RECENT CASES INVOLVING LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS (includes cases since the Business Law Section Spring 2008 program survey until February 2009)

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RECENT CASES INVOLVING
LIMITED LIABILITY COMPANIES AND
LIMITED LIABILITY PARTNERSHIPS

By Elizabeth S. Miller
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This paper summarizes cases, as of February, 2009, that have appeared since the paper prepared for the Partnerships and LLCs: Important Case Law Developments– 2008 program presented at the Spring Meeting of the Business Law Section of the ABA. Additional surveys of LLP and LLC cases may be accessed at the Baylor Law School web site at http://law.baylor.edu.

I. Limited Liability Partnerships

A. Service of Process

PDM Steel Service Centers, Inc. v. Mullen & Filippi, No. F054031 (Cal. App. 5th Dist. Aug. 8, 2008). The plaintiff attempted service of process on a California LLP by serving an office employee of the LLP. The individual was not the registered agent identified in the LLP's registration statement, and the plaintiff failed to establish that the individual had ostensible authority to accept service of process for the LLP. Therefore, the plaintiff did not comply with the procedures required for service of process on an LLP.

B. Venue

Ex parte Burr & Forman, LLP, __ So.2d __, 2008 WL 4182829 (Ala. 2008) (pointing out that fact partnership is LLP does not change its treatment for venue purposes because partnership that registers as LLP is same entity that existed before registration and continues to be partnership under Alabama law subject to LLP provisions of partnership statute).

C. Pro Se Representation

Marin v. Gilberg, Civil Action No. V-07-62, 2008 WL 2770382 (S.D. Tex. July 11, 2008) (LLP may not appear pro se).

D. Diversity Jurisdiction

Morgan, Lewis & Bockius LLP v. City of East Chicago, No. 08 C 2748, 2008 WL 4812658 (N.D. Ill. Oct. 29, 2008) (applying rule that citizenship of LLP is determined by citizenship of all its partners and thus "stateless" partner (U.S. citizen domiciled in United Kingdom) destroyed diversity jurisdiction).

ZF Lemforder Corporation v Rochling Automotive Duncan, L.L.P., C.A. No. 7:8-3436-HMH, 2008 WL 4831470 (D.S.C. Nov. 3, 2008) (dismissing for lack of subject matter jurisdiction based on rule that citizenship of LLP is determined by citizenship of all its partners).

E. Limited Liability of Partners

iCore Networks, Inc. v. McQuade Brennan LLP, No. 1:08CV748(JCC), 2009 WL 36596 (E.D. Va. Jan. 5, 2009). A partner of a District of Columbia LLP accounting firm moved to dismiss professional malpractice and breach of fiduciary duty claims against him in his individual capacity. In an earlier opinion, the court found that the plaintiff had not sufficiently alleged an individual duty separate and apart from the duty of the LLP, and the partner was protected from vicarious liability by the D.C. LLP statute. The main issue addressed by the court in this opinion was whether the plaintiff's amended complaint alleged a duty on the part of the partner that would allow him to be liable in his individual capacity. The court found that it did. The plaintiff was suing the firm for embezzling funds from the plaintiff by overcharging for services, charging for unperformed services, and forging and cashing checks. To conceal the embezzlement, an individual or individuals at the firm created false invoices and made alterations of the plaintiff's books and records. The firm alleged that one individual carried out the scheme acting alone; however, the plaintiff sought to hold one of the partners, McQuade, personally liable. The court reviewed the amended allegations and found that, liberally construed, they alleged a duty on the part of McQuade in his individual capacity. The complaint stated that McQuade reviewed the work done by the alleged embezzler and assured the plaintiff that the work had been done properly. The alleged assurances were given at a time when the firm was negotiating a long-term accounting services contract with the plaintiff. The court stated that it may have been reasonable for McQuade to assume that the long-term engagement depended upon the outcome of the check reconciliations and assurances provided by McQuade. Thus, there was a plausible claim that McQuade's actions violated a duty of reasonable care and led, in whole or in part, to the damages suffered by the plaintiff. The claim for professional malpractice thus survived. The court noted that courts do not generally regard the accountant-client relationship as a fiduciary one, but concluded that the allegations supported a breach of fiduciary duty claim as well.

iCore Networks, Inc. v. McQuade Brennan LLP, No. 1:08cv748 (JCC), 2008 WL 4550988 (E.D. Va. Oct. 7, 2008) (noting limited liability of partner in LLP and holding conclusory allegation that partner "assumed responsibility" for LLP accounting firm's performance was insufficient to allege individual duty by partner to client).

Santos v. 304 West 56th Street Realty LLC, 862 N.Y.S.2d 435 (N.Y. Sup. 2008) (stating complaint must be dismissed as to general partner of defendant LLP in negligence action since partner of partnership which is LLP is not liable for liabilities of LLP).

Red River Wings, Inc. v. Hoot, Inc., 751 N.W.2d 206 (N.D. 2008). Two individuals who were partners in an LLP that was a limited partner in limited partnerships that owned franchised restaurants were held liable for the LLP's breach of fiduciary duty as a limited partner in connection with seizing control of the limited partnerships and ousting the general partner. The court relied upon the veil piercing provision of the North Dakota LLP statute which states that principles of corporate veil piercing apply to LLPs. The court stated that the evidence of the participation of the LLP partners in the takeover of the limited partnership in which the LLP was a limited partner supported the trial court's implicit finding that it would be inequitable if the LLP partners' acts were treated as those of the LLP alone and that the trial court did not err in holding the partners of the LLP liable.

Kuslansky v. Kuslansky, Robbins, Stechel, and Cunningham, LLP, 858 N.Y.S.2d 213 (N.Y.A.D. 2 Dept. 2008). A withdrawn partner sought to recover payment from the remaining partners for the value of his partnership interest under the partnership agreement. The defendant partners argued that they were shielded from liability by the New York LLP provisions, but the court pointed out that the New York Court of Appeals held in *Ederer v. Gursky* that the LLP liability shield only applies to a partner's liability to third parties and does not shield a general partner in an LLP from breaches of the partnership's or partner's obligations to each other.

F. Bankruptcy

In re Rambo Imaging, L.L.P., No. 07-11190-FRM, 2008 WL 2778846 (Bankr. W.D. Tex. July 15, 2008). The issue in this case was whether an individual who was a partner of a Texas LLP was a general partner with standing to be a petitioner in an involuntary bankruptcy case. The partnership was a general partnership registered under the Texas full shield LLP statute. The court stated that it had been unable to find any case law addressing the ability of a partner in an LLP to file an involuntary action, and the court relied upon *Collier on Bankruptcy* in concluding that the petitioning general partner should be treated as a shareholder of a corporation under the Bankruptcy Code and thus ineligible to be a petitioning partner under Section 303(b)(3). *Collier on Bankruptcy* takes the position that a full shield LLP should be treated as a corporation because the definition of a "corporation" under the Bankruptcy Code broadly encompasses a "partnership association organized under a law that makes only the capital subscribed responsible for the debts of the association" and because, in view of the purpose of Section 303(b)(3), which is to protect general partners who are exposed to personal liability for partnership obligations, it makes sense that Section 303(b)(3) should not be available to LLP partners. The court went on to conclude that, even if the petitioning individual was a general partner, he should be estopped to make that claim because it was clearly inconsistent with the individual's position in prior litigation in which he claimed to be a limited partner. The court stated that the individual's view of what type of partner he was seemed to change as his perceived interest changed, and that is precisely the situation judicial estoppel was designed to address.

G. Securities Laws

Securities and Exchange Commission v. Merchant Capital, LLC, 311 Fed.Appx. 250, 2009 WL 294751 (11th Cir. 2009). In a prior opinion, the court of appeals concluded that the LLP interests in 28 LLPs were investment contracts subject to federal securities laws. The court in the prior opinion remanded the case to the district court for a finding of whether the defendants had acted with scienter or negligently with respect to certain material omissions. The court of appeals instructed the district court to consider numerous matters, including whether the defendants had any business reason, apart from evading the securities laws, for employing a sham balloting procedure and adopting a business form that divided the investors into 28 separate partnerships when they intended to pool the money. On remand, the district court, on the same record from the prior appeal, simply found that there was no scienter because, in its view, the omissions were made in good faith. The court of appeals stated that it was clear from the record that the omissions were committed negligently or with scienter, and the court remanded to the district court once again with instructions that it was not at liberty to find that the omissions were made neither with scienter or negligently. The court also ordered the district court to enter judgment for the SEC on the strict liability violations of the registration provisions.

II. Limited Liability Companies

A. Diversity Jurisdiction

Federal courts of appeals and district courts continue to hold that an LLC has the citizenship of each of its members for diversity jurisdiction purposes. The district court opinions to this effect are too numerous to list. A few district court opinions raising issues of particular interest are noted below. Recent opinions in which circuit courts of appeals have applied or recognized the rule that an LLC's citizenship is determined by that of all its members include ***Harvey v. Grey Wolf Drilling Co.***, 542 F.3d 1077 (5th Cir. 2008) and ***Metalmark Northwest, LLC v. Stewart***, No. 06-35321, 2008 WL 361039 (9th Cir. Feb. 11, 2008).

In ***County of Durham v. Time Warner Entertainment Advance Newhouse Partnership***, No. 1:08CV225, 2008 WL 4287943 (M.D.N.C. Sept. 16, 2008), the court rejected the argument that "Series A Members" of a Delaware LLC, who exercised no management control and were treated as holders of non-voting preferred stock for federal income tax purposes, did not represent true ownership and were not members of the LLC for purposes of determining the LLC's citizenship in this diversity case. The court stated that it was not the province of the court to analyze the "business reality" of the LLC's structure, and the LLC agreement unambiguously specified that Series A Members together with the "Common Equity Member" constituted the "Members" of the LLC pursuant to the Delaware Limited Liability Company Act. The court also held that it was the citizenship of the entity for whose benefit the Series A interest was held that must be considered rather than the citizenship of the nominee owner.

In ***Bond v. Veolia Water Indianapolis, LLC***, 571 F.Supp.2d 905 (S. D. Ind. 2008), the court concluded that a Delaware LLC was an "unincorporated association" under the Class Action Fairness Act provision in 28 U.S.C. § 1332(d)(10) so that its citizenship for diversity purposes is determined by the state where its principal place of business is located and the state under whose laws it is organized (i.e., in the same manner that a corporation's citizenship is determined). The LLC argued that it was not an "unincorporated association" under Delaware law and thus should not be treated as an unincorporated association under Section 1332(d)(10). The LLC argued that its citizenship should be determined by the citizenship of each of its members under the general rule set forth for unincorporated associations by the Supreme Court in *Carden v. Arkoma Associates*. The court rejected the paradox presented by the LLC's argument that an LLC is not an "unincorporated association" under Delaware law, and thus not an unincorporated association for purposes of Section 1332(d)(10), while the LLC relied on the rule in *Carden*, which sets forth the rule for determining citizenship for all kinds of unincorporated associations. The court found that the LLC's approach would prevent Section 1332(d)(10) from achieving its clear purpose. Citing the Senate committee report on the Class Action Fairness Act, the court concluded that Congress used the phrase "unincorporated association" in Section 1332(d)(10) as broadly as the

Supreme Court used it in the case law. The court then applied the same test that applies to corporations to determine the location of the LLC's principal place of business (the "nerve center" test).

In ***Go Fast Sports & Beverage Company v. Buckner***, Civil Action No. 08-cv-01527-MSK-MJW, 2008 WL 2852626 (D. Colo. July 23, 2008), the defendants argued that the citizenship of an LLC defendant could be disregarded for purposes of diversity jurisdiction because it was administratively dissolved and could no longer be sued. The court stated that administrative dissolution of a perpetual LLC does not destroy its citizenship for diversity purposes if the LLC continues to exist under state law. The articles of organization submitted with the notice of removal stated that the LLC was a perpetual LLC that had been administratively dissolved in March 2005. At that time, Colorado law provided that an administratively dissolved LLC continues its existence but shall not carry on any business except as appropriate to wind up and liquidate its affairs. Thus, the administrative dissolution did not terminate the LLC's existence, and the court considered its citizenship in assessing diversity jurisdiction. Because one of the LLC's members was a Colorado citizen as well as the plaintiff, the parties were not diverse and the court lacked jurisdiction.

A federal district court addressed the effect of administrative dissolution of an Oregon corporation that was a member of a Delaware LLC in determining the citizenship of the Delaware LLC in ***Tri-County Metropolitan Transportation District of Oregon v. Butler Block, LLC***, Civil No. 08-259-AA, 2008 WL 2037306 (D. Or. May 7, 2008). The plaintiff, an Oregon corporation, filed suit against a Delaware LLC, and the Delaware LLC sought dismissal on the basis that the court lacked diversity jurisdiction. The court held that administrative dissolution of an Oregon LLC that was a member of the Delaware LLC did not terminate the membership of the Oregon LLC in the Delaware LLC under Delaware law. The court pointed out that neither the Delaware LLC statute nor the Delaware LLC's operating agreement permitted the Oregon LLC to withdraw. Further, the court stated that the Delaware statute does not recognize "administrative" dissolution, and the Oregon statute provides that administrative dissolution does not prevent commencement of a proceeding by or against the LLC. Thus, the court concluded that, although the Oregon LLC was administratively dissolved at the time the complaint was filed against the Delaware LLC, the Oregon LLC's membership had not ceased and its existence as a citizen of Oregon (its sole member was an Oregon resident) continued so that complete diversity of citizenship was lacking and the court did not have subject matter jurisdiction.

In ***Geismann, M.D., P.C. v. Aestheticare, LLC***, Civil Action No. 07-2575-KHV, 2008 WL 961272 (D. Kan. April 9, 2008), the court pointed out that, whereas Section 1332(a) requires complete diversity between all plaintiffs and all defendants, Section 1332(d), enacted as part of the Class Action Fairness Act of 2005, requires only minimal diversity, i.e., diversity between one plaintiff and one defendant, and that Section 1332(d) changes the rules governing unincorporated associations in class actions. For purposes of Section 1332(d), an unincorporated association is a citizen of the state where it has its principal place of business and under whose laws it is organized.

In ***Metalmark Northwest, LLC v. Stewart***, Nos. 04-682-KI, Cv 05-1920-KI, 2008 WL 803011 (D. Or. March 20, 2008), the district court analyzed the citizenship of the LLC plaintiff under circumstances where one of the two members had ceased to be a member and its interest was held by an assignee. Under the terms of the plaintiff LLC's operating agreement, the membership of a corporation that was a member of the LLC ceased upon the corporation's administrative dissolution, and its citizenship thus was not considered for purposes of the LLC's citizenship when determining diversity jurisdiction. Because the holder of the former member's interest was an assignee who had not been admitted as a member under the operating agreement and Oregon LLC statute, the LLC had only one remaining member for purposes of determining citizenship.

B. Personal Jurisdiction Over Members and Managers

Clement v. Lipson, 999 So.2d 1072 (Fla. App. 2008) (LLC's receiver failed to establish basis for exercise of personal jurisdiction over LLC's managers in connection with improper sales of timeshare interests to investors where managers acted only in their capacities as managers and were not personally involved in timeshare sales and allegations did not support claims of independent torts).

Progressive Minerals LLC v. Rashid, Civil Action No. 5:07CV108, 2008 WL 4416408 (N.D.W.Va. Sept. 24, 2008) (concluding that West Virginia long-arm statute conferred personal jurisdiction over managing member of LLC based on managing member's writing and faxing letter to individual in West Virginia in connection with business engagement between LLC and West Virginia entity).

Shaker Construction Group, LLC v. Schilling, No. 1:08cv278, 2008 WL 4346777 (S.D. Ohio Sept. 18, 2008) (holding court lacked personal jurisdiction over two members of LLC holding company that owned LLC casino/hotel in Mississippi where members' alleged contacts with Ohio occurred only because plaintiff, a co-member and construction manager of the casino/hotel project, was located in Ohio).

EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V., Civil Action No. 3184-VCP, 2008 WL 4057745 (Del. Ch. Sept. 2, 2008). A Delaware LLC sued one of its members, a Dutch LLC ("VG 109"), and the member's parent corporation ("NIBC"), seeking a declaration that VG 109 was NIBC's alter ego, specific performance of provisions of the LLC agreement regarding the reimbursement of tax withholding payments made on VG 109's behalf, and a declaration that VG 109's attempted transfer of its economic interest was invalid. The LLC asserted four bases for the court's exercise of personal jurisdiction over NIBC: (1) Delaware's long-arm statute; (2) the terms of the LLC agreement; (3) alter ego or veil piercing theories of jurisdiction; and (4) agency theory of personal jurisdiction.

The court rejected the argument that NIBC's single act of participating in the formation of the LLC in Delaware was sufficient to confer personal jurisdiction under the long-arm statute. Personal jurisdiction over VG 109, which consented to jurisdiction in the LLC agreement, was not challenged, and the court acknowledged that ownership of a Delaware subsidiary may constitute the transaction of business in Delaware. The court concluded, however, that the only business the LLC claimed NIBC conducted in Delaware was participating in the formation of the LLC, a participation too attenuated to subject it to personal jurisdiction, especially since the LLC failed to demonstrate that the LLC was NIBC's or VG 109's subsidiary, as the term is commonly understood, as opposed to a company in which VG 109 held only a minority interest. The record did not show that NIBC formed the LLC, or participated in the formation, in a meaningful fashion. NIBC was one of eighteen lenders that agreed to the formation of the LLC as part of a debt restructuring plan, and the complaint did not allege that NIBC had a dominant or controlling position in the lender group. The record did not suggest that NIBC or VG 109 caused the LLC to be formed as a Delaware LLC, as opposed to some other type of entity. The court stated that it was not persuaded that a minority member of an LLC with as small and indirect an ownership interest as that of NIBC (VG 109 was listed at various times as owning approximately 4.5% and 2.5% of the equity interest in the LLC) would be subject to personal jurisdiction in Delaware in the absence of facts suggesting NIBC participated in selecting Delaware as the state of formation or otherwise actively participated in the formation beyond taking an indirect minority membership interest.

The court next rejected the argument that the consent to jurisdiction provision in the LLC agreement applied to NIBC. Though the term "party" in the consent to jurisdiction provision was not defined, the court found nothing to suggest that the term would include NIBC, which was neither a signatory nor a member as to the original or amended LLC agreement. Though NIBC was an affiliate covered by the indemnification provisions of the LLC agreement, the court stated that the LLC failed to explain how the application of the indemnification provisions to NIBC supported its contention that NIBC consented to jurisdiction. In fact, the court found that the parties manifested an intent not to include affiliates in the consent to jurisdiction provision by expressly including affiliates in the indemnification provisions while referring only to parties in the consent to jurisdiction provision.

The court next discussed the agency and alter ego theories of personal jurisdiction. The court identified certain common factors but explained that the scope of the alter ego theory was broader in that only the precise conduct instigated by the parent is attributable to the parent under the agency theory whereas all of the activities of the subsidiary are attributable to the parent under the alter ego theory. Drawing all inferences in favor of the LLC, the court found for purposes of determining NIBC's amenability to suit in Delaware that VG 109 acted as NIBC's agent, but the court found that the actions of VG 109 did not provide a sufficient basis for the exercise of jurisdiction under the long-arm statute. In other words, apart from its consent to jurisdiction, VG 109 would not have been subject to jurisdiction in Delaware. The court concluded that a minority, passive investor in a Delaware LLC who allegedly breaches the LLC agreement in a manner that affects the rights of the LLC and its members *inter se* is not subject to jurisdiction under Delaware's long-arm statute for the breach without a showing that the LLC investor took some additional action from which the cause of action arose to consciously take advantage of the laws of Delaware. The court refused to impute VG 109's consent to jurisdiction under the agency theory because sophisticated parties had negotiated an agreement that included a consent to jurisdiction by the parties, and not their affiliates, and circumventing the parties' intention under the guise of an agency argument would "sanction bootstrapping and defeat the careful drafting of the consent provision."

The court also rejected the argument that NIBC was subject to personal jurisdiction under the alter ego theory. Because the court found that there were insufficient acts of VG 109 to satisfy the long-arm statute, the court stated that it need not decide the question of whether VG 109 was the alter ego of NIBC. However, the court discussed the LLC's arguments for disregarding the separate existence of VG 109 and its parent corporation and concluded that the LLC had not made a sufficient showing of fraud or other inequity to disregard the corporate form. The court pointed out that the fraud or injustice must stem from an inequitable use of the corporate form itself, not merely from the underlying cause of action for breach of contract. A conclusory statement in the complaint that NIBC knowingly used VG 109 as an instrument to shield itself from liability for tax obligations related to ownership in the LLC was insufficient to support a reasonable inference that NIBC's use of VG 109's limited liability status was fraudulent or inequitable. There also was no showing that VG 109's capitalization was so minimal as to prove it was a sham entity. The court also stated that the LLC's inability to sue NIBC in Delaware for taxes due from VG 109 did not create the requisite inequity.

Compass Financial Partners, L.L.C. v. Unlimited Holdings, Inc., No. CV 07-1964-PHX-MHM, 2008 WL 2945585 (D. Ariz. July 28, 2008) (holding that fact that defendant was member of LLC that owns property in Arizona is insufficient in itself to subject defendant to personal jurisdiction).

King v. Hawgwild Air, LLC, Civil Action No. 3:08-CV-0153-L, 2008 WL 2620099 (N.D. Tex. June 27, 2008) (examining activities of Arkansas LLC and holding that LLC was not subject to general or specific jurisdiction in Texas, looking to partnership law for guidance as to whether to attribute member's contacts to LLC and concluding that member's unrelated contacts with Texas could not be attributed to LLC to establish general jurisdiction).

Autumn Cashmere, Inc. v. IMMA, L.L.C., No. 08-CV-11593, 2008 WL 2478322 (E.D. Mich. June 17, 2008). The court stated that tortious acts committed by the sole member and officer of an LLC could be imputed to the LLC for purposes of personal jurisdiction because the New York LLC law states that "every member is an agent of the limited liability company for the purpose of its business, and the act of every member ... binds the limited liability company." The court acknowledged that an LLC can escape liability for the acts of managers and members if the member or manager in fact has no authority to act, but the court found that the sole member and officer's alleged complete control over the LLC vitiated that argument, and the court was convinced by the plaintiff's alter ego argument for purposes of imputing the acts of the member to the LLC.

Renaissance Health Publishing, LLC v. Resveratrol Partners, LLC, 982 So.2d 739 (Fla. App. 2008) (holding Nevada LLC and its president who used interactive web site to sell products to Florida residents and disparage products of competitor whose headquarters were located in Florida were subject to personal jurisdiction in Florida).

Town of West Hartford v. Taubman Centers, Inc., Nos. X02UWYCV075007876S, X02UWYCV075007877S, 2008 WL 2252494 (Conn. Super. May 9, 2008) (holding that corporation's ownership of partnership interest in limited partnership that owned partnership interest in partnership that owned membership interest in LLC that owned retail mall in Connecticut was insufficient to subject corporation to personal jurisdiction in Connecticut).

Mayville v. Glatkowski, Civil File Action No. 1:08-CV-232-TWT, 2008 WL 2037155 (N.D. Ga. May 8, 2008) (holding that defendant members of Tennessee LLCs were subject to personal jurisdiction in Georgia notwithstanding they had no physical presence in Georgia where they contacted plaintiff at her Georgia residence to induce her to purchase Tennessee land and where allegations included intentional fraud, but dismissing for improper venue since plaintiff's residence in Georgia was sole connection of forum to transaction).

Fisk Ventures, LLC v. Segal, Civil Action No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008). Disagreements between the members of two classes of membership interest in a Delaware LLC led to a deadlock, and one of the Class B members filed a petition for dissolution. Segal, a Class A member who was the LLC's founding member, president, and sole officer, filed counterclaims and third-party claims against the Class B members. Johnson, a Class B member, filed a motion to dismiss Segal's claims against him for lack of personal jurisdiction, and the other Class B members filed a motion to dismiss Segal's counterclaims and third-party claims for failure to state a claim. The court granted Johnson's motion to dismiss for lack of personal jurisdiction as well as the motion of the other Class B members to dismiss Segal's claims for failure to state a claim. Segal argued that Johnson was subject to the court's jurisdiction under the Delaware long arm statute because Johnson had insisted, as a condition to investing in the LLC, that the LLC be formed under Delaware law and that its governing contracts utilize Delaware law. Also, Johnson had attended some board meetings and had appeared in TV advertising broadcast in Delaware. Segal's claims against Johnson, however, did not arise from or have any nexus with these contacts. In addition, the court found that Johnson was not a de facto manager and did not otherwise materially participate in the management of the LLC for purposes of the consent to jurisdiction provision of the Delaware LLC statute (which applies to managers of LLCs or those who "participate[ ] materially in the management" of the LLC). The statute explicitly distinguishes between managers and the people who appoint them, by specifying that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager is not by itself participation in the management of the LLC. The court said that occasionally conferring with the representatives to the board elected by Johnson did not constitute material participation in the management of the LLC. Further, the fact that Johnson had rights as a member under the LLC agreement to affect the activities of the LLC *through* his representatives to the board did not mean that he was participating materially in the management of the LLC.

American General Life Insurance Company v. Margolis Family 1, LLC, Civil Action No. 1:07-CV-0230-JEC, 2008 WL 857436 (N.D. Ga. March 28, 2008) (finding that court had personal jurisdiction over individual who obtained Georgia insurance policy, formed Georgia LLC for purpose of paying premiums on policy, agreed to assist LLC in financing payment of life insurance policy, and entered financing agreement with another Georgia LLC to fund premium payments).

Gonzalez v. Lehtinen, No. 13-06-441-CV, 2008 WL 668600 (Tex.App. March 13, 2008) (noting difference between"jurisdictional veil piecing" and veil piercing for purpose of imposing liability, stating that certain issues such as fraud and undercapitalization are not assessed in jurisdictional veil piercing analysis, and concluding that Mexican citizen who was managing member of Texas LLC controlled internal business operations to such degree that individual was LLC's alter ego for personal jurisdiction purposes).

Venezia Amos, LLC v. Favret, No. 3:07cv146/MCR, 2008 WL 410163 (N.D. Fla. Feb. 12, 2008). The plaintiff sued an LLC and its managing member for federal securities fraud in connection with the plaintiff's purchase of a 40% interest in the LLC. The defendants argued that the court lacked personal jurisdiction over them. The court determined that F & F Developers, LLC (F & F), a Louisiana LLC, and its managing member (Favret), a Mississippi resident, were subject to the court's specific and general jurisdiction. Favret owned a majority interest in F & F, which in turn owned 50% of Venezia Resort, LLC, a Mississippi LLC engaged in developing residential resort condominiums in Biloxi, Mississippi. Venezia Resort maintained an office in Florida and conducted extensive business there. Favret was the managing member of F & F, and the court found that Favret served as the agent of F & F in connection with Venezia Resort business. Favret was also the managing member of Venezia Resort. Favret attended numerous membership and operations meetings of Venezia Resort in his individual capacity, as the majority interest owner of F & F, as the agent of F & F, and as the managing member of Venezia Resort. Based on these meetings and other activities of Favret in Florida, individually and on behalf of F & F, the court concluded that there was a basis for the exercise of specific and general jurisdiction over both F & F and Favret.

Wachovia Securities, LLC v. NOLA, LLC, 248 F.R.D. 544 (N.D. Ill. 2008) (concluding court lacked jurisdictional power to issue sanctions against LLC member who failed to appear for deposition as designated LLC representative because personal jurisdiction does not automatically extend to members of LLC, but ordering LLC to produce for deposition its manager over whom court had jurisdiction since LLC had made previous designation of its representative in bad faith).

M-R Logistics, LLC v. Riverside Rail, LLC, 537 F.Supp.2d 269 (D. Mass. 2008) (applying principles regarding jurisdiction over corporate officers and holding that nonresident managing member and authorized agent of New Jersey based LLC were not subject to personal jurisdiction in breach of contract action, though LLC was subject to court's jurisdiction, where there was no evidence that they gained any personal benefit or acted outside their employment, or that they were the alter egos of the LLC, or that they actually personally guaranteed the contract).

C. Service of Process

Pallman Maschinenfabrik GmbH & Co. v. Evergreen Composite Technology, Civil Action No. 5:08-CV-33(HL), 2009 WL 112683 (M.D. Ga. Jan. 16, 2009) (denying motion to dismiss for insufficient service of process because Federal rules as well as state law provided means to serve LLC and movant alleged only that service of process on LLC did not comply with state law).

Kallauner v. One Source Construction, LLC, 995 So.2d 59 (La. App. 2008) (noting that statute governing service of process on LLC is virtually identical to statute applicable to corporations and that cases under corporate statute may serve as authority in LLC context and concluding attempted service on LLC by serving secretary of LLC's registered agent did not comply with statute).

Pioneer Navigation Ltd. v. STX Pan Ocean (U.K.) Co., Ltd., No. 08 Civ. 10490(JGK), 2008 WL 5334550 (S.D.N.Y. 2008) (holding that individual with business address in Southern District of New York qualified as registered agent for foreign LLC).

Mobilevision Imaging Services, L.L.C. v. Lifecare Hospitals of North Texas, 260 S.W.3d 561 (Tex. App. 2008) (reversing default judgment against foreign LLC because plaintiff did not plead facts necessary to show that Texas Secretary of State was LLC's agent for service of process under long-arm statute and nothing in record established strict compliance required under statute).

Trini Realty Corp. v. Fulton Center LLC, 861 N.Y.S.2d 743 (App. Div. 2d Dept. 2008) (holding LLC's mere denial of receipt of summons and complaint was insufficient to rebut presumption of proper service created by affidavit regarding service by delivery of summons and complaint to Secretary of State).

DeJesus v. CC720, LLC, No. 6:08-cv-11-Orl-31DAB, 2008 WL 2856631 (M.D. Fla. July 22, 2008) (denying plaintiff's motion for default judgment against LLC because plaintiff failed to cite any service of process statute regarding propriety of service, noting that it was clear that plaintiff's counsel did not consult Division of Corporation's website to learn identity of LLC's managing members or correct address, and admonishing plaintiff that motions for entry of default judgment must analyze appropriate Florida service of process statutes applicable to type of entity against whom judgment is sought).

Downey v. 610 Morrison Road, LLC, No. 07AP-903, 2008 WL 2751214 (Ohio App. July 15, 2008) (discussing Ohio service of process provisions, commenting that LLC is neither corporation nor partnership under Ohio law, stating that procedure for serving "unincorporated associations" does not necessarily include LLCs, and noting that, while procedural rule provides specific methods of service for corporations, partnerships, and other entities, no specific method of service has been created for LLCs).

Manzella v. Dorsey, 258 S.W.3d 501 (Mo. App. 2008) (holding trial court did not err in quashing service or process on legal assistant of law firm LLC where statute provides for service of process on LLC by serving authorized person in lieu of registered agent and legal assistant swore in affidavit that she was not authorized agent to receive service of process for law firm LLC).

Autumn Cashmere, Inc. v. IMMA, L.L.C., No. 08-CV-11593, 2008 WL 2478322 (E.D. Mich. June 17, 2008) (stating that long arm statute providing for limited personal jurisdiction over "unincorporated voluntary association" clearly included LLCs).

Roylance v. ADT Security Services, Inc., No. C 08-1101 JF (RS), 2008 WL 2444795 (N.D. Cal. June 16, 2008)(stating that agents of LLCs appear to fall within broad catchall provision of service of process statute that includes among others, agents of corporations, agents of unincorporated associations, public entities, and any "person not otherwise specified in this article" and that agents of LLCs may be served pursuant to such statute even though not expressly listed "as are agents of corporations and unincorporated associations").

RJM Aviation Associates, Inc. v. GP Aviation Services, LLC, No. 3:06-CV-2007 (CFD), 2008 WL 918538 (D. Conn. March 28, 2008) (noting that question of whether foreign LLC should be treated as partnership or corporation for purposes of Connecticut long arm statutes remains unsettled but concluding that resolution of issue was unnecessary because foreign LLC's contractual dealings with Connecticut party satisfied standard for exercise of personal jurisdiction over foreign LLC regardless of whether LLC was treated as partnership or corporation).

Halo Tech Holdings, Inc. v. Cooper, Civ. No. 3:07-CV-489(AHN), 2008 WL 877156 (D. Conn. March 26, 2008) (concluding that Connecticut long arm statute applicable to foreign partnerships and voluntary associations does not apply to foreign LLCs, stating that parties did not argue that any difference existed between "limited liability company" and "limited liability corporation," and citing case law holding that "limited liability corporation is to be treated like any other corporation for long arm purposes").

SS & C Technologies, Inc. v. Providence Investment Management, LLC, 2008 WL 691702, No. 3:07 CV 484(CFD) (D. Conn. March 12, 2008) (noting unsettled nature of Connecticut law with respect to whether LLC should be treated as corporation or partnership for purposes of Connecticut long-arm statutes, but stating it was unnecessary to resolve question since court found it had jurisdiction under both statutes).

Tunnard v. Simply Southern Homes, LLC, 985 So.2d 166 (La. App. 2008) (holding that return of service of process on LLC was sufficient where it indicated service was made on LLC and citation was directed to LLC through its agent).

Montana Professional Sports, LLC v. National Indoor Football League, LLC, 180 P.3d 1142 (Mont. 2008) (holding that service upon individual who held herself out as person in charge of LLC's only office was proper service on LLC).

Tyco Fire & Security, LLC v. Hernandez Alcocer, No. 04023127-CIV, 2005 WL 6104560 (S.D. Fla. Oct. 7, 2005) (concluding that substituted service was properly made on Texas LLC by service on individual who was designated registered agent of LLC and who was served at girlfriend's residence in North Carolina where individual had stayed for four months before being served because such service complied with North Carolina rule permitting substituted service upon registered agent at agent's usual place of abode).

NYDIC Management Services, L.L.C. v. DS Montvale, L.L.C., 2008 WL 110392 (N.J. Super. A.D. Jan. 3, 2008) (holding that LLC should not be treated as partnership or unincorporated association for purposes of service of process on LLC in light of statutory protection provided LLC members against personal liability for debts of LLC).

D. Venue

Della Ratta v. Dyas, 961 A.2d 629 (Md. App. 2008) (discussing and analyzing LLC judicial dissolution statute and concluding that provision conferring authority for judicial dissolution on circuit court in county of LLC's principal office is venue provision and does not deprive all other circuit courts of subject matter jurisdiction).

Advocate Financial, L.L.C. v. Parker Interests, L.L.C., Civil Action No. 07-757-FJP-CN, 2008 WL 2773650 (M.D. La. July 16, 2008) (noting that it is generally accepted that unincorporated business associations such as partnerships and LLCs are analogous to corporations for purposes of venue under Section 1391(a)(1)).

May v. Ruyan, No. 06-11309-BC, 2008 WL 786539 (E.D. Mich. March 20, 2008) (finding venue was proper where claims included fraudulent inducement of LLC formed under Michigan law and at least one preliminary discussion about formation occurred in Michigan).

Federal Express v. American Bicycle Group, LLC, No. E2007-01483-COA-R9-CV, 2008 WL 565687 (Tenn. Ct. App. March 4, 2008) (holding that LLC is "found" in county where registered agent is located for venue purposes).

E. Standing/Authority to Sue

Krueger v. Zeman Construction Company, 758 N.W.2d 881 (Minn. App. 2008) (noting legitimacy of decision to conduct business as LLC to avoid personal liability but that decision to execute contract as member of LLC also precludes exercise of rights under contract; holding individual sole owner of LLC lacked standing to sue for business discrimination in performance of contract under Minnesota Human Rights Act where LLC rather than individual entered contract).

Best Western International, Inc. v. Furber, No. CV-06-1537-PHX-DGC, 2008 WL 5102064 (D. Ariz. Dec. 2, 2008). A member/manager of an LLC asserted a claim for tortious interference against Best Western on the basis that Best Western improperly removed the hotel operated by the LLC from its reservation system. Best Western argued that the member did not have standing to assert the claim because any harm was directly suffered by the LLC. The court stated that the member had standing because it served as manager under the LLC operating agreement and received a management fee of a percentage of gross revenue from hotel room sales. Thus, the member had an individual stake in the revenue separate and apart from his economic interest as a member.

Baron v. Rocketboom, LLC, 868 N.Y.S.2d 661 (N.Y. App. Div. 1st Dept. 2008) (denying 49% owner of LLC leave to intervene in suit by 51% member's father against LLC to recover on loan because LLC statute prohibits LLC members from entering actions against LLC except where object is to enforce member's right against LLC, and 49% member did not demonstrate any right with respect to LLC's assets since equity interest cannot be equated to "right" to LLC's assets; denying motion seeking joinder of 51% member in absence of evidence showing exception to statute precluding joinder of members in suits against LLC or showing that complete relief could not be afforded plaintiff without son's joinder).

Katz v. Katz, 867 N.Y.S.2d 100 (N.Y. App. Div. 2 Dept. 2008) (holding husband did not have standing to recover rent and other damages for period of wife's alleged "holdover occupancy" of marital residence owned by LLC of which husband was sole member).

Duneland Sand, Inc. v. Misch, No. 45A03-0801-CV-15, 2008 WL 4456340 (Ind. App. Oct. 6, 2008) (affirming trial court's dismissal of suit filed by individual on behalf of corporation and LLC on basis individual no longer owned any interest in entities because defendant had exercised option to purchase stock and units of such entities and transfer was intended to be complete upon creation of successor entity to hold assets excluded from sale of such entities).

Out of the Box Promotions, LLC v. Koschitski, 866 N.Y.S.2d 677 (N.Y. Sup. 2008). The plaintiff alleged that he and the defendant were each 50% members of an LLC, and the plaintiff brought a derivative suit alleging various acts of misconduct on the part of the defendant. The defendant sought dismissal on the grounds that the plaintiff was not a member and lacked standing, but the court found the documentation provided by the defendant failed to conclusively establish that the plaintiff was not a member.

Bartfield v. Murphy, 578 F.Supp.2d 638 (S.D.N.Y. 2008). The court applied the "direct injury" test to determine if an LLC member's claims against the other member were direct or derivative claims. The court concluded that claims for breach of fiduciary duty (based on diversion of business and misuse of voting power) and unjust enrichment were derivative. The court stated that a claim based on failure to disclose certain material facts might support a direct suit because the duty of disclosure was owed by the defendant member to his fellow member. The court directed the plaintiff to file a more definite statement of this claim because the allegations were not sufficiently detailed for the court to conclude whether the plaintiff alleged harm for which he could directly recover.

Aubrey v. Sanders, Civ. Action No. 07-0137, 2008 WL 4443826 (W.D. Pa. Sept. 26, 2008) (stating that LLC member who instituted fraud lawsuit in his individual name could not pursue damages incurred by two LLCs in connection with their purchase or lease of certain equipment).

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008). The plaintiff brought suit against his parents seeking dissolution of the family business, a construction company organized as an LLC and owned 50% by the father and 50% by the son. The son sought to add his mother as a defendant on the basis of allegations that she committed civil theft by writing checks on the LLC account for personal expenses. The court stated that the son made a sufficient showing that his mother was part of the controversy to support adding her as a party although the defendants opposed the motion on the grounds that the mother was not a member or manager of the LLC and any lost profits belonged to the LLC rather than the individual members. The court also allowed the son to add a claim of civil theft against the father. The defendants argued that the amendment should be rejected for lack of standing because the allegation stated a harm to the LLC, but the court held that liability of a member or manager who commits a tortious act in the course of company business extends to other members or managers who are injured. The court refused to dismiss the son's claim against the father for unjust enrichment. The defendants argued that the son did not have standing to assert the unjust enrichment claim because the alleged harm was to the LLC, but the court again stated that a member or manager who commits a tortious act in the course of company business is personally liable to those injured, including other members.

Empire Financial Services, Inc. v. Todd, Civil Action No. 1:08-cv-226-WHA, 2008 WL 4277809 (M.D. Ala. Sept. 16, 2008) (recognizing separate existence of LLC and its members and holding judicial estoppel did not preclude LLC members from pursuing claims against LLC's lender, though claims were not listed in LLC's bankruptcy, because members alleged direct claims rather than claims belonging to LLC).

Stanziale v. Skiba, No. CV040412495, 2008 WL 4150302 (Conn. Super. Aug. 20, 2008). The court held that the proper plaintiff in an action to prosecute a claim against the defendant for payment on a construction contract with an LLC was the LLC. The LLC had been dissolved prior to the filing of the suit, and the two individuals who brought the suit alleged that they were authorized to wind up the business and affairs of the LLC. The court held that the LLC was clearly the proper plaintiff under the LLC statute. Authority to wind up the business and affairs of the LLC did not carry with it authority to bring suit in their own names or individual capacities. The court found that the mistake in naming the individual principals of the dissolved LLC rather than the LLC itself was an honest mistake and granted the motion to substitute the LLC as plaintiff.

Reid Pointe, LLC v. Stevens, No. 08 CVS 4304, 2008 WL 3846174 (N.C. Super. Aug. 18, 2008) (rejecting Unfair and Deceptive Trade Practices Act claims asserted by member because claims implicated only rights and interests of LLCs and thus belonged to LLCs).

546-552 West 146th Street LLC v. Arfa, 863 N.Y.S.2d 412 (App. Div. 1st Dept. 2008). LLC plaintiffs brought this action against member/managers who allegedly received commissions in connection with the purchase of real estate by the LLCs without disclosing the commissions to the LLCs or to prospective investors whose investments were used to fund the closings of the property acquisitions. The court held that the LLCs lacked standing to assert the claims because the alleged wrongdoers were the only members and managers at the time the agreements for the commissions were entered into and their acts and knowledge were thus imputed to the LLCs. (The court noted that the investors had brought a parallel action in which the question of whether the investors were wronged when their investments were solicited would be determined.) According to the court, the adverse interest exception did not apply because it arises if the principal's interests have been totally abandoned; the exception cannot be invoked merely because the agents have a conflict of interest or are not acting primarily for the their principal. The pleadings did not allege or provide a basis for inferring that the original members and managers totally abandoned the interests of the LLC because they accomplished the LLCs' main purpose of acquiring the properties. Further, the court held that application of the adverse interest exception would be barred in any event because the adverse interest exception does not apply if the alleged wrongdoers were, at the time of the misconduct, either the sole managers or sole owners of the plaintiff. Finally, the court rejected the argument that the defendants were liable as promoters because the challenged agreements were entered into before formation of the LLCs and the promoters could not have then owed fiduciary obligations to the non-existent entities.

Miceli v. KBRG of Statesville, LLC, No. 5:05CV265-V, 2008 WL 2945451 (W.D.N.C. July 24, 2008) (holding that dissolution of defendant LLC did not destroy its standing to defend action under North Carolina law as part of winding up process).

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Lake State Federal Credit Union v. Tretsven, No. A07-1542, 2008 WL 2732111 (Minn. App. July 15, 2008) (holding individual member of LLC named as mortgagee but not formed until after mortgage was executed lacked standing to pursue appeal of case involving rights to property under mortgage because LLC statute provides that member is not proper party to proceeding by or against LLC unless proceeding involves member's right against or liability to LLC or unless proceeding involves claim of personal responsibility of member and claim has some basis other than member's status as member; administrative termination of LLC did not affect court's holding that individual lacked standing to pursue appeal based on mortgage naming LLC as mortgagee because, while member of terminated LLC is permitted to bring or defend claim on LLC's behalf, claim must be brought in LLC's name).

Blair v. McDonagh, 894 N.E.2d 377 (Ohio App. 2008). Blair and McDonagh formed an LLC to operate Irish pub restaurants. Disputes developed, and litigation the members asserted against each other various claims, including claims for breach of contract and breach of fiduciary duty. On appeal, Blair argued that McDonagh's breach of fiduciary duty claim was actually the LLC's and could only be raised by the LLC. The court stated that there are circumstances under which a shareholder in a close corporation may bring an individual action, but the court found it unnecessary to reach that issue because Blair never raised the issue until he filed his motion for JNOV. Further, Blair asserted his own claim for breach of fiduciary duty; therefore, under his logic he, too, should have brought the claim in the name of the LLC. Instead, he named the LLC as a defendant. He requested and relied upon the instructions on breach of fiduciary duty and related damages, and the court held that any error was invited error.

Morris v. Hennon & Brown Properties, LLC, No. 1:07CV780, 2008 WL 2704292 (M.D.N.C. July 3, 2008). The court discussed general fiduciary duty principles under North Carolina law and cited provisions of the North Carolina LLC statute dealing with duties of LLC managers, but declined to answer the question of "whether a co-manager of an LLC in North Carolina, nothing else appearing, stands in a fiduciary relationship to the members of the LLC." The court stated that this was an unanswered question involving North Carolina law that should be avoided by a federal court if possible. Thus, the court first addressed the standing of the defendant investor to assert its breach of fiduciary duty counterclaims against the plaintiff, one of several managers of LLCs in which the defendant invested. The court stated that it was not necessary to "explore the depths of what might constitute fiduciary duties under the North Carolina Limited Liability Company Act" because, assuming the acts alleged breached a fiduciary duty, the question at the heart of the standing issue was to whom the duties were owed. The court analyzed the standing question by comparing the situation to a closely held corporation. The court stated that a derivative action is generally the appropriate vehicle where a shareholder or LLC member seeks to recover on behalf of the corporation or LLC. The court recognized an exception to the rule that shareholders have no right to bring actions in their own name where the wrongdoers are shareholders and directors who so control the corporation that recovery by the corporation would not protect the minority, but the court stated that the investor had not established that he was a minority member in the LLCs nor had he established that the manager he was suing was in control of the LLCs. Because the investor filed an individual action but did not show that he was specifically and particularly harmed or that any special duty was owed to him, the court concluded that he had no standing to bring a direct action.

Maitland v. Int'l Registries, LLC, Civil Action No. 3669-CC, 2008 WL 2440521 (Del. Ch. June 6, 2008). A 50% member of an LLC did not have authority to retain counsel for the LLC defendant in a case brought by the other 50% member where the plaintiff member did not consent to hiring counsel. The LLC agreement vested management in the members and provided that the decision of the members holding a majority of all interests shall be controlling. The LLC agreement also provided that the initial members were granted all rights, powers, authorities, and authorizations necessary, appropriate, advisable, and convenient to manage the LLC and carry out its affairs, but the court rejected the argument that this latter provision gave one member the power to retain counsel and file an answer for the LLC because such an interpretation would also give the other member the same authority. Since a deadlocked LLC cannot validly retain counsel and file an answer, the court granted the plaintiff member's motion to strike the answer filed by counsel retained by the other member and disqualify the attorney as counsel for the LLC, but the court permitted the other member to intervene as a party defendant to defend on behalf of the LLC.

Wasko v. Farley, 947 A.2d 978 (Conn. App. 2008). The court held that an individual member of an LLC did not have standing to sue in her individual capacity for damages incurred by her LLC when it was forced to hire an additional dental assistant as a result of injuries suffered by the individual member. Thus, the trial court properly declined to instruct the jury on damages resulting from additional costs incurred by the plaintiff's LLC in an action brought by the plaintiff in her individual capacity.

Hampton Island Founders v. Liberty Capital, 658 S.E.2d 619 (Ga. 2008). An LLC that owned land (Hampton Island Founders LLC or "Founders") and an LLC that was to secure financing (Liberty Capital LLC or "Capital") formed an LLC (Hampton Island LLC or "Joint Venture LLC") for developing the land into a residential retreat. Founders contributed the land to Joint Venture LLC in exchange for a 40% interest, and Capital committed to secure a certain amount of financing in exchange for a 60% interest. Hampton Island Management Inc. ("HIMI") was the manager of Joint Venture LLC. If Capital did not obtain the specified level of funding, its interest was to be reduced to 10%, and Founders interest would increase to 90%. When Capital's deadline for securing financing passed without its securing the specified level of funding, Shealy, the individual who formed and originally controlled Founders and Founders' four members, declared Capital in default and took steps to terminate Joint Venture LLC's relationship with HIMI and name himself as sole manager of Joint Venture LLC. Founders then brought suit against Capital and others seeking a declaration that Capital did not meet its obligation and an injunction prohibiting Capital from exercising any control of Joint Venture LLC. The defendants filed a motion for injunctive relief to maintain the status quo, and the court issued a temporary injunction decreeing that HIMI was the sole manager of Joint Venture LLC and that neither Shealy nor Founders were to manage Joint Venture LLC or claim that any other entity was the manager. Subsequently, the court permitted two of Founders' member entities, as well as investors in Founders' member entities, to intervene, and the intervenors/investors sought a mandatory injunction to allow meetings of Founders' member entities so that a vote could be taken to determine who would manage the member entities. The intervenors/investors informed the court that, if permitted to vote, they would remove Shealy as manager of Founders' member entities, remove him as manager of Founders, and appoint a manager of Founders who would be favorable to the defendants and cause Founders to dismiss its suit. The court granted the relief sought by the intervenors/investors. Founders appealed, and the supreme court determined that the first injunction maintaining the status quo by enabling HIMI to continue to manage Joint Venture LLC pending resolution of the lawsuit was appropriate. However, the court concluded that the second injunction permitting the vote to change management of Founders and its member entities did not balance the relative equities and was error. The court stated that denial of the injunctive relief sought by the intervenors/investors would only inconvenience them by forcing them to await the outcome of the litigation, but issuance of the injunction would result in dismissal of the plaintiff's lawsuit without an opportunity for the plaintiff to be heard. The court also concluded that permitting intervention by Founders' members and investors in those members was error because it was not clear how the intervenors' ability to protect their interest (assuming they had a sufficient interest) in the transaction or subject matter of the lawsuit was impeded by the lawsuit, how it was not adequately protected by Capital and the other defendants, or why they could not pursue an independent remedy against Founders and Shealy.

Johnson v. Booth, 184 P.3d 289 (Mont. 2008) (holding that co-owner of corporation and LLC did not have standing to appeal appointment of receiver for corporation and LLC because claim belonged to corporation and LLC).

Wilcox v. Webster Insurance, N0. CV075010093S, 2008 WL 1822402 (Conn. Super. March 26, 2008) (holding that LLC members lacked standing to assert claims arising out of accident involving LLC's dump truck against LLC's automobile insurer because any harm suffered that was redressable under policy was traceable to their ownership in LLC).

American Heritage, Inc. v. Nevada Gold & Casino, Inc., 259 S.W.3d 816 (Tex. App. 2008) (holding that plaintiff had standing to sue for breach of its contract with defendant in which parties agreed to form LLC to operate casino; rejecting defendant's argument that plaintiff must sue derivatively, explaining that party lacks standing to sue derivatively where it has contracted with another to acquire ownership in entity but is then prevented from doing so by other's breach of contract).

UniDev, L.L.C. v. Housing Authority of New Orleans, Civil Action No. -05-2649, 2008 WL 906308 (E.D. La. April 2, 2008) (holding LLC's members did not have standing to sue for breach of construction contract entered by their LLC because they lacked contractual privity).

Jacobs v. Baum, No. 1:07-CV-167, 2008 WL 819037 (N.D. N.Y. March 24, 2008). The court dismissed the claims of an individual who sued "individually and d/b/a" an LLC formerly known as a corporation because an individual cannot sue "d/b/a" an LLC or corporate entity and the individual alleged no basis upon which he could individually pursue rights of the corporation or LLC. The court also dismissed the LLC's claims on a contract to which the corporation was a party because, although an argument could be made that the LLC brought suit "formerly known as" the corporation that was the party to the contract, it is reasonable to expect plaintiffs to have knowledge and plead with precision the person, entity, and/or entities asserting a particular claim.

Kwon v. Yun, No. 05 Civ. 1142(GEL)(DFE), 2008 WL 190058 (S.D. N.Y. Jan. 22, 2008) (holding prima facie credible defense to dissolved Delaware LLC's counterclaim was stated by allegation that LLC had filed certificate of cancellation because Delaware LLC is artificial entity with power to sue or be sued, and such power continues after dissolution "until the filing of a certificate of cancellation").

STS Gas Services, Inc. v. Seth, No. 13-05-463-CV, 2008 WL 152229 (Tex.App. Jan. 17, 2008). Although the Texas assumed name statute states that a party shall not maintain an action arising out of a contract or act in which an assumed name was used until an assumed name certificate has been filed as required by law, and the plaintiff LLC filed suit prior to filing its assumed name certificate as required by law, the defendant failed to raise the argument in the trial court and never filed a motion to abate. Thus, the court of appeals found that the defendant waived this complaint. The court of appeals also concluded that the trial court did not err in awarding relief to Shiva Investment First, L.L.C., an assumed name of SIFCO, L.L.C., in a declaratory judgment action regarding a lease entered by an individual doing business as Shiva Investment First, L.L.C. The court pointed out that the Texas Rules of Civil Procedure permit a party to sue or be sued in its assumed name. Further, the record indicated that proper assumed name certificates were filed establishing Shiva Investment First, L.L.C. as an assumed name for SIFCO, L.L.C., and SIFCO, L.L.C. transacted business and corresponded with the defendant in its assumed name and identified itself in all pleadings as SIFCO, L.L.C. or Shiva Investment First, L.L.C. As a result, the court concluded that SIFCO, L.L.C. was a party to the lease by virtue of its assumed name, Shiva Investment First, L.L.C., and was entitled to relief.

F. Pro Se Representation

Dalmayer v. Michigan, No. 08-12784-BC, 2009 WL 224586 (E.D. Mich. Jan. 29, 2009) (holding that artificial entities such as LLCs must be represented by licensed counsel in federal court and that provisions of LLC statute permitting members to enforce rights of LLC in derivative proceeding do not obviate requirement that LLC be represented by licensed counsel).

Century 21 Real Estate LLC v. Everitt, No. 08-14609, 2009 WL 187704 (E.D. Mich. Jan. 23, 2009) (holding rule requiring representation by licensed attorney applies to all artificial entities, including LLCs).

Bell v. Manhattan Motorcars, Inc., No. 06-cv-4972(GBD), 2009 WL 111467 (S.D.N.Y. Jan. 16, 2009) (dismissing case because individual attempting to proceed pro se on behalf of LLC failed to secure counsel as ordered by court).

Gass v. Headlands Contracting & Tunneling, Inc., No. 2008-G-2841, 2008 WL 4964656 (Ohio App. Nov. 21, 2008) (holding LLC could not prosecute appeal without licensed attorney).

Gobe Media Group, LLC v. Cisneros, 959 A.2d 892 (N.J. App. 2008) (holding judgment entered in favor of LLC that was not represented by licensed counsel was voidable at election of defendant).

State of North Dakota v. Riemers, 757 N.W.2d 50 (N.D. 2008) (holding documents filed in lawsuit by LLC's owner, manager, and sole agent were void because LLC must be represented by licensed attorney).

United States v. Hagerman, 549 F.3d 536 (7th Cir. 2008) (holding dismissal of LLC's appeal was justified, but not compelled, by LLC appellant's failure to hire licensed counsel after firing previous counsel, and affirming LLC's conviction on merits in order to lay to rest any doubts regarding LLC's guilt).

Wisconsin Laborers Health Fund v. D & D Construction, LLC, No. 08-cv-459-bbc, 2008 WL 4458148 (W.D. Wis. Sept. 30, 2008) (striking LLC's answer because answer was not signed by licensed attorney and LLC must be represented by licensed attorney).

Miller v. Account Management Services, No. 1:07-CV-231, 2008 WL 4415502 (N.D. Ind. Sept. 25, 2008) (ordering LLC defendant to obtain counsel because LLC may only appear in court by counsel).

Susko v. Cox Enterprises, Inc., Civil Action No. 5:07CV144 (STAMP), 2008 WL 4279669 (N.D.W.Va. Sept. 16, 2008) (holding LLC cannot appear pro se or represent itself through or by its officers).

United States v. Flaherty, 540 F.3d 89 (2d Cir. 2008) (noting that sole member of LLC may not represent LLC in court).

CIT Group/Commercial Services, Inc. v. Crystal Springs Apparel, LLC, Docket No. 3:08-cv-00113-FDW, 2008 WL 2832772 (W.D.N.C. July 16, 2008) (stating that LLC may only appear in federal court through licensed counsel).

Lake State Federal Credit Union v. Tretsven, No. A07-1542, 2008 WL 2732111 (Minn. App. July 15, 2008) (noting that LLC must be represented by attorney in court).

CIT Group/Commercial Services, Inc. v. Crystal Springs Apparel, LLC, No. 2:08-cv-00113-FDW, 2008 WL 2484512 (W.D. N.C. June 17, 2008) (entering default judgment against LLC because LLC failed to retain counsel and LLC may only appear in federal court through licensed counsel).

Rice v. Don Peck's Transportation LLC, No. 08-0051-DRH, 2008 WL 2224903 (S.D. Ill. May 27, 2008) (stating that LLC may appear in court only through licensed attorney).

Cruz v. Petty Transportation, LLC, No. 6:08-cv-498-ORL-22KRS, 2008 WL 2157154 (M.D. Fla. May 22, 2008) (stating that LLC may only appear through licensed counsel).

Landmark American Insurance Company v. Green Lantern Roadhouse LLC, No. 07-cv-05350MJR, 2008 WL 2157168 (S.D. Ill. May 21, 2008). A default judgment against an LLC was entered after its pro se motion for extension of time to answer was stricken because an LLC may only appear through licensed counsel. Good cause existed for setting aside the default judgment where the action was still in early stages, the managing member mistakenly believed he could represent the LLC pro se and, when informed he must hire counsel, counsel was hired and appeared.

SNET Information Serv. v. Photopros Studio, LLC, No. CV0706001104S, 2008 WL 979937 (Conn. Super. March 19, 2008) (noting that rule prohibiting unlicensed individual from appearing on behalf of corporation or partnership has been applied to LLCs, but holding sole member of LLC may appear on behalf of LLC because it is "his own cause").

Streeter v. Office of Douglas R. Burgess, LLC, No. 107-CV-0097-WKW, 2008 WL 508456 (M.D. Ala. 2008) (stating LLC must be represented by lawyer).

State v. Liberty Bail Bonds, No. 1 CA-CV 06-0769, 2008 WL 4095513 (Ariz. App. Jan. 24, 2008) (noting that Arizona Supreme Court appears to treat corporations and LLCs similarly with regard to unauthorized practice of law and holding that trial court did not err in precluding LLC's owner, who was not licensed attorney, from representing LLC).

G. Derivative Suits

Remora Investments, L.L.C. v. Orr, 673 S.E.2d 845 (Va. 2009). Remora Investments, L.L.C. ("Remora"), a 50% member of a Virginia LLC, sued the other 50% member, who was also the manager, for breach of fiduciary duty. The trial court held that an LLC manager does not owe the members fiduciary duties and that an LLC member does not have a direct right of action against another member or manager for breach of fiduciary duty. Remora appealed, arguing that it had standing to sue the managing member for breach of fiduciary duty. The Virginia Supreme Court agreed with the trial court based on the Virginia LLC statute and analogous corporate law. The court pointed out that the Virginia general partnership statute provides that a partner owes the partnership and the other partners the duties of loyalty and care. The court agreed with the trial court that an LLC member does not have standing to bring a breach of fiduciary duty claim directly against another member or manager because the General Assembly would have explicitly provided for such fiduciary duties, as it had done in the partnership context, if it had intended to impose such duties. Remora argued that LLC managers owe members fiduciary duties by analogous application of corporate case law, but the court rejected this argument. The court stated that its holdings in the cases relied upon by Remora did not support Remora's contention that the court had approved direct causes of action by individual shareholders against directors. Remora also relied upon the Delaware case of *Tooley v. Donaldson, Lufkin, & Jenrette, Inc*. in support of Remora's argument that its claim was direct rather than derivative, but the court did not decide whether to adopt the analysis employed by the Delaware Supreme Court in *Tooley* because the court concluded that all the injuries alleged by Remora were injuries to the LLC even if it followed the approach employed in *Tooley*.

Bahlenhorst v. Vrdolyak, No. 08 C 5474, 2009 WL 65180 (N.D. Ill. Jan. 9, 2009)(holding that plaintiff's breach of fiduciary duty claims involving two LLCs were derivative in nature because they alleged injuries to LLC or duties owed to LLC itself; dismissing complaint because LLCs were indispensable parties with regard to derivative claims on their behalf and joinder would destroy diversity).

Connors v. Howe Elegant, LLC, 47 Conn. L. Rptr. 107, 2009 WL 242324 (Conn. Super. 2009) (raising *sua sponte* issue of whether member had standing to assert various causes of action and concluding member lacked standing to assert tort claims in her individual capacity because they were injuries to LLC rather than plaintiff member, and concluding that certain counterclaims asserted by defendant member were also derivative and could not be asserted directly).

Kahn v. Portnoy, Civil Action No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008). The plaintiff, a "shareholder" of a publicly traded Delaware LLC, brought a derivative action against the directors of the LLC alleging that the directors breached their fiduciary duties to the LLC by approving a transaction designed to benefit one of the directors and certain entities affiliated with the director. The directors moved to dismiss the action on the basis that the directors acted in accordance with their duties under the LLC agreement. The court found that there was more than one reasonable interpretation of the LLC agreement and denied the motion to dismiss because the court was not at liberty to choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). The court also addressed whether the plaintiff had alleged sufficient facts to establish demand was excused in this derivative action. The court noted that corporate case law supplies the governing principles for evaluating demand futility and thus applied the *Aronson* test, under which demand is excused if the plaintiff alleges particularized facts that establish a reasonable doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. The LLC agreement provided that the duties of the directors would be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law unless otherwise specifically provided for in the LLC agreement, and Section 7.5(a) of the LLC agreement modified the duties of directors of a Delaware corporation by providing that "[i]t shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence." The court stated that Section 7.5(a) would not alter the *Aronson* analysis because the conflicts alleged in the case did not involve a conflict between a shareholder and a director or a shareholder and the LLC. Further, even assuming that Section 7.5(a) applied to the board's decision whether to initiate suit in the case, the court was not convinced that the demand futility or *Aronson* requirements were altered by the LLC agreement. The court noted that the LLC agreement could have altered the demand futility and *Aronson* requirements, but the court did not interpret Section 7.5(a) to eliminate or modify the ability of shareholders to bring a suit on behalf of the LLC or modify the prerequisites for doing so. Taking the well-pleaded complaint as true, the court concluded that it created a reasonable doubt as to the disinterestedness or independence of a majority of the board.

Bryan D. Scofield, Inc. v. Susan A. Daigle, Ltd., 999 So.2d 311 (La. App. 2008). The relationship between three members of a law firm LLC deteriorated, and two of the members sued the third member for breach of fiduciary duty, breach of the operating agreement, and fraudulent breach of an oral agreement made in connection with the departure of one of the members. The trial court dismissed the breach of fiduciary duty claim on the basis that it must be brought as a derivative suit. The court of appeals concluded that the plaintiff members had a right to bring individual claims against the other member under certain circumstances. The court pointed out that the Louisiana Limited Liability Company Law, which provides that members with management responsibilities have fiduciary obligations to the other members as well as the LLC, is almost identical to the provision in the corporate statute addressing fiduciary duties of officers and directors. The court stated that the provisions in the LLC and corporate statutes should mean the same thing, and the court thus found it appropriate to rely on corporate case law in this context. The court stated that corporate cases have held that a shareholder may have a right to sue officers and directors directly if the breach of fiduciary duty causes direct loss to the shareholder, and the court concluded the same rule would apply to members who suffer a direct loss caused by another member's breach of fiduciary duty.

Blue Water Sunset, LLC v. First View, LLC, No. B204012, 2008 WL 5394933 (Cal. App. 2 Dist. Dec. 9, 2008). The court concluded that a 50% member's claims for breach of fiduciary duty against the other 50% member/sole manager were derivative and the plaintiff member lacked standing to pursue the claims because it did not allege that it provided to the LLC or its board written notice of the claims or a copy of the proposed pleading before the action was filed. The court stated that corporate law principles for determining whether a claim is direct or derivative apply to LLCs, and the court held that the plaintiff's allegations of misappropriation of money, conveyance and lease of LLC real property, and incurrence of liabilities on behalf of the LLC involved damage to the LLC rather than the member directly. The court then applied the statutes requiring written notice or delivery of the proposed complaint to the entity or its board prior to filing suit. The plaintiff member argued it satisfied the notice requirements based on the denial of the plaintiff's inspection rights under the operating agreement, the alleged refusal of the other member to pursue the claims, and the service of the summons and complaint. The court found that these allegations were deficient because they did not allege the LLC or its board was informed in writing of the facts supporting the claims or served with a copy of the proposed pleading before the action was filed. The plaintiff member suggested that it was excused from compliance with the statutory notice requirements because it was futile to demand action from the LLC, but the court found that the plaintiff failed to adequately raise and brief this argument and refused to consider it. The plaintiff argued that certain claims should not be dismissed based on allegations that the other member was the alter ego of the LLC and the alter ego should be vicariously liable for the member's breach of fiduciary duty and other wrongs. The court stated that this belated argument was waived; however, to fully put the issue to rest, the court addressed the argument. The court stated that its research indicated that the law cut against the plaintiff on this argument. Noting that the plaintiff's argument was a "reverse piercing" claim rather than a traditional alter ego claim, the court declined to apply the doctrine of reverse piercing based on California case law rejecting the doctrine.

Polak v. Kobayashi, Civ. No. 05-330-SLR, 2008 WL 4905519 (D. Del. Nov. 13, 2008). Two individuals, Polak and Kobayashi, formed a Delaware LLC to acquire an undeveloped tract of land in Hawaii. Polak intiated litigation against Kobayashi after their relationship soured. Polak sought judicial dissolution and asserted various other claims against Kobayashi. Because Polak and Kobayashi were citizens of different states, the court concluded that it had diversity jurisdiction over the dissolution claim, but the court did not have jurisdiction over derivative claims because the LLC was a real party in interest and its citizenship (i.e., that of its individual members) destroyed diversity. The only claim of Polak's that was direct other than the judicial dissolution claim was a breach of contract claim based on

Kobayashi's unilateral decision-making of the LLC, which impaired Polak's contractual right to jointly manage the LLC. The court held that claims for breach of fiduciary duty, declaratory judgment, and unjust enrichment, were, at least in part, derivative claims because they were based on Kobayashi's misappropriating and acquiring an additional tract of land in his own name.

Yuko Ito v. Suzuki, 869 N.Y.S.2d 28 (N.Y. App. Div. 1st Dept. 2008). The court held that an LLC investor adequately alleged a fraud claim against the LLC's manager but not the manager's attorney or the investor's attorney. The court stated that owners of a fractional interest in a common entity are owed a fiduciary duty by its manager, and a member of an LLC has standing to maintain a derivative action. The court concluded that the investor's motion to amend the complaint to add derivative claims was timely given the recent resolution of the question of a member's standing to bring derivative claims under New York law and the fact that the detailed facts concerning the attorney defendants' involvement were peculiarly within the knowledge of other parties.

Kroupa v. Garbus, 583 F.Supp.2d 949 (N.D. Ill. 2008) (noting that Delaware courts have held that case law governing corporate derivative suits is applicable to derivative suits on behalf of LLC; holding that LLC member's claim against member-manager for breach of fiduciary duty based on acts of mismanagement was derivative under Delaware law and LLC was indispensable party with respect to claim for removal of manager).

Out of the Box Promotions, LLC v. Koschitski, 866 N.Y.S.2d 677 (N.Y. Sup. 2008). The plaintiff alleged that he and the defendant were each 50% members of an LLC, and the plaintiff brought a derivative suit alleging various acts of misconduct on the part of the defendant. The defendant sought dismissal on the grounds that the plaintiff was not a member and lacked standing, but the court found the documentation provided by the defendant failed to conclusively establish that the plaintiff was not a member.

Bartfield v. Murphy, 578 F.Supp.2d 638 (S.D.N.Y. 2008). The court applied the "direct injury" test to determine if an LLC member's claims against the other member were direct or derivative claims. The court concluded that claims for breach of fiduciary duty (based on diversion of business and misuse of voting power) and unjust enrichment were derivative. The court stated that a claim based on failure to disclose certain material facts might support a direct suit because the duty of disclosure was owed by the defendant member to his fellow member. The court directed the plaintiff to file a more definite statement of this claim because the allegations were not sufficiently detailed for the court to conclude whether the plaintiff alleged harm for which he could directly recover. The court held that the LLC was a necessary party with respect to the derivative claims raised on its behalf, but its joinder would destroy diversity and thus the derivative claims had to be dismissed.

Stack v. Midwood Chayim Aruchim Dialysis Associates, Inc., 864 N.Y.S.2d 121 (N.Y. Sup. 2008) (reversing lower court's dismissal of LLC member's derivative claims in view of decision by Court of Appeals in *Tzolis v. Wolff* recognizing right of LLC member to bring derivative suits).

Billings v. Bridgepoint Partners, LLC, 863 N.Y.S.2d 591 (N.Y. Sup. 2008). The court determined that a minority member's breach of fiduciary duty claims against the other two members were derivative because the harm sought to be remedied was harm first and foremost to the LLC. The court noted that the Appellate Division had not addressed whether limitations such as the contemporaneous ownership and demand requirements applicable in the corporate and limited partnership context apply in the LLC context and that the court must determine whether these requirements existed at common law. The court concluded that there was a contemporaneous ownership requirement at common law and that an LLC member must therefore be a member at the time of the offending conduct and at the time of the commencement of the action to sue derivatively. Because the plaintiff had withdrawn as a member and had only a right to future payment for his LLC interest, the plaintiff did not have standing to sue derivatively. The court stated that it need not reach the issue of whether a demand is required in the context of an LLC derivative suit, but the court stated that it could see no basis upon which to conclude that a demand requirement similar to that imposed in the corporate and limited partnership contexts should not be imposed in the LLC context.

Charles O. Bradley Trust v. Zenith Capital LLC, No. C 04-02239 JSW, 2008 WL 3400340 (N.D. Cal. Aug. 11, 2008) (commenting that principles in corporate case law for characterizing action as derivative are applicable to corporations and LLCs and are equally applicable to limited partnerships).

Pravak v. Meyer Eye Group, PLC, No. 07-2433-JPM-dkv, 2008 WL 2951101 (W.D. Tenn. July 25, 2008) (declining to dismiss claims for declaratory and injunctive relief, which defendants alleged could only be brought derivatively, because allegations appeared to comply with procedural requirements for derivative actions).

Blair v. McDonagh, 894 N.E.2d 377 (Ohio App. 2008). Blair and McDonagh formed an LLC to operate Irish pub restaurants. Disputes developed, and litigation between the members ensued. The members asserted against each other various claims, including claims for breach of contract and breach of fiduciary duty. On appeal, Blair argued that McDonagh's breach of fiduciary duty claim was actually the LLC's and could only be raised by the LLC. The court stated that there are circumstances under which a shareholder in a close corporation may bring an individual action, but the court found it unnecessary to reach that issue because Blair never raised the issue until he filed his motion for JNOV. Further, Blair asserted his own claim for breach of fiduciary duty; therefore, under his logic he, too, should have brought the claim in the name of the LLC. Instead, he named the LLC as a defendant. He requested and relied upon the instructions on breach of fiduciary duty and related damages, and the court held that any error was invited error.

Wood v. Baum, 953 A.2d 136 (Del. 2008). The plaintiff brought a derivative suit against the members of the board of a Delaware LLC alleging breach of fiduciary duty claims based on alleged improper valuation of certain non-performing assets, improper charitable contributions, related party transactions, and failure to maintain accounting and monitoring controls and procedures. The court of chancery dismissed the complaint for failure to allege particularized facts sufficient to establish that demand on the board would have been futile. The Delaware Supreme Court stated that the test set forth in *Aronson v. Lewis* applies when it is alleged that directors made a conscious business decision in breach of their fiduciary duties, and the test in *Rales v. Blasband* applies when the subject of the derivative suit is a violation of the board's oversight duties. The plaintiff attempted to create a "reasonable doubt" that the board would have properly exercised its business judgment by alleging that the board was disabled because of a substantial risk of personal liability. In evaluating that claim, the court stated that the exculpation clause in the LLC's operating agreement must be kept in mind. Under the operating agreement and the Delaware LLC statute, the directors' liability was limited to claims of "fraudulent or illegal conduct" or "bad faith violation[s] of the implied contractual covenant of good faith and fair dealing." The court stated that, where directors are contractually or otherwise exculpated from liability, a serious threat of liability may only be found to exist if the plaintiff pleads with particularity a non-exculpated claim. Thus, the plaintiff in this case was required to plead particularized facts demonstrating that the directors acted with scienter, i.e., that they had "actual or constructive knowledge" that their conduct was legally improper. The court characterized the issue before it as whether the complaint alleged with particularity that a majority of the directors knowingly engaged in "fraudulent" or "illegal" conduct or breached "in bad faith" the covenant of good faith and fair dealing. The court concluded that the plaintiff failed to meet this pleading burden. The plaintiff did not plead with particularity any claim based on fraudulent conduct. Although the complaint alleged many violations of securities and tax laws, the complaint did not allege with particularity that the directors knowingly engaged in such conduct or that they knew such conduct was illegal. The court rejected the plaintiff's argument that such knowledge should be inferred from the fact that the transactions had to be authorized by the board and because they were related party transactions. The court stated that Delaware law is clear that board approval of a transaction, even one that turns out to be improper, is not alone enough to infer culpable knowledge or bad faith. The court also stated that the plaintiff's assertion that membership on the audit committee is a sufficient basis to infer the requisite scienter was contrary to well-settled Delaware law. The court distinguished a "bad faith violation of the implied contractual covenant of good faith and fair dealing" from the fiduciary duty breaches asserted by the plaintiff, and concluded that the complaint did not allege any contractual claims, let alone a "bad faith" breach of the implied contractual covenant of good faith and fair dealing. The court commented that the failure to allege with particularity any facts from which particular directors' knowledge of accounting irregularities may be inferred is frequently compounded by a failure to make a statutory books and records request, and the court noted that the plaintiff in this case chose not to make a books and records request. In sum, the court concluded that, given the broad exculpation provision in the operating agreement, the plaintiff's factual allegations were insufficient to establish demand futility.

Hague v. Rica, 2008 WL 2329897 (N.J. Super. A.D. June 9, 2008) (holding that trial court properly dismissed LLC member's third party complaint because it alleged injury of LLC and no special injury suffered by members; recognizing principle that court has discretion to treat derivative claim as direct in context of closely held corporation, but concluding trial court correctly exercised discretion in declining to treat member's claims as individual claims since member had no greater right to monies wrongfully taken than other members such as plaintiffs who brought principal derivative action).

Stokes v. Rodda, No. 60142-3-I, 2008 WL 2174434 (Wash. App. May 27, 2008). The court determined that Stokes, a member who had been forced out of a professional LLC by her co-member, Chamberlain, was not a "fair and adequate" representative of the LLC in a derivative suit filed by Stokes against an attorney who had assisted Chamberlain in forcing Stokes out and transferring the LLC's anesthesiology contract with a hospital to another entity. Stokes had previously sued Chamberlain and the LLC of which she was a member for wrongful termination and had brought derivative claims against Chamberlain, his new LLC, and his co-member in the new LLC. The court stated that Stokes was inimical to the interests of the LLC and Chamberlain as evidenced by her prior lawsuit against them for wrongful termination. The court pointed out that her hostility was rooted in the same transactions that gave rise to her derivative claim against the attorney and stated that Stokes could not point to anyone other than herself who could benefit from a finding that the hospital contract should have stayed with the LLC. The court concluded that her personal antagonism made it unlikely that she would scrupulously keep the interests of Chamberlain and the LLC in mind if allowed to pursue the derivative litigation. The court also stated that Stokes was not able to articulate a coherent theory explaining how the LLC was harmed in any practical sense by losing the hospital contract and characterized her lawsuit as vexatious rather than meritorious. The court did not rule out the possibility that one member of a two-member LLC could responsibly serve as derivative plaintiff to safeguard the LLC's interest in a proper case, but the court stated that there were no facts in this case supporting a determination that Stokes would be either "fair" or "adequate" in her representation of the LLC in this case.

Stokes v. Anesthesia Associates of Monroe, PLLC, No. 59304-8-I, 2008 WL 2174419 (Wash. App. May 27, 2008). After the plaintiff was forced out of a professional LLC by her co-member, she sued the LLC for wrongfully excluding her. Later she amended her complaint to add derivative claims against her co-member, his new LLC, and his new co-member. The court concluded that the plaintiff could not fairly and adequately represent the interests to be benefitted by her derivative claims. The court stated that the plaintiff could not identify any economic interest of her own or any economic benefit to the LLC or its other member that would be served by continuing the derivative litigation. The plaintiff had sued the LLC and her co-member for wrongful termination, making it unlikely that she would scrupulously keep their interests in mind if permitted to continue the derivative litigation. Additionally, the court stated that the jury's verdict awarding her damages for wrongful termination was a finding that she was no longer a member at the time she was terminated. Thus, the court concluded that the plaintiff lacked standing for the additional reason that she was not a member at the time the derivative action was commenced.

Regions Bank v. Regional Property Development Corporation, No. 07 CVS 12469, 2008 WL 1836657 (N.C. Super. April 21, 2008). An LLC member asserted claims against the LLC's lender for breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty in connection with the lender's sale of the LLC's note to the three other members of the LLC. The court concluded that the member did not have standing to bring the claim. The court stated that the rules regarding shareholder derivative actions apply as well to members of an LLC and that the member could not bring an individual cause of action for wrongs or injuries to the LLC. The LLC was composed of four members, and the member who asserted the claim did not allege that it held a minority interest; thus, the court said it could not be said that the other members owed a special duty arising solely from their control of the LLC. The complaining member alleged that the other members, with the assistance of the lender, leveraged their control over the loan to force the complaining member to agree to allow the LLC to make distributions to the other members that were not otherwise due, but a claim that distributions were unlawfully made is just another way of saying that assets were wrongfully diverted, which is a claim that would belong to the LLC and not a member.

Trivedi v. Pathak, Civil Action No. 3:08CV3-HEH, 2008 WL 1758913 (E.D. Va. April 16, 2008) (holding that fraud and mismanagement claims asserted by 2% member of Virginia LLC belonged to LLC itself and that appropriate action was thus derivative action in which LLC was necessary party that would destroy diversity of citizenship).

Cascade Falls, L.L.C. v. Henning, 143 Wash.App. 1056, 2008 WL 934074 (Wash. App. April 8, 2008) (holding that defendant's claim that trial court erred in admitting evidence of damages in connection with causes of action against him for breach of fiduciary duty, fraud, and conversion claims where plaintiff member did not file a derivative action did not merit review because defendant did not properly preserve and develop his argument).

East Quogue Jet, LLC v. East Quogue Members, LLC, 857 N.Y.S.2d 627 (N.Y. A.D. 2 Dept. 2008) (concluding lower court should have granted summary judgment dismissing derivative claims against managing member for waste and mismanagement because, although members may bring derivative actions, conduct as managing member was consistent with obligations under LLC operating agreement and statute and plaintiffs failed to raise issue of triable fact).

Madelone v. Whitten, 18 Misc.3d 1131, No. 9929-07, 2008 WL 399175 (N.Y. Sup. 2008) (noting that argument that New York does not permit LLC member to bring derivative action is foreclosed by *Tzolis v. Wolff*, in which New York Court of Appeals held that LLC members may bring derivative suits notwithstanding lack of provisions in LLC statute expressly authorizing such suits).

Crouse v. Mineo, 658 S.E.2d 33 (N.C. App. 2008). The court discussed the agency and management provisions of the North Carolina LLC statute and concluded that the plaintiff, a member/manager of an LLC, did not have authority to file this action on behalf of the LLC against his co-member/manager based on alleged misappropriation of LLC assets, but the plaintiff did have standing to file a derivative action. The court found that the plaintiff satisfied the requirement that he allege with particularity the efforts made to obtain the desired action by the LLC and the reason for failure to obtain the action. The court concluded that the plaintiff's claims for breach of fiduciary duty related to his relationship with his co-member through the LLC and did not state an individual claim for unfair and deceptive trade practices.

Segal v. Cooper, 856 N.Y.S.2d 12 (N.Y. A.D. 1 Dept. 2008) (stating that plaintiff in derivative unjust enrichment action alleged with sufficient particularity that majority of controlling members of LLC were interested in challenged transaction and that demand would thus have been futile).

Kira Inc. v. All Star Maintenance Inc., 267 Fed.Appx. 352, 2008 WL 510508 (5^{th} Cir. 2008). A minority member of a Nevada LLC brought a derivative suit against the other two members of the LLC. The plaintiff asserted various claims based on the alleged improper use by the defendant members of the LLC's name and the payment of management fees to affiliates of the defendants. The plaintiff argued that the district court erred in denying its motion to disqualify defense counsel due to conflicts in representing the LLC and the defendant members accused of harming the LLC's interests. The court stated that any conflicts asserted by the plaintiff were more theoretical than real. All members were parties to the action, and the plaintiff was the only party who stood to benefit from a plaintiff's verdict. The court could not imagine any remedy that could have been obtained by the LLC that would have been different from a remedy in favor of the plaintiff and saw no purpose that would have been served by independent counsel for the LLC in this case. Thus, the court held that the district court did not abuse its discretion in denying the motion to disqualify.

Parsons & Whittemore Enterprises Corporation v. Cello Energy, LLC, Civil Action No. 07-0743-CG-B, 2008 WL 227952 (S.D. Ala. Jan. 25, 2008). The plaintiff entered certain agreements with an Alabama LLC regarding the use and development of technology and under which plaintiff obtained an option to acquire an interest in Alabama LLC. The plaintiff sued the LLC and other parties to prevent them from taking actions and performing under agreements in conflict with plaintiff's agreements with the LLC. The court concluded that the plaintiff was not a member of the LLC because it was not listed as a member in either the LLC's articles of organization or operating agreement, and a member is defined in the Alabama LLC statute as a person reflected in the LLC's required records as an owner of some governance rights of a membership interest. The LLC sought dismissal of the lawsuit on the basis that the action was a derivative action and the plaintiff was not a member with standing to bring such an action under the Alabama LLC statute. The court declined to dismiss the action because it was not a lawsuit brought by a member to recover in the right an LLC, but a lawsuit by a non-member to prevent the LLC and other defendants from interfering with the contractual rights of the plaintiff under its agreements with the LLC.

H. Necessary Parties

Bahlenhorst v. Vrdolyak, No. 08 C 5474, 2009 WL 65180 (N.D. Ill. Jan. 9, 2009)(dismissing complaint because LLCs were indispensable parties with regard to derivative claims on their behalf and joinder would destroy diversity).

Kroupa v. Garbus, 583 F.Supp.2d 949 (N.D. Ill. 2008) (holding that LLC member's claim against member-manager for breach of fiduciary duty based on acts of mismanagement was derivative under Delaware law and LLC was indispensable party with respect to claim for removal of manager).

Goldberg v. Stelmach, No. B199830, 2008 WL 4428650 (Cal. App. 2 Dist. Oct. 2, 2008). The court concluded that the plaintiff's breach of fiduciary duty action based on an LLC's failure to distribute funds to the plaintiff was not barred by res judicata because the plaintiff's claim was based on a refusal to distribute funds and provide an accounting *after* funds interpleaded in a prior suit were returned to the LLC. The court also determined that the LLC was not a necessary party to the suit because the plaintiff sought recovery of damages not from the LLC, but from the LLC's manager/agent (REM, LLC or "REM") and the individual (Stelmach) who served as manager/agent of REM. Under the California LLC statute, REM, as the manager of the LLC, owed the same fiduciary duties to the LLC and to the plaintiff and other members of the LLC as a partner owes to a partnership and the partners. Further, REM, as manager of the LLC was an agent of the LLC and was liable for its own torts even though it had no liability solely by reason of being manager of the LLC. The plaintiff also alleged that Stelmach, the sole member and manager of REM, was liable as the alter ego of REM. Because the plaintiff did not seek recovery from the LLC, but instead sought to recover from the LLC's manager/agent and the manager/agent's alleged alter ego, the court concluded that the LLC was not a necessary party. The court distinguished claims made by the plaintiff involving other entities managed by REM and held that these entities were necessary parties.

Bartfield v. Murphy, 578 F.Supp.2d 638 (S.D.N.Y. 2008). The court held that an LLC was a necessary party with respect to the derivative claims raised on its behalf, but its joinder would destroy diversity and thus the derivative claims had to be dismissed. The court also found that the LLC was indispensable to the plaintiff's claim for declaratory judgment regarding rights of the members with respect to the LLC's diverted business. Thus, the claim for declaratory relief also had to be dismissed.

Beane v. Beane, Civil No. 06-cv-446-Sm, 2008 WL 1787105 (D. N.H. April 18, 2008) (holding LLC plaintiff whose rights were being asserted was necessary and indispensable party and not merely nominal plaintiff whose citizenship could be disregarded for diversity purposes, and commenting that if there was any nominal party it was individual member who brought action personally and on LLC's behalf).

I. Scope of Discovery

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed on other grounds, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI, a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. In addition to the disputes on the merits, the parties had a discovery dispute which the court addressed on appeal. The court held that Mahar's request for approximately one year of documents related to PSMI was reasonable. The court directed the trial court on remand to reconsider its blanket refusal to allow Mahar to obtain additional documents of Ewie, PSMI, and their owners, officers, and employees, as well as documents of Comerica Bank, related to acquiring Mahar's interest in the LLC, dissolution of the LLC, or transferring or selling the assets of the LLC. Finally, the court directed the trial court to reconsider its refusal to allow Mahar to depose two attorneys of the LLC. The court stated that either attorney's work or advice to individuals would be privileged, but Mahar, as a member of the LLC, was entitled to information from the attorneys about their representation of the LLCs. Moreover, the court stated that the privilege would not apply to the extent one of the attorneys may have acted with Ewie to fraudulently withhold information to which Mahar was entitled.

Maitland v. Int'l Registries, LLC, Civil Action No. 3669-CC, 2008 WL 2440521 (Del. Ch. June 6, 2008). The court denied the motion of the plaintiff, a member of an LLC, for commission requesting documents and deposition testimony from the outside auditor of the LLC. The court stated that the action at its core was an action for inspection of LLC books and records and that granting the motion for commission would effectively give the plaintiff member the relief he sought. The court stated that the plaintiff could not use the discovery process in a books and records case to gain access to the books and records ultimately at issue.

Advanced Arm Dynamics of New England, LLC v. Comprehensive Prosthetics Services, LLC, No. CV065004605S, 2008 WL 2502307 (Conn. Super. May 30, 2008) (denying motion to compel out-of-state resident who was president and majority owner of corporate member of LLC plaintiff to appear in state for deposition because there was no showing that individual was "managing agent" of LLC plaintiff).

Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium, 982 So.2d 1211 (Fla. App. 2008). The plaintiff sought discovery of financial records of an LLC in an action involving various claims against the LLC and its members, including a fraudulent transfer claim premised on the belief that the LLC had made cash distributions to its members rendering the LLC insolvent. The court concluded that the information was not discoverable because it was not relevant and would not lead to discovery of relevant information. A dissenting opinion argued that the majority's conclusion ignored the relevance of the requested information to plaintiff's claim regarding improper distributions.

City of Seattle v. Professional Basketball Club, LLC, No. CO7-1620MJP, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008) (ordering LLC to produce certain email messages of members because emails of members were documents under "possession, custody, or control" of LLC by virtue of agency status of members).

J. Arbitration

Cooner Sales Company v. New England Electric Wire Corporation, No. B201539, 2009 WL 311361 (Cal. App. 2 Dist. Feb. 9, 2009) (discussing four arbitration proceedings between LLC members revolving around sale by one member of its interest to third party, noting that res judicata doctrine applies to arbitration proceedings, and concluding that third arbitration award should be confirmed).

JD Investment Co., LLC v. Agrihouse, Inc., No. C08-1661RSM, 2009 WL 113277 (W.D. Wash. Jan. 13, 2009) (refraining from exercising jurisdiction to enforce arbitration clause due to earlier-filed case in Colorado in which respondents asserted arbitration clause in operating agreement was unenforceable because operating agreement itself was incomplete and unenforceable due to absence of asset purchase agreement referred to and incorporated by reference in operating agreement).

Colachis v. Griswold, No. B206091, 2008 WL 5395682 (Cal. App. 2 Dist. Dec. 29, 2008). The court concluded that an arbitration clause in a Membership Interest Purchase Agreement that encompassed claims "relating to" the purchase agreement encompassed members' claims against co-members for breach of fiduciary duty, breach of contract, and fraud although the conduct underlying the claims occurred prior to the purchase of the plaintiffs' interests and was based on the operating agreement rather than any breach of the purchase agreement. The court stated that the claims related to the purchase agreement because the alleged misconduct forced the plaintiffs to sell their interests to the defendants under the purchase agreement. The court also rejected the plaintiffs' argument that members who were not parties to the purchase agreement were not subject to the arbitration. The plaintiffs relied upon a provision in the purchase agreement that there were no third party beneficiaries of the agreement; however, the court noted that the LLC was a party and that all defendants were members of the LLC. In addition, the non-party members joined in the motion to compel arbitration, thereby voluntarily submitting to the arbitration.

Baird v. Manayan, No. H032241, 2008 WL 4998341 (Cal. App. 6th Dist. Nov. 25, 2008). Manayan, an acupuncturist, entered into an operating agreement with Baird, a chiropractor, to form an LLC. Shortly after the LLC opened for business, Manayan failed to make a capital contribution and the relationship began to deteriorate. The parties agreed that Manayan would purchase Baird's interest, but Manayan failed to follow through, and Baird filed an action against Manayan. The court entered an order compelling arbitration under the operating agreement, and the arbitrator found in favor of Baird. Manayan moved to vacate or correct the award on the grounds that the underlying contract was an illegal agreement. Manayan argued that the purpose of providing chiropractic and alternative health care was illegal because neither chiropractors nor acupuncturists were permitted to operate as an LLC and the two were not permitted to do business together in a single practice. The court found that Manayan was equitably estopped from asserting illegality because the arrangement to operate as an LLC with Baird was the product of her own undertaking. Manayan was a licensed attorney who undertook to draft the operating agreement and assured Baird that she would take care of all the legal prerequisites for organizing and starting the business. The court also held that Manayan waived the illegality argument by failing to raise it during the arbitration. Moreover, the court noted that Manayan did not contest the legality of the arbitration clause since she moved to compel arbitration. Thus, she had no basis to complain that the trial court viewed the improper LLC as severable from the allocation of interests in the business and no sound basis to challenge the implied finding that the agreement to purchase Baird's interest created an independent enforceable obligation.

Lustfield v. Milne, 5 Pa. D. & C.5th 469, 2008 WL 5544410 (Pa. Com. Pl. 2008) (holding that arbitration clause in LLC agreement did not require arbitration of scope of arbitration clause even though clause provided for arbitration pursuant to AAA Commercial Rules which include rule that provides for arbitrator to determine scope of arbitration clause).

Towerhill Wealth Management, LLC v. Bander Family Partnership, L.P., C.A. No. 3830-VCS, 2008 WL 4615865 (Del. Ch. Oct. 9, 2008). An investor and various investment LLCs became involved in a dispute regarding the investor's redemption from the LLCs. The Investment Advisory Agreements and the Operating Agreements contained different provisions for resolving disputes. The Investment Advisory Agreements contained arbitration clauses, and the Operating Agreements called for resolution in the chancery court after non-binding arbitration or mediation. The investor initiated arbitration proceedings, and the LLCs filed suit to enjoin the arbitration and obtain a declaratory judgment. The court denied the investor's motion to dismiss, and the investor sought interlocutory appeal. The court denied the request for interlocutory appeal. The court stated that the investor knew when it signed the operating agreements that some disputes with the LLC would come to the chancery court rather than going to binding arbitration. In its arbitration complaint, the investor repeatedly accused the LLCs of violating the operating agreements, and it was only the Investment Advisory Agreement that provided for binding arbitration; therefore, the court distinguished the case from *Willie Gary*, which only called for substantive arbitrability to be determined by an arbitrator where "the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." The court stated that it was impossible to select one dispute resolution clause in this case and say it applies generally to all disputes. In addition, the investor's arbitration complaint, by its own words, arose primarily from and sought relief for breach of the operating agreements, which called for judicial dispute resolution rather than arbitration.

Andrews v. Ford, 990 So.2d 820 (Miss. App. 2008). After one of the members of an LLC died, the deceased member's administratrix brought suit against the remaining member for breach of contract and specific performance of a buy-sell agreement. The court construed the LLC operating agreement and buy-sell agreement between the members as part of the same transaction because the agreements were executed on the same date and the buy-sell agreement was referred to in the operating agreement. The court concluded, however, that the dispute between the deceased member's estate and remaining member was not within the scope of the arbitration clause in the operating agreement because the deceased member's estate was not a "member" under the operating agreement and the arbitration clause only encompassed disputes among members.

Durina v. Filtroil, No. 07 CO 24, 2008 WL 4307892 (Ohio App. Sept. 18, 2008). A member of a Nevada LLC filed an action seeking judicial dissolution and asserting various other causes of action. The trial court determined that it lacked jurisdiction to dissolve the Nevada LLC, and the court stayed the action on the remaining claims because the LLC's regulations required arbitration of disputes between members. The court reviewed the arbitration clause in the LLC regulations and concluded that it encompassed the claims asserted in the case. The court found no indication that there was a delay in asserting the right to arbitration.

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008). The plaintiff brought suit against his parents asserting various claims against them and seeking dissolution of the family business, a construction company organized as an LLC and owned 50% by the father and 50% by the son. The son sought to add his mother as a defendant on the basis of allegations that she committed civil theft by writing checks on the LLC account for personal expenses. The court stated that the son made a sufficient showing that his mother was part of the controversy to support adding her as a party. The defendants sought dismissal of the lawsuit based on an arbitration provision in the operating agreement. The arbitration provision named the mother as arbitrator in the event of a deadlock. The court declined to send the matter to arbitration before the mother because the court had allowed the mother to be sued and she thus had a direct interest in the outcome of the matter.

Magenis v. Bruner, 187 P.3d 1222 (Colo. App. 2008) (interpreting arbitration clause in LLC operating agreement and concluding agreement required award of attorney's fees to prevailing party).

Savanna Investors, LLC v. Vaughn, No. X08CV084012896S, 2008 WL 4021333 (Conn. Super. July 30, 2008) (concluding that plaintiff failed to establish case presented extraordinary situation calling for judicial intervention in arbitration process or that plaintiff LLC member's rights to security in assets or property of defendant LLC would be irretrievably lost by being required to present claims for interim relief to arbitration panel).

Open MRI of Okeechobee, LLC v. Aldana, 978 So.2d 232 (Fla. App. 2008) (holding that claims by LLC members for wrongful termination of their LLC interests, which were seized based on plaintiffs' acquisition of ownership in competing enterprise, were not subject to arbitration clause in operating agreement because arbitration clause excepted claims pertaining to operating agreement's non-competition provision).

Georgia Rehabilitation Center, Inc. v. Newnan Hospital, 658 S.E.2d 737 (Ga. 2008). The court held that a member's request for judicial dissolution was not subject to arbitration because the arbitration clause in the operating agreement required arbitration of any claim arising out of, in connection with, or relating to the agreement. Though the agreement provided for certain causes of dissolution, the court concluded a request for judicial dissolution was an independent legal mechanism and did not arise out of or relate to the terms of the operating agreement.

Lutz v. Right Time Holdings, LLC, Nos. 07-1039-JTM, 07-11-6-JTM, 2008 WL 782644 (D. Kan. March 21, 2008). The court concluded that the claims of employees of two LLCs that they did not receive the proper amount of compensation under Option, Purchase, and Redemption Agreements with the LLCs were determined to be encompassed in the arbitration provision in the Option Agreement. The individual defendants, who were the principal members and managers of the LLCs, were entitled to invoke the arbitration clause although the individuals were not themselves signatories. Though the claims for accounting and breach of duty sounded in tort and would not be arbitrable under Kansas law, the court concluded that federal law governed arbitrability of the claims notwithstanding provisions in the agreement referencing Kansas as governing law.

Zebrasky v. Valdes, No. 07 MA 34, 2008 WL 927780 (Ohio App. March 17, 2008). The court analyzed language in an LLC operating agreement that provided for compensation of members in specified amounts and stated that "no other compensation" was payable to members without a vote of the members. The court concluded that the provision was ambiguous because it could reasonably be interpreted to permit the member vested with day-to-day management authority to reduce compensation or could reasonably be interpreted to prohibit any change in compensation without action by the members. The trial court thus erred in refusing to hold a trial to determine the meaning of the provision before referring the dispute to arbitration under an arbitration clause that excluded from its scope disputes arising out of the managing member's management authority.

Tamposi v. Tamposi LLC, No. 200704283, 2008 WL 497306 (Mass. Super. Jan. 7, 2008) (concluding that arbitration provision contained in operating agreement of LLC that served as manager of second LLC did not apply to dispute regarding Red Sox shares held by second LLC).

Cohen v. Looking for Palladin, LLC, No. 07CV6359(HB), 2008 WL 544597 (S.D. N.Y. Feb. 29, 2008) (interpreting arbitration provision of operating agreement as encompassing securities claims under subscription agreement).

JM Financial Capital, L.L.C. v. Cannon, No. 1 CA-CV 06-0591, 2007 WL 5448148 (Ariz. App. Aug. 21, 2007) (holding LLC member and spouse did not waive arbitration rights provided in loan documents and LLC operating agreement by participating in receivership proceedings initiated by LLC's lender, but did waive arbitration rights by asking court to dissolve and liquidate LLC).

Delgadillo v. White, No. 1 CA-CV 06-0275, 2007 WL 5439745 (Ariz. App. July 31, 2007). White and Delgadillo settled disputes relating to a partnership and an LLC in which they were the partners and members. The settlement agreement contained an arbitration clause. Delgadillo then filed a lawsuit asserting additional claims relating to two other LLCs in which they were members, and White moved to compel arbitration to interpret the scope of the release contained in the settlement agreement. The court upheld the arbitrator's interpretation of the settlement agreement. The arbitrator concluded that Delgadillo intended to release the claims related to the other LLCs and that derivative claims asserted by Delgadillo were encompassed by the release as well. The release covered "all rights...by and/or between the Parties," and the court stated that Delgadillo's derivative claims were assertions of rights by him and, as such, were released.

K. Stay of Proceedings

Pharmalytica Services, LLC v. Agno Pharmaceuticals, LLC, C.A. No. 3343-VCN, 2008 WL 2721742 (Del. Ch. July 9, 2008). An LLC sought a preliminary injunction prohibiting a member from taking action on behalf of the LLC or holding himself out as an authorized representative of the LLC. In 2006, after discovering that a member had formed another business that was competing with the LLC, the board of the LLC removed the member from the management team and from the positions of president and CEO by majority vote. The member objected but made no formal challenge at the time. In 2007, the LLC sued the member asserting various claims sounding in breach of fiduciary duty, equitable and legal fraud, and breach of the LLC's operating agreement. In 2008, the LLC learned that the member was in China asserting the LLC's rights to appoint designees to the board of a joint venture between the LLC and a Chinese entity, prompting the LLC's motion for a preliminary injunction. The member argued that his removal required the unanimous vote of the board of directors of the LLC because the operating agreement required a unanimous vote of the board for major decisions. The LLC relied upon provisions of the operating agreement giving the board authority to remove a member of the management team with or without cause based on a majority vote and providing that senior officers and other managers could be dismissed by the board for illicitly seeking personal gain or other delinquent behavior. The court characterized the preliminary injunction sought as in the nature of a status quo order under Section 18-110 of the Delaware Limited Liability Company Act, which is comparable to Section 225 of the Delaware General Corporation Law. That provision allows for continued operation of the business, with a goal of minimal disruption, while the identities of those properly holding corporate power can be established. The court pointed out that the member did not act in a constructive or direct fashion for the benefit of the LLC for 18 months following the 2006 meeting at which he was removed from his management positions, and his appearance in China and assertion of authority on behalf of the LLC was inconsistent with his course of action since the 2006 meeting and with the expectations of a majority of the members. The court stated that the rational, ongoing governance of the LLC required certainty as to who was running the LLC and that preserving the status quo as traditionally done in the corporate setting was the proper course. The court concluded that the management that had been in control since 2006 should remain in control in the interim and that the member should be precluded from purporting to represent the interests of the LLC. The court noted that the traditional analysis for a status quo order under the corporate and LLC statutes eschews the formalistic application of the preliminary injunction framework; however, because the LLC presented its claim as a request for a preliminary injunction, the court adhered to those standards and found that the LLC had demonstrated a reasonable probability of success on the merits that the member should not be acting on its behalf, that the member's conduct in China without ongoing authority was likely to cause significant and irreparable harm, and that a balancing of harms weighed in favor of the LLC.

EuroCapital Advisors, LLC v. Colburn, C.A. No. 3035-VCN, 2008 WL 401352 (Del. Ch. Feb. 14, 2008). The court exercised its discretion to stay this action in Delaware brought by a Delaware LLC and an individual who claimed to be its sole member (Dyne) against an individual (Colburn) who claimed to be a member in the LLC by virtue of an oral agreement with Dyne. In the Delaware action, the LLC and Dyne sought a declaratory judgment that Colburn was not a member in the LLC, or, alternatively, rescission of her membership based on misrepresentations by Colburn. In an action in federal court previously filed against Colburn in connection with another dispute, Colburn had asserted individual and derivative claims as a member of the LLC against Dyne and another individual (Markiles) to whom she claimed profits of the LLC had been diverted. Colburn's claims in the federal action were dismissed on grounds of improper joinder, and she then filed an action in California state court asserting the same claims against the LLC, Dyne and Markiles. The court applied the Delaware rule that a party seeking a stay must show that there is "a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues." If these conditions are satisfied, a court has discretion, to be "freely exercised," to stay the proceeding. The court found that the California action would be accorded first-filed status because, although the action in California state court was filed after the Delaware action, the claims had first been filed in the federal action and would be viewed as a continuation of the earlier-filed but dismissed federal court action. The court concluded that there was substantial identity between the parties and issues, the key question in both actions being whether Colburn is a member of the LLC. The court also found that the California courts were capable of providing prompt and complete justice in the matter. The court stated that Dyne and the LLC were unable to identify any important questions in an emerging area of Delaware law. Dyne and the LLC suggested that the identity of members in a Delaware LLC would constitute such an area, but the court found no apparent novel questions relating to membership in this case. Though the judicial inquiry might be factually complicated, the court stated that the legal issue was simply a matter of contract, i.e., to what did Colburn and Dyne agree. Dyne and the LLC also suggested that there were important questions of LLC governance, but the court stated that these questions were framed by the derivative aspects of Colburn's complaint in California and were not squarely raised in the Delaware action. Thus, as a matter of discretion, the court stayed the Delaware action. The court noted that Dyne and the LLC had not raised, and had no basis to argue, that litigating in California would cause any hardship since Dyne and Colburn were both California residents and the events in question took place in California. The court noted that it did not need to reach the novel attempt of Dyne and the LLC to exercise personal jurisdiction over Colburn in Delaware under the provisions of the Delaware LLC statute that subject a member who participates materially in the management of the LLC to personal jurisdiction as a manager.

Citrin Holdings LLC v. Cullen 130 LLC, C.A. No. 2791-VCN, 2008 WL 241615 (Del. Ch. Jan. 17, 2008). The court exercised its discretion to stay this action in Delaware brought by the majority member of several Delaware LLCs against the minority member. The court found that the conditions for exercise of the court's discretion to stay the action were satisfied, i.e., the minority member had filed a previous action in Texas involving substantially the same issues and parties, and the Texas court was capable of doing prompt and complete justice. In the Delaware action, the majority member sought a declaratory judgment that its efforts to dissolve the LLCs were proper, that the minority member was not entitled to advancement of expenses incurred in pursuing the Texas action (although the minority member had not asserted such a right), and that the Delaware court would retain jurisdiction in any disputes arising out of the dissolutions. In the Texas action, the minority member sought an accounting of the LLCs and asserted claims of fraud and misrepresentation against the majority member. After the filing of the Delaware action, the minority member amended his complaint in the Texas action to allege breaches of fiduciary duty and majority oppression based on the majority member's actions to dissolve the LLCs and the acquisition by the majority member or its affiliates of properties the LLCs had been investigating. The court found that the Texas action did not lose its status as "first-filed" despite a three-month delay in service of the complaint on the majority member because the majority member had knowledge of the lawsuit less than five days after its filing and possession of a copy of the complaint less than a month after its filing. Additionally, nothing other than docketing and service had occurred in the Texas action prior to service of the complaint. Next the court concluded that the issues and parties in the two actions were substantially the same. Although the precise issues framed initially in the Texas action bore little resemblance to the issues posed by the Delaware action, both complaints arose from the same core conduct. Finally, the court concluded that the Texas court was capable of doing prompt and complete justice. The court acknowledged that the majority member was correct in its assertion that

Delaware law with respect to dissolution and winding up of LLCs has not been fully developed, but the court stated that the majority member identified no novel or important issue that should impel a Delaware court to refrain from yielding the field. Should the issue of the Texas court's personal jurisdiction over the majority member be resolved against the minority member, the court stated that the question of the stay could be revisited, but a mere challenge to personal jurisdiction did not demonstrate that the Texas court was unable to address fully the disputes. The court pointed out that both parties had engaged in tactics designed to secure the preferred forum and neither could lay exclusive claim to the high ground. Having determined that the prerequisites for the exercise of discretion to stay the proceeding were satisfied, the court identified two especially important considerations in weighing whether to stay the Delaware action. First, although there might be a distinction drawn between pre-dissolution and dissolution/post-dissolution conduct, any global resolution would necessarily involve both periods of time, and one comprehensive proceeding would be more efficient. Second, the court viewed the Delaware complaint as only sparsely crystallizing a ripe dispute since it only sought a declaration of non-breach with respect to dissolution and a resolution of a right to advancement that had not been sought. The court thus concluded that there simply were no causes of action asserted in the Delaware action that called out for judicial determination in Delaware.

L. Claim Preclusion

Kramer v. Stelter, 588 F.Supp.2d 862 (N.D. Ill. 2008) (holding that sole owner of LLC suing "Individually, and as the President and Sole Owner" of LLC was in privity with LLC that brought previous action for purposes of application of res judicata because LLCs are in privity with their individual owners, particularly when owner has exclusive control over LLC).

Krepps v. Reiner, 588 F.Supp.2d 471 (S.D.N.Y. 2008) (holding that LLC's manager was bound by judgment in LLC's prior suit against third party because manager controlled prior litigation).

M. Nature of LLC

American Electric Power Company v. Affiliated FM Insurance Company, 556 F.3d 282 (5th Cir. 2009). In this case, the court held that an insurance policy that covered "any subsidiary corporation now existing or hereafter acquired" was unambiguous and did not include LLCs. American Electric Power Company ("AEP") sued its insurer after it discovered losses that occurred in 1999 due to employee theft at two LLC subsidiaries of Central & Southwest Corporation ("CSW"), a conglomerate acquired by AEP in 2000. AEP claimed that the losses were covered under the prior loss clause of its policy with Affiliated FM Insurance Company ("Affiliated"). The Affiliated policy was amended to include CSW and its subsidiaries in 2000 when AEP acquired CSW, and the prior loss clause provided coverage for earlier losses if those losses would have been covered under an insurance policy in existence at the time of the loss. At the time of the theft, CSW was covered by a policy issued by Chubb Insurance Group (the "Chubb policy"), which expressly covered CSW and "any subsidiary corporation now existing or hereafter acquired." The court applied Louisiana contract interpretation principles but noted that the outcome would remain the same under Texas law. The court concluded that the district court did not err in finding that the term "corporation" was unambiguous and excluding parole evidence. The court rejected AEP's argument that the common understanding of "corporation" extends to unincorporated entities like LLCs. The LLCs in issue were Oklahoma LLCs, and the court cited Oklahoma law defining an LLC as "an unincorporated association or proprietorship." The court also cited the Louisiana LLC statute, which provides that "[n]o limited liability company organized under this Chapter shall be deemed, described as, or referred to as an incorporated entity, corporation, body corporate, [etc.]." AEP pointed to numerous judicial and legal references to "limited liability corporations," but the court stated that these were merely imprecise references that did not alter the fundamental distinction between the two types of entities. The court found nothing "absurd" in interpreting the term "corporation" to cover a particular type of subsidiary and not others. AEP also argued that the district court should have reformed the Chubb policy to include LLCs. Although AEP filed affidavits from both Chubb and CSW stating that LLCs were intended to be covered under the general heading of "corporation" in the Chubb policy, the court found that the district court did not err in refusing to reform the policy because Affiliated assumed the coverage obligations under the unambiguous terms of the Chubb policy and there was no indication that Affiliated knew or should have known of any understanding between Chubb and CSW regarding the meaning of the term "corporation." Further, the court stated that use of the term “corporation” was not the type of clerical error that reformation is intended to remedy, and the court characterized AEP’s argument for reformation as an attempt to make an end-run around the parol evidence rule.

MFP Eagle Highlands, LLC v. American Health Network of Indiana, LLC, No. 1:07-cv-0424-DFH-WGH, 2009 WL 77679 (S.D. Ind. Jan. 9, 2009). An organization of affiliated physicians signed a long-term lease that contained a provision giving the organization the right to assign the lease to two specified physicians “as individuals or in any business association.” The lease was assigned to an LLC owned by the two physicians, and the building owner argued that the lease could only be assigned to the physicians personally in a business association that was not a separate entity from the physicians. The court rejected this interpretation and held that the LLC was a “business association” to which the clause permitted the lease to be assigned. The individual physicians thus had no personal liability on the lease.

Susko v. Cox Enterprises, Inc., Civil Action No. 5:07CV144 (STAMP), 2008 WL 4279673 (N.D.W.Va. Sept. 16, 2008) (holding LLC cannot bring false light invasion of privacy claim because LLC, as unincorporated association, has no personal right of privacy).

Virginia Cellular LLC v. Virginia Department of Taxation, 666 S.E.2d 374 (Va. 2008). A telecommunications company structured as an LLC argued that it was exempt from the minimum tax imposed on a telecommunications company under the Virginia Tax Code. The Tax Code provides that “[a] telecommunications company shall be subject to a minimum tax, instead of the corporate tax imposed by § 58.1-400....” Section 58.1-400 imposes a six percent income tax on “every corporation organized under the laws of the Commonwealth and every foreign corporation having income from Virginia sources.” The Department of Taxation promulgated a regulation stating that “every telecommunications company certified as such by the SCC is subject to the minimum tax even though it may be exempt from, or not subject to, the corporate income tax under § 58.1-400.” The court held that the plain language of the statutes, read together, indicates that the minimum tax only applies to corporations because the minimum tax is to be paid instead of the corporate tax. The court held that the Department of Taxation’s regulation interpreting the statutory minimum tax was invalid to the extent it imposed the minimum tax on pass-through entities because the regulation was inconsistent with the statute.

Bond v. Veolia Water Indianapolis, LLC, 571 F.Supp.2d 905 (S. D. Ind. 2008). The court concluded that a Delaware LLC was an “unincorporated association” under the Class Action Fairness Act provision in 28 U.S.C. § 1332(d)(10) so that its citizenship for diversity purposes is determined by the state where its principal place of business is located and the state under whose laws it is organized (i.e., in the same manner that a corporation’s citizenship is determined). The LLC argued that it was not an “unincorporated association” under Delaware law and thus should not be treated as an unincorporated association under Section 1332(d)(10). The LLC argued that its citizenship should be determined by the citizenship of each of its members under the general rule set forth for unincorporated associations by the Supreme Court in *Carden v. Arkoma Associates*. The court rejected the paradox presented by the LLC’s argument that an LLC is not an “unincorporated association” under Delaware law, and thus not an unincorporated association for purposes of Section 1332(d)(10), while the LLC relied on the rule in *Carden*, which sets forth the rule for determining citizenship for all kinds of unincorporated associations. The court found that the LLC’s approach would prevent Section 1332(d)(10) from achieving its clear purpose. Citing the Senate committee report on the Class Action Fairness Act, the court concluded that Congress used the phrase “unincorporated association” in Section 1332(d)(10) as broadly as the Supreme Court used it in the case law. The court then applied the same test that applies to corporations to determine the location of the LLC’s principal place of business (the “nerve center” test).

Interphase Garment Solutions, LLC v. Fox Television Stations, Inc., 566 F.Supp.2d 460 (D. Md. 2008) (dismissing LLC’s claim for intentional infliction of emotional distress because “corporation ‘lacks cognizant ability to experience emotions’” and dismissing LLC’s claim for invasion of privacy because “‘a corporation, partnership or unincorporated association has no personal right of privacy’”).

Advocate Financial, L.L.C. v. Parker Interests, L.L.C., Civil Action No. 07-757-FJP-CN, 2008 WL 2773650 (M.D. La. July 16, 2008) (noting that it is generally accepted that unincorporated business associations such as partnerships and LLCs are analogous to corporations for purposes of venue under Section 1391(a)(1)).

Downey v. 610 Morrison Road, LLC, No. 07AP-903, 2008 WL 2751214 (Ohio App. July 15, 2008) (discussing Ohio service of process provisions, commenting that LLC is neither corporation nor partnership under Ohio law, stating that procedure for serving "unincorporated associations" does not necessarily include LLCs, and noting that, while procedural rule provides specific methods of service for corporations, partnerships, and other entities, no specific method of service has been created for LLCs).

Johnson v. Wells Fargo Home Mortgage, Inc., 558 F.Supp.2d 1114 (D. Nev. 2008) (holding that damages suffered by LLC borrower in connection with commercial loan were not recoverable under Fair Credit Reporting Act because that Act only protects individual consumers).

Champluvier v. Couch, 557 F.Supp.2d 748 (N.D. Miss. 2008). The court concluded that a prosecutor did not violate the constitutional rights of a member of an LLC by prosecuting her under a state embezzlement statute in connection with her conversion of LLC assets to her own use. Although the Mississippi Supreme Court ultimately determined that an LLC was not an "incorporated company" covered by the embezzlement statute at the time, the prosecutor's interpretation was rational, as evidenced by the fact that a majority of the Mississippi Court of Appeals and two dissenting justices of the Mississippi Supreme Court agreed with the prosecutor's interpretation of the statute.

Preferred Real Estate Investments, LLC v. Lucent Technologies, Inc., Civil Action No. 2:07-CV-05374 (DMC), 2008 WL 2414968 (D. N.J. June 11, 2008). The plaintiff sought a writ of attachment under a statute which permitted a writ of attachment if the defendant is a corporation created by the laws of another state and that state authorizes attachments against New Jersey corporations authorized to do business in that state. The property involved was owned by a Delaware LLC, and the court noted that a strict reading of the statute would allow business entities to shield themselves from attachment by simply transferring assets to an unincorporated entity. Thus, the court concluded that a more liberal reading of the statute encompassing LLCs was appropriate. Since Delaware has a reciprocal statute allowing for attachment against a corporation not created or existing under Delaware law, the court concluded the statutory grounds for attachment were present.

Regenstreif v. Board of Assessors, 859 N.Y.S.2d 857 (N.Y. Sup. 2008) (holding that Small Claims Assessment Review provisions did not exclude consideration of home owned by single member LLC and occupied by LLC's owner).

Johnson v. Wells Fargo Home Mortgage, Inc., 558 F.Supp.2d 1114 (D. Nev. 2008) (holding that damages suffered by LLC borrower in connection with commercial loan were not recoverable under Fair Credit Reporting Act because that Act only protects individual consumers).

In the Matter of JPMorgan Chase Bank, N.A., 852 N.Y.S.2d 718 (N.Y. Sur. 2008) (granting reformation of will to allow trustee to form LLC rather than corporation created by decedent during his lifetime to receive trust assets in view of income tax advantages of LLC over corporation; ordering that plan for structuring LLC to parallel corporate structure with respect to management and control be provided to court and parties).

Romanowski v. RNI, LLC, No. C 06-6575 PJH, 2008 WL 361125 (N.D. Cal. Feb. 11, 2008) (commenting on hybrid nature of LLC and equating individual's reference to himself as "shareholder" to that of "member" of LLC).

In re Enron Creditors Recovery Corp. (Enron Corporation v. Baupost Group, LLC), 380 B.R. 307 (S.D. N.Y. 2008) (discussing nature of LLC and affirming bankruptcy court's conclusion that indenture provision defining "senior indebtedness" as indebtedness of issuer of debentures owed to subsidiary "corporation" encompassed debt owed to LLC whose directors the issuer had voting power to elect; stating that fact that LLCs were not specifically mentioned in list of enterprises considered "corporation" under indenture was understandable in light of fact that indenture, which was governed by Texas law, was drafted in 1987, and LLCs were not recognized in Texas until 1991).

N. Formation of Failure to Form LLC

Sole Energy Company v. Hodges, No. G039197, 2008 WL 5101271 (Cal. App. 4 Dist. Dec. 4, 2008) (referring to trial court's order that LLC which was never formed lacked power or capacity to enter letter of intent such that letter of intent was void and there could be no assignee or successor to letter of intent, but confining discussion on appeal to dispositive issues of causation and damages).

Western Securities Corporation v. Eternal Technologies Group, Inc., 303 Fed.Appx. 173, 2008 WL 5212386 (5th Cir. 2008) (stating that Florida law permits application of de facto corporation and corporation by estoppel to LLCs).

O. Pre-Formation Transactions

546-552 West 146th Street LLC v. Arfa, 863 N.Y.S.2d 412 (App. Div. 1st Dept. 2008). LLC plaintiffs brought this action against member/managers who allegedly received commissions in connection with the purchase of real estate by the LLCs without disclosing the commissions to the LLCs or to prospective investors whose investments were used to fund the closings of the property acquisitions. The court held that the LLCs lacked standing to assert the claims because the alleged wrongdoers were the only members and managers at the time the agreements for the commissions were entered into and their acts and knowledge were thus imputed to the LLCs. The court rejected the argument that the defendants were liable as promoters because the challenged agreements were entered into before formation of the LLCs and the promoters could not have then owed fiduciary obligations to the non-existent entities.

Lake State Federal Credit Union v. Tretsven, No. A07-1542, 2008 WL 2732111 (Minn. App. July 15, 2008) (holding trial court did not err in determining that neither LLC named as mortgagee nor its sole member had any interest in mortgaged property because LLC was not formed until after mortgage was issued in LLC's name; subsequent formation did not affect court's analysis because mortgage cannot be delivered to nonexistent entity, and allowing future interest to vest in organized entities would be inconsistent with public policy of encouraging legal organization).

B-G Investors IV, L.L.C. v. Thibaut HG Corporation, 985 So.2d 837 (La. App. 2008) (holding that member who executed contract to purchase real estate as individual "who will assign this contract to a Limited Liability Company to be formed, of which he will be a member," but who had never assigned rights as contemplated, had sole legal right to assert claims related to violation of seller's obligations).

In re Hausman, 858 N.Y.S.2d 330 (N.Y. A.D. 2 Dept. 2008). The court held that the de facto corporation doctrine is applicable to LLCs but that the LLC in issue was not a de facto entity capable of taking title at the time of a purported conveyance to the LLC. There was no evidence that an attempt to file the articles of organization was made prior to the execution of the deed, and there was thus no colorable attempt to comply with the statutes governing incorporation or organization as required by the de facto corporation doctrine.

Norfolk Southern Railway Company v. Jacobs, 549 F.Supp.2d 990 (N.D. Ohio 2008) (holding that parties clearly intended LLC rather than individual to be party to lease modification executed before LLC was formed and that Ohio law provided ample basis to dismiss plaintiff's "formalistic" argument for promoter liability).

Briar Road, L.L.C. v. Lezah Stenger Homes, Inc., 256 S.W.3d 131 (Mo. App. 2008) (holding that pre-formation agreement to assign rights to exercise option to LLC did not fall within Missouri LLC statute prohibiting LLC from transacting business until articles of organization have been filed because statute provided exception for acts incidental to organization of LLC and no request was made for real estate in question to be conveyed to LLC until after its articles of organization had been filed).

Mastroianni v. Fairfield County Paving, LLC, 942 A.2d 418 (Conn. App. 2008) (holding LLC that was formed after execution of lease and ultimately occupied leased premises without submitting rental payments or performing improvements was liable on lease).

02 Development, LLC v. 607 South Park, LLC, 159 Cal.App.4th 609, 71 Cal.Rptr.3d 608 (Cal. App. 2 Dist. 2008) (applying corporate law principles regarding pre-incorporation contracts and holding that LLC could enforce pre-organization contract that LLC adopted after it came into existence).

P. Limited Liability of LLC Members and Managers/Personal Liability Under Agency or Other Principles

Stuart v. Stuart, 962 A.2d 842 (Conn. App. 2009) (noting statutory liability protection of LLC members and managers and absence of veil piercing allegations such that individual members were not liable for unjust enrichment claim against LLC).

Altus Assisted Living, L.L.C. v. Plantation Village Living, L.L.C., No. CIV-07-1077-F, 2009 WL 82475 (W.D. Okla. Jan. 9, 2009) (granting leave to amend and allege more specific facts regarding Fair Labor Standards Act jurisdictional requirements and noting that LLC members may have liability under FLSA if there is factual basis for direct statutory liability or factual basis for veil piercing).

Spanish Tiles, Ltd. v. Hensey, C.A. No. 05C-07-025 RFS, 2009 WL 86609 (Del. Super. Jan. 7, 2009) (stating rule that corporate officer who participates in tort committed in name of corporation has individual liability also applies in LLC context).

Allen v. Dackman, 964 A.2d 210 (Md. App. 2009). The court held that a member of an LLC that owned real property was not an "owner" or "operator" of the property for purposes of being responsible for compliance with the Baltimore City Housing Code. As the LLC rather than the member had the legal right to sell and convey title, the member was not an "owner" for purposes of the Housing Code. Because the LLC did not lease the property and its members were not even aware that the plaintiffs were living in it when the property was purchased by the LLC, the member could not be held liable as an "operator." Additionally, the court rejected the argument that the member could be held individually liable in tort because he had "charge, care or control" of the property. Finally, the court held that the Maryland Limited Liability Company Act precluded the plaintiffs from imputing the alleged negligent acts of the LLC to the member.

Haire v. Bonnelli, 870 N.Y.S.2d 591 (N.Y. App. Div. 3d Dept. 2008) (holding allegations that officers or members of defendant corporations or LLCs participated in commission of tort in furtherance of business by reducing or eliminating mall security to maximize profits stated basis to impose personal liability on officers or members for injuries sustained by victim of shooting on mall premises).

Sentry Construction Corporation v. Revolation Enterprise, LLC, No. CV065000790, 2008 WL 5481405 (Conn. Super. Dec. 5, 2008) (holding that LLC statutes do not shield member or manager from liability under CUTPA based on principle that officer of corporation who commits tort is personally liable regardless of whether corporation itself is liable, which principle applies equally to members or managers of LLC).

EMI April Music Inc. v. Jet Rumeurs, Inc., Civil Action No. 3:08-CV-660-M, 2008 WL 5137147 (N.D. Tex. Dec. 5, 2008) (citing LLC statutory provisions regarding management of LLC and sharing of profits and losses in concluding that individual owner of corporation was liable for corporation's copyright infringement).

Boucher v. Shaw, 196 P.3d 959 (Nev. 2008). The Nevada Supreme Court answered in the negative the following certified question from the Ninth Circuit Court of Appeals: "Can individual managers be held liable as employers for unpaid wages under Chapter 608 of the Nevada Revised Statutes?" The court noted as an initial matter that the certified question was ambiguous in that the term "individual manager" would relate to management-level employees or to statutory "managers" of LLCs since both of the individuals involved were statutory managers of the LLC employer in issue. The court stated that the question before the court related only to management-level employees because the LLC statute makes clear that statutory managers cannot be held individually liable for the debts of the LLC. The court relied upon case law from other states and corporate law under which individual liability does not extend to officers, directors, or shareholders except as provided by specific statute and concluded that there was no clear legislative intent to extend personal liability for unpaid wages to individual managers.

NEFT, LLC v. Border States Energy, LLC, 297 Fed.Appx. 406, 2008 WL 4613577 (6^{th} Cir. 2008). The plaintiff sued a Kentucky LLC and its members, and the parties settled their dispute pursuant to a settlement agreement that required the defendants to deliver a note signed by the LLC. When the LLC failed to make its first payment, the members agreed to personally guarantee repayment of the note up to a maximum amount of $20,000 each. The LLC ultimately defaulted on the note, and the plaintiff sought to reach the personal assets of the members. The court recognized the limited liability of a member of a Kentucky LLC absent a written agreement by the member to be personally obligated for a debt, obligation, or liability of the LLC. The court concluded that the settlement agreement between the claimant and LLC did not entitle the claimant to recover from the members, and the liability of the members was limited to the amount of their personal guarantees.

1800 Ocotillo, LLC v. WLB Group, Inc., 196 P.3d 222 (Ariz. 2008) (stating that professional corporation and professional LLC statutes providing that shareholders and members remain personally liable for negligent or wrongful acts committed by them "establish that professionals who organize under them do not enjoy the same protections against personal liability that generally results from incorporation or formation of a limited liability company").

Katz v. Image Innovations Holdings, Inc., No. 06 Civ. 3707(JGK), 2008 WL 4840880 (S.D.N.Y. Nov. 5, 2008) (holding LLC members were protected from CEO's claims that members misrepresented LLC's financial condition where merger clause in LLC's employment agreement with CEO disclaimed representations "made by or on behalf of the Company to the Executive").

Regions Bank v. Ark-La-Tex Water Gardens, L.L.C., 997 So.2d 734 (La. App. 2008) (recognizing that LLC members and managers may not generally be held personally liable for debts and obligations of LLC absent proof of negligence or wrongful conduct, stating that statute was not intended to shield professionals from liability for personal negligence, and holding individual was subject to personal liability arising from his own negligence in performing construction of water feature).

Ehresmann v. Muth, 757 N.W.2d 402 (S.D. 2008). The plaintiff purchased some property from Doug and Charity Muth pursuant to a contract for deed and subsequent warranty deed listing the Muths as sellers. A prior purchase agreement listed an LLC in which Doug Muth had an interest as the seller. The plaintiff experienced problems with the property and brought suit against Doug Muth alleging fraud, negligent misrepresentation, negligent construction, and breach of implied warranty. The court concluded that there was a fact issue as to whether Muth was acting in an individual or agent capacity when overseeing construction and sale of the property, and the trial court erred in granting Muth summary judgment on the issue of his personal liability.

Crump v. Mack, Civil No. 6:06CV00017, 2008 WL 4693511 (W.D. Va. 2008) (holding plaintiff failed to state quasi-contract and unjust enrichment claims against individual agents of LLC because plaintiff did not allege existence of personal agreements with individuals or tortious conduct or actions taken beyond status as agents of LLC).

Commonwealth Land Title Insurance Company v. M.S.I. Holdings, LLC, No. C.A. 08-217ML, 2008 WL 4681775 (D. R.I. Oct. 21, 2008) (acknowledging that status as member of Rhode Island LLC does not create liability for LLC's obligations or subject member to suit on claims against LLC, but stating that Rhode Island statute does not absolve member from his or her own tort liability, and plaintiff's claims for fraudulent inducement and misrepresentation against member were adequately plead).

Fischer v. Bella-Vin Development, LLC, No. CV075003012S, 2008 WL 4779742 (Conn. Super. Oct. 10, 2008) (recognizing that LLC members are liable for their own professional negligence or wrongful acts and for tortious conduct in certain other settings and finding negligence claim against member was sufficiently alleged, but noting distinction between contract and tort claims and striking contract claims against member in absence of allegations supporting veil piercing).

RLO Properties, Inc. v. Chapman, No. CV065001650, 2008 WL 4683870 (Conn. Super. Oct. 7, 2008) (concluding that oral lease was with individual rather than individual's LLC where landlord understood tenant was individual doing business as painting contractor and individual did not advise landlord whether business was sole proprietorship, corporation, or LLC, and holding LLC was jointly and severally liable for fair rental value where LLC admitted that it occupied premises).

In re Hood (Custom Mortgage Solutions, Inc v. Hood), Bankruptcy No. 07-30717, Adversary No. 07-3104, 2008 WL 4492016 (Bankr. S.D. Ill. Oct. 2, 2008) (stating that debtor, 50% member of LLC, would not ordinarily be responsible for liabilities of LLC, but stating that stockholders or officers can be held individually liable when they have knowledge of and participate in course of corporation's wrongdoing, and finding that plaintiff failed to establish that debtor had sufficient control or wrongful intent to cause LLC to engage in malicious prosecution complained of).

Goldberg v. Stelmach, No. B199830, 2008 WL 4428650 (Cal. App. 2 Dist. Oct. 2, 2008) (stating that LLC manager was agent of LLC and liable for its own torts even though it had no liability solely by reason of being manager).

Alexander Building, LLC v. Queen & Crescent Hotel, LLC, Civil Action No. 08-1513, 2008 WL 4373033 (E.D. La. Sept. 23, 2008). Smith signed a lease as "managing member" of "Queen & Crescent, L.L.C." The plaintiff sued Smith, Queen & Crescent Hotel, LLC, Q & C Holding, LLC, and Q & C Holding Manager, LLC, alleging that there was no such entity as "Queen & Crescent, L.L.C." registered with the Louisiana Secretary of State but that the Queen & Crescent Hotel used the rented space. The only LLC named as a defendant that was in existence at the time the lease was signed was Queen & Crescent Hotel, LLC. A later addendum to the lease also listed "Queen & Crescent LLC" as the lessee. The LLC defendants asserted that Smith exceeded his authority to execute the lease. The court acknowledged the limited liability of a member, manager, or other agent of an LLC, but stated that a member who exceeds his authority can be held personally liable. The court also stated that an agent who enters a contract without disclosing his principal may be liable on the contract. The court thus concluded that the plaintiff stated a claim against Smith on the basis that he acted as agent of an undisclosed principal or exceeded his authority as the manager of an LLC when signing the lease. The court held that another individual who was alleged to be a member or manager of two of the LLC defendants when he attempted to cancel the lease was not a proper party because the Louisiana LLC statute states that a member or manager is not a proper party to a proceeding against an LLC and there was no allegation that the individual committed any fraud or wrongdoing that would lead to personal liability.

Sanchez v. Mulvaney, 274 S.W.3d 708 (Tex. App. 2008). The plaintiffs sought to hold an LLC member liable for the LLC's breach of contractual obligations on the basis that the LLC had forfeited its status as a Texas LLC. The court stated the general rule that members are not individually liable for the debts of a limited liability company. The court then stated that the LLC was a "limited liability corporation," to which state law principles for piercing the corporate veil apply, and that the plaintiffs could hold the member liable for the LLC's alleged breach of contract only to the extent they pierced the corporate veil. The plaintiffs relied only upon provisions of the Texas Tax Code regarding forfeiture and brought forth no evidence of fraud that would entitle them to hold the member individually liable; therefore, the court concluded that the trial court properly granted summary judgment in favor of the member on the breach of contract claim. However, the court of appeals stated that the trial court erred in rendering summary judgment in the member's favor with respect to certain non-contract claims. The court stated that the plaintiffs' allegations of the member's own tortious and fraudulent actions, including alleged Deceptive Trade Practices Act violations, did not depend upon veil piercing because a corporation's agent is personally liable for his own fraudulent or tortious acts, even when acting within the scope of employment.

Carbon El Norteno, L.L.C. v. Sanchez, No. 13-07-00565-CV, 2008 WL 3971554 (Tex. App. Aug. 28, 2008). Micaela and Omar Alvarado owned and operated an LLC which they sold to the plaintiff. The Alvarados signed the purchase and sale agreement in their individual capacities, and Omar signed in his capacity as president and duly authorized representative of the LLC. The plaintiff obtained a summary judgment against the LLC and the Alvarados, and the Alvarados argued that they were not liable in their individual capacities. The court of appeals affirmed the summary judgment against the Alvarados because they did not raise the issue of capacity or file a verified plea challenging capacity in the trial court, and they both signed the agreement selling the LLC in their individual capacities. The court rejected the assertion that the Texas Limited Liability Company Act protected the Alvarados from individual liability because the record showed that the Alvarados sold their ownership in the LLC and thus were not members of the LLC when the suit was brought.

Bayer v. Omni Hotels Management Corporation, 995 So.2d 639 (La. App. 2008) (holding member of LLC owner of property was not liable for injuries arising from defective condition of property contributed by member to LLC because LLC members are not liable for debts, obligations, or liabilities of LLC, and former owner of property is liable for defective conditions only if former owner knew of defective conditions prior to transfer of property).

IMC, Inc. v. Gambulos, No. 05-07-00470-CV, 2008 WL 3867429 (Tex. App. Aug. 21, 2008). The president of an LLC filled out and signed a credit application for the LLC that contained a "personal guarantee" paragraph at the bottom of the second page of the application. After the LLC filed for bankruptcy, the creditor sued the president for unpaid invoices based on the personal guaranty. The president sought summary judgment and filed an affidavit with the second page of the credit application attached and swore that he signed the guaranty in his capacity as president of the LLC and was not individually bound. The court stated that a personal guaranty is not transformed into a corporate guaranty by the fact that a corporate title follows an individual signature because corporate designations appearing after signatures on personal guaranties are considered only to identify the person and not as proof that the person is acting in any particular capacity. The court could not conclude that the president was entitled to judgment as a matter of law based on only the second page of the credit application and the applicable law.

In re Lufkin (Hendon v. Lufkin), 393 B.R. 585 (Bankr. E.D. Tenn. 2008) (stating that member of professional LLC may be personally liable by reason of such person's own acts or conduct and debtor-attorney could not escape liability by hiding behind legal fiction that PLLC was separate entity or blaming court-appointed receiver or former financial officer).

Tenable Protective Services, Inc. v. Bit E-Technologies, L.L.C., No. 89958, 2008 WL 3870666 (Ohio App. Aug. 21, 2008). The plaintiff sought to hold two individuals who were members and senior managers of a Georgia LLC personally liable on a contract with the plaintiff. The court applied Ohio law to the issue of the individual defendants' liability based on a choice-of-law provision in the contract specifying that Ohio law would govern any disputes. Relying on the Ohio LLC statute, the court held that the individual defendants were not personally liable for the obligations of the LLC.

Echelon Homes, L.L.C. v. Carter Lumber Company, No. 277471, 2008 WL 3540210 (Mich. App. Aug. 14, 2008). The court held that the trial court did not abuse its discretion in ordering the plaintiff LLC to post a bond as security where the trial court determined that the LLC was unlikely to prevail at trial and lacked the resources to pay an award of case evaluation sanctions. The court held that the trial court erred, however, to the extent it held that the dissolved LLC's members could be held liable for sanctions against the LLC. The court noted that the members continue to be protected from personal liability for the LLC's debts during the winding up, but the fact that the LLC has been dissolved and is impecunious, while its members are immune from liability, is even more reason to require the LLC to post a bond to ensure a potential award of case evaluation sanctions will be paid.

Smith v. Riverwalk Entertainment LLC, Civil Action No. 05-1416, 2008 WL 3285909 (W.D. La. Aug. 8, 2008). The plaintiffs sought to hold a manager of a Louisiana LLC personally liable for bad faith breach of contract and tortious conspiracy. The court acknowledged the statutory limitation of liability of LLC members and managers and the agency principle that an agent who contracts in the name of the principal within the limits of his authority does not bind himself personally on the contract. The court noted that an agent is not protected from personal liability when he commits fraud and cited the Louisiana LLC statutory provision preserving any rights a person may have against a member or manager because of fraud, breach of professional duty, or other negligent or wrongful act. The plaintiffs relied upon the rule that LLC members or managers can be held personally liable for fraud, but the court concluded that no fraud had been committed in this case. The court also considered an argument that several affiliated LLCs were part of a single business enterprise so that each was liable for the actions of the other. The court explained that the single business enterprise theory is a vehicle for holding a group of affiliated entities responsible for the obligations of one of the entities. The court concluded that the evidence in the record raised a genuine issue of material fact regarding the relationship of the LLCs so as to preclude summary judgment on this issue.

Daines v. Vincent, 190 P.3d 1269 (Utah 2008). The plaintiff sought to hold an individual who was a member and chairman of the board of a Utah LLC personally liable with respect to a transaction involving the services of the plaintiff and the LLC in connection with the development of a surgical center for some physicians. The supreme court agreed with the trial court that the plaintiff failed to present competent evidence that the individual defendant was acting in other than a representative capacity for the LLC in his dealings with the plaintiff. The Utah LLC statute provides that an organizer, member, manager, or employee of an LLC is not personally liable for a debt or obligation of the LLC, and the individual was thus not liable unless he entered a contract with the plaintiff in a manner indicating the contract was his liability. The court noted that a memorandum of understanding signed by the individual was signed by him directly under the name of the LLC and recited that the individual would sign on behalf of the LLC. Also, the initial term sheet indicated that the individual was acting on behalf of the LLC and that the plaintiff's compensation would come from the surgical center being formed and not from the individual. Testimony by the plaintiff further reflected his understanding that the individual was acting on behalf of the LLC. The court thus affirmed the directed verdict in favor of the individual.

State v. Cruz, No. 36568-5-II, 2008 WL 2811270 (Wash. App. July 22, 2008) (stating that member of LLC is not personally liable for debt or liability of LLC under Washington law, noting that Washington LLC statute permits veil piercing but that no such claim was asserted, and concluding that LLC member was not proper party in dispute over bail bond money remitted to LLC issuer of bond).

Mexico Construction v. Thompson, No. CV075002988, 2008 WL 2930417 (Conn. Super. July 6, 2008). The court discussed the limitation of liability under the Connecticut LLC statute (which generally provides a shield against individual liability to a member or manager of an LLC but provides for personal liability of a member or manager for his or her negligent or wrongful acts) and stated that it parallels common law under which an officer of a corporation who commits a tort is personally liable regardless of whether the corporation is liable. Similarly, the court stated that the provision that a member or manager is not a proper party to a proceeding against an LLC does not preclude imposing liability on a member or manager who has engaged in or participated in the commission of tortious conduct. The defamation allegations against the LLC member in this case were not based solely on his status as a member or manager. Rather, the defamatory statements were allegedly made by the individual himself, and the statutory immunity provisions thus did not apply.

Selinger Enterprises, Inc. v. Cassuto, 860 N.Y.S.2d 533 (N.Y. A.D. 2nd Dept. 2008) (holding that individual who signed brokerage contract as agent of LLC was not personally liable on contract).

Barone v. Perkins, No. 2007-CA-000838-MR, 2008 WL 2468792 (Ky. App. June 20, 2008). The plaintiffs alleged several causes of action against the members of an LLC in relation to construction of the plaintiffs' home. The LLC had been administratively dissolved but was reinstated with retroactive effect. The individuals oversaw the construction of the home, but the trial court concluded that the individuals did not perform any work on the actual construction in issue. The court of appeals held that the statutory limitation on liability of LLC members shielded the individuals from liability. The court noted that the trial court found that neither individual engaged in any tortious activity and that they at all times were acting in their capacities as members of the LLC. The court stated that it was not the court's role to create a public policy exception to the immunity granted by the legislature to LLC members.

Seymour v. United States, No. 4:06-CV-116, 2008 WL 2509831 (W.D. Ky. June 19, 2008). The court concluded that the sole member of an LLC was personally liable for employment taxes owed by the LLC. The LLC leased the restaurant and obtained a liquor license, but the member argued that she did not authorize anyone to operate a restaurant under the auspices of her LLC and that she had a "gentlemen's agreement" with another individual who was to operate the restaurant. The court stated that whether the operation of the restaurant under the legal identity of the LLC was within the understanding of the "gentlemen's agreement" was a matter between the member and the other individual and did not affect the member's liability for the employment taxes. The court also found that the bookkeeper for the restaurant was personally liable although he was not the owner of the LLC and was not provided funds to pay the taxes. The bookkeeper had authority to sign checks for the LLC and was responsible for calculating payroll taxes and filing payroll tax returns; therefore, he was a "responsible person" under Section 6672(a). The court determined his conduct was "willful" because he knew about the delinquent taxes and chose to pay other creditors before paying the government.

Hauser v. Bosman, No. 2007 AP2865, 2008 WL 2185978 (Wis. App. May 28, 2008). The court determined that whether the plaintiff contracted with an LLC or its individual member presented a question of fact precluding summary judgment in favor of the LLC's individual member. The plaintiff's arguments that a negligent home inspection would support an independent tort action against the individual member of the LLC under the rule that an individual is responsible for his own tortious conduct was asserted without citing supporting legal authority, and the court of appeals refused to consider it, but stated that the trial court could address the argument on remand after proper briefing.

J & J Sports Productions, Inc. v. Scarato, No. 4:07CV2058 JCH, 2008 WL 2065195 (E.D. Mo. May 14, 2008) (concluding plaintiff adequately alleged personal involvement of LLC member in alleged pirating activity so as to support claim against individual).

Gardner v. Marcum, 665 S.E.2d 336 (Ga. App. 2008) (acknowledging that LLC members are not liable for LLC obligations solely by reason of being members, stating that whether to pierce "corporate veil" is normally fact issue, and concluding that summary judgment holding members of LLC liable for return of funds paid to LLC must be reversed because undisputed facts did not establish as matter of law that LLC's members were personally liable to account for funds paid by plaintiff to LLC).

L & L Holding Company, L.L.C. v. United States, 101 A.F.T.R.2d 2008-2081, 2008-1 USTC ¶ 50,324, 2008 WL 1908840 (W.D. La. April 30, 2008). The IRS filed tax liens against two entities, each of which was the sole member of a disregarded LLC for a period of time, to collect unpaid employment and unemployment tax owed by the LLC. Each member filed suit challenging the IRS determination that the liens were valid, and the suits were consolidated. The court rejected the plaintiffs' argument that the employment tax statute and check-the-box regulations are in conflict. The court determined that the check-the-box regulations are actually in harmony with the employment tax statute as they resolve an ambiguity in how to treat an LLC for employment tax purposes. The court thus ruled that the IRS interpretation of the check-the-box regulations was correct as applied to the levy of employment taxes and the filing of related tax liens against successive sole owners of a single member LLC.

State v. Tebbenhoff, 2008 WL 1848575 (N.J. Super. A.D. April 23, 2008) (holding that individual who wrote hot check on LLC's account could be criminally prosecuted as individual because "[t]he fact that an entity on whose behalf he acted was a limited liability company for which debts the defendant would not be personally liable [citation omitted] does not negate defendant's criminal culpability for his issuance of a check that was dishonored multiple times.").

University of Kansas v. Sinks, 565 F.Supp.2d 1216 (D. Kan. 2008) (holding that provision of Kansas LLC statute providing that LLC's tort liabilities are solely LLC's and that no member or manager shall have liability based solely on member or manager status does not foreclose individual liability for member who commits tort or when veil piercing grounds are present, and sufficient evidence of member's active and knowing participation in trademark infringement existed to preclude summary judgment in favor of member).

Ervin v. Turner, 662 S.E.2d 721 (Ga. App. 2008) (holding member/manager of LLC was liable, upon failure of bank venture undertaken by LLC, for severance owed individual hired to serve as bank president notwithstanding statutory limitation on member's liability because member/manager was contractually obligated under organizer contribution agreement as personal guarantor of president's employment contract).

University of Kansas v. Sinks, 565 F.Supp.2d 1216 (D. Kan. 2008) (acknowledging limited liability of member under Kansas LLC statute, but denying member's motion for summary judgment on trademark infringement claim, based on principle that corporate officer is personally liable for his own tortious acts, where evidence was sufficient to persuade reasonable jury that individual actively and knowingly caused alleged infringement of marks).

Porter Drywall, Inc. v. Nations Construction, LLC, No. 07AP-726, 2008 WL 852619 (Ohio App. March 31, 2008) (holding that statutory limitation on LLC member's liability did not protect member from liability on contract which on its face imposed personal liability on member who signed it).

Jacobs v. Baum, No. 1:07-CV-167, 2008 WL 819037 (N.D. N.Y. March 24, 2008) (acknowledging officers and directors of corporation may be liable for fraud if they participate or have actual knowledge of it, but dismissing fraud claims against individual who was allegedly LLC officer, director and/or member for lack of specificity).

State v. Ratan Hospitality, No. B194660, 2008 WL 739846 (Cal. App. 2 Dist. March 20, 2008) (acknowledging that LLC member or manager may not be held liable merely because of status as member or manager, but finding managing member of LLC was properly included in injunction in nuisance action based on managing member's involvement in negotiation of LLC's lease, acquisition of LLC's business license, business operations of LLC, and proceedings arising out of complaint against LLC).

Taylor v. Southern Belle Dairy Co., LLC, No. 2006-CA-001830-MR, 2008 WL 682211 (Ky. App. March 14, 2008) (affirming summary judgment against individual who co-owned grocery stores with her husband where individual failed to present evidence supporting her allegation that grocery stores were LLCs).

Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433 (6th Cir. 2008). The plaintiff received a collection letter from "The Law Offices of Michael P. Margelefsky, LLC," and the plaintiff sued the LLC and Margelefsky, its sole member, for violations of the Fair Debt Collection Practices Act. The LLC operated two separate businesses, a law practice and a debt collection agency, and the letter received by the plaintiff contained the address and phone number of the debt collection agency operating under the name of the LLC. The letter did not contain an individual's signature, but contained a signature block for an "account representative." Margelefsky testified that he drafted the form letter but did not review the specific letter sent to the plaintiff before it was mailed. The trial court granted Margelefsky summary judgment on the issue of his individual liability, and the plaintiff appealed. The court of appeals acknowledged that Ohio law precludes personal liability for members of an LLC on the basis of the LLC's liability, but the court discussed a split of authority regarding individual liability under the FDCPA in the context of a corporate structure. The court characterized the Seventh Circuit and a few district courts as concluding that a shareholder, officer, or employee of a corporate debt collector may not be held personally liable without meeting the requirements to pierce the corporate veil. The court described the other side of the split as a series of district court opinions concluding that a shareholder, officer, or employee of a corporation may be held personally liable as a debt collector without piercing the corporate veil where the individual is personally involved in the debt collection at issue. The court found the case of *Ditty v. CheckRite, Ltd.*, a Utah district court decision involving a single member LLC, to be most similar to the instant case. In that case, the court concluded that the LLC's sole member fell within the definition of a "debt collector" and could be liable without piercing the veil of the LLC. The court rejected the Seventh Circuit's conclusion that the FDCPA employs the same vicarious liability principles found in Title VII, and the court agreed with the Utah district court's conclusion in another case that a person who authors collection letters, supervises collection activities, and is the sole attorney in a debt collection firm is a debt collector as defined by the FDCPA. Because Margelefsky drafted the form letter that was sent to the plaintiff, was one of only two attorneys at the law firm, was the sole member of the LLC, was the one who negotiated the terms with the mailing service provider used in the debt collection practice, oversaw compliance with the applicable collection laws, and was the person to whom the plaintiff was directed to make her check or money order payable, the court concluded that Margelefsky was regularly engaged, directly and indirectly, in the collection of debts and was thus a "debt collector" subject to individual liability. The court found that a jury should determine whether the letter in issue was deceptive and misleading – specifically, whether the letter gave the impression that it was from an attorney when it was not. The letter was printed on law firm letterhead, made repeated reference to a law firm, and directed payment to an individual lawyer; however, it also explicitly stated that it was from a debt collector and was signed by an unnamed "account representative." The court concluded that the letter presented a genuine issue of material fact as to whether one could reasonably conclude, under the "least sophisticated consumer" test, that the collection letter was susceptible to a belief that it was from an attorney.

Murrin v. Fischer, No. 07-CV-1295 (PJS/RLE), 2008 WL 540857 (D. Minn. Feb. 25, 2008) (stating that limited liability of law firm LLC is provided by LLC statute rather than professional firm statute and neither failure to pay fee required by Professional Responsibility Board nor initial absence of required language in articles of organization specifying type of professional services rendered by firm was basis for holding individual members personally liable for firm wrongdoing).

Castro-Vega v. Waible, Civil No. 07-675-ST, 2008 WL 342754 (D. Or. 2008) (concluding that individual who was general manager of LLC and individual who was manager and registered agent of LLC were "employers" within meaning of Fair Labor Standards Act and thus jointly and severally liable for plaintiff's wages).

Metropolitan Government of Nashville v. Printer's Alley Theater, LLC, Nos. M2007-00329-COA-R3-CV, M2007-00391-COA-R3-CV, 2008 WL 199849 (Tenn. Ct. App. Jan. 23, 2008) (affirming trial court's contempt punishment of individual who was organizer, chief manager, member, and registered agent of LLC, and officer, shareholder, director, and registered agent of corporation, where individual had actual notice of injunctions prohibiting businesses from providing sexually oriented entertainment, entities continued to provide such entertainment in violation of court's order, and individual had repeatedly represented to courts that he was owner and agent of clubs with ability to control their operation).

Mowbray v. Zumot, 533 F.Supp.2d 554 (D. Md. Jan. 30, 2008) (relying on contract law and statutory liability protection of members of Maryland LLCs and holding that individual who signed agreement in capacity of executive officer and member of LLC was not personally liable for obligations under agreement; holding individual who signed agreement in individual capacity had personal liability on contract; holding individual who was party to contract had standing to sue on contract notwithstanding defendants' argument that LLCs which owned property that was subject of contract suffered harm).

Eve v. Cosmos, LLC, Civil Action No. 06-188-DLB, 2008 WL 239604 (E.D. Ky. Jan. 29, 2008) (denying motions to strike defendant LLC members' replies to plaintiff's response to defendants' joint motion for summary judgment where affidavit with certificate of existence (which was relevant because administratively dissolved status of LLC and subsequent reinstatement was relevant to members' limited liability) furnished with reply should have been included with initial motion filing, but in court's discretion would be accepted as supplementation because it added no new evidence not otherwise disclosed in discovery, and reply arguing member had no personal involvement in business and thus no acts or omissions on which liability for personal negligence could be premised was replying to argument made in plaintiff's response to summary judgment motion and was based on depositions taken by plaintiff).

Sturm v. Harb Development, LLC, No. HHBCV07001058, 2008 WL 249220 (Conn. Super. Jan. 2, 2008) (noting that new home construction was not within definition of "professional services" for purposes of imposing liability on LLC member or manager under statutory provision for liability for negligent or wrongful conduct while rendering professional services).

Smith v. Teel, 175 P.3d 960 (Ok. App. 2007). The court held that the LLC veil should not be pierced to impose liability on LLC members with regard to the duty to exercise reasonable care not to sell alcohol to a noticeably intoxicated person. The plaintiff's wrongful death claim against two managers/owners of an LLC based on the LLC's sale of alcohol to an intoxicated person failed because there was no evidence that the individual defendants personally sold alcohol to the patron involved, had knowledge that any employees served alcohol to a noticeably intoxicated person, or were present on the night in question.

L.F. Pace Construction, Inc. v. Simko, No. CV010387513, 2008 WL 4686485 (Conn. Super. Dec. 7, 2007) (holding that genuine issues of material fact regarding extent of involvement of attorney member of PLLC in legal services and representation giving rise to plaintiffs' action precluded summary judgment in favor of attorney).

Cooper v. Coldwell Banker, Civil Action No. 07-1208, 2007 WL 4792982 (W.D. La. Dec. 2, 2007) (holding plaintiff's mere allegations that individual was owner of LLC real estate firm and that agent who questioned transaction at issue was fired by firm did not state claim against individual for personal liability for firm's racial discrimination because complaint did not allege any personal participation by individual in allegedly unlawful acts and did not state claim under statutory exception to limited liability afforded member of LLC where individual acts outside capacity of member, manager, employee or agent).

Miller v. Raytheon Aircraft Co., 229 S.W.3d 358 (Tex. App. 2007) (commenting that, under Delaware law, LLC members generally are not liable for LLC's obligations absent showing that court should pierce veil).

Q. LLC Veil Piercing

Ruffing v. Masterbuilt Tool & Die, LLC, No. 1:09-CV-01264, 2009 WL 185950 (N.D. Ohio Jan. 23, 2009). An employee of an LLC sought to pierce the veil and hold a parent corporation and sister LLC liable for breach of the employment contract and related claims. The defendants argued that it was never appropriate to pierce an Ohio LLC and that, even if an LLC can be pierced, it is never appropriate to impute liability from one sister corporation to another. The court rejected the argument that an LLC is immune from the general law of corporate veil piercing and also rejected the contention that piercing is always inappropriate between sister corporations. The parties agreed that Ohio law governed the plaintiff's veil piercing claim, and the court applied Ohio corporate veil piercing principles. The court pointed out that the Ohio LLC statute, on which the defendants relied for their argument that piercing does not apply to LLCs, provides that members and managers of an LLC are not personally liable for the debts of the LLC *solely* by reason of being a member or manager. That is, the statute does not state that no one other than the LLC can be held liable for the LLC's debts, but merely provides that members and managers are not personally liable because they happen to be members or managers. The court stated that many courts have applied corporate veil piercing to LLCs and that the defendants did not cite "a single case that has ever differentiated an LLC from a corporation for purposes of veil piercing." The court found "no reason to believe that Ohio would reach a unique result." The court analyzed each prong of Ohio's three-prong corporate veil piercing test and concluded that the plaintiff's pleadings were sufficient as to each prong. With respect to the first prong, that the shareholders or another legal entity exercised such complete control that the corporation had no separate mind, will, or existence of its own, the court commented that it will only be in rare and extreme cases that one sister corporation can truly control another; however, the plaintiff had alleged sufficient facts to proceed to discovery. The defendants did not contest that the plaintiff had sufficiently pled the second and third prongs, i.e., that their control was used to commit fraud, an illegal act, or a similarly unlawful result, and that the plaintiff suffered injury or unjust loss as a result of the control and wrong. The court made a point of stating that the plaintiff's pleadings were sufficient to satisfy these requirements based on specific allegations that the plaintiff was always paid by the sister LLC rather than the LLC with whom he contracted, that the LLC with whom he contracted was not "real," and that various aspects of the contract appeared to be fraudulent to the extent the LLC with whom the plaintiff contracted had no assets, liabilities, products, or employees other than the plaintiff.

Stuart v. Stuart, 962 A.2d 842 (Conn. App. 2009) (noting statutory liability protection of LLC members and managers and absence of veil piercing allegations such that individual members were not liable for unjust enrichment claim against LLC, and LLC itself did not have fiduciary relationship with plaintiffs although its member was executor of estate of father of plaintiffs and member, trustee of testamentary trust established by father, and general partner of limited partnership over which court imposed constructive trust in favor of estate).

State Capital Title & Abstract Company v. Pappas Business Services, LLC, Civil Action No. 3:08-cv-3619-FLW, 2009 WL 114160 (D.N.J. Jan. 15, 2009). The plaintiff sought to pierce the veil of a closely-held LLC and hold Gary and Mary Pappas, who were members and the sole officers of the LLC, liable for the LLC's alleged fraudulent breach of contract. The defendants moved to dismiss the veil piercing claim, arguing that their LLC was no different than any other closely held LLC and that the plaintiff's theory threatened to undo the presumption of limited liability afforded to shareholders and officers of a corporate entity. The court agreed with the defendants and dismissed the veil piercing claim. The court noted that the corporate veil applies with equal force to an LLC and applied corporate veil piercing principles. Taking the allegations as true, Gary and Mary Pappas, through their LLC, fraudulently induced the plaintiff to enter into a contractual relationship. The court concluded that, even assuming the members' conduct was of the type sufficient to justify piercing the corporate veil, the plaintiff failed to allege any of the following factors: undercapitalization, siphoning of funds, or disregard of corporate structure and record keeping. Neither defendant was alleged to have so dominated the corporate structure as to render the corporate structure a sham. The court stated that it appeared that the LLC was "an example of a small, closely held corporation that is comprised of less than five members, not a sham corporate entity set up to defraud individuals and businesses and evade personal liability" and that the court "is not obligated to pierce the corporate veil of a corporation that is comprised of only one shareholder or member because, quite obviously, that one member must dominate the corporate entity if the business is to function and be profitable." The court characterized veil piercing as an extraordinary exception to the principle of limited liability of shareholders and members of a corporate entity and stated that, under the plaintiff's logic, the members of a small, closely held corporation would be individually liable in any instance where they are accused of a fraudulent breach of contract.

MFP Eagle Highlands, LLC v. American Health Network of Indiana, LLC, No. 1:07-cv-0424-DFH-WGH, 2009 WL 77679 (S.D. Ind. Jan. 9, 2009). An organization of affiliated physicians signed a long-term lease that contained a provision giving the organization the right to assign the lease to two specified physicians "as individuals or in any business association." The lease was assigned to an LLC owned by the two physicians, and the building owner argued that the lease could only be assigned to the physicians personally in a business association that was not a separate entity from the physicians. The court rejected this interpretation and held that the LLC was a "business association" to which the clause permitted the lease to be assigned. The individual physicians thus had no personal liability on the lease. The court also rejected the building owner's attempt to pierce the veil of the LLC to hold the physicians liable. The court stated that it made sense to apply to LLCs the same standards applied to corporations and discussed the heavy burden facing a plaintiff attempting to pierce the veil. The court found that the evidence on numerous factors weighed against piercing the veil. The court noted that the LLC observed legal formalities and kept appropriate records. There was no evidence that the LLC paid personal obligations of its principals or that assets and affairs were commingled. There was also no evidence that anyone represented to the building owner that the LLC was anything other than an LLC or that any member ignored or manipulated the LLC form. The plaintiff argued that the LLC was undercapitalized and that it was used to promote fraud, injustice, or illegal activities, but the court was not persuaded. The court stated that the plaintiff seemed to be arguing that the LLC should have had sufficient capital to assure payment of $2,000,000 in remaining long-term rent obligations, which, in effect, was an argument that the plaintiff was entitled to have personal guarantees. The court stated that the plaintiff should have bargained for guarantees if it desired them. The court stated that forming the LLC to avoid personal liability was a legitimate business goal, particularly where the physicians had no personal liability on the original lease and the lease gave the absolute right to assign the lease to a business association formed by the physicians. Because the facts surrounding the capitalization and functioning of the LLC as well as the assignment of the lease were not in dispute, the court concluded the defendants were entitled to summary judgment on the plaintiff's attempt to hold the physicians personally liable.

Leblanc v. Capital Fulfillment Group, Inc., No. WOCV200700177, 2008 WL 5505490 (Mass. Super. Dec. 10, 2008) (finding plaintiff pled facts sufficient to overcome motion to dismiss claims against individual defendants who were allegedly liable under veil piercing principles as agents or officers of corporation and LLC and as principals of single enterprise).

RCO International Corporation v. Clevenger, 904 N.E.2d 941 (Ohio App. 2008) (applying corporate veil piercing principles and holding plaintiff was not required to plead fraud in order to allege veil piercing claim against member of LLC).

United States Small Business Administration v. Alto Tech Ventures, LLC, No. 07-4530 SC, 2008 WL 5245903 (N.D. Cal. Dec. 17, 2008) (applying common law corporate alter ego doctrine, as provided by California LLC statute, to SBA's claim that members of LLC were liable for LLC's breach of agreement and finding existence of triable issues of fact).

In re Heritage Organization, L.L.C. (Faulkner v. Korman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. The trustee argued that each of the entities affiliated with Kornman should be liable for the LLC's debts under one or more of the following theories: (1) single business enterprise, (2) alter ego, and (3) sham to perpetrate injustice. The court stated that Texas looks to the law of the jurisdiction of formation when determining the liability of an owner under a veil piercing claim. With the exception of a Tennessee corporation and a Texas corporation, the entity defendants were all Delaware LLCs, corporations, and limited partnerships. The court concluded that Delaware does not separately recognize the single business enterprise theory or sham to perpetrate injustice or fraud. Rather, the concepts involved in these theories are subsumed in the alter ego analysis under Delaware law. The court granted summary judgment in favor of all the entities on the single business enterprise theory because it is not recognized as a stand-alone theory in Delaware or Tennessee, and the theory was rejected by the Texas Supreme Court after the court's hearing on the summary judgment motions. The court also granted summary judgment in favor of all the entities other than the Texas corporation on the sham to perpetrate injustice/fraud claim because Delaware and Tennessee do not recognize that theory as a separate basis to pierce the veil. The court found genuine issues of material fact precluded summary judgment on the trustee's alter ego claim. The court recognized that the debtor was an LLC rather than a corporation but noted that emerging LLC case law illustrates that situations resulting in a piercing of the LLC veil are similar to those that warrant piercing the corporate veil. The court stated that actual fraud was not required to pierce the veil based upon the alter ego theory under Delaware law, and the court characterized the test under Delaware law as: (1) whether the entities in question operate as a single economic entity, and (2) whether there was an overall element of injustice or unfairness. The court noted that, in an alter ego analysis involving an LLC, "somewhat less emphasis is placed on whether the LLC observed internal formalities because fewer such formalities are legally required," but stated that the failure of commonly-owned entities to follow legal formalities when contracting with each other is tantamount to a declaration that the entities are one in the same. The court pointed to evidence that Kornman's entities dealt informally with one other as raising a fact issue on the first prong of the alter ego test. With respect to the second prong (that the entities were used to effectuate fraud or for an unfair or inequitable purpose), the court pointed to the LLC's failure to disclose to its clients concerns raised by the IRS regarding the LLC's high risk estate and tax planning strategies, the LLC's distributions of millions of dollars to its members after the IRS raised concerns, and the LLC's continued distributions after the filing of multi-million dollar claims against the LLC.

Blue Water Sunset, LLC v. First View, LLC, No. B204012, 2008 WL 5394933 (Cal. App. 2 Dist. Dec. 9, 2008). The court concluded that a 50% member's claims for breach of fiduciary duty against the other 50% member/sole manager were derivative and the plaintiff member lacked standing to pursue the claims because it did not allege that it provided to the LLC or its board written notice of the claims or a copy of the proposed pleading before the action was filed. The plaintiff argued that certain claims should not be dismissed based on allegations that the other member was the alter ego of the LLC and the alter ego should be vicariously liable for the member's breach of fiduciary duty and other wrongs. The court stated that this belated argument was waived; however, to fully put the issue to rest, the court addressed the argument. The court stated that its research indicated that the law cut against the plaintiff on this argument. Noting that the plaintiff's argument was a "reverse piercing" claim rather than a traditional alter ego claim, the court declined to apply the doctrine of reverse piercing based on California case law rejecting the doctrine.

Strong v. JCM Partners, LLC, No. C055163, 2008 WL 5077591 (Cal. App. 3 Dist. Dec. 3, 2008) (stating that corporate veil piercing principles apply to LLCs and finding facts insufficient to pierce veil of LLC parent to hold subsidiaries liable for acts of parent or each other).

Ronald A. Chisholm (U.S.A.) Inc. v. Anpro Trading, L.L.C., Civil Action No. 06-3300, 2008 WL 4691213 (E.D. La. Oct. 22, 2008). The sole member of an LLC sought dismissal of the plaintiff's attempt to hold the member personally liable on a contract of the LLC. The plaintiff argued that the totality of the circumstances demonstrated that it was entitled to pierce the veil, but the only specific contentions were that the LLC was undercapitalized and failed to follow formalities. The evidence of undercapitalization was testimony by the member that he would write a check from the LLC to himself for salary in whatever figure he thought the LLC could allow itself, and the initial capitalization of the LLC was $1,000. The court held that this evidence did not establish undercapitalization per se, and the court stated that the plaintiff did not provide any other evidence concerning the LLC's financial status to establish de facto undercapitalization. With regard to formalities, the plaintiff relied upon the LLC's failure to hold annual meetings. The member testified that the organizational documents permitted meetings to be held in person or by telephone and did not require minutes. When asked whether the informal meetings were held by telephone or otherwise, the member testified that the meetings were basically him having a meeting with himself. The court stated that, because the LLC was a single member LLC, the failure to hold meetings did not raise a fact issue with regard to adherence to corporate formalities. The court found that the undisputed facts established "substantial compliance" with corporate formalities. The court also stated that courts have usually applied more stringent standards for piercing the corporate veil where the liability is based on contract because the party seeking relief is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity whose shareholders have limited liability. The plaintiff offered no evidence rebutting this presumption, and the court granted the member's motion for summary judgment.

Fischer v. Bella-Vin Development, LLC, No. CV075003012S, 2008 WL 4779742 (Conn. Super. Oct. 10, 2008) (concluding allegations that individual was controlling member of LLC and that any act or omission of LLC was that of individual were insufficient to support veil piercing claim).

In re DePaulis (Holland v. DePaulis), Civil No. 3:07cv75, 2008 WL 4446999 (W.D.N.C. Sept. 26, 2008) (concluding corporate "instrumentality rule" is fair guide for proof required to disregard LLC entity in absence of North Carolina case law enunciating extent to which rule is applicable to LLCs and finding evidence supported bankruptcy court's finding that debtor did not act dishonestly or fraudulently but rather poured virtually his entire net worth into failed business venture).

EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V., Civil Action No. 3184-VCP, 2008 WL 4057745 (Del. Ch. Sept. 2, 2008). A Delaware LLC sued one of its members, a Dutch LLC ("VG 109"), and the member's parent corporation ("NIBC"), seeking a declaration that VG 109 was NIBC's alter ego, specific performance of provisions of the LLC agreement regarding the reimbursement of tax withholding payments made on VG 109's behalf, and a declaration that VG 109's attempted transfer of its economic interest was invalid. The LLC asserted four bases for the court's exercise of personal jurisdiction over NIBC: (1) Delaware's long-arm statute; (2) the terms of the LLC agreement; (3) alter ego or veil piercing theories of jurisdiction; and (4) agency theory of personal jurisdiction. In discussing the agency and alter ego theories of personal jurisdiction, the court identified certain common factors but explained that the scope of the alter ego theory was broader in that only the precise conduct instigated by the parent is attributable to the parent under the agency theory whereas all of the activities of the subsidiary are attributable to the parent under the alter ego theory. The court rejected the argument that NIBC was subject to personal jurisdiction under the alter ego theory. Because the court had found that there were insufficient acts of VG 109 to satisfy the long-arm statute, the court stated that it need not decide the question of whether VG 109 was the alter ego of NIBC. However, the court discussed the LLC's arguments for disregarding the separate existence of VG 109 and its parent corporation and concluded that the LLC had not made a sufficient showing of fraud or other inequity to disregard the corporate form. The court pointed out that the fraud or injustice must stem from an inequitable use of the corporate form itself, not merely from the underlying cause of action for breach of contract. A conclusory statement in the complaint that NIBC knowingly used VG 109 as an instrument to shield itself from liability for tax obligations related to ownership in the LLC was insufficient to support a reasonable inference that NIBC's use of VG 109's limited liability status was fraudulent or inequitable. There also was no showing that VG 109's capitalization was so minimal as to prove it was a sham entity. The court also stated that the LLC's inability to sue NIBC in Delaware for taxes due from VG 109 did not create the requisite inequity.

NetJets Aviation, Inc. v. LHC Communications, LLC, 537 F.3d 168 (2d Cir. 2008). The plaintiffs sought to hold the sole member of a Delaware LLC liable for the breach of contract of the LLC on the basis that the member was the LLC's alter ego. The trial court granted summary judgment in favor of the member on the ground that the plaintiffs had not adduced sufficient evidence to pierce the veil of the LLC. The Second Circuit Court of Appeals discussed Delaware corporate veil piercing principles and concluded that such principles are generally applicable to an LLC, with the caveat that somewhat less emphasis is placed on whether the LLC observed internal formalities in an alter ego analysis of an LLC. The court stated, however, that if two entities with common ownership "'failed to follow legal formalities *when contracting with each other* it would be tantamount to declaring that they are indeed one in the same.'" The court examined the evidence that the LLC and its sole member operated as a single entity and found that the evidence, viewed most favorably to the plaintiffs, showed that the LLC was started with a capitalization of no more than $20,100, that it proceeded to invest millions of dollars supplied by its member, and that the member put money into the LLC as needed and took money out as the member needed it. The LLC had only one officer other than its member, and the officer was paid by the member or one of his corporations. The LLC shared space with other companies owned by the member and shared employees with the member or other companies owned by the member. The member formed the LLC to be used as an investment vehicle for him to make investments, and the ultimate decisions were always made by the member. The court reviewed evidence relating to financial transactions involving the LLC, including transfers to the member or third parties on his behalf in connection with living expenses. The individual in charge of the LLC's financial records testified that the member made the decision to treat moneys deposited into the LLC as loans so that the member could make withdrawals as he needed money without having to pay taxes on the money withdrawn. The loans were not evidenced by written agreements, and there were no set repayment programs or terms. The member decided when to put money in or take money out of the LLC. The court concluded that this evidence was ample to permit a reasonable factfinder to find that the member completely dominated the LLC and treated its bank account as one of his pockets. The court then reviewed evidence relating to fraud, illegality, or injustice and stated that there may be overlap in the proof offered to show the LLC and member operated as a single entity and the proof relating to unfairness. The court found evidence of injustice in an affidavit submitted by the member to counter the plaintiffs' contention that the LLC was undercapitalized. The affidavit stated that the member did not intend for the monies paid to the LLC to be treated as loans and that such payments were in fact capital contributions. The court pointed out that the individual in charge of the LLC's books testified that the member instructed him to treat the payments as loans so that the member could take money out of the LLC without tax consequences. The court explained that the member's withdrawals of money from the LLC would be characterized as distributions if the payments to the LLC were capital contributions and such distributions might well have violated the prohibition on distributions under the Delaware LLC statute given that the LLC had ceased operating and was unable to pay its debt to the plaintiffs. The court stated that a factfinder could infer that the member's payments to the LLC were deliberately mischaracterized as loans to mask the fact that the member was making withdrawals prohibited by law. The court also stated that a reasonable factfinder could find that the member operated the LLC in his own self-interest in a manner that unfairly disregarded the rights of the LLC's creditors given various payments and withdrawals on the member's behalf at a time when the LLC was unable to pay its debt to the plaintiffs and evidence that the member withdrew more money from the LLC than he put in. The court concluded by finding that neither the LLC member nor the plaintiffs were entitled to summary judgment on the veil piercing claim.

Sanchez v. Mulvaney, 274 S.W.3d 708 (Tex. App. 2008). The plaintiffs sought to hold an LLC member liable for the LLC's breach of contractual obligations on the basis that the LLC had forfeited its status as a Texas LLC. The court stated the general rule that members are not individually liable for the debts of a limited liability company. The court then stated that the LLC was a "limited liability corporation," to which state law principles for piercing the corporate veil apply, and that the plaintiffs could hold the member liable for the LLC's alleged breach of contract only to the extent they pierced the corporate veil. The plaintiffs relied only upon provisions of the Texas Tax Code regarding forfeiture and brought forth no evidence of fraud that would entitle them to hold the member individually liable; therefore, the court concluded that the trial court properly granted summary judgment in favor of the member on the breach of contract claim. However, the court of appeals stated that the trial court erred in rendering summary judgment in the member's favor with respect to certain non-contract claims. The court stated that the plaintiffs' allegations of the member's own tortious and fraudulent actions, including alleged Deceptive Trade Practices Act violations, did not depend upon veil piercing because a corporation's agent is personally liable for his own fraudulent or tortious acts, even when acting within the scope of employment.

Smith v. Riverwalk Entertainment LLC, Civil Action No. 05-1416, 2008 WL 3285909 (W.D. La. Aug. 8, 2008). The court considered an argument that several affiliated LLCs were part of a single business enterprise so that each was liable for the actions of the other. The court explained that the single business enterprise theory is a vehicle for holding a group of affiliated entities responsible for the obligations of one of the entities. The court concluded that the evidence in the record raised a genuine issue of material fact regarding the relationship of the LLCs so as to preclude summary judgment on this issue.

Waterview Site Services, Inc. v. Pay Day, Inc., Nos. CV054004988S, CV065001330S , 2008 WL 4307871 (Conn. Super. Aug. 8, 2008) (finding that individual was acting as vice president and agent of LLC (which was identified earlier in opinion as Pay Day, Inc., and thus may actually have been corporation) and that plaintiffs failed to establish that corporate veil should be pierced to hold individual liable).

Handam v. Wilsonville Holiday Partners, LLC, 190 P.3d 480 (Or. App. 2008) (stating that plaintiff's allegations might allow inference that individual who was LLC's "principal" or "shareholder" followed poor business practices, but did not allow inference that individual's conduct was dishonest or deceitful or intended to harm third party and thus did not justify piercing "corporate veil" to hold individual personally liable for default judgment against LLC).

In the Matter of Athena Construction, L.L.C., Civil Action No. 06-2004, 2008 WL 318743 (W.D. La. Aug. 4, 2008) (stating that corporations and LLCs are generally recognized as distinct legal entities under Louisiana law and granting summary judgment motion of LLC's parent company because there was no evidence that parent was LLC's alter ego or that they constituted a single business enterprise, and thus no genuine issue of material fact as to parent's liability for damages resulting from LLC's alleged negligence or alleged unseaworthy condition of LLC's barge).

Securities and Exchange Commission v. Wolfson, 539 F.3d 1249 (10^{th} Cir. 2008) (stating that court would consider all claims in securities fraud civil enforcement action against Colorado LLC and its managing member jointly in absence of any allegation that LLC had corporate identity separate from managing member).

Connecticut Light and Power Company v. Westview Carlton Group, LLC, 950 A.2d 522 (Conn. App. 2008). The court discussed the instrumentality test for piercing the corporate veil and determined that there was ample evidence to support the trial court's determination that the veil of the defendant LLC should be pierced to hold the sole member liable for its unpaid electricity bills. The LLC lacked a registered agent, filed no annual reports with the Secretary of State, lacked any documentation required for an LLC under the LLC statute, failed to maintain any business records for its property, failed to file any tax returns for the years involved, and was undercapitalized. There was also evidence that the member commingled LLC funds for his own benefit by transferring funds from the LLC to another entity controlled by him for purported payment of undocumented and unsubstantiated loans. Finally, when the LLC sold its property, the member rather than its creditor was the beneficiary of the proceeds of the sale. The court rejected the defendants' suggestion that this was simply a case of a single shareholder being charged with a corporate debt solely based on his ownership status. The court stated that there was ample evidence that the LLC had no separate existence and that it was used to perpetrate an unjust act in contravention of the plaintiff's legal rights.

Double Construction Company, LLC v. Advanced Home Builders, LLC, No. CV065003609, 2008 WL 4050864 (Conn. Super. Aug. 6, 2008) (noting that corporate veil piercing principles apply to LLCs and finding that evidence established that father and daughter owners of LLC were liable for LLC's breach of contract under instrumentality and alter ego theories).

State v. Cruz, No. 36568-5-II, 2008 WL 2811270 (Wash. App. July 22, 2008) (stating that member of LLC is not personally liable for debt or liability of LLC under Washington law, noting that Washington LLC statute permits veil piercing but that no such claim was asserted, and concluding that LLC member was not proper party in dispute over bail bond money remitted to LLC issuer of bond).

Sentry Medical Products, LLC v. American Dental Supply, LLC, No. 02-C-426, 2008 WL 2694897 (E.D. Wis. July 3, 2008). Four years after obtaining a judgment against an LLC for breach of contract, the plaintiff sought to amend the judgment to add non-party individuals on the basis that they were the alter egos of the LLC. The court stated that Wisconsin courts had not construed state law to permit enforcement of judgments against non-parties in supplementary proceedings and that the court thus lacked jurisdiction over the individual alter ego defendants. Further, the court said that the plaintiff's claim would fail even if were properly before the court because the plaintiff had been litigating essentially the same issue it sought to raise in its post-judgment motion in California, and the California court had issued a decision rejecting the plaintiff's alter ego claim. The plaintiff's claim was thus precluded on claim preclusion principles. Its remedy if it disagreed with the California decision was to appeal that decision, not to start a new action in another state.

Ypsilanti Community Utilities Authority v. MeadWestvaco Air Systems, LLC, No. 07-CV-15280, 2008 WL 2610273 (E.D. Mich. June 30, 2008) (noting that unpublished Michigan cases have applied corporate veil piercing principles to LLCs and that defendant apparently did not argue that all LLC veil piercing claims are meritless, and concluding that plaintiffs adequately alleged facts plausible on their face to state veil piercing claim against member of Delaware LLC notwithstanding limited liability of members under Delaware and Michigan law).

Beuff Enterprises Florida, Inc. v. Villa Pizza, LLC, Civil Action No. 07-2159 (PGS), 2008 WL 2565008 (D. N.J. June 25, 2008) (interpreting claims against LLC's managing member to be premised on veil piercing and finding allegations sufficient to survive motion to dismiss).

Troutwine Estates Development Company, LLC v. ComSub Design and Engineering, Inc., No. 45A04-0802-CV-111, 2008 WL 2439916 (Ind. App. June 18, 2008) (remanding for specific factual findings regarding basis for imposing liability on LLC members under alter ego doctrine).

Regency Centers, L.P. v. Civic Partners Vista Village I, LLC, No. G038095, 2008 WL 2358860 (Cal. App. 4 Dist. June 11, 2008). The court concluded the trial court did not err in finding that the sole member of an LLC was liable for the LLC obligations as the LLC's alter ego. The court recognized that the alter ego doctrine is applied strictly and sparingly under California and Delaware law, but found the trial court's findings and analysis more than adequate to explain its reasons in imposing liability on the LLC's member as its alter ego. The court pointed to the trial court's findings that the LLC had no capitalization, that funds between it and a corporation owned by the member were used interchangeably, that the entities were controlled by the member without formalities, that the LLC had no employees, no books, and no positive income, that the LLC's money was dissipated after it was reimbursed for costs and development fees, that the LLC was used for the convenience of its member and as part of his own finances, and that it would be inequitable to allow the LLC's status to shield the member from liability.

DeWitt v. Sealtex Company, Inc., Nos. 273387, 273390, 274255, 275931, 2008 WL 2312668 (Mich. App. June 5, 2008) (holding trial court erred in piercing "corporate veil" of LLC where LLC was not mere instrumentality of its members, was formed in compliance with Michigan law, maintained separate books and records, filed tax returns, and was not used to commit fraud).

Taurus IP, LLC v. DaimlerChrysler Corporation, 559 F.Supp.2d 947 (W.D. Wis. 2008) (expressing skepticism regarding defendant's arguments that Texas law absolutely protects managers of LLC from veil piercing liability or at least requires actual fraud rather than constructive fraud, but finding it unnecessary to address such issues inasmuch as justice could be served without piercing veil of LLC because claimant failed to establish that LLC was not likely to satisfy judgment).

Rual Trade Ltd. v. Viva Trade LLC, 549 F.Supp.2d 1067 (E.D. Wis. 2008) (stating that veil piercing of LLC is generally governed by law of state of organization, that factors justifying deviation from such rule were not present, and that complaint alleged sufficient facts for plaintiff to proceed on alter ego veil piercing claim).

State Department of Transportation v. Pilothouse 60, LLC, 185 P.3d 487 (Or. App. 2008) (holding that unity of ownership did not exist with respect to two parcels of land involved in condemnation proceeding where one parcel was owned by LLC and one was owned by LLC's members because Oregon Supreme Court has rejected "unity of control" theory in condemnation context).

Double G.G. Leasing, LLC v. Underwriters at Lloyds, London, No. AANCV075003003, 2008 WL 2345205 (Conn. Super. May 16, 2008) (holding insurer was not entitled to pierce veil of LLC insured to impose "duties in the event of loss or damage" on LLC's sole member under identity theory because there was no evidence transaction was tainted by fraud, but evidence showed unity of interest such that LLC had no independent existence and adherence to fiction of separate identity would defeat justice and equity by allowing LLC and its sole member to escape duties under policy).

Construction, LLC v. Gravelroad Entertainment, LLC, Civil Action No. 6: 07-155-DCR, 2008 WL 2038878 (E.D. Ky. May 12, 2008). The plaintiff sought to pierce the veil of a Tennessee LLC to hold the three members liable for breach of contract and fraud. The court stated that Kentucky had the most significant relationship to the transaction despite the fact that the LLC was organized under Tennessee law, and the court relied upon a Kentucky Supreme Court case for the proposition that Kentucky law will apply to a contract issue if there are sufficient contacts and not overwhelming interests to the contrary. The court analyzed the evidence and found that it was insufficient to pierce the veil. The court spoke in terms of corporate veil piercing and found that the evidence showed that the plaintiff knew it was dealing with the LLC, and the plaintiff failed to present evidence demonstrating the LLC was undercapitalized or that the members ignored corporate formalities or blurred the distinction between themselves and the "corporation." The court further found that the allegations did not support a claim for fraud as a basis to pierce the veil.

Westmeyer v. Flynn, 889 N.E.2d 671 (Ill. App. 2008). The plaintiff sought to pierce the veil of a Delaware LLC in order to hold the members liable for a judgment obtained by the plaintiff in a prior suit against the LLC. The court first rejected the defendants' res judicata argument, relying on a prior case in which the court had held that a judgment creditor may choose to file a new action to pierce the corporate veil of a judgment debtor to hold individual shareholders and directors liable for a judgment against the corporation. The court next rejected the defendants' argument that they could not be held liable under Delaware law for the judgment against the LLC. The court stated that Delaware law applied to the veil piercing claim, relying on the rule that efforts to pierce the corporate veil are governed by the state of incorporation, and the court concluded that there was authority for the application of the doctrine of piercing the corporate veil to a Delaware LLC although the plaintiffs did not rely on any reported Delaware decisions directly dealing with veil piercing. Relying on statements by Delaware courts regarding the liability protection of a Delaware LLC, the court concluded that a limited liability company should be subject to the same treatment as a corporation for liability purposes and that the doctrine of piercing the corporate veil applies to an LLC under Delaware law. The lower court thus erred in dismissing the plaintiff's claims on the basis that the doctrine of piercing the corporate veil did not apply to the defendants' LLC.

Gardner v. Marcum, 665 S.E.2d 336 (Ga. App. 2008) (acknowledging that LLC members are not liable for LLC obligations solely by reason of being members, stating that whether to pierce "corporate veil" is normally fact issue, and concluding that summary judgment holding members of LLC liable for return of funds paid to LLC must be reversed because undisputed facts did not establish as matter of law that LLC's members were personally liable to account for funds paid by plaintiff to LLC).

Haynes Construction Co. v. Martino & Card Remodeling, LLC, No. CV085005514, 2008 WL 2039596 (Conn. Super. April 28, 2008). The plaintiff brought a breach of contract action against an LLC with whom the plaintiff contracted and sought to pierce the LLC's veil to hold an individual member liable. The court held that the plaintiff established probable cause for a prejudgment remedy against the individual based on evidence that the individual completely dominated the LLC's finances, policies, and business practices. The only other member had withdrawn from the business, and the individual was effectively the only member. He used his control to commit wrongs on plaintiff and others. The LLC received money from the plaintiff, and the individual misappropriated the money and caused the LLC to abandon the contract and leave suppliers and employees unpaid. The court stated that there was a complete unity of interest between the individual and LLC, observing that when the individual was forced to prove that he had paid employees to obtain additional money, he paid them out of his personal checking account.

Utzler v. Braca, No. FBTCV065003257S, 2008 WL 2068200 (Conn. Super. April 25, 2008). The plaintiff, an investor in a real estate LLC sought to pierce the veil of the LLC and hold the individual who managed the LLC liable for breach of the plaintiff's contract with the LLC. The court concluded, after a lengthy discussion of the manner in which the individual defendant operated the LLCs formed for his real estate development activities and estate planning purposes, that the plaintiff established the LLCs were the alter egos of the defendant under the instrumentality and identity theories.

ColtTech, LLC v. JLL Partners, Inc., 538 F.Supp.2d 1355 (D. Kan. 2008). The court stated that the law of the state of organization of a foreign LLC governs the liability of a member and, applying Delaware law, concluded that the sole member of a Delaware LLC was not liable for the LLC's debt. Since the sole member was not liable, neither could the sole member's parent, the parent's members, or sponsors of the parent's members be held liable. Even if the plaintiff were able to pierce the veil of the LLC's parent to impose debt on the parent's holding company, which was also an LLC, no evidence supported imposition of liability on a private equity firm that was not a member of the LLC but merely a sponsor of one of several member investors. The plaintiff cited no authority for the proposition that a financial sponsor of a parent LLC's member may be held liable for the debts of the LLC, even if the court pierced the veil of the subsidiary.

In re Polo Builders, Inc. (Brown v. Real Estate Resource Management, LLC), 388 B.R. 338 (Bankr. N.D. Ill. 2008) (stating that Illinois state courts and bankruptcy courts apply corporate veil piercing principles to LLCs but finding that trustee's attempt to pierce LLC veil failed (notwithstanding LLC's failure to follow formalities required by operating agreement) because any harm resulted from trustee's lack of due diligence in dealing with LLC and acceptance of risk associated with shell entity rather than any abuse of LLC form by its member and manager).

Gonzalez v. Lehtinen, No. 13-06-441-CV, 2008 WL 668600 (Tex.App. 2008). The court of appeals concluded that the trial court was presented with sufficient evidence to make an implied finding that a Texas LLC was the alter ego of Cardenas, a prominent Mexican citizen, and that Cardenas was thus subject to the reach of the Texas long arm statute as someone who "did business" in Texas. The court noted the difference between "jurisdictional veil-piecing" and veil-piercing for the purpose of imposing liability. In a jurisdictional veil-piecing case, the court stated that it does not assess certain issues such as fraud and undercapitalization. Instead, the focus was on whether Cardenas controlled the internal business operations of the LLC to a degree "greater than that normally associated with common ownership and directorship." The court of appeals concluded the evidence was sufficient for the trial court to find that Cardenas was the alter ego of the LLC based on testimony that Cardenas gave personal assurances that he was "well-to-do" and there would be "no money problems with this type of business," that Cardenas was so closely involved with the LLC business that he used its mailing address as his own and could almost always be reached by telephone when calling its phone number, and that, while the articles of organization did not distinguish between Cardenas and another individual as managing members, the other individual was in practice Cardenas's subordinate and Cardenas was in charge of the business. There was also evidence that Cardenas negotiated with the plaintiff on behalf of the LLC, was virtually always present on the premises, owned the real estate on which the business was situated, and maintained an accountant at the facility to monitor the business at all times.

K.C. Properties of N.W. Arkansas, Inc. v. Lowell Investment Partners, LLC,__ S.W.3d __, 2008 WL 659825 (Ark. 2008). Ozark Mountain Water Park, LLC ("Water Park LLC") was formed for the purpose of operating a water park on land owned by Pinnacle Hills Realty, LLC ("Realty LLC"). Pinnacle Management Services, LLC ("Management LLC") was the manager of Water Park LLC, and the members of Realty LLC and Management LLC were three LLCs owned by the three individuals who were the managers of Management LLC. Realty LLC sold the land to another party, and the 49% member of Water Park LLC sued the 51% member, as well as Management LLC, the individual managers of Management LLC, and the members of Realty LLC and Management LLC (i.e., the LLCs owned by the individual managers of Management LLC). The trial court granted summary judgment for the defendants. The supreme court first addressed the application of the provision of the Arkansas LLC statute protecting members and managers from liability for debts and liabilities of the LLC and the provision limiting liability of a member or manager to the LLC or other members for acts or omissions not constituting gross negligence or willful misconduct. The court held that the provision limiting liability of members and managers for debts and liabilities of the LLC was intended to prohibit suits against a member by a third party, and the court held that the only parties the 49% member of Water Park LLC could sue for gross negligence or willful misconduct were the 51% member and the manager of Water Park LLC. The court stated that Realty had no fiduciary duty to the plaintiffs, and the court found no basis to hold the defendants liable for breach of the operating agreement or breach of fiduciary duties. The court also affirmed the trial court's grant of summary judgment on the plaintiffs' claim that the veil of the LLCs should be pierced. The plaintiffs argued that there were fact issues precluding summary judgment on this claim and that the individuals, as managers of Management LLC, and the individuals' LLCs, as members of Management LLC, were liable for the actions of Management LLC and the 51% member of Water Park LLC. The plaintiffs' relied upon answers to interrogatories by the defendants that admitted that the LLC that was the 51% member of Water Park LLC technically had no members, no operating agreement, no books, no records, and no assets, that Realty paid all its bills, and that there had been no capital contributions or loans by the members. Based on Arkansas case law in the corporate context, however, the court concluded that the 51% member of Water Park LLC, Management LLC, and the LLCs owned by the individuals were all separate and distinct legal entities regardless of whether they included the same people. According to the court, there were no facts presented upon which the individuals' LLCs could be held liable for the actions of Management LLC or the 51% member of Water Park LLC.

All Metals Industries, Inc. v. TD Banknorth, No. CV075002464S, 2008 WL 731954 (Conn. Super. Feb. 27, 2008) (stating that corporate veil piercing doctrines apply to LLCs, but striking LLC creditor's claims against individual members of LLC in absence of allegations of elements of veil piercing; granting summary judgment as to defendants).

Taurus IP, LLC v. DaimlerChrysler Corp., 534 F.Supp.2d 849 (W.D. Wisc. 2008) (stating law of "state of incorporation"of veiled entity governs whether and when its corporate form should be disregarded; applying Texas corporate veil piercing principles to Texas LLC and concluding actual fraud was not required to hold LLC manager liable under alter ego doctrine and fact issues precluded summary judgment in favor of manager; granting summary judgment to Wisconsin LLCs because Wisconsin alter ego doctrine requires proof of control over entity regarding particular inequitable transaction and Wisconsin LLCs did not engage in any conduct closely related to Texas LLC's alleged breach of warranty).

Smith v. Teel, 175 P.3d 960 (Ok. App. 2007). Applying case law from the corporate context, the court held that the LLC veil should not be pierced to impose liability on LLC members with regard to the duty to exercise reasonable care not to sell alcohol to a noticeably intoxicated person. The plaintiff's wrongful death claim against two managers/owners of an LLC based on the LLC's sale of alcohol to an intoxicated person failed because there was no evidence that the individual defendants personally sold alcohol to the patron involved, had knowledge that any employees served alcohol to a noticeably intoxicated person, or were present on the night in question.

Naples v. Keystone Building & Development Corporation, No. CV065007487S, 2008 WL 283778 (Conn. Super. Jan. 15, 2008) (stating that corporate veil piercing principles apply to LLCs but finding plaintiffs failed to meet burden of proof to pierce veil).

Sturm v. Harb Development, LLC, No. HHBCV07001058, 2008 WL 249220 (Conn. Super. Jan. 2, 2008) (stating that corporate veil piercing principles apply to LLCs but finding plaintiffs failed to allege any facts supporting veil piercing theories).

Gray v. Shaw, No. 1 CA-CV 06-0298, 2007 WL 5439746 (Ariz. App. Aug. 9, 2007). The court found that the plaintiffs failed to offer evidence supporting their claim that three Arizona LLCs were the alter egos of the members where there was no evidence that the LLCs failed to follow legal formalities or commingled their finances with those of the members. Also, the plaintiffs did not assert that they were unaware they were dealing with LLCs. Assuming, without deciding, as the parties appeared to believe, that corporate veil piercing applies to LLCs, the court concluded the trial court properly granted summary judgment in favor of the members.

In re Derivium Capital, LLC (Campbell v. Cathcart), 380 B.R. 429 (Bankr. D. S.C. 2006) (addressing corporate defendant's motion to dismiss various claims filed by trustee of LLC against entity defendants owned by individual members of LLC and finding allegations supported alter ego veil piercing and substantive consolidation claims pursuant to which trustee sought to reach assets of corporate defendant to satisfy liabilities of LLC).

R. Authority of Members and Managers

Law Offices of Squire & Pierre-Louis, LLC v. Fahey Bank, No. 08AP-647, 2009 WL 311441 (Ohio App. Feb. 10, 2009) (holding LLC's guaranty, signed by one member without other member's knowledge prior to signatory member's withdrawal as member, was enforceable against LLC since it was undisputed that signatory member possessed general authority to take actions on LLC's behalf so long as he was member and trial court's finding of apparent authority was not appealed and furnished independent basis for enforceability of guaranty).

Kahane v. Jansen, No. A115269, 2008 WL 5077628 (Cal. App. 1 Dist. Dec. 3, 2008). A member of an LLC sued a lawyer for the LLC alleging various causes of action predicated on the argument that the lawyer owed a duty to the LLC and its members–specifically to the plaintiff as a manager– to represent the interests of the LLC and its members and not to favor the interests of any member or manager over the interests of other members. The plaintiff argued that he was a manager, and, as such, had standing to bring an action against the attorney on behalf of the LLC and had the authority to waive the attorney-client privilege in order to pursue the LLC's claims. The trial court concluded that corporate rather than partnership law applied to the attorney-client relationship issue and rejected the plaintiff's contention that he was a co-manager. After prevailing in the plaintiff's action, the attorney filed a malicious prosecution action against the plaintiff. In the attorney's malicious prosecution action, the court analyzed whether the plaintiff in the prior action had probable cause for his action. The court discussed the plaintiff's claim that he was a co-manager of the LLC and concluded that there was ample evidence to support a good faith claim by the plaintiff that he was a co-manager of the LLC. The evidence included a borrowing authorization signed by nearly all of the members, construction documents identifying the plaintiff as a manager, and the role the plaintiff played in the development of the LLC's project.

Manitaras v. Beusman, 868 N.Y.S.2d 121 (N.Y. App. Div. 2nd Dept. 2008). Plaintiff, the owner of either 49.74% or 49.89% (the parties differed on the precise figure) objected to the proposed sale of the LLC's sole asset by the members holding the remaining interest. The operating agreement vested management in its managing members, but the operating agreement was silent on the issue of the sale of the LLC's sole asset. The court held that the default rule in the New York LLC statute controlled and the statutory requirement that the sale of all the assets of an LLC receive approval by a majority in interest of the members was met.

Thompson v. Wiener, No. CV08-991-PHX-GMS, 2008 WL 5068945 (D. Ariz. Nov. 25, 2008). The court concluded that it had subject matter jurisdiction over members of an LLC not named in an EEOC complaint against the LLC, under a judicial exception that allows suit to proceed if the respondent named in the EEOC complaint is a principal or agent of the unnamed party, because the Arizona LLC statute provides that each member is an agent of the LLC for the purpose of carrying on its business.

Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F.Supp.2d 760 (E.D.N.C. 2008) (rejecting argument that execution of agreement by individual in capacity as managing member of one LLC constitutes execution of agreement on behalf of second LLC of which managing member was also principal).

Jack J. Morris Associates v. Mispillion Street Partners, LLC, C.A. No. 07C-04-023-RFS, 2008 WL 3906755 (Del. Super. Aug. 26, 2008). After an LLC agreement was amended to remove an individual (Burton) as a general manager, Burton continued to hold himself out as a representative of the LLC and signed an agreement with the plaintiff on behalf of the LLC. In this suit against the LLC for payments due under the contract signed by Burton, the plaintiff sought summary judgment. The court discussed the agency concepts of actual (express and implied) authority and apparent authority and determined that various questions related to whether Burton had actual or apparent authority were for the jury to decide. Accordingly, the plaintiff's motion for summary judgment was denied.

Pharmalytica Services, LLC v. Agno Pharmaceuticals, LLC, C.A. No. 3343-VCN, 2008 WL 2721742 (Del. Ch. July 9, 2008). An LLC sought a preliminary injunction prohibiting a member from taking action on behalf of the LLC or holding himself out as an authorized representative of the LLC. In 2006, after discovering that a member had formed another business that was competing with the LLC, the board of the LLC removed the member from the management team and from the positions of president and CEO by majority vote. The member objected but made no formal challenge at the time. In 2007, the LLC sued the member asserting various claims sounding in breach of fiduciary duty, equitable and legal fraud, and breach of the LLC's operating agreement. In 2008, the LLC learned that the member was in China asserting the LLC's rights to appoint designees to the board of a joint venture between the LLC and a Chinese entity, prompting the LLC's motion for a preliminary injunction. The member argued that his removal required the unanimous vote of the board of directors of the LLC because the operating agreement required a unanimous vote of the board for major decisions. The LLC relied upon provisions of the operating agreement giving the board authority to remove a member of the management team with or without cause based on a majority vote and providing that senior officers and other managers could be dismissed by the board for illicitly seeking personal gain or other delinquent behavior. The court characterized the preliminary injunction sought as in the nature of a status quo order under Section 18-110 of the Delaware Limited Liability Company Act, which is comparable to Section 225 of the Delaware General Corporation Law. That provision allows for continued operation of the business, with a goal of minimal disruption, while the identities of those properly holding corporate power can be established. The court pointed out that the member did not act in a constructive or direct fashion for the benefit of the LLC for 18 months following the 2006 meeting at which he was removed from his management positions, and his appearance in China and assertion of authority on behalf of the LLC was inconsistent with his course of action since the 2006 meeting and with the expectations of a majority of the members. The court stated that the rational, ongoing governance of the LLC required certainty as to who was running the LLC and that preserving the status quo as traditionally done in the corporate setting was the proper course. The court concluded that the management that had been in control since 2006 should remain in control in the interim and that the member should be precluded from purporting to represent the interests of the LLC. The court noted that the traditional analysis for a status quo order under the corporate and LLC statutes eschews the formalistic application of the preliminary injunction framework; however, because the LLC presented its claim as a request for a preliminary injunction, the court adhered to those standards and found that the LLC had demonstrated a reasonable probability of success on the merits that the member should not be acting on its behalf, that the member's conduct in China without ongoing authority was likely to cause significant and irreparable harm, and that a balancing of harms weighed in favor of the LLC.

Maitland v. Int'l Registries, LLC, Civil Action No. 3669-CC, 2008 WL 2440521 (Del. Ch. June 6, 2008). A 50% member of an LLC did not have authority to retain counsel for the LLC defendant in a case brought by the other 50% member where the plaintiff member did not consent to hiring counsel. The LLC agreement vested management in the members and provided that the decision of the members holding a majority of all interests shall be controlling. The LLC agreement also provided that the initial members were granted all rights, powers, authorities, and authorizations necessary, appropriate, advisable, and convenient to manage the LLC and carry out its affairs, but the court rejected the argument that this latter provision gave one member the power to retain counsel and file an answer for the LLC because such an interpretation would also give the other member the same authority. Since a deadlocked LLC cannot validly retain counsel and file an answer, the court granted the plaintiff member's motion to strike the answer filed by counsel retained by the other member and disqualify the attorney as counsel for the LLC, but the court permitted the other member to intervene as a party defendant to defend on behalf of the LLC.

Cascade Falls, L.L.C. v. Henning, 143 Wash.App. 1056, 2008 WL 934074 (Wash. App. April 8, 2008). Two brothers, Scott and Greg Henning, formed a Washington LLC. A few years later, they discussed going their separate ways, and Greg withdrew. After operating the LLC as its sole member for several years, Scott learned of irregular business and accounting activities by Greg. Unbeknownst to Scott, Greg had continued to operate using the LLC's name and one of its bank accounts. Scott filed this lawsuit, alleging breach of fiduciary duties, fraud, and conversion of the LLC's money by Greg. Greg argued that the trial court erred by refusing to give his requested jury instruction on actual or apparent authority. Greg contended that, for Scott and the LLC to claim the funds in a bank account holding the proceeds of a project completed by Greg on behalf of the LLC prior to Greg's withdrawal, Greg must have had actual or apparent authority to sign the contract in the LLC's name. Absent such authority, Greg claimed Scott and the LLC could have no ownership interest in the funds. Greg failed to preserve this argument for review by failing to include the proposed instruction in the appellate record.

Halstead Brooklyn, LLC v. 96-98 Baltic, LLC, 854 N.Y.S.2d 437 (N.Y. A.D. 2 Dept. 2008) (holding that purported brokerage agreement that was not signed by managing member of LLC in accordance with its operating agreement could not be relied upon to establish amount of brokerage commission due).

Fielbon Development Company, LLC v. Colony Bank of Houston County, 660 S.E.2d 801 (Ga. App. 2008) (holding that LLC was obligated to bank on promissory note signed by owner/manager even if funds were obtained for owner's personal use because loan was in LLC's ordinary course of business and owner's actions in connection therewith were not so dissimilar from acts LLC had authorized owner to perform as to make them "not apparently carrying on in the usual way the business or affairs" of LLC).

Kite Ranch, LLC v. Powell Family of Yakima, LLC, 181 P.3d 920 (Wyo. 2008) (upholding trial court's preliminary injunction giving member with positive capital account exclusive management authority (excepting certain extraordinary actions) in LLC whose members did not execute operating agreement because trial court's action merely enforced management rules required by Wyoming law and maintaining status quo in operating business does not mean decision cannot be made).

Old National Villages, LLC v. Lenox Pines, LLC, 659 S.E.2d 891(Ga. App. 2008) (interpreting authority of general manager under operating agreement and concluding manager had authority to enter consent judgment even though sole member had no notice of complaint or consent judgment; noting that holding otherwise would undermine separate entity status of LLC and its member).

Crouse v. Mineo, 658 S.E.2d 33 (N.C. App. 2008). The court discussed the agency and management provisions of the North Carolina LLC statute and concluded that the plaintiff, a member/manager of an LLC, did not have authority to file this action on behalf of the LLC against his co-member/manager based on alleged misappropriation of LLC assets, but the plaintiff did have standing to file a derivative action.

In re Kingsville Motors, Inc. (Almy v. Brown), No. 04-33755-DK, 2008 WL 686724 (Bankr. D. Md. March 12, 2008). Two investors in an LLC asserted an unjust enrichment claim against the debtor corporation based on funds loaned to the debtor by the LLC's president. The investors furnished the funds by checks made payable to a name that was similar to the LLC's but was also the name of a corporation that had been formed by the LLC's president without the knowledge of the investors. The investors intended the funds to be used by the LLC to purchase real estate from the debtor corporation, but the president funneled the funds to the corporation through promissory notes payable to the president and the corporation with the name similar to the LLC's. The trustee argued that the investors' unjust enrichment claim was barred because they were negligent in failing to consult an attorney in connection with their execution of the operating agreement and investment in the LLC. The court held that the claim was not barred. In hindsight, commented the court, the investors should have consulted an attorney, but Maryland law does not require an attorney to be consulted, and the LLC's president was a long-time colleague in whom the investors placed their trust. The trustee also argued that the LLC's president was authorized to enter the transactions in issue. Though the LLC had broad powers under the Maryland LLC statute, and the operating agreement gave the president broad management powers to invest funds for the purposes of the LLC, the court stated that the president did not have unfettered power to transfer the LLC's assets where the stated purpose communicated to the investors of the invested funds was to acquire real property from the debtor corporation, not to provide operating funds to the corporation.

Internal Medicine Alliance, LLC v. Budell, 659 S.E.2d 668 (Ga. App. 2008). Two doctors, Verbitsky and Budell, formed a manager-managed LLC and agreed that each was a 50% member, that they would share equally in profits and losses, and that they would jointly manage the LLC. After a falling out, Budell agreed to leave and form his own practice. The members agreed that Budell was entitled to a redemption of his interest but were unable to agree on a buy out price for Budell's interest. In litigation that ensued, the trial court awarded Budell the fair value of his interest and found that Verbitsky breached her fiduciary duty to the LLC and Budell after Budell's departure. The trial court found that Verbitsky's failure to repay Budell his capital contribution did not support a conversion claim. Both parties appealed. With respect to the breach of fiduciary duty claim against Verbitsky, the court stated that LLC managers have a fiduciary duty to act with the utmost good faith and loyalty. Verbitsky argued that she did not exercise management over the LLC and that, to the extent she did, it was agreed that Verbitsky and Budell would handle his or her own accounts receivable. Verbitsky argued that another individual who was not a member was the manager of the LLC, but the court concluded he was not a manager because the Georgia statute requires a non-member manager to be designated, appointed, or elected by more than one half of the members, and there was no evidence that the individual was ever chosen as a manager with the approval of both Verbitsky and Budell. The court concluded that after Budell's departure he became a passive member and Verbitsky became the sole manager with a fiduciary duty to manage the LLC's affairs in the manner she believed in good faith to be in the best interests of the LLC.

Pantazopoulos v. Garden State Cardiology, 2008 WL 509829 (N.J. Super. Ch. Feb. 25, 2008) (concluding that filing of Form 8082 in which member identified himself as representative of LLC and proposed amended return was willful violation of court's order enjoining member from taking any action in name or on behalf of LLC or representing that he had any authority with regard to LLC).

City of Seattle v. Professional Basketball Club, LLC, No. CO7-1620MJP, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008) (ordering LLC to produce certain email messages of members because emails of members were documents under "possession, custody, or control" of LLC by virtue of agency status of members).

Sunflower Bank, N.A. v. Airport Red Coach Inn of Wichita, L.L.C., No. 95,320, 2008 WL 360641 (Kan. App. Feb. 8, 2008). An LLC operating agreement provided that the members could appoint a member as general manager of the LLC and that such person would have authority to execute instruments on behalf of the LLC. The operating agreement also required consent of all members for LLC borrowing. The members appointed a manager who signed certain promissory notes on behalf of the LLC, and the bank argued that the members must have intended for the manager to have some discretionary authority. The court held that the managing member was not authorized to execute the promissory notes because the members did not approve the loans. The court found that the term "execute" meant the power to sign loan documents on behalf of the LLC, but only once the authority to borrow had been granted by all members. The manager did not have implied authority because the LLC members had no idea he was borrowing the money. The bank could not rely on statutory provisions regarding the manager's apparent authority because the bank had a copy of the operating agreement and thus had written notice of the limits on the manager's authority.

S. Admission of Members

Spurlock v. Begley, No. 2007-CA-002523-MR, 2008 WL 5429542 (Ky. App. Dec. 31, 2008). An LLC member, Griffin, orally announced at a meeting of several individuals that he was giving another individual, Begley, a 25% interest in the LLC. Begley later agreed to sell his 25% interest in the LLC to Spurlock as part of an agreement by Spurlock to purchase from Begley a $75,000 note owed by the LLC to Begley. Begley sued Spurlock when Spurlock failed to pay according to the terms of the agreement, and Spurlock alleged a failure of consideration on the basis that Begley did not own a 25% interest in the LLC. The jury found that Griffin transferred to Begley a 25% ownership interest, and the court entered a judgment in favor of Begley. On appeal, the court discussed the provisions of the Kentucky LLC statute regarding membership and ownership. Spurlock argued that the only method to have "ownership" in an LLC is to be admitted as a member, but the court noted that the LLC statute does not speak of "owners" or "ownership;" rather, the statute speaks in terms of the "limited liability company interest." The court discussed assignment of LLC interests versus admission to membership and pointed out that no requirement of the LLC statute requires an assignment of an LLC interest to be made in writing. As the record contained no evidence of an operating agreement, the court assumed that the LLC had no operating agreement that restricted transfer of LLC interests or required transfers to be in writing. The court explained how the LLC statute provides for the division of management rights (membership) and economic rights (an LLC interest), and the court held that the trial court's submitted instruction inquiring about Griffin's transfer of 25% ownership in the LLC was sufficient to cover assignment of a 25% interest in the LLC and that Begley was not required to prove that Griffin or the LLC formally admitted Begley as a member. Spurlock also argued that no consideration passed because the LLC was administratively dissolved shortly after the trial of the case and the note was in default and practically worthless at the time of the transaction. The court acknowledged that Spurlock made a poor decision but rejected the argument that there was a failure of consideration.

Potluri v. Yalamanchili, No. 06-13517, 2008 WL 4793382 (E.D. Mich. Nov. 3, 2008). Potluri asserted various causes of action in connection with his claim that he and Yalamanchili orally agreed to acquire various businesses in which each would own an equal share regardless of the legal form or owner of record. One of the businesses formed was an LLC, and Potluri and Yalamanchili agreed to list a third party as owner and CEO to disguise the ownership of the LLC because Potluri was subject to a non-compete agreement and they did not want to risk violating that agreement. When the record owner and Yalamanchili refused to recognize Potluri's claim to ownership in the LLC, Potluri sued them asserting various causes of action. The court held that Potluri's claims for promissory estoppel and unjust enrichment were barred by his "unclean hands" in knowingly misrepresenting his ownership interest to enable creation of a business in violation of his non-competition agreement. Because the agreement to form and be equal owners of the LLC could be performed within one year, the court rejected the argument that it violated the statute of frauds. The court rejected the argument that the agreement violated a Michigan statute requiring agreements for the sale or transfer of securities to be in writing because the evidence did not show that the ownership interest purportedly created by the agreement was a security under Michigan law and Yalamanchili offered no legal support for his argument that an ownership interest in an LLC is generally considered a security. Potluri's breach of contract claim survived summary judgment because a fact question remained as to whether the contract existed and what rights it conferred on Potluri. Yalamanchili argued that Potluri was not a member of the LLC because he was not admitted as a member in any of the ways provided by the Michigan LLC statute. The court pointed out, however, that Potluri was not claiming to be a member; rather, Potluri alleged that Yalamanchili breached their oral agreement by failing to recognize him as an equal owner. Furthermore, the court stated that no provision of the Michigan LLC statute requires an owner to be a member. According to the court, the fact that Potluri was not a member was relevant, but not dispositive, in deciding whether he had an ownership interest in the LLC.

County of Durham v. Time Warner Entertainment Advance Newhouse Partnership, No. 1:08CV225, 2008 WL 4287943 (M.D.N.C. Sept. 16, 2008). The court rejected the argument that "Series A Members" of a Delaware LLC, who exercised no management control and were treated as holders of non-voting preferred stock for federal income tax purposes, did not represent true ownership and were not members of the LLC for purposes of determining the LLC's citizenship in this diversity case. The court stated that it was not the province of the court to analyze the "business reality" of the LLC's structure, and the LLC agreement unambiguously specified that Series A Members together with the "Common Equity Member" constituted the "Members" of the LLC pursuant to the Delaware Limited Liability Company Act. The court also held that it was the citizenship of the entity for whose benefit the Series A interest was held that must be considered rather than the citizenship of the nominee owner.

Falgoust v. Hart Eye Center, LLC, 984 So.2d 958 (La. App. 2008). An ophthalmologist, Dr. Falgoust, entered a professional services agreement with another ophthalmologist, Dr. Hart, under which Dr. Falgoust worked for Dr. Hart's LLC and made buy-in payments totalling over $200,000. Dr. Falgoust terminated the agreement and filed suit for breach of contract against Dr. Hart and the LLC, seeking reimbursement for the buy-in payments. The court held that Dr. Falgoust had not acquired an ownership interest under the terms of the agreement, and that his termination of the agreement prior to acquiring an ownership interest precluded him from asserting a claim for reimbursement as an owner. A dissenting judge disagreed with the majority's interpretation and argued that the buy-in payments were made for the purpose of investing in the LLC and that Dr. Falgoust acquired an ownership interest.

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, Civil Action No. 5:07cv162-DCB-JMR, 2008 WL 2789504, 102 A.F.T.R.2d 2008-5256 (S.D. Miss. July 17, 2008). Stanley, a licensed physician, was a member of a professional LLC and the president and sole shareholder of an S corporation that performed services on behalf of the LLC through Stanley. The question in this case was whether payments made by the LLC to Stanley and/or his corporation were "wages or salary payable to or received by" Stanley for purposes of the continuous levy provision of Section 6331(e) of the Internal Revenue Code. The LLC argued that it was not indebted to Stanley for any undistributed profits on the date on which the LLC received the notice of levy and that Stanley was a member who received profits based upon the amount of fees he produced and not an employee to whom it paid a wage or salary. The IRS asserted that Stanley and/or his corporation should be treated as an employee or independent contractor inasmuch as they were compensated based on the amount of money collected by Mission for medical services which Stanley rendered rather than based on the membership interest of Stanley and/or his corporation in the LLC. The IRS argued that the fact that the LLC labeled Stanley and/or his corporation as its member did not change the factual nature of the relationship as that of an employee or an independent contractor. The LLC contended that the services were performed by Stanley in his own behalf as a member of the LLC and that there was no evidence that Stanley was contractually bound to provide services for the LLC. According to the LLC, it merely acted as a collection conduit (after deduction of its operating expenses) for the payments which Stanley's patients made to his corporation for medical services that Stanley had rendered and for which the corporation had billed. The LLC argued that the case law upon which the IRS relied did not support the position that profits paid to member physicians of a professional LLC constitute "wages and salary" subject to a continuing levy under the relevant federal statutes. The court cited case law construing "salary or wages" broadly for purposes of the continuing levy provision, and the court concluded that the term includes fees paid to an independent contractor as compensation for services rendered. The court concluded that there was a fact question as to whether Stanley provided services to the LLC as an independent contractor.

East Quogue Jet, LLC v. East Quogue Members, LLC, 857 N.Y.S.2d 627 (N.Y. A.D. 2 Dept. 2008) (holding that lower court erred in granting summary judgment in dispute over party's status as member where operating agreement purportedly signed by all members reflected party's membership interest but two investors submitted affidavits stating that their signatures were forgeries and that they never signed any agreement permitting receipt of membership interest without contributing any money).

Bank Hapoalim (Switzerland) Ltd. v. XG Technology, Inc., No. 8:07-cv-170-T-23MSS, 2008 WL 126583 (M.D. Fla. 2008). The plaintiff's breach of fiduciary duty suit against individuals who were managers of a Delaware LLC that converted into a corporation failed because the plaintiff, an assignee of securities in the LLC, did not establish that it was admitted as a member of the LLC. The plaintiff also failed to establish that it became a shareholder in the corporation as a result of the conversion and failed to overcome the presumption that the individual defendants were protected by the business judgment rule as directors and officers of the corporation; therefore, the breach of fiduciary duty claims against the individuals as officers and directors failed as well. The plaintiff was a bank that was assigned units in the LLC by a member of the LLC prior to the conversion. At the request of the member, the LLC issued a certificate stating that the bank was the owner of four million units. A few months later, the LLC informed the bank that a pledge existed against the certificate and that the securities were null and void due to the member's default under the pledge agreement. After the conversion, the corporation went public. The documents relating to the conversion did not account for the bank's securities or list the bank as a shareholder of the corporation. The bank asserted that the managers of the LLC owed it a duty of loyalty and care as "legal title holders of the securities" and that the managers breached their duties by failing to safeguard the membership interest of the bank, failing to notify the bank of the conversion, failing to account for the securities in the public offering, and refusing to convert the securities of the LLC. The court stated that the manager of a Delaware LLC owes a fiduciary duty of loyalty and care only to the company and its members. Thus, absent an allegation that the bank was a member or a party to or otherwise bound by the LLC's agreement, the court concluded the breach of fiduciary duty claim based on the defendants' status as managers could not stand. Because the complaint did not even mention the LLC agreement, the court stated that the key issue was whether the complaint sufficiently alleged that the bank, an assignee of a member of the LLC, assumed member status. The court pointed out that the Delaware LLC statute provides that an assignee may become a member with the approval of all the members other than the assigning member or in compliance with the LLC agreement. The court also quoted the provision of the Delaware LLC statute that provides that an assignee becomes a member when the person's permitted admission is reflected in the records of the LLC. Since the complaint did not allege approval by the members, compliance with the agreement, or reflection of the bank's admission as a member in the LLC records, the complaint failed to allege that the defendants owed the bank a fiduciary duty. Having failed to allege its status as a member of the LLC, the bank also failed to allege its status as a shareholder of the corporation resulting from the conversion. The bank relied upon the statutory conversion provision that states that the rights, securities, or interests in the converting LLC may be exchanged or converted into securities or interests for the converted entity, but the court stated that this provision permits, but does not require, conversion of the LLC interests, and that the statutory provision also authorizes cancellation of interests. Because the complaint failed to allege the bank's status as a shareholder, and based on the presumption of propriety of director and officer actions under the business judgment rule, the court held that the breach of fiduciary duty claim against the defendants as corporate officers and directors failed. The court also dismissed claims seeking an order compelling conversion of the LLC securities into shares of the corporation and issuance of the converted shares as well as a claim for damages resulting from the refusal to convert the securities because the statutory conversion provision relied upon by the bank does not require conversion of the interests of the converting LLC into securities of the entity into which the LLC is being converted.

Glasnak v. Garmo, No. 275555, 2008 WL 466886 (Mich. App. 2008) (stating that arbitrator's decision that member was admitted to existing LLC without being obligated to make future capital contributions as provided in LLC's operating agreement was not error of law because Michigan LLC statute provides that member may be admitted without incurring any obligation to make capital contribution and arbitrator found there was no evidence member ever agreed to be bound by operating agreement provision regarding additional capital contributions).

Rhodehamel v. Rhodehamel, No. C07-0081Z, 2008 WL 249042 (W.D. Wash. Jan. 29, 2008). An individual, Emma, established an LLC in which she retained a 70% interest and assigned each of her three grown children a 10% interest. Emma funded the LLC with assets from her revocable trust. Emma's daughter Joyce, who was 54 years old and had no children, was dissatisfied with the terms of the LLC, which restricted transfer of a member's interest to another member or a lineal descendant or ascendant of the individual. Joyce's attorney wrote a letter to the individual's attorney stating that Joyce had "intentionally disclaimed the gift of LLC interest as currently structured." After Emma's death, Joyce sought an accounting of the LLC and asserted that the disclaimer was not valid. The court held that the disclaimer did not meet the statutory requirements for a disclaimer, but upheld Joyce's exclusion from the LLC. The evidence showed that Emma understood Joyce to be declining the gift, and the LLC membership was thus amended from 10% for each of the individual's three children to 25% interests for each of the other two children. The increase in the other children's membership was accomplished by a gift of part of Emma's interest under the LLC agreement. The court said that Emma could have made the same arrangements even if Joyce had not purported to disclaim her interest because Emma directed the transfer of assets from her trust to the LLC and made the redistribution of LLC shares via her notarized signature. In light of Emma's understanding of Joyce's intent, the court would not permit Joyce to be heard to complain that she should have received some share of the LLC.

Parsons & Whittemore Enterprises Corporation v. Cello Energy, LLC, Civil Action No. 07-0743-CG-B, 2008 WL 227952 (S.D. Ala. Jan. 25, 2008). The plaintiff entered certain agreements with an Alabama LLC regarding the use and development of technology and under which plaintiff obtained an option to acquire an interest in Alabama LLC. The plaintiff sued the LLC and other parties to prevent them from taking actions and performing under agreements in conflict with plaintiff's agreements with the LLC. In analyzing whether the court had diversity jurisdiction, the court concluded that the plaintiff was not a member of the LLC because it was not listed as a member in either the LLC's articles of organization or operating agreement, and a member is defined in the Alabama LLC statute as a person reflected in the LLC's required records as an owner of some governance rights of a membership interest.

T. LLC Property/Interest of Member

Kwok v. Transnation Title Insurance Company, 170 CalApp.4th 1562, 89 Cal.Rptr.3d 141 (Cal. App. 2 Dist. 2009) (noting that members of LLC did not hold ownership interest in property to which LLC held title and citing statutory provision that membership interest is personal property of member and member has no interest in specific LLC property).

Katz v. Katz, 867 N.Y.S.2d 100 (N.Y. App. Div. 2 Dept. 2008) (holding husband did not have standing to recover rent and other damages for period of wife's alleged "holdover occupancy" of marital residence owned by LLC of which husband was sole member).

Millenium Equity Holdings, LLC v.Mahlowitz, 895 N.E.2d 495 (Mass. App. 2008) (pointing out that automatic restraining order in divorce action affected only property of parties to divorce action and thus restrained husband from disposing of his LLC interest and proceeds of such interest but did not affect LLC itself or LLC's property).

Reza v. Reza, No. 2-07-371-CV, 2008 WL 4445619 (Tex. App. Oct. 2, 2008) (noting that membership interest in LLC is personal property and that member has no interest in specific LLC property and holding that trial court in divorce action abused its discretion when it awarded to husband all interest in entity variously referred to as corporation and LLC where mediated settlement agreement did not divide or mention entity and alter ego was neither pled nor tried).

Hornick v. Boyce, 280 Fed.Appx. 770 (10^{th} Cir. (Col.) 2008) (noting absence of Colorado case law on question of whether 50% owner/passive investor in closely held business is qualified to testify regarding value of assets owned by entity, and holding it was not plain error for 50% passive owner of Colorado LLC to testify regarding value of 5,000 acre ranch which was LLC's sole asset).

Timm v. Montana Dept. of Public Health and Human Services, 184 P.3d 994 (Mont. 2008) (noting potentially different treatment of property of LLCs and corporations for purposes of Medicaid eligibility and concluding that rationale for "no corporation, no trust" rule could not withstand scrutiny and violated equal protection as applied to petitioner in this case).

Hernandez v. Hernandez, 249 S.W.3d 885 (Mo. App. 2008) (affirming trial court's finding that apartment buildings acquired by husband prior to marriage were transmuted into marital property by his contribution of buildings to LLC of which husband and wife were equal members and joint managers).

VanderWerp v. Plainfield Charter Township, 752 N.W.2d 479 (Mich. App. 2008). The homestead exemption was not available for property that was the residence of the settlor/trustee of a revocable trust that was the sole member of an LLC to which the property had been transferred. Under the Michigan statutes, only an "owner" may claim the homestead exemption. An "owner" includes a grantor who has placed the property in a revocable trust, but the property in this case was conveyed to the LLC of which the grantor trust was the member. An LLC member has no specific interest in LLC property, and the definition of "owner" for purposes of the homestead exemption was not broad enough to include an LLC.

Ott v. L & J Holdings, LLC, 654 S.E.2d 902 (Va. 2008). The court held that a deed to an LLC from a husband and wife, executed by the wife acting for herself and under power of attorney from the husband, was not a gift deed despite the caption designating it as such. The transfer was undertaken for legitimate business reasons, and the husband and wife received benefits, including possible future tax benefits commensurate with their percentage interests, without self-dealing on the wife's part. The deed was thus within the power granted by the husband's power of attorney.

In re McGrath (Gray v. Assali), Bankruptcy No. 05-90165-A-7, Adversary No. 07-9002, 2008 WL 859152 (Bankr. E.D. Cal. March 31, 2008) (finding that two couples took their interests in LLC individually rather than through another LLC, that creditor did not have attached or perfected security interest in LLC interest, and enforcement of claim against debtor's LLC interest after filing of bankruptcy petition was willful violation of automatic stay even if claimants consulted attorney and were under mistaken impression that debtor did not own LLC interest because they knew of debtor's bankruptcy; holding that under California law, recovery for conversion is limited to cases involving tangible personal property and liability for conversion of LLC interest would only exist if defendant had taken something tangible representing interest such as shares of stock).

Bruno v. Bruno, No. FA054004906S, 2008 WL 907512 (Conn. Super. March 17, 2008) (finding that shares in LLC previously held by terminated employee became treasury shares, acknowledging that Delaware LLC statute does not provide for creation of "treasury shares" as such, but noting that statute permits LLC to purchase, redeem, or otherwise acquire LLC interests and that such interests are deemed cancelled unless otherwise provided in LLC agreement, and concluding that, under settlement agreement which provided for forfeiture of terminated employee's interest in LLC, terminated employee no longer owned his interest in LLC and it had been cancelled by virtue of Delaware LLC statute).

Riverboat Development, Inc. v. Indiana Department of State Revenue, 881 N.E.2d 107 (Ind. Tax Ct. 2008). The court held that income of a Kentucky S corporation from a minority interest in an LLC that operated a gambling riverboat in Indiana was not "adjusted gross income derived from sources within Indiana" for purposes of withholding requirements on income passed through to non-resident shareholders. The LLC interest is intangible personal property, and income from intangible personal property is from an Indiana source under the Indiana tax laws if the receipt from the intangible is attributable to Indiana. Receipts in the form of dividends from investments are attributable to Indiana if the taxpayer's commercial domicile is Indiana, and the S corporation was not domiciled in Indiana. Thus, the income the S corporation received as a result of its membership in the LLC was not "adjusted gross income derived from sources within Indiana" and was not subject to the withholding obligations applicable to such income.

Matz v. Merideth, No. 2 CA-CV 2006-0151, 2007 WL 5290465 (Ariz. App. July 25, 2007). After a falling out among the members of an LLC that operated an emergency veterinary clinic, two of the members formed a new entity to operate a new emergency clinic at the same location. The original LLC was ordered judicially dissolved in litigation between the members, and the dissolution proceeding was eventually consolidated with another action brought by one of the members (Matz) against the two members who formed the new clinic. Matz claimed that the two members who formed the new clinic "appropriated and distributed to themselves" all of the intangible assets of the LLC, including its goodwill, and that these actions violated the LLC's operating agreement because the assets were not distributed equally to the members. The trial court concluded that the two members who appropriated the goodwill were liable under the Arizona wrongful distribution statute and that the value of Matz's interest in the distribution was $188,000. The two members who formed the new clinic argued that a dissolved business can have no goodwill as a matter of law, but the court rejected that argument. The court of appeals concluded that the trial court did not err in finding that the dissolved LLC had goodwill and that the two former members who conducted business at the same location as the old LLC were liable for appropriating it. The court also found that the trial court's determination of the value of the LLC's goodwill was not clearly erroneous. The court of appeals questioned whether appropriation of an LLC's assets by members is a "distribution" as contemplated by the distribution statute, but assumed, without deciding, that it was proper for the trial court to grant relief under the distribution statute since the members did not address the issue on appeal.

U. Fiduciary Duties of Members and Managers

Remora Investments, L.L.C. v. Orr, 673 S.E.2d 845 (Va. 2009). Remora Investments, L.L.C. ("Remora"), a 50% member of a Virginia LLC, sued the other 50% member, who was also the manager, for breach of fiduciary duty. The trial court held that an LLC manager does not owe the members fiduciary duties and that an LLC member does not have a direct right of action against another member or manager for breach of fiduciary duty. Remora appealed, arguing that it had standing to sue the managing member for breach of fiduciary duty. The Virginia Supreme Court agreed with the trial court based on the Virginia LLC statute and analogous corporate law. The supreme court pointed out that it has analogized LLCs and managers to corporations and directors in previous cases and that the Virginia LLC statute contains provisions setting forth standards of conduct for LLC managers in terms almost identical to provisions regarding directors in the Virginia corporate statute. The Virginia LLC statute requires an LLC manager to discharge the manager's duties in accordance with the manager's good faith business judgment, and the corporate statute requires a director to discharge his duties in accordance with the director's good faith business judgment. The LLC and corporate statutes do not purport to impose duties between members of an LLC, between members and managers of an LLC, between shareholders of a corporation, or between individual shareholders and officers and directors. In contrast, the court pointed out, the Virginia general partnership statute provides that a partner owes the partnership and the other partners the duties of loyalty and care. The court agreed with the trial court that an LLC member does not have standing to bring a breach of fiduciary duty claim directly against another member or manager because the General Assembly would have explicitly provided for such fiduciary duties, as it had done in the partnership context, if it had intended to impose such duties. Remora argued that LLC managers owe members fiduciary duties by analogous application of corporate case law, but the court rejected this argument. The court stated that its holdings in the cases relied upon by Remora did not support Remora's contention that the court had approved direct causes of action by individual shareholders against directors. Remora also relied upon the Delaware case of *Tooley v. Donaldson, Lufkin, & Jenrette, Inc*. in support of Remora's argument that its claim was direct rather than derivative, but the court did not decide whether to adopt the analysis employed by the Delaware Supreme Court in *Tooley* because the court concluded that all the injuries alleged by Remora were injuries to the LLC even if it followed the approach employed in *Tooley*. The court concluded by pointing out that the LLC's operating agreement set forth numerous rights, powers, and duties of managers, but did not establish fiduciary duties between members or between a member and a manager. The court noted that such provisions can be included in an LLC operating agreement just as a corporation and its shareholders are free to vary the commercial rules by contract in the corporate context.

Van Der Puy v. Van Der Puy, No. 2008AP512, 2009 WL 80244 (Wis. App. Jan. 14, 2009). After the death of the patriarch of a family business (Paper Box), Paper Box was unable to pay a loan guaranteed by the decedent, and the decedent's four children entered into a forbearance agreement to save Paper Box from liquidation and preserve estate assets. The forbearance agreement allowed Paper Box to continue to operate by paying down its debt through loans from the heirs and refinancing from another lender. The plaintiff agreed to forbear regarding collection of amounts owed him by Paper Box in connection with a prior redemption of his shares in the business, and the agreement gave the refinancing lender discretion as to when payments to him and rental payments by Paper Box to an LLC owned by the siblings would resume. The LLC owned a warehouse, and Paper Box had entered an eight-year lease with the LLC. The plaintiff filed suit seeking judicial dissolution and receivership of the LLC on the basis that his siblings were operating the LLC in an illegal, oppressive, and fraudulent manner and that the LLC's assets were being misapplied or wasted. The plaintiff also claimed that one of his siblings breached his fiduciary duty to his father's estate by not disclosing the conflicts of interest inherent in his various roles as executor of his father's estate, president of Paper Box, guarantor of indebtedness of Paper Box, and heir to his father's estate. The court first addressed the alleged breach of fiduciary duty claim and concluded that the forbearance agreement, which the plaintiff reviewed with his lawyer, clearly advised the plaintiff as to the circumstances and terms of the transactions associated with the forbearance agreement. Furthermore, the evidence indicated that the plaintiff was already aware of the various hats worn by his brother. The court next concluded that grounds for judicial dissolution were not present because, even if the rent-free use of the LLC's warehouse and failing to seek a new tenant resulted in a windfall to the plaintiff's siblings, the LLC was being operated in accordance with the forbearance agreement, and there was nothing illegal or fraudulent in permitting the suspension of rental payments to the LLC per the forbearance agreement.

Connors v. Howe Elegant, LLC, 47 Conn. L. Rptr. 107, 2009 WL 242324 (Conn. Super. 2009). Two individuals, Connors and Kiman, formed an LLC to operate a beauty and hair salon. Connors was a skin care specialist, and Kiman was a hairdresser. They operated the LLC for several years but decided to end their association when an argument arose over an issue at work. Connors talked openly with employees and customers about leaving and starting her own business while she was still operating at the LLC's location. The employees made it clear they would be following Connors to her business, and Connors took customer information and used it to send an announcement about her new business. While the premises for Connors' new business were being finished, her employees started seeing customers there, but Connors continued to see her customers at the LLC's premises because her work station was not ready at the new premises. Eventually, Kiman changed the locks and Connors was unable to gain access to retrieve a make-up kit she needed to service teenage customers for a high school prom. Connors retrieved the makeup kit the following day with police assistance and did not enter the premises again. Kiman thereafter ceased doing business under the LLC name, assumed the LLC's lease, withdrew the LLC's funds, and began doing business under her new business's name. The parties were unable to reach an agreement regarding the sale of Connors' interest or the dissolution of the LLC, and Connors filed this action seeking dissolution. Connors also alleged various causes of action based on Kiman's alleged appropriation of funds and assets of the LLC and breach of the operating agreement. Kiman and the LLC alleged counterclaims for breach of fiduciary and statutory duties. The court first raised sua sponte the issue of whether Connors had standing to assert various causes of action and concluded that she lacked standing to assert the tort claims in her individual capacity because they were injuries to the LLC and not to Connors. The court also concluded that Kiman's counterclaims were derivative and could not be asserted by Kiman. Addressing the LLC's counterclaim against Connors for breach of duty, the court set forth provisions of the Connecticut LLC statute regarding management of an LLC and the duty of care of a manager or member. The court analyzed the nature of the LLC's business, comparing it to a cooperative because everyone worked on a commission basis, and concluded that customer information was not the property of the LLC. Under all the circumstances, the court concluded that it was reasonable for Connors and Kiman to establish their own LLCs and pursue the establishment of their new businesses once they had agreed to part ways and before the dissolution of their LLC. The court explained: "These are not wealthy people; they are beauticians servicing the lower Connecticut valley area who could not afford to suspend their livelihood while awaiting the outcome of litigation, now three and one-half years old. ...[E]ach knew the other would be plying her trade under the guise of a new corporate entity." The court cited the Restatement of Agency and case law from other jurisdictions for the proposition that it was not improper for the members to prepare to compete prior to the termination of their relationship. The court concluded that Connors did not breach any duty to the LLC and that, even if she did, there was no showing of any but nominal damages. The court downplayed the significance of the "lock-out" but found for Connors on the claim.

Price v. Paragon Graphic, Ltd., No. 08CA3, 2008 WL 5244993 (Ohio App. Dec. 16, 2008) (relying on case law addressing fiduciary duties of majority shareholders to minority shareholders in analyzing claims that majority member breached its fiduciary duties by taking over sole and complete operation of LLC and by utilizing business for its personal gain to detriment of other member).

In re Heritage Organization, L.L.C. (Faulkner v. Korman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. Based on the provisions of the LLC operating agreement, the court granted summary judgment in favor of Kornman and Walker, who were officers of the managing member of the LLC as well as officers of the LLC, on the trustee's breach of fiduciary duty/gross negligence claims against them. The operating agreement contained a broad exculpation clause as follows:

> The Manager shall not be required to exercise any particular standard of care, nor shall he owe any fiduciary duties to the Company or the other Members. Such excluded duties include, by way of example, not limitation, any duty of care, duty of loyalty, duty of reasonableness, duty to exercise proper business judgment, duty to make business opportunities available to the company, and any other duty which is typically imposed upon corporate officers and directors, general partners or

> trustees. The Manager shall not be held personally liable for any harm to the Company or the other Members resulting from any acts or omissions attributed to him. Such acts or omissions may include, by way of example but not limitation, any act of negligence, gross negligence, recklessness, or intentional misconduct.

Walker and Kornman argued that they were protected by this clause as agents of the manager; however, the court found that there were fact issues as to the capacity in which Kornman and Walker acted (i.e., whether as officers of the LLC or as agents of the LLC's manager), and it therefore was not possible on the summary judgment record to conclude that they were protected by the exculpation clause applicable to the manager. The court thus proceeded to analyze other provisions of the operating agreement bearing on the duties imposed on the LLC's officers. The court reviewed various provisions of the operating agreement and concluded that, taken together, the operating agreement set up a duty delegation structure beginning with the LLC's manager. The operating agreement expressly eliminated the duties and liabilities of the manager, and the operating agreement expressly limited the duties of the officers of the LLC to those provided in the agreement. While the operating agreement conferred on the LLC's president the same duties granted to the manager, the court characterized that provision as "hollow" given the express exclusion of duties of the manager. The officers of the LLC other than the president had only those duties that were prescribed or delegated by the president or the manager, and there was no evidence in the summary judgment record regarding either the manager's grant of duties to the president or the president's or manager's delegation or prescription of duties to any other officer. Faced with an operating agreement that provided only for duties as delegated or prescribed by the manager or president, and no evidence of any delegation or prescription, the trustee argued that the officers owed common law fiduciary duties to the LLC. The court rejected this argument, noting that Delaware LLCs are creatures of contract and that the Delaware LLC statute allows the LLC agreement to expand, restrict, or eliminate any duties a person owes to the LLC. The court stated that the LLC agreement clearly contemplated that the LLC's officers owed only those duties that were either delegated or prescribed by the LLC's manager or president, and, absent any delegation or prescription evident in the summary judgment record, the trustee failed to demonstrate the existence of any fiduciary duties by Kornman or Walker.

Kahn v. Portnoy, Civil Action No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008). The plaintiff, a "shareholder" of a publicly traded Delaware LLC, brought a derivative action against the directors of the LLC alleging that the directors breached their fiduciary duties to the LLC by approving a transaction designed to benefit one of the directors and certain entities affiliated with the director. The directors moved to dismiss the action on the basis that the directors acted in accordance with their duties under the LLC agreement. The court found that there was more than one reasonable interpretation of the LLC agreement and denied the motion to dismiss because the court was not at liberty to choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). The LLC agreement provided that the duties of the directors would be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law unless otherwise specifically provided for in the LLC agreement. Section 7.5(a) of the LLC agreement modified the duties of directors of a Delaware corporation by providing that "[i]t shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence." Adopting a reasonable interpretation that was most favorable to the plaintiff, the court found that the sentence read in context could be interpreted to apply only to board decisions that involved a conflict of interest between a shareholder and the board or a shareholder and the LLC because the prior sentence of Section 7(a) specifically referred to such situations. The challenged transaction did not involve such a conflict, and, therefore, at least one reasonable interpretation of the provision did not alter the duty of loyalty in this case. Further, the court stated that the "clear and convincing" standard in the provision did not necessarily alter the pleading standard. The court proceeded to analyze whether the plaintiff stated a claim for breach of the directors' duty of loyalty under corporate law as altered by exculpatory provisions in the LLC agreement. The LLC agreement contained two "arguably conflicting" exculpatory provisions, which the court was unable to explain as "anything other than poor drafting or a strategy that 'if one exculpatory provision is good, then two must be better.'" One provision eliminated personal director liability for money damages for a breach of duty subject to certain exceptions including breach of a director's duty of loyalty to the LLC or shareholders, as modified by the agreement, and acts or omissions not in good faith. Another provision of the LLC agreement, which applied "notwithstanding anything to the contrary" in the agreement, eliminated monetary liability of directors absent a final judgment that the person acted in "bad faith" or engaged in certain other types of misconduct. The court discussed the concept of bad faith and the factual allegations and concluded that the plaintiff alleged sufficient facts to establish a showing for purposes of Rule 12(b)(6) that the directors acted in "classic, quintessential bad faith."

The court also addressed whether the plaintiff had alleged sufficient facts to establish demand was excused in this derivative action. The court noted that corporate case law supplies the governing principles for evaluating demand futility and thus applied the *Aronson* test, under which demand is excused if the plaintiff alleges particularized facts that establish a reasonable doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Based on its prior discussion of Section 7.5(a) of the LLC agreement, the court stated that Section 7.5(a) would not alter the *Aronson* analysis because the conflicts alleged in the case did not involve a conflict between a shareholder and a director or a shareholder and the LLC. Further, even assuming that Section 7.5(a) applied to the board's decision whether to initiate suit in the case, the court was not convinced that the demand futility or *Aronson* requirements were altered by the LLC agreement. The court noted that the LLC agreement could have altered the demand futility and *Aronson* requirements, but the court did not interpret Section 7.5(a) to eliminate or modify the ability of shareholders to bring a suit on behalf of the LLC or modify the prerequisites for doing so. Taking the well-pleaded complaint as true, the court concluded that it created a reasonable doubt as to the disinterestedness or independence of a majority of the board.

Bryan D. Scofield, Inc. v. Susan A. Daigle, Ltd., 999 So.2d 311 (La. App. 2008). The relationship between three members of a law firm LLC deteriorated, and two of the members sued the third member for breach of fiduciary duty, breach of the operating agreement, and fraudulent breach of an oral agreement made in connection with the departure of one of the members. The trial court dismissed the breach of fiduciary duty claim on the basis that it must be brought as a derivative suit. The court of appeals concluded that the plaintiff members had a right to bring individual claims against the other member under certain circumstances. The court pointed out that the Louisiana Limited Liability Company Law, which provides that members with management responsibilities have fiduciary obligations to the other members as well as the LLC, is almost identical to the provision in the corporate statute addressing fiduciary duties of officers and directors. The court stated that the provisions in the LLC and corporate statutes should mean the same thing, and the court thus found it appropriate to rely on corporate case law in this context. The court stated that corporate cases have held that a shareholder may have a right to sue officers and directors directly if the breach of fiduciary duty causes direct loss to the shareholder, and the court concluded the same rule would apply to members who suffer a direct loss caused by another member's breach of fiduciary duty. The court noted that the LLC statute provides that a member shall not be personally liable to the LLC or the members unless the member acted in a grossly negligent manner or engaged in conduct demonstrating a greater disregard of the duty of care than gross negligence. Thus, the court examined the petition to determine if it stated a cause of action for a breach of fiduciary duty amounting to gross negligence directly damaging the member plaintiffs. The plaintiff members argued that the defendant deliberately ignored her statutorily imposed duties of good faith, care, and loyalty in ending the relationship between the members. The court described the duty of loyalty as involving an obligation of utmost good faith, fairness, and honesty in dealings pertaining to the enterprise. The petition alleged that the defendant member had secret discussions with clients and third parties regarding her scheme to terminate the membership of one of the plaintiffs, advised the ousted member that he was terminated despite the other plaintiff's objection, gave the ousted member less than 48 hours to make a decision about the defendant's offer to purchase the ousted member's interest, refused to provide information to support the basis for the buy-out offer, viewed the ousted member's failure to make a decision as a rejection of the buy-out offer, and sent correspondence to clients advising that the ousted member was leaving the firm for unspecified reasons. The court found that these allegations described intentional breaches of the defendant's duty of loyalty to the plaintiffs individually. The court concluded that the amended petition, but not the original petition, alleged a breach of the operating agreement and that issue was not before the court. Finally, the court concluded that the petition alleged the defendant's breach of an oral agreement not to contact certain adjusters regarding the decision of the second plaintiff to leave the firm.

Yuko Ito v. Suzuki, 869 N.Y.S.2d 28 (N.Y. App. Div. 1st Dept. 2008). The court held that an LLC investor adequately alleged a fraud claim against the LLC's manager but not the manager's attorney or the investor's attorney. Affording the investor the benefit of favorable inferences and accepting as true the complaint's allegations that the manager's attorney knew or should have known that the active assistance he provided to the manager was harmful to the investor's interest, the court found that the investor sufficiently alleged against the attorney a claim for aiding and abetting breach of fiduciary duty. The court stated that owners of a fractional interest in a common entity are owed a fiduciary duty by its manager, and a member of an LLC has standing to maintain a derivative action.

Kertesz v. Spa Floral, LLC, 994 So.2d 473 (Fla. App. 2008). After being ousted as managing member, the founder of an LLC sued for compensation for the loss in value of his membership interest based on the other members' alleged breach of their duty of care to the plaintiff. Noting that the complaint did not refer to or include any articles of organization or operating agreement, the court relied upon the Florida LLC statute and decisional law and stated that governance and operation of the LLC is a simple matter of majority rule in the absence of other written terms. The court held that the decline in value of the plaintiff's LLC interest was not actionable without more. The court stated that the plaintiff's allegation that the LLC lost business because of his removal called into question the wisdom or business judgment of the majority, and the members could not be sued simply because they exercised their prerogative to change management in the absence of some wrongful or unlawful basis, such as prohibited discrimination or circumstances detailed in whistleblower statutes. The decision to replace the plaintiff did not constitute misappropriation or waste just because some clients of the LLC disapproved. The court stated that the business decision to replace the plaintiff might prove sound over a longer term, and, if it did not, a change of management that ultimately proves to be improvident does not of itself give rise to a cause of action against the majority who voted for it or the LLC.

Nightingale & Associates, LLC v. Hopkins, Civ. Docket No. 07-4239 (FSH), 2008 WL 4848765 (D. N.J. Nov. 5, 2008) (dismissing minority member's claim for "minority shareholder oppression" because choice of Delaware law in operating agreement gave Delaware substantial relationship to case and fact that New Jersey has oppressed minority shareholder statute while Delaware does not recognize cause of action for minority shareholder oppression did not override parties' choice of law; dismissing member's claim for "wrongful misconduct" in connection with member's removal from LLC because member did not identify any source of common or statutory law in Delaware or New Jersey supporting cause of action and claim simply restated essence of breach of contract claim).

In re Johnson (Gates v. Johnson), Bankruptcy No. 2:07-BK-06248-SSC, Adversary No. 2:08-AP-00189-SSC, 2008 WL 5071756 (Bankr. D. Ariz. Oct. 21, 2008). The court held that Johnson's failure to disclose to his LLC co-member when they went into business together that the IRS had a claim against Johnson for $200,000 in delinquent taxes was not fraudulent for purposes of rendering the co-member's claim against Johnson non-dischargeable in bankruptcy. The court found that the co-member's claim that he never would have invested with Johnson if he had known about the delinquent taxes was not consistent with the evidence. The plaintiff made no financial disclosure himself to Johnson, and there was no evidence the plaintiff cared about Johnson's financial situation. Further, the plaintiff learned of Johnson's poor credit rating when they were turned down for a loan, and there was no evidence the plaintiff took any action against Johnson. Instead, they restructured the LLC and obtained the loan. The court rejected as well the contention that Johnson's affluent lifestyle was an affirmative representation of wealth. The court next examined whether the members were in a fiduciary relationship for purposes of the exception from discharge based on "fraud or defalcation while acting in a fiduciary capacity." The court pointed out that the Arizona Limited Liability Company Act, unlike the Arizona Revised Uniform Partnership Act, is silent regarding the duties a member owes to the LLC and the other members. In the absence of persuasive authority defining the duties LLC members owe to one another, the court stated that its only recourse would be to review the operating agreement, which the plaintiff failed to provide. Thus, the court stated that it was impossible to determine, what, if any, fiduciary relationship existed between the parties, and the plaintiff failed to carry his burden of proof on the issue.

Satterfield v. Ennis, Civil Action No. 08-cv-00751-ZLW-CBS, 2008 WL 4649026 (D. Colo. Oct. 20, 2008) (observing that Colorado LLC statute "does not appear to mandate that co-members of a limited liability company owe fiduciary duties to one another" but concluding that plaintiff's pro se pleading, liberally construed, was sufficient to allege existence and breach of fiduciary duty of co-members of LLC and of successor LLCs of LLC that expelled plaintiff).

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed in part, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI, a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. Ewie sought summary judgment on the basis that it was the majority member and properly sought dissolution under the articles of organization and operating agreement in light of the dissolution date of December 31, 2004. Ewie further argued that it was forced to seek judicial dissolution and that Mahar lacked standing to bring its counterclaims because the LLC dissolved on December 31, 2004, and Ewie's conduct seeking dissolution was not unfair or oppressive. Ewie argued that the non-compete provision had not been violated because it was PSMI and not Ewie that contracted with GM.

The court held that the operating agreement was ambiguous as to whether unanimous consent of the members was required to dissolve upon the termination date specified in the articles of organization, and that the trial court thus erred when it ruled that the LLC automatically dissolved on the date specified in the articles of organization. The court also held that it was error for the trial court to grant summary disposition on the dissolution question because, regardless of the dissolution date in the articles of organization, Mahar presented evidence that Ewie and its principals took steps prior to the dissolution to take over the LLC's contract with GM. Though Ewie argued that Mahar had no standing to assert the LLC's claims, the court stated that Mahar had statutory authority under the Michigan LLC statute to bring an action to establish that Ewie, a controlling member, engaged in fraudulent, willfully unfair, or oppressive conduct. Ewie argued that it was within its rights to force dissolution of the LLC, but the Michigan LLC statute permits winding up of an LLC by the members who have not "wrongfully dissolved" the LLC, and the court held that Mahar presented evidence that could lead a reasonable jury to conclude that Ewie "wrongfully dissolved" the LLC because of Ewie's desire to usurp the GM contract. Further, the statute requires "good cause" for a judicial winding up, and the court stated that "good cause" would not include formation of a new company to take over the LLC's business. On appeal, the Michigan Supreme Court held that any ambiguity in the operating agreement was irrelevant given the termination date in the articles of organization because the Michigan statute provides for automatic dissolution at the time specified in the articles of organization. The court remanded for reconsideration of Ewie's motion for summary disposition for judicial dissolution in light of a provision in the Michigan LLC statute providing that a court may cancel or alter a provision in the articles of organization if controlling managers or members have engaged in illegal or fraudulent acts or willfully unfair and oppressive conduct.

The court of appeals also held that a jury must decide whether Ewie violated provisions of the operating agreement requiring the members to discharge their duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC and that a jury should consider whether the conduct of Ewie and its owners violated the non-compete clause in the operating agreement. Relying on provisions of the Michigan LLC statute and the operating agreement, the court stated that Ewie, as managing member, was required to disclose to Mahar that Ewie's principals were forming PSMI to take over the GM contract and to obtain Mahar's consent to transfer substantially all of the assets of the LLC to PSMI.

Downs v. Rosenthal Collins Group, L.L.C., 895 N.E.2d 1057 (Ill. App. 2008). The plaintiff sought indemnification from an LLC for attorney's fees incurred in successfully defending an earlier action against him by the LLC for breach of fiduciary duty and breach of contract. The plaintiff was the CEO and a member of the LLC, and the operating agreement of the LLC provided that the LLC "shall indemnify each Member for any act performed by such Member with respect to Company matters permitted by this Agreement and/or Majority Approval, but in no event for fraud, willful misconduct, negligence, or an intentional breach of this Agreement." The plaintiff asserted that all actions underlying the complaint were taken with respect to LLC matters and that he was entitled to indemnification for his defense costs in the prior suit because the claims were dismissed against him as factually and legally without merit. The court of appeals affirmed the trial court's dismissal of the plaintiff's claim for indemnification because the operating agreement did not specifically address attorney's fees. The court stated that an indemnification agreement must be strictly construed with respect to attorney's fees, and the court found no language in the operating agreement indicating the parties' intent to include attorney's fees.

In re Martinez (Humphries v. Martinez), Bankruptcy No. 08-41344-13-abf, Adversary No. 08-4111-13-abf, 2008 WL 5157707 (Bankr. W.D. Mo. Aug 1, 2008). The plaintiff and the debtor formed an LLC governed by an oral agreement. In a prior state court action, the court determined that a written "Partnership Agreement" that was never signed accurately reflected the parties' agreement. The parties had discussions about buying each other out, but a buy-out was not consummated, and the LLC was never dissolved. The claim in this case revolved around the debtor's withdrawal of funds from the LLC's account without consent or authorization of the plaintiff. In a state court action, the court found the debtor liable to the plaintiff and the LLC, and the plaintiff sought to have the debt related to the withdrawal of the funds declared nondischargeable on the basis that it was a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The court stated that the plaintiff was not entitled to the relief requested because the funds taken belonged to the LLC rather than the plaintiff. However, the court proceeded to consider whether there was a fiduciary relationship between the debtor and the plaintiff. The court explained that a fiduciary relationship for purposes of the non-dischargeability provision is more narrowly defined than under general common law and requires a technical or express trust. The court stated that nothing in the parties' agreement imposed any fiduciary duty on the debtor as to LLC funds. The agreement merely provided for control and management of the LLC to be split between the parties and for adequate accounting records to be maintained. Because the agreement did not create an express or technical trust, the court stated that the LLC would not be entitled to relief for fraud or defalcation in a fiduciary capacity even if it were a party.

M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd., 193 P.3d 536 (Nev. 2008). The operating agreement of a residential real estate development LLC contained the following provision permitting members to engage in competition:

> This Operating Agreement shall not preclude or limit in any respect the right of any Member or Administrative Committee Member to engage in or invest in any business activity of any nature or description, including those which may be the same or similar to the Company's business and in direct competition therewith. Any such activity may be engaged in independently or with other Members or Administrative Committee Members. No Member shall have the right, by virtue of the Articles of Organization, this Operating Agreement or the relationship created hereby, to any interest in such other ventures or activities, or to the income or proceeds derived therefrom. The pursuit of such ventures, even if competitive with the business of the Company, shall not be deemed wrongful or improper and any Member or Administrative Committee Member shall have the right to participate in or to recommend to others any investment opportunity.

Although the minority member had the right to develop other projects, the LLC and its majority member sued the minority member and the minority member's company alleging, *inter alia*, that the minority member and his company converted the LLC's contractor's license for their own purposes when they used the LLC's license rather than obtain a separate contractor's license to develop competing properties. The trial court entered a directed verdict in favor of the minority member on the conversion claim, and the supreme court reversed the trial court's judgment and remanded for a trial on that issue. The court first determined that intangible property, such as a license, can be converted under Nevada law. The court then determined that the plaintiffs had offered sufficient evidence on the issue of whether the minority member's use of the license constituted "wrongful dominion" over the license to overcome the motion for directed verdict. There was testimony that the majority member and manager did not grant the minority member permission to use the LLC's license and that the operating agreement did not authorize the use of the LLC's license on the other projects even though it permitted members to engage in other projects. Although there was testimony that other members of the LLC used the license on individual projects, the court stated that the evidence was not so overwhelming that a verdict against the minority member would be contrary to law, and the probative value of any prior course of conduct concerning the license was undermined by the fact that the use of the license by other members occurred prior to the current majority member's acquisition of its interest in the LLC. The court noted that the fact that the jury found in favor of the minority member on the other claims of wrongful conduct (which included breach of fiduciary duty claims) did not mean there could be no "wrongful dominion" with respect to the conversion claim. The court viewed the element of "wrongful dominion" as distinct from the "wrongfulness" element of other torts, and it was for the jury to determine whether the specific elements of conversion existed.

Goldberg v. Stelmach, No. B199830, 2008 WL 4428650 (Cal. App. 2 Dist. Oct. 2, 2008) (noting that LLC manager owed same fiduciary duties to LLC and members as a partner owes to a partnership and the partners).

Bartfield v. Murphy, 578 F.Supp.2d 638 (S.D.N.Y. 2008) (stating that member's claim based on failure to disclose certain material facts might support direct suit because duty of disclosure was owed by defendant member to his fellow member).

Sports Imaging of Arizona, L.L.C. v. 1993 CKC Trust, No. 1 CA-CV 05-0205, 2008 WL 4448063 (Ariz. App. Sept. 30, 2008). An LLC asserted claims for conversion, breach of fiduciary duty, and breach of contract against an entity (Omi-Omni Medical Imaging, P.L.C. or "Omni") serving as a manager of the LLC, the trust that owned 99% of Omni, and the individuals (Dr. and Mrs. Christensen) who managed and controlled Omni and the trust that owned 99% of Omni. The court stated that the Christensens could have personal liability for their involvement in tortious acts of Omni because corporate officers and directors are liable for their involvement in a corporation's intentional torts, and the court concluded that there were genuine issues as to the personal liability of the Christensens for their involvement in Omni's systematic dismantling of the LLC's business and acts of alleged conversion of LLC assets. Though the court was not convinced that a statement by Dr. Christensen acknowledging that he and Omni owed the LLC fiduciary duties amounted to a judicial admission, the statement at least demonstrated a belief that Dr. Christensen owed a fiduciary duty and assisted in the creation of a fact issue regarding whether such a duty existed. Based on the fiduciary duty owed by Omni as manager of the LLC, the control exercised by the Christensens over Omni, and facts bearing on whether the Christensens assumed a fiduciary duty and participated in actions breaching Omni's fiduciary duty, the court found that there were fact questions regarding the breach of fiduciary duty claims against the Christensens. Additionally, the court found that a trust controlled by the Christensens owed fiduciary duties to the LLC. The trust owned 15% of the LLC and 99% of Omni, and the court relied upon corporate case law holding that shareholders who have the ability to control a corporation owe a fiduciary duty to the corporation and other shareholders. The court concluded that there were fact issues regarding whether the trust breached its fiduciary duty to the LLC. The court noted that Arizona has not adopted the Uniform Limited Liability Company Act (ULLCA), which the defendants relied upon for the proposition that a member in a manager-managed LLC does not owe the LLC or another member a fiduciary duty. However, the court went on to note that ULLCA has been revised and that its current language supported the LLC's argument in that the revised statute merely provides that a member in a manager-managed LLC does not owe a fiduciary duty solely by reason of being a member. The court cited commentary to the revised act that suggests a controlling member of a manager-managed LLC may be understood to owe a fiduciary duty. The court reviewed the evidence regarding the breach of fiduciary duty claims against Omni itself and found the evidence sufficient to support the jury's finding in favor of the LLC on its breach of fiduciary duty claims against Omni. The court pointed out testimony by Dr. Christensen regarding the existence of a fiduciary duty and reviewed evidence of Omni's control over the LLC. The court concluded that the evidence supported the jury's finding that Omni breached its fiduciary duty by effectively destroying the LLC and driving it out of business. Omni argued that it could resign its role as manager and end its fiduciary obligation at any time, but the court found that, while Omni may have taken steps to resign as manager, it never formally did so. Even if Omni resigned, the court stated that its obligations continued with respect to certain assets that it continued to control. Omni's ongoing responsibilities gave rise to fiduciary duties, and its ability to resign or withdraw its services as a manager was limited by a fiduciary obligation to provide reasonable notification. The court rejected other arguments made by Omni, including its argument regarding the measure of breach of fiduciary duty damages and the sufficiency of the evidence regarding conversion claims against Omni.

Out of the Box Promotions, LLC v. Koschitski, 866 N.Y.S.2d 677 (N.Y. Sup. 2008). The plaintiff alleged that he and the defendant were each 50% members of an LLC, and the plaintiff brought a derivative suit alleging various acts of misconduct on the part of the defendant. The defendant sought dismissal on the grounds that the plaintiff was not a member and lacked standing, but the court found the documentation provided by the defendant failed to conclusively establish that the plaintiff was not a member. The court also found that the plaintiff stated a cause of action for wrongful interference with prospective contractual relations because the defendant, as an LLC manager, owed a fiduciary duty to the plaintiff and the LLC, and the alleged means employed by the defendant violated the duty of fidelity and thus constituted "wrongful means." The complaint also stated a cause of action for unfair competition based on the defendant's alleged diversion of LLC business by purposely causing confusion or mistake and appropriation of customers by using the LLC's credit for his own new company. Finally, although inartfully stated, the plaintiff's cause of action for solicitation of the LLC's customers through false statements of the financial instability of the LLC sufficiently alleged a breach of fiduciary duty.

546-552 West 146th Street LLC v. Arfa, 863 N.Y.S.2d 412 (App. Div. 1st Dept. 2008). LLC plaintiffs brought this action against member/managers who allegedly received commissions in connection with the purchase of real estate by the LLCs without disclosing the commissions to the LLCs or to prospective investors whose investments were used to fund the closings of the property acquisitions. The court held that the LLCs lacked standing to assert the claims because the alleged wrongdoers were the only members and managers at the time the agreements for the commissions were entered into and their acts and knowledge were thus imputed to the LLCs. (The court noted that the investors had brought a parallel action in which the question of whether the investors were wronged when their investments were solicited would be determined.) According to the court, the adverse interest exception did not apply because it arises if the principal's interests have been totally abandoned; the exception cannot be invoked merely because the agents have a conflict of interest or are not acting primarily for their principal. The pleadings did not allege or provide a basis for inferring that the original members and managers totally abandoned the interests of the LLC because they accomplished the LLCs' main purpose of acquiring the properties. Further, the court held that application of the adverse interest exception would be barred in any event because the adverse interest exception does not apply if the alleged wrongdoers were, at the time of the misconduct, either the sole managers or sole owners of the plaintiff. Finally, the court rejected the argument that the defendants were liable as promoters because the challenged agreements were entered into before formation of the LLCs and the promoters could not have then owed fiduciary obligations to the non-existent entities.

O'Dell v. O'Dell, No. E2007-02619-COA-R3-CV, 2008 WL 3875434 (Tenn. Ct. App. Aug. 21, 2008). The plaintiff and his two sons formed an LLC in which the three members ultimately held equal voting rights. The plaintiff sued his sons and other family members alleging that they conspired to deprive the plaintiff of property and his rights as a member of the LLC. Specifically, the plaintiff alleged that the defendants failed to complete or furnish certain documentation regarding the LLC; that the plaintiff was not notified of LLC meetings; that the plaintiff spent his own money on LLC business and the defendants claimed these payments as tax deductions without consulting the plaintiff; that the defendants withheld information from the plaintiff; that the defendants closed certain LLC accounts and opened new ones; that the defendants did not assist the plaintiff with the day-to-day operations of the LLC; that the defendants removed LLC property without the plaintiff's permission; that the defendants "intimidated" the plaintiff to ensure that deadlines would be met; and that one of the defendants verbally assaulted the plaintiff with regard to the LLC. The court concluded that these allegations did not state a claim for outrageous conduct but that the complaint did state a cause of action for violations of the Tennessee Limited Liability Company Act.

Urban Hotel Development Company v. President Development Group, L.C., 535 F.3d 874 (8th Cir. 2008) (rejecting plaintiff's argument that other members breached their duties of care and loyalty when they removed plaintiff as member, stating that, because the members relied in good faith on the operating agreement, district court did not err in concluding that there was no evidence of breach of fiduciary duty).

ULQ, LLC v. Meder, 666 S.E.2d 713 (Ga. App. 2008). Four individuals formed an LLC, and the operating agreement designated the majority member as the sole manager. The operating agreement provided that an officer could be removed by the manager with or without cause whenever in the manager's judgment the best interest of the LLC would be served. Removal was a dissociating event requiring the member to sell his interest to the other members or the LLC at a designated value. The manager appointed Meder, a 10% member, as vice president and later terminated him, claiming that he had abused other employees and that his termination was thus in the best interests of the LLC. The LLC exercised its right to purchase Meder's interest. The value in effect under the operating agreement at that time was the value of a member's capital account, and Meder's capital account was zero due to LLC losses. Meder sued the LLC, alleging that his termination and buy out breached the operating agreement, breached fiduciary duties owed to him by the LLC, and wrongfully converted the value of his capital investment and interest. The LLC counterclaimed alleging various causes of action based on Meder's contacting LLC clients, after his termination as an officer and before the purchase of his membership interest, to persuade them to withhold their business from the LLC. The LLC sought summary judgment on Meder's breach of contract claim on the basis that the operating agreement permitted his termination with or without cause, but the court of appeals held that the trial court did not err in denying summary judgment because there was a fact issue with respect to the duty of good faith and fair dealing implied in all contracts.

The court stated that the exercise of discretion by a party to a contract is subject to the implied duty of good faith unless the contract states that the discretion is "absolute" or within the "sole" judgment of the party. Because the operating agreement did not vest the manager with absolute discretion in terminating an officer, but rather required the manager to conclude that termination was in the best interest of the LLC, the manager was required to exercise good faith in terminating Meder. Meder presented evidence that he was not abusing other employees and that the true motive for terminating him was to allow the LLC to purchase his interest for nothing at a time when the LLC was about to take off financially, thereby raising an issue regarding the exercise of good faith by the manager. The LLC prevailed on its argument that it did not owe Meder a fiduciary duty. The court acknowledged that the majority owner as the sole manager owed a fiduciary duty to the LLC and its members, but concluded that it would make no sense to hold the LLC responsible for a manager's breach of a fiduciary duty to the LLC and its members. The court cited case law from other jurisdictions holding that a corporation owes no fiduciary duty to its shareholders and held that an LLC owes no fiduciary duty to its members, either directly or vicariously for actions taken by its manager. The trial court thus erred in denying summary judgment in favor of the LLC on Meder's breach of fiduciary duty claim. Relying on the Georgia LLC statute, the court rejected the LLC's argument that Meder breached a fiduciary duty to the LLC when he convinced the LLC's customer to withhold business from the LLC. The LLC statute requires a member or manager, when managing the affairs of the LLC, to act in a manner the member or manager believes in good faith to be in the best interest of the LLC, but the statute also specifies that a non-manager member of a manager-managed LLC has no duties to the LLC or the other members solely by reason of acting as a member unless otherwise provided by the articles of organization or a written operating agreement. Based on this statutory provision, the court held that a non-managing member in a manager-managed LLC owes no duties to the LLC or other members. The court stated that such duties may be imposed in the operating agreement or articles of organization, but neither the operating agreement nor the articles of organization in this case did so. Thus, the trial court did not err in granting Meder summary judgment on the breach of fiduciary duty claim.

Todd v. Sullivan Construction LLC, 191 P.3d 196 (Idaho 2008). Todd and Sullivan formed an LLC to engage in masonry and concrete construction work, and Sullivan discovered that Todd and an employee of the LLC were planning to go into business together and that the employee used the LLC's equipment and employees to do concrete jobs on the side for a corporation whom the LLC sought as a customer. The employee resigned, and Sullivan purchased Todd's interest in the LLC. Todd and the former employee of the LLC then formed their own concrete construction company. The former LLC employee billed for the concrete work performed for the corporation whose business the LLC had sought, and the payments for that work were deposited in the account of the new company formed by Todd and the former LLC employee. Among the claims asserted by the LLC in ensuing litigation among the parties was a claim against Todd for willful misconduct. The trial court dismissed this claim, and the LLC appealed. The LLC alleged that Todd solicited business away from the LLC or otherwise usurped opportunities of the LLC for his personal benefit while still a member of the LLC and that this conduct was "willful misconduct" under the Idaho LLC statute because it was a breach of fiduciary duty to the LLC. The Idaho LLC statute provides that a member or manager shall not be liable to the LLC or the members for any action or failure to act on behalf of the LLC unless the act or omission constitutes gross negligence or willful misconduct. The court stated that the statute does not create a cause of action but rather sets forth a burden of proof for an LLC or its members to hold another member or manager liable for acts or omissions on behalf of the LLC. Both the LLC and Todd assumed that the statute applied to the LLC's willful misconduct claim, though the court noted that it could certainly be argued that the conduct in issue was not taken on behalf of the LLC. The court analyzed whether the evidence that Todd had breached his fiduciary duty by soliciting business away from the LLC was sufficient to amount to willful misconduct. The trial court concluded that there was no proof that Todd engaged in "active" willful misconduct, but the court of appeals stated that the statute does not require proof of *active* willful misconduct – it only requires proof of willful misconduct. The court of appeals concluded that the trial court's holding that there was sufficient evidence to support submission of the LLC's tortious interference claim (which was based on the same alleged misconduct as the willful misconduct claim), and Todd's failure to challenge the jury's finding that Todd committed that tort, was inconsistent with the trial court's directed verdict on the willful misconduct claim. The court stated that intentionally interfering with the LLC's prospective business was willful misconduct, and, if there was sufficient evidence to show that Todd and the LLC's employee were acting in concert to interfere with the LLC's prospective business with respect to the jobs in issue, there was sufficient evidence that Todd himself usurped those business opportunities.

Blair v. McDonagh, 894 N.E.2d 377 (Ohio App. 2008). Blair and McDonagh formed an LLC to operate Irish pub restaurants. Disputes developed, and the members asserted against each other various claims, including claims for breach of contract and breach of fiduciary duty. The jury returned a verdict in favor of McDonagh on all claims. On appeal, Blair argued that McDonagh's breach of fiduciary duty claim was actually the LLC's and could only be raised by the LLC. The court stated that there are circumstances under which a shareholder in a close corporation may bring an individual action, but the court found it unnecessary to reach that issue because Blair never raised the issue until he filed his motion for JNOV. Further, Blair asserted his own claim for breach of fiduciary duty; therefore, under his logic he, too, should have brought the claim in the name of the LLC. Instead, he named the LLC as a defendant. He requested and relied upon the instructions on breach of fiduciary duty and related damages, and the court held that any error was invited error. The court also rejected Blair's argument that the evidence established that McDonagh breached his duty of good faith and fair dealing by refusing to consent to a line of credit that Blair had negotiated for the LLC and that was necessary for the good of the LLC. The court stated that an LLC, like a partnership, involves a fiduciary relationship that imposes on the members a duty to exercise the utmost good faith and honesty in all dealings and transactions with the LLC. Similarly, the court said that the parties to a contract owe each other a duty of good faith and fair dealing. The court found that McDonagh presented substantial evidence that he had acted in good faith and that he had withheld his consent for legitimate reasons, the most important of which was that Blair had refused to provide necessary financial information to evaluate the business and the necessity for the loan. Additionally, McDonagh's loans to the LLC would have been subordinated to the line of credit loan. The court stated that McDonagh was not acting in bad faith when he failed to consent to the line of credit loan under these circumstances.

Savanna Investors, LLC v. Vaughn, No. X08CV084012896S, 2008 WL 4021333 (Conn. Super. July 30, 2008) (comparing general partner's fiduciary obligations to limited partner to those owed by LLC managing member to passive investor member and finding probable cause to conclude managing member breached fiduciary duties to plaintiff member).

Pravak v. Meyer Eye Group, PLC, No. 07-2433-JPM-dkv, 2008 WL 2951101 (W.D. Tenn. July 25, 2008). Three ophthalmologists agreed to form an ophthalmology practice, and Dr. Pravak signed a letter of intent in which he agreed to become a member in a newly formed LLC. The three doctors signed the LLC's lease agreement, a membership consent form, and a loan agreement, and Dr. Pravak was paid a "draw" by the LLC until the other two doctors began characterizing themselves as the only partners and ceased to characterize Dr. Pravak's compensation as a "draw." The LLC's accountant indicated that she wished to recode all Dr. Pravak's checks as contract labor, and the other two doctors asserted that the LLC did not have formal members without an operating agreement. Dr. Pravak filed suit alleging various causes of action, including breach of contract, tortious interference with contract, breach of fiduciary duty, civil RICO violations, and injunctive and declaratory relief. The court discussed fiduciary duties under the Tennessee LLC statute and case law and stated that Tennessee courts have interpreted the statutory language to mean that members owe fiduciary duties to a member-managed LLC but not to each other. The court stated that an exception to this general rule imposes a fiduciary relationship upon a majority owner of an LLC in his relationship to the minority owner, but that this case involved uncomplicated contractual duties and not a factual situation involving oppression by the majority of the minority. The court stated that the general rule that members of a member-managed LLC do not owe one another fiduciary duties applied in this case because the case did not stem from the expulsion of a minority member through the exploitation of the majority's status as was the case in *Anderson v. Wilder*, the only Tennessee LLC case to impose a fiduciary duty based on oppression of the minority by the majority. The court thus dismissed the breach of fiduciary duty claims. The court dismissed Dr. Pravak's RICO claim because the LLC could not be both the "person" and the "enterprise" in the alleged RICO violations. The court declined to dismiss the claims for declaratory and injunctive relief, which the defendants alleged could only be brought derivatively, because the allegations appeared to comply with the procedural requirements for derivative actions.

Cosmopolitan Imports, LLC v. Pacific Funds, LLC, No. 59896-1-I, 2008 WL 2791983 (Wash. App. July 21, 2008). McMullen formulated a business plan to buy and resell certain real property and sugar mill equipment and signed a letter of intent to purchase the property. McMullen and Monjazeb formed a new LLC to acquire, develop, and manage the property, and they signed an LLC agreement under which each had a 50% interest and Monjazeb was the manager. Monjazeb agreed to provide the initial earnest money deposit for the purchase of the property, and McMullen contributed the letter of intent. McMullen, allegedly with Monjazeb's consent, entered a purchase and sale agreement to buy the property on behalf of the LLC, but Monjazeb argued that he had not consented and that McMullen violated the LLC agreement because Monjazeb was the sole manager with authority to enter contracts on behalf of the LLC. Monjazeb agreed to provide the additional funds required under the purchase and sale agreement if McMullen signed a loan agreement under which McMullen agreed to surrender his share of the LLC in exchange for Monjazeb's conditional promise to loan him the funds to buy back a 49% share of the LLC. The LLC closed the purchase of the property, and Monjazeb declined to loan McMullen the funds to repurchase his interest because McMullen did not furnish the collateral required under the loan agreement. As sole owner of the LLC, Monjazeb then developed the real property and sold the sugar mill equipment for a profit. McMullen sued Monjazeb alleging misappropriation of his business plan, breach of contract, and breach of fiduciary duties. The court rejected the argument that the business plan was a legally protectable trade secret and concluded that Monjazeb acted in accordance with the loan agreement even if it was. The court also rejected McMullen's argument that the loan agreement was void for want of consideration. The court held that Monjazeb's discretion in loaning McMullen the funds to repurchase his interest was not so broad or unfettered as to make it illusory. The court also rejected McMullen's argument that Monjazeb had a pre-existing duty to fund the entire acquisition of the sugar mill properties. The LLC agreement provided that no additional capital contributions beyond the initial contributions were required and that any additional contributions would be determined by all members. With respect to the breach of fiduciary duty claims, the court stated that McMullen's arguments served only to obscure the fact that McMullen was unable to provide the collateral specified in the loan agreement in connection with the loan to repurchase his interest. The court stated that Monjazeb did not breach his duty of good faith by refusing to change the terms of the contract. The court characterized McMullen's contention that Monjazeb "duped" him into signing the loan agreement as baseless. The court stated that it is true that members of an LLC are mutual fiduciaries, but nothing prohibits them from entering contractual business arrangements with one another. According to the court, it was not reasonable for McMullen to rely on any representations made by Monjazeb as his fiduciary that would excuse him from the general duty to read a contract before signing it. The loan agreement was only three pages long, was clear and straightforward, and was initialed on each page by McMullen.

In re Healy (Carwin v. Healy), Bankruptcy No. 07-31197-B-7, Adversary No. 08-02159-B, 2008 WL 2852871 (Bankr. E.D. Cal. July 21, 2008). The plaintiff was induced to invest and become a member in an LLC based on misrepresentations made by the LLC through Healy and another individual. The plaintiff obtained a state court judgment based on the misrepresentations, and the plaintiff sought to have the judgment against Healy declared nondischargeable in Healy's bankruptcy proceeding. The court held that the judgment did not fall within the discharge exception for fraud or defalcation while acting in a fiduciary capacity. The court acknowledged that an LLC manager owes to the LLC and its members the same fiduciary duty owed by partners in a partnership under California law, but the court said the fraud pre-dated the fiduciary relationship and Healy was not acting in a fiduciary capacity when he made the misrepresentations to the plaintiff.

Morris v. Hennon & Brown Properties, LLC, No. 1:07CV780, 2008 WL 2704292 (M.D.N.C. July 3, 2008). The court discussed general fiduciary duty principles under North Carolina law and cited provisions of the North Carolina LLC statute dealing with duties of LLC managers, but declined to answer the question of "whether a co-manager of an LLC in North Carolina, nothing else appearing, stands in a fiduciary relationship to the members of the LLC." The court stated that this was an unanswered question involving North Carolina law that should be avoided by a federal court if possible. Thus, the court first addressed the standing of the defendant investor to assert its breach of fiduciary duty counterclaims against the plaintiff, one of several managers of LLCs in which the defendant invested. The court stated that it was not necessary to "explore the depths of what might constitute fiduciary duties under the North Carolina Limited Liability Company Act" because, assuming the acts alleged breached a fiduciary duty, the question at the heart of the standing issue was to whom the duties were owed. The court analyzed the standing question by comparing the situation to a closely held corporation. The court stated that a derivative action is generally the appropriate vehicle where a shareholder or LLC member seeks to recover on behalf of the corporation or LLC. Because the investor filed an individual action but did not show that he was specifically and particularly harmed or that any special duty was owed to him, the court concluded that he had no standing to bring a direct action.

In re Lobell (Brooke Credit Corporation v. Lobell), 390 B.R. 206 (M.D. La. 2008) (noting that Fifth Circuit Court of Appeals has not decided if LLC members are "fiduciaries" for purposes of exception to discharge for fraud or defalcation in fiduciary capacity, and stating that no controlling authority supports creditor's right to enforce duty even assuming duty exists).

Wood v. Baum, 953 A.2d 136 (Del. 2008). The plaintiff brought a derivative suit against the members of the board of a Delaware LLC alleging breach of fiduciary duty claims based on alleged improper valuation of certain non-performing assets, improper charitable contributions, related party transactions, and failure to maintain accounting and monitoring controls and procedures. The court of chancery dismissed the complaint for failure to allege particularized facts sufficient to establish that demand on the board would have been futile. The Delaware Supreme Court stated that the test set forth in *Aronson v. Lewis* applies when it is alleged that directors made a conscious business decision in breach of their fiduciary duties, and the test in *Rales v. Blasband* applies when the subject of the derivative suit is a violation of the board's oversight duties. The plaintiff attempted to create a "reasonable doubt" that the board would have properly exercised its business judgment by alleging that the board was disabled because of a substantial risk of personal liability. In evaluating that claim, the court stated that the exculpation clause in the LLC's operating agreement must be kept in mind. Under the operating agreement and the Delaware LLC statute, the directors' liability was limited to claims of "fraudulent or illegal conduct" or "bad faith violation[s] of the implied contractual covenant of good faith and fair dealing." The court stated that, where directors are contractually or otherwise exculpated from liability, a serious threat of liability may only be found to exist if the plaintiff pleads with particularity a non-exculpated claim. Thus, the plaintiff in this case was required to plead particularized facts demonstrating that the directors acted with scienter, i.e., that they had "actual or constructive knowledge" that their conduct was legally improper. The court characterized the issue before it as whether the complaint alleged with particularity that a majority of the directors knowingly engaged in "fraudulent" or "illegal" conduct or breached "in bad faith" the covenant of good faith and fair dealing. The court concluded that the plaintiff failed to meet this pleading burden. The plaintiff did not plead with particularity any claim based on fraudulent conduct. Although the complaint alleged many violations of securities and tax laws, the complaint did not allege with particularity that the directors knowingly engaged in such conduct or that they knew such conduct was illegal. The court rejected the plaintiff's argument that such knowledge should be inferred from the fact that the transactions had to be authorized by the board and because they were related party transactions. The court stated that Delaware law is clear that board approval of a transaction, even one that turns out to be improper, is not alone enough to infer culpable knowledge or bad faith. The court also stated that the plaintiff's assertion that membership on the audit committee is a sufficient basis to infer the requisite scienter was contrary to well-settled Delaware law. The court distinguished a "bad faith violation of the implied contractual covenant of good faith and fair dealing" from the fiduciary duty breaches asserted by the plaintiff, and concluded that the complaint did not allege any contractual claims, let alone a "bad faith" breach of the implied contractual covenant of good faith and fair dealing. The court commented that the failure to allege with particularity any facts from which particular directors' knowledge of accounting irregularities may be inferred is frequently compounded by a failure to make a statutory books and records request, and the court noted that the plaintiff in this case chose not to make a books and records request. In sum, the court concluded that, given the broad exculpation provision in the operating agreement, the plaintiff's factual allegations were insufficient to establish demand futility.

Roemmich v. Eagle Eye Development, LLC, 526 F.3d 343 (8th Cir. 2008). The court of appeals affirmed the district court's grant of summary judgment on a minority member's breach of fiduciary duty claims accruing more than six years prior to commencement of the suit on statute of limitations grounds. The court held, as a matter of first impression, that a breach of fiduciary duty claim arising under the North Dakota LLC statute is governed by North Dakota's six year statute of limitations. The court concluded that alleged breaches of fiduciary duty were a series of discrete acts rather than a continuing wrong and that, even if the district court erred in rejecting the continuing wrong doctrine as to claims based on commingling of personal and LLC funds, the question need not be reached because the minority member failed to provide any evidence establishing that the conduct occurred within the six year period prior to the commencement of the suit. The court held that the district court correctly allowed the parties to present evidence of events occurring more than six years prior to commencement of the suit for purposes of crafting an equitable remedy in connection with the minority member's statutory oppression claim and concluded that the district court considered the totality of conduct in determining whether the majority's conduct amounted to a freeze out of the minority, a breach of fiduciary obligations imposed by the LLC statute, or an unfair deprivation of the minority's reasonable expectations. The court concluded that the district court's findings of fact (that the majority did not breach its fiduciary duties in most respects and that the minority member did not have a reasonable expectation regarding various matters) were not clearly erroneous. The court affirmed the district court's decision to award defendants reasonable expenses and attorney's fees under the North Dakota LLC statute, rejecting the minority member's claim that he could not have acted in bad faith under the statute since he prevailed on portions of his claim.

Berman v. Sugo LLC, 580 F.Supp.2d 191 (S.D.N.Y. 2008). In a dispute between two members of an LLC, the court refused to dismiss breach of fiduciary duty claims asserted against a member based on alleged misappropriation of business opportunities and unfair competition, relying on cases in which courts have recognized that LLC members, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members. The court said that an argument that a letter of understanding permitted competition involved interpretation of the letter and would not be undertaken at the motion to dismiss stage. The court rejected a claim for conversion based on misappropriation of business opportunities because New York does not recognize a cause of action for conversion of intangible property. The court denied a motion for reconsideration of its opinion and explained that it applied the law of New York, the forum state, in the context of this dispute regarding a Connecticut LLC because there was no material conflict between the laws of New York and Connecticut with respect to formation of an oral agreement where a party has expressed intent not to be bound until the agreement is in writing.

Tuckerbrook Alternative Investments, LP v. Banerjee, Civil Action No. 08-10636-PBS, 2008 WL 2356349 (D. Mass. June 4, 2008). An investment advisor hired an individual to act as portfolio manager of three funds, and the two parties entered into LLC agreements for three Delaware LLCs that served as general partners of the three funds. The parties disagreed as to whether managing members of a Delaware LLC owe each other fiduciary duties, and the court stated that Delaware case law was sparse on the point but relied upon *VGS, Inc. v. Castiel* in concluding that the managing members owed a duty of loyalty to each other, the LLC general partner, and the limited partners to work together in good faith to protect the interests of the limited partnership.

Bookhamer v. I. Karten-Bermaha Textiles Co., L.L.C., 859 N.Y.S.2d 172 (N.Y. A.D. 1 Dept. 2008) (holding that there were triable issues of fact as to whether fiduciary obligations owed to non-managing member, i.e., to operate LLC in good faith, to avoid self-dealing, and to make full disclosure, were breached).

Monier v. Boral Lifetile, Inc., C.A. No. 3117-VCN, 2008 WL 2168334 (May 13, 2008). Monier, Inc. (Monier) and Boral Lifetile, Inc. (Boral) each owned 50% interests in a Delaware LLC that was managed by a management committee consisting of three representatives of each member. Monier sought a declaratory judgment determining the percentage of net income that must be distributed under the LLC operating agreement, and Boral sought dismissal of Monier's claim. The operating agreement specified that 50% of the net income would be distributed each year unless the management committee approved a greater or lesser distribution without any dissenting vote. In 2000, the management committee adjusted the distribution rate to 100% of the audited net profits, and the parties disputed whether this was a change that was intended to be in effect on an ongoing basis for the indefinite future. Monier argued that making the change on an ongoing basis was a valid exercise of the management committee's authority under the operating agreement or, alternatively, constituted an amendment of the operating agreement. Boral argued that Monier's construction demonstrated a violation of the management committee's fiduciary obligations as an impermissible abdication of the committee's duty to manage. The court concluded that Boral could not demonstrate that the mere setting of the distribution rate at 100% until the management committee unanimously determined otherwise constituted an abdication and breach of fiduciary duty.

Fisk Ventures, LLC v. Segal, Civil Action No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008). Disagreements between the members of two classes of membership interest in a Delaware LLC led to a deadlock, and one of the Class B members filed a petition for dissolution. Segal, a Class A member who was the LLC's founding member, president, and sole officer, filed counterclaims and third-party claims against the Class B members. Johnson, a Class B member, filed a motion to dismiss Segal's claims against him for lack of personal jurisdiction, and the other Class B members filed a motion to dismiss Segal's counterclaims and third-party claims for failure to state a claim. The court granted Johnson's motion to dismiss for lack of personal jurisdiction as well as the motion of the other Class B members to dismiss Segal's claims for failure to state a claim. The court dismissed Segal's breach of contract claim because it was based on breaches of duties not found in the LLC agreement. The court stated that the LLC agreement in no way obligated one class of members to acquiesce to the wishes of the other simply because the other believed its approach to be superior or in the best interests of the LLC. The LLC agreement contained provisions limiting the duties of members except as expressly set forth in the agreement and waiving liability absent gross negligence, fraud, or intentional misconduct. Segal argued that this provision established a duty to act without gross negligence, fraud, or intentional misconduct, but the court stated that the provision did not create a code of conduct resulting in liability for any damage caused by gross negligence, willful misconduct, or a knowing violation of law. The court stated that Segal's arguments regarding other provisions of the agreement were "similarly tortured" and the court "decline[d] to follow Segal's invitation to turn an expressly exculpatory provision into an all encompassing and seemingly boundless standard of conduct." Further, even if the agreement did somehow create a code of conduct, the court stated that Segal failed to allege facts sufficient to support an inference that the members acted with gross negligence, willful misconduct, bad faith, or in knowing violation of the law. The court also dismissed Segal's claim that the Class B members breached the implied covenant of good faith and fair dealing by blocking financing opportunities presented by Segal. The agreement expressly provided for the vote required to approve financing, and the court stated that mere exercise of one's contractual rights, without more, cannot constitute a breach of the implied covenant of good faith and fair dealing. The court dismissed Segal's breach of fiduciary duty claims as well. Segal relied upon the same provisions in the LLC agreement for his breach of fiduciary duty claims that he relied upon with respect to his breach of contract claims. The court stated that the agreement greatly restricted and even eliminated fiduciary duties as permitted by the Delaware LLC statute, but, even assuming the validity of Segal's argument that there remained a duty not to act in bad faith or with gross negligence, he failed to allege facts to support such a breach of duty.

Swartz v. Deutsche Bank, No. C03-1252MJP, 2008 WL 1968948 (W.D. Wash. May 2, 2008). The court discussed circumstances under which fiduciary relationships arise under Washington law and rejected the argument that a financial advisor/managing member of a Delaware LLC was not a fiduciary of an investing member because they dealt at arm's length. The court stated that representations in the LLC agreement that management would be vested solely in the managing member suggested more than an arm's length relationship and that concealment of material facts gave rise to fiduciary-like duties. The court concluded that the plaintiff sufficiently alleged the elements of a breach of fiduciary duty claim notwithstanding a provision of the LLC agreement that provided no member shall be a fiduciary of the other members and that each member waived any claim for breach of fiduciary obligations to the fullest extent permitted by law. The court noted that that Delaware law does not allow limitation or elimination of liability for a bad faith violation of the implied contractual covenant of good faith and fair dealing and that it is unclear under Delaware law whether provisions seeking to eliminate all fiduciary duties are valid when a member manages the entity in an illegal fashion. The court stated that the defendants would not be shielded by the disclaimer of a fiduciary relationship in the LLC agreement with respect to the plaintiff's allegations of bad faith in advancing an illegal tax shelter scheme and misrepresenting several functions of the scheme.

Utzler v. Braca, No. FBTCV065003257S, 2008 WL 2068200 (Conn. Super. April 25, 2008). The plaintiff, an investor in a real estate LLC sought to pierce the veil of the LLC and hold the individual who managed the LLC liable for breach of the plaintiff's contract with the LLC. The court, after a lengthy discussion of the manner in which the individual defendant operated the LLCs formed for his real estate development activities and estate planning purposes, concluded that the plaintiff established that the LLCs were the alter egos of the defendant under the instrumentality and identity theories. The court also concluded that there was a fiduciary relationship between the plaintiff and the individual defendant based on the efforts the defendant made to induce the plaintiff to trust him and invest his funds in a venture over which the defendant had complete control. The defendant failed to meet his burden of showing that he fairly dealt with the plaintiff. The defendant breached his duty by using funds provided by the plaintiff and the lender for purposes other than the project, such as personal expenses and expenses related to other properties, by subjecting the project property to a third mortgage to secure a loan on other properties, and by hiring the real estate agency at which his son worked to list the project property. The court held that exceeding the construction budget for the property did not rise to the level of a breach of fiduciary duty. The court also rejected the plaintiff's claim against the individual defendant for breach of the implied covenant of good faith and fair dealing because the agreement under which the plaintiff invested was between the plaintiff and the defendant's LLC, and the individual defendant thus did not owe the plaintiff a duty of good faith under the agreement.

Delgadillo v. White, No. 1 CA-CV 07-0042, 2008 WL 4095494 (Ariz. App. April 22, 2008). Delgadillo and White formed various real estate investment LLCs. The LLCs were managed by Delgadillo, White, and Cole. Delgadillo and a third party who was a long-time client of White's both sought to purchase property from one of the LLCs, and the members voted to accept the offer of the third party. The court held that Delgadillo was entitled to bring an individual action against White and Cole based upon their alleged breach of fiduciary duty because his complaint stemmed not only from a loss of value to the LLC for the alleged failure to obtain the maximum value of the property, but also for Delgadillo's lost opportunity to purchase the property. Regarding the breach of fiduciary duty claim, the court stated that it was aware of no authority to support imposing a fiduciary duty on White and Cole to Delgadillo as a potential purchaser of an asset in an arm's length transaction. The court assumed that White and Cole owed a fiduciary duty to Delgadillo as managers of the LLC for purposes of the decision, noting that the private placement memorandum and operating agreement of the LLC contemplated that managers owe members fiduciary duties. The court also stated that the operating agreement afforded Delgadillo inspection and voting rights and permitted him to transact business with the LLC, subject to applicable law and any contrary provision in the operating agreement. The court stated that it was "thus clear that a member-to-member duty existed." To analyze whether the duties were breached, the court turned to authorities on duties owed in the context of a corporation, "an entity analogous to a limited liability company;" however, the court concluded that none of these authorities gave Delgadillo a right to purchase a company asset or receive assistance in purchasing such an asset. A majority of the LLC's members voted to accept the other party's offer, and Delgadillo's counsel admitted at oral argument that the defendants had no obligation to favor Delgadillo over the other party. Delgadillo asserted, however, that a letter to investors misled them about the other party's offer and that Cole and White failed to achieve the best value for the LLC's members. The court reviewed the communications received by the members and concluded there was no evidence any investor was actually misled. Regarding the argument that White and Cole failed to achieve the best value for the LLC's members, the court stated that Delgadillo's reliance on the Delaware case of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* was misplaced because the instant case involved the sale of a corporate asset rather than any fundamental change of control of the LLC. Further, the court stated that *Revlon* is irrelevant and imposes no heightened duties when the majority shareholders are making the decisions. The court stated that it had no evidence to conclude that the price was not a fair price at the time of the sale and that it would not second guess the decision of the members on appeal where they used their judgment to determine which offer would best serve the LLC. Delgadillo argued that White and Cole failed to adequately investigate his offer, but Delgadillo failed to specify what information was needed and what material information was not disclosed. The court stated that it failed to see what material information was lacking given that the LLC had been negotiating the sale with the purchaser for approximately three years, thus affording the members plenty of time to investigate, and the members received a copy of Delgadillo's offer and were familiar with him based on his management of the LLC. Finally, the court held that the members effectively ratified the sale of the LLC's property even if White and Cole owed Delgadillo a fiduciary duty and breached it. Delgadillo argued that the ratification failed because the members were not fully informed. The court held that there was no evidence that the members were deprived of material information, but the court also stated that Delgadillo, as a manager, was equally to blame if there was a failure to adequately inform the members. The court reversed the trial court's award of attorney's fees to White and Cole because the court concluded that the member-to-member duty would have existed notwithstanding the operating agreement and the claim thus did not arise out of a contract.

Regions Bank v. Regional Property Development Corporation, No. 07 CVS 12469, 2008 WL 1836657 (N.C. Super. April 21, 2008). An LLC member asserted claims against the LLC's lender for breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty in connection with the lender's sale of the LLC's note to the three other members of the LLC. The lender argued that there is no cause of action under North Carolina law for aiding and abetting breach of fiduciary duty and that the complaining member did not have standing to assert the claims because they did not involve a direct injury or special duty and could only be brought by the LLC. The court concluded that there was no binding precedent directly addressing whether there exists a cause of action for aiding and abetting breach of fiduciary duty, but there was some persuasive authority suggesting that such a claim exists. Therefore, the court declined to dismiss the case on that ground. The court concluded, however, that the member did not have standing to bring the claim. The court stated that the rules regarding shareholder derivative actions apply to members of an LLC and that the member could not bring an individual cause of action for wrongs or injuries to the LLC. The LLC was composed of four members, and the member who asserted the claim did not allege that it held a minority interest; thus, the court said it could not be said that the other members owed a special duty arising solely from their control of the LLC. The complaining member alleged that the other members, with the assistance of the lender, leveraged their control over the loan to force the complaining member to agree to allow the LLC to make distributions to the other members that were not otherwise due, but a claim that distributions were unlawfully made is just another way of saying that assets were wrongfully diverted, which is a claim that would belong to the LLC and not a member.

Poppert v. Dicke, 747 N.W.2d 629 (Neb. 2008). A minority shareholder of a dissolved corporation sued the majority shareholder and an LLC owned by the majority shareholder for breach of the duties of loyalty, care, and good faith and fair dealing. The trial court dismissed the breach of duty causes of action on the basis that no such duties existed. The trial court reasoned that there was no express fiduciary duty relating to the conduct of LLC members and managers under the Nebraska LLC statute. (It is not clear whether the court was referring to duties owed to the LLC and other members or to duties owed to a third party.) The trial court certified its dismissal, and the plaintiff appealed. The plaintiff argued that the trial court erred in finding that there was no fiduciary duty imposed upon members and managers of an LLC. The supreme court concluded that it lacked jurisdiction over the appeal because the trial court did not have authority to certify the judgment as final. The order disposed of three theories of recovery for a particular cause of action but did not dispose of other theories of recovery for the same cause of action. The supreme court thus dismissed the appeal.

In re House of Lloyd Sales LLC (Stanton v. SGC Partners I, LLC), Bankruptcy No. 02-40208, Adversary Nos. 05-4014, 06-4283, 2008 WL 957663 (Bankr. W.D. Mo. April 8, 2008). In this bankruptcy of the House of Lloyd companies, which were organized as LLCs, the trustee sued individuals and entities connected with an investor who purchased the ailing House of Lloyd business from the founding Lloyd family. The trustee alleged that the defendants breached their fiduciary duties to the LLCs by either choosing to go into the third party e-fulfillment business, not waiting until the existing direct sales business had been turned around to do so, or not spending enough to make the new business successful. The complaint alleged "willful and wanton and/or grossly negligent conduct" in failing to conduct a reasonable investigation of the new commerce venture and in diverting millions of dollars to the venture at a time when such funds were needed in the LLC responsible for running the direct sales side of the House of Lloyd business. The underlying theme of the trustee's case was that the defendants acted with reckless indifference to the fate of the direct sales business, that they intended to use its warehouse, equipment, and personnel to build an e-commerce business, and that they let the sales business die because of their real interest in the new ventures. The court undertook a lengthy review of the summary judgment evidence and concluded the defendants complied with their fiduciary duties. The court relied upon the Delaware business judgment rule, which it found protected the defendants, and the court thus found it unnecessary to reach other defenses raised by the defendants. The other defenses included the Delaware statutory protection of managers and members who rely in good faith on professionals or experts, an exculpatory clause in the LLC operating agreements, and an absence of fiduciary duties to unsecured creditors prior to insolvency. The court discussed the duty of care under Delaware law and concluded that the defendants' decision to pursue the e-fulfillment business, which was the culmination of months of due diligence, resulted from a rational, good faith process. The court also rejected the trustee's argument that the defendants were not protected by the business judgment rule because they breached their duty of loyalty by having conflicting interests, acting in bad faith, and collecting management fees. With respect to the conflict of interest claim, the court found no evidence that the defendants used their control to act in the best interests of someone other than the House of Lloyd companies. The court found no conflict between the interests of the direct sales business of House of Lloyd and the new e-fulfillment business, and the court noted that it was illogical to assume that the defendants deliberately ignored the interests of the direct sales business, the success of which was crucial to the defendants' investment in House of Lloyd. The court likewise rejected the trustee's argument that the defendants acted in bad faith in authorizing or terminating the e-fulfillment business. With respect to the management fees, which were not specifically approved by the Board, but were paid in the regular course by the finance arm of the House of Lloyd companies, the court found that payment of the fees did not rise to bad faith or breach of fiduciary duty given that the defendants did not authorize or even realize that improper payments were being made and immediately caused them to stop once learning about them. Assuming the fees should not have been paid, the court found that there was insufficient evidence of an "utter failure" to implement controls or monitor for an oversight claim, and insufficient evidence of bad faith in failing to seek recovery of fees. The court also found that, even assuming the decision to launch the e-fulfillment business was a breach of fiduciary duty, the trustee failed to show it was the cause of the demise of the House of Lloyd business. In sum, the court stated that "Delaware law encourages entrepreneurs to start new companies, and to try to save existing ones, by limiting the liability of those in control of such companies," and the mere fact that a strategy turns out poorly does not itself create an inference that fiduciary duties were breached. The trustee failed to show that the process employed by the investors was not rational or employed in a good faith effort to advance corporate interests and failed to show that the challenged action caused the demise of the House of Lloyd business; therefore, the court granted the defendants motion for summary judgment.

Cascade Falls, L.L.C. v. Henning, 143 Wash.App. 1056, 2008 WL 934074 (Wash. App. April 8, 2008). Two brothers, Scott and Greg Henning, formed a Washington LLC. A few years later, they discussed going their separate ways, and Greg withdrew. After operating the LLC as its sole member for several years, Scott learned of irregular business and accounting activities by Greg. Unbeknownst to Scott, Greg had continued to operate using the LLC's name and one of its bank accounts. Scott filed this lawsuit, alleging breach of fiduciary duties, fraud, and conversion of the LLC's money by Greg. The court concluded that the trial court did not err in applying a discovery rule to the statute of limitations regarding the breach of fiduciary duty, fraud, and conversion claims. Greg also complained that the trial court erred in allowing evidence of damages in support of Scott's fraud and conversion claims because Scott did not file a derivative action; however, the court found the contentions did not merit review because Greg did not properly preserve and develop his argument. Greg argued that the trial court erred in admitting evidence supporting Scott's request for an account from Greg of the LLC's assets when Scott's complaint did not state a claim for an accounting. The court stated that the requisites for a cause of action for an accounting are (1) a fiduciary relation between the parties or the account is so complicated that it cannot be conveniently taken in an action at law, and (2) the plaintiff has demanded an accounting and the defendant has refused to render it. Scott's complaint stated claims against Greg for breach of fiduciary duty, fraud, and conversion; there was no claim for a general accounting. Greg cited no authority that a suit for an accounting is a prerequisite for collection of damages for an LLC member's conversion of funds based upon claims of fiduciary duty or fraud. Scott did include in his request for judgment and relief that Greg be directed to account for the LLC's finances for a period of time; thus, there was accounting evidence admitted at trial to prove the claims of Scott and the LLC. Greg failed to object to the admission of any particular accounting evidence, and the court refused to further review his contentions in this regard.

In re Kilroy (Guerriero v. Kilroy), Bankruptcy No. 05-90083-H4-7, Adversary No. 06-3320, 2008 WL 780692 (Bankr. S.D. Tex. March 24, 2008). The court concluded that the debtor did not owe the plaintiff a fiduciary duty for purposes of the exception to discharge for a debt based on fraud or defalcation in a fiduciary capacity. The debtor was the majority member and manager of an LLC that served as the general partner for a limited partnership. In a prior opinion, the bankruptcy court found that the debtor exercised sufficient control over the LLC and limited partnership to establish a fiduciary relationship with the plaintiff, who was the minority member of the LLC and limited partner of the limited partnership. However, the court stated that it did not have the partnership agreement before it at the time of the prior decision, and the court found that the terms of the partnership agreement eliminated any fiduciary relationship. The partnership agreement provided: "[T]he General Partner [i.e., the LLC controlled by the debtor] shall conduct the affairs of the Partnership in good faith toward the best interest of the Partnership. The General Partner, however, is liable for errors and omissions in performing its duties with respect to the Partnership only in the case of bad faith, gross negligence, or breach of the provisions of this Agreement, but not otherwise." Both the LLC and limited partnership were Delaware entities, and the Delaware Revised Uniform Limited Partnership Act permits partners to contract out of common law fiduciary duties in the partnership agreement. Under the Delaware limited partnership statute, the partners may eliminate fiduciary duties but may not eliminate the implied contractual covenant of good faith and fair dealing. The court concluded that the partnership agreement in this case reduced the general partner's duties from a fiduciary duty to merely a duty of good faith. The plaintiff argued that a fiduciary duty existed because the debtor controlled the LLC which was the general partner, and the debtor was thus essentially acting as the general partner. However, the court stated that, if the partnership agreement limited the LLC general partner's duties to that of merely good faith, a higher standard could not be imposed on the debtor as the controlling member of the LLC.

Madelone v. Whitten, 18 Misc.3d 1131, No. 9929-07, 2008 WL 399175 (N.Y. Sup. 2008). Madelone and Whitten, along with two other individuals, were members of an LLC, and Whitten was the manager. Madelone claimed that Whitten refused to acknowledge the applicability of involuntary transfer provisions in the operating agreement that were triggered when Whitten filed for divorce and that Whitten continued to hold himself out as manager of the LLC after being removed. Madelone also alleged that Whitten had engaged in conduct threatening the LLC's credit and financial viability, that Whitten had taken steps to drive down the value of the business in connection with his pending divorce action, and that Madelone had been "frozen out" of the LLC's day-to-day business. Thus, the petition also raised claims of breach of fiduciary duty and waste. The other members resisted Madelone's efforts to enforce the involuntary transfer provisions, arguing that the conduct of the parties and the terms of the agreement itself demonstrated that the provision was not intended to be self-executing. The court concluded that Madelone had established a likelihood of success on his claim to enforce the involuntary transfer provisions and that he had shown the prospect of irreparable injury since the other members had indicated their intent to terminate Madelone as a member and employee absent injunctive relief and Madelone would be entitled to almost 43% of the LLC's voting rights if the court ultimately agreed that the involuntary transfer provisions were enforceable. The court concluded that this shift in governance and control constituted irreparable harm. Madelone also contended that he had demonstrated a likelihood of success with respect to causes of action asserted derivatively on behalf of the LLC for breach of fiduciary duty and waste as well as a claim the other members breached a fiduciary duty owed to Madelone directly by freezing him out of LLC meetings and affairs. The court concluded that there was not a sufficient likelihood of success to warrant injunctive relief on the derivative claims. The court noted that a significant number of the allegations involved the business judgment of the LLC's management, which are issues that are not generally amenable to judicial review so long as they are within the scope of management's delegated authority and there is no showing of bad faith, self-dealing, fraud or other misconduct.

Bank Hapoalim (Switzerland) Ltd. v. XG Technology, Inc., No. 8:07-cv-170-T-23MSS, 2008 WL 126583 (M.D. Fla. 2008). The plaintiff's breach of fiduciary duty suit against individuals who were managers of a Delaware LLC that converted into a corporation failed because the plaintiff, an assignee of securities in the LLC, did not establish that it was admitted as a member of the LLC. The plaintiff also failed to establish that it became a shareholder in the corporation as a result of the conversion and failed to overcome the presumption that the individual defendants were protected by the business judgment rule as directors and officers of the corporation; therefore, the breach of fiduciary duty claims against the individuals as officers and directors failed as well. The plaintiff was a bank that was assigned units in the LLC by a member of the LLC prior to the conversion. At the request of the member, the LLC issued a certificate stating that the bank was the owner of four million units. A few months later, the LLC informed the bank that a pledge existed against the certificate and that the securities were null and void due to the member's default under the pledge agreement. After the conversion, the corporation went public. The documents relating to the conversion did not account for the bank's securities or list the bank as a shareholder of the corporation. The bank asserted that the managers of the LLC owed it a duty of loyalty and care as "legal title holders of the securities" and that the managers breached their duties by failing to safeguard the membership interest of the bank, failing to notify the bank of the conversion, failing to account for the securities in the public offering, and refusing to convert the securities of the LLC. The court stated that the manager of a Delaware LLC owes a fiduciary duty of loyalty and care only to the company and its members. Thus, absent an allegation that the bank was a member or a party to or otherwise bound by the LLC's agreement, the court concluded the breach of fiduciary duty claim based on the defendants' status as managers could not stand. Because the complaint did not even mention the LLC agreement, the court stated that the key issue was whether the complaint sufficiently alleged that the bank, an assignee of a member of the LLC, assumed member status. The court pointed out that the Delaware LLC statute provides that an assignee may become a member with the approval of all the members other than the assigning member or in compliance with the LLC agreement. The court also quoted the provision of the Delaware LLC statute that provides that an assignee becomes a member when the person's permitted admission is reflected in the records of the LLC. Since the complaint did not allege approval by the members, compliance with the agreement, or reflection of the bank's admission as a member in the LLC records, the complaint failed to allege that the defendants owed the bank a fiduciary duty.

In re Derivium Capital, LLC (Campbell v. Cathcart), 380 B.R. 407 (Bankr. D. S.C. 2006). Two members of a South Carolina LLC sought to dismiss claims against them arising out of their alleged misappropriation of funds of the LLC. The court held that the LLC's bankruptcy trustee had standing to assert a claim for wrongful distributions under the South Carolina LLC statute as well as claims based upon fraudulent or wrongful conduct. The court rejected the members' argument that the defenses of *in pari delicto* and the business judgment rule barred the trustee's actions because they were not apparent from the face of the complaint and involved factual determinations. The court stated that the business judgment rule immunizes management in transactions where there is a reasonable basis to indicate the transaction was undertaken in good faith, but does not apply in cases of self-dealing, fraud, or other unconscionable conduct. The complaint alleged that the members acted fraudulently or otherwise engaged in self-dealing, and such allegations, if true, precluded the application of the defenses of *in parti delicto* and the business judgment rule. The court also rejected the members' argument that the trustee's claim for civil conspiracy was barred by the doctrine of intracorporate conspiracy. Under this doctrine, the agents of a corporation cannot be liable for conspiring with the corporation, but the court stated that South Carolina law recognizes that agents may be liable for conspiracy if they conspire with one another. The court granted the members' motion to dismiss fraudulent transfer claims based on actual fraud due to the trustee's failure to plead these claims with sufficient specificity, but granted the trustee leave to amend. The court found that the trustee had met its pleading burden with respect to fraudulent transfer claims based on constructive fraud. The court also found that the factual allegations of conduct constituting fraud, bad faith, and abuse of confidence or breach of fiduciary duty supported a claim for constructive trust. The members sought dismissal of a claim based on deepening insolvency, arguing that such a claim is not recognized under South Carolina law and was duplicative of other claims. The court said it had not identified a case in its district recognizing a deepening insolvency cause of action, but concluded that the fact that there had not been a reported case in that district was not grounds alone to dismiss the claim since it is a recognized cause of action in some jurisdictions and is receiving growing acceptance in the federal judiciary and especially "considering the heightened fiduciary duty placed upon shareholders of a corporation once the corporation is insolvent." The court did not view the claim as duplicative of other claims because the deepening insolvency claim related to damages sustained by the LLC as a result of the members' alleged wrongful prolonging of the corporate life of the LLC and incurrence of additional liabilities by the LLC, whereas the breach of fiduciary duty claim appeared primarily aimed at recovering distributions to the members that caused insolvency. The court addressed several other claims including claims for equitable subordination and equitable consolidation. The court found that the trustee had adequately alleged both claims.

K.C. Properties of N.W. Arkansas, Inc. v. Lowell Investment Partners, LLC,__ S.W.3d __, 2008 WL 659825 (Ark. 2008). Ozark Mountain Water Park, LLC ("Water Park LLC") was formed for the purpose of operating a water park on land owned by Pinnacle Hills Realty, LLC ("Realty LLC"). Pinnacle Management Services, LLC ("Management LLC") was the manager of Water Park LLC, and the members of Realty LLC and Management LLC were three LLCs owned by the three individuals who were the managers of Management LLC. Realty LLC sold the land to another party, and the 49% member of Water Park LLC sued the 51% member, as well as Management LLC, the individual managers of Management LLC, and the members of Realty LLC and Management LLC (i.e., the LLCs owned by the individual managers of Management LLC). The trial court granted summary judgment for the defendants. The supreme court first addressed the application of the provision of the Arkansas LLC statute protecting members and managers from liability for debts and liabilities of the LLC and the provision limiting liability of a member or manager to the LLC or other members for acts or omissions not constituting gross negligence or willful misconduct. The court held that the provision limiting liability of members and managers for debts and liabilities of the LLC was intended to prohibit suits against a member by a third party, and the court held that the only parties the 49% member of Water Park LLC could sue for gross negligence or willful misconduct were the 51% member and the manager of Water Park LLC. The court pointed out that it was Realty LLC, not the 51% member or manager of Water Park LLC, that sold the land to another party, and the court concluded that neither the 51% member nor the manager acted or failed to act in a manner constituting gross negligence or willful misconduct. The court next analyzed arguments based on agency law and the provisions of the LLC statute dealing with agency authority. The plaintiffs argued that Management LLC, through the acts of its managers and members (who were also the members of Realty LLC), caused Realty LLC to sell the property intended for the water park, and that the actions of Management LLC were imputed to the 51% member of Water Park LLC by and through their common ownership and management. The court pointed out that the individuals and their LLCs were not parties to the Water Park LLC operating agreement and that the individuals' LLCs were acting as members of Realty LLC when the property was sold to another party. The court stated that Realty had no fiduciary duty to the plaintiffs, and the court found no basis to hold the defendants liable for breach of the operating agreement or breach of fiduciary duties.

Weiner v. Weiner, No. 1:06-CV-642, 2008 WL 746960 (W.D. Mich. March 18, 2008). The minority owner of numerous single purpose real estate entities adequately alleged a direct action for minority oppression against her brother, the majority owner of the entities. The entities included a corporation and numerous limited partnerships and LLCs. The court relied upon provisions of the Michigan LLC and corporate statutes expressly providing for minority oppression claims and noted that limited partners are free to pursue their own direct claims although the limited partnership statute does not address minority oppression claims. That the majority owner managed the jointly owned entities in accordance with the terms of the agreements governing the joint entities did not end the court's inquiry as to oppressive conduct. The majority owner's conduct was governed by his role as a fiduciary as well as the entity agreements. Evidence of interest-free loans by the jointly owned entities to entities owned by the majority member along with evidence of increases in management fees and lack of documentation to support the accrued management and leasing fees was sufficient to create a fact issue regarding self-dealing and resulting damages. The court stated that the evidence of interest-free loans to the majority member's entities gave rise to a fact issue as to whether the minority member suffered an injury separate from the majority member's injury. The court rejected the defendant's argument that the minority member's receipt of ownership interests in the entities as gifts, many from the defendant himself, affected her rights or altered his fiduciary obligations. The court denied the plaintiff's request for an accounting without prejudice pending further discovery. The court urged the parties to find a resolution in order to avoid costly proceedings with a special master. The court commented that the business could no longer continue to be managed as it had been in the past and encouraged the parties to be creative in finding a solution to eliminate the conflicts of interest inherent in the current structure.

3 Point Holdings, L.L.C. v. Gulf South Solutions, L.L.C., Civil Action No. 06-10902, 2008 WL 695379 (E.D. La. March 13, 2008) (granting unopposed motion for summary judgment by creditors of LLC who asserted claims against LLC's members and managers based on "expanded fiduciary duty" owed to creditors once LLC was within "zone of insolvency").

Internal Medicine Alliance, LLC v. Budell, 659 S.E.2d 668 (Ga. App. 2008). Two doctors, Verbitsky and Budell, formed a manager-managed LLC and agreed that each was a 50% member, that they would share equally in profits and losses, and that they would jointly manage the LLC. After a falling out, Budell agreed to leave and form his own practice. The members agreed that Budell was entitled to a redemption of his interest but were unable to agree on a buy out price for Budell's interest. In litigation that ensued, the trial court awarded Budell the fair value of his interest and found that Verbitsky breached her fiduciary duty to the LLC and Budell after Budell's departure. The trial court found that Verbitsky's failure to repay Budell his capital contribution did not support a conversion claim. Both parties appealed. With respect to the breach of fiduciary duty claim against Verbitsky, the court stated that LLC managers have a fiduciary duty to act with the utmost good faith and loyalty. Verbitsky argued that she did not exercise management over the LLC and that, to the extent she did, it was agreed that Verbitsky and Budell would handle his or her own accounts receivable. Verbitsky argued that another individual who was not a member was the manager of the LLC, but the court concluded he was not a manager because the Georgia statute requires a non-member manager to be designated, appointed, or elected by more than one half of the members, and there was no evidence that the individual was ever chosen as a manager with the approval of both Verbitsky and Budell. The court concluded that after Budell's departure he became a passive member and Verbitsky became the sole manager with a fiduciary duty to manage the LLC's affairs in the manner she believed in good faith to be in the best interests of the LLC. At the time Budell left he had generated over $40,000 in receivables owed the LLC, but only a small amount was collected from insurance carriers after his departure. The evidence showed Verbitsky did nothing to collect these amounts and failed to provide the billing clerk guidance when asked what to do about Budell's outstanding bills. In contrast, Verbitsky hired an additional billing clerk to assist in collecting her bills. Thus, the court of appeals concluded that the trial court was justified in finding Verbitsky failed to act in the best interest of the LLC by failing to take any steps to have Budell's bills processed and collected after his departure, and given the level of hostility and bad blood, that Verbitsky's decision was made in bad faith to negatively impact Budell's ownership interest. The court of appeals found there was insufficient evidence to support the trial court's finding that Verbitsky was liable for conversion based on her failure to reimburse Budell for his capital contribution while reimbursing herself for hers. The court stated that conversion is not a viable claim when there is nothing more than a failure by a defendant to pay money owed the plaintiff. Budell did not allege that his capital contribution was entrusted to Verbitsky for a specific purpose and then misused by her; therefore, Budell's claim was nothing more than a claim for money allegedly owed to him and could not serve as the basis for a claim of conversion.

All Metals Industries, Inc. v. TD Banknorth, No. CV075002464S, 2008 WL 731954 (Conn. Super. Feb. 27, 2008) (striking creditor's breach of fiduciary duty claim against LLC members because creditor of insolvent corporation cannot assert direct claim against corporation's directors, LLC members and corporate shareholders are not liable for entity's obligations, and there is no statutory or case law imposing on members, shareholders, officers or directors of corporation or LLC any fiduciary duty to creditors).

Peregrine Emerging CTA Fund, LLC v. Tradersource, Inc., No. 07 C 5528, 2008 WL 474369 (N.D. Ill. Feb. 19, 2008). An LLC that operated a commodities fund sued its manager, which was a corporation, and the manager's president for breach of contract, negligence, and breach of fiduciary duty in connection with the manager's alleged failure to monitor and inform the LLC of increased risk parameters caused by actions taken by one of the trading advisors the manager was obligated to monitor. The relationship between the manager and the LLC was governed by an operating agreement containing an exculpatory clause applicable to managers and manager associates. The operating agreement provided that it was to be governed by and construed in accordance with the law of Delaware without regard to Delaware conflict of law provisions, but the LLC argued that Illinois substantive law should be applied to each cause of action and should resolve issues such as the definition of "gross negligence" and whether the LLC had a cause of action for breach of fiduciary duty. The LLC acknowledged that it was formed under Delaware law but stated that it was a resident of Illinois and that all of the alleged conduct and losses occurred in Illinois. The court applied Illinois choice of law rules and concluded that Delaware law governed all of the issues in the case. The LLC did not show that applying Delaware law to interpretation of the operating agreement's exculpatory clause would violate a fundamental Illinois policy or that Illinois had a materially greater interest in the litigation than Delaware. The court rejected the LLC's argument that a choice of forum clause selecting Illinois constituted an agreement that Illinois substantive law should apply to the contract. The court concluded that the negligence claims were governed by Delaware law as well because they were specifically related to the contractual relationship and, in such cases, Illinois courts place great weight on the location where the contractual relationship is centered. In this case, the parties centered their relationship in Delaware, and Delaware law applied to the negligence claims arising out of the contractual relationship since Delaware had the greatest interest in the contractual relationship. With respect to the fiduciary duty claims, the court stated that Delaware law applied since such claims are governed by the law of the "state of incorporation," and the LLC was "incorporated" under Delaware law. The court dismissed the LLC's negligence and breach of fiduciary duty claims against the manager's president based on a provision in the operating agreement shielding a "manager associate" (a defined term encompassing the manager's president) from personal liability for any act or omission in the performance of the manager's duties to the LLC. The LLC alleged that the defendants failed to monitor and inform the LLC of increased risk parameters caused by actions of a trading advisor, and there was nothing to suggest the manager's president engaged in any activity outside the scope of the manager's obligations under the contract. The court rejected the LLC's arguments that limitations on the scope of indemnifiable conduct evinced an intent to hold manager associates liable under some circumstances. The court stated that the manager associate exculpatory provision trumped the indemnification clause and was intended to exculpate manager associates for all acts within the manager's duty to the LLC because the exculpatory clause was applicable "notwithstanding any other provision" of the operating agreement. Further, the court held that the negligence and breach of fiduciary duty claims should be dismissed because the allegations of wrongdoing were all related to the operating agreement and were subsumed by the breach of contract claim under Delaware law. Finally, the court held that all claims must be dismissed based on the general exculpatory provision in the operating agreement. Under that provision, a manager could only be held liable for conduct amounting to criminal wrongdoing, fraud, gross negligence, or intentional misconduct. The court found that the LLC's allegations of failure to monitor and inform the LLC did not amount to allegations of gross negligence. The court stated that none of the facts or conclusions alleged by the LLC came close to an allegation of "gross negligence" as defined under Delaware law, i.e., that the defendants were recklessly uninformed or acted outside the bounds of reason.

Kira Inc. v. All Star Maintenance Inc., 267 Fed.Appx. 352, 2008 WL 510508 (5^{th} Cir. 2008). A minority member of a Nevada LLC asserted direct and derivative claims against the other two members of the LLC. The plaintiff's claims were based on the alleged improper use by the defendant members of the LLC's name and the payment of management fees to affiliates of the defendants. The court of appeals agreed with the district court that there was insufficient evidence to create a jury question on the service mark claim. The evidence showed the operating agreement expressly permitted all three members to compete with each other and with the LLC, even to the exclusion of the LLC from business the LLC was capable of performing. The operating agreement did not reserve the name to the LLC or otherwise prohibit its use. The evidence also showed that the chairman of one of the defendant members had been using some form of the name for many years prior to the formation of the LLC. Thus, the district court correctly determined that the plaintiff had failed to meet its threshold burden of showing the LLC had a protectible interest in the service mark. The court of appeals also rejected the plaintiff's argument that the district court should have entered judgment in its favor in connection with payment of management fees. The plaintiff argued that the district court should have entered judgment rescinding the contracts and requiring disgorgement of the fees to the LLC based on the jury's finding that the defendant members breached the operating agreement and their duties of good faith and fair dealing. The court of appeals rejected this argument because the jury found that the plaintiff suffered no harm. The jury also found the defendants did not breach any fiduciary duties. Under the controlling Nevada law, rescission is an equitable remedy that seeks to place the parties in the same position they occupied before the contract. A judgment returning the fees would have effectively ignored the jury's determination that the plaintiff suffered no harm. The court stated that the jury's verdict was understandable given the evidence that necessary services were performed at a rate that was substantially below market rate. Thus, the plaintiff's argument that it was entitled to equitable relief was without merit.

In re Wheelus (Tarpon Point, LLC v. Wheelus), Bankruptcy No. 07-30114-JDW, Adversary No. 07-3022, 2008 WL 372470 (Bankr. M.D. Ga. Feb. 11, 2008) (concluding LLC members/managers do not occupy fiduciary capacity under Georgia LLC statute for purposes of dischargeability exception for defalcation in fiduciary capacity).

V. Inspection and Access to Information

Destito v. Hazen, 147 Wash.App. 1025, 2008 WL 4902634 (Wash. App. Div. 1 Nov. 17, 2008) (affirming trial court's decision that children or their father, as their designated agent, had right to inspect and copy LLC records of LLC established by children's mother where mother did not dispute that children were members of LLC and LLC was established as means of investing inherited funds received by children).

United States v. Ryerson, 545 F.3d 483 (7th Cir. 2008) (relying on partnership and LLC statutes conferring on partners and members access and inspection rights, and stating that ex-wife remained connected to ex-husband's residence through co-ownership of business where no evidence indicated that she quit her managerial role or sold her stake before police search, in holding that defendant's ex-wife had authority to consent to search of records kept in basement of house).

Maitland v. Int'l Registries, LLC, Civil Action No. 3669-CC, 2008 WL 2440521 (Del. Ch. June 6, 2008). The court denied the motion of the plaintiff, a member of an LLC, for commission requesting documents and deposition testimony from the outside auditor of the LLC. The court stated that the action at its core was an action for inspection of LLC books and records and that granting the motion for commission would effectively give the plaintiff member the relief he sought. The court stated that the plaintiff could not use the discovery process in a books and records case to gain access to the books and records ultimately at issue.

TravelCenters of America , LLC v. Brog, Civil Action No. 3516-CC, 2008 WL 868107 (Del. Ch. March 31, 2008) (dismissing claim or access to any and all books and records of Delaware LLC for failure to allege proper purpose (relying on corporate case law regarding burden to establish proper purpose for inspection) and concluding that, even assuming proper purpose had been pleaded, books and records inspection counterclaim should not be consolidated with expedited declaratory judgment action regarding validity of defendants' notice of intent to present business and nominate directors in view of bylaws advance notice provision).

W. Interpretation of Operating Agreement

Fuiaxis v. 111 Huron Street, LLC, 872 N.Y.S.2d 184 (N.Y. App. Div. 2d Dept. 2009) (enforcing capital call against LLC member to fund legal fees incurred by LLC in member's judicial dissolution action, finding that capital call complied with terms of LLC's operating agreement and that operating agreement was consistent with New York LLC statute which does not preclude LLC from using its funds to defend judicial dissolution action).

Ficus Investments, Inc. v. Private Capital Management, LLC, 872 N.Y.S.2d 93 (N.Y. App. 1st Dept 2009). The operating agreement of a Florida LLC contained an advancement of expenses provision that required the LLC to advance funds to pay for or reimburse expenses of a member, manager, or officer if such person delivered a written affirmation of the person's good faith belief that his or her conduct did not constitute certain types of wrongdoing that were not indemnifiable and a written undertaking to repay any advances if it was ultimately determined that the person was not entitled to indemnification. The indemnification provision of the operating agreement relieved the LLC of the obligation to indemnify a member, manager, or officer who "is adjudged liable to the Company or is subjected to injunctive relief in favor of the Company" for intentional misconduct or a knowing violation of law or for any transaction for which the individual received an unauthorized personal benefit. The action arose out of allegations that the LLC's CEO and other named defendants misappropriated millions of dollars in funds and assets of the LLC. During the course of the proceeding, the CEO sought reimbursement and advancement of his litigation fees and expenses. The trial court had already issued multiple temporary restraining orders and preliminary injunctions against the CEO, and the plaintiffs argued that the issue of advancement was academic if he would not be entitled to indemnification. The appellate court relied upon Delaware case law and concluded that the provision referring to injunctive relief pertained solely to indemnification and was separate and distinct from the advancement provision. Advancement was contingent only upon the person's submission of a written affirmation that he or she had not engaged in the specified misconduct and an undertaking to repay any funds disbursed. Two other individuals whose status as "officers" the plaintiffs contested, but who had been held out as officers of the LLC, were also entitled to advancement according to the court.

In re Heritage Organization, L.L.C. (Faulkner v. Korman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. Based on the provisions of the LLC operating agreement, the court granted summary judgment in favor of Kornman and Walker, who were officers of the managing member of the LLC as well as officers of the LLC, on the trustee's breach of fiduciary duty/gross negligence claims against them. The operating agreement contained a broad exculpation clause as follows:

> The Manager shall not be required to exercise any particular standard of care, nor shall he owe any fiduciary duties to the Company or the other Members. Such excluded duties include, by way of example, not limitation, any duty of care, duty of loyalty, duty of reasonableness, duty to exercise proper business judgment, duty to make business opportunities available to the company, and any other duty which is typically imposed upon corporate officers and directors, general partners or trustees. The Manager shall not be held personally liable for any harm to the Company or the other Members resulting from any acts or omissions attributed to him. Such acts or omissions may include, by way of example but not limitation, any act of negligence, gross negligence, recklessness, or intentional misconduct.

Walker and Kornman argued that they were protected by this clause as agents of the manager; however, the court found that there were fact issues as to the capacity in which Kornman and Walker acted (i.e., whether as officers of the LLC or as agents of the LLC's manager), and it therefore was not possible on the summary judgment record to conclude that they were protected by the exculpation clause applicable to the manager. The court thus proceeded to analyze other provisions of the operating agreement bearing on the duties imposed on the LLC's officers. The court reviewed various provisions of the operating agreement and concluded that, taken together, the operating agreement set up a duty delegation structure beginning with the LLC's manager. The operating agreement expressly eliminated the duties and liabilities of the manager, and the operating agreement expressly limited the duties of the officers of the LLC to those provided in the agreement. While the operating agreement conferred on the LLC's president the same duties granted to the manager, the court characterized that provision as "hollow" given the express exclusion of duties of the manager. The officers of the LLC other than the president had only those duties that were prescribed or delegated by the president or the manager, and there was no evidence in the summary judgment record regarding either the manager's grant of duties to the president or the president's or manager's delegation or prescription of duties to any other officer. Faced with an operating agreement that provided only for duties as delegated or prescribed by the manager or president, and no evidence of any delegation or prescription, the trustee argued that the officers owed common law fiduciary duties to the LLC. The court rejected this argument, noting that Delaware LLCs are creatures of contract and that the Delaware LLC statute allows the LLC agreement to expand, restrict, or eliminate any duties a person owes to the LLC. The court stated that the LLC agreement clearly contemplated that the LLC's officers owed only those duties that were either delegated or prescribed by the LLC's manager or president, and, absent any delegation or prescription evident in the summary judgment record, the trustee failed to demonstrate the existence of any fiduciary duties by Kornman or Walker.

Kahn v. Portnoy, Civil Action No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008). The plaintiff, a "shareholder" of a publicly traded Delaware LLC, brought a derivative action against the directors of the LLC alleging that the directors breached their fiduciary duties to the LLC by approving a transaction designed to benefit one of the directors and certain entities affiliated with the director. The directors moved to dismiss the action on the basis that the directors acted in accordance with their duties under the LLC agreement. The court found that there was more than one reasonable interpretation of the LLC agreement and denied the motion to dismiss because the court was not at liberty to choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). The LLC agreement provided that the duties of the directors would be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law unless otherwise specifically provided for in the LLC agreement. Section 7.5(a) of the LLC agreement modified the duties of directors of a Delaware corporation by providing that "[i]t shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence." Adopting a reasonable interpretation that was most favorable to the plaintiff, the court found that the sentence read in context could be interpreted to apply only to board decisions that involved a conflict of interest between a shareholder and the board or a shareholder and the LLC because the prior sentence of Section 7(a) specifically referred to such situations. The challenged transaction did not involve such a conflict, and, therefore, at least one reasonable interpretation of the provision did not alter the duty of loyalty in this case. Further, the court stated that the "clear and convincing" standard in the provision did not necessarily alter the pleading standard. The court proceeded to analyze whether the plaintiff stated a claim for breach of the directors' duty of loyalty under corporate law as altered by exculpatory provisions in the LLC agreement. The LLC agreement contained two "arguably conflicting" exculpatory provisions, which the court was unable to explain as "anything other than poor drafting or a strategy that 'if one exculpatory provision is good, then two must be better.'" One provision eliminated personal director liability for money damages for a breach of duty subject to certain exceptions including breach of a director's duty of loyalty to the LLC or shareholders, as modified by the agreement, and acts or omissions not in good faith. Another provision of the LLC agreement, which applied "notwithstanding anything to the contrary" in the agreement, eliminated monetary liability of directors absent a final judgment that the person acted in "bad faith" or engaged in certain other types of misconduct. The court discussed the concept of bad faith and the factual allegations and concluded that the plaintiff alleged sufficient facts to establish a showing for purposes of Rule 12(b)(6) that the directors acted in "classic, quintessential bad faith."

The court also addressed whether the plaintiff had alleged sufficient facts to establish demand was excused in this derivative action. The court noted that corporate case law supplies the governing principles for evaluating demand futility and thus applied the *Aronson* test, under which demand is excused if the plaintiff alleges particularized facts that establish a reasonable doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Based on its prior discussion of Section 7.5(a) of the LLC agreement, the court stated that Section 7.5(a) would not alter the *Aronson* analysis because the conflicts alleged in the case did not involve a conflict between a shareholder and a director or a shareholder and the LLC. Further, even assuming that Section 7.5(a) applied to the board's decision whether to initiate suit in the case, the court was not convinced that the demand futility or *Aronson* requirements were altered by the LLC agreement. The court noted that the LLC agreement could have altered the demand futility and *Aronson* requirements, but the court did not interpret Section 7.5(a) to eliminate or modify the ability of shareholders to bring a suit on behalf of the LLC or modify the prerequisites for doing so. Taking the well-pleaded complaint as true, the court concluded that it created a reasonable doubt as to the disinterestedness or independence of a majority of the board.

TravelCenters of America, LLC v. Brog, Civil Action No. 3751-CC, 2008 WL 5272861 (Del. Ch. Dec. 5, 2008). The court interpreted provisions of an LLC operating agreement regarding procedures to nominate directors to be conditions rather than promises. As such, a nomination that failed to comply with the provision did not constitute a "breach" of the agreement for purposes of a provision that indemnified the LLC for costs and expenses, including attorney's fees, arising from a shareholder's breach of any provision of the LLC agreement. The nomination procedures described the requirements for a proper and timely notice of nomination of a person for election to the board of directors of the LLC. The court concluded that these requirements were conditions to nominating a person for election and not promises by shareholders. The presence of words such as "must" and "shall" did not compel a finding that the notice requirements were promises, and no particular label is required for a condition. The submission of a non-compliant notice meant that the shareholders' attempted nominations failed but did not render the shareholders personally liable under the LLC agreement or constitute a breach triggering the indemnification provision.

Racing Investment Fund 2000 v. Clay Ward Agency, Inc., No. 2007-CA-0022820MR, 2008 WL 5102151 (Ky. App. Dec. 3, 2008). An insurance agent obtained an agreed judgment against an LLC for unpaid policy premiums, and the LLC made partial payment and claimed it was no longer actively conducting business and had tendered the entirety of its assets. The insurance agent filed a motion to hold the LLC in contempt, and the court issued an order holding the LLC in technical contempt and ordering that the judgment be paid in 90 days. The issue was whether the LLC was required to pay the insurance agent the remaining balance based on a provision in the operating agreement that provided for routine capital calls of the members "to pay operating, administrative, or other business expenses which have been incurred, or which the Manager reasonably anticipates will be incurred" or whether dissolution of the LLC forestalled payment of the judgment. The court found that the provision in the operating agreement fell within the provision of the Kentucky LLC statute that allows members of an LLC to alter their limited liability in a written operating agreement. Because other provisions of the agreement addressing the limited liability of the members contained provisos referring to the capital call provision, the court rejected the argument that these other provisions overrode the capital call provision. The court also stated that the instant case was not about the personal liability of the LLC's members, but rather involved an order against the LLC, a separate legal entity, to make a capital call for the purpose of complying with its obligations under the agreed judgment. The court pointed out that the dissolved LLC still existed, and the court agreed with the trial court that it was reasonable and possible for the LLC to obtain the funds necessary to pay the agreed judgment. The court stated that the LLC's members or its manager must meet the mandates of the trial court order, and the court upheld the trial court's finding of civil contempt.

Baird v. Manayan, No. H032241, 2008 WL 4998341 (Cal. App. 6th Dist. Nov. 25, 2008). Manayan, an acupuncturist, entered into an operating agreement with Baird, a chiropractor, to form an LLC. Shortly after the LLC opened for business, Manayan failed to make a capital contribution and the relationship began to deteriorate. The parties agreed that Manayan would purchase Baird's interest, but Manayan failed to follow through, and Baird filed an action against Manayan. The court entered an order compelling arbitration under the operating agreement, and the arbitrator found in favor of Baird. Manayan moved to vacate or correct the award on the grounds that the underlying contract was an illegal agreement. Manayan argued that the purpose of providing chiropractic and alternative health care was illegal because neither chiropractors nor acupuncturists were permitted to operate as an LLC and were not permitted to do business together in a single practice. The court found that Manayan was equitably estopped from asserting illegality because the arrangement to operate as an LLC with Baird was the product of her own undertaking. Manayan was a licensed attorney who undertook to draft the operating agreement and assured Baird that she would take care of all the legal prerequisites for organizing and starting the business. The court also held that Manayan waived the illegality argument by failing to raise it during the arbitration. Moreover, the court noted that Manayan did not contest the legality of the arbitration clause since she moved to compel arbitration. Thus, she had no basis to complain that the trial court viewed the improper LLC as severable from the allocation of interests in the business and no sound basis to challenge the implied finding that the agreement to purchase Baird's interest created an independent enforceable obligation.

Friedman v. Ocean Dreams, LLC, 868 N.Y.S.2d 131 (N.Y. App. Div. 2nd Dept. 2008) (relying on merger clause in partnership redemption agreement, no oral modification clause in LLC agreement, and general release in affirming summary judgment against plaintiff on claims that he owned 50% of LLC based on oral agreement and prior partnership agreements).

Greetham v. Sogima L-A Manager LLC, C.A. No. 2084-VCL, 2008 WL 4767722 (Del. Ch. Nov. 3, 2008). The parties formed an LLC and acquired several portfolios of tax liens and related property, but a dispute developed over who would service the assets acquired. The plaintiffs relied upon a draft servicing agreement and a side letter in asserting that the parties agreed the plaintiffs' entity would be the sole and permanent servicer. As a threshold issue, the court determined that Delaware law applied to the dispute. The plaintiffs argued that Delaware law applied based on the choice of law provision in the operating agreement, which provided that the agreement shall be governed and construed in accordance with Delaware law and that the parties agreed that any dispute arising in connection with the agreement shall be resolved in the Delaware Chancery Court. Alternatively, the plaintiffs argued that there were no significant differences between the relevant Delaware and New Jersey law. The defendants maintained that there were slight differences between Delaware and New Jersey law and that New Jersey law should govern under the "most significant relationship" test. Guided by the principle that Delaware courts will honor contractual choice of law provisions so long as the jurisdiction bears some material relationship to the transaction, the court concluded that Delaware law applied.

The court stated that there was a material relationship with Delaware because the key entities underlying the transaction were Delaware entities. The court also recognized that the entities, operating in several different states, sought a "'reliable body of law to govern their relationship.'" The court then analyzed the draft servicing agreement and circumstances of the negotiations and concluded that the draft agreement was not intended to be the final agreement. The court concluded that the record overwhelmingly established that the draft servicing agreement and side letter were no more than an agreement to agree. The court also concluded that the plaintiffs failed to demonstrate that the defendants promised that the plaintiffs' entity would serve as the sole servicer and that the plaintiffs relied upon this purported representation. Thus, the court rejected the plaintiffs' promissory estoppel claim as well.

Lustfield v. Milne, 5 Pa. D. & C.5th 469, 2008 WL 5544410 (Pa. Com. Pl. 2008) (holding that arbitration clause in LLC agreement did not require arbitration of scope of arbitration clause even though clause provided for arbitration pursuant to AAA Commercial Rules which include rule that provides for arbitrator to determine scope of arbitration clause).

Towerhill Wealth Management, LLC v. Bander Family Partnership, L.P., C.A. No. 3830-VCS, 2008 WL 4615865 (Del. Ch. Oct. 9, 2008). An investor and various investment LLCs became involved in a dispute regarding the investor's redemption from the LLCs. The Investment Advisory Agreements and the Operating Agreements contained different provisions for resolving disputes. The Investment Advisory Agreements contained arbitration clauses, and the Operating Agreements called for resolution in the chancery court after non-binding arbitration or mediation. The investor initiated arbitration proceedings, and the LLCs filed suit to enjoin the arbitration and obtain a declaratory judgment. The court denied the investor's motion to dismiss, and the investor sought interlocutory appeal. The court denied the request for interlocutory appeal. The court stated that the investor knew when it signed the operating agreements that some disputes with the LLC would come to the chancery court rather than going to binding arbitration. In its arbitration complaint, the investor repeatedly accused the LLCs of violating the operating agreements, and it was only the Investment Advisory Agreement that provided for binding arbitration; therefore, the court distinguished the case from *Willie Gary*, which only called for substantive arbitrability to be determined by an arbitrator where "the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." The court stated that it was impossible to select one dispute resolution clause in this case and say it applies generally to all disputes. In addition, the investor's arbitration complaint, by its own words, arose primarily from and sought relief for breach of the operating agreements, which called for judicial dispute resolution rather than arbitration.

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed in part, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI, a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. Ewie sought summary judgment on the basis that it was the majority member and properly sought dissolution under the articles of organization and operating agreement in light of the dissolution date of December 31, 2004. Ewie further argued that it was forced to seek judicial dissolution and that Mahar lacked standing to bring its counterclaims because the LLC dissolved on December 31, 2004, and Ewie's conduct seeking dissolution was not unfair or oppressive. Ewie argued that the non-compete provision had not been violated because it was PSMI and not Ewie that contracted with GM.

The court held that the operating agreement was ambiguous as to whether unanimous consent of the members was required to dissolve upon the termination date specified in the articles of organization, and that the trial court thus erred when it ruled that the LLC automatically dissolved on the date specified in the articles of organization. The court also held that it was error for the trial court to grant summary disposition on the dissolution question because, regardless of the dissolution date in the articles of organization, Mahar presented evidence that Ewie and its principals took steps prior to the dissolution to take over the LLC's contract with GM. Though Ewie argued that Mahar had no standing to assert the LLC's claims, the court stated that Mahar had statutory authority under the Michigan LLC statute to bring an action to establish that Ewie, a controlling member, engaged in fraudulent, willfully unfair, or oppressive conduct. Ewie argued that it was within its rights to force dissolution of the LLC, but the Michigan LLC statute permits winding up of an LLC by the members who have not "wrongfully dissolved" the LLC, and the court held that Mahar presented evidence that could lead a reasonable jury to conclude that Ewie "wrongfully dissolved" the LLC because of Ewie's desire to usurp the GM contract. Further, the statute requires "good cause" for a judicial winding up, and the court stated that "good cause" would not include formation of a new company to take over the LLC's business. On appeal, the Michigan Supreme Court held that any ambiguity in the operating agreement was irrelevant given the termination date in the articles of organization because the Michigan statute provides for automatic dissolution at the time specified in the articles of organization. The court remanded for reconsideration of Ewie's motion for summary disposition for judicial dissolution in light of a provision in the Michigan LLC statute providing that a court may cancel or alter a provision in the articles of organization if controlling managers or members have engaged in illegal or fraudulent acts or willfully unfair and oppressive conduct.

The court of appeals also held that a jury must decide whether Ewie violated provisions of the operating agreement requiring the members to discharge their duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC and that a jury should consider whether the conduct of Ewie and its owners violated the non-compete clause in the operating agreement. Relying on provisions of the Michigan LLC statute and the operating agreement, the court stated that Ewie, as managing member, was required to disclose to Mahar that Ewie's principals were forming PSMI to take over the GM contract and to obtain Mahar's consent to transfer substantially all of the assets of the LLC to PSMI.

Johannsen v. Utterbeck, 196 P.3d 341 (Idaho 2008). The Idaho Supreme Court agreed with the trial court that a provision in an operating agreement requiring a member to contribute "certain real property" to the LLC was ambiguous with regard to whether the member was required to contribute a specific amount of property or not. The jury heard testimony from witnesses regarding what was intended and concluded that the member was required to contribute the entire tract notwithstanding the member's argument that the operating agreement permitted, but did not require, contribution of the entire tract. The member relied upon language in the operating agreement specifying that capital contributions shall be made incrementally as agreed by the members, but the court stated that the ambiguity in the agreement was a fact issue for the jury to decide.

Downs v. Rosenthal Collins Group, L.L.C., 895 N.E.2d 1057 (Ill. App. 2008). The plaintiff sought indemnification from an LLC for attorney's fees incurred in successfully defending an earlier action against him by the LLC for breach of fiduciary duty and breach of contract. The plaintiff was the CEO and a member of the LLC, and the operating agreement of the LLC provided that the LLC "shall indemnify each Member for any act performed by such Member with respect to Company matters permitted by this Agreement and/or Majority Approval, but in no event for fraud, willful misconduct, negligence, or an intentional breach of this Agreement." The plaintiff asserted that all actions underlying the complaint were taken with respect to LLC matters and that he was entitled to indemnification for his defense costs in the prior suit because the claims were dismissed against him as factually and legally without merit. The court of appeals affirmed the trial court's dismissal of the plaintiff's claim for indemnification because the operating agreement did not specifically address attorney's fees. The court stated that an indemnification agreement must be strictly construed with respect to attorney's fees, and the court found no language in the operating agreement indicating the parties' intent to include attorney's fees.

Miller v. Arnona, 993 So.2d 787 (La. App. 2008). The court set aside a default judgment in favor of one LLC member (Miller) against another member (Arnona) who removed the equipment and food from the premises of the restaurant that had been operated by the LLC before Hurricane Katrina. A few months before Hurricane Katrina, Arnona and another LLC that owned the premises where the restaurant was operated notified Miller that they were withdrawing as members of the restaurant LLC. Although the operating agreement provided that operation of the restaurant would cease if the LLC that owned the premises withdrew from the restaurant LLC, Miller continued to operate the restaurant until Hurricane Katrina. After Hurricane Katrina, Arnona removed the equipment and food from the restaurant, and Miller sued Arnona for lost profits that he estimated he could have made if he had been able to continue the restaurant.

The court set aside the default judgment obtained by Miller and remanded the case for a new trial because the evidence suggested that Miller had no right to occupy the premises based on the operating agreement and Arnona had instituted eviction proceedings against Miller. The court also found that Miller's evidence of lost profits was insufficient.

Olson v. Halvorsen, C.A. No. 1884-VCL, 2008 WL 4661831 (Del. Ch. Oct. 22, 2008). The dispute in the case arose among the founders of a hedge fund LLC when one of the founders was removed from the LLC. An unsigned LLC agreement provided that a founder was entitled to a multi-year earnout, in this case purportedly worth more than $100 million, when the founder left the LLC. The court held that the one-year provision of the Delaware statute of frauds applies to LLC operating agreements, and the multi-year payment structure set forth in the unsigned operating agreement was thus unenforceable. The court noted that the Delaware LLC statute expressly allows oral operating agreements, but does not address whether the statute of frauds applies to such agreements. Commentators disagree as to whether the statute of frauds applies to Delaware LLC agreements, and the court stated that there appeared to be no case law in Delaware or elsewhere on the subject. The court noted that few oral LLC agreements are likely to contain any term or provision that cannot possibly be performed within one year, and the statute of frauds would not limit the enforcement of an oral agreement if it contained no such provisions. If, however, an oral LLC agreement contains a provision or provisions that cannot possibly be performed within one year, the court held that such provision or provisions are unenforceable based on the policy underlying the statute of frauds. The court analyzed the payment provisions in the unsigned LLC agreement and concluded that the payout obligation fell within the one-year statute of frauds provision because all amounts except the first payment could not possibly be calculated until after one year following the alleged agreement, and there were additional substantive obligations and restrictions on the remaining members extending for multiple years. The court analyzed exceptions to the statute of frauds involving multiple writings and part performance and concluded that these did not apply in this case. Other writings relied upon by the removed member did not clearly and specifically reference the unsigned operating agreement or the payout provision. The court followed the rule followed in the majority of jurisdictions and a Delaware Superior Court decision that an agreement not performable within one year (in contrast to a contract involving the sale of land) is not validated by part performance; therefore, the part performance exception was not available to the removed member.

M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd., 193 P.3d 536 (Nev. 2008). The operating agreement of a residential real estate development LLC contained the following provision permitting members to engage in competition:

> This Operating Agreement shall not preclude or limit in any respect the right of any Member or Administrative Committee Member to engage in or invest in any business activity of any nature or description, including those which may be the same or similar to the Company's business and in direct competition therewith. Any such activity may be engaged in independently or with other Members or Administrative Committee Members. No Member shall have the right, by virtue of the Articles of Organization, this Operating Agreement or the relationship created hereby, to any interest in such other ventures or activities, or to the income or proceeds derived therefrom. The pursuit of such ventures, even if competitive with the business of the Company, shall not be deemed wrongful or improper and any Member or Administrative Committee Member shall have the right to participate in or to recommend to others any investment opportunity.

Although the minority member had the right to develop other projects, the LLC and its majority member sued the minority member and the minority member's company alleging, *inter alia*, that the minority member and his company converted the LLC's contractor's license for their own purposes when they used the LLC's license rather than obtain a separate contractor's license to develop competing properties. The trial court entered a directed verdict in favor of the minority member on the conversion claim, and the supreme court reversed the trial court's judgment and remanded for a trial on that issue. The court first determined that intangible property, such as a license, can be converted under Nevada law. The court then determined that the plaintiffs had offered sufficient evidence on the issue of whether the minority member's use of the license constituted "wrongful dominion" over the license to overcome the motion for directed verdict. There was testimony that the majority member and manager did not grant the minority member permission to use the LLC's license and that the operating agreement did not authorize the use of the LLC's license on the other projects even though it permitted members to engage in other projects. Although there was testimony that other members of the LLC used the license on individual projects, the court stated that the evidence was not so overwhelming that a verdict against the minority member would be contrary to law, and the probative value of any prior course of conduct concerning the license was undermined by the fact that the use of the license by other members occurred prior to the current majority member's acquisition of its interest in the LLC. The court noted that the fact that the jury found in favor of the minority member on the other claims of wrongful conduct (which included breach of fiduciary duty claims) did not mean there could be no "wrongful dominion" with respect to the conversion claim. The court viewed the element of "wrongful dominion" as distinct from the "wrongfulness" element of other torts, and it was for the jury to determine whether the specific elements of conversion existed.

The court rejected the majority member's argument that the trial court erred in admitting parol evidence on the meaning of the operating agreement in connection with the majority member's breach of contract claim against the minority member for breach of the general covenant of good faith and fair dealing. The majority member argued that the operating agreement (which included a provision that the articles of organization and operating agreement contained the entire understanding of the parties and superseded prior understandings and agreements) was clear and unambiguous in that, while it unambiguously allowed members to pursue other projects, it did not provide them authority to use the LLC's contractor's license in pursuit of those projects. The court found that the admission of parol evidence did not violate the parol evidence rule because the agreement was silent on the ability of members to use the license on other projects, and parol evidence was admissible on this point to prove a subsequent oral modification or to resolve a latent ambiguity in the agreement.

Andrews v. Ford, 990 So.2d 820 (Miss. App. 2008). After one of the members of an LLC died, the deceased member's administratrix brought suit against the remaining member for breach of contract and specific performance of a buy-sell agreement. The court construed the LLC operating agreement and buy-sell agreement between the members as part of the same transaction because the agreements were executed on the same date and the buy-sell agreement was referred to in the operating agreement. The court concluded, however, that the dispute between the deceased member's estate and remaining member was not within the scope of the arbitration clause in the operating agreement because the deceased member's estate was not a "member" under the operating agreement and the arbitration clause only encompassed disputes among members.

In re Seneca Investments, LLC, Civil Action No. 3624-CC, 2008 WL 4329230 (Del. Ch. Sept. 23, 2008). An LLC member sought judicial dissolution of the LLC. The court analyzed the claim under the judicial dissolution provisions of the Delaware LLC statute and the Delaware corporation statute because the members contractually agreed that the LLC would be governed as a corporation and that the Delaware General Corporation Law would apply. The LLC had two organizational documents: an operating agreement and a charter. The purpose clause in the charter stated that the purpose of the LLC was "to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law." The petition for dissolution alleged that the LLC had abandoned its business and should thus be dissolved. Specifically, the petition alleged that the LLC had not for several years had a business plan, sought or received capital, had shareholder or director meetings, or sought to hire anyone who could conduct business on its behalf. The LLC's only assets were approximately $2.2 million in cash, shares of stock of a publicly held company, and a minority interest in a private internet marketing company. The LLC sought judgment on the pleadings, and the court concluded that the petitioner alleged no facts that would compel the court to grant the petition for dissolution. In the absence of extensive LLC case law interpreting the LLC judicial dissolution statute, and given the similarity of the LLC and limited partnership judicial dissolution statutes (authorizing the court to decree dissolution whenever it is not reasonably practicable to carry on the business in conformity with the LLC/limited partnership agreement), the court considered limited partnership case law in this context as well as LLC case law. In the absence of an allegation of deadlock, the court focused on whether it was impracticable for the LLC to fulfill its business purpose. Because the LLC's charter stated that its purpose was to engage in any lawful act or activity for which corporations may be organized, and a corporation may function as a passive instrumentality to hold title to assets, the court concluded the allegations were insufficient to support a claim that it was not reasonably practicable to carry on in conformity with the operating agreement. The court stated that allegations that the LLC had failed to comply with certain provisions of the operating agreement (such as making distributions, providing reports, and continuing to allow the petitioner to serve as director) were not grounds for dissolution, and the court would not attempt to police violations of operating agreements by dissolving LLCs. The court rejected the petitioner's argument that the operating agreement prohibited any business activity by the LLC other than liquidating assets and distributing cash. Turning to the provision of the Delaware General

Corporation Law that allows the court of chancery to appoint a custodian or receiver when the corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets, the court analyzed whether the LLC had abandoned its business by looking to the LLC's purpose clause. In view of the broad purpose clause, and because a corporation can lawfully function as a passive holding company, the court concluded that the facts alleged in the petition showed that the LLC was performing a valid corporate function by passively investing in other businesses. Furthermore, the court pointed out that the LLC was pursuing counterclaims, and pursuing legal claims is an acceptable and common corporate function. The court stated that it was aware of the possibility that a company facing a petition for dissolution would file non-meritorious counterclaims to avoid dissolution, but the court did not see any indication of abuse in the instant case.

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008) (dismissing plaintiff member's claim for breach of contract against other member because plaintiff failed to allege his own performance of operating agreement).

EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V., Civil Action No. 3184-VCP, 2008 WL 4057745 (Del. Ch. Sept. 2, 2008). A Delaware LLC sued one of its members, a Dutch LLC ("VG 109"), and the member's parent corporation ("NIBC"), seeking a declaration that VG 109 was NIBC's alter ego, specific performance of provisions of the LLC agreement regarding the reimbursement of tax withholding payments made on VG 109's behalf, and a declaration that VG 109's attempted transfer of its economic interest was invalid. The LLC asserted several bases for the court's exercise of personal jurisdiction over NIBC, one of which was premised on the terms of the LLC agreement. Personal jurisdiction over VG 109, which consented to jurisdiction in the LLC agreement, was not challenged; however, the court rejected the argument that the consent to jurisdiction provision in the LLC agreement applied to NIBC. Though the term "party" in the consent to jurisdiction provision was not defined, the court found nothing to suggest that the term would include NIBC, which was neither a signatory nor a member as to the original or amended LLC agreement. Though NIBC was an affiliate covered by the indemnification provisions of the LLC agreement, the court stated that the LLC failed to explain how the application of the indemnification provisions to NIBC supported its contention that NIBC consented to jurisdiction. In fact, the court found that the parties manifested an intent not to include affiliates in the consent to jurisdiction provision by expressly including affiliates in the indemnification provisions while referring only to parties in the consent to jurisdiction provision.

Kinnard v. Stone, No. CIV-07-250-R, 2008 WL 4000445 (W.D. Okla. Aug. 25, 2008). Stone assigned his interest in various LLCs and partnerships pursuant to written assignments. Pursuant to an unwritten agreement, Stone had the right to buy back the interests within six months. In this litigation, the parties disputed whether Stone owned any interest in the entities, and one of the arguments made by Stone was that certain assignments were prohibited by the terms of the partnership agreements or operating agreements of the particular entities. One of the LLC agreements required written consent of each member for any assignment of a member's interest. Because Stone's interest in the LLC was assigned, restored, and assigned again without regard to the provision, the court held that Stone waived the consent requirement. Alternatively, the court found that the required consent was satisfied by email messages among the members. The court stated that Stone could not rely on the no-waiver provision contained in the LLC operating agreement when his actions were taken in violation of the transfer restriction provisions in the agreement. The court also noted that because the transferee of Stone's interest was already a member, there was no issue regarding substitution of a member. The court held that the members waived a consent requirement in another LLC operating agreement relating to loans to a member or affiliate and that Stone received consideration for his interests in the form of cash and assumption of certain liabilities. Finally, the court held that the assignments were sales with the right to redeem within a specified period of time rather than loans collateralized by the interests for an unlimited time.

Samsara Investment III, LLC v. Wallace, No. 07-cv-9385 (JFK), 2008 WL 3884362 (S.D.N.Y. Aug. 21, 2008). The plaintiff invested in an LLC in exchange for a specified preferred return under an operating agreement executed by the plaintiff, the defendant, and the LLC. The operating agreement was governed by Mississippi law and provided that the plaintiff would become the managing member if the preferred return was not paid by a certain date. The agreement also contained provisions prohibiting waivers and requiring that modifications be in writing. In a suit by the plaintiff against the defendant on the defendant's guaranty of the LLC's payment obligations, the defendant asserted counterclaims asserting that the plaintiff breached the operating agreement and fiduciary duties that a manager owes an LLC under Mississippi law. The basis of the counterclaims was the plaintiff's failure to take over as manager when the LLC defaulted on the preferred return. The court held that, although the operating agreement prohibited waivers and required modifications to be in writing, these provisions were themselves waived by the parties' consistent course of conduct in allowing the defendant to continue as managing member.

Tunney v. Hilliard, C.A. No. 1317-VCN, 2008 WL 3875620 (Del. Ch. Aug. 20, 2008). Tunney and Hilliard owned and operated a corporation (which was the operating entity) and an LLC (a real estate holding entity) in connection with their restaurant business. After they sold the business, Tunney argued that he was entitled to a "commission" out of the sales proceeds based on an oral agreement reached with Hilliard when Tunney assumed additional management responsibilities in Hilliard's absence. Hilliard denied making this agreement with Tunney and claimed that any additional efforts by Tunney were de minimis or within the scope of their original 50-50 agreement. The court reviewed the evidence and agreed with Hilliard. The court found that Hilliard's decreased presence resulted in few changes in the business. The stock certificates of the corporation evidenced equal ownership, and the written LLC agreement provided for equal distribution of the profits. The court acknowledged that Delaware law permits oral modifications of written agreements, but stated that they were not favored for "a host of policy and pragmatic reasons." Thus, a party seeking to prove an oral modification must prove the intended change with sufficient specificity and directness as to leave no doubt of the intended change to the formal document. The court concluded Tunney fell well short of that mark. The court also rejected Tunney's promissory estoppel claim because he failed to prove that Hilliard promised him additional compensation. Finally, the court rejected various equitable claims by both parties for compensation for "additional"efforts expended in operating the business. The court found that each contributed more or less equally to the success of the business and that they were left to abide by their original 50-50 agreement.

R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, Civil Action No. 3803-CC, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008). The petitioners sought judicial dissolution of nine Delaware LLCs. With respect to two of the LLCs, the court held that the petitioners did not have standing under the Delaware LLC statute to seek dissolution and winding up because only managers or members have standing to do so under the statute. The court stated that there was no authority for the proposition that a member of an LLC that is itself a member of another LLC can seek dissolution or the winding up of the latter LLC. The court held that the claim for receivership survived because the statute permits a "creditor, member or manager... or any other person who shows good cause" to present an application for receivership. With respect to the other seven LLCs, the court dismissed the action because the members waived the right to seek dissolution or the appointment of a liquidator in the LLC agreements. Although the LLC agreement specified events of dissolution that included entry of a decree of judicial dissolution, the court did not find that this provision conflicted with the waiver of dissolution rights contained elsewhere in the LLC agreement because the Delaware statute permits a court to enter a decree of judicial dissolution upon an application by *or for* a member or manager, and the members or managers cannot waive the rights of others to make such applications *for* them. The court proceeded to address freedom of contract in the LLC context to waive rights to seek judicial dissolution and the appointment of a liquidator. The court concluded that the Delaware LLC statute does not preclude waiver of these rights. The court rejected the argument that statutory provisions that do not include the qualification "unless otherwise provided in a limited liability company agreement" (or some variation thereof) are mandatory and may not be waived. The court noted that the statute did not expressly prohibit waiver of such rights, and the judicial dissolution and receivership provisions are phrased in permissive terms (i.e., the court of chancery "may" decree dissolution or appoint a trustee or receiver under such provisions). The most important factor in the analysis according to the court was the fact that the rights waived in the LLC agreement were not designed to protect third parties. The court pointed out that it had previously recognized that third parties have no interest in a judicial dissolution proceeding under the Delaware Limited Liability Company Act, and the LLC agreement did not affect the statutory right of creditors to petition for appointment of a receiver. The court also rejected the argument that the waiver of rights to seek dissolution and receivership violated the public policy of Delaware. Stressing the policy of contractual freedom and the enforceability of voluntary agreements of sophisticated parties, the court concluded that the policy of Delaware mandated that it respect the parties' agreement. According to the court, there is no threat to equity in enforcing a waiver of the right to seek dissolution because the unwaivable implied covenant of good faith and fair dealing ensures that members will not be trapped in an LLC at the mercy of others acting unfairly and in bad faith.

Magenis v. Bruner, 187 P.3d 1222 (Colo. App. 2008) (interpreting arbitration clause in LLC operating agreement and concluding agreement required award of attorney's fees to prevailing party).

Pravak v. Meyer Eye Group, PLC, No. 07-2433-JPM-dkv, 2008 WL 2951101 (W.D. Tenn. July 25, 2008). Three ophthalmologists agreed to form an ophthalmology practice, and Dr. Pravak signed a letter of intent in which he agreed to become a member in a newly formed LLC. The three doctors signed the LLC's lease agreement, a membership consent form, and a loan agreement, and Dr. Pravak was paid a "draw" by the LLC until the other two doctors began characterizing themselves as the only partners and ceased to characterize Dr. Pravak's compensation as a "draw." The LLC's accountant indicated that she wished to recode all Dr. Pravak's checks as contract labor, and the other two doctors asserted that the LLC did not have formal members without an operating agreement. Dr. Pravak filed suit alleging various causes of action, including breach of contract, tortious interference with contract, breach of fiduciary duty, civil RICO violations, and injunctive and declaratory relief. The court held that the letter of intent was a binding agreement between the parties and was not subject to a condition precedent. The essential terms and the parties' subsequent conduct were sufficient to create a binding agreement. Thus, Pravak's breach of contract claims were claims upon which relief could be granted, and the court declined to dismiss them. Dr. Pravak's claim that the other two doctors interfered with the LLC's obligations under the letter of intent failed because the other two doctors were also parties to the letter of intent.

Urban Hotel Development Company v. President Development Group, L.C., 535 F.3d 874 (8th Cir. 2008). The plaintiff asserted that its removal from three LLCs was ineffective because the operating agreements authorized redemption of a member's interest but not removal of a member. The operating agreement of the LLCs provided that each member granted the LLC the right to redeem the member's interest, that exercise of the LLC's right to redeem required delivery of notice to the redeeming member, and that redemption required approval of the holders of 65% of the distribution percentages of all members. The plaintiff was notified by the LLCs that he was being removed, and the plaintiff argued that its removal was ineffective because the letter did not indicate a redemption of the plaintiff's interest. The court pointed out that the Missouri LLC statute provides that a member ceases to be a member when the member is expelled in accordance with the operating agreement. Though the terms "removal" or "expelled" were not used in the operating agreement, the court held that it was clear that the redemption clause in the operating agreements provided a mechanism to remove or expel a member. The court stated that the power to redeem a member's interest under the operating agreement was not conditioned on use of the word "redemption." The LLCs gave the member notice, and the removal was authorized by members owning the requisite percentage of distribution percentages; therefore, the court concluded that the plaintiff's removal was effective. The failure of the LLCs to pay the redemption price within ten days after the notice as required by the operating agreements was a breach of contract but did not render the removal ineffective according to the court. The court rejected the plaintiff's argument that the other members breached their duties of care and loyalty when they removed the plaintiff. The court stated that, because the members relied in good faith on the operating agreements, the district court did not err in concluding that there was no evidence of breach of fiduciary duty. Finally, the court affirmed the district court's finding that the fair market value of the services performed by the plaintiff in exchange for its interest was $10,000. The operating agreement provided that the redemption price was the "actual tax basis of the redeeming member." The plaintiff claimed the redemption price was $167,667 while the LLCs claimed it was zero. The court stated that tax basis in a partnership can be obtained by exchanging services for a partnership interest as well as contributing property or money or assuming liabilities. The court stated that the value of services is determined by the fair market value of the interest received. The court then concluded that the district court's finding that the value of the services provided by the plaintiff in exchange for its partnership interest was not clearly erroneous because there was substantial evidence in the record demonstrating that the plaintiff had contributed services with a fair market value of $10,000.

ULQ, LLC v. Meder, 666 S.E.2d 713 (Ga. App. 2008). Four individuals formed an LLC, and the operating agreement designated the majority member as the sole manager. The operating agreement provided that an officer could be removed by the manager with or without cause whenever in the manager's judgment the best interest of the LLC would be served. Removal was a dissociating event requiring the member to sell his interest to the other members or the LLC at a designated value. The manager appointed Meder, a 10% member, as vice president and later terminated him, claiming that he had abused other employees and that his termination was thus in the best interests of the LLC. The LLC exercised its right to purchase Meder's interest. The value in effect under the operating agreement at that time was the value of a member's capital account, and Meder's capital account was zero due to LLC losses. Meder sued the LLC, alleging that his termination and buy out breached the operating agreement, breached fiduciary duties owed to him by the LLC, and wrongfully converted the value of his capital investment and interest. The LLC counterclaimed alleging various causes of action based on Meder's contacting LLC clients, after his termination as an officer and before the purchase of his membership interest, to persuade them to withhold their business from the LLC. The LLC sought summary judgment on Meder's breach of contract claim on the basis that the operating agreement permitted his termination with or without cause, but the court of appeals held that the trial court did not err in denying summary judgment because there was a fact issue with respect to the duty of good faith and fair dealing implied in all contracts. The court stated that the exercise of discretion by a party to a contract is subject to the implied duty of good faith unless the contract states that the discretion is "absolute" or within the "sole" judgment of the party. Because the operating agreement did not vest the manager with absolute discretion in terminating an officer, but rather required the manager to conclude that termination was in the best interest of the LLC, the manager was required to exercise good faith in terminating Meder. Meder presented evidence that he was not abusing other employees and that the true motive for terminating him was to allow the LLC to purchase his interest for nothing at a time when the LLC was about to take off financially, thereby raising an issue regarding the exercise of good faith by the manager. The court held that Meder breached the operating agreement by convincing a customer to withhold its business from the LLC by falsely informing the customer that the LLC was experiencing severe financial difficulties that had resulted in Meder's termination. So long as Meder was a member or owner of the LLC, he was obligated under a provision of the operating agreement not to interfere with customer relationships of the LLC. Finally, relying on the Georgia LLC statute, the court rejected the LLC's argument that Meder breached a fiduciary duty to the LLC when he convinced the LLC's customer to withhold business from the LLC. The LLC statute requires a member or manager, when managing the affairs of the LLC, to act in a manner the member or manager believes in good faith to be in the best interest of the LLC, but the statute also specifies that a non-manager member of a manager-managed LLC has no duties to the LLC or the other members solely by reason of acting as a member unless otherwise provided by the articles of organization or a written operating agreement. Based on this statutory provision, the court held that a non-managing member in a manager-managed LLC owes no duties to the LLC or other members absent provisions imposing duties in the operating agreement or articles of organization.

Blair v. McDonagh, 894 N.E.2d 377 (Ohio App. 2008). Blair and McDonagh formed an LLC to operate Irish pub restaurants. Disputes developed, and the members asserted against each other various claims, including claims for breach of contract and breach of fiduciary duty. The jury returned a verdict in favor of McDonagh on all claims. The court rejected Blair's argument that the evidence established that McDonagh breached his duty of good faith and fair dealing by refusing to consent to a line of credit that Blair had negotiated for the LLC and that was necessary for the good of the LLC. The court stated that an LLC, like a partnership, involves a fiduciary relationship that imposes on the members a duty to exercise the utmost good faith and honesty in all dealings and transactions with the LLC. Similarly, the court said that the parties to a contract owe each other a duty of good faith and fair dealing. The court found that McDonagh presented substantial evidence that he had acted in good faith and that he had withheld his consent for legitimate reasons, the most important of which was that Blair had refused to provide necessary financial information to evaluate the business and the necessity for the loan. Additionally, McDonagh's loans to the LLC would have been subordinated to the line of credit loan. The court stated that McDonagh was not acting in bad faith when he failed to consent to the line of credit loan under these circumstances. Finally, the court held that the trial court did not err in ruling that $20 million in advances by McDonagh to the LLC were loans rather than capital contributions. The operating agreement provided that the members contemplated that additional requirements of the LLC would be met by a bank loan and/or capital contribution of McDonagh and that the LLC was authorized to accept additional capital contributions from McDonagh in such amount as the members deemed appropriate or necessary. Blair argued that these provisions showed the parties contemplated that McDonagh's advances would be treated as capital contributions rather than loans. However, the operating agreement also provided that no member was required to make any further capital contribution or loan to the LLC. Thus, under the plain language of the agreement, McDonagh was permitted, but not required, to provide loans or capital, and the operating agreement did not show that McDonagh's advances were necessarily capital contributions. The court concluded that there was evidence to support the trial court's decision that McDonagh's advances were intended by the parties to be loans based on evidence of how Blair treated the advances on the LLC's tax returns, language on the memo line of the checks, and testimony of one of Blair's accountants.

Imprimis Investors LLC v. United States, 83 Fed.Cl. 46 (Ct. Cl. 2008). An LLC and its tax matters partner filed suit seeking readjustment of certain partnership items, and another LLC member filed a notice of election to participate and an amendment to the complaint. The primary dispute concerned whether the allocation of partnership tax items of "ordinary income" included short term capital gains for the tax year 2000. The court examined and interpreted the LLC agreement to determine whether it provided a special allocation of items of short term capital gain. The court concluded that a provision for special allocation of "ordinary income" in the LLC agreement did not provide for a special allocation of capital gains.

IH Riverdale, LLC v. McChesney Capital Partners, LLC, 666 S.E.2d 8 (Ga. App. 2008). The court held that amendment of an LLC operating agreement to eliminate a minority member's 5% "guaranty profit distribution" was valid because the agreement permitted amendment by members holding at least a majority interest, defined as 80% of the aggregate ownership interest, and the amendment was approved by members owning 94.68% of the LLC's ownership interest. The court concluded that the operating agreement was clear and unambiguous, that the guaranty distribution provision was not included in "major decisions" requiring unanimous consent, and that parol evidence could not be used to construe the contract.

Wood v. Baum, 953 A.2d 136 (Del. 2008). The plaintiff brought a derivative suit against the members of the board of a Delaware LLC alleging breach of fiduciary duty claims based on alleged improper valuation of certain non-performing assets, improper charitable contributions, related party transactions, and failure to maintain accounting and monitoring controls and procedures. The court of chancery dismissed the complaint for failure to allege particularized facts sufficient to establish that demand on the board would have been futile. The Delaware Supreme Court stated that the test set forth in *Aronson v. Lewis* applies when it is alleged that directors made a conscious business decision in breach of their fiduciary duties, and the test in *Rales v. Blasband* applies when the subject of the derivative suit is a violation of the board's oversight duties. The plaintiff attempted to create a "reasonable doubt" that the board would have properly exercised its business judgment by alleging that the board was disabled because of a substantial risk of personal liability. In evaluating that claim, the court stated that the exculpation clause in the LLC's operating agreement must be kept in mind. Under the operating agreement and the Delaware LLC statute, the directors' liability was limited to claims of "fraudulent or illegal conduct" or "bad faith violation[s] of the implied contractual covenant of good faith and fair dealing." The court stated that, where directors are contractually or otherwise exculpated from liability, a serious threat of liability may only be found to exist if the plaintiff pleads with particularity a non-exculpated claim. Thus, the plaintiff in this case was required to plead particularized facts demonstrating that the directors acted with scienter, i.e., that they had "actual or constructive knowledge" that their conduct was legally improper. The court characterized the issue before it as whether the complaint alleged with particularity that a majority of the directors knowingly engaged in "fraudulent" or "illegal" conduct or breached "in bad faith" the covenant of good faith and fair dealing. The court concluded that the plaintiff failed to meet this pleading burden. The plaintiff did not plead with particularity any claim based on fraudulent conduct. Although the complaint alleged many violations of securities and tax laws, the complaint did not allege with particularity that the directors knowingly engaged in such conduct or that they knew such conduct was illegal. The court rejected the plaintiff's argument that such knowledge should be inferred from the fact that the transactions had to be authorized by the board and because they were related party transactions. The court stated that Delaware law is clear that board approval of a transaction, even one that turns out to be improper, is not alone enough to infer culpable knowledge or bad faith. The court also stated that the plaintiff's assertion that membership on the audit committee is a sufficient basis to infer the requisite scienter was contrary to well-settled Delaware law. The court distinguished a "bad faith violation of the implied contractual covenant of good faith and fair dealing" from the fiduciary duty breaches asserted by the plaintiff, and concluded that the complaint did not allege any contractual claims, let alone a "bad faith" breach of the implied contractual covenant of good faith and fair dealing. The court commented that the failure to allege with particularity any facts from which particular directors' knowledge of accounting irregularities may be inferred is frequently compounded by a failure to make a statutory books and records request, and the court noted that the plaintiff in this case chose not to make a books and records request. In sum, the court concluded that, given the broad exculpation provision in the operating agreement, the plaintiff's factual allegations were insufficient to establish demand futility.

Donohue v. Corning, 949 A.2d 574 (Del. Ch. 2008). Donohue brought an action challenging his removal as managing member of an LLC and sought advancement of his expenses under the indemnification and advancement provision of the LLC agreement. The LLC agreement required indemnification and advancement in connection with the "defense or disposition" of a proceeding in which a covered person is involved or with which a covered person is threatened. The court cited corporate case law regarding the policy of Delaware legislation on indemnification, but the court stated that it could not award advancement merely because Donohue had a plausible argument that he brought suit, at least in part, to advance the interests of the LLC and that advancement in such a situation would comport with public policy behind allowing indemnification in corporate disputes. In view of the broad contractual discretion granted LLCs with respect to advancement, the court stated that Donohue must establish his entitlement to advancement under the terms of the LLC agreement itself. The court found Donohue's argument telling insofar as Donohue argued that he was responding to a threatened proceeding rather than arguing that the provision contemplated coverage for directors initiating suit to fulfill their fiduciary duties by challenging a wrongful removal. The court agreed with Donohue's implicit acknowledgment that conduct must be responsive or defensive in nature to give rise to an advancement right under the LLC agreement. The court commented that the "in connection with the defense or disposition" language was likely included to avoid the result in a corporate case in which the absence of such language from the bylaws exposed the corporation to liability for indemnification and advancement in proceedings initiated by directors that were not responsive to an existing or threatened proceeding. The court stated that the "defense or disposition" language would be mere surplusage if it were not interpreted as requiring an action to be defensive or responsive. The court concluded that Donohue was not entitled to advancement under the LLC agreement because he did not identify a threatened proceeding that he was defending or disposing of by bringing his suit. The court stated that a "for cause" removal was not a proceeding as contemplated by the advancement provision. Donohue tried to characterize his removal for cause based on alleged breaches of fiduciary duty as a threatened proceeding, but the defendants repeatedly told Donohue that they were not threatening him with a proceeding, and the court noted that the defendants would thus be estopped to initiate proceedings against Donohue for the actions that allegedly supported his removal for cause. The court found nothing invidious about interpreting the advancement provision as permitting the LLC discretion in instituting or threatening a proceeding that would trigger advancement. The court also noted that the agreement contained an incentive for members or former members to bring meritorious disputes over the LLC agreement by requiring the losing party to pay the fees of the prevailing party.

Berman v. Sugo LLC, 580 F.Supp.2d 191 (S.D.N.Y. 2008). In a dispute between two members of an LLC, the court found the allegations insufficient to show that an oral operating agreement existed between the two members. A written letter of understanding specifically contemplated a "more formal" operating agreement, and a draft operating agreement stated that it would be effective when signed by all the members. Also, one of the members expressed an intent not to be bound by the operating agreement until he signed it. The court stated that the only conclusion to be drawn from these facts was that the parties intended not to be bound by the operating agreement until it was signed; thus, various claims based on alleged breaches of the operating agreement failed. Claims for tortious interference with the operating agreement failed for the same reason. The court refused to dismiss breach of fiduciary duty claims asserted against a member based on alleged misappropriation of business opportunities and unfair competition, relying on cases in which courts have recognized that LLC members, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members. The court said that an argument that the letter of understanding permitted competition involved interpretation of the letter and would not be undertaken at the motion to dismiss stage. The court denied a motion for reconsideration of its opinion and explained that it applied the law of New York, the forum state, in the context of this dispute regarding a Connecticut LLC because there was no material conflict between the laws of New York and Connecticut with respect to formation of an oral agreement where a party has expressed intent not to be bound until the agreement is in writing.

Monier v. Boral Lifetile, Inc., C.A. No. 3117-VCN, 2008 WL 2168334 (May 13, 2008). Monier, Inc. (Monier) and Boral Lifetile, Inc. (Boral) each owned 50% interests in a Delaware LLC that was managed by a management committee consisting of three representatives of each member. Monier sought a declaratory judgment determining the percentage of net income that must be distributed under the LLC operating agreement, and Boral sought dismissal of Monier's claim. The operating agreement specified that 50% of the net income would be distributed each year unless the management committee approved a greater or lesser distribution without any dissenting vote. In 2000, the management committee adjusted the distribution rate to 100% of the audited net profits, and the parties disputed whether this was a change that was intended to be in effect on an ongoing basis for the indefinite future. Monier argued that making the change on an ongoing basis was a valid exercise of the management committee's authority under the operating agreement or, alternatively, constituted an amendment of the operating agreement. Boral argued that the operating agreement gave authority to vary the 50% default distribution rate under the operating agreement from time to time, but not in perpetuity, and that the 2000 action was a limited policy change that was reaffirmed annually by action of the management committee until 2005, when the policy was questioned. Boral also argued that Monier's construction demonstrated a violation of the management committee's fiduciary obligations as an impermissible abdication of the committee's duty to manage. Finally, Boral argued that the requirements for amending the operating agreement were not met. Boral interpreted the operating agreement to impose the following requirements for amendments: (1) approval by the management committee without dissent; (2) approval by all members; and (3) a signed writing of both members. The court concluded that Monier stated a claim for its interpretation of the operating agreement (i.e., that the agreement authorized the management committee to change the distribution rate for an indefinite period of time). Though Monier's interpretation might not ultimately prevail, it was not unreasonable and survived the motion to dismiss. The court also concluded that Boral could not demonstrate that the mere setting of the distribution rate at 100% until the management committee unanimously determined otherwise constituted an abdication and breach of fiduciary duty.

Tuckerbrook Alternative Investments, LP v. Banerjee, Civil Action No. 08-10636-PBS, 2008 WL 2356349 (D. Mass. June 4, 2008). An investment advisor (Tuckerbrook) hired an individual (Banerjee) to act as portfolio manager of three funds, and the two parties entered into LLC agreements for three Delaware LLCs that served as general partners of the three funds. Tuckerbrook and Banerjee were each 50% managing members of the LLCs. After acrimony developed and Tuckerbrook learned that Banerjee had approached competitors, Tuckerbrook terminated Banerjee's employment "for cause" and, without Banerjee's permission, entered into investment management agreements for each of the funds under which Tuckerbrook was to make the day-to-day decisions for the funds. Although Banerjee's employment was terminated, he remained a co-managing member of the general partners of the Tuckerbrook funds, and the parties disputed whether Banerjee's noncompetition agreement precluded him from continued involvement with the three funds he had been managing when he was employed. Banerjee argued that both the LLC and limited partnership agreements provided that the general partner would manage the investments and that the LLC agreement required the "managing members" (emphasizing the plural term was used) to approve any contract. Thus, Banerjee asserted that both managing members had to agree to the investment contract that was authorized by Tuckerbrook and that the agreement was not enforceable without Banerjee's consent. The court stated that, since the LLC agreement provided that there was no manager, the management was vested in the members in proportion to the current percentage or other interest of members in the profits of the LLC as provided by the Delaware LLC statute, and neither member controlled the LLC since each owned 50%. The court stated that any victory by Banerjee that the investment management agreements were ultra vires would be a pyrrhic victory because the limited partnership agreement expressly contemplated hiring Tuckerbrook to manage the funds, and Tuckerbrook had been doing so without a written agreement since Banerjee was hired. The court stated that this course of performance supported the existence of an implied contract. The court also found that the contracts read as a whole showed a likelihood that Tuckerbrook would succeed on its argument that Banerjee was precluded from managing any distressed fund, including the Tuckerbrook funds, for a post-employment period of three months.

Whittington v. Dragon Group L.L.C., Civil Action No. 2291-VCP, 2008 WL 2316305 (Del. Ch. June 6, 2008). A member of an embattled LLC asserted claims for declaratory and injunctive relief related to his efforts to be recognized as a member of the LLC. Previous litigation had resulted in a settlement represented by an agreement in principle, but the parties ended up in a dispute regarding the meaning of the agreement in principle and the membership rights of the parties in the LLC. The defendants claimed that the plaintiff's claims were barred by the equitable doctrine of laches. The defendants claimed that the analogous statute of limitations for the plaintiff's equitable claims would be the three-year statute of limitations applicable to contract actions, and the plaintiff claimed that there was no analogous limitations period for his claims for declaratory and injunctive relief. The court concluded that the plaintiff's claims were based on the agreement in principle and that the statute of limitations applicable to contract claims was the analogous statute of limitations for purposes of a laches analysis. The court determined that the agreement in principle was not a contract under seal to which the common law twenty-year limitations period would apply even though the word "seal" was pre-printed next to each signature. The court concluded that there was a genuine issue of material fact as to when the defendants breached the agreement in principle by not giving the plaintiff his due share of the LLC. Furthermore, assuming the breach occurred more than three years prior to the plaintiff's filing of the action, the court considered it desirable to inquire further regarding the possibility that tolling occurred based on the doctrine of unknowable injuries or fraudulent concealment. The court also found there were genuine issues of material fact as to whether the plaintiff was dilatory in bringing the action based on possible inquiry notice of the defendants' breach. Finally, the court concluded that there were genuine issues of material fact regarding the defendants' claim that the doctrine of laches should bar the plaintiff's claims even if the plaintiff brought them within a period less than the analogous three-year limitations period. Application of laches in this manner would require a finding that the defendants were prejudiced, and the court found that there were fact issues in that regard.

Fisk Ventures, LLC v. Segal, Civil Action No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008). Disagreements between the members of two classes of membership interest in a Delaware LLC led to a deadlock, and one of the Class B members filed a petition for dissolution. Segal, a Class A member who was the LLC's founding member, president, and sole officer, filed counterclaims and third-party claims against the Class B members. Johnson, a Class B member, filed a motion to dismiss Segal's claims against him for lack of personal jurisdiction, and the other Class B members filed a motion to dismiss Segal's counterclaims and third-party claims for failure to state a claim. The court granted Johnson's motion to dismiss for lack of personal jurisdiction as well as the motion of the other Class B members to dismiss Segal's claims for failure to state a claim. The court dismissed Segal's breach of contract claim because it was based on breaches of duties not found in the LLC agreement. The court stated that the LLC agreement in no way obligated one class of members to acquiesce to the wishes of the other simply because the other believed its approach to be superior or in the best interests of the LLC. The LLC agreement contained provisions limiting the duties of members except as expressly set forth in the agreement and waiving liability absent gross negligence, fraud, or intentional misconduct. Segal argued that this provision established a duty to act without gross negligence, fraud, or intentional misconduct, but the court stated that the provision did not create a code of conduct resulting in liability for any damage caused by gross negligence, willful misconduct, or a knowing violation of law. The court stated that Segal's arguments regarding other provisions of the agreement were "similarly tortured" and the court "decline[d] to follow Segal's invitation to turn an expressly exculpatory provision into an all encompassing and seemingly boundless standard of conduct." Further, even if the agreement did somehow create a code of conduct, the court stated that Segal failed to allege facts sufficient to support an inference that the members acted with gross negligence, willful misconduct, bad faith, or in knowing violation of law. The court also dismissed Segal's claim that the Class B members breached the implied covenant of good faith and fair dealing by blocking financing opportunities presented by Segal. The agreement expressly provided for the vote required to approve financing, and the court stated that mere exercise of one's contractual rights, without more, cannot constitute a breach of the implied covenant of good faith and fair dealing. The court dismissed Segal's breach of fiduciary duty claims as well. Segal relied upon the same provisions in the LLC agreement for his breach of fiduciary duty claims that he relied upon with respect to his breach of contract claims. The court stated that the agreement greatly restricted and even eliminated fiduciary duties as permitted by the Delaware LLC statute, but, even assuming the validity of Segal's argument that there remained a duty not to act in bad faith or with gross negligence, he failed to allege facts to support such a breach of duty. Finally, the court dismissed Segal's claim for tortious interference with his employment contract since the employment contract allowed the LLC to replace Segal as CEO by a vote of 50% of the board at any time after the second anniversary of the agreement.

Abuy Development, L.L.C. v. Yuba Motorsports, Inc., No. 4:06CV799SNL, 2008 WL 1777412 (E.D. Mo. April 16, 2008). Two entities, Abuy Development, LLC ("Abuy") and Yuba Motorsports, Inc. ("Yuba"), formed a Delaware LLC for developing a motorplex. The parties entered an operating agreement containing provisions regarding additional capital contributions and failure to make capital contributions which were the subject of the dispute in this case. After the initial capital contributions made by the parties, which consisted of a cash contribution by Abuy and a credit for work performed by Yuba on the project, additional cash capital contributions were made. Abuy loaned Yuba the amounts needed for it to make the additional contributions. Yuba defaulted in the payment of the promissory notes to Abuy, and Abuy sought to adjust the capital accounts under the operating agreement. The adjustment essentially gave Abuy 100% membership in the LLC. Abuy argued it had the right to adjust the capital accounts under a provision of the operating agreement that addressed the failure of a "Defaulting Member" to make additional capital contributions. The court determined that the term "Defaulting Member" was ambiguous and considered extrinsic evidence, including testimony by the lawyers who represented the parties in the drafting and negotiation of the operating agreement. Both lawyers testified that it was their understanding that the provisions of the operating agreement permitted a member to loan funds to another member who was not willing to make an additional capital contribution and that the remedy for a member who made such a loan and was not timely repaid was an adjustment to the capital accounts. Thus, Abuy, as the "Non-Defaulting Member" under the agreement had the right to adjust the capital accounts due to the failure of Yuba, the "Defaulting Member" under the agreement, to repay the loans. The evidence also showed that Yuba knew or should have known that this provision was a legal "squeeze down provision" by which a defaulting member could lose its ownership interest. The court commented in the course of its discussion rejecting counterclaims asserted by Yuba, that Abuy, having properly adjusted the capital accounts in such a manner that Yuba no longer owned an interest, had no obligation to advise or notify a non-member (Yuba) of any purported discussions or offers of alternative uses for the subject real property.

Hampton Island Founders v. Liberty Capital, 658 S.E.2d 619 (Ga. 2008). An LLC that owned land (Hampton Island Founders LLC or "Founders") and an LLC that was to secure financing (Liberty Capital LLC or "Capital") formed an LLC (Hampton Island LLC or "Joint Venture LLC") for developing the land into a residential retreat. Founders contributed the land to Joint Venture LLC in exchange for a 40% interest, and Capital committed to secure a certain amount of financing in exchange for a 60% interest. Hampton Island Management Inc. ("HIMI") was the manager of Joint Venture LLC. If Capital did not obtain the specified level of funding, its interest was to be reduced to 10%, and Founders interest would increase to 90%. When Capital's deadline for securing financing passed without its securing the specified level of funding, Shealy, the individual who formed and originally controlled Founders and Founders' four members, declared Capital in default and took steps to terminate Joint Venture LLC's relationship with HIMI and name himself as sole manager of Joint Venture LLC. Founders then brought suit against Capital and others seeking a declaration that Capital did not meet its obligation and an injunction prohibiting Capital from exercising any control of Joint Venture LLC. The defendants filed a motion for injunctive relief to maintain the status quo, and the court issued a temporary injunction decreeing that HIMI was the sole manager of Joint Venture LLC and that neither Shealy nor Founders were to manage Joint Venture LLC or claim that any other entity was the manager. Subsequently, the court permitted two of Founders' member entities, as well as investors in Founders' member entities, to intervene, and the intervenors/investors sought a mandatory injunction to allow meetings of Founders' member entities so that a vote could be taken to determine who would manage the member entities. The intervenors/investors informed the court that, if permitted to vote, they would remove Shealy as manager of Founders' member entities, remove him as manager of Founders, and appoint a manager of Founders who would be favorable to the defendants and cause Founders to dismiss its suit. The court granted the relief sought by the intervenors/investors. Founders appealed, and the supreme court determined that the first injunction maintaining the status quo by enabling HIMI to continue to manage Joint Venture LLC pending resolution of the lawsuit was appropriate. However, the court concluded that the second injunction permitting the vote to change management of Founders and its member entities did not balance the relative equities and was error. The court stated that denial of the injunctive relief sought by the intervenors/investors would only inconvenience them by forcing them to await the outcome of the litigation, but issuance of the injunction would result in dismissal of the plaintiff's lawsuit without an opportunity for the plaintiff to be heard. The court also concluded that permitting intervention by Founders' members and investors in those members was error because it was not clear how the intervenors' ability to protect their interest (assuming they had a sufficient interest) in the transaction or subject matter of the lawsuit was impeded by the lawsuit, how it was not adequately protected by Capital and the other defendants, or why they could not pursue an independent remedy against Founders and Shealy.

In re Kilroy (Guerriero v. Kilroy), Bankruptcy No. 05-90083-H4-7, Adversary No. 06-3320, 2008 WL 780692 (Bankr. S.D. Tex. March 24, 2008). The court concluded that the debtor did not owe the plaintiff a fiduciary duty for purposes of the exception to discharge for a debt based on fraud or defalcation in a fiduciary capacity. The debtor was the majority member and manager of an LLC that served as the general partner for a limited partnership. In a prior opinion, the bankruptcy court found that the debtor exercised sufficient control over the LLC and limited partnership to establish a fiduciary relationship with the plaintiff, who was the minority member of the LLC and limited partner of the limited partnership. However, the court stated that it did not have the partnership agreement before it at the time of the prior decision, and the court found that the terms of the partnership agreement eliminated any fiduciary relationship. The partnership agreement provided: "[T]he General Partner [i.e., the LLC controlled by the debtor] shall conduct the affairs of the Partnership in good faith toward the best interest of the Partnership. The General Partner, however, is liable for errors and omissions in performing its duties with respect to the Partnership only in the case of bad faith, gross negligence, or breach of the provisions of this Agreement, but not otherwise." Both the LLC and limited partnership were Delaware entities, and the Delaware Revised Uniform Limited Partnership Act permits partners to contract out of common law fiduciary duties in the partnership agreement. Under the Delaware limited partnership statute, the partners may eliminate fiduciary duties but may not eliminate the implied contractual covenant of good faith and fair dealing. The court concluded that the partnership agreement in this case reduced the general partner's duties from a fiduciary duty to merely a duty of good faith. The plaintiff argued that a fiduciary duty existed because the debtor controlled the LLC which was the general partner, and the debtor was thus essentially acting as the general partner. However, the court stated that, if the partnership agreement limited the LLC general partner's duties to that of merely good faith, a higher standard could not be imposed on the debtor as the controlling member of the LLC.

Madelone v. Whitten, 18 Misc.3d 1131, No. 9929-07, 2008 WL 399175 (N.Y. Sup. 2008). Three individuals, Madelone, Harrington, and Whitten, formed an LLC in which they each held a 1/3 interest and Whitten was the manager. The three original members later transferred a portion of their interest to a fourth individual who was admitted as a member and held a 10% interest. When Whitten began experiencing marital difficulties, the operating agreement was amended to include an involuntary transfer provision that would require the purchase and sale of a member's interest in the event the member or member's spouse filed for a legal separation or divorce. Whitten filed for a legal separation from his wife and relinquished his role as manager, but he was reinstated, and actions to effectuate the involuntary transfer provision were rescinded, when he reconciled with his wife. After Whitten re-filed for divorce, the other members removed Whitten as manager and designated Harrington as manager. Madelone and Harrington also retained a law firm that advised that the involuntary transfer provision had been triggered by Whitten's divorce action. After a meeting of the members in which the buy out issue was not addressed, Madelone filed an action against the other members seeking to enforce the involuntary transfer provisions or, in the alternative, a decree that it was no longer reasonably practicable to continue to operate the LLC in accordance with the articles of organization and operating agreement. Madelone claimed that Whitten refused to acknowledge the applicability of the involuntary transfer provisions and continued to hold himself out as manager of the LLC. The other members resisted Madelone's efforts to enforce the involuntary transfer provisions, arguing that the conduct of the parties and the terms of the agreement itself demonstrated that the provision was not intended to be self-executing. After reviewing both the terms of the agreement and the action of the members, the court found these arguments were without merit. The court found the terms of the agreement were clear and rejected the argument that action taken at meetings of the members foreclosed application of the involuntary transfer provisions. The agreement contained a provision precluding claims of waiver, estoppel, and de facto amendment of the operating agreement absent a writing executed by all members specifically referring to the provision being waived or amended. Based on this provision, the court refused to give effect to resolutions purporting to define Whitten's role and to estop the LLC and its members from asserting that Whitten was no longer a member because Madelone voted against the resolutions and Whitten abstained. The court further noted that it was unclear how the affirmative vote of just 40% in interest of the members would comply with the general voting provisions of the operating agreement that required the vote or written consent of members holding at least a majority in interest to take action. The court thus concluded that Madelone had established a likelihood of success on his claim to enforce the involuntary transfer provisions. The court also concluded that Madelone had shown the prospect of irreparable injury since the other members had indicated their intent to terminate Madelone as a member and employee absent injunctive relief and Madelone would be entitled to almost 43% of the LLC's voting rights if the court ultimately agreed that the involuntary transfer provisions were enforceable. The court concluded that this shift in governance and control constituted irreparable harm.

Old National Villages, LLC v. Lenox Pines, LLC, 659 S.E.2d 891(Ga. App. 2008) (interpreting authority of general manager under operating agreement and concluding manager had authority to enter consent judgment even though sole member had no notice of complaint or consent judgment; noting that holding otherwise would undermine separate entity status of LLC and its member).

Georgia Rehabilitation Center, Inc. v. Newnan Hospital, 658 S.E.2d 737 (Ga. 2008). The court held that a member's request for judicial dissolution was not subject to arbitration because the arbitration clause in the operating agreement required arbitration of any claim arising out of, in connection with, or relating to the agreement. Though the agreement provided for certain causes of dissolution, the court concluded a request for judicial dissolution was an independent legal mechanism and did not arise out of or relate to the terms of the operating agreement.

Zebrasky v. Valdes, No. 07 MA 34, 2008 WL 927780 (Ohio App. March 17, 2008). The court analyzed language in an LLC operating agreement that provided for compensation of members in specified amounts and stated that "no other compensation" was payable to members without a vote of the members. The court concluded that the provision was ambiguous because it could reasonably be interpreted to permit the member vested with day-to-day management authority to reduce compensation or could reasonably be interpreted to prohibit any change in compensation without action by the members. The trial court thus erred in refusing to hold a trial to determine the meaning of the provision before referring the dispute to arbitration under an arbitration clause that excluded from its scope disputes arising out of the managing member's management authority.

In re Kingsville Motors, Inc., No. 04-33755-DK, 2008 WL 686724 (Bankr. D. Md. March 12, 2008) (concluding that broad management powers conferred on LLC president under operating agreement did not give president unfettered power to transfer LLC assets to corporation where stated purpose communicated to investors was to acquire real property from corporation, not provide operating funds to corporation).

Segal v. Geisha NYC, LLC, 517 F.3d 501 (7th Cir. (Ill.) 2008) (stating operating agreements of Delaware LLCs that owned and operated original restaurant were relevant to determination of whether new LLCs formed by certain participants in original restaurant were authorized to use original restaurant's name and design when establishing additional restaurants, and concluding operating agreements authorized use of original restaurant's intellectual property).

Peregrine Emerging CTA Fund, LLC v. Tradersource, Inc., No. 07 C 5528, 2008 WL 474369 (N.D. Ill. Feb. 19, 2008). An LLC that operated a commodities fund sued its manager, which was a corporation, and the manager's president for breach of contract, negligence, and breach of fiduciary duty in connection with the manager's alleged failure to monitor and inform the LLC of increased risk parameters caused by actions taken by one of the trading advisors the manager was obligated to monitor. The relationship between the manager and the LLC was governed by an operating agreement containing an exculpatory clause applicable to managers and manager associates. The operating agreement provided that it was to be governed by and construed in accordance with the law of Delaware without regard to Delaware conflict of law provisions, but the LLC argued that Illinois substantive law should be applied to each cause of action and should resolve issues such as the definition of "gross negligence" and whether the LLC had a cause of action for breach of fiduciary duty. The LLC acknowledged that it was formed under Delaware law but stated that it was a resident of Illinois and that all of the alleged conduct and losses occurred in Illinois. The court applied Illinois choice of law rules and concluded that Delaware law governed all of the issues in the case. The LLC did not show that applying Delaware law to interpretation of the operating agreement's exculpatory clause would violate a fundamental Illinois policy or that Illinois had a materially greater interest in the litigation than Delaware. The court rejected the LLC's argument that a choice of forum clause selecting Illinois constituted an agreement that Illinois substantive law should apply to the contract. The court concluded that the negligence claims were governed by Delaware law as well because they were specifically related to the contractual relationship and, in such cases, Illinois courts place great weight on the location where the contractual relationship is centered. In this case, the parties centered their relationship in Delaware, and Delaware law applied to the negligence claims arising out of the contractual relationship since Delaware had the greatest interest in the contractual relationship. With respect to the fiduciary duty claims, the court stated that Delaware law applied since such claims are governed by the law of the "state of incorporation," and the LLC was "incorporated" under Delaware law. The court dismissed the LLC's negligence and breach of fiduciary duty claims against the manager's president based on a provision in the operating agreement shielding a "manager associate" (a defined term encompassing the manager's president) from personal liability for any act or omission in the performance of the manager's duties to the LLC. The LLC alleged that the defendants failed to monitor and inform the LLC of increased risk parameters caused by actions of a trading advisor, and there was nothing to suggest the manager's president engaged in any activity outside the scope of the manager's obligations under the contract. The court rejected the LLC's arguments that limitations on the scope of indemnifiable conduct evinced an intent to hold manager associates liable under some circumstances. The court stated that the manager associate exculpatory provision trumped the indemnification clause and was intended to exculpate manager associates for all acts within the manager's duty to the LLC because the exculpatory clause was applicable "notwithstanding any other provision" of the operating agreement. Further, the court held that the negligence and breach of fiduciary duty claims should be dismissed because the allegations of wrongdoing were all related to the operating agreement and were subsumed by the breach of contract claim under Delaware law. Finally, the court held that all claims must be dismissed based on the general exculpatory provision in the operating agreement. Under that provision, a manager could only be held liable for conduct amounting to criminal wrongdoing, fraud, gross negligence, or intentional misconduct. The court found that the LLC's allegations of failure to monitor and inform the LLC did not amount to allegations of gross negligence. The court stated that none of the facts or conclusions alleged by the LLC came close to an allegation of "gross negligence" as defined under Delaware law, i.e., that the defendants were recklessly uninformed or acted outside the bounds of reason.

Braunstein v. Dann Ocean Towing, Inc., 383 B.R. 362 (D. Mass. 2008) (analyzing "ordinary course of business" for purposes of powers of LLC debtor in possession that owned and managed houseboat and concluding creditor's reasonable expectations regarding ordinary course of business would have encompassed costs of salvage and repair of damaged houseboat given provision in LLC's operating agreement empowering LLC to enter into contracts related to accomplishment of LLC's purposes).

Tamposi v. Tamposi LLC, No. 200704283, 2008 WL 497306 (Mass. Super. Jan. 7, 2008) (concluding that arbitration provision contained in operating agreement of LLC that served as manager of second LLC did not apply to dispute regarding Red Sox shares held by second LLC).

Kira Inc. v. All Star Maintenance Inc., 267 Fed.Appx. 352, 2008 WL 510508 (5th Cir. 2008). A minority member of a Nevada LLC asserted direct and derivative claims against the other two members of the LLC. The plaintiff's claims were based on the alleged improper use by the defendant members of the LLC's name and the payment of management fees to affiliates of the defendants. The court of appeals agreed with the district court that there was insufficient evidence to create a jury question on the service mark claim. The evidence showed the operating agreement expressly permitted all three members to compete with each other and with the LLC, even to the exclusion of the LLC from business the LLC was capable of performing. The operating agreement did not reserve the name to the LLC or otherwise prohibit its use. The evidence also showed that the chairman of one of the defendant members had been using some form of the name for many years prior to the formation of the LLC. Thus, the district court correctly determined that the plaintiff had failed to meet its threshold burden of showing the LLC had a protectible interest in the service mark. The court of appeals also rejected the plaintiff's argument that the district court should have entered judgment in its favor in connection with payment of management fees. The plaintiff argued that the district court should have entered judgment rescinding the contracts and requiring disgorgement of the fees to the LLC based on the jury's finding that the defendant members breached the operating agreement and their duties of good faith and fair dealing. The court of appeals rejected this argument because the jury found that the plaintiff suffered no harm. The jury also found the defendants did not breach any fiduciary duties. Under the controlling Nevada law, rescission is an equitable remedy that seeks to place the parties in the same position they occupied before the contract. A judgment returning the fees would have effectively ignored the jury's determination that the plaintiff suffered no harm. The court stated that the jury's verdict was understandable given the evidence that necessary services were performed at a rate that was substantially below market rate. Thus, the plaintiff's argument that it was entitled to equitable relief was without merit.

Sunflower Bank, N.A. v. Airport Red Coach Inn of Wichita, L.L.C., No. 95,320, 2008 WL 360641 (Kan. App. Feb. 8, 2008). An LLC operating agreement provided that the members could appoint a member as general manager of the LLC and that such person would have authority to execute instruments on behalf of the LLC. The operating agreement also required consent of all members for LLC borrowing. The members appointed a manager who signed certain promissory notes on behalf of the LLC, and the bank argued that the members must have intended for the manager to have some discretionary authority. The court held that the managing member was not authorized to execute the promissory notes because the members did not approve the loans. The court found that the term "execute" meant the power to sign loan documents on behalf of the LLC, but only once the authority to borrow had been granted by all members. The manager did not have implied authority because the LLC members had no idea he was borrowing the money. The bank could not rely on statutory provisions regarding the manager's apparent authority because the bank had a copy of the operating agreement and thus had written notice of the limits on the manager's authority.

X. Transfer of Interest/Buy-Out of Member

In re Louis J. Pearlman Enterprises, Inc. (Kapila v. Deutsche Bank A.G.), 398 B.R. 59 (M.D. Fla. 2008) (holding purported transfer of ownership of LLC by individual who was managing member, owned 1% interest in LLC, and owned corporate member that was 99% member of LLC was void and of no effect because transfer did not comply with LLC operating agreement inasmuch as 99% corporate member did not execute required written consent to transfer and did not execute required written consent to termination, revocation, waiver, modification, or amendment of agreement, and purported transferee did not execute required written agreement to be bound by agreement or pay any costs related to purported transfer).

Spurlock v. Begley, No. 2007-CA-002523-MR, 2008 WL 5429542 (Ky. App. Dec. 31, 2008). An LLC member, Griffin, orally announced at a meeting of several individuals that he was giving another individual, Begley, a 25% interest in the LLC. Begley later agreed to sell his 25% interest in the LLC to Spurlock as part of an agreement by Spurlock to purchase from Begley a $75,000 note owed by the LLC to Begley. Begley sued Spurlock when Spurlock failed to pay according to the terms of the agreement, and Spurlock alleged a failure of consideration on the basis that Begley did not own a 25% interest in the LLC. The jury found that Griffin transferred to Begley a 25% ownership interest, and the court entered a judgment in favor of Begley. On appeal, the court discussed the provisions of the Kentucky LLC statute regarding membership and ownership. Spurlock argued that the only method to have "ownership" in an LLC is to be admitted as a member, but the court noted that the LLC statute does not speak of "owners" or "ownership;" rather, the statute speaks in terms of the "limited liability company interest." The court discussed assignment of LLC interests versus admission to membership and pointed out that no requirement of the LLC statute requires an assignment of an LLC interest to be made in writing. As the record contained no evidence of an operating agreement, the court assumed that the LLC had no operating agreement that restricted transfer of LLC interests or required transfers to be in writing. The court explained how the LLC statute provides for the division of management rights (membership) and economic rights (an LLC interest), and the court held that the trial court's submitted instruction inquiring about Griffin's transfer of 25% ownership in the LLC was sufficient to cover assignment of a 25% interest in the LLC and that Begley was not required to prove that Griffin or the LLC formally admitted Begley as a member. Spurlock also argued that no consideration passed because the LLC was administratively dissolved shortly after the trial of the case and the note was in default and practically worthless at the time of the transaction. The court acknowledged that Spurlock made a poor decision but rejected the argument that there was a failure of consideration.

Colachis v. Griswold, No. B206091, 2008 WL 5395682 (Cal. App. 2 Dist. Dec. 29, 2008). The court concluded that an arbitration clause in a Membership Interest Purchase Agreement that encompassed claims "relating to" the purchase agreement encompassed members' claims against co-members for breach of fiduciary duty, breach of contract, and fraud although the conduct underlying the claims occurred prior to the purchase of the plaintiffs' interests and was based on the operating agreement rather than any breach of the purchase agreement. The court stated that the claims related to the purchase agreement because the alleged misconduct forced the plaintiffs to sell their interests to the defendants under the purchase agreement. The court also rejected the plaintiffs' argument that members who were not parties to the purchase agreement were not subject to the arbitration. The plaintiffs relied upon a provision in the purchase agreement that there were no third party beneficiaries of the agreement; however, the court noted that the LLC was a party and that all defendants were members of the LLC. In addition, the non-party members joined in the motion to compel arbitration, thereby voluntarily submitting to the arbitration.

DeNike v. Cupo, 958 A.2d 446 (N.J. 2008) (disqualifying trial judge and ordering full retrial of case involving termination and buy out of LLC member where judge was engaged in employment discussions and negotiations with plaintiff's counsel before final order was signed).

In re Dubin, 864 N.Y.S.2d 526 (N.Y. Sup. 2008) (holding order to turn over proceeds of buy-out of deceased member's LLC interest held in joint checking account to estate was proper, but portion of summary judgment directing that decedent's capital account be turned over was erroneous where record suggested capital account may have been included in purchase price of interest).

Duneland Sand, Inc. v. Misch, No. 45A03-0801-CV-15, 2008 WL 4456340 (Ind. App. Oct. 6, 2008) (affirming trial court's dismissal of suit filed by individual on behalf of corporation and LLC on basis individual no longer owned any interest in entities because defendant had exercised option to purchase stock and units of such entities and transfer was intended to be complete upon creation of successor entity to hold assets excluded from sale of such entities).

Kinnard v. Stone, No. CIV-07-250-R, 2008 WL 4000445 (W.D. Okla. Aug. 25, 2008). Stone assigned his interest in various LLCs and partnerships pursuant to written assignments. Pursuant to an unwritten agreement, Stone had the right to buy back the interests within six months. In this litigation, the parties disputed whether Stone owned any interest in the entities, and one of the arguments made by Stone was that certain assignments were prohibited by the terms of the partnership agreements or operating agreements of the particular entities. One of the LLC agreements required written consent of each member for any assignment of a member's interest. Because Stone's interest in the LLC was assigned, restored, and assigned again without regard to the provision, the court held that Stone waived the consent requirement. Alternatively, the court found that the required consent was satisfied by email messages among the members. The court stated that Stone could not rely on the no-waiver provision contained in the LLC operating agreement when his actions were taken in violation of the transfer restriction provisions in the agreement. The court also noted that because the transferee of Stone's interest was already a member, there was no issue regarding substitution of a member. The court held that the members waived a consent requirement in another LLC operating agreement relating to loans to a member or affiliate and that Stone received consideration for his interests in the form of cash and assumption of certain liabilities. Finally, the court held that the assignments were sales with the right to redeem within a specified period of time rather than loans collateralized by the interests for an unlimited time.

Urban Hotel Development Company v. President Development Group, L.C., 535 F.3d 874 (8th Cir. 2008). The plaintiff asserted that its removal from three LLCs was ineffective because the operating agreements authorized redemption of a member's interest but not removal of a member. The operating agreement of the LLCs provided that each member granted the LLC the right to redeem the member's interest, that exercise of the LLC's right to redeem required delivery of notice to the redeeming member, and that redemption required approval of the holders of 65% of the distribution percentages of all members. The plaintiff was notified by the LLCs that he was being removed, and the plaintiff argued that its removal was ineffective because the letter did not indicate a redemption of the plaintiff's interest. The court pointed out that the Missouri LLC statute provides that a member ceases to be a member when the member is expelled in accordance with the operating agreement. Though the terms "removal" or "expelled" were not used in the operating agreement, the court held that it was clear that the redemption clause in the operating agreements provided a mechanism to remove or expel a member. The court stated that the power to redeem a member's interest under the operating agreement was not conditioned on use of the word "redemption." The LLCs gave the member notice, and the removal was authorized by members owning the requisite percentage of distribution percentages; therefore, the court concluded that the plaintiff's removal was effective. The failure of the LLCs to pay the redemption price within ten days after the notice as required by the operating agreements was a breach of contract but did not render the removal ineffective according to the court. The court rejected the plaintiff's argument that the other members breached their duties of care and loyalty when they removed the plaintiff. The court stated that, because the members relied in good faith on the operating agreements, the district court did not err in concluding that there was no evidence of breach of fiduciary duty. Finally, the court affirmed the district court's finding that the fair market value of the services performed by the plaintiff in exchange for its interest was $10,000. The operating agreement provided that the redemption price was the "actual tax basis of the redeeming member." The plaintiff claimed the redemption price was $167,667 while the LLCs claimed it was zero. The court stated that tax basis in a partnership can be obtained by exchanging services for a partnership interest as well as contributing property or money or assuming liabilities. The court stated that the value of services is determined by the fair market value of the interest received. The court then concluded that the district court's finding that the value of the services provided by the plaintiff in exchange for its partnership interest was not clearly erroneous because there was substantial evidence in the record demonstrating that the plaintiff had contributed services with a fair market value of $10,000.

ULQ, LLC v. Meder, 666 S.E.2d 713 (Ga. App. 2008). Four individuals formed an LLC, and the operating agreement designated the majority member as the sole manager. The operating agreement provided that an officer could be removed by the manager with or without cause whenever in the manager's judgment the best interest of the LLC would be served. Removal was a dissociating event requiring the member to sell his interest to the other members or the LLC at a designated value. The manager appointed Meder, a 10% member, as vice president and later terminated him, claiming that he had abused other employees and that his termination was thus in the best interests of the LLC. The LLC exercised its right to purchase Meder's interest. The value in effect under the operating agreement at that time was the value of a member's capital account, and Meder's capital account was zero due to LLC losses. Meder sued the LLC, alleging that his termination and buy out breached the operating agreement, breached fiduciary duties owed to him by the LLC, and wrongfully converted the value of his capital investment and interest. The LLC counterclaimed alleging various causes of action based on Meder's contacting LLC clients, after his termination as an officer and before the purchase of his membership interest, to persuade them to withhold their business from the LLC. The LLC sought summary judgment on Meder's breach of contract claim on the basis that the operating agreement permitted his termination with or without cause, but the court of appeals held that the trial court did not err in denying summary judgment because there was a fact issue with respect to the duty of good faith and fair dealing implied in all contracts. Because the operating agreement did not vest the manager with absolute discretion in terminating an officer, but rather required the manager to conclude that termination was in the best interest of the LLC, the manager was required to exercise good faith in terminating Meder. Meder presented evidence that he was not abusing other employees and that the true motive for terminating him was to allow the LLC to purchase his interest for nothing at a time when the LLC was about to take off financially, thereby raising an issue regarding the exercise of good faith by the manager. The LLC prevailed on its argument that it did not owe Meder a fiduciary duty. The court acknowledged that the majority owner as the sole manager owed a fiduciary duty to the LLC and its members, but concluded that it would make no sense to hold the LLC responsible for a manager's breach of a fiduciary duty to the LLC and its members.

Dickson v. Rehmke, 164 Cal.App.4th 469, 78 Cal.Rptr.3d 874 (Cal. App. 3 Dist. 2008). The plaintiff filed this action for judicial dissolution of the LLC he co-owned with another individual. The defendant member moved to avoid the dissolution by invoking the California statutory procedure for purchase of the plaintiff's interest at fair market value. The court appointed appraisers and issued an alternative decree determining the value of the membership interest and giving the defendant member 90 days to buy the plaintiff's interest or allow the process of winding up and dissolution to begin. The defendant tendered a check, and the court entered a judgment in accordance with its alternative decree. The plaintiff filed his appeal within 60 days after service of the judgment but later than 60 days from the decree. The issue was the timeliness of the appeal, which depended upon whether the trial court's decree was appealable under the language of the statute. The court stated that neither the briefing nor the court's own research had revealed any cases involving the statutory procedures in the LLC context, but noted that parallel provisions exist for avoiding dissolution in the corporate context. The court also noted as a prefatory matter that the trial court was not bound by the findings of the appraisers and that the absence of a unanimous or majority appraisers' award did not render the statute inapplicable. The statute provides for numerous juristic activities, i.e., appointment of appraisers, order of reference for purpose of ascertaining the dissenting share and setting procedures for necessary evidence, confirmation of unanimous or majority appraisal award or de novo determination of value, alternative decree that directs winding up and dissolution unless the purchasing parties tender timely payment, and a judgment on their bond for costs if they fail to act. The concluding provision for appellate review, however, states that "[a]ny member aggrieved by *the action* of the court may appeal therefrom." The court concluded that the issuance of the decree is the action to which the provision for appeal refers, finding support for such conclusion in the text of the next provision in the statute and in the cases dealing with the purchase option in the corporate context. Because the court's decree was appealable, the appeal was not timely and was dismissed.

Regency Centers, L.P. v. Civic Partners Vista Village I, LLC, No. G038095, 2008 WL 2358860 (Cal. App. 4 Dist. June 11, 2008). Two entities formed a Delaware LLC to own and develop a shopping center. The member who invested the capital (RCLP) notified the developer member (Civic) that it was exercising its option under the operating agreement to buy out Civic's interest. Civic concluded that RCLP had miscalculated the buy out price but did not notify RCLP. The court concluded that the trial court did not err in finding Civic waived its right to challenge RCLP's calculated purchase price by engaging in deliberate foot-dragging in hopes that RCLP would make an error in properly exercising the option. The court reversed the trial court's judgment for punitive damages based on promissory fraud because the trial court made no finding that Civic and its member had no intention of honoring the operating agreement at the time it was entered. The court also concluded that the trial court did not err in finding that the sole member of Civic was liable for Civic's obligations as Civic's alter ego.

Succession of Wascom, No. 2007 CA 1932, 2008 WL 2065062 (La. App. 2008). A member who purported to transfer her 5% interest in an LLC argued that the transfer, as either a donation or a contract, was null and void on several grounds. The court held that there was no evidence that the transfer involved any terms other than those recited in the document, which represented that the transfer was in exchange for the assumption by the other member (the transferor's grandfather) of any and all of the member's existing obligations and liabilities related to the LLC.

Bruno v. Bruno, No. FA054004906S, 2008 WL 907512 (Conn. Super. March 17, 2008) (finding that shares in LLC previously held by terminated employee became treasury shares, acknowledging that Delaware LLC statute does not provide for creation of "treasury shares" as such, but noting that statute permits LLC to purchase, redeem, or otherwise acquire LLC interests and that such interests are deemed cancelled unless otherwise provided in LLC agreement, and concluding that, under settlement agreement which provided for forfeiture of terminated employee's interest in LLC, terminated employee no longer owned his interest in LLC and it had been cancelled by virtue of Delaware LLC statute).

Internal Medicine Alliance, LLC v. Budell, 659 S.E.2d 668 (Ga. App. 2008). Two doctors, Verbitsky and Budell, formed a manager-managed LLC and agreed that each was a 50% member, that they would share equally in profits and losses, and that they would jointly manage the LLC. After a falling out, Budell agreed to leave and form his own practice. The members agreed that Budell was entitled to a redemption of his interest but were unable to agree on a buy out price for Budell's interest. In litigation that ensued, the trial court awarded Budell the fair value of his interest, and found that Verbitsky breached her fiduciary duty to the LLC and Budell after Budell's departure. The trial court found that Verbitsky's failure to repay Budell his capital contribution did not support a conversion claim. Both parties appealed. With respect to the valuation of Budell's interest, the court of appeals concluded that the trial court did not err in determining the fair value of the interest without taking into account the future lease obligation of the LLC. Verbitsky testified that she and Budell agreed at the time he left that his interest would be valued based on a portion of the "fixed assets, minus depreciation," plus what he "brought" to the practice, minus "overhead." She also testified that she never asked him to assume any obligation for the remaining payments on the lease. This was sufficient evidence to support valuation of Budell's interest without including the lease obligation in overhead. With respect to the breach of fiduciary duty claim against Verbitsky, the court of appeals concluded that the trial court was justified in finding Verbitsky failed to act in the best interest of the LLC by failing to take any steps to have Budell's bills processed and collected after his departure, and given the level of hostility and bad blood, that Verbitsky's decision was made in bad faith to negatively impact Budell's ownership interest. The court of appeals found there was insufficient evidence to support the trial court's finding that Verbitsky was liable for conversion based on her failure to reimburse Budell for his capital contribution while reimbursing herself for hers. The court stated that conversion is not a viable claim when there is nothing more than a failure by a defendant to pay money owed the plaintiff. Budell did not allege that his capital contribution was entrusted to Verbitsky for a specific purpose and then misused by her; therefore, Budell's claim was nothing more than a claim for money allegedly owed to him and could not serve as the basis for a claim of conversion.

Y. Capital Contributions and Contribution Obligations

Fuiaxis v. 111 Huron Street, LLC, 872 N.Y.S.2d 184 (N.Y. App. Div. 2d Dept. 2009) (enforcing capital call against LLC member to fund legal fees incurred by LLC in member's judicial dissolution action, finding that capital call complied with terms of LLC's operating agreement and that operating agreement was consistent with New York LLC statute which does not preclude LLC from using its funds to defend judicial dissolution action).

Racing Investment Fund 2000 v. Clay Ward Agency, Inc., No. 2007-CA-0022820MR, 2008 WL 5102151 (Ky. App. Dec. 3, 2008). An insurance agent obtained an agreed judgment against an LLC for unpaid policy premiums, and the LLC made partial payment and claimed it was no longer actively conducting business and had tendered the entirety of its assets. The insurance agent filed a motion to hold the LLC in contempt, and the court issued an order holding the LLC in technical contempt and ordering that the judgment be paid in 90 days. The issue was whether the LLC was required to pay the insurance agent the remaining balance based on a provision in the operating agreement that provided for routine capital calls of the members "to pay operating, administrative, or other business expenses which have been incurred, or which the Manager reasonably anticipates will be incurred" or whether dissolution of the LLC forestalled payment of the judgment. The court found that the provision in the operating agreement fell within the provision of the Kentucky LLC statute that allows members of an LLC to alter their limited liability in a written operating agreement. Because other provisions of the agreement addressing the limited liability of the members contained provisos referring to the capital call provision, the court rejected the argument that these other provisions overrode the capital call provision. The court also stated that the instant case was not about the personal liability of the LLC's members, but rather involved an order against the LLC, a separate legal entity, to make a capital call for the purpose of complying with its obligations under the agreed judgment. The court pointed out that the dissolved LLC still existed, and the court agreed with the trial court that it was reasonable and possible for the LLC to obtain the funds necessary to pay the agreed judgment. The court stated that the LLC's members or its manager must meet the mandates of the trial court order, and the court upheld the trial court's finding of civil contempt.

Johannsen v. Utterbeck, 196 P.3d 341 (Idaho 2008). The Idaho Supreme Court agreed with the trial court that a provision in an operating agreement requiring a member to contribute "certain real property" to the LLC was ambiguous with regard to whether the member was required to contribute a specific amount of property or not. The jury heard testimony from witnesses regarding what was intended and concluded that the member was required to contribute the entire tract notwithstanding the member's argument that the operating agreement permitted, but did not require, contribution of the entire tract. The member relied upon language in the operating agreement specifying that capital contributions shall be made incrementally as agreed by the members, but the court stated that the ambiguity in the agreement was a fact issue for the jury to decide.

Blair v. McDonagh, 894 N.E.2d 377 (Ohio App. 2008). Blair and McDonagh formed an LLC to operate Irish pub restaurants. Disputes developed, and the members asserted various claims against each other. The court held that the trial court did not err in ruling that $20 million in advances by McDonagh to the LLC were loans rather than capital contributions. The operating agreement provided that the members contemplated that additional requirements of the LLC would be met by a bank loan and/or capital contribution of McDonagh and that the LLC was authorized to accept additional capital contributions from McDonagh in such amount as the members deemed appropriate or necessary. Blair argued that these provisions showed the parties contemplated that McDonagh's advances would be treated as capital contributions rather than loans. However, the operating agreement also provided that no member was required to make any further capital contribution or loan to the LLC. Thus, under the plain language of the agreement, McDonagh was permitted, but not required, to provide loans or capital, and the operating agreement did not show that McDonagh's advances were necessarily capital contributions. The court concluded that there was evidence to support the trial court's decision that McDonagh's advances were intended by the parties to be loans based on evidence of how Blair treated the advances on the LLC's tax returns, language on the memo line of the checks, and testimony of one of Blair's accountants.

Abuy Development, L.L.C. v. Yuba Motorsports, Inc., No. 4:06CV799SNL, 2008 WL 1777412 (E.D. Mo. April 16, 2008). Two entities, Abuy Development, LLC ("Abuy") and Yuba Motorsports, Inc. ("Yuba"), formed a Delaware LLC for developing a motorplex. The parties entered an operating agreement containing provisions regarding additional capital contributions and failure to make capital contributions which were the subject of the dispute in this case. After the initial capital contributions made by the parties, which consisted of a cash contribution by Abuy and a credit for work performed by Yuba on the project, additional cash capital contributions were made. Abuy loaned Yuba the amounts needed for it to make the additional contributions. Yuba defaulted in the payment of the promissory notes to Abuy, and Abuy sought to adjust the capital accounts under the operating agreement. The adjustment essentially gave Abuy 100% membership in the LLC. Abuy argued it had the right to adjust the capital accounts under a provision of the operating agreement that addressed the failure of a "Defaulting Member" to make additional capital contributions. The court determined that the term "Defaulting Member" was ambiguous and considered extrinsic evidence, including testimony by the lawyers who represented the parties in the drafting and negotiation of the operating agreement. Both lawyers testified that it was their understanding that the provisions of the operating agreement permitted a member to loan funds to another member who was not willing to make an additional capital contribution and that the remedy for a member who made such a loan and was not timely repaid was an adjustment to the capital accounts. Thus, Abuy, as the "Non-Defaulting Member" under the agreement had the right to adjust the capital accounts due to the failure of Yuba, the "Defaulting Member" under the agreement, to repay the loans. The evidence also showed that Yuba knew or should have known that this provision was a legal "squeeze down provision" by which a defaulting member could lose its ownership interest. The court commented in the course of its discussion rejecting counterclaims asserted by Yuba, that Abuy, having properly adjusted the capital accounts in such a manner that Yuba no longer owned an interest, had no obligation to advise or notify a non-member (Yuba) of any purported discussions or offers of alternative uses for the subject real property.

Glasnak v. Garmo, No. 275555, 2008 WL 466886 (Mich. App. 2008) (stating that arbitrator's decision that member was admitted to existing LLC without being obligated to make future capital contributions as provided in LLC's operating agreement was not error of law because Michigan LLC statute provides that member may be admitted without incurring any obligation to make capital contribution and arbitrator found there was no evidence member ever agreed to be bound by operating agreement provision regarding additional capital contributions).

Z. Compensation of Member

Tunney v. Hilliard, C.A. No. 1317-VCN, 2008 WL 3875620 (Del. Ch. Aug. 20, 2008). Tunney and Hilliard owned and operated a corporation (which was the operating entity) and an LLC (a real estate holding entity) in connection with their restaurant business. After they sold the business, Tunney argued that he was entitled to a "commission" out of the sales proceeds based on an oral agreement reached with Hilliard when Tunney assumed additional management responsibilities in Hilliard's absence. Hilliard denied making this agreement with Tunney and claimed that any additional efforts by Tunney were de minimis or within the scope of their original 50-50 agreement. The court reviewed the evidence and agreed with Hilliard. The court found that Hilliard's decreased presence resulted in few changes in the business. The stock certificates of the corporation evidenced equal ownership, and the written LLC agreement provided for equal distribution of the profits. The court acknowledged that Delaware law permits oral modifications of written agreements, but stated that they were not favored for "a host of policy and pragmatic reasons." Thus, a party seeking to prove an oral modification must prove the intended change with sufficient specificity and directness as to leave no doubt of the intended change to the formal document. The court concluded Tunney fell well short of that mark. The court also rejected Tunney's promissory estoppel claim because he failed to prove that Hilliard promised him additional compensation. Finally, the court rejected various equitable claims by both parties for compensation for "additional"efforts expended in operating the business. The court found that each contributed more or less equally to the success of the business and that they were left to abide by their original 50-50 agreement.

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, Civil Action No. 5:07cv162-DCB-JMR, 2008 WL 2789504, 102 A.F.T.R.2d 2008-5256 (S.D. Miss. July 17, 2008). Stanley, a licensed physician, was a member of a professional LLC and the president and sole shareholder of an S corporation that performed services on behalf of the LLC through Stanley. The question in this case was whether payments made by the LLC to Stanley and/or his corporation were "wages or salary payable to or received by" Stanley for purposes of the continuous levy provision of Section 6331(e) of the Internal Revenue Code. The LLC argued that it was not indebted to Stanley for any undistributed profits on the date on which the LLC received the notice of levy and that Stanley was a member who received profits based upon the amount of fees he produced and not an employee to whom it paid a wage or salary. The IRS asserted that Stanley and/or his corporation should be treated as an employee or independent contractor inasmuch as they were compensated based on the amount of money collected by Mission for medical services which Stanley rendered rather than based on the membership interest of Stanley and/or his corporation in the LLC. The IRS argued that the fact that the LLC labeled Stanley and/or his corporation as its member did not change the factual nature of the relationship as that of an employee or an independent contractor. The LLC contended that the services were performed by Stanley in his own behalf as a member of the LLC and that there was no evidence that Stanley was contractually bound to provide services for the LLC. According to the LLC, it merely acted as a collection conduit (after deduction of its operating expenses) for the payments which Stanley's patients made to his corporation for medical services that Stanley had rendered and for which the corporation had billed. The LLC argued that the case law upon which the IRS relied did not support the position that profits paid to member physicians of a professional LLC constitute "wages and salary" subject to a continuing levy under the relevant federal statutes. The court cited case law construing "salary or wages" broadly for purposes of the continuing levy provision, and the court concluded that the term includes fees paid to an independent contractor as compensation for services rendered. The court concluded that there was a fact question as to whether Stanley provided services to the LLC as an independent contractor.

Bookhamer v. I. Karten-Bermaha Textiles Co., L.L.C., 859 N.Y.S.2d 172 (N.Y. A.D. 1 Dept. 2008) (holding that there were triable issues of fact as to whether controlling member was entitled to collect excess distributions as compensation for carrying out daily operations of LLC's business and whether such compensation was fair and reasonable).

AA. Improper Distributions

Bookhamer v. I. Karten-Bermaha Textiles Co., L.L.C., 859 N.Y.S.2d 172 (N.Y. A.D. 1 Dept. 2008) (holding that there were triable issues of fact as to whether controlling member was entitled to collect excess distributions as compensation for carrying out daily operations of LLC's business and whether such compensation was fair and reasonable).

Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium, 982 So.2d 1211 (Fla. App. 2008). The plaintiff sought discovery of financial records of an LLC in an action involving various claims against the LLC and its members, including a fraudulent transfer claim premised on the belief that the LLC had made cash distributions to its members rendering the LLC insolvent. The court concluded that the information was not discoverable because it was not relevant and would not lead to discovery of relevant information. A dissenting opinion argued that the majority's conclusion ignored the relevance of the requested information to plaintiff's claim regarding improper distributions.

In re 37-02 Plaza LLC, 387 B.R. 413 (Bankr. E.D. N.Y. 2008). Chan, a former member of a New York LLC, sought to collect on promissory notes executed by the LLC as payment for the buy-out of Chan's interest by Tomasino, the managing member of the LLC. The note was signed by Tomasino individually and in his capacity as managing member. The LLC argued that the notes were legally unenforceable for lack of consideration and that payment of the notes would violate the statutory restriction on distributions under the New York LLC statute. The court stated that the LLC bargained for a benefit to a third party, Tomasino, in exchange for its obligation on the notes and that this benefit to a third party was consideration for the LLC's obligation on the notes. In addition, the court held that the notes were supported by consideration because the LLC bargained for a detriment to Chan in the form of Chan's surrender of his interest in the LLC. The court also rejected the LLC's argument that payments on the notes amounted to distributions to Tomasino and Chan in violation of the New York LLC statute, which prohibits distributions to members of an LLC when the LLC is insolvent or the distribution would render it insolvent. The court concluded that payments on the note did not constitute "distributions" as defined by the statute because they were not payments to a person in his or her capacity as a member. Chan was no longer a member, and, while the payments resulted in a benefit to Tomasino, they were payments made pursuant to the LLC's contractual obligation on the note rather than payments to Tomasino in his capacity as a member. Thus, payments under the note were not impermissible distributions under the New York LLC statute.

In re Young (Rands v. Young), 384 B.R. 94 (Bankr. D. N.J. 2008). The court held that the three-year statute of limitations governing member liability for distributions under the New Jersey LLC statute did not apply to funds misappropriated by members and did not bar embezzlement nondischargeability claims. The court noted that neither Black's Law Dictionary nor the LLC statute provides a definition of "distribution," but the court stated that the typical nature of a distribution is a distribution of profits or a return of capital. The transfers in issue differed from a typical distribution in that the transfers involved alleged misappropriation of funds by a member for personal use. The court found support for its conclusion in similar provisions of the New Jersey Partnership Act, which defines a "distribution" as a transfer of money or property from a partnership to a partner in the partner's capacity as partner or to the partner's transferee. Since the alleged transfers were for the member's unauthorized personal use, the court did not view the member as acting in his capacity as a member. The member argued that a distribution is any money taken out of the LLC by or for a member, relying on *In re Die Fliedermaus, LLC*, a New York bankruptcy case. In that case, the trustee sought to avoid distributions as fraudulent conveyances, and the court held that the three-year statute of limitations applicable to distributions under the New York LLC statute barred the avoidance action. The court stated that the types of payments in *Die Fliedermaus* were distinguishable because the distributions in *Die Fliedermaus* were challenged on the basis that they were made while the LLC was insolvent; there was no allegation of embezzlement. In addition, the court noted that the New York bankruptcy court had addressed the trustee's breach of fiduciary duty claim separately, indicating the court recognized that taking money in breach of fiduciary duties was not a distribution subject to the three-year statute of limitations. The court next stated that, even if the court were to find the three-year statute of limitations applied in this case, disputed facts existed that could lead to tolling because the member allegedly concealed the misappropriations. The court found it unnecessary to resolve whether the member was acting in a fiduciary capacity for purposes of the nondischargeability provision because the allegations were consistent with embezzlement.

Matz v. Merideth, No. 2 CA-CV 2006-0151, 2007 WL 5290465 (Ariz. App. July 25, 2007). After a falling out among the members of an LLC that operated an emergency veterinary clinic, two of the members formed a new entity to operate a new emergency clinic at the same location. The original LLC was ordered judicially dissolved in litigation between the members, and the dissolution proceeding was eventually consolidated with another action brought by one of the members (Matz) against the two members who formed the new clinic. Matz claimed that the two members who formed the new clinic "appropriated and distributed to themselves" all of the intangible assets of the LLC, including its goodwill, and that these actions violated the LLC's operating agreement because the assets were not distributed equally to the members. The trial court concluded that the two members who appropriated the goodwill were liable under the Arizona wrongful distribution statute and that the value of Matz's interest in the distribution was $188,000. The two members who formed the new clinic argued that a dissolved business can have no goodwill as a matter of law, but the court rejected that argument. The court of appeals concluded that the trial court did not err in finding that the dissolved LLC had goodwill and that the two former members who conducted business at the same location as the old LLC were liable for appropriating it. The court also found that the trial court's determination of the value of the LLC's goodwill was not clearly erroneous. The court of appeals questioned whether appropriation of an LLC's assets by members is a "distribution" as contemplated by the distribution statute, but assumed, without deciding, that it was proper for the trial court to grant relief under the distribution statute since the members did not address the issue on appeal.

BB. Withdrawal, Expulsion, or Termination of Member

Nightingale & Associates, LLC v. Hopkins, Civ. Docket No. 07-4239 (FSH), 2008 WL 4848765 (D. N.J. Nov. 5, 2008) (dismissing member's claim for "wrongful misconduct" in connection with member's removal from LLC because member did not identify any source of common or statutory law in Delaware or New Jersey supporting cause of action and claim simply restated essence of breach of contract claim).

Satterfield v. Ennis, Civil Action No. 08-cv-00751-ZLW-CBS, 2008 WL 4649026 (D. Colo. Oct. 20, 2008) (finding expelled member's unjust enrichment claim against former co-members and successor LLCs marginally sufficient to state claim; observing that Colorado LLC statute "does not appear to mandate that co-members of a limited liability company owe fiduciary duties to one another" but concluding that plaintiff's pro se pleading, liberally construed, was sufficient to allege existence and breach of fiduciary duty of co-members of LLC and of successor LLCs of LLC that expelled plaintiff).

Implants International, Ltd. v. Implants International North America, LLC, No. 08-12137, 2008 WL 4104477 (E.D. Mich. Sept. 4, 2008). The plaintiff argued that Mohan Emmanuel, a citizen of the United Kingdom, had severed his relationship with the defendant LLC and was not a member of the LLC when the complaint was filed and that Emmanuel's citizenship thus should not be considered in determining the citizenship of the LLC for purposes of diversity jurisdiction. The court, however, determined that Emmanuel had not withdrawn as a member. His written correspondence only reflected his resignation as Executive Chairman. The operating agreement stated that a member may withdraw only as provided in the agreement, which required consent of the managers unless the member had assigned and transferred all his units to another member or an assignee admitted as a substitute member. The court stated that there was no evidence Emmanuel assigned or transferred all his units to another member or substitute member or that he withdrew from the LLC with the consent of the managers. He thus remained a member of the LLC whose citizenship destroyed diversity jurisdiction.

In re Lull (Kotoshirodo v. Dorland and Associates, Inc.), Bankruptcy No. 06-00898, Adversary No. 08-90001, 2008 WL 3895561 (Bankr. D. Hawaii Aug. 22, 2008). Three individuals, Lull, Tipaldi, and Jasper, formed a Hawaii LLC in 2005. The articles of organization identified the three individuals as the members and managers of the LLC. The first annual report was submitted in August 2006 dated as of July 1, 2006, but was returned to Tipaldi for reasons not apparent in the record. A resubmitted annual report was received by the Department of Commerce on October 17, 2006. The report had a handwritten line through Lull's name on the member-managers list along with a handwritten notation to remove Lull. Thereafter, Lull had no interest in the LLC. Lull filed bankruptcy on December 8, 2006, and Tipaldi filed a proof of claim based on a promissory note. The questions presented in this adversary proceeding were whether the removal of Lull from the LLC was a preferential transfer to Tipaldi and what preference period applied. The court concluded that Lull's removal as a member and manager of the LLC fell within the broad definition of "transfer" in Section 547(b) of the Bankruptcy Code because the membership interest would have constituted property of the bankruptcy estate had he not been removed. The transfer also benefitted Tipaldi, who was both a creditor of Lull and one of the two remaining members of the LLC. The element of preference was uncontested because Tipaldi filed a proof of claim and obtained a default judgment in an adversary proceeding determining that Lull owed him over $3,000,000. Lull testified at his Section 341 creditors' meeting that he "signed off his interest" in the LLC because he owed Tipaldi money. Lull's insolvency during the year preceding his bankruptcy was also established. The court determined that the transfer occurred within 90 days of the bankruptcy, finding that Lull's removal was not effective until the re-submitted annual report was accepted for filing on October 17, 2006. Even if the effective date of Lull's removal was August 21, 2006, however, the court concluded that the one-year preference period applicable to insiders applied to Tipaldi. The court reviewed the concepts of statutory and non-statutory insiders and concluded that Tipaldi was a non-statutory insider of Lull because of their business relationship. Finally, the court determined that the transfer effected by Lull's removal enabled Tipaldi to receive more than he would have received in a straight liquidation; however, the court concluded the sum to be recovered by the trustee from Tipaldi could not be determined on the record because there was no proof of the value of Lull's LLC interest at the time of the transfer. The record also failed to demonstrate if or how to apportion the preferential transfer between Tipaldi and Jasper, the other remaining member of the LLC.

Urban Hotel Development Company v. President Development Group, L.C., 535 F.3d 874 (8th Cir. 2008). The plaintiff asserted that its removal from three LLCs was ineffective because the operating agreements authorized redemption of a member's interest but not removal of a member. The operating agreement of the LLCs provided that each member granted the LLC the right to redeem the member's interest, that exercise of the LLC's right to redeem required delivery of notice to the redeeming member, and that redemption required approval of the holders of 65% of the distribution percentages of all members. The plaintiff was notified by the LLCs that he was being removed, and the plaintiff argued that its removal was ineffective because the letter did not indicate a redemption of the plaintiff's interest. The court pointed out that the Missouri LLC statute provides that a member ceases to be a member when the member is expelled in accordance with the operating agreement. Though the terms "removal" or "expelled" were not used in the operating agreement, the court held that it was clear that the redemption clause in the operating agreements provided a mechanism to remove or expel a member. The court stated that the power to redeem a member's interest under the operating agreement was not conditioned on use of the word "redemption." The LLCs gave the member notice, and the removal was authorized by members owning the requisite percentage of distribution percentages; therefore, the court concluded that the plaintiff's removal was effective. The failure of the LLCs to pay the redemption price within ten days after the notice as required by the operating agreements was a breach of contract but did not render the removal ineffective according to the court. The court rejected the plaintiff's argument that the other members breached their duties of care and loyalty when they removed the plaintiff. The court stated that, because the members relied in good faith on the operating agreements, the district court did not err in concluding that there was no evidence of breach of fiduciary duty. Finally, the court affirmed the district court's finding that the fair market value of the services performed by the plaintiff in exchange for its interest was $10,000. The operating agreement provided that the redemption price was the "actual tax basis of the redeeming member." The plaintiff claimed the redemption price was $167,667 while the LLCs claimed it was zero. The court stated that tax basis in a partnership can be obtained by exchanging services for a partnership interest as well as contributing property or money or assuming liabilities. The court stated that the value of services is determined by the fair market value of the interest received. The court then concluded that the district court's finding that the value of the services provided by the plaintiff in exchange for its partnership interest was not clearly erroneous because there was substantial evidence in the record demonstrating that the plaintiff had contributed services with a fair market value of $10,000.

ULQ, LLC v. Meder, 666 S.E.2d 713 (Ga. App. 2008). Four individuals formed an LLC, and the operating agreement designated the majority member as the sole manager. The operating agreement provided that an officer could be removed by the manager with or without cause whenever in the manager's judgment the best interest of the LLC would be served. Removal was a dissociating event requiring the member to sell his interest to the other members or the LLC at a designated value. The manager appointed Meder, a 10% member, as vice president and later terminated him, claiming that he had abused other employees and that his termination was thus in the best interests of the LLC. The LLC exercised its right to purchase Meder's interest. The value in effect under the operating agreement at that time was the value of a member's capital account, and Meder's capital account was zero due to LLC losses. Meder sued the LLC, alleging that his termination and buy out breached the operating agreement, breached fiduciary duties owed to him by the LLC, and wrongfully converted the value of his capital investment and interest. The LLC counterclaimed alleging various causes of action based on Meder's contacting LLC clients, after his termination as an officer and before the purchase of his membership interest, to persuade them to withhold their business from the LLC. The LLC sought summary judgment on Meder's breach of contract claim on the basis that the operating agreement permitted his termination with or without cause, but the court of appeals held that the trial court did not err in denying summary judgment because there was a fact issue with respect to the duty of good faith and fair dealing implied in all contracts. The court stated that the exercise of discretion by a party to a contract is subject to the implied duty of good faith unless the contract states that the discretion is "absolute" or within the "sole" judgment of the party. Because the operating agreement did not vest the manager with absolute discretion in terminating an officer, but rather required the manager to conclude that termination was in the best interest of the LLC, the manager was required to exercise good faith in terminating Meder. Meder presented evidence that he was not abusing other employees and that the true motive for terminating him was to allow the LLC to purchase his interest for nothing at a time when the LLC was about to take off financially, thereby raising an issue regarding the exercise of good faith by the manager. The LLC prevailed on its argument that it did not owe Meder a fiduciary duty. The court acknowledged that the majority owner as the sole manager owed a fiduciary duty to the LLC and its members, but concluded that it would make no sense to hold the LLC responsible for a manager's breach of a fiduciary duty to the LLC and its members.

Pharmalytica Services, LLC v. Agno Pharmaceuticals, LLC, C.A. No. 3343-VCN, 2008 WL 2721742 (Del. Ch. July 9, 2008). An LLC sought a preliminary injunction prohibiting a member from taking action on behalf of the LLC or holding himself out as an authorized representative of the LLC. In 2006, after discovering that a member had formed another business that was competing with the LLC, the board of the LLC removed the member from the management team and from the positions of president and CEO by majority vote. The member objected but made no formal challenge at the time. In 2007, the LLC sued the member asserting various claims sounding in breach of fiduciary duty, equitable and legal fraud, and breach of the LLC's operating agreement. In 2008, the LLC learned that the member was in China asserting the LLC's rights to appoint designees to the board of a joint venture between the LLC and a Chinese entity, prompting the LLC's motion for a preliminary injunction. The member argued that his removal required the unanimous vote of the board of directors of the LLC because the operating agreement required a unanimous vote of the board for major decisions. The LLC relied upon provisions of the operating agreement giving the board authority to remove a member of the management team with or without cause based on a majority vote and providing that senior officers and other managers could be dismissed by the board for illicitly seeking personal gain or other delinquent behavior. The court characterized the preliminary injunction sought as in the nature of a status quo order under Section 18-110 of the Delaware LLC, which is comparable to Section 225 of the Delaware General Corporation Law. That provision allows for continued operation of the business, with a goal of minimal disruption, while the identities of those properly holding corporate power can be established. The court pointed out that the member did not act in a constructive or direct fashion for the benefit of the LLC for 18 months following the 2006 meeting at which he was removed from his management positions, and his appearance in China and assertion of authority on behalf of the LLC was inconsistent with his course of action since the 2006 meeting and with the expectations of a majority of the members. The court stated that the rational, ongoing governance of the LLC required certainty as to who was running the LLC and that preserving the status quo as traditionally done in the corporate setting was the proper course. The court concluded that the management that had been in control since 2006 should remain in control in the interim and that the member should be precluded from purporting to represent the interests of the LLC. The court noted that the traditional analysis for a status quo order under the corporate and LLC statutes eschews the formalistic application of the preliminary injunction framework; however, because the LLC presented its claim as a request for a preliminary injunction, the court adhered to those standards and found that the LLC had demonstrated a reasonable probability of success on the merits that the member should not be acting on its behalf, that the member's conduct in China without ongoing authority was likely to cause significant and irreparable harm, and that a balancing of harms weighed in favor of the LLC.

Ross v. Nelson, 861 N.Y.S.2d 670 (N.Y. A.D. 1st Dept. 2008). The court held that the plaintiff was properly removed as a member-manager although the operating agreement lacked a specific provision for removal because the operating agreement referred to "expulsion" as an event causing dissolution and reorganization. The court stated that the New York LLC statute permitted removal of a manager by majority vote of the members given the lack of a provision in the operating agreement. Two dissenting judges argued that a provision in the operating agreement requiring all members to vote for the plaintiff in any election of managers precluded removal of the plaintiff because the statutory removal provision applies "except as provided in the operating agreement."

Joyner v. JEM Enterprises, LLC, No. CV54014991S, 2008 WL 2745885 (Conn. Super. June 16, 2008) (granting summary judgment against plaintiff on unjust enrichment claim based on LLC's retention of plaintiff's capital contribution following plaintiff's withdrawal as member because plaintiff had assigned her LLC interest to individual who was not party to litigation and there was no evidence plaintiff suffered detriment).

Schell v. Kent, Civil No. 06-cv-425-JM, 2008 WL2019431 (D. N.H. May 9, 2008). Two individuals, Kent and Schell, formed a Nevada LLC. The individuals parted ways, with Schell agreeing to cease his participation in the LLC and Kent agreeing to repay Schell certain amounts for expenses Schell had incurred in connection with the LLC or on the LLC's behalf. Kent continued to operate the LLC but failed to pay Schell the amounts he agreed to pay. Schell continued to hold a membership interest in the LLC. Eventually the Nevada Secretary of State revoked the LLC's authority to do business, but the LLC was not wound up. Schell brought breach of contract and unjust enrichment claims based on the amounts owed him, but the court held that the claims were barred by New Hampshire's three-year statute of limitations on contracts. The court stated that, to the extent Schell sought damages for his economic interest, that claim arose when the LLC's authority to do business was revoked by the Nevada Secretary of State and Schell's failure to enforce the statutory provisions and compel a winding up during the three years following the revocation of the LLC's charter barred his unjust enrichment claim according to the court.

In re Klingerman (Klingerman v. ExecuCorp, LLC), 388 B.R.677 (Bankr. E.D. N.C. 2008). The bankruptcy debtor in possession, Klingerman, sought judicial dissolution and winding up of an LLC of which Klingerman was a founding member. The other member, Parker, alleged that Klingerman ceased to be a member when he filed bankruptcy and thus lacked standing to seek an accounting or judicial dissolution. Parker relied upon the operating agreement and the North Carolina LLC statutes. The operating agreement provided that a member shall not voluntarily withdraw or take any voluntary action that would cause a "Withdrawal Event." The operating agreement did not define the term "Withdrawal Event," but the North Carolina Limited Liability Company Act provides that a person ceases to be a member upon specified events of withdrawal including the filing of a voluntary bankruptcy petition. Parker argued that Klingerman ceased to be a member when he filed his bankruptcy petition because the operating agreement did not negate the statutory provisions for withdrawal. Klingerman's loss of membership status was significant because the North Carolina LLC statute provides for judicial dissolution only where a proceeding is brought by the Attorney General, a member, or the LLC itself. The court stated that Klingerman would not have standing to pursue dissolution if the analysis stopped with the operating agreement and the North Carolina LLC statute, but the court proceeded to consider Bankruptcy Code Section 541(c). Section 541(c)(1) provides that all of the debtor's interest in property becomes property of the estate notwithstanding any provision in applicable nonbankruptcy law that is conditioned on the commencement of a bankruptcy and that effects a forfeiture, modification, or termination of the debtor's interest in property. Agreeing with *In re Ehmann*, the court concluded that all of the debtor's rights and interest, economic and non-economic, passed to the estate under Section 541(c). The court viewed the converting of a debtor's membership interest to that of an assignee by operation of a state statute as a modification or termination of the interest that is rendered ineffective by Section 541(c). In so concluding, the court disagreed with *In re Garrison-Ashburn, L.C.*, in which a bankruptcy court concluded that the debtor/member's bankruptcy estate only had the rights of an assignee. As a member of the LLC, Klingerman's estate had standing to seek dissolution. The court left for another day the question of whether the request for judicial dissolution should be granted.

Cascade Falls, L.L.C. v. Henning, 143 Wash.App. 1056, 2008 WL 934074 (Wash. App. April 8, 2008). Two brothers, Scott and Greg Henning, formed a Washington LLC. A few years later, they discussed going their separate ways, and Greg withdrew. After operating the LLC as its sole member for several years, Scott learned of irregular business and accounting activities by Greg. Unbeknownst to Scott, Greg had continued to operate using the LLC's name and one of its bank accounts. Scott filed this lawsuit, alleging breach of fiduciary duties, fraud, and conversion of the LLC's money by Greg. Scott alleged that he was the sole member of the LLC, but Greg filed a counterclaim for declaratory judgment that he was still a member of the LLC because Scott had not formally consented in writing to his withdrawal pursuant to the Washington LLC statute. Scott contended that Greg should be estopped to claim membership in the LLC because he had submitted an affidavit stating that he withdrew from the LLC in another lawsuit involving the

LLC and third parties. The trial court ruled that Greg was judicially estopped from claiming membership in the LLC. On appeal, Greg argued that the trial court erred because the Washington LLC statute states a bright-line rule for membership withdrawal that strictly requires written consent by all members for a member's withdrawal if the LLC agreement does not specify the time or events upon which a member may withdraw. Greg argued that this rule precludes application of equitable principles. The court of appeals disagreed. The pleadings and evidence factually established that Greg withdrew with Scott's consent, and Scott effectively restated his consent in his affidavit in the other lawsuit when he characterized himself as the only member of the LLC and agreed with Greg's statement that he had withdrawn. Further, the parties, including Scott, acted like Greg had withdrawn because the LLC's tax return and annual report listed Scott as the only member. Under these circumstances, the court saw nothing in the statute that would preclude a finding that Scott consented.

Limousine Livery, Ltd. v. A Airport Limousine Service, L.L.C., 980 So.2d 780 (La. App. 2008) (denying member's request for injunctive relief in connection with member's suspension of membership because member failed to establish irreparable injury would be suffered if injunction did not issue, injunction was sought not to prevent future acts but to undo past act, and injunction was in effect mandatory injunction to reinstate member which could not be granted without hearing).

Crouse v. Mineo, 658 S.E.2d 33 (N.C. App. 2008). The court held that the plaintiff did not cease to be a member by filing a petition seeking dissolution of LLC. The statutory provision relied upon by the defendant states that a member who seeks *for himself* dissolution ceases to be a member; the provision does not cause dissociation of a member who files a petition for dissolution of the LLC of which he is a member.

Romanowski v. RNI, LLC, No. C 06-6575 PJH, 2008 WL 361125 (N.D. Cal. Feb. 11, 2008) (noting lack of evidence that individual "disassociated" from LLC).

CC. Dissolution and Winding Up

Price v. Paragon Graphic, Ltd., No. 08CA3, 2008 WL 5244993 (Ohio App. Dec. 16, 2008) (finding set off granted by trial court in favor of majority member for amount owed by member against LLC violated statutory mandate regarding order of payment of assets in liquidation and remanding for distribution of assets in accordance with statute).

Racing Investment Fund 2000 v. Clay Ward Agency, Inc., No. 2007-CA-0022820MR, 2008 WL 5102151 (Ky. App. Dec. 3, 2008). An insurance agent obtained an agreed judgment against an LLC for unpaid policy premiums, and the LLC made partial payment and claimed it was no longer actively conducting business and had tendered the entirety of its assets. The insurance agent filed a motion to hold the LLC in contempt, and the court issued an order holding the LLC in technical contempt and ordering that the judgment be paid in 90 days. The issue was whether the LLC was required to pay the insurance agent the remaining balance based on a provision in the operating agreement that provided for routine capital calls of the members "to pay operating, administrative, or other business expenses which have been incurred, or which the Manager reasonably anticipates will be incurred" or whether dissolution of the LLC forestalled payment of the judgment. The court found that the provision in the operating agreement fell within the provision of the Kentucky LLC statute that allows members of an LLC to alter their limited liability in a written operating agreement. The court stated that the instant case was not about the personal liability of the LLC's members, but rather involved an order against the LLC, a separate legal entity, to make a capital call for the purpose of complying with its obligations under the agreed judgment. The court pointed out that the dissolved LLC still existed, and the court agreed with the trial court that it was reasonable and possible for the LLC to obtain the funds necessary to pay the agreed judgment. The court stated that the LLC's members or its manager must meet the mandates of the trial court order, and the court upheld the trial court's finding of civil contempt.

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed in part, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI, a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. Ewie sought summary judgment on the basis that it was the majority member and properly sought dissolution under the articles of organization and operating agreement in light of the dissolution date of December 31, 2004. Ewie further argued that it was forced to seek judicial dissolution and that Mahar lacked standing to bring its counterclaims because the LLC dissolved on December 31, 2004, and Ewie's conduct seeking dissolution was not unfair or oppressive. Ewie argued that the non-compete provision had not been violated because it was PSMI and not Ewie that contracted with GM.

The court held that the operating agreement was ambiguous as to whether unanimous consent of the members was required to dissolve upon the termination date specified in the articles of organization, and that the trial court thus erred when it ruled that the LLC automatically dissolved on the date specified in the articles of organization. The court also held that it was error for the trial court to grant summary disposition on the dissolution question because, regardless of the dissolution date in the articles of organization, Mahar presented evidence that Ewie and its principals took steps prior to the dissolution to take over the LLC's contract with GM. Though Ewie argued that Mahar had no standing to assert the LLC's claims, the court stated that Mahar had statutory authority under the Michigan LLC statute to bring an action to establish that Ewie, a controlling member, engaged in fraudulent, willfully unfair, or oppressive conduct. Ewie argued that it was within its rights to force dissolution of the LLC, but the Michigan LLC statute permits winding up of an LLC by the members who have not "wrongfully dissolved" the LLC, and the court held that Mahar presented evidence that could lead a reasonable jury to conclude that Ewie "wrongfully dissolved" the LLC because of Ewie's desire to usurp the GM contract. Further, the statute requires "good cause" for a judicial winding up, and the court stated that "good cause" would not include formation of a new company to take over the LLC's business. On appeal, the Michigan Supreme Court held that any ambiguity in the operating agreement was irrelevant given the termination date in the articles of organization because the Michigan statute provides for automatic dissolution at the time specified in the articles of organization. The court remanded for reconsideration of Ewie's motion for summary disposition for judicial dissolution in light of a provision in the Michigan LLC statute providing that a court may cancel or alter a provision in the articles of organization if controlling managers or members have engaged in illegal or fraudulent acts or willfully unfair and oppressive conduct.

The court of appeals also held that a jury must decide whether Ewie violated provisions of the operating agreement requiring the members to discharge their duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC and that a jury should consider whether the conduct of Ewie and its owners violated the non-compete clause in the operating agreement. Relying on provisions of the Michigan LLC statute and the operating agreement, the court stated that Ewie, as managing member, was required to disclose to Mahar that Ewie's principals were forming PSMI to take over the GM contract and to obtain Mahar's consent to transfer substantially all of the assets of the LLC to PSMI.

Stanziale v. Skiba, No. CV040412495, 2008 WL 4150302 (Conn. Super. Aug. 20, 2008). The court held that the proper plaintiff in an action to prosecute a claim against the defendant for payment on a construction contract with an LLC was the LLC. The LLC had been dissolved prior to the filing of the suit, and the two individuals who brought the suit alleged that they were authorized to wind up the business and affairs of the LLC. The court held that the LLC was clearly the proper plaintiff under the LLC statute. Authority to wind up the business and affairs of the LLC did not carry with it authority to bring suit in their own names or individual capacities. The court found that the mistake in naming the individual principals of the dissolved LLC rather than the LLC itself was an honest mistake and granted the motion to substitute the LLC as plaintiff.

Echelon Homes, L.L.C. v. Carter Lumber Company, No. 277471, 2008 WL 3540210 (Mich. App. Aug. 14, 2008). The court held that the trial court did not abuse its discretion in ordering the plaintiff LLC to post a bond as security where the trial court determined that the LLC was unlikely to prevail at trial and lacked the resources to pay an award of case evaluation sanctions. The court held that the trial court erred, however, to the extent it held that the dissolved LLC's members could be held liable for sanctions against the LLC. The court noted that the members continue to be protected from personal liability for the LLC's debts during the winding up, but the fact that the LLC has been dissolved and is impecunious, while its members are immune from liability, is even more reason to require the LLC to post a bond to ensure a potential award of case evaluation sanctions will be paid. The court denied the defendant's motion to dismiss the LLC's case. The defendant sought dismissal based on the LLC's allegedly improper dissolution without notice to creditors, and the defendant also argued that the LLC had been mismanaged and that its creditors, and perhaps its members, were the proper plaintiffs. The court noted that the LLC had filed its back reports and been reinstated before the time of dissolution, that the LLC was not required to give notice to creditors except to cut off existing claims, that there was no evidence any assets were not distributed to creditors, and that the statute only allowed members of a dissolved LLC to petition a court to wind up its affairs. The court also pointed out that the LLC statute provides that a dissolved LLC may sue and be sued in its name and that an action brought by or against an LLC before its dissolution does not abate because of the dissolution. The provisions relied upon by the defendant (which imposed duties in the management and winding up of the LLC) did not provide a basis for dismissing a pending action; rather, they impose duties that are enforceable by members, not the defendant, and the court held the trial court erred by not granting the LLC's request for sanctions in connection with the motion to dismiss.

Miceli v. KBRG of Statesville, LLC, No. 5:05CV265-V, 2008 WL 2945451 (W.D.N.C. July 24, 2008). The dissolution of the defendant LLC did not destroy its standing to defend this action under North Carolina law. Though North Carolina's LLC dissolution statutes are non-specific as to which activities an LLC in dissolution may continue, the court stated that the similarity in language to the corporation statute suggests that an LLC in dissolution may continue its participation in a lawsuit as part of the winding up process. Based on a careful reading of the LLC statute, corporate case law, and the corporate statute, the court concluded that defending a lawsuit is one of the limited activities permitted for an LLC in dissolution to continue the winding up process.

Wallace v. Hayes, 191 P.3d 365 (Mont. 2008). The district court did not err in concluding that an LLC member would not be allowed to share in a liquidating distribution of a judgment issued against him. The member relied upon the operating agreement and the Wyoming statute, which provided for distributions as follows: (1) payment of liabilities to creditors other than members, (2) payment of debts owing to members other than for capital and profits, (3) debts to members with respect to capital, and (4) debts to members with respect to profits. The member also argued that the statute and operating agreement entitled him to share in distributions in proportion to his share of the LLC. The court found that the judgment made clear that the member would be entitled to be paid for any obligations of the LLC to the member but would not be entitled to receive any portion of the amounts remaining from the judgment when it came to the distribution of profits. The member failed to timely appeal the judgment, and the court of appeals affirmed the order carrying out the judgment. With respect to the district court's order that the LLC be dissolved while certain patent infringement claims against it were outstanding, the court of appeals concluded that the member had failed to present any evidence of any pending litigation and had thus failed to mount a credible challenge to the court's decision to dissolve the LLC.

Hartford Insurance Company v. Ohio Casualty Insurance Company, 189 P.3d 195 (Wash. App. 2008). In a prior case, an LLC condominium developer which had been administratively dissolved was sued by the condominium association. The LLC did not take steps to reinstate or wind up its affairs during the two-year statutory grace period, and the secretary of state cancelled the LLC's certificate of formation at the end of the two-year period. The LLC had filed third party claims against the construction manager and several subcontractors during the two-year period, and the LLC and the construction manager settled the condominium association's claims six months after the cancellation of the LLC's certificate. The construction manager had also filed third party claims (which were derivative of the LLC's claims) against the subcontractors. The LLC and construction manager settled the condominium association's claims, and the insurers of the LLC and the construction manager paid the settlement. The LLC's insurer was assigned the claims of the construction manager and its insurer against the subcontractors. When the subcontractors discovered that the LLC had been cancelled, they obtained dismissal of the LLC's third party and indemnity claims on the basis that the LLC ceased to exist and did not have standing to prosecute the claims. The claims of the construction manager were dismissed on the basis that they were entirely derivative of the LLC's invalid claims. In the appeal of that case, the court of appeals affirmed the dismissals. In the present case, the LLC's insurer sought equitable contribution from insurers of the subcontractors whom it alleged had improperly declined to indemnify and defend the LLC as an additional insured on the subcontractor policies. The trial court dismissed the insurer's claims, and the insurer conceded on appeal that it had no right to recover as the assignee of the insurer of the construction manager because the construction manager's insurer acted as a volunteer in paying on the settlement. The LLC's insurer also conceded that it could not recover as an assignee of the LLC because the assignment occurred after the LLC's cancellation and was thus invalid. Nevertheless, the LLC's insurer argued that it was equitably entitled to recover from the other insurers through subrogation. The other insurers argued that the LLC's insurer acted as a volunteer in settling the case after the LLC ceased to exist. The court disagreed with the defendants' argument that the duty of the LLC's insurer to defend ended when the LLC was cancelled. The court relied upon the recently enacted, and retroactively effective, three-year survival of claims statute. Under that statute, six months still remained during which suits against the LLC could be initiated because the effective date of dissolution was the date of administrative dissolution, and the settlement occurred two and one-half years after dissolution. The court stated that the legislature's purpose in enacting the survival provision was to provide remedies for parties injured by acts of an LLC and to encourage LLCs to act in good faith. By statute, a dissolved LLC is required to pay or make reasonable provision for claims, and the court stated that it would thwart the statutory purpose of requiring a dissolving entity to leave behind such assets as will reasonably provide for unsatisfied claims if an insurance policy cannot be reached by the LLC's creditors after the winding up process is complete. The court also rejected the argument that the LLC's insurer could have refused to indemnify the LLC in the settlement on the basis that the cancelled LLC could not have asserted indemnity or bad faith claims against its insurer. The court found this argument to be inconsistent with the insurer's obligation to act in good faith and as overly confident that it no longer faced any threat of civil litigation. The court noted that, while cancellation marks the end of an LLC as a separate legal entity, claims against the LLC or managers and members do not necessarily abate. In this evolving landscape of liability, the court did not view the fact that the LLC lacked standing to enforce the policy as dispositive of the insurer's obligation. Where the insurer has been paid to provide indemnity, the court concluded the insurer acts prudently and in protection of its interests by making coverage available even though its insured is defunct, particularly where there is a claim survival statute. Thus, the court held that the LLC's insurer was not acting as a volunteer when paying on behalf of the insured LLC and was not barred from pursuing reimbursement through a subrogation action.

Downey v. Ambassador Development, LLC, 568 F.Supp.2d 28, Civil Action No. 08-982 (JDB) (D. D.C. 2008). The court remanded this case to state court because an LLC defendant did not join in removal. The other defendants argued that the LLC could not consent to removal because it was dissolved and no longer existed. The court stated that the D.C. LLC statute and case law interpreting the concept of winding up suggest that a dissolved LLC may be subject to suit. The evidence showed that, after its dissolution, the LLC had retained counsel to represent it in an arbitration, and the court thus concluded that the record, construed in the light most favorable to the plaintiff, indicated that the dissolved LLC had the capacity to retain legal counsel and engage in matters that are part of the winding up process. Because there remained the possibility that the claims against the dissolved LLC would survive summary judgment, the court remanded the case.

A.B. Medical Services PLLC v. Travelers Indemnity Company, 858 N.Y.S.2d 574 (N.Y. Dist. Ct. 2008). A professional LLC sought to recover no-fault benefits as assignee of a patient who received medical treatment from the LLC. Because the license of the physician who was the LLC's sole member and manager had been suspended, the physician was not permitted to continue as a member, and the court considered maintenance of the suit without a qualified member a nullity. However, the suspension of the member's license did not render the existence of the LLC fraudulent. The court stated that recovery by the LLC on its claim would be permitted as part of its winding up, and the physician would be entitled to receive, as a creditor of the LLC, payments earned. The court stayed the proceeding to allow for filing of articles of dissolution and appointment of a representative to wind up the LLC's affairs.

Penrose v. Trojan Manufacturing Co., Inc., No. 07-CV-603S(F), 2008 WL 1766618 (W.D. N.Y. April 14, 2008) (stating that Tennessee LLC listed as inactive on Secretary of State's records could be sued on claim accruing before dissolution because Tennessee LLC statute provides that dissolution of LLC does not bar assertion of claim against LLC provided liability was incurred prior to dissolution).

Crouse v. Mineo, 658 S.E.2d 33 (N.C. App. 2008). The court held that the statutory provision regarding judicial winding up or appointment of a person to wind up the affairs of the LLC gave the trial court discretion to do so by virtue of use of the term "may" in the statute, and the trial court did not abuse its discretion in denying plaintiff's motion to appoint the plaintiff to wind up the affairs of the LLC.

Sky Cast, Inc. v. Global Direct Distribution, LLC, Civil Action No. 07-161-JBT, 2008 WL 754734 (E.D. Ky. March 18, 2008) (granting summary judgment in favor of managing members on fraudulent misrepresentation claims by dissolved LLC's creditor where alleged misrepresentations that all debts, obligations, and liabilities of LLC had been paid or discharged were made to Florida officials to induce officials to approve dissolution and there was no evidence that creditor relied to its detriment on dissolution filing or suffered any damage based on statements contained in dissolution filing).

Serrano on California Condominium Homeowners Association v. First Pacific Development, Ltd., 178 P.3d 1059 (Wash. App. 2008). The plaintiff's claim against a dissolved LLC was barred because the court determined that the "effective date of dissolution" for purposes of the statute requiring that suits against dissolved LLCs commence within three years of the "effective date of dissolution" was the date of the LLC's administrative dissolution rather than the date two years later when the LLC was dissolved and wound up upon cancellation of its certificate of formation. The court stated that any language in the *Chadwick Farms* case suggesting the three year statutory period ran from cancellation of the certificate was not necessary and was dicta. The claim was timely in *Chadwick Farms* regardless of whether the "effective date of dissolution" was the date of administrative dissolution or the date of cancellation of the certificate, the court in that case did not directly address the meaning of "effective date of dissolution."

Kwon v. Yun, No. 05 Civ. 1142(GEL)(DFE), 2008 WL 190058 (S.D. N.Y. Jan. 22, 2008) (holding prima facie credible defense to dissolved Delaware LLC's counterclaim was stated by allegation that LLC had filed certificate of cancellation because Delaware LLC is artificial entity with power to sue or be sued, and such power continues after dissolution "until the filing of a certificate of cancellation").

Matz v. Merideth, No. 2 CA-CV 2006-0151, 2007 WL 5290465 (Ariz. App. July 25, 2007). After a falling out among the members of an LLC that operated an emergency veterinary clinic, two of the members formed a new entity to operate a new emergency clinic at the same location. The original LLC was ordered judicially dissolved in litigation between the members, and the dissolution proceeding was eventually consolidated with another action brought by one of the members (Matz) against the two members who formed the new clinic. Matz claimed that the two members who formed the new clinic "appropriated and distributed to themselves" all of the intangible assets of the LLC, including its goodwill, and that these actions violated the LLC's operating agreement because the assets were not distributed equally to the members. The trial court concluded that the two members who appropriated the goodwill were liable under the Arizona wrongful distribution statute and that the value of Matz's interest in the distribution was $188,000. The two members who formed the new clinic argued that a dissolved business can have no goodwill as a matter of law, but the court rejected that argument. The court of appeals concluded that the trial court did not err in finding that the dissolved LLC had goodwill and that the two former members who conducted business at the same location as the old LLC were liable for appropriating it. The court also found that the trial court's determination of the value of the LLC's goodwill was not clearly erroneous. The court of appeals questioned whether appropriation of an LLC's assets by members is a "distribution" as contemplated by the distribution statute, but assumed, without deciding, that it was proper for the trial court to grant relief under the distribution statute since the members did not address the issue on appeal.

DD. Judicial or Administrative Dissolution

Van Der Puy v. Van Der Puy, No. 2008AP512, 2009 WL 80244 (Wis. App. Jan. 14, 2009). After the death of the patriarch of a family business (Paper Box), Paper Box was unable to pay a loan guaranteed by the decedent, and the decedent's four children entered into a forbearance agreement to save Paper Box from liquidation and preserve estate assets. The forbearance agreement allowed Paper Box to continue to operate by paying down its debt through loans from the heirs and refinancing from another lender. The plaintiff agreed to forbear regarding collection of amounts owed him by Paper Box in connection with a prior redemption of his shares in the business, and the agreement gave the refinancing lender discretion as to when payments to him and rental payments by Paper Box to an LLC owned by the siblings would resume. The LLC owned a warehouse, and Paper Box had entered an eight-year lease with the LLC. The plaintiff filed suit seeking judicial dissolution and receivership of the LLC on the basis that his siblings were operating the LLC in an illegal, oppressive, and fraudulent manner and that the LLC's assets were being misapplied or wasted. The plaintiff also claimed that one of his siblings breached his fiduciary duty to his father's estate by not disclosing the conflicts of interest inherent in his various roles as executor of his father's estate, president of Paper Box, guarantor of indebtedness of Paper

Box, and heir to his father's estate. The court first addressed the alleged breach of fiduciary duty claim and concluded that the forbearance agreement, which the plaintiff reviewed with his lawyer, clearly advised the plaintiff as to the circumstances and terms of the transactions associated with the forbearance agreement. Furthermore, the evidence indicated that the plaintiff was already aware of the various hats worn by his brother. The court next concluded that grounds for judicial dissolution were not present because, even if the rent-free use of the LLC's warehouse and failing to seek a new tenant resulted in a windfall to the plaintiff's siblings, the LLC was being operated in accordance with the forbearance agreement, and there was nothing illegal or fraudulent in permitting the suspension of rental payments to the LLC per the forbearance agreement.

Fisk Ventures, LLC v. Segal, Civil Action No. 3017-CC, 2009 WL 73957 (Del. Ch. Jan. 13, 2009). Fisk Ventures, LLC ("Fisk"), a Class B member of Ginitrix, LLC ("the LLC"), sought judicial dissolution of the LLC under the Delaware LLC statute. The LLC was formed to commercialize biotechnology concepts of the founder. Segal, the founder of the LLC and the sole Class A member, opposed dissolution. Under the LLC agreement, the LLC's board could only act pursuant to approval of 75% of the members of the board, which consisted of two members appointed by Segal and two members appointed by Fisk. The LLC agreement provided that the LLC would be dissolved upon the written consent of members holding 75% of the membership interests or entry of a judicial decree of dissolution. Segal's opposition prevented the requisite vote for dissolution, and judicial dissolution was the only other possible means of dissolution. The board had a long history of deadlock, and the LLC had no office, no capital funds, no grant funds, and generated no revenue. Under these circumstances, the court found ample cause to order dissolution under the Delaware LLC statute, which authorizes a court to decree judicial dissolution when it is not reasonably practicable to carry on the business in conformity with the LLC agreement. The court looked to case law in the limited partnership context for guidance on the standard for judicial dissolution and concluded that there was no need to show that the purpose of the LLC was "completely frustrated." The court stated that relevant factors in applying the "reasonably practicable" standard include the following: (1) member vote deadlocked at the board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate. According to the court, none of these factors is individually dispositive, and they need not all be present, but the court proceeded to find each factor present in this case. The 75% approval requirement under the LLC agreement resulted in hopeless deadlock, and there was no "tie-breaking" mechanism under the agreement. Given the long history of discord, the court did not believe the parties would ever be able to harmoniously resolve their differences. Segal argued that Fisk's put right under the LLC agreement was a mechanism for resolving the situation since it provided an exit right to Fisk; however, Fisk was not required to exercise its put right, and there was no mechanism to force it to sell. The court stated that it was not permitted to second guess a party's business decision in choosing whether or not to exercise its negotiated option rights. The court next discussed the dire financial condition (no office, no capital funds, and no revenue) of the LLC. Segal argued that the LLC had been unable to raise funds due to Fisk's refusal to allow further capital infusions without significant anti-dilution provisions. Segal further contended that the LLC would be free to raise funds to effect the buy-out of Fisk if Fisk were forced to exercise its put right. The court stated that it would not substitute its business judgment for that of Fisk simply because Segal believed it to be in his best interest. Segal also argued that dissolution would destroy any value preserved in a patent license held by the LLC, but the court was not convinced that any potential value could not be accessed through a fair and proper sale of the asset. The court also rejected Segal's argument that Fisk was barred by unclean hands from seeking judicial dissolution. The court stated that Fisk was free to exercise its leverage under the LLC agreement, and the court was in no position to redraft the LLC agreement for these sophisticated and well-represented parties. In view of the deadlock and dire financial straits that left the LLC with no reasonable means to operate its business, the only remedy available was dissolution.

Connors v. Howe Elegant, LLC, 47 Conn. L. Rptr. 107, 2009 WL 242324 (Conn. Super. 2009). Two individuals, Connors and Kiman, formed an LLC to operate a beauty and hair salon. Connors was a skin care specialist, and Kiman was a hairdresser. They operated the LLC for several years but decided to end their association when an argument arose over an issue at work. The parties were unable to reach an agreement regarding the sale of Connors' interest or the dissolution of the LLC, and Connors filed this action seeking dissolution. The court determined that judicial dissolution of the LLC was appropriate because is was not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. The members were deadlocked, each member's actions had destroyed the trust between them, and the LLC had ceased to operate as a functioning business. In connection with the dissolution, the court resolved questions regarding the LLC's lease, bank account, petty cash, inventory, and equipment.

Kertesz v. Spa Floral, LLC, 994 So.2d 473 (Fla. App. 2008). After being ousted as managing member, the founder of an LLC sued for judicial dissolution and receivership of the LLC based on an alleged deadlock in management. Noting that the complaint did not refer to or include any articles of organization or operating agreement, the court relied upon the Florida LLC statute and decisional law and stated that governance and operation of the LLC is a simple matter of majority rule in the absence of other written terms. The court rejected the argument that there was a deadlock because there was no impasse. The majority had the right to replace the plaintiff as the managing member, and the majority voted to do so. In the absence of a deadlock, there were no grounds for judicial dissolution or receivership.

Della Ratta v. Dyas, 961 A.2d 629 (Md. App. 2008). Della Ratta and Dyas were equal owners of an LLC and a general partnership, and Dyas filed an action against Della Ratta alleging that Della Ratta was attempting wrongfully to squeeze out Dyas from the LLC and partnership. The action was filed in Anne Arundel County. A month later, Dyas filed an amended complaint requesting dissolution of the general partnership. Nine months later, Della Ratta moved to have the entire action transferred to Montgomery County on the basis that the general partnership's principal office was located in Montgomery County and that the Montgomery County circuit court had exclusive jurisdiction under the Maryland Revised Uniform Partnership Act by virtue of the request for dissolution. In a later amended complaint, Dyas added a count seeking dissolution of the LLC, and Della Ratta argued as a defense that the court in Anne Arundel County lacked jurisdiction under the Maryland Limited Liability Company Act, which provides that, on application by a member, the circuit court in the county in which the principal office of the LLC is located may decree dissolution when it is not reasonably practicable to carry on the business in conformity with the articles of organization or the operating agreement. The case was tried in Anne Arundel County, and the circuit court concluded, inter alia, that it was no longer reasonably practicable to carry on the business of the LLC or general partnership and that the facts were sufficient to warrant dissolution, but that only the Montgomery County circuit court had jurisdiction to grant dissolution. The action was transferred to Montgomery County, and the court there entered orders for dissolution. Della Ratta argued on appeal that the plain and unambiguous language of the partnership and LLC statutes gave exclusive subject matter jurisdiction of a dissolution action to the circuit court in the county in which the principal offices of the partnership and LLC were located, and that the orders entered by the Montgomery Court were void because the "applications" for dissolution were filed in Anne Arundel County. The court of appeals discussed and analyzed the partnership and LLC dissolution statutes at some length, comparing them to the limited partnership and corporate dissolution statutes, and concluded that the provisions in issue were venue provisions and not provisions that withdrew subject matter jurisdiction from all other circuit courts. Assuming, alternatively, that the LLC and general partnership statutes conferred subject matter jurisdiction on the circuit court of Montgomery County, the court held that the statutes were not violated because the Montgomery County court ordered the dissolution of the LLC and supervised the winding up of the general partnership. The court rejected the argument that the statutory reference to the filing of an "application" by a member or partner deprived the Anne Arundel County court of subject matter jurisdiction to hear testimony and find facts that would support relief in the form of involuntary dissolution or judicially supervised winding up. According to the court, the statutory provisions specifying that the circuit court in the county in which the principal office of a partnership or LLC is located may decree dissolution or order judicial supervision of winding up on the application of a member or partner does no more than identify the class with standing to bring an action.

Polak v. Kobayashi, Civ. No. 05-330-SLR, 2008 WL 4905519 (D. Del. Nov. 13, 2008). Two individuals, Polak and Kobayashi, formed a Delaware LLC to acquire an undeveloped tract of land in Hawaii. Polak intiated litigation against Kobayashi after their relationship soured. Polak sought judicial dissolution and asserted various other claims against Kobayashi. The court held that judicial dissolution was warranted because the parties each owned a fifty percent interest in the LLC, were deadlocked regarding its dissolution, and had not amicably communicated for several years. Additionally, the court stated that Kobayashi's wrongful retention of a tract of land belonging to the LLC and unilateral management of the LLC had destroyed Polak's trust in him as a joint manager. Under these circumstances, it was not reasonably practicable to continue business in conformity with the LLC agreement. The court also awarded Polak his attorney's fees, applying the standard that an attorney's fee award is appropriate when the losing party's conduct involves "bad faith, conduct which was totally unjustified, or the like."

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed in part, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI, a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. Ewie sought summary judgment on the basis that it was the majority member and properly sought dissolution under the articles of organization and operating agreement in light of the dissolution date of December 31, 2004. Ewie further argued that it was forced to seek judicial dissolution and that Mahar lacked standing to bring its counterclaims because the LLC dissolved on December 31, 2004, and Ewie's conduct seeking dissolution was not unfair or oppressive. Ewie argued that the non-compete provision had not been violated because it was PSMI and not Ewie that contracted with GM.

The court held that the operating agreement was ambiguous as to whether unanimous consent of the members was required to dissolve upon the termination date specified in the articles of organization, and that the trial court thus erred when it ruled that the LLC automatically dissolved on the date specified in the articles of organization. The court also held that it was error for the trial court to grant summary disposition on the dissolution question because, regardless of the dissolution date in the articles of organization, Mahar presented evidence that Ewie and its principals took steps prior to the dissolution to take over the LLC's contract with GM. Though Ewie argued that Mahar had no standing to assert the LLC's claims, the court stated that Mahar had statutory authority under the Michigan LLC statute to bring an action to establish that Ewie, a controlling member, engaged in fraudulent, willfully unfair, or oppressive conduct. Ewie argued that it was within its rights to force dissolution of the LLC, but the Michigan LLC statute permits winding up of an LLC by the members who have not "wrongfully dissolved" the LLC, and the court held that Mahar presented evidence that could lead a reasonable jury to conclude that Ewie "wrongfully dissolved" the LLC because of Ewie's desire to usurp the GM contract. Further, the statute requires "good cause" for a judicial winding up, and the court stated that "good cause" would not include formation of a new company to take over the LLC's business. On appeal, the Michigan Supreme Court held that any ambiguity in the operating agreement was irrelevant given the termination date in the articles of organization because the Michigan statute provides for automatic dissolution at the time specified in the articles of organization. The court remanded for reconsideration of Ewie's motion for summary disposition for judicial dissolution in light of a provision in the Michigan LLC statute providing that a court may cancel or alter a provision in the articles of organization if controlling managers or members have engaged in illegal or fraudulent acts or willfully unfair and oppressive conduct.

Johannsen v. Utterbeck, 196 P.3d 341 (Idaho 2008). The trial court judicially dissolved the LLC after trial of a dispute regarding a member's obligation to contribute property, and the trial court distributed the liabilities and assets according to each member's equity. Noting that the Idaho LLC statute does not provide a standard of review for judicial dissolution and winding up, the supreme court applied a clearly erroneous standard and concluded that the trial court's distribution of assets and liabilities was supported by substantial and competent evidence.

In re Seneca Investments, LLC, Civil Action No. 3624-CC, 2008 WL 4329230 (Del. Ch. Sept. 23, 2008). An LLC member sought judicial dissolution of the LLC. The court analyzed the claim under the judicial dissolution provisions of the Delaware LLC statute and the Delaware corporation statute because the members contractually agreed that the LLC would be governed as a corporation and that the Delaware General Corporation Law would apply. The LLC had two organizational documents: an operating agreement and a charter. The purpose clause in the charter stated that the purpose of the LLC was "to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law." The petition for dissolution alleged that the LLC had abandoned its business and should thus be dissolved. Specifically, the petition alleged that the LLC had not for several years had a business plan, sought or received capital, had shareholder or director meetings, or sought to hire anyone who could conduct business on its behalf. The LLC's only assets were approximately $2.2 million in cash, shares of stock of a publicly held company, and a minority interest in a private internet marketing company. The LLC sought judgment on the pleadings, and the court concluded that the petitioner alleged no facts that would compel the court to grant the petition for dissolution. In the absence of extensive LLC case law interpreting the LLC judicial dissolution statute, and given the similarity of the LLC and limited partnership judicial dissolution statutes (authorizing the court to decree dissolution whenever it is not reasonably practicable to carry on the business in conformity with the LLC/limited partnership agreement), the court considered limited partnership case law in this context as well as LLC case law. In the absence of an allegation of deadlock, the court focused on whether it was impracticable for the LLC to fulfill its business purpose. Because the LLC's charter stated that its purpose was to engage in any lawful act or activity for which corporations may be organized, and a corporation may function as a passive instrumentality to hold title to assets, the court concluded the allegations were insufficient to support a claim that it was not reasonably practicable to carry on in conformity with the operating agreement. The court stated that allegations that the LLC had failed to comply with certain provisions of the operating agreement (such as making distributions, providing reports, and continuing to allow the petitioner to serve as director) were not grounds for dissolution, and the court would not attempt to police violations of operating agreements by dissolving LLCs. The court rejected the petitioner's argument that the operating agreement prohibited any business activity by the LLC other than liquidating assets and distributing cash. Turning to the provision of the Delaware General Corporation Law that allows the court of chancery to appoint a custodian or receiver when the corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets, the court analyzed whether the LLC had abandoned its business by looking to the LLC's purpose clause. In view of the broad purpose clause, and because a corporation can lawfully function as a passive holding company, the court concluded that the facts alleged in the petition showed that the LLC was performing a valid corporate function by passively investing in other businesses. Furthermore, the court pointed out that the LLC was pursuing counterclaims, and pursuing legal claims is an acceptable and common corporate function. The court stated that it was aware of the possibility that a company facing a petition for dissolution would file non-meritorious counterclaims to avoid dissolution, but the court did not see any indication of abuse in the instant case.

Durina v. Filtroil, No. 07 CO 24, 2008 WL 4307892 (Ohio App. Sept. 18, 2008). A member of a Nevada LLC filed an action seeking judicial dissolution and asserting various other causes of action. The trial court determined that it lacked jurisdiction to dissolve the Nevada LLC, and the court stayed the action on the remaining claims because the LLC's regulations required arbitration of disputes between members. The court of appeals agreed with the trial court in both respects. With respect to the judicial dissolution claim, the court cited case law in other jurisdictions holding that one state cannot dissolve a corporation from another state, and the court pointed out that the Ohio judicial dissolution statutes on which the plaintiff relied do not allow for dissolution of a non-Ohio LLC. The court stated that the Nevada and Ohio statutes are similar in that they both restrict application of their judicial dissolution statutes to LLCs formed pursuant to the laws of their respective states. The court concluded that there was no question that a Nevada LLC can only be dissolved in Nevada. The court reviewed the arbitration clause in the LLC regulations and concluded that it encompassed the claims asserted in the case. The court found no indication that there was a delay in asserting the right to arbitration.

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008). The plaintiff brought suit against his parents asserting various claims against them and seeking dissolution of the family business, a construction company organized as an LLC and owned 50% by the father and 50% by the son. The son sought to add his mother as a defendant on the basis of allegations that she committed civil theft by writing checks on the LLC account for personal expenses. The court stated that the son made a sufficient showing that his mother was part of the controversy. The defendants sought dismissal of the lawsuit based on an arbitration provision in the operating agreement. The arbitration provision named the mother as arbitrator in the event of a deadlock. The court declined to send the matter to arbitration before the mother because the court had allowed the mother to be sued and she thus had a direct interest in the outcome of the matter. The court also refused to dismiss the plaintiff's claim for judicial dissolution. Under the Connecticut LLC statute, a court may order judicial dissolution when it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. The son alleged that he was wrongfully excluded from the business and that the assets of the LLC had been used to pay personal expenses of the father and others. The defendants argued that the disputes did not affect the functioning of the company or its ability to carry on its business because the father was the sole manager. The court found the allegations sufficient to support the claim for judicial dissolution, saying that the complaint described a once shared business that was no longer being shared. That the business may still be running did not detract from the claim that it was not running as expected according to the court. Due to unresolved fact issues as to whether the plaintiff had previously been provided complete information, the court also declined the defendants' request to dismiss a request by the plaintiff for judicial accounting.

R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, Civil Action No. 3803-CC, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008). The petitioners sought judicial dissolution of nine Delaware LLCs. With respect to two of the LLCs, the court held that the petitioners did not have standing under the Delaware LLC statute to seek dissolution and winding up because only managers or members have standing to do so under the statute. The court stated that there was no authority for the proposition that a member of an LLC that is itself a member of another LLC can seek dissolution or the winding up of the latter LLC. The court held that the claim for receivership survived because the statute permits a "creditor, member or manager... or any other person who shows good cause" to present an application for receivership. With respect to the other seven LLCs, the court dismissed the action because the members waived the right to seek dissolution or the appointment of a liquidator in the LLC agreements. Although the LLC agreement specified events of dissolution that included entry of a decree of judicial dissolution, the court did not find that this provision conflicted with the waiver of dissolution rights contained elsewhere in the LLC agreement because the Delaware statute permits a court to enter a decree of judicial dissolution upon an application by *or for* a member or manager, and the members or managers cannot waive the rights of others to make such applications *for* them. The court proceeded to address freedom of contract in the LLC context to waive rights to seek judicial dissolution and the appointment of a liquidator. The court concluded that the Delaware LLC statute does not preclude waiver of these rights. The court rejected the argument that statutory provisions that do not include the qualification "unless otherwise provided in a limited liability company agreement" (or some variation thereof) are mandatory and may not be waived. The court noted that the statute did not expressly prohibit waiver of such rights, and the judicial dissolution and receivership provisions are phrased in permissive terms (i.e., the court of chancery "may" decree dissolution or appoint a trustee or receiver under such provisions). The most important factor in the analysis according to the court was the fact that the rights waived in the LLC agreement were not designed to protect third parties. The court pointed out that it had previously recognized that third parties have no interest in a judicial dissolution proceeding under the Delaware Limited Liability Company Act, and the LLC agreement did not affect the statutory right of creditors to petition for appointment of a receiver. The court also rejected the argument that the waiver of rights to seek dissolution and receivership violated the public policy of Delaware. Stressing the policy of contractual freedom and the enforceability of voluntary agreements of sophisticated parties, the court concluded that the policy of Delaware mandated that it respect the parties' agreement. According to the court, there is no threat to equity in enforcing a waiver of the right to seek dissolution because the unwaivable implied covenant of good faith and fair dealing ensures that members will not be trapped in an LLC at the mercy of others acting unfairly and in bad faith.

Reid Pointe, LLC v. Stevens, No. 08 CVS 4304, 2008 WL 3846174 (N.C. Super. Aug. 18, 2008). In this dispute between members of several North Carolina LLCs, the court concluded that conclusory allegations that the assets of the LLCs were being misapplied and wasted were insufficient to sustain a claim for judicial dissolution; however, applying an indulgent standard, allegations relating to the deteriorating relationship between the members were sufficient to allow pursuit of a claim.

In re Klingerman, No. 07-02455-5-ATS, 2008 WL 3287199 (Bankr. E.D.N.C. Aug. 2, 2008). In this order regarding confirmation of the debtor's plan, the court addressed the debtor's request for judicial dissolution of an LLC in which he and another individual (Parker) were each 50% members. The viability of the plan depended upon whether the debtor could force dissolution of the LLC. The debtor argued that the LLC should be dissolved under the North Carolina LLC statute because he and Parker were irreconcilably deadlocked, and the debtor had filed an adversary proceeding to dissolve the LLC. Parker filed a motion for summary judgment in the adversary proceeding on the grounds that the debtor ceased to be a member when he filed bankruptcy and did not have standing to force dissolution. The bankruptcy court denied that motion. In this opinion, the court discussed the members' disagreements and disputes regarding the ownership of the LLC and matters related to the LLC's primary asset, a building, and concluded that there was a deadlock that was detrimental to the business. The court noted, however, that the decision to dissolve was still a discretionary decision of the trial court. The court deferred its decision on confirmation of the plan for 30 days to give the parties time to reach an agreement. In the absence of an agreement within 30 days, the court stated it would rule on the plan and, in so doing, would consider whether in the adversary proceeding it would be likely to dissolve the LLC pursuant to the LLC statute, to exercise its broad authority under the LLC statute to modify the terms of the operating agreement, or to leave things as they were.

Kirksey v. Grohmann, 754 N.W.2d 825 (S.D. 2008). Four sisters inherited equal ownership in their family's land and conveyed their ownership in the land to an LLC in exchange for equal ownership in the LLC. The LLC was formed to avoid paying certain estate taxes by employing a special use valuation, to keep the land in the family, and to keep ownership in the real property in the sisters and not their spouses. One sister, Grohmann, lived on the land and managed the LLC. Initially, the land was leased to Grohmann and two other sisters for livestock grazing, but one of the sisters sold her livestock to the other two, and Grohmann and Randell continued to lease the land from the LLC to graze livestock owned by them and preserve the special use valuation. Relations between the sisters became strained, and Kirksey and Ruby sought to terminate the grazing lease and dissolve the LLC after receiving an appraisal of the real estate indicating that it was worth over $3.2 million. At a meeting of the LLC members, Grohmann and Randell opposed motions to terminate the lease and dissolve the LLC. Major actions taken by the LLC required a majority vote of the members, and the parties were deadlocked. Kirksey and Ruby filed a suit for judicial dissolution on the basis that the LLC's economic purpose was unreasonably frustrated and that it was not reasonably practicable to carry on the LLC's business in conformity with the articles of organization or operating agreement. Kirksey argued that the strained relations made any major decision making impossible. Kirksey further claimed that Grohmann and Randell had a personal financial interest in continuing the lease and preventing dissolution to the detriment of Kirksey and Ruby. The court examined the judicial dissolution provisions in the South Dakota LLC statute and discussed partnership and LLC case law in other jurisdictions addressing circumstances under which judicial dissolution was sought. The court examined the language of the operating agreement regarding the purpose of the LLC and stated that it was clear that the intended business was a livestock and farming operation. While there was no dispute that the ranching and livestock operation could continue despite the sisters' dissension, the court stated that the question was whether it was reasonably practicable for the LLC to continue in accordance with the operating agreement. Kirksey and Ruby argued that the livestock lease was no longer beneficial to the LLC because the rental rate was set when the land was worth considerably less. Grohmann and Randell argued that Kirksey and Ruby were aware of the nominal profit margin when the LLC was formed and that nothing had changed to make it impracticable for the LLC to continue. The court stated that the sisters formed the LLC with the understanding that they would have relatively equal say in the management and operation, but the court concluded that equality in decision making no longer existed because Grohmann and Randell had all the power with no reason to change the terms of a lease extremely favorable to them. Leaving half the owners with all the power in the operation of the LLC was not a reasonable and practicable operation of the business according to the court. The court said the deadlock impeded the continued function of the business in conformity with the operating agreement because there was no procedure to break a tie and protect the LLC in the event of changed conditions. As long as the LLC was under the control of and favorable only to half its members, the court found it could not be said to be reasonably practicable for it to continue in accordance with its operating agreement. The court also concluded that the economic purpose of the LLC was likely to be unreasonably frustrated, recognizing that there is little case law addressing this standard. The court acknowledged that forced dissolution is a drastic remedy but found that the deadlocked condition of the LLC and the inability of the sisters to communicate other than through their lawyers was unreasonably frustrating the economic purpose of the LLC. The court thus remanded for an order of judicial dissolution and winding up of the LLC.

Go Fast Sports & Beverage Company v. Buckner, Civil Action No. 08-cv-01527-MSK-MJW, 2008 WL 2852626 (D. Colo. July 23, 2008). The defendants argued that the citizenship of an LLC defendant could be disregarded for purposes of diversity jurisdiction because it was administratively dissolved and could no longer be sued. The court stated that administrative dissolution of a perpetual LLC does not destroy its citizenship for diversity purposes if the LLC continues to exist under state law. The articles of organization submitted with the notice of removal stated that the LLC was a perpetual LLC that had been administratively dissolved in March 2005. At that time, Colorado law provided that an administratively dissolved LLC continues its existence but shall not carry on any business except as appropriate to wind up and liquidate its affairs. Thus, the administrative dissolution did not terminate the LLC's existence, and the court considered its citizenship in assessing diversity jurisdiction. Because one of the LLC's members was a Colorado citizen as well as the plaintiff, the parties were not diverse and the court lacked jurisdiction.

Hartford Insurance Company v. Ohio Casualty Insurance Company, 189 P.3d 195 (Wash. App. 2008). The court disagreed with the defendants' argument that the duty of the LLC's insurer to defend ended when the LLC was administratively cancelled. The court relied upon the recently enacted, and retroactively effective, three-year survival of claims statute. Under that statute, six months still remained during which suits against the LLC could be initiated because the effective date of dissolution was the date of administrative dissolution, and the settlement occurred two and one-half years after dissolution. The court stated that the legislature's purpose in enacting the survival provision was to provide remedies for parties injured by acts of an LLC and to encourage LLCs to act in good faith. By statute, a dissolved LLC is required to pay or make reasonable provision for claims, and the court stated that it would thwart the statutory purpose of requiring a dissolving entity to leave behind such assets as will reasonably provide for unsatisfied claims if an insurance policy cannot be reached by the LLC's creditors after the winding up process is complete.

In the Matter of the Dissolution of Beverwyck Abstract, LLC, 861 N.Y.S.2d 854 (N.Y. A.D. 3rd Dept. 2008) (holding that trial court correctly determined that date of dissolution was date on which court ordered LLC dissolved after trial of judicial dissolution action brought by members where operating agreement and LLC statute provided for nonjudicial dissolution upon vote or written consent of majority of members but no such vote or written consent occurred).

Dickson v. Rehmke, 164 Cal.App.4th 469, 78 Cal.Rptr.3d 874 (Cal. App. 3 Dist. 2008). The plaintiff filed this action for judicial dissolution of the LLC he co-owned with another individual. The defendant member moved to avoid the dissolution by invoking the California statutory procedure for purchase of the plaintiff's interest at fair market value. The court appointed appraisers and issued an alternative decree determining the value of the membership interest and giving the defendant member 90 days to buy the plaintiff's interest or allow the process of winding up and dissolution to begin. The defendant tendered a check, and the court entered a judgment in accordance with its alternative decree. The plaintiff filed his appeal within 60 days after service of the judgment but later than 60 days from the decree. The issue was the timeliness of the appeal, which depended upon whether the trial court's decree was appealable under the language of the statute. The court stated that neither the briefing nor the court's own research had revealed any cases involving the statutory procedures in the LLC context, but noted that parallel provisions exist for avoiding dissolution in the corporate context. The court also noted as a prefatory matter that the trial court was not bound by the findings of the appraisers and that the absence of a unanimous or majority appraisers' award did not render the statute inapplicable. The statute provides for numerous juristic activities, i.e., appointment of appraisers, order of reference for purpose of ascertaining the dissenting share and setting procedures for necessary evidence, confirmation of unanimous or majority appraisal award or de novo determination of value, alternative decree that directs winding up and dissolution unless the purchasing parties tender timely payment, and a judgment on their bond for costs if they fail to act. The concluding provision for appellate review, however, states that "[a]ny member aggrieved by *the action* of the court may appeal therefrom." The court concluded that the issuance of the decree is the action to which the provision for appeal refers, finding support for such conclusion in the text of the next provision in the statute and in the cases dealing with the purchase option in the corporate context. Because the court's decree was appealable, the appeal was not timely and was dismissed.

Nichiryo America, Inc. v. Oxford Worldwide, LLC, No. 03:07-CV-00335-LRH-VPC, 2008 WL 2457935 (D. Nev. June 16, 2008) (finding it unnecessary to answer question of whether individual can be liable for LLC debt incurred prior to forfeiture of LLC's right to do business where LLC was reinstated "as if such right had at all times remained in full force and effect").

Tal v. Superior Vending, LLC, No. 11709/07, 2008 WL 2447365 (N.Y. Sup. June 6, 2008). After antagonism developed between two LLC members, one of them was excluded from the business. The excluded member commenced a judicial dissolution proceeding in 2003 but failed to pursue it, and it was dismissed. The member who continued the business formed another corporation and commingled the assets and business of the two entities and continued the business in the corporation using the same name. In this second dissolution proceeding, the court found that the doctrine of laches precluded the excluded member from seeking interim distributions and an equal share of the combined value of the business assets as presently constituted. The court determined that the most equitable approach to judicial dissolution was to view the parties as having parted ways when the excluded member's involvement in the business ceased and to treat his membership interest as terminated at that time. The court ordered the member who continued the business to purchase the excluded member's interest for the amount of the excluded member's investment plus interest from the date of his exclusion from the business. The court further ordered that, in the event the member continuing the business failed to purchase the other member's interest as provided in the court's order, a receiver would be appointed to liquidate the business.

OLP, LLC v. Burningham, 185 P.3d 1138 (Utah App. 2008). Wilson and Burningham, the members of a Utah LLC, had a falling out, and Wilson filed suit alleging various causes of action, including a claim for repudiation. Burningham asserted various affirmative defenses and brought counterclaims including a request for dissolution of the LLC under the Utah LLC statute. Throughout the litigation, Burningham sought judicial dissolution and winding up of the LLC under the Utah LLC statute, and the district court eventually agreed that the LLC had been effectively dissolved by the parties' inability to cooperate in the management and control of the LLC. Instead of proceeding with dissolution proceedings under the statute, however, the court determined that there was an initial fact question as to whether Burningham owed Wilson damages for repudiating the parties' agreement. The jury found in favor of Wilson and awarded damages. Burningham argued that the Utah LLC statute is a comprehensive act governing all aspects of an LLC's formation, existence, and dissolution and that it abrogates any preexisting common law action for repudiation, but the court of appeals held that a cause of action for money damages for repudiation of an LLC exists independently of the LLC act. The court relied upon partnership law recognizing a cause of action for repudiation and concluded that permitting an LLC member to sue for damages when the other members wrongfully repudiate the LLC agreement and convert the assets to their own use does not conflict with the provisions of the LLC statute. Burningham argued that there can be no wrongful dissolution of an LLC when the LLC is rightfully dissolved under the LLC statute, and Burningham argued that the court's order (entered at the time of trial in 2004) determining that the LLC was dissolved no later than August 31, 2001, was a rightful dissolution. The court of appeals was not convinced that the district court's order was intended to be a formal order of dissolution as opposed to a cut-off date for Wilson's claim to lost profits if the jury found that Burningham breached the parties' agreement in a manner that did not constitute a repudiation. In any event, the court distinguished a claim for repudiation from one seeking dissolution and concluded that Wilson could recover damages for repudiation based on events occurring prior to dissolution. Burningham pointed out that the Utah general partnership statutes contain wrongful dissolution provisions whereas no such provisions are contained in the Utah LLC statute, and the court agreed with Burningham that the legislature apparently did not intend to allow LLC members to unilaterally dissolve an LLC in contravention of the parties' agreement, but the court did not think permitting a wrongfully excluded member to recover money damages was inconsistent with the legislature's intent to make an LLC more difficult to dissolve. Since the jury determined that Wilson had been wrongfully excluded prior to any dissolution by the district court, it was proper to award Wilson damages without regard to any subsequent dissolution.

The court also rejected Burningham's argument that the district court should have conducted a judicial winding up. The court stated that the LLC statute gives courts considerable discretion in handling dissolved LLCs, and the court found nothing in the statute that precluded the court from allowing the members themselves to conduct the winding up. The court found it was appropriate for the district court to simply allow Burningham to wind up the LLC, since he was the member who was most ably situated to do so after his exclusion of Wilson and conversion of the assets and since he was the member who had requested the winding up. The court noted that it would exceed the scope of the case to decide the effect of a repudiation claim on the membership and ownership status of an LLC's various members, and stated that it agreed with the district court that Wilson had disclaimed any continuing interest or membership in the LLC by rejecting equitable proceedings and obtaining a money judgment against Burningham.

The court rejected Burningham's argument that he was deprived of equitable claims and defenses and stated that it was not improper for the jury to consider the repudiation claim first although it turned on the same operative facts as Burningham's alleged equitable defenses.

The court also rejected Burningham's argument that a repudiation claim should be limited to situations in which the repudiating party denies the parties' business organization, be it a partnership or LLC, ever existed. The court stated that the definition of a repudiation used by the district court – that a party repudiates a contract when that party does or says anything indicating that he does not intend to perform the contract, and that repudiation is not the mere breach of the contract or some of its terms – appeared to be consistent with prior case law. The court refused to adopt a narrower rule that requires a member or partner of a company such as an LLC to deny the existence of the LLC.

Finally, the court rejected Burningham's argument that the district court erred in allowing the jury to consider the LLC as a going concern. The court reiterated its view that the district court may or may not have dissolved the LLC by its order, and the court stated that operation of the LLC after August 31, 2001, the date on which the court determined the LLC had effectively dissolved, could not violate the court's order because the order was not entered until the time of trial in 2004. Even if operation of the LLC did conflict with the statute, the court stated that its operation did in fact occur. Since it was Burningham who had wrongfully ousted Wilson and continued operating the LLC, the court stated that any violation would seem to be attributable to Burningham rather than Wilson or the district court. The court also stated that a claim for repudiation is not incompatible with a claim for judicial dissolution and that Wilson was not required to choose to pursue only one remedy since Utah law permits a party to seek remedies in the alternative. In any event, the court concluded that Burningham had failed to show how he was prejudiced when the district court allowed the jury to consider the LLC as a going concern.

Saunders v. Firtel, Nos. CV054007690S, CV054007691S, CV054012805S, 2008 WL 2314070 (Conn. Super. May 14, 2008) (ordering judicial dissolution of LLC on grounds it was not reasonably practicable to carry on LLC's business in conformity with articles of organization or operating agreement).

Schell v. Kent, Civil No. 06-cv-425-JM, 2008 WL2019431 (D. N.H. May 9, 2008). Two individuals, Kent and Schell, formed a Nevada LLC. The individuals parted ways, with Schell agreeing to cease his participation in the LLC and Kent agreeing to repay Schell certain amounts for expenses Schell had incurred in connection with the LLC or on the LLC's behalf. Kent continued to operate the LLC but failed to pay Schell the amounts he agreed to pay. Schell continued to hold a membership interest in the LLC. Eventually the Nevada Secretary of State revoked the LLC's authority to do business, but the LLC was not wound up. Schell brought breach of contract and unjust enrichment claims based on the amounts owed him, but the court held that the claims were barred by New Hampshire's three-year statute of limitations on contracts. The court stated that, to the extent Schell sought damages for his economic interest, that claim arose when the LLC's authority to do business was revoked by the Nevada Secretary of State and Schell's failure to enforce statutory provisions and compel a winding up during the three years following the revocation of the LLC's charter barred his unjust enrichment claim according to the court.

Tri-County Metropolitan Transportation District of Oregon v. Butler Block, LLC, Civil No. 08-259-AA, 2008 WL 2037306 (D. Or. May 7, 2008). The plaintiff, an Oregon corporation, filed suit against a Delaware LLC, and the Delaware LLC sought dismissal on the basis that the court lacked diversity jurisdiction. The court held that administrative dissolution of an Oregon LLC that was a member of the Delaware LLC did not terminate the membership of the Oregon LLC in the Delaware LLC under Delaware law. The court pointed out that neither the Delaware LLC statute nor the Delaware LLC's operating agreement permitted the Oregon LLC to withdraw. Further, the court stated that the Delaware statute does not recognize "administrative" dissolution, and the Oregon statute provides that administrative dissolution does not prevent commencement of a proceeding by or against the LLC. Thus, the court concluded that, although the Oregon LLC was administratively dissolved at the time the complaint was filed against the Delaware LLC, the Oregon LLC's membership had not ceased and its existence as a citizen of Oregon (its sole member was an Oregon resident) continued so that complete diversity of citizenship was lacking and the court did not have subject matter jurisdiction.

Hiner v. Boldon, No. A07-0254, 2008 WL 1799772 (Minn. App. April 22, 2008). Two individuals, Hiner and Boldon, formed an LLC without a member control agreement, operating agreement, or buy-sell agreement. After the LLC began experiencing financial difficulties and conflicts developed between the members, Hiner sued Boldon seeking equitable relief and attorney's fees and a judicial intervention under the Minnesota LLC statute. Boldon counterclaimed for a judicial intervention and sale of Hiner's interest to Boldon. The trial court had difficulty sorting through the situation because of the informality with which the parties operated, but the trial court concluded that the members were deadlocked and that each member had violated his duty to act in an honest, fair, and reasonable manner to some degree. The trial court found that it would be inequitable under the circumstances to order winding up through liquidation and that it would be inequitable to order a complete equalization of contributions (the court found that Hiner and an entity owned by Hiner had contributed over $89,000 while Boldon had contributed about $33,000). Thus, the trial court ordered Hiner to form a successor entity and continue the business of the LLC and ordered that Boldon not be involved or have an interest in the successor entity. The court also granted Hiner $8,670 to equalize the contributions and $40,000 in attorney's fees. An incomplete record was furnished to the court of appeals, and the court stated that it could not conclude that the trial court erred based on the incomplete record furnished. In the absence of any formal agreements, documents, resolutions, or minutes establishing the parties actual membership interests, the trial court did not clearly err in its accounting of the members' contributions, and Boldon's argument that the trial court failed to address Hiner's breaches of fiduciary duty and abused its discretion by awarding attorney's fees were not supported by the record before the court.

Ervin v. Turner, 662 S.E.2d 721 (Ga. App. 2008) (holding that trial court properly dissolved LLC under statutory provision for judicial dissolution when it is not reasonably practicable to carry on LLC's business in conformity with written operating agreement or articles of organization because start-up bank venture of LLC failed and plaintiffs and defendants agreed to dissolve LLC).

Georgia Rehabilitation Center, Inc. v. Newnan Hospital, 658 S.E.2d 737 (Ga. 2008). The court held that a member's request for judicial dissolution was not subject to arbitration because the arbitration clause in the operating agreement required arbitration of any claim arising out of, in connection with, or relating to the agreement. Though the agreement provided for certain causes of dissolution, the court concluded a request for judicial dissolution was an independent legal mechanism and did not arise out of or relate to the terms of the operating agreement.

Serrano on California Condominium Homeowners Association v. First Pacific Development, Ltd., 178 P.3d 1059 (Wash. App. 2008). The plaintiff's claim against a dissolved LLC was barred because the court determined that the "effective date of dissolution" for purposes of the statute requiring that suits against dissolved LLCs commence within three years of the "effective date of dissolution" was the date of the LLC's administrative dissolution rather than the date two years later when the LLC was dissolved and wound up upon cancellation of its certificate of formation. The court stated that any language in the *Chadwick Farms* case suggesting the three year statutory period ran from cancellation of the certificate was not necessary and was dicta. The claim was timely in *Chadwick Farms* regardless of whether the "effective date of dissolution" was the date of administrative dissolution or the date of cancellation of the certificate, the court in that case did not directly address the meaning of "effective date of dissolution."

Crouse v. Mineo, 658 S.E.2d 33 (N.C. App. 2008). The court held that the plaintiff did not cease to be a member by filing a petition seeking dissolution of LLC. The statutory provision relied upon by the defendant states that a member who seeks *for himself* dissolution ceases to be a member; the provision does not cause dissociation of a member who files a petition for dissolution of the LLC of which he is a member. The court held that the statutory provision regarding judicial winding up or appointment of a person to wind up the affairs of the LLC gave the trial court discretion to do so by virtue of use of the term "may" in the statute, and the trial court did not abuse its discretion in denying plaintiff's motion to appoint the plaintiff to wind up the affairs of the LLC.

Caplash v. Rochester Oral & Maxillofacial Surgery Associates, LLC, 851 N.Y.S.2d 769 (N.Y. A.D. 4 Dept. 2008) (concluding trial court erred in granting summary judgment for dissolution of LLC because, while plaintiff established that it was not reasonably practicable to carry on business of LLC in conformity with articles of organization or operating agreement, evidence of plaintiff's termination of employment with LLC and consequent termination of membership under operating agreement gave rise to fact issue with respect to plaintiff's standing to seek dissolution).

EE. Dissenter's Rights

Humphrey Industries Ltd. v. Clay Street Associates LLC, No. 60923-8-I, 2008 WL 5182026 (Wash. App. Dec. 8, 2008). An LLC member dissented from a merger of the LLC that was designed to facilitate the liquidation of the LLC by allowing the sale of the LLC's real property to which the dissenting member would not consent. After the surviving LLC sold its real property, the LLC tendered an amount to the dissenting member using an income capitalization approach to value the dissenting member's interest. The dissenting member rejected the LLC's offer, and the LLC offered the dissenting member an additional amount. The dissenting member rejected that offer and filed this dissenter's rights lawsuit under the Washington Limited Liability Company Act. The LLC filed a petition seeking judicial determination of the LLC's value, and the court consolidated the two actions. After the action was filed, the LLC made an offer under CR 68, which the dissenting member also rejected. The trial court heard testimony about the marketing and sale of the property and calculated the dissenting member's share based on the value of the property after deduction of transaction costs and outstanding liabilities. The court also found that the dissenting member acted arbitrarily, vexatiously, and not in good faith and assessed attorney's fees and expert fees against the dissenting member under the

LLC statute. The court also awarded the LLC its post-CR 68 offer costs pursuant to that rule. Finding that the LLC substantially complied with the statute, the court denied the dissenting member's fee request. The court of appeals analyzed the value of the dissenting member's interest and found the evidence supported the trial court's finding of fair value. The court concluded that the trial court did not err in refusing to treat the dissenting member as an expert on the value of the real property and, in the absence of a definition of "fair value" in the LLC statute, the court found no error in basing fair value on the fair market value of the real estate in the context of a single-asset LLC owning real estate. The court upheld the deduction of transaction costs in the valuation process. The court also found that the LLC substantially complied with the statute and that the evidence supported an award of fees in favor of the LLC. Although the LLC did not meet the payment deadline under the statute, the LLC acted swiftly to liquidate its only asset and paid the dissenting member immediately upon realizing the proceeds of the sale. The court stated that the LLC met the legislative objective of avoiding oppression of a dissenting member. In response to the dissenting member's argument that the LLC did not timely file suit within 60 days after receiving the dissenting member's initial demand for payment, the court read the provisions of the statute to provide the LLC and the dissenter a total of 60 days for the exchange of communications provided by the statute and a period of 60 days from the dissenting member's demand of its own estimated fair value. The court concluded that the LLC's initial payment was credible and did not defeat a finding of substantial compliance by the LLC where the payment was almost 75% of the fair value determined by the court. Finally, the court characterized the evidence of the dissenting member's vexatious conduct as ample. The dissenting member objected to the sale of the property although the LLC was dysfunctional, demanded an amount based on a value the court found unsupported by credible evidence, rejected an amount that exceeded the amount received by other members and the amount ultimately awarded, and had a past history of litigiousness and unreasonable conduct in dealing with the LLC and the members.

FF. Accounting

Gottlieb v. Northriver Trading Company LLC, 872 N.Y.S.2d 46 (N.Y. App. Div. 1st Dept. 2009) (rejecting assertion that LLC members are limited to statutory remedies with regard to potential fraud and holding LLC members may seek equitable accounting under common law).

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008) (declining defendants' request to dismiss request by member for judicial accounting due to unresolved fact issues as to whether complete information had been previously furnished).

Cascade Falls, L.L.C. v. Henning, 143 Wash.App. 1056, 2008 WL 934074 (Wash. App. April 8, 2008). Two brothers, Scott and Greg Henning, formed a Washington LLC. A few years later, they discussed going their separate ways, and Greg withdrew. After operating the LLC as its sole member for several years, Scott learned of irregular business and accounting activities by Greg. Greg argued that the trial court erred in admitting evidence supporting Scott's request for an account from Greg of the LLC's assets when Scott's complaint did not state a claim for an accounting. The court stated that the requisites for a cause of action for an accounting are (1) a fiduciary relation between the parties or the account is so complicated that it cannot be conveniently taken in an action at law, and (2) the plaintiff has demanded an accounting and the defendant has refused to render it. Scott's complaint stated claims against Greg for breach of fiduciary duty, fraud, and conversion; there was no claim for a general accounting. Greg cited no authority that a suit for an accounting is a prerequisite for collection of damages for an LLC member's conversion of funds based upon claims of fiduciary duty or fraud. Scott did include in his request for judgment and relief that Greg be directed to account for the LLC's finances for a period of time; thus, there was accounting evidence admitted at trial to prove the claims of Scott and the LLC. Greg failed to object to the admission of any particular accounting evidence, and the court refused to further review his contentions in this regard.

East Quogue Jet, LLC v. East Quogue Members, LLC, 857 N.Y.S.2d 627 (N.Y. A.D. 2 Dept. 2008) (stating that individual had standing to bring accounting since defendants admitted in their answer that individual was member).

GG. Professional LLCs

Baird v. Manayan, No. H032241, 2008 WL 4998341 (Cal. App. 6th Dist. Nov. 25, 2008). Manayan, an acupuncturist, entered into an operating agreement with Baird, a chiropractor, to form an LLC. Shortly after the LLC opened for business, Manayan failed to make a capital contribution and the relationship began to deteriorate. The parties agreed that Manayan would purchase Baird's interest, but Manayan failed to follow through, and Baird filed an action against Manayan. The court entered an order compelling arbitration under the operating agreement, and the arbitrator found in favor of Baird. Manayan moved to vacate or correct the award on the grounds that the underlying contract was an illegal agreement. Manayan argued that the purpose of providing chiropractic and alternative health care was illegal because neither chiropractors nor acupuncturists were permitted to operate as an LLC and the two were not permitted to do business together in a single practice. The court found that Manayan was equitably estopped from asserting illegality because the arrangement to operate as an LLC with Baird was the product of her own undertaking. Manayan was a licensed attorney who undertook to draft the operating agreement and assured Baird that she would take care of all the legal prerequisites for organizing and starting the business. The court also held that Manayan waived the illegality argument by failing to raise it during the arbitration. Moreover, the court noted that Manayan did not contest the legality of the arbitration clause since she moved to compel arbitration. Thus, she had no basis to complain that the trial court viewed the improper LLC as severable from the allocation of interests in the business and no sound basis to challenge the implied finding that the agreement to purchase Baird's interest created an independent enforceable obligation.

1800 Ocotillo, LLC v. WLB Group, Inc., 196 P.3d 222 (Ariz. 2008) (stating that professional corporation and professional LLC statutes providing that shareholders and members remain personally liable for negligent or wrongful acts committed by them "establish that professionals who organize under them do not enjoy the same protections against personal liability that generally results from incorporation or formation of a limited liability company").

In re Lufkin (Hendon v. Lufkin), 393 B.R. 585 (Bankr. E.D. Tenn. 2008) (stating that member of professional LLC may be personally liable by reason of such person's own acts or conduct and debtor-attorney could not escape liability by hiding behind legal fiction that PLLC was separate entity or blaming court-appointed receiver or former financial officer).

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, Civil Action No. 5:07cv162-DCB-JMR, 2008 WL 2789504, 102 A.F.T.R.2d 2008-5256 (S.D. Miss. July 17, 2008). Stanley, a licensed physician, was a member of a professional LLC and the president and sole shareholder of an S corporation that performed services on behalf of the LLC through Stanley. The question in this case was whether payments made by the LLC to Stanley and/or his corporation were "wages or salary payable to or received by" Stanley for purposes of the continuous levy provision of Section 6331(e) of the Internal Revenue Code. The LLC argued that it was not indebted to Stanley for any undistributed profits on the date on which the LLC received the notice of levy and that Stanley was a member who received profits based upon the amount of fees he produced and not an employee to whom it paid a wage or salary. The IRS asserted that Stanley and/or his corporation should be treated as an employee or independent contractor inasmuch as they were compensated based on the amount of money collected by Mission for medical services which Stanley rendered rather than based on the membership interest of Stanley and/or his corporation in the LLC. The IRS argued that the fact that the LLC labeled Stanley and/or his corporation as its member did not change the factual nature of the relationship as that of an employee or an independent contractor. The LLC contended that the services were performed by Stanley in his own behalf as a member of the LLC and that there was no evidence that Stanley was contractually bound to provide services for the LLC. According to the LLC, it merely acted as a collection conduit (after deduction of its operating expenses) for the payments which Stanley's patients made to his corporation for medical services that Stanley had rendered and for which the corporation had billed. The LLC argued that the case law upon which the IRS relied did not support the position that profits paid to member physicians of a professional LLC constitute "wages and salary" subject to a continuing levy under the relevant federal statutes. The court cited case law construing "salary or wages" broadly for purposes of the continuing levy provision, and the court concluded that the term includes fees paid to an independent contractor as compensation for services rendered. The court concluded that there was a fact question as to whether Stanley provided services to the LLC as an independent contractor.

A.B. Medical Services PLLC v. Travelers Indemnity Company, 858 N.Y.S.2d 574 (N.Y. Dist. Ct. 2008). A professional LLC sought to recover no-fault benefits as assignee of a patient who received medical treatment from the LLC. Because the license of the physician who was the LLC's sole member and manager had been suspended, the physician was not permitted to continue as a member, and the court considered maintenance of the suit without a qualified member a nullity. The suspension of the member's license did not render the existence of the LLC fraudulent, however. The court stated that recovery by the LLC on its claim would be permitted as part of its winding up, and the physician would be entitled to receive, as a creditor of the LLC, payments earned. The court stayed the proceeding to allow for filing of articles of dissolution and appointment of a representative to wind up the LLC's affairs.

Murrin v. Fischer, No. 07-CV-1295 (PJS/RLE), 2008 WL 540857 (D. Minn. Feb. 25, 2008) (stating that limited liability of law firm LLC is provided by LLC statute rather than professional firm statute and neither failure to pay fee required by Professional Responsibility Board nor initial absence of required language in articles of organization specifying type of professional services rendered by firm was basis for holding individual members personally liable for firm wrongdoing).

L.F. Pace Construction, Inc. v. Simko, No. CV010387513, 2008 WL 4686485 (Conn. Super. Dec. 7, 2007) (holding that genuine issues of material fact regarding extent of involvement of attorney member of PLLC in legal services and representation giving rise to plaintiffs' action precluded summary judgment in favor of attorney).

HH. Foreign LLC - Failure to Qualify to Do Business

Holmes v. United States, No. CV07-421-S-EJL, 2009 WL 35175 (D. Idaho Jan. 5, 2009) (holding that failure of foreign LLCs to register to do business in Idaho did not render chain of title containing conveyances by LLCs defective because statute provides that failure of LLC to register does not impair validity of any contract or act of LLC and, moreover, neither owning real property, nor selling in an isolated transaction completed within 30 days, constitutes transacting business in Idaho within meaning of statute).

North Star Capital Acquisition, LLC v. Murillo, No. CV085018084, 2008 WL 5157975 (Conn. Super. Nov. 14, 2008) (noting that corporate foreign qualification statute contains provision for stay of proceeding commenced by foreign corporation pending determination of need for foreign corporation to obtain certificate of authority while foreign LLC statute contains no such provision and inferring General Assembly did not intend for court to have power to grant such stay in proceeding involving foreign LLC, but concluding court has inherent authority to grant stay and determining that foreign LLC's collection of debts fell within activities excluded from definition of transacting business such that foreign LLC was not required to register).

Dague v. Huddler, Civil Action No. 07-5539, 2008 WL 4444266 (E.D. Pa. Oct. 2, 2008) (finding that foreign LLC failed to register as required by statute but denying motion to dismiss without prejudice and granting LLC thirty days to comply with foreign registration statute).

Sta-Rite Industries, LLC v. Preferred Pump & Equipment, No. 5:08 CV 1072, 2008 WL 3874676 (N.D. Ohio Aug. 14, 2008) (analyzing case law in corporate context and concluding that failure of foreign LLC to register prior to filing suit could not be cured by subsequent registration and thus required dismissal).

Hugo Douglas & Associates v. Virgin Islands Conference, Civil No. 2007-28, 2008 WL 2954752 (D. Virgin Islands July 30, 2008) (discussing qualification requirements for foreign LLCs under Virgin Islands law and denying defendant's motion to dismiss in which defendant argued that plaintiff foreign LLC was precluded from commencing suit where defendant's affidavit referred to wrong LLC in stating that foreign LLC was not registered as foreign or domestic LLC).

Rice v. Palisades Acquisition XVI, LLC, No. 07 C 4759, 2008 WL 538921 (N.D. Ill. Feb. 25, 2008) (holding that filing suit to collect debt was isolated transaction and did not constitute "transacting business" by foreign LLC).

II. Foreign LLCs - Constitutionality of Fee or Tax

Ventas Finance I, LLC v. California Franchise Tax Board, 165 Cal.App.4th 1207, 81 Cal.Rptr.3d 823 (Cal. App. 1st Dist. 2008). The California Franchise Tax Board (FTB) appealed a judgment ordering a refund of the entire tax paid by a Delaware LLC for the years 2001-2003 along with an award of attorney's fees in favor of the LLC. The court of appeals upheld the trial court's determination that the franchise tax in effect during the years in issue violated the Commerce Clause because it was not fairly apportioned. However, the court of appeals concluded that neither federal due process nor any principle of California law required the FTB to refund the entire amount paid by the LLC. The court held that the refund should be limited to the amount paid by the LLC that exceeded the amount it would have been assessed under a fair method of apportionment, and the court remanded with directions to redetermine the amount of the refund. The court did not reach the question of whether the newly enacted franchise tax, which specifies a method for calculating the amount of refunds in the event the former provision is adjudged to violate the Commerce Clause, may be applied to this case or whether any principle of due process would preclude its retroactivity. The court also addressed the grounds on which attorney's fees in a tax refund suit may be awarded and remanded to permit the trial court to redetermine eligibility and amount in light of the court's determination regarding the amount of the refund.

JJ. Foreign LLC – Governing Law

Hotel 71 Mezz Lender LLC v. Falor, 869 N.Y.S.2d 61 (N.Y. App. Div. 1st Dept. 2008). In an action to enforce personal guaranties of the defendants, the plaintiff obtained an ex parte attachment of the defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs and a subsequent order conditionally appointing a receiver for the interests. The appellate court vacated the orders because the res in an attachment proceeding must be within the jurisdiction of the court issuing the attachment. Although the defendants voluntarily submitted to the jurisdiction of any court in New York City pursuant to the terms of the guaranty, and the order of attachment was served on one of the defendants who was in New York temporarily, the court stated that it was undisputed that neither the defendant served with the order nor any of the other nondomiciliary defendants or entities in which they had an attachable interest had any tangible or intangible property in New York. The court stated that an LLC is a hybrid of a corporation and limited partnership and that owners of membership interests not represented by certificates in an LLC should have rights comparable to those of corporate shareholders and limited partners. The court stated that "the situs of shares of a corporation is either 'where the corporation exists' or where the shareholders are domiciled," and the court cited case law holding that "an interest in a limited partnership–as with a corporation–is situated where the partnership is formed and operates." The court rejected the argument in the dissent that the New York court had jurisdiction to order attachment of the interests based on the proposition that the situs of a debt is wherever the debtor can be found. With respect to the receivership, the court stated that a court should decline to appoint a receiver where a judgment relates strictly to the internal affairs and management of a foreign corporation or LLC because such questions are of local administration and should be relegated to courts of the jurisdiction under the laws of which the corporation or LLC is organized. According to the court, "[i]nstead of appointing a receiver of defendants' ownership and/or management interests in the foreign entities with the power to assume any management role they may have in those entities and authorizing him to seek the aid of courts of those states in which the real estate is located in executing his duties as receiver, plaintiff, now the judgment creditor, should have been relegated to the states of the companies' situses where it could have receivers appointed upon a proper showing of necessity." The court affirmed that part of the trial court's order restraining the defendants from transferring or otherwise disposing of their assets, including their interests in the nondomiciliary LLCs.

Nightingale & Associates, LLC v. Hopkins, Civ. Docket No. 07-4239 (FSH), 2008 WL 4848765 (D. N.J. Nov. 5, 2008) (dismissing minority member's claim for "minority shareholder oppression" because choice of Delaware law in operating agreement gave Delaware substantial relationship to case and fact that New Jersey has oppressed minority shareholder statute while Delaware does not recognize cause of action for minority shareholder oppression did not override parties' choice of law; dismissing member's claim for "wrongful misconduct" in connection with member's removal from LLC because member did not identify any source of common or statutory law in Delaware or New Jersey supporting cause of action and claim simply restated essence of breach of contract claim).

Greetham v. Sogima L-A Manager LLC, C.A. No. 2084-VCL, 2008 WL 4767722 (Del. Ch. Nov. 3, 2008). The parties formed an LLC and acquired several portfolios of tax liens and related property, but a dispute developed over who would service the assets acquired. The plaintiffs relied upon a draft servicing agreement and a side letter in asserting that the parties agreed the plaintiffs' entity would be the sole and permanent servicer. As a threshold issue, the court determined that Delaware law applied to the dispute. The plaintiffs argued that Delaware law applied based on the choice of law provision in the operating agreement, which provided that the agreement shall be governed and construed in accordance with Delaware law and that the parties agreed that any dispute arising in connection with the agreement shall be resolved in the Delaware Chancery Court. Alternatively, the plaintiffs argued that there were no significant differences between the relevant Delaware and New Jersey law. The defendants maintained that there were slight differences between Delaware and New Jersey law and that New Jersey law should govern under the "most significant relationship" test. Guided by the principle that Delaware courts will honor contractual choice of law provisions so long as the jurisdiction bears some material relationship to the transaction, the court concluded that Delaware law applied. The court stated that there was a material relationship with Delaware because the key entities underlying the transaction were Delaware entities. The court also recognized that the entities, operating in several different states, sought a "'reliable body of law to govern their relationship.'" The court then analyzed the draft servicing agreement and circumstances of the negotiations and concluded that the draft agreement was not intended to be the final agreement. The court concluded that the record overwhelmingly established that the draft servicing agreement and side letter were no more than an agreement to agree. The court also concluded that the plaintiffs failed to demonstrate that the defendants promised that the plaintiffs' entity would serve as the sole servicer and that the plaintiffs relied upon this purported representation. Thus, the court rejected the plaintiffs' promissory estoppel claim as well.

Tenable Protective Services, Inc. v. Bit E-Technologies, L.L.C., No. 89958, 2008 WL 3870666 (Ohio App. Aug. 21, 2008). The plaintiff sought to hold two individuals who were members and senior managers of a Georgia LLC personally liable on a contract with the plaintiff. The court applied Ohio law to the issue of the individual defendants' liability based on a choice-of-law provision in the contract specifying that Ohio law would govern any disputes. Relying on the Ohio LLC statute, the court held that the individual defendants were not personally liable for the obligations of the LLC.

Berman v. Sugo, LLC, 580 F.Supp.2d 191 (S.D.N.Y. 2008). The court denied a motion for reconsideration of its opinion and explained that it applied the law of New York, the forum state, in the context of this dispute regarding a Connecticut LLC because there was no material conflict between the laws of New York and Connecticut with respect to formation of an oral agreement where a party has expressed intent not to be bound until the agreement is in writing.

Rual Trade Ltd. v. Viva Trade LLC, 549 F.Supp.2d 1067 (E.D. Wis. 2008) (stating that veil piercing of LLC is generally governed by law of state of organization and that factors justifying deviation from such rule were not present).

Construction, LLC v. Gravelroad Entertainment, LLC, Civil Action No. 6: 07-155-DCR, 2008 WL 2038878 (E.D. Ky. May 12, 2008). The plaintiff sought to pierce the veil of a Tennessee LLC to hold the three members liable for breach of contract and fraud. The court stated that Kentucky had the most significant relationship to the transaction despite the fact that the LLC was organized under Tennessee law, and the court relied upon a Kentucky Supreme Court case for the proposition that Kentucky law will apply to a contract issue if there are sufficient contacts and not overwhelming interests to the contrary. The court analyzed the evidence and found that it was insufficient to pierce the veil.

Westmeyer v. Flynn, 889 N.E.2d 671 (Ill. App. 2008) (stating that Delaware law applied to LLC veil piercing claim based on rule that efforts to pierce corporate veil are governed by law of state of incorporation, and concluding that there was authority for application of corporate veil piercing doctrine to Delaware LLC though plaintiffs did not rely on any reported Delaware decisions directly dealing with veil piercing).

ColtTech, LLC v. JLL Partners, Inc., 538 F.Supp.2d 1355 (D. Kan. 2008) (stating that law of state of organization of foreign LLC governs liability of member and applying Delaware law to veil piercing claim).

Taurus IP, LLC v. DaimlerChrysler Corp., 534 F.Supp.2d 849 (W.D. Wisc. 2008) (stating law of "state of incorporation"of veiled entity governs whether and when its corporate form should be disregarded).

KK. Charging Order

Zokaites v. Pittsburgh Irish Pubs, LLC, 962 A.2d 1220 (Penn. 2008). A judgment creditor sought an order compelling the judgment debtor, who owned a 20.5% membership interest in two LLCs, to transfer his membership interests in the LLCs to the sheriff for sale to satisfy the judgment. The Pennsylvania Supreme Court affirmed the trial court's decision that Pennsylvania law does not permit such an order. The court noted that the Pennsylvania LLC statute and its comments make clear that a member may transfer the economic portion of the member's interest but may not transfer the governance rights associated with the member's interest without the consent of all other members unless a written operating agreement provides otherwise. Under the statute, unless otherwise provided in a written operating agreement, if all of the members do not consent to the transfer of a member's interest, the transferee has no right to participate in the management of the business and affairs of the LLC or to become a member, and the transferee shall only be entitled to receive the distributions and return of contributions to which the member would otherwise be entitled. The court quoted from commentary to the statute stating that the "right to participate in management" retained by a member upon an unapproved transfer is intended to include the right to vote, as well as rights to information and to compel dissolution of the LLC. The court noted a dearth of case law interpreting the scope of the Pennsylvania Limited Liability Company Law, but noted decisions in other states dealing with situations similar to that at hand. The court stated that "[i]t is manifest from reading Pennsylvania's Limited Liability Company Law, and the decisions of our sister states interpreting similar laws, that the purpose sought by the Legislature in promulgating our limited liability statute was to preclude a judgment creditor from securing more than repayment of his debt by means of a 'charging order,' which is the remedy for a judgment creditor against a member's interest in a limited liability company." The court stated that there was "no justification...to ignore the intent of the Legislature to protect the close-knit structure of the limited liability company and violate the other members' interests and rights by declaring that they must accept a judgment creditor of a member into full membership with all the rights appurtenant thereto when the judgment debtor could not transfer those rights himself," and the court found the judgment creditor's attempt to expand his recoupment efforts from one of just securing economic rights to also obtaining governance rights was proscribed by the Pennsylvania LLC statute and applicable case law.

Federal Trade Commission v. Olmstead, 528 F.3d 1310 (11th Cir . 2008). The FTC obtained a judgment against two individuals, and the district court granted an order compelling the individuals to surrender to a receiver their membership interests in several non-party, single-member LLCs organized under Florida law. A subsequent order authorized the receiver to liquidate the assets in the individuals' LLCs and to pay the proceeds to the FTC. The individuals challenged the district court's order requiring them to surrender the assets of their non-party, single-member LLCs. The individuals argued that the district court's order was contrary to the Florida Limited Liability Company Act, which provides that a judgment creditor may obtain a charging order and that the judgment creditor has only the rights of an assignee. Because the charging order provision does not distinguish between single-member and multi-member LLCs, the individuals contended that the charging order is the only remedy available to a member's judgment creditor even if the member is the sole member of the LLC. The FTC argued that the overall statutory context leads to the conclusion that a charging order is a senseless (and non-exclusive) remedy for a judgment creditor against the membership interest in a single-member LLC. The FTC pointed to the origins of the common law charging order remedy and its purpose of protecting non-debtor partners from being forced into partnership with a partner's creditor. That rationale is lost in a single-member LLC where no non-debtor members need protection, and the FTC argued that other provisions of the LLC statute demonstrate that application of the charging order remedy would produce absurd results. For example, the FTC argued that the provision of the LLC statute specifying that an assignee can become a member with the consent of members other than the judgment debtor would lead to absurd results if single-member LLCs were treated the same as multi-member LLCs because an assignee would not be able to become a member in a single-member LLC. The FTC also argued that application of the charging order provision in the single-member LLC context would conflict with provisions of the Florida LLC statute providing that an LLC member ceases to be a member upon assignment of the member's interest and that an LLC is dissolved when there are no members. According to the FTC, if the charging order is the only remedy of a judgment creditor of a member of a single-member LLC, the LLC would be left without a member to manage and wind up the LLC. The FTC argued that the assignment of a member's interest to a judgment creditor of a member of a single-member LLC should necessarily enable the creditor to step in and liquidate the LLC's assets in order to harmonize the statutory provisions. The court of appeals determined that Florida law was not sufficiently well-established for it to determine with confidence whether the district court's order was permissible, and the court thus certified to the Florida Supreme Court the question of whether, under the charging order provision, a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment. The court stated that it did not intend to limit the issues to be considered by the Florida Supreme Court and asked for guidance.

United States Fidelity and Guaranty Company v. The Scott Companies, No. C-03-5376 SBA (EMC), Docket No. 350, 2008 WL 728874 (N.D. Cal. March 17, 2008). The court granted a charging order with respect to partnership and membership interests owned by two judgment debtors. The court concluded that the plaintiffs failed to establish that a receivership was necessary, noting that previous fraudulent transfers by the judgment debtors involved constructive rather than actual fraud, that the plaintiffs had not shown any further fraudulent conduct since the judgments were entered, and that the value of the partnership and membership interests exceeded the amount of the judgments. Acknowledging the plaintiffs' concern that there would be no incentive to make distributions because of the outstanding judgments against the judgment debtors, the court ordered the defendants to produce for the plaintiffs the K-1's for the interests in issue and ordered the parties to meet and work out an auditing system for the period of time until the judgments are satisfied.

LL. Divorce of Member

Katz v. Katz, 867 N.Y.S.2d 100 (N.Y. App. Div. 2 Dept. 2008) (holding husband did not have standing to recover rent and other damages for period of wife's alleged "holdover occupancy" of marital residence owned by LLC of which husband was sole member).

Medical Vision Group, P.S.C. v. Philpot, 261 S.W.3d 485 (Ky. 2008) (holding joinder of corporation and LLC owned solely by husband and wife was proper in divorce proceeding in order to enable court to enforce husband's payment obligations under marital dissolution decree).

Millenium Equity Holdings, LLC v.Mahlowitz, 895 N.E.2d 495 (Mass. App. 2008) (pointing out that automatic restraining order in divorce action affected only property of parties to the divorce action and thus restrained husband from disposing of his LLC interest and proceeds of such interest but did not affect LLC itself or LLC's property).

Reza v. Reza, No. 2-07-371-CV, 2008 WL 4445619 (Tex. App. Oct. 2, 2008) (noting that membership interest in LLC is personal property and that member has no interest in specific LLC property and holding that trial court in divorce action abused its discretion when it awarded to husband all interest in entity variously referred to as corporation and LLC where mediated settlement agreement did not divide or mention entity and alter ego was neither pled nor tried).

Signore v. Signore, 110 Conn.App. 126, 954 A.2d 245 (Conn. App. 2008) (discussing calculation of income and benefits from sole member LLC in divorce case and concluding trial court's determination regarding husband's gross income was supported by evidence).

Carroll v. Elzey, No. 59891-1-I, 2008 WL 3906353 (Wash. App. Aug. 25, 2008) (analyzing evolution of business that was conducted in several forms over time and concluding that trial court in partition action correctly determined marital community of parties had interest in LLC that was not distributed at time of marital dissolution decree and that parties thus remained tenants in common after dissolution of marriage and interest was subject to partition).

Ulliman v. Ulliman, No. 22560, 2008 WL 2942213 (Ohio App. Aug. 1, 2008). Susan Ulliman appealed the trial court's refusal to consider as income for support purposes one-half of the retained earnings of an LLC of which her ex-husband, Matthew Ulliman, was a one-half owner. The members of the LLC had elected to treat the LLC as an S corporation, and the trial court found that Matthew's entire half-interest in the LLC was marital property. The trial court valued the interest at $4,780,500, awarded the interest to Matthew, and ordered Matthew to pay Susan her half of its value. Susan asked the court to consider half of the LLC's retained earnings, in addition to Matthew's salary, as

Matthew's income for support purposes. The trial court refused, saying that considering the retained earnings as income would constitute "double dipping" because the value of the marital interest was based on the LLC's historic earned income, the unspent sum of which makes up retained earnings. The court of appeals stated that the statutory definitions of "income" are broad enough to encompass retained earnings, but its mere presence is insufficient to require its inclusion. The court stated that the two critical issues to be examined were: first, whether the owning party exercises sufficient control over the decision to distribute or withdraw the retained earnings, and, second, whether the owning party is using the corporation to shelter income so as to avoid paying support. The court found the evidence that Matthew had sufficient control over the retained earnings to give him unilateral access for personal reasons to be weak. The court stated that Matthew and the other member made most decisions jointly, and, even if he had sufficient control, the law imposes on Matthew a fiduciary obligation that would preclude him from unilaterally dipping into retained earnings for personal reasons. The court characterized the tax status of the LLC as an S corporation as largely irrelevant to the question of Matthew's control. The court pointed out that the "flow through" of income is metaphorical and that the income is merely a number on his tax return rather than cash in his pocket. The court thus concluded that there was little evidence to support the notion that Matthew had the right or ability to treat any portion of the LLC's retained earnings as his personal piggy bank. The court also concluded that Susan failed to point to any evidence suggesting that Matthew intended to shelter his income in the retained earnings to avoid paying support. Finally, the court stated that it was important to consider the business judgment of the owners of a closely held business with respect to retained earnings in order to see if business related reasons have prompted the retention of earnings. The court found the record replete with evidence of the critical role that retained earnings played in the LLC's operations. Thus, the court found ample support for the trial court's decision to exclude retained earnings from Matthew's income.

Hernandez v. Hernandez, 249 S.W.3d 885 (Mo. App. 2008) (affirming trial court's finding that apartment buildings acquired by husband prior to marriage were transmuted into marital property by his contribution of buildings to LLC of which husband and wife were equal members and joint managers).

Springer v. Damrich, 993 So.2d 481 (Ala. Civ. App. 2008) (holding that, for purposes of child support, "gross income" of father included income from father's single member LLC after deduction and expenses and not LLC's gross receipts even if father reported LLC's gross receipts on his Schedule C).

Thomson v. Thomson, 978 So.2d 509 (La. App. 2008) (holding trial court in divorce case did not abuse discretion in calculating minority discounts in valuing LLC interests owned by community).

Stonehocker v. Stonehocker, 176 P.3d 476 (Utah App. 2008) (holding that LLC used car dealership did not have goodwill apart from husband).

Young v. Young, 881 N.E.2d 1 (Ind. App. 2007). Relying on case law holding that a shareholder of a wholly owned S corporation could be treated as self-employed for purposes of calculating the shareholder's child support obligation, the court of appeals held that the divorce court properly credited the husband with the cost of his children's health care insurance premium incurred by the husband's wholly owned LLC. Inasmuch as income of the wholly owned LLC was properly factored into the determination of the member's child support obligation, it followed that the LLC's costs and expenses were also properly taken into consideration. The trial court erred, however, in neglecting to include cost of healthcare premium in husband's income before crediting him with the amount.

MM. Receivership

Securities and Exchange Commission v. Byers, No. 08 Civ. 7104(DC), 2009 WL 212928 (S.D.N.Y. Jan. 30, 2009). In this SEC enforcement action, a receiver was appointed for a Virginia LLC that was organized to raise capital to invest in a diamond mine in Nambia. The LLC was managed by another entity, and the receiver assumed control of the manager pursuant to the terms of the receivership order. The LLC's operating agreement provided that the LLC's manager could be removed at any time with cause by the vote of members holding 75% of the preferred interests. One of the investors, individually and on behalf of the preferred members, claimed to have written consents from 88.6% of the preferred members seeking to have the receiver replaced with an entity owned by the investor. The investor asserted that the preferred members did not select the receiver, that the receiver had no experience running a company like the

LLC, and that the receiver had no relationship with the people running the diamond mine in which the LLC invested. The investor sought to have the receivership order modified to the extent it prohibited him from replacing the receiver as manager, arguing that a receiver cannot have more authority than the entity over which he assumes control. The investor argued that the operating agreement permitted removal and replacement of the manager, even if the person in control of the manager is a federal receiver. The court rejected this argument because it would render a federal receivership meaningless. According to the investor's reasoning, an entity subject to a receivership could simply vote to have the receiver removed and carry on its business, and, if the investor's argument were correct, the preferred members in this case could vote to replace the receiver with the defendants, who raised millions of dollar that were unaccounted for and were being investigated by the receiver. The court agreed with the SEC that there was good reason to continue the receiver's management of the LLC.

Hotel 71 Mezz Lender LLC v. Falor, 869 N.Y.S.2d 61 (N.Y. App. Div. 1st Dept. 2008). In an action to enforce personal guaranties of the defendants, the plaintiff obtained an ex parte attachment of the defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs and a subsequent order conditionally appointing a receiver for the interests. The appellate court vacated the orders because the res in an attachment proceeding must be within the jurisdiction of the court issuing the attachment. Although the defendants voluntarily submitted to the jurisdiction of any court in New York City pursuant to the terms of the guaranty, and the order of attachment was served on one of the defendants who was in New York temporarily, the court stated that it was undisputed that neither the defendant served with the order nor any of the other nondomiciliary defendants or entities in which they had an attachable interest had any tangible or intangible property in New York. The court stated that an LLC is a hybrid of a corporation and limited partnership and that owners of membership interests not represented by certificates in an LLC should have rights comparable to those of corporate shareholders and limited partners. The court stated that "the situs of shares of a corporation is either 'where the corporation exists' or where the shareholders are domiciled," and the court cited case law holding that "an interest in a limited partnership–as with a corporation–is situated where the partnership is formed and operates." The court rejected the argument in the dissent that the New York court had jurisdiction to order attachment of the interests based on the proposition that the situs of a debt is wherever the debtor can be found. With respect to the receivership, the court stated that a court should decline to appoint a receiver where a judgment relates strictly to the internal affairs and management of a foreign corporation or LLC because such questions are of local administration and should be relegated to courts of the jurisdiction under the laws of which the corporation or LLC is organized. According to the court, "[i]nstead of appointing a receiver of defendants' ownership and/or management interests in the foreign entities with the power to assume any management role they may have in those entities and authorizing him to seek the aid of courts of those states in which the real estate is located in executing his duties as receiver, plaintiff, now the judgment creditor, should have been relegated to the states of the companies' situses where it could have receivers appointed upon a proper showing of necessity." The court affirmed that part of the trial court's order restraining the defendants from transferring or otherwise disposing of their assets, including their interests in the nondomiciliary LLCs.

Zampa v. Sandora, No. CV000435965, 2008 WL 4210773 (Conn. Super. Aug. 26, 2008) (accepting LLC receiver's final accounting where receiver was satisfied that he had received sufficient information to submit final accounting, members' lack of cooperation had turned receivership into eight-year process of winding up LLC, and neither member was able to identify further information that would affect final accounting).

R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, Civil Action No. 3803-CC, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008). The petitioners sought judicial dissolution of nine Delaware LLCs. With respect to two of the LLCs, the court held that the petitioners did not have standing under the Delaware LLC statute to seek dissolution and winding up because only managers or members have standing to do so under the statute. The court stated that there was no authority for the proposition that a member of an LLC that is itself a member of another LLC can seek dissolution or the winding up of the latter LLC. The court held that the claim for receivership survived because the statute permits a "creditor, member or manager... or any other person who shows good cause" to present an application for receivership. With respect to the other seven LLCs, the court dismissed the action because the members waived the right to seek dissolution or the appointment of a liquidator in the LLC agreements.

Georgia Rehabilitation Center, Inc. v. Newnan Hospital, 663 S.E.2d 204 (Ga. 2008) (holding trial court did not err in expanding powers of receiver appointed to manage affairs of LLC during dissolution given receiver's need to track down, control, and protect LLC's assets).

Johnson v. Booth, 184 P.3d 289 (Mont. 2008) (holding that co-owner of corporation and LLC did not have standing to appeal appointment of receiver for corporation and LLC because claim belonged to corporation and LLC).

Asal v. Adams, No. CV-04-0072635S, 2008 WL 1735175 (Conn. Super. March 25, 2008). An LLC member sued his co-member for dissolution, breach of the operating agreement, mismanagement, and an accounting. The judge entered a TRO restricting the defendant from entering the business and appointing the plaintiff receiver of the LLC. The plaintiff failed to post the required bond and did not provide any reports concerning his activities as receiver. The defendant had been ordered to provide an accounting for the period during which the defendant ran the business, and the defendant had likewise failed to provide an accounting. The court noted that the case was peculiar in that one of the principals had been appointed receiver but had never posted the bond and never accounted to the court or the defendant regarding his actions as receiver. Faced with "this peculiar mix of a receiver who is not really a receiver," the court looked at the operating agreement to determine the relationship of the plaintiff and defendant. Based on the capital contributions made by the parties and the terms of the operating agreement, the court determined that the defendant, as a non-contributing member under the operating agreement, should transfer all of his interest to the plaintiff, a contributing member, who was entitled to an offset under the agreement in an amount greater than the value of the non-contributing member's interest.

NN. Bankruptcy

In re Heritage Organization, L.L.C. (Faulkner v. Korman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. The court found that there were genuine issues of material fact precluding summary judgment on claims that millions of dollars transferred by the LLC to several parties were made with actual intent to hinder, delay, or defraud the LLC's creditors. The evidence included at least three badges of fraud: the transfers were made to insiders, the LLC had been sued or threatened with suit at the time of the transfers, and there was no reasonably equivalent value given in exchange for the transfers. The court also concluded that the trustee's preference claims survived summary judgment because the defendants failed to produce evidence that the payments were made according to ordinary business terms.

In re Johnson (Gates v. Johnson), Bankruptcy No. 2:07-BK-06248-SSC, Adversary No. 2:08-AP-00189-SSC, 2008 WL 5071756 (Bankr. D. Ariz. Oct. 21, 2008). The court held that Johnson's failure to disclose to his LLC co-member when they went into business together that the IRS had a claim against Johnson for $200,000 in delinquent taxes was not fraudulent for purposes of rendering the co-member's claim against Johnson non-dischargeable in bankruptcy. The court found that the co-member's claim that he never would have invested with Johnson if he had known about the delinquent taxes was not consistent with the evidence. The plaintiff made no financial disclosure himself to Johnson, and there was no evidence the plaintiff cared about Johnson's financial situation. Further, the plaintiff learned of Johnson's poor credit rating when they were turned down for a loan, and there was no evidence the plaintiff took any action against Johnson. Instead, they restructured the LLC and obtained the loan. The court rejected as well the contention that Johnson's affluent lifestyle was an affirmative representation of wealth. The court next examined whether the members were in a fiduciary relationship for purposes of the exception from discharge based on "fraud or defalcation while acting in a fiduciary capacity." The court pointed out that the Arizona Limited Liability Company Act, unlike the Arizona Revised Uniform Partnership Act, is silent regarding the duties a member owes to the LLC and the other members. In the absence of persuasive authority defining the duties LLC members owe to one another, the court stated that its only recourse would be to review the operating agreement, which the plaintiff failed to provide. Thus, the court stated that it was impossible to determine, what, if any, fiduciary relationship existed between the parties, and the plaintiff failed to carry his burden of proof on the issue.

In re Martinez (Humphries v. Martinez), Bankruptcy No. 08-41344-13-abf, Adversary No. 08-4111-13-abf, 2008 WL 5157707 (Bankr. W.D. Mo. Aug 1, 2008). The plaintiff and the debtor formed an LLC governed by an oral agreement. In a prior state court action, the court determined that a written "Partnership Agreement" that was never signed accurately reflected the parties' agreement. The parties had discussions about buying each other out, but a buy-out was not consummated, and the LLC was never dissolved. The claim in this case revolved around the debtor's withdrawal of funds from the LLC's account without consent or authorization of the plaintiff. In a state court action, the court found the debtor liable to the plaintiff and the LLC, and the plaintiff sought to have the debt related to the withdrawal of the funds declared nondischargeable on the basis that it was a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The court stated that the plaintiff was not entitled to the relief requested because the funds taken belonged to the LLC rather than the plaintiff. However, the court proceeded to consider whether there was a fiduciary relationship between the debtor and the plaintiff. The court explained that a fiduciary relationship for purposes of the non-dischargeability provision is more narrowly defined than under general common law and requires a technical or express trust. The court stated that nothing in the parties' agreement imposed any fiduciary duty on the debtor as to LLC funds. The agreement merely provided for control and management of the LLC to be split between the parties and for adequate accounting records to be maintained. Because the agreement did not create an express or technical trust, the court stated that the LLC would not be entitled to relief for fraud or defalcation in a fiduciary capacity even if it were a party.

In re Louis J. Pearlman Enterprises, Inc. (Kapila v. Deutsche Bank A.G.), 398 B.R. 59 (M.D. Fla. 2008) (stating that various rights of individual and corporate debtor members, including voting rights, management rights, and profit rights, constituted property of the bankruptcy estates of such members).

In the Matter of Yorkshire, LLC (Knight v. Luedtke), 540 F.3d 328 (5th Cir. 2008). The court of appeals upheld an award of sanctions against an individual, Knight, and the attorney hired by Knight as bankruptcy counsel for a limited partnership and its general partner LLC. Knight was president and a manager of the LLC. Knight and the attorney prepared for the bankruptcy in secret and did not consult with or inform any other owner, officer, employee, or creditor. The attorney signed each petition as attorney for the debtor, and the individual signed each petition as "President, Manager." The petitions were filed after Knight received notice from the other members of the LLC that a meeting of the entities was going to be held to consider removal of Knight from his position of authority in the LLC. The evidence showed the attorney conducted little due diligence on the financial status of the entities and no diligence on their ownership and management so as to reach an informed decision as to whether a bankruptcy filing was warranted and, if so, who had authority to file it. After the bankruptcy filings, Knight was removed from his position of authority, and new counsel was substituted for the bankrupt entities. A pending state court action brought by Knight against the entities and the other owners was removed to the bankruptcy court, and the attorney Knight hired to file bankruptcy for the entities represented Knight in the adversary action against his former clients (the debtors). Eventually all parties stipulated that the limited partnership and LLC were solvent and in no way in default, and the bankruptcies were dismissed. The bankruptcy court found that the bankruptcy filing was made in bad faith, i.e., that it was made to inflict injury on Knight's co-members with a bad motive and with no meaningful thought being given to the actual purposes of Chapter 11 bankruptcy. Based on the finding of a bad faith filing, the bankruptcy court awarded sanctions against Knight and the attorney. The district court affirmed, and the court of appeals likewise held that the bankruptcy court did not abuse its discretion.

In re Lull (Kotoshirodo v. Dorland and Associates, Inc.), Bankruptcy No. 06-00898, Adversary No. 08-90001, 2008 WL 3895561 (Bankr. D. Hawaii Aug. 22, 2008). Three individuals, Lull, Tipaldi, and Jasper, formed a Hawaii LLC in 2005. The articles of organization identified the three individuals as the members and managers of the LLC. The first annual report was submitted in August 2006 dated as of July 1, 2006, but was returned to Tipaldi for reasons not apparent in the record. A resubmitted annual report was received by the Department of Commerce on October 17, 2006. The report had a handwritten line through Lull's name on the member-managers list along with a handwritten notation to remove Lull. Thereafter, Lull had no interest in the LLC. Lull filed bankruptcy on December 8, 2006, and Tipaldi filed a proof of claim based on a promissory note. The questions presented in this adversary proceeding were whether the removal of Lull from the LLC was a preferential transfer to Tipaldi and what preference period applied. The court concluded that Lull's removal as a member and manager of the LLC fell within the broad definition of "transfer" in Section 547(b) of the Bankruptcy Code because the membership interest would have constituted property of the bankruptcy estate had he not been removed. The transfer also benefitted Tipaldi, who was both a creditor of Lull and one of the two remaining members of the LLC. The element of preference was uncontested because Tipaldi filed a proof of claim and obtained a default judgment in an adversary proceeding determining that Lull owed him over $3,000,000. Lull testified at his Section 341 creditors' meeting that he "signed off his interest" in the LLC because he owed Tipaldi money. Lull's insolvency during the year preceding his bankruptcy was also established. The court determined that the transfer occurred within 90 days of the bankruptcy, finding that Lull's removal was not effective until the re-submitted annual report was accepted for filing on October 17, 2006. Even if the effective date of Lull's removal was August 21, 2006, however, the court concluded that the one-year preference period applicable to insiders applied to Tipaldi. The court reviewed the concepts of statutory and non-statutory insiders and concluded that Tipaldi was a non-statutory insider of Lull because of their business relationship. Finally, the court determined that the transfer effected by Lull's removal enabled Tipaldi to receive more than he would have received in a straight liquidation; however, the court concluded the sum to be recovered by the trustee from Tipaldi could not be determined on the record because there was no proof of the value of Lull's LLC interest at the time of the transfer. The record also failed to demonstrate if or how to apportion the preferential transfer between Tipaldi and Jasper, the other remaining member of the LLC.

In re Klingerman, No. 07-02455-5-ATS, 2008 WL 3287199 (Bankr. E.D.N.C. Aug. 2, 2008). In this order regarding confirmation of the debtor's plan, the court addressed the debtor's request for judicial dissolution of an LLC in which he and another individual (Parker) were each 50% members. The viability of the plan depended upon whether the debtor could force dissolution of the LLC. The debtor argued that the LLC should be dissolved under the North Carolina LLC statute because he and Parker were irreconcilably deadlocked, and the debtor had filed an adversary proceeding to dissolve the LLC. Parker filed a motion for summary judgment in the adversary proceeding on the grounds that the debtor ceased to be a member when he filed bankruptcy and did not have standing to force dissolution. The bankruptcy court denied that motion. In this opinion, the court discussed the members' disagreements and disputes regarding the ownership of the LLC and matters related to the LLC's primary asset, a building, and concluded that there was a deadlock that was detrimental to the business. The court noted, however, that the decision to dissolve was still a discretionary decision of the trial court. The court deferred its decision on confirmation of the plan for 30 days to give the parties time to reach an agreement. In the absence of an agreement within 30 days, the court stated it would rule on the plan and, in so doing, would consider whether in the adversary proceeding it would be likely to dissolve the LLC pursuant to the LLC statute, to exercise its broad authority under the LLC statute to modify the terms of the operating agreement, or to leave things as they were.

In re Stamat (Neary v. Stamat), 395 B.R. 59 (Bankr. N.D. Ill. 2008) (acknowledging that characterization of single member LLCs as separate legal entities was correct but finding argument irrelevant to debtors' failure to properly disclose gross income of single member LLCs on bankruptcy schedules and concluding debtors' reckless disregard for truth or falsity of disclosures constituted intent to hinder, delay or defraud creditor and concealment of property supporting denial of discharge).

In re Blue Stone Real Estate, Construction & Development Corporation, 392 B.R. 897 (Bankr. M.D. Fla. 2008) (holding Section 1107(a) of Bankruptcy Code permits court to alter powers of managers of LLC debtor).

In re Healy (Carwin v. Healy), Bankruptcy No. 07-31197-B-7, Adversary No. 08-02159-B, 2008 WL 2852871 (Bankr. E.D. Cal. July 21, 2008). The plaintiff was induced to invest and become a member in an LLC based on misrepresentations made by the LLC through Healy and another individual. The plaintiff obtained a state court judgment based on the misrepresentations, and the plaintiff sought to have the judgment against Healy declared nondischargeable in Healy's bankruptcy proceeding. The court held that the judgment did not fall within the discharge exception for fraud or defalcation while acting in a fiduciary capacity. The court acknowledged that an LLC manager owes to the LLC and its members the same fiduciary duty owed by partners in a partnership under California law, but the court said the fraud pre-dated the fiduciary relationship and Healy was not acting in a fiduciary capacity when he made the misrepresentations to the plaintiff.

In re Klingerman (Klingerman v. ExecuCorp, LLC), 388 B.R.677 (Bankr. E.D. N.C. 2008). The bankruptcy debtor in possession, Klingerman, sought judicial dissolution and winding up of an LLC of which Klingerman was a founding member. The other member, Parker, alleged that Klingerman ceased to be a member when he filed bankruptcy and thus lacked standing to seek an accounting or judicial dissolution. Parker relied upon the operating agreement and the North Carolina LLC statutes. The operating agreement provided that a member shall not voluntarily withdraw or take any voluntary action that would cause a "Withdrawal Event." The operating agreement did not define the term "Withdrawal Event," but the North Carolina Limited Liability Company Act provides that a person ceases to be a member upon specified events of withdrawal including the filing of a voluntary bankruptcy petition. Parker argued that Klingerman ceased to be a member when he filed his bankruptcy petition because the operating agreement did not negate the statutory provisions for withdrawal. Klingerman's loss of membership status was significant because the North Carolina LLC statute provides for judicial dissolution only where a proceeding is brought by the Attorney General, a member, or the LLC itself. The court stated that Klingerman would not have standing to pursue dissolution if the analysis stopped with the operating agreement and the North Carolina LLC statute, but the court proceeded to consider Bankruptcy Code Section 541(c). Section 541(c)(1) provides that all of the debtor's interest in property becomes property of the estate notwithstanding any provision in applicable nonbankruptcy law that is conditioned on the commencement of a bankruptcy and that effects a forfeiture, modification, or termination of the debtor's interest in property. Agreeing with *In re Ehmann*, the court concluded that all of the debtor's rights and interest, economic and non-economic, passed to the estate under Section 541(c). The court viewed the converting of a debtor's membership interest to that of an assignee by operation of a state statute as a modification or termination of the interest that is rendered ineffective by Section 541(c). In so concluding, the court disagreed with *In re Garrison-Ashburn, L.C.*, in which a bankruptcy court concluded that the debtor/member's bankruptcy estate only had the rights of an assignee. As a member of the LLC, Klingerman's estate had standing to seek dissolution. The court left for another day the question of whether the request for judicial dissolution should be granted.

In re Lobell (Brooke Credit Corporation v. Lobell), 390 B.R. 206 (M.D. La. 2008). The court noted that the Fifth Circuit Court of Appeals has not decided if LLC members are "fiduciaries" for purposes of the exception to discharge for fraud or defalcation in a fiduciary capacity, and stated that no controlling authority supports a creditor's right to enforce the duty even assuming there is such a duty. The court stated that the debtor member and her LLC were insiders of each other and held that the member's transfer of the LLC's property with intent to hinder and defraud a creditor within one year of filing bankruptcy barred the debtor's discharge.

In re J.S. II, L.L.C., 389 B.R. 570 (Bankr. N.D. Ill. 2008). The LLC debtors asserted claims of breach of fiduciary duty against a 50% member/former manager (Snitzer). Snitzer blamed the problems on mismanagement by the other two members and filed a counterclaim seeking to equitably subordinate the interests of the other two members. The other two members argued that the claims asserted by Snitzer were derivative and could only be brought by them as debtors in possession. The court stated that creditors have direct standing to pursue an equitable subordination claim. Snitzer alleged inequitable conduct on the part of the other two members consisting of disregard of corporate formalities with regard to the LLCs, undercapitalization of the LLCs by failing to capitalize the project as required by the operating agreements, and gross mismanagement. The court concluded that the allegations satisfied the requirement for equitable misconduct and injury, and Snitzer had standing to bring the claim for equitable subordination.

In re Global Ship Systems, LLC, 391 B.R. 193 (Bankr. S.D. Ga. 2007). An LLC's lender, who was also a Class B interest holder whose consent was required for the LLC to file bankruptcy, challenged the involuntary bankruptcy of the LLC filed by three individuals who claimed to be creditors and who were solicited or encouraged by one of the members to file the involuntary case. The court concluded that the case fell within the parameters which classically define a bad faith filing, stating that the involuntary case was a pure subterfuge for a voluntary petition, filed by creditors at the instigation of the LLC or its managers/members. The court stated that Georgia law is clear in permitting, to the maximum extent possible, parties to exercise freedom of contract in structuring an LLC. The court acknowledged that an absolute waiver of the right to file bankruptcy violates public policy if asserted by a lender, but the operating agreement clearly gave the lender, in its role as a member, the right to prevent a voluntary bankruptcy by withholding consent. In view of the Georgia legislature's determination that LLCs should be granted broad discretion in the organization and management of their affairs, the court concluded that the lender retained a separate right, as an equity holder, to refuse to consent to a voluntary bankruptcy. The court emphasized that the filing of an involuntary case at the suggestion of a debtor to circumvent limits on the filing under the debtor's governing documents is only suggestive of, not conclusive evidence of, bad faith. The court distinguished *In re Kingston Square Assoc.*, in which an orchestrated filing was permitted because a bankruptcy in that case could preserve equity for unsecured creditors and limited partners. In contrast, the debt held by the lender in this case far exceeded the value of the collateral, and there was no basis to believe that unsecured creditors and equity holders would be any worse off after foreclosure. The court found that there were other causes for dismissal in addition to its finding of bad faith, and the court also granted the lender's motion for relief from the stay to permit foreclosure in the alternative. The court discussed in a footnote the relationships of the petitioning creditors with the LLC and stated that its finding of bad faith depended upon that of the LLC and its management and not that of the petitioning creditors.

In re Young (Rands v. Young), 384 B.R. 94 (Bankr. D. N.J. 2008). The court held that the three-year statute of limitations governing member liability for distributions under the New Jersey LLC statute did not apply to funds misappropriated by members and did not bar embezzlement nondischargeability claims. The transfers in issue differed from a typical distribution in that the transfers involved alleged misappropriation of funds by a member for personal use. The member argued that a distribution is any money taken out of the LLC by or for a member, relying on *In re Die Fliedermaus, LLC*, a New York bankruptcy case. In that case, the trustee sought to avoid distributions as fraudulent conveyances, and the court held that the three-year statute of limitations applicable to distributions under the New York LLC statute barred the avoidance action. The court stated that the types of payments in *Die Fliedermaus* were distinguishable because the distributions in *Die Fliedermaus* were challenged on the basis that they were made while the LLC was insolvent; there was no allegation of embezzlement. In addition, the court noted that the New York bankruptcy court had addressed the trustee's breach of fiduciary duty claim separately, indicating the court recognized that taking money in breach of fiduciary duties was not a distribution subject to the three-year statute of limitations. The court next stated that, even if the court were to find the three-year statute of limitations applied in this case, disputed facts existed that could lead to tolling because the member allegedly concealed the misappropriations. The court found it unnecessary to resolve whether the member was acting in a fiduciary capacity for purposes of the nondischargeability provision because the allegations were consistent with embezzlement.

In re McGrath (Gray v. Assali), Bankruptcy No. 05-90165-A-7, Adversary No. 07-9002, 2008 WL 859152 (Bankr. E.D. Cal. March 31, 2008) (finding that two couples took their interests in LLC individually rather than through another LLC, that creditor did not have attached or perfected security interest in LLC interest, and enforcement of claim against debtor's LLC interest after filing of bankruptcy petition was willful violation of automatic stay even if claimants consulted attorney and were under mistaken impression that debtor did not own LLC interest because they knew of debtor's bankruptcy).

Braunstein v. Dann Ocean Towing, Inc., 383 B.R. 362 (D. Mass. 2008) (analyzing "ordinary course of business" for purposes of powers of LLC debtor in possession that owned and managed houseboat and concluding creditor's reasonable expectations regarding ordinary course of business would have encompassed costs of salvage and repair of damaged houseboat given provision in LLC's operating agreement empowering LLC to enter into contracts related to accomplishment of LLC's purposes).

In re McCormick, 381 B.R. 594 (Bankr. S.D. N.Y. 2008). The debtor, an individual, sought extension of the automatic stay in his Chapter 13 bankruptcy to his wholly owned LLC. The court first analyzed whether an LLC is eligible to be a debtor or co-debtor under Chapter 13. The court concluded that an LLC is not eligible to be a debtor under Chapter 13 because it is not an individual, and the court concluded the co-debtor stay is limited to individuals with consumer debt. The court next concluded that the provision of Chapter 13 authorizing self-employed debtors to continue to engage in business post-petition permits an individual operating a business as a sole proprietorship to continue to operate the business, but the court stated that the debtor had excluded himself from the class of self-employed debtors contemplated by Section 1304 by operating his business as an LLC, and Section 1304 thus did not authorize the extension of the automatic stay to the debtor's LLC. The court also denied the debtor's request for extension of the stay as an exercise of the court's extraordinary powers under Section 105(a). The court distinguished case law relied upon by the debtor and concluded that such action would be contrary to the Bankruptcy Code. Finally, the court rejected the debtor's argument that the automatic stay extended to the property of the debtor's LLC under a "property of the estate" theory. The court agreed with the debtor that his interest in the LLC became property of the estate, but found that the debtor's property interest was confined to the intangible rights of ownership provided under the New York LLC statute. The court stated that it was unclear what impact the collection actions against the LLC would have on the debtor's intangible rights of ownership (since the debtor's petition alleged that his shares in the LLC had no value and the debtor admitted at the hearing that the LLC was essentially a shell), and the debtor provided the court no evidence that the pending actions against the LLC would have any immediate adverse economic impact on the estate's interest in the LLC.

In re Wheelus (Tarpon Point, LLC v. Wheelus), Bankruptcy No. 07-30114-JDW, Adversary No. 07-3022, 2008 WL 372470 (Bankr. M.D. Ga. Feb. 11, 2008) (concluding LLC members/managers do not occupy fiduciary capacity under Georgia LLC statute for purposes of dischargeability exception for defalcation in fiduciary capacity).

In re Dealers Agency Services, Inc. (Menchise v. Clark), 380 B.R. 608 (Bankr. M.D. Fla. 2007) (holding that plaintiff did not satisfy burden of showing transfer to LLC was voidable preference).

In re Derivium Capital, LLC (Campbell v. Cathcart), 380 B.R. 407 (Bankr. D. S.C. 2006). Two members of a South Carolina LLC sought to dismiss claims against them arising out of their alleged misappropriation of funds of the LLC. The court held that the LLC's bankruptcy trustee had standing to assert a claim for wrongful distributions under the South Carolina LLC statute as well as claims based upon fraudulent or wrongful conduct. The court rejected the members' argument that the defenses of *in pari delicto* and the business judgment rule barred the trustee's actions because they were not apparent from the face of the complaint and involved factual determinations. The court stated that the business judgment rule immunizes management in transactions where there is a reasonable basis to indicate the transaction was undertaken in good faith, but does not apply in cases of self-dealing, fraud, or other unconscionable conduct. The complaint alleged that the members acted fraudulently or otherwise engaged in self-dealing, and such allegations, if true, precluded the application of the defenses of *in parti delicto* and the business judgment rule. The court also rejected the members' argument that the trustee's claim for civil conspiracy was barred by the doctrine of intracorporate conspiracy. Under this doctrine, the agents of a corporation cannot be liable for conspiring with the corporation, but the court stated that South Carolina law recognizes that agents may be liable for conspiracy if they conspire with one another. The court granted the members' motion to dismiss fraudulent transfer claims based on actual fraud due to the trustee's failure to plead these claims with sufficient specificity, but granted the trustee leave to amend. The court found that the trustee had met its pleading burden with respect to fraudulent transfer claims based on constructive fraud. The court also found that the factual allegations of conduct constituting fraud, bad faith, and abuse of confidence or breach of fiduciary duty supported a claim for constructive trust. The members sought dismissal of a claim based on deepening insolvency, arguing that such a claim is not recognized under South Carolina law and was duplicative of other claims. The court said it had not identified a case in its district recognizing a deepening insolvency cause of action, but concluded that the fact that there had not been a reported case in that district was not grounds alone to dismiss the claim since it is a recognized cause of action in some jurisdictions and is receiving growing acceptance in the federal judiciary and especially "considering the heightened fiduciary duty placed upon shareholders of a corporation once the corporation is insolvent." The court did not view the claim as duplicative of other claims because the deepening insolvency claim related to damages sustained by the LLC as a result of the members' alleged wrongful prolonging of the corporate life of the LLC and incurrence of additional liabilities by the LLC, whereas the breach of fiduciary duty claim appeared primarily aimed at recovering distributions to the members that caused insolvency. The court addressed several other claims including claims for equitable subordination and equitable consolidation. The court found that the trustee had adequately alleged both claims.

In re Derivium Capital, LLC (Campbell v. Cathcart), 380 B.R. 429 (Bankr. D. S.C. 2006) (addressing corporate defendant's motion to dismiss various claims filed by trustee of LLC against entity defendants owned by individual members of LLC and finding allegations supported alter ego veil piercing and substantive consolidation claims pursuant to which trustee sought to reach assets of corporate defendant to satisfy liabilities of LLC).

OO. Fraudulent Transfer

In re Heritage Organization, L.L.C. (Faulkner v. Korman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. The court found that there were genuine issues of material fact precluding summary judgment on claims that millions of dollars transferred by the LLC to several parties were made with actual intent to hinder, delay, or defraud the LLC's creditors. The evidence included at least three badges of fraud: the transfers were made to insiders, the LLC had been sued or threatened with suit at the time of the transfers, and there was no reasonably equivalent value given in exchange for the transfers. The court also concluded that the trustee's preference claims survived summary judgment because the defendants failed to produce evidence that the payments were made according to ordinary business terms.

In re Lobell (Brooke Credit Corporation v. Lobell), 390 B.R. 206 (M.D. La. 2008) (stating that debtor member and her LLC were insiders of each other and holding member's transfer of LLC's property with intent to hinder and defraud creditor within one year of filing bankruptcy barred debtor's discharge).

In re Dealers Agency Services, Inc. (Menchise v. Clark), 380 B.R. 608 (Bankr. M.D. Fla. 2007) (holding that debtor's transfer of substantially all his assets to newly formed LLC owned and controlled by insiders of debtor when lawsuit was pending against debtor was made with actual intent to hinder, delay or defraud creditor; plaintiff did not establish that individual defendants received property of debtor in excess of earned compensation; plaintiff did not establish that transfer was constructively fraudulent because record did not establish value of assets transferred by debtor or value received by LLC; plaintiff did not satisfy burden of showing transfer to LLC was voidable preference).

PP. Creditor's Rights

Hotel 71 Mezz Lender LLC v. Falor, 869 N.Y.S.2d 61 (N.Y. App. Div. 1st Dept. 2008). In an action to enforce personal guaranties of the defendants, the plaintiff obtained an ex parte attachment of the defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs and a subsequent order conditionally appointing a receiver for the interests. The appellate court vacated the orders because the res in an attachment proceeding must be within the jurisdiction of the court issuing the attachment. Although the defendants voluntarily submitted to the jurisdiction of any court in New York City pursuant to the terms of the guaranty, and the order of attachment was served on one of the defendants who was in New York temporarily, the court stated that it was undisputed that neither the defendant served with the order nor any of the other nondomiciliary defendants or entities in which they had an attachable interest had any tangible or intangible property in New York. The court stated that an LLC is a hybrid of a corporation and limited partnership and that owners of membership interests not represented by certificates in an LLC should have rights comparable to those of corporate shareholders and limited partners. The court stated that "the situs of shares of a corporation is either 'where the corporation exists' or where the shareholders are domiciled," and the court cited case law holding that "an interest in a limited partnership–as with a corporation–is situated where the partnership is formed and operates." The court rejected the argument in the dissent that the New York court had jurisdiction to order attachment of the interests based on the proposition that the situs of a debt is wherever the debtor can be found. With respect to the receivership, the court stated that a court should decline to appoint a receiver where a judgment relates strictly to the internal affairs and management of a foreign corporation or LLC because such questions are of local administration and should be relegated to courts of the jurisdiction under the laws of which the corporation or LLC is organized. According to the court, "[i]nstead of appointing a receiver of defendants' ownership and/or management interests in the foreign entities with the power to assume any management role they may have in those entities and authorizing him to seek the aid of courts of those states in which the real estate is located in executing his duties as receiver, plaintiff, now the judgment creditor, should have been relegated to the states of the companies' situses where it could have receivers appointed upon a proper showing of necessity." The court affirmed that part of the trial court's order restraining the defendants from transferring or otherwise disposing of their assets, including their interests in the nondomiciliary LLCs.

Pioneer Navigation Ltd. v. STX Pan Ocean (U.K.) Co., Ltd., No. 08 Civ. 10490(JGK), 2008 WL 5334550 (S.D.N.Y. 2008) (vacating writ of attachment against foreign LLC because individual with business address in Southern

District of New York qualified as registered agent for foreign LLC and LLC was "found" in District, for purposes of attachment statute, because it had both jurisdictional presence and registered agent in District).

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, Civil Action No. 5:07cv162-DCB-JMR, 2008 WL 2789504, 102 A.F.T.R.2d 2008-5256 (S.D. Miss. July 17, 2008). Stanley, a licensed physician, was a member of a professional LLC and the president and sole shareholder of an S corporation that performed services on behalf of the LLC through Stanley. The question in this case was whether payments made by the LLC to Stanley and/or his corporation were "wages or salary payable to or received by" Stanley for purposes of the continuous levy provision of Section 6331(e) of the Internal Revenue Code. The LLC argued that it was not indebted to Stanley for any undistributed profits on the date on which the LLC received the notice of levy and that Stanley was a member who received profits based upon the amount of fees he produced and not an employee to whom it paid a wage or salary. The IRS asserted that Stanley and/or his corporation should be treated as an employee or independent contractor inasmuch as they were compensated based on the amount of money collected by Mission for medical services which Stanley rendered rather than based on the membership interest of Stanley and/or his corporation in the LLC. The IRS argued that the fact that the LLC labeled Stanley and/or his corporation as its member did not change the factual nature of the relationship as that of an employee or an independent contractor. The LLC contended that the services were performed by Stanley in his own behalf as a member of the LLC and that there was no evidence that Stanley was contractually bound to provide services for the LLC. According to the LLC, it merely acted as a collection conduit (after deduction of its operating expenses) for the payments which Stanley's patients made to his corporation for medical services that Stanley had rendered and for which the corporation had billed. The LLC argued that the case law upon which the IRS relied did not support the position that profits paid to member physicians of a professional LLC constitute "wages and salary" subject to a continuing levy under the relevant federal statutes. The court cited case law construing "salary or wages" broadly for purposes of the continuing levy provision, and the court concluded that the term includes fees paid to an independent contractor as compensation for services rendered. The court concluded that there was a fact question as to whether Stanley provided services to the LLC as an independent contractor.

Fritz v. Coffey, No. 1:07-CV-115-TS, 2008 WL 2444552 (N.D. Ind. June 16, 2008) (holding that Indiana lien statute providing for priority lien in favor of employees of "corporation doing business in Indiana" on property and earnings of corporation for all work and labor performed for corporation did not encompass LLCs, pointing out other Indiana lien statutes that refer to LLCs and stating that court is not empowered to extend statutory coverage beyond wording of statute).

Preferred Real Estate Investments, LLC v. Lucent Technologies, Inc., Civil Action No. 2:07-CV-05374 (DMC), 2008 WL 2414968 (D. N.J. June 11, 2008). The plaintiff sought a writ of attachment under a statute which permitted a writ of attachment if the defendant is a corporation created by the laws of another state and that state authorizes attachments against New Jersey corporations authorized to do business in that state. The property involved was owned by a Delaware LLC, and the court noted that a strict reading of the statute would allow business entities to shield themselves from attachment by simply transferring assets to an unincorporated entity. Thus, the court concluded that a more liberal reading of the statute encompassing LLCs was appropriate. Since Delaware has a reciprocal statute allowing for attachment against a corporation not created or existing under Delaware law, the court concluded the statutory grounds for attachment were present.

QQ. Secured Transactions

In re Silver Dollar, LLC (First Community Bank of East Tennessee v. Jones), 388 B.R. 317 (Bankr. E.D. Tenn. 2008). In order to determine whether a financing statement adequately named the LLC debtor when it identified the LLC by its assumed name, the court analyzed UCC Section 9-503(a)(1), which provides that, in the case of a registered organization, the financing statement sufficiently names the debtor only if it sets forth "the name of the debtor indicated on the public record of the debtor's jurisdiction of organization...which shows the debtor to have been organized." The court determined that the financing statement, which identified the LLC debtor by its assumed name, "Silver Dollar Stores, LLC," rather than its name as set forth in the LLC's articles of organization, "Silver Dollar, LLC," did not comply with Tennessee UCC Section 9-503(a)(1) because an assumed name does not meet the requirements of the statute. The fact that the debtor had registered its assumed name did not cause it to fall within the phrase "name indicated on the public record" as used in Section 9-503(a)(1) according to the court. A fact issue remained as to whether the error in identifying the debtor rendered the financing statement "seriously misleading," and thus ineffective, within the meaning of Section 9-506, because it was unclear whether a search of the records of the filing office under the debtor's correct legal name, using the filing office's standard search logic, would disclose the financing statements filed by the secured party under the assumed name.

In re McGrath (Gray v. Assali), Bankruptcy No. 05-90165-A-7, Adversary No. 07-9002, 2008 WL 859152 (Bankr. E.D. Cal. March 31, 2008) (finding that two couples took their interests in LLC individually rather than through another LLC, that creditor did not have attached or perfected security interest in LLC interest, and enforcement of claim against debtor's LLC interest after filing of bankruptcy petition was willful violation of automatic stay even if claimants consulted attorney and were under mistaken impression that debtor did not own LLC interest because they knew of debtor's bankruptcy).

RR. Securities Laws

Trachsel v. Buchholz, No. C-08-02248 RMW, 2009 WL 86698 (N.D. Cal. Jan. 9, 2009) (dismissing RICO claims arising out of alleged fraudulent "pump and dump" scheme involving sale of interests in LLC formed for real estate project because RICO claims sounding in securities fraud cannot be predicate acts and complaint showed that alleged sale of interests in LLC constituted sale of securities under California law and alleged acts would be actionable under federal securities law).

Potluri v. Yalamanchili, No. 06-13517, 2008 WL 4793382 (E.D. Mich. Nov. 3, 2008). Potluri asserted various causes of action in connection with his claim that he and Yalamanchili orally agreed to acquire various businesses in which each would own an equal share regardless of the legal form or owner of record. One of the businesses formed was an LLC, and Potluri and Yalamanchili agreed to list a third party as owner and CEO to disguise the ownership of the LLC because Potluri was subject to a non-compete agreement and they did not want to risk violating that agreement. When the record owner and Yalamanchili refused to recognize Potluri's claim to ownership in the LLC, Potluri sued them asserting various causes of action. The court rejected the argument that the agreement violated a Michigan statute requiring agreements for the sale or transfer of securities to be in writing because the evidence did not show that the ownership interest purportedly created by the agreement was a security under Michigan law and Yalamanchili offered no legal support for his argument that an ownership interest in an LLC is generally considered a security.

Securities and Exchange Commission v. Wolfson, 539 F.3d 1249 (10th Cir. 2008) (stating that court would consider all claims in securities fraud civil enforcement action against Colorado LLC and its managing member jointly in absence of any allegation that LLC had corporate identity separate from managing member).

U.S. v. Leonard, 529 F.3d 83 (2d Cir. 2008). The defendants were convicted of securities fraud, and the court found the evidence was sufficient to support the jury's finding that interests in two LLCs, each of which was formed to produce a particular movie, were securities. The parties agreed that the only category of security that potentially applied in the case was that of an "investment contract," and the court applied *Howey* as interpreted in the Second Circuit. The court noted that a review of the organizational documents of the LLCs in issue indicated that the members were expected to play an active role in the management of the LLCs and would lead to the conclusion that the LLC interests were not securities if the court confined itself to an analysis of the documents. In actuality, however, the evidence showed that the members played an extremely passive role in the operation and management of the business. Although the documents called for members to vote on all important decisions, members testified that they voted, at most, only a couple of times. The documents also called for a number of committees, but only two committees were formed for each LLC, and only a few of the several hundred investors served on those committees. "Interim managers" initially controlled the LLCs and made almost every major production decision regarding the movies prior to the completion of fundraising by the LLCs. The members' management rights did not accrue until the LLCs were "fully organized." The court also found it relevant that the members were presented with take-it-or-leave-it subscription agreements and did not appear to have negotiated any of the terms of the LLC agreements. That the members did not play any role in shaping the organizational documents raised doubts as to whether they were expected to have significant control over the enterprise. Finally, the court noted that the members had no particular experience in film or entertainment and thus would have had difficulty exercising their formal right to take over management of the LLCs after they were fully organized.

Securities and Exchange Commission v. Northshore Asset Management, No. 05 Civ. 2192(WHP), 2008 WL1968299 (S.D. N.Y. May 5, 2008) (holding that LLC interests in investment fund were "investment contracts" and thus "securities" for Exchange Act purposes and that failure to disclose certain information occurred in connection with purchases of interests for purposes of securities fraud under the Exchange Act).

Swartz v. Deutsche Bank, No. C03-1252MJP, 2008 WL 1968948 (W.D. Wash. May 2, 2008). The court concluded that an investor in an LLC sufficiently alleged a securities fraud claim under Section 10(b) of the Exchange Act where the confidential memorandum and LLC agreement indicated the parties were to pool their resources, the defendant would act as managing member empowered to make all investment decisions, and the program was intended to produce a profit. The plaintiff failed, however, to allege facts sufficient to support his claim against an individual associated with the managing member as a control person. The Washington courts mirror the federal approach to defining a "security," and the plaintiff's investment in an LLC was a security under Washington securities law. The plaintiff's allegations against the LLC's managing member were sufficient to qualify the managing member as a "seller," but the plaintiff's allegations against an individual associated with the LLC's managing member failed to establish the individual as someone who occupied a position similar to a seller or materially aided in the transaction.

Consolidated Management Group, LLC v. Department of Corporations, 175 Cal.App.4th 598, 75 Cal.Rptr.3d 795 (Cal. App. 1 Dist. 2008) (stating, in course of analyzing joint venture interests under California securities law, that pivotal criterion for characterizing partnership or joint venture interests, as well as limited liability company interests, as securities usually will be profits "'solely [or substantially] from the efforts of others'" element of *Howey* test).

Ward v. Bullis, 748 N.W.2d 397 (N.D. 2008). Investors in several LLCs formed for the purpose of purchasing and holding stock in a technology company sued the attorney involved in setting up the LLCs alleging common law fraud and violations of the North Dakota securities statute. The trial court granted the attorney's motion for summary judgment on the basis that the plaintiffs did not raise any genuine issue of material fact with respect to their fraud claims, that the attorney did not personally violate the securities statute by offering for sale or selling securities, and that the attorney was not liable as an agent under the securities statute. The plaintiffs appealed. The plaintiffs argued that the attorney was liable under the securities statute as an agent of the seller who participated or aided in the sale. The supreme court held that the statutory definition of an agent under the securities statute controlled and that the statute did not include common law agents. The statute defines an "agent" as "an individual, other than a broker-dealer, who represents a broker-dealer or an issuer or is self-employed in effecting or attempting to effect purchases or sales of securities." The court reviewed case law in other jurisdictions regarding an attorney's liability as an agent under securities laws and concluded that an attorney must do more than act as legal counsel to be liable as an agent under the North Dakota securities statute. The attorney must actively assist in offering securities for sale, solicit offers to buy, or actually perform the sale. The court concluded that there was a genuine issue of material fact in this case as to whether the attorney's conduct constituted an attempt to effect the purchase or sale of securities. The evidence, if believed, established that his role in the investment scheme was more than that of an attorney who merely provided legal services and drafted documents. The plaintiffs provided evidence that the attorney planned or assisted in planning the investment scheme, hired the stockbroker involved in the transaction, traveled to Australia and Arizona to assist in purchasing the stock, acted as "secretary" of at least one of the LLCs, drafted investment documents and was responsible for making sure they were filled out and returned, accepted the investment documents without the client's signature, received the investment funds into his firm's trust account and disbursed funds, received a 5% commission in addition to his flat or hourly fee, issued the investors' shares or units, and advised one of the investors that he was an "accredited investor" when the investor stated that he was not. While the supreme court determined that the trial court improperly granted summary judgment on the plaintiffs' fraud claims under the securities statute (because the attorney could be liable as an agent who participated in or aided a sale in violation of the statute), the trial court did not err in granting summary judgment on the common law fraud claim because there was no evidence that the attorney either made fraudulent statements or was "acting in concert," which would require that there was a common plan, the participants knew of the plan and its purpose, and the participants took substantial steps to encourage the achievement of the result. There was no evidence presented of a common plan to commit fraud or that the attorney knew that the stockbroker made fraudulent statements or omitted material information in soliciting investors.

Venezia Amos, LLC v. Favret, No. 3:07cv146/MCR, 2008 WL 410163 (N.D. Fla. Feb. 12, 2008). The plaintiff sued an LLC and its managing member for federal securities fraud in connection with the plaintiff's purchase of a 40% interest in the LLC. The defendants argued that the court lacked personal jurisdiction over them, that the membership interest purchased by the plaintiff was not a security, and that the plaintiff's allegations failed to meet the heightened pleading requirements of the Private Securities Litigation Reform Act. The court first determined that F & F Developers, LLC (F & F), a Louisiana LLC, and its managing member (Favret), a Mississippi resident, were subject to the court's specific and general jurisdiction. The court next determined that the 40% membership interest in F & F purchased by the plaintiff was a security under the *Howey* definition of an investment contract, rejecting the defendants' argument that the interest lacked the passivity required to show the expectation of profit was based on the entrepreneurial efforts of a third party. The plaintiff argued that it was a passive member of F & F, having bought its interest for the purpose of investing in Venezia Resort. Further, the plaintiff argued that F & F could not be described as "member-managed" given the numerous provisions of the operating agreement effectively providing for centralized management by the managing member, Favret. The court agreed with the plaintiff. The court pointed out that the day to day management and control of F & F rested in Favret, the operating agreement stated that only Favret had authority to bind, act, or assume any obligation or responsibility for F & F, and the operating agreement gave Favret authority with regard to bank accounts and distribution of capital assets. The court was persuaded that any expectation of profit by F & F members was based strictly on the efforts of Favret, the managing member, even assuming the plaintiff had voting rights and the right to inspect the LLC's records as argued by the defendants. The court concluded, however, that the plaintiff's allegations of securities fraud and control liability were not sufficiently particularized to meet the heightened pleading standards of the Private Securities Litigation Reform Act.

SS. Worker's Compensation

James v. F&V Distribution Company, LLC, 864 N.Y.S.2d 304 (N.Y. Sup. 2008) (extending exclusivity provisions of Worker's Compensation Law to management LLC that actually performed administrative functions for another LLC that managed property on which plaintiff was injured, but exclusivity provisions did not extend to LLC owner of property even though LLC's members were also members of management LLCs because relationships were ownership relationships rather than employment relationships).

Allen v. Reynolds, 186 P.3d 663 (Idaho 2008) (holding that worker's compensation insurance policy issued to individual did not cover employee of individual's LLC).

TT. State and Local Taxes

Estate of Stuart v. Oklahoma Tax Commission, 195 P.3d 1280 (Okla. App. 2008) (holding non-resident decedent's interest in Texas limited partnership was subject to estate tax where limited partnership was sole member of Oklahoma LLC that owned ranch in Oklahoma).

Virginia Cellular LLC v. Virginia Department of Taxation, 666 S.E.2d 374 (Va. 2008). A telecommunications company structured as an LLC argued that it was exempt from the minimum tax imposed on a telecommunications company under the Virginia Tax Code. The Tax Code provides that "[a] telecommunications company shall be subject to a minimum tax, instead of the corporate tax imposed by § 58.1-400...." Section 58.1-400 imposes a six percent income tax on "every corporation organized under the laws of the Commonwealth and every foreign corporation having income from Virginia sources." The Department of Taxation promulgated a regulation stating that "every telecommunications company certified as such by the SCC is subject to the minimum tax even though it may be exempt from, or not subject to, the corporate income tax under § 58.1-400." The court held that the plain language of the statutes, read together, indicates that the minimum tax only applies to corporations because the minimum tax is to be paid instead of the corporate tax. The court held that the Department of Taxation's regulation interpreting the statutory minimum tax was invalid to the extent it imposed the minimum tax on pass-through entities because the regulation was inconsistent with the statute.

Wildwood Medical Center, L.L.C. v. Montgomery County, 954 A.2d 457 (Md. App. 2008) (holding transfer of property from partnership to LLC whose members were same as partners of transferring partnership was exempt from recordation and transfer taxes under exemption involving transfer from and dissolution of "predecessor entity" notwithstanding property was not titled in partnership since Maryland law does not require partnership property to be held in partnership name).

Regenstreif v. Board of Assessors, 859 N.Y.S.2d 857 (N.Y. Sup. 2008) (holding that Small Claims Assessment Review provisions did not exclude consideration of home owned by single member LLC and occupied by LLC's owner).

Riverboat Development, Inc. v. Indiana Department of State Revenue, 881 N.E.2d 107 (Ind. Tax Ct. 2008). The court held that income of a Kentucky S corporation from a minority interest in an LLC that operated a gambling riverboat in Indiana was not "adjusted gross income derived from sources within Indiana" for purposes of withholding requirements on income passed through to non-resident shareholders. The LLC interest is intangible personal property, and income from intangible personal property is from an Indiana source under the Indiana tax laws if the receipt from the intangible is attributable to Indiana. Receipts in the form of dividends from investments are attributable to Indiana if the taxpayer's commercial domicile is Indiana, and the S corporation was not domiciled in Indiana. Thus, the income the S corporation received as a result of its membership in the LLC was not "adjusted gross income derived from sources within Indiana" and was not subject to the withholding obligations applicable to such income.

Kaplan v. Director, Division of Taxation, 23 N.J.Tax 594, 2008 WL 269022 (N.J. Tax. Jan. 8, 2008) (holding that partnership tax treatment under New Jersey Gross Income Tax Act was not available with respect to ownership of real estate in tenancies in common made up of disregarded single member LLCs where conscious decision was made to acquire real estate in such manner in order to effect tax free exchanges under Internal Revenue Code).

UU. Medicaid Eligibility and LLC Property

Timm v. Montana Dept. of Public Health and Human Services, 184 P.3d 994 (Mont. 2008) (noting potentially different treatment of property of LLCs and corporations for purposes of Medicaid eligibility and concluding that rationale for "no corporation, no trust" rule could not withstand scrutiny and violated equal protection as applied to petitioner in this case).

VV. Unfair Business Practices Statutes

Reid Pointe, LLC v. Stevens, No. 08 CVS 4304, 2008 WL 3846174 (N.C. Super. Aug. 18, 2008). The court held that removal of a member as manager of an LLC and demands for capital calls related to matters of internal corporate governance rather than day-to-day business activities and were not sufficiently "in or affecting commerce" to sustain an Unfair and Deceptive Trade Practices Act (UDTPA) claim. Other UDTPA claims asserted by a member failed because they implicated only the rights and interests of the LLCs and thus belonged to the LLCs.

Johnson v. Wells Fargo Home Mortgage, Inc., 558 F.Supp.2d 1114 (D. Nev. 2008) (holding that damages suffered by LLC borrower in connection with commercial loan were not recoverable under Fair Credit Reporting Act because that Act only protects individual consumers).

WW. Wage and Employment Statutes

Boucher v. Shaw, 196 P.3d 959 (Nev. 2008). The Nevada Supreme Court answered in the negative the following certified question from the Ninth Circuit Court of Appeals: "Can individual managers be held liable as employers for unpaid wages under Chapter 608 of the Nevada Revised Statutes?" The court noted as an initial matter that the certified question was ambiguous in that the term "individual manager" would relate to management-level employees or to statutory "managers" of LLCs since both of the individuals involved were statutory managers of the LLC employer in issue. The court stated that the question before the court related only to management-level employees because the LLC statute makes clear that statutory managers cannot be held individually liable for the debts of the LLC. The court relied upon case law from other states and corporate law under which individual liability does not extend to officers, directors, or shareholders except as provided by specific statute and concluded that there was no clear legislative intent to extend personal liability for unpaid wages to individual managers.

XX. Insurance

American Electric Power Company v. Affiliated FM Insurance Company, 556 F.3d 282 (5th Cir. 2009). In this case, the court held that an insurance policy that covered "any subsidiary corporation now existing or hereafter acquired" was unambiguous and did not include LLCs. American Electric Power Company ("AEP") sued its insurer after it discovered losses that occurred in 1999 due to employee theft at two LLC subsidiaries of Central & Southwest Corporation ("CSW"), a conglomerate acquired by AEP in 2000. AEP claimed that the losses were covered under the prior loss clause of its policy with Affiliated FM Insurance Company ("Affiliated"). The Affiliated policy was amended to include CSW and its subsidiaries in 2000 when AEP acquired CSW, and the prior loss clause provided coverage for earlier losses if those losses would have been covered under an insurance policy in existence at the time of the loss. At the time of the theft, CSW was covered by a policy issued by Chubb Insurance Group (the "Chubb policy"), which expressly covered CSW and "any subsidiary corporation now existing or hereafter acquired." The court applied Louisiana contract interpretation principles but noted that the outcome would remain the same under Texas law. The court concluded that the district court did not err in finding that the term "corporation" was unambiguous and excluding parole evidence. The court rejected AEP's argument that the common understanding of "corporation" extends to unincorporated entities like LLCs. The LLCs in issue were Oklahoma LLCs, and the court cited Oklahoma law defining an LLC as "an unincorporated association or proprietorship." The court also cited the Louisiana LLC statute, which provides that "[n]o limited liability company organized under this Chapter shall be deemed, described as, or referred to as an incorporated entity, corporation, body corporate, [etc.]." AEP pointed to numerous judicial and legal references to "limited liability corporations," but the court stated that these were merely imprecise references that did not alter the fundamental distinction between the two types of entities. The court found nothing "absurd" in interpreting the term "corporation" to cover a particular type of subsidiary and not others. AEP also argued that the district court should have reformed the Chubb policy to include LLCs. Although AEP filed affidavits from both Chubb and CSW stating that LLCs were intended to be covered under the general heading of "corporation" in the Chubb policy, the court found that the district court did not err in refusing to reform the policy because Affiliated assumed the coverage obligations under the unambiguous terms of the Chubb policy and there was no indication that Affiliated knew or should have known of any understanding between Chubb and CSW regarding the meaning of the term "corporation." Further, the court stated that use of the term "corporation" was not the type of clerical error that reformation is intended to remedy, and the court characterized AEP's argument for reformation as an attempt to make an end-run around the parol evidence rule.

Kwok v. Transnation Title Insurance Company, 170 CalApp.4th 1562, 89 Cal.Rptr.3d 141 (Cal. App. 2 Dist. 2009) (holding transfer of title of property from LLC to its members as trustee of family trust was not distribution pursuant to dissolution where property did not devolve to members individually but was transferred by deed to trust, and transfer thus terminated coverage under title insurance policy; noting that members of LLC never held ownership interest in property to which LLC held title and citing statutory provision that membership interest is personal property of member and member has no interest in specific LLC property).

Oregon State Bar Professional Liability Fund v. Benfit, 201 P.3d 936 (Or. App. 2009) (holding that investors' claims against attorney who attempted to remedy prior unregistered sale of LLC membership interests by merger of LLC into corporation that issued unregistered stock was "same or related claim," for purposes of professional liability policy, as claim against first attorney who handled issuance of unregistered membership interests, and both claims were encompassed within coverage limit applicable to "same or related claims").

Chapman v. Georgine Realty, No. CV055001346, 2008 WL 4307618 (Conn. Super. Aug. 29, 2008) (recognizing separate existence of LLC and its sole member and rejecting argument that allegation LLC's sole member has insurance policy with insurer is essentially allegation that LLC has policy with insurer).

Hartford Insurance Company v. Ohio Casualty Insurance Company, 189 P.3d 195 (Wash. App. 2008). In a prior case, an LLC condominium developer which had been administratively dissolved was sued by the condominium association. The LLC did not take steps to reinstate or wind up its affairs during the two-year statutory grace period, and the secretary of state cancelled the LLC's certificate of formation at the end of the two-year period. The LLC had filed third party claims against the construction manager and several subcontractors during the two-year period, and the LLC and the construction manager settled the condominium association's claims six months after the cancellation of the LLC's certificate. The construction manager had also filed third party claims (which were derivative of the LLC's claims) against the subcontractors. The LLC and construction manager settled the condominium association's claims, and the insurers of the LLC and the construction manager paid the settlement. The LLC's insurer was assigned the claims of the construction manager and its insurer against the subcontractors. When the subcontractors discovered that the LLC had been cancelled, they obtained dismissal of the LLC's third party and indemnity claims on the basis that the LLC ceased to exist and did not have standing to prosecute the claims. The claims of the construction manager were dismissed on the basis that they were entirely derivative of the LLC's invalid claims. In the appeal of that case, the court of appeals affirmed the dismissals. In the present case, the LLC's insurer sought equitable contribution from insurers of the subcontractors whom it alleged had improperly declined to indemnify and defend the LLC as an additional insured on the subcontractor policies. The trial court dismissed the insurer's claims, and the insurer conceded on appeal that it had no right to recover as the assignee of the insurer of the construction manager because the construction manager's insurer acted as a volunteer in paying on the settlement. The LLC's insurer also conceded that it could not recover as an assignee of the LLC because the assignment occurred after the LLC's cancellation and was thus invalid. Nevertheless, the LLC's insurer argued that it was equitably entitled to recover from the other insurers through subrogation. The other insurers argued that the LLC's insurer acted as a volunteer in settling the case after the LLC ceased to exist. The court disagreed with the defendants' argument that the duty of the LLC's insurer to defend ended when the LLC was cancelled. The court relied upon the recently enacted, and retroactively effective, three-year survival of claims statute. Under that statute, six months still remained during which suits against the LLC could be initiated because the effective date of dissolution was the date of administrative dissolution, and the settlement occurred two and one-half years after dissolution. The court stated that the legislature's purpose in enacting the survival provision was to provide remedies for parties injured by acts of an LLC and to encourage LLCs to act in good faith. By statute, a dissolved LLC is required to pay or make reasonable provision for claims, and the court stated that it would thwart the statutory purpose of requiring a dissolving entity to leave behind such assets as will reasonably provide for unsatisfied claims if an insurance policy cannot be reached by the LLC's creditors after the winding up process is complete. The court also rejected the argument that the LLC's insurer could have refused to indemnify the LLC in the settlement on the basis that the cancelled LLC could not have asserted indemnity or bad faith claims against its insurer. The court found this argument to be inconsistent with the insurer's obligation to act in good faith and as overly confident that it no longer faced any threat of civil litigation. The court noted that, while cancellation marks the end of an LLC as a separate legal entity, claims against the LLC or managers and members do not necessarily abate. In this evolving landscape of liability, the court did not view the fact that the LLC lacked standing to enforce the policy as dispositive of the insurer's obligation. Where the insurer has be paid to provide indemnity, the court concluded the insurer acts prudently and in protection of its interests by making coverage available even though its insured is defunct, particularly where there is a claim survival statute. Thus, the court held that the LLC's insurer was not acting as a volunteer when paying on behalf of the insured LLC and was not barred from pursuing reimbursement through a subrogation action.

Meche v. Volkov, Civil Action No. 07-1491, 2008 WL 2704531 (E.D. La. July 3, 2008) (notice of cancellation of insurance sent to LLC's registered agent at address specified in policy application as mailing address of LLC was effective).

Focal Point LLC v. CNA Insurance Company, Inc., No. C 07-05764 MHP, 2008 WL 2397422 (N.D. Cal. June 10, 2008). An expelled LLC member asserted that the other members breached their fiduciary duties and their duty of good faith and fair dealing and that he was not paid his fair share of the value of the LLC when he was expelled. The members tendered the claims to their D&O insurer and the insurer denied coverage. The members claimed that they were covered as individual insureds and sought recovery from the insurer of their defense costs incurred while defending against the expelled member as well as indemnification for the settlement amount they paid to the expelled member. The court concluded that neither the D&O part nor the entity coverage part of the policy covered the claims in this case. The D&O part did not cover the claims because the policy excluded suits brought by an insured person under the policy, and the expelled member was an insured person. The court concluded that the entity coverage part did not cover the claims because the expelled member did not assert a claim against the LLC; the expelled member claimed that his fellow members breached their fiduciary duties to him, and the court noted that the LLC did not owe fiduciary duties to its expelled member and could not be sued for such a breach. The individual insureds claimed that the expelled member deliberately asserted his claims in such a manner that the other members would be individually liable for their defense costs, but the court said that it was not the province of the court to fill the gap in insurance even if this was the case. The court analyzed whether the policy covered the individual insured's claims against the LLC and concluded that the policy did not provide coverage. The indemnification by the LLC was pursuant to agreement and was not contested by the LLC, and there thus was no "claim" for indemnification. Additionally, the court concluded that the exclusion for breach of contract claims would preclude coverage of any indemnification claim even if the LLC had failed to indemnify the members because the claim would be for breach of the operating agreement. The court added that public policy also supported its conclusion, stating that the "insured v. insured" exception in the D&O part of the policy would be eviscerated if individual members who were sued by co-members for breach of fiduciary duty could turn around and seek indemnification from the LLC and trigger coverage under the policy. The court also said that it was sound public policy to uphold the exclusion limiting the insurer's coverage for an entity's contractual obligations. Finally, the court rejected the argument that the alleged wrongful expulsion was a covered event under the policy because it was taken on behalf of the LLC. Assuming the members were acting on behalf of the LLC, the court stated that the LLC's contractual obligation to indemnify the members still was not covered under the policy. Further, the court stated that it would be bad public policy to hold the LLC liable for its members' defense of breach of fiduciary duty claims under the guise of acting on behalf of the LLC.

Great American Insurance Company of New York v. North American Specialty Insurance Company, 542 F.Supp.2d 1203 (D. Nev. 2008). The court held that a liability insurance policy insuring members of an LLC in connection with the conduct of the LLC's business covered the members in connection with a claim against them in connection with the construction of a home by the LLC under a contract executed by a predecessor partnership and assumed by the LLC in the LLC's purchase of the partnership's assets. The LLC actually built the home, and the fact that the members were named in the homeowners' suit as general partners of the LLC's predecessor and that the policy excluded coverage for any past partnership was immaterial since it was the LLC's conduct that was in issue.

YY. Statute of Frauds

Potluri v. Yalamanchili, No. 06-13517, 2008 WL 4793382 (E.D. Mich. Nov. 3, 2008). Potluri asserted various causes of action in connection with his claim that he and Yalamanchili orally agreed to acquire various businesses in which each would own an equal share regardless of the legal form or owner of record. One of the businesses formed was an LLC, and Potluri and Yalamanchili agreed to list a third party as owner and CEO to disguise the ownership of the LLC because Potluri was subject to a non-compete agreement and they did not want to risk violating that agreement. When the record owner and Yalamanchili refused to recognize Potluri's claim to ownership in the LLC, Potluri sued them asserting various causes of action. Because the agreement to form and be equal owners of the LLC could be performed within one year, the court rejected the argument that it violated the statute of frauds. The court rejected the argument that the agreement violated a Michigan statute requiring agreements for the sale or transfer of securities to be in writing because the evidence did not show that the ownership interest purportedly created by the agreement was a security under Michigan law and Yalamanchili offered no legal support for his argument that an ownership interest in an LLC is generally considered a security.

Perry Golf Course Development, LLC v. Housing Authority of the City of Atlanta, 670 S.E.2d 171 (Ga. App. 2008) (holding alleged oral agreement among LLC members to include golf course in LLC's Revitalization Agreement with City Housing Authority would require acquisition of land by LLC and was thus unenforceable under statute of frauds).

Olson v. Halvorsen, C.A. No. 1884-VCL, 2008 WL 4661831 (Del. Ch. Oct. 22, 2008). The dispute in the case arose among the founders of a hedge fund LLC when one of the founders was removed from the LLC. An unsigned LLC agreement provided that a founder was entitled to a multi-year earnout, in this case purportedly worth more than $100 million, when the founder left the LLC. The court held that the one-year provision of the Delaware statute of frauds applies to LLC operating agreements, and the multi-year payment structure set forth in the unsigned operating agreement was thus unenforceable. The court noted that the Delaware LLC statute expressly allows oral operating agreements, but does not address whether the statute of frauds applies to such agreements. Commentators disagree as to whether the statute of frauds applies to Delaware LLC agreements, and the court stated that there appeared to be no case law in Delaware or elsewhere on the subject. The court noted that few oral LLC agreements are likely to contain any term or provision that cannot possibly be performed within one year, and the statute of frauds would not limit the enforcement of an oral agreement if it contained no such provisions. If, however, an oral LLC agreement contains a provision or provisions that cannot possibly be performed within one year, the court held that such provision or provisions are unenforceable based on the policy underlying the statute of frauds. The court analyzed the payment provisions in the unsigned LLC agreement and concluded that the payout obligation fell within the one-year statute of frauds provision because all amounts except the first payment could not possibly be calculated until after one year following the alleged agreement, and there were additional substantive obligations and restrictions on the remaining members extending for multiple years. The court analyzed exceptions to the statute of frauds involving multiple writings and part performance and concluded that these did not apply in this case. Other writings relied upon by the removed member did not clearly and specifically reference the unsigned operating agreement or the payout provision. The court followed the rule followed in the majority of jurisdictions and a Delaware Superior Court decision that an agreement not performable within one year (in contrast to a contract involving the sale of land) is not validated by part performance; therefore, the part performance exception was not available to the removed member.

ZZ. Equitable Contribution

Amphibious Partners, LLC v. Redman, 534 F.3d 1357 (10th Cir. 2008). The plaintiff sued its co-members in an LLC for contribution after the plaintiff paid the full amount of an LLC loan guaranteed by the defendants and by five of the six individual members of the plaintiff. The plaintiff sought 50% of the debt based on the defendants' 50% interest in the LLC, and the defendants argued that their liability should be limited to 2/7 based on the number of guarantors. The trial court found that the defendants improperly excluded the plaintiff from the business and retained the funds earned from the business, thus destroying the plaintiff's ability to benefit from the loan. Because the defendants received the entire benefit from the loan, the trial court concluded that the defendants were liable in contribution to the plaintiff for the entire amount of the debt. The court of appeals found no abuse of discretion in the trial court's application of equitable principles. The court stated that contribution is an equitable doctrine and that the portion of the contribution co-obligors must bear is determined by the benefit each has received.

AAA. Tortious Interference

Perry Golf Course Development, LLC v. Housing Authority of the City of Atlanta, 670 S.E.2d 171 (Ga. App. 2008) (holding Atlanta Housing Authority, which had entered into Revitalization Agreement with LLC, could not be held liable for tortious interference with LLC members' contractual relationship by interfering with fiduciary duties owed among members because Housing Authority's conduct was directly related to "interwoven contractual arrangement" for redeveloping property and only stranger to business relationship underpinning contract may be liable for tortious interference).

Out of the Box Promotions, LLC v. Koschitski, 866 N.Y.S.2d 677 (N.Y. Sup. 2008). The plaintiff alleged that he and the defendant were each 50% members of an LLC, and the plaintiff brought a derivative suit alleging various acts of misconduct on the part of the defendant. The court found that the plaintiff stated a cause of action for wrongful interference with prospective contractual relations because the defendant, as an LLC manager, owed a fiduciary duty to the plaintiff and the LLC and the alleged means employed by the defendant violated the duty of fidelity and thus constituted "wrongful means."

Ladd v. Ladd Construction, LLC, No. TTDCV074007051S, 2008 WL 4416048 (Conn. Super. Sept. 15, 2008). In a dispute involving a father and son owned LLC, the son asserted a claim for tortious interference against the father, alleging that the father exerted influence to prevent the son from performing work in the construction industry and prevented the son from performing excavation or sewer work by refusing to provide the son with his share of the LLC's profits (which prevented the son from acquiring the equipment necessary to perform the work. The court dismissed the tortious interference claim because the allegations failed to state a claim of intentional interference with any particular, existing business relationship, failed to indicate whether the father knew of the business relationship, and failed to provide a factual basis for permitting proof of malice.

Pravak v. Meyer Eye Group, PLC, No. 07-2433-JPM-dkv, 2008 WL 2951101 (W.D. Tenn. July 25, 2008) (doctor's claim that two other doctors interfered with LLC's obligations under letter of intent regarding formation of LLC ophthalmology practice failed because other two doctors were also parties to letter of intent).

ULQ, LLC v. Meder, 666 S.E.2d 713 (Ga. App. 2008) (holding member breached operating agreement by convincing customer to withhold its business from LLC because member was obligated under operating agreement not to interfere with customer relationships but same conduct could not form basis of tortious interference claim because member was owner of LLC rather than a stranger to contract or business relationship).

Fishkin v. Susquehanna Partners, G.P., 563 F.Supp.2d 547 (E.D. Pa. 2008) (stating that LLC can only act through employees and managers and that claim that LLC induced its member/managers to breach contracts is problematic, but finding it unnecessary to decide issue because facts failed to establish that LLC induced member/managers to breach their contracts).

Fisk Ventures, LLC v. Segal, Civil Action No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008) (dismissing member's claim against other members for tortious interference with his employment contract since employment contract allowed LLC to replace member as CEO by vote of 50% of board at any time after second anniversary of agreement).

BBB. Intracorporate Conspiracy

In re Derivium Capital, LLC (Campbell v. Cathcart), 380 B.R. 407 (Bankr. D. S.C. 2006) (rejecting LLC members' argument that trustee's claim for civil conspiracy was barred by doctrine of intracorporate conspiracy, under which corporate agents cannot be liable for conspiring with corporation, because South Carolina law recognizes that agents may be liable for conspiracy where they conspire with one another).

CCC. Successor Liability

Milliken & Company v. Duro Textiles, LLC, 887 N.E.2d 244 (Mass. 2008) (applying de facto merger and mere continuation theories of successor liability and concluding that continued existence of predecessor corporation did not preclude imposition of successor liability on LLC purchaser of corporation's assets).

Simpson v. Ithaca Gun Company LLC, 856 N.Y.S.2d 397 (N.Y. A.D. 4 Dept. 2008). The court found that the elements of a de facto merger were not present in connection with a creditor's acceptance of an LLC's assets under security agreements. Orders were filled and repairs were completed by the LLC's employees for several weeks after the assets were surrendered; however, within six months, the creditor surrendered the assets to another secured creditor with priority, and the second creditor sold the remaining assets and operations at the LLC's facility ceased.

DDD. Conversion, Merger, Reorganization

Humphrey Industries Ltd. v. Clay Street Associates LLC, No. 60923-8-I, 2008 WL 5182026 (Wash. App. Dec. 8, 2008). An LLC member dissented from a merger of the LLC that was designed to facilitate the liquidation of the LLC by allowing the sale of the LLC's real property to which the dissenting member would not consent. After the surviving LLC sold its real property, the LLC tendered an amount to the dissenting member using an income capitalization approach to value the dissenting member's interest. The dissenting member rejected the LLC's offer, and the LLC offered the dissenting member an additional amount. The dissenting member rejected that offer and filed this dissenter's rights lawsuit under the Washington Limited Liability Company Act. The LLC filed a petition seeking judicial determination of the LLC's value, and the court consolidated the two actions. After the action was filed, the LLC made an offer under CR 68, which the dissenting member also rejected. The trial court heard testimony about the marketing and sale of the property and calculated the dissenting member's share based on the value of the property after deduction of transaction costs and outstanding liabilities. The court also found that the dissenting member acted arbitrarily, vexatiously, and not in good faith and assessed attorney's fees and expert fees against the dissenting member under the LLC statute. The court also awarded the LLC its post-CR 68 offer costs pursuant to that rule. Finding that the LLC substantially complied with the statute, the court denied the dissenting member's fee request. The court of appeals analyzed the value of the dissenting member's interest and found the evidence supported the trial court's finding of fair value. The court concluded that the trial court did not err in refusing to treat the dissenting member as an expert on the value of the real property and, in the absence of a definition of "fair value" in the LLC statute, the court found no error in basing fair value on the fair market value of the real estate in the context of a single-asset LLC owning real estate. The court upheld the deduction of transaction costs in the valuation process. The court also found that the LLC substantially complied with the statute and that the evidence supported an award of fees in favor of the LLC. Although the LLC did not meet the payment deadline under the statute, the LLC acted swiftly to liquidate its only asset and paid the dissenting member immediately upon realizing the proceeds of the sale. The court stated that the LLC met the legislative objective of avoiding oppression of a dissenting member. In response to the dissenting member's argument that the LLC did not timely file suit within 60 days after receiving the dissenting member's initial demand for payment, the court read the provisions of the statute to provide the LLC and the dissenter a total of 60 days for the exchange of communications provided by the statute and a period of 60 days from the dissenting member's demand of its own estimated fair value. The court concluded that the LLC's initial payment was credible and did not defeat a finding of substantial compliance by the LLC where the payment was almost 75% of the fair value determined by the court. Finally, the court characterized the evidence of the dissenting member's vexatious conduct as ample. The dissenting member objected to the sale of the property although the LLC was dysfunctional, demanded an amount based on a value the court found unsupported by credible evidence, rejected an amount that exceeded the amount received by other members and the amount ultimately awarded, and had a past history of litigiousness and unreasonable conduct in dealing with the LLC and the members.

Lach v. Man O'War, LLC, 256 S.W.3d 563, No. 2005-SC-001014-DG (Ky. 2008). 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 in effect a conversion for which her consent had not been obtained as required by Kentucky law. 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 supreme court reached the same conclusion as the court of appeals, finding that there was no conversion because a conversion involves only one entity changing its legal form. The court noted that the general partners referred to the transaction on a couple of occasions as a conversion, but stated that the transaction must be analyzed for what it was, not what someone said it was. The court also commented that it had not been asked, and had not considered, whether the restructuring constituted a merger under the Kentucky limited partnership statute. The supreme court disagreed with the court of appeals on the issue of whether the restructuring of the limited partnership was a breach of fiduciary duty by the general partners. The court concluded as a matter of law that the restructuring of the limited partnership into an LLC without the limited partner's approval was a breach of fiduciary duty to her, as was the transfer of the partnership's assets to the LLC. The court held that the transfer of the limited partnership's assets to the LLC violated the Kentucky limited partnership statute because the statute deprives a general partner of the authority to do any act which makes it impossible to carry on the ordinary business of the partnership without the written consent of all limited partners. The court also held that the attorney-client privilege could not be used to prevent discovery of information related to the breach of a partner's fiduciary duty.

In re Dimmings, 386 B.R. 199 (Bankr. N.D. Ohio 2008) (holding that LLC's motion for relief from stay did not show it held security interest in collateral where it attached several corporate certificates, including certificate of conversion, but did not show that assets in issue were transferred, assigned, or otherwise legally became property of movant LLC).

Browning-Ferris Industries, Inc. v. U.S., 101 A.F.T.R.2d 2008-1770, 2008-1 USTC ¶ 50,297, 2008 WL 1743903 (C.A. Fed. April 16, 2008). A corporation that converted to an LLC filed suit for a tax refund as agent for a consolidated group of subsidiaries and then sought dismissal due to lack of standing based on the conversion of the corporation to an LLC. The appeals court concluded that the corporation did not cease to exist for purposes of being able to act as agent of the consolidated group in a tax refund case. Under the Delaware conversion statute, a conversion does not constitute a dissolution of the corporation. The court of claims concluded that a deemed liquidation occurred and deprived the corporation of standing to sue for a tax refund when the corporation converted to an LLC; however, the appeals court held that the court of claims erred in relying on a provision of the check-the-box regulations regarding the effect of a conversion of an eligible entity classified as an association to a disregarded entity. Since the converting corporation was not an eligible entity covered by the rule and there was no other authority supporting the contention that the corporation ceased to exist for purposes of filing for tax refunds for years prior to the conversion, the conversion did not deprive the corporation of standing to sue for the tax refund.

Bank Hapoalim (Switzerland) Ltd. v. XG Technology, Inc., No. 8:07-cv-170-T-23MSS, 2008 WL 126583 (M.D. Fla. 2008). The plaintiff's breach of fiduciary duty suit against individuals who were managers of a Delaware LLC that converted into a corporation failed because the plaintiff, an assignee of securities in the LLC, did not establish that it was admitted as a member of the LLC. The plaintiff also failed to establish that it became a shareholder in the corporation as a result of the conversion and failed to overcome the presumption that the individual defendants were protected by the business judgment rule as directors and officers of the corporation; therefore, the breach of fiduciary duty claims against the individuals as officers and directors failed as well. The plaintiff was a bank that was assigned units in the LLC by a member of the LLC prior to the conversion. At the request of the member, the LLC issued a certificate stating that the bank was the owner of four million units. A few months later, the LLC informed the bank that a pledge existed against the certificate and that the securities were null and void due to the member's default under the pledge agreement. After the conversion, the corporation went public. The documents relating to the conversion did not account for the bank's securities or list the bank as a shareholder of the corporation. The bank asserted that the managers of the LLC owed it a duty of loyalty and care as "legal title holders of the securities" and that the managers breached their duties by failing to safeguard the membership interest of the bank, failing to notify the bank of the conversion, failing to account for the securities in the public offering, and refusing to convert the securities of the LLC. The court stated that the manager of a Delaware LLC owes a fiduciary duty of loyalty and care only to the company and its members. Thus, absent an allegation that the bank was a member or a party to or otherwise bound by the LLC's agreement, the court concluded the breach of fiduciary duty claim based on the defendants' status as managers could not stand. Because the complaint did not even mention the LLC agreement, the court stated that the key issue was whether the complaint sufficiently alleged that the bank, an assignee of a member of the LLC, assumed member status. The court pointed out that the Delaware LLC statute provides that an assignee may become a member with the approval of all the members other than the assigning member or in compliance with the LLC agreement. The court also quoted the provision of the Delaware LLC statute that provides that an assignee becomes a member when the person's permitted admission is reflected in the records of the LLC. Since the complaint did not allege approval by the members, compliance with the agreement, or reflection of the bank's admission as a member in the LLC records, the complaint failed to allege that the defendants owed the bank a fiduciary duty. Having failed to allege its status as a member of the LLC, the bank also failed to allege its status as a shareholder of the corporation resulting from the conversion. The bank relied upon the statutory conversion provision that states that the rights, securities, or interests in the converting LLC may be exchanged or converted into securities or interests of the converted entity, but the court stated that this provision permits, but does not require, conversion of the LLC interests, and that the statutory provision also authorizes cancellation of interests. Because the complaint failed to allege the bank's status as a shareholder, and based on the presumption of propriety of director and officer actions under the business judgment rule, the court held that the breach of fiduciary duty claim against the defendants as corporate officers and directors failed. The court also dismissed claims seeking an order compelling conversion of the LLC securities into shares of the corporation and issuance of the converted shares as well as a claim for damages resulting from the refusal to convert the securities because the statutory conversion provision relied upon by the bank does not require conversion of the interests of the converting LLC into securities of the entity into which the LLC is being converted.

Allen v. United of Omaha Life Insurance Company, 236 S.W.3d 315 (Tex. App. 2007). The court held that a limited partnership's rights as the designated beneficiary of a key man life insurance policy vested in an LLC pursuant to a merger of the limited partnership into the LLC so that the policy proceeds were payable to the surviving LLC. The policy in issue insured the life of Marvin Fred Allen, who was the CEO of CreditWatch Services, L.P., a Texas limited partnership, and the president of the limited partnership's LLC general partner when the policy was purchased in 2001. Allen signed the application in his individual capacity as the insured and in his capacity as president of the LLC general partner as the policy's applicant/owner. He designated the limited partnership as the sole beneficiary. In 2002, the limited partnership merged with an Ohio limited liability company. The survivor of the merger was the Ohio LLC, CreditWatch Services, Ltd. (which later changed its name to CreditWatch Services LLC). The insurance policy's beneficiary designation was never changed. Six months after the merger, Allen died, and the insurer subsequently issued a check in the amount of the policy proceeds payable to "CreditWatch Services." CreditWatch Services LLC deposited the check into its account. Allen's widow brought suit claiming that the insurer should have paid the proceeds to Allen's estate because the policy's designated beneficiary ceased to exist after the merger and because the LLC had no insurable interest in Allen's life at the time of his death. The court held that, regardless of whether the limited partnership's interest as beneficiary was characterized as a chose in action or an expectancy, the interest was transferable and vested in the surviving LLC pursuant to the language of the merger agreement and the Texas and Ohio merger statutes. Both the Texas Revised Limited Partnership Act and the Ohio Revised Code provide for the vesting of all rights and interests in the surviving entity without further act or deed, and the terms of the merger agreement were consistent with the statutes. The court rejected the argument that the merger was the corporate equivalent of the death of a natural person beneficiary. The court stated that, while the separate existence of a non-surviving entity ceases, all of its rights and obligations continue to exist in the surviving entity.

EEE. Single Member's Employment Tax Liability /Validity of Check-the-Box Regulations

Kandi v. United States, 295 Fed.Appx. 873, 2008 WL 4429296 (9th Cir. 2008). The court rejected the taxpayer's challenge to the check-the-box regulations and held that the regulations represented a reasonable interpretation by the Treasury Department of the Internal Revenue Code. The court stated that the recent decision by the IRS to adopt new regulations regarding the treatment of employment taxes on wages paid after January 1, 2009 by a sole member LLC did not change the result. The decision to adopt an alternative approach did not make the prior approach unreasonable or strip the agency of *Chevron* deference.

Seymour v. United States, No. 4:06-CV-116, 2008 WL 2509831 (W.D. Ky. June 19, 2008). The court concluded that the sole member of an LLC was personally liable for employment taxes owed by the LLC. The LLC leased the restaurant and obtained a liquor license, but the member argued that she did not authorize anyone to operate a restaurant under the auspices of her LLC and that she had a "gentlemen's agreement" with another individual who was to operate the restaurant. The court stated that whether the operation of the restaurant under the legal identity of the LLC was within the understanding of the "gentlemen's agreement" was a matter between the member and the other individual and did not affect the member's liability for the employment taxes. The court also found that the bookkeeper for the restaurant was personally liable although he was not the owner of the LLC and was not provided funds to pay the taxes. The bookkeeper had authority to sign checks for the LLC and was responsible for calculating payroll taxes and filing payroll tax returns; therefore, he was a "responsible person" under Section 6672(a). The court determined his conduct was "willful" because he knew about the delinquent taxes and chose to pay other creditors before paying the government.

L & L Holding Company, L.L.C. v. United States, 101 A.F.T.R.2d 2008-2081, 2008-1 USTC ¶ 50,324, 2008 WL 1908840 (W.D. La. April 30, 2008). The IRS filed tax liens against two entities, each of which was the sole member of a disregarded LLC for a period of time, to collect unpaid employment and unemployment tax owed by the LLC. Each member filed suit challenging the IRS determination that the liens were valid, and the suits were consolidated. The court rejected the plaintiffs' argument that the employment tax statute and check-the-box regulations are in conflict. The court determined that the check-the-box regulations are actually in harmony with the employment tax statute as they resolve an ambiguity in how to treat an LLC for employment tax purposes. The court thus ruled that the IRS interpretation of the check-the-box regulations was correct as applied to the levy of employment taxes and the filing of related tax liens against successive sole owners of a single member LLC.

FFF. LLC Payments as Wages or Salary Subject to IRS Levy

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, Civil Action No. 5:07cv162-DCB-JMR, 2008 WL 2789504, 102 A.F.T.R.2d 2008-5256 (S.D. Miss. July 17, 2008). Stanley, a licensed physician, was a member of a professional LLC and the president and sole shareholder of an S corporation that performed services on behalf of the LLC through Stanley. The question in this case was whether payments made by the LLC to Stanley and/or his corporation were "wages or salary payable to or received by" Stanley for purposes of the continuous levy provision of Section 6331(e) of the Internal Revenue Code. The LLC argued that it was not indebted to Stanley for any undistributed profits on the date on which the LLC received the notice of levy and that Stanley was a member who received profits based upon the amount of fees he produced and not an employee to whom it paid a wage or salary. The IRS asserted that Stanley and/or his corporation should be treated as an employee or independent contractor inasmuch as they were compensated based on the amount of money collected by Mission for medical services which Stanley rendered rather than based on the membership interest of Stanley and/or his corporation in the LLC. The IRS argued that the fact that the LLC labeled Stanley and/or his corporation as its member did not change the factual nature of the relationship as that of an employee or an independent contractor. The LLC contended that the services were performed by Stanley in his own behalf as a member of the LLC and that there was no evidence that Stanley was contractually bound to provide services for the LLC. According to the LLC, it merely acted as a collection conduit (after deduction of its operating expenses) for the payments which Stanley's patients made to his corporation for medical services that Stanley had rendered and for which the corporation had billed. The LLC argued that the case law upon which the IRS relied did not support the position that profits paid to member physicians of a professional LLC constitute "wages and salary" subject to a continuing levy under the relevant federal statutes. The court cited case law construing "salary or wages" broadly for purposes of the continuing levy provision, and the court concluded that the term includes fees paid to an independent contractor as compensation for services rendered. The court concluded that there was a fact question as to whether Stanley provided services to the LLC as an independent contractor.

GGG. Attorney Liability, Disqualification

Oregon State Bar Professional Liability Fund v. Benfit, 201 P.3d 936 (Or. App. 2009) (holding that investors' claims against attorney who attempted to remedy prior unregistered sale of LLC membership interests by merger of LLC into corporation that issued unregistered stock was "same or related claim," for purposes of professional liability policy, as claim against first attorney who handled issuance of unregistered membership interests, and both claims were encompassed within coverage limit applicable to "same or related claims").

Kahane v. Jansen, No. A115269, 2008 WL 5077628 (Cal. App. 1 Dist. Dec. 3, 2008). A member of an LLC sued a lawyer for the LLC alleging various causes of action predicated on the argument that the lawyer owed a duty to the LLC and its members–specifically to the plaintiff as a manager– to represent the interests of the LLC and its members and not to favor the interests of any member or manager over the interests of other members. The lawyer relied upon corporate law in arguing that the LLC's attorney owed a fiduciary duty to the LLC and not its individual members, had no duty to disclose conflicts of interest to the members, and could not be liable to the members for professional negligence or conspiracy to defraud the members. Similarly, applying corporate law, the attorney argued the plaintiff, as a member akin to a shareholder, could not sue the LLC's attorney without a waiver of the attorney-client privilege by the LLC itself. The plaintiff relied upon partnership law for the proposition that the attorney owed a duty of disclosure to the members. Additionally, the plaintiff relied upon certain precedents for the proposition that the attorney could be found to have an attorney-client relationship with the members of the LLC as well as with the LLC itself or that, at a minimum, the attorney owed a fiduciary duty to all members. The plaintiff also argued that he was a co-manager, and, as such, had standing to bring an action against the attorney on behalf of the LLC and had the authority to waive the attorney-client privilege in order to pursue the LLC's claims. The trial court concluded that corporate rather than partnership law applied to the attorney-client relationship issue and rejected the plaintiff's contention that he was a co-manager. After prevailing in the plaintiff's action, the attorney filed a malicious prosecution action against the plaintiff. In the attorney's malicious prosecution action, the court analyzed whether the plaintiff in the prior action had probable cause for his action. The court first discussed the plaintiff's claim that he was a co-manager of the LLC and concluded that there was ample evidence to support a good faith claim by the plaintiff that he was a co-manager of the LLC. The evidence included a borrowing authorization signed by nearly all of the members, construction documents identifying the plaintiff as a manager, and the role the plaintiff played in the development of the LLC's project. Next the court discussed and analyzed the plaintiff's claim that an attorney for an LLC owes a fiduciary duty to the members of the LLC. The court concluded that the plaintiff's claim fell well within the development of precedent that litigants are entitled to advance.

Yuko Ito v. Suzuki, 869 N.Y.S.2d 28 (N.Y. App. Div. 1st Dept. 2008). The court held that an LLC investor adequately alleged a fraud claim against the LLC's manager but not the manager's attorney or the investor's attorney. The plaintiff failed to allege any misrepresentation by the attorneys that were calculated to induce the investor's detrimental reliance to support a fraud claim. The investor's malpractice and breach of fiduciary duty claims against the manager's attorney failed because of the absence of a contractual relationship between the investor and the attorney. Affording the investor the benefit of favorable inferences and accepting as true the complaint's allegations that the manager's attorney knew or should have known that the active assistance he provided to the manager was harmful to the investor's interest, the court found that the investor sufficiently alleged against the attorney a claim for aiding and abetting breach of fiduciary duty.

DeNike v. Cupo, 958 A.2d 446 (N.J. 2008) (disqualifying trial judge and ordering full retrial of case involving termination and buy out of LLC member where judge was engaged in employment discussions and negotiations with plaintiff's counsel before final order was signed).

Event Firm, LLC v. Augustin, 985 So.2d 1174 (Fla. App. 2008) (holding trial court erred in disqualifying LLC's attorneys without conducting evidentiary hearing on issue of whether attorneys previously represented defendant member or LLC only).

In the Matter of Yorkshire, LLC (Knight v. Luedtke), 540 F.3d 328 (5^{th} Cir. 2008). The court of appeals upheld an award of sanctions against an individual, Knight, and the attorney hired by Knight as bankruptcy counsel for a limited partnership and its general partner LLC. Knight was president and a manager of the LLC. Knight and the attorney prepared for the bankruptcy in secret and did not consult with or inform any other owner, officer, employee, or creditor. The attorney signed each petition as attorney for the debtor, and the individual signed each petition as "President, Manager." The petitions were filed after Knight received notice from the other members of the LLC that a meeting of the entities was going to be held to consider removal of Knight from his position of authority in the LLC. The evidence showed the attorney conducted little due diligence on the financial status of the entities and no diligence on their ownership and management so as to reach an informed decision as to whether a bankruptcy filing was warranted and, if so, who had authority to file it. After the bankruptcy filings, Knight was removed from his position of authority, and new counsel was substituted for the bankrupt entities. A pending state court action brought by Knight against the entities and the other owners was removed to the bankruptcy court, and the attorney Knight hired to file bankruptcy for the entities represented Knight in the adversary action against his former clients (the debtors). Eventually all parties stipulated that the limited partnership and LLC were solvent and in no way in default, and the bankruptcies were dismissed. The bankruptcy court found that the bankruptcy filing was made in bad faith, i.e., that it was made to inflict injury on Knight's co-members with a bad motive and with no meaningful thought being given to the actual purposes of Chapter 11 bankruptcy. Based on the finding of a bad faith filing, the bankruptcy court awarded sanctions against Knight and the attorney. The district court affirmed, and the court of appeals likewise held that the bankruptcy court did not abuse its discretion.

Ward v. Bullis, 748 N.W.2d 397 (N.D. 2008). Investors in several LLCs formed for the purpose of purchasing and holding stock in a technology company sued the attorney involved in setting up the LLCs alleging common law fraud and violations of the North Dakota securities statute. The trial court granted the attorney's motion for summary judgment on the basis that the plaintiffs did not raise any genuine issue of material fact with respect to their fraud claims, that the attorney did not personally violate the securities statute by offering for sale or selling securities, and that the attorney was not liable as an agent under the securities statute. The plaintiffs appealed. The plaintiffs argued that the attorney was liable under the securities statute as an agent of the seller who participated or aided in the sale. The supreme court held that the statutory definition of an agent under the securities statute controlled and that the statute did not include common law agents. The statute defines an "agent" as "an individual, other than a broker-dealer, who represents a broker-dealer or an issuer or is self-employed in effecting or attempting to effect purchases or sales of securities." The court reviewed case law in other jurisdictions regarding an attorney's liability as an agent under securities laws and concluded that an attorney must do more than act as legal counsel to be liable as an agent under the North Dakota securities statute. The attorney must actively assist in offering securities for sale, solicit offers to buy, or actually perform the sale. The court concluded that there was a genuine issue of material fact in this case as to whether the attorney's conduct constituted an attempt to effect the purchase or sale of securities. The evidence, if believed, established that his role in the investment scheme was more than that of an attorney who merely provided legal services and drafted documents. The plaintiffs provided evidence that the attorney planned or assisted in planning the investment scheme, hired the stockbroker involved in the transaction, traveled to Australia and Arizona to assist in purchasing the stock, acted as "secretary" of at least one of the LLCs, drafted investment documents and was responsible for making sure they were filled out and returned, accepted the investment documents without the client's signature, received the investment funds into his firm's trust account and disbursed funds, received a 5% commission in addition to his flat or hourly fee, issued the investors' shares or units, and advised one of the investors that he was an "accredited investor" when the investor stated that he was not. While the supreme court determined that the trial court improperly granted summary judgment on the plaintiffs' fraud claims under the securities statute (because the attorney could be liable as an agent who participated in or aided a sale in violation of the statute), the trial court did not err in granting summary judgment on the common law fraud claim because there was no evidence that the attorney either made fraudulent statements or was "acting in concert," which would require that there was a common plan, the participants knew of the plan and its purpose, and the participants took substantial steps to encourage the achievement of the result. There was no evidence presented of a common plan to commit fraud or that the attorney knew that the stockbroker made fraudulent statements or omitted material information in soliciting investors.

Jean v. Angle, No. CV064016486, 2008 WL 2168873 (Conn. Super. May 1, 2008) (granting motion to disqualify attorney from representation of defendant in dispute concerning purchase of limousine business where plaintiffs claimed that LLC of which they were members purchased limousine business and defendant claimed he purchased it, attorney was only party present at closing on behalf of purchaser of business, and parties disputed whether attorney represented LLC or individual).

Madelone v. Whitten, 18 Misc.3d 1131, No. 9929-07, 2008 WL 399175 (N.Y. Sup. 2008) (denying motion for disqualification of counsel for plaintiff member of LLC in action seeking enforcement of operating agreement involuntary transfer provisions and asserting derivative claims, notwithstanding fact that counsel had previously represented LLC and another member, because court found interests of plaintiff and LLC were not materially adverse and sufficient factual basis for disqualification was not established with respect to prior representation of other member where details regarding such representation were not presented).

Kira Inc. v. All Star Maintenance Inc., 267 Fed.Appx. 352, 2008 WL 510508 (5th Cir. 2008). A minority member of a Nevada LLC brought a derivative suit against the other two members of the LLC. The plaintiff asserted various claims based on the alleged improper use by the defendant members of the LLC's name and the payment of management fees to affiliates of the defendants. The plaintiff argued that the district court erred in denying its motion to disqualify defense counsel due to conflicts in representing the LLC and the defendant members accused of harming the LLC's interests. The court stated that any conflicts asserted by the plaintiff were more theoretical than real. All members were parties to the action, and the plaintiff was the only party who stood to benefit from a plaintiff's verdict. The court could not imagine any remedy that could have been obtained by the LLC that would have been different from a remedy in favor of the plaintiff and saw no purpose that would have been served by independent counsel for the LLC in this case. Thus, the court held that the district court did not abuse its discretion in denying the motion to disqualify.

HHH. Attorney Client Privilege

Kahane v. Jansen, No. A115269, 2008 WL 5077628 (Cal. App. 1 Dist. Dec. 3, 2008). A member of an LLC sued a lawyer for the LLC alleging various causes of action predicated on the argument that the lawyer owed a duty to the LLC and its members–specifically to the plaintiff as a co-manager– to represent the interests of the LLC and its members and not to favor the interests of any member or manager over the interests of other members. The lawyer relied upon corporate law in arguing that the LLC's attorney owed a fiduciary duty to the LLC and not its individual members, had no duty to disclose conflicts of interest to the members, and could not be liable to the members for professional negligence or conspiracy to defraud the members. Similarly, applying corporate law, the attorney argued the plaintiff, as a member akin to a shareholder, could not sue the LLC's attorney without a waiver of the attorney-client privilege by the LLC itself. The plaintiff relied upon partnership law for the proposition that the attorney owed a duty of disclosure to the members. Additionally, the plaintiff relied upon certain precedents for the proposition that the attorney could be found to have an attorney-client relationship with the members of the LLC as well as with the LLC itself or that, at a minimum, the attorney owed a fiduciary duty to all members. The plaintiff also argued that he was a co-manager, and, as such, had standing to bring an action against the attorney on behalf of the LLC and had the authority to waive the attorney-client privilege in order to pursue the LLC's claims. The trial court concluded that corporate rather than partnership law applied to the attorney-client relationship issue and rejected the plaintiff's contention that he was a co-manager.

Montgomery v. eTreppid Technologies, LLC, 548 F.Supp.2d 1175 (D. Nev. 2008). In litigation between an LLC and Montgomery, a member and former manager, the LLC resisted certain discovery requests on the grounds of attorney-client privilege. Montgomery claimed that, as a member and former manager of the LLC, he was a "joint client" and that the attorney-client privilege could not be asserted against him with respect to privileged communications during the time he was a manager. The LLC argued that it was the sole client and that the ability to assert the privilege belonged to current management. The issue of first impression for the court was whether an LLC should be treated as a partnership or corporation for purposes of the attorney-client privilege. The court discussed the "hybrid" nature of an LLC and cited LLC cases addressing derivative litigation, the business judgment rule, and veil piercing in which courts have applied corporate law to LLCs. The court stated that Montgomery cited no case law applying the law of partnerships to LLCs and that Montgomery relied only upon the general proposition that members of an LLC owe one another fiduciary duties and a general comparison of the structure of the LLC to that of a partnership. The court agreed with the LLC that, even if the court found the LLC operated like a partnership, partnerships and limited partnerships are treated as corporations for purposes of the attorney-client privilege under federal law. Based on a review of the LLC's operating agreement, the court concluded that the LLC's management structure more resembled a corporation than a partnership. Taking into account the case law applying corporate law to LLCs in other areas, Montgomery's failure to cite case law applying partnership law to LLCs, and the fact that federal courts have treated partnerships as corporations for purposes of the attorney-client privilege, the court concluded that the LLC should be treated as a corporation pursuant to federal common law. The court then discussed the divergent views reflected in the case law regarding who the client is for purposes of the attorney-client privilege. Some courts have held that the corporate entity is the sole client, while others have embraced a "joint client" exception, i.e., have taken the view that the corporate entity and present and former directors are joint clients for purposes of asserting the privilege. The court found the "sole client" line of cases more persuasive and was influenced by the fact that Montgomery was suing to benefit himself individually rather than on behalf of the LLC or in his capacity as a former manager or officer. The court thus held that the LLC was the client for purposes of the attorney-client privilege and that only current management of the LLC was entitled to assert or waive the privilege.