate the automatic stay because no “property” of the debtor’s estate was affected and Panagiotou’s actions were “purely ministerial.” Panagiotou argued that his actions merely formalized the pre-existing status and that the membership interests were altered by the additional capital contributions rather than the subsequent written documentation of the reallocation. According to Panagiotou, the debtor consented to the additional capital contributions and the amendments were automatic and mandatory. The court rejected these arguments and stated that the proper course of action for Panagiotou would have been to move for relief from the stay rather than engage in self-help. The court stated that it could not conclude the debtor’s legal interest was not affected even if the debtor lacked an equitable interest in the LLC. Further, Panagiotou’s efforts were not in accordance with the LLC agreement because it required that the amendment be duly executed by all members. That the members were mandated to amend the agreement did not make amendment “automatic.” The court also rejected Panagiotou’s argument that his conduct was proper based on the debtor’s authorization, in a letter six months prior to the bankruptcy, of Panagiotou’s exercise of the debtor’s ownership rights. The court said that Panagiotou’s reliance on the letter to justify amending the agreement violated the automatic stay provision prohibiting acts to enforce a lien.

*Farmers Cooperative Ass’n v. Cooper*, No. 05-1042, 2006 WL 1231663 (Iowa App. April 26, 2006) (analyzing LLC member’s claim for contribution against co-member guarantors and finding no basis under unjust enrichment theory because co-members, who had paid portion of LLC debt and were released from their guaranties, were not benefitted by other member’s payment and would suffer no loss if he did not pay).

#### **BB. Compensation of Member**

*Gottier’s Furniture, LLC v. La Pointe*, No. CV040084606S, 2007 WL 1600021 (Conn. Super. May 16, 2007) (concluding increases in managing member’s compensation and that of member’s spouse were reasonable under circumstances where they assumed additional duties and restored financial stability to LLC after other member’s misappropriation of funds).

*Jandrain v. Lovald*, 351 B.R. 679 (D. S.D. 2006). The court rejected an LLC manager’s claim for compensation for services rendered to the LLC in view of inadequate records and documentation and legal problems associated with the claim under the South Dakota LLC statute. Jandrain, a CPA who was a member and manager of a bankrupt manager-managed Idaho LLC filed a proof of claim for “director fees.” Jandrain claimed that he performed various accounting and other services. He had not submitted invoices to the LLC, and he had no agreement with the LLC as to how to distinguish between the performance of services for which he would submit a bill and services provided as a member of the board of managers or as an officer. There was no agreed rate of compensation, nor was the fact of anticipated compensation discussed or negotiated. The board minutes did not reflect any discussion of compensation of Jandrain, and the books did not reflect an account payable to Jandrain. Jandrain admitted that he did not expect to be paid until the LLC’s plant was performing profitably, which it never did. Even without this contingency, the court stated that it was impossible to sort out in which of various capacities Jandrain’s services were rendered due to the broad and vague description of services submitted. The court reviewed a number of provisions of the South Dakota Limited Liability Company Act and stated that even a casual reading of the statutes would have alerted Jandrain to the perils of providing services with an expectation of being paid. The court pointed out that a member’s contribution may include services and that it would be impossible to determine without some agreement whether Jandrain’s services were additional capital contributions. The court stated that the statutory provision that a member is not entitled to remuneration for services performed for the LLC other than in the winding up context should have set off alarms with a member such as Jandrain planning to provide services for compensation. The court stated that if the legislature had intended to authorize what Jandrain did, it would have included a provision for a manager-managed LLC like that authorizing a member of a member-managed LLC to transact business with the company and have the rights and obligations of a person who is not a member. The court stated that it was not lacking in sympathy for Jandrain, who obviously rendered valuable services and probably went beyond the call of duty, but the court said he had fallen into a trap of his own making by failing to handle the matter with the appropriate professionalism. The court held that Jandrain failed to prove an express or implied contract with the LLC for compensation. The court rejected Jandrain’s claim of ratification by the board of managers because the management and control of the LLC passed to the Chapter 7 trustee upon the conversion of the LLC’s bankruptcy from a Chapter 11 to a Chapter 7 bankruptcy. Additionally, the court pointed out that there was no contract to ratify. The court declined to award Jandrain a recovery in quantum meruit,

concluding that it would be inequitable to permit Jandrain to recover when he had ignored statutory provisions and failed to do what was required to be compensated.

### **CC. Equity Compensation Agreements**

*Hopmayer v. Aladdin Industries, LLC*, No. M2003-01583-COA-R3-CV, 2004 WL 1283984 (Tenn. Ct. App. June 9, 2004) (concluding agreement by LLC to issue phantom units was sufficiently definite to be enforceable and LLC breached the agreement).

*Aggarwal v. Nexabit Networks, Inc.*, No. CIV.A. 99-6174, 2001 WL 34032503 (Mass.Super. May 30, 2001). An LLC employer sought summary judgment against an at-will employee on the employee's breach of covenant of good faith and fair dealing claim. On three occasions, the employee was granted shares in the LLC subject to certain conditions and a vesting schedule under an Equity Incentive Plan. Shortly before the date on which some of the shares would have vested, the employee was terminated. The court found that these shares, as well as shares that were apparently awarded for past work on a patent, were compensation already earned that could support a claim for breach of the implied covenant of good faith and fair dealing. The court concluded that other shares could not be considered compensation for past services and would not support a claim for breach of the covenant of good faith and fair dealing.

### **DD. Dissolution and Dissociation**

#### **1. Bankruptcy**

*In re Allentown Ambassadors, Inc. (Allentown Ambassadors, Inc. v. Northeast American Baseball, LLC)*, 361 B.R. 422 (Bankr. E.D. Pa. 2007). The court addressed several issues in a lengthy opinion dealing with the debtor corporation's rights and status as a member of a dissolved LLC. The debtor corporation operated a minor league baseball team and was a member of a baseball league organized as a North Carolina LLC. The debtor's primary claim was that the other members of the LLC exercised control over property of the estate, in violation of the automatic stay provision of Section 362(a)(3) of the Bankruptcy Code, when the members dissolved the LLC and formed a new league without the debtor. The debtor also claimed that an individual manager of the LLC breached his fiduciary duty to the debtor. The defendants sought summary judgment on these claims, but the court denied the motion as to both claims. With respect to the first claim, the defendants argued that the debtor's bankruptcy terminated its membership in the LLC under the terms of the operating agreement, which resulted in the debtor's status changing from that of member to assignee. The defendants claimed that the subsequent dissolution of the LLC did not deprive the debtor of any rights and was not a violation of Section 362(a)(3) since the debtor still had its economic rights to receive the distributions to which it was entitled under the operating agreement. After a lengthy analysis, the court concluded that the record was inadequate at this stage of the proceedings to permit the court to determine whether the provision of the LLC operating agreement purporting to terminate the debtor's membership in the LLC upon the debtor's bankruptcy filing was enforceable under Section 365(e) of the Bankruptcy Code. The court analyzed the rights of a member under the North Carolina Limited Liability Company Act as well as the enforceability of the ipso facto provision in the operating agreement and concluded that the operating agreement was an executory contract but that the record did not establish whether the ipso facto provision terminating the debtor's membership upon its bankruptcy filing was enforceable. In the course of its discussion, the court concluded that the provisions of the North Carolina LLC statute, which provide that a membership interest is assignable in whole or in part, but require unanimous consent of the other members for an assignee to become a member, do not constitute a clear and unequivocal prohibition on assignment under "applicable law ... excus[ing] a party from accepting performance from or rendering performance to" an assignee for purposes of Section 365(c)(1) and (e)(2). The court then considered the nature of the operations of the LLC baseball league and concluded that the record did not permit the court to determine whether the identity of a member was a material aspect of the operating agreement or whether the only material prerequisite to admission of a new member was the member's ability to perform its obligations under the agreement. Because the court could not determine whether the debtor's membership terminated upon its bankruptcy, and the parties did not dispute that the debtor retained its economic rights in the LLC, the defendants were not entitled to summary judgment on the debtor's claim that they violated Section 362(a)(3) by exercising control over the debtor's property when they dissolved the LLC. Finally, even assuming the debtor only retained its economic rights in the LLC, the court determined that the impact of dissolution of the LLC on those rights alone was significant enough to warrant denial of the defendants' summary judgment motion on the Section 362(a)(3) claim. With respect to the individual manager's fiduciary duty claim, the court examined provisions of the North Carolina LLC Act as well as the operating agreement and rejected the manager's argument that his duty was owed solely to the LLC and not to

individual members. The court predicted that North Carolina appellate courts would extend to LLCs the principles developed in the case law of closely held corporations. The court thus concluded that majority members of an LLC owe a fiduciary duty to minority members (based on the duty owed by majority shareholders to minority shareholders) and that the defendant manager would also owe a duty to the individual members because the manager's powers were derived from and delegated to the manager by the member-managers of the LLC. While the court acknowledged that the debtor might have a difficult time proving that the manager breached his duty, the court perceived the possibility that the challenged conduct was part of a pattern to "oppress" the debtor. Thus, the manager was not entitled to summary judgment.

*In re Tsiaoushis (Meiburger v. Endeka Enterprises, L.L.C.)*, Bankruptcy No. 05-15135-RGM, Adversary No. 06-1167, 2007 WL 186536 (Bankr. E.D. Va. Jan. 19, 2007). The court determined that an LLC agreement providing for dissolution and liquidation of the LLC on the bankruptcy of a member was not an executory contract; therefore, Section 365(e)(1) was not applicable and the automatic dissolution clause was not an unenforceable ipso facto clause. The court rejected the argument that all partnership agreements and LLC agreements are executory contracts. The court characterized the determination of whether a partnership or LLC agreement is or is not an executory contract as an individualized analysis. The debtor was not a manager (having ceased to be a manager prior to the filing), and had no unperformed duties arising as a member of the LLC. The debtor and another individual were the largest interest holders, and the other member was the sole manager. The other member argued that the debtor might have a fiduciary duty to vote for an additional capital contribution in certain circumstances, but the court stated that "[t]he failure to perform a remote and speculative fiduciary duty, if one exists, is not a 'material breach excusing performance of the other.'" The court stated that there is no *per se* rule and that the outcome depends upon an analysis of each particular operating agreement utilizing Professor Countryman's definition of an executory contract. The court stated that this was the analysis that was employed by the court in the *Garrison-Ashburn* case and noted that the instant case was very similar to that case. The court discussed other cases in which courts have examined LLC agreements and noted the absence of a *per se* rule. Summing up the results in other cases, the court stated that when the court determines there are no unperformed obligations on the part of the parties, the operating agreement is not an executory contract. If, on the other hand, there are unperformed obligations of both the debtor and the other party, the court must determine whether, if not performed, non-performance would constitute a material breach excusing the other party from further performance. If so, the operating agreement is an executory contract. The court pointed out that the reported cases went no further; i.e., none of the cases, after determining that the operating agreement was an executory contract, took the next step of evaluating the applicability of Section 365(e)(2), which exempts certain executory contracts from the application of the ipso facto prohibition.

*In re Modanlo (Modanlo v. Mead)*, Civil Action No. DKC 2006-1168, 2006 WL 4486537 (D. Md. Oct. 26, 2006). The sole member of a Delaware LLC filed bankruptcy, and the trustee took several steps in order to take control of the LLC and a corporation owned by the LLC. The steps taken by the trustee in this regard included a "Written Consent of and Agreement Regarding Admission of Personal Representative of Last Remaining Member" under Section 18-806 of the Delaware LLC Act. In that document, the trustee consented to the continuation of the LLC effective as of the date of the occurrence of an event described in Section 18-801(a)(4) of the Delaware LLC Act (i.e., the bankruptcy of the last remaining member) and, as personal representative of the last remaining member, agreed to the admission of the trustee as a member as of that date. The court agreed with the trustee that the LLC was dissolved upon the bankruptcy of the sole member because, under Section 18-304(1) of the Delaware LLC Act, a person ceases to be a member upon the person's bankruptcy, and, under Section 18-801(a), an LLC is dissolved if it has no remaining members. Under Section 18-801(a)(4), there is an exception to dissolution upon the termination of the last remaining member if a successor member is appointed within 90 days, but the trustee was not appointed until more than 90 days after the filing of the member's bankruptcy; therefore, this exception was not available to the trustee. The LLC was resuscitated under Section 18-806, however, which permits the personal representative of the last remaining member of an LLC to avoid the dissolution and winding up of an LLC by consenting in writing to the continuation of the LLC and agreeing to become a member of the LLC. The court found that the bankruptcy trustee's consent met these requirements. The court analyzed the definition of a "personal representative" under the Delaware LLC Act and concluded that a bankruptcy trustee falls within the definition. Section 18-101(13) defines a "personal representative" broadly to include "as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof...." Because the scope of the term "other legal representative" is not clear on its face, the court looked to decisions analyzing the same language in other contexts and examined the policy rationale behind other sections of the Delaware LLC Act. The court concluded that the Delaware Supreme Court would likely hold that a bankruptcy trustee meets the statutory definition of a "personal representative." The court rejected the debtor's argument that the bankruptcy estate held only



an economic interest and that the trustee could not become a member or participate in the LLC's management. The court stated that the debtor's argument ignored the effect of Section 18-806, and the court distinguished other Delaware cases in which the bankruptcy of a member occurred in the context of an LLC that had other remaining members.

*In re Farmland Industries, Inc.*, 296 B.R. 497 (Bankr. W.D. Mo. 2003) (vacating prior order and holding on reconsideration that the determination of the effect of a member's bankruptcy on the member's membership in the LLC is a core bankruptcy proceeding, and that counterclaim for judicial dissolution, being closely intertwined with the issues in the core proceeding, should also be heard by the bankruptcy court).

*Milford Power Company, LLC v. PDC Milford Power, LLC*, 866 A.2d 738 (Del. Ch. 2004). PDC Milford Power, LLC ("PDC"), a member of Milford Power Company, LLC (the "LLC"), filed a bankruptcy petition which was later dismissed. The LLC then filed this case alleging that PDC's membership interest in the LLC was divested as a result of the bankruptcy filing under the plain terms of the LLC agreement. In a lengthy opinion analyzing Sections 541, 365 and 349 of the Bankruptcy Code, the court concluded that the ipso facto clause in the LLC agreement was pre-empted to the extent it would deprive PDC of the economic rights available to an assignee under the Delaware LLC act; however, the ipso facto clause was enforceable insofar as it divested PDC of its right to participate in the governance of the LLC. The court relied in large part upon the Delaware District Court's opinion in *In re IT Group, Inc.* (summarized below). The provisions of the LLC agreement in issue stated that a member's bankruptcy was an event of withdrawal (consistent with the Delaware LLC act) and provided that a withdrawn member's interest was assigned to the remaining members or their designees. The court first rejected an unclean hands defense raised by PDC and then rejected PDC's argument that the dismissal of the bankruptcy made the bankruptcy a non-event and left PDC's membership interest the same as it was before the filing. Next the court considered the pre-emption issue. In a lengthy discussion, the court reviewed the provisions of the Bankruptcy Code bearing on the issue and acknowledged the confusion surrounding Section 365. ("A law professor could fruitfully spend the next year or so examining the implications that the Bankruptcy Code has on ipso facto clauses in alternative entity agreements. As a state trial judge with many cases to decide, I do not have all year to peer through the muck in search of what will at most be a debatable answer.") Ultimately, the court concluded that an ipso facto clause in an LLC agreement retains the same potency after a Section 349 dismissal that it would have during the course of a bankruptcy proceeding. Section 365(e)(1) generally invalidates ipso facto clauses that terminate or modify any right of the debtor solely because of the commencement of a bankruptcy. However, the provisions of Section 365(e)(2) and 365(c)(1) (the "Assumability Exceptions") trump Section 365(e)(1) and preclude the trustee's assumption or assignment of an executory contract where applicable law excuses a non-debtor party from accepting performance from or rendering performance to an entity other than a debtor without that party's consent. Because the Delaware LLC act excuses (as a default rule) the members of an LLC from accepting performance of an LLC agreement by an assignee, the court concluded that the ipso facto provision of the LLC agreement was effective to the extent it deprived PDC of its ability to participate as a member in the governance of the LLC. By contrast, the Delaware LLC act does not (as a default rule) excuse members from accepting an assignment of a member's bare economic interest; therefore, the LLC agreement provision divesting PDC of its interest was pre-empted. The court concluded that this left Section 18-304 of the Delaware LLC act with continued vitality in that it means a member who files bankruptcy ceases to be a member, but becomes an assignee with the rights specified for assignees in Section 18-702(b).

*In re Garrison-Ashburn, L.C.*, 253 B.R. 700 (Bankr. E.D. Va. 2000). In this case, a member of a Virginia LLC filed bankruptcy, and the court concluded that the LLC operating agreement was not an executory contract and thus not within the provisions of Bankruptcy Code § 365(c) and (e) preventing enforcement of certain ipso facto clauses. The court explained the history of and reasons for amendments to the Virginia LLC act that eliminated reference to events that would automatically dissolve an LLC. Pursuant to the amendments, events that formerly triggered dissolution became events of dissociation. Under the amended statute, the bankruptcy of a member results in dissociation, and the dissociated member stands in the same relationship to the LLC as an assignee of a membership interest. The court distinguished the *DeLuca* and *Broyhill* cases as having been decided prior to the check the box regulations and changes to the Virginia statute. The court pointed out that this case did not involve an entity whose organic documents or enabling statute dissolved the LLC on the member's bankruptcy, and the operating agreement merely provided for the management structure of the LLC. It imposed no additional duties or responsibilities on members and permitted a member to resign from all offices and committees at any time without breaching the agreement. The court stated that such a person would stand in an analogous position to the LLC as a shareholder to a corporation. Under these circumstances, the court said, there is no executory contract.

***In re DeLuca (Broyhill v. DeLuca)***, 194 B.R. 65 (Bankr. E.D. Va. 1996). The DeLucas were real estate developers who were members of D & B Countryside, L.L.C., a Virginia LLC. The LLC operating agreement provided, consistent with the Virginia LLC statute, that bankruptcy of a member dissolved the LLC unless the remaining members elected to continue the business of the LLC. If the bankrupt member were also the only manager, the remaining members could elect a new manager. After the DeLucas filed bankruptcy, the remaining members voted to continue and replaced them as managers. The DeLucas claimed that the provisions of the operating agreement permitting this action were unenforceable under the United States Bankruptcy Code. The court, like the court in *Daugherty*, concluded that the operating agreement was an executory contract. However, the court found that the provisions triggering dissolution upon a member's bankruptcy and granting remaining members the right to continue the business and elect a new manager were enforceable because the operating agreement was a personal service contract that could not be assumed over the objections of the other members under Section 365 of the Bankruptcy Code. (In *In Re Garrison - Ashburn, LC*, 253 B.R. 700 (Bankr. E.D. Va. 2001), the court distinguished this case as having been decided prior to changes to the Virginia LLC act.)

***In re DeLuca (JTB Enterprises, L.C. v. D & B Venture, L.C.)***, 194 B.R. 79 (Bankr. E.D. Va. 1996). The second DeLuca decision addressed the ramifications of the DeLuca bankruptcy with respect to D & B Venture, L.C. ("D & B"), a Virginia LLC whose members were two other LLCs, R & M Kiln Creek, L.C. ("R & M") and JTB Enterprises, L.C. ("JTB"). R & M was the manager of D & B, and the sole members of R & M were Robert and Marilyn DeLuca. JTB argued that the bankruptcy of the DeLucas dissolved R & M, which in turn dissolved D & B, and conferred upon JTB, as the sole remaining member, the right to wind up D & B's affairs. The D & B operating agreement provided that D & B would be dissolved upon certain events, including dissolution or bankruptcy of either of its members, and that the manager would liquidate the affairs of D & B upon dissolution. The court agreed with JTB that the bankruptcy of the DeLucas dissolved R & M. The dissolution of R & M in turn dissolved D & B. However, the court determined that the terms of the operating agreement vesting the right to liquidate D & B in the manager should control and that R & M thus had the right to wind up D & B's affairs as well as its own affairs. (Though R & M, rather than the DeLucas, held the membership interest in D & B, the court engaged in its analysis, at least in part, as if the DeLucas owned their interest in D & B directly, stating that it was appropriate to "disregard the form of the DeLucas' interest in D & B Venture and to look to the substance." The court noted that the DeLucas did not even list their interest in R & M on their schedules, and the court characterized R & M as little more than a "conduit or shell" of the DeLucas whose function was holding "technical title to what [was] in substance the DeLucas' interest in D & B Venture." The R & M operating agreement provided that R & M would be dissolved upon the bankruptcy of a member, and there were no other members to object to the assumption of its management by the DeLucas regardless of whether the operating agreement was considered a personal service contract. Though the DeLucas had not taken any steps to assume the R & M operating agreement, the only purpose of doing so would be to continue, through it, the management of D & B. The court found no policy that protected R & M from its own dissolution since it was not itself in bankruptcy.) (In *In Re Garrison - Ashburn, LC*, 253 B.R. 700 (Bankr. E.D. Va. 2001), the court distinguished this case as having been decided prior to changes to the Virginia LLC act.)

***Matter of Daugherty Construction, Inc.***, 188 B.R. 607 (Bankr. D. Neb. 1995). The bankruptcy court held that a Chapter 11 bankruptcy filing by a member of two Nebraska LLCs did not terminate the membership of the debtor member and dissolve the LLCs even though the Nebraska LLC statute and the articles of organization and operating agreements of each LLC provided that the LLC would be dissolved upon the bankruptcy of a member. The court first concluded that the LLC membership interests constituted property of the bankruptcy estate and that any provisions of state law or the LLC articles of organization or operating agreements purporting to dissolve the LLC and terminate the debtor's membership interest were unenforceable under Section 541(l) of the Bankruptcy Code. The court also found Section 365(l) of the Bankruptcy Code applicable. That provision voids any provision in a contract or applicable state law that forfeits, modifies, or terminates the debtor's interest in property based upon the insolvency or financial condition of the debtor or the commencement of a bankruptcy case. Finally, the court found that the articles of organization and operating agreements were executory contracts that could be assumed by the debtor in possession under Section 365 of the Bankruptcy Code and that Section 365(e) prevented the termination or modification of the articles of organization and operating agreements any time after the commencement of the bankruptcy solely because of a provision conditioned upon insolvency or bankruptcy.

## 2. Withdrawal, Expulsion, or Termination of Member

*Darwin Limes, LLC v. Limes*, No. WD-06-049, 2007 WL 1378357 (Ohio App. May 11, 2007). Disputes arose in a family farm organized as an LLC. The LLC was owned by four siblings, Charles, Dale, Donald, and Betty Limes. Donald had traditionally farmed the land on a cash rent basis under an alleged oral lease. The other members decided to terminate any lease arrangement with Donald, and litigation involving claims for receivership, judicial dissolution, and declaratory judgment ensued. Donald won the bid and retained the lease for another year. Donald argued that the LLC was dissolved automatically when both Donald and Dale filed for judicial dissolution and there was no agreement to continue. The court interpreted a provision of the Ohio LLC statute which provides that it is an event of withdrawal of a member if the member “files a petition or answer in any reorganization,...dissolution, or similar relief proceeding under any law or rule that seeks for himself any of those types of relief.” Relying on this provision, which was also included in the dissociation provisions of the operating agreement, Donald argued that Dale ceased to be a member (thus causing dissolution of the LLC) upon Dale’s filing of a claim for judicial dissolution of the LLC. The court pointed out, however, that dissociation occurs when a member seeks dissolution for himself or itself. Thus, no member was dissociated when Dale or Donald filed claims for judicial dissolution of the LLC.

*Duke v. Graham*, 158 P.3d 540 (Utah 2007). The court concluded that provisions of the Utah Limited Liability Company Act providing for judicial expulsion of members and judicial removal of managers did not strip arbitrators of the authority to remove members and managers. Because the statute also contains provisions authorizing expulsion of members and removal of managers as provided in an operating agreement, the court concluded that expulsion of members and removal of managers may be accomplished through mechanisms described in an LLC’s operating agreement, including an agreement to arbitrate. Thus, an arbitration award expelling members of an LLC and removing one of them as a manager in an arbitration proceeding brought pursuant to an arbitration clause in the operating agreement did not exceed the arbitrator’s power. The court stated that its conclusion that the legislature did not limit the mechanism for expulsion and removal to a judicial decree is also consistent with the Utah Arbitration Act.

*In re Modanlo (Modanlo v. Mead)*, Civil Action No. DKC 2006-1168, 2006 WL 4486537 (D. Md. Oct. 26, 2006). The sole member of a Delaware LLC filed bankruptcy, and the trustee took several steps in order to take control of the LLC and a corporation owned by the LLC. The steps taken by the trustee in this regard included a “Written Consent of and Agreement Regarding Admission of Personal Representative of Last Remaining Member” under Section 18-806 of the Delaware LLC Act. In that document, the trustee consented to the continuation of the LLC effective as of the date of the occurrence of an event described in Section 18-801(a)(4) of the Delaware LLC Act (i.e., the bankruptcy of the last remaining member) and, as personal representative of the last remaining member, agreed to the admission of the trustee as a member as of that date. The court agreed with the trustee that the LLC was dissolved upon the bankruptcy of the sole member because, under Section 18-304(1) of the Delaware LLC Act, a person ceases to be a member upon the person’s bankruptcy, and, under Section 18-801(a), an LLC is dissolved if it has no remaining members. Under Section 18-801(a)(4), there is an exception to dissolution upon the termination of the last remaining member if a successor member is appointed within 90 days, but the trustee was not appointed until more than 90 days after the filing of the member’s bankruptcy; therefore, this exception was not available to the trustee. The LLC was resuscitated under Section 18-806, however, which permits the personal representative of the last remaining member of an LLC to avoid the dissolution and winding up of an LLC by consenting in writing to the continuation of the LLC and agreeing to become a member of the LLC. The court found that the bankruptcy trustee’s consent met these requirements. The court analyzed the definition of a “personal representative” under the Delaware LLC Act and concluded that a bankruptcy trustee falls within the definition. Section 18-101(13) defines a “personal representative” broadly to include “as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof...” Because the scope of the term “other legal representative” is not clear on its face, the court looked to decisions analyzing the same language in other contexts and examined the policy rationale behind other sections of the Delaware LLC Act. The court concluded that the Delaware Supreme Court would likely hold that a bankruptcy trustee meets the statutory definition of a “personal representative.” The court rejected the debtor’s argument that the bankruptcy estate held only an economic interest and that the trustee could not become a member or participate in the LLC’s management. The court stated that the debtor’s argument ignored the effect of Section 18-806, and the court distinguished other Delaware cases in which the bankruptcy of a member occurred in the context of an LLC that had other remaining members.

*Fazzone, Baillie, Ryan & Seadale, LLC v. Baillie, Hall & Hershman, P.C.*, No. CV040833143S, 2007 WL 155161 (Conn. Super. Jan. 2, 2007) (discussing attorney member’s breach of fiduciary duty in connection with

withdrawal from LLC law firm and formation of new firm and finding evidence supported jury's valuation of withdrawn member's interest in LLC).

***Holdeman v. Epperson***, 857 N.E.2d 583 (Ohio 2006). The 51% member of a two-member LLC died, and the Ohio Supreme Court held that the rights of the executor of the deceased member were not confined to those of an assignee, and the executor was entitled to exercise all the rights possessed by the deceased member prior to his death for the purpose of settling the estate. The court relied upon a provision of the Ohio Limited Liability Company Act that provides as follows: "If a member who is an individual dies or is adjudged an incompetent, his executor, administrator, guardian or other legal representative may exercise all of his rights as a member for the purpose of settling the estate or administering his property, including any authority that he had to give an assignee the right to become a member." The operating agreement of the LLC stated that the successor in interest of a deceased member succeeded to the interest of the member but did not become a member unless admitted in accordance with the agreement. The surviving member relied upon various provisions of the Ohio LLC statute in arguing that the deceased member withdrew from the LLC upon his death and that his executor obtained only the rights of an assignee. The court stated that the operating agreement was consistent with the general provisions of the Ohio LLC statute regarding rights of assignees and membership interests, but pointed out that the provision regarding the rights of a legal representative of a deceased member does not state that it applies "except as otherwise provided in the operating agreement." The court thus inferred that the General Assembly did not intend for that provision to be restricted by contrary language in the operating agreement. Accordingly, the court held that an executor of a deceased member of an LLC has all rights the member had prior to death for the limited purpose of settling the deceased member's estate or administering his property. A dissenting justice argued that the operating agreement should control the relationship of the remaining member and the executor. In the dissenting justice's view, the Ohio LLC statute provides that an executor has only the rights of an assignee and not the full rights of a member unless the operating agreement provides otherwise. Additionally, the dissenting justice argued that the majority ducked the real controversy and failed to provide needed guidance by not defining the rights the executor possessed "for the purpose of settling [the member's] estate or administering his property." The dissenting justice viewed the proper scope of the phrase as only those actions necessary to collect, evaluate, and distribute assets due the estate.

***Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corporation***, 368 B.R. 679 (N.D. Ill. 2006). The court found that an LLC member stated a claim for wrongful dissociation against the other member based on the defendant member's alleged de facto withdrawal and subsequent formal withdrawal pursuant to a withdrawal agreement. The operating agreement prohibited voluntary withdrawal and provided that such a withdrawal would be considered a wrongful dissociation. The court also found that the alleged wrongful dissociation could form the basis of a breach of fiduciary duty claim. The court also declined to dismiss a claim for inducement of breach of fiduciary duty against a corporation that sought to acquire the defendant member's parent and allegedly directed the defendant member to withdraw from the LLC.

***Gowin v. Granite Depot, LLC***, 634 S.E.2d 714 (Va. 2006). An individual (Gowin) was admitted as a 20% member of an LLC and executed a promissory note in the amount of \$12,500 for his capital contribution. Gowin claimed that the other member (Stathis) told him that the note was something the LLC's lawyer said had to be done, that Gowin should not worry about it, and that the LLC would take care of it. Gowin never paid the note. After the relationship between Stathis and Gowin deteriorated, Stathis amended the articles of organization to provide that the members by majority vote may eliminate another member who fails to make a required capital contribution. Stathis, as majority member, executed a written consent of members eliminating Gowin as a member for failure to make his required contribution by defaulting on the note. Gowin filed a derivative suit against Stathis alleging various acts of wrongdoing and requesting an accounting and judicial expulsion of Stathis. The trial court dismissed the suit on the basis that Gowin's membership had been properly terminated and that Gowin was without standing to prosecute a derivative suit. Gowin appealed, and the Virginia Supreme Court held that informal action in the LLC context may bind an LLC just as informal action in the closely held corporation context may bind a corporation, but the court concluded that the LLC in this case was not bound by the oral waiver of Stathis regarding payment of the note because Stathis, as manager and controlling member, did not generally conduct the affairs of the LLC in an informal manner. Furthermore, the court held that Stathis did not breach a fiduciary duty to the LLC by adopting the amendment to the articles of organization. The court determined, however, that the promissory note signed by Gowin was a demand note on which demand was never made; therefore, the note never became overdue, and Gowin remained a member because termination of his membership for non-payment of the note was improper.

**Hubbard v. Talbott Tavern, Inc.**, Nos. 2003-CA-001468-MR, 2003-CA-001543-MR, 2004-CA-002184-MR, 2006 WL 2089308 (Ky. App. July 28, 2006) (dissociation of member upon bankruptcy rendered unnecessary decision as to propriety of lower court's order that member was dissociated upon "judicial assignment" of interests to member's judgment creditor).

**Schrager v. Isquith**, No. CH05-272, 2006 WL 2022185 (Va. Cir. Ct. July 18, 2006) (analyzing alleged improprieties in member's financial transactions and concluding they were grounds for judicial expulsion under Virginia LLC statute (i.e., wrongful conduct adversely and materially affecting LLC business, willful or persistent material breach of operating agreement, and conduct relating to LLC business making it not reasonably practicable to carry on in business with member)).

**Sayers v. Artistic Kitchen Design LLC**, 633 S.E.2d 619 (Ga. App. 2006) (interpreting provision of LLC statute regarding dissociation of member upon filing of reorganization proceeding and concluding provision does not result in dissociation of a member who seeks reorganization of a different member).

**Actives International, LLC v. Reitz**, 2006 WL 1688144 (N.J. Super. Ch. June 16, 2006) (enforcing agreement of counsel setting date of dissociation as valuation date for determining "fair value" in buy out of dissociated member of LLC).

**Eureka VII LLC v. Niagra Falls Holdings LLC**, 899 A.2d 95 (Del. Ch. 2006). The plaintiff, a 50% member of a Delaware LLC, sought a declaration that the other member had relinquished its membership and retained only economic rights based on the defendant's alleged material breaches of the LLC agreement. The court determined that the defendant breached the LLC agreement in at least four instances and that the defendant's breaches resulted in a creditor of the defendant's owner gaining ownership and control of the defendant in violation of anti-transfer provisions in the LLC agreement. The LLC agreement was silent as to the remedy for breach, and the plaintiff suggested a remedy inspired by Section 18-702(b)(3) of the Delaware Limited Liability Company Act, which provides that a member ceases to be a member upon assignment of all the member's LLC interest. Although the statutory provision did not literally apply to the case, the court found that the requested remedy was entirely fitting and proportionate because the defendant's breaches implicated a clear contractual goal reflected in the LLC agreement (i.e., to ensure that the plaintiff did not find itself owning the LLC with a partner it did not approve), and the breaches led to the very situation the agreement was designed to prevent. The court also noted that the defendant's breaches ultimately had the same effect as a complete assignment for the benefit of creditors, a type of assignment that results in the divestiture of membership under the Delaware LLC statute. The court clarified that the remedy it crafted left the defendant with the rights of an assignee, which do not include the right to participate actively in management, but do include the right to bring a derivative action if the plaintiff were to breach a contractual or fiduciary duty to the LLC. The court dismissed the defendant's counterclaims, which were based on the plaintiff's failure to close on the purchase of the defendant's interest after the defendant invoked a buy/sell provision. The court concluded that the defendant was in no equitable position to invoke the buy/sell provision because the defendant had committed an undisclosed material breach of the LLC agreement prior to invoking the buy/sell provision. Furthermore, there was no evidence that the defendant was able to buy out the plaintiff at the price set by the defendant. Finally, the court dismissed the defendant's claim for dissolution. According to the court, the only plausible basis for dissolution was that continuation of the LLC was impracticable because the plaintiff and the party controlling the defendant did not get along. The impasse no longer existed, however, because the defendant was left with only the rights of an assignee, and the plaintiff had authority to act as the sole member.

**Connecticut Plywood Corporation v. Custom Cabinets & Refacing, LLC**, No. CV44001660S, 2005 WL 2857505 (Conn. Super. Oct. 13, 2005) (holding defendant member who guaranteed LLC indebtedness to supplier was not liable on debt incurred by LLC after defendant member ceased his association with LLC and LLC was being conducted as sole proprietorship by remaining member, where defendant member informed plaintiff of change in LLC's business and made separate agreement regarding payment of LLC's then existing indebtedness).

**Directory Services, L.L.C. v. Rowland**, No. A-04-039, 2005 WL 2205926 (Neb. App. Sept. 13, 2005). The court reviewed conflicting evidence as to whether the five members of an LLC agreed that they would individually guarantee the LLC's debt and concluded that the members agreed that each would be required to guaranty the debt. The court found that the defendant member's failure to execute the required guaranty was a substantial and fundamental breach of contract entitling the LLC to rescind the member's membership.

*Actives International, L.L.C. v. Reitz*, No. BER-C-239-05, 2005 WL 1861939 (N.J. Super. Ch. Aug. 5, 2005). An LLC sought to expel one of its members (Reitz) whom it alleged was guilty of poor performance, competing with the LLC, and attempts to divert business opportunities. Reitz denied the wrongdoing but admitted that he had agreed to leave the LLC because of the “political differences” that had developed among the members. The court noted the grounds for judicial removal of a member specified in the New Jersey LLC act: (1) wrongful conduct that adversely and materially affected the LLC’s business, (2) willful or persistent material breach of the operating agreement, or (3) conduct relating to the LLC’s business that makes it not reasonably practicable to carry on the business with the member. The court determined that Reitz’s agreement to a process of dissociation and his declared interest in starting or becoming affiliated with a new business, along with the parties’ philosophical differences, made it clear that it was no longer reasonably practicable to carry on business together. The court pointed out that it was making no ruling on the first two grounds for expulsion at this stage, merely that it was not reasonably practicable for Reitz to continue as a member in the LLC because of the friction and deteriorating situation among the members. The court stated that Reitz would be declared dissociated, with the valuation issue to be determined, and without prejudice to Reitz’s position with respect to possible further adjudication of the first two grounds for expulsion.

*CCD, L.C. v. Millsap*, 116 P.3d 366 (Utah 2005). An LLC had the right to seek statutory expulsion of a member notwithstanding the member’s attempt to block the expulsion by first retiring under the terms of the operating agreement. The member’s misappropriation of funds in the LLC’s trust account supported the expulsion, and the LLC did not waive its right to expel the member. Although the operating agreement stated that a member could not be expelled, the court found that the prohibition on expulsion was superseded by provisions of the Utah LLC statute that specified grounds for judicial expulsion and prohibited the operating agreement from varying the statutory right to expel a member. The court stated that the member’s misappropriation of funds could reasonably be interpreted to satisfy one or more of the statutory grounds for judicial expulsion (wrongful conduct that adversely and materially affected the LLC’s business, willful and persistent material breach of the articles of organization or operating agreement or a duty owed the LLC or other members, or conduct relating to the LLC’s business that makes it not reasonably practicable to carry on the business with the member). The member claimed that he had retired pursuant to the terms of the operating agreement and that the retirement terminated his membership and rendered the attempt to expel him a nullity since he was no longer a member. The court relied upon policy considerations to reject the member’s claim and concluded the statute authorized the LLC to expel the member. The court recognized the logic of the member’s argument, but stated there was no legal principle that required legislative enactments to be “leashed to Aristotelian logic.” The court stated that the legitimate policy aims of the statute would be frustrated if a member whose conduct made him eligible for expulsion could block expulsion by voluntarily ceasing to be a member, which, under the terms of the operating agreement in issue, threatened a forced liquidation of the LLC. The court found sufficient grounds to expel the member where the member had been given a second chance after a first incident involving misappropriation of \$625,000. The member’s second instance of misconduct involved misappropriation of \$11,540. The court found the second incident was sufficient grounds to expel the member and concluded the LLC’s waiver of its right to expel the member for the first instance did not limit its right to expel the member for the subsequent misconduct.

*Wyoming.com, LLC v. Lieberman*, 109 P.3d 883 (Wyo. 2005) (holding further proceedings were improper and action should be dismissed since issue of status of withdrawn member’s interest had been determined and withdrawn member remained equity interest holder with no obligation to sell his interest and no right to be bought out by LLC).

*Warren v. Weber and Warren Anesthesia Services, LLC*, 612 S.E.2d 17 (Ga. App. 2005). The court distinguished case law imposing a duty to wind up unfinished business in the partnership dissolution context and held that the evidence supported the jury’s finding that a member who resigned from an LLC did not breach a fiduciary duty to the LLC by performing services for a surgical center with which the LLC had contracted to provide services. The court stated that the Georgia LLC statute and the LLC operating agreement contemplate resignation, and the act of resignation is not a breach of fiduciary duty. Furthermore, the surgical center terminated its contract with the LLC and the operating agreement did not prohibit members who resigned from forming a competing business or soliciting customers of the LLC. The court also held that the trial court did not err in refusing to give an instruction describing wrongful dissolution because the instruction was based on case law decided under the Georgia Uniform Partnership Act and did not accurately state LLC law. Finally, the court held the trial court did not err in submitting an instruction defining “member” as a person who has been admitted as a member and has not ceased to be a member because the instruction recited the statutory definition of a member under the Georgia LLC act and the plaintiffs provided no authority for their argument that the definition was not accurate and should have been adjusted to the evidence.

***Kinkle v. R.D.C., L.L.C.***, 889 So.2d 405 (La. App. 2004) (holding that death of member did not dissolve LLC under terms of operating agreement, and statute in effect when LLC was formed did not provide for buy-out upon death of member, thus deceased member's personal representative was assignee with right to share in profits and losses and distributions, but no right to participate in management and no right to information or an accounting).

***Bell v. Walton***, 861 A.2d 687 (Me. 2004). Walton and Bell formed an LLC in which each was a 50% member and a manager. After disagreements arose, Bell discontinued his full-time employment in 2001. The Maine LLC act provides that a member may voluntarily withdraw from an LLC by giving written notice to the other members thirty days prior to withdrawal unless otherwise provided in the operating agreement or articles of organization. The LLC's articles of organization did not address member withdrawal, and there was no operating agreement in place; therefore the default rule applied. Bell never tendered written notice of withdrawal. After Bell and Walton failed to agree on the terms of a buy-out of Bell's interest, Bell brought a derivative suit against Walton for breach of fiduciary duty, and Walton countered that Bell had terminated his interest in the LLC in 2001. The court held that strict compliance with the statutory requirement of written notice for withdrawal is required, and Bell had not withdrawn because the "bright line" of written notice had not been crossed. The court said it was mindful that an LLC is a creature of statute and concluded there was no reason to engraft a judicially created doctrine of constructive notice of withdrawal on the clear statutory scheme. Walton argued that the notice requirement is for the benefit of those entitled to receive the notice and can be waived by them; however, the court said the requirement benefits all members and it would not be appropriate to allow a person to waive a requirement that benefits another. The court explained that the notice requirement protects the remaining members by giving them the opportunity to notify creditors that the withdrawing member can no longer bind the LLC, and it also protects members against false or unfounded claims of withdrawal. In addition, the court said the requirement leaves room for members to attempt to informally resolve differences they may have before resorting to the withdrawal process.

***Leisher v. Alfred***, No. D041303, 2004 WL 693207 (Cal. App. April 3, 2004). Leisher and Alfred formed an LLC with Alfred as the manager. Alfred engaged in misconduct as manager and Leisher removed him as manager. The business declined, and Leisher ultimately filed suit to dissolve the LLC. Leisher also sought an accounting and damages from Alfred. The court held that the removal of Alfred did not dissolve the LLC because neither the California LLC act nor the operating agreement provided for dissolution in the event of the expulsion of a member. The court also applied the operating agreement to resolve disputes over various distributions and payments.

***LGB Group, LLC v. Booty***, Nos. CAL 03-00088, CAE 02-00408, CAL 03-08305, 2004 WL 1058958 (Md. Cir. Ct. Jan. 28, 2004). An LLC obtained a judgment against one of its members who had stolen from the LLC while acting as president of the LLC. The court held the member's interest was properly forfeited under Maryland law when the member failed to pay the judgment against him. The court relied upon a provision of the Maryland LLC act stating that a member who fails to make a payment that the member is required to make to the LLC may be subject to specified remedies or consequences such as forfeiture of the defaulting member's interest. The members adopted a resolution reducing the member's interest to zero after obtaining valuations from an independent accounting firm, and the value of the interest was offset against the judgment. The court also held the member forfeited his membership by seeking dissolution and "partition" of the LLC. The court relied upon a provision of the Maryland LLC act that states a person ceases to be a member if the person files a petition or answer seeking for that person any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation. (The court did not explain why this provision would apply to a request to dissolve the LLC itself rather than the person who is the member.)

***Bell v. Bangor Metal Works, LLC***, No. CV-02-100, 2003 WL 24842276 (Me. Super. Sept. 25, 2003) (concluding member who departed from day-to-day operations of LLC was still member because withdrawal as specified by statute did not occur).

***Love v. Fleetway Air Freight & Delivery Service, L.L.C.***, 875 So.2d 285 (Ala. 2003) (interpreting term "withdrawal" in LLC member agreement and LLC operating agreement and concluding that termination of manager's employment did not constitute withdrawal as a member).

***Lamprecht v. Jordan, LLC***, 75 P.3d 743 (Idaho 2003) (interpreting withdrawal and buy-out provisions in operating agreement and concluding that former member was entitled only to the balance in his capital account as of the date his employment with the LLC terminated).

**Brazil v. Rickerson**, 268 F.Supp.2d 1091 (W.D. Mo. 2003). Brazil was a member of three LLCs, two of which were governed by identical operating agreements. The third LLC was governed by a slightly different operating agreement. Although there was some overlap in ownership, the members and ownership interests in the three LLCs varied. The defendants sent a notice of termination of Brazil's membership in the LLCs pursuant to Article 7 of each operating agreement. The provisions of Article 7 of each agreement were not identical. Article 7 of two of the operating agreements provided for expulsion of a member, when, in the opinion of a majority in interest of the members, a member has been "guilty of misconduct or act in any manner inconsistent with the good faith observable between Members to such an extent as to render it impracticable for the then members to carry on the Company business together." Although an early draft of the third operating agreement contained identical language, that language was removed, and Article 7 of the third operating agreement only provided for expulsion of a "Designated Managing Member." Brazil filed suit alleging various causes of action based on what he alleged was his wrongful expulsion from the LLCs. The court determined that the members had the power to expel Brazil under two of the operating agreements and that the requisite determination by the majority interest did not require a meeting or a vote. However, the court concluded that fact questions remained as to whether the majority in interest believed it was "impracticable" to continue to operate with Brazil; therefore, the court could not determine as a matter of law that the expulsion was wrongful or that fiduciary duties were breached. With respect to the third LLC, the court determined that the members did not have the power to expel Brazil. The operating agreement did not confer the power to expel a member in Brazil's position, and the court concluded that oblique references to expulsion of a member in another agreement were not sufficient to provide for the affirmative power to expel members. Thus, the court concluded that Brazil's expulsion from that LLC was wrongful.

**River Links at Deer Creek, LLC v. Melz**, 108 S.W.3d 855 (Tenn.Ct.App. 2002). Under the terms of its operating agreement, River Links at Deer Creek, LLC ("River Links") dissolved upon the administrative dissolution of Deer Creek Golf Interests, LLC ("Deer Creek"), a member of River Links, for failure to file required annual reports. After the administrative dissolution, the remaining members of River Links voted to continue its business, amend the operating agreement, redeem the interest of Deer Creek, and remove Melz (Deer Creek's "principal") from the Board of Managers of River Links. After these actions, Deer Creek was reinstated. Melz argued that the retroactive nature of the reinstatement rendered the actions taken by the other members of River Links after the administrative dissolution invalid. Melz also sought to arbitrate the claims because the operating agreement of River Links contained an arbitration clause. The court held that the trial court should retain jurisdiction of the issue because of the lack of LLC case law. "An arbitrator dealing with the complex facts of this case would have no guidance on the proper interpretation of the Limited Liability Company Act, and would have to expend a great deal of time and energy to reach a well-considered conclusion, but his ultimate decision would have no precedential value." It thus appeared reasonable to the court for the trial court to retain jurisdiction over the declaratory judgment claim.

**Baker v. Jones & Henry Engineers, LTD**, No. L-00-1198, 2001 WL 304088 (Ohio App. March 30, 2001). A member of an engineering firm LLC sued for wrongful termination after the other members voted to terminate his employment and demanded he resell his membership interest. The plaintiff argued that termination of his employment was wrongful because the operating agreement and membership interest subscription agreement contractually obligated the LLC to retain him. The member based this argument on the inclusion of the phrase "long-term investment" in each of these agreements, which the member asserted was evidence that a member was entitled to employment until he voluntarily left the firm or retired. The court concluded that there was no evidence of an express or implied contract in this regard. The court also rejected other arguments based upon promissory estoppel, public policy, and fraud.

**Walker v. Resource Development Company Limited, L.L.C.**, 791 A.2d 799 (Del. Ch. 2000). Walker, a first cousin of former President Bush, was brought in as a member of a Delaware LLC in order to utilize his connections and reputation to help the LLC secure needed financing. After Walker failed to secure financing and the other members became concerned about Walker's drinking problem, financial irresponsibility, and other matters, he was relieved of his official duties for a period of time. He was later given his job back, and the members entered into a formal operating agreement designating Walker as an 18% member. Ultimately, however, the relationship soured completely, and the other members purported to remove him as a member and terminate his ownership interest. The members referred to Walker's poor performance and misconduct in the written notice of his removal, but there was also a dispute over whether Walker had a side deal that constituted a conflict of interest. The court concluded that the other members had no authority to remove Walker as a member either under the Delaware LLC act or the operating agreement. The court rejected the argument that the members had the inherent power to remove Walker and deprive him of his ownership interest based upon his alleged breach of fiduciary duty. Although the court recognized that there was a relationship of sufficient trust and confidence to impose on Walker a duty to disclose a material fact such as a conflict of interest, the



court concluded that the members did not rely on any understanding that Walker was independent in entering into the operating agreement. Thus, the court rejected the members' misrepresentation claim against Walker. The court also rejected the members' claim that they were protected from liability for their effort to appropriate Walker's interest based upon a good faith reliance on the operating agreement. After purporting to remove Walker, a series of financing transactions led to the exchange of the members' membership interests in the LLC into shares of a Canadian corporation. Walker failed to prove the value of his 18% interest in the LLC, thus there was no basis for an award of damages; however, the court imposed a constructive trust in Walker's favor upon 18% of the shares the other members had received in the Canadian corporation.

*Whitmore v. Hawkins*, No. 99-1443, 2000 WL 828285 (4<sup>th</sup> Cir. June 27, 2000). Whitmore was hired as chief operating officer of an LLC that operated fast food restaurants. He also received a 5% membership interest in the LLC and a 5% interest in a second LLC that was being formed to acquire additional fast food franchises. When Whitmore's employment was terminated, he claimed that he was entitled to receive the value of his membership interests under provisions of the Maryland LLC act in effect at the time. The court pointed out that the statutory provisions relied upon by Whitmore were default provisions and that the operating agreements of the two LLCs had provisions addressing withdrawal and buy-out. The court concluded that the termination of Whitmore's employment did not amount to a withdrawal or entitle Whitmore to receive the value of his interest under either of the operating agreements, thus Whitmore was not entitled to be bought out.

*Gee v. Bullock*, 1996 R.I. Super. 941, 1996 WL 937009 (R.I. Super. Nov. 16, 1996). Two members of an LLC sued the third member, Bullock, seeking injunctive relief barring Bullock from operating the LLC and permitting them to carry on the business. Bullock sought dissolution and an accounting. The court found that Bullock made fraudulent representations when she claimed to have sole ownership of an existing business into which she induced the plaintiffs to invest and when she promised to sign an operating agreement giving the plaintiffs a fifty-one percent controlling interest in their newly formed LLC. In fact, another individual had a substantial interest in the business Bullock claimed to own, and Bullock later refused to sign the operating agreement for the new LLC. Ultimately, Bullock locked the other two members out of the business premises and transferred the assets of the LLC to a new corporation formed by Bullock and yet another investor. The court concluded that the LLC dissolved when Bullock wrongfully excluded/expelled the other two members from the business and that the LLC could only continue for winding up purposes. Thus, the court denied the plaintiffs' requested injunctive relief. The court went on to discuss the fraudulent nature of the transfer of the LLC's assets to Bullock's new corporation under Rhode Island's Uniform Fraudulent Transfer Act. Finally, the court appointed an attorney to conduct the winding up of the LLC because Bullock, having wrongfully caused the dissolution of the LLC, was not entitled to participate in the winding up of the LLC's affairs.

### 3. Rights of Dissociated Members/Estate of Deceased Member

*Ptasynski v. CO2 Claims Coalition, LLC*, Civil Action No. 02-WM-00830-WDM-MEH, 2007 WL 1306492 (D. Colo. May 3, 2007) (agreeing with plaintiff that withdrawal merely terminated his management rights and that plaintiff retained his ongoing pro rata financial rights as if he had not withdrawn (as opposed to pro rata interest in LLC's value at time of withdrawal), but holding that plaintiff failed to prove amounts to which plaintiff was entitled).

*Holdeman v. Epperson*, 857 N.E.2d 583 (Ohio 2006). The 51% member of a two-member LLC died, and the Ohio Supreme Court held that the rights of the executor of the deceased member were not confined to those of an assignee, and the executor was entitled to exercise all the rights possessed by the deceased member prior to his death for the purpose of settling the estate. The court relied upon a provision of the Ohio Limited Liability Company Act that provides as follows: "If a member who is an individual dies or is adjudged an incompetent, his executor, administrator, guardian or other legal representative may exercise all of his rights as a member for the purpose of settling the estate or administering his property, including any authority that he had to give an assignee the right to become a member." The operating agreement of the LLC stated that the successor in interest of a deceased member succeeded to the interest of the member but did not become a member unless admitted in accordance with the agreement. The surviving member relied upon various provisions of the Ohio LLC statute in arguing that the deceased member withdrew from the LLC upon his death and that his executor obtained only the rights of an assignee. The court stated that the operating agreement was consistent with the general provisions of the Ohio LLC statute regarding rights of assignees and membership interests, but pointed out that the provision regarding the rights of a legal representative of a deceased member does not state that it applies "except as otherwise provided in the operating agreement." The court thus inferred that the General Assembly did not intend for that provision to be restricted by contrary language in the operating

agreement. Accordingly, the court held that an executor of a deceased member of an LLC has all rights the member had prior to death for the limited purpose of settling the deceased member's estate or administering his property. A dissenting justice argued that the operating agreement should control the relationship of the remaining member and the executor. In the dissenting justice's view, the Ohio LLC statute provides that an executor has only the rights of an assignee and not the full rights of a member unless the operating agreement provides otherwise. Additionally, the dissenting justice argued that the majority ducked the real controversy and failed to provide needed guidance by not defining the rights the executor possessed "for the purpose of settling [the member's] estate or administering his property." The dissenting justice viewed the proper scope of the phrase as only those actions necessary to collect, evaluate, and distribute assets due the estate.

*Uzielli v. Frank*, 137 Fed.Appx. 795, 2005 WL 1412036 (6<sup>th</sup> Cir. 2005) (holding abstention was appropriate in LLC member's action to determine rights under operating agreement with respect to option to purchase deceased member's interest because federal court's decision would not settle controversy, estate requested state probate court to address valuation of interest prior to plaintiff's filing suit in federal court, federal court had no particular expertise in matter, and judicial economy would be promoted by having issue decided in probate court where estate would otherwise be administered).

*Kinkle v. R.D.C., L.L.C.*, 889 So.2d 405 (La. App. 2004) (holding that death of member did not dissolve LLC under terms of operating agreement, and statute in effect when LLC was formed did not provide for buy-out upon death of member, thus deceased member's personal representative was assignee with right to share in profits and losses and distributions, but no right to participate in management and no right to information or an accounting).

*Lieberman v. Wyoming.com LLC*, 82 P.3d 274 (Wyo. 2004) (holding that withdrawn member of a Wyoming LLC retained his equity interest in the LLC because the Wyoming LLC act does not address the fate of a member's equity interest upon the member's dissociation and the operating agreement contained no provision regarding the equity interest of a withdrawn member).

*Lamprecht v. Jordan, LLC*, 75 P.3d 743 (Idaho 2003) (interpreting withdrawal and buy-out provisions in operating agreement and concluding that former member was entitled only to the balance in his capital account as of the date his employment with the LLC terminated).

*Branca v. Conley*, 2001 WL 1807403 (Oct. 30, 2001) (finding member's claims for fraud, breach of fiduciary duty, and conspiracy in connection with buy-out of member's interest were released in settlement agreement executed in connection with buy-out).

*Lieberman v. Wyoming.com LLC*, 11 P.3d 353 (Wyo. 2000). The court interpreted the Wyoming LLC act and the operating agreement of a Wyoming LLC to determine the rights of Lieberman, a dissociated member. Lieberman's contribution upon formation of the LLC was documented at \$20,000, consisting of services rendered and to be rendered. When Lieberman was terminated as vice-president of the LLC, he served a notice of withdrawal and demand for the return of his share of the current value of the company, which he estimated at \$400,000. The remaining members avoided dissolution of the LLC by electing to continue the LLC and approved the return of Lieberman's \$20,000 capital contribution. The court discussed a provision of the Wyoming LLC act that entitles a member to demand the return of the member's capital contribution if the operating agreement does not prohibit or restrict the right. Since the LLC operating agreement did not restrict this right, Lieberman was entitled to the return of his \$20,000 contribution. The question remained whether he was entitled to receive any further distribution. A provision permitting a member to compel dissolution upon an unsuccessful demand for the return of the member's contribution was not applicable since the LLC agreed to return Lieberman's contribution. Noting the absence of a provision in the Wyoming LLC act governing dissociation, the court turned to various provisions of the operating agreement dealing with membership certificates, transfer of interest, quorum, and voting and concluded that it remained unclear what became of Lieberman's ownership interest beyond his capital contribution. Thus, the court remanded for a further determination in this regard.

*Lindsay, Marcel, Harris & Pugh, L.L.C. v. Harris*, 752 So.2d 335 (La. App. 2000). Harris and Pugh gave notice of their withdrawal from their four-member law firm LLC and formed their own law firm. When the LLC filed suit against the withdrawn members, the withdrawn members answered and sought dissolution. The court of appeals determined that the withdrawn members had no right to seek judicial dissolution because the statute conferred no such right on former members. In addition, the court found no basis in the operating agreement for the withdrawn members

to obtain dissolution. Included among the causes of dissolution listed in the operating agreement was “reduction in the number of Members to 1,” but the court pointed out that two members remained after the withdrawal of the other members.

***Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenbaum and Walker, P.L.C.***, 599 N.W.2d 677 (Iowa 1999). A lawyer left his firm (a professional LLC) and went to another firm, and there was a dispute over the provision of the operating agreement dealing with benefits to be paid to a retiring member. The specific issue on appeal was whether the “continuation payments” under the operating agreement qualified as “retirement benefits” under Iowa DR 2-108(A). The payments were conditioned on the lawyer’s termination of the private practice of law in Iowa. The lawyer argued that this was an impermissible covenant not to compete. The court concluded that the provisions in this case (requiring ten years of service and sixty years of age or twenty-five years of service) clearly constituted a retirement plan, and the restriction on future practice was therefore valid, even though the plan applied to situations involving less than full retirement.

***Investcorp, LP v. Simpson Investment Company, L.C.***, 983 P.2d 265 (Kan. 1999). The members of a family-held Kansas LLC deadlocked on important management issues, and several members withdrew to effect a dissolution of the LLC. The withdrawing members claimed that they were entitled to participate in the LLC’s winding up under the operating agreement. The LLC’s remaining members argued that the withdrawing members were no longer members and thus had no right to participate in the LLC’s winding up. Both factions relied on the operating agreement, which provided for the “members” to wind up and liquidate the LLC and defined “members” as “those persons who are members of the Company from time to time, including any Substitute Members.” The district court found that the withdrawing members were not entitled to participate in the dissolution process. The Kansas Supreme Court, however, examined the use of the term “member” and “remaining member” in other provisions of the operating agreement and concluded that “[t]he many references to ‘member’ in the Act when coupled with the operating agreement suggest that the better view is that, in dissolution, ‘member’ includes a withdrawing member having a financial interest in the Company’s assets.” The court went on to state that control of the dissolution process resided in the managers of the LLC under the operating agreement and the Kansas act.

***Five Star Concrete, L.L.C. v. Klink***, 693 N.E.2d 583 (Ind. App. 1998). The court in this case determined that a dissociating member of an LLC had no right to receive a distribution of income allocated to the member for tax purposes and that there were fact issues precluding summary judgment on the issue of whether the buy-out of the dissociating member divested the member of its entire economic interest in the LLC. Klink, Inc. (“Klink”) and four other corporations formed an LLC. Klink withdrew from the LLC, and the remaining members decided to purchase Klink’s ownership units and continue the business. The members agreed that Klink would receive \$61,047.22 for the value of Klink’s “units.” After the end of Klink’s fiscal year, Klink was allocated its share of the LLC’s income for the portion of the year that Klink was a member. Klink asserted that it was entitled to a distribution in this amount. The court concluded that neither Indiana law nor the operating agreement gave a member a right to a distribution of income allocated to the member for income tax purposes. The remaining issue involved the meaning of the term “units” inasmuch as Klink’s units were bought out on its withdrawal. The LLC contended that Klink divested itself of its entire interest when it sold its units to the LLC. Klink argued that it sold less than all of its economic rights. Klink pointed to the operating agreement reference to a unit as “an interest in the Company representing a contribution to capital.” The LLC pointed out, however, that the operating agreement generally entitled each unit to a vote and a proportionate share of the LLC’s net income, gains, losses, deductions, and credits. The court concluded that fact issues precluded resolution of this issue by summary judgment. The court addressed as a separate issue the valuation method and whether it represented the fair market value of Klink’s entire interest. The court concluded that summary judgment was not appropriate on this issue either.

***Goldstein and Price, L.C. v. Tonkin & Mondl, L.C.***, 974 S.W.2d 543 (Mo. App. 1998). The LLC in this case converted from a partnership in January 1994 and adopted the partnership agreement as the operating agreement until a new operating agreement could be prepared. In November 1994, before a new operating agreement was adopted, one of the members, Tonkin, advised other members of the firm that he intended to withdraw. He provided a written notice of withdrawal stating an effective date of December 31, 1994. The managing members concluded that the partnership agreement that served as the LLC’s operating agreement required Tonkin’s withdrawal on November 30, 1994. The agreement stated that “withdrawal shall become effective on the last day of the calendar month after service of the withdrawal notice. . .” The court found this language by itself to be ambiguous but interpreted it with reference to other parts of the agreement and concluded that withdrawal was effective November 30, 1994. The parties also had a

disagreement as to the withdrawn member's share of certain fees received by the firm after Tonkin's withdrawal. The court looked to the operating agreement as controlling but found no provision addressing work in progress in the withdrawal context. Thus, under the terms of the written agreement, Tonkin was not entitled to any portion of the disputed fee. However, the court concluded that the parties orally modified the operating agreement regarding the fee in question by agreeing to treat the fee as an account receivable. The agreement provided for allocation of accounts receivable, and Tonkin was awarded his share under the agreement.

*Lloyd v. Horn, Inc.*, No. Civ.A. 95-2549-KHV, 1997 WL 150052 (D. Kan. Jan. 29, 1997), aff'd, 1998 WL 939493 (10<sup>th</sup> Cir. Aug. 21, 1998). The court rescinded an operating agreement of an LLC on the grounds that Lloyd, one of the members, committed fraud in the formation of the LLC, and the court concluded that Lloyd's rights were governed by the partnership agreement under which the parties had operated before organizing as an LLC. However, the court concluded that it could not determine Lloyd's rights under the partnership agreement by summary judgment and scheduled the matter for trial. The court referred to confusion between the terms "capital account" and "capital contribution" and as to whether Lloyd should be treated as a withdrawing or expelled partner under the provisions of the partnership agreement.

*Advanced Orthopedics, L.L.C. v. Moon*, 656 So.2d 1103 (La. App. 1995). The members of an LLC had a falling out, and one member, Moon, formed a competitive business and resigned from the LLC. Moon's attacks on the formation of the LLC were rejected by the court. Moon also argued that he was entitled to reimbursement for a capital contribution. He contended that he had made his agreed upon capital contribution of \$10,000 in the form of past experience, good will, services rendered, and equipment. While the court acknowledged that capital contributions do not have to be in the form of cash, it concluded that there was no evidence that Moon made a non-cash capital contribution.

#### **4. Sharing of Post-Dissolution Profits and Losses**

*Howard v. Perry*, 106 P.3d 465 (Id. 2005). Interpreting the operating agreement of a professional LLC, the court found that fees collected after dissolution were assets of the firm to be distributed equally to members rather than liabilities as distributions to be paid as monthly draws and quarterly bonuses to the member who generated the fees. Draws and bonuses had been paid through the date of dissolution, and the operating agreement made no provision for distributing uncollected fees to the member who generated the fees.

*Investcorp, L.P. v. Simpson Investment Co., LLC*, 85 P.3d 1140 (Kan. 2004) (applying Kansas LLC act and LLC operating agreement and concluding that withdrawn members were required to share in post-withdrawal dissolution expenses incurred by the LLC).

*Hurwitz v. Padden*, 581 N.W.2d 359 (Minn. App.1998). The court in this case applied partnership law to determine how fees from contingent fee files should be divided between the members of a dissolved LLC law firm. Hurwitz and Padden formed a two-person law firm in 1991. In 1993, articles of organization were filed, and the firm became a limited liability company. In 1996, the parties dissolved the firm and successfully resolved all issues except the division of fees from several contingent fee cases. The parties had no written agreement on the allocation of fees, but prior to dissolution the parties shared all firm proceeds on a 50-50 basis. Since the Minnesota LLC act borrowed the concept of dissolution from the UPA, the court concluded that it was appropriate to apply partnership law to resolve the issue at hand. Specifically, the court concluded that "partnership principles, including the 'no-compensation' rule' [under which partner other than surviving partner has no right to compensation for services rendered in furtherance of partnership business in winding up stage], govern the division of fees obtained from pre-dissolution contingency files." Thus, the court held that the fees should be split equally, consistent with the pre-dissolution method of allocation of fees. The court noted by way of footnote the change to Minnesota partnership law made by RUPA effective 1/1/99 whereby a partner is entitled to reasonable compensation for services rendered in winding up the business of the partnership.

#### **5. Judicial Dissolution/Appointment of Liquidator**

*Darwin Limes, LLC v. Limes*, No. WD-06-049, 2007 WL 1378357 (Ohio App. May 11, 2007). Disputes arose in a family farm organized as an LLC. The LLC was owned by four siblings, Charles, Dale, Donald, and Betty Limes. Donald had traditionally farmed the land on a cash rent basis under an alleged oral lease. The other members decided to terminate any lease arrangement with Donald, and litigation involving claims for receivership, judicial dissolution,

and declaratory judgment ensued. While the litigation was pending, the managing members voted to take bids on a lease of the land from Dale and Donald. The court interpreted the standard for judicial dissolution – that it is not reasonably practicable to carry on the business of the LLC in conformity with its articles of organization and operating agreement – and concluded that judicial dissolution was not appropriate. The court pointed out that the business of the LLC was farming, the operating agreement provided for continuation of the LLC even if Donald dissociated, and the LLC was in fact carrying on its business based on the award of the farming lease under the newly instituted bidding procedure.

*Vieira v. Eiswert*, No. E040984, 2007 WL 891330 (Cal. App. March 26, 2007) (holding that LLC member's breach of contract, fraud, and dissolution claims against co-members did not violate anti-SLAPP statute).

*Decker v. Decker*, 726 N.W.2d 664 (Wis. App. 2006) (concluding member's "obstructionist" tactics in connection with buy-out provisions of operating agreement authorized a court decree of dissolution because tactics showed a lack of good faith and constituted "oppressive" conduct).

*Rapoza v. Talamo*, No. 062779BLS1, 2006 WL 3292632 (Mass. Super. Oct. 10, 2006) (finding grounds for judicial dissolution based on deadlock).

*Lyons v. Salamone*, 821 N.Y.S.2d 188 (N.Y. A. D. 1 Dept. 2006) (finding it was equitable method of dissolution of LLC to permit either member to bid fair market value of other's interest, with receiver directed to accept highest bid, but it was improper to appoint private attorney as receiver to value business and sell it without oversight).

*Roemmich v. Eagle Eye Development, LLC*, No. 1:04-cv-079, 2006 WL 2433410 (D. N.D. Aug. 16, 2006) (finding that controlling member's conduct was "oppressive," but concluding that equities did not favor dissolution of LLC or buy-out of minority member's interest because minority member's inequitable conduct substantially outweighed any inequitable or unreasonable conduct on part of controlling member, and fashioning remedies to address controlling member's failure to provide information, failure to document decision-making, and failure to hold member meetings).

*Ribadab Properties Corp. v. Eaton*, No. CV-05-2338-PHX-DGC, 2006 WL 1734368 (D. Ariz. June 16, 2006) (denying motion for special master in suit seeking judicial dissolution given status of negotiations and prospect of achievable out-of-court resolution).

*Eureka VIII LLC v. Niagra Falls Holdings LLC*, 899 A.2d 95 (Del. Ch. 2006) (dismissing claim for dissolution because impasse between members no longer existed after court divested defendant of its membership rights and left defendant with rights of assignee and plaintiff with authority to act as sole member).

*Video Ocean Group, LLC v. Balaji Management Inc.*, No. Civ.A. H-03-1311, 2006 WL 964565 (S.D. Tex. April 12, 2006) (holding LLC that was reinstated after forfeiture for failure to pay franchise taxes could maintain action).

*Widewaters Herkimer Company, LLC v. Aiello*, 817 N.Y.S.2d 790 (N.Y. A.D. 4 Dept. 2006) (stating that allegations of breach of fiduciary duty and unlawful or oppressive conduct did not state grounds for judicial dissolution).

*Sotomayor v. Medifast, Inc.*, 814 N.Y.S.2d 103 (N.Y. A.D. 1 Dept. 2006) (dismissing derivative claims asserted on behalf of Delaware LLC not authorized to do business in New York and no longer in existence and good standing in Delaware).

*First Taunton Financial Corp. v. Arlington Land Acquisition-99, LLC*, No. 034449BLS, 2006 WL 696689 (Mass. Super. Feb. 27, 2006) (permitting claim for dissolution notwithstanding provision of operating agreement prohibiting member from petitioning for dissolution because member relied upon another provision mandating dissolution after sale of all or substantially all of LLC's assets).

*Horning v. Horning Construction, LLC*, 816 N.Y.S.2d 877 (N.Y. Sup. 2006). Horning brought this action for judicial dissolution of Horning Construction, LLC, a New York LLC engaged in the commercial construction business. The construction business was originally formed and operated by Horning as a corporation. In order to lessen his workload, Horning formed a new LLC to take over the business of the corporation and brought in two individuals as co-members of the LLC. Horning intended that his co-members would share in the day to day responsibilities in return for the 1/3 interest each received in the LLC. Horning and his fellow members failed to agree on the terms of an

operating agreement, and their relationship deteriorated. Horning contended his co-members did not assume their anticipated duties and he offered to sell the LLC to them, but they could not agree on the terms of a sale. Horning filed a suit to dissolve the LLC and sought appointment of a liquidating receiver. The court concluded that the standard for judicial dissolution under the New York LLC statute was not met and rejected Horning's argument that New York LLC case law stood for the proposition that dissolution was required whenever a member desired to sever the LLC relationship and there was no operating agreement. The court noted that amendments to the LLC statute eliminating default withdrawal and dissolution rights left the judicial dissolution remedy as the sole means of obtaining dissolution in the absence of an operating agreement. The statute provides for judicial dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." Though the parties were having disagreements and Horning was unhappy with the situation, the business was thriving and there was no deadlock. The court stated it could sympathize with Horning's plight, but stated that courts had rejected dissolution petitions in similar and worse scenarios under more liberal standards designed to protect minority interests in the corporate context. The court hinted that other oppression-based remedies might be available in some circumstances, noting that it need not consider whether any other remedy was available to Horning since he had only sought involuntary dissolution.

*In re Grupo Dos Chiles, LLC*, No.Civ.A. 1447-N, 2006 WL 668443 (Del. Ch. March 10, 2006). In February 2000, a certificate of formation for a Delaware LLC was filed. The certificate of formation named Rivera as the initial member. The following month Shriver and Martinez (Rivera's mother) executed a brief LLC agreement naming themselves as managing partners. In 2003, the LLC lost its good standing in Delaware because of a failure to pay Delaware taxes, and Shriver filed an action in Virginia, where the LLC was operating a restaurant, seeking a judicial winding up. In 2005, Martinez paid the LLC's back taxes and had its good standing reinstated. Shriver then filed this action in Delaware claiming that the LLC's membership could not be changed without an amendment to its certificate of formation since the certificate listed Rivera as the sole member. Shriver also asserted that the payment of the LLC's back taxes and restoration of its good standing were not authorized since the action was taken without a vote of the LLC's membership. The court stated that it need not decide whether the certificate of formation was correct in listing Rivera as the sole member when filed, finding it was immaterial whether Rivera was the initial member. The court said it was clear that Shriver and Martinez were the members under the LLC agreement, which superseded the certificate of formation. The court characterized the certificate of formation as the first statutory step in creating an LLC and stated that the Delaware LLC statute contemplates the certificate will be complemented by an agreement. The court found that the agreement made it clear that Martinez and Shriver were to be the members even though it referred to them as the managing partners. The court also pointed to other documentary evidence (loan documents, correspondence, and other documents) indicating Martinez and Shriver were the members. The court found no obligation to amend the certificate of formation, stating that there was no indication that the identification of Rivera as the initial member was not accurate when filed, and pointing out that the Delaware statute does not require that the members be set out in the certificate of formation. With respect to the payment of the LLC's back taxes and restoration of its good standing, the court found that the act was not proper under the unique circumstances in this case. The court stated that it need not determine whether restoring the good standing of an LLC that has been cancelled for failure to pay its taxes is a ministerial act that any member or manager may take without a vote of the members. The court characterized the narrow issue in this case as follows: "The issue is whether once an LLC has lost its good standing for nonpayment of taxes and the member attempting to restore good standing represents less than a majority of the voting power of the LLC and knows there is a dispute as to whether the LLC should continue and where another co-member of the LLC has initiated litigation to dissolve the company, the member with that knowledge can unilaterally restore the LLC to good standing." The court held the LLC was not in good standing because it was not proper for Martinez to restore its good standing without Shriver's consent.

*In re Air Safety International, L.C.*, 336 B.R. 843 (S. D. Fla. 2005) (holding administratively dissolved LLC had capacity to receive distribution of surplus proceeds of estate because LLC continued to exist for purposes of winding up and liquidation).

*In re Ehmman (Movitz v. Fiesta Investments, LLC)*, 334 B.R. 437 (Bankr. D. Ariz. 2005), withdrawn, 337 B.R. 228 (Bankr. D. Ariz. 2006). This opinion appeared in the advance sheets, but was withdrawn pursuant to a "buy and bury" settlement intended to keep the opinion from having precedential value. In the withdrawn opinion, the trustee requested judicial dissolution or receivership of an LLC in which the debtor was a member prior to filing bankruptcy. The court determined that the manager was operating the LLC in a manner benefitting favored members to the exclusion of the bankruptcy estate based on numerous insider transactions occurring after the appointment of the trustee and in

violation of the terms of the operating agreement. The court stopped short of ordering judicial dissolution because the operating agreement expressly waived the members' rights to seek judicial dissolution under circumstances that might have applied. Noting that the statute precludes waiver of a member's right to obtain judicial dissolution when it is not reasonably practicable to carry on the LLC business in conformity with the operating agreement, the court suggested that the receiver may be entitled to seek judicial dissolution if the receiver determines that it is not reasonably practicable to carry on the LLC business in conformity with its operating agreement.

*Terex Corporation v. STV USA, Inc.*, No. Civ.A. 1614-N, 2005 WL 2810717 (Del. Ch. Oct. 20, 2005) (concluding arbitration clause in LLC agreement encompassed judicial dissolution).

*Directory Services, L.L.C. v. Rowland*, No. A-04-039, 2005 WL 2205926 (Neb. App. Sept. 13, 2005) (affirming dismissal of LLC member's request for dissolution of Missouri LLC operating in Nebraska, stating that Nebraska courts do not have jurisdiction to dissolve a foreign corporation, even one that has its corporate office in Nebraska).

*In re Silver Leaf, L.L.C.*, No. Civ. A. 20611, 2005 WL 2045641 (Del. Ch. Aug. 18, 2005). The court decreed judicial dissolution of a Delaware LLC on the basis that it was not reasonably practicable to carry on the business in conformity with the LLC agreement because the members were deadlocked and the business purpose was moot. Concluding that the LLC was involved in a scheme with another corporation to deceive investors, the court refused to appoint a receiver. The LLC was formed to market a new vending machine designed to dispense freshly cooked french fries. The machine was developed and manufactured by a corporation known as Tasty Fries, Inc. (Tasty Fries). The LLC entered a stock purchase agreement and a sales and marketing agreement with Tasty Fries, but disputes among the individuals and entities involved led to termination of the sales and marketing agreement and deadlock among the members of the LLC. The LLC's three members were split into two factions owning 50% each. The court noted the paucity of Delaware cases applying the standard for judicial dissolution of an LLC and looked to limited partnership case law for guidance since the limited partnership judicial dissolution provision is worded essentially the same as the LLC provision. The court concluded that the deadlock among the members made it impossible to take the actions necessary to continue functioning as a business because important business decisions required approval of a majority in interest of the members and the LLC agreement provided no mechanism to break the impasse. The court rejected the argument that the 50% member could not vote its interest. Although the operating agreement purported to allow members to vote their interests only if they were "not in default of [their] obligations," the agreement did not define "default," and there were no apparent financial obligations that the member had failed to perform, just various alleged instances of misconduct. Furthermore, there was evidence of conduct violating the operating agreement on the part of the other members. Under the circumstances, the court refused to construe the operating agreement to limit the voting rights of the LLC members. In addition to being unable to take the actions necessary to carry on its business due to the deadlock of the members, the business purpose of the LLC was no longer feasible because the sales and marketing agreement had been terminated, and the LLC thus no longer had the right to market the machine it was formed to market. The court thus decreed dissolution of the LLC. The conduct by the members of the LLC was such that the court concluded unclean hands barred all parties from being appointed receiver or recovering on any of their other claims. As described in detail by the court, the entire venture was fraught with problems and amounted to a securities fraud. Tasty Fries was never able to manufacture an operable machine and had a history of publishing overly optimistic, if not outright misleading, press releases. In addition, a majority of the total shares issued by Tasty Fries were void because of irregularities in three separate amendments to its articles of incorporation to increase the number of authorized shares. The court characterized Tasty Fries as little more than a vehicle to raise money from gullible investors—simply a penny stock fraud. The court found that the business plan relied upon by the LLC members showed that they knew the sale of machines was never commercially viable. Under the circumstances, the court denied the members any relief other than dissolution, a result the court characterized as serving "the interest of justice by putting an end to this dispute once and for all."

*ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1 (Tenn. Ct. App. 2005) (noting principles of equity cannot create rights outside boundaries drawn by breach of contract case, but claim for judicial dissolution permits court to grant any equitable relief it considers just and reasonable, and approving of equitable distribution fashioned by trial judge under decree of dissolution).

*Matthews v. Matthews*, No. M2003-01159-COA-R3-CV, 2005 WL 819728 (Tenn. App. April 7, 2005). The differences of two brothers who owned an LLC escalated to the point that a judicial dissolution of the LLC was granted. Rather than ordering liquidation of the LLC, the court, with the consent of the members, afforded the members the

opportunity to purchase the LLC. One of the brothers purchased the LLC at the court-ordered auction. The procedure did not permit the members to pick and choose assets and liabilities of the LLC. A new dispute arose when the non-purchasing member submitted a proposed order reciting that the liabilities of the LLC included a note executed by the two members prior to formation of the LLC and ordering that the purchasing member must continue to pay all liabilities established by the parties when they operated the LLC. The brothers agreed to resolve the dispute by a declaratory judgment action in which the sole issue was whether the LLC was obligated under the note. The trial court found the LLC had assumed liability on the note. The purchasing member appealed, claiming that the LLC did not assume the note and that, even if it did, the indebtedness would be unenforceable because there was no writing evidencing the assumption. The court first addressed the statute of frauds defense and stated that the defense was waived because the member did not plead it. The court went on to state that the defense was not applicable in any event because the case at bar was an action to dissolve the LLC. The court stated the statute of frauds applies when one party is seeking to hold another party liable for the debt of another, and the parties were seeking a declaratory judgment as to whether the note was a liability of the LLC. The court held that the evidence supported the trial court's finding that the LLC assumed liability on the note even though there was no written assumption because the evidence showed that the LLC made all required monthly payments after its formation, listed the note as a liability on its business and financial records, and deducted the interest payments.

*Percontino v. Camporeale*, No. BER-C-5-05, 2005 WL 730234 (N.J. Super. Ch. March 24, 2005) (looking to partnership and close corporation law to interpret standard for judicial dissolution of LLC, i.e., that it is not reasonably practicable to carry on the business in conformity with the operating agreement).

*Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004). The court held that a 50% member of a deadlocked two-member LLC was entitled to judicial dissolution, interpreting Section 18-802 of the LLC act by analogizing to the provisions of the Delaware corporate law applicable to a deadlocked two-shareholder corporation. The LLC in issue owned the property occupied by a restaurant that was wholly owned by Talcott but, prior to the falling out, was run by Haley under an employment contract that gave him a 50% share in the profits. Haley argued that the deadlocked LLC should be judicially dissolved because it was not reasonably practicable to carry on the business in conformity with the LLC agreement when the members were deadlocked and the agreement called for the LLC to be governed by the two members. Talcott argued that Haley should be relegated to an alternative exit provision in the LLC agreement. Talcott argued that it was reasonably practicable to continue the business of the LLC in conformity with the agreement because the exit mechanism provided for a buy-out of Haley's interest for fair market value, determined as provided in the agreement, while allowing the LLC to continue. A buy-out of Haley would permit the LLC to continue to own the land so that it could continue to be offered to the restaurant at its favorable rent. The court concluded that the exit provision was not a reasonable alternative, however, because there was no mechanism to obtain Haley's release as a personal guarantor for the LLC's mortgage. The court found the exit mechanism was not an adequate remedy because it would leave Haley liable for the debt of an entity over which he had no control. The court recognized the contractual freedom LLC members have to craft resolutions to conflicts in their business relationships and acknowledged that the exit mechanism bore on the propriety of ordering dissolution, but the court found that the exit mechanism failed as an adequate remedy because it did not effect an equitable separation. (The court commented when setting forth the factual background of the case that the exit provision did not state that any member dissatisfied with the status quo must break the impasse by exit rather than a suit for dissolution.) Analogizing to Section 273(a) of the Delaware General Corporation Law, the court found all the conditions required to order a judicial dissolution if the LLC had been a corporation (50% members, a joint venture, and a deadlock). The court found no reason to distinguish the LLC in this case from a deadlocked joint venture corporation and concluded Haley's request for judicial dissolution should be granted because it was the only practical remedy available to him.

*Sivsa Entertainment v. World International Network*, No. B164377, 2004 WL 1895080 (Cal. App. Aug. 25, 2004). The court of appeals concluded that the California LLC statute does not permit members to modify or waive the right to judicial dissolution; therefore, for purposes of analyzing an anti-SLAPP motion, a member's reliance on a waiver of judicial dissolution in an LLC operating agreement lacked "minimal merit," and the member's claim for breach of contract (based on the other member's filing of a suit for judicial dissolution contrary to the waiver provision) was stricken. The court analyzed the provisions of the California LLC statute and noted that the operating agreement generally governs the legal relations of the members and that the judicial dissolution provisions are not among the provisions the statute specifically identifies as not being subject to waiver or variation. The court pointed out, however, that the statute goes on to provide that the provisions of specified chapters of the statute, including the chapter of the statute addressing dissolution, are subject to variation by the articles of organization or operating agreement only to the



extent expressly provided in those chapters. The court concluded that the right to seek judicial dissolution apparently cannot be waived by agreement since the statutory judicial dissolution provisions do not contain any indication that the right to seek judicial dissolution may be modified or waived.

*Schott v. Animagic Studios, LLC*, No. E2003-02287-COA-R3CV, 2004 WL 1813280 (Tenn. Ct. App. Aug. 16, 2004) (affirming trial court's conclusion that plaintiff was neither a member nor creditor of LLC and thus was not entitled to maintain action for dissolution, receiver, and court supervised winding up).

*Andrews v. Andrews*, 895 So.2d. 898 (Ala. 2004). Husband and wife formed an LLC and were subsequently divorced. Wife filed this action seeking judicial dissolution of the LLC. Husband argued that the filing of the action resulted in the termination of wife's membership on the basis of statutory provisions stating that a person ceases to be a member of an LLC upon the filing of a petition "seeking for the member any . . . dissolution . . . under any statute, law, or regulation." Husband also argued that wife's governance rights terminated with the termination of her membership and that he was entitled to purchase her interest in the LLC. The court appeared to conclude that wife's filing of a petition seeking dissolution of the LLC would have terminated her membership but for the fact that she filed the petition in the wrong county. The court concluded that the trial court lacked subject matter jurisdiction of wife's action for judicial dissolution because the statutory judicial dissolution provision states that the circuit court in the county where the articles of organization are filed may decree dissolution when it is not reasonably practicable to carry on the business of the LLC, and wife did not file her action in the county where the articles of organization were filed. Thus, the court found the trial court had no choice but to dismiss wife's action and it did not err in holding that she remained a member and was not compelled to accept husband's offer to purchase her interest.

*Kranias v. Tsiogas*, 884 So.2d 162 (Fla. App. 2004) (concluding court lacked jurisdiction to appoint receiver for LLC real property where related action seeking judicial dissolution and receivership was filed first in another county).

*Spires v. Casterline*, 778 N.Y.S.2d 259 (N.Y. Sup. 2004). Articles of organization for a New York LLC were filed, but the members did not sign any document entitled "Operating Agreement." The court held that an LLC's failure to adopt a written operating agreement as required by the New York LLC act does not result in an entity that is instead a partnership. The court also found no basis for judicial dissolution of the LLC in the articles of organization. The court determined that certain documents did not constitute an operating agreement of the LLC, but a document entitled "LHS Partner's Interim Voting Agreement" did satisfy the definition of an operating agreement. Since the Interim Voting Agreement covered only certain matters, however, the LLC was governed by the statutory default rules in most respects. The court viewed the statutory default provisions as the "operating agreement" of the LLC for purposes of the court's analysis of whether judicial dissolution was warranted (i.e., whether it was not reasonably practicable to carry on the business in conformity with the operating agreement). The evidence indicated that one of the members wanted to withdraw, and the other members wanted to remove him, but the members could not agree on how to accomplish the departure. The court stated that, because the statute provides that a member may not withdraw prior to the dissolution and winding up of an LLC, dissolution and winding up must precede the withdrawal or removal of a member. Further, the court noted that the statute provides that withdrawal or removal of a member triggers dissolution and winding up. The court concluded that judicial dissolution was warranted because the statutory operating agreement provided no other mechanism for withdrawal or removal, and, thus, it was not reasonably practicable to carry on the LLC's business in conformity with the statutory operating agreement that requires the dissolution and winding up of the LLC prior to withdrawal of a member.

*Braham v. Barton of Redlands, Inc.*, Nos. B168121, B168883, 2004 WL 886889 (Cal.App. April 27, 2004) (holding arbitrator's interpretation of LLC operating agreement was not subject to judicial review, and removal of manager and decision that LLC's business had come to an end was not a decree of dissolution).

*The Dunbar Group, LLC v. Tignor*, 593 S.E.2d 216 (Va. 2004). Tignor and Dunbar were equal members of an LLC. Dunbar brought an action for judicial expulsion of Tignor based on Tignor's wrongful conduct, and Tignor filed an application for judicial dissolution. After a hearing on both pleadings, the chancellor ordered that Tignor be expelled. The chancellor also ordered that the LLC be dissolved. Dunbar appealed the chancellor's order that the LLC be dissolved. The Virginia Supreme Court applied the standard for judicial dissolution and concluded that the evidence did not support the dissolution of the LLC. Tignor sought dissolution on the grounds that, because of "serious differences of opinion" and "deadlock," it was "not reasonably practicable to carry on the business of [the LLC] in conformity with

the Articles of Organization and Operating Agreement.” Tignor’s judicial expulsion, however, made it reasonably practicable for the LLC to continue.

***In re Tufts Oil and Gas III***, 871 So.2d 476 (La. App. 2004) (holding president of corporate general partner of limited partnership did not have authority to seek judicial dissolution of LLC owned by limited partnership).

***Bell v. Bangor Metal Works, LLC***, No. CV-02-100, 2003 WL 24842276 (Me. Super. Sept. 25, 2003) (finding grounds for judicial dissolution based on member’s breach of duties during negotiations with other member to wrap up relationship).

***Artigas v. Renewal Arts Realty Corp.***, 803 N.Y.S.2d 12 (N.Y. A.D. 1 Dept. 2003) (dismissing claim for judicial dissolution of LLC because petition relied upon New York Business Corporation Law rather than Limited Liability Company Law and did not plead requisite grounds for dissolution of LLC).

***Schindler v. Niche Media Holdings, LLC***, 772 N.Y.S.2d 781 (N.Y. Sup. 2003). A minority member of a New York LLC filed suit asserting various “personal” and “derivative” claims and asking for injunctive relief. Among the claims was a “personal” and “derivative” demand for dissolution of the LLC and its wholly owned subsidiary LLC. The court concluded that there was virtually no likelihood of success on the merits on the cause of action for dissolution. First the court concluded that the New York LLC statute does not permit derivative actions because it does not contain any provision authorizing such actions. Next the court concluded that the standard for judicial dissolution – that “it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement” – requires proof that the business sought to be dissolved is unable to function as intended or is failing financially. The court found the complaining member’s allegations insufficient to meet the standard since there were no allegations that the business could not be carried on in accordance with the articles of organization or operating agreement, or that any internal deadlock impeded its smooth operation. The court also noted that the business was flourishing financially, and that the plaintiff’s complaint fell short even assuming the corporate standard for judicial dissolution applied. The court refused to enjoin the LLC from paying the legal expenses of the defendant member/manager since the operating agreement contained a broad indemnification clause and there had been no final adjudication that the manager had engaged in conduct disqualifying him from indemnification. The plaintiff argued that it is well-settled that a corporate owner may not pay attorney’s fees out of corporate funds in the context of a dissolution proceeding, but the court concluded it was not bound by rules regarding derivative lawsuits for judicial dissolutions of corporations, having already concluded that a member may not sue derivatively for dissolution under the New York LLC act.

***Landskroner v. Landskroner***, 797 N.E.2d 1002 (Ohio App. 2003) (holding that former member had no standing to seek judicial dissolution because statute provides for judicial dissolution upon application of “any member”).

***Lindsay v. Pacific Topsoils, Inc.***, Nos. 50558-1-I, 50593-9-I, 2003 WL 22121055 (Wash.App. Sept. 15, 2003) (affirming judicial dissolution of LLC on the grounds that it was not reasonably practicable to carry on the LLC in conformity with its purpose and was reasonable, practical, and equitable to dissolve the LLC because of animosity between the two co-managers).

***Rubin v. Wright***, No. 398112, 2002 WL 31954879 (Conn.Super. Dec. 30, 2002) (denying LLC member’s application for injunction to prevent dissolution of LLC investment banking firm where plaintiff conceded dissolution was inevitable, and there was no reason to believe the plaintiff’s interest in the LLC would not be protected in judicial dissolution).

***In re Extreme Wireless, LLC***, 750 N.Y.S.2d 520 (N.Y.A.D. 2 Dept. 2002). The court stated that the appropriateness of an order of dissolution of an LLC is a matter vested in the sound discretion of the trial court and that the lower court had properly exercised its discretion in granting the petition for dissolution on the basis that it was no longer reasonably practicable to carry on the business of the LLC in conformity with the articles of organization or operating agreement. The court also upheld the trial court’s denial of an injunction prohibiting the petitioner from opening a competing business in violation of the LLC operating agreement’s covenant not to compete. The court stated that the dissolution rendered the injunctive relief academic because “there is no longer a company in existence with which to compete.”

***In re Pontchartrain Plaza***, No. 02-CA-54, 2002 WL 1066924 (5<sup>th</sup> Cir. May 29, 2002) (looking to corporate dissolution provisions for guidance on effect of initial ex parte order ordering LLC's dissolution (which court concluded merely commenced the dissolution process) and rejecting member's challenge to ex parte order where member was then served with petition and order, had opportunity to present defenses to dissolution at hearing, and did not contest factual allegations that LLC had failed to achieve its objective, LLC was out of money and members could not agree on how to carry out business, thus rendering it not practicable to carry on the business).

***Reig v. Amore II, L.L.C.***, 31 Conn. L. Rptr. 620, 2002 WL 819080 (Conn. Super. 2002) (granting member's request for dissolution and appointment of person to wind up LLC's affairs over other member's objections, concluding that inability of equal members to work together constituted "other cause" for judicial winding up under the statute).

***Cogniplex, Inc. v. Ross***, Nos. 00 C 7463, 00 C 7933, 2002 WL 483411 (N.D. Ill. March 29, 2002) (interpreting Illinois LLC act provisions providing for LLC's opportunity to buy out dissociating member's interest and requiring dissolution of LLC if LLC fails to comply with buy out procedures and concluding that claim for dissolution was stated where purchase offer was not made within time-frame required by statute).

***Weinmann v. Duhon***, 818 So.2d 206 (La. App. 2002) (interpreting operating agreement provisions that created impasse (because one faction could fire general manager while other faction could re-hire him) and stating such a situation was precisely one where judicial dissolution is authorized on basis that it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement).

***Lindsay, Marcel, Harris & Pugh, L.L.C. v. Harris***, 752 So.2d 335 (La. App. 2000). Harris and Pugh gave notice of their withdrawal from their four member law firm LLC and formed their own law firm. When the LLC filed suit against the withdrawn members, the withdrawn members answered and sought dissolution. The court of appeals determined that the withdrawn members had no right to seek judicial dissolution because the statute conferred no such right on former members. In addition, the court found no basis in the operating agreement for the withdrawn members to obtain dissolution. Included among the causes of dissolution listed in the operating agreement was "reduction in the number of Members to 1," but the court pointed out that two members remained after the withdrawal of the other members.

***McConnell v. Hunt Sport Enterprises***, 725 N.E.2d 1193 (Ohio App. 1999). The court determined that judicial dissolution of the LLC in this case on the basis that it was no longer reasonably practicable to carry on the business in conformity with the LLC's articles of organization and operating agreement was not "wrongfully caused" by the member who acted wrongfully in breaching the operating agreement and usurping control of the LLC. The reason it was no longer practicable to carry on the business was the LLC's failure to obtain the hockey franchise it sought rather than the wrongful conduct of a member. Thus, no member was precluded from participating in the winding up by the terms of the operating agreement that allowed only members who have not wrongfully caused dissolution to participate in winding up. The issue was moot, however, because there was a liquidating trustee appointed by the court.

***Investcorp, LP v. Simpson Investment Company, L.C.***, 983 P.2d 265 (Kan. 1999). The court's analysis of the meaning of the term "member" in the operating agreement is discussed *supra*. After concluding that "members" entitled to participate in winding up included withdrawing members, the court addressed the request of the withdrawing members for appointment of a receiver. The withdrawing members claimed that the current members were incompetent to conduct the liquidation of the LLC. The court denied the withdrawing members' request for a receiver, characterizing the allegations of incompetence as "minor" and insufficient, even if proved, to warrant appointment of a receiver. The court noted that there were no allegations of fraud, breach of fiduciary duty or waste, nor a showing of "good cause."

***Suntech Processing Systems, L.L.C. v. Sun Communications, Inc.***, No. 05-98-00799-CV, 1998 WL 767672 (Tex. App. Nov. 5, 1998). In this case, a member of two LLCs claimed that a proposed transfer of funds by one LLC to the other would constitute a fraudulent transfer. The trial court in the case entered an injunction against the payment and ordered the LLCs dissolved under the statutory provision that an LLC may be judicially dissolved if it is not reasonably practicable to carry on the business of the LLC in conformity with its articles of organization or regulations. The trial court appointed a liquidator under another statutory provision authorizing the court to wind up an LLC's affairs or appoint a person to carry out the liquidation. The liquidator was given control of the two LLCs and had essentially all of the powers of a receiver. The court of appeals concluded that the order appointing a "liquidator" was an order appointing a "receiver;" therefore, the court had jurisdiction over the interlocutory appeal. The court held that the order

of judicial dissolution and appointment of a liquidator was improper in this case as it did not properly preserve the subject matter of the suit until the trial court could finally determine whether the payment would be a fraudulent transfer. In other words, the court found the trial court's order was improper because it gave the LLC member its ultimate relief.

## 6. Winding Up

***Darwin Limes, LLC v. Limes***, No. WD-06-049, 2007 WL 1378357 (Ohio App. May 11, 2007). Disputes arose in a family farm organized as an LLC. The LLC was owned by four siblings, Charles, Dale, Donald, and Betty Limes. Donald had traditionally farmed the land on a cash rent basis under an alleged oral lease. The other members decided to terminate any lease arrangement with Donald, and litigation involving claims for receivership, judicial dissolution, and declaratory judgment ensued. While the litigation was pending, the managing members voted to take bids on a lease of the land from Dale and Donald. Donald won the bid and retained the lease for another year. Donald argued that the LLC was dissolved automatically when both Donald and Dale filed for judicial dissolution and there was no agreement to continue. The court interpreted a provision of the Ohio LLC statute which provides that it is an event of withdrawal of a member if the member "files a petition or answer in any reorganization, ...dissolution, or similar relief proceeding under any law or rule that seeks for himself any of those types of relief." Relying on this provision, which was also included in the dissociation provisions of the operating agreement, Donald argued that Dale ceased to be a member (thus causing dissolution of the LLC) upon Dale's filing of a claim for judicial dissolution of the LLC. The court pointed out, however, that dissociation occurs when a member seeks dissolution for himself or itself. Thus, no member was dissociated when Dale or Donald filed claims for judicial dissolution of the LLC. Additionally, the court concluded that, even if it agreed with Donald's interpretation that Dale was dissociated, dissolution did not occur under the dissolution provision of the operating agreement, which listed the types of dissociation that would trigger dissolution but did not include the filing of a dissolution proceeding in the list of dissociation events dissolving the LLC. The court next interpreted the standard for judicial dissolution – that it is not reasonably practicable to carry on the business of the LLC in conformity with its articles of organization and operating agreement – and concluded that judicial dissolution was not appropriate. The court pointed out that the business of the LLC was farming, the operating agreement provided for continuation of the LLC even if Donald dissociated, and the LLC was in fact carrying on its business based on the award of the farming lease under the newly instituted bidding procedure.

***Venezia Resort, LLC v. Favret***, No. 3:07cv74/MCR/EMT, 2007 WL 1364342 (N.D. Fla. May 8, 2007) (staying action involving funds in dispute in dissolution of LLC, in part relying on fact that Mississippi court would have jurisdiction to wind up LLC's affairs and such action would result in piecemeal, duplicative, and wasteful litigation).

***Gottier's Furniture, LLC v. La Pointe***, No. CV040084606S, 2007 WL 1600021 (Conn. Super. May 16, 2007) (declining defendant member's request to appoint receiver to wind up affairs of LLC inasmuch as defendant member had misappropriated LLC funds and had unclean hands, and, alternatively, because dissolution receivership is extraordinary remedy that is not warranted merely based on dissension of members or financial difficulty).

***Drayton Grain Processors v. NE Foods, Inc.***, Civil File No. 3:06-cv-37, 2007 WL 983825 (D. N.D. March 20, 2007) (finding that dissolved LLC's winding up without notification to claimant and "troubling" assertion that it had made reasonable provision for known and anticipated liabilities when it had rebuffed attempts to resolve claim against it was basis to impose successor liability on corporate sole member that received dissolved LLC's assets in attempt to defraud claimant).

***Union Square Grill Hospitality Group, LLC v. Blue Smoke American Bar & Grill LLC***, No. 3:06-CV-00976 (PCD), 2007 WL 869024 (D. Conn. March 19, 2007). The court discussed the requirement under the Connecticut LLC statute that notice of an LLC's dissolution be given to known claimants, and the court held that the "managing partner" of an LLC that failed to give notice to a creditor was personally liable to the extent of the assets distributed to the managing partner after dissolution. The court also concluded that an LLC that succeeded to the dissolved LLC's business was liable for a judgment against the predecessor LLC under the "continuity" doctrine of successor liability.

***Zanker Group, LLC v. Summerville at Litchfield Hills, LLC***, Nos. UWY(X10)CV044010223S, UWY(X10)CV044010567S, 2007 WL 865904 (Conn. Super. March 6, 2007). The court considered breach of fiduciary duty claims in the context of liquidation and stated that the statutory obligation of a manager or member is the same as that under common law. The court concluded that an operating agreement provision requiring 90% member approval of transactions with affiliates was inapplicable after dissolution, that the managers were authorized to liquidate the LLCs,

and that fair value was paid in a transaction where property interests of the LLCs were transferred to wholly owned entities of one of the members.

*Decker v. Decker*, 726 N.W.2d 664 (Wis. App. 2006). The court of appeals withdrew an earlier opinion in this matter and issued this opinion in which it interpreted the buy-sell and dissolution provisions of an LLC operating agreement and sought to clarify the trial court's order in the case. Two brothers who operated an investment real estate business through a number of LLCs had reorganized the business by entering an operating agreement and forming a new LLC. Pursuant to the operating agreement, one of the brothers, David, sent a letter to the other brother, Frederick, declaring that a deadlock existed. Frederick did not believe that a deadlock existed and requested that David rescind the letter, but David refused. Frederick then made an offer under the operating agreement to buy David's interest in the business for \$7,000,000, approximately two to three times what the interest was worth. David accepted the offer, but Frederick never closed on the purchase. David brought an action asserting, among other claims, a claim for damages for breach of contract based on Frederick's failure to buy his interest. The court found that Frederick's offer and David's acceptance did not amount to an enforceable contract because the operating agreement provided for the consequences of a failure to close. Upon Frederick's failure to close, David had an opportunity to purchase Frederick's interest for the same amount, and if David did not do so, the operating agreement provided for dissolution of the LLC. The court found that Frederick "sabotaged" the buy-out provisions of the operating agreement by making an outrageous offer of \$7,000,000 with no intention of closing on the purchase and knowing David would not be inclined to pay that amount, leaving dissolution as the specified remedy under the operating agreement when a purchase and sale of one of their interests did not occur. Frederick argued that the LLC's properties must then be sold on the open market and that the court-appointed receiver was not authorized to accept an offer by David. The court, however, concluded that the receiver was authorized to accept David's offer because it was no different from any third party offer except that it was for "all the property interests held by Frederick and it eliminated costly real estate commissions and other miscellaneous costs." The trial court's order stated that the receiver was authorized to assign to David all *interests* in the LLC not already owned by David, but the court of appeals stated that only a sale of *assets* would be consistent with the dissolution procedure specified in the operating agreement. Therefore, the court of appeals ordered that the trial court's order be corrected to refer to a sale of the LLC's assets. The court stated that a sale of assets would presumably have negative tax consequences for David, but the court found that the operating agreement permitted no other result. The court said that a sale of LLC interests could only occur under the operating agreement when the LLC was to continue to exist as a viable company. Under the circumstances, the operating agreement mandated dissolution and a sale of the assets. Furthermore, the court concluded that the trial court had statutory authority to order the sale to David under the judicial dissolution provisions of the Wisconsin LLC statute. These provisions authorize a court decree of dissolution when a controlling member engages in "oppressive" conduct, and the court found Frederick's "obstructionist" tactics showed a lack of good faith and constituted oppression.

*In re Midpoint Development, L.L.C. (Holliman v. Midpoint Development, L.L.C.)*, 466 F.3d 1201 (10<sup>th</sup> Cir. 2006). The court dismissed the bankruptcy of an Oklahoma LLC because the LLC filed articles of dissolution prior to the bankruptcy filing and ceased to exist under Oklahoma law when the articles of dissolution were filed. On November 14, 2003, the LLC's sole member executed and filed articles of dissolution with an effective date of November 14, 2003. On the same day, the member filed a petition for appointment of a receiver to complete the winding up of the LLC's affairs. On June 22, 2004, the LLC filed a petition for bankruptcy relief. Two creditors filed a motion to dismiss the bankruptcy on the basis that the debtor no longer existed and was ineligible to be a debtor. The bankruptcy court determined that the LLC was empowered to wind up its affairs after dissolution, including filing bankruptcy. The district court determined that the LLC ceased to exist on the effective date of its articles of dissolution and reversed the bankruptcy court's order. The court of appeals analyzed the relevant provisions of the Oklahoma LLC statute at length and affirmed the district court's dismissal of the bankruptcy on the basis that the LLC ceased to exist on the effective date of its articles of dissolution. The court relied upon provisions of the Oklahoma LLC Act specifying that the LLC comes into existence when the articles of organization are filed and that the articles of organization are canceled upon the filing of articles of dissolution. The court also noted that a subsequent amendment to the statute clarifies that the existence of an LLC continues until cancellation of the articles of organization. The court also examined other provisions of the statute and found that, read together, they indicated that dissolution and the winding up period should precede the effective date of the articles of dissolution. The court stated that the LLC should have wound up its affairs prior to filing articles of dissolution or should have specified an effective date in the future if it desired to have a significant period of time to wind up, including filing for bankruptcy.

***Puleo v. Topel***, 856 N.E.2d 1152 (Ill. App. 2006). The plaintiffs sought to hold the sole member and manager of an LLC personally liable for a debt incurred by the LLC after the LLC was involuntarily dissolved and before it was reinstated. The plaintiffs argued that the managing member should be liable just as an officer or director of an Illinois corporation would be liable for a debt incurred by a dissolved corporation. The court examined the provisions of the Illinois LLC statute and found that they differed from the corporate statute. The court pointed out that the LLC statute expressly provides that a member or manager is not liable for debts of the LLC unless the articles of organization provide for personal liability and the member has consented in writing to the provision. Additionally, the LLC statute only addresses liability to the LLC for unauthorized acts during winding up and does not contain a provision like that in the corporate statute which imposes liability on a person who assumes to exercise corporate powers without authority. Finally, the court found it significant that the legislature removed from the LLC statute a provision that provided for personal liability of members and managers to the extent a shareholder or director in an Illinois corporation would be personally liable under analogous circumstances.

***O'Neal v. Blackerby***, 950 So.2d 424 (Fla. App. 2006) (holding operating agreement provision that provided for dissolution upon "sale or other disposition of all or substantially all of [the LLC's] property and assets" was ambiguous with respect to sale of LLC's real property where LLC still had cash proceeds on hand and operating agreement contained provision for reinvestment of net cash flow).

***Lyons v. Salamone***, 821 N.Y.S.2d 188 (N.Y. A. D. 1 Dept. 2006) (finding it was equitable method of dissolution of LLC to permit either member to bid fair market value of other's interest, with receiver directed to accept highest bid, but it was improper to appoint private attorney as receiver to value business and sell it without oversight).

***Milk v. Total Pay and HR Solutions, Inc.***, 634 S.E.2d 208 (Ga. App. 2006) (commenting that dissolution alone does not cause LLC to cease to exist or render its members personally liable for LLC debts).

***People Place Auto Hand Carwash, LLC v. Commissioner of Internal Revenue***, 126 T.C. No. 19, 2006 WL 1642339 (U.S. Tax Ct. June 14, 2006) (noting that dissolved LLC continues to exist for purposes of winding up its affairs and litigating claims against it and concluding that even if LLC dissolved or terminated pursuant to Tennessee law upon filing of members' bankruptcy petitions, LLC continued to exist for purposes of challenging and litigating its liability for employment taxes).

***ARC LifeMed, Inc. v. AMC-Tennessee, Inc.***, 183 S.W.3d 1 (Tenn. Ct. App. 2005) (noting that pleadings themselves established continued existence of LLC which members had agreed to dissolve, but, even if termination had occurred, case was properly before court under provision of Tennessee LLC statute permitting former managers, governors, or members to assert or defend in LLC's name any claims by or against LLC).

***Direct Marketing Services, LLC v. Bluegreen Corp.***, No. 3:04-CV-508, 2005 WL 1594543 (E.D. Tenn. July 6, 2005). The court concluded that an administratively dissolved LLC lacked capacity to sue for damages arising out of a sublease because the Tennessee LLC statute confined the authority of an administratively dissolved LLC to actions necessary to wind up and liquidate its business. Assuming the LLC's suit fell within a provision permitting collection of debts owing to the LLC, the court found that the LLC's senior vice president could not prosecute the suit in the LLC's name as the real party in interest because those authorized to take winding up actions under the Tennessee statute are specified as the board of governors of a board-managed LLC, the members of a member-managed LLC, or the managers acting under the direction of the members or board of governors.

***In re Desmond***, No. 03-13878-MWV, 2005 WL 1244842 (Bankr. D. N.H. April 1, 2005) (concluding equitable title to Delaware LLC's assets did not pass to debtor upon debtor's bankruptcy because LLC continued for purposes of winding up after dissolution, and debtor was estopped to assert LLC dissolved upon filing of debtor's bankruptcy petition because debtor continued to do business on behalf of LLC after debtor filed bankruptcy).

***Warren v. Weber and Warren Anesthesia Services, LLC***, 612 S.E.2d 17 (Ga. App. 2005). The court distinguished case law imposing a duty to wind up unfinished business in the partnership dissolution context and held that the evidence supported the jury's finding that a member who resigned from an LLC did not breach a fiduciary duty to the LLC by performing services for a surgical center with which the LLC had contracted to provide services. The court stated that the Georgia LLC statute and the LLC operating agreement contemplate resignation, and the act of resignation is not a breach of fiduciary duty. Furthermore, the surgical center terminated its contract with the LLC and

the operating agreement did not prohibit members who resigned from forming a competing business or soliciting customers of the LLC. The court also held that the trial court did not err in refusing to give an instruction describing wrongful dissolution because the instruction was based on case law decided under the Georgia Uniform Partnership Act and did not accurately state LLC law.

**Howard v. Perry**, 106 P.3d 465 (Id. 2005). Interpreting the operating agreement of a professional LLC, the court found that fees collected after dissolution were assets of the firm to be distributed equally to members rather than liabilities as distributions to be paid as monthly draws and quarterly bonuses to the member who generated the fees. Draws and bonuses had been paid through the date of dissolution, and the operating agreement made no provision for distributing uncollected fees to the member who generated the fees.

**General Technology Applications, Inc. v. Exro Ltda**, 388 F.3d 114 (4th Cir. 2004). The claims asserted by a member of a Virginia LLC were derivative because they were based on a patent license allegedly held by the LLC; therefore, the member had no standing to assert the LLC's claim for money recovered by the other member in connection with infringement of the patent. The "wrinkle" in the case was that the LLC's certificate of organization had been cancelled by the state for failure to pay its annual registration fee. Once the certificate was cancelled, the LLC was automatically dissolved and obligated to wind up. Under the Virginia LLC act, when the certificate of a manager-managed LLC is cancelled, the property and affairs of the LLC automatically pass to the managers as liquidating trustees. Thus, the member was still without standing to pursue the claim. The court said that a derivative action was not necessarily barred during the post-dissolution winding up process, but the legal rights were not the member's to assert individually.

**In the Matter of the Estate of Bender**, 806 N.E.2d 59 (Ind. App. 2004) (concluding dissolved LLC's exercise of option to purchase property was appropriate act in connection with LLC's winding up because the option was exercised in order to facilitate the sale of adjacent LLC property that was not to be distributed in kind to members).

**Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.**, 854 A.2d 121 (Del.Ch. 2004). A former member of a dissolved LLC sued the LLC for breach of certain provisions of the LLC agreement. Although claims against a Delaware LLC generally may be brought only until the certificate of cancellation is filed, the court held that the complaint was sufficient to support an application to nullify the LLC's certificate of cancellation based upon the failure to wind up in compliance with the Delaware LLC act. The Delaware LLC act requires a dissolved LLC to make provision for claims that, based on facts known to the LLC, are likely to arise or to become known to the LLC within 10 years of its dissolution. The court held the allegations of the complaint were sufficient to support the inference that the LLC was wound up in contravention of these provisions and thus to support an application for nullification of the certificate of cancellation.

**Investcorp, L.P. v. Simpson Investment Co., LLC**, 85 P.3d 1140 (Kan. 2004) (applying Kansas LLC act and LLC operating agreement and concluding that withdrawn members were required to share in post-withdrawal dissolution expenses incurred by the LLC).

**Nicor Energy v. Dillon**, No. 03 C 1169, 2004 WL 51234 (N.D. Ill. Jan. 7, 2004) (denying creditor of dissolved LLC an expedited hearing on damages, noting that Delaware LLC act provides for orderly dissolution and winding up, contemplates pending litigation involving dissolved LLCs, and protects creditors).

**Nadler v. Grayson Construction Co., Inc.**, 34 Conn. L. Rptr. 482, 2003 WL 1963158 (Conn.Super. 2003) (holding that members of two dissolved LLCs were proper parties in suit based on claims against the dissolved LLCs because the LLC statute permits enforcement of claims against members to the extent of assets distributed to them in liquidation).

**Josey v. George**, No. CV010810269, 2003 WL 231665 (Conn.Super. Jan. 9, 2003) (making findings of fact and conclusions of law in aftermath of dissolution of LLC, which the parties and the court referred to intermittently as a partnership).

**Rubin v. Wright**, No. 398112, 2002 WL 31954879 (Conn.Super. Dec. 30, 2002) (denying LLC member's application for injunction to prevent dissolution of LLC investment banking firm where plaintiff conceded dissolution).

was inevitable, and there was no reason to believe the plaintiff's interest in the LLC would not be protected in judicial dissolution).

***Bio-Septic Systems, LLC v. Weiss***, 60 P.3d 943 (Mont. 2002). Weiss, Cullinan, and others formed an LLC to market a device invented by Weiss. Acrimonious relations developed between Cullinan and the other members. The LLC eventually collapsed, and Weiss ultimately assumed management. Weiss informed Cullinan that he intended to dissolve the LLC and disburse the assets as required by law. Cullinan accused Weiss of wrongdoing in connection with certain payments and Weiss's commencing work for a company with which the LLC had previously contracted for marketing of the device. Cullinan brought suit for dissolution of the LLC and accused Weiss of breach of fiduciary duty. Weiss counterclaimed and joined in the request for dissolution. Cullinan filed an amended complaint alleging sole ownership to the LLC and waiving any further winding up. The court found that Weiss had acted properly in the winding up pursuant to agreements made by the members. Cullinan challenged the lower court's finding that an experimental prototype unit produced by the LLC belonged to Cullinan and was the responsibility of Cullinan. The court upheld the lower court's action, as it was consistent with positions taken by both Cullinan and Weiss in the proceedings.

***Newman v. McLean***, No. B152794, 2002 WL 31117064 (Cal. App. Sept. 25, 2002) (dismissing member's cross-claim for indemnity against co-defendant and former co-member of dissolved LLC in suit by other members on basis that member from whom indemnity was sought entered good faith settlement with plaintiffs, and dismissing breach of contract and fraud claims on basis of release executed at time of dissolution of LLC).

***Benchmark Investments, LLC v. Elms at Mystic, LLC***, No. 555579, 2002 WL 194492 (Conn. Super. Jan. 11, 2002) (striking claim against LLC and member based on statute permitting claims against dissolved LLC or member of dissolved LLC to extent of assets distributed in liquidation where plaintiff failed to allege LLC was dissolved but rather alleged that LLC was "at all relevant times a Connecticut limited liability company").

***Regenstein v. Simon***, No. CV980169421, 2001 WL 1378761 (Conn. Super. Oct. 17, 2001). The two members of a dissolved LLC asserted various claims against each other. As the court summed up the relevant events, "[T]he defendant advised the plaintiff of her decision to immediately dissolve or terminate the company, and thereafter both parties embarked on courses of conduct aimed at maximizing their own personal interests instead of engaging in an orderly and cooperative winding down of the company." The court declined to apportion blame between the two parties and merely divided the remaining funds of the LLC between the two members in accordance with their percentage ownership interests. (At least, this appears to be what the court intended. There was an apparent typographical error in the percentages recited in dividing the remaining funds.)

***In re Chicago Trading Group, Inc. (Fogel v. Spike Trading, L.L.C.)***, Nos. 97 B 19843, 99 A 00410, 2001 WL 40071 (Bankr. N.D. Ill. Jan. 17, 2001). A bankruptcy trustee sued an LLC and its members seeking to recover from the members improper distributions made during the winding up of the LLC. The parties agreed that under Illinois law an LLC member may be liable for a dissolved LLC's debts to the extent of any improper distributions received. The trustee argued that he had a direct cause of action against the LLC members resulting from improper distributions, but the court agreed with one of the LLC members that the trustee could only recover in supplementary proceedings after obtaining a judgment against the LLC. Since the trustee had not obtained a judgment against the LLC, the claim against the member failed. Additionally, the court stated that the trustee would have to identify property of the debtor held by the member and the value of the property.

***Skyline Partners, LLC v. Easley***, No. 03-99-00602-CV, 2000 WL 1028483 (Tex.App. July 27, 2000). This case involved a dispute as to whether an LLC's claim against a deceased member was timely presented to the administratrix of the deceased member's estate. In the course of the court's opinion, the court notes that, while the member's death dissolved the LLC, the LLC had authority to wind up its affairs, including the ability to make payments to creditors required by the deceased member's actions.

***Investcorp, LP v. Simpson Investment Company, L.C.***, 983 P.2d 265 (Kan. 1999). The members of a family-held Kansas LLC deadlocked on important management issues, and several members withdrew to effect a dissolution of the LLC. The withdrawing members claimed that they were entitled to participate in the LLC's winding up under the operating agreement. The LLC's remaining members argued that the withdrawing members were no longer members and thus had no right to participate in the LLC's winding up. Both factions relied on the operating agreement, which provided for the "members" to wind up and liquidate the LLC and defined "members" as "those persons who are



members of the Company from time to time, including any Substitute Members.” The district court found that the withdrawing members were not entitled to participate in the dissolution process. The Kansas Supreme Court, however, examined the use of the term “member” and “remaining member” in other provisions of the operating agreement and concluded that “[t]he many references to ‘member’ in the Act when coupled with the operating agreement suggest that the better view is that, in dissolution, ‘member’ includes a withdrawing member having a financial interest in the Company’s assets.” The court went on to state that control of the dissolution process resided in the managers of the LLC under the operating agreement and the Kansas act.

#### **EE. Accounting**

*Chuang v. Ming Ter Chen*, No. B185791, 2006 WL 3518228 (Cal. App. 2 Dist. Dec. 7, 2006) (concluding trial court conducted complete accounting and correctly determined that doubts arising from members’ failure to keep proper records or inability or unwillingness to establish establish items of account must be resolved against them).

*In re McCabe (Braunstein v. Panagiotou)*, 345 B.R. 1 (D. Mass 2006) (finding basis for trustee’s accounting claim against debtor’s co-member based on fiduciary relationship between members, but not against LLC because existence of fiduciary relationship is pre-requisite to accounting claim under Massachusetts law, and trustee provided no evidence that fiduciary duty was owed by LLC to debtor member of LLC).

*Braden v. Strong*, No. M2004-02369-COA-R3-CV, 2006 WL 369274 (Tenn. Ct. App. Feb. 16, 2006) (concluding excluded partner had right to accounting with respect to partnership converted to LLC without her consent).

*Thorpe v. Levenfeld*, No. 04 C 3040, 2005 WL 2420373 (N.D. Ill. Sept. 29, 2005) (granting LLC member leave to amend to adequately plead basis for equitable accounting, which requires absence of adequate remedy at law and one or more of: (1) breach of fiduciary duty, (2) fraud, (3) need for discovery, or (4) complex mutual accounts).

*ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1 (Tenn. Ct. App. 2005) (stating LLC was entitled to proper accounting from managing member, based on analogies to partnership law and under terms of management contract).

*Historic Charleston Holdings, LLC v. Mallon*, 617 S.E.2d 388 (S.C. App. 2005). The court held that a master-in-equity erred in failing to order an accounting in an action involving judicial dissolution of the LLC and determination of the members’ rights with respect to the proceeds of LLC property. The LLC’s operating agreement called for an accounting in connection with the liquidation of the LLC, and the South Carolina Uniform Limited Liability Company Act provides for a member to bring an action “with or without an accounting” to enforce rights under the operating agreement and the statute. The master relied upon these provisions to fashion a remedy short of an accounting and concluded that the right to an accounting had been waived by the failure to timely request an accounting. The court acknowledged the master’s authority under the statute to grant relief to a member without an accounting and to decree dissolution, but concluded an accounting was necessary under the circumstances for the dissolution and winding up of the business. The court indicated that an accounting will ordinarily be warranted in connection with a dissolution even absent a provision in the operating agreement requiring an accounting. The court found no evidence that the member who sought to enforce the right to an accounting had waived the right; rather, he had asserted his desire for an accounting at several junctures.

*Solutia Inc. v. FMC Corp.*, No. 04 Civ. 2842(WHP), 2005 WL 711971 (S.D. N.Y. March 29, 2005) (applying New York partnership law to question of whether claims of member of Delaware “joint venture” LLC were barred due to failure to bring prior accounting and concluding claims were not barred).

*Yavarone v. Jim Moroni’s Oil Service, LLC*, No. CV030102318S, 2005 WL 737010 (Conn. Super. Feb. 18, 2005) (rejecting LLC member’s claim for accounting where there was no allegation that member had demanded and been refused accounting, member had complete access to financial records of LLC, final accounting had been prepared by CPA, final tax returns were filed, and affairs of LLC had been settled).

*Kaufman v. Guest Capital, L.L.C.*, No. 03 Civ. 1509(RJH), 2005 WL 167602 (S.D. N.Y. Jan. 25, 2005) (concluding member failed to establish right to accounting against LLC under Delaware law, which provides for an accounting only where (1) there are mutual accounts; (2) accounts are all on one side but there are circumstances of great

complication; and (3) a fiduciary relationship exists between the parties and a duty rests on defendant to render an account, because there was no claim of mutual accounts, no showing that LLC's investments supported contention of complicated accounts, and member failed to identify any special relationship, knowledge, confidentiality, or dependence to transform the "purely commercial" relationship between the member and the LLC into a fiduciary relationship).

*Kinkle v. R.D.C., L.L.C.*, 889 So.2d 405 (La. App. 2004). A deceased LLC member's personal representative brought an action to establish that the estate was entitled to its proportionate share of distributions of surplus income since the death of the member and to an accounting. The court concluded that the deceased member's personal representative was an assignee pursuant to the provisions of the LLC statute, and was entitled only to receive such distributions, to share in such profits or losses, and to receive such allocation of income, gain, loss, deduction, credit, or similar item to which the assignor was entitled and to the extent assigned. The court held the personal representative was thus entitled to allocations and distributions as provided in the operating agreement. The court denied the personal representative's request for an accounting because the statute does not confer information and inspection rights on an assignee.

*Leisher v. Alfred*, No. D041303, 2004 WL 693207 (Cal. App. April 3, 2004) (commenting that partnership cases on accounting may not be applicable in LLC context, but declining to decide issue because cases relied upon were distinguishable in any event).

*Yakima Medical Group, LLC v. Khan, M.D.*, No. 20718-1-III, 2003 WL 1962786 (Wash.App. April 29, 2003). Three doctors formed an LLC. When disputes arose, two of them voted to remove the third, Khan, as president and Chief Clinical Officer. Khan tried to persuade the employee doctors that they were employed by him personally rather than the LLC and had the locks changed at the clinic where the records and assets of the LLC were located. He instructed the employees not to allow the other two members or the employee doctors on the premises. The other two members brought suit seeking an injunction and damages and removal of Khan as a member. The court upheld an injunction against Khan enjoining him from harassing the doctors, taking payments for services rendered by the LLC, and obstructing access to patient charts, other records, and medical equipment. The court also found that the trial court did not err in the date it used for an accounting. Khan argued that the trial court should have used the date on which he was removed from the LLC as president, but the court pointed out that he was not dissociated as a member on that date, and the Washington LLC act does not specify how a final accounting date for an LLC is determined. The court said the act indicates that a member is dissociated either 90 or 120 days after legal action is taken. Although the date the trial court used was earlier than this, the court found it was nevertheless appropriate under the circumstances. The court stated that Khan had suggested a final accounting date that preceded legal action for dissociation, and the documents available to the court valued the assets as of the date used by the court. The court indicated that Khan's activities after that date negatively impacted the LLC and its profitability and stated that he had not shown the court's determination was error.

#### **FF. Dissenters' Rights**

*Roemmich v. Eagle Eye Development, LLC*, 386 F.Supp.2d 1089 (D. N.D. 2005). Roemmich, a 30% member of a North Dakota LLC, was removed as a governor and treasurer of the LLC and brought a suit in which one of his causes of action was labeled a claim for dissenter's rights. The defendants argued the member had no basis for such a claim because the statutory basis for the exercise of dissenter's rights, an amendment to the articles of organization that materially and adversely affects the rights or preferences of the dissenting member, had not occurred. Though the LLC's articles of organization had not been amended so as to trigger statutory dissenter's rights, the court concluded that the statute would permit the member's requested relief of a buy-out for fair market value if he established his claim that his right to vote had been improperly restricted because the statute authorizes broad equitable relief under circumstances such as deadlock and waste.

*Froelich v. Senior Campus Living LLC*, 355 F.3d 802 (4th Cir. 2004). In this appraisal proceeding arising out of an LLC merger in which the plaintiff was squeezed out, the LLC challenged the valuation of the dissenting member's membership interest as determined by the statutory appraisal procedure provided by Maryland law. The LLC argued that the valuation should be adjusted downward because the dissenting member presented evidence conflicting with earlier rulings of the district court relative to fraud and breach of fiduciary duty claims of the plaintiff. The LLC further argued that the appraisers improperly took into account appreciation resulting from the contested reclassification. The court rejected these arguments and affirmed the judgment of the magistrate based on the recommendation of the court-appointed appraisers. The court rejected the notion that an earlier finding that the board of the LLC was protected

by the business judgment rule precluded the dissenting member from presenting evidence that the appraisal obtained and relied upon by the board of the LLC in the reclassification transaction was flawed because the LLC's appraiser did not receive accurate information from the board. The court stated that the earlier finding that the board was protected by the business judgment rule with respect to the terms of the reclassification did not equate to a finding that the board was correct; rather, the business judgment rule merely requires deference to a board's decision absent fraud, bad faith, or gross negligence. The court stated that the statutory appraisal process virtually required the court-appointed appraisers to consider all evidence, including any shortcomings in the board-obtained appraisal, in determining the fair value of the dissenting member's interest. The court also rejected the argument that the appraisers' consideration of certain events occurring subsequent to the valuation date resulted in the improper inclusion of appreciation in value resulting from the reclassification.

*Pine Creek, LLC v. Pine Mount, LLC*, 558 S.E.2d 44 (Ga. App. 2001). A Georgia LLC sought to restrict a member to the remedy of dissent and appraisal under the provisions of the Georgia LLC act upon the sale of the LLC's sole asset. The court held that there were fact issues as to whether the procedural requirements of the operating agreement were met. The issues revolved around certain transfers of interests that the dissenting member claimed were in violation of transfer restrictions in the operating agreement.

*Froelich v. Erickson*, 96 F. Supp.2d 507 (D. Md. 2000), aff'd, 5 Fed.Appx. 287 (4<sup>th</sup> Cir. 2001). The factual background of this case is rather complicated, but the claims involved assertions of fraud, breach of fiduciary duty, and breach of contract by Froelich, an ousted CEO and board member of a Maryland LLC. Froelich was also a member of the LLC who, along with other minority members, was cashed out in a squeeze-out merger following a reclassification of interests of the LLC approved by all members except Froelich. The court found that the reclassification and squeeze out were related parts of a transaction in which Froelich had properly preserved his statutory right to an appraisal. The court explained that the Maryland LLC statute grants a member the same appraisal rights as an objecting stockholder under corporate law. Maryland corporate law provides appraisal rights in connection with a parent-subsidary merger, and Froelich properly objected to the squeeze-out merger. The court viewed the reclassification and subsequent squeeze-out merger as a single transaction rather than separate events such that Froelich was entitled to appraisal of his interests immediately prior to the reclassification rather than appraisal of his reclassified interests immediately prior to the merger that occurred five months later.

#### **GG. Professional LLCs**

*Physicians' Reciprocal Insurers v. Jordan*, 836 N.Y.S.2d 215 (N.Y. A.D. 2 Dept. 2007) (holding that physician was acting as employee of professional LLC of which he was also member when he treated patient in malpractice action and physician thus was not insured as "stockholder" under LLC's excess professional liability policy).

*Babb v. Bynum & Murphrey, PLLC*, 643 S.E.2d 55 (N.C. App. 2007). The plaintiffs sued Bynum and Murphrey, two members of a law firm LLC, alleging that Bynum engaged in numerous acts of fiduciary fraud in connection with the handling of a trust. The plaintiffs alleged claims against Murphrey for negligence, negligent supervision, and breach of fiduciary duty. The plaintiff argued that Murphrey had a duty to them under the North Carolina Limited Liability Act and the firm's operating agreement. First, the court cited the statutory provision protecting a member from liability for the obligation of the LLC but providing that a member may become liable for the member's own acts or conduct. Though the plaintiffs claimed that they were seeking to hold Murphrey liable for his own acts and omissions, the court concluded that the plaintiffs failed to allege any direct acts by Murphrey and were relying on Murphrey's failure to act. The court concluded that the LLC statute did not impose a duty on Murphrey to investigate Bynum if Murphrey did not have any actual knowledge. The court also rejected the plaintiffs' claim that the operating agreement created a duty on the part of Murphrey. Although the operating agreement stated that a member shall be liable for his own professional negligence and that a member must comply with the rules of professional conduct, the court concluded that the plaintiffs were not third party beneficiaries of the agreement. The court said that the intent of the parties was to benefit the law firm and its members, not to directly benefit the plaintiffs. Thus, the plaintiffs were at most incidental beneficiaries and not third party beneficiaries with standing to sue.

*Allstate Insurance Company v. A & A Medical Transportation Services, Inc.*, Nos. 260766, 261504, 2007 WL 162477 (Mich. App. Jan. 23, 2007) (holding that no fault insurance act did not preclude payment to clinics that were allegedly improperly organized under general LLC provisions rather than professional LLC provisions of Michigan LLC statute).

*Simae v. Levi*, 802 N.Y.S.2d 493 (N.Y. A.D. 2 Dept. 2005) (holding failure to obtain required approval of Public Health Council did not render transfer of 1/3 interest in LLC surgery center ineffective as a matter of law and could not be raised by defendants as bar to performance of their contractual obligation under option agreement with plaintiff).

*Malone v. D and R, LLC*, No. CV040834225S, 2004 WL 2943111 (Conn.Super. Nov. 10, 2004) (stating that parties mistakenly relied on provisions of the Connecticut LLC statute addressing the liability of a manager of an LLC rendering professional services because the dispute arose out of an agreement calling for the construction of a new condominium, and such an agreement is not a contract concerning “professional services”).

*Keszenheimer v. Boyd*, 897 So.2d 190 (Miss. App. 2004). Keszenheimer sought to hold Smallwood, an individual member of a professional LLC, liable for malpractice in connection with another member’s representation of Keszenheimer in litigation that resulted in a judgment adverse to Keszenheimer. By statute in Mississippi an individual who renders professional services as an employee of a professional LLC is liable for a “negligent or wrongful act or omission in which he personally participates,” but a member or employee is not liable for the conduct of other members or employees except a person under his “direct supervision or control.” Keszenheimer argued that the firm’s use of the terms “we,” “us,” and “the firm” in correspondence to him established that he was receiving services from the entire firm and its members. The court stated that the use of such terms did not show that Smallwood either personally participated in a negligent or wrongful act or directly supervised someone who committed wrongful conduct. The court stated that nothing in the record suggested Smallwood had any contact with Keszenheimer, nor did the record support the bare allegations that the members, including Smallwood, regularly consulted one another on cases being handled by the firm. Thus, dismissal of Smallwood was proper.

*Walker v. Virginia Housing Development Authority*, No. CH03-253, 2003 WL 23018817 (Va. Cir. Ct. Nov. 5, 2003) (interpreting statutory authority of professional LLCs to act in fiduciary capacity and holding that statute recognizes that acting as trustee under deed of trust is part of the practice of law and that statute permits professional LLCs to use other attorneys as agents to fulfill the necessary fiduciary duties).

*Selective Ins. Co. of America v. Medical Alliances, LLC*, 827 A.2d 1188 (N.J.Super.L. 2003). The issue in this case was the legality of the structure of the defendant LLCs and their ability to practice medicine in New Jersey. The plaintiff, an insurer, asserted that several Illinois LLCs involved in rendering neurodiagnostic services were illegal because the practice of medicine in a corporate format is prohibited in New Jersey except as permitted in specific legislative or regulatory provisions. The preliminary relief sought by the plaintiff was an order requiring the defendants to respond to discovery requests regarding the ownership of the LLCs. The court discussed at some length the provisions of the New Jersey Business Corporation Act and the Professional Service Corporation Act. The court stated that the underlying issues with respect to the practice of a profession in an LLC are the same as with respect to corporations. The court noted that, although the New Jersey Supreme Court has adopted a rule with regard to the practice of law in the LLC form, the Board of Medical Examiners and Board of Chiropractor Examiners have not adopted a rule permitting or prohibiting LLCs. The court also observed that the Legislature never considered whether licensed professionals could form and practice through an LLC when the Legislature passed the New Jersey LLC act. The court apparently concluded that an LLC might be able to engage in the practice of medicine in New Jersey if all of its members are licensed to practice medicine. The court concluded that the insurer was entitled to discovery to determine the ownership of the LLCs to learn if they were actually owned by medical doctors, chiropractors, corporations, or lay persons and whether they were actually practicing medicine in New Jersey. According to the court, “whether or not licensed medical professionals or entities can practice as a LLC, be they domestic or foreign, is a matter that can only be determined through discovery.”

#### **HH. Single Purpose LLCs**

*LaSalle Bank N.A. v. Mobile Hotel Properties, LLC*, 367 F.Supp.2d 1022 (E.D. La. 2004). The amendment of an Alabama LLC’s articles of organization altered the status of the LLC as a single purpose entity under loan documents requiring the LLC to maintain such status even though the LLC continued to operate as a single purpose entity. The court said the change in operative language to authorize any lawful activity rather than the sole purpose of acquisition, ownership, operation, and management of a specified hotel was a legal, formal, and effective amendment triggering default and recourse provisions of the loan documents because the LLC failed to maintain its status as a “single purpose entity.”

## II. Series LLC

**GxG Management LLC v. Young Brothers and Co., Inc.**, Civil No. 05-162-B-K, 2007 WL 1702872 (D. Me. June 11, 2007) (further discussing and clarifying prior conclusion, in opinion noted below, that Delaware series is not separate entity with capacity to sue).

**GxG Management LLC v. Young Brothers and Co., Inc.**, Civil No. 05-162-B-K, 2007 WL 551761 (D. Me. Feb. 21, 2007), amended, 2007 WL 1702872 (D. Me. June 11, 2007) (holding LLC had standing to bring breach of contract and related claims as real party in interest even though series held nominal ownership of boat that was subject of contract, noting that Delaware statute does not address standing of LLC to pursue litigation on behalf of its series or standing of series to pursue litigation in its own behalf, and commenting that LLC and its series are not separate entities).

## JJ. Imputed Fiduciary Duties

**Barbieri v. Swing-N-Slide Corp.**, 65 USLW 2584, 22 Del. J. Corp. L. 1148, 1997 WL 55956 (Del. Ch. Jan. 29, 1997). Greengrass Management LLC (“Management”) and Greengrass Capital (“Capital”) formed a general partnership, Greengrass Holdings (“Holdings”). Management was organized by several senior officers of Swing-N-Slide Corp., including Mueller, a director and the president and CEO of Swing-N-Slide. Holdings executed a two-step tender offer to acquire a majority stake in Swing-N-Slide. Barbieri, a Swing-N-Slide shareholder, brought an action challenging the transaction. He argued that because Mueller had an ownership interest in Management, and Management was one of the two general partners of Holdings, Management and Holdings owed fiduciary duties to the Swing-N-Slide shareholders. The court found that the persons who formed Management, as senior officers of Swing-N-Slide, owed fiduciary duties to Swing-N-Slide. Thus, the issue of apparent first impression was whether a legal entity must take on the pre-existing fiduciary duties of those who form and control it. The court determined that the fiduciary duties of the Swing-N-Slide director and officers must be imputed to the LLC they formed because “[n]either Mueller nor the others would escape their fiduciary obligations to [Swing-N-Slide] had they not formed Management. To allow them to use this State’s laws allowing the formation of the limited liability company as a vehicle to avoid those very duties would be unconscionable.” As to Holdings’ liability, the court found that Holdings was made up of two partners, Management and Capital. Capital had no pre-existing fiduciary duties to Swing-N-Slide or its shareholders, and the court refused to assume that Management “so controls or otherwise so dominates the affairs of the partnership that the partnership itself must take on the fiduciary obligations of a single partner.” Thus, the court determined that Holdings need not take on the imputed fiduciary duties of Management.

## KK. Foreign LLCs

### 1. Personal Jurisdiction

**Greystone Tribeca Acquisition, L.L.C. v. Ronstrom**, 863 So.2d 473 (Fla. App. 2004) (concluding LLC and its members were not subject to jurisdiction by virtue of presence of subsidiary LLC in state).

**Hartford Fire Ins. Co. v. United Restoration LLC**, No. CV020813517, 2003 WL 1962864 (Conn.Super. April 4, 2003) (holding that Connecticut long-arm statute for corporations applies to LLCs).

**Nadler v. Grayson Construction Co., Inc.**, 34 Conn. L. Rptr. 482, 2003 WL 1963158 (Conn.Super. 2003) (holding that long-arm statute applicable to foreign partnerships applies to foreign LLCs and that evidentiary hearing must be held on alter ego allegations relied upon to sustain personal jurisdiction over foreign LLC).

**New England National LLC v. Kabro of East Lyme LLC**, No. 550014, 2000 WL 254590 (Conn. Super. Feb. 23, 2000) (applying Connecticut long-arm statute applicable to foreign partnerships and finding that foreign LLC had transacted business in Connecticut so as to justify the court’s exercise of specific personal jurisdiction over the LLC).

**MCNC Oil & Gas Company v. IBEX Resources Company, L.L.C.**, 23 F. Supp.2d 729 (E.D. Mich. 1998) (applying Michigan long-arm statute regarding specific jurisdiction over unincorporated associations to conclude that Oklahoma LLC was subject to personal jurisdiction).

## 2. Failure to Qualify to Do Business

*AMP Management, LLC v. Scottsdale Insurance Company*, No. 06-4079-SAC, 2007 WL 677633 (D. Kan. Feb. 28, 2007) (citing foreign corporation provisions and holding foreign LLC lacked standing to sue because of its failure to qualify to do business in Kansas).

*Ferron v. VC E-Commerce Solutions, Inc.*, No. 2:06-CV-322, 2007 WL 295455 (S.D. Ohio Jan. 29, 2007) (holding foreign LLC's failure to qualify to transact business was not deceptive trade practice under Ohio Consumer Sales Practices Act).

*Eastern Investments, LLC v. Cyberfile, Inc.*, 947 So.2d 630 (Fla. App. 2007) (permitting foreign LLC that cured failure to comply with foreign registration requirements to maintain suit).

*Blenheim LLC v. Il Posto LLC*, 827 N.Y.S.2d 620 (N.Y. City Civ. Ct. 2006) (permitting LLC that alleged it was New York LLC to correct pleadings to conform to proof that LLC was Delaware LLC authorized to do business in New York).

*Salom Enterprises, LLC v. TS Trim Industries, Inc.*, 464 F.Supp.2d 676 (E.D. Mich. 2006) (holding that foreign LLC which obtained certificate of authority after commencing lawsuit and was conducting only winding up activities in forum state had standing to bring suit).

*Highway Traffic Safety Associates v. Gomien and Harrop*, 857 N.E.2d 877 (Ill. App. 2006) (concluding that statute prohibiting unregistered foreign LLC from maintaining civil action in Illinois did not preclude foreign LLC from filing petition to register foreign judgment in effort to enforce judgment under full faith and credit clause).

*Cottone v. Cedar Lake, LLC*, 854 N.E.2d 456 (Mass. App. Ct. 2006) (holding unregistered foreign LLC was not precluded from seeking relief from zoning board and defending appeal against it in superior court where statute precluded unregistered foreign LLC from bringing action in any court of Massachusetts and did not preclude unregistered LLC from defending any action, suit, or proceeding).

*HMMH Holdings, LLC v. Hallenborg*, No. CV065001446S, 2006 WL 2411476 (Conn. Super. Aug. 1, 2006) (granting motion to dismiss against foreign LLC that was doing business in state but had not registered to transact business).

*Saintsbury Holdings, LLC v. RMC, LLC*, No. 1:06-CV-00014, 2006 WL 1900317 (M.D. Tenn. July 11, 2006) (relying on statutory provision permitting stay of proceedings to determine whether foreign LLC must obtain certificate of authority and deferring question of whether foreign LLC was "transacting business" in Tennessee until after discovery).

*Sotomayor v. Medifast, Inc.*, 814 N.Y.S.2d 103 (N.Y. A.D. 1 Dept. 2006) (dismissing derivative claims asserted on behalf of Delaware LLC not authorized to do business in New York and no longer in existence and good standing in Delaware).

*Premier Capital LLC v. Dickens*, No. G034429, 2005 WL 2338789 (Cal. App. 4 Dist. Sept. 23, 2005) (holding foreign LLC's collection of indebtedness in California was not transaction of intrastate commerce requiring LLC to qualify to transact business in California).

*Bizniz, LLC v. Commonwealth Land Title Insurance Co.*, No. CV040834304S, 2005 WL 1433479 (Conn. Super. May 19, 2005) (holding Nevada LLC engaged in mortgage lending in Connecticut was not "transacting business" in Connecticut because of statutory exclusion, and thus LLC's failure to register to transact business did not bar it from maintaining action).

*Cottone v. Cedar Lake, LLC*, No. 022064B, 2005 WL 1009447 (Mass. Super. April 1, 2005). The court held that an unregistered foreign LLC was not precluded from bringing an administrative action before a zoning board because the foreign qualification statute restricted unregistered foreign LLCs from maintaining an action in the courts. Furthermore, the LLC was not precluded from defending on appeal the favorable order it obtained from the zoning board,

and the court stated it need not decide if the LLC would have had the right to appeal if an adverse ruling by the board had been rendered.

*E.T. Corporation v. Unique Opportunities, LLC* No. E043367, 2005 WL 91490 (Cal. App. Jan. 14, 2005) (holding unregistered foreign LLC was not precluded from defending action and pursuing appeal under statute that precludes unregistered foreign LLC transacting intrastate business from “maintaining” an action).

*CS Assets, LLC v. H & H Real Estate Development, Inc.*, 353 F.Supp.2d 1197 (N.D. Ala. 2005) (holding foreign LLC that failed to register to transact business in Alabama before filing suit could cure its failure to register prior to the court’s determination of a motion to dismiss where statute precluded unregistered foreign LLC from “maintaining” an action).

*In re Zoning Ordinance Amendments*, 2003 WL 23341352 (Va. Cir. Ct. Jan. 6, 2003) (holding commencement of lawsuit by foreign LLCs is among activities not deemed to be doing business but staying proceedings until such time as unregistered foreign LLCs registered in Virginia).

*Albers v. Guthy-Renker Corp.*, 92 Fed.Appx. 497 (9th Cir. 2004) (holding LLC did not have capacity to sue in California because it was foreign LLC transacting business in California and was not registered to do so).

*Danka Funding, L.L.C. v. Page, Scrantom, Sprouse, Tucker & Ford, P.C.*, 21 F. Supp.2d 465 (D. N.J. 1998). The defendant sought to have the plaintiff LLC’s claims dismissed for failure to comply with the New Jersey registration requirements applicable to foreign LLCs doing business in New Jersey. The plaintiff was a New York LLC which was not registered in New Jersey at the time it filed suit. It had previously been registered, but the registration had lapsed. It subsequently re-registered after the suit was filed. The court followed corporate cases to the effect that a company’s failure to register does not require dismissal so long as the company corrects the deficiency during the proceedings. The defendant argued that these cases should not apply in this case because the defendant filed suit in another jurisdiction before the LLC re-registered. The court disagreed and held that the registration related back for purposes of the first to file rule.

### **3. Foreign Non-Professional LLC (in Jurisdiction Limiting LLCs to Professionals)**

*IHS Acquisition XV, Inc. v. Kings Harbor Care Center*, No. 98 CIV 7621(LBS), 1999 WL 223152 (S.D. N.Y. April 16, 1999). The plaintiff, as successor-in-interest to an LLC, sued for payment for respiratory therapy services rendered under a contract with the defendant. The defendant moved to dismiss on the basis that the contract was void as against public policy. Specifically, the defendant argued that the LLC was a foreign non-professional LLC which was not permitted to provide or contract to provide professional services in New York. The court construed this contention as an illegality defense that could not support dismissal at this stage in the proceedings. The court noted that there was no absolute or per se rule of illegality of such contracts in New York and stated that a number of factors would have to be addressed to resolve whether the contract in issue was enforceable.

### **4. Law Governing Foreign LLC**

*Freeman Management Corporation v. Shurgard Storage Centers, Inc.*, No. 3:06cv736, 2007 WL 1541877 (M.D. Tenn. May 23, 2007). The court held that the merger of a corporation into a newly formed Delaware LLC effected a transfer by operation of law of the corporation’s interests in several joint ventures and thus violated a provision in the joint venture agreements prohibiting transfer of the joint venture interest without the consent of the other joint venturer. The merger was accomplished under the Washington Business Corporation Act and the Delaware Limited Liability Company Act, but the joint venture agreements provided that they were governed by Tennessee law. The court determined that Tennessee law applied to the issue of whether the merger resulted in a transfer for purposes of the prohibition on transfer under the joint venture agreements.

*Heer v. Price*, No. 1:06CV-114-R, 2007 WL 1100693 (W.D. Ky. April 11, 2007) (holding that North Carolina law applied to dispute arising under Membership Acquisition Agreement containing North Carolina choice of law provision and North Carolina LLC Act did not preclude court from asserting jurisdiction of action brought by member of North Carolina LLC against manager of LLC for fraud and breach of fiduciary duty regardless of whether suit was characterized as direct or derivative suit).

***In re Lowry (Lowry Food Products, Inc. v. Alto Dairy Cooperative)***, Bankruptcy No. 03-33950 HDH-7, Adversary No. 05-3108, 2007 WL 738144 (Bankr. N.D. Tex. March 7, 2007) (applying Texas most significant relationship test to conflict of laws question and concluding Wisconsin law applied to breach of contract claim based on Wisconsin LLC agreements and breach of duty claim).

***In re Kilroy (Nibbi v. Kilroy)***, 357 B.R. 411 (Bankr. S.D. Tex. 2006). The plaintiffs sought to pierce the veil of a Delaware LLC and treat the LLC as the alter ego of the debtor in order to attribute to the debtor false representations made by the LLC in a private placement memorandum and pursue certain other claims for fraud, embezzlement, and breach of fiduciary duty that depended upon the disregard of the LLC's separate existence. Applying Texas conflict of laws principles (citing the Texas Business Corporation Act), the court stated that Delaware substantive law determined whether the veil of a Delaware LLC should be pierced. In a previous suit, a Texas state court had found the LLC in question to be the alter ego of the debtor, and the court found that Delaware law dictated that the law of collateral estoppel of the state where a judgment was rendered determines the scope of collateral estoppel in the second case. Applying Texas offensive collateral estoppel principles, the court concluded that it could pierce the veil of the LLC based on the finding in state court that the LLC was the alter ego of the debtor. Alternatively, the court found that the same result could be achieved using Delaware offensive collateral estoppel. Additionally, even if offensive collateral estoppel under Texas or Delaware law could not be applied to prevent the debtor from denying that the LLC was his alter ego, the court concluded that the LLC's veil could be pierced by directly relying on the alter ego doctrine under Delaware law. The court discussed the factors relevant to an alter ego determination under Delaware law and concluded that the plaintiff's allegations were sufficient to support such a claim. The court acknowledged the dearth of Delaware case law on the issue of whether an LLC's veil may be pierced using corporate veil piercing principles, but concluded that the Delaware Chancery Court has conceptually endorsed the application of corporate veil piercing principles to LLCs.

***Cognex Corporation v. VCode Holdings, Inc.***, Civ. No. 06-1040 (JNE/JJG), 2006 WL 3043129 (D. Minn. Oct. 24, 2006) (applying Illinois law to question of whether parent and Illinois LLC were alter egos).

***D'Elia v. Rice Development, Inc.***, 147 P.3d 515 (Utah App. 2006) (noting that California veil piercing principles applied to California corporation and Utah veil piercing principles applied to Utah LLC based on rule that law of state of formation governs liability of entity's owners, but stating that veil piercing law of California and Utah differed little and presented no need to bifurcate analysis).

***In re Kilroy (Guerriero v. Kilroy)***, 354 B.R. 476 (Bankr. S.D. Tex. 2006) (applying Delaware law to question of standing to bring derivative suit on behalf of Delaware LLC).

***Finkelstein v. Warner Music Group Inc.***, 820 N.Y.S.2d 264 (N.Y. A.D. 1 Dept. 2006) (stating Delaware law governs question of whether claims asserted on behalf of Delaware LLC are derivative).

***Facchina v. Malley***, No. Civ.A. 783-N, 2006 WL 2328228 (Del. Ch. Aug. 1, 2006) (rejecting argument that California law governed internal affairs of Delaware LLC whose only place of business was in California and stating that Delaware law governs internal affairs of Delaware LLC regardless of its place of operations).

***Kira, Inc. v. All Star Maintenance***, No. A-03-CA-950 LY, 2006 WL 2193006 (W.D. Tex. July 31, 2006) (applying Nevada law to summary judgment motions relating to breach of operating agreement and breach of duty claims based on parties' position that Nevada law should apply, choice of law clause in operating agreement, and internal affairs doctrine).

***Burkle v. Burkle***, 141 Cal.App.4th 1029, 46 Cal.Rptr.3d 562 (Cal. App. 2 Dist. 2006). Carrie Burkle's father, Ronald Burkle, formed a Delaware LLC when Carrie was 19 years old. Ronald owned 99% of the LLC and provided the funds for Carrie's 1% interest in the LLC. Carrie filed suit seeking declaratory relief and an accounting after learning of her 1% interest in the LLC. Carrie sought access to the LLC's books and records through discovery requests and based on California statutory provisions. Ronald sought summary judgment and asserted that the capital contributions he made to the LLC were loans to Carrie and that he drew down Carrie's capital account to repay himself for the prior loans plus accrued interest on the loans. The court of appeals determined that Carrie had inspection rights under Section 17453 of the Corporations Code, which states: "If the members of a foreign limited liability company residing in this state represent 25 percent or more of the voting interests of members of that limited liability company, those members shall



be entitled to all information and inspection rights provided in Section 17106.” (Section 17106 provides members of a California LLC access to records for purposes reasonably related to the member’s interest.) Ronald argued that “those members” entitled to inspection rights are only those California members with a 25% or greater interest; however, the court of appeals had no difficulty concluding that once the interest of California residents in an LLC reaches the 25% threshold, any California member is entitled to the benefits of California law on inspection of LLC records. According to the court, “those members’ unambiguously refers to California members, and merely distinguishes members residing in California from members residing elsewhere, who are not entitled to inspection rights under California law.” Since all the members of the LLC – Carrie with a 1% interest and Ronald with a 99% interest – resided in California, Carrie was entitled to inspection rights.

***Morgan Howard (United States), LLC v. Lewis***, No. FSTCV054006343S, 2006 WL 2348892 (Conn. Super. July 14, 2006) (stating Delaware law governs rights of member of Delaware LLC but Connecticut law governs standing, and concluding member lacked standing to bring claims as direct claims under either Connecticut or Delaware law).

***Team EJP Racing, LLP v. Dollar***, No. 5:06-CV-17-V, 2006 WL 1875333 (W.D. N.C. July 5, 2006) (applying Arkansas law to issue of member’s liability based on provisions of North Carolina LLC statute providing that liability of managers and members of foreign LLC is governed by law of LLC’s state of formation).

***NetJets Aviation, Inc. v. LHC Communications LLC***, No. 02 Civ.7441 (DAB), 2006 WL 1627899 (S.D. N.Y. June 12, 2006) (holding Delaware law governed piercing of Delaware LLC under New York choice of law principles).

***Schwan v. CNH America, LLC***, No. 4:04CV3384, 2006 WL 1215395 (D. Neb. May 4, 2006) (concluding Nebraska law governed piercing of Delaware LLC because corporate internal affairs rule does not apply where rights of third parties external to corporation are at issue, and interest of Nebraska in applying its law to citizens injured by foreign corporation outweighs interests of state of incorporation).

***Brown v. 1514 W. Thomas, L.L.C.***, No. 257017, 2006 WL 889381 (Mich. App. April 6, 2006) (holding Illinois law governed usury defense in transaction where lender was Michigan resident and note was signed in Michigan, but borrower was Illinois LLC, note contained Illinois choice of law clause, loan proceeds were for investment in Illinois property, and Illinois law specifically permits LLC to agree to any rate of interest).

***In re Chari (Rieser v. Todd)***, Bankruptcy No. 99-35862, Adversary No. 01-3252, 2005 WL 4030034 (Bankr. S.D. Ohio Sept. 2, 2005) (holding Texas law applied to loan to Ohio LLC where documents contained Texas choice of law clause, idea for loan was conceived in Texas, and negotiations and contracting took place in Texas; therefore, trustee for Ohio LLC had standing to bring usury claim notwithstanding Ohio statute prohibiting LLC from asserting usury as claim or defense).

***Douzinis v. American Bureau of Shipping, Inc.***, 888 A.2d 1146 (Del. Ch. 2006). The minority members of a Delaware LLC sued the majority member and its affiliates for diverting assets of the LLC to the majority member’s affiliates without compensation to the LLC. The defendants sought to compel the minority members to arbitrate their claims pursuant to a broad arbitration clause in the LLC agreement, and the court found the arbitration clause encompassed the minority members’ claims. The court observed that the LLC agreement presented an unusual situation regarding the applicable law because it contained a Texas choice of law clause as follows: “Except to the extent any provision hereof is mandatorily required to be governed by the [Delaware Limited Liability Company Act], this agreement is governed by and shall be construed in accordance with the laws of the state of Texas....” The court stated that the Texas choice of law clause created “the odd situation where the parties to an LLC domiciled in Delaware chose to have their LLC Agreement governed by another state’s law, except when the Delaware LLC Act requires the application of Delaware law.” The court concluded the choice of law provision was valid because Delaware respects choice of law provisions when the chosen law has a material relationship to the matter at issue, a requirement that was satisfied because the LLC operated out of Texas. The court did not attempt to parse the differences between Texas and Delaware law because the parties agreed there was no material difference between the two states’ laws regarding the issues before the court.

***JTL Consulting, L.L.C. v. Shanahan***, 190 S.W.3d 389 (Mo. App. 2006) (holding parties waived Delaware choice of law clause in operating agreement by citing Missouri rather than Delaware law in arguments on enforceability of customer nonsolicitation clause in operating agreement).

***Melcher v. Apollo Medical Fund Management, L.L.C.***, 808 N.Y.S.2d 207 (N.Y. A.D. 1 Dept. 2006) (holding that Delaware limitations period was not imported by virtue of Delaware choice of law clause in LLC agreement).

***Sachs v. Adeli***, 804 N.Y.S.2d 731 (N.Y. A.D. 1 Dept. 2005). A minority member of an LLC sued the LLC and its majority member seeking to collect on indebtedness and guarantees held by the minority member and alleging fraud in connection with the minority member's investment in the LLC. The fraud claim was based on the failure of the LLC and majority member to disclose sales tax liabilities of the LLC at the time of his investment. The minority member sought to compel the defendants to execute authorizations necessary for the minority member to obtain sales tax information from the New York authorities, and the court granted the member's motion to compel. The court determined as a threshold issue that New York not only had jurisdiction over the dispute, but New York law should be applied to the dispute. The court pointed out that the plaintiff invested in a company that was headquartered in New York, conducted its principal business in New York, and paid taxes in New York. Additionally, the information sought by the plaintiff was available only from a New York agency. The court stated that the plaintiff should be secure in the knowledge that the State of New York would provide both the laws and forum for redress. The court relied upon the statutory inspection rights of LLC members under the New York LLC statute as well as New York case law holding that tax records are discoverable if the information is necessary to the litigation and is unavailable from any other source. The court concluded by noting that the outcome would be the same if Delaware law controlled, citing statutory inspection rights of LLC members under Delaware law and Delaware case law addressing the necessity of inspecting tax returns in connection with a fraud claim.

***Wright v. Herman***, 230 F.R.D. 1 (D. D.C. 2005) (holding Virginia law would govern claims involving internal affairs of Virginia LLC, including allegation members chose to operate inter se as partners, citing provision of District of Columbia LLC statute regarding law governing foreign LLCs).

***Rupp v. Thompson***, No. C5-03-347, 2004 WL 3563775 (Minn. Dist. Ct. March 17, 2004) (stating that same conflict of laws considerations apply to LLCs and business corporations and applying corporate internal affairs doctrine to conclude that Colorado substantive law would govern dispute involving alleged unfair merger of Colorado LLC).

***Butler v. Adoption Media, LLC***, No. C04-1035 PJH, 2005 WL 2077484 (N.D. Cal. Aug. 26, 2005). The defendants argued that Arizona law should be applied to the analysis of whether the individual defendants were the alter egos of two Arizona LLCs as well as to the question of any successor liability of the LLCs. The court stated that California applies the three-step "governmental interest" test to determine the applicable law. Under this test, the court first determines whether the law of the foreign state actually differs from California law. If it does, the court considers each state's interest in having its own law apply to determine if there is a "true conflict" between their interests. If each state has a legitimate interest, the court compares the extent to which each state's interest will be impaired if the other state's law is applied. The defendants relied upon the California LLC act, which provides that "[t]he laws of the state under which a foreign limited liability company is organized shall govern its organization and internal affairs and the liability and authority of its managers and members." The court found, however, that this provision simply codifies the internal affairs doctrine as applied to LLCs and does not apply to disputes that include people or entities that are not part of the LLC. The court stated that the parties did not dispute that Arizona law and California law are identical on the subject of alter ego liability, and the court found that the law of each state is also identical with regard to successor liability.

***D.R. Horton Inc.-New Jersey v. Dynastar Development, L.L.C.***, No. MER-L-1808-00, 2005 WL 1939778 (N.J. Super. L. Aug. 10, 2005). Although the parties did not dispute that New Jersey law determined whether to pierce the veil of a New Jersey LLC owned by two Louisiana entities, the court discussed the choice of law issue. The court noted various arguments and approaches and ultimately stated that it need not resolve the issue of whether the state of formation, governmental interest, or most significant contacts test determined the applicable veil piercing law because the LLC in question was formed under New Jersey law and maintained its most significant contacts in New Jersey, and New Jersey had a sufficient interest in the case to apply its veil piercing law.

***Lily Transportation Corp. v. Royal Institutional Services, Inc.***, 832 N.E.2d 666 (Mass. App. Ct. 2005) (stating question of whether to pierce Pennsylvania LLC's veil would be governed by law of LLC's "state of incorporation," although Massachusetts law did not appear to differ from Pennsylvania law).

***S.R. International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC***, 375 F.Supp.2d 238 (S.D. N.Y. 2005) (holding Delaware law governed question of whether court could pierce veil of Delaware LLC because, under New York choice of law principles, law of state of incorporation determines whether court can disregard corporate form).

***Hopkins v. Duckett***, No. Civ.A.02-5589 (JCL), 2005 WL 1262907 (D. N.J. May 27, 2005). The plaintiff argued that New Jersey law should govern the plaintiff's request for appointment of a custodian of a Delaware LLC in which the plaintiff was a member. The LLC's operating agreement contained a Delaware choice of law provision, but the plaintiff asserted that his oppression claims that formed the basis for his request of a custodian were not subject to the choice of law provision because the operating agreement did not address oppression. Further, the plaintiff argued that the choice of law provision was not enforceable because the facts of the case were unrelated to Delaware and, to the extent Delaware would not allow appointment of a custodian under the circumstances of the case, the application of Delaware law would be contrary to New Jersey public policy providing broad remedies to oppressed minority shareholders. The court concluded Delaware law applied to the dispute. The court pointed out that statements in the plaintiff's brief established that the plaintiff's claims were related to the operating agreement. Further, the court stated that Delaware bore a relationship to the LLC since it was a Delaware LLC and that the plaintiff had not demonstrated New Jersey had a greater interest in the case than Delaware. The court stated that the gravamen of the complaint was the management and governance of the LLC as it related to the plaintiff. The court denied the request for appointment of a custodian because Delaware law does not expressly provide for appointment of a custodian to relieve minority shareholder oppression. (The court analyzed the case as if it were governed by the custodian provisions of the Delaware General Corporation Law.) The court was not persuaded that following Delaware law violated New Jersey public policy, pointing out that appointment of a custodian under New Jersey law is a discretionary and extraordinary remedy and that it would be unnecessary under the circumstances of the case.

***Kaufman v. Guest Capital, L.L.C.***, No. 03 Civ. 1509(RJH), 2005 WL 167602 (S.D. N.Y. Jan. 25, 2005) (applying Delaware law based on choice of law clause in LLC operating agreement specifying Delaware law would govern offering documents).

***Allison v. Danilovic***, No. B163363, 2004 WL 2797988 (Cal. App. 2 Dist. Dec. 7, 2004). An employee filed a claim with the Labor Commissioner alleging that she was owed unpaid wages by an individual and the individual's LLC. The court of appeals upheld the lower court's judgment holding the individual liable for the unpaid wages. The court concluded that the alter ego theory applies to LLCs under either Delaware or California law and held that, in the event of a conflict of laws, California veil piercing principles would apply to the Delaware LLC in question because the LLC was located and operated in California, and the parties, as well as the officers, directors, and employees, lived in California. The court stated that the most significant relationship test applies to "matters peculiar to corporations, including internal administration," and California had a more significant relationship to the wage and alter ego issues than Delaware, which was "merely the state of incorporation."

***Ayres v. AG Processing Inc.***, 345 F.Supp.2d 1200 (D. Kan. 2004). The plaintiffs, minority members and former managers of a Nebraska LLC, brought this action against the majority member and three managers. The plaintiffs sought damages for breach of fiduciary duty, tortious interference with business relationship, minority oppression, breach of contract, and failure to fund a 401 profit sharing plan. The court determined that the breach of fiduciary duty and minority oppression claims were governed by Nebraska law because the Kansas LLC statute provides that the laws of the state of organization govern the internal affairs of a foreign LLC and the liability of its members and managers. The court determined that the breach of fiduciary duty and oppression claims involved "internal affairs." The court then determined that the claims could be brought directly under Nebraska law because the plaintiffs alleged that they had been damaged in their individual capacities by the termination of their status as employees, managers, and members of the LLC and the defendants' failure to pay equity bonuses to which the plaintiffs claimed they were entitled. The court determined that Kansas law governed the tortious interference claims under the Kansas general torts conflict of laws rule because the tortious interference claims did not relate to the "internal affairs" of the foreign LLC or the "liability of its members and managers." The parties agreed that the breach of contract claims based on provisions of the operating agreement were governed by Nebraska law because the operating agreement contained a choice of law provision designating Nebraska law. The court stated that it would apply Nebraska law to the breach of contract claims because "the forum selected by the choice of law provision bears a reasonable relation to the Operating Agreement."

*Matjasich v. State of Kansas Dept. of Human Resources*, 21 P.3d 985 (Kan. 2001). The Kansas Supreme Court held that the law governing a foreign LLC operating a nursing home in Kansas included not only the LLC act of the LLC's state of organization but also provisions of the wage payment law of the state of organization under which a member of an LLC could be held personally liable for unpaid wages. The court analyzed the Kansas Wage Payment Law and concluded that it did not provide for personal liability of LLC members because the definition of employer has not been amended to include LLCs along with corporations, partnerships, etc.; however, the court concluded that the Utah wage payment law rather than the Kansas law governed the liability of the members of the Utah LLC for unpaid wages arising out of its business in Kansas. The court relied upon provisions of the Kansas LLC act that provide the laws of the jurisdiction of organization govern the internal affairs and the liability of members. The court construed these provisions to include not only the LLC act but other laws bearing on member liability.

## 5. Constitutionality of Fee or Tax

*Ventas Finance 1 LLC v. California Franchise Tax Board*, No. 05-440001 (Cal Super. Ct. San Francisco 2006). The court held that the statute imposing the California LLC fee is unconstitutional because it does not provide for a fair apportionment that comports with the Commerce and Due Process Clauses. The LLC in this case derived income from California sources, but the court held that the statute could not be reformed to cure the constitutional defect because the legislative history was clear that the legislature had expressly rejected apportionment when it enacted the statute. The court thus held the entire fee (beyond the \$800 minimum) unconstitutional.

*Northwest Energetic Services, LLC v. California Franchise Tax Board*, No. CGC-05-437721 (Cal. Super. Ct. San Francisco April 13, 2006). The court held that California's LLC fee is unconstitutional on the basis that the fee is an unfairly apportioned tax in violation of the Commerce and Due Process Clauses. The court rejected the Franchise Tax Board's arguments that the fee is a regulatory fee and not a tax that must be fairly apportioned. The plaintiff was a foreign LLC whose only contact with the State of California was its registration with the Secretary of State's office, and the court ordered a refund of all fees paid.

## LL. Charging Order

*Goldberg v. Winogradow*, No. CV000093186S, 2006 WL 3041979 (Conn. Super. Oct. 12, 2006) (discussing charging order provisions and denying application for execution to extent it requested relief beyond rights of assignee, but granting request for judgment debtor's share of profits of LLC and right to receive distributions of LLC assets).

*Hubbard v. Talbott Tavern, Inc.*, Nos. 2003-CA-001468-MR, 2003-CA-001543-MR, 2004-CA-002184-MR, 2006 WL 2089308 (Ky. App. July 28, 2006). Relying on the charging order provisions of the Kentucky LLC statute, a trial court issued an order that a judgment debtor's membership interests in several LLCs were "judicially assigned" to the plaintiff and ordered that the member dissociate and cease being a member in the LLCs based on the provision in the Kentucky LLC statute stating that a member is dissociated upon an assignment for the benefit of creditors. The member appealed the order to dissociate and cease being a member and questioned the applicability of the provision stating that a member is dissociated upon an assignment for the benefit of creditors. The court held that the member's prior bankruptcy resulted in dissociation and that the court need not decide whether the member was properly dissociated because of an assignment to creditors.

*Federal Trade Commission v. Peoples Credit First, LLC*, No. 8:03-CV-2353-T-TBM, 2006 WL 1169677 (M.D. Fla. May 3, 2006). The FTC obtained a judgment against two individuals, Olmstead and Connell, and sought to liquidate the assets of several non-party LLCs. Olmstead and Connell objected to the liquidation of the assets as contrary to the Florida LLC statute and argued that the court was at most authorized to enter a charging order against their interests in the LLCs. The court disagreed. The court pointed out that the sole member of each of the LLCs in issue was Olmstead or Connell and concluded that "under these circumstances, the purposes of the statute are not defeated by the proposed liquidation of the assets of these companies which presently all [sic] under receivership."

*Brant v. Krilich*, 835 N.E.2d 582 (Ind. App. 2005). A judgment debtor with interests in various businesses, including a number of LLCs, appealed after the judgment creditor obtained a garnishment order against bank accounts of the businesses and an order transferring the judgment debtor's ownership interests in the businesses. The court of appeals noted that the trial court assumed without evidence that the judgment debtor and the businesses were alter egos. The court held that the failure to provide the businesses notice of the proceedings and make them parties rendered the

garnishment and transfer of ownership interests invalid. The court discussed the judgment debtor's argument that a charging order is the exclusive remedy with respect to a judgment debtor's interest in an LLC and concluded that a member's interest in an LLC is personal property that is subject to execution under Indiana law but stressed that the property that is subject to execution is only the economic interest and not the membership in the LLC. The court stated that the judgment creditor could not through execution receive any of the judgment debtor's rights to participate in management nor could it inspect the books and records of the LLC. The court also noted that an assignee may not become a member without consent of all other members and found no reason the courts should disregard this rule by forcing the members of an LLC to accept a judgment creditor as a member. The court characterized execution as indistinguishable from a charging order and stated that the effect of the law was that a charging order is essentially the only remedy for a judgment creditor against a member's interest in an LLC.

*Merchants Bank & Trust Co. v. Chestnut Tree Hill Partnership*, No. CV900033304S, 2003 WL 21403958 (Conn.Super. June 6, 2003). The assignee of a judgment sought a charging order against the judgment debtor's interests in three LLCs and a corporation. The court held that the assignee of the judgment presented sufficient evidence to show that it was the current holder of the judgment and thus had standing to seek a charging order without being substituted as a party plaintiff. The court went on to hold that the charging order remedy was not available with respect to the judgment debtor's interest in a corporation. Further, the court declined to issue a nunc pro tunc order to retroactively reach LLC interests sold by the judgment debtor after the application for charging order was made. The judgment creditor argued that the court's failure to schedule an immediate hearing allowed the judgment debtor to sell his interests in two LLCs. The court stated that the judgment creditor had not been prejudiced by an act of the court or judicial procedure; rather any unjust prejudice was caused by the judgment debtor when he sold his LLC interests. Further, the judgment creditor did not seek to correct a prior court order, as is generally the purpose of a nunc pro tunc order, but simply to make the court's order retroactive. The court charged the LLC interest still owned by the judgment debtor, ordering the LLC to remit to the judgment creditor any distributions of cash, profits, and assets to which the judgment debtor would otherwise be entitled until the judgment was satisfied.

*In re Ashley Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003). The sole member of a Colorado LLC filed bankruptcy, and the court held that the Chapter 7 trustee became a "substituted member" and could cause the LLC to sell the LLC's real property and distribute the proceeds to the estate. The court reasoned that the trustee acquired the governance rights of the bankrupt member of the LLC because the trustee succeeded to the debtor's membership interest and there were no other members whose approval was required for admission of the trustee as a member. The court quoted provisions of the Colorado LLC act that refer to consent or approval by the "other members" for admission of an assignee as a member. The debtor argued that the trustee represented creditors' interests and was only entitled to a charging order, but the court concluded that the charging order is for the protection of other members and thus serves no purpose in a single-member LLC. The court noted in a footnote that a non-debtor member, even one with an infinitesimal interest, would be able to prevent a bankrupt member's trustee from acquiring the bankrupt member's rights to govern and vote; however, the court also noted that creditors or a bankruptcy trustee would have recourse under bankruptcy avoidance provisions or fraudulent transfer laws where a "peppercorn" member is employed for purposes of hindering, delaying, or defrauding creditors.

*Delta Development and Investment Co. v. Yeh*, No. 47192-9-I, 2002 WL 31748937 (Wash.App. Dec. 9, 2002). Yeh, an officer and director of a corporation formed to develop real estate, misappropriated money from the corporation and invested in other properties. The court imposed a constructive trust in favor of the corporation on Yeh's two-thirds interest in a real estate development LLC, describing it as an interest in real property. After imposition of the constructive trust, Yeh, who had been managing the property, transferred management to MacLean, the other member of the LLC. The corporation asked for a receiver to manage the property owned by the LLC. MacLean intervened and argued that the nature of an LLC prevented the corporation from becoming a member without MacLean's consent and from reaching the LLC's real property. The court noted that an LLC is a separate entity from its members and that the decree of constructive trust failed to recognize the distinction but characterized the error as no more than "mere form." The court said MacLean was arguing that, even if the court had correctly characterized Yeh's interest in the LLC as personal property, the corporation would not have been entitled to a management role as a mere assignee. The court distinguished a judgment creditor and the charging order remedy from a beneficiary of a constructive trust because the judgment is not monetary. The court stated that the statute does not rule out the possibility that a member's interest can be reached by constructive trust where the judgment is not for a particular amount. Having concluded that the corporation was not a "judgment creditor" limited to non-managerial rights of an assignee under the charging order statute, the court accepted the substantive effect of the judgment substituting the corporation for Yeh as the owner of the

two-thirds LLC interest with all the rights, privileges, and benefits associated with ownership of the interest including the right to participate in management. The court remanded for the sole purpose of correcting the technical error of referring to the interest the corporation received as an interest in real property. The court noted in a footnote that it was not addressing MacLean's newly raised argument that the corporation was an assignee as the transferee of the interest held by Yeh as constructive trustee because it was not presented in the opening brief.

***Koh v. Inno-Pacific Holdings, Ltd.***, 54 P.3d 1270 (Wash. App. 2002). The plaintiff obtained a judgment in California against the defendant, a Singapore corporation, and learned in post-judgment discovery that the defendant owned an interest in a Washington LLC. The Washington LLC owned real estate in Washington, but its principal place of business was in Malaysia. The plaintiff obtained a charging order from a Washington trial court, but the trial court subsequently quashed the order on the basis that it lacked jurisdiction over the membership interest because it was personal property located outside the state of Washington. Relying on two cases dealing with charging orders in the partnership context, the court of appeals determined that an LLC membership interest is located where the LLC is formed. The court agreed with the plaintiff that the Washington LLC act allowed the plaintiff to reach the defendant's membership interest through a charging order and rejected the defendant's argument that the exercise of jurisdiction would offend the Constitution. The court determined that registration of a valid foreign judgment in conjunction with the presence of the property in Washington satisfied due process. In fact, the court stated, allowing the action was required in order to give full faith and credit to the California judgment.

***World Fuel Services Corporation v. Moorehead***, 229 F.Supp.2d 584 (N.D. Tex. 2002). The plaintiff registered a foreign judgment in Texas and sought a turnover order and receivership with respect to the defendant's non-exempt assets. Included in these assets were stocks, bonds, debentures, options, accounts receivable, and other property interests pledged to various third parties. The plaintiff also sought a charging order against the defendant's interest in two limited partnerships and an LLC. The court upheld the magistrate's issuance of a turnover order and appointment of a receiver to take possession and control of all the defendant's non-exempt assets and property interests and to sell the assets and property interests in satisfaction of the judgment. With respect to the request for the charging order, the court upheld the magistrate's finding that the charging order was "unnecessary" because the receivership included the limited partnership and LLC interests. (The court's receivership order specifically gave the receiver authority to exercise all powers and rights exercisable by the defendant with respect to his stock, bonds, warrants, debentures, and options in corporations in which the defendant had any legal or beneficial interest, including voting rights, but the order did not mention specifically the rights of the receiver with respect to the limited partnership and LLC interests. The order generally gave the receiver authority to take possession and control of, and to sell, all the defendant's non-exempt assets and to perform any and all acts necessary and appropriate in order to take possession and control of, and to sell, the defendant's assets.)

***Cadle Co. v. Ginsburg***, No. CV950076811S, 2002 WL 1295027 (Conn.Super. May 16, 2002). This opinion is merely the court's order charging the interest of the defendant with payment of the judgment entered in the action. The court's opinion analyzing why a charging order was appropriate is at 2002 WL 725500 and is summarized below.

***Cadle Co. v. Ginsburg***, No. CV950076811S, 2002 WL 725500 (Conn. Super. March 28, 2002). The plaintiff obtained a judgment against the defendant and applied for a charging order against the defendant's interest in Jai Alai Associates, LLC. The defendant objected to issuance of the charging order claiming that the LLC and IRS must be made parties and that issuing a charging order would violate state law by allowing an unlicensed individual to hold an interest in a jai alai business. The court rejected the argument that the LLC must be made a party, citing the LLC provisions detailing the process and effect of obtaining a charging order (explaining that a charging order merely gives the judgment creditor the rights of an assignee to distributions and does not dissolve the LLC or entitle the judgment creditor to participate in the affairs of the LLC or become a member) and concluding that a charging order does not impact the rights of an LLC to the degree necessary to require it to be a party. The court also rejected the argument that the IRS, which allegedly had or might claim a lien on the interest, should be made a party, stating that any charging order would be subject to any superior rights of the IRS in the defendant's interest. Finally, the court rejected the argument that the charging order would violate state licensing laws. The court found the state statute requiring an individual or business engaging in jai alai to obtain a license did not preclude issuance of the charging order, which would only give the judgment creditor the rights of an assignee and would not entitle the creditor to participate in management or become or exercise the rights of a member.

**Herring v. Keasler**, 563 S.E.2d 614 (N.C. App. 2002). A judgment creditor of an LLC member sought a charging order and an order directing that the member's interest be sold and proceeds applied towards the judgment. The court granted the charging order, but the court concluded that the North Carolina LLC act did not authorize the forced sale of the interest. The court quoted from the statute to the effect that a charging order entitles the judgment creditor to receive distributions and allocations to which the judgment debtor would be entitled but does not dissolve the LLC or entitle the judgment creditor to become or exercise any rights of a member. The court's reasoning for finding forced sale was not permitted was that the forced sale of a membership interest to satisfy a debt would "necessarily entail the transfer of a member's ownership interest to another, thus permitting the purchaser to become a member" in violation of statutory provisions that require consent of all members to admit a person as a member.

**Baker v. David A. Dorfman, P.L.L.C.**, No. 99 Civ. 9385 (DLC), 2000 WL 1010285 (S.D. N.Y. July 21, 2000), aff'd, 232 F.3d 121 (2d Cir. 2000). Baker obtained a judgment against David Dorfman for legal malpractice and fraud. Subsequently, Dorfman formed a professional LLC and began to operate his law practice through the PLLC. In this action, Baker sought to hold the PLLC liable on the judgment against Dorfman as a successor in interest. The court concluded that the PLLC was liable as a successor in interest. Baker also sought assignment of a 75% interest in the PLLC and appointment of himself as receiver for the LLC. (The court explained that the request for assignment of a 75% interest was to permit Baker to receive 75% of the profits of the PLLC while leaving Dorfman an incentive to generate future profits.) The court relied upon the charging order provisions of the New York LLC act to grant Baker's request for assignment of an interest in the LLC. The court relied upon general receivership provisions to conclude that the circumstances warranted appointment of a receiver, and the court appointed Baker, through his attorney, receiver of the PLLC. In a per curiam opinion, the court of appeals generally affirmed the district court's judgment, including the assignment of 75% of the profits of the PLLC, but raised *sua sponte* a concern regarding the breadth of the receivership order granting sweeping authority with regard to the PLLC's affairs. The court remanded for further consideration of the impact of the order on confidentiality and other obligations involved in the attorney-client relationship between Dorfman and his clients.

**Banc One Capital Partners v. Russell**, No. 74086, 1999 WL 435787 (Ohio. App. 8 Dist. June 24, 1999). Two judgment creditors of a 50% member in an LLC obtained a charging order against the member's membership interest. One of the creditors was the other 50% member. The LLC leased a building on which it held an option to purchase. The creditors valued the option at \$500,000. The creditors attempted to exercise the option, and the debtor member complained that the trial court had improperly transferred his governance rights in the LLC and the option itself to the judgment creditors. The court found no evidence that the trial court's order reached the option itself or the member's governance rights. The court pointed out that the order stated that the member's "membership interest" in the LLC "shall be charged and transferred to" the creditors, and the order did not reference the option itself. However, the court did characterize the member as having a 50% financial interest in the option itself by virtue of his membership interest in the LLC. The court stated that the trial court's order did not reach the member's governance rights but that the other member could exercise the option under his statutory agency power. The court acknowledged that it was improper for the trial court's order to state that the interest was charged "and transferred," but found the error inconsequential.

**PB Real Estate, Inc. v. DEM II Properties**, 719 A.2d 73 (Conn. App. 1998). A judgment creditor of two lawyers obtained a charging order against the LLC law firm of the judgment debtors. The order directed the LLC to pay to the plaintiff "present and future shares of any and all distributions, credits, drawings, or payments due to the defendant[s] . . . until the judgment is satisfied in full . . ." The plaintiff applied for a turnover order claiming the LLC had failed to fully comply with the order. The challenges to the turnover order basically turned on whether certain payments were "distributions" subject to the charging order. The defendants claimed that the payments in issue were merely compensation for services as lawyers and were similar to the wages paid other employees of the firm. The defendants argued they never authorized any distributions. The court rejected the defendants' arguments and held the payments were distributions subject to the charging order.

#### **MM. Tortious Interference With Contract**

**Venezia Resort, LLC v. Favret**, No. 3:07cv74/MCR/EMT, 2007 WL 1364342 (N.D. Fla. May 8, 2007) (holding that lawyer and lawyer's law firm, as agent of LLC member and member's manager, were not strangers to, and thus could not be liable for tortious interference with, banking relationship between LLC and its bank).

***Bakerman v. Sidney Frank Importing Co., Inc.***, No. Civ.A. 1844-N, 2006 WL 3927242 (Del. Ch. Oct. 16, 2006) (dismissing minority member's tortious interference claim because defendants were parties to operating agreement with which they allegedly interfered).

***Baron Financial Corporation v. Natanzon***, 471 F.Supp.2d 535 (D. Md. 2006) (stating that shareholder of corporation or member of LLC may not recover for tortious interference of business or contract of corporation or LLC because tort of intentional interference with contract is meant to protect parties to contracts rather than persons who might be harmed by breach of someone else's contract).

***DeShazo v. Estate of Clayton***, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (concluding that transfer of property by member to member's trust and development of property by member's trust did not violate any term of LLC's operating agreement, even though LLC was organized for purpose of developing property, and transfer and disposition of property did not interfere with other members' contractual rights, there being no written agreement between transferring member and other members regarding exclusive right to develop property or requiring transferring member to contribute property or profits from property to LLC).

***Sykes v. Hengel***, 394 F.Supp.2d 1062 (S.D. Iowa 2005) (holding members of LLC's board of managers were not personally liable for any libelous statements in letter to unit holders regarding termination of CEO because there was no evidence they were doing anything other than performing administrative duty, and members of board of managers could not be held liable for tortious interference with employment contract between LLC and CEO because there was no showing of abuse of qualified privilege).

***CAPCO 1998-D7 Pipestone, LLC v. Milton Ventures, LLP***, No. 05 C 1024, 2005 WL 1667445 (N.D. Ill. July 13, 2005) (declining to dismiss tortious interference claim based on individual manager's alleged interference with contract between plaintiff and LLC, stating manager was not agent as a matter of law inasmuch as question remained whether manager was carrying on LLC's business in ordinary course, had authority to act for LLC on particular matter, and was acting inconsistent with LLC's interests and out of desire for personal gain).

***Carruthers v. Flaum***, 365 F.Supp.2d 448 (S. D. N.Y. 2005) (dismissing tortious interference with contract claim based on oral operating agreement of Delaware LLC formed for purpose of developing high stakes bingo and other gaming facilities on ancestral land of Unkechaug Indian Nation because illegal purpose rendered operating agreement unenforceable).

***Bogle v. Summit Investment Company, LLC***, 107 P.3d 520 (N. M. App. 2005) (recognizing an LLC's agent can be held liable for his own tortious acts, but concluding LLC member/manager was not liable for tortious interference with LLC's contract because conduct interfering with LLC's contract was not based on an improper personal or individual motive separate from LLC's motive).

***Ayres v. AG Processing Inc.***, 345 F.Supp.2d 1200 (D. Kan. 2004). The plaintiffs, minority members and former managers of a Nebraska LLC, sued an individual (Reagan) for tortious interference with contract and tortious interference with prospective business relationship. The plaintiffs alleged that Reagan procured the LLC's breach of the operating agreement with the plaintiffs, and the defendants argued that the LLC was not a party to its operating agreement and thus could not have breached the contract. The court found that the plaintiffs stated a claim for tortious interference with contract by alleging the existence of a contract between the plaintiffs and the majority member, Reagan's knowledge of the contract, his intentional procurement of its breach, the absence of justification, and resulting damage to the plaintiffs. The court stated that the allegation the LLC breached the contract rather than the majority member was immaterial; throughout the complaint, the plaintiffs referred to the majority member as being a party to the operating agreement that created and formed the LLC. The court also rejected the argument that the claim for tortious interference with prospective business relationship must be dismissed because the plaintiffs were at-will employees. The court questioned the defendant's contention that a claim for tortious interference with prospective business advantage could never be asserted by an at-will employee. Furthermore, the court refused to summarily conclude that the plaintiffs were at-will employees because the plaintiffs alleged that the operating agreement named the plaintiffs as initial managers and provided that each manager shall hold office until removed by the member who nominated him or until his successor is elected and qualified. The court rejected the other challenges to the sufficiency of the plaintiffs' allegations of tortious interference, as well.



**Maillet v. Frontpoint Partners, L.L.C.**, No. 02-Civ. 7865(GBD), 2003 WL 21355218 (S.D. N.Y. June 10, 2003). The plaintiff sued an LLC and three individuals who, along with the plaintiff, were members of the LLC. The plaintiff and the three individual defendants were all signatories to the LLC operating agreement and an Equity Reallocation Agreement (the "Equity Agreement") whereby the parties agreed to the equity interest that the members would hold in the LLC. In a Services and Collaboration Agreement ("Services Agreement"), the plaintiff agreed to manage an investment fund for the LLC. Only one of the three individual defendants was a signatory to the Services Agreement. The court referred to the LLC operating agreement, the Equity Agreement, and the Services Agreement collectively as a "partnership agreement" and referred to the members of the LLC as "partners." The plaintiff alleged that the individual defendants tortiously interfered with the plaintiff's partnership agreement with the LLC and caused the LLC to breach the contract. The court stated that only a stranger to the contract, such as a third party, can be liable for tortious interference with the contract and that one cannot state a claim for tortious interference against one of the contracting parties. The court concluded that the plaintiff failed to state a claim against the defendant who was a party to all three of the agreements making up the "partnership agreement." Because two of the individuals were not signatories to the Services Agreement, the court said that there was a fact issue as to whether they were parties to that agreement and to the partnership agreement as a whole. These two defendants argued that the plaintiff did not state a claim against them in any event because officers and directors cannot be held liable for inducing a breach of contract by their corporations when they act within the scope of employment. The court concluded that the complaint alleged facts that indicated the plaintiff might be able to show that these members acted out of favoritism and in bad faith, and thus outside the scope of their employment, in causing the plaintiff to be terminated from the company and replaced by a close friend of one of the defendants.

**Leshine v. Goodrich**, No. CV010448323, 2003 WL 21235483 (Conn.Super. May 15, 2003). Two members of an LLC sued Goodrich, the LLC's chairman, for breach of fiduciary duty and tortious interference with certain contracts between the LLC and the plaintiffs. Goodrich sought to strike these claims on the basis that a party or indirect party to a contract cannot tortiously interfere with that contract. The court cited case law to the effect that a corporate officer may be liable for tortiously interfering with the corporation's contract if the officer acts outside of the officer's authority. The plaintiffs alleged that Goodrich acted in his individual capacity in improperly purporting to terminate LLC contracts with the plaintiffs. The plaintiffs also alleged that Goodrich was beginning a business venture with a third party in which he planned to divulge LLC trade secrets and manufacture the LLC's product for his own benefit to the exclusion of the plaintiffs and that Goodrich schemed "to take complete control of [the LLC] and strip [the plaintiffs] of their contract and common-law rights in and to [the LLC], its governance and its income, its assets, its business opportunities and its business operations." The court concluded that these allegations sufficiently alleged malicious or bad faith conduct outside the authority of Goodrich as chairman of the LLC such that Goodrich would be an outsider liable for tortious interference with the contracts between the LLC and the plaintiffs.

**Tam v. Lo**, 968 F. Supp. 1326 (N.D. Ill. 1997). The plaintiff, Tam, invested \$73,000 in an Illinois LLC, and was offered a management position. Plaintiff's brother-in-law, Tang, invested \$20,000 in the LLC. The plaintiff was subsequently asked to resign, which he agreed to do if he and his brother-in-law were paid the amount of their investments. They never received their money back, and the plaintiff's brother-in-law assigned his interest to the plaintiff. The plaintiff sued the LLC and three individuals whom the court referred to as "also part of [the LLC's] management." The plaintiff alleged breach of contract, fraud/misrepresentation, tortious interference with contract, and violation of the Illinois Limited Liability Company Act. This opinion addressed the defendants' Rule 12(b)(6) motion to dismiss. Among the conclusions reached by the court was the conclusion that the LLC could not logically be liable for tortiously interfering with an employment contract between the plaintiff and the LLC because a party cannot be held liable for inducing itself to breach a contract. Further, the court seemed to invite the individual defendants to argue that they could not be liable either. The court stated, "Whether corporate managers/officers can be held liable for inducing the corporation to breach a contract is another issue. . . . Because Defendants failed to address this issue, the Court will not address it--perhaps Defendants will address it when attacking Plaintiff's amended complaint." With respect to the plaintiff's allegation that the defendants violated the Illinois Limited Liability Company Act, the court concluded that the count could only be brought against the LLC (which the court referred to as a "corporation"), not the individuals. The court's opinion does not specify what acts constituted the alleged violation nor the provision(s) of the statute that were allegedly violated.

## **NN. Treatment of LLC Under Other Statutes or Contracts**

### **1. Alcoholic Beverage Laws**

*Meyer v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 890 P.2d 1361 (Okla. App. 1995). The issue in this case was whether an Oklahoma LLC is permitted to hold a liquor license under Oklahoma law. The Oklahoma Constitution prohibits licensing of "corporations, business trusts, and secret partnerships." The court rejected the argument that an LLC is in essence a partnership and concluded that an LLC falls within the constitutional prohibition because of the limited liability of members. The court did not view the provision in the Oklahoma LLC act permitting LLCs to be organized for any lawful purpose as indicative of a legislative intent to override other specific statutory prohibitions and noted that the provision would be ineffective to override a constitutional prohibition in any event.

*R & R Marketing, L.L.C. v. Brown-Forman Corporation*, 729 A.2d 1 (N.J. 1999). The New Jersey Supreme Court reversed and remanded to the Director of the Division of Alcoholic Beverage Control ("ABC") the New Jersey appeals court's decision that the formation of an LLC by two liquor wholesalers was in substance a merger in which the statutory anti-discrimination protection of the two wholesalers' franchise rights was preserved. The appeals court had reversed the Director's decision that the statutory anti-discrimination protection was lost by the transfer of the business to the LLC. Each of the wholesaler members of the LLC was authorized to distribute distilled spirits for Brown-Forman prior to the formation of the LLC. The two members hoped to transfer their supplier authorizations to the LLC with supplier consent. Alternatively, they agreed that they would purchase the alcoholic beverages and transfer them to the LLC at cost. Brown-Forman refused to fill orders by the wholesalers. ABC found that the plan to transfer products to the LLC at cost was a "sham" and that the formation of the LLC was not equivalent to a merger. The appeals court reversed ABC. It noted that the protection of the statute would have continued had the two distributors effectuated a corporate merger and concluded that the protection of the anti-discrimination statute would not defeat the purpose of that statute and would advance New Jersey's goal in promoting formation of LLCs. The supreme court essentially agreed with the appeals court that the economic reality rather than the form of a reorganization transaction should govern a wholesaler's rights under the anti-discrimination law but remanded the matter to ABC to reconsider the status of the parties in view of the economic reality of the restructured organization. The court felt that various economic issues were unclear in the record. Additionally, pending the appeal, one of the LLC members had acquired the other. The court assumed that the acquirer would be entitled to retain any protection previously afforded the acquired wholesaler. The court also instructed ABC to articulate the relationship between its findings in the case to the policy of the anti-discrimination law. The court admonished ABC to provide guidance through regulation, directive, or policy statement that would enable parties to shape future transactions to the law's policies.

### **2. Receivership Laws**

*Gottier's Furniture, LLC v. La Pointe*, No. CV040084606S, 2007 WL 1600021 (Conn. Super. May 16, 2007) (declining defendant member's request to appoint receiver to wind up affairs of LLC inasmuch as defendant member had misappropriated LLC funds and had unclean hands, and, alternatively, because dissolution receivership is extraordinary remedy that is not warranted merely based on dissension of members or financial difficulty).

*In re Bayou Group, L.L.C., (Adams v. Marwil)*, 363 B.R. 674 (S.D. N.Y. 2007). Ten affiliated hedge fund LLCs (consisting of six Delaware LLCs, three New York LLCs, and one Connecticut LLC) were operated by their principals as a fraudulent Ponzi scheme, and a group of creditors of the LLCs filed a lawsuit in federal court seeking appointment of a "federal equity receiver" for the LLCs. The district court appointed a receiver pursuant to its powers under Section 10b of the Exchange Act and Rule 10b-5 and its inherent equity power. The order appointed Jeff Marwil as "non-bankruptcy federal equity receiver and exclusive managing member" of the LLCs. Marwil ultimately filed bankruptcy petitions for the LLCs and signed each petition as "sole managing member." The United States trustee asked the bankruptcy court to appoint a Chapter 11 trustee, and the bankruptcy court denied the request. The district court affirmed the bankruptcy court's denial because the court concluded that Marwil was not merely a custodian or receiver, but was the new exclusive managing member of the LLCs. The court stated that the order appointing Marwil was made pursuant to federal securities laws and its inherent equity power, and the corporate management powers conferred were not merely derivative of the receivership appointment. Thus, his corporate management role did not cease when he caused the LLCs to file bankruptcy. The court noted that it could have appointed Marwil as manager pursuant to federal receivership statutes alone, and, in that case, the corporate management powers would have ceased when the LLCs filed for bankruptcy. The court, however, stressed that it appointed Marwil as manager pursuant to federal securities laws and

the court's inherent equity authority. In view of the criminal violations of the federal securities laws committed by the principals of the LLCs, the court concluded that both the federal securities laws and the court's equity jurisdiction provided a basis for appointment of Marwil as managing member. The court commented that the state law of Delaware, New York, and Connecticut would have provided a basis to appoint Marwil as a receiver to manage the LLCs, but the court noted that the state law issues were not briefed and that the court did not appoint Marwil pursuant to state law. The court concluded that Marwil, as managing member of the LLCs, could act as debtor-in-possession, and the court observed that the proceedings exposed a loophole in the Bankruptcy Code insofar as the creditors had essentially been able to appoint their own bankruptcy "trustee" by having a district judge appoint corporate governance of the LLCs prior to filing of any bankruptcy.

*Patel v. Patel*, 627 S.E.2d 21 (Ga. 2006) (holding that mere fact LLC members were treating LLC as their own, without showing of insolvency, waste, mismanagement, or other danger of loss or injury, did not furnish grounds for appointment of receiver).

*In re Silver Leaf, L.L.C.*, No. Civ. A. 20611, 2005 WL 2045641 (Del. Ch. Aug. 18, 2005). The court decreed judicial dissolution of a Delaware LLC on the basis that it was not reasonably practicable to carry on the business in conformity with the LLC agreement because the members were deadlocked and the business purpose was moot. Concluding that the LLC was involved in a scheme with another corporation to deceive investors, the court refused to appoint a receiver. The court stated that receivership is an equitable remedy and the doctrine of unclean hands could thus be considered by the court in determining who, if anyone, should be appointed as receiver. Because the LLC and its members were involved with another company in a fraudulent scheme to raise money from investors rather than a commercially viable business venture, the court refused to appoint either party as receiver and denied all relief other than dissolution of the LLC.

*Actives International, L.L.C. v. Reitz*, No. BER-C-239-05, 2005 WL 1861939 (N.J. Super. Ch. Aug. 5, 2005) (denying member's request for custodial receiver, stating that it is drastic remedy to be avoided whenever possible, and finding no concrete assertions of financial mismanagement, absconding of funds, or recent significant improprieties that would cause court to consider such drastic remedy, especially in view of fact that remaining members had agreed to comply with certain conditions in operating LLC's business).

*Percontino v. Camporeale*, No. BER-C-5-05, 2005 WL 730234 (N.J. Super. Ch. March 24, 2005) (concluding court has power to appoint a receiver or fiscal agent although New Jersey LLC statute does not specifically provide, but declining to do so because access to books and records and prohibition against extraordinary transfers of assets and retention of funds without proper accounting were sufficient protection at this stage of litigation).

*Grandini v. Carizo*, 891 So.2d 1216 (Fla. App. 2005) (reversing non-final order appointing receiver of two LLCs because parties were not properly noticed that receivership was to be addressed, scope of hearing was improperly expanded to address receivership issue with no notice, and determination that dissolution of LLC was necessary was erroneous).

*Schott v. Animagic Studios, LLC*, No. E2003-02287-COA-R3CV, 2004 WL 1813280 (Tenn. Ct. App. Aug. 16, 2004) (affirming trial court's conclusion that plaintiff was neither a member nor creditor of LLC and thus was not entitled to maintain action for dissolution, receiver, and court supervised winding up).

*Kranias v. Tsiogas*, 884 So.2d 162 (Fla. App. 2004) (concluding court lacked jurisdiction to appoint receiver for LLC real property where related action seeking judicial dissolution and receivership was filed first in another county).

*Baker v. David Alan Dorfman, P.L.L.C.*, 232 F.3d 121 (2d Cir. 2000). Baker obtained a judgment against David Dorfman for legal malpractice and fraud. Subsequently, Dorfman formed a professional LLC and began to operate his law practice through the PLLC. In this action, Baker sought to hold the PLLC liable on the judgment against Dorfman as a successor in interest. The district court held that the PLLC law firm had successor liability on the judgment against the member, assigned the judgment creditor a 75% interest in the LLC, and appointed the judgment creditor's attorney receiver of the PLLC. The order appointing the receiver granted sweeping authority over the PLLC's operations, and the court of appeals raised *sua sponte* a concern regarding protection of the attorney-client relationship between the judgment debtor and his clients. The court of appeals remanded for further consideration of the receivership order in light of the law and rules of legal ethics governing the attorney-client relationship and the practice of law.

***Oil and Grease on Wheels, Inc. v. Medicare Supply Co. of New England***, No. C.A. 96-1789, 2000 WL 622584 (R.I. Super. April 26, 2000). A receiver was appointed for Medicare Supply Co. of New England (“Medicare”), a member of a Rhode Island LLC. Medicare argued that appointment of the receiver constituted an event of dissociation under the LLC agreement which in turn entitled Medicare to be bought out under the agreement. Events of dissociation included a change in control of a member of the LLC. Control was defined under the agreement as an ownership interest sufficient to carry any motion, the right to elect or appoint directors or managers, or the right to manage. The court concluded that a change in control had occurred because the shareholders, directors, and officers of Medicare no longer controlled Medicare. The court stated that control did not have to shift to the receiver for a change in control to occur; it was sufficient that those formerly in control no longer had control. The court rejected the argument that the receiver was an assignee but did accept that the receiver was analogous to a judgment or lien creditor of Medicare. As a type of lien creditor, the court said the receiver succeeded to the rights of the dissociated member to be bought out.

***Suntech Processing Systems, L.L.C. v. Sun Communications, Inc.***, No. 05-98-00799-CV, 1998 WL 767672 (Tex. App. Nov. 5, 1998). A member of two LLCs claimed that a proposed transfer of funds by one LLC to the other would constitute a fraudulent transfer. The trial court in the case entered an injunction against the payment and ordered the LLCs dissolved under the statutory provision that an LLC may be judicially dissolved if it is not reasonably practicable to carry on the business of the LLC in conformity with its articles of organization or regulations. The trial court appointed a liquidator under another statutory provision authorizing the court to wind up an LLC’s affairs or appoint a person to carry out the liquidation. The liquidator was given control of the two LLCs and had essentially all of the powers of a receiver. The court of appeals concluded that the order appointing a “liquidator” was an order appointing a “receiver;” therefore, the court had jurisdiction over the interlocutory appeal. The court held that the order of judicial dissolution and appointment of a liquidator was improper in this case as it did not properly preserve the subject matter of the suit until the trial court could finally determine whether the payment would be a fraudulent transfer. In other words, the court found the trial court’s order was improper because it gave the LLC member its ultimate relief.

***Diaz v. Fernandez***, 910 P.2d 96 (Colo. App. 1995). Two members with a 49% interest in a Colorado LLC sought appointment of a receiver for the LLC. The Colorado Rules of Civil Procedure provide for the appointment of a receiver when the moving party establishes “a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its . . . profits are in danger of being lost. . . or materially injured or impaired.” The court first held that a receivership was authorized under appropriate circumstances without a pending request for dissolution since a member of an LLC has a personal property interest in the LLC. The court then discussed the standard for appointment of a receiver and concluded that the member in this case was entitled to an evidentiary hearing on the appointment of a receiver based upon a CPA’s affidavit that there were deficiencies in various aspects of the LLC’s records and financial operations, that the LLC was insolvent or in danger of insolvency, that wage related taxes, withholding and garnished amounts had not been paid, and that there were unusual related party transactions outside the ordinary course of business.

### 3. Securities Laws

***Endico v. Fontes***, 485 F.Supp.2d 411 (S.D. N.Y. 2007). The plaintiff brought suit under Section 10(b) of the Exchange Act and Rule 10b-5, alleging that he was defrauded in connection with his sale of a 2/3 membership interest in an LLC. The court determined that the sale did not involve the sale of a “security” and dismissed the case. The plaintiff sued in his own right and derivatively on behalf of the LLC, claiming that the defendants tricked the plaintiff into transferring a 2/3 membership interest without paying for it, caused the LLC to buy property with the plaintiff’s money, mortgaged the property, and looted the proceeds from the LLC. Though the plaintiff tried to establish that he was a passive investor in order to establish that the membership interest was an investment contract under the *Howey* test, the court concluded that the record did not establish that the interests sold by the plaintiff were passive. Focusing on what the plaintiff sold, the court pointed out that the defendants became the managing members of the LLC and certainly were not passive investors. Thus, the court said it was extremely doubtful that the interests he sold were securities even if the plaintiff was thereafter a passive investor. Moreover, the court concluded that the plaintiff retained important elements of control after the sale such that he was not a passive investor even if the court looked exclusively at the plaintiff’s status following the sale. The court pointed out that the plaintiff was a signatory on the LLC’s checking account and had a veto right over the sale and mortgage of LLC property. Thus, based on the record, the court found no material prospect that the plaintiff would succeed in establishing that the interests he sold were securities and thus no material prospect that he could prevail on the securities fraud claim.

***In re Bayou Group, L.L.C., (Adams v. Marwil)***, 363 B.R. 674 (S.D. N.Y. 2007). Ten affiliated hedge fund LLCs (consisting of six Delaware LLCs, three New York LLCs, and one Connecticut LLC) were operated by their principals as a fraudulent Ponzi scheme, and a group of creditors of the LLCs filed a lawsuit in federal court seeking appointment of a “federal equity receiver” for the LLCs. The district court appointed a receiver pursuant to its powers under Section 10b of the Exchange Act and Rule 10b-5 and its inherent equity power. The order appointed Jeff Marwil as “non-bankruptcy federal equity receiver and exclusive managing member” of the LLCs. Marwil ultimately filed bankruptcy petitions for the LLCs and signed each petition as “sole managing member.” The United States trustee asked the bankruptcy court to appoint a Chapter 11 trustee, and the bankruptcy court denied the request. The district court affirmed the bankruptcy court’s denial because the court concluded that Marwil was not merely a custodian or receiver, but was the new exclusive managing member of the LLCs. The court stated that the order appointing Marwil was made pursuant to federal securities laws and its inherent equity power, and the corporate management powers conferred were not merely derivative of the receivership appointment. Thus, his corporate management role did not cease when he caused the LLCs to file bankruptcy. The court noted that it could have appointed Marwil as manager pursuant to federal receivership statutes alone, and, in that case, the corporate management powers would have ceased when the LLCs filed for bankruptcy. The court, however, stressed that it appointed Marwil as manager pursuant to federal securities laws and the court’s inherent equity authority. In view of the criminal violations of the federal securities laws committed by the principals of the LLCs, the court concluded that both the federal securities laws and the court’s equity jurisdiction provided a basis for appointment of Marwil as managing member. The court commented that the state law of Delaware, New York, and Connecticut would have provided a basis to appoint Marwil as a receiver to manage the LLCs, but the court noted that the state law issues were not briefed and that the court did not appoint Marwil pursuant to state law. The court concluded that Marwil, as managing member of the LLCs, could act as debtor-in-possession, and the court observed that the proceedings exposed a loophole in the Bankruptcy Code insofar as the creditors had essentially been able to appoint their own bankruptcy “trustee” by having a district judge appoint corporate governance of the LLCs prior to filing of any bankruptcy.

***Conde v. SLS West, LLC***, No. 104CV1925JDTTAB, 2005 WL 1661747 (S.D. Ind. July 15, 2005) (declining to dismiss plaintiff’s federal securities fraud claim, relying on *Howey* analysis and concluding that plaintiffs had sufficiently alleged they did not possess a level of control over LLC that would render protection of the federal securities laws unnecessary with respect to their interests in closely held Indiana LLC).

***Fraternity Fund, Ltd. v. Beacon Hill Asset Management LLC***, 376 F.Supp.2d 385 (S.D. N.Y. 2005) (holding complaint sufficiently alleged controlling person liability of LLC member under Section 20(a) of Exchange Act where member allegedly owned 50% of LLC, LLC agreement generally vested member with management and control of LLC’s business and authorized member to take actions necessary to cause LLC to comply with law, and member represented in due diligence report that it monitored and reviewed portfolio risks of LLC and ensured portfolio marks were consistent with asset values).

***Tirapelli v. Advanced Equities, Inc.***, 813 N.E.2d 1138 (Ill. App. 2004) (holding investors in LLC alleged state securities law violations for fraud based on oral misrepresentations, but claims were barred by non-reliance and integration clauses in the subscription agreements signed by investors).

***Kronenberg v. Katz***, C.A. No. 19964, 2004 WL 1152282 (Del.Ch. May 19, 2004). The plaintiffs invested in a Delaware LLC promoted by Katz, the mayor of Philadelphia. The LLC was run by Robins, whom Katz represented was a trusted employee with a good business track record. In fact, Robins had a history of criminal convictions and bankruptcies, but these facts were not disclosed to the plaintiffs. Within a couple of years after the LLC agreement was signed, Robins had burned through most of the \$2 million the plaintiffs invested, and it came to light that he had diverted several hundred thousand dollars of the LLC’s funds to himself. In addition, it turned out the “independent feasibility studies” that had been shown to the plaintiffs were mostly written by Katz and Robins. The plaintiffs sued for rescission alleging violation of the anti-fraud provision of the Pennsylvania Securities Act. (The Pennsylvania Securities Act defines a “security” to include an LLC membership interest subject to an exception not relevant in this case.) Katz argued that the fraud claim was barred by an integration clause in the LLC agreement. The court concluded that the integration clause did not bar the plaintiffs’ claim even if reliance is an element under the Pennsylvania securities fraud provision. The court stated it was likely the Pennsylvania Supreme Court would not interpret the provision to require reliance. The court also concluded that scienter is not required under the Pennsylvania securities fraud provision. The defendants could only escape summary judgment if they could point to evidence suggesting that they could not have

known about the false and misleading nature of their statements had they exercised reasonable care. This they were unable to do, and the court granted the plaintiffs judgment for rescission.

***Robinson v. Glynn***, 349 F.3d 166 (4th Cir. 2003). An LLC member alleged that the defendant committed federal securities fraud when he sold the plaintiff an interest in the LLC. The court of appeals upheld the district court's summary judgment for the defendant on the basis that the LLC interest was not a security because the plaintiff was an active and knowledgeable executive of the LLC rather than a mere passive investor. The court applied the *Howey* test and focused on the "economic reality" of the investment to analyze whether the LLC interest was an "investment contract" within the meaning of the securities laws. The court examined the powers accorded the plaintiff under the LLC operating agreement and concluded that he was not a passive investor heavily dependent on the efforts of others. The plaintiff had the power to appoint two managers to the seven person board of managers, and he occupied one of those positions. He was the vice-chairman of the board of managers and a member of the four person executive committee to whom the board further delegated management. The plaintiff was also the treasurer of the LLC and had various powers associated with that office. Though the plaintiff lacked the technological expertise of others at the company, the court rejected the argument that his lack of technological expertise prevented him from meaningfully asserting his rights. The court stated that the references to the plaintiff's interest as "shares" and "securities" in the purchase agreement, operating agreement, and the certificates representing the interest might indicate that the parties believed the securities laws to apply, but were not effective to invoke the securities laws. The court also rejected the argument that the plaintiff's LLC interest constituted "stock" under the securities laws because it was neither denominated stock by the parties nor did it possess all the characteristics of stock (finding that the LLC interest lacked several of the five characteristics typically associated with stock). The court said that the plaintiff was not misled into believing he was purchasing stock because the LLC documents all termed his investment as a "membership interest" rather than "stock," noting that even the share certificate he received referred to him as a holder of "membership interests in GeoPhone Company, L.L.C., within the meaning of the Delaware Limited Liability Company Act." The court concluded by specifically declining to declare a general rule that LLC interests are either investment contracts or non-securities. The court noted that LLCs lack standardized membership rights or organizational structures and can assume an almost unlimited variety of forms. "Even drawing firm lines between member-managed and manager-managed LLCs threatens impermissibly to elevate form over substance," the court concluded.

***Securities and Exchange Commission v. Phoenix Telecom, L.L.C.***, 231 F.Supp.2d 1223 (N.D. Ga. 2001) (ordering disgorgement and "third tier" civil penalty against former vice-president and co-founder of LLC who, knowing the LLC was operating at a loss and with a negative net worth, marketed LLC's pay-telephone plan as a safe investment and without disclosing his previous criminal history or securities laws violations).

***Tirapelli v. Advanced Equities, Inc.***, 215 F.Supp.2d 964 (N.D. Ill. 2002) (dismissing 10b-5 securities fraud claim based upon alleged oral misrepresentations in connection with sale of preferred LLC membership interests where subscription documents contained non-reliance and integration clauses and reasonable reliance on alleged oral misrepresentations thus could not be established).

***Nelson v. Stahl***, 173 F. Supp.2d 153 (S.D. N.Y. 2001). The plaintiffs alleged securities fraud in connection with the sale of their stock in a corporation and their interests in several LLCs. Applying the *Howey* test, the court concluded that the interests in the LLC were not securities. The court stated that, whether or not the members in fact abdicated their authority, the legal structure they selected precluded a finding that the membership interests were securities. The plaintiffs owned, in the aggregate, 60% of the membership interests in the LLCs, and the LLC agreements vested management in the members. The members had access to information regarding the affairs of the LLC and had ultimate control over the LLC's affairs. The court declined to treat the purchase of the LLC interests as part of the purchase of stock in a related entity so as to entertain the Rule 10b-5 action with respect to all of the transactions.

***Erickson v. Horing***, 2001 WL 1640142 (D. Minn. Sept. 21, 2001) (holding that the plaintiffs were collaterally estopped from bringing this federal securities fraud action (which was based upon the reorganization of a North Dakota LLC into a Delaware corporation) because of an adverse judgment in a parallel state fraud action).

***Great Lakes Chemical Corporation v. Pharmacia Corporation***, 788 A.2d 544 (Del. Ch. 2001). In *Great Lakes Chemical Corp. v. Monsanto Co.*, 96 F. Supp.2d 376 (D.Del. 2000), the federal district court held that the purchase of 100% of the LLC interests in a Delaware LLC was not a purchase of securities. In this case, the plaintiff alleged that the seller warranted in the purchase agreement that the ownership interests the plaintiff purchased were securities. The

court held that a reference to the interests as “equity securities” in the section of the agreement warranting title to the interests did not constitute a warranty that the interests were securities under the federal securities laws.

***Dafofin Holdings S.A. v. Hotelworks.com, Inc.***, No. 00 CIV. 7861(LAP), 2001 WL 940632 (S.D. N.Y. Aug. 17, 2001). The plaintiffs brought securities fraud claims in connection with an investment in a hotel enterprise. The investment involved receipt by Dafofin Holdings S.A. (“Dafofin”) of an “economic interest in connection with [a] membership interest” in an LLC that held an interest in another LLC that owned the hotel. Dafofin claimed that it relied on various misrepresentations and that the defendants refused to provide a copy of the operating agreement of the LLC that owned the hotel before the parties entered the investment agreement. The plaintiffs did not receive the operating agreement until over two years later. The alleged misrepresentations were inconsistent with provisions of the investment agreement and the LLC operating agreement. The court determined that the plaintiffs’ 10b-5 claims were barred by limitations because the investment agreement put the plaintiffs on notice that at least one misrepresentation had been made. The court also dismissed the plaintiffs’ claims under Section 12(a)(2) of the Exchange Act (because the transaction was made pursuant to a private transaction rather than a public offering) and under Section 17(a) of the Securities Act (because the Second Circuit does not recognize a private right of action under Section 17(a)).

***Ak’s Daks Communications, Inc. v. Maryland Securities Division***, 771 A.2d 487 (Md. App. 2001). This case apparently involved the same LLC interests that were determined to be securities in *Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 977 P.2d 826 (Ariz. Ct. App. 1998). The Maryland Court of Appeals applied the *Howey* test in determining that the LLC interests were investment contract securities. The court rejected the argument that the *Williamson v. Tucker* presumption (that general partners’ interests are not securities) applies to LLC membership interests. The court viewed the presumption as inappropriate in the LLC context given that LLC members ordinarily have limited liability and may be less involved in management than general partners.

***Cogniplex, Inc. v. Hubbard Ross, L.L.C.***, No. 00 C 7463, 00 C 7933, 2001 WL 436210 (N.D. Ill. April 27, 2001). Three individuals formed an LLC in which each was a 1/3 owner, but they never agreed on or executed an operating agreement. When the relationship soured, two of the members sued the third member for, inter alia, securities fraud and failure to register under the securities laws. From the LLC’s inception, the defendant member had managed and exercised controlled over the LLC, and the court concluded that the membership interests of the plaintiffs were investment contract securities under the federal and Illinois securities laws. The defendant argued that the membership interests were not investment contracts because the default rules of the Illinois LLC act that applied in the absence of an operating agreement gave each member equal rights of management and control. The court stated that it would look to the particulars of the situation rather than the generalized default rules and concluded that the plaintiffs’ interests were securities since the defendant assumed control over the LLC and its profits while the plaintiffs were passive investors. The court found that it could not perform at such an early stage of the litigation the intensive factual analysis necessary to determine whether the sale of the membership interests fell within the private placement exemption under 4(2) of the Securities Act of 1933, but the court did determine as a matter of law that the sale of the membership interests met the requirements for an exemption under Illinois law.

***Tschetter v. Berven***, 621 N.W.2d 372 (S.D. 2001). The South Dakota Supreme Court applied the *Howey* and *Williamson* tests to conclude that the plaintiffs’ membership interests in the LLC in question (a restaurant) were not securities under South Dakota law. The court pointed out that the operating agreement vested management in the members and gave the members substantial power and authority. The court also stated that the record established that the plaintiffs were informed and active in the affairs of the LLC and were aware of and capable of exercising their powers as members. Although the LLC’s management was contracted out to another entity, the court said the LLC retained the ability to terminate the management contract upon a failure to perform as required, and the members retained substantial power and the ability to conduct the necessary oversight of the LLC’s operations. A dissenting opinion characterized the situation as one in which the plaintiffs had very little control and concluded that a question of fact existed as to whether the membership interests were securities.

***KFC Ventures, L.L.C. v. Metaire Medical Equipment Leasing Corp.***, No. CIV. A. 99-3765, 2000 WL 726877 (E.D. La. June 5, 2000). The issue in this case was whether the plaintiff’s LLC membership interest was a security under federal securities laws. In response to the defendants’ motion for failure to state a claim for securities fraud, the court held that it was possible that the plaintiff’s membership interest was a security. The focus was upon whether the investment involved an expectation of profits to be derived solely from the efforts of others. The LLC in question was manager-managed, and the operating agreement gave the manager full power and discretion to manage the affairs of the

LLC. The operating agreement did not permit a member to act as the LLC's agent and largely limited the member's role to voting on extraordinary matters such as dissolution. The manager was also an 85% member of the LLC. Thus, the court concluded the membership interest might be a security. However, the plaintiff's allegations of fraud lacked particularity, and the court dismissed the claims subject to fifteen days leave for the plaintiff to amend and plead with sufficient particularity.

***Great Lakes Chemical Corporation v. Monsanto Company***, 96 F. Supp.2d 376 (D. Del. 2000). The plaintiff purchased a Delaware LLC from the defendants and brought a securities fraud suit alleging that the defendants failed to disclose material information in connection with the sale. The defendants moved to dismiss for failure to state a claim, arguing that the interests sold to the plaintiff were not securities. The plaintiff argued that the LLC membership interests were either "stock," an "investment contract," or "any interest or instrument commonly known as a 'security'." After reviewing various seminal cases in the securities area as well as recent decisions specifically addressing whether LLC membership interests constituted securities, the court addressed the plaintiff's arguments that the membership interests in issue were securities. First, the court rejected the argument that the membership interests in issue were "stock" although the court acknowledged that the interests were "stock-like" in nature. To determine whether the membership interests were investment contracts, the court applied *Howey*. The court concluded that the plaintiff did not invest in a "common enterprise" because it bought 100% of the LLC membership interests from the defendants. The plaintiffs pointed out that when the LLC was formed it involved a pooling of contributions by the two defendants; however, the court focused on the challenged transaction, which was the sale of the defendants' interests to the plaintiff, rather than the formation of the LLC. The court also concluded that the plaintiff's expectation of profits did not depend solely on the efforts of others. While the LLC was manager-managed, the operating agreement gave members the power to remove managers, with or without cause, and to dissolve the LLC. The court pointed out that the plaintiff's ownership of 100% of the LLC meant that its power to remove managers was not diluted by the presence of other ownership interests. Finally, although the purchase agreement referred to the interests as "equity securities," the court rejected the argument that the membership interests were "any interest or instrument commonly known as a security" because the interests did not satisfy the *Howey* test. Relying on Supreme Court and lower court cases, the court refused to distinguish between an "investment contract" and "any interest or instrument commonly known as a security."

***Keith v. Black Diamond Advisors, Inc.***, 48 F. Supp.2d 326, Fed. Sec. L. Rep. ¶ 90,458 (S.D. N.Y. March 8, 1999). The plaintiff brought a Rule 10b-5 securities fraud claim in connection with his purchase of membership interests in a New York LLC. The court found that the plaintiff's membership interests were not securities because the fourth element of the *Howey* test, an expectation of profit from the managerial or entrepreneurial efforts of others, was not met. The LLC was member-managed, and the plaintiff had a broad range of rights and powers.

***Nutek Information Systems, Inc. v. Arizona Corporation Commission***, 977 P.2d 826 (Ariz. App. Div. 1 1998). The court employed a *Howey* analysis to determine that membership interests in Texas LLCs involved in telecommunications were investment contract securities under Arizona law. The focus was, predictably, on the element of the *Howey* analysis that inquires into whether the investors were led to expect profits based upon the efforts of others. The court relied heavily upon *Williamson v. Tucker*, a Fifth Circuit case addressing whether interests in a general partnership may be considered securities. Although the LLCs were member-managed, the court concluded that the membership interests were securities. The members did not exercise meaningful control and were dependent upon others for the management of the LLC. Management was contractually delegated to another LLC, and it was practically impossible to replace the manager. The members were numerous and geographically dispersed. Additionally, the members lacked technical expertise in the specific business of the LLCs. The court declined to give the LLCs the "strong presumption" that an interest in a general partnership is not a security. The court noted that limitation of liability of LLC members gives members less incentive to be informed about, and active in, the business of the LLC.

***Securities and Exchange Commission v. Shreveport Wireless Cable Television Partnership***, Fed. Sec. L. Rep. ¶ 90,322, 1998 WL 892948 (D. D.C. Oct. 20, 1998). The court determined that there was a genuine issue of material fact as to whether partnership interests in two general partnerships and membership interests in a Louisiana wireless cable LLC were securities under federal securities laws, and the court thus denied the defendants' motion for summary judgment on the question. The defendants claimed that the investors did not purchase the LLC interests with the expectation that the efforts of others would generate the profits because they purchased interests in two general partnerships along with the LLC. The court treated the general partnership interests and LLC interests as the same kind of interest in its analysis because the powers granted to the investors under the partnership agreements and the LLC agreement were the same. To determine whether the interests were investment contracts under *Howey*, the court relied



upon *Williamson v. Tucker*. The SEC argued that (1) the agreements left so little power in the hands of the partners that power was in fact distributed as in a limited partnership, or (2) the partners were so dependent upon the unique entrepreneurial or management ability of the manager that they could not replace the manager or otherwise exercise meaningful power. The court examined the agreements and concluded that they appeared to confer no more responsibility on the partners or members than those of limited partners or shareholders. Thus, the court could not conclude, based upon the agreements alone, that the interests were not securities as a matter of law. The SEC argued that the interests were such diluted fractional interests that they constituted stock or limited partnership interests. The SEC also pointed to the promoters' performance of substantial post-purchase services upon which the future profits of the enterprise depended. The court noted that investors with the powers of general partners may choose to delegate their powers and remain passive without their interests becoming securities. The court found, however, that there was a fact issue as to the extent and date on which the partners controlled the enterprise.

***People v. Riggle***, 95CA1476 (Colo. App. Jan. 15, 1998). This case was not selected for publication and is not available on Westlaw or Lexis. The following summary is based on information supplied to the author by Robert Keatinge. The defendant in this case appealed a jury verdict finding him guilty of selling unregistered securities and employing unlicensed sales representatives under Colorado law for selling interests in a Nevada LLC (a wireless cable deal). The Colorado Court of Appeals held that the facts permitted the jury to find that the interests being sold in the Nevada manager-managed LLC were securities, but the appeals court reversed the verdict because the jury was not provided with a requested clarifying instruction regarding the definition of a security. The court appeared to acknowledge that the same presumption of non-security status applicable to general partners applies to members who have the right by a majority vote to remove the manager and assume management functions themselves. However, the court stated that a factfinder might find that (1) the number of members necessary to remove the manager would make removing the manager impractical, (2) the number of members would make management impractical, and (3) the business in which the LLC was to engage was very specialized and the operating agreement provided that it was in the members' best interest to engage a manager. On this basis, the court determined that there was sufficient evidence to support the jury's finding that the interests were investment contracts and therefore securities. The court of appeals reversed, however, because the trial court refused to respond to the jury's request for clarifying instructions on the definition of a security and the *Howey* test.

***IBS Financial Corporation v. Seidman and Associates, LLC***, 136 F.3d 940 (3rd Cir. 1998). A group that included LLCs filed a Schedule 13D with the SEC, and the court was called upon to interpret the "control" disclosure requirements as applied to the LLCs. The IBSF Committee to Maximize Shareholder Value (the "Committee"), a group of shareholders of IBS Financial Corporation ("IBSF"), filed a Schedule 13D which IBSF contended did not conform with the requirements of the Securities Exchange Act and SEC regulations. With respect to the LLC members of the Committee, IBSF argued that the Schedule 13D did not report information regarding the persons "controlling" the LLCs. In general, the defendants argued that it was sufficient to provide information about certain managers of the LLCs whereas IBSF argued that information about certain members and others must also be included. For those LLCs in which a majority in interest of the members had the power to remove the manager, the court held that the majority member was a person "controlling" the LLCs. Thus, information regarding the majority member should have been included in the Schedule 13D. One of the LLCs had an investment manager and an administrative manager. The Committee argued that only the investment manager was a "controlling" person while IBSF argued that the administrative manager, the majority member, and the majority member's general partner were all "controlling" persons of the LLC. The administrative manager had the power to remove the investment manager and to make management decisions. The court thus concluded that the administrative manager was a "controlling" person. However, since the operating agreement of this LLC made no provision for removal of the administrative manager, the court concluded that the Committee was not required to include information regarding the majority member or its general partner.

***Securities and Exchange Commission v. Parkersburg Wireless Limited Liability Company***, 991 F. Supp. 6 (D. D.C. 1997). The court held that membership interests in a wireless cable limited liability company were "securities" subject to the Securities Act of 1933 and the Securities Exchange Act of 1934. The court found that the membership interests fit the definition of an "investment contract" security under the *Howey* test. The court found that the LLC members shared "horizontal commonality" because they were told that they would receive a pro rata share of revenues from the operation. The court also found the members had "vertical commonality" with the entity, meaning that the investors' success was inextricably linked to the success or failure of the entity (which the court referred to as a "corporation"). Finally, the investors' profits were to be derived from the efforts of others because the investors had little, if any, input into the company. The court rejected the argument that the members exercised the ultimate power

over the LLC. The court noted that they may have theoretically possessed the right to manage the affairs of the LLC under the terms of the operating agreement, but the court stated that the inexperience and geographic diversity of the more than 700 investors essentially precluded exercise of such rights.

***Fransen v. Terps Limited Liability Company***, 153 F.R.D. 655 (D. Colo. 1994). The court imposed Rule 11 sanctions on the plaintiff for failure to make an adequate pre-filing investigation as to whether certain defendants were “sellers” of securities. The plaintiff sought damages for violations of federal and state securities laws in connection with the sale of membership interests in a Colorado LLC. The court did not discuss why the membership interests would be securities but assumed that to be the case in discussing the Rule 11 sanctions issue. The plaintiff named certain individuals as defendants on the basis that they were identified as promoters, but the court pointed out that to be a “seller” more is required than simply being a promoter. The plaintiff argued that consent of the members of the LLC to admission of new members, as required under the LLC subscription agreement, amounted to an act of solicitation. The court rejected this argument, pointing to case law holding directors’ authorization of the sale of a corporation’s securities insufficient to make them liable as statutory sellers.

#### 4. Bankruptcy

See also cases under heading “Dissolution and Dissociation-Bankruptcy.”

***In re Grosman (Bar-Am v. Grosman)***, Bankruptcy No. 6:05-bk-10450-KSJ, Adversary No. 6:05-ap-328, 2007 WL 1526701 (Bankr. M.D. Fla. May 22, 2007) (characterizing LLC as joint venture whose members owed one another fiduciary duties as joint venturers, discussing fiduciary duties of managing member under Florida LLC statute and concluding that managing member’s statutory fiduciary duties of loyalty and care did not amount to express or technical trust required to constitute fiduciary duty under Bankruptcy Code Section 523(a)(4) exception from discharge for defalcation in fiduciary capacity, but holding managing member’s transfer of LLC assets to himself, entities he controlled, and family members without distributing any assets to co-member was willful and malicious injury of another entity or its property satisfying exception to discharge under Section 523(a)(6)).

***In re Hurley (Vickers v. Hurley)***, Bankruptcy No. 03-16467-JNF, Adversary No. 04-1438 (Bankr. D. Mass. May 15, 2007) (finding debtor’s transfer of assets to 97% owned LLC was made with intent to defraud creditors and warranted denial of discharge).

***In re J.S. II, LLC***, \_\_ B.R. \_\_, 2007 WL 1593204 (Bankr. N.D. Ill. 2007) (granting motion to employ special counsel for LLCs in derivative litigation filed by non-manager members against manager members, finding that counsel had previously been employed by LLCs and that counsel’s interests were not adverse to interests of LLCs even though counsel represented non-manager members with respect to derivative claims asserted against them by manager members).

***In re Silver (Lincoln National Life Insurance Co. v. Silver)***, \_\_ B.R. \_\_, 2007 WL 1153901 (Bankr. D. N.M. 2007) (revoking discharge of debtor based on debtor’s failure to turn over art and furnishings fraudulently transferred to LLC and ultimately returned to debtor).

***In re Reserve Capital Corp; In re Hawkins Development LLC; In re Hawkins; In re Hawkins Family, LLC; In re Hawkins Manufactured Housing, Inc.; In re Forest View, LLC; In re Wooded Estates, LLC; In re Tioga Park, LLC***, Nos. 03-60071, 03-60072, 03-60073, 03-60074, 03-60075, 03-60076, 03-60077, 03-60078, 2007 WL 880600 (Bankr. N.D. N.Y. March 21, 2007) The court analyzed a motion to substantively consolidate the bankruptcy cases of individuals and various corporations and entities owned by the individuals and concluded that substantive consolidation was not justified under either of two critical factors examined: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identities in extending credit, or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. The court noted that the assertion that the income and expenses of the LLCs appeared on the individual debtors’ tax returns did not serve as a basis for substantive consolidation under the first factor.

***Kreisler v. Goldberg***, 478 F.3d 209 (4<sup>th</sup> Cir. 2007) (applying Maryland law and concluding there existed no basis to conclude that wholly owned LLC subsidiary of LLC debtor should not be recognized as separate legal entity and that automatic stay did not protect debtor’s LLC subsidiary nor did debtor have any direct interest in assets of LLC subsidiary).

*In re Bayou Group, L.L.C., (Adams v. Marwil)*, 363 B.R. 674 (S.D. N.Y. 2007). Ten affiliated hedge fund LLCs (consisting of six Delaware LLCs, three New York LLCs, and one Connecticut LLC) were operated by their principals as a fraudulent Ponzi scheme, and a group of creditors of the LLCs filed a lawsuit in federal court seeking appointment of a “federal equity receiver” for the LLCs. The district court appointed a receiver pursuant to its powers under Section 10b of the Exchange Act and Rule 10b-5 and its inherent equity power. The order appointed Jeff Marwil as “non-bankruptcy federal equity receiver and exclusive managing member” of the LLCs. Marwil ultimately filed bankruptcy petitions for the LLCs and signed each petition as “sole managing member.” The United States trustee asked the bankruptcy court to appoint a Chapter 11 trustee, and the bankruptcy court denied the request. The district court affirmed the bankruptcy court’s denial because the court concluded that Marwil was not merely a custodian or receiver, but was the new exclusive managing member of the LLCs. The court stated that the order appointing Marwil was made pursuant to federal securities laws and its inherent equity power, and the corporate management powers conferred were not merely derivative of the receivership appointment. Thus, his corporate management role did not cease when he caused the LLCs to file bankruptcy. The court noted that it could have appointed Marwil as manager pursuant to federal receivership statutes alone, and, in that case, the corporate management powers would have ceased when the LLCs filed for bankruptcy. The court, however, stressed that it appointed Marwil as manager pursuant to federal securities laws and the court’s inherent equity authority. In view of the criminal violations of the federal securities laws committed by the principals of the LLCs, the court concluded that both the federal securities laws and the court’s equity jurisdiction provided a basis for appointment of Marwil as managing member. The court commented that the state law of Delaware, New York, and Connecticut would have provided a basis to appoint Marwil as a receiver to manage the LLCs, but the court noted that the state law issues were not briefed and that the court did not appoint Marwil pursuant to state law. The court concluded that Marwil, as managing member of the LLCs, could act as debtor-in-possession, and the court observed that the proceedings exposed a loophole in the Bankruptcy Code insofar as the creditors had essentially been able to appoint their own bankruptcy “trustee” by having a district judge appoint corporate governance of the LLCs prior to filing of any bankruptcy.

*In re Allentown Ambassadors, Inc. (Allentown Ambassadors, Inc. v. Northeast American Baseball, LLC)*, 361 B.R. 422 (Bankr. E.D. Pa. 2007). The court addressed several issues in a lengthy opinion dealing with the debtor corporation’s rights and status as a member of a dissolved LLC. The debtor corporation operated a minor league baseball team and was a member of a baseball league organized as a North Carolina LLC. The debtor’s primary claim was that the other members of the LLC exercised control over property of the estate, in violation of the automatic stay provision of Section 362(a)(3) of the Bankruptcy Code, when the members dissolved the LLC and formed a new league without the debtor. The debtor also claimed that an individual manager of the LLC breached his fiduciary duty to the debtor. The defendants sought summary judgment on these claims, but the court denied the motion as to both claims. With respect to the first claim, the defendants argued that the debtor’s bankruptcy terminated its membership in the LLC under the terms of the operating agreement, which resulted in the debtor’s status changing from that of member to assignee. The defendants claimed that the subsequent dissolution of the LLC did not deprive the debtor of any rights and was not a violation of Section 362(a)(3) since the debtor still had its economic rights to receive the distributions to which it was entitled under the operating agreement. After a lengthy analysis, the court concluded that the record was inadequate at this stage of the proceedings to permit the court to determine whether the provision of the LLC operating agreement purporting to terminate the debtor’s membership in the LLC upon the debtor’s bankruptcy filing was enforceable under Section 365(e) of the Bankruptcy Code. The court analyzed the rights of a member under the North Carolina Limited Liability Company Act as well as the enforceability of the ipso facto provision in the operating agreement and concluded that the operating agreement was an executory contract but that the record did not establish whether the ipso facto provision terminating the debtor’s membership upon its bankruptcy filing was enforceable. In the course of its discussion, the court concluded that the provisions of the North Carolina LLC statute, which provide that a membership interest is assignable in whole or in part, but require unanimous consent of the other members for an assignee to become a member, do not constitute a clear and unequivocal prohibition on assignment under “applicable law ... excus[ing] a party from accepting performance from or rendering performance to” an assignee for purposes of Section 365(c)(1) and (e)(2). The court then considered the nature of the operations of the LLC baseball league and concluded that the record did not permit the court to determine whether the identity of a member was a material aspect of the operating agreement or whether the only material prerequisite to admission of a new member was the member’s ability to perform its obligations under the agreement. Because the court could not determine whether the debtor’s membership terminated upon its bankruptcy, and the parties did not dispute that the debtor retained its economic rights in the LLC, the defendants were not entitled to summary judgment on the debtor’s claim that they violated Section 362(a)(3) by exercising control over the debtor’s property when they dissolved the LLC. Finally, even assuming the debtor only retained its economic rights in the LLC, the court determined that the impact of dissolution of the LLC on those rights alone was significant

enough to warrant denial of the defendants' summary judgment motion on the Section 362(a)(3) claim. With respect to the individual manager's fiduciary duty claim, the court examined provisions of the North Carolina LLC Act as well as the operating agreement and rejected the manager's argument that his duty was owed solely to the LLC and not to individual members. The court predicted that North Carolina appellate courts would extend to LLCs the principles developed in the case law of closely held corporations. The court thus concluded that majority members of an LLC owe a fiduciary duty to minority members (based on the duty owed by majority shareholders to minority shareholders) and that the defendant manager would also owe a duty to the individual members because the manager's powers were derived from and delegated to the manager by the member-managers of the LLC. While the court acknowledged that the debtor might have a difficult time proving that the manager breached his duty, the court perceived the possibility that the challenged conduct was part of a pattern to "oppress" the debtor. Thus, the manager was not entitled to summary judgment.

*In re Tsiaoushis (Meiburger v. Endeka Enterprises, L.L.C.)*, Bankruptcy No. 05-15135-RGM, Adversary No. 06-1167, 2007 WL 186536 (Bankr. E.D. Va. Jan. 19, 2007). The court determined that an LLC agreement providing for dissolution and liquidation of the LLC on the bankruptcy of a member was not an executory contract; therefore, Section 365(e)(1) was not applicable and the automatic dissolution clause was not an unenforceable ipso facto clause. The court rejected the argument that all partnership agreements and LLC agreements are executory contracts. The court characterized the determination of whether a partnership or LLC agreement is or is not an executory contract as an individualized analysis. The debtor was not a manager (having ceased to be a manager prior to the filing), and had no unperformed duties arising as a member of the LLC. The debtor and another individual were the largest interest holders, and the other member was the sole manager. The other member argued that the debtor might have a fiduciary duty to vote for an additional capital contribution in certain circumstances, but the court stated that "[t]he failure to perform a remote and speculative fiduciary duty, if one exists, is not a 'material breach excusing performance of the other.'" The court stated that there is no *per se* rule and that the outcome depends upon an analysis of each particular operating agreement utilizing Professor Countryman's definition of an executory contract. The court stated that this was the analysis that was employed by the court in the *Garrison-Ashburn* case and noted that the instant case was very similar to that case. The court discussed other cases in which courts have examined LLC agreements and noted the absence of a *per se* rule. Summing up the results in other cases, the court stated that when the court determines there are no unperformed obligations on the part of the parties, the operating agreement is not an executory contract. If, on the other hand, there are unperformed obligations of both the debtor and the other party, the court must determine whether, if not performed, non-performance would constitute a material breach excusing the other party from further performance. If so, the operating agreement is an executory contract. The court pointed out that the reported cases went no further; i.e., none of the cases, after determining that the operating agreement was an executory contract, took the next step of evaluating the applicability of Section 365(e)(2), which exempts certain executory contracts from the application of the ipso facto prohibition.

*In re Modanlo (Modanlo v. Mead)*, Civil Action No. DKC 2006-1168, 2006 WL 4486537 (D. Md. Oct. 26, 2006). The sole member of a Delaware LLC filed bankruptcy, and the trustee took several steps in order to take control of the LLC and a corporation owned by the LLC. The steps taken by the trustee in this regard included a "Written Consent of and Agreement Regarding Admission of Personal Representative of Last Remaining Member" under Section 18-806 of the Delaware LLC Act. In that document, the trustee consented to the continuation of the LLC effective as of the date of the occurrence of an event described in Section 18-801(a)(4) of the Delaware LLC Act (i.e., the bankruptcy of the last remaining member) and, as personal representative of the last remaining member, agreed to the admission of the trustee as a member as of that date. The court agreed with the trustee that the LLC was dissolved upon the bankruptcy of the sole member because, under Section 18-304(1) of the Delaware LLC Act, a person ceases to be a member upon the person's bankruptcy, and, under Section 18-801(a), an LLC is dissolved if it has no remaining members. Under Section 18-801(a)(4), there is an exception to dissolution upon the termination of the last remaining member if a successor member is appointed within 90 days, but the trustee was not appointed until more than 90 days after the filing of the member's bankruptcy; therefore, this exception was not available to the trustee. The LLC was resuscitated under Section 18-806, however, which permits the personal representative of the last remaining member of an LLC to avoid the dissolution and winding up of an LLC by consenting in writing to the continuation of the LLC and agreeing to become a member of the LLC. The court found that the bankruptcy trustee's consent met these requirements. The court analyzed the definition of a "personal representative" under the Delaware LLC Act and concluded that a bankruptcy trustee falls within the definition. Section 18-101(13) defines a "personal representative" broadly to include "as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof...." Because the scope of the term "other legal representative" is not clear on its face, the court looked to decisions analyzing

the same language in other contexts and examined the policy rationale behind other sections of the Delaware LLC Act. The court concluded that the Delaware Supreme Court would likely hold that a bankruptcy trustee meets the statutory definition of a “personal representative.” The court rejected the debtor’s argument that the bankruptcy estate held only an economic interest and that the trustee could not become a member or participate in the LLC’s management. The court stated that the debtor’s argument ignored the effect of Section 18-806, and the court distinguished other Delaware cases in which the bankruptcy of a member occurred in the context of an LLC that had other remaining members.

*In re Wells (Andrews v. Wells)*, \_\_ B.R. \_\_, 2006 WL 4526426 (Bankr. M.D. La. 2006) (holding managing member of Louisiana LLC was in fiduciary relationship with other member of LLC for purposes of dischargeability exception of Bankruptcy Code, and managing member’s use of LLC funds for which managing member could not account constituted defalcation in fiduciary capacity excepted from discharge).

*In re The Heritage Organization, L.L.C.*, 350 B.R. 733 (N.D. Tex. 2006) (concluding that trustee made initial showing that draft operating agreement of debtor LLC’s managing member related to debtor LLC’s property or financial affairs)

*In re Fortune Natural Resources Corporation*, 350 B.R. 693 (E.D. La. Bankr. 2006) (holding that LLC controlled by son of member of board of directors of debtor corporation was non-statutory insider).

*In re CEP Holdings, LLC*, Nos. 06-51847, 06-51848, 01-51849, 2006 WL 3422665 (Bankr. N.D. Ohio Nov. 28, 2006) (stating that Section 101(31) definition of insider, which relates to corporations and does not refer to LLCs, is substantially transferable when determining insider status for LLCs).

*In re Weddle (Elsaesser v. Cougar Crest Lodge, LLC)*, 353 B.R. 892 (Bankr. D. Idaho 2006). The plaintiff in this adversarial proceeding alleged that the defendant LLC received a preferential transfer when it recorded judgments it recovered against the debtors and obtained a lien on the debtors’ real property. The debtors were members of the transferee LLC, each holding a 5% interest in the LLC. The only other member (Manning) was the father of Terri Weddle, one of the debtors. The LLC operated a lodge, and the debtors were employees of the LLC and managed the daily operations until their employment was terminated by Manning, who was designated in the operating agreement and articles of organizations as the sole manager of the LLC. The LLC obtained a judgment on a note executed by the debtors and a separate judgment for fees and costs. The LLC recorded the judgments, and the debtors filed bankruptcy several months later. Since the judgments were recorded more than 90 days prior to the bankruptcy petition, the plaintiff had to prove the LLC was an insider to prevail on the preference claim. The court rejected the plaintiff’s claim that the debtors were statutory insiders as defined under Section 101(31)(A) of the Bankruptcy Code because the definition does not specifically address membership, management, or control of an LLC; the definition only mentions an individual’s relationship to a partnership or corporation. The plaintiff argued in the alternative that the LLC was an insider on the basis that the LLC and Manning were alter egos. Since Manning was the father of Terri Weddle and was a *per se* insider, the plaintiff argued that the LLC, as Manning’s alter ego, was an insider. The court concluded that Idaho courts would apply corporate veil piercing principles to LLCs, but the court granted the LLC summary judgment on this claim. The court concluded that the plaintiff’s slim showing of unity of interest, which was based on Manning’s alleged operation of the LLC without regard to formalities, might be sufficient to raise a disputed issue of material fact, although the court pointed out that the type of total control exercised by Manning was allowed by law. The court granted summary judgment for the LLC, however, because the plaintiff provided no support for the allegation that failure to treat Manning and the LLC as alter egos would lead to inequitable results. The fact that general unsecured creditors would receive a smaller distribution was insufficient to support this prong of the alter ego analysis. Finally, the court rejected the plaintiff’s argument that the LLC was a non-statutory insider. The court found no indication that the LLC exercised any control or influence over the debtors at the time of the transfers in question.

*In re Kilroy (Guerriero v. Kilroy)*, 354 B.R. 476 (Bankr. S.D. Tex. 2006) (concluding that debtor, who was majority member and manager of LLC that served as general partner of limited partnership, exercised sufficient control over Delaware LLC and limited partnership to establish fiduciary relationship with individual who was minority member of LLC and limited partner of limited partnership for purposes of dischargeability exception for fraud or defalcation in fiduciary capacity).

*In re Midpoint Development, L.L.C. (Holliman v. Midpoint Development, L.L.C.)*, 466 F.3d 1201 (10<sup>th</sup> Cir. 2006). The court dismissed the bankruptcy of an Oklahoma LLC because the LLC filed articles of dissolution prior to

the bankruptcy filing and ceased to exist under Oklahoma law when the articles of dissolution were filed. On November 14, 2003, the LLC's sole member executed and filed articles of dissolution with an effective date of November 14, 2003. On the same day, the member filed a petition for appointment of a receiver to complete the winding up of the LLC's affairs. On June 22, 2004, the LLC filed a petition for bankruptcy relief. Two creditors filed a motion to dismiss the bankruptcy on the basis that the debtor no longer existed and was ineligible to be a debtor. The bankruptcy court determined that the LLC was empowered to wind up its affairs after dissolution, including filing bankruptcy. The district court determined that the LLC ceased to exist on the effective date of its articles of dissolution and reversed the bankruptcy court's order. The court of appeals analyzed the relevant provisions of the Oklahoma LLC statute at length and affirmed the district court's dismissal of the bankruptcy on the basis that the LLC ceased to exist on the effective date of its articles of dissolution. The court relied upon provisions of the Oklahoma LLC Act specifying that the LLC comes into existence when the articles of organization are filed and that the articles of organization are canceled upon the filing of articles of dissolution. The court also noted that a subsequent amendment to the statute clarifies that the existence of an LLC continues until cancellation of the articles of organization. The court also examined other provisions of the statute and found that, read together, they indicated that dissolution and the winding up period should precede the effective date of the articles of dissolution. The court stated that the LLC should have wound up its affairs prior to filing articles of dissolution or should have specified an effective date in the future if it desired to have a significant period of time to wind up, including filing for bankruptcy.

*In re JNS Aviation, LLC (Nick Corp. v. JNS Aviation, Inc.)*, 350 B.R. 283 (Bankr. N.D. Tex. 2006) (addressing LLC veil piercing, analyzing whether piercing claims were property of estate, and declining to approve settlement relating to fraudulent transfer and breach of fiduciary duty claims where settlement purported to encompass piercing claims).

*In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (holding that party removed as manager prior to bankruptcy filing of LLC had no standing to assert bankruptcy filing was not authorized, but creditor was "party in interest" with standing to challenge bankruptcy on basis all members did not consent as required by operating agreement; dismissing bankruptcy because bankruptcy was filed without consent of all members as required under Washington law and operating agreement).

*In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006) (holding bankrupt managing member of single member LLC had no authority to file Chapter 11 bankruptcy petition for LLC because interests of member and member's spouse in LLC had become property of their Chapter 7 estate and (relying on *In re Albright*) were subject to sole and exclusive authority of Chapter 7 trustee who was only one entitled to manage LLC and decide whether LLC would file bankruptcy).

*In re Lesick (Rehabilitated Inner City Housing, LLC v. Mayor)*, Bankruptcy No. 03-00038, Adversary No. 05-10075, 2006 WL 2083655 (Bankr. D. Dist. Col. July 19, 2006) (analyzing standing of LLC, which was not pre-petition creditor, to challenge action in violation of automatic stay).

*In re HSM Kennewick, L.P.*, 347 B.R. 569 (Bankr. N.D. Tex. 2006) (holding that automatic stay in member's bankruptcy did not preclude other member from seeking receivership of LLC because bankrupt member had no interest in assets or property of LLC).

*In re Bianchini (Bianchini v. Ryan)*, 346 B.R. 593 (Bankr. D. Conn. 2006). In a prior lawsuit against the debtor in New Jersey, a judgment was entered against entities owned by the debtor, including an LLC, based in part on the jury's findings that the entities were the debtor's alter egos created to shield assets or for other unjust purposes, and that the assets of any of them should be used to satisfy debts of any other. A judgment lien was recorded on property owned by the LLC, and the property was later conveyed to the debtor subject to the lien. In this bankruptcy proceeding, the debtor sought to treat the LLC's property as his own at the time the judgment lien was recorded in order to claim his interest in the property as exempt under Section 522(b)(2). The court declined to do so, stating that it did not construe the New Jersey judgment as declaring that the debtor was the owner of the LLC's property at that time, but rather as permitting the judgment creditor to disregard the state of record title to the extent necessary to satisfy the judgment. The court noted that the debtor was attempting to "reverse pierce" the LLC's veil to treat the LLC's assets as his own and observed that many jurisdictions recognize both offensive and defensive reverse piercing. The court stated that equitable principles govern veil piercing in Connecticut and concluded that Connecticut courts would not pierce the veil between the debtor and the LLC to allow the debtor to benefit by disregarding record title to the property when the debtor had

placed record title to the property in the LLC for unjust purposes. The court commented in a footnote that if record title to the property were still in the LLC as of the petition date and the trustee sought to pierce the LLC's veil for the benefit of the debtor's creditors, that would have been a different matter.

***In re McCabe (Braunstein v. Panagiotou)***, 345 B.R. 1 (D. Mass 2006). The debtor filed bankruptcy and listed a 50% interest in a Delaware LLC as part of his property. The trustee brought an action against the LLC's other member, Panagiotou, based on Panagiotou's post-petition unilateral amendment of the LLC agreement to reduce the debtor's interest to 5% and increase Panagiotou's interest to 95%. Panagiotou also reduced the LLC's 100% interest in two other LLC's to 5% and gave himself a 95% interest in those LLCs. Panagiotou argued that the reallocations of membership interests were in accordance with the LLC agreements, which permitted additional capital contributions with the agreement of all members and required amendment of the agreements to reflect the additional contributions. The debtor did not dispute that Panagiotou had made additional capital contributions, but claimed that he never assented to the amendments formally reallocating the membership interests. The trustee sought summary judgment that Panagiotou violated the automatic stay, and Panagiotou argued that his conduct did not violate the automatic stay because no "property" of the debtor's estate was affected and Panagiotou's actions were "purely ministerial." Panagiotou argued that his actions merely formalized the pre-existing status and that the membership interests were altered by the additional capital contributions rather than the subsequent written documentation of the reallocation. According to Panagiotou, the debtor consented to the additional capital contributions and the amendments were automatic and mandatory. The court rejected these arguments and stated that the proper course of action for Panagiotou would have been to move for relief from the stay rather than engage in self-help. The court stated that it could not conclude the debtor's legal interest was not affected even if the debtor lacked an equitable interest in the LLC. Further, Panagiotou's efforts were not in accordance with the LLC agreement because it required that the amendment be duly executed by all members. That the members were mandated to amend the agreement did not make amendment "automatic." The court also rejected Panagiotou's argument that his conduct was proper based on the debtor's authorization, in a letter six months prior to the bankruptcy, of Panagiotou's exercise of the debtor's ownership rights. The court said that Panagiotou's reliance on the letter to justify amending the agreement violated the automatic stay provision prohibiting acts to enforce a lien. The court addressed several other arguments in addition to those related to violation of the automatic stay. Pointing out that an LLC interest is personal property under the laws of Massachusetts (the forum state), Delaware (the LLC's state of formation), and Idaho (the state in which the LLC's real property was located), the court rejected Panagiotou's argument that the debtor's estate lacked a property interest that could be subject to turnover and avoidance of post-petition transfer. Similarly, the court held that the debtor's LLC interest was personal property that could be the subject of a conversion claim. The court found that there was a basis for the trustee's accounting claim against Panagiotou but not against the LLC because the existence of a fiduciary relationship is a pre-requisite to an accounting claim under Massachusetts law. The defendants did not deny that Panagiotou owed fiduciary obligations to the debtor (a fellow member), but the trustee provided no evidence that the LLC owed a fiduciary duty to the debtor (a member of the LLC).

***People Place Auto Hand Carwash, LLC v. Commissioner of Internal Revenue***, 126 T.C. No. 19, 2006 WL 1642339 (U.S. Tax Ct. June 14, 2006) (holding that proceeding to collect employment taxes from LLC was not subject to automatic stay in members' bankruptcy because LLC is separate legal entity and tax liability is LLC's and not members').

***In re Federalpha Steel LLC (Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corp.)***, 341 B.R. 872 (Bank. N.D. Ill. 2006) (dismissing various state law claims (including claims for breach of operating agreement, breach of fiduciary duty, and breach of member withdrawal agreement) brought by trust established under LLC debtor's Chapter 11 plan on grounds they were not "related to" bankruptcy case, and abstaining from hearing certain analytically related claims).

***In re First Connecticut Consulting Group, Inc.***, 340 B.R. 210 (D. Vt. 2006) (holding bankruptcy court's conclusion that LLC bankruptcy was filed in bad faith by party who knew he had no ownership interest in LLCs was not abuse of discretion).

***In re Capital Acquisitions & Management Corp.***, 341 B.R. 632 (Bankr. N.D. Ill. 2006). The debtor was a 20% member of a Florida LLC, and the court determined that the LLC operating agreement was not an executory contract that may be assumed or rejected and that the right of first refusal provision in the operating agreement was not an unenforceable ipso facto clause. The court found the operating agreement was not an executory contract because the debtor had no current obligations which, if left unperformed, would constitute a material breach. The court

acknowledged that if circumstances changed, the debtor might have certain future obligations, such as indemnification of the LLC for loss or liability attributable to the assessment of a tax with respect to the debtor's share of LLC profits or gains; however, the court did not view such remote potential obligations as sufficient to render the contract executory. The court stated that the Seventh Circuit takes a narrow approach to the definition of an executory contract. Acknowledging that LLC operating agreements have been found to be executory contracts in some cases, the court pointed out that the debtor member in those cases had an ongoing managerial role. The court noted that it had not been able to locate any published case in the Seventh Circuit in which an LLC agreement was found to be an executory contract, and the court stated that its conclusion in the instant case was consistent with persuasive precedent in which the courts found LLC operating agreements were not executory contracts. The court then analyzed whether the receiver's sale of the debtor's interest was subject to the right of first refusal provision in the operating agreement and concluded the right of first refusal was not an unenforceable ipso facto clause under Section 365(c) or an impermissible restraint on assignment under Section 365(f). The court stated that the provisions of Section 365 are only applicable to an executory contract but that the right of first refusal would still be enforceable even if the operating agreement were an executory contract. The right of first refusal was not triggered by the bankruptcy filing or the appointment of the receiver— it applied to any sale of a member's interest. The court acknowledged that the debtor might receive a higher price for its interest absent the right of first refusal, but stated that the debtor knew when it signed the operating agreement that any sale would be subject to the right of first refusal, and the receiver took the debtor's rights as it found them on the date of the petition.

*In re Delta Star Broadcasting, L.L.C.*, No. Civ.A. 05-2783, 2006 WL 285974 (E.D. La. Feb. 6, 2006). Three individuals each owned a 1/3 membership interest in a Louisiana LLC, and one of the members (Bruno) filed a voluntary Chapter 11 bankruptcy petition on behalf of the LLC. Bruno argued he was authorized to file the petition because his action was approved by two of the three members (Bruno and Treen). Treen's approval was evidenced by a consent signed by Treen the day before the bankruptcy filing. The third member (Starr) argued that Treen had transferred his membership interest to an entity controlled by Starr eleven days prior to the filing of the bankruptcy and that Treen's consent to the bankruptcy filing was thus ineffective. Starr further argued that the bankruptcy filing was ineffective even if Treen remained a member after the transfer of his interest because the bankruptcy filing was not approved at a properly-noticed meeting of the LLC's members. The bankruptcy court held that the filing was not authorized because it was not approved by a formal resolution at a meeting of the members. The district court held that the bankruptcy judge erred in finding the bankruptcy filing was not properly authorized. The court first discussed the effect of the transfer of Treen's membership interest and concluded that Treen retained his right to vote as a member after the transfer of his membership interest because the Louisiana LLC statute provides that the assignor remains a member unless and until the assignee is admitted as a member, which requires unanimous consent of the other members. The court next considered the validity of the authorization of the bankruptcy filing and concluded that an LLC's petition in bankruptcy must be authorized by a majority of the members unless the articles of organization or operating agreement provide otherwise. The court relied upon the statutory provision requiring a majority of the members to authorize "the sale, exchange, lease, mortgage, pledge, or transfer of all or substantially all of the assets of the limited liability company." The court noted that neither the statute nor the LLC's governing documents contained any express requirement that member decisions be made by resolution or at formal meetings. The court noted the paucity of case law interpreting the Louisiana LLC statute but pointed to secondary authorities emphasizing the flexibility and informality of the LLC as compared to a traditional business corporation. The court concluded the Louisiana legislature could easily have imposed more formal decision making procedures on LLCs if it had intended to impose such requirements. The court observed that the legislature had done just that in providing for removal of a manager only "at a meeting expressly called for that purpose." According to the court, that provision suggested that the omission of formal requirements elsewhere in the statute was intentional.

*In re JNS Aviation, LLC*, 334 B.R. 202 (Bankr. N.D. Tex. 2005) (holding LLC members were "parties in interest" with standing to object to claim).

*Jackson v. Corporategear, LLC*, No. 04 Civ. 10132(DC), 2005 WL 3527148 (S.D. N.Y. Dec. 21, 2005). The plaintiff sued an LLC for breach of contract, and the LLC subsequently filed a Chapter 7 bankruptcy petition. The lawsuit against the LLC was stayed until a final order was issued in the bankruptcy. The bankruptcy court's order decreed that the LLC's estate had been fully administered. The plaintiff's claim was not paid or otherwise administered in the bankruptcy proceedings. The plaintiff resumed pursuing his case and took a judgment against the LLC. The plaintiff then filed this suit asserting an alter ego claim against the owners of the LLC. The defendants argued that the plaintiff lacked standing to pursue the alter ego claim because only a bankruptcy trustee has standing to pierce the



corporate veil of a bankrupt corporation until the claim has been abandoned. The issue in this case was the application of this principle once the bankruptcy proceedings are closed. The court phrased the issue as follows: “In a Chapter 7 case, once the estate is fully administered, the trustee is discharged, and the case is closed, may a creditor assert an alter ego claim against the owner of the debtor corporation based on pre-petition events, even where the claim was not ‘abandoned’ by the trustee because it was not listed in the debtor’s schedule of assets?” The court concluded the answer was yes, although the court characterized the law as far from clear. The court cited several considerations. First, once the bankruptcy proceedings are concluded, there is no longer an estate, and the trustee is no longer available to pursue the alter ego claim. Second, even where an alter ego claim was not listed in the schedule of assets and thus not deemed abandoned, the claim logically can be deemed property of the estate only if there is an estate. Third, in a Chapter 7 case, a corporate debtor cannot be discharged, and the corporation continues to exist; therefore, if a claim against a corporate debtor was not administered, it survives and can be pursued after the Chapter 7 case is closed.

*In re Carlson (Pierce v. Carlson)*, 334 B.R. 626 (Bankr. D.C. Ill. 2005) (finding there could be no fiduciary relationship between co-equal members of LLC for purposes of exception to discharge for debt arising out of fraud or defalcation in fiduciary capacity under Section 523(a)(4)).

*In re Ehmann (Movitz v. Fiesta Investments, LLC)*, 334 B.R. 437 (Bankr. D. Ariz. 2005), withdrawn, 337 B.R. 228 (Bankr. D. Ariz. 2006). This opinion appeared in the advance sheets, but was withdrawn pursuant to a “buy and bury” settlement intended to keep the opinion from having precedential value. In the withdrawn opinion, the court appointed a receiver to operate an LLC of which the debtor was a member prior to filing bankruptcy. In a prior opinion (summarized below), the court rejected the argument that the trustee acquired only the rights of an assignee with respect to the debtor’s interest in a family LLC, concluding that the debtor’s relationship to the LLC was not an executory contract and that Arizona law restricting the rights of a transferee was preempted by Section 541(c) of the Bankruptcy Code in this case. The court reaffirmed this conclusion, disagreeing with the conclusion reached in *In re Garrison-Ashburn*, which the debtor relied upon in rearguing the point. Though the court concluded that Section 541(c) overrides state law and contractual limitations on the rights of an assignee, the court commented in a footnote that it was not necessary to determine whether the trustee could exercise the debtor’s vote in the LLC or otherwise participate in management. The court indicated that, at this juncture, it was only determining whether the trustee could enforce a member’s right to have the LLC operated in accordance with the operating agreement. The court determined that the manager was operating the LLC in a manner benefitting favored members to the exclusion of the bankruptcy estate and in defiance of the trustee’s requests based on numerous insider transactions occurring after the appointment of the trustee and in violation of the terms of the operating agreement. The court characterized the conduct of the LLC and its manager after the trustee’s appointment as demonstrating “an unequivocal intent to operate [the LLC] as if it were a revocable spendthrift trust.” Relying on a court’s authority under the Arizona LLC statute to enforce an operating agreement by injunctive or other appropriate relief, the court concluded that injunctive relief would be inadequate and that the only potentially effective remedy was appointment of a receiver to operate the LLC in accordance with its business purposes, the operating agreement, and state law. The court stopped short of ordering judicial dissolution because the operating agreement expressly waived the members’ rights to seek judicial dissolution under circumstances that might have applied. Noting that the statute precludes waiver of a member’s right to obtain judicial dissolution when it is not reasonably practicable to carry on the LLC business in conformity with the operating agreement, the court suggested that the receiver might be entitled to seek judicial dissolution if the receiver determined that it was not reasonably practicable to carry on the LLC business in conformity with its operating agreement.

*In re LaVelle*, 350 B.R. 505 (D. Idaho 2005) (relying on principles of LLC property to conclude that debtors could not assert homestead exemption in property owned by LLC).

*In re Real Homes, LLC*, 352 B.R. 221 (D. Idaho 2005) (dismissing bankruptcy where management structure of debtor LLC was unclear and debtor failed to establish bankruptcy filing was authorized).

*In re 4 WHIP, LLC*, 332 B.R. 670 (Bankr. D. Conn. 2005). The trustee and a creditor sought to dismiss or convert this Chapter 11 case on the basis that the LLC debtor was a non-existent entity and therefore not a “person” qualified to be a debtor under the Bankruptcy Code. The court held that a “person” eligible to be a debtor under the Bankruptcy Code includes a de facto LLC so long as the entity has a bona fide business existence prior to the petition date. The debtor in this case claimed to have conducted business in good faith under the name “4 Whip, LLC” on the mistaken belief that formation documents had been submitted to and approved by the Connecticut Secretary of State. The debtor argued that Connecticut law would regard the entity as a de facto LLC under principles established for

corporations. The uncontested record established that the debtor transacted business under its LLC name prior to filing bankruptcy relief. Specifically, the record showed that the debtor prepared and believed it had filed articles of organization, obtained an employer identification number from the IRS, and was carried on the city tax rolls as the owner of real property which it managed. Thus, the court found the LLC to be an eligible debtor. The court noted that the property rights which comprise the bankruptcy estate are determined by state law, and that, under such law, the property the debtor purported to own might in fact be owned by some other entity due to the LLC's lack of formal organization at the time of the relevant transactions. The court stated that such questions were not currently before the court.

***In re Brentwood Golf Club, LLC***, 329 B.R. 802 (Bankr. E.D. Mich. 2005). The court determined that an LLC debtor (a golf course) and a related LLC (a tavern operated on the golf course premises) were alter egos and that the veil of the related LLC would thus be pierced so that the assets of the related LLC were property of the bankruptcy estate. The court also determined that the doctrine of substantive consolidation applied to the two LLCs even if they were not alter egos. Noting that the Sixth Circuit has not determined the standard for substantive consolidation, the court applied the standards set forth by the D.C. Circuit and the Second Circuit and concluded substantive consolidation was warranted under either approach. Applying the D.C. Circuit approach, the court concluded that there was a substantial identity between the two LLCs and substantive consolidation was necessary to avoid a harm or produce a benefit to the estate. Applying one of two alternative tests followed in the Second Circuit, the court concluded the affairs of the LLCs were so entangled that consolidation would benefit all creditors. The court looked at seven factors specified by the Second Circuit in this regard and found all seven factors weighed in favor of substantive consolidation. These seven factors were: (1) consolidated financial records (no separate financial records prior to Chapter 11 filing); (2) unity of interest and ownership (below market rate lease between the LLCs and family ownership of both entities); (3) commingling of assets and business functions (shared bank account and joint loan agreement with bank); (4) failure to observe corporate formalities; (5) inter-entity transfers or loans (transfers with no appropriate documentation or observance of any corporate or legal formalities and no connection to actual costs of operating each business); (6) difficulty in segregating assets and liabilities of entities (books and records in disarray and entities shared same bank account); (7) profitability dependent on consolidation at single location (golf course and tavern dependent on each other's customers).

***In re Owens Corning***, 419 F.3d 195 (3<sup>rd</sup> Cir. 2005). The court held that the substantive consolidation of Owens Corning (OCD) and 17 of its subsidiaries with three of OCD's non-debtor subsidiaries, as proposed in the debtors' Chapter 11 plan, would be inequitable to certain OCD creditors, a syndicate of banks, who lent a substantial sum pre-petition under a credit agreement requiring that OCD subsidiaries guarantee the debt. The court reviewed the history of the doctrine of substantive consolidation and specified what must be established to invoke the doctrine. The court then determined that the proposed consolidation did not fit the facts of the case. The subsidiaries of OCD included LLCs as well as corporations, and the court commented that, though it was rejecting the consolidation sought in the case, no reason exists to limit it under the right circumstances to any particular form of entity. The court stated that a proponent of substantive consolidation must establish with respect to the entities to be consolidated either that (1) pre-petition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (2) post-petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. The court found no pre-petition disregard of corporate separateness in this case; in fact, the credit agreement was premised on the separateness of OCD and its subsidiaries. The court also found no hopeless commingling post-petition. Perhaps the most fatal flaw of the plan, according to the court, was that it was "deemed" consolidation, i.e., a pretend consolidation for all but the banks. The court stated that the plan proponents sought to remake substantive consolidation not as a remedy, but rather a stratagem to "deem" separate resources reallocated to OCD to strip the banks of rights under the Bankruptcy Code, favor other creditors, and trump possible plan objections.

***In re Rick's Auto Outlet of Monticello, LLC (Williams v. Wells Fargo Financial Mississippi 2, Inc.)***, 327 B.R. 650 (8<sup>th</sup> Cir. BAP 2005) (holding Chapter 7 trustee could avoid deed of trust on LLC property because acknowledgment, which failed to comply with form of acknowledgment for LLCs under Mississippi statute, failed to provide notice that individual members who signed deed of trust were acting on behalf of LLC).

***In re Business Intelligent Systems, LLC***, 325 B.R. 575 (Bankr. W.D. Ky. 2005) (applying *Roth* factors from tax context and concluding that funds advanced by member to LLC constituted loan rather than contribution to equity of LLC, even though *Roth* factors alone would likely have yielded opposite result, because circumstances of case required analysis of terms of operating agreement which required capital contribution obligation to be written and provided that majority of members could authorize incurrence of indebtedness).

*In re Desmond*, No. 03-13878-MWV, 2005 WL 1244842 (Bankr. D. N.H. April 1, 2005) (concluding equitable title to Delaware LLC's assets did not pass to debtor upon debtor's bankruptcy because LLC continued for purposes of winding up after dissolution, and debtor was estopped to assert LLC dissolved upon filing of debtor's bankruptcy petition because debtor continued to do business on behalf of LLC after debtor filed bankruptcy).

*S & B Construction, LLC v. Old Fort, LLC*, 826 N.E.2d 32 (Ind. App. 2005) (LLC members were judicially estopped to contradict LLC's allegation in prior bankruptcy proceeding because of identity of interests between members and LLC).

*In re White Mountain Mining Company, L.L.C. (Phillips v. Congelton, L.L.C.)*, 403 F.3d 164 (4th Cir. 2005) (upholding bankruptcy court's denial of investor's motion to compel arbitration of action to determine whether pre-petition advances to LLC debtor were debt or equity because action was core proceeding and arbitration presented inherent conflict with purposes of Bankruptcy Code to centralize disputes and facilitate reorganization of LLC).

*In re Die Fliedermas, LLC (O'Connell v. Shallo)*, 323 B.R. 101 (Bankr. S.D. N.Y. 2005) (finding defendants who had right to manage and control LLC were in prima facie fiduciary relationship with LLC under New York law and were also properly characterized as insiders under Bankruptcy Code).

*In re Grafton Partners, L.P. (Kipperman v. Circle Trust F.B.O.)*, 321 B.R. 527 (9th Cir. (BAP) 2005) (concluding withdrawal of capital from LLC in non-public, non-market transaction, involving LLC interest that was illegally unregistered security, did not qualify as "settlement payment" that is "commonly used in the securities trade" under Bankruptcy Code so as to be immune from avoidance preference).

*In re OODC, LLC (Rosener v. Majestic Management, Inc.)*, 321 B.R. 128 (Bankr. D. Del. 2005) (holding Chapter 11 trustee's allegations were sufficient to pursue "collapsing" theory under which trustee argued separate steps (lending by banks to purchaser, asset purchases, and subsequent transfers of funds to selling company owners and affiliates) in LBO involving LLC purchaser and corporate and LLC sellers should be treated as one integrated transaction, trustee's allegations were sufficient to support actual and constructive fraudulent transfer claims, and trustee's allegations were sufficient to support claims for individual's breach of fiduciary duties of loyalty and good faith to LLC debtor, even though individual was not "an officer, director or majority shareholder" of the LLC, because trustee pled facts showing individual's actual control of LLC).

*In re McCook Metals, L.L.C. (Baldi v. Lynch)*, 319 B.R. 570 (Bankr. N.D. Ill. 2005) (holding LLC debtor's transfer of right to acquire smelting plant to related LLC was fraudulent transfer, that manager/chief operating officer of LLC was person for whose benefit fraudulent transfer was made, that manager/chief operating officer owed fiduciary duty to debtor LLC's creditors which was breached by usurpation of the debtor LLC's opportunity to acquire the smelter, that manager/chief operating officer's claims against debtor LLC were disallowed until manager paid damages owed trustee, and that any legitimate claims of manager/chief operating officer against debtor LLC should not be equitably subordinated).

*In re Ehmman (Movitz v. Fiesta Investments, LLC)*, 319 B.R. 200 (Bankr. D. Ariz. 2005). The bankruptcy court held that a non-managing debtor's interest in a family LLC, including the non-economic rights, passed to the bankruptcy trustee as property of the bankruptcy estate because Arizona law restricting the rights of a transferee was preempted by bankruptcy law in this case. The debtor was a member in an LLC formed by his parents for estate planning purposes. After the debtor filed bankruptcy, substantial amounts flowed out of the LLC for the benefit of other members, but no distributions were made to the trustee. The trustee sought a declaration that it had the status of a member in the LLC (i.e., that the trustee had the non-economic rights as well as economic rights associated with membership). The trustee also sought a determination that the LLC's assets were being diverted for improper purposes and an order dissolving or liquidating the LLC or appointing a receiver. The LLC moved to dismiss the trustee's case on the basis that the trustee should be treated as an assignee or the holder of a charging order. The court concluded that the articles of organization and operating agreement were not an executory contract as to which state law restrictions on the trustee's rights would be respected by virtue of Section 365(e)(2). The court examined the member's relationship to the LLC and concluded that the member had no management rights or responsibilities and no continuing obligations that would render the contract an executory contract. The court noted the purposes for which the debtor's parents formed the LLC (to remove assets from their estates and accumulate wealth for their children after their deaths) and stated one would not expect the children to have any obligations in connection with these goals. The operating agreement imposed many

obligations on the managers, but did not identify any obligations of the debtor as a member. The court also analogized the non-managing LLC interests to limited partner interests, noting cases in which courts have held limited partner interests were non-executory contracts. As a non-executory contract, the trustee succeeded to all of the member's rights and interest under Section 541 notwithstanding restrictions or inconsistent provisions in the Arizona LLC act or the operating agreement.

***Milford Power Company, LLC v. PDC Milford Power, LLC***, 866 A.2d 738 (Del. Ch. 2004). PDC Milford Power, LLC ("PDC"), a member of Milford Power Company, LLC (the "LLC"), filed a bankruptcy petition which was later dismissed. The LLC then filed this case alleging that PDC's membership interest in the LLC was divested as a result of the bankruptcy filing under the plain terms of the LLC agreement. In a lengthy opinion analyzing Sections 541, 365 and 349 of the Bankruptcy Code, the court concluded that the ipso facto clause in the LLC agreement was pre-empted to the extent it would deprive PDC of the economic rights available to an assignee under the Delaware LLC act; however, the ipso facto clause was enforceable insofar as it divested PDC of its right to participate in the governance of the LLC. The court relied in large part upon the Delaware District Court's opinion in *In re IT Group, Inc.* (summarized below). The provisions of the LLC agreement in issue stated that a member's bankruptcy was an event of withdrawal (consistent with the Delaware LLC act) and provided that a withdrawn member's interest was assigned to the remaining members or their designees. The court first rejected an unclean hands defense raised by PDC and then rejected PDC's argument that the dismissal of the bankruptcy made the bankruptcy a non-event and left PDC's membership interest the same as it was before the filing. Next the court considered the pre-emption issue. In a lengthy discussion, the court reviewed the provisions of the Bankruptcy Code bearing on the issue and acknowledged the confusion surrounding Section 365. ("A law professor could fruitfully spend the next year or so examining the implications that the Bankruptcy Code has on ipso facto clauses in alternative entity agreements. As a state trial judge with many cases to decide, I do not have all year to peer through the muck in search of what will at most be a debatable answer.") Ultimately, the court concluded that an ipso facto clause in an LLC agreement retains the same potency after a Section 349 dismissal that it would have during the course of a bankruptcy proceeding. Section 365(e)(1) generally invalidates ipso facto clauses that terminate or modify any right of the debtor solely because of the commencement of a bankruptcy. However, the provisions of Section 365(e)(2) and 365(c)(1) (the "Assumability Exceptions") trump Section 365(e)(1) and preclude the trustee's assumption or assignment of an executory contract where applicable law excuses a non-debtor party from accepting performance from or rendering performance to an entity other than a debtor without that party's consent. Because the Delaware LLC act excuses (as a default rule) the members of an LLC from accepting performance of an LLC agreement by an assignee, the court concluded that the ipso facto provision of the LLC agreement was effective to the extent it deprived PDC of its ability to participate as a member in the governance of the LLC. By contrast, the Delaware LLC act does not (as a default rule) excuse members from accepting an assignment of a member's bare economic interest; therefore, the LLC agreement provision divesting PDC of its interest was pre-empted. The court concluded that this left Section 18-304 of the Delaware LLC act with continued vitality in that it means a member who files bankruptcy ceases to be a member, but becomes an assignee with the rights specified for assignees in Section 18-702(b).

***In re KRSM Properties, LLC (Gilliam v. Speier)***, 318 B.R. 712 (9th Cir. BAP 2004). Prior to filing a Chapter 7 bankruptcy petition, an LLC owned by Michael and Stella Gilliam issued checks totaling \$136,000 to the IRS and California Franchise Tax Board to pay estimated personal taxes owed by the Gilliams, at least some of which apparently related to capital gains on the sale of real property owned by the LLC. The LLC itself did not owe taxes because the Gilliams had elected disregarded entity status for the LLC. The court addressed two questions: (1) whether the LLC members had standing to oppose the trustee's motion to recover the LLC funds used to make the tax payments, and (2) whether estimated tax payments made by a single-member LLC to the account of personal tax liabilities of the member(s) are property of the LLC's bankruptcy estate subject to turnover. The court found that the members satisfied the "injury in fact" and "adversely and pecuniarily affected" tests in order to prosecute the appeal. The court then analyzed the LLC members' argument that their election to have the LLC disregarded for tax purposes entitled them to have LLC funds used to pay the members' estimated taxes. The court agreed with the trustee that the separate existence of the LLC bankruptcy estate cannot be disregarded and that there is "a distinction that makes a difference under the Bankruptcy Code between the status of an LLC and a sole proprietorship." The court pointed out various consequences of the separate existence of the LLC, including the ability of the LLC to sue and be sued, the lack of direct ownership by the members in LLC property, and the liability protection of the members. The court discussed the tax advantages and alternatives available to LLC members and acknowledged that the owners were personally liable for tax resulting from the sale of LLC property by virtue of their elected tax treatment of the LLC. The court concluded, however, that the tax election had no effect on the legal status of the ownership of the LLC assets, and requiring turnover of the tax payments

in this case comported with both tax and bankruptcy law. The court commented that an LLC is not a “personal piggy bank” and payment of the owners’ personal income taxes must give way to payment of LLC creditors under the Chapter 7 liquidation scheme.

***In re Cybersight LLC (Burtch v. Gannon)***, No. 02-11033, Civ.A. 04-112 JF, 2004 WL 2713098 (D. Del. Nov. 17, 2004). Prior to filing a Chapter 7 bankruptcy, the debtor LLC entered an amended and restated LLC agreement under which Gannon purchased a 1.5% membership interest in the LLC and was appointed as an officer of the LLC. Gannon remained an employee of the LLC until he was terminated. Under the LLC agreement, the LLC was obligated to repurchase Gannon’s membership interest, and the purchase price was determined in an arbitration proceeding. The arbitration award was entered as a judgment approximately one year prior to the filing of the LLC’s bankruptcy petition. The LLC did not make any payments to Gannon, and Gannon filed a proof of claim. The trustee sought to reclassify Gannon’s claim as an equity interest subject to subordination. The court concluded that Gannon’s equity stake in the LLC was extinguished pre-petition and that the judgment became a fixed debt obligation of the LLC entitled to general unsecured claimant status once the judgment was entered by the court.

***In re Ireland (Nelson v. Stillwater National Bank and Trust Co.)***, 316 B.R. 766 (10<sup>th</sup> Cir. BAP 2004) (rejecting lender’s claim that debtor’s pre-petition note renewed and extended the LLC’s secured note as recited in debtor’s note, and setting aside pre-petition transfer effected by payment of LLC’s debt with proceeds of debtor’s note).

***In re Desmond (Desmond v. U.S. Asset Funding, LP)***, 316 B.R. 593 (Bankr. D. N.H. 2004). The Chapter 11 debtor was the sole member and manager of an LLC. The debtor entered certain transaction documents under which he purported to transfer his interest in the LLC and collaterally assigned the LLC’s interest in an option agreement to the defendants to secure a note. No court approval was sought or obtained, and the defendants claimed they did not have knowledge of the bankruptcy at the time the documents were signed. The defendants foreclosed on the collateral and the debtor obtained a temporary restraining order. The court dissolved the temporary restraining order insofar as it concerned the assets of the LLC, stating that it would not exercise its power to enjoin a creditor from pursuing its alleged rights against a non-debtor LLC. The court stated that there was no question the debtor’s membership interest was personal property under Delaware law but refused to find that the debtor’s right to manage and control the LLC as its sole member was an asset of the estate such that court approval was required for action taken outside the ordinary course of business. The court distinguished the *Albright* case (summarized below) as follows: “That case clearly stands for the proposition that a Chapter 7 trustee succeeds to the rights of a debtor who is the sole member of an LLC, absent an operating agreement to manage and control the LLC. In the instant case, there is no Chapter 7 or Chapter 11 trustee other than the fiction that filing a Chapter 11 creates a new entity, a debtor-in-possession. There is no distinction between Plaintiff as an individual and as the sole member of the LLC. His authority to act on behalf of the LLC was apparent. The actions in *Albright* for which authority was sought were in the future and not to undo actions for which there was apparent authority.” The court noted the LLC could continue to contest the validity of the foreclosure in another action that had been filed. The court continued the injunctive relief “to the extent needed against the Debtor.” (Presumably the court meant that the defendants were enjoined from taking action against the debtor himself and his membership interest, but the court does not address the issue of the transfer of the debtor’s interest other than to note when reciting the factual background that the transaction documents purported to transfer the membership interest.)

***In re Global Service Group LLC (Kittay v. Atlantic Bank of New York)***, 316 B.R. 451 (Bankr. S.D. N.Y. 2004). The Chapter 7 trustee for the debtor, a New York LLC, sued members and insiders of the LLC and the LLC’s senior secured creditor (Atlantic Bank), alleging various causes of action based on fraudulent transfers and the “deepening insolvency” theory. The court reviewed the theory of “deepening insolvency,” i.e., the fraudulent prolongation of a corporation’s life beyond insolvency resulting in damage to the corporation caused by increased debt. While some courts have treated it as an independent cause of action, others have viewed it as a theory of damages, and still others have rejected it outright. The court cited several cases suggesting that New York courts regard “deepening insolvency” as a theory of damages. The court found it unnecessary, however, to distinguish between “deepening insolvency” as a tort or damage theory because prolonging a corporation’s life, without more, will not result in liability under either approach. According to the court, one must show that a company’s life was prolonged in breach of a separate duty or through commission of an actionable tort to recover for “deepening insolvency.” Thus, the trustee’s allegation that Atlantic Bank made a loan to the LLC that it knew or should have known the LLC could never repay may have been bad banking, but was not a tort. The court stated that the unspoken premise of the trustee’s “deepening insolvency” theory was that the managers of an insolvent LLC are under an absolute duty to liquidate the company and that one who knowingly extends credit to the insolvent company breaches a duty in the nature of aiding and abetting the

managers' wrongdoing. The court rejected this assumption. The court relied on case law addressing the fiduciary duties of corporate officers and directors in the context of insolvency, noting that the duties are owed to multiple constituencies (the corporation, its shareholders, and its creditors) once insolvency ensues. At that point, said the court, there is "'an obligation. . .to exercise judgment in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity.'" There is no absolute duty to shut down and liquidate an insolvent corporation, and a complaint must overcome the business judgment rule with specific allegations that the fiduciaries acted in bad faith or with fraudulent intent. Because the complaint did not suggest that Atlantic Bank could have foreseen that the insiders would misappropriate the loan proceeds or operate the insolvent LLC for an improper purpose, the court concluded the complaint failed to state a claim against the bank. The court also rejected the aiding and abetting claim against Atlantic Bank because it wrongly implied that the mere continuation of the LLC's operations violated a legal duty. The complaint also failed to state a claim for equitable subordination against the bank because it did not charge the bank with wrongful or inequitable conduct, or allege that it became an insider of the LLC by acquiring control. The trustee sought to force Atlantic Bank to satisfy its claim from assets of the members/managers under the marshaling doctrine; however, the complaint failed to allege that Atlantic Bank had the right to resort to a separate fund owned by the estate (there being no allegation that the trustee had an interest in the assets of the members/managers), and the complaint failed to plead facts sufficient to show a basis to pierce the LLC's veil. The court stated that the fraudulent transfer claims against insider members and managers stated a claim for breach of fiduciary duty, but the mere allegation that the LLC continued to do business and incur indebtedness while insolvent did not. The trustee argued that it appeared the insiders continued to operate the LLC as a means of siphoning the LLC's funds for their individual benefit, and the court said this allegation might be legally sufficient to open up recovery under the "deepening insolvency" theory because the prolongation of the LLC's life would "smack of self-dealing" and constitute a breach of fiduciary duty. Because the complaint did not expressly include this allegation, but did include allegations of self-dealing and fraudulent transfer, the court allowed the trustee an opportunity to replead.

***In re Midpoint Development, L.L.C.***, 313 B.R. 486 (Bankr. W.D. Okla. 2004) (holding that a dissolved LLC may be a Chapter 11 debtor since the Oklahoma LLC Act implies that a dissolved LLC does not cease to exist but continues for winding up purposes).

***In re Calhoun***, 312 B.R. 380 (Bankr. N.D. Iowa 2004). The automatic stay did not protect LLCs in which the debtor had an interest because they were separate entities; listing the LLCs as other names by which the debtor was known did not include the LLCs as debtors in his bankruptcy petition.

***In re First Connecticut Consulting Group, Inc.***, No. MISC. 04-101, 2004 WL 1676211 (Bankr. D. Vt. July 27, 2004). After weaving through a "complicated web" of facts, the court dismissed the Chapter 11 cases of several LLCs on the basis that the individual who claimed to own the LLCs did not own them and thus lacked authority to file the cases. Alternatively, even if the individual owned the LLCs, the court concluded the petitions were not filed in good faith.

***In re Telluride Income Growth Ltd. Partnership***, 311 B.R. 585 (Bankr. D. Colo. 2004). A Colorado LLC was formed following the administrative dissolution of another Colorado LLC in order to succeed the dissolved LLC as general partner of an Arizona limited partnership. The court concluded that the second LLC could not automatically be regarded as the successor of the dissolved LLC, was not properly substituted as general partner, and lacked authority to file a bankruptcy petition on behalf of the limited partnership. Further, if the LLC that filed the bankruptcy petition was the administratively dissolved LLC, it lacked authority because it was no longer competent to transact business in Colorado. Administrative dissolution of the first LLC dissolved the limited partnership under the terms of the limited partnership agreement even though the limited partnership agreement referred only to dissolution of a corporate or partnership general partner. The court interpreted the provisions of the limited partnership agreement referring to the effect of dissolution of a corporate or partnership general partner as also encompassing an LLC general partner.

***In re Ealy***, 307 B.R. 653 (Bankr. E.D. Ark. 2004) (acknowledging that property of LLC is not property of member under Arkansas law, but finding debtor had equitable interest in property held by debtor's LLC, and automatic stay thus protected property, where creation of LLC resulted from misunderstanding and intent was for debtor to own property).

*In re Mulder (Baker Dev. Corp. v. Mulder)*, 307 B.R. 637 (Bankr. N.D. Ill. 2004) (stating in footnote that even if debtor owned interest in LLC that allegedly fraudulently conveyed property, only LLC interest would be property of bankruptcy estate and not property of LLC itself).

*In re Crowe Rope Industries, LLC (Turner v. JPB Enterprises, Inc.)*, 307 B.R. 1 (D. Me. 2004) (noting standard for piercing LLC veil under Maine law is same as for corporation, and concluding that Maine law would not permit corporation to pierce its own veil (based on Maine Supreme Court's rejection of "reverse piercing" by shareholder of corporation to assert corporation's rights) and thus Trustee could not assert alter ego claim on behalf of estate).

*In re XO Communications, Inc. (XO Communications, Inc. v. Start Investments, Inc.)*, No. 02-12947 (AJG), 03 Civ. 1898(DC), 2004 WL 360437 (S.D. N.Y. Feb. 26, 2004) (holding bankruptcy judge's order abstaining from determining severability of put provision in LLC agreement in favor of ADR procedure in LLC agreement was interlocutory order not subject to immediate appeal).

*In re Brentwood Lexford Partners, L.L.C.*, 292 B.R. 255 (Bankr. N.D. Tex. 2003). The Chapter 7 trustee brought an adversary proceeding to set aside alleged fraudulent transfers. The court held that certain excess cash flow distributions to the members of an LLC engaged in the property management business were fraudulent transfers because they were made with the intent to hinder and delay collection of a note owed by the LLC. The court reached this conclusion based on evidence that the LLC's officers knew that a note payment was due shortly after the distributions, knew that the LLC would have insufficient cash to make the note payment, and viewed its business as worth less than the debt on the note. Furthermore, the LLC's officers and board did not tell the noteholder about the distributions, had not yet provided financial information from the prior year to the noteholder, and did not tell the noteholder that it would not make the next note payment. LLC officers testified that they intended to force the noteholder to renegotiate the note and they believed the distributions and failure to make the note payment would give the LLC leverage in the negotiations. The court found intent to hinder or delay could be inferred from this evidence. The court rejected the argument that the distributions were in the nature of compensation for services of the members. The court noted that there were no employment contracts providing that excess cash flow distributions would be part of their salary or bonus, no funds withheld from the distributions for income tax purposes, and no board resolutions treating the excess cash flow as salary or bonus. The noteholder did not consider excess cash flow distributions as compensation, but rather considered the distributions to be dividends or payments on account of the equity interests of the members. The court thus concluded that the LLC did not receive reasonably equivalent value for the distributions. The court analyzed whether the LLC was insolvent within the meaning of the Texas fraudulent transfer provisions and concluded that the LLC was insolvent. The court concluded that certain payments for legal and accounting services did not constitute fraudulent transfers, nor did the cancellation of certain contracts with the LLC and the formation of another entity that took over some of the contracts constitute fraudulent transfers.

The court also addressed breach of fiduciary duty claims against members of the LLC who were officers. The court discussed the fiduciary duties of the LLC's officers as if they were officers of a corporation. The court stated that the officers of a corporation owe a fiduciary duty to the corporation and its shareholders. Further, the court stated that the officers owe a fiduciary duty to the creditors of the corporation when the corporation is insolvent. According to the court, "[o]fficers of an insolvent corporation breach their fiduciary duty by transferring funds to themselves, in effect, as equity holders, to the detriment of the corporation's creditors." The court determined, however, that the trustee and the LLC's major creditor were estopped from pursuing the breach of fiduciary duty claim. The noteholder was a "sophisticated player" and understood companies in the LLC's business. It conducted its own assessment of the LLC's assets and concluded that the LLC's assets supported its debt structure. The excess cash distributions were permitted under the terms of the note. The court thus applied the equitable estoppel doctrine to the fiduciary duty claim related to the excess cash distributions. (This case is further summarized above under the headings "Fiduciary Duties of Members and Managers" and "Improper Distributions.")

*In re The IT Group, Inc., Co. (Northrup Grumman Technical Services, Inc. v. The Shaw Group Inc.)*, 302 B.R. 483 (D.Del. 2003). After filing bankruptcy, the debtors, members of a Delaware LLC, attempted to transfer their rights under the LLC operating agreement to another member. The court upheld the bankruptcy court's conclusion that the debtors could not transfer their membership rights without the consent of the other members, that the debtors could assign their economic rights subject to a right of first refusal of the members in the operating agreement, and that a default provision under the operating agreement was unenforceable as an ipso facto clause. The default provision in issue affected the debtors' economic interest in the LLC. If the clause providing that the debtors' bankruptcy constituted a default was enforceable, another member was entitled to buy out the debtors' interest at an amount equivalent to the value

of their accrued capital account on the date of their bankruptcy petition. If the debtors were not in default, the other member was not entitled to exercise its buy out rights, and the debtors' economic interests would be their ongoing rights to profits and losses from the LLC. The court rejected the argument that the default provision was enforceable under Section 365(e)(2)(A). Because the Delaware LLC act permits the assignment of a member's economic interest and does not excuse the members from rendering performance to an assignee, the court concluded that Section 365(e)(2)(A) did not apply and the default provision was unenforceable as an ipso facto clause. The court concluded that the right of first refusal provision was enforceable and was not an ipso facto clause because it was triggered by a transfer and not by bankruptcy. The court also rejected the argument that the right of first refusal was an unenforceable restraint on assignment under Section 365(f). Finally, the court rejected the argument that public policy militated against enforcement of the right of first refusal because the procedures implicated by the right of first refusal were too onerous. The court did not regard the issues related to allocation of the purchase price of the debtors' economic interest as rendering the right of first refusal unenforceable.

*In re DotMD, LLC (DotMD, LLC v. Weyer)*, 303 B.R. 519 (Bankr.N.D.Ga. 2003). The bankruptcy trustee sought to set aside a judgment lien recorded by the defendant two weeks before the debtor LLC filed bankruptcy. The court appeared to agree with the trustee that the judgment lien was not properly recorded in the General Execution Docket where it was recorded under the name of a predecessor corporation rather than the LLC which survived the merger with the corporation, particularly since the judgment was recorded a year after the merger and the judgment creditor had full knowledge of the merger and the name of the surviving entity. The court concluded that the trustee did not have the power to set aside the lien under the strong-arm clause in Section 544(a)(1), even if the judgment was not properly recorded on the General Execution Docket, because the trustee did not stand in the shoes of a third party purchaser. However, the court found that the lien did not attach to the monies in the possession of the trustee because the monies were derived from a chose in action, and a judgment lien in Georgia does not attach to a chose in action.

*In re Avalon Hotel Partners, LLC*, 302 B.R. 377 (Bankr.D.Or. 2003). The court determined that the chapter 11 bankruptcy of an Oregon LLC required member approval because it was a "Major Decision" requiring approval of members holding "in excess of 75% of the Ownership Interests" under the LLC operating agreement. The court also characterized the bankruptcy filing as a conversion into another type of entity requiring consent of a majority of the members under the Oregon LLC act because the bankruptcy converted the LLC into a debtor-in-possession charged with the fiduciary responsibilities of a trustee in bankruptcy. The adoption of a resolution by the LLC's manager was thus insufficient to authorize the filing either under the operating agreement or Oregon law. The bankruptcy filing was ratified, however, by a subsequent consent resolution approved by members holding more than 75% in interest, and the court stated that such a ratification to approve a bankruptcy filing is not inconsistent with the Bankruptcy Code. The court refused to apply judicial estoppel to dismiss the bankruptcy although counsel for the LLC's manager represented in state court litigation on the day that the bankruptcy was filed that no bankruptcy would be filed before 5:00 p.m. on that day. The court also concluded that the bankruptcy was not filed in bad faith and that abstention was not warranted.

*In re Imageset, Inc. (Turner v. Phoenix Financial, LLC)*, 299 B.R. 709 (Bankr. D. Me. 2003) (holding that members of LLC formed by insiders of debtor were not "initial transferees" with respect to pre-petition transfers by debtor to LLC and did not qualify as "entities for whose benefit such transfers were made" under Bankruptcy Code Section 550 and that fact issues precluded summary judgment on issue of whether LLC exercised sufficient control over debtor to be regarded as insider under Maine's insider preference statute).

*In re Farmland Industries, Inc.*, 296 B.R. 497 (Bankr. W.D. Mo. 2003) (vacating prior order and holding on reconsideration that the determination of the effect of a member's bankruptcy on the member's membership in the LLC is a core bankruptcy proceeding, and that counterclaim for judicial dissolution, being closely intertwined with the issues in the core proceeding, should also be heard by the bankruptcy court).

*In re Mendy*, No. Civ.A. 02-3651, 02-16708, 2003 WL 21488654 (E.D. La. June 20, 2003) (affirming bankruptcy court's order lifting the automatic co-debtor stay against an LLC because the LLC was a legal entity separate from the debtor (who was a member of the LLC and guarantor of LLC indebtedness), and the debtor thus had no interest in the LLC's property or the proceeds of the loan guaranteed by the debtor).

*In re Condor Exploration, LLC*, 294 B.R. 370 (Bankr. D. Colo. 2003) (applying corporate test to determine LLC's principal place of business for purposes of proper venue of LLC's bankruptcy and concluding that justice was best served by transfer of venue from Colorado to Wyoming).



***In re Securities Investor Protection Corp. v. Consolidated Investment Services, Inc. (Snyder v. Floworks, Inc.)***, Nos. 95-1645 ABC(SIPA), 02-1547 ABC, 2003 WL 21383648 (Bankr. D. Colo. June 9, 2003). The appointed fiduciary in a Securities Investor Protection Act winding up (the “Trustee”) created an LLC to receive assets in settlement of a claim asserted by the Trustee. The Trustee later filed an adversary proceeding seeking injunctive relief with respect to the assets received in the settlement by the LLC. The Trustee sought to cure deficiencies in the Trustee’s standing and questions as to the court’s jurisdiction by adding the LLC as a plaintiff, filing articles of dissolution pursuant to which the assets of the LLC (including the claims in the suit) were distributed to the Trustee, and dropping the LLC from the suit. The court concluded that these actions did not cure the standing and jurisdiction problems. The court stated that jurisdiction is determined at the time of the filing of the action, and the action did not involve the Trustee in that capacity or property of the estate. When the Trustee chose to take the property rights he received in the settlement and place them in a separate entity, only the ownership interest in the LLC remained property of the estate. Thus, the Trustee lacked standing, and the court lacked jurisdiction.

***In re Moreno (Alpine Bank v. Moreno)***, 293 B.R. 777 (Bankr.D.Colo. 2003) (finding no basis to validate defective deed of trust which erroneously identified LLC as grantor rather than actual individual owner and which was executed by individual owner only in her representative capacity for LLC).

***In re Albright***, 291 B.R. 538 (Bankr. D. Colo. 2003). The sole member of a Colorado LLC filed bankruptcy, and the court held that the Chapter 7 trustee became a “substituted member” and could cause the LLC to sell the LLC’s real property and distribute the proceeds to the estate. The court reasoned that the trustee acquired the governance rights of the bankrupt member of the LLC because the trustee succeeded to the debtor’s membership interest and there were no other members whose approval was required for admission of the trustee as a member. The court quoted provisions of the Colorado LLC act that refer to consent or approval by the “other members” for admission of an assignee as a member. The debtor argued that the trustee represented creditors’ interests and was only entitled to a charging order, but the court concluded that the charging order is for the protection of other members and thus serves no purpose in a single-member LLC. The court noted in a footnote that a non-debtor member, even one with an infinitesimal interest, would be able to prevent a bankrupt member’s trustee from acquiring the bankrupt member’s rights to govern and vote; however, the court also noted that creditors or a bankruptcy trustee would have recourse under bankruptcy avoidance provisions or fraudulent transfer laws where a “peppercorn” member is employed for purposes of hindering, delaying, or defrauding creditors.

***In re IDS Holding Co., LLC (IDS Holding Co., LLC v. Madsen)***, 292 B.R.233 (Bankr. D. Conn. 2003). A bankrupt LLC, in its capacity as debtor-in-possession, sought to recover a distribution made to its dominant member (Madsen) in connection with the sale of substantially all of the LLC’s assets. The LLC was insolvent at the time of the sale, and all of the proceeds of the sale (consisting of shares of stock in the purchaser) were distributed to the members in accordance with their interests. The LLC’s members had an agreement about the distribution of the proceeds of the sale whereby the members pledged some of the shares they received for the benefit of certain LLC creditors and Madsen agreed to dismiss a pending lawsuit against one of the LLC’s suppliers and another member. The LLC claimed that the distribution violated the Connecticut LLC act, was a fraudulent transfer under the Bankruptcy Code and the Connecticut Uniform Fraudulent Transfer Act, was a voidable preference under the Bankruptcy Code, and was a breach of Madsen’s fiduciary duty as a member of the LLC to its creditors. Madsen argued the transfer was supported by consideration and that he was entitled to summary judgment. The LLC argued that Madsen’s receipt of the shares violated the provisions of the Connecticut LLC act regarding the distribution of assets on a winding up. However, the court found this provision inapplicable because the LLC had not dissolved and was not in the process of winding up. The LLC conceded that the Connecticut LLC act does not prohibit an insolvent LLC from distributing its assets to its members, but the LLC argued that the court was permitted to apply corporate law restrictions under the provision of the LLC act that provides the principles of law and equity supplement the act. The court concluded that it need not address this argument because the LLC conceded that it had never actually dissolved. Thus, the court granted Madsen summary judgment on the claim that the distribution violated the Connecticut LLC statutes. The court found that there were fact issues regarding whether the distributions were made with intent to hinder or delay LLC creditors and whether Madsen gave reasonably equivalent value. Madsen argued that the distribution could not be a voidable preference because he was only an equity owner and not a creditor or claim holder. The court concluded that Madsen was a creditor by virtue of the distribution agreement and the Connecticut LLC act, which states that a member has the status of a creditor at the time a member becomes entitled to a distribution. Finally, the court applied case law from the corporate context to conclude that Madsen owed a fiduciary duty to LLC creditors when the LLC became insolvent.

***Venables v. Smith***, No.Civ.A. 02C-09-126JOH, 2003 WL 1903779 (Del.Super. March 14, 2003). The plaintiff sued an attorney who failed to record a deed transferring certain property to an LLC. The plaintiff and her sisters had retained the attorney to form an LLC for the purpose of holding real estate held by the sisters as general partners. The attorney formed the LLC but failed to prepare a deed transferring the properties to the newly formed LLC. The plaintiff filed bankruptcy and paid a cash settlement to her largest creditor after the creditor threatened to partition the partnership property. The attorney defended on the basis that the creditor would have reached the property in any event since the bankruptcy of the LLC member was an “involuntary withdrawal” under the operating agreement that dissolved the LLC under the terms of the operating agreement when the other sisters did not elect to continue the LLC. The court stated that the attorney’s reasoning was flawed. The court pointed out that the LLC members had no reason to continue because its purpose was to hold the property which was never transferred to it. The court concluded that the dissolution had no bearing on the viability of the plaintiff’s claim.

***In re Liimatainen (Notinger v. Liimatainen)***, 2002 BNH 32, 2002 WL 31317182 (Bankr. D. N.H. Oct. 10, 2002) (stating that failure to list an ownership interest in an LLC may be grounds for denial of discharge but concluding claimant did not prove that debtor/manager of LLC, who signed certificate of formation and operating agreement (as manager) but was not listed as member, was actual owner of LLC).

***In re Woods (Cundy v. Woods)***, 284 B.R. 282 (D. Colo. 2001). The plaintiffs and the debtor were investors who entered a joint venture agreement and formed an LLC to secure financing and manage a real estate project. The debtor was also the attorney for the LLC (referred to in the case as the joint venture) and a member of the management committee. The plaintiffs alleged that the debtor owed them a fiduciary duty as a co-venturer, management committee member, and attorney for the venture, and that his liability for the venture’s debt was non-dischargeable because it arose from a defalcation of fiduciary duty when he obligated the venture to loan amounts in excess of borrowing authorizations. The court found that there must be an express or technical trust, not merely a general fiduciary relationship like that arising out of an attorney-client, joint venture, or partnership relationship for a fiduciary relationship to exist under section 532(a)(4) (the dischargeability exception for defalcation in a fiduciary capacity). Additionally, the court found that the bankruptcy court was in error in concluding a defalcation had occurred.

***In re Interiors of Yesterday, LLC (Orsini v. Interiors of Yesterday, LLC)***, 284 B.R. 19 (Bankr. D. Conn. 2002)(holding that LLC must be represented by attorney in bankruptcy court but that *pro se* filing of Chapter 7 petition was not void *ab initio* and LLC’s failure to appear through attorney until more than three months later did not constitute “cause” for dismissal of case).

***Sumlin Construction Co., L.L.C. v. Taylor***, 850 So.2d 303 (Ala. 2002). A member of an Alabama LLC filed bankruptcy and was granted a discharge. After the bankruptcy proceeding was closed, the member filed a derivative suit against the other members of the LLC. The plaintiff’s status as a member was critical to the plaintiff’s standing to bring the derivative suit, and the Alabama LLC act provides that a member ceases to be a member upon the voluntary filing of a petition in bankruptcy or an adjudication of bankruptcy. The plaintiff claimed this provision was an unenforceable ipso facto clause. The Alabama Supreme Court determined that the operating agreement (which did not address the effect of bankruptcy of a member) was an executory contract involving the significant services of the member and, thus, the other members would not have to accept performance by the trustee. It was therefore not necessary for the court to decide whether the provision of the Alabama LLC act that provides a member ceases to be a member upon bankruptcy would otherwise constitute an unenforceable ipso facto clause. Additionally, the court determined that Section 365(e) is intended only to apply during the pendency of a bankruptcy case and is inapplicable once the automatic stay against ipso facto termination has been lifted. Therefore, the member would have been divested of his membership when the bankruptcy was closed prior to the filing of the derivative suit. Since the Alabama LLC derivative suit provisions require the plaintiff to be a member, and the plaintiff was no longer a member, the plaintiff did not have standing.

***Chase Manhattan Bank v. Iridium Africa Corporation***, 197 F.Supp.2d 120 (D. Del. 2002). As part of a financing arrangement, Iridium LLC assigned its right to certain reserve capital call obligations in the Iridium LLC agreement to Chase Manhattan Bank (Chase). Under the reserve capital call provisions, members could be called upon to purchase additional interests in the Iridium LLC. Ultimately, Iridium LLC filed bankruptcy, and Chase sought to enforce its rights against the members under the reserve capital call provisions. Whether assignment of Iridium’s rights to Chase was valid and whether certain amendments to the reserve capital call provisions were properly adopted were issues in dispute in the case, and the court determined that fact issues precluded summary judgment on these issues. Chase and the defendants also made certain arguments about the application of Section 365 of the Bankruptcy Code to

the LLC agreement. The defendants argued that the obligation of Iridium LLC to issue interests under the reserve capital call provisions of the LLC agreement was an executory contract under Section 365(c). Further, the defendants argued that because Iridium LLC was in bankruptcy it could not as a matter of law assume the agreement and issue the interests, and material breach thus excused the members from the obligation to pay for the interests. Chase had several counter-arguments. First, Chase argued that because Chase had no obligations to the LLC members the Iridium LLC agreement was not executory as to Chase. The court rejected this argument. Chase also argued that the LLC's issuance of interests pursuant to the reserve capital call provisions was not governed by Section 365(c) because the interests were not a "security" of the debtor or a "financial accommodation" under the Bankruptcy Code. The court rejected these arguments, as well. Thus, the court concluded the LLC agreement did create executory commitments under Section 365(c)(2). Finally, Chase argued that the interests to be issued would be worthless, thus there would be no material breach, and the LLC agreement could not be executory. The court found that the value of the interests presented a question of fact (it being possible that the interests were worthless, making the failure to issue them not a material breach and the agreement non-executory); therefore, the court denied summary judgment. The court also addressed Chase's argument that the members had waived all of their defenses in broad waiver provisions in the LLC agreement (though there was a dispute as to whether the waiver provisions were properly adopted). Assuming the waiver provision was properly adopted, Chase argued the provision applied to all defenses of the members, but the court concluded that it did not waive the protections of the Bankruptcy Code. Specifically, the provisions of Section 365(c)(2) (prohibiting assumption of executory contracts covered by that provision) cannot be waived. With respect to defenses other than non-waivable defenses under the Bankruptcy Code, the court found ambiguity in the waiver provisions with respect to their application to the failure of the LLC to issue the interests.

*In re McKnew (KMK Factoring, L.L.C. v. McKnew)*, 270 B.R. 593 (Bankr. E.D. Va. 2001). The issue in this adversary proceeding was whether, for purposes of § 523(a)(4) of the Bankruptcy Code, the debtor was acting in a fiduciary capacity in his role as manager of a Virginia LLC. Section 523(a)(4) prohibits discharge of an individual's debt arising from fraud or defalcation while acting in a fiduciary capacity. The proceeding involved allegations that the debtor had wrongfully withdrawn monies from the LLC in breach of his fiduciary duties as manager. The court acknowledged that other courts have held that partners or corporate officers were fiduciaries for purposes of § 523(a)(4) but noted that the question of fiduciary status of an LLC member or manager for purposes of § 523(a)(4) was an issue of first impression. The court noted the provisions of the Virginia LLC act requiring a manager to discharge the manager's duties in accordance with the manager's good faith business judgment in the best interest of the company and concluded that, based upon such provisions, LLC managers have a fiduciary duty to the LLC. (The court also concluded that there are no fiduciary obligations among members in view of the lack of a similar provision for members.) However, this generalized fiduciary relationship was insufficient under the strict approach to § 523(a)(4) fiduciary status taken by the court in prior cases. Decisions in the Eastern District of Virginia restrict the term "fiduciary" for purposes of § 523(a)(4) to express or technical trusts, and the court noted that the Virginia LLC act does not impose any trust upon funds contributed to the LLC nor in any manner address the relationship between a manager and the monies of an LLC. The court rejected the argument that the alleged conduct by the manager came within the purview of § 523(a)(4) "analogizing to Virginia decisions concerning officers or directors" and on the basis that Virginia law does not suggest anything "other than a generalized fiduciary duty would be imposed upon a limited liability company manager." The court went on to determine, however, that the manager's excess withdrawals amounted to a non-dischargeable claim for embezzlement under § 523(a)(4). The court found that actions to obfuscate and conceal the nature and amount of the excess compensation showed fraudulent intent. In various financial reports to, and conversations with, the other members, the manager deceived them regarding the payments. Finally, the court determined that the Virginia statutory cap on a manager's liability to the LLC did not apply because the manager's acts amounted to "willful misconduct."

*In re Miller (Coleman v. Miller)*, 270 B.R. 303 (D. Kan. 2001). The debtor was a 50% member in an LLC (Alma Cheese, LLC), and another LLC (Triangle Marketing, LLC) was the other 50% member. Triangle Marketing, LLC and its two members brought this adversarial proceeding complaining of fraud by the debtor in failing to disclose certain trade debts of Alma Cheese, LLC in connection with the plaintiffs' guarantee and purchase of industrial revenue bonds of the LLC. The plaintiffs objected to the discharge of the undisclosed trade debts under § 523(a)(2)(A), which prohibits discharge of a debt obtained by fraud or misrepresentation of the debtor's financial condition. The district court upheld the bankruptcy court's dismissal of the proceeding on the basis that the trade debts were not the debts of the plaintiffs or the debtor, and the plaintiffs were not creditors to whom the debts were owed. The plaintiffs argued that the bankruptcy court erred in not interpreting their allegations to state a viable claim or in failing to allow the plaintiffs to amend, but the court found that the allegations were deficient and the bankruptcy court did not have a duty to find some interpretation that would avoid dismissal.

***In re Utilimax.com, Inc.***, 265 B.R. 63 (Bankr. E.D. Pa. 2001). The debtor was one of approximately 180 members of an LLC that operated as a conduit for its members and was responsible for the bulk electric power system in a multi-state area. The LLC filed an involuntary petition of bankruptcy against the debtor based upon an unpaid obligation for goods sold and delivered. Issues included whether the claim asserted by the LLC was subject to a bona fide dispute and whether fellow members of the LLC could qualify as holders of claims against the debtor. The court discussed provisions of the LLC operating agreement regarding enforcement of obligations and concluded that the joining petitioners did not have “claims” and that conversations at a members committee meeting did not amount to a de facto amendment of the operating agreement.

***In re ICLNDS Notes Acquisition, LLC***, 259 B.R. 289 (Bankr. N.D. Ohio 2001). An LLC manager of an LLC prepared and filed a Chapter 7 bankruptcy petition on behalf of the LLC. The court held that an LLC comes within the definition of a “person” under the Bankruptcy Code and is eligible to be a debtor, but an LLC must be represented by counsel like a corporation or a partnership. The court further concluded that a lay person who prepares a bankruptcy petition and schedules on behalf of an LLC is engaged in the unauthorized practice of law. The court thus dismissed the case.

***In re Sandman Associates, L.L.C. (Dye v. Sandman Associates, L.L.C.)***, 251 B.R. 473 (W.D. Va. 2000). The court held that an LLC’s letter agreement that it would grant a membership interest to a new member in exchange for a capital contribution was not an executory contract that could be rejected by the LLC. The agreement called for James Dye to make a \$350,000 capital contribution in exchange for a 25% membership interest. Dye made the contribution and was treated as a member by the LLC, though Dye never signed the operating agreement as the letter agreement required. The court found that the failure to sign the operating agreement was not a material breach and that the agreement had been substantially performed. Thus, it was not an executory contract. The court also addressed Dye’s objections to the application for fees filed by the law firm for the LLC debtor. Dye objected on the grounds that the firm was representing the interests of the other members rather than the LLC in the dispute over Dye’s membership. The court upheld the bankruptcy court’s finding that the services of the law firm were rendered in an effort to clarify the debtor’s ability to reorganize and function as an ongoing entity.

***In re Forbes Property Management, L.L.C.***, 252 B.R. 171 (Bankr. D. Colo. 2000). An LLC debtor filed an application for authority to hire counsel. The application was granted, but the LLC sought clarification regarding the procedures for payment since the funds to be used were not property of the estate. The \$5,000 retainer was paid by the general managing member of the LLC from personal funds, but the court’s original order required application for court approval of fees and set forth guidelines for compensation. In the course of modifying the original order, the court pointed out that the managing member and the LLC had a potential, though not actual, conflict of interest and cautioned counsel that he represented and served the interests of the debtor and not those of its managing member.

***In re Barman (Solomon v. Barman)***, 237 B. R. 342 (Bankr. E.D. Mich. 1999). The LLC issue in this case was whether a South Carolina LLC was an “insider” of the Chapter 7 debtors. Mr. Barman was one of three members of the LLC. The debtors admitted that they were insiders of the LLC but disputed that the LLC was an insider of theirs. The court examined the Bankruptcy Code definitions of “insider” and “affiliate” and concluded that an LLC is sufficiently analogous to a corporation for purposes of determining insiders to consider similar principles. An “insider” includes a corporation of which the debtor is a director, officer, or person in control as well as an affiliate or insider of an affiliate. An affiliate includes a corporation if 20% or more of its voting securities are owned or controlled by the debtor. The court cited various provisions of the South Carolina LLC act reflecting that LLC members have voting rights. The court concluded that Barman was an insider because he was one of three members and thus held a position analogous to a director, officer, or person in control. The court also held Barman was an affiliate, and thus an insider, because he owned or controlled one-third of the voting rights in the LLC.

***In re Heritage Leasing Corporation***, No. C/A 96-75946-W, 1998 WL 2016851 (Bankr. D. S.C. Sept. 17, 1998) (declining to extend *Reading Co. v. Brown* to give rise to administrative priority claim where lease entered in name of LLC that was never formed allegedly resulted in lease to partnership and post-petition breach by Chapter 7 trustee, as successor to bankrupt partner, who rejected lease and left premises).

## 5. Antitrust

*Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp.2d 130 (D.Mass. 2000), aff'd, 284 F.3d 47 (1<sup>st</sup> Cir. 2002). In this antitrust case brought by professional soccer players against Major League Soccer, L.L.C., a Delaware LLC, the court concluded that the LLC should be treated as a corporation for purposes of the court's analysis of the application of Section 1 of the Sherman Act. The court cited several FTC rulings in which the FTC has treated LLCs like corporations and cited non-antitrust cases in which courts have concluded that an LLC is more closely analogous to a corporation than a partnership. The LLC argued that it was a "single entity" and thus could not violate Section 1 of the Sherman Act. Since the court determined to treat the LLC as a corporation for this analysis, the court stated that the LLC's operations should be analyzed as the operations of a single corporation, with its operator investors treated as officers and shareholders. The court then examined the LLC and concluded that it was indeed a "single entity;" therefore, the defendants were entitled to summary judgment on the Sherman Act claim. On appeal, the First Circuit thought it doubtful that this was a case where single entity status applied, but concluded that remand was not required because the jury's findings on the relevant market doomed the case. The district court also addressed the plaintiffs' argument that the formation of the LLC in the first place violated Section 7 of the Clayton Act and concluded that the defendants were entitled to judgment on that claim as well. Again, the First Circuit concluded that the jury's rejection of the plaintiff's characterization of the market doomed this claim in any event.

## 6. Condominium and Cooperative Conversion Protection and Abuse Relief Act

*Darnet Realty Associates, LLC v. 136 East 56th Street Owners, Inc.*, 153 F.3d 21 (2d Cir. 1998). A real estate development partnership which owned shares in an owners' corporation reorganized as a New York LLC, and the court found the successor LLC to be the same continuing entity for purposes of the statutory termination window under Section 3607(b) of the Condominium and Cooperative Conversion Protection and Abuse Relief Act. In a later released opinion, *Darnet Realty Associates, LLC v. 136 East 56th Street Owners, Inc.*, Nos. 98 Civ. 5864 LBS, 98 Civ. 6011 LBS, 1999 WL 47328 (2d Cir. Feb. 1, 1999), the court addressed the LLC's subsequent sale of all of its shares and proprietary leases in 136 East Main Street Owners, Inc. to another LLC (which in turn sold the shares and leases to another LLC). The court concluded that the transferee LLC was not a successor and did not have special developer status under the Act. This determination led to the conclusion that the notice was within the two year window period provided for in Section 3607(b) of the Act.

## 7. Right to Financial Privacy Act

*Exchange Point LLC v. Securities and Exchange Commission*, 100 F. Supp.2d 172 (S.D. N.Y. 1999). A Delaware LLC challenged a government subpoena of bank records under the Right to Financial Privacy Act (RFPA). Under RFPA, a "person" with standing to challenge such a subpoena is defined as "an individual or a partnership of five or fewer individuals." The question was thus whether the LLC was a "person" under RFPA. The court examined the nature of an LLC and concluded that it did not have standing under RFPA. In addition to the fact that an LLC is not covered by the "plain meaning" of the words "individual" or "partnership," the court focused heavily on the limitation of liability in an LLC and the fact that Congress did not include corporations with 5 or fewer shareholders.

## 8. Gramm-Leach-Bliley Privacy Act

*Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, No. Civ.A. 18928, 2002 WL 205681 (Del. Ch. Jan. 29, 2002). A member of two Delaware LLCs sought to inspect the books and records of the LLCs, and the managing member of the LLC argued it need only produce the LLC's general ledger accounts transactions histories, continuity schedules, annual reports, bank account ledger cards, and trial balances. The court interpreted the Delaware LLC act and LLC agreements (which gave access to "all books and records" of the LLCs) and concluded that the member also had the right to inspect the tax returns and member lists of the LLC. The court rejected the argument that disclosure of the member lists would violate the privacy provisions of the Gramm-Leach-Bliley Act because there is an exception to the prohibition on disclosure where disclosure is necessary to comply with other laws and legal requirements, and the court found disclosure was required to comply with Delaware law and other legal requirements.

## 9. Title VII

*Miller v. Bloomin' Apple, L.L.C.*, No. 00 C 50286, 2002 WL 206541 (N.D. Ill. Feb. 11, 2002)(finding LLC that was sole member of another LLC had adequate notice of EEOC charges, though not named in EEOC charges, to be made party to Title VII suit).

## 10. Agricultural Lien Statute

*In re Bernstein (Bernstein Ranch, LLC v. U.S.)*, 230 B.R. 144 (Bankr. D. N.D. 1999). An LLC claimed an agricultural lien on cattle proceeds by virtue of feed and care provided the cattle. Two brothers who owned the cattle executed a bill of sale to the LLC, in which they were members, and the LLC later reconveyed the cattle to the brothers. The lien was challenged with respect to the period of time during which title to the cattle was held by the LLC on the basis that, under North Dakota law, an owner of crops or livestock cannot claim a supplier's lien for inputs the owner himself provides to the crop or livestock. The court compared the transfer to the LLC to a case in which a family created a partnership for the purpose of raising potatoes. A company owned by the mother provided services and claimed a lien, but it was disallowed on the basis that the mother, as a participant in the joint venture, had an interest in the crops themselves, and the expenses for which she claimed a lien constituted a contribution to the common undertaking of the joint venture. The court stated that the circumstances surrounding the LLC were similar to those in that case. If the cattle were owned by the LLC during the time in question, said the court, the logic of that case would preclude recognition of the lien. The court analyzed the circumstances of the transfer to the LLC and determined that the sale was absolute and effective upon the signing of the bill of sale. Since the cattle were owned by the LLC, it could not claim a lien for its expenses for feed and services.

## 11. State and Local Business Tax

*In re Inselman*, 334 B.R. 267 (Bankr. D. Ariz. 2005) (holding LLC member/manager was not personally liable for LLC's unpaid privilege tax, interpreting provisions of Arizona privilege tax imposing personal liability on any "person who fails to remit any additional charge made to cover the tax or truthfully account for and pay over such amount" as imposing liability only on merchant/taxpayer, not its officers, employees, or agents).

*City of Los Angeles v. Furman Selz Management, L.L.C.*, 17 Cal.Rptr.3d 139 (Cal. App. 2004) (concluding city could not impose business tax on LLC wholly owned by financial corporation where LLC had elected to be disregarded for tax purposes and its income was subject to higher rate applicable to financial corporation).

*Texas Utilities Electric Company v. Sharp*, 962 S.W.2d 723 (Tex.App. 1998). This case was a suit for a refund of franchise tax paid by Texas Utilities Electric Company (TUEC). TUEC claimed that it was entitled to deduct as "debt" future rental expense under certain operating agreements. The court noted that the franchise tax applies to both corporations and LLCs in Texas, even though most of the statutory provisions use only the word "corporation," because the Tax Code defines a "corporation" to include a limited liability company. The court stated that it used the term "corporation" in its discussion for convenience even though it appeared to the court that TUEC was a limited liability company. The court concluded that the future rentals in issue were not deductible "debt" for franchise tax purposes. (It is clear that LLCs in Texas are subject to the Texas franchise tax, and the court's analysis of the particular provision of the Tax Code in issue was not uniquely affected by TUEC's status as an LLC. The court merely interpreted franchise tax provisions of the Texas Tax Code applicable to LLCs as well as corporations.)

## 12. Real Estate Transfer Tax (and Other Consequences of Transfer)

*In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, L.L.C.*, 161 P.3d 303 (Okla. 2007) (holding transfer of real estate from individuals' trust to individuals' LLC was not transfer or conveyance excepted from constitutional limit on increase of assessed value for ad valorem tax purposes).

*Montgomery County v. Wildwood Medical Center, L.L.C.*, \_\_\_ A.2d \_\_\_, 2007 WL 686966 (Md. App. 2007) (holding that conveyance of real estate from individuals doing business as general partnership to LLC did not qualify for exemption from recordation and transfer tax applicable to transfer of title from predecessor entity to LLC because title was never transferred from individuals to partnership and title thus was transferred to LLC from individuals rather than from predecessor entity).

***In the Matter of the Assessments for the Year 2003 of Certain Properties Owned by Affordable Residential Communities 7, L.L.C.***, 150 P.3d 399 (Okla. Civ. App. 2006) (holding transfer of property from LLC subsidiaries to other LLC subsidiaries owned and controlled by common parent LLC fell within transfer exemption that resulted in application of 5% cap on valuation increase in any taxable year)

***Wallasey Tenants Association, Inc. v. Varner***, 892 A.2d 1135 (D.C. App. 2006) (holding individual's transfer of property to wholly owned LLC was not sale under Tenant Opportunity to Purchase Act).

***Signature Villas, L.L.C. v. City of Ann Arbor***, 714 N.W.2d 392 (Mich. App. 2006) (holding transfer of ownership of real property took place for purposes of reassessment provisions of General Property Tax Act upon sale of all membership interests in LLC that owned real property).

***Acadia Brandywine Town Center, LLC v. New Castle County***, 879 A.2d 923 (Del. 2005). An LLC that survived a reverse triangular merger in which it received real property sought a declaratory judgment that the merger was not a conveyance of the real property subject to the Delaware realty transfer tax. The Delaware Supreme Court held that the merger came within the merger exemption to the realty transfer tax. The court concluded that legislation in 1986 was not intended to eliminate the merger exemption that had been recognized by regulations since 1984 and held that reverse mergers involving real estate continue to be exempt from the realty transfer tax.

***F.M. Management Company Limited Partnership v. Wisconsin Dept. of Revenue***, No. 03-1536, 2003 WL 22998104 (Wis.App. Dec. 23, 2003) (holding that transfers of real estate between limited partnership and wholly owned LLC were not exempt from Wisconsin transfer tax because exemption provision in issue only applied to transfers between an LLC and a natural person member).

***Crescent Miami Center, LLC v. Dept. of Revenue***, 857 So.2d 904 (Fla.App. 2003) (holding documentary stamp tax applied to transfer of real property from limited partnership to newly formed LLC affiliate).

***Lester Associates v. Commonwealth***, 816 A.2d 394 (Pa.Cmwlth.Ct. 2003) (concluding that there was no legal transfer of title on which transfer tax could be imposed based on deeds into and out of LLC where LLC did not exist at the time of the purported conveyance to it).

***Mandell v. Gavin***, 816 A.2d 619 (Conn. 2003) (holding no transfer tax was due on contribution of property by individual member to wholly owned LLC under provision imposing tax where the consideration for the property conveyed equals or exceeds one thousand dollars, concluding that there was no consideration for the transfer of real property to the LLC because there was no bargained for exchange).

***Ferris v. Gavin***, 816 A.2d 628 (Conn. 2003) (holding that the court's decision in *Mandell v. Gavin* controlled and that no transfer tax was due on conveyance of property by individual to individual's wholly owned LLC).

***Tranfo v. Gavin***, 817 A.2d 88 (Conn. 2003) (holding that the court's decision in *Mandell v. Gavin* controlled and that no transfer tax was due on conveyance of property by individual to individual's 99% owned LLC).

***GT, Kansas, L.L.C. v. Riley County Register of Deeds***, 22 P.3d 600 (Kan. 2001) (interpreting Kansas mortgage registration statute and holding that borrowing entity's change from general partnership to LLC after the original mortgage was filed did not cause mortgagee to lose the statutory exemption from paying a mortgage registration fee on the refinanced portion of the mortgage).

***Wolter v. Wisconsin Dept. of Revenue***, 605 N.W.2d 283 (Wis. App. 1999). A family limited partnership which owned three parcels of land reorganized as an LLC, and the family members recorded in the deed records a "Memorandum of Organizational and Operating Agreement" giving notice of the reorganization. The Wisconsin Department of Revenue assessed a real estate transfer tax on the land, and the Tax Appeals Commission found that the transaction was a taxable transfer under Wisconsin law. The appeals court agreed. The court analyzed the Memorandum and concluded it was a "conveyance" by the partnership. Then the court concluded that the conveyance was "for value" even though no cash consideration was involved because the members received capital accounts in the LLC as well as new and more beneficial rights and privileges associated with the LLC form (quoting an article that points out advantages of an LLC over a limited partnership.)

### 13. Personal Property Tax

*RCN-BecoCom, LLC v. Commissioner of Revenue*, 820 N.E.2d 208 (Mass. 2005) (holding personal property tax exemption applicable to property of certain Massachusetts corporations does not apply to LLCs because plain language of statute refers only to corporations).

*Bensen Apartments, LLC v. Douglas County Assessor*, No. TC-MD 040518C, TC-MD 040519C, 2005 WL 1804412 (Or. Tax Magistrate Div. 2005). The tax assessor claimed that the individual member of numerous separate LLCs should be considered the owner and taxpayer with respect to property owned and used by the LLCs for business purposes. The member argued that the LLCs themselves were the owners and taxpayers with respect to the property. The distinction determined whether the total assessed value of the property exceeded the statutory exemption amount for ad valorem taxes. If each LLC was a separate taxpayer, the value of the property of each LLC fell below the exemption amount. The property exceeded the exemption amount if the member was deemed the taxpayer for the property owned by the LLCs. The court examined provisions of the Oregon LLC statute and concluded the LLCs were the taxpayers.

### 14. Sales Tax

*International Paper Co. v. Cohen*, 126 P.3d 222 (Colo. App. 2005) (upholding assessment of sales tax on transfer of manufacturing plant by corporation to newly formed LLC subsidiary in exchange for LLC membership interest).

### 15. Passive Activity (Material Participation) Rules

*Gregg v. United States*, 186 F.Supp.2d 1123 (D. Or. 2000). The issue in this case was the application of the material participation standard under IRC Section 469 (the passive activity loss provisions) to an LLC member. Gregg was a member of a service LLC in which capital was not a material income producing factor. The IRS audited Gregg's return and disallowed Gregg's characterization of a flow through loss from the LLC as an ordinary loss and re-characterized it as a passive activity loss. Gregg argued that he should be treated as a general partner for purposes of the tests determining "material participation" (thereby meeting the standard of material participation if he met any one of the seven tests in the temporary regulations under Section 469), but the IRS argued that Gregg (and any member of an LLC) should be treated as a limited partner (and thereby allowed to meet one of only three tests) because members of LLCs have limited liability. The court discussed the nature of LLCs, the nature of limited partnerships, and the legislative history of Section 469 and concluded that the limited partnership test in Temporary Treasury Reg. 1.469-5T(e)(3)(i)(B) is obsolete when applied to LLCs and their members. In sum, it is not applicable to all LLC members because LLCs are designed to permit active involvement by LLC members in the management of the business. The court concluded that Gregg could meet the standard for material participation under any one of the seven tests and went on to analyze the application of the tests to the specifics of the case.

### 16. Schedule C Deduction

*Corduan v. Comm'r of Internal Revenue*, T.C. Summ. Op. 2004-51, 2004 WL 944475 (U.S. Tax Ct. May 4, 2004) (disallowing taxpayer's Schedule C deduction based on claimed net loss from activity of taxpayer's LLC where taxpayer had represented to State of Wisconsin that LLC had no activity and was nonexistent).

### 17. Estate and Gift Tax

*Kimbell v. United States*, 371 F.3d 257 (5th Cir. 2004) (holding decedent did not retain sufficient control of assets transferred to LLC general partner of family limited partnership to warrant including assets in her estate under Section 2036(a) where her LLC interest was only 50% and her son had the sole management power).

*Hackl v. Commissioner of Internal Revenue*, 335 F.3d 664 (7th Cir. 2003) (affirming tax court decision (summarized below) that gifts of interests in LLC did not qualify as present interests for purposes of annual gift tax exclusion even though the donees gave up all their legal rights in the transferred interests because the interests did not confer upon the donees a substantial present economic benefit).



***Hackl v. Commissioner of Internal Revenue***, 118 T.C. No. 14, 2002 WL 467117 (U.S. Tax Ct. 2002). The Tax Court held that gifts of interests in a family LLC were not present interests that would entitle the taxpayers to the gift tax annual exclusion. The taxpayers made gifts to their children and grandchildren of membership units in an LLC organized to hold and operate tree farming properties. Under the terms of the operating agreement, members could not withdraw from the LLC without the prior consent of the manager. If a member desired to withdraw, the member could offer to sell the member's interest to the LLC, but the manager had exclusive authority to accept or reject the offer. A member was not permitted to transfer or in any way alienate the member's interest except with the prior written consent of the manager, which could be withheld in the manager's sole discretion. If a transfer was made with consent, the transferee would be admitted as a substitute member; if a transfer was made in violation of the operating agreement, the transferee was not entitled to become a member, but only had the right to receive profits and distributions to which the transferor would have been entitled. The court rejected the taxpayers' contention that when a gift takes the form of an outright transfer of an equity interest in a business or property, no further analysis is needed. The court stated that a taxpayer claiming an annual exclusion must establish that the transfer conferred on the donee an unrestricted and noncontingent right to immediate use, possession, or enjoyment of property or of income from the property, both of which demand that such immediate use, possession, or enjoyment be of a nature that substantial economic benefit is derived therefrom. The court found that the terms of the operating agreement foreclosed the ability of the donees presently to access any substantial economic or financial benefit. The court then concluded that the gifts did not afford the donees to the right to use, possession, or enjoyment of income because the parties stipulated that the LLC was to acquire and manage timberland for long-term income and appreciation, not to produce immediate income, and that it was anticipated the LLC would operate at a loss for number of years. The court said that even if the taxpayers had shown the LLC would generate income at or near the time of the gifts, they failed to show any ascertainable portion would flow out to the donees because distributions were in the sole discretion of the manager under the operating agreement.

#### **18. Withholding and Employment Tax Liability**

***McNamee v. Dept. of Treasury***, 488 F.3d 100 (2<sup>nd</sup> Cir. 2007). The Second Circuit joined the Sixth Circuit in upholding the validity of the check-the-box regulations and affirming the ability of the IRS to hold a single member of a disregarded LLC personally liable for unpaid employment taxes. McNamee was the owner of a single member LLC that had not elected to be treated as a corporation under the check-the-box regulations. The LLC failed to pay any required payroll taxes (i.e., unemployment, social security and Medicare as well as withheld employee income taxes and employee FICA contributions) for a year and a half. The IRS assessed the taxes against McNamee personally and placed a lien on his property. McNamee argued that the IRS did not have authority to pierce the veil of an LLC and that the check-the-box regulations conflicted with the Internal Revenue Code. The court of appeals held that the check-the-box regulations are eminently reasonable in light of the emergence of LLCs and the ambiguous statutory treatment under the Internal Revenue Code. The court also rejected McNamee's argument that proposed changes to the regulations, under which a disregarded LLC's owner would not be liable for payroll taxes, indicate that the current regulations are wrong. The court held that the proposed changes provide no basis for finding the existing regulations unreasonable. Finally, the court rejected McNamee's argument that the IRS's attempt to collect the LLC's unpaid payroll taxes from him violates state law. The court concluded that single member LLCs are entitled to whatever advantages state law provides, but state law cannot abrogate the owner's federal tax liability.

***Litriello v. United States***, 484 F.3d 372 (6<sup>th</sup> Cir. 2007). The plaintiff, the sole member of several disregarded LLCs, was deemed to be the sole proprietor of the businesses under Internal Revenue Code Section 7701, and the IRS sought to levy on the plaintiff's property in connection with unpaid employment taxes arising from the LLCs' operations. The plaintiff challenged the check-the-box regulations on several grounds. The court rejected the plaintiffs' challenges, holding that the check-the-box regulations are a reasonable interpretation of ambiguous provisions of Section 7701 and a valid exercise of agency authority by the Treasury. The court also concluded that the plaintiff's failure to make an election under the check-the-box regulations dictated that the LLCs be treated as disregarded entities under the regulations and prevented them from being treated as corporations; therefore, the plaintiff was deemed to be the sole proprietor of the businesses under Section 7701 and had personal liability for the employment taxes arising from the businesses. Finally, the court rejected the plaintiff's claim that the regulations impermissibly altered the legal status of the LLCs as separate entities under state law. While the plaintiff's LLCs were entitled to whatever advantages state law provided, the court concluded that state law could not abrogate his tax liability. The court noted that, after the plaintiff filed his notice of appeal in this case, the IRS proposed amendments to its entity classification regulations that would shield individuals in the plaintiff's circumstances from personal liability, but the court rejected the argument that the proposed regulations should be deemed to reflect the Treasury's current policy and applied to the plaintiff's case. The

court concluded that the proposed regulations did not in any way undermine the determination that the current regulations are reasonable and valid.

***Kandi v. United States***, No. C05-0840C, 2006 WL 83463 (W.D. Wash. Jan. 11, 2006). A single member LLC incurred employment taxes, and the IRS sought to collect payment of the taxes from the sole member of the LLC. The IRS argued that the member was the employer for employment tax purposes because the LLC was a disregarded entity under the check-the-box regulations. After the parties had submitted their original motions and cross motions for summary judgment, the IRS issued proposed regulations reversing its position that an owner of a single member LLC is personally liable for the LLC's employment tax liability. The IRS proposal specifically provided that the change would not take effect until the regulations became final, but the petitioner argued that not applying the regulation retroactively would be an abuse of discretion. The court found that the refusal to apply the regulations retroactively was not an abuse of discretion and that the current regulations rather than the proposed regulations governed the petitioner's case. The court agreed with the IRS's position that disregarding the separate existence of a single member LLC for "federal tax purposes" includes employment tax purposes and makes the employment taxes a member liability that is properly assessable against the member. The court found no textual support for the petitioner's argument that the check-the-box regulations affect only the assessment of income taxes. The court also rejected the argument that the IRS's interpretation strips the sole member of an LLC of the limited liability provided under state law. The court concluded that the employment tax liability in the case of a disregarded LLC is the member's liability *ab initio* and is never attributable to the LLC. The court noted that the sole member has an election regarding its treatment and that any personal tax liabilities resulting from the failure to elect corporate treatment are attributable to the member's choice rather than any attempt by the IRS to pierce the LLC veil.

## 19. Secured Transactions

***In re Coldwave Systems, LLC (Braunstein v. Gateway Management Services Limited)***, \_\_ B.R. \_\_, 2007 WL 1417631 (Bankr. D. Mass. 2007) (noting that Massachusetts LLC was "registered organization" within meaning of California UCC and that Massachusetts was thus correct location for filing of financing statement on LLC's patent).

***In re Dreiling***, No. 05-64189, 2007 WL 172364 (Bankr. W.D. Mo. Jan. 18, 2007). The court analyzed the creation and perfection of a security interest in the debtors' one-third LLC interest and concluded that the security interest was not properly perfected and was thus unenforceable against the trustee. The creditor asserted a secured claim based on an assignment that provided that the debtors "hereby assign to the [creditor] a security interest in their ownership shares of [the LLC]." The assignment further provided that the debtors acknowledged and understood that the assignment gave the creditor a sufficient security interest in the ownership of the LLC to allow the creditor to receive payment in a specified amount plus interest from the proceeds of any sale of the debtors' share of the LLC or the sale of the debtors' share of the assets of the LLC. The court analyzed the rights of the trustee as a lien creditor under Kansas law since the LLC was a Kansas LLC. The creditor asserted that the debtors assigned a portion of their ownership interest in the LLC and that such assignment was valid under the Kansas LLC statute because the statute provides that an LLC interest is assignable in whole or in part except as provided in the operating agreement. The court concluded, however, that the assignment did not purport to assign the debtors' ownership interest, but rather a security interest in the one-third ownership interest. The court reviewed the treatment of an LLC interest under the Kansas UCC and concluded that the LLC interest was not a security governed by Article 8 but rather a general intangible governed by Article 9. Assuming without deciding that the creditor had a valid security interest that attached to the debtors' interest when the assignment was executed, the court concluded that the lien was not properly perfected because the creditor did not file a financing statement. Since the lien was not properly perfected, the trustee took the LLC interest free of the lien and could liquidate it for the benefit of all unsecured creditors.

***Bryan Brothers Cattle Co. v. Glenbrook Cattle Company, LLC***, No. 2:4CV139SAA, 2:4CV145SAA, 2006 WL 1233069 (N.D. Miss. May 1, 2006) (financing statement was not effective as to cattle owned by LLC where financing statement did not name LLC but only two individuals who were members, one of whom was also its registered agent).

***In re Lea Lumber & Plywood LLC***, 266 B.R. 342 (Bankr. E.D. N.C. 2001). The court concluded that several flaws in the signature of a debtor LLC on a UCC-1 financing statement did not render the financing statement ineffective. The financing statement had been signed by a corporate officer of the corporation that was the manager of the LLC. The officer's corporate title was missing, but the court indicated that would be a "hyper-technical" ground on which to void

the financing statement. The court characterized the failure to indicate the name of the corporation that was the manager of the LLC as a “more serious error” but concluded that a number of factors mitigated the error, including the fact that the debtor’s signature would not even be required under Revised Article 9.

*Greenville Riverboat, LLC v. Less, Getz & Lipman, P.L.L.C.*, 131 F. Supp.2d 842 (S.D. Miss. 2000). An LLC brought an interpleader action, depositing with the court sums owed by the LLC to a member of the LLC under the LLC agreement. Greenville Marine Corporation asserted a prior right to part of the funds based upon its perfected security interest in the member’s right to receive payments from the LLC. Another claimant challenged the enforceability of the security interest on the basis that the description of the collateral was insufficient. The court upheld the sufficiency of the assignment of “payments due under that certain agreement existing between Rainbow Entertainment, Inc. and Greenville Riverboat, LLC, a Mississippi Limited Liability Company, as evidenced by that certain Escrow and Assignment Agreement between Rainbow Entertainment, Inc. and Greenville Marine Corporation, the terms and provisions of which are incorporated herein by reference.” The court said this was sufficient to identify the collateral as the member’s right to receive payments from the LLC. The court went on to explain that the escrow agreement referenced in the description specifically stated that the promissory note was “secured by the unconditional assignment by Rainbow to Greenville Marine of the first sums due by Greenville Riverboat, LLC, to Rainbow.”

## **20. Bid Submission Process**

*Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 896 So.2d 251 (La. App. 2005) (rejecting argument that LLC’s bid was defective for various reasons, including failure to include periods in the abbreviation L.L.C. in reference used to identify bidder).

*General Electric Company v. County of Cook*, No. 00 C 6587, 2001 WL 417321 (N.D. Ill. March 5, 2001). The court found that a Delaware LLC falsely represented itself as a joint venture in a bid proposal submitted in connection with construction of a county hospital. The ordinances and the instructions to bidders apparently addressed partnerships and/or joint ventures and corporations but not LLCs. The LLC identified itself as a joint venture and submitted the execution form for a joint venture. The court found that the LLC was not a joint venture for purposes of meeting certain requirements regarding participation in minority and women’s business enterprises and failed to meet certain other requirements. The court stated that the LLC, as a corporate entity, failed to comply with the requirements for corporate bidders. The court found that the LLC encouraged the county to believe that one of the LLC members would be personally responsible as a member of a joint venture when in fact the member would have no liability for the LLC’s obligations.

*Frontier Traylor Shea, LLC v. Metropolitan Airports Commission*, 132 F. Supp.2d 1193 (D. Minn. 2000). Three members of an LLC submitted a statement during the pre-qualification process associated with bidding on an airport construction project. In the statement, the members identified their entity as “Frontier/Traylor/Shea joint venture” and identified it as a “joint-and-several joint partnership.” Subsequently, the LLC submitted the lowest bid, but the airport commission rejected the bid on the basis that the entity was not pre-qualified since it was an LLC rather than a joint venture partnership, the status indicated by the Frontier entity that was pre-qualified. The LLC sought injunctive relief and argued that it was a joint venture, citing a treatise and some cases referring to an LLC as a joint venture. The airport argued that a joint venture is a form of partnership and cannot take the form of an LLC. The court concluded that the airport commission’s decision was not illegal, arbitrary, capricious, or unreasonable “[g]iven the lack of clarity in the status of when a limited liability corporation [sic] is legally a joint venture and the conflicting documents presented” to the airport commission.

## **21. Workers’ Compensation; Employment Statutes**

*Jessie v. Dermitt*, No. 2005-CI-001961-MR, 2006 WL 3524524 (Ky. App. Dec. 8, 2006) (holding that LLC managers would fall within exclusivity provisions of workers’ compensation statute that protects employer’s “employee, officers or directors” along with employer, but finding defendants were not sued for their actions as managers but for their actions as landlords of building where business was operated).

*Pepler v. Coyne*, 822 N.Y.S.2d 516 (N.Y. A.D. 1 Dept. 2006) (discussing personal liability of LLC co-founder and managing member under state employment discrimination law based on status as “employer”).

**Harper v. Coates-Clark Orthopedic Surgery & Sports Medicine Center, LLC**, Case No. 3:05-cv-166-J-MCR, 2006 WL 2523135 (M.D. Fla. Aug. 30, 2006) (concluding allegations that defendant owner/officer of LLC acted directly or indirectly in interest of LLC employer and was substantially in control of terms and conditions of plaintiff's work stated claim against individual as "employer" under Fair Labor Standards Act).

**Hamby v. Profile Products, L.L.C.**, 632 S.E.2d 804 (N.C. App. 2006). An employee of an LLC brought a personal injury action based on injuries sustained in a workplace accident. The employee sued the LLC employer, a co-employee, and another LLC that was the sole member-manager of the LLC employer. The trial court granted summary judgment in favor of the LLC employer and the co-employee but denied summary judgment as to the member-manager. The member-manager sought an interlocutory appeal on several grounds. In the course of addressing the arguments, the court of appeals concluded that the plaintiff was pursuing an ordinary negligence claim against the member-manager and that the member-manager was not protected by the exclusivity provision of the North Carolina Worker's Compensation Act. A dissenting judge cited case law holding that the protection of the exclusivity provisions of the Worker's Compensation Act extends to officers, managers, and directors of a corporate employer and argued this case law applied equally in the LLC context. The dissenting judge also relied upon provisions of the North Carolina LLC Act describing the agent status of a manager; however, the majority relied upon the principle that the Worker's Compensation Act exclusivity provisions do not bar recovery against a related but separate entity from the employer and concluded that the controlling statute was the provision of the LLC statute providing that members and managers may be liable by reason of their own acts or conduct.

**Dickens v. Alliance Analytical Laboratories, LLC**, 111 P.3d 889 (Wash. App. 2005) (finding LLC that was member/manager/director of another LLC was "employer" for purposes of liability under wage statute but individual sole member of LLC manager did not have liability unless LLC veil could be pierced, which involved unresolved fact issues).

**Collie Concessions, Inc. v. Bruce**, 612 S.E.2d 900 (Ga. App. 2005) (stating sole member of LLC does not own property owned by LLC and holding sole member's control of parking lot owned by LLC was insufficient to invoke "parking lot" exception to rule that worker's compensation benefits do not cover employees while traveling to and from work).

**Borkowski v. Commonwealth**, 139 S.W.3d 531 (Ky. App. 2004). The court upheld the finding of the lower court and the Kentucky Unemployment Insurance Benefits Commission denying unemployment benefits to Borkowski, a member/manager of an LLC that ceased doing business. Borkowski was one of 46 members who owned a total of 56 units in the LLC, but was apparently the largest unit holder with 11 units. Borkowski was also the manager of the LLC and was paid an annual salary of \$100,000 for management services. The court found there was substantial evidence that the LLC member/manager was not an "employee" entitled to benefits, noting that Borkowski referred to the LLC as "my company" and made all the decisions pertaining to the operations of the LLC. Borkowski did not dispute that the lower court and the Commission properly concluded an LLC member is not an "officer of a corporation" for purposes of statutory unemployment benefits.

**Smith v. State Dept. of Public Safety**, 89 P.3d 1062 (Okla. 2004) (concluding LLC member was not "self-employed" for purposes of provision of Oklahoma statute dealing with modifications of revoked driver's license).

**Ingalls v. Standard Gypsum, L.L.C.**, 70 S.W.3d 252 (Tex. App. 2001). Two corporations formed an LLC and entered a management agreement in which one of the corporations agreed to manage and operate the LLC and cause the LLC to maintain workers' compensation insurance. A worker was injured, and the worker sued the two members of the LLC alleging they were negligent in failing to provide certain safeguards. The members argued that they were "employers" protected from suit under the exclusive remedy provision of the Texas Workers' Compensation Act. The court considered cases dealing with this issue in the partnership and corporate parent-subsidary context. The court concluded that the current statutory treatment of partnerships as entities had overruled case law treating partners as employers, and analogized to the parent/subsidary context because of the liability shield provided to members of an LLC. Since the case law in the corporate parent/subsidary context has recognized the separate existence of the parent and subsidiary for purposes of the workers' compensation law, the members were not permitted to argue they were the same entity as the LLC for such purposes.

## 22. Divorce of Member(s)

*In re the Marriage of Villarreal*, No. 06-1652, 2007 WL 1486097 (Iowa App. May 23, 2007) (holding LLC with negative net worth was properly valued at zero for purposes of award on divorce because neither party had personal liability for LLC's debts).

*Moise v. Moise*, 956 So.2d 9 (La. App. 2007) (holding that LLC interest was separate property of husband who contributed separate property in exchange for 100% interest in LLC, that wife was manager, not member, of LLC despite being identified on lease as member and despite sharing in profits, and that equal share in profits did not necessarily indicate membership because profits of LLC are community property).

*Johnson v. Johnson*, Record No. 0037-06-04, 2006 WL 2805132 (Va. App. Oct. 3, 2006) (concluding that spouse's 95% interest in LLC was separate property even though LLC was formed during marriage where LLC's property consisted of warehouse transferred from LLP in which spouse had 95% interest as separate property).

*Block v. Block*, No. 26888, 2006 WL 995249 (Hawaii App. April 6, 2006) (discussing value of member's interest in LLC landscaping business and concluding lower court erred in not using capital account balance as value of interest).

*Gill v. Gill*, 895 So.2d 807 (La. App. 2005) (recognizing member/managers stand in fiduciary relationship with other members who may bring an action for breach of fiduciary duty and finding trial court's valuation of LLC in divorce proceedings was not manifestly unreasonable taking into account all interrelated claims associated with operation of LLC).

*Medvey v. Medvey*, 850 A.2d 1092 (Conn. App. 2004) (concluding income which former spouse was not directly receiving because he caused it to be paid to LLC in which he was a "partner" was still former spouse's income on which alimony payment was based).

*In re Marriage of Brumback*, 122 Wash.App. 1022, 2004 WL 1524540 (Wash. App. 2004) (holding evidence supported trial court's finding that value of spouse's interest in professional limited liability company did not include any goodwill value).

*Powell v. Powell*, 124 S.W.3d 100 (Tenn. Ct. App. 2004) (adopting standards applicable to closely held corporations for valuation of LLC for marital property purposes).

*Ricatto v. Ricatto*, 772 N.Y.S.2d 705 (N.Y.A.D. 2 Dept. Feb. 23, 2004) (upholding TRO that restrained LLC in which divorcing spouse was 50% member from disposing of real property).

*Houchens v. Boschert*, 758 N.E.2d 585 (Ind. App. 2001). The wife in a divorce action appealed the trial court's valuation of the wife's interest in an LLC. The wife complained of the trial court's failure to exclude personal goodwill, but the court of appeals faulted the wife for failing to differentiate between enterprise and personal goodwill. The wife also complained that the trial court had not properly considered the effect of transfer restrictions in the operating agreement on the value of her interest in the LLC, but the court of appeals did not find the trial court's determination to be clearly erroneous. Finally, the court upheld the equal division of the value of the wife's interest in the LLC. (While the opinion generally refers to an award of one-half of the wife's interest to the husband, it appears that the trial court actually awarded one-half of the value of the interest, rather than one-half of the interest itself, to the husband.)

*Gervais v. Gervais*, No. CV010511239, 2001 WL 1561829 (Conn. Super. Nov. 15, 2001). Husband and wife were equal members of an LLC. The wife brought suit seeking a distribution of profits, accounting, past profits, and appointment of a receiver for the LLC. The court held that these matters could be properly heard in the divorce action that was already pending between the husband and wife.

## 23. Creditor Rights

***Fidelity National Title Insurance Co. v. Gil***, 482 F.Supp.2d 274 (D. Conn. 2007) (concluding that judgment debtor's executor, judgment debtor's co-member in LLC, and LLC were not in contempt of garnishment order served on LLC with respect to distribution of proceeds of sale of LLC's property to deceased member's executor where order did not directly bind parties and order did not account for treatment of sale proceeds subsequently realized by LLC in which debtor member had interest).

***Dowling v. Chicago Options Associates, Inc.***, 847 N.E.2d 741 (Ill. App. 2006) (holding trial court erred in ordering judgment debtor to convey LLC membership interests directly to judgment creditor because, while judgment creditor did not dispute that membership interests were subject to collection efforts, statutory provision relied upon by judgment creditor required property to be delivered to sheriff for public sale).

***National Center for the Employment of the Disabled v. Ross***, No. CV 05-2014-PHX-JAT, 2006 WL 778647 (D. Ariz. March 27, 2006) (holding transfer of LLC interest was not fraudulent transfer as to judgment creditor whose judgment was invalid).

***Stornaway Properties, Inc. v. O'Brien***, 891 A.2d 123 (Conn. App. 2006) (denying request of judgment creditor of husband for constructive trust on general partner interest and managing member LLC interest of wife, rejecting judgment creditor's argument that judgment debtor and wife were unjustly enriched by interests where wife made cash contribution to entities, provided services to them, and personally guaranteed loans to them).

***Sarasota CCM, Inc. v. Golf Marketing, LLC***, 891 A.2d 72 (Conn. App. 2006) (holding that evidence entitled judgment creditor of individual judgment debtor to turnover order for funds held in bank accounts in LLC name where judgment debtor was sole signatory on accounts, accounts were opened with judgment debtor's social security number, and Connecticut Secretary of State certified that search of records did not reveal any domestic or foreign LLC under name appearing on accounts).

***Brant v. Krilich***, 835 N.E.2d 582 (Ind. App. 2005). A judgment debtor with interests in various businesses, including a number of LLCs, appealed after the judgment creditor obtained a garnishment order against bank accounts of the businesses and an order transferring the judgment debtor's ownership interests in the businesses. The court of appeals noted that the trial court assumed without evidence that the judgment debtor and the businesses were alter egos. The court held that the failure to provide the businesses notice of the proceedings and make them parties rendered the garnishment and transfer of ownership interests invalid. The court discussed the judgment debtor's argument that a charging order is the exclusive remedy with respect to a judgment debtor's interest in an LLC and concluded that a member's interest in an LLC is personal property that is subject to execution under Indiana law but stressed that the property that is subject to execution is only the economic interest and not the membership in the LLC. The court stated that the judgment creditor could not through execution receive any of the judgment debtor's rights to participate in management nor could it inspect the books and records of the LLC. The court also noted that an assignee may not become a member without consent of all other members and found no reason the courts should disregard this rule by forcing the members of an LLC to accept a judgment creditor as a member. The court characterized execution as indistinguishable from a charging order and stated that the effect of the law was that a charging order is essentially the only remedy for a judgment creditor against a member's interest in an LLC.

***Ross v. National Center for Employment of the Disabled***, 170 S.W.3d 635 (Tex.App. 2005), reversed on other grounds, 201 S.W.3d 694 (Tex. 2006). A \$10 million default judgment was taken in Texas state court against Ross, the sole member of two Arizona LLCs. The plaintiff sought a turnover order requiring Ross to turn over a \$1.2 million letter of credit owned by the LLCs. The plaintiff claimed that Ross, as owner of the LLCs, controlled the \$1.2 million letter of credit, and that the statutory criteria for a turnover order were met: (1) the property could not be readily attached or levied upon by ordinary legal process, and (2) the property was not exempt from attachment, execution, or other seizure. The LLCs were not joined as parties nor was it alleged that the LLCs were the alter ego of Ross. Ross argued that the turnover order could not issue without initiation of proceedings against the LLCs. The court of appeals reviewed the case law dealing with turnover proceedings and non-judgment debtors and found no abuse of discretion in the trial court's issuance of the turnover order for the letter of credit. Although the Texas and Arizona LLC acts contain charging order provisions, the court did not mention these provisions in the case, nor did the court discuss the difference between an LLC interest and corporate stock when relying on cases dealing with corporate stock ownership.

*PCL/Calumet v. EnterCitement, LLC*, 760 N.E.2d 633 (Ind. App. 2001). An LLC creditor who held a mechanic's lien sought to have the court apply the doctrine of equitable subordination with respect to a mortgage lien held by members of the LLC. The court held that the doctrine was not available outside of a bankruptcy proceeding. As further support for its refusal to subordinate the mortgage, the court noted that the LLC statutes permit members and managers to lend money and transact other business with the LLC.

#### 24. Fraudulent Transfer

*In re Hurley (Vickers v. Hurley)*, Bankruptcy No. 03-16467-JNF, Adversary No. 04-1438 (Bankr. D. Mass. May 15, 2007) (finding debtor's transfer of assets to 97% owned LLC was made with intent to defraud creditors and warranted denial of discharge).

*In re Silver (Lincoln National Life Insurance Co. v. Silver)*, \_\_ B.R. \_\_, 2007 WL 1153901 (Bankr. D. N.M. 2007) (revoking discharge of debtor based on debtor's failure to turn over art and furnishings fraudulently transferred to LLC and ultimately returned to debtor).

*In re Herrman (Compton v. Herrman)*, 355 B.R. 287 (Bankr. D. Kan. 2006) (denying creditor's motion for summary judgment because creditor failed to establish as matter of law that transfer of debtor's home to debtor's wholly owned LLC was made with requisite intent for fraudulent transfer, noting that transfer of home to wholly owned LLC could not have affected debtor's net worth and did not change house from non-exempt to exempt property).

*In re Die Fliedermas, LLC (O'Connell v. Shallo)*, 323 B.R. 101 (Bankr. S.D. N.Y. 2005). The court interpreted the New York LLC statute's provision regarding return of improper distributions and concluded that the three year limitations period applies to other actions under state law to force return of a distribution, such as a fraudulent transfer action. The court based its conclusion on the language of Section 508(b), a savings clause which states that the LLC statute does not affect any obligation of a member for the amount of a distribution under the operating agreement or "other applicable law." Because this savings clause is prefaced by the language "[s]ubject to subdivision (c) of this section" (the three year limitations period), the court concluded the look-back period under "other applicable law" was limited to three years as well. The court rejected the argument that New York LLC law elevates a member entitled to a distribution to the status of a creditor taking for value.

*In re OODC, LLC (Rosener v. Majestic Management, Inc.)*, 321 B.R. 128 (Bankr. D. Del. 2005) (holding Chapter 11 trustee's allegations were sufficient to pursue "collapsing" theory under which trustee argued separate steps (lending by banks to purchaser, asset purchases, and subsequent transfers of funds to selling company owners and affiliates) in LBO involving LLC purchaser and corporate and LLC sellers should be treated as one integrated transaction, and trustee's allegations supported actual and constructive fraudulent transfer claims).

*In re McCook Metals, L.L.C. (Baldi v. Lynch)*, 319 B.R. 570 (Bankr. N.D. Ill. 2005). The court concluded that the debtor LLC's transfer of its right to acquire a smelting plant to a related LLC was a fraudulent transfer. The court found actual intent to hinder or defraud creditors based on various "badges of fraud," and the court also found the transfer was constructively fraudulent because the transfer was not made for reasonably equivalent value. The court concluded that Lynch, a manager and the chairman and chief operating officer of the debtor LLC, was a person for whose benefit the transfer was made, and the trustee could thus recover the value of the property from Lynch pursuant to Section 550(a)(1) of the Bankruptcy Code. The trustee established that Lynch was a person for whose benefit the transfer was made based on Lynch's 56% ownership and control of the LLC to which the transfer was made.

*Word v. Stidham*, 609 S.E.2d 651 (Ga. App. 2004) (holding material issues of fact existed as to whether conveyance of debtor's one-half interest in his residence to a newly formed LLC was done with intent to hinder, delay, or defraud creditors, and as to whether his LLC interest was reasonably equivalent in value to the transferred interest in realty).

*Business Loan Express, LLC v. Pak*, No. JFM-04-634, 2004 WL 1554395 (D. Md. July 9, 2004). While a confessed judgment was pending against them, Mr. and Mrs. Pak transferred two properties to a newly formed LLC with the assistance of their attorney daughter. The daughter controlled the LLC, and it subsequently sold one of the properties and wired the proceeds to Korea in payment of an alleged obligation owed by Mrs. Pak to her brother. There was no evidence the LLC owed anything to Mrs. Pak's brother. The court characterized the transactions as fraudulent

conveyances and set aside the conveyance of the property still owned by the LLC. Because the daughter was a member of a conspiracy to defraud the plaintiff, the plaintiff was awarded a monetary damage award against the daughter in the amount of the sale proceeds transferred to Mrs. Pak's brother in Korea.

***Intuition Consolidated Group, Inc. v. Dick Davis Publishing Company***, No. 03 Civ.5063 PKC, 2004 WL 594651 (S.D. N.Y. March 25, 2004) (finding pleadings alleged fraudulent conveyance to LLC where plaintiff alleged that shortly after executing lease corporation transferred all of the assets necessary to carry on its business to an LLC that operated under the same name).

***Metro Communication Corp., BVI v. Advanced Mobilecomm Technologies, Inc.***, 854 A.2d 121 (Del.Ch. 2004) (dismissing plaintiff's fraudulent transfer claim because pleadings failed to allege facts suggesting the reorganization and distribution in issue involved any actual intent to hinder, delay, or defraud plaintiff).

***J.K. Scanlan Company, Inc. v. Construction Group, Inc.***, 835 A.2d 79 (Conn.App. 2003) (affirming lower court's pre-judgment remedy against LLC successors to corporate defendant based upon transfer of corporate assets to LLCs for alleged purpose of hindering collection of potential judgment against corporate defendant).

***In re Imageset, Inc. (Turner v. Phoenix Financial, LLC)***, 299 B.R. 709 (Bankr. D. Me. 2003) (holding that fact issues precluded summary judgment on issue of whether LLC formed by debtor/transferor's insiders exercised sufficient control over debtor to be regarded as insider under Maine's insider preference statute).

***Mountview Plaza Assoc., Inc. v. World Wide Pet Supply, Inc.***, 820 A.2d 1105 (Conn.App. 2003) (holding that the plaintiff alleged sufficient material facts to support a default judgment against an LLC on the basis that the transfer of a corporation's assets to the LLC without consideration was a fraudulent transfer made with the intent to avoid the corporation's debt to the plaintiff).

***In re IDS Holding Co., LLC (IDS Holding Co., LLC v. Madsen)***, 292 B.R.233 (Bankr. D. Conn. 2003). A bankrupt LLC, in its capacity as debtor-in-possession, sought to recover a distribution made to its dominant member (Madsen) in connection with the sale of substantially all of the LLC's assets. The LLC was insolvent at the time of the sale, and all of the proceeds of the sale (consisting of shares of stock in the purchaser) were distributed to the members in accordance with their interests. The LLC's members had an agreement about the distribution of the proceeds of the sale whereby the members pledged some of the shares they received for the benefit of certain LLC creditors and Madsen agreed to dismiss a pending lawsuit against one of the LLC's suppliers and another member. The LLC claimed that the distribution violated the Connecticut LLC act, was a fraudulent transfer under the Bankruptcy Code and the Connecticut Uniform Fraudulent Transfer Act, was a voidable preference under the Bankruptcy Code, and was a breach of Madsen's fiduciary duty as a member of the LLC to its creditors. Madsen argued the transfer was supported by consideration and that he was entitled to summary judgment. The LLC argued that Madsen's receipt of the shares violated the provisions of the Connecticut LLC act regarding the distribution of assets on a winding up. However, the court found this provision inapplicable because the LLC had not dissolved and was not in the process of winding up. The LLC conceded that the Connecticut LLC act does not prohibit an insolvent LLC from distributing its assets to its members, but the LLC argued that the court was permitted to apply corporate law restrictions under the provision of the LLC act that provides the principles of law and equity supplement the act. The court concluded that it need not address this argument because the LLC conceded that it had never actually dissolved. Thus, the court granted Madsen summary judgment on the claim that the distribution violated the Connecticut LLC statutes. The court found that there were fact issues regarding whether the distributions were made with intent to hinder or delay LLC creditors and whether Madsen gave reasonably equivalent value. Madsen argued that the distribution could not be a voidable preference because he was only an equity owner and not a creditor or claim holder. The court concluded that Madsen was a creditor by virtue of the distribution agreement and the Connecticut LLC act, which states that a member has the status of a creditor at the time a member becomes entitled to a distribution. Finally, the court applied case law from the corporate context to conclude that Madsen owed a fiduciary duty to LLC creditors when the LLC became insolvent.

***In re Brentwood Lexford Partners, L.L.C.***, 292 B.R. 255 (Bankr. N.D. Tex. 2003). The Chapter 7 trustee brought an adversary proceeding to set aside alleged fraudulent transfers. The court held that certain excess cash flow distributions to the members of an LLC engaged in the property management business were fraudulent transfers because they were made with the intent to hinder and delay collection of a note owed by the LLC. The court reached this conclusion based on evidence that the LLC's officers knew that a note payment was due shortly after the distributions,



knew that the LLC would have insufficient cash to make the note payment, and viewed its business as worth less than the debt on the note. Furthermore, the LLC's officers and board did not tell the noteholder about the distributions, had not yet provided financial information from the prior year to the noteholder, and did not tell the noteholder that it would not make the next note payment. LLC officers testified that they intended to force the noteholder to renegotiate the note and they believed the distributions and failure to make the note payment would give the LLC leverage in the negotiations. The court found intent to hinder or delay could be inferred from this evidence. The court rejected the argument that the distributions were in the nature of compensation for services of the members. The court noted that there were no employment contracts providing that excess cash flow distributions would be part of their salary or bonus, no funds withheld from the distributions for income tax purposes, and no board resolutions treating the excess cash flow as salary or bonus. The noteholder did not consider excess cash flow distributions as compensation, but rather considered the distributions to be dividends or payments on account of the equity interests of the members. The court thus concluded that the LLC did not receive reasonably equivalent value for the distributions. The court analyzed whether the LLC was insolvent within the meaning of the Texas fraudulent transfer provisions and concluded that the LLC was insolvent. The court concluded that certain payments for legal and accounting services did not constitute fraudulent transfers, nor did the cancellation of certain contracts with the LLC and the formation of another entity that took over some of the contracts constitute fraudulent transfers. (This case is further summarized above under the headings "Fiduciary Duties of Members and Managers" and "Improper Distributions.")

***Venables v. Smith***, No. Civ. A. 02C-09-126JOH, 2003 WL 1903779 (Del. Super. March 14, 2003). The plaintiff sued an attorney who failed to record a deed transferring certain property to an LLC. The plaintiff and her sisters had retained the attorney to form an LLC for the purpose of holding real estate held by the sisters as general partners. The attorney formed the LLC but failed to prepare a deed transferring the properties to the newly formed LLC. The plaintiff filed bankruptcy and paid a cash settlement to her largest creditor after the creditor threatened to partition the partnership property. The attorney defended on the basis that the transfer to the LLC would have been voidable as a fraudulent transfer in any event. The court denied the attorney's motion for summary judgment, finding that the attorney had failed to establish as a matter of law that the transfer of the property would have been a fraudulent transfer. The court found that there were fact issues involving the plaintiff's intent and solvency at the time the transfer was to have been made. With respect to the issue of reasonably equivalent value, the court rejected the argument that the more limited rights of LLC creditors diminished the value of the LLC membership the plaintiff was to receive in exchange for the transfer. The court stated that "[t]he fact that the transfer of the property would make it more difficult for creditors to reach does not lessen the value of the LLC interest." (The court and the parties apparently assumed that the partner's creditor could directly pursue the real estate held by the general partnership.)

***Lenge v. Beizer***, No. CV000802145, 2002 WL 31967553 (Conn. Super. Dec. 30, 2002) (concluding that attorney solo practitioner's transfer of his building and law practice to LLCs during pendency of litigation against attorney was fraudulent transfer made with intent to defraud plaintiff under Uniform Fraudulent Conveyance Act and common law of fraudulent conveyance).

***National Loan Investors, L.P. v. World Properties, LLC***, No. X03CV980491738S, 2002 WL 1815906 (Conn. Super. June 27, 2002) (concluding transfer by partnership to LLC was fraudulent transfer to "insider" even though individual who was majority partner of the partnership owned only 1% of the LLC inasmuch as individual's wife and children owned remaining interests in the LLC and individual exercised control over their interests and the entity).

***LFG, LLC v. Navarre***, No. 01C9451, 2002 WL 1379112 (N.D. Ill. June 26, 2002) (finding allegations pertaining to LLC's fraudulent transfer claim against LLC lender satisfied particularity requirement and that pleadings also stated claims for conversion and unjust enrichment).

***Mullen and Mahon, Inc. v. Mobilmed Support Services LLC***, 773 A.2d 952 (Conn. App. 2001) (concluding transfer by corporation to LLC was transfer to "insider" for antecedent debt).

***Litchfield Asset Management Corporation v. Howell***, 799 A.2d 298 (Conn. App. 2002) (stating that judgment for damages against spouse of LLC member who allegedly conspired to fraudulently transfer assets to LLC was improper because spouse was not transferee and judgment against non-transferee was not authorized under fraudulent transfer statute).

***RT Gilbane Corp. v. Neighborhood House, LLC***, No. 00-1973, 2002 WL774992 (Mass. Super. Feb. 15, 2002). Three brothers formed an LLC for the purpose of acquiring and developing real estate for use by non-profit entities at below market rents. The brothers intended to and did obtain tax benefits by means of deductions for charitable contributions but did not otherwise intend to profit from the endeavor. Ultimately, the LLC ended its operations by transferring its property to a non-profit organization for substantially less than the appraised value of the property. The only significant debt at the time of the transfer consisted of unpaid and disputed invoices of the project manager for the LLC. The court rejected the arguments of the project manager that the transfer was a fraudulent transfer. The court found no indication of an actual intent to hinder, delay, or defraud the creditor. The plaintiff also claimed the transfer was actionable because the LLC did not receive reasonably equivalent value and was insolvent at the time or as a result of the transfer. The court rejected this claim, as well, concluding that a debtor is not obligated to reserve funds sufficient to defend litigation arising from a disputed claim as well as to pay the claim.

***Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC***, 37 P.3d 485 (Colo. App. 2001). A judgment creditor garnished the bank account of an LLC after obtaining a judgment against two corporations affiliated with the LLC. The court upheld the garnishment on the basis that the LLC was the alter ego of one of the judgment debtor corporations and that fraudulent transfers to the LLC had occurred. The LLC was formed after the creditor initiated its lawsuit against the corporations. The LLC was funded by all of the assets of one of the corporations, which became the sole member of the LLC, and the revenues from the business that had been operated by the corporation thereafter went to the LLC. Additionally, the individual who managed these various related entities and owned the ultimate parent of the LLC filed a UCC-1 financing statement to perfect an earlier security interest in the assets. The court found that the LLC and related corporations were alter egos of one another, that fraudulent conveyances had occurred, and that the judgment debtors and related parties had acted in concert to insulate assets from the judgment. The court found that both the transfer of assets to the LLC and the filing of the UCC-1 constituted fraudulent transfers made with actual intent to hinder, delay, or defraud a creditor. The court of appeals stated that the trial court had ample record support for its finding that a “pea in a shell game” had been taking place. The court rejected the argument that the transfers were not fraudulent in the absence of a finding by the trial court that the transfers were made without receipt of reasonably equivalent value. The court stated that such a finding was unnecessary since the trial court found actual intent to defraud.

## **25. Franchise Laws**

***R.N.R. Oils, Inc. v. BP West Coast Products, LLC***, Nos. B182808, B182977, B190002, 2006 WL 1917811 (Cal. App. 2 Dist. July 13, 2006) (addressing separate nature of LLC but distinguishing case law holding LLC is “another person” for purposes of statutory right of first refusal provision in favor of franchisee when franchisor transfers leased premises to “another person,” and holding that commonly owned and controlled LLC affiliate was not “another person” within meaning of statute).

***Abraham & Sons Enterprises v. Equilon Enterprises, LLC***, 292 F.3d 958 (9<sup>th</sup> Cir. 2002). Franchisees of Shell and Texaco alleged a violation of California franchise law when Shell and Texaco transferred title, possession, and control of leased gas stations to an LLC jointly owned by Shell and Texaco. The California provision in issue stated that a franchisor who leases premises to a franchisee may not sell, transfer, or assign to another person the franchisor’s interest in the premises unless the franchisor first offers the property to the franchisee. The court recognized the LLC as “another person,” rejecting the argument of Shell and Texaco that the LLC should not be treated as a separate and distinct entity. The court also determined that contribution of the properties to the LLC was a “transfer” under the statute.

## **26. Statute of Frauds**

***Estate of E.A. Collins v. Geist***, 153 P.3d 1167 (Idaho 2007). The court rejected the argument that a manager’s authority to convey real estate on behalf of an LLC must be in writing under the provisions of an Idaho statute that requires conveyance of an estate in real property to be made by a written instrument that is signed by the conveyor or the conveyor’s agent authorized in writing. The court relied upon provisions of the Idaho LLC statute conferring apparent authority on a manager when apparently carrying on the business of the LLC in the usual way and providing that title to LLC property may be transferred by an instrument of transfer executed by a manager in the name of the LLC. The court noted that an LLC may only act through its agents and concluded that the specific provisions of the LLC statute control over the more general statute requiring an agent’s authority to be in writing when a conveyance of real property is involved.

**Fausak's Tire Center, Inc. v. Blanchard**, \_\_\_ So.2d \_\_\_, 2006 WL 3526744 (Ala. Civ. App. 2006) (holding that oral buy-sell agreement regarding LLC interest was not unenforceable under statute of frauds even though LLC's sole asset was real property because LLC interest is personal property).

**All Star Land Title Agency, Inc. v. Surewin Investment, Inc.**, No. 87569, 2006 WL 3095701 (Ohio App. Nov. 2, 2006). Two corporations, All Star and Surewin, formed an Ohio LLC to operate a title agency. After Surewin's owner formed a title agency with another person and requested winding up of the LLC, All Star sued Surewin alleging breach of contract and breach of fiduciary duty. All Star argued that Surewin breached an oral agreement that it would refer customers of its real estate business to the LLC, but the court found that the oral agreement was unenforceable based on the statute of frauds. The court stated that the agreement could not be performed within one year because the LLC's term was thirty years. The court rejected All Star's argument that the doctrine of part performance removed the agreement from the statute of frauds, citing the Ohio Supreme Court's holding that the doctrine of part performance applies in the sale or leasing of real estate, not to contracts of personal services.

**DeShazo v. Estate of Clayton**, No. CV 05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (stating oral promise by member to contribute real estate would be unenforceable under Idaho statute of frauds).

**Minca v. Kathryn Arnett Studio, LLC**, 931 So.2d 1126 (La. App. 2006) (holding parol evidence was admissible to establish member's guaranty of LLC's debt on basis that promise was not primarily to answer for debt of another, but impelled by pecuniary or business motivation on part of promisor such that promise was new and independent obligation).

**Botkin v. Security State Bank**, 130 P.3d 92 (Kan. 2006) (concluding member guaranties of LLC indebtedness, which provided that each member's liability was limited to "proportional ownership share," while ambiguous, stated essential terms with reasonable certainty as required by statute of frauds).

**Thorpe v. Levenfeld**, No. 04 C 3040, 2005 WL 2420373 (N.D. Ill. Sept. 29, 2005) (concluding it was unclear whether statute of frauds barred claim based on oral promise of 25% interest in law firm LLC because it was unclear whether promise involved sale of stock or securities or contract for services).

**Matthews v. Matthews**, No. M2003-01159-COA-R3-CV, 2005 WL 819728 (Tenn. App. April 7, 2005). In the course of a judicial dissolution proceeding, a dispute arose as to whether the LLC had assumed liability on a note executed by its two members. The court stated that the statute of frauds defense was waived because the member asserting it did not plead it. The court went on to state that the defense was not applicable in any event because the case at bar was an action to dissolve the LLC. The court stated the statute of frauds applies when one party is seeking to hold another party liable for the debt of another, and the parties were seeking a declaratory judgment as to whether the note was a liability of the LLC. The court held that the evidence supported the trial court's finding that the LLC assumed liability on the note even though there was no written assumption because the evidence showed that the LLC made all required monthly payments after its formation, listed the note as a liability on its business and financial records, and deducted the interest payments.

**Stoker v. Bellemeade, LLC**, 615 S.E.2d 1 (Ga. App. 2005) (rejecting, on basis of statute of frauds, LLC member's claim that other member's purchase and development of properties violated oral agreement to purchase and develop such properties jointly, finding written operating agreement pursuant to which members jointly acquired some properties did not show part performance consistent with presence of alleged contract and inconsistent with lack of contract).

**Sliman's Printing, Inc. v. Velo International**, No. 2004CA00095, 2005 WL 100963 (Ohio App. Jan. 18, 2005) (holding president of LLC who assured plaintiff it would receive full payment of amount owed by LLC to plaintiff was not liable under agency or veil piercing theories because there was no evidence president guaranteed LLC debt in writing as required by statute of frauds).

**Rogers v. Brooks**, No. 04-30141, 2004 WL 2977452 (5th Cir. Dec. 22, 2004) (applying Louisiana law and recognizing that sale of interest in LLC owning oil and gas lease need not generally be in writing, though sale of oil and gas lease must be in writing, but holding that sale of LLC interest in this case must be in writing because parties clearly anticipated entering into written agreement).

**Gora v. Drizin**, 752 N.Y.S.2d 297 (N.Y.A.D. 1 Dept. 2002)(holding that Statute of Frauds barred breach of contract claim based on oral promise of sole member of LLC to convey 50% interest in LLC to plaintiff after LLC acquired real property owned by the parties' bankrupt partnership pursuant to partnership's plan of reorganization).

**Urda v. Sahl**, No. CV020468800S, 2003 WL 21007160 (Conn.Super. April 17, 2003) (holding that the defendant promised to convey a 50% interest in real estate, rather than an interest in an LLC later formed to hold the real estate, in exchange for the plaintiff's management of the real estate and thus the oral agreement was subject to the Statute of Frauds, but concluding that plaintiff's claim survived motion to strike based on allegations of the plaintiff's performance of the contract).

## 27. Land Use

**Peyton v. State of Newburgh, Inc.**, 786 N.Y.S.2d 458 (N.Y. A.D. 1 Dept. Dec. 14, 2004) (holding members of LLC property owner were "owners" within meaning of regulatory provision requiring property "owners" to install smoke detectors because the definition of "owner" includes owners of the freehold and any other person, firm, or corporation directly or indirectly in control of the building).

**Dale Properties, LLC v. County of Hennepin**, No. 28918, 2002 WL 31895514 (Minn. Tax. Dec. 20, 2002) (holding that property transferred from individual to family general partnership to family LLC satisfied holding period and requirement that owner be "noncorporate entity" for purposes of favorable treatment under green acres statute.)

**South Dakota Farm Bureau, Inc. v. Hazeltine**, 202 F.Supp.2d 1020 (D. S.D. 2002) (striking down state constitutional provision prohibiting limited liability entities from acquiring real estate for farming and from engaging in farming in state on grounds provision violated ADA and Commerce Clause).

**Town of Middlebury v. Connecticut Siting Council**, No. CV010508047S, 2002 WL 442383 (Conn. Super. Feb. 27, 2002) (holding that LLC was "person" entitled to acquire and hold certificate of environmental compatibility and public need for construction and operation of electric generating facility).

## 28. Mechanic's and Materialman's Lien

**PM Contracting Co., Inc. v. 32 AA Associates LLC**, No. 604088/02, 2003 WL 21960250 (N.Y. Sup. Aug. 7, 2003) (holding that naming parent LLC of LLC that actually owned real property in issue was mere "misdescription" of owner of property under mechanic's lien law since parent beneficially owned property by virtue of its ownership and control of the true owner).

**Longview Production Co. v. Dubberly**, 99 S.W.3d 427 (Ark. 2003) (accepting certified question as to whether the phrase "person or persons" in mechanic's and materialman's lien statute includes an LLC where statutory construction provision indicates reference to a party or person includes "bodies corporate").

## 29. Contractual Provision Referring to "Corporation" or "Partnership"

**In re Enron Creditors Recovery Corp.**, \_\_ B.R. \_\_, 2007 WL 1531611 (Bankr. S.D. N.Y. 2007) (concluding LLC fell within scope of term "corporation" as used in indenture for purposes of determining whether LLC was "subsidiary" as defined in indenture).

**Mall at IV Group Properties, LLC v. Roberts**, No. Civ.A. 02-4692 (WHW), 2005 WL 3338369 (D. N.J. Dec. 8, 2005). The plaintiff sought summary judgment piercing the veil of an LLC to hold individuals who owned and managed the LLC liable for a judgment obtained against the LLC. In addition to other evidence, the court examined a non-recourse provision in the lease between the plaintiff and the LLC. The lease provided that there would be no recourse on the tenant's obligations against any incorporator, subscriber, shareholder, officer or director of any "corporation or partnership or joint venturer." The plaintiffs argued the provision did not apply to the LLC since it was not included in the language "corporation or partnership or joint venturer;" however, the court stated the language was plainly intended to limit liability and that the scope seemed to cover an LLC, noting that the New Jersey LLC statute is located in Title 42, "Partnerships and Partnership Associations." The court also found the non-recourse provision relevant to its analysis insofar as it supported the defendants' assertion that the plaintiffs were fully aware they were

conducting business with limited liability entities. The court concluded that unresolved fact issues precluded summary judgment on the veil piercing claim and stated that the non-recourse provision did not dispose of the issue and would not prevent individual liability if the veil is pierced.

*In re Telluride Income Growth Ltd. Partnership*, 311 B.R. 585 (Bankr. D. Colo. 2004). A Colorado LLC was formed following the administrative dissolution of another Colorado LLC in order to succeed the dissolved LLC as general partner of an Arizona limited partnership. The court concluded that administrative dissolution of the first LLC dissolved the limited partnership under the terms of the limited partnership agreement even though the limited partnership agreement referred only to dissolution of a corporate or partnership general partner; the court interpreted the provisions of the limited partnership agreement referring to the effect of dissolution of a corporate or partnership general partner as also encompassing an LLC general partner. The court pointed out that Arizona did not yet have an LLC act at the time the limited partnership was formed so it was not surprising that the limited partnership agreement did not refer to LLCs. (The court did not address why the agreement did not refer to LLCs when the limited partnership was apparently set up with a Colorado LLC as the general partner from its inception.)

*Garcia v. Foulger Pratt Development, Inc.*, 845 A.2d 16 (Md.App. 2003) (holding that LLC was not “operating partnership” within meaning of agreement to establish and issue interests in operating partnerships to own buildings constructed in development project).

*Foley v. Aspen Ski Lodge Limited Partnership*, No. 98-1010, 2000 WL 223549 (10<sup>th</sup> Cir. Feb. 28, 2000). As part of a financial restructuring, a limited partnership transferred all its operating assets to an LLC in exchange for a membership interest in the LLC. The plaintiff, an assignee of a limited partner’s interest, claimed that the transfer dissolved the partnership under a provision of the limited partnership agreement that provided that the partnership would be dissolved and terminated upon the sale of all or substantially all of the assets of the partnership. However, the partnership agreement provided that the sale of the partnership assets to “a corporation organized solely for the purposes of continuing the business of the Partnership in exchange for the corporation’s capital stock” would not be deemed a sale of all or substantially all of the assets for purposes of the dissolution provision. Relying on this provision, the trial court concluded that the transfer to the LLC did not constitute a sale of all or substantially all of the assets. On appeal, the plaintiff raised for the first time the argument that the transfer to the LLC fell outside the provision because the transfer was made to an LLC and not a corporation. The court refused to consider this argument because the plaintiff had not raised it in the court below.

### **30. Directors’ and Officers’ Liability Insurance**

*Kronemyer v. Philadelphia Indemnity Insurance Co.*, No. B161586, 2003 WL 21213243 (Cal.App. May 27, 2003). Two South Dakota LLCs asserted various claims against the individual who had served as president, including conversion, breach of fiduciary duty, breach of contract, and trade libel. The president was an insured under an “Executive Safeguard” policy providing “Directors and Officers Liability & Company Reimbursement Insurance.” The president demanded that the insurer defend and indemnify him against the claims. The court first determined that the policy did not require the insurer to provide a defense, and the court rejected various arguments that the policy provided coverage for the claims against the president. The president argued that the policy covered negligent mismanagement, notwithstanding an “insured versus insured” exclusion, on the basis that the claim was for contribution or indemnity on a claim not otherwise excluded under the policy. The court rejected the argument that the claims against the president were for contribution or indemnity. The president argued that the contribution or indemnity exception applied because he was entitled to “direct” indemnification by the LLC for the very damages it sought. The president relied upon South Dakota law authorizing LLCs to reimburse managers for liabilities incurred in the ordinary course of business or for the preservation of the business or its property. The president also pointed out that California law has similar provisions. The president further argued that he was entitled to contractual indemnification under the operating agreements. The court rejected the argument that these provisions brought him within the contribution or indemnity exception to the insured versus insured exclusion. The court stated that the complaint was still one for damages even if the individual himself had a claim for indemnity. The president also relied upon his right to indemnification as a basis to come within a “Presumptive Indemnification” exception to certain exclusions from coverage. The president argued that South Dakota and California law, as well as the LLC operating agreement, required the LLC to indemnify him. The court stated that South Dakota law permits South Dakota LLCs to indemnify officers and agents but does not mandate indemnification. Similarly, the court said California law permits, but does not require, LLCs to indemnify officers. The court pointed out that California law prohibits LLCs from indemnifying officers for breach of fiduciary duty. The court also determined

that the terms of the operating agreement did not require indemnity because the LLC was required to do so only on advice of counsel and only after approving such an action.

### **31. General Liability Insurance**

*Acuity v. North Central Video, LLLP*, No. 1:05-cv-010, 2007 WL 1356919 (D. N.D. May 7, 2007) (commenting that reference to LLC “manager” in insurance policy referred to statutorily-created position equivalent to CEO or managing partner under North Dakota LLC statute and does not apply to subordinate employees such as store manager).

*Brown v. MR Group, LLC*, 693 N.W.2d 138 (Wis. App. 2005). The court concluded the terms “manager” and “member” had the meanings given those terms under the Wisconsin LLC statute when used in a general liability insurance policy’s provision specifying who was an “insured” in the context of an LLC. The court determined that the term “real estate manager,” which was used in the policy without reference to an LLC, should be given its common and ordinary meaning. Accordingly, an individual who was not a member or manager of the LLC, and was not a real estate manager in the usual sense because he was not in the business of managing real estate, was not covered under the policy.

*U.S. Underwriters Insurance Co. v. City Club Hotel, LLC*, 369 F.3d 102 (2d Cir. 2004) (holding that LLC members were entitled to rely on LLC’s notice of claim to insurer and that insurer’s failure to timely notify LLC of its intention to disclaim coverage was also failure to notify LLC members in timely manner).

*Regency Motors of Metairie, L.L.C. v. Hibernia-Rosenthal Insurance Agency, L.L.C.*, 868 So.2d 905 (La.App. 2004) (holding attempted expulsion of members and threats to take legal action against them if they continued to participate in LLC’s affairs did not fall within coverage of umbrella and liability policies for “wrongful eviction” and “malicious prosecution”).

### **32. Wire Tap Statute; Expectation of Privacy**

*Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So.2d 321 (Fla. App. 2004) (holding LLC management committee had no expectation of privacy with respect to telephone conference meetings and thus had no cause of action under Florida wiretap statute with respect to defendant’s secret recording of meetings).

### **33. Campaign Contribution Laws**

*Moe, L.L.C. v. Louisiana Board of Ethics*, 875 So.2d 22 (La. 2004) (holding Board of Ethics had authority to subpoena certain records of LLCs to determine if LLCs were political action committees or organizations whose primary purpose was to support or oppose candidates where public record was devoid of any evidence LLCs had any business purpose at all).

### **34. Commercial Claims Court**

*Richard G. Roseetti, LLC v. Werther*, 6 Misc.3d 1040(A), 2005 WL 689479 (N.Y. City Ct. 2005) (concluding LLC has attributes of voluntary association with corporate liability protection and thus can bring action in commercial claims court under statute providing that commercial claim includes cause of action for money where claimant is “a corporation, partnership or association”).

### **35. Trade Secrets**

*Dexxon Digital Storage, Inc. v. Haenszel*, 832 N.E.2d 62 (Ohio App. 2005) (holding LLC was “person” within meaning of Ohio’s Uniform Trade Secrets Act definition of “person,” which listed other forms of business entities but did not specifically mention LLCs).

### **36. Attorney’s Fees**

*State v. Thompson*, 197 S.W.3d 685 (Tenn. 2006) (stating that LLC qualifies as “partnership or corporation” for purposes of definition of “small business” in Equal Access to Justice Act).

*Potter v. GMP, L.L.C.*, 141 S.W.3d 698 (Tex. App. 2004) (concluding that member who prevailed on breach of fiduciary duty claim was not entitled to recover attorney's fees under statute providing for recovery by prevailing party in breach of contract action because claims for breach of fiduciary duty were not founded on the operating agreement).

*Butterfield v. Moyer*, No. 8-04-04, 2004 WL 2496846 (Ohio App. Nov. 8, 2004) (holding failure to award prejudgment interest on other member's claim for back salary owed under provisions of operating agreement was improper because prejudgment interest is provided by Ohio statute with respect to judgment on a contract).

### **37. Open Records Laws**

*Allen v. Day*, 213 S.W.3d 244 (Tenn. Ct. App. 2006) (holding privately owned LLC was functional equivalent of government agency under Public Records Act based on its relationship as management service provider for publicly owned arena, and LLC's confidential settlement agreement was thus subject to disclosure under Public Records Act).

### **38. Conflict of Interest Statute**

*In re Ark-La-Tex Antique and Classic Vehicles, Inc.*, 943 So.2d 1169 (La. App. 2006) (discussing sufficiency of evidence that member, who was also public servant, owned more than 25% of LLC or exercised control for purposes of violation of conflict of interest statute).

### **39. Criminal Statutes**

*Champulvier v. State*, 942 So.2d 145 (Miss. 2006). The Mississippi Supreme Court reversed the court of appeals and held that a criminal statute punishing embezzlement by certain persons from an "incorporated company" or "private person" does not apply to similar acts against a limited liability company. The court pointed out that an LLC is by definition an unincorporated association and the LLC statute specifically prohibits an LLC from using the words "corporation" or "incorporated" in its name. The court noted that the Legislature amended the embezzlement statute as recently as 2003, at which time it was presented with a golden opportunity, if it chose to do so, to further revise the statute to include the "more modern business entities." The defendant's conviction for stealing from an LLC was thus reversed.

## **OO. Conversion, Merger, Reorganization**

*Regency Plaza, LLC v. Morantz*, No. 06AP-837, 2007 WL 1536812 (Ohio App. May 29, 2007) (concluding that transfer of real property from individuals to wholly owned general partnership and then to wholly owned LLC were not changes in ownership contemplated by settlement agreement that would void agreement).

*Freeman Management Corporation v. Shurgard Storage Centers, Inc.*, No. 3:06cv736, 2007 WL 1541877 (M.D. Tenn. May 23, 2007). The court held that the merger of a corporation into a newly formed Delaware LLC effected a transfer by operation of law of the corporation's interests in several joint ventures and thus violated a provision in the joint venture agreements prohibiting transfer of the joint venture interest without the consent of the other joint venturer. The merger was accomplished under the Washington Business Corporation Act and the Delaware Limited Liability Company Act, but the joint venture agreements provided that they were governed by Tennessee law. The court determined that Tennessee law applied to the issue of whether the merger resulted in a transfer for purposes of the prohibition on transfer under the joint venture agreements. The court reviewed Tennessee merger statutes and case law and concluded that a merger results in a transfer by operation of law under Tennessee law. The court also reviewed case law in other jurisdictions supporting its conclusion that "vesting" language in a merger statute involves a transfer. The court distinguished a Texas case that concluded a merger does not result in a transfer, pointing out the explicit language in the Texas statute providing that property vests "without any transfer." The court also noted that the new LLC in this case was owned by a third-party competitor, and the court stated that construing the merger as not having effected a transfer would result in forcing the other joint venturers to accept as a partner a person with which they did not consent to be partners.

*Beacon Square Limited Partnership v. Inland Wetlands*, No. CV064011011S, 2007 WL 1247094 (Conn. Super. April 13, 2007) (discussing effect of conversion of limited partnership to LLC and holding LLC and its manager

were aggrieved parties in land development permit proceeding where application for permit was made by manager of LLC and land was actually owned by LLC but record title was held in predecessor limited partnership).

***Browning Ferris Industries, Inc. v. United States***, 75 Fed.Cl.591, 99 A.F.T.R.2d 2007-1312, 2007-1 USTC ¶ 50,374 (Fed. Cl. 2007) (holding that common parent corporation of consolidated group that converted (under Delaware conversion provisions) to single member disregarded LLC was constructively liquidated upon conversion and ceased to exist for purposes of serving as agent of consolidated group).

***Tzolis v. Wolff***, 829 N.Y.S.2d 488 (N.Y. A.D. 1 Dept. 2007). The court declined to resolve on documentary evidence the question of whether approval of members representing 55% of the membership interests was sufficient to authorize the sale of the sole asset of an LLC that had previously operated as a partnership and was converted to an LLC. The LLC had adopted no formal operating agreement, and the defendants argued the transaction was approved in accordance with the partnership agreement. The plaintiffs argued that the sale of the LLC's sole asset was an extraordinary event requiring unanimous consent under the partnership agreement, and the court stated that the plaintiffs were likely correct in their interpretation of the partnership agreement. Alternatively, in the event the partnership agreement no longer controlled after the change from a partnership to an LLC, the plaintiffs argued that two-thirds approval was required pursuant to the LLC statute in effect at the time. Furthermore, regardless of whether a majority, two-thirds, or unanimous approval was required, the validity of the approval was in doubt because members approving the transaction were alleged to have a financial interest. The court stated that the LLC statute disallows a transaction between an LLC and one or more of its managers, or with another business entity in which one or more of its managers has a substantial financial interest. The court thus concluded the plaintiffs had alleged a viable cause of action to set aside the transaction.

***Husch & Eppenberger, LLC v. Eisenberg***, 213 S.W.3d 124 (Mo. App. E.D. 2006) (holding that LLC resulting from conversion of general partnership had standing to seek reformation of release in favor of predecessor partnership, and predecessor partnership's agreement regarding dissolution prevailed over contradictory statutory provisions that would otherwise have caused dissolution on death or withdrawal of partner).

***Facchina v. Malley***, No. Civ.A. 783-N, 2006 WL 2328228 (Del. Ch. Aug. 1, 2006). The court applied the statutory default rules to resolve a dispute over who was the managing member of a Delaware LLC, concluding that the LLC did not have an LLC agreement and that members constituting more than 50% in interest had authority to remove the defendants as managing members and replace them with another individual who became the managing member. The defendants argued that a shareholder's agreement in effect for a predecessor corporation constituted the operating agreement of the LLC, but the court rejected that argument. The members of the LLC had begun their business as shareholders of a California corporation but discovered that they could not achieve the S corporation status they desired because one of the shareholders was a foreign national. The corporation then merged into a newly formed Delaware LLC, but the members of the LLC never executed an operating agreement. The defendants argued that the shareholder's agreement governing the corporation became the operating agreement of the surviving LLC, and the defendants challenged the validity of various actions taken after the merger, including the removal of the defendants and designation of another individual as managing member, on the basis that they were not accomplished in compliance with the shareholder's agreement. The court stated that the shareholder's agreement did not automatically take on the role of the operating agreement because the corporation ceased to exist in the merger, and the court concluded that the defendants failed to establish any agreement that the shareholder's agreement became the LLC's operating agreement. The defendants relied upon a provision in the merger agreement reciting that the operating agreement of the LLC would be the one "in effect immediately prior to the effective time;" however, the court did not read this provision to constitute an adoption of the shareholder's agreement as the operating agreement after the merger. The court pointed out that the provision simply established that the LLC's operating agreement before the merger would be the operating agreement of the surviving LLC after the merger; however, the LLC never had an operating agreement. The defendants claimed that everyone understood the shareholder's agreement would serve as the operating agreement because the LLC was intended to be a continuation of the enterprise governed by the shareholder's agreement. The court acknowledged that such an agreement might have made sense, but the defendants failed to prove such an agreement (which the court noted could have been reached orally) by all the members. The testimony only established an understanding by two of the members (the defendants), not an agreement of all the members. The statutory default rules thus applied to the LLC, and removal of the manager was effective.



***Lenhard v. U.S. Filter Operation***, No. CV06-5000775S, 2006 WL 1611260 (Conn. Super. May 26, 2006) (holding service on Secretary of State was proper in suit against withdrawn foreign corporation that converted to LLC because plaintiff sued withdrawn corporation rather than LLC).

***JP Morgan Trust Company, National Association v. Mid-America Pipeline Company***, 413 F.Supp.2d 1244 (D. Kan. 2006) (finding unresolved issues regarding effect of conversion of Delaware corporation to Delaware LLC precluded dismissal of claims against predecessor corporation).

***Braden v. Strong***, No. M2004-02369-COA-R3-CV, 2006 WL 369274 (Tenn. Ct. App. Feb. 16, 2006) (concluding excluded partner had right to accounting with respect to partnership converted to LLC without her consent).

***Lach v. Man O' War, LLC***, No. 2004-CA-001958-MR, 2005 WL 3116000 (Ky. App. Nov. 23, 2005). A limited partnership serving as the sole general partner of another limited partnership was reorganized as an LLC, and a limited partner challenged the reorganization on the basis that it was an improper conversion. The reorganization was accomplished by a series of steps involving the formation of the LLC, transfer to the LLC of the partnership's interest as general partner in the second limited partnership, and dissolution of the limited partnership resulting in distribution of the LLC ownership to the partners in proportion to their interests in the partnership. The plaintiff argued that the transaction amounted to a conversion under Kentucky law and thus required approval of all the partners. The court found there was no conversion because the dissolution did not flow into the formation of the LLC. The formation of the LLC was an event separate from the existence of the partnership. The limited partnership agreement did not carry over into the operating agreement, and the partnership did not evince an intent to convert. The limited partner also argued the effect of the partnership's actions constituted an "indirect" conversion in violation of Kentucky statutes, but the court concluded a conversion did not occur merely because the LLC retained some of the same business purposes as the partnership and was capitalized by some of the partnership's assets. The court noted that the transfer of partnership assets and termination of the partnership were within the authority of the general partners as specified in the limited partnership agreement. The court also rejected the limited partner's argument that the transfer of assets to the LLC made it impossible for the partnership to carry on its business and that the general partners breached their fiduciary duties by transferring the assets to the LLC.

***Connecticut Plywood Corporation v. Custom Cabinets & Refacing, LLC***, No. CV44001660S, 2005 WL 2857505 (Conn. Super. Oct. 13, 2005) (holding defendant member who guaranteed LLC indebtedness to supplier was not liable on debt incurred by LLC after defendant member ceased his association with LLC and LLC was being conducted as sole proprietorship by remaining member, where defendant member informed plaintiff of change in LLC's business and made separate agreement regarding payment of LLC's then existing indebtedness).

***In re DotMD, LLC (DotMD, LLC v. Weyer)***, 303 B.R. 519 (Bankr.N.D.Ga. 2003). The court did not appear convinced that a post-merger judgment recorded in the name of the predecessor corporation rather than the surviving LLC was properly recorded based on the provisions of the LLC act that provide for the preservation of creditors' rights in a merger and for the continuation of a proceeding against a constituent entity as if the merger did not occur. While the court agreed that the LLC act permitted the continuation of the litigation against the predecessor corporation as the named defendant, the court had "serious doubts" about whether the language and policies of the Georgia statutes go so far as to permit a judgment creditor to prevail against an innocent third party purchaser when the judgment creditor records a post-merger judgment against the old constituent entity rather than the new surviving entity, particularly when the judgment is recorded a year after the merger and when the judgment creditor has full knowledge of the merger and the name of the surviving entity. The court pointed out that the LLC act does not state that it is sufficient for a creditor to record a judgment lien or UCC financing statement in the name of the constituent business entity rather than the surviving entity. Furthermore, the court pointed out that the LLC merger provisions deal with the rights of the creditor or the party to the lawsuit on the one hand and the debtor or business entity being sued on the other. The court observed that the merger provisions do not address the rights of third parties or suggest that they are intended to pre-empt any state recording statutes. The issue of whether the judgment lien was properly recorded turned out to be immaterial in this case, however, because the court held the bankruptcy trustee did not stand in the shoes of a third party purchaser.

***Purina Mills, L.L.C. v. Less***, 295 F.Supp.2d 1017 (N.D. Iowa 2003) (holding pig seller which converted from corporation to Delaware LLC while pig purchase agreement was in effect was proper party in interest and could bring breach of contract action against buyers where both Delaware and Iowa law provided that all rights, privileges, powers, and property of an entity that converts to an LLC are vested in the LLC, the agreement permitted the assignment of rights

to any parent, affiliate, or subsidiary without buyers' consent, and the buyers had accepted performance from the LLC and treated it as a proper party in interest).

***Lenge v. Beizer***, No. CV000802145, 2002 WL 31967553 (Conn.Super. Dec. 30, 2002) (treating attorney's transfer of building and law practice to LLCs as conversion resulting in liability of LLCs for pre-conversion liabilities along with attorney).

***Holland v. Fahnstock & Co., Inc.***, 210 F.R.D. 487 (S.D. N.Y. 2002) (adopting magistrate's report stating that sole proprietor was not discharged when sole proprietorship converted to LLC because a sole proprietor retains personal liability for all pre-conversion debts and obligations when it converts to an LLC).

***Greenwich Global, LLC v. Clairvoyant Capital, LLC***, No. CV010182930S, 2002 WL 31168715 (Conn.Super. Aug. 22, 2002) (holding conversion of limited partnership to LLC was invalid under Delaware law because conversion was undertaken without authorization of the general partner, whom limited partners had attempted, but failed, to effectively remove).

***Solar Cells, Inc. v. True North Partners, LLC***, No. Civ.A. 19477, 2002 WL 749163 (Del. Ch. April 25, 2002). A member of an LLC whose interest would decrease from 50% of the voting units to 5% of the voting units in a proposed merger of the LLC sought a preliminary injunction on the basis that the other member and managers appointed by it acted in bad faith in approving the proposed merger and that the defendants would be unable to prove the entire fairness of the merger. First Solar, LLC (the "LLC"), a Delaware LLC, was formed by True North Partners, LLC ("True North") and Solar Cells, Inc. ("Solar Cells") to commercialize solar power technology. Solar Cell contributed the technology, and True North contributed and loaned money to the LLC. Solar Cells and True North each received 50% of the voting membership units, and True North received 100% of the non-voting units. True North had the right to elect three of the five managers, and Solar Cells had the right to elect the other two. The LLC's initial funding was depleted, and the members unsuccessfully negotiated various alternatives for financing and restructuring. Without notice to Solar Cells, the True North managers executed a written consent approving the proposed merger of the LLC into an LLC wholly owned by True North. Solar Cells received notice of the proposed merger four days before it was to close. Under the terms of the merger, the balance of True North's loan to the LLC would be converted into equity, and Solar Cells would end up with 5% of the voting units in the surviving LLC. The court found that there was a reasonable likelihood that Solar Cells would prevail on the merits, that is, that True North would be required to establish the entire fairness of the merger and would be unable to do so. True North argued that the actions taken to authorize the merger were clearly authorized by the operating agreement and that the operating agreement limited fiduciary duties owed by the True North managers. The court noted that the provisions of the operating agreement limited liability stemming from a conflict of interest but that the limitation on the managers' liability did not bear on the request for injunctive relief. Further, the provisions of the operating agreement protected the managers so long as they acted in good faith. With respect to fair dealing, the court was critical of the lack of an independent bargaining mechanism and failure to give Solar Cells advance notice. ("[I]t is not an unassailable defense to say that what was done was in technical compliance with the law... The fact that the Operating Agreement permits action by written consent of a majority of the Managers and permits interested transactions free from personal liability does not give a fiduciary free reign to approve any transaction he sees fit regardless of the impact on those to whom he owes a fiduciary duty.") The court also found that the valuation used to establish the price was likely not fair because it was irreconcilable with valuations only a few months before True North decided to proceed with the merger. Finally, the court found that irreparable harm was threatened because of the dilution of the equity and voting position of Solar Cells, the difficulty in valuing the LLC, and the limitation of True North's liability for conflicts arising from its fiduciary obligations.

***Shoreline Care Limited Partnership v. Jansen & Rogan Consulting Engineers, P.C.***, No. X06CV940155982S(CLD), 2002 WL 180886 (Conn. Super. Jan. 10, 2002) (finding that standing was satisfied in suit brought in limited partnership name where limited partnership had contracted with defendant and then converted to LLC, relying on language in conversion statute and case law to the effect that LLC is deemed the "same entity" and results from a "seamless transition").

***Flippo v. CSC Associates III, L.L.C.***, 547 S.E.2d 216 (Va. 2001). The Virginia Supreme Court affirmed a trial court judgment holding the manager of Flippo Land & Timber Co., LLC, a family-owned LLC ("Flippo LLC") liable for breach of fiduciary duty to the LLC and barring the manager and his brother from serving as managers. Flippo LLC held timberlands and had three members: Carter Flippo, who was also manager, Carter's brother Arthur Flippo, and CSC

Associates III, L.L.C. (“CSC”), an LLC owned by the three children of Carter’s and Arthur’s sister. In response to the refusal of CSC to allow Carter and Arthur to transfer their interests in Flippo LLC to individual LLCs for estate planning purposes, Carter consulted a law firm and chose a course of action suggested by the law firm that would allow Carter and Arthur to satisfy their estate planning goals by holding their interests in the timberland business in LLCs. Pursuant to the advice received by Carter from his lawyers, Carter, as manager of Flippo LLC, caused the LLC to transfer all of its non-cash assets to a new LLC. The transfer of Flippo LLC’s assets dissolved Flippo LLC under the operating agreement, and CSC was given the option of joining the new LLC if it agreed to the terms of its operating agreement, under which Carter and Arthur could hold their interests through LLCs. (Prior to trial, the new LLC dissolved and returned the assets to Flippo LLC, rendering claims against the new LLC moot.) Carter was found liable for breach of fiduciary duty based upon his orchestration of the transfer of Flippo LLC’s assets to the new LLC. He appealed, arguing that he was entitled to a defense based upon his reliance on the law firm’s advice. His defense was based upon a provision of the Virginia LLC act protecting a manager who acts in good faith reliance on legal counsel or other professionals. The court found that this provision was not applicable in the instant case. The court pointed out that a manager, like a corporate director, is required by statute to discharge his duties in accordance with his good faith business judgment in the best interests of the LLC. Additionally, the LLC and corporate statutes contain nearly identical provisions protecting managers and corporate directors from liability in the exercise of that judgment under certain circumstances. The court found, however, that Carter was receiving advice in his personal capacity for his own personal interests when he consulted with the law firm, and he was therefore not protected by these provisions. Further, the court rejected the argument that reliance on advice of counsel was a defense to punitive damages, and the award of punitive damages was upheld. The court also upheld the removal of Carter as manager and the prohibition of his brother Arthur’s serving as manager on the basis that this point was not properly preserved for appeal. The court finally rejected the claims of Carter and Arthur for dissolution of Flippo LLC and for rescission of the operating agreement based on fraud and mutual mistake, and the court upheld sanctions against Carter and Arthur based upon their allegations of mutual mistake and fraud.

*VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000), aff’d, 781 A.2d 696 (Del. 2001). An LLC with three entities as members and three individuals as managers entered a merger approved by two of the three managers pursuant to the operating agreement. In the merger, two members with a combined 75% in the LLC were relegated to a 37.5% minority interest in the surviving corporation, and Castiel, the individual who controlled the two members with the 75% interest, was excluded from management. Castiel appointed two of the three managers of the LLC (these managers consisted of Castiel and another appointee), but the third manager (the owner of the 25% member) convinced Castiel’s appointee to join him in a written consent to merge the LLC without notice to Castiel. The court determined that the LLC agreement permitted a merger to be approved by a vote of a majority of the managers and that Section 18-404(d) of the Delaware LLC act literally permits written majority consents without notice to other managers, but the court concluded that the two managers breached their duty of loyalty to Castiel by failing to give him notice. The following comment by the court regarding the application of Section 18-404(d) is representative of the court’s tone throughout the opinion: “The General Assembly never intended, I am quite confident, to enable two managers to deprive, clandestinely and surreptitiously, a third manager representing the majority interest in the LLC of an opportunity to protect that interest by taking an action that the third manager’s member would surely have opposed if he had knowledge of it. My reading of Section 18-404(d) is grounded in a classic maxim of equity -- ‘Equity looks to the intent rather than to the form.’” The court stated that the two managers who took the action to merge owed a duty of loyalty to the LLC, its investors and Castiel, their fellow manager. The court observed that the LLC agreement allowed the action to merge to be taken by a simple majority of managers (rather than following the default member approval requirement) because all parties understood that Castiel had the right to appoint and remove a majority of the managers. Had notice been given, Castiel of course would have attempted to remove his appointee and block the action. The court rejected the argument that the managers were protected by the business judgment rule. The court said the managers owed Castiel a duty to give him prior notice even if he would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC. If Castiel was not suited to run the company, as claimed by the other two managers, this was an issue to be determined in board meetings with all managers present or in future litigation, if necessary.

*Froelich v. Erickson*, 96 F. Supp.2d 507 (D. Md. 2000), aff’d, 5 Fed.Appx. 287 (4<sup>th</sup> Cir. 2001). The factual background of this case is rather complicated, but the claims involved assertions of fraud, breach of fiduciary duty, and breach of contract by Froelich, an ousted CEO and board member of a Maryland LLC. Froelich was also a member of the LLC who, along with other minority members, was cashed out in a squeeze-out merger following a reclassification of interests of the LLC approved by all members except Froelich. Two documents primarily governed the LLC’s

operations as an LLC. These documents were an Operating Agreement, which the court characterized as the LLC equivalent of a corporate charter, and a Members Agreement, which the court described as the equivalent of a stockholders' agreement. The operating agreement defined classes of preferred and common interests, the role and responsibility of the board, and the rights and duties of the members. The member agreement supplemented the operating agreement by specifically defining rights of members and restrictions on alienation of interests. The court summed up Froelich's claims as a challenge to "a handful of corporate actions taken by [the LLC's] Board and its Members." The court summed up the key issues in the case as follows: "(i) Did the corporate documents or Maryland corporate law authorize the Board to take the actions that Froelich challenges? (ii) If the Board or the Members had the power to act, by what standard (e.g., business judgment rule or fiduciary duty) should the Court review the Board's exercise of that power? and (iii) Did the Board meet the appropriate standard?" The court characterized the case as arising in the context of corporate decisions by the LLC's board of directors and applied the business judgment rule. The court noted that the LLC's operating agreement stated that the LLC's directors "are subject to the duties of a corporate fiduciary as defined by Maryland law;" thus, the court continued, the LLC board's decisions are measured against the business judgment rule "just as if [the LLC] were a traditional corporation, rather than an LLC." The court found no evidence that the board had acted in bad faith and concluded that the board's actions were protected by the business judgment rule. The court also concluded as follows: the LLC and majority member did not breach a duty of good faith and fair dealing (noting uncertainty under Maryland law as to whether there is a separate cause of action in this regard and stating that the duty in any event only prohibits a party from preventing the other party from performing under the contract); the majority member did not breach a fiduciary duty to Froelich by usurping a business opportunity (stating that a majority interest holder clearly owes the minority a fiduciary duty but finding no breach in view of the board's independent approval of the transaction); the reclassification did not breach the operating agreement or the member agreement (finding that the transaction fell outside a provision in the member agreement restricting redemptions and was governed by the operating agreement, which was amended in accordance with its terms to permit the reclassification). In Froelich's favor, the court found that the LLC owed Froelich severance pay under an employment agreement between the LLC and Froelich and that the reclassification and squeeze-out were related parts of a transaction in which Froelich had properly preserved his statutory right to an appraisal. The court explained that the Maryland LLC statute grants a member the same appraisal rights as an objecting stockholder under corporate law. Maryland corporate law provides appraisal rights in connection with a parent-subsidiary merger, and Froelich properly objected to the squeeze-out merger. The court viewed the reclassification and subsequent squeeze-out merger as a single transaction rather than separate events such that Froelich was entitled to appraisal of his interests immediately prior to the reclassification rather than appraisal of his reclassified interests immediately prior to the merger that occurred five months later.

*Cole v. Kershaw*, No. Civ.A. 13904, 2000 WL 1206672 (Del.Ch. Aug. 15, 2000). The plaintiff, a former partner in a Delaware general partnership, challenged the 1993 merger of the partnership into a Delaware LLC. The merger eliminated the plaintiff's interest for cash. The plaintiff claimed the merger was invalid because it was not authorized under the Delaware partnership act or the partnership agreement and, even if otherwise valid, was invalid because it was unfair to the plaintiff. While neither the Delaware partnership act nor the partnership agreement authorized merger of the partnership, the court found that the merger was authorized under the Delaware LLC act, which authorized LLCs to merge with other entities. According to the court, "If this provision, explicitly authorizing LLCs to merge with general partnerships, is to have meaning, the General Assembly must be presumed to have intended that such a merger could go in either direction, i.e., that LLCs would be allowed to merge with general partnerships, or the reverse. Therefore, the fact that the general partnership statute was silent on the subject is of no moment." The court also found that the LLC statute was applicable even though the partnership was formed prior to the effective date of the LLC act. The court concluded that the effect of the merger was to dissolve the partnership. The court agreed with the plaintiff's claim that the merger did not meet the entire fairness test and that the plaintiff was entitled to an award of damages measured by his proportionate share of the fair value of the partnership as of the merger date.

*Sinatra ex rel. Nite Life, Inc. v. Edin*, 774 So.2d 191(La.App. 2000). Edin and Sinatra formed Nite Life, Inc. to operate a night club, and each contributed \$50,000 to the corporation for a \$100,000 security deposit required to lease certain premises. Later Sinatra and Edin formed an LLC to take over all assets of the corporation including the lease and the rights to the deposit. Edin, Sinatra and their bookkeeper proceeded as if the lease had been transferred, but the court stated that the lease was not effectively transferred because the lease and deposit constituted substantially all of the assets of Nite Life, Inc. and the technical requirements under the corporate statute were not followed. Sinatra ultimately withdrew from the LLC pursuant to an agreement whereby he received \$50,000 and released the LLC from any liabilities. The corporation was dissolved by action of Edin and Sinatra. About the same time, the lease was canceled because Edin decided to purchase the property, and the \$100,000 security deposit was returned to Edin or the

LLC and used as a down payment on the property. Sinatra argued that he was entitled to a distribution of \$50,000 because the lease was never effectively transferred and the deposit should have been returned to the corporation and distributed to the shareholders. The court rejected Sinatra's claim on the basis that he had failed to comply with a requirement under the corporate law that the claim be brought within 90 days of the attempted transfer of the lease. The court also rejected Sinatra's claim for breach of fiduciary duty inasmuch as Sinatra intended that, and gave instructions for, the lease to be transferred, and he proceeded as if the transfer had been accomplished.

***Kanefield v. SP Distributing Company, L.L.C.***, 25 S.W.3d 492 (Mo. App. 2000). A sole proprietor entered an agreement with an employee, the plaintiff in the case, whereby the proprietor agreed to give the plaintiff 10% of the proceeds from the sale of the business if the plaintiff was employed at the time of the sale. After the proprietor died, his wife operated the business as a partnership in dual capacities, as the surviving spouse and trustee of a family trust. Later the wife transferred portions of her interest to two sons, and the partners converted the partnership to an LLC. The next year, the LLC terminated the plaintiff's employment. The plaintiff sought a declaratory judgment, breach of contract damages, and imposition of an equitable lien. Later the plaintiff added a count of fraudulent conveyance. The trial court dismissed all these claims, and the plaintiff appealed. The court of appeals found that the plaintiff alleged facts that would support the existence of a contract either under successor liability theories or based upon an agreement with the wife after the proprietor's death. The plaintiff alleged that the defendants breached the contract by terminating his employment, failing to pay him his share of the net proceeds upon sale of the business, and repudiating the agreement and offering the business for further sale. The defendants argued that the conversion of the partnership to an LLC was not a sale of the business, but the court stated that there were nevertheless disputes regarding the allegations of breach of contract. The court found that the plaintiff failed to state a claim for fraudulent conveyance in that neither the addition of two partners nor the subsequent conversion to an LLC changed the plaintiff's rights or put the assets of the business beyond his reach. Finally, the court determined that the plaintiff had stated a cause of action for an equitable lien.

***Nakano v. Jamie Sadock, Inc.***, No. 98 CIV. 0515, 1999 WL 1225259 (S.D. N.Y. Dec. 20, 1999). After the plaintiff invested in an S corporation, the corporation was reorganized as an LLC because the plaintiff was not a U.S. citizen. The plaintiff claimed that the restructuring was a fraudulent scheme by the other members effected without her consent to deprive her of the value of her investment, which involved not only stock in the corporation but rights under a distributorship agreement. The court concluded that the plaintiff failed to allege quantifiable damages. The fact that her interest in the corporation was extinguished was insufficient alone to show damages since the plaintiff received a proportionate interest in the LLC which acquired the assets of the corporation. In a later opinion at 2000 WL 680365 (May 25, 2000), the court held that its partial summary judgment against the plaintiff in this regard did not, under the law of the case doctrine, preclude the plaintiff from amending her complaint to include claims of waste (by means of excessive compensation paid to the managing members of the LLC), misappropriation (by inexplicable withdrawal of initial capital), and breach of fiduciary duty (by the foregoing and preparation of misleading financial statements).

***Wolter v. Wisconsin Dept. of Revenue***, 605 N.W.2d 283 (Wis. App. 1999). A family limited partnership which owned three parcels of land reorganized as an LLC, and the family members recorded in the deed records a "Memorandum of Organizational and Operating Agreement" giving notice of the reorganization. The Wisconsin Department of Revenue assessed a real estate transfer tax on the land, and the Tax Appeals Commission found that the transaction was a taxable transfer under Wisconsin law. The appeals court agreed. The court analyzed the Memorandum and concluded it was a "conveyance" by the partnership. Then the court concluded that the conveyance was "for value" even though no cash consideration was involved because the members received capital accounts in the LLC as well as new and more beneficial rights and privileges associated with the LLC form (quoting an article that points out advantages of an LLC over a limited partnership.)

***Devereaux's Carpentry Services, LLC v. Ericson***, 25 Conn. L. Rptr. 555, 1999 WL 956768 (Conn. Super. Oct. 6, 1999). The court held that an LLC was a continuation of its predecessor sole proprietorship and, as such, entitled to enforce a construction contract entered by the sole proprietor. The defendants entered a construction contract with Stephen Devereaux, a sole proprietor doing business as Devereaux's Carpentry Service, for construction of an addition to the defendants' home. Thereafter, Devereaux formed Devereaux's Carpentry Services, LLC. The LLC filed a mechanic's lien on the defendants' home, and the defendants claimed that they had no agreement with the LLC. The court followed the Connecticut Supreme Court's decision in *C & J Builders & Remodelers, LLC v. Geisenheimer*, 733 A.2d 193 (Conn. 1999), to equate the sole proprietor's formation of the LLC to a statutory conversion such that "all the interests and obligations incurred by, or chargeable against, the sole proprietorship or its assets are transferred by operation of law."

***C & J Builders and Remodelers, LLC v. Geisenheimer***, 733 A.2d 193 (Conn. 1999). The issue in this case was whether an LLC could enforce an arbitration clause in a contract entered by the LLC's 99% owner prior to the conversion of the owner's sole proprietorship to an LLC. Charles Pageau, doing business as a sole proprietor, entered a contract with the defendants and later formed an LLC in which he thereafter conducted his business. The operating agreement recited that the LLC was "successor to Charles Pageau [doing business as] C & J Builders and Remodelers" and that Pageau had a 99% membership ownership interest and virtually absolute control over the business. In determining whether the LLC was a "successor in interest" to the contract, the court acknowledged that the formation of the LLC was not a statutory conversion, but the court could find no reason to distinguish between the effect of a statutory conversion of a partnership to an LLC under the Connecticut conversion statute and the conversion of a sole proprietorship to an LLC. The court stated that the conversion statute in effect treats a converted LLC as the "successor in interest" to the converting partnership. The court concluded, therefore, that "where a sole proprietorship converts to a limited liability company, all of the interests and obligations incurred by, or chargeable against, the sole proprietorship or its assets are transferred to the limited liability company by operation of law." (In the trial court's opinion, the trial court concluded that the LLC had the benefit of the contract, but did so using veil piercing principles.)

***Town of Vernon v. Rumford Associates IV***, 732 A.2d 779 (Conn. App. 1999). The defendant, a partnership that had converted to an LLC and filed bankruptcy after foreclosure proceedings were instituted against it, complained that the trial court improperly awarded fees in connection with the foreclosure in violation of the automatic bankruptcy stay. After the partnership converted to an LLC, the LLC sought to be substituted in the pending foreclosure proceeding against the partnership or, alternatively, to intervene. The LLC also filed bankruptcy. The court denied the LLC's motion to be substituted or intervene. Thereafter, the court awarded fees and expenses against the partnership for delay of the foreclosure sale caused by the bankruptcy filing. The partnership claimed that this action violated the automatic stay in the bankruptcy. The court disagreed. The court discussed the effect of the statutory conversion of the partnership to an LLC and noted that the conversion statute allows an action or proceeding pending against the converting partnership to continue "as if the conversion had not occurred." The court noted that the LLC did not appeal the denial of its motion to be substituted or to intervene. Thus, the court said, the converted LLC never became a party to the suit, and the bankruptcy protection did not apply when the court awarded the additional fees against the partnership.

***Blum Shapiro & Company, P.C. v. Searles & Houser, LLC***, No. CV 990586283S, 1999 WL 669824 (Conn. Super. Aug. 11, 1999). An accounting firm organized as an LLC combined its practice with an accounting firm organized as a professional corporation pursuant to a somewhat vague letter agreement. The business continued under the auspices of the PC. The court pointed out that, while the parties used the term "merger," Connecticut statutes do not permit an LLC to merge with a PC. The court noted that a PC is free to acquire the assets of an LLC, and apparently that was the nature of the transaction. The issue was whether the PC acquired non-compete agreements between the LLC and two of its employees who left the PC a year or so after the "merger" and solicited the firm's clients. The court concluded that the PC did not acquire the covenants not to compete from the LLC. The court noted that restrictive covenants necessary to protect a proprietor's business are generally deemed assigned to the purchaser of the business, but the court went on to conclude that the PC did not acquire all the assets of the LLC. Further, noted the court, the entities did not merge, and the PC assigned no value to any covenant not to compete or goodwill.

***Maas Technologies, Inc. v. Henning***, No. 98 01751, 1999 WL 269109 (La. App. 3 Cir. March 31, 1999). The opinion in this case was originally available on Westlaw but was removed and is now only referenced in a table at 744 So.2d 238. Two members of an LLC sued the other two members and a third party alleging that a merger of the LLC into one of the defendant members and then into the third party constituted a conversion of the plaintiffs' assets. The LLC operating agreement had an arbitration clause that required "a dispute arising between the Members concerning the operation, management or buyout of the interest of the LLC" to be submitted to arbitration. The court held that the plaintiffs' claim fell within the scope of the arbitration clause. The court also found that the dispute must be arbitrated even though one of the defendants was not a party to the operating agreement. The court stated that the plaintiffs' allegations were directed primarily against the member who controlled the entities with which the LLC merged. The court concluded that the first merger (between the LLC and one of its members) was certainly arbitrable and, if found improper, would make any complaint against the company involved in the second merger moot.

***Academy Mortgage Company, LLC v. Juarez***, 740 So.2d 708 (La. App. 5<sup>th</sup> Cir. 1999). An LLC mortgage company had originally been operated as a partnership, but the partnership converted to an LLC on the advice of partners who were attorneys. Neither the manager, who was also a partner, nor his wife, who was employed in the business, were attorneys. The manager and his wife alleged that two of the attorney partners were negligent in their

capacities as counsel to them as follows: failing to inform them of the effect of a conversion from a partnership to an LLC; failing to inform them of the attorney partners' potential personal gain in power in the new LLC (specifically, failing to inform them that the conversion would enable a majority of the members of the LLC to approve certain matters without consent of the minority, such as dissolution and winding up, transfer of substantially all of the assets, and amendment of the articles of organization and operating agreement); failing to advise them of potential personal financial gain to the attorney partners due to the conversion; failing to advise them to seek separate counsel; failing to advise them as to conflicts of interest; failing to obtain their consent for having a business transaction with the client and serving as counsel to the client at the same time; and failing to give advice and obtain consent regarding the conflict of interest in writing. The manager and his wife alleged that the attorneys had provided legal services to them and the LLC or its predecessor on numerous occasions. The manager and his wife phrased the issue as whether a lawyer commits legal malpractice by entering into a business transaction with a client without the written consent required under the Louisiana Rules of Professional Conduct. The court found it unnecessary to reach the issue of whether the attorneys had an attorney-client relationship with the manager and his wife because, assuming there was an attorney-client relationship, the court found that the action was time-barred.

*Child Care of Irvine, L.L.C. v. Facchina*, No. Civ. A. 16227, 1998 WL 409363 (Del. Ch. July 15, 1998). This case involved a dispute between LLC members in which it was unclear whether the parties' rights were governed by the shareholder agreement of the predecessor corporation, the default provisions of the Delaware LLC act, the merger agreement by which the predecessor corporation was converted to an LLC, or a draft LLC agreement never signed by the members. The plaintiff members of the LLC sought to remove the defendant member, Facchina, as manager of the LLC. The parties had originally formed the business as a Delaware corporation. The corporation was subsequently converted into an LLC by virtue of a merger of the corporation into a newly formed Delaware LLC which survived the merger. An LLC agreement for the new LLC was never signed. The plaintiffs claimed that the shareholder agreement of the predecessor corporation reflected the terms of the members' agreement for the operation of the LLC. Alternatively, the plaintiffs relied upon the default right to remove a manager under the Delaware LLC act. Facchina claimed that a draft LLC agreement never signed by the members governed their relationship. Alternatively, Facchina claimed that the merger agreement itself was the LLC agreement. The court concluded that summary judgment for either side was inappropriate because there were sharply disputed facts and insufficient undisputed facts to support a legal ruling on the issues before the court. The court noted that both the shareholder agreement and the draft LLC agreement contained arbitration provisions and encouraged the parties to pursue arbitration in California.

*Lloyd v. Horn, Inc.*, No. 97-3074, 1998 WL 939493 (10<sup>th</sup> Cir. Aug. 21, 1998). The court of appeals affirmed the decision of the district court rescinding an operating agreement on the basis of unilateral mistake and constructive fraud. A partnership converted to an LLC, but the managing partner did not inform the others that he did not intend to continue in his management role after the conversion. The LLC operating agreement did not appoint the individual as managing member, but the other members assumed he would take on the position consistent with his role in the partnership. The court found the concealment amounted to constructive fraud because it breached the fiduciary duty of the managing partner to disclose material information. Thus, the court upheld the trial court's rescission of the LLC operating agreement. (The district court's opinion is available at 1997 WL 150052 (D. Kan. Jan. 29, 1997)).

*Darnet Realty Associates, LLC v. 136 East 56th Street Owners, Inc.*, 153 F.3d 21 (2d Cir. 1998). A real estate development partnership which owned shares in an owners' corporation reorganized as a New York LLC, and the court found the successor LLC to be the same continuing entity for purposes of the statutory termination window under Section 3607(b) of the Condominium and Cooperative Conversion Protection and Abuse Relief Act.

*Weinshel v. Capossela, Cohen, Engelson & Colman, P.C.*, No. CV 320454, 1997 WL 325835 (Conn. Super. June 6, 1997). This case dealt principally with corporate law issues arising when an accounting firm which was operating as a professional corporation changed its name and transferred its assets to a newly formed LLC. Capossela, Cohen, Engelson & Colman, P.C. changed its name to C.C.E. & C., P.C. and transferred its assets to a newly formed LLC which began doing business under the name Capossela, Cohen, Engelson & Colman, LLC. The plaintiff, a shareholder and former employee of the PC, asserted various causes of action against the PC, the new LLC, and individual shareholders of the PC based upon the alleged failure of the defendants to make certain buy-out payments owed the plaintiff following his departure from the PC. This opinion dealt with the plaintiff's request that the court enjoin the dissolution of the PC or appoint a receiver for winding up the PC's affairs. As the basis for such relief, the plaintiff asserted that the PC's change of name, sale of assets, and proposed dissolution had not received shareholder approval as required by the

corporate statutes. The court disagreed and denied the request for injunctive relief or appointment of a receiver. A subsequent related opinion appears at 1999 WL 171404 (Conn. Super. March 1, 1999).

***Kansas Public Employees Retirement System v. Reimer & Kroger Associates, Inc.***, 60 F.3d 1304 (8th Cir. 1995). While the focus of this case is not on LLC issues, the court does discuss in a footnote the effect of the conversion of a partnership to an LLC. A law firm that had converted from a partnership to an LLC under Missouri law sought to intervene in a lawsuit brought by the Kansas Public Employees Retirement System (KPERs) against various defendants. KPERs had previously notified the law firm that it intended to add it as a defendant in the instant case pending in federal court but later indicated that it intended to assert its claims against the law firm in a separate suit to be filed in state court. The law firm then sought to intervene in the suit in federal court. KPERs attempted to make an issue out of the fact that its correspondence and draft pleadings all referred to the law firm as a partnership rather than an LLC. The court referred to this distinction as "disingenuous" and pointed out that, under the Missouri conversion provisions, the LLC acquired all of the former partnership's "rights, privileges, powers, debts, [and] causes of action" and was burdened with all of its "duties, debts, liens, liabilities and rights of creditors." Additionally, the law firm had admitted its responsibility for paying any judgment against the former partnership.

#### **PP. Successor Liability**

***Kowalski v. Integral Seafood LLC***, Civ. Nos. 05-00679 BMK, 06-00182 BMK, 2007 WL 1376378 (D. Hawaii May 4, 2007) (joining LLC as transferee of interest in patent infringement action based on evidence of transfer to LLC of goodwill and business contacts of member).

***Storage and Office Systems, LLC v. United States***, 490 F.Supp.2d 955 (S.D. Ind. 2007) (refusing to apply federal common law successor liability principles to hold LLC purchaser of corporation's assets liable for unpaid taxes because tax lien was not filed at time of sale and federal common law should not be applied to supplement or modify scheme established by IRC Section 6323).

***Butler v. Adoption Media, LLC***, 486 F.Supp.2d 1022 (N.D. Cal. 2007). After a general partnership refused to post the profile of a gay couple on the partnership's website facilitating adoption, the couple sued the partnership, its two individual partners, two Arizona LLCs subsequently formed by the individuals, and two corporations formed by the individuals to serve as members of the LLCs. The plaintiffs argued that the LLCs were liable as successors of the partnership and that the LLCs and other entity defendants were all alter egos of the individuals. After the partnership refused to post the plaintiffs' profile on its web site, the individual partners formed the two LLCs, transferred assets from the partnership to the LLCs, formed two corporations (one owned by each of the individuals) to serve as members of the LLCs, and transferred their membership interests in the LLCs to the corporations. Applying California successor liability rules to the analysis of whether the LLCs were liable as successors of the partnership, the court concluded that there was no basis for successor liability because there was no express or implied assumption, the requirements of the de facto merger and mere continuation doctrines were not met (since the partnership continued to exist), and there was no evidence that the partnership transferred assets to the LLCs for a fraudulent purpose. Applying California law to the analysis of whether the LLCs and other entity defendants were alter egos of the individuals and one another, the court granted summary judgment to the defendants.

***Baca v. Depot Sales, LLC***, Civil Action No. 06-cv-00714-EWN-PAC, 2007 WL 988061 (D. Colo. March 30, 2007) (applying successor liability principles to LLC that acquired sole proprietorship).

***Drayton Grain Processors v. NE Foods, Inc.***, Civil File No. 3:06-cv-37, 2007 WL 983825 (D. N.D. March 20, 2007) (concluding that corporation was liable as successor to dissolved LLC under any of four exceptions to general rule that purchaser of assets does not assume liabilities of purchased company).

***Union Square Grill Hospitality Group, LLC v. Blue Smoke American Bar & Grill LLC***, No. 3:06-CV-00976 (PCD), 2007 WL 869024 (D. Conn. March 19, 2007) (concluding that LLC that succeeded to dissolved LLC's business was liable for judgment against predecessor LLC under "continuity" doctrine of successor liability).

***Sundance Rehabilitation Corporation v. New Vision Care Associates II, Inc.***, No. 04-3571-CV-S-FJG, 2007 WL 709014 (W.D. Mo. March 5, 2007) (holding that plaintiff did not establish grounds to pierce veil of corporate and



LLC entities even though LLC had been found to be continuation of corporate predecessors because criteria necessary to satisfy corporate continuation doctrine differs significantly from test to pierce corporate veil).

***Quebecor World (USA), Inc. v. Harsha Associates, L.L.C.***, 455 F.Supp.2d 236 (W.D. N.Y. 2006) (holding that allegations LLC continued business of LLC that contracted with plaintiff were sufficient to survive motion to dismiss on basis of de facto merger or mere continuation theories of successor liability).

***Nautilus Insurance Company v. Wadsworth***, No. 2:05-CV-64, 2006 WL 2452949 (D. Vt. Aug. 23, 2006) (concluding that LLC would not be liable under mere continuation doctrine for liability of member incurred when member was operating as unincorporated business prior to formation of LLC).

***Orthotec, LLC v. REO SpineLine, LLC***, 438 F.Supp.2d 1122 (C.D. Cal. 2006) (concluding that West Virginia LLC did not acquire all or substantially all of Ohio LLC's assets, and, assuming it did, transaction did not result in de facto merger or mere continuation).

***Mitchell v. CFC Financial LLC***, 230 F.R.D. 548 (E.D. Wisc. 2005) (granting leave for plaintiff's amendment to change name of defendant from predecessor LLC to LLC survivor of pre-suit merger, and permitting amendment to relate back inasmuch as surviving LLC was intended defendant, was on notice of action, and was not prejudiced).

***Butler v. Adoption Media, LLC***, No. C04-1035 PJH, 2005 WL 2077484 (N.D. Cal. Aug. 26, 2005) (reviewing successor liability rules under Arizona and California law and concluding they do not differ).

***Fuisz v. Walter E. Lynch AIA, PLLC***, 147 Fed.Appx. 319, 2005 WL 1690522 (4<sup>th</sup> Cir. 2005) (applying Virginia corporate successor liability principles and concluding professional LLC was liable for judgment rendered against predecessor architectural entities owned by sole member of LLC, pointing out continuity of ownership, employees, and business, fact that asset transfer was not arm's length transaction, and fact that transfer occurred only six months after judgment was rendered, thereby indicating LLC was used for purpose of avoiding predecessor entities' liability on judgment).

***Milliken & Co. v. Duro Textiles, LLC***, 19 Mass.L.Rptr. 509, 2005 WL 1791562 (June 10, 2005) (analyzing whether LLC had successor liability for corporate predecessor's debt under mere continuation and de facto merger theories and concluding facts supported imposing liability on successor LLC under these theories unless creditor was barred from recovery based on unclean hands doctrine).

***Glentel, Inc. v. Wireless Ventures, LLC***, 362 F.Supp.2d 992 (N.D. Ind. 2005) (analyzing successor liability in context of sale of assets by one LLC to another LLC based on case law in corporate context and concluding as a matter of law that successor liability could not be imposed on purchaser).

***Miller v. Forge Mench Partnership Ltd.***, No. 00 Civ. 4314(MBM), 2005 WL 267551 (S.D. N.Y. Feb. 2, 2005) (holding "de facto merger" and "continuation" successor liability doctrines applied to LLC transferee of limited partnership's assets, and claimant need not establish basis to pierce LLC veil or show fraud to impose successor liability under such doctrines).

***Securities Exchange Commission v. Diversified Corporate Consulting Group***, 378 F.3d 1219 (11th Cir. 2004) (holding Delaware LLC successor in interest to dissolved Florida LLC with the same name could not be held liable where the SEC knew before trial that the Delaware LLC was a separate entity successor in interest and took no steps to add it as a defendant).

***Hawk, Inc. v. City Brewing Co., LLC***, No. 02-1833, 2003 WL 1563767 (Wis.App. March 27, 2003) (stating that, while Wisconsin courts typically apply successor liability rules to corporate entities, the court saw no reason why the principles of successor liability should not apply to LLCs such as the purchasing LLC in question, and concluding that the plaintiff failed to place in dispute any of the exceptions to the general rule against successor liability so as to avoid summary judgment).

**Lenge v. Beizer**, No. CV000802145, 2002 WL 31967553 (Conn.Super. Dec. 30, 2002) (characterizing attorney's transfer of building and law practice to LLCs as conversion resulting in liability of LLCs for pre-conversion liabilities along with attorney).

**Leber v. Universal Music and Video Distribution, Inc.**, 225 F.Supp.2d 928(S.D. Ill. 2002). The plaintiffs sued for breach of a collective bargaining agreement of Universal Music and Video Distribution, Inc. ("Universal") and sought to hold an LLC in which Universal was a member and the LLC's other corporate member ("Panasonic") liable under various theories, including successor liability. The court applied successor liability principles as they have developed in the labor law context and concluded that neither the LLC nor Panasonic were the alter egos of Universal.

**Weldon v. Great White North Distribution Services, L.L.C.**, 197 F.Supp.2d 893 (E.D. Mich. 2002) (applying corporate successor liability principles in context of Delaware corporation's continuation of Virginia LLC's business).

**Crane Construction Company v. Klaus Masonry, LLC**, 114 F. Supp.2d 1116 (D. Kan. 2000). The court in this case acknowledged that corporate successor liability rules apply to other forms of business organizations and cited the *LiButti* case, in which the mere continuation doctrine was applied where the predecessor was a sole proprietorship and the successor an LLC. The court refused to apply the mere continuation doctrine to this case, in which a creditor of a deceased sole proprietor was attempting to impose liability on the LLC formed to carry on the business after the sole proprietor's death by the sole proprietor's son.

**Kanefield v. SP Distributing Company, L.L.C.**, 25 S.W.3d 492 (Mo. App. 2000). A sole proprietor entered an agreement with an employee, the plaintiff in the case, whereby the proprietor agreed to give the plaintiff 10% of the proceeds from the sale of the business if the plaintiff was employed at the time of the sale. After the proprietor died, his wife operated the business as a partnership in dual capacities, as the surviving spouse and trustee of a family trust. Later the wife transferred portions of her interest to two sons, and the partners converted the partnership to an LLC. The next year, the LLC terminated the plaintiff's employment. The plaintiff sought a declaratory judgment, breach of contract damages, and imposition of an equitable lien. Later the plaintiff added a count of fraudulent conveyance. The trial court dismissed all these claims, and the plaintiff appealed. The court of appeals found that the plaintiff alleged facts that would support the existence of a contract either under successor liability theories or based upon an agreement with the wife after the proprietor's death. The plaintiff alleged that the defendants breached the contract by terminating his employment, failing to pay him his share of the net proceeds upon sale of the business, and repudiating the agreement and offering the business for further sale. The defendants argued that the conversion of the partnership to an LLC was not a sale of the business, but the court stated that there were nevertheless disputes regarding the allegations of breach of contract. The court found that the plaintiff failed to state a claim for fraudulent conveyance in that neither the addition of two partners nor the subsequent conversion to an LLC changed the plaintiff's rights or put the assets of the business beyond his reach. Finally, the court determined that the plaintiff had stated a cause of action for an equitable lien.

**Baker v. David A. Dorfman, P.L.L.C.**, No. 99Civ.9385(DLC), 2000 WL 1010285 (S.D. N.Y. July 21, 2000), *aff'd*, 232 F.3d 121 (2d Cir. 2000). Baker obtained a judgment against David Dorfman for legal malpractice and fraud. Subsequently, Dorfman formed a professional LLC and began to operate his law practice through the PLLC. In this action, Baker sought to hold the PLLC liable on the judgment against Dorfman as a successor in interest. The court concluded that the PLLC was liable as a successor in interest. The court found no reason to doubt that the "traditional rules of successor liability are applicable to limited liability companies." The court also commented that the facts of the case supported an inference that Dorfman formed the LLC as a fraudulent attempt to escape his obligation to Baker. The court of appeals affirmed the district court's judgment imposing successor liability in a *per curiam* opinion in which it praised the lower court's "well-reasoned and thorough" opinion. The court of appeals noted in particular its agreement with the lower court's application of successor liability "regardless of whether the predecessor or successor organization was a corporation or some other form of business organization." The court noted in a footnote that, because the defendants never raised the issue, it expressed no opinion regarding the extent to which New York income exemptions might limit the application of successor liability where the alleged successor is a single-member company formerly operated as a sole proprietorship.

**LiButti v. United States**, 178 F.3d 114 (2d Cir. 1999). In this tax case, the court determined that a Kentucky LLC was not subject to personal or in rem jurisdiction of the New York court under a minimum contacts analysis. The court also rejected an alternative argument by the IRS based upon Rule 25(c) and Rule 71 of the Federal Rules of Civil Procedure. The exercise of personal jurisdiction under this approach required that the LLC be a successor in interest

to a sole proprietorship under New Jersey successor liability law. The court recited the four exceptions to non-liability where a company transfers assets to another company under New Jersey law and noted that the rule and its exceptions apply regardless of whether the predecessor or successor organization is a corporation or some other form of business. The LLC did not fall into any of these exceptions.

#### **QQ. Attorney Liability/Disqualification**

*In re Senior Cottages of America, LLC (Moratzka v. Morris)*, 482 F.3d 997 (8<sup>th</sup> Cir. 2007) (holding that trustee had standing to bring claim against attorneys for aiding and abetting breach of fiduciary duty of manager/majority owner of debtor LLC because debtor could have asserted claim prior to filing of bankruptcy, and trustee adequately stated claim for aiding and abetting breach of duty where trustee alleged manager/majority owner stripped LLC's assets without reasonable compensation, attorneys knew action was in breach of owner's fiduciary duty, and attorneys provided substantial assistance and advised LLC to conclude transaction).

*Valley/50th Avenue, L.L.C. v. Stewart*, 153 P.3d 186 (Wash. 2007) (holding that member and LLC were separate entities both of whom were owed duty by attorneys who took deed of trust on LLC's property to secure payment of legal fees owed by member, and concluding that fact issues as to firm's compliance with ethical obligations precluded summary judgment foreclosing deed of trust).

*Fogarty v. Parker, Poe, Adams, and Bernstein, L.L.P.*, \_\_ So.2d \_\_, 2007 WL 80794 (Ala. 2007). The Alabama Supreme Court issued this modified opinion replacing its prior opinion of August 18, 2006. The modified opinion is almost identical to its prior opinion, and the court reached the same conclusions regarding the claims asserted by minority members of an Alabama LLC against a North Carolina law firm and two of its attorneys based on the attorneys' role in denying them access to the books and records of the LLC. The plaintiffs alleged that the attorneys threatened legal action against them if they continued to seek access to the LLC's records, misrepresented Alabama law by stating that Alabama law did not entitle them to access to the LLC's books and records, and removed the books and records from Alabama to prevent the plaintiffs from having access to them. The court held that the Alabama Legal Services Liability Act (ALSLA) was not the exclusive remedy for the minority members' claims because the ALSLA applies only to allegations of legal malpractice, i.e., claims against legal services providers that arise from the performance of legal services. The court stopped short of saying, as it had in its original opinion, that the ALSLA applies only to claims brought by the one who receives legal services; however, the court stated, as it had in its original opinion, that it appeared the ALSLA did not apply to the plaintiffs' claims because the plaintiffs' complaint did not allege tortious conduct resulting from the receipt of legal services from the attorneys and because the attorneys expressly stated that they never provided legal services to the plaintiffs. Furthermore, the ALSLA did not apply to the attorneys because they were not licensed to practice law in Alabama, and the ALSLA applies only to attorneys licensed in Alabama. The court next held that Alabama recognizes a private cause of action for the unauthorized practice of law in Alabama and concluded that the plaintiffs stated a claim for relief by alleging that the attorneys were not licensed in Alabama and that the plaintiffs were injured as a result of representations made concerning Alabama law for the majority owners and the LLC itself. The court also found that the plaintiffs had stated a claim against the attorneys based on the statutory inspection provisions of the Alabama Limited Liability Company Act. The court pointed out that the statute provides for personal liability of "any agent, member, or manager" of an LLC who refuses to permit a member to inspect the books and records without reasonable cause. The plaintiffs alleged that the attorneys were acting as the LLC's agent and that they refused to permit the plaintiffs to inspect certain records without reasonable cause; therefore, the allegations supported a claim for relief under the statute, which provides for a penalty in an amount up to 10% of the fair market value of the membership interest of the member in addition to other damages.

*Yassky v. Meltzer, Lippe, Goldstein & Schlissel*, 829 N.Y.S.2d 313 (N.Y. A.D. 1 Dept. 2007) (stating that attorney hired to represent LLC in eviction proceeding was not responsible for failure to publish notice of LLC's formation).

*Aranki v. Goldman & Associates, LLP*, 825 N.Y.S.2d 97 (N.Y. A.D. 2 Dept. 2006) (finding allegations that attorney and majority members of LLC colluded to freeze out minority members were sufficient to state cause of action for legal malpractice and for aiding and abetting breach of fiduciary duty).

*Williams v. Roberts*, 931 So.2d 1217 (La. App. 2006) (finding no attorney-client relationship between attorney and plaintiff members of LLCs, where attorney was hired by another member to draft LLC formation documents (which

plaintiffs alleged contained terms extremely adverse to them) and plaintiffs' belief that attorney represented plaintiffs was not reasonable).

**Columbus Bar Ass'n v. Mills**, 846 N.E.2d 1253 (Ohio 2006) (suspending attorney who represented multiple parties in connection with LLC formation and dispute).

**Spears v. Overbey**, 170 Fed.Appx. 379 (6<sup>th</sup> Cir. 2006) (concluding attorney who represented individuals in formation of LLC and various transactions in connection with purchase of hotel, including execution of guaranties, was not impermissibly conflicted by prior representation of lender).

**Summit Lodging, LLC v. Jones, Spitz, Moorhead, Baird & Albergotti, P.A.**, 627 S.E.2d 259 (N.C. App. 2006) (holding court had personal jurisdiction over attorneys in malpractice action where attorneys formed North Carolina LLC for North Carolina residents and later advised clients in restructuring debt).

**Omnicare, Inc. v. Provider Services, Inc.**, No. 1:05CV2609, 2006 WL 414061 (N.D. Ohio Feb. 21, 2006) (disqualifying attorney and his law firm from representation of LLC and one of its members under DR 5-102(A) and (B) because attorney, who was managing member of LLC, had knowledge regarding agreement in dispute and would be called as witness by both sides).

**Lio v. Zhong**, 10 Misc.3d 1068(A), No. 600455/05, 2006 WL 37044 (N.Y. Sup. Jan. 6, 2006). The court dismissed the plaintiff's claims against an attorney who had allegedly represented the LLC, one of the defendant members, and the defendant member's spouse at various points. The attorney never represented the plaintiff and did not have a duty to the plaintiff personally, and the court held the plaintiff's claims of aiding and abetting a breach of fiduciary duty were too vague to withstand dismissal. The court acknowledged that the defendant members owed the plaintiff fiduciary duties and that a third party may have aiding and abetting liability where the third party knowingly participates in a breach of fiduciary duty by providing substantial assistance to the violator. To the extent the plaintiff's allegations against the attorney related to conflicts of interest, they were conflicts as to which the plaintiff did not have standing to complain. To the extent the plaintiff's allegations related to the failed negotiations for a buy-out, the court held that the failed negotiations did not implicate the defendants' fiduciary duties and thus did not serve as a basis for aiding and abetting a breach of duty claim. The court acknowledged that a third party may have aiding and abetting liability where the third party knowingly participates in a breach of fiduciary duty by providing substantial assistance to the violator; however, the court held the plaintiff's allegations against the attorney did not state a claim in this regard.

**FPJ Investments, LLC v. Ameritex, LLC**, No. CV054011052S, 2005WL 3624389 (Conn. Super. Dec. 8, 2005) (holding substantial relationship between present lawsuit and prior matters precluded attorneys from representing plaintiff LLC where attorneys had represented defendant LLC at time matters in dispute arose).

**Blanton v. Prins**, 938 So.2d 847 (Miss. App. 2005) (holding attorney for LLC owed no duty to LLC's members, and concluding no breach of duty by attorney occurred even if relationship existed because attorney's efforts to advise plaintiff member concerning settlement developments were reasonable).

**Bottoms v. Stapleton**, 706 N.W.2d 411 (Iowa 2005). A minority member of an LLC sued the LLC and its majority member seeking damages for breach of fiduciary duty and conversion, judicial dissolution, an accounting, and a receivership. The minority member sought to disqualify the defendants' attorney from representing the LLC and the majority member. The court of appeals found that, despite the potential for a conflict of interest, the record did not establish a current significant risk that the attorney's representation of one defendant would materially interfere with the zealous representation of the other defendant. The trial court had concluded that the defendants' attorneys could not represent both the LLC and the majority member because the allegations that the majority member breached duties to the company by converting and embezzling LLC funds presented a significant divergence of interests of the LLC and majority member. The appeals court analyzed Rule 32:1.7 of the Iowa Rules of Professional Conduct dealing with conflict of interest and pointed out that the plaintiff did not seek recovery on behalf of the LLC, but only sought to recover amounts to which he was personally entitled as an owner. The court characterized the equitable remedies against the LLC as merely ancillary to the claims against the majority member. The court distinguished case law in the corporate context where a shareholder was seeking to recover derivatively on behalf of the corporation and a different standard for disqualification applied. The court stated that the plaintiff could reassert its motion to disqualify if in the future it had evidence satisfying the test of Rule 37:1.7.

***Legal Aid Society of Cleveland v. W&D Partners I, L.L.C.***, 834 N.E.2d 850 (Ohio App. 2005) (holding member of lessee LLC lacked standing in forcible entry and detainer action to bring motion to disqualify attorney representing LLC officer based on alleged conflict of interest, though attorney had previously represented LLC, where member had no attorney client relationship with officer's attorney and member did not file derivative action on behalf of LLC).

***Valley/50th Ave., L.L.C. v. Stewart***, No. 31703-6-II, 2005 WL 1502021 (Wash. App. June 21, 2005). An LLC's sole member/manager, Rose, executed a deed of trust on LLC property in favor of a law firm to secure a note for outstanding legal fees owed to the firm by Rose on other matters. The firm had formed the LLC for Rose two years prior to execution of the deed of trust. Shortly after the LLC was formed, Rose conveyed 98% of the economic units to his sons, but the firm claimed it was unaware of this transfer. When the law firm sought to foreclose on the LLC's property, the LLC challenged the enforceability of the deed of trust on various grounds including violation of attorney rules of professional conduct. The court rejected the argument that the firm's representation of both Rose and the LLC gave rise to material conflicts of interest and violated Rule 1.7(b). The court stated that the scope of the firm's representation of the LLC was confined to preparing and filing organizational documents and serving as registered agent of the LLC, and the court concluded that it was unlikely the firm's security interest in the LLC's property materially limited its ability to represent the LLC. Similarly, the court did not find that the LLC and Rose were adverse with respect to other matters in which the firm represented the member. The court also rejected the LLC's arguments that the firm violated Rule 1.8 relating to a business transaction between a lawyer and a client. The court found it immaterial whether the LLC received a benefit from the transaction because Rose, the LLC's manager, pledged the LLC's asset to secure his promissory note. To the extent the transaction involved a conflict between Rose and his sons as to how the LLC's property was used, the court pointed out that Rose transferred his economic units to his sons without the firm's knowledge or assistance. The court rejected the arguments that the firm did not communicate the terms of the agreement to the LLC and that the LLC did not consent to the transaction because it was the LLC's manager, Rose, who proposed and negotiated the transaction, and the LLC knew what its manager knew. The court also concluded that Rose, as the LLC's manager, had a reasonable opportunity to consult with other attorneys about the security interest.

***Harwell v. Zimmerman***, 925 So.2d 964 (Ala. Civ. App. 2005) (dismissing fraud claim by co-owner of LLC against attorney who filed articles of organization but failed to disclose that he had drafted no operating agreement and that he previously represented other co-owners individually, noting that it was undisputed that attorney had no duty to draft operating agreement, and co-owner admitted she knew of attorney's prior representation of other owners and admitted that damages sought were not caused by attorney).

***Milo Fields Trust v. Britz***, 874 A.2d 1130 (N.J. Super. A.D. 2005) (holding barter arrangement in which attorney acquired minority interests in LLCs was not covered by and did not violate professional conduct rule on business transactions between attorney and client, and, assuming it did, majority owner's conduct constituted waiver, estoppel, and ratification).

***Flores v. Matthews & Branscomb***, No. 04-04-00690-CV, 2005 WL 763310 (Tex. App. April 6, 2005) (affirming dismissal of case against attorneys by members who claimed attorneys jointly represented them with other member and LLC in formation, and holding that finding of fraud in inducement against members precluded them from relying on provision in LLC regulations they claimed attorneys failed to disclose).

***In re Ruffin***, 610 S.E.2d 803 (S.C. 2005) (finding attorney member of LLC did not generally undertake legal representation of other members and LLC and reversing ethical rule violations based on Rules 1.2 (scope of representation), 1.7 (conflict of interest), and 1.15 (safekeeping of property), but affirming violations based on various other rules, including violation of Rule 1.1 (competence) based on incorrect advice regarding mechanic's lien actions filed against LLC).

***Tessmer v. Steinberg***, No. 251474, 2005 WL 736514 (Mich. App. March 31, 2005) (concluding there was no attorney-client relationship between plaintiff member and lawyer who drafted LLC organizational documents).

***Business Loan Express, LLC v. Pak***, No. JFM-04-634, 2004 WL 1554395 (D. Md. July 9, 2004). While a confessed judgment was pending against them, Mr. and Mrs. Pak transferred two properties to a newly formed LLC with the assistance of their attorney daughter. The daughter controlled the LLC, and it subsequently sold one of the properties and wired the proceeds to Korea in payment of an alleged obligation owed by Mrs. Pak to her brother. There was no

evidence the LLC owed anything to Mrs. Pak's brother. The court characterized the transactions as fraudulent conveyances and set aside the conveyance of the property still owned by the LLC. Because the daughter was a member of a conspiracy to defraud the plaintiff, the plaintiff was awarded a monetary damage award against the daughter in the amount of the sale proceeds transferred to Mrs. Pak's brother in Korea.

*Blickenstaff v. Clegg*, 97 P.3d 439 (Idaho 2004) (holding genuine issues of material fact precluded summary judgment on LLC member's claim for breach of fiduciary duty against LLC's attorney).

*Berkowitz v. Fishbein, Badillo, Wagner & Harding*, 777 N.Y.S.2d 99 (N.Y. App. Div. Dept. 1 2004) (holding law firm for one LLC member did not have duty to other member, and release executed by LLC member in connection with buyout covered law firm).

*Beard v. Newsome Management Company*, 597 S.E.2d 835 (Ct. App. S.C. 2004). An attorney prepared new LLC agreements reflecting new ownership arrangements and buy-out provisions. The attorney, Beard, red-lined all the changes and sent the new agreements to the members with a letter in which he stated that he did not represent the LLC members and advised that they have their own professionals review the documents. Later the LLCs bought out Watkins and he sued the LLCs and the other member. The attorneys for Watkins sought to join Beard, alleging malpractice and breach of fiduciary duty claims against him on the basis that he had an attorney-client relationship with Watkins. The court denied the motion to add Beard, and the case settled, but Beard sought sanctions. He argued that the claims against him were not for a proper purpose and were not made by the attorneys for Watkins in good faith. Because the attorneys based their decision on an affidavit provided by a professor, the court denied the motion for sanctions.

*Exposition Partner, L.L.P. v. King, Leblanc & Bland, L.L.P.*, 869 So.2d 934 (La.App. 2004) (declining to dismiss LLC member's cause of action against law firm and lawyer that represented LLC because fraud and related causes of action did not depend upon attorney-client relationship, and concluding LLC's law firm and lawyer were subject to court's jurisdiction where lawyer formed LLC under Louisiana law, 50% of ownership of LLC was based in Louisiana, LLC's registered office was in Louisiana, lawyer made at least three trips to Louisiana in representation of LLC and had many contacts by phone and letter, and reason for formation of LLC was to create secondary market for certificates to be issued from lawsuit in Louisiana).

*Falcigno v. Tessei*, No. 105039/2002, 2003 WL 105349 (N.Y. Sup. Jan. 7, 2003). Creditors of an LLC alleged that the LLC fraudulently assigned its assets for the purpose of rendering the LLC insolvent, defrauding the plaintiffs, and avoiding the LLC's obligations to the plaintiffs. The court applied corporate law to conclude that the attorney for the LLC did not owe a fiduciary duty to creditors of the LLC. The court also determined that the 10% owner of the LLC did not state a cause of action for malpractice against the LLC's attorney. Even if the 10% owner could be considered a client, said the court, he had not sufficiently alleged causation. The court had serious doubts as to whether an attorney for a "corporation" has a duty to the "corporate shareholders." The court also concluded that the plaintiffs failed to state a cause of action for participating in a fraudulent conveyance. The court concluded that the simple act of representing a client in a transaction should not be sufficient to state a claim against an attorney unless the creditor is aware of particular facts that show the attorney counseled the client to engage in a fraud.

*McLeod v. Jackson*, 829 So.2d 722 (Miss.App. 2002). McLeod hired an attorney to assist him in forming an LLC with two other members. The attorney drafted the certificate of formation and an LLC agreement. The blanks regarding the contributions of the members were never completed, and McLeod sued the attorney for malpractice. The attorney had advised that the blanks regarding contributions be filled in. One of the other persons forming the LLC stated that he did not want to fill in the information regarding contributions, and the attorney advised that it was not necessary to include the information in the certificate of formation. The court cited the requirements of the Mississippi LLC act regarding formation of an LLC and maintenance of records regarding contributions. A record of contributions is required to be maintained at the LLC's principal place of business unless the information is contained in the certificate of formation. The attorney's summary judgment evidence included an affidavit from an expert on formation of LLCs who stated that the attorney met his duty by pointing out to the members that the contributions needed to be set out in writing. The expert stated that once the decision was made not to include the information in the documents filed with the Secretary of State, it was for the LLC itself to complete the document and maintain the record of contributions. McLeod failed to offer any evidence to create a fact issue, and the court upheld summary judgment in favor of the attorney.

**Keyak v. Traverso**, No. A095338, 2002 WL 1398060 (Cal. App. 1 Dist. June 28, 2002). The court upheld the trial court's denial of a motion to disqualify the law firm representing the plaintiffs. The plaintiffs and the defendant entered an oral joint venture that resulted in the formation of a corporation and several LLCs to hold title to properties involved in the venture. The defendant claimed that the plaintiffs' lawyer represented him and the entities in matters related to the litigation and should be disqualified. The lawyer had written numerous transmittal letters which were copied to the defendant stating that the lawyer did not represent the defendant and advising that the defendant have his own counsel. The trial court found the defendant's testimony that he did not receive these letters was not credible. The defendant did not directly challenge this finding but argued that the letters showed that the lawyer represented the joint venture and the entities formed and, by extension, the defendant. The court of appeals found ample evidence to support the trial court's implied findings supporting its denial of the disqualification motion. Finally, the court of appeals upheld the decision of the trial court to defer decision on whether the law firm should be disqualified because the lawyer representing the plaintiff was likely to be a witness at trial. The court found that the inquiries involved with respect to this issue were appropriately deferred to a later stage of the litigation.

**Credit Index, L.L.C. v. Risk Wise Intl. L.L.C.**, 746 N.Y.S.2d 885 (N.Y. Sup. 2002). The plaintiff LLC sought an order disqualifying the law firm representing the defendants on the grounds that the law firm represented an individual founder, manager, and (directly and through affiliates) majority owner of the LLC plaintiff on various matters including the negotiation of the operating agreement of the predecessor to the LLC plaintiff. The law firm claimed the operating agreement of the predecessor LLC bore no similarity to the operating agreement of the plaintiff LLC, but the court concluded the law firm's representation of the individual involved matters substantially related to the issues in the case. The motion to disqualify was granted.

**In re Woods (Cundy v. Woods)**, 284 B.R. 282 (D. Colo. 2001). The plaintiffs and the debtor were investors who entered a joint venture agreement and formed an LLC to secure financing and manage a real estate project. The debtor was also the attorney for the LLC (referred to in the case as the joint venture) and a member of the management committee. The plaintiffs alleged that the debtor owed them a fiduciary duty as a co-venturer, management committee member, and attorney for the venture, and that his liability for the venture's debt was non-dischargeable because it arose from a defalcation of fiduciary duty when he obligated the venture to loan amounts in excess of borrowing authorizations. The court found that there must be an express or technical trust, not merely a general fiduciary relationship like that arising out of an attorney-client, joint venture or partnership relationship. Additionally, the court found that the bankruptcy court erred in concluding a defalcation had occurred.

**Roller v. Walsh**, 718 N.Y.S.2d 519 (N.Y. A.D. 4 Dept. 2000). The court reversed dismissal of a suit by three LLC members against an attorney who provided services in connection with the formation and operation of the LLC and allegedly breached his fiduciary duty and duty of care by advancing the interests of the fourth member.

**Levy v. Mukdissi**, No. 99-2507, 2000 WL 1473475 (Mass. Super. Aug. 2, 2000). The court disqualified an attorney who represented a member of an LLC against the other members in a dispute arising out of their dental practice LLC. The court found that an attorney-client relationship had existed between the attorney and the defendant members and that the current representation of one of the members was adverse to the interests of the other three. The court rejected the attorney's argument that the services were solely for the benefit of the LLC, pointing to the fact that the individual members paid for his services. The court stated that the attorney represented the individual interests of all of the members when he prepared the agreement to associate and the subsequent operating agreements.

**Academy Mortgage Company, LLC v. Juarez**, 740 So.2d 708 (La. App. 5<sup>th</sup> Cir. 1999). An LLC mortgage company sued its manager and his wife, who was an LLC employee, for mismanagement and breach of fiduciary duty. The manager, who was also a member of the LLC, and his wife impleaded other members of the LLC, who were attorneys, and alleged legal malpractice against those members. The LLC's business had originally been operated as a partnership, but the partnership converted to an LLC on the advice of partners who were attorneys. Neither the manager nor his wife were attorneys. The manager and his wife alleged that two of the attorney members were negligent in their capacities as counsel to them as follows: failing to inform them of the effect of a conversion from a partnership to an LLC; failing to inform them of the attorney partners' potential personal gain in power in the new LLC (specifically, failing to inform them that the conversion would enable a majority of the members of the LLC to approve certain matters without consent of the minority, such as dissolution and winding up, transfer of substantially all of the assets, and amendment of the articles of organization and operating agreement); failing to advise them of potential personal financial gain to the attorney partners due to the conversion; failing to advise them to seek separate counsel; failing to advise them

as to conflicts of interest; failing to obtain their consent for having a business transaction with the client and serving as counsel to the client at the same time; and failing to give advice and obtain consent regarding the conflict of interest in writing. The manager and his wife alleged that the attorney members had provided legal services to them and the LLC or its predecessor on numerous occasions. The manager and his wife phrased the issue as whether a lawyer commits legal malpractice by entering into a business transaction with a client without the written consent required under the Louisiana Rules of Professional Conduct. The court found it unnecessary to reach the issue of whether the attorney members had an attorney-client relationship with the manager and his wife because, assuming there was an attorney-client relationship, the court found that the action was time-barred.

*Arifin v. Schude*, No. 98 C 1591, 1999 WL 342395 (N.D. Ill. May 14, 1999). Two members of an LLC sued the third member for various acts of alleged wrongdoing. The plaintiffs also sued their lawyer for malpractice in connection with his representation of them in forming the LLC. The court found that the plaintiffs' pleading adequately stated a cause of action against the lawyer. Specifically, the complaint alleged an attorney-client relationship and breach of the duty of care by making false representations regarding a bank account for the LLC, failure to ensure the bank account was established as represented to the clients, and performance of legal work that furthered the interests of the third member of the LLC and damaged the interests of the clients while being paid with the clients' funds.

*Burton v. Selker*, 36 F. Supp.2d 984 (N.D. Ohio 1999), *aff'd*, 2002 WL 252454 (6<sup>th</sup> Cir. 2002). The malpractice claim in this case arose out of a complex series of transactions related to the purchase by the plaintiff of an interest in a professional wrestling league. No significant insight regarding LLCs is provided in the case, but LLCs were formed and utilized in the course of the transactions involved. In general, the case highlights the issues involved in multi-party representation and participation in business ventures related to the client's business. The defendant lawyer represented his son and a business associate of his son's in their quest to purchase a professional wrestling league. The son's business associate ultimately sued the lawyer for legal malpractice, claiming that the defendant engaged in self-dealing, favoritism toward the son to the plaintiff's detriment, failures to disclose, and multiple client representation without effective waiver of the conflicts of interest. Among the plaintiff's complaints was the alleged failure of the lawyer to disclose his role in forming and investing in an LLC that played a part in a merchandising arrangement among the plaintiff, the lawyer's son, and the wrestling league they sought to purchase. Ultimately, the court granted summary judgment in favor of the lawyer on the malpractice claim. A critical factor in the lawyer's favor was a written engagement letter signed by the plaintiff that the court deemed a sufficient waiver of the conflicts of interest.

*Peaceful Family Limited Partnership v. Van Hedge Fund Advisors, Inc.*, No. 98 C 1539, 1999 U.S. Dist. LEXIS 1838 (D. Minn. Feb. 18, 1999). The plaintiffs brought this lawsuit after they lost a substantial amount of their investment in an LLC. The plaintiffs sued their investment advisor for securities fraud, and the plaintiffs asserted legal malpractice, breach of fiduciary duty, and negligent misrepresentation claims against the LLC's lawyers. The plaintiffs alleged that the LLC's lawyers were negligent in drafting an Offering Memorandum, misrepresenting and omitting various material facts, and in various acts and omissions related to efforts to deal with a prohibition imposed on one of the LLC's managers that prevented his trading on the Chicago Board Options Exchange. In analyzing the plaintiff's claims, the court spoke in corporate terms and relied on case law in the corporate context. The court held that there was no attorney-client relationship between the plaintiffs and the LLC's lawyers, nor were the plaintiffs the intended beneficiaries of the attorney-client relationship between the lawyers and the LLC. Additionally, the plaintiffs failed to establish any other duty on the part of the lawyers to communicate accurate information to them. Thus, the plaintiffs failed to state a claim against the lawyers.

#### **RR. Attorney Client Privilege**

*Union Square Grill Hospitality Group, LLC v. Blue Smoke American Bar & Grill LLC*, No. 3:06-CV-00976 (PCD), 2007 WL 869024 (D. Conn. March 19, 2007) (holding LLC liable for judgment against predecessor dissolved LLC under "continuity" doctrine of successor liability).

*Melcher v. Apollo Medical Fund Management, L.L.C.*, 829 N.Y.S.2d 483 (N.Y. A.D. 1 Dept. 2007) (holding that member waived attorney-client privilege with respect to conversations with counsel relating to formation of LLC where member selectively disclosed portions of communications beneficial to his position in affidavit and deposition).



*In re The Heritage Organization, L.L.C.*, 350 B.R. 733 (N.D. Tex. 2006) (discussing attorney client privilege in context of bankruptcy trustee's attempt to compel turnover of documents by law firm that had represented debtor LLC).

*Friedman v. Superior Court*, No. B188701, 2006 WL 2497981 (Cal. App. 2 Dist. Aug. 29, 2006) (holding limited partner in family limited partnership was not client of attorneys working for affiliated LLCs, and therefore was not holder of attorney-client privilege, because admission of member of LLC requires consent of all members and status of member cannot be conferred by court or other parties without consent of members).

*Delta Financial Corp. v. Morrison*, 819 N.Y.S.2d 425 (N.Y. Sup. 2006) (holding email communication between attorney and LLC was protected by attorney client privilege in action by member asserting violation of operating agreement where email sought legal advice on member's rights under operating agreement and there was lack of mutuality to support fiduciary duty exception to privilege at time of communication because member and LLC were then in adversarial stance).

*Shaffer v. OhioHealth Corp.*, No. 03AP-102, 2004 WL 35725 (Ohio App. 2004). An LLC's former president brought an action against the LLC for wrongful termination. While employed by the LLC, the plaintiff had obtained a legal opinion from the LLC's lawyer regarding the legality of certain proposed contracts involving the LLC. Based upon the legal opinion, the plaintiff urged action with which the LLC's board disagreed. Shortly thereafter, the plaintiff's employment with the LLC was terminated, and the plaintiff sued. The plaintiff had copies or originals of the communications and legal opinions rendered by the LLC's lawyer and relied upon them in his pleadings. The LLC sought to strike the portions of the pleadings referring to opinions or statements of the LLC's lawyer and also sought a protective order to prevent the plaintiff from divulging or using information in his possession covered by the attorney client privilege between the LLC and its lawyer. The court held that, with respect to documents and communications obtained by the plaintiff during his employment with the LLC, the attorney client privilege belonged to the LLC, and the privilege could not be waived by the LLC's former president.

*Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.*, 738 N.Y.S.2d 179 (N.Y. Sup. 2002) (referring to LLC as corporation throughout discussion of whether attorney/client privilege attached to written communication between two LLC employees containing recitation of oral legal advice rendered by attorneys and concluding that this "written communication between corporate employees for the purpose of facilitating the rendition of legal advice in the course of the professional relationship between the attorney and the corporate client" was privileged).

*Seegerstrom v. United States*, 87 A.F.T.R.2d 2001-1153, 2001-1 USTC ¶ 50,315, 2001 WL 283805 (N.D. Cal. 2001) (finding documents relating to attorney's representation of mother and son in estate planning matters, including assistance in formation of LLC, fell within legal representation, rather than "business advice" not protected by privilege, that certain non-privileged facts were protected because interwoven with privileged communications, and that communications with accountants and financial advisors were protected because they were intended to be in confidence for the purpose of assisting attorney in rendering legal services).

*Medical Waste Technologies, L.L.C. v. Alexian Brothers Medical Center, Inc.* No. 97 C 3805, 1998 WL 387705 (N.D. Ill. June 24, 1998) (finding defendant waived attorney/client privilege regarding attorney's representation of defendant in connection with proposed formation of LLC based upon defendant's injection of failure to form LLC as new issue constituting affirmative defense to plaintiff's claims).

#### **SS. Unauthorized Practice of Law**

*Disciplinary Counsel v. Kafele*, 843 N.E.2d 169 (Ohio 2006) (holding LLC member, who was not licensed attorney, engaged in unauthorized practice of law by preparing and filing legal papers in court on behalf of LLC).

*Columbus Bar Assoc. v. Verne*, 788 N.E.2d 1064 (Ohio 2003) (holding that accountant's advising clients regarding choice of business entity and drafting LLC articles of organization constituted unauthorized practice of law).

*In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289 (Bankr. N.D. Ohio 2001). An LLC manager of an LLC prepared and filed a Chapter 7 bankruptcy petition on behalf of the LLC. The court held that an LLC comes within the definition of a "person" under the Bankruptcy Code and is eligible to be a debtor, but an LLC must be represented by

counsel like a corporation or a partnership. The court further concluded that a lay person who prepares a bankruptcy petition and schedules on behalf of an LLC is engaged in the unauthorized practice of law. The court thus dismissed the case.

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