
Are the Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing from Other Forms?

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I. INTRODUCTION

One would expect the answer to the question posed in the title to depend to a significant degree on the extent to which legislatures have developed a unique theory of limited liability companies (LLCs) or have simply borrowed from other forms. Commentators and courts often describe an LLC as a “hybrid” combining certain corporate and partnership features. This characterization invites the notion that in any given case, an LLC should be thought of either as “like a corporation” or “like a partnership.” Viewed this way, an LLC may be unique in the manner it combines certain corporate and partnership features, but is perceived as having few, if any, features that are themselves unique or that, while inspired by the corporate or partnership form, play out in a manner other than they would in the corporate or partnership form.¹ If a provision in a state’s LLC statute was obviously borrowed from the corporate or partnership context, then it should not be surprising to see courts relying on precedent from that context on the issue, and that is often the case. However, the case law provides glimpses of a unique theory of LLCs even where a concept, such as limited

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1. This view of limited partnerships is reflected in *Gotham, L.P. v. Hallwood Realty, L.P.*, in which the court stated:

The limited partnership is a hybrid entity. It grafts the limited partner, a passive investor similar to a corporate shareholder, onto a general partnership. In interpreting the statutory provisions for forming limited partnerships, the Court has turned to both corporate and general partnership law In infrequent circumstances, a dispute within a limited partnership may exhibit an entirely novel characteristic of the limited partnership. In that situation, the Court will likely find no specific doctrine to import into the limited partnership context, but must rely on general principles of fairness and equity to interpret the disputed limited partnership statute.

liability (a corporate concept) or the charging order (a partnership concept), has been borrowed from another form. If the issue is one that is not explicitly addressed within the parameters of the LLC statute, such as how an LLC or those associated with it are to be treated under another statutory or regulatory scheme, it also should come as no surprise when courts look at how other entities have been treated and whether and to what extent LLCs should be subject to similar treatment.

Ultimately, the statutory and decisional law reflect a good deal of wholesale borrowing from the corporate and partnership contexts, the wisdom of which has been and will continue to be the subject of debate. To date, there appear to be more situations where courts dealing with LLCs have analogized to corporate precedent than partnership precedent, but one must be careful about the conclusions that are drawn from this state of the case law. Some issues, like the limited liability of a member or the direct versus derivative distinction in the LLC context, are prone to be litigated more frequently than others, and these features happen to be borrowed from the corporate context. In general, there simply is more case law dealing with the corporate context from which to draw, and courts tend to be somewhat more familiar with corporate law. Further, a court's reliance on case law dealing with the corporate context does not mean that the result in a particular case would not have been different in the partnership context. In fact, as partnership law has moved away from the aggregate theory and toward the entity theory (and as corporate law has adapted to some of the particular concerns arising in the closely held corporation context), the distinctions between partnerships and corporations have become less pronounced. Thus, applying corporate or partnership principles may lead to the same result in many cases, and the more appropriate question may be whether and to what extent the LLC context calls for distinct analysis or treatment.

Some insight into how courts conceptualize LLCs is gleaned from cases in which the courts must determine how an LLC is treated under statutes (or, in some cases, private contracts or arrangements) that do not explicitly refer to LLCs. Statutes drafted prior to the advent of LLCs obviously were not drafted with LLCs in mind, and if the statute has not been amended to address LLCs, the issue may arise whether an LLC is included in some other term used in the statute, such as "person," "corporation," or "association." The courts have reached various conclusions in such cases. Although courts have readily accepted the analogy between an LLC and a corporation in many cases—even interpreting the word "corporation" in some instances to include an LLC—there are a number of notable contexts in which courts have recognized the unincorporated nature of an LLC and have refused to equate an LLC to a corporation. Part II discusses cases in which courts have had to determine whether or how a statute or doctrine applies to an LLC when the statute does not explicitly refer to LLCs.

Part III examines judicial treatment of LLCs under the LLC statutes themselves. As noted above, the LLC form is often characterized as a “hybrid” entity because it combines certain corporate and partnership features. Inasmuch as LLC statutes borrowed heavily from the corporate and partnership contexts, it is no surprise that courts have looked to corporate and partnership case law when interpreting and applying LLC statutes. Analogizing to corporate or partnership law is sensible in many cases, and, when appropriate, facilitates more efficient and predictable results than attempting to develop LLC law “from scratch” so to speak. On the other hand, courts must take care not to assume that corporate or partnership precedent will resolve any question that arises in the LLC context. The very manner in which corporate and partnership principles are combined in the LLC context leads to some unique questions that may necessitate unique answers. Furthermore, to the extent that LLC statutes reflect variations from corporate and partnership approaches or themes, judicial analysis should acknowledge and address such variations and ensure that LLC law develops in a manner that takes such variations into account. Though the LLC case law spans less than two decades, it is already too voluminous for this article to comprehensively review and assess. Part III simply provides a glimpse of the judicial treatment of LLCs to date under LLC statutes by highlighting approaches and trends in a few select areas and illustrative cases.

II. CASES ANALYZING THE NATURE OF AN LLC UNDER STATUTES THAT DO NOT REFER TO LLCs AND DOCTRINES DEVELOPED OUTSIDE THE LLC CONTEXT

A. *Treatment of LLCs for Diversity Jurisdiction Purposes*

A substantial body of case law has developed in the context of the determination of the citizenship of an LLC for diversity jurisdiction purposes, and federal courts have overwhelmingly concluded that an LLC is not “incorporated” within the meaning of the federal diversity jurisdiction statute. Federal courts that have confronted and analyzed the issue have been virtually unanimous in concluding that an LLC’s citizenship is not determined in the same manner as a corporation’s citizenship for purposes of diversity jurisdiction, under which a corporation is deemed to be a citizen of its state of incorporation and the state where its principal place of business is located.² Rather, based on the approach to citizenship applied by the United States Supreme Court to a limited partnership in *Carden v. Arkoma Associates*,³ federal courts have consistently held that an LLC has the citizenship of each of

2. 28 U.S.C. § 1332(c)(1) (2000).

3. 494 U.S. 185, 195-96 (1990).

its members.⁴ In *Carden*, the Court rejected the argument that a limited partnership should be considered a citizen of its jurisdiction of formation or, alternatively, that only the citizenship of its general partners should be considered.⁵ The Court refused to deviate from the established precedent of considering the citizenship of every member of an unincorporated entity.⁶ Acknowledging that its conclusion could “validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization,”⁷ the Court left to Congress the task of “accommodating our diversity jurisdiction to the changing realities of commercial organization.”⁸ The Court noted that Congress chose not to redefine how artificial entities other than corporations are treated under the diversity jurisdiction statute when it adopted the current dual-citizenship rule for corporations in 1958.⁹ The Court recognized that the states would continue to create a wide assortment of artificial entities with different powers and characteristics but concluded that the manner in which the citizenship of these entities should be determined is a matter “more readily resolved by legislative prescription than by legal reasoning.”¹⁰ Thus, federal courts were essentially constrained by the United States Supreme Court to approach LLCs in this

4. Every federal court of appeals that has analyzed how an LLC’s citizenship is determined for diversity jurisdiction purposes has concluded that its citizenship is determined by the citizenship of all of its members in accordance with the rule applied in *Carden*. See *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008); *Thomas v. Guardsmark, L.L.C.*, 487 F.3d 531, 534 (7th Cir. 2007); *OnePoint Solutions, L.L.C. v. Borchert*, 486 F.3d 342, 346 (8th Cir. 2007); *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992 (7th Cir. 2007); *Intec USA, L.L.C. v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 651 (7th Cir. 2006); *Wise v. Wachovia Secs., L.L.C.*, 450 F.3d 265, 267 (7th Cir. 2006); *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 347 (7th Cir. 2006); *Johnson v. Columbia Props. Anchorage, L.P.*, 437 F.3d 894, 899 (9th Cir. 2006); *Pramco, L.L.C. v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 43 (1st Cir. 2006); *Saxon Fibers, L.L.C. v. Wood*, 118 Fed. Appx. 750, 753 (4th Cir. 2005); *Factory Mut. Ins. Co. v. Bobst Group USA, Inc.*, 392 F.3d 922, 925 (7th Cir. 2004); *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 881 n.1 (7th Cir. 2004); *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1021 (11th Cir. 2004); *Mut. Assignment & Indemnity Co. v. Lind-Waldock & Co.*, 364 F.3d 858, 861 (7th Cir. 2004); *GMAC Commercial Credit L.L.C. v. Dillard Dept. Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004); *Belleville Catering Co. v. Champaign Mktg. Place, L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003); *Provident Energy Assocs. of Montana v. Bullington*, No. 02-35798, 2003 WL 22301792, at *1 (9th Cir. Oct. 7, 2003); *Homfield II, L.L.C. v. Comair Holdings, Inc.*, No. 01-1151, 2002 WL 31780184, at *1 (6th Cir. 2002); *Handelsman v. Bedford Village Assocs., L.L.C.*, 213 F.3d 48, 51-52 (2d Cir. 2000); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998).

District court opinions on this issue number in the hundreds and are thus too numerous to list. A somewhat unusual application of diversity jurisdiction principles occurred in *ConnectU L.L.C. v. Zuckerberg*, 482 F. Supp. 2d 3, 27 (D. Mass. 2007) (concluding LLC plaintiff had no members for purposes of diversity jurisdiction at time suit was filed and that LLC was thus “stateless” and destroyed diversity jurisdiction).

5. *Carden*, 494 U.S. at 187.

6. *Id.* at 195.

7. *Id.* at 196.

8. *Id.* at 197.

9. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990).

10. *Id.* at 197.

manner and to look to the citizenship of an LLC's members in determining citizenship for diversity purposes. Some federal courts have grown impatient with parties who fail to appreciate the well-established difference between an LLC and a corporation for purposes of establishing citizenship in a diversity case, and a party increasingly risks incurring the court's wrath and harsh treatment for this oversight.¹¹ Other courts are more tolerant as they point out the error in a party's assumption that an LLC is treated in the same manner as a corporation for purposes of diversity jurisdiction.¹² It does not appear that Congress is inclined to step in and alter the approach taken by courts to an LLC's citizenship in regular diversity jurisdiction cases. In 2005, Congress amended the diversity jurisdiction statute with respect to class actions and included in these amendments a dual-citizenship test for unincorporated associations in class action diversity cases;¹³ Congress did not, however, act to address the issue outside of the class-action context.

11. See *Belleville Catering Co. v. Champaign Mktg. Place, L.L.C.*, 350 F.3d 691, 693-94 (7th Cir. 2003) (criticizing counsel for parties in scathing terms for treating LLC as corporation for purposes of diversity jurisdiction and ordering counsel to perform remaining services required to resolve dispute without charging parties any attorney's fees); *Allstate Ins. Co. v. Santa Ana L.L.C.*, No. 08-60865-CIV, 2008 WL 2404822, at *1 (S.D. Fla. June 11, 2008) (dismissing action for failure to adequately allege citizenship of LLC and echoing frustration of Seventh Circuit Court of Appeals regarding lawyers' lack of familiarity with diversity jurisdiction rules); *Sterling Wholesale, L.L.C. v. Miami-McLane Trading Corp.*, No. 08-60867-CIV, 2008 WL 2404825, at *1 (S.D. Fla. June 11, 2008) (mirroring *Allstate* above); *Tilkin & Cagen, Inc. v. United Metal Receptacle Corp.*, No. 08 C 1564, 2008 WL 2339825, at *1 (N.D. Ill. June 4, 2008) (stating nearly full decade had elapsed since Seventh Circuit Court of Appeals spelled out requirements for establishing diversity of citizenship when LLC is party and disregard of such well-established rule by plaintiff's counsel should trigger automatic dismissal); *Lexington Ins. Co. v. Gilco Scaffolding Co.*, No. 08 C 2634, 2008 WL 2035760, at *1 (N.D. Ill. May 12, 2008) (mirroring *Tilkin* above); *MB Fin. Bank, N.A. v. DirechTech Holding Co.*, No. 08 C 2524, 2008 WL 1995057, at *1 (N.D. Ill. May 6, 2008) (mirroring *Tilkin* above).

12. *Realco L.L.C. v. AK Steel Corp.*, Civil Action No. 06-131-ART, 2008 WL 1990810 (E.D. Ky. May 5, 2008). In this case, the parties did not dispute the court's subject matter jurisdiction, but the court inquired on its own as to the citizenship of the plaintiff LLC's members. *Id.* at *1. Disclosure by the plaintiff revealed that complete diversity was lacking based on the rule that an LLC has the citizenship of each of its members, and the court remanded the case to state court for lack of jurisdiction. *Id.* The court noted that "[i]t is common in cases like this for one to assume that limited liability companies are no different than corporations, and thus the pleadings often allege only the place of incorporation and principal place of business." *Id.* The court pointed out that this is an incorrect assumption and that it is well-established that an LLC has the citizenship of each of its members. *Id.* The court acknowledged that "it may seem illogical at first blush to treat a limited liability company differently from a corporation," but stated that "it is the job of Congress, not the courts, to fix any inconsistencies this may cause." *Id.* at *2. The court concluded almost apologetically, stating:

The Court does not take this action lightly, as it realizes the burden this action imposes on the parties. As the Court is sure the parties recognize, jurisdiction is not something with which the Court has discretion. And, in this regard, the Court appreciates the parties' diligence and assistance in determining whether jurisdiction in this matter is appropriate.

Id.

13. 29 U.S.C. § 1332(d)(10) (Supp. V. 2005).

B. Treatment of LLC Interests Under Securities Laws

The federal securities laws do not mention LLC interests in the provisions defining a “security.” Therefore, whether an LLC membership interest constitutes a security depends upon whether the interest falls within any of the numerous categories or types of investments listed in the definition. The analysis employed in the case law is whether the membership interest in question is an “investment contract” as that term is used in the definition of a security. The cases dealing with the treatment of membership interests under federal securities laws generally reflect a careful analysis of the particular membership interests involved to determine if they constitute “investment contracts.”¹⁴ The seminal case discussing investment contracts is the 1946 opinion of the Supreme Court in *Securities & Exchange Commission v. W.J. Howey Co.*¹⁵ In applying the *Howey* test to determine whether an LLC membership interest is a security, the principal issue is generally whether the member’s expected profits are to be derived solely or substantially from the efforts of others.¹⁶ Analysis of the substance rather than form has generally

14. See generally *United States v. Leonard*, 529 F.3d 83 (2d Cir. 2008); *Robinson v. Glynn*, 349 F.3d 166 (4th Cir. 2003); *Burnett v. Rowzee*, No. SACV07641DOCANX, 2007 WL 2809769 (C.D. Cal. Sept. 26, 2007); *Endico v. Fontes*, 485 F. Supp. 2d 411 (S.D.N.Y. 2007); *Conde v. SLS West, L.L.C.*, No. 104CV1925JDTTAB, 2005 WL 1661747 (S.D. Ind. July 15, 2005); *Nelson v. Stahl*, 173 F. Supp. 2d 153 (S.D.N.Y. 2001); *Cogniplex, Inc. v. Hubbard Ross, L.L.C.*, No. 00 C 7463, 00 C 7933, 2001 WL 436210 (N.D. Ill. Apr. 27, 2001); *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376 (D. Del. 2000); *KFC Ventures, L.L.C. v. Metairie Med. Equip. Leasing Corp.*, No. CIV. A. 99-3765, 2000 WL 726877 (E.D. La. June 5, 2000); *Keith v. Black Diamond Advisors, Inc.*, 48 F. Supp. 2d 326 (S.D.N.Y. 1999); *SEC v. Shreveport Wireless Cable Television P’ship*, Fed. Sec. L. Rep. ¶ 90,322, 1998 WL 892948 (D.D.C. Oct. 20, 1998); *SEC v. Parkersburg Wireless Cable Television L.L.C.*, 991 F. Supp. 6 (D.D.C. 1997).

Similarly, a number of courts have relied on *SEC v. W.J. Howey Co.* and *Williamson v. Tucker* in analyzing whether LLC membership interests are investment contract securities under state securities laws patterned after the federal statutes. *Howey*, 328 U.S. 293, 298-99 (1946); *Williamson*, 645 F.2d 404, 423-26 (5th Cir. 1981); see *Tschetter v. Berven*, 621 N.W.2d 372 (S.D. 2001); *Nutek Info. Sys., Inc. v. Arizona Corp. Comm’n*, 977 P.2d 826 (Ariz. Ct. App. 1998); *Ak’s Daks Commc’ns, Inc. v. Maryland Sec. Div.*, 771 A.2d 487 (Md. Ct. Spec. App. 2001).

15. 328 U.S. 293 (1946). The Court in *Howey* defined the term “investment contract” as a “contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” *Id.* at 298-99. The *Howey* definition can be broken down into three elements: (1) an investment of money (2) in a common enterprise (3) with the expectation of profits to be derived solely from the efforts of others (or, as interpreted in later cases, without significant efforts on the part of the investor). *Williamson*, 645 F.2d at 417-19; see also *Ak’s Daks Commc’ns, Inc.*, 771 A.2d at 495 n.5 (discussing characterization of *Howey* as three or four part test). Sometimes the third element is further broken down as follows: (3) with the expectation of profits (4) to be derived solely from the efforts of others. *Id.*

16. An LLC comprised of at least two members generally satisfies the first two parts of the *Howey* test: (1) investment, (2) in a common enterprise. On the other hand, in *Great Lakes Chemical Corp. v. Monsanto Co.*, the court concluded that the plaintiff did not invest in a “common enterprise” because it bought 100 percent of the LLC membership interests from the defendants. 96 F. Supp. 2d 376, 389-90 (D. Del. 2000). The plaintiffs pointed out that the LLC involved a pooling of contributions when it was formed by the two defendants, but the court focused on the challenged transaction, which was the sale of 100 percent of the defendant’s membership interests to the plaintiff. *Id.* The court also concluded that the plaintiff’s expectation of profit did not depend upon the efforts of others inasmuch as the plaintiff’s ownership of 100 percent of the

been the approach taken by courts in determining whether an LLC membership interest is a security. Thus, while the presence or absence of managers will be significant, analysis of this issue extends beyond the basic determination of whether the LLC employs the member-management model or the manager-management model.

Courts confronted with the question of whether an LLC membership interest is a security have looked to case law addressing whether joint venture or partnership interests constitute securities. In particular, *Williamson v. Tucker*¹⁷ has influenced the development of LLC case law in this area. In *Williamson*, the Court of Appeals for the Fifth Circuit reasoned that a general partnership interest may satisfy the *Howey* test if the investor has no effective voice in management although a general partnership interest would not ordinarily be the sort of passive investment that constitutes an investment contract.¹⁸ The court stated that a partner's lack of managerial power might be the result of (1) the allocation of power in the partnership agreement, (2) inexperience and ignorance in business matters resulting in an inability to exercise partnership rights, or (3) actual dependence on the entrepreneurial or managerial ability of the promoter or manager.¹⁹ The mere fact that an LLC is denominated as member-managed does not ensure that courts will not characterize its membership interests as securities.²⁰ Applying the reasoning in *Williamson*, a membership interest may be a security of the investment contract type if the regulations vest ultimate control in others; if the interests are sold to such large numbers of the general public that the interest does not provide any real control; if a member lacks the business experience and knowledge to exercise management rights possessed by the member; or if a member is, in fact, dependent upon the ability of a promoter or manager because of some unique expertise on the part of the promoter or manager.²¹

While courts in LLC cases have relied upon *Williamson* for guidance in analyzing the third prong of *Howey*, some of these courts have expressly differed with *Williamson* with regard to one issue. In *Williamson*, the court

membership interests gave it the power to remove the managers. *Id.* at 391-92.

17. 645 F.2d 404.

18. *Id.* at 423.

19. *Id.* at 424. The court noted that there may be other factors not implicated in the case that would give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded. *Id.*

20. See SEC v. Parkersburg Wireless Cable Television L.L.C., 991 F. Supp. 6, 8-9 n.3 (D.C. Cir. 1997) (concluding inexperience and geographic diversity of over 700 members precluded exercise of their management rights in LLC affairs); Cogniplex, Inc. v. Hubbard Ross, L.L.C., No. 00 C 7463, 00 C 7933, 2001 WL 436210, at *10 (N.D. Ill. Apr. 27, 2001) (stating LLCs appear to be most resistant of all possible business structures to formulaic application of *Howey* test"); Nutek Info. Sys., Inc. v. Arizona Corp. Comm'n, 977 P.2d 826, 832 (Ariz. Ct. App. 1998) (pointing to delegation of management functions, geographic dispersal of investors, lack of expertise of investors, and large number of investors as factors that worked against members' ability to exercise effective control despite fact that articles of organization vested management in members).

21. *Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981).

stated that an investor who claims his general partnership or joint venture interest is an investment contract has a “difficult burden” to overcome in showing that, despite the partnership form the investment took, the investor was so dependent on another that the investor “was in fact unable to exercise meaningful partnership powers.”²² The court’s discussion has been characterized as reflecting a “strong presumption” that a general partnership interest is not a security.²³ In several cases involving LLC membership interests, courts have explicitly refused to accord LLC membership interests any such presumption, pointing to differences between the general partnership and LLC form that militated against extending the presumption to LLC membership interests.²⁴ In *Robinson v. Glynn*,²⁵ as the first federal court of appeals decision addressing whether an LLC membership interest is a security, the Court of Appeals for the Fourth Circuit noted that LLCs lack standardized membership rights or organizational structures and can assume an almost unlimited variety of forms. Thus, the court declined to state any general rule as to whether LLC interests are investment contracts or non-securities.²⁶ “Even drawing firm lines between member-managed and manager-managed LLCs threatens impermissibly to elevate form over substance,” according to the court.²⁷ Similarly, the Court of Appeals for the Second Circuit, in its first opinion addressing the characterization of an LLC interest under federal securities laws, observed that “because of the sheer diversity of LLCs,

22. *Id.* at 424.

23. See *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 240-41 (4th Cir. 1988).

24. See *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 391 (D. Del. 2000) (stating analogy to partnership law is convenient for analyzing interests in LLCs but per se rule or even presumption that LLC interests are not securities is inappropriate given important differences between LLCs and partnerships); *Nutek Info. Sys., Inc. v. Arizona Corp. Comm’n*, 977 P.2d 826, 833-34 (Ariz. Ct. App. 1998) (rejecting presumption for similar reasons); *Ak’s Daks Commc’ns, Inc. v. Maryland Sec. Div.*, 771 A.2d 487, 498 (Md. Ct. Spec. App. 2001) (adopting reasoning of *Great Lakes Chemical Corp.* and *Nutek* and characterizing some other courts as having extended *Williamson* presumption with little or no discussion of distinctions between general partnerships and LLCs); see also *Toothman v. Peters*, 80 P.3d 804, 813 (Colo. App. 2002) (declining to extend *Williamson* presumption to limited liability partnerships).

25. 349 F.3d 166, 174 (4th Cir. 2003).

26. *Id.* In *Robinson v. Glynn*, an LLC member alleged that the defendant committed federal securities fraud when he sold the plaintiff an interest in the LLC, but the court determined that the plaintiff’s LLC membership interest was not a security. *Id.* at 168. The court of appeals upheld the district court’s summary judgment for the defendant on the basis that the LLC interest was not a security because the plaintiff was an active and knowledgeable executive of the LLC rather than a mere passive investor. *Id.* The court applied the *Howey* test and focused on the “economic reality” of the investment to analyze whether the LLC interest was an “investment contract” within the meaning of the securities laws. *Id.* at 170. The court examined the powers accorded the plaintiff under the LLC operating agreement and concluded that he was not a passive investor heavily dependent on the efforts of others. *Id.* at 170-71. The plaintiff was the vice-chairman of the seven-person board of managers, had the power to appoint two managers to the board, was a member of the four-person executive committee, and was also the treasurer of the LLC. *Id.* Though the plaintiff lacked the technological expertise of others at the company, the court rejected the argument that his lack of expertise prevented him from meaningfully asserting his rights. *Id.*

27. *Id.* at 174.

membership interests therein resist categorical classification. Thus, an interest in an LLC is the sort of instrument that requires ‘case-by-case analysis’ into the ‘economic realities’ of the underlying transaction.”²⁸

Further illustrating its view that the “economic reality” of an investment governs the characterization of an LLC interest in the securities context, the Fourth Circuit in *Robinson v. Glynn* stated that references to the plaintiff’s interest as “shares” and “securities” in the purchase agreement, operating agreement, and certificates representing the interest might indicate that the parties believed the securities laws to apply, but were not effective to invoke the securities laws.²⁹ The court also rejected the argument that the plaintiff’s LLC interest constituted “stock” under the securities laws because it was neither denominated “stock” by the parties nor did it possess all the characteristics of stock.³⁰ The court said that the plaintiff was not misled into believing he was purchasing stock because the LLC documents all termed his investment as a “membership interest” rather than “stock,” noting that even the share certificate he received referred to him as a holder of “membership interests in GeoPhone Company, L.L.C., within the meaning of the Delaware Limited Liability Company Act.”³¹

28. *United States v. Leonard*, 529 F.3d 83, 89 (2d Cir. 2008). In *Leonard*, 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. *Id.* at 85. 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 that circuit. *Id.* at 87-90. 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. *Id.* at 89. In actuality, however, the evidence showed that the members played an extremely passive role in the operation and management of the business. *Id.* Although the documents called for members to vote on all important decisions, members voted at most only a couple of times. *Id.* 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. *Id.* at 89-90. “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. *Id.* at 90. The members’ management rights did not accrue until the LLCs were “fully organized.” *Id.* 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. *Id.* 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. *Id.* 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. *Id.*

29. 349 F.3d at 172.

30. *Id.* at 172-73 (finding LLC interest lacked several of five characteristics typically associated with stock); see also *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 389 (D. Del. 2000) (rejecting argument that LLC membership interests in issue, while stock-like in nature, fell within meaning of term “stock” under federal securities law).

31. *Robinson v. Glynn*, 349 F.3d 166, 174 (4th Cir. 2003); cf. *Great Lakes Chem. Corp.*, 96 F. Supp. 2d 376 (rejecting argument that membership interests were “any interest or instrument commonly known as a security,” even though parties referred to membership interests as “equity securities” in their purchase contract, because interests did not satisfy requirements of “investment contract”).

C. *Treatment of LLCs Under Various Statutes Referring to “Corporations,” “Partnerships,” or “Unincorporated Associations”*

Some courts have rigidly adhered to the literal language of a statute referring to corporations and have concluded that an LLC is not encompassed in the statute while other courts have taken a more flexible, pragmatic approach. In *Champluvier v. State*,³² for instance, a member of an LLC was found guilty of embezzling from the LLC. The pivotal issue in the case was whether an LLC was an “incorporated entity” under the embezzlement statute. A majority of the Mississippi Court of Appeals concluded that an LLC and a corporation were similar enough to permit conviction under the statute,³³ noting that Champluvier’s interpretation would “create another advantage to LLCs beyond the tax benefits to its members since the members could also embezzle all of the assets away from LLC and its members without fear of retribution.”³⁴ Three dissenting judges argued that the plain language of the statute did not apply to unincorporated entities.³⁵ The Mississippi Supreme Court reversed, holding that the plain and unambiguous term “incorporated entity” must be read literally and did not encompass an LLC.³⁶ The court pointed out that the legislature had amended the statute as recently as 2003 and had not chosen to revise the statute to include “more modern business entities.”³⁷ Two justices dissented from the majority’s opinion.³⁸ In subsequent civil rights cases brought by Champluvier against the prosecutor and trial judge, the federal district court characterized the issue as a “close one” on which reasonable minds could, and did, differ at every stage of the litigation.³⁹

In contrast to the literal adherence to the term “incorporated company” in *Champluvier*, a federal district court in New Jersey recently read the term “corporation” in an attachment statute to include LLCs.⁴⁰ The plaintiff sought a writ of attachment under a statute that permits 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.⁴¹ The property involved was owned by a Delaware LLC,

32. 942 So.2d 145 (Miss. 2006).

33. *Champluvier v. State*, 942 So.2d 172, 177–78 (Miss. Ct. App. 2005), *rev’d*, 942 So.2d 145 (Miss. 2006).

34. *Id.* at 178.

35. *Id.* at 184–85 (Barnes, J., dissenting).

36. 942 So.2d at 154.

37. *Id.* at 153. The statute has since been amended to broaden its scope so that it is no longer limited to “incorporated entities.” See MISS. CODE ANN. § 97-23-19 (1999).

38. *Champluvier v. State*, 942 So.2d 145, 154–56 (Miss. 2006) (Randolph, J., dissenting).

39. *Champluvier v. Couch*, 557 F. Supp. 2d 748, 753 (N.D. Miss. 2008); *Champluvier v. Evans*, No. 2:08CV14-P-A, 2008 WL 2699796, at *4 (N.D. Miss. June 30, 2008).

40. *Preferred Real Estate Invs., L.L.C. v. Lucent Techs., Inc.*, No. 2:07-CV-05374, 2008 WL 2414968, at *2 (D.N.J. June 11, 2008).

41. *Id.* at *2.

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.⁴² Thus, the court concluded that a more liberal reading of the statute encompassing LLCs was appropriate.⁴³ Because 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.⁴⁴ This flexibility in interpreting the coverage of a statutory (or contractual) provision that does not explicitly embrace LLCs is evidenced in a number of cases, though it is by no means possible to articulate any general rules in this regard.⁴⁵

There are any number of other contexts in which courts have struggled to determine whether or how statutes apply when they do not expressly refer to LLCs. In Connecticut, for example, the long-arm statutes⁴⁶ do not refer to LLCs, and the case law is in some disarray with respect to the application of the long-arm statutes to an LLC. A number of courts have treated a foreign LLC as a foreign partnership for purposes of the Connecticut long-arm statutes.⁴⁷

42. *Id.*

43. *Id.*

44. *Preferred Real Estate Invs.*, 2008 WL 2414968, at *2. The court did not analyze whether Delaware would also interpret its statute to encompass LLCs.

45. See, e.g., *Enron Corp. v. Baupost Group, L.L.C. (In re Enron Creditors Recovery Corp.)*, 380 B.R. 307, 315 (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 issuer had voting power to elect); *In re Telluride Income Growth L.P.*, 311 B.R. 585, 587-88 (Bankr. D. Colo. 2004) (interpreting provisions of limited partnership agreement referring to effect of dissolution of corporate or partnership general partner as also encompassing LLC general partner); *Dexxon Digital Storage, Inc. v. Haenszel*, 832 N.E.2d 62, 66 (Ohio Ct. App. 2005) (holding LLC was "person" within meaning of Ohio's Uniform Trade Secrets Act definition of "person," which listed other forms of business entities but did not specifically mention LLCs); *Richard G. Roseetti, L.L.C. v. Werther*, 6 Misc. 3d 1040(A), 2005 WL 689479, at *2 (N.Y. City Ct. 2005) (concluding LLC has attributes of voluntary association with corporate liability protection and thus can bring action in commercial claims court under statute providing commercial claim includes cause of action for money where claimant is "a corporation, partnership or association"); *State v. Thompson*, 197 S.W.3d 685, 692 (Tenn. 2006) (stating LLC qualifies as "partnership or corporation" for purposes of definition of "small business" in Equal Access to Justice Act). *But see Fritz v. Coffey*, No. 1:07-CV-115-TS, 101 A.F.T.R.2d 2008-2649, 2008 WL 2444552, at *4 (N.D. Ind. June 16, 2008) (holding 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, distinguishing other Indiana lien statutes that refer to LLCs, and stating court is not empowered to extend statutory coverage beyond statutory wording); *Exchange Point, L.L.C. v. SEC*, 100 F. Supp. 2d 172, 175 (S.D.N.Y. 1999) (holding LLC was not "person" with standing to challenge government subpoena of bank records under Right to Financial Privacy Act, which defined "person" as "an individual or a partnership of five or fewer individuals," relying on "plain meaning" of "individual" and "partnership" and focusing heavily on LLC's limitation of liability and fact that Congress did not include corporations with five or fewer shareholders).

46. See CONN. GEN. STAT. § 52-59b (2006) (providing long-arm jurisdiction over nonresident individuals, foreign partnerships, and foreign voluntary associations); CONN. GEN. STAT. § 33-929(f) (2006) (providing jurisdiction over foreign corporations).

47. See § 52-59b(a) (pertaining to "foreign partnership"); *Screen Tech, Inc. v. Carolina Precision Plastics, L.L.C.*, No. 3:05CV975 (SRU), 2006 WL 197360, at *2 (D. Conn. Jan. 25, 2006) (interpreting "foreign

Other courts have concluded that the long-arm statute applicable to a “foreign corporation” is applicable to a foreign LLC and that an LLC does not fall within the scope of the long-arm statute applicable to a “foreign partnership or foreign voluntary association.”⁴⁸ Still others have dodged the question by concluding that the facts of the particular case satisfied either statute.⁴⁹ One court’s particularly convoluted explanation of this issue included a citation to another opinion for the proposition that “the Connecticut ‘cases hold that a limited liability corporation is to be treated like any other corporation for long-arm purposes.’”⁵⁰ In a botched attempt to clarify this statement, the court explained in a footnote that “[t]he parties do not argue that any difference exists under this statute between a ‘limited liability company’ and a ‘limited liability corporation.’”⁵¹

D. A Court’s Endeavor to Find the Right Analogy: Montgomery v. eTrepid Technologies, L.L.C. (Treatment of an LLC for Purposes of the Attorney-Client Privilege)

A recent case in which a federal district court analyzed the application of the attorney-client privilege in the LLC context provides an interesting study of a court’s reasoning when confronted with applying to an LLC a doctrine that has developed outside the LLC context. In *Montgomery v. eTrepid Technologies, L.L.C.*,⁵² an LLC resisted certain discovery requests made by Montgomery, a

partnership” to include foreign LLC for purposes of long-arm statute); *Nadler v. Grayson Constr. Co.*, No. CV020190015S, 2003 WL 1963158, at *5 (Conn. Super. Ct. Apr. 15, 2003); *New England Nat’l L.L.C. v. Kabro of East Lyme L.L.C.*, No. 550014, 2000 WL 254590, at *3 (Conn. Super. Ct. Feb. 23, 2000); *Worms v. WGB Partners, L.L.C.*, No. CV950149182S, 1996 WL 571464, at *3 (Conn. Super. Ct. Sept. 26, 1996); see also *Autumn Cashmere, Inc. v. IMMA, L.L.C.*, No. 08-CV-11593, 2008 WL 2478322, at *2 (E.D. Mich. June 17, 2008) (stating long-arm statute providing limited personal jurisdiction over “unincorporated voluntary association” clearly includes LLCs).

48. See § 33-929(f) (providing jurisdiction over foreign corporations); *Halo Tech Holdings, Inc. v. Cooper*, Civ. No. 3:07-CV-489(AHN), 2008 WL 877156, at *8 (D. Conn. Mar. 26, 2008) (concluding foreign corporation long-arm statute, not foreign partnership long-arm statute, applies to LLC); *In re Bayou Hedge Fund Inv. Litig.*, 472 F. Supp. 2d 534, 537 (S.D.N.Y. 2007); *Hartford Fire Ins. Co. v. United Restoration, L.L.C.*, No. CV020813517, 2003 WL 1962864, at *5 (Conn. Super. Ct. Apr. 4, 2003); see also *NYDIC Mgmt. Servs., L.L.C. v. DS Montvale, L.L.C.*, No. L-5768-05, 2008 WL 110392, at *1-2 (N.J. Super. Ct. App. Div. Jan. 3, 2008) (stating LLC was “neither a partnership nor an unincorporated association,” and though court rules did not specifically provide for service of process on LLCs, they should not be treated as partnerships or unincorporated associations for purpose of service of process in light of statutory protection provided members against personal liability).

49. *RJM Aviation Assocs., Inc. v. GP Aviation Servs., L.L.C.*, No. 3:06-CV-2007 (CFD), 2008 WL 918538, at *3 (D. Conn. Mar. 28, 2008) (finding same outcome whether LLC in issue was treated as corporation or partnership for purposes of Connecticut long-arm statutes); *SS & C Techs., Inc. v. Providence Inv. Mgmt., L.L.C.*, No. 3:07 CV 484 (CFD), 2008 WL 691702, at *2 (D. Conn. Mar. 12, 2008).

50. *Halo Tech Holdings*, 2008 WL 877156, at *8 (citing *Bayou Hedge Funds*, 472 F. Supp. 2d at 537).

51. *Id.* Whatever the merits of analogizing an LLC to a corporation under particular circumstances, it is the author’s fervent hope that references to a “limited liability corporation” will eventually cease appearing in the cases. See *id.* at *8 n.7.

52. 548 F. Supp. 2d 1175 (D. Nev. 2008).

member and former manager, 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.⁵³ The LLC argued that it was the sole client and that the ability to assert the privilege belonged to current management.⁵⁴

The court framed the issue as whether an LLC should be treated as a partnership or corporation for purposes of the attorney-client privilege.⁵⁵ After discussing the “hybrid” nature of an LLC and noting the paucity of case law addressing the attorney-client privilege in the LLC context, the court cited LLC cases addressing derivative litigation, the business judgment rule, and veil piercing in which courts have applied corporate law to LLCs.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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 in other areas, 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.⁶⁰

53. *Id.* at 1177.

54. *Id.*

55. *Id.* at 1179.

56. *Montgomery v. eTrepid Techs., L.L.C.*, 548 F. Supp. 2d 1175, 1179-81 (D. Nev. 2008).

57. *Id.* at 1181.

58. *Id.*

59. *Id.* at 1182. Though the operating agreement revealed that the LLC elected to be classified as a partnership for federal tax purposes, the management structure provided for in the operating agreement resembled that of a corporation. *Id.* The operating agreement provided for management by a management committee with the “general powers and duties of the management typically vested in the board of directors and the office of the chief executive officer of a corporation.” *Id.* The LLC’s manager was given the title “president” and had the “general powers and duties of management typically vested in the office of the chief operating officer of a corporation.” *Id.* Member action was required on certain important matters. *Id.* The court also mentioned that the LLC had a resident agent similar to a corporation, filed articles of organization like a corporation files articles of incorporation, and had an operating agreement “akin to bylaws.” *Id.*

60. *Montgomery*, 548 F. Supp. 2d at 1183. The court then discussed the divergent views reflected in the case law regarding who the client is for purposes of the attorney-client privilege. *Id.* at 1183-87. 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

While the district court in *Montgomery* did a thoughtful and thorough job of analyzing the case law reflecting various approaches to application of the attorney-client privilege once it concluded that the LLC context was analogous to the corporate context, its initial discussion of the nature of an LLC and whether to apply corporate or partnership principles in the context of the attorney-client privilege harbors some disturbing implications.⁶¹ The court's conclusion that the corporate analogy was appropriate with respect to the LLC in this case is a reasonable one given that the court ultimately concluded that even general and limited partnerships are treated in the same manner as corporations for purposes of the attorney-client privilege under federal law.⁶² Additionally, to the extent the management and operational structure of the LLC closely resembled a corporate structure and the issue involved the rights of a member and managerial official whose roles were similar to a shareholder, director, and officer, the court's emphasis on the corporate nature of the structure specified by the operating agreement seems appropriate.⁶³ To the extent, however, that the opinion implies that the court was counting cases in which LLCs have been analogized to corporations or partnerships in other contexts, and that the balance was tipped by the LLC's citation to cases in four areas (veil piercing, standing, business judgment rule, and derivative actions) in which courts have applied corporate principles to LLCs while *Montgomery* failed to cite a single case applying partnership law to an LLC, the opinion suggests an analysis that is simply too facile. In fact, the plaintiff could have cited cases treating an LLC like a partnership in numerous areas. Determining whether an LLC is more like a corporation or a partnership with respect to a particular issue or doctrine should not be an exercise in tallying cases in which an LLC has been analogized to one or the other. If it were, the cases addressing the citizenship of an LLC for purposes of diversity jurisdiction (which are more numerous than the cases on any other single issue in the LLC context at this point) might preclude an LLC from being treated in the same manner as a corporation in other cases.⁶⁴ Obviously, the relevance of other contexts in

asserting the privilege). *Id.* at 1183-85. 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. *Id.* at 1187. 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. *Id.*

61. See *supra* note 60 and accompanying text.

62. *Montgomery v. eTrepid Technologies, L.L.C.*, 548 F. Supp. 2d 1175, 1181-82 (D. Nev. 2008).

63. *Id.* at 1182.

64. It is not suggested that the treatment of LLCs for purposes of diversity jurisdiction should determine an LLC's treatment under other doctrines or statutes unless there is something about the analysis employed under the diversity statute that appears relevant to the other area in question. One federal court has mused that "the practice of treating limited liability companies as limited partnerships to determine diversity jurisdiction suggests that similar treatment is likely appropriate for purposes of determining personal jurisdiction" when confronted with long-arm statutes that do not explicitly refer to LLCs. *RJM Aviation Assocs., Inc. v. GP Aviation Servs., L.L.C.*, No. 3:06-CV-2007 (CFD), 2008 WL 918538, at *3 (D. Conn. Mar. 28, 2008); *SS & C*

which an LLC has been treated like a corporation or partnership should be considered in connection with the particular aspect or issue in question.

III. JUDICIAL TREATMENT OF LLCs WITHIN THE CONTEXT OF THE LLC STATUTES THEMSELVES

The typical state LLC statute borrows heavily from corporate and partnership statutes,⁶⁵ though the LLC statutes in many states have certainly taken on a more uniquely LLC character over time as issues have been identified and addressed by amendments to the statutes.⁶⁶ LLC statutory provisions that are patterned closely after corporate or partnership provisions encourage courts to rely on precedent in the context from which the provisions were drawn and thus tend to inhibit the development of new, or at least modified, approaches tailored to the LLC context.⁶⁷ Assuming the rules

Techs, Inc. v. Providence Inv. Mgmt., L.L.C., No. 3:07 CV 484 (CFD), 2008 WL 691702, at *2 (D. Conn. Mar. 12, 2008).

65. The Wisconsin Supreme Court has offered this fairly typical account of the origins of the Wisconsin Limited Liability Company Law:

Wisconsin enacted its own LLC law in 1993 with the passage of the Wisconsin Limited Liability Company Law (WLLCL), Wis. Stat. Ch. 183. The WLLCL was drafted by members of the State Bar Business Committee with assistance from the Legislative Reference Bureau and the Office of the Secretary of State. See Drafting Records of 1993 A.B. 820. Although the business entity it created was new and distinct, the WLLCL borrowed concepts from a number of sources, including the Wisconsin Uniform Limited Partnership Act, Wis. Stat. Ch. 179, the Wisconsin Business Corporation Law, Wis. Stat. Ch. 180, and the 1992 Prototype Limited Liability Company Act, drafted by the Subcommittee on Limited Liability Companies of the Committee on Partnerships and Unincorporated Business Organizations of the ABA Section of Business Law.

Gottsacker v. Monnier, 697 N.W.2d 436, 441 (Wis. 2005).

66. For example, issues related to single member LLCs, such as the enforceability of a single member LLC agreement or the continuation of the LLC after the death or termination of the membership of the last remaining member, have given rise to provisions somewhat unique to the LLC context. See, e.g., DEL. CODE ANN. tit. 6, §§ 18-101(7), 18-801(4) (2008); TEX. BUS. ORGS. CODE ANN. §§ 11.056, 101.001 (Vernon 2008).

67. As an example, in many states, the LLC statutes contain provisions borrowed from corporate statutes addressing the effect of the filing of articles of organization or the transaction of business for a purported corporation, and this legislative borrowing encourages courts to look to the case law in the corporate context. In *Stone v. Jetmar Properties, L.L.C.*, 733 N.W.2d 480 (Minn. Ct. App. 2007), the Minnesota Court of Appeals interpreted provisions of the Minnesota LLC statute by relying on reporter's notes to a similar corporate statute. The court determined that the de facto corporation doctrine was abolished in Minnesota when the 1981 corporate statute was adopted and that the doctrine does not apply in the LLC context either because of the similarity in the corporate and LLC statutes. *Id.* at 485-86. Courts have consistently borrowed principles developed in the corporate context regarding de facto incorporation, corporation by estoppel, and promoter liability in cases that involve transactions in the LLC name prior to the filing of the articles of organization. See, e.g., *Nick Corp. v. JNS Aviation, Inc. (In re JNS Aviation, L.L.C.)*, 376 B.R. 500 (Bankr. N.D. Tex. 2007) (applying corporate promoter liability principles to purchase agreement entered in name of nonexistent LLC and finding individual who signed contract was obligated on contract as promoter of LLC and deemed to be assignor of contract under assignment executed in LLC's name); *02 Development, L.L.C. v. 607 South Park, L.L.C.*, 71 Cal. Rptr. 3d 608 (Cal. Ct. App. 2008) (applying corporate law principles regarding pre-incorporation contracts and holding LLC could enforce pre-organization contract that LLC adopted after it came into existence); *BRJM, L.L.C. v. Output Sys., Inc.*, 917 A.2d 605 (Conn. App. Ct. 2007) (applying law of

borrowed from the corporate or partnership context make sense in the LLC context (which, with respect to some issues, may be the subject of vigorous debate), this is not a bad thing. It makes for more predictable and efficient interpretation and application of the statutory provision if practitioners and judges recognize a rule as a familiar one from the corporate or partnership context, and they do not have to formulate an analysis on a blank slate.⁶⁸ On the other hand, the slate may have some content ill-suited to LLCs, and, in such cases, it is obviously desirable for the law to develop in a manner suited to the unique qualities of LLCs.⁶⁹ For that to happen, legislatures and courts may have to think (and write) outside the corporate or partnership box.

A. Limited Liability of Members and Piercing the LLC Veil

The statutory limited liability of members obviously begs the question of whether there are any exceptions to that liability protection. There is a substantial body of law addressing veil piercing of an LLC, and the courts have readily accepted the proposition that corporate veil piercing doctrines apply in the LLC context. That courts apply corporate veil piercing principles to LLCs does not mean that piercing the LLC veil is easy to accomplish, and there are many cases in which courts have rejected the sufficiency of the allegations or evidence with respect to attempts to pierce the LLC veil. In general, courts do not appear any more or less inclined to pierce the veil of an LLC than the veil of a corporation. A few courts have paused to note that the nature of an LLC may dictate that corporate veil piercing principles should be modified in certain

agency and corporations to contract signed by individual as member of non-existent LLC and holding contract was valid contract personally binding individual who executed contract); *Blue Paper, Inc. v. Provost*, 914 So. 2d 1048 (Fla. Dist. Ct. App. 2005) (concluding individual who signed contract on behalf of LLC to be formed was liable in his individual capacity under principles applicable to corporate promoters, and contract thus did not lack mutuality of remedy); *P.D. 2000, L.L.C. v. First Fin. Planners, Inc.*, 998 S.W.2d 108 (Mo. Ct. App. 1999) (applying corporate principles in estopping defendant from denying existence of LLC that was attempting to enforce pre-formation contract entered on its behalf).

68. With regard to the development of the law of fiduciary duties in Delaware, Chief Justice Myron Steele of the Delaware Supreme Court has observed that

it must be accepted that fiduciary duties will be developed in each new business context by drawing analogies from duties recognized in already existing contexts. The alternative is to develop fiduciary duties in these new statutory entities as an entirely new body of law, recognizing all business fiduciaries as a single group with a distinct body of principles and rules. The latter is an unlikely and unwise course for Delaware, given its rich common law of corporations readily adaptable, when appropriate, to limited partnerships and limited liability companies.

Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 8-9 (2007).

69. In this regard, Chief Justice Steele has commented that "there is also a danger in continuing to analogize principles of fiduciary duty as used in the corporate governance context to the internal governance of limited partnerships and limited liability companies. Wrong analogies can be drawn for many possible reasons . . ." *Id.* at 9.

respects when applied to LLCs.⁷⁰

In some states, the LLC statutes specify that corporate veil piercing principles apply to LLCs while recognizing the flexibility and potential informality of the LLC form by discounting the importance of formalities.⁷¹ In most states, the statutes are silent regarding piercing.⁷² Whether the LLC statute suggests the application of veil piercing or not, courts have readily imported corporate veil piercing doctrines into the LLC context.⁷³

The veil piercing context presents opportunities for courts to tailor the corporate rules to reflect the uniqueness of an LLC, but relatively few courts have attempted to do so. In *Kaycee Land and Livestock v. Flahive*,⁷⁴ the Wyoming Supreme Court concluded that there was no legal or policy reason to treat LLCs differently from corporations for purposes of veil piercing but acknowledged that the precise application of the factors may differ based on the inherently flexible and informal nature of LLCs. A Nevada bankruptcy court has commented that the factors analyzed under the corporate alter ego doctrine may carry less weight in the LLC context and that domination by an owner may not justify piercing because LLC statutes allow members to manage the LLC and illustrate a legislative intent to allow small, one-person, and family-owned businesses the freedom to operate their companies themselves and still enjoy protection from personal liability.⁷⁵

A New Jersey Superior Court engaged in an extensive discussion of veil

70. See *Cement-Lock v. Gas Tech. Inst.*, 523 F. Supp. 2d 827, 846 (N.D. Ill. 2007) (applying Delaware veil piercing principles to analyze whether Delaware LLC's veil should be pierced and noting failure to follow corporate formalities may not be as significant for LLC as for corporation); *FILCO Am., Inc. v. Olhoss Trading Co., L.L.C.*, 321 F. Supp. 2d 1266, 1269-70 (M.D. Ala. 2004) (noting some factors applied in corporate veil piercing may not apply to LLCs in same manner as corporations, and quoting commentators who assert that inadequacy of capital should provide less basis to pierce veil in LLC context); see also *infra* notes 73-81 and accompanying text (discussing cases positing certain factors relied upon in corporate veil piercing should have less weight in LLC context and LLC veil piercing law should be adapted to special characteristics of LLCs).

71. See, e.g., CAL. CORP. CODE ANN. § 17101(a)-(b) (West 2006) (providing for limited liability of members, but adopting common-law alter ego doctrine as applied to corporate shareholders except that failure to follow formalities with respect to calling and conducting meetings shall not be considered); COLO. REV. STAT. ANN. § 7-80-107 (2008) (stating courts shall apply case law interpreting conditions and circumstances under which corporate veil of corporation may be pierced but failure of LLC to observe formalities or requirements relating to management and affairs is not itself grounds to impose liability on members); MINN. STAT. ANN. § 322B.303 subd. 2 (West 2004) (providing case law stating conditions and circumstances under which corporate veil of corporation may be pierced applies to LLCs without addressing formalities).

72. See, e.g., DEL. CODE. ANN. tit. 6, § 18-303(a) (1999) (providing no member or manager of an LLC shall be obligated personally for any LLC debt, obligation, or liability solely by reason of being member or acting as manager); NEV. REV. STAT. ANN. §§ 86.371, 86.381 (LexisNexis 2004) (providing no member or manager is individually liable for LLC debts or liabilities and member is not proper party in proceeding against LLC except where object of proceeding is to enforce member's right against or liability to LLC); TEX. BUS. ORGS. CODE ANN. §§ 101.113, 101.114 (Vernon 2008) (stating same rule as Nevada Statute above).

73. Please see the appendix to this article for a list of cases in which courts have relied on corporate veil piercing principles in the LLC context.

74. 46 P.3d 323 (Wyo. 2002).

75. *AE Restaurant Assocs., L.L.C. v. Giampietro (In re Giampietro)*, 317 B.R. 841 (Bankr. D. Nev. 2004).

piercing in the LLC context and concluded that the New Jersey statute, because it is silent regarding veil piercing, endorses the evolution of court-made rules tailored to the LLC's special attributes.⁷⁶ The court agreed with judicial opinions and commentators that have concluded LLC veil piercing law should be adapted to the special characteristics of LLCs.⁷⁷ It identified adherence to corporate formalities, dominion and control by the owner, and undercapitalization as factors that should be weighed differently in the LLC and corporate context.⁷⁸ Though the court declined to formulate a generally applicable standard for LLCs, it concluded that these factors "should not loom as large" in the LLC case before it as in the case of a corporation.⁷⁹ In rejecting the plaintiff's attempt to hold an individual member/manager of a New Jersey LLC personally liable for the LLC's breach of contract, the court noted that the individual did not intentionally mislead the plaintiff or hide the LLC's role, and the court pointed out the plaintiff made no effort to inquire regarding the LLC's role in the transaction.⁸⁰ Given the lesser weight assigned to formalities and dominion and control, the court did not find the individual's inattention to detail (e.g., misuse of stationery) and operational efficiencies (such as use of a central office for his various business entities) justified piercing the LLC's veil.⁸¹

B. Fiduciary Duties in the LLC Context

The LLC statutes across the country reflect a variety of approaches toward fiduciary duties of members and managers. In very general terms, the various statutory approaches to fiduciary duties may be categorized as follows: (1) statutes that specify duties or standards and authorize contractual modification of duties and liabilities;⁸² (2) statutes that specify duties or standards but are silent regarding contractual modification of duties and liabilities;⁸³ (3) statutes that do not specify duties or standards but authorize contractual modification of duties and liabilities;⁸⁴ and (4) statutes that are silent as to both duties or

76. *D.R. Horton Inc.-N.J. v. Dynastar Dev., L.L.C.*, No. MER-L-1808-00, 2005 WL 1939778, at *16 (N.J. Super. Law Div. Aug. 10, 2005).

77. *Id.* at *33-36.

78. *Id.*

79. *Id.* at *36.

80. *D.R. Horton, Inc.*, 2005 WL 1939778, at *37.

81. *Id.*

82. *See, e.g.*, ALA. CODE § 10-12-21(e)-(1) (2008); CAL. CORP. CODE §§ 17005(d), 17150, 17153 (2008); COLO. REV. STAT. §§ 7-80-108(1.5), 7-80-108(2)(d), 7-80-404 (2008); GA. CODE ANN. § 14-11-305 (2008); 805 ILL. COMP. STAT. ANN. 180/15-3, 180/15-5 (2008).

83. *See, e.g.*, ALASKA STAT. §§ 10.50.110(a), 10.50.135 (2006) (addressing duty of care of manager and managing member, and allowing operating agreement to limit or increase rights or duties of members in member-managed LLC, but not explicitly addressing modification of manager's duties); OHIO REV. CODE ANN. § 1705.29 (2004) (specifying duty of care for managers and limiting liability for damages, but not addressing modification of manager's duties).

84. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-1101(c), (e) (1999); KAN. STAT. ANN. § 17-76,134(c) (2007);

standards and contractual modification of duties and liabilities.⁸⁵ Within certain of these general categories there are significant variations. Statutory articulations of duties and standards that show up in the state LLC statutes include provisions based on standards of conduct applicable to corporate directors found in the Model Business Corporation Act,⁸⁶ provisions based on duties and standards set forth in the Revised Uniform Partnership Act,⁸⁷ Uniform Limited Liability Company Act,⁸⁸ or Prototype Limited Liability Company Act,⁸⁹ and other formulations.⁹⁰ Regardless of the statutory approach

TEX. BUS. ORGS. CODE ANN. § 101.401 (Vernon 2008).

85. See generally MD. CODE ANN., CORPS. & ASS'NS §§ 4A-101 to 4A-1103 (West 2007). This approach leaves courts free to apply the law of agency generally and to analogize to corporate or partnership law, as appropriate under particular circumstances, in determining the duties and standards applicable in a given case. Although a statute of this type contains no explicit authorization to modify duties or limit liabilities, the enforceability of such provisions in the operating agreement may be premised upon more general provisions regarding the operating agreement. For example, the Maryland Limited Liability Company Act states that members may enter into an operating agreement "to regulate or establish *any* aspect of the affairs of the limited liability company or the relations of its members . . ." (emphasis added). *Id.* § 4A-402(a). Presumably, the members have a great deal of freedom to specify and define the duties and standards they wish to adopt under this type of provision. In *Froelich v. Erickson*, the governing documents of the LLC in issue used corporate terms and explicitly incorporated Maryland law regarding corporate fiduciaries. 96 F. Supp. 2d 507 (D. Md. 2000). Not surprisingly, the court applied corporate law principles in analyzing the duty issues. *Id.* at 520.

86. See MODEL BUS. CORP. ACT § 8.30(a) (1984) (containing language paralleled by numerous state LLC statutes); see also Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 366-67 (listing state statutes that utilize language similar to section 8.30(a)). The 1984 version of the Model Business Corporation Act (MBCA) § 8.30(a) read as follows:

- (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
 - (1) in good faith;
 - (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (3) in a manner he reasonably believes to be in the best interests of the corporation.

MBCA § 8.30(a).

87. UNIF. P'SHIP ACT § 404 (1997), 6 U.L.A. 143-44 (2001) (specifying partners' fiduciary duties of care and loyalty and obligation to discharge duties in good faith).

88. UNIF. LTD. LIAB. CO. ACT § 409 (1996), 6B U.L.A. 597-98 (2003) (specifying fiduciary duties of care and loyalty and obligation to discharge duties in good faith applicable to managers of manager-managed LLCs and members of member-managed LLCs). Eight states (Alabama, Hawaii, Illinois, Montana, South Carolina, South Dakota, Vermont, and West Virginia) have adopted the original Uniform Limited Liability Company Act. The Revised Uniform Limited Liability Company Act differs somewhat from the original act in how it addresses member and manager fiduciary duties. See REV. UNIF. LTD. LIAB. CO. ACT § 409 (2006), 6B U.L.A. 488-89 (2006) (addressing member and manager duties). Idaho and Iowa are the only states that have adopted the Revised Uniform Limited Liability Company Act.

89. AM. BAR ASS'N PROTOTYPE LTD. LIAB. CO. ACT § 402 (1992) (setting forth gross negligence standard of liability and duty to account for benefits or profits derived under specified circumstances). See, e.g., ARK. CODE ANN. § 4-32-402 (1993); N.M. STAT. ANN. § 53-19-16 (2008).

90. See CAL. CORP. CODE § 17153 (West 2008) (stating managers have same fiduciary duties as partners); *id.* § 17150 (stating members of member-managed LLC have duties of manager specified in LLC statute); 15 PA. CONS. STAT. ANN. § 8904(a)(1) (West 2008) (providing members in member-managed LLC are subject to specified provisions relating to general partners); 15 PA. CONS. STAT. ANN. § 8943(b)(1) (West 2008)

taken, courts in LLC cases have tended to consult the case law on fiduciary duties in the corporate and/or partnership context. Provisions in LLC operating agreements limiting or defining the scope of duties have played a significant role in numerous cases. Thus far, the courts have shown a readiness to apply such provisions.

*McConnell v. Hunt Sports Enterprises*⁹¹ was the first case to address the fiduciary duties of members of an LLC to any significant degree. The case involved a dispute between members of an LLC formed to pursue a professional hockey franchise.⁹² When some of the members objected to the proposed terms of a lease that was necessary to obtain ownership of the franchise, other members formed a separate ownership group that agreed to the lease and obtained the franchise.⁹³ The court explained the nature of a fiduciary relationship and stated that an LLC, like a partnership, involves a fiduciary relationship that would normally preclude direct competition between the members and the company.⁹⁴ Because the operating agreement allowed members to compete, the court proceeded to address whether an operating agreement may limit or define the scope of members' fiduciary duties.⁹⁵ The court answered the question in the affirmative.⁹⁶ The court found support for its conclusion in cases recognizing the freedom of close corporation shareholders and partners to limit the scope of fiduciary duties that would apply absent certain agreements.⁹⁷ The court found that the operating agreement clearly and unambiguously permitted members to compete against the LLC and that obtaining the franchise thus did not breach a fiduciary duty.⁹⁸

While it is common for courts to analogize to corporate or partnership law regarding fiduciary duties of members or managers,⁹⁹ not all courts have found

(providing managers in manager-managed LLC are subject to specified statutory duties and standards of conduct of corporate directors and operating agreement may increase but not relax duties of representatives under such provisions).

91. 725 N.E.2d 1193 (Ohio Ct. App. 1999).

92. *Id.* at 1200.

93. *Id.* at 1202.

94. *Id.* at 1214.

95. *McConnell v. Hunt Sports Enters.*, 725 N.E.2d 1193, 1214-15 (Ohio Ct. App. 1999).

96. *Id.* at 1215.

97. *Id.* at 1215-16.

98. *Id.* at 1216. The court indicated that "the method of competing" might constitute a breach of fiduciary duty if it amounted to "dirty pool" but found no willful misconduct, misrepresentation, or concealment by the members who formed the other group. *Id.*

99. See, e.g., *Berman v. Sugo L.L.C.*, No. 07 Civ. 1795 (RPP), 2008 WL 2414052, at *8 (S.D.N.Y. June 12, 2008) (citing numerous New York cases in support of proposition that federal and state courts have recognized LLC members, like partners in partnership, owe fiduciary duty of loyalty to fellow members); *Morris v. Zelch (In re Regional Diagnostics, L.L.C.)*, 372 B.R. 3, 28 (Bankr. N.D. Ohio 2007) (reviewing duties of loyalty and care of director of Delaware corporation and stating that Delaware courts have applied business judgment rule in LLC context); *Acropolis Enterprises, Inc. v. C.R. Amusements, L.L.C. (In re C.R. Amusements, L.L.C.)*, 259 B.R. 523, 531 (Bankr. D. R.I. 2001) (referring to manager/majority member as "Majority Shareholder" and stating that majority owed duty to minority under Rhode Island case law imposing partner-like fiduciary duties on shareholders of closely held corporations); *Minnesota Invco of RSA #7, Inc. v.*

it necessary to do so. Some courts have viewed the existence of fiduciary duties as an obvious proposition, even in the absence of statutory provisions articulating duties, and have not prefaced the application of the duties with any discussion of or comparison to corporate or partnership law.¹⁰⁰ Some courts

Midwest Wireless Holdings, L.L.C., 903 A.2d 786, 797 (Del. Ch. 2006) (applying corporate business judgment rule in analyzing claims against board members of LLC); Metro Commc'n Corp., *BVI v. Advanced Mobilecomm Tech., Inc.*, 854 A.2d 121 (Del. Ch. 2004) (relying on corporate case law in addressing disclosure duties of LLC fiduciaries); *Purcell v. Southern Hills Inv., L.L.C.*, 847 N.E.2d 991, 997 (Ind. App. Ct. 2006) (imposing common-law fiduciary duties on officers and members of Indiana LLCs absent contrary provisions in operating agreement and holding that "common law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs"); *Anest v. Audino*, 773 N.E.2d 202, 209–11 (Ill. App. Ct. 2002) (applying corporate business opportunity doctrine); *Cimarron Feeders v. Bolle*, 17 P.3d 957, 964-65 (Kan. Ct. App. 2001) (concluding trial court did not commit error by utilizing language of section 404 of Kansas (Revised) Uniform Partnership Act for guidance when defining for jury fiduciary duties of LLC members); *Jundt v. Jurassic Res. Dev.*, 656 N.W.2d 15, 23–25 (N.D. 2003) (applying corporate business opportunity doctrine); *Flippo v. CSC Assocs. III, L.L.C.*, 547 S.E.2d 216 (Va. 2001) (stating manager, like corporate director, is required by statute to discharge duties in accordance with good faith business judgment in best interests of LLC and relying on corporate precedent in interpreting provisions of Virginia LLC act protecting manager who acts in good faith reliance on legal counsel or other professionals).

100. See *Carson v. Lynch Multimedia Corp.*, 123 F. Supp. 2d 1254 (D. Kan. 2000). In *Carson*, the defendant managers and members (who voted to terminate another member who served as president and general manager) argued that any remedies for minority oppression or breach of fiduciary duty had to be created by the operating agreement. *Id.* at 1264. The court rejected these arguments, stating that the provision of the Kansas LLC Act permitting the operating agreement to expand or restrict duties of a manager or member recognizes that a manager or member may owe fiduciary duties. *Id.* With respect to a breach of fiduciary duty claim against the individual who allegedly influenced and controlled a majority of the managers, the court relied on the general equitable concept of a fiduciary as one who occupies a special position of confidence and trust involving a duty to act for another's benefit and influence over another. *Id.* at 1258-59. The court concluded that the allegations of influence and control over a majority of the LLC managers were sufficient to permit the plaintiffs to go forward in their attempt to prove an implied or imputed fiduciary duty. *Id.* at 1259. The court did refer to corporate law in one part of the opinion in response to the argument that the business judgment rule protected the actions of managers. *Id.* at 1260. The court stated that the business judgment rule presupposes that directors act on an informed basis and in the honest belief that their actions are in the best interest of the company, but the complaint alleged that the actions were taken for reasons wholly unrelated to the business of the LLC. *Id.* at 1260. Additionally, the court relied on corporate law in analyzing the derivative nature of certain claims. *Id.* at 1259-60. For a Delaware Court of Chancery opinion in which the court found it unnecessary to cite authority regarding fiduciary duties in other contexts, see *VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000). In this case, the court referred repeatedly to the duty of loyalty owed by two managers. *Castiel*, 2000 WL 1277372, at *4. The court apparently found this principle to be so obvious that it required no citation of authority. An LLC with three entities as members and three individuals as managers entered a merger approved by two of the three managers pursuant to the operating agreement. *Id.* at *1-3. In the merger, two members with a combined 75 percent in the LLC were relegated to a 37.5 percent minority interest in the surviving corporation, and Castiel, the individual who controlled the two members with the 75 percent interest, was excluded from management. *Id.* at *2. Castiel appointed two of the three managers of the LLC (these two managers consisted of Castiel and another appointee), but the third manager (the owner of the 25 percent member) convinced Castiel's appointee to join him in a written consent to merge the LLC without notice to Castiel. *Id.* Although the court determined that the LLC agreement permitted a merger to be approved by a vote of a majority of the managers and that section 18-404(d) of the Delaware LLC act literally permits written majority consents without notice to other managers, it concluded that the two managers breached their duty of loyalty to Castiel by failing to give him notice. *Id.* at *3-4. The court relied heavily on general principles of equity in interpreting the statute and reviewing the action taken by the two managers. *Id.* at *4. The court stated that the two managers who took the action to merge owed a duty of loyalty to the LLC, its investors, and Castiel, their fellow manager, and they

have confined the discussion of duties or standards to the governing LLC statute and/or operating agreement,¹⁰¹ and a few courts have distinguished

failed to discharge this duty in good faith. *Id.* It rejected the argument that the managers were protected by the business judgment rule. *Id.* at *5. The court said the managers owed Castiel a duty to give him prior notice even if he would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC. *Id.* at *4. If Castiel was not suited to run the company, as claimed by the other two managers, this was an issue to be determined in board meetings with all managers present or in future litigation, if necessary. *Id.* at *5.

In subsequent Delaware opinions dealing with LLCs, the courts have frequently relied upon corporate precedent regarding fiduciary duties. See *Minnesota Invco of RSA #7, Inc. v. Midwest Wireless Holdings, L.L.C.*, 903 A.2d 786 (Del. Ch. 2006) (citing and applying corporate business judgment rule in analyzing claims against board members of LLC); *Blackmore Partners, L.P. v. Link Energy L.L.C.*, No. Civ.A. 454-N, 2005 WL 2709639, at *8 (Del. Ch. Oct. 14, 2005) (applying corporate duty of care and business judgment rule to board of directors of LLC); *Metro Commc'n Corp., BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121 (Del. Ch. 2004) (relying on corporate case law regarding duty of disclosure); *Solar Cells, Inc. v. True North Partners, L.L.C.*, No. Civ.A. 19477, 2002 WL 749163, at *4 (Del. Ch. Apr. 25, 2002) (relying on corporate case law regarding "entire fairness" of merger); *In re Bigmar, Inc.*, No. Civ.A. 19289-NC, 2002 WL 550469 (Del. Ch. Apr. 5, 2002) (citing Delaware corporate cases of *Malone v. Brincat* and *Rosenblatt v. Getty Oil Co.*, in support of duty of full candor and disclosure under Michigan LLC law); see also Steele, *Judicial Scrutiny of Fiduciary Duties*, *supra* note 68 (stating "[t]here is an assumed default to traditional corporate governance fiduciary duties where the [LLC] agreement is silent, or at least not inconsistent with the common law fiduciary duties").

Delaware courts also have stressed the importance of the LLC agreement in analyzing fiduciary duties in the LLC context. See *Douzinis v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149–50 (Del. Ch. 2006) (distinguishing Delaware case law from corporate context and noting that it is frequently impossible to decide fiduciary duty claims in alternative entity cases without close examination and interpretation of governing instrument because Delaware alternative entity statutes permit contracting parties to expand or restrict fiduciary duties). Note, however, that technical compliance with procedures set forth in the operating agreement does not ensure that fiduciary duties are not breached if the duties have not been specifically and clearly limited or eliminated. See *Solar Cells, Inc.*, 2002 WL 749163, at *4-5. In this case, the court cautioned that "it is not an unassailable defense to say that what was done was in technical compliance with the law." *Id.* The court continued its analysis:

The fact that the Operating Agreement permits action by written consent of a majority of the Managers and permits interested transactions free from personal liability does not give a fiduciary free reign to approve any transaction he sees fit regardless of the impact on those to whom he owes a fiduciary duty.

Id.; see also *Castiel*, 2000 WL 1277372, at *4 (finding, as discussed above, approval of merger by majority of managers without notice to third manager breached fiduciary duty to majority member despite fact that LLC agreement allowed merger with approval of simple majority of managers (rather than following statutory default member approval requirement) because all parties understood that majority member had right to appoint and remove majority of managers and, had notice been given, majority member would have attempted to remove appointee and block action).

101. See, e.g., *Lynch Multimedia Corp. v. Carson Commc'ns, L.L.C.*, 102 F. Supp. 2d 1261 (D. Kan. 2000). In this case, the court interpreted provisions of an operating agreement pertaining to business opportunities and the right of members and managers to engage in other ventures. *Id.* at 1261. One of the members of a Kansas LLC sued another member and the member's owners and agent for breach of the operating agreement and breach of fiduciary duty when they acquired other cable franchises rather than securing them for the LLC. *Id.* at 1261–62. The LLC operated a television cable system, and the operating agreement specified that if an opportunity to purchase certain cable television systems came to the attention of a member, the opportunity must first be offered to the LLC. *Id.* at 1262–63. Another provision in the operating agreement stated that any member or manager was permitted to engage in other business ventures, and the LLC

LLCs from partnerships and corporations or have otherwise exhibited reluctance to recognize duties not articulated in the LLC statute.¹⁰²

would have no rights in such regard. *Id.* at 1263. Robert Carson was president and a manager of the LLC as well as trustee of a trust that owned a 20 percent interest in the LLC. *Id.* at 1262. In 1997, Carson informed representatives of Lynch Multimedia Corporation (Lynch), a 60 percent owner of the LLC, of the potential availability of certain cable systems. *Id.* at 1263. Lynch was receptive to exploring the opportunities. *Id.* Over the next year, discussions continued. *Id.* Eventually, Carson acquired the cable systems through his own entity. *Id.* Lynch sued for breach of the operating agreement and breach of fiduciary duty. *Id.* at 1261. The court held that the operating agreement's requirement that certain opportunities be "offered" to the LLC contemplated only that the LLC be made aware of such opportunities, not that a formal offer be presented. *Id.* at 1264. The court concluded that Carson satisfied this requirement by making Lynch aware of the opportunities. *Id.* The court also stated that the operating agreement's requirement that certain opportunities be offered to the LLC must be read in conjunction with the provision permitting members to engage in other ventures; therefore, it plainly was directed at permitting members to enter separate and additional business relations in the cable television industry. *Id.* The court thus granted summary judgment in favor of the defendants on both the breach of operating agreement and breach of fiduciary duty claims. *Id.* at 1265. The court said that Lynch had not articulated how the breach of fiduciary duty claims were distinguishable from the breach of operating agreement claims, citing the provision of the Kansas LLC act that permits members of an LLC to expand or restrict their duties and liabilities by agreement. *Id.* For another case in which the court found it unnecessary to look beyond the terms of the operating agreement in analyzing the conduct in issue, see *Ledford v. Smith*, 618 S.E.2d 627 (Ga. Ct. App. 2005). In this case, an LLC's ownership was divided between three individuals (Active Members) and an entity owned by five other individuals (Dyna-Vision). 618 S.E.2d at 630. The Active Members bought out Dyna-Vision's interest pursuant to a push-pull provision in the operating agreement and then sold the assets of the LLC to a third party who had financed the purchase by the Active Members of Dyna-Vision's interest. *Id.* at 631-33. Dyna-Vision sued the Active Members based on the Active Members' failure to disclose that their purchase of Dyna-Vision's interest was being financed by a third party to whom they planned to sell the LLC. *Id.* at 633. The court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, stating that any duties owed by LLC members to each other and the LLC are set forth in the Georgia LLC statute and relying on the members' freedom under the statute to restrict and eliminate fiduciary duties. *Id.* at 635-36. A clause in the operating agreement permitted members to engage in all other business ventures so long as they did not compete with the LLC, and the court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC. *Id.* at 636. The court of appeals cited and relied upon *Stoker v. Bellemeade, L.L.C.*, 615 S.E.2d 1 (Ga. App. 2005), *rev'd on other grounds*, 631 S.E.2d 693 (Ga. 2006), another Georgia case that focused on the statutory freedom to modify fiduciary duties. In *Stoker*, the court held that members of an LLC did not breach fiduciary duties by participating in allegedly competing real estate developments because the operating agreement permitted them to do so. 615 S.E.2d at 9-10. The court also relied upon the members' freedom to contract in applying an exculpatory clause in the operating agreement. *Id.* at 11. The clause provided that a member would not be liable absent fraud, gross negligence, or intentional breach of the operating agreement, and the court held that claims based on excessive development costs did not involve conduct constituting gross negligence. *Id.* at 11-12.

102. See *Agincourt, L.L.C. v. Stewart (In re Lake Country Investments, L.L.C.)*, Nos. 99-20287, 00-6064, 2001 WL 267475, at *10 (Bankr. D. Idaho Mar. 19, 2001) (stating LLC is distinct from corporation or partnership, characterizing case law applicable to partnerships as having "limited utility," and noting "primacy of the structural and organizational documents" under Idaho LLC act); *In re Garrison-Ashburn, L.C.*, 253 B.R. 700, 709 (Bankr. E.D. Va. 2000) (finding absence of statutory provisions imposing fiduciary duty obligations on members of Virginia LLCs significant in view of express provisions on fiduciary duties in Virginia partnership statutes and noting LLCs are "statutory creations, not common law creations like partnerships"); *Warren v. Weber and Warren Anesthesia Servs., L.L.C.*, 612 S.E.2d 17, 22-23 (Ga. App. 2005) (distinguishing case law imposing duty to wind up unfinished business in partnership dissolution context and holding trial court did not err in refusing to give instruction describing wrongful dissolution because instruction was based on case law decided under Georgia Uniform Partnership Act and did not accurately state LLC law).

In *Gottsacker v. Monnier*,¹⁰³ the Wisconsin Supreme Court focused on the statutory standard applicable to a transaction involving a conflict of interest by LLC members and refrained from drawing on precedent from the corporate or partnership context.¹⁰⁴ The court of appeals had stated that LLC members have a fiduciary duty to the LLC and other members,¹⁰⁵ but the supreme court confined its analysis to the statutory standard imposed on members and did not refer to “fiduciary” duties.¹⁰⁶ In a concurring opinion, two justices expressed the view that the rights and obligations of LLC members to the LLC and each other are set by statute and that common-law concepts such as the fiduciary duty of a majority shareholder of a corporation to a minority shareholder are replaced by statutory obligations.¹⁰⁷ In their view, “[t]he court of appeals improperly engrafted a common law fiduciary duty” on the defendant members.¹⁰⁸

At the other end of the spectrum from *Gottsacker*, which focused exclusively on the LLC statute in addressing duties owed by LLC members, is a Tennessee Court of Appeals decision in which the court found that the duties explicitly imposed on members by the Tennessee LLC statute are supplemented by common-law duties analogous to those imposed on shareholders of closely held corporations. In *Anderson v. Wilder*,¹⁰⁹ the majority members of a Tennessee LLC argued that they owed no fiduciary duty to the minority because the LLC is a “creature of statute,” and the Tennessee LLC act imposes a fiduciary duty on members of a member-managed LLC to the LLC itself but

103. 697 N.W.2d 436 (Wis. 2005).

104. *See id.* 443-45.

105. *Gottsacker v. Monnier*, 676 N.W.2d 533, 537 (Wis. Ct. App. 2004), *rev'd*, 697 N.W.2d 436 (Wis. 2005).

106. *Gottsacker*, 697 N.W.2d at 443-45. In the transaction challenged in this case, two members of a Wisconsin LLC who constituted a majority in interest of the LLC caused the LLC to transfer its sole asset to a newly created LLC owned by the two members. *Id.* at 439. The Wisconsin Supreme Court held that the conveyance involved a material conflict of interest, but concluded the conflict of interest did not prevent the majority members from voting on the transaction so long as they dealt fairly with the LLC. *Id.* at 443-44. The court relied on statutory provisions prohibiting a member or manager from acting or failing to act in a manner that constitutes a willful failure to deal fairly with the LLC or its members in connection with a matter in which the member or manager has a material conflict of interest. *Id.* at 444. The court noted that the statutory duties may be modified, limited, or expanded by the members' agreement and suggested that LLC members may wish to impose greater protections to obviate future problems of this type. *Id.* at 444 n.9. The court interpreted the statutory standard as precluding willful action or failure to act in a manner that will have the effect of injuring the LLC or its members. *Id.* at 444-45. The court stated that the inquiry contemplates both the conduct and the end result, which the court viewed as intertwined, as well as a determination of the purpose of the LLC and the justified expectations of the parties. *Id.* at 445. The court of appeals had found that the transaction in this case was unfair because the sale was not at arm's length and it was impractical for the LLC to carry on with its intended business after the transfer of the property, but the supreme court concluded the court of appeals exceeded its constitutional power by making findings of fact. *Id.* The supreme court thus remanded the case to the trial court for further findings and application of the standard pronounced by the court. *Id.*

107. *Id.* at 447.

108. *Id.* at 447 n.3.

109. No. E2003-00460-COA-R3-CV, 2003 WL 22768666 (Tenn. Ct. App. Nov. 21, 2003).

is silent as to any fiduciary duty among members. The court, however, relied upon cases involving closely held corporations to conclude that the statutory duty provisions are supplemented by a common-law fiduciary duty of the majority members of an LLC to the minority.¹¹⁰

C. Transferee Rights and the Charging Order in the Single-Member LLC Context

One area in which courts are beginning to confront questions regarding the application of partnership-based concepts in the LLC context is that involving the transferability of member rights and the charging order. The LLC statutes obviously borrowed from the partnership model with respect to the treatment of membership interests and admission of members. As is the case in the partnership context, the LLC statutes generally provide for free transferability of the interest of an LLC member, but (unless otherwise provided in the operating agreement) the transferee's rights are limited to the economic rights

110. *Id.* at *3–6. The court distinguished another Tennessee LLC case, *McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002), as “in essence an employment dispute” not involving “an allegation of oppression by a majority shareholder group.” *Anderson*, 2003 WL 22768666, at *6. In *Anderson*, the plaintiffs, expelled members of an LLC, alleged that the defendant members, who owned 53 percent of the LLC units, breached their fiduciary duty and duty of good faith to the plaintiffs. *Id.* at *1. After their expulsion, the plaintiffs were bought out at a price of \$150 per unit pursuant to the terms of the operating agreement. *Id.* Shortly after that, the defendants sold 49.9 percent of the LLC to a third party at a price of \$250 per unit. *Id.* The court analyzed the question of whether the defendants' actions, viewed in the light most favorable to the plaintiffs under the summary judgment standard, could reasonably be said to have violated their fiduciary duty of dealing fairly and honestly with, and in good faith toward, the plaintiffs. *Id.* at *7. The defendants argued that their actions were expressly permitted by the operating agreement and that they acted in good faith in expelling the plaintiffs. *Id.* at *2. The court concluded that there was a genuine issue of material fact as to whether the expulsion of the plaintiffs was in good faith or whether it was done solely to force the acquisition of their membership units at a price of \$150 per unit in order to sell them at \$250 per unit. *Id.* at *10. A later decision reaffirmed the prior holding that the majority owed the minority fiduciary duties and upheld the trial court's judgment against the defendants after they were found liable for breach of those duties. *Anderson v. Wilder*, No. E2006–02647–COA–R3–CV, 2007 WL 2700068 (Tenn. Ct. App. Sept. 17, 2007). The Tennessee Court of Appeals has apparently limited the scope of the common-law duty recognized in *Anderson* to situations involving oppression. See *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 23 (Tenn. Ct. App. 2005). In *ARC LifeMed*, an LLC member asserted breach of contract and breach of fiduciary duty claims against its co-member based on mismanagement of the LLC. *Id.* at 4, 17. The court of appeals reviewed the evidence and decided that it supported the trial court's finding that the managing member materially breached its management agreement. *Id.* at 17–21. The court found that the breach of fiduciary duty claims failed, however. *Id.* at 21. The court relied on *McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002), in which the court held that members' fiduciary duties are ordinarily owed to the LLC because the Tennessee LLC Act describes the fiduciary duties of a member as owing to the LLC, not to individual members. *Id.* at 22. (Although the LLC was a Delaware LLC, the court applied Tennessee law throughout its analysis. No mention was made of any choice of law issue.) Although the court in *Anderson* distinguished *McGee* and imposed a fiduciary duty upon a majority member to a minority member based on partnership and closely held corporation principles, the court found the instant case to be more like the *McGee* case, which involved a mere employment dispute controlled by an employment agreement and operating agreement. *Id.* at 22–23. The court stated that the case at bar likewise involved “uncomplicated contractual duties under an operating agreement and a management agreement and not a factual situation involving oppression by a majority shareholder of minority shareholders.” *Id.* at 23.

associated with the interest, and a person may be admitted as a member only with the consent or agreement of all members.

A related feature of almost all LLC statutes is the charging order remedy. The charging order provision permits a judgment creditor of a member to obtain a court order charging the member's interest with payment of the judgment so that any distributions that would otherwise be payable to the member are directed to the holder of the charging order. A charging order gives the judgment creditor no more rights than an assignee or transferee, and the charging order does not entitle the judgment creditor to exercise the management or voting rights of a member or otherwise to reach the property of the LLC itself. In the multi-member LLC context, the application of these provisions and the underlying rationale can be fairly readily understood based on their partnership origin. In the single-member LLC context, courts have been confronted with the tension between these provisions and a single-owner entity.

In *In re Albright*,¹¹¹ the sole member of a Colorado LLC filed bankruptcy, and the court held that the Chapter 7 trustee became a "substituted member" and could cause the LLC to sell its real property and distribute the proceeds to the estate.¹¹² The court reasoned that the trustee acquired the governance rights of the bankrupt member of the LLC because the trustee succeeded to the debtor's membership interest and there were no other members whose approval was required for admission of the trustee as a member.¹¹³ The court quoted provisions of the Colorado LLC act that refer to consent or approval by the "other members" for admission of an assignee as a member.¹¹⁴ The debtor argued that the trustee represented creditors' interests and was only entitled to a charging order, but the court responded that the charging order is for the protection of other members and thus serves no purpose in a single-member LLC.¹¹⁵ The court noted in a footnote that a non-debtor member, even one with an infinitesimal interest, would be able to prevent a bankrupt member's trustee from acquiring the bankrupt member's rights to govern and vote. However, the court also noted that creditors or a bankruptcy trustee would have recourse under bankruptcy avoidance provisions or fraudulent transfer laws where a "peppercorn" member is employed for purposes of hindering, delaying, or defrauding creditors.¹¹⁶ Two other bankruptcy courts have expressed their agreement with the court's reasoning in *Albright*.¹¹⁷

111. 291 B.R. 538 (Bankr. D. Colo. 2003).

112. *Id.* at 540.

113. *Id.*

114. *Id.*

115. *In re Albright*, 291 B.R. at 541.

116. *Id.* at 541 n.9.

117. *In re Modanlo*, Nos. 05-26549-NVA, 06-10158-NVA, 2007 WL 2609470, at *12 (Bankr. D. Md. May 19, 2007) (citing *In re Albright* with approval and characterizing it as persuasive). In *Modanlo*, the court determined that a debtor's single member Delaware LLC, which dissolved upon the debtor's bankruptcy, was

Outside the bankruptcy context, in *Federal Trade Commission v. Olmstead*,¹¹⁸ the Court of Appeals for the Eleventh Circuit was recently confronted with the application of the charging order remedy in the single-member LLC context.¹¹⁹ The court determined that Florida law was not sufficiently well-established for it to determine with confidence whether the district court could properly order two individual judgment debtors, each of whom was the sole member of several Florida LLCs, to surrender all right, title, and interest in their single-member LLCs to satisfy the judgment.¹²⁰ The court thus certified the question to the Florida Supreme Court.¹²¹

In *Olmstead*, the Federal Trade Commission (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.¹²² A subsequent order authorized the receiver to liquidate the assets in the individuals' LLCs and pay the proceeds to the FTC.¹²³ The individuals challenged the district court's order requiring them to surrender the assets of their non-party, single-member LLCs.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷

resuscitated by the actions of the debtor's trustee (acting as the debtor's personal representative) and that the trustee possessed management rights in the debtor's LLC in addition to the debtor's economic interest. *Id.* at 7. The court concluded that the term "personal representative" as used in the Delaware LLC statute regarding the last remaining member encompasses bankruptcy trustees. *Id.* It distinguished Delaware case law holding that an LLC member's management or governance rights are not assignable because the cases were decided in a multi-member LLC context. *Id.* at *13; see also *In re A-Z Electronics, L.L.C.*, 350 B.R. 886, 890-91 (Bankr. D. Idaho 2006) (holding bankrupt managing member of single member LLC had no authority to file Chapter 11 bankruptcy petition for LLC because interests of member and member's spouse in LLC had become property of their Chapter 7 estate and, relying on *In re Albright*, were subject to sole and exclusive authority of Chapter 7 trustee who was only one entitled to manage LLC and decide whether LLC would file bankruptcy).

118. 528 F.3d 1310 (11th Cir. 2008).

119. *Id.* at 1313.

120. *Id.* at 1314.

121. *Id.*

122. *Olmstead*, 528 F.3d at 1312.

123. *Id.* at 1312.

124. Federal Trade Comm'n v. *Olmstead*, 528 F.3d 1310, 1312-13 (11th Cir. 2008).

125. *Id.* at 1313.

126. *Id.*

127. *Id.*

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.¹²⁸ Because that rationale is lost in a single-member LLC where no non-debtor members need protection, the FTC argued that other provisions of the LLC statute demonstrate that application of the charging order remedy would produce absurd results.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ In certifying to the Florida Supreme Court the question of the propriety of the district court's order, the circuit court stated that it did not intend to limit the issues to be considered by the Florida Supreme Court and asked for guidance.¹³⁴ Whether that guidance reflects a literal application of the charging order provision or a modification taking into account the distinction between a single-member and multi-member entity remains to be seen.

D. Kasten v. Doral Dental USA, L.L.C.: A Court Interprets LLC Statutory Inspection and Information Rights that Depart from Corporation and Partnership Models

If an LLC statute addresses a matter in a manner that differs from the corporate or partnership context, a court should carefully consider those differences and should resist the urge simply to import corporate or partnership precedent without good reason.¹³⁵ In *Kasten v. Doral Dental USA, L.L.C.*,¹³⁶

128. *Olmstead*, 528 F.3d at 1313.

129. *Id.*

130. Federal Trade Comm'n v. *Olmstead*, 528 F.3d 1310, 1313-14 (11th Cir. 2008).

131. *Id.* at 1314.

132. *Id.*

133. *Id.*

134. *Olmstead*, 528 F.3d at 1314.

135. Likewise, legislatures should be careful about expressing a matter in the LLC statute in a manner that

for example, the Wisconsin Supreme Court attached significance to differences in the Wisconsin LLC statutes and the corporate and limited partnership statutes regarding inspection rights and access to information. Among other issues raised in the case, the court addressed how to determine if a request for records is a “reasonable request” as required by the LLC statute.¹³⁷

The court examined the record inspection provisions of the corporation and partnership statutes and noted differences between each of those statutes and the LLC statute. The LLC statute provides a member the right to inspect and copy, “upon reasonable request,” any LLC record required to be kept under the statute and, unless otherwise provided in the operating agreement, “any other record” wherever located.¹³⁸ The limited partnership statute restricts the right to inspect records to those records required to be kept under the statute, and the corporate statute contains numerous limitations relating to shareholder access to records.¹³⁹ The court contrasted the lack of restrictions in the inspection provisions of the LLC statute and stated that the scope of a member’s right under the default provisions of the LLC statute is exceptionally broad and hinges on what constitutes an LLC “record” and the degree and kind of restrictions that the requirement of a “reasonable request” imposes.¹⁴⁰ The court characterized the broad rights provided under the LLC statute as consistent with the “purposes of simplicity and freedom of contract that are at the heart of the [statute].”¹⁴¹ The court stated that the default rules, which do not include cumbersome restrictions, “were designed for less sophisticated companies that would be less likely to craft their own inspection rules,” while the statute “envisions that larger, more sophisticated companies with multiple members” may adopt rules more suited to their needs.¹⁴² In analyzing what constitutes a “reasonable request” with respect to member inspection rights, the court rejected the argument that the “reasonable request” requirement limits the types of records subject to inspection, but also refused to interpret the phrase as

differs from the corporate or partnership context if the intent is really to provide for the same substantive result as the corporate or partnership context because courts may well attach significance to the differences. For example, in *Kuhn v. Tumminelli*, 841 A.2d 496, 500–01 (N.J. Super. Ct. App. Div. 2004), the court concluded that an LLC member who embezzled funds by cashing customer checks was authorized under the New Jersey Limited Liability Company Act to endorse checks. The court distinguished the partnership context, noting that limitations on the authority of partners under the Uniform Partnership Act were not included in the broadly worded provisions of the LLC statute. *Id.* at 501; *see also* *Bernstein v. Tractmanager*, 953 A.2d 1003, 1009–10 (Del. Ch. 2007) (“Limited liability companies and corporations differ in important ways, most pertinently in regard to indemnification: mandating it in the case of corporate directors and officers who successfully defend themselves, but leaving the indemnification of managers and officers of limited liability companies to private contract.”).

136. 733 N.W.2d 300 (Wis. 2007).

137. *Id.* at 317–19.

138. *Id.* at 310 (citing WIS. STAT. § 183.0405(2) (2008)).

139. *Id.* at 312.

140. *Kasten*, 733 N.W.2d at 313.

141. *Id.*

142. *Kasten v. Doral Dental USA, L.L.C.*, 733 N.W.2d 300, 317 (Wis. 2007).

pertaining only to the time and manner of inspection.¹⁴³ While the phrase “reasonable request” applies only to the time and manner of inspection under the limited partnership statute, the court pointed out that the limited partnership statute differs from the LLC statute in that the limited partnership statute authorizes inspection of only specified records.¹⁴⁴ The court discussed various approaches taken in other state LLC statutes and concluded that the absence of a “proper purpose” requirement in the Wisconsin statute is significant but does not mean that “the statute is blind to a member’s motive for making an inspection request.”¹⁴⁵ The court concluded that the purpose of the “reasonable request” requirement in the Wisconsin LLC inspection provision is to protect the LLC from member inspection requests that impose undue financial burdens on the LLC and that the requirement relates to the breadth of the request as well as the timing and form of inspection.¹⁴⁶ The court provided a non-exclusive list of factors that may be relevant in balancing the statute’s bias in favor of member access against the costs of the inspection to the LLC in determining whether a request is so burdensome as to be unreasonable.¹⁴⁷

The court’s analysis of member inspection and information rights in *Kasten* was not restricted to the Wisconsin LLC statute because the LLC’s operating agreement addressed member rights in this regard. The operating agreement included a provision giving members access to the LLC’s books of account and all other LLC records at reasonable times.¹⁴⁸ Another provision gave each member, “upon reasonable request,” the right to inspect and copy “Company documents.”¹⁴⁹ Thus, some of the terminology in the operating agreement matched the terminology in the statute, i.e., “reasonable request”, but other terminology differed, i.e., “Company documents.” The court consulted the dictionary definitions of “document” and “record” and concluded that the term “document” is a broader category of stored information than “record.”¹⁵⁰ The court concluded that the term “Company documents” under the operating agreement encompassed document drafts and email (other than purely personal or social email), but the court expressly refrained from addressing whether the statutory phrase “any other records” embraces informal or non-financial records, email, or document drafts.¹⁵¹ Did the court read too much into the use

143. *Id.* at 317.

144. *Id.*

145. *Id.* at 318–19.

146. *Kasten*, 733 N.W.2d at 319.

147. *Id.* at 320. The court remanded the case to the trial court for a determination of the reasonableness of the member’s request to inspect email and document drafts. *Id.* at 321–22.

148. *Kasten v. Doral Dental USA, L.L.C.*, 733 N.W.2d 300, 311 (Wis. 2007).

149. *Id.*

150. *Id.* at 314.

151. *Id.* at 314–15. The statute further imposes a duty on LLC managers, upon reasonable request of a member, to disclose “true and full information of all things affecting the members.” *Id.* at 316 (quoting 51 WISC. STAT. § 183.0405(3) (2008)). The operating agreement did not address the managers’ duty to disclose

of the word “documents” versus “records” in the operating agreement? It is hard to say, but the court’s recognition of the contractual freedom to deviate from the statutory provisions and its careful attention to the language used in the agreement certainly reflect judicial best practices in this area.

IV. CONCLUSION

Inasmuch as the typical state LLC statute borrows heavily from corporate and partnership statutes, the tendency of courts to rely on precedent in the context from which the provisions were drawn is unsurprising. To the extent reliance on corporate and partnership precedent in this manner facilitates predictable and efficient interpretation of an LLC provision, the practice has obvious utility and often makes perfect sense. On the other hand, rigid adherence to corporate or partnership principles may yield results ill-suited to LLCs, or at least represent lost opportunities for LLCs to fill a distinct niche in business organizations law. Courts should be careful not to assume that corporate or partnership precedent will resolve every question that arises in the LLC context. The very manner in which corporate and partnership principles are combined in the LLC context leads to some unique questions that may dictate unique answers. Furthermore, to the extent that LLC statutes reflect variations from corporate and partnership approaches or themes, judicial analysis should acknowledge and address such variations to ensure that LLC law develops in a manner that takes such variations into account. There are some examples of LLC-tailored analyses in the case law to date, and further experience with LLCs will continue to generate more.

Where the issue is one that is not explicitly addressed within the parameters of the LLC statute, such as how an LLC or those associated with it are to be treated under another statutory or regulatory scheme, the tendency of courts to examine how other entities have been treated and to analogize to the LLC context is not surprising. Where a statute does not expressly refer to LLCs, as in the case of a statute enacted prior to the advent of LLCs, the question may arise whether other terminology used in the statute, such as “person,” “corporation,” or “association,” encompasses LLCs. Courts have reached various conclusions in such cases. Some courts have readily accepted the analogy between an LLC and a corporation, at times even interpreting the word “corporation” to include an LLC. In a number of contexts, however, courts have emphasized the unincorporated nature of an LLC and have concluded that

information to members, but the court explained that the statutory requirement that managers provide “true and full information of all things affecting members” imposes a duty on managers to provide such information regardless of whether the information is recorded and stored as a record or document. *Id.* The court construed the phrase “all things affecting the members” to mean all things affecting the requesting member’s financial interest in the LLC. *Id.* While the member’s right to “true and full information” under this provision is limited to matters affecting the member’s financial interest, the court rejected the argument that a member’s statutory right of access to records is limited to records affecting the member’s financial interest. *Id.*

an LLC is not the equivalent of a corporation. In some cases, it is entirely appropriate to approach an LLC as “like a corporation” or “like a partnership.” Here again, however, courts should be mindful (as they have been with respect to treatment of LLC interests under federal securities laws) that some contexts call for refinement or variation of the principles and analyses applied to other entities if the theory and policy underlying the LLC form, as well as the particular doctrine being applied to the LLC, are to be best effectuated.

APPENDIX (SEE FOOTNOTE 73)

Cases in which courts have relied on corporate veil piercing principles in the LLC context include the following: *NetJets Aviation, Inc. v. LHC Commc’ns, L.L.C.*, 537 F.3d 168, 178-84 (2d Cir. 2008) (stating Delaware corporate veil piercing principles apply to LLCs and concluding questions of whether single member LLC was operated as alter ego of its member and whether LLC was operated with overall element of injustice or unfairness were questions for factfinder at trial); *Hollowell v. Orleans Reg’l Hosp. L.L.C.*, 217 F.3d 379, 388-89 (5th Cir. 2000) (applying corporate veil piercing principles and rejecting challenges to jury’s findings of alter ego and single business enterprise in WARN Act case against LLC and various affiliated individuals and entities); *Wachovia Sec., L.L.C. v. Neuhauser*, 528 F. Supp. 2d 834, 857 (N.D. Ill. 2007) (stating plaintiff presented little to no evidence supporting its assertion of unity of interest and ownership between LLC and its members and failed to overcome heavy burden of meeting stringent standards applicable to voluntary contract creditor seeking to pierce corporate veil under Illinois law); *Cement-Lock v. Gas Tech. Inst.*, 523 F. Supp. 2d 827, 846 (N.D. Ill. 2007) (applying Delaware veil piercing principles to analyze whether Delaware LLC’s veil should be pierced and noting failure to follow corporate formalities may not be as significant for LLC as for corporation; concluding sufficient veil piercing evidence existed for claim to survive summary judgment based on allegations that would show LLC was intended to and did serve fraudulent purpose); *Sudamax Industria E Comercio De Cigarros, Ltda v. Buttes & Ashes, Inc.*, 516 F. Supp. 2d 841, 849 (W.D. Ky. 2007) (applying corporate veil piercing principles and concluding evidence did not support piercing LLC veil to hold individual owner and related entities liable); *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 912 (N.D. Ill. 2007) (noting plaintiffs could rely on corporate veil piercing principles to pierce LLC veil, stating that “reverse piercing” was potentially applicable, and finding allegations sufficient to state alter ego claim); *Butler v. Adoption Media, L.L.C.*, 486 F. Supp. 2d 1022, 1075-76 (N.D. Cal. 2007) (applying California law to analysis of whether LLCs and other entity defendants were alter egos of individuals and one another, and granting defendants summary judgment because plaintiffs failed to provide any

evidence of bad faith or that LLCs were created to avoid effect of statute); *Shapiro v. VPA, P.C. (In re Valley X-Ray Co.)*, 360 B.R. 254, 259 (E.D. Mich. 2007) (stating principles to disregard limited liability of LLC are same as for corporation and concluding LLC and former 51 percent member were not alter egos); *S.R. Int'l Bus. Ins. Co. v. World Trade Ctr. Props., L.L.C.*, 375 F. Supp. 2d 238, 243-44 (S.D.N.Y. 2005) (concluding Delaware veil piercing law would apply to question of whether Delaware LLC's veil should be pierced and discussing veil piercing standard under Delaware alter ego theory, but finding it unnecessary to pierce LLC's veil); *Filo Am., Inc. v. Olhoss Trading Co.*, 321 F. Supp. 2d 1266, 1269 (M.D. Ala. 2004) (concluding Alabama law permits piercing of LLC veil and plaintiff stated claim to pierce defendant LLC's veil by alleging members had fraudulent purpose in conception of business, but noting some factors applied in corporate veil piercing may not apply to LLCs in same manner they apply to corporations); *Hunter v. Youthstream Media Networks, Inc.*, 241 F. Supp. 2d 52, 59-61 (D. Mass. 2002) (relying on corporate veil piercing principles in denying pre-trial equitable attachment on basis plaintiff failed to establish likelihood of prevailing on piercing claim against LLC member); *GMAC Commercial Mortgage Corp. v. Gleichman*, 84 F. Supp. 2d 127, 140 (D. Me. 1999) (referring to LLC and its sole member in corporate terms throughout most of opinion and concluding pleadings sufficient to allege misuse of "corporate form" and "inequitable outcome if the Court recognizes [the LLC's] corporate form"); *Ditty v. CheckRite, Ltd.*, 973 F. Supp. 1320, 1335-36 (D. Utah 1997) (concluding corporate alter ego doctrine applies to LLCs but plaintiffs had not produced sufficient summary judgment evidence to pierce LLC veil as matter of law); *Businger v. Storer (In re Storer)*, 380 B.R. 223, 234-35 (Bankr. D. Mont. 2007) (applying Montana corporate veil piercing principles to LLC and concluding LLC was alter ego of one of its two members because member listed creditors of LLC as his creditors on bankruptcy schedule, but holding member did not use LLC as subterfuge to perpetrate fraud); *Nick Corp. v. JNS Aviation, Inc. (In re JNS Aviation L.L.C.)*, 376 B.R. 500, 526-31 (Bankr. N.D. Tex. 2007) (determining corporate veil piercing principles apply to LLCs and concluding LLC's owners used LLC to perpetrate actual fraud on LLC's judgment creditor); *Nibbi v. Kilroy (In re Kilroy)*, 357 B.R. 411, 430 (Bankr. S.D. Tex. 2006) (noting dearth of Delaware case law on application of corporate veil piercing principles to Delaware LLCs, but concluding Court of Chancery has conceptually endorsed such application and finding evidence sufficient to treat Delaware LLC as alter ego of debtor); *Elsaesser v. Cougar Crest Lodge, L.L.C. (In re Weddle)*, 353 B.R. 892, 897-99 (Bankr. D. Idaho 2006) (concluding Idaho courts would apply corporate veil piercing principles to LLCs, but finding no support for plaintiff's allegation that failure to treat LLC and member as alter egos would lead to inequitable result); *Fisher v. Hamilton (In re Teknek, L.L.C.)*, 343 B.R. 850, 863 n.6 (Bankr. N.D. Ill. 2006) (commenting that LLCs may be subject to veil piercing in manner

similar to piercing corporate veil under corporate alter ego doctrine); *Simon v. Brentwood Tavern, L.L.C. (In re Brentwood Golf Club, L.L.C.)*, 329 B.R. 802, 814-15 (Bankr. E.D. Mich. 2005) (determining LLC debtor and related LLC were alter egos and veil of related LLC should be pierced so that related LLC's assets were property of bankruptcy estate); *AE Restaurant Assocs., L.L.C. v. Giampietro (In re Giampietro)*, 317 B.R. 841, 846-48 (Bankr. D. Nev. 2004) (rejecting argument that silence of LLC statute regarding veil piercing precluded application of piercing principles, and concluding Nevada corporate veil piercing principles apply in LLC context, but finding evidence did not warrant piercing of LLC veil); *Turner v. JPB Enter., Inc. (In re Crowe Rope Industries, L.L.C.)*, 307 B.R. 1, 6-7 (D. Me. 2004) (noting standard for piercing LLC veil under Maine law is same as for corporation, and concluding Maine law would not permit corporation to pierce its own veil based on Maine Supreme Court's rejection of "reverse piercing" by shareholder of corporation to assert corporation's rights); *Trexler v. I.P., L.L.C. (In re Trexler)*, 295 B.R. 573, 578-79 (Bankr. D.S.C. 2003) (holding allegation that LLC filed annual reports with Secretary of State and evidence of minutes of meetings indicated LLC adhered to some formalities and established meritorious defense to piercing allegations for purposes of challenge to default judgment, but affirming default judgment because defendants failed to show excusable neglect or other equitable basis for relief); *In re Securities Investor Prot. Corp.*, 274 B.R. 768, 775 (Bankr. N.D. Ill. 2002) (concluding that, while Illinois LLC act precluded piercing on basis of failure to follow formalities, nothing in statute barred piercing LLC veil on other grounds applicable to corporations); *Anderson, L.L.C. v. Stewart*, 234 S.W.3d 295, 301 (Ark. 2006) (concluding trial court's decision to pierce LLC veil was not clearly erroneous); *Morris v. Cee Dee, L.L.C.*, 877 A.2d 899, 907-08 (Conn. App. Ct. 2005) (holding evidence did not support piercing LLC veil, but probable cause existed to believe member himself was negligent in connection with plaintiffs' claim); *KLM Indus., Inc. v. Tylutki*, 815 A.2d 688, 692-93 (Conn. App. Ct. 2003) (noting trial court's incorrect reference to corporate defendant as LLC and disagreeing with trial court's decision to pierce corporate veil, but agreeing with trial court that determination of whether to pierce veil of corporation or LLC requires same analysis); *Bastan v. RJM & Assocs., L.L.C.*, 29 Conn. L. Rptr. 646 (Conn. Super. Ct. 2001) (rejecting argument of individual sole member of LLC that there can be no equitable piercing of member-managed LLC); *Milk v. Total Pay & HR Solutions, Inc.*, 634 S.E.2d 208, 212 (Ga. Ct. App. 2006) (rejecting plaintiff's argument that LLC veil should be pierced based on undercapitalization because evidence did not show intent to avoid payment of future debts at time of capitalization); *Bonner v. Brunson*, 585 S.E.2d 917, 918-19 (Ga. Ct. App. 2003) (comparing LLC veil to corporate veil and holding evidence did not support piercing LLC veil to hold member personally liable because payments to member, member's wife, and member's

corporation did not amount to abuse of LLC form by commingling or confusing LLC business with member's personal affairs); *Vanderford Co. v. Knudson*, 165 P.3d 261, 270-71 (Idaho 2007) (holding evidence of payments to LLC's managing member for management of personal investments and confusion regarding ownership of funds in LLC checking account supported submission of plaintiff's requested jury instructions on LLC as alter ego of managing member); *Westmeyer v. Flynn*, 889 N.E.2d 671, 678 (Ill. App. Ct. 2008) (concluding corporate veil piercing principles apply to Delaware LLCs); *Four Seasons Mfg., Inc. v. 1001 Coliseum, L.L.C.*, 870 N.E.2d 494, 504 (Ind. Ct. App. 2007) (applying corporate veil piercing principles to LLC without discussion of fact that entity was LLC rather than corporation and finding piercing warranted to hold liable sole member of LLC who orchestrated fraudulent transfer to second wholly owned LLC); *Troutwine Estates Dev. Co., L.L.C. v. ComSub Design and Eng'g, Inc.*, 854 N.E.2d 890, 899-900 (Ind. Ct. App. 2006) (concluding corporate veil piercing principles apply to Indiana LLCs but remanding because trial court did not state findings of fact supporting personal liability of LLC members); *Lee v. Clinical Research Ctr. of Fla., L.C.*, 889 So.2d 317, 323 (La. Ct. App. 2004) (applying single business enterprise analysis to LLC and various affiliated LLCs and concluding evidence did not suffice to characterize the LLCs as single business enterprise); *Imperial Trading Co. v. Uter*, 837 So.2d 663, 670 (La. Ct. App. 2002) (affirming trial court's finding that plaintiff failed to prove LLCs were disregarded to extent they were indistinguishable from their members under corporate veil piercing standards); *Hamilton v. AAI Ventures, L.L.C.*, 768 So.2d 298, 303 (La. Ct. App. 2000) (applying corporate veil piercing principles in upholding trial court's piercing of LLC veil to hold member personally liable on LLC's contract); *Lily Transp. Corp. v. Royal Institutional Servs., Inc.*, 832 N.E.2d 666, 674-75 (Mass. App. Ct. 2005) (holding misleading conduct of member and related entity was not basis to pierce LLC veil and declining to hold members who were not involved in misleading conduct liable in any event); *Matias v. Mondo Props. L.L.C.*, 841 N.Y.S.2d 279, 281 (N.Y. App. Div. 2007) (commenting that corporate veil piercing applies to LLCs, but noting heavy burden to show domination of company resulted in wrongful consequences, and finding that plaintiff failed to raise triable issue of fact in this regard); *Ledy v. Wilson*, 831 N.Y.S.2d 61, 62 (N.Y. App. Div. 2007) (holding summary judgment evidence sufficient to raise fact issue regarding piercing of LLC); *Merrell-Benco Agency, L.L.C. v. HSBC Bank USA*, 799 N.Y.S.2d 590, 609 (N.Y. App. Div. 2005) (stating LLC parent would not be liable for LLC subsidiary's debt, even if parent LLC had been in existence at time debt was incurred, because parent company generally will not be liable for obligations of its subsidiary unless it can be shown parent exercised complete domination and control); *Milistar (NY) Inc. v. Natasha Diamond Jewelry Mfrs., L.L.C.*, 797 N.Y.S.2d 10 (N.Y. App. Div. 2005) (stating evidence in record established

LLC was “not a legal corporation, but rather a mere alter ego of [individual defendant] and the corporation’s debt should thus be imputed to [defendant] individually”); *Retropilis, Inc. v. 14th St. Dev., L.L.C.*, 797 N.Y.S.2d 1, 3 (N.Y. App. Div. 2005) (finding allegations insufficient to support claim to pierce LLC veil where only three of more than seventy checks tendered by plaintiff were mistakenly deposited into wrong entity’s account and were immediately transferred to proper account upon discovery of error, and no checks were deposited into member’s personal account); *Collins v. E-Magine, L.L.C.*, 739 N.Y.S.2d 15, 17 (N.Y. App. Div. 2002) (recognizing statutory liability protection of LLC members and managers and holding plaintiff failed to raise triable issue on alter ego); *Intercept Corp. v. Calima Fin., L.L.C.*, 741 N.W.2d 209, 212-14 (N.D. 2007) (concluding evidence supported finding individual was member of LLC and not merely employee because individual’s testimony and documentary evidence of transfer of ownership were not credible, and trial court’s findings supported piercing veil of LLC to hold individual member liable under corporate veil piercing principles applicable to North Dakota LLCs); *Advanced Tel. Sys., Inc. v. Com-Net Prof’l Mobile Radio, L.L.C.*, 846 A.2d 1264, 1281 (Pa. Super. Ct. 2004) (concluding trial court did not abuse its discretion in refusing to pierce LLC veil despite evidence of lack of formalities where such lack did not lead to misuse of corporate form); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590-91 (Tex. App. 2007) (holding corporate veil piercing principles apply to Texas LLCs and evidence supported jury’s finding that member caused LLC to perpetrate actual fraud for member’s benefit); *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass’n*, 77 S.W.3d 487, 500-01 (Tex. App. 2002) (relying upon corporate veil piercing principles in analyzing plaintiff’s claim that LLC was alter ego of its member and concluding evidence was insufficient to pierce LLC’s veil); *d’Elia v. Rice Dev., Inc.*, 147 P.3d 515, 521 (Utah Ct. App. 2006) (applying Utah veil piercing principles to Utah LLC and California veil piercing principles to California corporation and affirming trial court’s determination that evidence did not support piercing entity veils because plaintiff encouraged informal and lax practices relied upon as justification to pierce veils); *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323, 327-28 (Wyo. 2002) (concluding no legal or policy reason exists to distinguish LLCs from corporations for purposes of veil piercing but acknowledging precise application of factors may differ based on inherently more flexible and informal nature of LLCs).

Piercing the LLC veil is also addressed in a number of cases involving a court’s exercise of personal jurisdiction. *See, e.g.*, *Taurus IP, L.L.C. v. DaimlerChrysler Corp.*, 519 F. Supp. 2d 905, 918-21 (W.D. Wis. 2007) (discussing LLC veil piercing in personal jurisdiction analysis); *Quebecor World (USA), Inc. v. Harsha Assocs. L.L.C.*, 455 F. Supp. 2d 236, 243-44 (W.D.N.Y. 2006) (same); *LaSalle Bank N.A. v. Mobile Hotel Props., L.L.C.*,

274 F. Supp. 2d 1293, 1300 (S.D. Ala. 2003) (same); Int'l Bancorp, L.L.C. v. Societe des Bains de Mer et du Cercle des Entrangers a Monaco, 192 F. Supp. 2d 467, 476-78 (E.D. Va. 2002) (same); ING (U.S.) Sec., Futures & Options, Inc. v. Bingham Inv. Fund, L.L.C., 934 F. Supp. 987, 988-89 (N.D. Ill. 1996); XL Vision, L.L.C. v. Holloway, 856 So.2d 1063, 1066-67 (Fla. Dist. Ct. App. 2003) (same); Wolf v. Summers-Wood, L.P., 214 S.W.3d 783, 790 (Tex. App. 2007) (same); Morris v. Powell, 150 S.W.3d 212, 219-20 (Tex. App. 2004) (same); Stauffacher v. Lone Star Mud, Inc., 54 S.W.3d 810, 816-17 (Tex. App. 2001) (same); Royal Mortgage Corp. v. Montague, 41 S.W.3d 721, 738 (Tex. App. 2001) (same).

Cases discussing or applying reverse piercing (i.e., piercing the entity veil to allow a creditor of an owner to reach assets of the entity) in the LLC context include the following: Bramante v. McClain, Civ. Act. No. SA-06-CA-0010 OG (NN), 2007 WL 4555943, at *1-3 (W.D. Tex. Dec. 18, 2007) (applying reverse veil piercing); *In re Schwab*, 378 B.R. 854, 857-58 (Bankr. D. Minn. 2007) (same); Cadle Co. v. Brunswick Homes, L.L.C. (*In re Moore*), 379 B.R. 284, 295-96 (Bankr. N.D. Tex. 2007) (same); Kendall v. Turner (*In re Turner*), 335 B.R. 140, 147 (Bankr. N.D. Cal. 2005) (same); Great Neck Plaza, L.P. v. Le Peep Rest., L.L.C., 37 P.3d 485 (Colo. App. 2001) (same); Litchfield Asset Mgmt. Corp. v. Howell, 799 A.2d 298 (Conn. App. Ct. 2002) (same); *cf.* Bianchini v. Ryan (*In re Bianchini*), 346 B.R. 593, 596-97 (Bankr. D. Conn. 2006) (noting many jurisdictions permit both offensive and defensive reverse piercing, but declining to allow debtor to benefit by disregarding record title to property placed in LLC for unjust purposes).