

**RECENT CASES INVOLVING
LIMITED LIABILITY COMPANIES AND
LIMITED LIABILITY PARTNERSHIPS**

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By Elizabeth S. Miller
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This paper includes summaries of cases that have appeared since the paper prepared for the case law update program presented at the 2009 Annual ABA Meeting. Additional surveys of LLP and LLC cases may be accessed at the Baylor Law School web site at <http://law.baylor.edu>.

I. Limited Liability Partnerships

A. Diversity Jurisdiction

Morson v. Kreindler & Kreindler, LLP, 616 F.Supp.2d 171 (D. Mass. 2009) (applying New York law to determine whether non-equity partner of New York LLP was partner or employee (based on Massachusetts statute specifying that internal affairs of foreign registered LLPs shall be governed by law of jurisdiction in which foreign LLP is registered) and concluding non-equity partner was employee whose citizenship was thus irrelevant in determining citizenship of LLP for diversity jurisdiction purposes).

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

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

B. Limited Liability of Partners

Evanston Insurance Company v. Dillard Department Stores Inc., No. 09-20261, 2010 WL 148650 (5th Cir. Jan. 15, 2010). Dillard Department Stores, Inc. (“Dillard’s”) sued a law firm, Chargois & Ernster, L.L.P., in 2003 for federal and state trademark infringement, cyberpiracy, and various business torts based on the law firm’s use of the Dillard’s name and logo on a website developed by the law firm to solicit clients with claims against Dillard’s. The law firm was registered as a Texas LLP. Early in 2004, while the litigation with Dillard’s was ongoing, the partners executed a separation agreement providing for dissolution of the partnership, and they did not renew the firm’s LLP registration when it expired in July, 2004. In November, 2004, the court entered a final judgment against “Chargois & Ernster, L.L.P.” Dillard’s was unable to collect the judgment, and Dillard’s filed a complaint against the two partners of the law firm in 2008. Each partner was served, and Dillard’s sought summary judgment declaring that the partners were personally liable on the judgment against the law firm. The district court granted summary judgment, and the partners appealed. The partners argued that they were protected from liability under the provisions of the Texas Revised Partnership Act and that the action was barred by the statute of limitations. The court first rejected the partners’ argument that they were protected from liability under the LLP provision of the Texas Revised Partnership Act that provides a partner is not liable for a debt or obligation of the partnership incurred while the partnership is an LLP. The partners argued that the law firm’s debt was incurred when the infringing website was created in 2003, at which time the firm was registered as an LLP. Noting that the terms “debt” and “incurred” are not defined in the statute, the court found, however, that a plain reading of the statute supported the argument of Dillard’s that the debt was incurred when the judgment was entered in 2004, at which time the LLP registration had expired. The court stated that the underlying conduct gave rise to the possibility of a future debt, but that a debt was not incurred at that time because the conduct might have gone undetected, might have been adjudged innocent, or Dillard’s might have opted not to sue. The parties did not rely on another provision of the LLP statute that states a partner is not personally liable for “errors, omissions, negligence, incompetence, or malfeasance committed” by another while the partnership is a registered LLP, but the court

considered it significant that liability of a partner is limited in that provision for malfeasance “committed” while the partnership is an LLP. The court stated that the legislature’s use of different language created a regime in which partners could be held liable for debts and obligations incurred when the partnership is not a registered LLP but would not bear liability for one another’s independent malfeasance committed while it is an LLP. Thus, the court concluded that the partners in this case were not protected from personal liability because the law firm was not registered as an LLP at the time its debt was incurred. The court rejected the argument that the Texas Revised Partnership Act required that Dillard’s sue the partners themselves in 2003 on the trademark and tort claims in order to later hold them liable. The statute provides that a judgment against a partnership is not itself a judgment against a partner, but the court pointed out that Dillard’s relied upon its 2008 judgment obtained against the partners in a different action which the partners lost after vigorously defending their individual interests. Finally, the court rejected the partners’ argument that the 2008 action against them was barred by the statute of limitations. The partners argued that the causes of action against them were for tort and trademark infringement accruing in 2003, but the court agreed with Dillard’s that its cause of action was a suit to impose liability on the partners for a partnership debt, which accrued at the earliest upon entry of the judgment in 2004, and that the action was brought within the four-year statute of limitations applicable to a suit for debt.

U.S. Claims, Inc. v. Saffren & Weinberg, LLP, Civil Action No. 07-0543, 2009 WL 2179738 (E.D. Pa. 2009). The court discussed the Pennsylvania LLP provisions and their application to claims against an LLP law firm partner, Weinberg, who argued he could not be held individually liable for any contracts or misrepresentations made by his partner, Saffren. The court examined the statutory provisions addressing liability in a Pennsylvania LLP and concluded that a partner in an LLP is liable for the partnership’s breach of contract executed by another partner and not the result of any error, omission, negligence, incompetence, or malfeasance by that partner. The complaint alleged that Saffren entered into acknowledgments of various purchase agreements, and the court concluded that it could not determine at this juncture of the litigation whether the breach of contract claims against Weinberg rested solely on wrongful acts of Saffren, with no involvement of Weinberg or the firm, or whether the claims were attributable to the partnership as a whole, making both partners individually liable. The court concluded that fraud claims against Weinberg sufficiently alleged that Weinberg committed or participated in the alleged fraudulent misrepresentations, noting that the LLP statute states that it does not affect the liability of a partner for any negligent or wrongful acts or misconduct committed by the partner or any person under the partner’s direct supervision or control.

Scarborough v. Napoli, Kaiser & Bern, LLP, 880 N.Y.S.2d 800 (N.Y. App. Div. 4th Dept. 2009) (noting that each partner, employee, or agent of LLP may be individually liable for his or her negligent or wrongful act and holding defendant associates in LLP law firm failed to establish as matter of law that they committed no negligent or wrongful act for which they could be individually liable in legal malpractice action).

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

not generally regard the accountant-client relationship as a fiduciary one, but concluded that the allegations supported a breach of fiduciary duty claim as well.

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

C. Foreign LLPs

Morson v. Kreindler & Kreindler, LLP, 616 F.Supp.2d 171 (D. Mass. 2009) (applying New York law to determine whether non-equity partner of New York LLP was partner or employee (based on Massachusetts statute specifying that internal affairs of foreign registered LLPs shall be governed by law of jurisdiction in which foreign LLP is registered) and concluding non-equity partner was employee whose citizenship was thus irrelevant in determining citizenship of LLP for diversity jurisdiction purposes).

D. Bankruptcy

In re Promedius Health Group, LLP (Wallach v. Douglas), 416 B.R. 389 (Bankr. W.D.N.Y. 2009). In this dispute over what definition of “insolvent” applies to a New York LLP under the Bankruptcy Code, the court determined that there are no “general partners” in a New York LLP so that the provision requiring “the sum of the excess of the value of each general partner’s non-partnership property” to be added to the assets of the LLP did not apply. The trustee argued that the definition of a corporation in Section 101(9)(A)(ii) applied to the LLP because the term includes a “partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association.” The defendants argued that the provision of the New York statute specifying that partners have liability for their own negligent or wrongful act or misconduct or that of any person under their direct supervision and control does not make only the capital subscribed responsible for the debts of the association. Further, the defendants argued that an LLP must consist of general partners because the New York statute specifies that an LLP is a partnership without limited partners. The court stated that it was incorrect to think of the “universe” of partnerships in New York as consisting only of general partnerships and limited partnerships, and, consequently, it was incorrect to think of the universe of partners as only general partners and limited partners. The court analyzed the language of the New York LLP statute and stated that the universe of partners in New York consists of general partners, limited partners, and partners in a registered LLP. Because the defendants were of the last type, they could not avail themselves of the provision in the Bankruptcy Code calling for inclusion of the assets of each general partner in determining insolvency of the LLP. Further, the court stated that it would reach the same result using the test set forth in *Collier on Bankruptcy* in discussing LLPs, under which it is posited that the degree of liability protection should determine whether the entity is a corporation under the definition in Section 101. In sum, the court determined that the partnership definition of insolvency in the Bankruptcy Code applied, but that there were no general partners in an LLP. Alternatively, based on the substance of the liability protection under the New York LLP statute, the court concluded that the corporate definition would apply.

In re Brobeck, Phleger & Harrison, LLP (Greenspan v. Orrick, Herrington & Sutcliffe LLP), 408 B.R.318 (Bankr. N.D. Cal. 2009). Prior to filing bankruptcy, in order to facilitate an orderly liquidation and movement of attorneys to other firms, the law firm of Brobeck, Phleger & Harrison, LLP (“Brobeck”) amended its partnership agreement to include a waiver of the rights of the firm and its partners to any “unfinished business” of the firm, as that term is defined in *Jewel v. Boxer*. The bankruptcy court held that the provision was valid as a matter of California partnership law but was a fraudulent transfer because it was a transfer of interests in Brobeck’s property that was made while Brobeck was insolvent and without the receipt by Brobeck of any value in return.

In *Jewel v. Boxer*, 156 Cal.App.3d 171, 203 Cal.Rptr. 13 (1984), a California court of appeals held that, in the absence of an agreement otherwise, when a partnership dissolves, the partners have a duty to account to the dissolved firm and their former partners for profits earned on the dissolved firm’s unfinished business after deducting for overhead and reasonable compensation. The *Jewel* case involved contingency fee matters, but later cases made clear that the rule also applies to hourly rate matters. Many Brobeck partners were familiar with the *Jewel* duty to account because a law firm had recently sued Brobeck for an accounting of profits earned on unfinished business completed by former partners of that firm who went to Brobeck. As the dissolution of Brobeck loomed, the Brobeck policy committee thus

recommended that the partnership agreement be amended to include a provision waiving *Jewel* claims that Brobeck would have against its former partners or their new firms except for two specified matters. The amendment received the requisite approval of the partners, and Brobeck proceeded to dissolve. After Brobeck entered involuntary bankruptcy, the trustee asserted various claims against the Brobeck partners and several firms who had hired Brobeck partners. The trustee settled with most of the partners and the two firms to which most Brobeck partners moved, but certain *Jewel* claims were not settled, and the trustee asserted these claims against two firms and ten former Brobeck partners who moved to those firms.

The court first analyzed whether the *Jewel* waiver was valid under California partnership law. The court concluded that the partners were not only free to adopt such a provision, but were, in fact, encouraged by the case law in this area to adopt an agreement as to how to handle unfinished business in a way that immediately disposes of unfinished business and minimizes the disruptive impact of the dissolution. The court rejected the trustee's arguments that the waiver ran afoul of the RUPA provision permitting modification of the duty of loyalty by identifying "specific types or categories of activities that do not violate the duty of loyalty" so long as the modification is not "manifestly unreasonable." The trustee argued that the provision was not specific enough because it did not refer to the partners' duty of loyalty, but the court stated that specific reference to the duty of loyalty, while "it may be a prudent exercise," is not required for a valid modification of the duty under RUPA. The court also rejected the trustee's argument that the provision was "manifestly unreasonable." The court stated that it was left to rely on its common sense in the absence of case law defining the term, and the court concluded that the *Jewel* waiver was not "manifestly unreasonable." The court reasoned that the waiver did not eliminate the duty of loyalty, but merely modified the duty to account, which is just one of the three duties of loyalty set forth in RUPA. The court stated that Brobeck's insolvency at the time of adoption of the waiver did not affect its validity under RUPA because RUPA does not govern the relationship of the partnership or its partners to third parties, such as creditors.

While the court determined that the *Jewel* waiver was lawful and valid under RUPA, the court ultimately determined that the waiver was avoidable as a fraudulent transfer. The court held that profits from unfinished business amounted to property of Brobeck and that the waiver effected a transfer of that property to the partners. Although the court concluded that the trustee failed to meet his summary judgment burden with respect to actual intent to hinder, delay, or defraud a creditor, the court concluded that the trustee was entitled to summary judgment that the *Jewel* waiver was a constructively fraudulent transfer. The parties did not dispute that Brobeck was insolvent when the waiver was approved, and the court concluded that there was no evidence that Brobeck received anything of value in exchange for the waiver. Thus, the waiver was avoidable as a fraudulent transfer, and the partners, as initial transferees, and their new firms, as immediate transferees, were liable to the extent of profits received on Brobeck's unfinished business.

E. Securities Laws

Securities and Exchange Commission v. Lowery, 633 F.Supp.2d 466 (W.D. Mich. 2009). The SEC brought an action for violation of anti-fraud and registration provisions of the federal securities laws based on the sale of unregistered units in Colorado LLPs engaged in the online casino business. After the death of one of the two individual promoters of the venture, the SEC sought summary judgment against the other individual, a 77-year-old retired lawyer whose role was to develop and manage the online casinos. The court concluded that the LLP units were investment contracts, and thus securities, as a matter of law. The court noted the decision of the Eleventh Circuit Court of Appeals in *SEC v. Merchant Capital* that interests in a Colorado LLP were investment contracts, and thus securities, whenever any one of the following criteria is met: (1) the LLP is similar in structure to a limited partnership, meaning that the partners had to vote for a particular managing partner and had no practical ability to conduct the LLP's business; (2) the partners had little or no experience in the business affairs of the LLP; or (3) the partners were so dependent on the unique entrepreneurial or managerial skill of the seller or promoter that they could not realistically replace him or exercise meaningful partnership powers. The court found all three criteria were satisfied in this case. The court discussed and relied upon the opinion of the government's expert, who concluded that the investor/partners became passive investors in the LLPs by necessity and choice because the investors lacked the experience, interest, or ability to manage the partnership and, in any event, designated the deceased promoter as the managing partner. The expert also stated that, due to the partners' limited liability, the partners had less of an incentive to be active in the business and affairs of the partnership than partners in a traditional partnership. Thus, the expert concluded that the presumption that partners have both the right and incentive to manage is not appropriate in an LLP. The expert further concluded that, even if the investors did not cede control to the deceased promoter, the investments would still be securities because the LLPs

themselves were passive. The internet gambling sites, which were the ultimate source of any return, were owned and operated by the defendant and entities controlled by or affiliated with him, and the LLPs thus relied upon the defendant and his affiliates to realize a profit. After concluding that the LLP investments were securities as a matter of law, the court addressed the other elements of the registration and fraud counts and found that the defendant, who was proceeding *pro se*, failed to show a genuine issue of material fact as to any element.

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

F. Reorganization/Merger/Conversion

In re Hawthorne Townhomes, L.P., 282 S.W.3d 131 (Tex. App. 2009). In 2005, Branch entered into a contract to purchase a new house. The sale closed in February 2006, and the closing documents included a limited warranty agreement containing an arbitration clause. The limited warranty/arbitration agreement was signed by Branch as the purchaser and Metro Townhomes & Homes, L.L.P. as the builder. In 2008, Branch sued based on defects in the house. The defendants moved to dismiss, or in the alternative to compel arbitration. The trial court denied both motions, and the defendants appealed. Branch argued that Metro Townhomes & Homes L.L.P. did not exist at the time it executed the limited warranty agreement at the closing, that there was thus no meeting of the minds, and that the limited warranty agreement with its arbitration provisions never became a valid contract. The evidence showed that Metro Townhomes & Homes, Inc. was incorporated in 2000, and, later that year, Metro Townhomes & Homes, L.L.P. registered as an LLP with Metro Townhomes & Homes, Inc. as general partner. Metro Townhomes & Homes, L.L.P. renewed the registration annually until July 5, 2004 when it withdrew its registration as an LLP. That same day, a certificate of limited partnership for Metro Townhomes, L.P. was filed showing Metro Townhomes & Homes, Inc. as its general partner. The certificate of limited partnership stated that the partnership was converting from a Texas general partnership, Metro Townhomes & Homes, L.L.P., into the limited partnership, Metro Townhomes, L.P. Branch argued that Metro Townhomes & Homes, L.L.P. ceased to exist on July 5, 2004, when it withdrew its registration, and it thus could not sign the limited warranty agreement in February 2006. The court quoted Section 9.05(h)(1) of the Texas Revised Partnership Act, which provides: “When a conversion of a converting entity takes effect: (1) the converting entity shall continue to exist, without interruption, but in the organizational form of the converted entity rather than in its prior organizational form.” (The court apparently overlooked the fact that the conversion of a general partnership into a limited partnership at the time of this conversion would have been governed by Section 9.01 of the Texas Revised Partnership Act, which was repealed September 1, 2005.) Based on this provision, the court concluded that Metro Townhomes & Homes, L.L.P. did not cease to exist when it withdrew its registration as an LLP. The limited warranty agreement contained a provision stating that the agreement and the binding arbitration process was binding on the builder’s successors and assigns, and the court stated that Metro Townhomes, L.P. was the successor of Metro Townhomes & Homes, L.L.P. and was bound by the arbitration clause. The court thus concluded that the defendants established the existence of a valid arbitration agreement.

G. Passive Activity Rules

Garnett v. Commissioner of Internal Revenue, 132 T.C. No. 19, 2009 WL 1883965 (U.S. Tax Ct. 2009). The taxpayers held interests in seven LLPs and two LLCs engaged in agribusiness operations, and the issue was whether the taxpayers’ interests should be considered interests in limited partnerships held as a limited partner so as to be treated as

presumptively passive under the special rule of IRC Section 469(h)(2). The court rejected the taxpayers' argument that limited liability was the controlling issue. The court stated that it was necessary to look at the facts and circumstances to ascertain the nature and extent of the taxpayers' participation since they were not precluded under state law from materially participating in the business of the entities. Accordingly, the court concluded that the taxpayers held their interests as general partners for purposes of the temporary regulations.

II. Limited Liability Companies

A. Diversity Jurisdiction

Federal courts of appeals and district courts continue to hold that an LLC has the citizenship of each of its members for diversity jurisdiction purposes. The district court opinions to this effect are too numerous to list. A few district court opinions raising issues of particular interest are noted below. Recent opinions in which circuit courts of appeals have applied or recognized the rule that an LLC's citizenship is determined by that of all its members include *Greenville Imaging, LLC v. Washington Hospital Corporation*, 326 Fed.Appx. 797, 2009 WL 1657057 (5th Cir. 2009) (holding that Fifth Circuit's 2008 decision that LLC's citizenship is determined for diversity jurisdiction purposes by citizenship of all members applies to cases filed in Mississippi federal courts before that decision).

Tri-County Metropolitan Transportation v. Butler Block, LLC, 337 Fed.Appx. 708 (9th Cir. 2009) (stating that under either Delaware or Oregon law an administratively dissolved LLC remained a member of defendant, a Delaware LLC, and was thus a member whose citizenship was relevant for purposes of determining diversity jurisdiction).

Ner Tamid Congregation of North Town v. Krivoruchko, 620 F.Supp.2d 924 (N.D. Ill. 2009) (stating that having several LLCs utilizing same address in Illinois did not make tax matters partner of LLC a citizen of Illinois for diversity jurisdiction purposes).

B. Personal Jurisdiction Over Members and Managers

Van Zyl v. Aviatour, Inc., No. 8:09-cv-151-T-23TGW, 2009 WL 2025159 (M.D. Fla. July 9, 2009) (concluding federal court in Florida had personal jurisdiction over Texas corporation which was 50% member of Texas LLC with respect to co-member's claims arising out of failure to pay for work performed pursuant to "Operating Agreement for Management" containing Florida forum selection clause, but plaintiff failed to present prima facie case of personal jurisdiction with respect to claim against co-member for conversion; concluding 50% member failed to present prima facie case of personal jurisdiction as to any claim against individual agent of other 50% member, a Texas corporation, even though individual was appointed manager of LLC where complaint did not identify duties imposed on manager nor allege breach of those duties and provisions allegedly breached expressly imposed duties on corporate member rather than individual manager).

Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC, No. 3:08-CV-1782-M, 2009 WL 1469808 (N.D. Tex. May 27, 2009) (concluding that individuals' contacts with Texas in connection with activities of two LLCs fell within scope of fiduciary shield doctrine and thus provided no basis for exercise of personal jurisdiction over individuals; rejecting argument that evidence showed individuals used LLC as alter ego for personal interests and thus declining to exercise personal jurisdiction over individuals based on LLC's breach of contract).

Stone v. Advance America, Cash Advance Centers, Inc., No. 08cv1549 WQH (WMc), 2009 WL 765665 (S.D. Cal. March 20, 2009) (holding plaintiff failed to submit any evidence rebutting showing by Delaware LLC and Delaware corporation that LLC was not alter ego of corporation for purposes of exercise of personal jurisdiction).

Wheaton Equipment Company v. Franmar, Inc., No. CV08-276-S-EJL, 2009 WL464337 (D. Idaho Feb. 24, 2009) (exercising personal jurisdiction over LLC based on its status as alter ego of individual owner of LLC and commonly owned corporation).

In re Western States Wholesale Natural Gas Antitrust Litigation (Heartland Regional Medical Center v. Oneok, Inc.; Breckenridge Brewery of Colorado, LLC v. Oneok, Inc.; Learjet, Inc. v. Oneok, Inc.; J.P. Morgan Trust Company v. The Williams Companies, Inc.), Nos. 2:03-CV-014310-PMP-PAL, 2:07-CV-00987-PMP-PAL, 2:07-CV-01351-PMP-PAL, 2:06-CV-00233-PMP-PAL, 2:05-CV-01331-PMP-PAL, 2009 WL 455555, 2009 WL 455653, 2009 WL 455658, 2009 WL 455663 (D. Nev. Feb. 23, 3009) (holding, in consolidated multi-district litigation arising out of energy crisis of 2000-2001, that indirect partially owned subsidiary LLC's contacts could not be imputed to parent North Carolina LLC for purposes of exercise of personal jurisdiction under alter ego theory where parent LLC did not control daily operations of subsidiary and plaintiff failed to establish fraud or injustice would result from failure to pierce veil even assuming lack of separateness were established).

Rensin v. State of Florida, 18 So.3d 572 (Fla. App. 2009) (holding record did not support exercising personal jurisdiction over CEO of LLCs based on fraud or intentional misconduct exception to corporate shield doctrine).

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

C. Service of Process

Rodriguez v. Wright, Scott & Associates, LLC, No. 08-CV-2618(SLT)(VVP), 2009 WL 2730874 (E.D.N.Y. Aug. 28, 2009) (holding plaintiff failed to establish adequate service of process on Maryland LLC).

Mandale v. Des Moines Tria Tower, LLC, Civil Action No. 08-04888, 2009 WL 2412596 (E.D. Pa. Aug. 5, 2009) (holding service of process on LLC member or LLC itself does not under Illinois law constitute service on all members, unlike Illinois provision applicable to partnerships, and service on members must thus be accomplished under requirements for service on individuals).

Anthony Hill Grading, Inc. v. SBS Investments, LLC, 678 S.E.2d 174 (Ga. App. 2009) (analyzing substituted service on LLC under applicable statutes and holding service failed to comply with statute applicable to LLCs as well as statute applicable to corporations, which court stated was also available in LLC context).

Azarkman v. Noora Nicca, LLC, No. B208467, 2009 WL 1273055 (Cal. App. 2 Dist. May 11, 2009) (holding party may rely on designation of agent for service of process on LLC filed with Secretary of State where party does not know that members were embroiled in dispute over LLC's management and authority that included dispute regarding validity of designation of agent).

Diebolt & Diebolt Development, LLC v. Hilltop Development, LLC, No. CV095009978, 2009 WL 1057916 (Conn. Super. March 26, 2009) (holding service on LLC by serving CT Corporation Systems was proper where CT Corporation Systems was LLC's registered agent on records of Secretary of State notwithstanding claim that agent services of CT Corporation Systems had been discontinued because LLC is required to provide updated information to Secretary of State if there are changes in statutory agent for service of process).

World Environment, L.L.C. v. Wolfpack Environmental, L.L.C., No. 01-08-00561-CV, 2009 WL 618697 (Tex. App. March 12, 2009) (holding that Texas LLC statute, which provides for service on LLC by serving manager or registered agent, does not provide for effective service by serving personal assistant of manager or registered agent of LLC and stating that plaintiff cited no authority for proposition that statute providing for service on individuals, partnerships, and unincorporated associations applies to LLCs).

Glacier Water Company LLC v. Earl, No. C08-1705RSL, 2009 WL 586128 (W.D. Wash. March 5, 2009) (finding service on foreign LLC that was not registered to do business in Washington was complete where Secretary of State was served and mailed summons and complaint the following day).

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

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

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

D. Venue

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

E. Standing/Authority to Sue

Moede v. Pochter, No. 07 C 1726, 2009 WL 2748954 (N.D. Ill. Aug. 27, 2009) (noting that contention that member's delay in making capital contribution deprived LLC of profits advanced claim of LLC as entity rather than that of member).

River City Rentals, LLC v. Bays, No. 4:08-CV-00104-R, 2009 WL 2753304 (W.D. Ky. Aug. 26, 2009) (holding alleged fraudulent misrepresentation made to individual prior to LLC's formation could not be asserted by LLC because misrepresentation must be made to plaintiff or plaintiff's agent).

Herrick Group & Associates LLC v. K.J.T., L.P., Civil Action No. 07-0628, 2009 WL 2596503 (E.D. Pa. Aug. 20, 2009) (discussing Nevada revival and reinstatement processes and concluding Nevada LLC that lacked capacity to sue when it filed lawsuit because its charter had been revoked thereafter cured its capacity defect when it was retroactively revived).

Walker v. Allianz Life Insurance Company of North America, No. 3-08-CV-2051-M, 2009 WL 1883418 (N.D. Tex. June 30, 2009) (dismissing claims belonging to LLC asserted by LLC's member because LLC can only be represented by licensed counsel and member is not proper party to proceedings by or against LLC except where object is to enforce member's right against or liability to LLC).

NAMA Holdings, LLC v. Greenberg Traurig, LLP, 880 N.Y.S.2d 34 (App. Div. 1st Dept. 2009) (holding plaintiff may assert individual claim against attorneys for LLC based on allegation that defendants colluded with LLC's managers to drive plaintiff from project).

In re Kindred (Thomas v. Murphy), Bankruptcy No. 6:08-bk-02334-KSJ, Adversary No. 6:08-ap-00171, 2009 WL 1788401 (Bankr. M.D. Fla. June 5, 2009) (rejecting challenge to trustee's standing to assert claims on behalf of LLCs equally owned by debtor and individual defendant because trustee was seeking rescission of operating agreements by which defendant assumed managerial control of each LLC and, if successful, could establish standing to assert claims on behalf of LLCs).

Hooks v. Ryan, No. 08-C-0631, 2009 WL 1307850 (E.D. Wis. May 6, 2009) (finding complaint did not satisfy pleading requirements inasmuch as Wisconsin LLC statute requires action on behalf of LLC to be brought in name of LLC and pursuant to authorization which must be described in complaint).

Alto Eldorado Partners v. City of Santa Fe, No. CIV. 08-0175 JB/ACT, 2009 WL 1312856 (D.N.M. March 11, 2009) (discussing whether individual owner of New Mexico LLC that owned subdivision had standing to challenge city's affordable housing ordinance and finding that provisions of New Mexico LLC statute did not support assertion of individual's claim and that requirements for third-party standing were not satisfied).

Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872 (Del. Ch. 2009) (dismissing individual's claim for tortious interference with prospective economic advantage because harm allegedly suffered by individual was based on his interest in LLC through which he did business and any claim for damages must be asserted by that entity).

Kwon v. Yun, 606 F.Supp.2d 344 (S.D.N.Y. 2009) (interpreting Section 18-805 of Delaware Limited Liability Company Act and determining that Delaware Court of Chancery implicitly revived dissolved LLC when it appointed trustee with authority to pursue LLC's claim, finding it unnecessary to decide whether corporate law would permit appointment of trustee for such purpose because LLC statute contains no time limit during which court's authority to appoint trustee must be exercised and Court of Chancery construed its own state law to permit appointment in this case).

3519-3513 Realty, LLC v. Law, 967 A.2d 954 (N.J. Super. App. Div. 2009) (holding that LLC's sole member was not owner of three-unit building owned by LLC and thus member lacked standing to evict tenants under statute permitting landlord to remove tenant if owner of building of three units or less seeks to personally occupy unit).

Law v. Bioheart, Inc., No. 2:07-cv-2177, 2009 WL 693149 (W.D. Tenn. March 13, 2009) (noting Tennessee law allows certain persons to maintain legal actions in LLC's name after administrative dissolution).

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The minority member of a Missouri LLC sued the majority member for breach of the operating agreement based on the majority member's withdrawal of its capital contribution without the consent of the minority member in violation of the operating agreement. The majority member argued that the minority member lacked standing to assert the claim because the claim belonged to the LLC rather than the minority member. The court acknowledged corporate case law requiring that shareholders bring suit to redress corporate injuries derivatively, but the court pointed out that the minority member based its claim on breach of the operating agreement rather than a recovery of corporate funds, and the Missouri LLC statute expressly provides that suits to enforce the operating agreement may be brought by any member. However, the court further pointed out that the Missouri statute contains special rules regarding the enforcement of capital contributions. Relying on the statutory provision that a member's capital contribution shall not be enforceable by any other member unless the obligated member has specifically agreed or consented to such enforcement, the court stated that the statute precluded a claim for enforcement of that part of the operating agreement given the absence of a specific agreement allowing one member to enforce another member's capital contribution. The court rejected the minority member's argument that it was permitted to seek damages for a collateral consequence of the withdrawal of the capital contribution (the LLC's inability to repay the minority member's loan to the LLC) as opposed to enforcement of the capital contribution by payment of the claim. The court concluded that such a claim for damages was likewise precluded by the statute. The court acknowledged that it was not altogether clear whether the statutory provision was applicable because the minority member arguably did not seek "enforcement" of the payment of the capital contribution, but the court concluded that the claim for damages still failed even if the statute allowed it because the loan that the minority member claimed the LLC would not be able to pay was not yet due. The court also rejected the minority member's claim that the majority member's withdrawal of its capital contribution breached its fiduciary duty to the minority member. The court stated that the minority member failed to point to any provision of the operating agreement that imposed a fiduciary duty on the majority member, and, even if the majority member owed a duty of good faith and fair dealing as a "majority shareholder," the duty was based on its status as a member. Both the operating agreement and the statute provided that a member is not liable to another member "solely by reason of acting in his capacity as a member." Assuming the duty of care owed to the LLC and, indirectly, its members, was violated, the court stated that the harm would have to be remedied through a derivative suit. There was

no direct harm to the minority member since the inability to repay the minority member's loan would harm the member in a capacity other than as a member, and any fiduciary duty would not extend to the member in the capacity as an outsider. Since the plaintiff's claims for breach of the operating agreement and breach of fiduciary duty failed, claims for civil conspiracy based on those causes of action failed as well.

Meyer v. Christie, No. 07-2230-CM, 2009 WL 331634 (D. Kan. Feb. 10, 2009) (holding that judgment as matter of law on question of Iowa LLC's capacity to sue was precluded by existence of fact question as to whether LLC was "doing business" in Kansas such that failure to register to do business would prevent it from bringing suit in Kansas).

Gale v. Carnrite, 559 F.3d 359 (5th Cir. 2009). In 1999, the Gales bought all of the membership interest in a Nevada LLC that owned a condominium unit in Mexico. Because of a legal restriction on non-Mexican ownership of real property, the Gales had to purchase the outstanding membership interest in the LLC. The sole asset of the LLC was beneficial ownership of a leasehold interest in the condominium under a special trust arrangement with a Mexican bank. In the sale agreement between the seller, Carnrite, and the Gales, Carnrite included a warranty that as of the date of closing "the LLC has and will have no liabilities of any nature...including without limitation tax liabilities due or to become due." When the sale was completed in January 2000, no one reported the transaction to the Mexican government and no taxes were paid on the transfer. After the Gales used the condominium for a number of years, the LLC sold the beneficial interest in the condominium. The sale resulted in a substantial Mexican capital gains tax liability. The Gales filed suit against Carnrite for allegedly breaching the contractual warranty he gave to them regarding tax liability when they bought the LLC. The Gales alleged that Carnrite breached the warranty by failing to report and pay taxes on the sale to the Gales. The district court entered summary judgment in favor of the Gales, finding that Carnrite breached the warranty because the parties' transaction gave rise to tax liability for the LLC. Carnrite appealed, and the first issue discussed in the opinion on appeal was the whether the Gales had standing to pursue the claim. Carnrite argued that it was the LLC rather than the Gales that were liable for the capital gains tax and that the Gales did not have standing since they suffered no injury. The Gales responded that the LLC assigned the claim to them when they filed the lawsuit in 2007. Carnrite did not dispute the usual propriety of such an assignment, but argued that the assignment was ineffective because Nevada had revoked the LLC's right to do business in 2004 for failure to pay franchise taxes and fees and file annual reports. The court concluded that the Gales had standing to pursue the claim, however, based on Nevada LLC statutes regarding dissolution and the fact that payment of the taxes ultimately fell on the Gales. The court pointed out that the Nevada LLC statutes provide that the property and assets of an LLC whose charter has been revoked must be held in trust and that dissolution proceedings should be pursued. Another statutory provision provides that dissolution does not impair a remedy or cause of action arising before dissolution and commenced within two years after the date of dissolution. Additionally, the Nevada statutes provide that the assets of a dissolved LLC may be distributed to its members. Based on these statutes, the court concluded the assets of the LLC, which included the cause of action against Carnrite, were held by the Gales in trust when its right to transact business was forfeited, and, moreover, the Gales were permitted to transfer those assets to themselves as the LLC's only members. As the parties ultimately injured and the assignees of the LLC's claims, the Gales had standing to pursue the action. After analyzing the tax liability, however, the court held that the record did not establish that Carnrite breached the terms of the warranty as worded in the contract he made with the Gales because the record indicated that Carnrite's failure to pay taxes on the transaction resulted in a tax liability of the Gales rather than the LLC.

Pride Mobility Products Corp. v. Dylewski, Civil Action No. 3:08-cv-0231, 2009 WL 249356 (M.D. Pa. Jan. 27, 2009) (dismissing LLC member's claims for conversion and civil theft against LLC's creditor because LLC's assets were assets of LLC rather than member, and member failed to allege that LLC's creditor acquired or possessed any of member's 50% membership interest or that member's interest was otherwise taken from him).

Sinclair v. Thomas, No. CV065001063, 2009 WL 323514 (Conn. Super. Jan. 15, 2009) (holding that member could not recover for amounts paid or damages suffered by LLC).

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

discrimination in performance of contract under Minnesota Human Rights Act where LLC rather than individual entered contract).

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

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

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

F. Pro Se Representation

Chien v. Skystar Bio Pharmaceutical Co., 623 F.Supp.2d 255 (D. Conn. 2009) (stating individual pro se litigant could not represent LLC and could not circumvent rule by having LLC assign its rights to individual).

Indian Springs LLC v. Indian Springs Land Investment, LLC, 215 P.3d 457 (Idaho 2009) (holding that individuals who are not licensed attorneys are prohibited from representing partnership or LLC in pro se capacity and dismissing appeal by partnership and LLC because they were not represented by licensed counsel on appeal).

In re Shattuck (Shattuck v. Bondurant), 411 B.R. 378 (10th Cir. (BAP) 2009) (holding bankruptcy court did not have discretion to permit individual receiver, who was not licensed attorney, to appear on behalf of LLC's receivership estate; local district court rule permitting pro se "individual" parties to appear in court did not apply to receiver in representative capacity, and, if such rule permits lay person receiver to represent artificial entity in federal court, it conflicts with law interpreting federal statute and is invalid).

Windsor v. United States, Civil Action No. 1:09-CV-2027-WSD, 2009 WL 2370669 (N.D. Ga. July 30, 2009) (denying individual's motion to waive representation by counsel and allow LLC and corporation to assign rights to individual because corporations and LLCs must be represented by counsel in litigation and federal courts have disapproved of circumvention of rule by procedural device of assignment of claims to lay individual).

Walker v. Allianz Life Insurance Company of North America, No. 3-08-CV-2051-M, 2009 WL 1883418 (N.D. Tex. June 30, 2009) (dismissing claims belonging to LLC asserted by LLC's member because LLC can only be represented by licensed counsel and member is not proper party to proceedings by or against LLC except where object is to enforce member's right against or liability to LLC).

Graham Kandiah, LLC v. JPMorgan Chase Bank, N.A., No. 08 CIV. 6956(JGK), 2009 WL 1704570 (S.D.N.Y. June 18, 2009) (holding LLC may only appear in federal court through counsel).

Nappy v. Colby Field LLC, No. 08-CV-4654(JS)(AKT) (E.D.N.Y. May 22, 2009) (holding that single member LLC must be represented by licensed counsel and would be subject to default judgment if it did not retain counsel).

Hooks v. Ryan, No. 08-C-0631, 2009 WL 1307850 (E.D. Wis. May 6, 2009) (noting that LLC cannot appear pro se).

IBEW-NECA Local 505 Welfare and Pension Plans v. R.D. Electric, L.L.C., Civil Action No. 09-0011-KD-C, 2009 WL 981913 (S.D. Ala. April 13, 2009) (stating that LLCs are artificial entities that cannot appear in federal court pro se).

Hutchins v. 3 Pickwick, LLC, Civil Action No. V-08-60, 2009 WL 959973 (S.D. Tex. April 8, 2009) (denying attorney's request to withdraw as counsel for plaintiff LLC where attorney knew of potential conflict and failed to take any action for almost one and one-half months, defendant waived any potential conflict on part of attorney, and defendant objected to attorney's withdrawal because LLC must be represented by counsel and plaintiff LLC had not fully complied with court's prior order for contempt and sanctions).

Trap King, LLLP v. Mobile Home Park Services, Inc., No. 08-CV-0661-CVE-FHM, 2009 WL 799269 (N.D. Okla. March 24, 2009) (striking answer of LLC because answer was not filed by licensed attorney and LLC must appear before court through licensed attorney).

Conagra Trade Group, Inc. v. Fuel Exploration, LLC, Civil Action Nos. 07-cv-02438-CMA-MEH, 07-cv-02552-CMA-MEH, 2009 WL 763097 (D. Colo. March 19, 2009) (striking LLC's brief because it was not filed by licensed attorney and LLCs like corporations and similar business entities must appear in court through licensed attorney).

Freund v. Weinstein, No. 08cv1469 (FB)(MDG), 2009 WL 750242 (E.D.N.Y. March 19, 2009) (noting corporations and LLCs must appear through counsel in federal court proceedings).

Spanish Tiles, Ltd. v. Hensey, C.A. No. 05C-07-025 RFS, 2009 WL 86609 (Del. Super. Jan. 7, 2009) (stating that LLCs are required to appear in court through counsel).

Harbolt v. Pelletier, 662 S.E.2d 355 (Ga. App. 2008) (recognizing rule that LLCs must be represented in court by attorney).

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

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

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

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

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

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

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

G. Derivative Suits

Water Craft Management, L.L.C. v. Mercury Marine, 638 F.Supp.2d 619 (M.D. La. 2009) (discussing test for distinguishing direct from derivative claims and finding individual members of LLC suffered direct damages personally and professionally and by way of personal liability on promissory note).

Williamette Crest Gaming, LLC v. Play N Trade Franchise, Inc., Civil No. 09-461-ST, 2009 WL 224381 (D. Or. July 27, 2009) (holding franchisor could enforce arbitration clause in franchise agreement with LLC against signatory and non-signatory members of LLC where franchise agreement expressly encompassed each person owning more than 20% of LLC franchisee; assuming franchise agreement did not control, members' allegations of misrepresentation related to disclosures required by franchisor, were relied upon as agents of LLC franchisee, and caused damages to LLC and thus must be brought in arbitration because claims were derivative of LLC's).

Angel Investors, LLC v. Garrity, 216 P.3d 944 (Utah. 2009). Angel Investors, LLC ("Angel"), a 1% owner of an LLC, brought a derivative suit on behalf of the LLC against six individuals who were the managing members and collectively owned 86% of the LLC. In addition to Angel, there were nineteen entities that had an ownership interest in the LLC. Prior to the derivative suit, Angel had initiated a direct suit against the LLC seeking dissolution of the LLC and other relief. The defendants argued that Angel lacked standing to bring the derivative suit because it did not meet the fair and adequate representation requirement of the Utah rules of civil procedure. The trial court agreed with the defendants, finding that (1) Angel was similarly situated to other minority owners, and (2) Angel could not fairly and adequately represent the interests of those similarly situated because the other minority owners indicated they did not support Angel as a derivative plaintiff and Angel's direct suit caused a conflict of interest. On appeal, the supreme court disagreed, holding that Angel qualified as a class of one and that the majority owners had not met their burden of showing that Angel was an inadequate representative of the LLC. The court stated that Utah Rule 23A, which speaks in terms of derivative actions brought on behalf of corporations and unincorporated associations, governs derivative actions on behalf of LLCs. In analyzing whether Angel was similarly situated to other minority owners or made up a class of one, the court recognized that closely held corporations are more vulnerable to malfeasance because majority shareholders likely serve on the board and their dual roles may make it easier to commit and justify malfeasance. In light of the greater vulnerability to malfeasance, the court held that a sole dissenting shareholder in a closely held corporation qualifies as a class of one for purposes of a derivative action when that shareholder (1) seeks by its pleadings to enforce a right of the corporation, and (2) does not appear to be similarly situated to any other shareholder. The court also held that a shareholder's motivation for opposing a derivative action is relevant to determining whether any shareholder is similarly situated to the derivative plaintiff. Angel brought suit alleging corporate malfeasance by the majority owners and alleged that owners other than itself stood to gain from the majority owners' continued malfeasance. Accordingly, as a sole dissenting shareholder of a "closely held corporation," Angel qualified as a class of one and there were no other similarly situated shareholders to be represented.

The court noted that a derivative plaintiff must be able to fairly and adequately represent the corporation, as well as shareholders similarly situated, although Rule 23A has no explicit requirement as to representation of the corporation's interest. The majority owners argued that Angel could not be a fair and adequate representative because (1) Angel had a conflict of interest with the LLC due to its suit to dissolve the LLC, (2) Angel did not sign the operating agreement, and (3) Angel stood to gain a relatively small amount of damages due to its minimal ownership interest in the LLC. The court concluded that Utah does not have a per se rule barring simultaneous direct and derivative actions, and that a possible conflict of interest, as found by the trial court, is insufficient to disqualify a derivative plaintiff. The majority owners failed to prove an actual conflict of interest because the relief Angel sought in the direct action (monetary damages and dissolution) was not incompatible with the relief sought in the derivative action, and Angel had to prove the same nucleus of operative facts in both actions. The court declined to address the majority owners'

argument that Angel's refusal to sign the operating agreement prevented it from fairly and adequately representing the LLC's interest because the argument was inadequately briefed. The court declined to address the argument that Angel stood to gain relatively little from any recovery and thus could not be considered a fair and adequate representative because the argument was not preserved in the trial court.

Bernards v. Summit Real Estate Management, Inc., 213 P.3d 1 (Or. App. 2009). Two individuals (Walter Bernards and Jerry Bernards) who were members of two member-managed LLCs (Greenbrier Apartment Buildings, LLC ("Greenbrier") and Pioneer Ridge Apartments, LLC ("Pioneer Ridge")), brought a derivative suit against the other members for breach of fiduciary duty based on the defendant members' refusal to take legal action against Summit Real Estate Management, Inc. ("Summit"), the management company for the apartment complexes owned by the LLCs, and McKenna, one of Summit's officers, after McKenna admitted embezzling approximately \$172,000 from Greenbrier and \$160,000 from Pioneer Ridge. The LLC operating agreements required unanimous consent to authorize a member to resort to legal action on behalf of the LLC where the amount exceeded \$5,000, and the other members refused to consent without explanation. After a direct action by Walter Bernards against Summit and McKenna was dismissed, the plaintiffs filed amended complaints adding Jerry Bernards as a plaintiff and adding derivative claims against the member defendants. The defendant members moved to dismiss the claims against them on the basis that the plaintiffs failed to allege facts showing or implying that the defendants breached their fiduciary duties or otherwise failed to act in good faith, on an informed basis, and in the best interest of the LLCs.

The plaintiffs argued that they need only allege that they made demand on the defendants to cause the LLCs to sue in their own right and that the demand was refused or ignored or the reason that demand was not made. The plaintiffs asserted that no allegation of wrongdoing was necessary, and that, if it was, the complaints alleged facts from which wrongdoing could be inferred. The court of appeals concluded that an allegation of either demand refusal or demand futility was necessary but not sufficient to state a derivative claim against LLC members. The court held that an allegation of facts sufficient to show bad faith, gross negligence, fraud, or willful or wanton misconduct was also required. The court noted that the pleading requirements in the Oregon statute requiring an allegation of demand refusal or demand futility are subject to variation by contract because the statute begins with the phrase "Except as otherwise provided in writing in the articles of organization or any operating agreement,...." The court stated that the members had altered the pleading requirements by agreeing in the operating agreement that a member shall not be liable to the other members or the LLC for honest mistakes of judgment or for action or inaction taken in good faith for a purpose reasonably believed to be in the best interest of the LLC provided that such mistake, action, or inaction does not constitute gross negligence, fraud, or willful or wanton misconduct. The court stated that the plaintiffs' claims against the defendant members were claims for breach of contract, and the contract insulated the members from liability short of the wrongful conduct described in the operating agreement. The court also pointed out that it had held that wrongful conduct is a necessary element of a derivative action in the context of derivative actions by shareholders against directors and that the LLC statute and the corporate statute on derivative actions are identical with the exception of the introductory clause in the LLC statute permitting variation of the pleading requirements by contract. The court discussed the case law in the corporate context requiring a party to rebut the business judgment rule to avoid the pre-litigation demand requirement. The court acknowledged that the present case involved demand refusal rather than demand futility, but the court could find no reason to conclude that one context requires an allegation of wrongdoing and the other does not. Thus, the court concluded that, unless plaintiffs' complaints alleged facts showing that the member defendants' action in refusing to institute legal proceedings against Summit and McKenna was not the exercise of business judgment – or, in the more specific language of the operating agreements, that the member defendants' decision was made in bad faith or amounted to gross negligence, fraud, or willful or wanton misconduct – the complaints did not state a claim.

The court rejected the argument of the defendants that the complaints would fall short even if they contained allegations of wrongful conduct. In this regard, the defendants argued that the provision of the operating agreements requiring unanimous consent for legal action replaced the pleading requirements for a derivative action and gave each member the unfettered ability to block any legal action on behalf of the LLC. The court stated that parties to a contract are bound by a requirement of good faith and fair dealing, and the operating agreement expressly provided for liability for bad faith, gross negligence, fraud, or willful or wanton conduct. Thus, the court said the agreement confirmed that consent could not be withheld except for a valid reason.

The court of appeals agreed with the trial court that the complaints did not allege facts from which a factfinder could conclude that the defendants acted with gross negligence or in bad faith. The court stated that the plaintiffs had to allege facts sufficient to overcome the presumption afforded by the business judgment rule that the defendants acted

for the benefit of the LLC – that they acted with the requisite culpability required by the operating agreement. Further, the court stated that, due to the unanimous consent requirement of the operating agreement, the plaintiffs had to allege facts demonstrating that *all* of the members acted with the requisite culpability. If even one of the members refused to proceed for a valid business reason, the LLCs could not bring the action against Summit and McKenna. According to the court, the scant facts alleged did not support an inference of wrongdoing as opposed to a mere possibility. The court discussed case law in the corporate context regarding the refusal to bring legal action when a right of recovery is clear and concluded that the plaintiffs had not presented facts sufficient to support an inference that legal action by the LLC would have led to “clear recovery” as that concept was interpreted by the court. Thus, dismissal of the plaintiffs’ complaint was proper.

NAMA Holdings, LLC v. Greenberg Traurig, LLP, 880 N.Y.S.2d 34 (App. Div. 1st Dept. 2009) (holding lower court correctly interpreted Nevada LLC’s operating agreement and Nevada statute in concluding member had standing to bring derivative action alleging law firm and one of its partners representing LLC and its managers in other litigation had conflict of interest resulting from managers’ involvement and partner’s hidden financial interest in competing project; holding plaintiff may also assert individual claim against attorneys for LLC based on allegation that defendants colluded with LLC’s managers to drive plaintiff from project).

U.S Medical Neuroscience Investments, L.L.C. v. Morton Plan Hospital Association, Inc., No. 8:09-cv-464-T-24 MAP, 2009 WL 1651424 (M.D. Fla. June 12, 2009). The court applied Indiana law to the question of whether claims by a member of an Indiana LLC against the other member were direct or derivative and found that the action need not be brought derivatively based on Indiana case law recognizing an exception to the general rule that requires certain claims to be brought in a derivative action. This exception applies in the case of a closely held corporation or LLC if the court finds that allowing a direct action will not (1) unfairly expose the corporation or LLC or the defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors or the corporation or LLC, or (3) interfere with a fair distribution of the recovery of all interested persons. In this case, the court concluded that allowing the case to proceed directly without joinder of the LLC would not unfairly expose the LLC or the parties to a multiplicity of actions because both members were before the court. The court found no evidence of any creditor in need of protection, and noted that the LLC’s two main creditors indicated that they favored the case proceeding as a direct action and that they anticipated a fair distribution of any recovery. The court distinguished a case in which an Indiana court determined that the LLC was an indispensable party because that case involved an ongoing venture, but the LLC in the instant case was not alleged to be an ongoing venture.

Yessenow v. Hudson, No. 2:08-CV-353 PPS, 2009 WL 1543495 (N.D. Ind. June 2, 2009). Yessenow sued Hudson and Wright to recover amounts allegedly owed in connection with the failed business dealings of the individuals, and Hudson and Wright countersued Yessenow for breach of fiduciary duty and unjust enrichment in connection with Yessenow’s activities as an officer of two Indiana LLCs. Though the court was confused by the convoluted nature of the pleadings, the court explained that Hudson and Wright appeared to be alleging that Yessenow breached his fiduciary duties as an officer of Illiana Surgery and Medical Center (“Illiana”), an Indiana LLC, and then as an officer of Heartland Memorial Hospital, LLC (“Heartland”), another Indiana LLC, which was the survivor of a merger involving Illiana and Heartland. The court stated that members of an LLC owe fiduciary duties to one another similar to shareholders in a closely-held corporation or partners in a partnership. The court analyzed whether the claims against Yessenow were direct or derivative because Heartland was in bankruptcy proceedings and any derivative claim on its behalf (or any claim of Illiana that became an asset of Heartland in the merger) would be an asset of the bankruptcy estate that must be asserted in bankruptcy court. The court stated that the distinction between a derivative and direct claim was complicated in the context of LLCs because LLCs often have few members who may be regarded more as partners with direct obligations to one another than shareholders in a corporation. The court stated that it thus had discretion to treat a claim by one member against another as a direct action if a direct action would not (1) unfairly expose the LLC to a multiplicity of actions; (2) materially prejudice the interests of the LLC’s creditors; or (3) interfere with a fair distribution of the recovery among all persons with an interest in the claim. Though the court acknowledged that the claims of self-dealing, mismanagement, and failing to exercise due care appeared at first blush to be more common to members as a whole than personal in nature, the court concluded that it had too little information at this stage of the proceedings to determine how to characterize the claims. The court had no information as to the membership of Heartland, or its predecessor Illiana, and no information as to whether the articles of organization or “any other charters or bylaws” specify who is authorized

to sue on behalf of Heartland. Thus, the court found it premature to dismiss the breach of fiduciary duty and unjust enrichment claims as derivative.

Ma'ayergi and Associates, LLC v. Pro Search, Inc., 974 A.2d 724 (Conn. App. 2009) (discussing nature of derivative action and concluding law of derivative actions was not applicable to individual member's defamation claim; distinguishing derivative action, which is brought on behalf of company where company cannot or will not sue on its own behalf, from defamation action in issue, which was brought by LLC itself as well as member in his individual capacity).

Natomas Gardens Investment Group LLC v. Sinadinis, No. CIV. S-08-2308 FCD/KJM, 2009 WL 1363382 (E.D. Cal. May 12, 2009) (applying corporate principles and finding minority members had standing to assert direct versus derivative RICO claim based on injury distinct from majority members; finding LLC members met fair and adequate representation and pleading requirements for assertion of derivative claims for legal and accounting malpractice).

In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. April 23, 2009). A minority member of an LLC brought an action for judicial dissolution of the LLC on the basis that the current managers failed to fulfill the LLC's original business plan and breached their fiduciary duties to the LLC. With respect to the petitioner's allegations of breaches of fiduciary duty, the court stated that the important policy function served by the demand rule in the context of derivative claims cannot be lightly bypassed by resort to an action for judicial dissolution. Because dissolution is a remedy of last resort and because of the limitations imposed on derivative actions, the court stated that a plaintiff only states a claim for dissolution premised on breaches of fiduciary duty where the pleadings allege that: (1) the plaintiff has proven the fiduciary breaches in a plenary action; and (2) there remains a rational basis for a dissolution remedy notwithstanding the remedy granted in the plenary action.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, No. 06 CVS 6091, 2009 WL 877636 (N.C. Super. March 31, 2009). Three members of a North Carolina PLLC law firm (the "Firm") left the firm to start their own firm. The members never agreed as to how to handle the departing members' interests in the Firm or whether the departure of the members was a withdrawal or the Firm dissolved. Eventually, the departing members filed suit, individually and derivatively on behalf of the Firm, seeking an accounting, liquidating distributions, damages, and injunctive relief preventing the Firm from incurring debt or practicing law in the name of the Firm except for its winding up. The remaining members asserted various affirmative defenses and counterclaims. As an initial matter, the court addressed a challenge to the departing members' standing to bring the action. The court determined that the departing members would be deemed members of the Firm when the action was commenced. Because the departing members did not constitute a majority of the members of the Firm, they did not have authority to cause the Firm to bring any claims, but the court concluded that the departing members had standing to bring derivative claims on behalf of the Firm.

Kumar v. Kumar, Civil Action No. 1:07CV263-DAS, 2009 WL 902035 (N.D. Miss. March 31, 2009) (noting that action was derivative action, but stating that chancellor may treat derivative suit as direct action and order individual recovery as long as it will not prejudice creditors and other interested parties).

Cement-Lock v. Gas Technology Institute, 618 F.Supp.2d 856 (N.D. Ill. 2009). The plaintiffs filed a derivative suit on behalf of a Delaware LLC based on an alleged fraudulent scheme to deprive the LLC of millions of dollars in intellectual property. The court addressed the propriety of the action as a derivative action and concluded that the action was proper and was not barred by unclean hands. The court rejected the argument that the two minority member plaintiffs did not fairly and adequately represent the interests of members similarly situated, stating that it is not always necessary that minority shareholders bringing a derivative suit represent the interests of the majority. Instead, the plaintiff must be capable of advancing the interest of those "similarly situated." The court also rejected the argument that plaintiff Cement-Lock ("CL"), an Illinois LLC, was a "sham" entity with no real interest in the litigation. The court noted that Illinois courts generally apply corporate veil piercing principles to LLCs and concluded that the defendants failed to show that piercing CL's LLC veil was necessary or appropriate. The court's analysis of the defendants' unclean hands argument required the court to determine whether the conduct of certain members of CL should be imputed to CL. The court determined that the prior Illinois Limited Liability Company Act governed the acts of CL's members and that the terms of CL's operating agreement controlled the scope of the members' authority under that statute. The operating

agreement granted to managing members the exclusive authority to act for and bind CL. That authority could be delegated, but there was no evidence of any delegation. Because the individuals in question were not managing members or mere proxies for managing members, their misconduct was not attributable to CL. The court also was not persuaded that the knowledge or conduct of the individuals in question should be imputed to CL under common law. Focusing on the conduct of the individual derivative plaintiff and the managing members of CL, the court concluded that the derivative action was not barred by unclean hands.

Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (S.C. 2009). Historic Charleston Holdings (“HCH”) became involved in a dispute with its co-member in a real estate development LLC and filed suit, individually and derivatively, against the co-member and the LLC. The parties referred the case to a special master who found that HCH was entitled to half the sale proceeds from certain property sold by the LLC and ordered dissolution and termination of the LLC. Among the issues addressed on appeal was the propriety of the special master’s award to HCH of statutory costs and attorney’s fees. Although the South Carolina LLC statute authorizes an award of attorney’s fees and costs to a prevailing plaintiff in a derivative action, the court held that HCH failed to properly plead the action as a derivative action and the special master thus erred in awarding attorney’s fees under the statute. While HCH’s complaint stated that HCH brought the action individually and in a derivative capacity, it did not contain particularized allegations necessary in a derivative action. Further, the relief granted was personal to HCH in that the special master ordered a distribution to HCH instead of an initial return of the converted funds to Dixie.

DirectTV Latin America, LLC v. Park 610, LLC, No. 08 Civ. 3987(VM)(GWG), 2009 WL 692202 (S.D.N.Y. March 18, 2009) (holding LLC was indispensable party to derivative claims brought on its behalf because rule that corporation is indispensable party in derivative action on its behalf applies to LLCs).

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The minority member of a Missouri LLC sued the majority member for breach of the operating agreement based on the majority member’s withdrawal of its capital contribution without the consent of the minority member in violation of the operating agreement. The majority member argued that the minority member lacked standing to assert the claim because the claim belonged to the LLC rather than the minority member. The court acknowledged corporate case law requiring that shareholders bring suit to redress corporate injuries derivatively, but the court pointed out that the minority member based its claim on breach of the operating agreement rather than a recovery of corporate funds, and the Missouri LLC statute expressly provides that suits to enforce the operating agreement may be brought by any member. However, the court further pointed out that the Missouri statute contains special rules regarding the enforcement of capital contributions. Relying on the statutory provision that a member’s capital contribution shall not be enforceable by any other member unless the obligated member has specifically agreed or consented to such enforcement, the court stated that the statute precluded a claim for enforcement of that part of the operating agreement given the absence of a specific agreement allowing one member to enforce another member’s capital contribution. The court rejected the minority member’s argument that it was permitted to seek damages for a collateral consequence of the withdrawal of the capital contribution (the LLC’s inability to repay the minority member’s loan to the LLC) as opposed to enforcement of the capital contribution by payment of the claim. The court concluded that such a claim for damages was likewise precluded by the statute. The court acknowledged that it was not altogether clear whether the statutory provision was applicable because the minority member arguably did not seek “enforcement” of the payment of the capital contribution, but the court concluded that the claim for damages still failed even if the statute allowed it because the loan that the minority member claimed the LLC would not be able to pay was not yet due. The court also rejected the minority member’s claim that the majority member’s withdrawal of its capital contribution breached its fiduciary duty to the minority member. The court stated that the minority member failed to point to any provision of the operating agreement that imposed a fiduciary duty on the majority member, and, even if the majority member owed a duty of good faith and fair dealing as a “majority shareholder,” the duty was based on its status as a member. Both the operating agreement and the statute provided that a member is not liable to another member “solely by reason of acting in his capacity as a member.” Assuming the duty of care owed to the LLC and, indirectly, its members, was violated, the court stated that the harm would have to be remedied through a derivative suit. There was no direct harm to the minority member since the inability to repay the minority member’s loan would harm the member in a capacity other than as a member, and any fiduciary duty would not extend to the member in the capacity as an

outsider. Since the plaintiff's claims for breach of the operating agreement and breach of fiduciary duty failed, claims for civil conspiracy based on those causes of action failed as well.

Spellman v. Katz, C.A. No. 1838-VCN, 2009 WL 418302 (Del. Ch. Feb. 6, 2009). Two doctors, Spellman and Katz, each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which the parties leased space for their joint medical practice. After their relationship deteriorated, Spellman left to practice on his own, and the two were unable to agree on how to become disentangled from each other. Spellman sought judicial dissolution based on the terms of the operating agreement, and Katz asserted a derivative counterclaim alleging that Spellman had breached his fiduciary duties to the LLC by refusing to participate in the refinancing of the building's mortgage. Spellman sought dismissal of the counterclaim based on Katz's failure to adequately plead demand futility. Katz argued that demand futility was demonstrated because Spellman could veto any proposed action, and it would be futile to request Spellman's permission for the LLC to sue Spellman. Noting that case law governing corporate derivative suits is equally applicable to suits on behalf of Delaware LLCs, the court stated that the mere threat of personal liability is insufficient to show a substantial likelihood of personal liability. To establish demand futility, Katz was required to (i) show a "substantial likelihood" of Spellman's personal liability and (ii) plead "with particularity" the facts supporting his claim that there was a "substantial likelihood" of personal liability. The court stated that Katz had pleaded only the naked assertion of a breach of fiduciary duty and the counterclaim showed no more than a mere threat of personal liability. Thus, it was insufficient to satisfy the pleading requirements, and the motion to dismiss the counterclaim was granted.

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

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

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

Kahn v. Portnoy, Civil Action No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008). The plaintiff, a "shareholder" of a publicly traded Delaware LLC, brought a derivative action against the directors of the LLC alleging that the directors breached their fiduciary duties to the LLC by approving a transaction designed to benefit one of the directors and certain entities affiliated with the director. The directors moved to dismiss the action on the basis that the

directors acted in accordance with their duties under the LLC agreement. The court found that there was more than one reasonable interpretation of the LLC agreement and denied the motion to dismiss because the court was not at liberty to choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). The court also addressed whether the plaintiff had alleged sufficient facts to establish demand was excused in this derivative action. The court noted that corporate case law supplies the governing principles for evaluating demand futility and thus applied the *Aronson* test, under which demand is excused if the plaintiff alleges particularized facts that establish a reasonable doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. The LLC agreement provided that the duties of the directors would be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law unless otherwise specifically provided for in the LLC agreement, and Section 7.5(a) of the LLC agreement modified the duties of directors of a Delaware corporation by providing that “[i]t shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence.” The court stated that Section 7.5(a) would not alter the *Aronson* analysis because the conflicts alleged in the case did not involve a conflict between a shareholder and a director or a shareholder and the LLC. Further, even assuming that Section 7.5(a) applied to the board’s decision whether to initiate suit in the case, the court was not convinced that the demand futility or *Aronson* requirements were altered by the LLC agreement. The court noted that the LLC agreement could have altered the demand futility and *Aronson* requirements, but the court did not interpret Section 7.5(a) to eliminate or modify the ability of shareholders to bring a suit on behalf of the LLC or modify the prerequisites for doing so. Taking the well-pleaded complaint as true, the court concluded that it created a reasonable doubt as to the disinterestedness or independence of a majority of the board.

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

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

should not be dismissed based on allegations that the other member was the alter ego of the LLC and the alter ego should be vicariously liable for the member's breach of fiduciary duty and other wrongs. The court stated that this belated argument was waived; however, to fully put the issue to rest, the court addressed the argument. The court stated that its research indicated that the law cut against the plaintiff on this argument. Noting that the plaintiff's argument was a "reverse piercing" claim rather than a traditional alter ego claim, the court declined to apply the doctrine of reverse piercing based on California case law rejecting the doctrine.

Polak v. Kobayashi, Civ. No. 05-330-SLR, 2008 WL 4905519 (D. Del. Nov. 13, 2008). Two individuals, Polak and Kobayashi, formed a Delaware LLC to acquire an undeveloped tract of land in Hawaii. Polak initiated litigation against Kobayashi after their relationship soured. Polak sought judicial dissolution and asserted various other claims against Kobayashi. Because Polak and Kobayashi were citizens of different states, the court concluded that it had diversity jurisdiction over the dissolution claim, but the court did not have jurisdiction over derivative claims because the LLC was a real party in interest and its citizenship (i.e., that of its individual members) destroyed diversity. The only claim of Polak's that was direct other than the judicial dissolution claim was a breach of contract claim based on Kobayashi's unilateral decision-making of the LLC, which impaired Polak's contractual right to jointly manage the LLC. The court held that claims for breach of fiduciary duty, declaratory judgment, and unjust enrichment, were, at least in part, derivative claims because they were based on Kobayashi's misappropriating and acquiring an additional tract of land in his own name.

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

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

H. Necessary Parties

Odom v. Posey, Civil Action No. 09-3532, 2009 WL 2356865 (E.D. La. July 27, 2009) (holding LLC was indispensable party destroying diversity jurisdiction in litigation between members to determine validity of actions taken at meeting, declare operating agreement invalid based on fraud and failure of consideration, and enjoin defendant members from managing LLC).

DirectTV Latin America, LLC v. Park 610, LLC, No. 08 Civ. 3987(VM)(GWG), 2009 WL 692202 (S.D.N.Y. March 18, 2009) (holding LLC was not indispensable party with respect to claims by one member against other member that would only affect members' interests in LLC because members' interests in Delaware LLC are personal property of members rather than property of LLC itself; LLC was indispensable party to derivative claims brought on its behalf because rule that corporation is indispensable party in derivative action on its behalf applies to LLCs; LLC was indispensable party to claims involving return of contributions and loans to LLC).

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

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

I. Scope of Discovery

Dees v. Kidney Group, LLC, 16 So.3d 277 (Fla. App. 2009). An LLC member sued the other two members and the LLC seeking access to records, judicial dissolution due to deadlock, appointment of a custodian or receiver, and damages against the two members for breach of their duties to the LLC. The plaintiff alleged that the defendant members misappropriated opportunities, engaged in self-dealing, and violated the operating agreement. The plaintiff sought documents relating to the LLC's clients and referencing the business relationship between or among opposing parties in the suit. When the plaintiff scheduled the deposition of the LLC's chief financial officer, the LLC obtained a protective order prohibiting any inquiry into three non-party LLCs. The appeals court concluded that the trial court did not apply the standards of the Florida rule regarding protective orders and that the plaintiff showed the order caused material harm given her allegations of mismanagement and usurpation of opportunities in breach of duties allegedly owed the LLC. The protective order prevented discovery concerning two prior clients and a new venture formed by the other two members of the LLC, and the information appeared relevant to the plaintiff's claims or reasonably calculated to lead to the discovery of admissible evidence. Thus, the court of appeals quashed the protective order.

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

J. Arbitration

Gilbert Street Developers, LLC v. La Quinta Homes, LLC, 174 Cal.App.4th 1185, 94 Cal.Rptr.3d 918 (Cal. App. 4th Dist. 2009) (holding question of whether arbitrators had power to determine their own jurisdiction was for courts because arbitration clause in LLC operating agreement stating that arbitration would be "conducted in accordance with the Rules of the American Arbitration Association existing at the date thereof" did not clearly and unmistakably provide that arbitrators had power to determine their own jurisdiction; holding that arbitration clause encompassing any dispute arising out of LLC operating agreement "exclusive of matters which are expressly within the discretion of the Members" did not require arbitration of dispute regarding application of push-pull buy-out provision because numerous choices or discretionary decisions by members were involved in process described in buy-out provision).

Rahman v. Park, 880 N.Y.S.2d 704 (App. Div. 2d Dept. 2009) (holding individual who provided funds to LLC member to increase member's interest in LLC and entered side agreement with LLC member to obtain one-third of member's interest was not bound by arbitration clause in operating agreement, even though side agreement contained provision whereby individual agreed to be bound by operating agreement, because side agreement contemplated judicial

resolution of claims (as evidenced by reference to court of competent jurisdiction in confidentiality clause) and contained clause specifying that side agreement controlled in event of conflict between side agreement and operating agreement).

Williamette Crest Gaming, LLC v. Play N Trade Franchise, Inc., Civil No. 09-461-ST, 2009 WL 224381 (D. Or. July 27, 2009) (holding franchisor could enforce arbitration clause in franchise agreement with LLC against signatory and non-signatory members of LLC where franchise agreement expressly encompassed each person owning more than 20% of LLC franchisee; assuming franchise agreement did not control, members' allegations of misrepresentation related to disclosures required by franchisor, were relied upon as agents of LLC franchisee, and caused damages to LLC and thus must be brought in arbitration because claims were derivative of LLC's).

In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. April 23, 2009). A minority member of an LLC brought an action for judicial dissolution of the LLC on the basis that the current managers failed to fulfill the LLC's original business plan and breached their fiduciary duties to the LLC. With respect to the petitioner's allegations of breaches of fiduciary duty, the court stated that the petitioner could not bypass a derivative action by resort to an action for judicial dissolution. The court additionally concluded that the petitioner's attempt to raise fiduciary duty claims in this judicial dissolution action was an improper attempt to bypass the dispute resolution procedure set forth in the LLC agreement, which required that "any questions, issues, or disputes arising out of or relating to the Agreement" be handled by negotiation, followed by mandatory mediation and, finally, binding arbitration.

Goldman v. KPMG LLP, 173 Cal.App.4th 209, 92 Cal.Rptr.3d 534 (Cal. App. 2d Dist. 2009). The plaintiffs sought damages in connection with allegedly fraudulent tax shelter schemes developed, marketed, and implemented by their former accountants, lawyers, and investment advisors. In one of the schemes, the process involved formation of LLCs in which the plaintiffs and their investment advisors became members. The operating agreements contained broad arbitration clauses. When plaintiffs sued the accountants, lawyers, and investment advisors, the accountants and lawyers sought an order compelling arbitration on the ground that the plaintiffs, as signatories to an arbitration agreement with the investment advisors, should be equitably estopped from asserting the right they otherwise would have had to pursue their claims against the accountants and lawyers in court. The court held that the plaintiffs were not estopped from suing the accountants and lawyers for fraud and negligence since the plaintiffs' claims were not founded on obligations created by the operating agreements. According to the court, the operating agreements were merely a procedural and collateral step in the creation of the tax shelters, and the operating agreements were not relied upon in the complaint.

Farina v. Perotti, No. CV084032655, 2009 WL 941846 (Conn. Super. March 12, 2009). Farina sought to compel Perotti to participate in arbitration based on an arbitration clause contained in the LLC agreement of Hometown Waste, LLC ("Hometown Waste"). The members of Hometown Waste were Farina and HTW Funding, LLC ("HTW"). Farina alleged that Perotti used HTW to control Hometown Waste and that Perotti should be bound by the arbitration clause in the Hometown Waste LLC agreement though he was not a signatory to the agreement. The court denied Farina's application to compel Perotti to arbitrate because the stipulation of the parties contained information regarding the ownership of the LLCs but no information as to agency or misuse so as to determine if Perotti was bound by the arbitration clause on veil piercing principles.

Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC, 310 Fed.Appx. 858, 2009 WL 383680 (6th Cir. 2009) (holding LLC could invoke arbitration clause in agreement entered by commonly owned corporation where corporation was mere instrumentality or alter ego of LLC under either Tennessee or Delaware law).

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

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

incomplete and unenforceable due to absence of asset purchase agreement referred to and incorporated by reference in operating agreement).

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

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

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

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

from and sought relief for breach of the operating agreements, which called for judicial dispute resolution rather than arbitration.

K. Claim Preclusion

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

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

L. Nature of LLC

Gidley v. Oliveri, 641 F.Supp.2d 92 (D.N.H. 2009) (discussing arrest and prosecution of LLC and holding officers were entitled to qualified immunity and were not liable for negligent or intentional infliction of emotional distress on LLC’s individual member where officers sought advice of county prosecutor before obtaining complaint against LLC “in care of” individual member and arranging for member to appear, with counsel, at police station to undergo standard booking-and-summons procedure).

Roadenbaugh v. Correct Care Solutions, No. 08-2178-CM, 2009 WL 1873796 (D. Kan. June 30, 2009) (rejecting plaintiff’s assertion that LLC could not avoid § 1983 liability because it was LLC rather than corporation and stating that plaintiff must show policy or custom with direct causal link to alleged injury regardless of whether private entity is organized as cooperative, corporation, partnership, LLC or otherwise).

Cappella v. Suresky at Hatfield Lane, LLC, 24 Misc.3d 1225(A), 2007 WL 6830765 (N.Y. Sup. 2007) (discussing distinction between LLCs and corporations but acknowledging that alter ego doctrine appeared to apply to all legal entities).

Tilley v. Global Payments, Inc., 603 F.Supp.2d 1314 (D. Kan. 2009) (noting that losses to LLC are not recoverable under Federal Credit Reporting Act because FCRA only protects individual consumers).

Marlowe v. Federal Deposit Insurance Corporation, Civil No. 08-5161, 2009 WL 856684 (W.D. Ark. March 30, 2009) (holding that insured status of account of family estate planning LLC should be analyzed under rule applicable to unincorporated association rather than rule applicable to corporate accounts, but noting that such analysis did not materially alter outcome of case because evidence did not support treating LLC as fiduciary or non-qualifying entity having no business purpose).

Summers v. City of Rochester, 875 N.Y.S.2d 658 (App. Div. 4 Dept. 2009) (holding that city’s formation of LLC to purchase and operate ferry did not violate New York constitutional provision that public corporation must be created by special act of legislature).

Cater v. State, 5 So.3d 391 (Miss. 2009) (holding LLC was “person” who could be victimized under criminal false pretenses statute).

JB4 Air LLC v. Department of Revenue, 905 N.E.2d 310 (Ill. App. 2009) (holding that single member LLC that owned airplane used by member for personal purposes was not encompassed within term “individual” for purposes of Illinois Use Tax Act exemption).

Ognibene v. Parkes, 599 F.Supp.2d 434 (S.D.N.Y. 2009) (concluding that extending corporate contribution ban on campaign contributions to partnerships and LLCs was constitutional, and Congress’s decision to limit FEC restrictions to corporations did not render local regulation of contributions by other entities unconstitutional).

Patel v. Garmo, No. 1:06-CV-469, 2009 WL 279034 (W.D. Mich. Feb. 5, 2009) (holding installment payment provision of Michigan judgment enforcement statute did not apply to LLC because installment payment provision was intended to protect individual debtors from garnishment of wages and LLC does not have wages or money due for “personal work and labor”).

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

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

M. Formation or Failure to Form LLC

Markoff v. Aaronoff, No. B204532, 2009 WL 1301683 (Cal. App. 2 Dist. May 12, 2009) (finding record did not support award of attorney’s fees based on attorney’s fees provision in unsigned loan documents and operating agreement for LLC that was never formed because there was no evidence parties ever agreed to terms of such documents although parties executed enforceable joint venture agreement in which they agreed to form LLC real estate venture).

Midsun Group, Inc. v. JEM Development, LLC, No. CV044000356, 2009 WL 1532334 (Conn. Super. May 5, 2009) (finding parties entered into two valid, enforceable, express, oral agreements to form real estate LLCs in which plaintiff would receive minority membership interest and that defendant breached those agreements and finding that plaintiff, a passive investor, placed its trust in defendant due to defendant's purported expertise and experience, that parties thus stood in fiduciary relationship, and that defendant did not meet its burden to establish that defendant dealt fairly with plaintiff).

Leon v. Kelly, No. CIV 07-0467 JB/WDS, 2008 WL 6011935 (D.N.M. Dec. 3, 2008) (finding genuine dispute as to whether parties had oral partnership agreement or agreement to create LLC).

JDH Capital, LLC v. Flowers, No. 07 CVS 5354, 2009 WL 649161 (N.C. Super. March 13, 2009). The court analyzed a letter of intent to form an LLC for the commercial development of certain property and concluded the letter of intent was non-binding. The court also concluded that the unenforceable letter of intent was not converted into an enforceable agreement by an oral agreement or partial performance.

Rosenshein v. Rose, 867 N.Y.S.2d 20 (N.Y. Sup. 2008) (rejecting claim that parties agreed to form LLC or partnership where there was no proof of any oral or written contract that plaintiff would be partner or member and proposal lacked material terms and was simply agreement to negotiate).

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

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

N. Pre-Formation Transactions

Smith v. New Leaf Associates, L.L.C., Civil Action No. 05-919-C, 2009 WL 2475072 (M.D. La. Aug. 12, 2009). The plaintiffs sued a Florida LLC and the individual who was its sole manager, secretary, and treasurer for fraud and RICO violations. The LLC argued that it could not be held liable for alleged wrongful acts that took place before it was formed, and the plaintiffs argued that the individual defendant was personally liable for the debts of the LLC because he engaged in business before the LLC was formed. The court held that the individual defendant could be held personally liable if the plaintiffs could prove that the individual transacted business on behalf of the LLC prior to its organization with actual knowledge the LLC had not been organized unless the plaintiffs also had knowledge that the LLC was not yet organized. The court relied upon Florida statutes providing that an LLC's existence begins when the articles of organization are filed, prohibiting an LLC from transacting business prior to its existence except for matters incidental to its organization, and imposing liability on persons acting on behalf of an LLC with actual knowledge that the LLC has not been organized except for liability to persons who also have actual knowledge that the LLC has not been organized. Because the plaintiffs failed to produce any evidence indicating that the LLC engaged in business in furtherance of the alleged fraudulent scheme after the date of its organization, the court dismissed the claims against the LLC.

River City Rentals, LLC v. Bays, No. 4:08-CV-00104-R, 2009 WL 2753304 (W.D. Ky. Aug. 26, 2009) (stating that individual could not have been acting as agent for LLC before its formation because earliest time of admission of member is date LLC is formed and nothing in Kentucky LLC statute allows individual to act as LLC's agent before LLC is formed; therefore, alleged fraudulent misrepresentation made to individual prior to LLC's formation could not be asserted by LLC because misrepresentation must be made to plaintiff or plaintiff's agent).

Morof v. United Missouri Bank, No. 08-10526, 2009 WL 1260015 (E.D. Mich. April 30, 2009) (rejecting plaintiff's claims against bank for alleged unauthorized endorsements on checks written by plaintiffs where plaintiffs

knew they were issuing checks as prospective investors to LLC not yet formed, there was no aggrieved intended payee, and plaintiffs' conduct ratified endorsements on investment checks).

In re Berris (Goldberg v. Steamplant Condominiums, LLC), Bankruptcy No. 08-13940-BKC-AJC, Adversary No. 08-10603-AJC, 2009 WL 1139085 (Bankr. S.D. Fla. April 27, 2009). The court concluded that the debtor, as the promoter of an LLC that was never formed, had standing to sue for the return of a deposit and breach of contract under a contract entered into in the name of the LLC. The court stated that, as a contracting promoter of a non-existent entity, the debtor became individually liable under the contract and logically became a beneficiary as well. The defendant argued that cases supporting the proposition that the promoter of a non-existent corporation is personally liable on a contract do not necessarily support the proposition that the promoter has standing to sue on the contract. The court acknowledged that case law was sparse in this regard, but concluded that Florida courts would reach a result similar to that in cases in other jurisdictions holding that a promoter may assert a claim under a contract signed on behalf of a non-existent corporation.

Model Board, LLC v. Board Institute, Inc., No. 08-12700, 2009 WL 691891 (E.D. Mich. March 12, 2009). The plaintiff and defendant agreed to form a Michigan LLC to be called "Model Board, LLC," but it was not formed during the time frame in issue, and the court held that it was not a "de facto corporation" because there was insufficient evidence that the members made bona fide efforts to incorporate in compliance with a charter or statute or that the company engaged in actual use of corporate powers that it would have obtained had it been incorporated properly. The court also held that the facts did not support the theory of corporation by estoppel.

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

Kerrigan v. Bourgeois, 16 So.3d 612 (La. App. 2009) (recognizing general rule of limited liability of LLC member under Louisiana law and holding plaintiff failed to prove any fraud, negligence, or wrongful conduct on part of member which would be basis for imposing personal liability on member).

Berdon v. Iwaskiewicz, No. CV065006800, 2009 WL 2358299 (Conn. Super. July 8, 2009) (holding there was no basis to hold managing member of LLC personally liable where plaintiffs had notice that they were contracting with LLC, individual did not do any physical labor involved in allegedly faulty roofing job, and all paperwork necessary to maintain LLC in good standing with Secretary of State's office was properly maintained).

Cyborowski v. Ennest, No. 08-13736-BC, 2009 WL 1658181 (E.D. Mich. June 11, 2009) (recognizing limited liability of LLC members and managers under Michigan law and stating that allegations failed to identify personal conduct creating individual liability on part of LLC members).

Cherry v. 3075 Wilshire Boulevard, No. B191020, 2009 WL 1593576 (Cal. App. 2 Dist. June 9, 2009) (discussing limited liability of LLC members and managers under California law and potential liability for personal participation in tortious or criminal conduct under principles analogous to corporate officers and directors, and concluding that evidence was insufficient to support personal liability of managing members of LLC because evidence did not establish that managing members actively participated in wrongful conduct, knew or should have known of dangerous condition in building owned by LLC and failed to take action to mitigate harm, or unreasonably relied on subordinates and contractors to maintain the building).

Trustees of the Estate of Bishop v. Brewer Environmental Industries, LLC, Civil Nos. 06-00612 HG-LEK, 08-00558 HG-LEK, 2009 WL 1544581 (D. Hawaii June 2, 2009) (refusing to dismiss CERCLA claims against individual members of LLC lessee of property because CERCLA provides for potential individual liability of any person who owned or operated facility at which hazardous substances were disposed).

In re Bedrock Marketing, LLC (Jubber v. Sleater), 404 B.R. 929 (Bankr. D. Utah 2009) (determining personal liability of LLC member as maker of note where signature did not unambiguously show representative capacity).

Reserves Development LLC v. Crystal Properties, LLC, C.A. No. 05C-11-011-RFS, 2009 WL 1514929 (Del. Super. May 19, 2009) (stating that LLC member must have participated in LLC's torts to impose personal liability on member for LLC's torts, and individual liability may arise if member directed, ordered, ratified, approved, or consented to tortious act; finding no evidence of personal participation by two LLC members in any fraud).

Double-Eight Oil and Gas, L.L.C. v. Caruthers Producing Company, 13 So.3d 754 (La. App. 2009) (holding LLC members could not be added to judgment against LLC because LLC statute provides for limitation of liability of members and members were never named as parties to suit).

Gator Development Corporation v. VHH, Ltd., No. C-080193, 2009 WL 1027584 (Ohio App. April 17, 2009) (acknowledging that individual could not be held liable for obligation of LLCs or LLP merely due to status as member, manager, or partner, but stating that he could be held liable for his own tortious acts or omissions, and holding that allegation that individual "participated" in improper and intentional interference with sales agreement comported with lenient rules of notice pleading for purposes of claim against individual in his personal capacity).

Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872 (Del. Ch. 2009). Kuroda, who served as an investment advisor for a group of entities that invested in Japanese corporations, was a non-managing member of a Delaware LLC that served as the general partner of the master fund. Because of disagreements with the managing members, Kuroda decided that he could no longer serve as an advisor to the funds. After negotiations regarding Kuroda's withdrawal from the LLC failed, Kuroda filed suit alleging numerous causes of action against the LLC, the managing members, and the individuals who owned and controlled the managing members. Kuroda asserted breach of contract claims against the LLC and the managing members based on their failure to pay him incentive allocations owed, failure to honor his request to withdraw the balance of his capital account, and issuance of a Schedule K-1 that improperly assigned him taxable income. The managing members argued that the breach of contract claims against them should be dismissed because they were not liable for the LLC's purported breaches of the LLC agreement. They relied upon language in the LLC agreement that tracked the language of the Delaware Limited Liability Company Act providing that a member is not liable for the debts, obligations, and liabilities of the LLC solely by reason of being a member. Another provision of the LLC agreement exculpated members from liability to one another for any action or inaction unless the action or inaction arose out of or was attributable to gross negligence, willful misconduct, or bad faith, in which case a member would be liable. The court held that, under at least one reasonable interpretation, these provisions did not limit the liability of the managing members for the kinds of breaches alleged in Kuroda's complaint. The court stated that the provision limiting liability of the members solely by reason of being a member did not necessarily limit liability for reasons other than their member status. Additionally, breaches of the agreement could reasonably be described as "any action or inaction," and the defendants did not argue that they were exculpated from liability under the terms of the exculpation provision. The language of the exculpation provision suggested that the parties knew how to clearly define their liability to one another and chose not to limit their liability for breach of contract claims alleged in the complaint. Furthermore, the provisions of the LLC agreement allegedly breached by the managing members did not specify whether members could be held responsible for their breach. Given the ambiguity created by various provisions of the agreement, the court could not conclude as a matter of law that the managing members could not be liable for the alleged breaches of the agreement.

Cancro v. McClure, No. DBDCV085004059S, 2009 WL 1140497 (Conn. Super. March 31, 2009) (holding hand-written document signed by sole member of LLC and reciting receipt of funds by LLC from plaintiff failed to meet elements of written agreement or negotiable instrument, but elements for claim of unjust enrichment against LLC's sole member were met).

Hudson and Keyse, LLC v. Goldberg & Associates, LLC, No. 07-81047-CIV, 2009 WL 790115 (S.D. Fla. March 24, 2009) (holding plaintiffs were not entitled to summary judgment against managing member with respect to LLC's breach of contract because managing member did not personally guarantee contract and plaintiffs did not show LLC's veil should be pierced to hold managing member personally liable).

Medical Practice Solutions, LLC v. Commissioner of Internal Revenue, 132 T.C. No. 7 (U.S. Tax Ct. 2009). A single member LLC failed to pay employment taxes for several periods, and the IRS sent notices of lien and intent to levy to the LLC's member. The member claimed that only the LLC was liable for the unpaid taxes and that the check-

the-box regulations, as applicable to employment taxes related to wages paid prior to January 1, 2009, were invalid. The member argued that the amended regulations, which treat a disregarded entity as a corporation for purposes of employment tax reporting and liability effective January 1, 2009, show that the prior regulations were invalid. Relying on the decisions of the federal courts of appeals in *Litriello v. United States* and *McNamee v. Dept. of Treasury*, the court rejected the member's arguments.

Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC, No. 08 Civ. 0442(TPG), 2009 WL 750195 (S.D.N.Y. March 20, 2009) (stating that individual defendants could be personally liable if they actively participated in LLC's trademark infringement).

In re Gonzalez, No. 4:07-bk-02459-JMM, 2009 WL 531866 (Bankr. D. Ariz. Feb. 25, 2009) (holding credit card issuer did not establish liability of individual for LLC's credit card debt because credit card agreement was for business account and individual signed only as agent of LLC).

Trinc, Inc. v. Radial Wheel, LLC, Civil No. 07-12488, 2009 WL 606453 (E.D. Mich. Feb. 25, 2009) (acknowledging that member is not liable for debts and obligations of LLC under Georgia and Michigan law, stating that agent who contracts within bounds of authority for disclosed principal is not liable on contract, and concluding that individuals did not have liability on LLC's contract).

Weinmann v. Duhon, 997 So.2d 647 (La. App. 2008) (interpreting settlement agreement arising out of protracted dispute among LLC members and finding trial court erred in concluding that members, who did not specify capacity in which they signed, were personally liable under settlement agreement for LLC's obligation to other members).

Krimmel v. Hovenssa, L.L.C., Civil No. 2002-0028, 2007 WL 6027821 (D. Virgin Islands Nov. 28, 2007) (holding LLC member was protected from liability for any alleged discrimination taking place at refinery operated by LLC because all of member's alleged actions were taken as member or manager of LLC).

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

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

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

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

Haire v. Bonelli, 870 N.Y.S.2d 591 (N.Y. App. Div. 3d Dept. 2008) (holding allegations that officers or members of defendant corporations or LLCs participated in commission of tort in furtherance of business by reducing

or eliminating mall security to maximize profits stated basis to impose personal liability on officers or members for injuries sustained by victim of shooting on mall premises).

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

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

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

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

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

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

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

Ehresmann v. Muth, 757 N.W.2d 402 (S.D. 2008). The plaintiff purchased some property from Doug and Charity Muth pursuant to a contract for deed and subsequent warranty deed listing the Muths as sellers. A prior purchase agreement listed an LLC in which Doug Muth had an interest as the seller. The plaintiff experienced problems with the property and brought suit against Doug Muth alleging fraud, negligent misrepresentation, negligent construction, and

breach of implied warranty. The court concluded that there was a fact issue as to whether Muth was acting in an individual or agent capacity when overseeing construction and sale of the property, and the trial court erred in granting Muth summary judgment on the issue of his personal liability.

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

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

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

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

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

P. LLC Veil Piercing

In re Suhadolnik (Denmar Builders, Inc. v. Suhadolnik), Bankruptcy No. 08-71951, Adversary No. 08-7116, 2009 WL 2591338 (Bankr. C.D. Ill. Aug. 20, 2009). A creditor of an Illinois LLC in which the debtor was a member and manager sought to pierce the veil of the LLC in order to hold the debtor personally liable for a debt owed by the LLC to the creditor. The debtor argued that Illinois law precludes piercing the veil of an LLC, relying on provisions of the Illinois Limited Liability Company Act. The court acknowledged that the statute clearly provided that an individual is not personally liable for the debts of an LLC solely because the individual is a member or manager or because the LLC has not observed formalities. The debtor argued, however, that the statute goes further and bars veil piercing under all circumstances. The court analyzed Illinois case law and prior versions of the Illinois LLC statute and concluded that veil piercing is available with respect to members and managers of Illinois LLCs under traditional veil piercing theories such as alter ego, fraud, and undercapitalization. The court found the complaint sufficient to withstand a motion to dismiss as to the veil piercing claim based on the allegation that the debtor had a controlling interest in the LLC and numerous allegations that could plausibly support a finding of alter ego, fraud, or undercapitalization.

Pactiv Corporation v. Perk-up, Inc., Civil Action No. 08-05072, 2009 WL 2568105 (D.N.J. Aug. 18, 2009) (discussing New Jersey and New York law on veil piercing, stating that choice of law issue need not be addressed at this stage of litigation because legal analysis to determine whether veil piercing is appropriate under New York and New Jersey law is substantially similar, and finding that plaintiffs' allegations were sufficient to avoid dismissal of veil piercing or alter ego claim).

Empire Bank v. Rumisek, 215 P.3d 621 (Kan. 2009) (discussing factors necessary to establish alter ego and finding genuine issues of material fact remained on claim that LLC was defendant member's alter ego).

Labbe v. Carusone, 974 A.2d 738 (Conn. App. 2009) (holding evidence did not support piercing veil of LLC to impose liability on defendant under identity or instrumentality theories where defendant transferred property from LLC to defendant in accordance with agreement with LLC and without awareness of plaintiff's legal action and defendant did not have unity of interest and ownership such that independence ceased to exist).

In re White (Williams v. White), 412 B.R. 860 (Bankr. W.D. Va. 2009) (recognizing that LLC veil may be pierced under limited circumstances after a judgment is obtained against LLC but finding plaintiffs failed to justify piercing veil of LLC in issue because plaintiffs did not first obtain judgment against LLC and, in any event, failed to establish use of LLC as alter ego to perpetrate fraud or deliberate undercapitalization requiring piercing to achieve justice).

Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC, C.A. No. 4380-VCN, 2009 WL 2356881 (Del. Ch. July 30, 2009). Evans, an individual who was the sole member and manager of an LLC, signed a lock-up agreement in which he agreed not to pledge or transfer certain stock owned by the LLC for a specified period of time. The agreement was signed by the individual and did not refer to the LLC. Below the individual's name, the title "Chief Executive Officer" appeared, but no company name was provided. The court found that Evans executed the lock-up agreement in his personal capacity and that the agreement did not bind the LLC. The court addressed in a footnote the defendant's argument that the LLC should be viewed as the alter ego of Evans and that the LLC should be estopped from pledging its shares in violation of the agreement. The court appeared to acknowledge the possibility that an LLC's veil could be pierced, but stated that the defendant did not plead facts necessary to put the alter ego and equitable estoppel arguments at issue. The court stated that it was not the plaintiff's burden to plead a negative, i.e., that the LLC was not inadequately capitalized.

Equity Trust Company v. Cole, 766 N.W.2d 334 (Minn. App. 2009). Investors in a large-scale real estate investment fraud scheme sued numerous LLCs and sought to hold several individuals who allegedly orchestrated the scheme liable as alter egos of the LLCs. The state intervened and secured the appointment of a receiver. Later, the state dismissed its complaint in intervention on the basis that it had fulfilled its obligation to protect the public interest by obtaining injunctions against the individuals involved and securing appointment of a receiver. After dismissing the state's complaint, the district court expanded the receivership to include additional entities that allegedly served as conduits for other receivership entities and ordered the attorney for individual defendants Geoff and Nancy Thompson to relinquish \$750,000 proceeds allegedly belonging to one of the entities. The district court granted default judgments against the entities and also granted the plaintiffs' request to pierce the "corporate" veils to hold the Thompsons liable under the alter ego theory. The district court rejected the argument that the Thompsons could only be liable if they were listed as shareholders or members in corporate documents. On appeal, the Thompsons did not dispute that many of the alter ego factors were present, but argued the district court abused its discretion because they were not shareholders or members of the entities. The court of appeals pointed out that the Minnesota LLC statute states that corporate veil piercing applies to LLCs and that much of the evidence suggested that the Thompsons did have an ownership interest in the entities. However, the court held that whether a party holds an ownership interest is not dispositive because veil piercing is an equitable remedy, and unscrupulous parties could avoid personal liability simply by acting in a capacity that does not involve ownership if veil piercing were dependent on a party's ownership interest in an entity. The court described or referred to evidence that the Thompsons were personally involved in the ownership, management, and operation of the entities, that corporate formalities were not observed, that at least one of the entities was capitalized with as little as \$200, that two of the entities were operated out of the same office, that the entities were not financially independent, and that the entities were operated in furtherance of a large-scale real estate fraud scheme. In light of this evidence, the court concluded that the district court did not abuse its discretion. The court also determined that the district court had authority to expand the receivership under the general receivership statute pursuant to which the receiver was appointed and the court's general equity powers.

Alvarez v. 9ER's Grill @ Blackhawk, L.L.C., Civil Action No. H-08-2905, 2009 WL 2252243 (S.D. Tex. July 28, 2009). The plaintiff sued two LLCs to collect unpaid overtime wages under the Fair Labor Standards Act (FLSA).

The evidence showed that she was employed by only one of the LLCs. The plaintiff argued that the two LLCs were part of an “enterprise” as defined by the FLSA in order to hold the non-employer LLC jointly and severally liable as well as to aggregate the gross sales of the two LLCs to satisfy the threshold volume of gross sales required to bring an employer within the coverage of the FLSA. Relying on Eleventh Circuit precedent, the court rejected the argument that being part of the same enterprise is a basis to hold non-employer members of the enterprise liable for other members’ FLSA obligations. The non-employer LLC was thus dismissed. The court found that the two LLCs were part of an “enterprise” under the FLSA such that the gross volume of sales of the two LLCs could be aggregated to bring the employer LLC within the coverage of FLSA. The court applied the following test, which the Fifth Circuit has said will establish a single “enterprise” for FLSA purposes: (1) the corporations perform related activities (2) through unified operation of common control (3) for a common business purpose. The court concluded that the LLCs had related activities because the primary activity of both was to operate a restaurant business. The stated purpose in the articles of “incorporation” of the two LLCs was to operate a restaurant business, and each LLC in fact operated a restaurant under the same trade name with the same signature dish. The restaurants were also marketed through the same website. The court found that the LLCs met the unified operations or common control element because they were formed by the same organizer on the same day and had the same members and managing member, and they were held out to the public collectively on the website. Finally, the court concluded that the LLCs were operated for a common purpose based on the previously recited evidence that showed both LLCs were operated for the common purpose of providing not only complementary food services but also profits for the two members.

Adams v. McFadden, 296 S.W.3d 743 (Tex. App. 2009). The trial court entered a judgment against an LLC based on the acts of an individual. The appellants argued that the pleadings and evidence did not support piercing the corporate veil and that the LLC was a limited liability *company* rather than a limited liability *corporation*. The court pointed out that the individual testified that the company was a limited liability *corporation* and that she was the president and sole stockholder. The court applied the rule that a person’s status as vice-principal of a corporation is sufficient to impute liability to the corporation on the basis that the acts of the vice-principal are the acts of the corporation itself. A corporate officer is among the types of corporate agent classified as a vice-principal. Since the undisputed evidence established that the individual was a vice-principal, her acts were imputed to the “corporation.”

Utzler v. Braca, 972 A.2d 743 (Conn. App. 2009). The court of appeals upheld the trial court’s findings that the defendant was liable to the plaintiff for an LLC’s breach of contract under veil piercing principles and that the defendant was liable for breach of fiduciary duty. The plaintiff invested in the building of a luxury home by entering into a contract with an LLC controlled by the defendant. In return for the plaintiff’s investment, the plaintiff was to receive the return of his investment plus 25% of the profit when the home was sold. Although the defendant nominally conducted his construction business through a number of business entities, the court stated that each of these companies was in fact his alter ego. Throughout the venture, the defendant treated the plaintiff’s investment as if it were his personal fund available for his personal needs. Despite an express provision in the investment contract that the plaintiff’s investment was to be used solely for the project, the defendant used funds contributed by the plaintiff for an unrelated project. He regularly deposited funds that he received from the plaintiff and from the financing for the project into a commingled bank account from which he made withdrawals for purposes unrelated to the project. In addition, the plaintiff diverted building resources to another project and for personal purposes. The court discussed the instrumentality rule and concluded that the record amply supported the trial court’s findings that the defendant’s wrongful diversions of funds violated the investment contract, that the breach caused a loss of the plaintiff’s investment, and that the defendant was personally liable under the instrumentality rule. The court found it unnecessary to address the trial court’s alternate finding that the defendant was liable under the identity rule.

Ner Tamid Congregation of North Town v. Krivoruchko, 620 F.Supp.2d 924 (N.D. Ill. 2009) (stating that court could not ignore separateness of LLCs established by individual defendant and that having several LLCs utilizing same address in Illinois did not make tax matters partner of LLC a citizen of Illinois for diversity jurisdiction purposes).

In re Spectranetics Corporation Securities Litigation, Civil Case No. 08-cv-02048-REB-KLM, 2009 WL 1663953 (D. Colo. June 15, 2009) (recognizing New Jersey LLC as separate legal entity and refusing to disregard distinction between LLC and individual member for purposes of aggregating stock ownership and financial losses of each in determining lead plaintiff in securities class action).

Cyborowski v. Ennest, No. 08-13736-BC, 2009 WL 1658181 (E.D. Mich. June 11, 2009) (recognizing limited liability of LLC members and managers under Michigan law and stating that allegations fell short of providing basis to pierce veil).

Cherry v. 3075 Wilshire Boulevard, No. B191020, 2009 WL 1593576 (Cal. App. 2 Dist. June 9, 2009) (discussing alter ego doctrine and holding plaintiffs offered insufficient evidence of unity of interest and inequity to support application of doctrine to managing members of LLC).

Chicago Regional Council of Carpenters v. Joseph J. Sciamanna, Inc., No. 08 C 4636, 2009 WL 1543892 (N.D. Ill. June 3, 2009) (holding plaintiffs met burden of making plausible showing that commonly owned corporation and LLC were alter egos such that court could exercise personal jurisdiction over corporation based on jurisdiction over LLC).

State Capital Title & Abstract Company v. Pappas Business Services, Civil Action No. 08-3619 (FLW), 2009 WL 1559795 (D. N.J. June 2, 2009) (holding amended complaint added only conclusory statements mirroring standard for piercing corporate veil as set forth in court's previous opinion and again failed to contain facts sufficient to state claim to pierce veil of defendant North Carolina LLC).

Sheffield Services Company v. Trowbridge, 211 P.3d 714 (Col. App. 2009). Trowbridge, a non-member manager of a Colorado LLC that owned residential real estate lots, contracted on behalf of the LLC to sell the lots to the plaintiff. The contract required the LLC to complete the requirements of a subdivision agreement between the LLC and the city. After the closing of the sale of the lots, the purchaser was forced to assume the obligations of the LLC under the subdivision agreement because the LLC did not fulfill its obligations and the city would not issue building permits until there was compliance with the subdivision agreement. The plaintiff sued the LLC and Trowbridge for breach of contract and wrongful attempt to deplete the LLC's assets. The trial court held that Trowbridge's personal liability for the breach of contract by the LLC was tried by consent, but the trial court dismissed the veil piercing claim against Trowbridge because it interpreted the Colorado LLC statute as precluding veil piercing to impose liability on a person who is not a member of an LLC. The Colorado LLC statute states that a court shall apply the case law interpreting the conditions and circumstances under which the corporate veil may be pierced under Colorado law in any case in which a party seeks to hold *the members* of an LLC personally liable for the actions of an LLC. The trial court concluded that this provision displaced the common law of corporate veil piercing, but the court of appeals disagreed because the statute does not expressly preclude a court from applying common law veil piercing to hold a manager personally liable for an LLC's actions. Construing the statute to preclude application of common law veil piercing doctrine to LLC managers as urged by Trowbridge would open the door to fraud according to the court of appeals. The court discussed the Colorado common law of corporate veil piercing and pointed out that the court of appeals in *LaFond v. Basham* extended corporate veil piercing doctrine beyond corporate shareholders by concluding that a corporate entity may be disregarded and corporate directors held personally liable if equity requires. The court characterized LLC managers as similar to corporate officers and directors, and the court saw no reason to decline to extend the reasoning in *LaFond v. Basham* to LLC managers. The court of appeals thus vacated the trial court's order dismissing the veil piercing claim and remanded for the trial court to determine whether its findings warranted application of the common law doctrine of corporate veil piercing to hold Trowbridge personally liable for the LLC's breach of contract.

Chadwick Farms Owners Association v. FHC LLC, 207 P.3d 1251 (Wash. 2009) (mentioning that LLC member may be liable under veil piercing theories in same manner as corporate shareholder).

Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC, No. 3:08-CV-1782-M, 2009 WL 1469808 (N.D. Tex. May 27, 2009) (rejecting argument that evidence showed individuals used LLC as alter ego for personal interests and thus declining to exercise personal jurisdiction over individuals based on LLC's breach of contract).

Lieberman v. Mossbrook, 208 P.3d 1296 (Wyo. 2009) (holding lower court erred in entering judgment against members of LLC for amount owed withdrawn member because neither LLC members nor corporate shareholders are ordinarily liable for acts of company or corporation and, in absence of evidence to support piercing veil of LLC or its successor corporation in merger, there was no basis to hold members individually liable).

Gowen v. Tiltware LLC, No. 2:08-cv-01581-RCJ-RJJ, 2009 WL 1441653 (D. Nev. May 19, 2009) (recognizing limited liability of members of California LLC is subject to corporate veil piercing principles but finding pleadings did not sufficiently allege alter ego claim against members, officers, or affiliated entities).

In re The Heritage Organization, L.L.C. (Faulkner v. Kornman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2009 WL 1349209 (Bankr. N.D. Tex. May 11, 2009). The trustee sought to pierce the veil of the debtor, The Heritage Organization, L.L.C. (“Heritage”), a Delaware LLC, and numerous related entities, in order to hold the related entities and Kornman, the individual who ultimately controlled all the entities, liable for Heritage’s liabilities. Most of the entities were Delaware entities. The members of Heritage included 2 Delaware limited partnerships and a Delaware LLC (the “Member Defendants”) that were in turn owned by other entities. Another group of entities controlled by Kornman or his son supplied goods and services to Heritage (the “Supplier Defendants”) and consisted of numerous Delaware LLCs and other entities that included a Tennessee corporation and a Texas corporation. In accordance with the court’s conclusion in a prior opinion in this bankruptcy proceeding, the court stated that, in Texas, the law of the state of formation governs a veil piercing claim to hold an owner liable for the entity’s debts; therefore, the court relied upon Delaware law in its veil piercing analysis except as to the Tennessee corporation and the Texas corporation. The court also reiterated its conclusion from its prior opinion that Delaware courts do not separately recognize a sham to perpetrate injustice theory. Rather, the sham concept is included in the alter ego analysis under Delaware law. The court discussed the two-pronged test for determining alter ego under Delaware law (which requires a determination that there is a single economic entity and an overall element of injustice or unfairness) and noted that, in an alter ego analysis involving an LLC, “somewhat less emphasis is placed on whether the LLC observed internal formalities because fewer such formalities are legally required.” Ultimately, the court concluded that the trustee’s veil piercing claims failed for several reasons. The court noted that the purpose of a veil piercing claim is to pierce an entity’s veil to hold the owners of the entity liable for the entity’s debts. Thus, with respect to Heritage, a proper veil piercing claim would seek to hold Heritage’s members liable for Heritage’s debts. Then, to the extent there was a basis to pierce the veil of each of those entities, the claimant could seek to hold their owners liable, and so forth. Assuming each of the entities is a Delaware entity, the Delaware two-prong alter ego test must be applied to and satisfied at each level or layer of ownership within the multi-faceted entity structure. However, the trustee simply took a global approach to all the entity defendants in an attempt to collapse the Kornman-controlled empire into Kornman and impose liability on all the entities and Kornman for Heritage’s debts. The court did not view the alter ego theory as working on such a global basis. The court stated that the trustee offered no evidence to support piercing the veil of any entities beyond Heritage. With respect to the Supplier Defendants, the court noted that not only was there no evidence of who the owners of the Supplier Defendants were or whether the operations of the Supplier Defendants and their owners satisfied the two-prong alter ego test, there was an additional conceptual problem raised by the trustee’s attempt to hold non-owners of Heritage liable for Heritage’s debts pursuant to the alter ego theory. The only connection shown between the Supplier Defendants and Heritage was the fact that they supplied goods and services to Heritage and that Kornman directly or indirectly controlled each of the entities. Even assuming Kornman was the ultimate owner of Heritage and each of the Supplier Defendants, the court said that the trustee would have to pierce the veils of each of the Supplier Defendants and their various owners up to Kornman’s ultimate ownership. Then the trustee would have to pierce Heritage’s veil and the veils of the various entities up the chain of ownership to Kornman. The two-prong alter ego test would have to be satisfied at each level of ownership of the Supplier Defendants and Heritage, and the trustee failed to offer such proof. Even with respect to the trustee’s attempt to pierce the veil of Heritage to hold its immediate owners, the Member Defendants, liable for Heritage’s debts, the court ultimately found that the trustee failed to carry his burden. With respect to the first prong of the Delaware alter ego test, the single economic entity analysis, the court acknowledged that there was some evidence of a failure to follow formalities in that one of the officers of Heritage was simply a puppet of Kornman. However, there was no evidence that the other officers of Heritage or the Member Defendants were not sufficiently diligent. And while the trustee presented some evidence that Heritage functioned as a facade for Kornman, the court characterized the evidence as equivocal. The court noted that it viewed siphoning of funds as different from making distributions to members permitted by law. The fact that the court had determined that distributions to the Member Defendants were fraudulent transfers did not make them unauthorized distributions from a corporate law standpoint according to the court. Rather, it simply permitted the trustee to avoid and recover the distributions on the basis that they were made with the intent to hinder, delay, or defraud Heritage creditors. With respect to the injustice or unfairness prong of the alter ego test, the court was also unable to conclude that the trustee satisfied his burden. The trustee’s argument centered around the fact that Heritage, which promoted tax shelters to wealthy individuals, continued to promote the tax shelters after the

IRS began investigating them. While the court did not condone Heritage's failure to disclose the IRS investigation to prospective clients (having characterized it as a "sharp practice" in the court's fraudulent transfer analysis), the court found that the clients, who were extremely wealthy and chose an obviously risky strategy, were told of the relevant legal authorities and the risks of the tax strategies. Thus, the court concluded that the trustee failed to prove an overall element of injustice or unfairness with respect to Heritage's sale of the tax shelters after the IRS investigation began. In sum, the trustee failed to prove his veil piercing claims as to Heritage and the various related Delaware entity defendants. The court also examined the veil piercing claims as to the Tennessee and Texas corporations under Texas and Tennessee law and found that the trustee's claims failed as to these entities as well.

Cappella v. Suresky at Hatfield Lane, LLC, 24 Misc.3d 1225(A), 2007 WL 6830765 (N.Y. Sup. 2007) (discussing distinction between LLCs and corporations but acknowledging that alter ego doctrine appeared to apply to all legal entities; holding prima facie defense under workers' compensation statute was established where plaintiff's corporate employer exercised complete domination and control over defendant LLC and LLC was accordingly plaintiff's employer's alter ego).

Breen v. Judge, No. CV074033896, 2009 WL 1175543 (Conn. Super. April 2, 2009) (addressing claim by judgment creditor of LLC that LLC's veil should be pierced so as to hold managing member liable on judgment and concluding that facts did not support piercing LLC's veil under instrumentality or identity tests).

Cement-Lock v. Gas Technology Institute, 618 F.Supp.2d 856 (N.D. Ill. 2009) (noting that Illinois courts generally apply corporate veil piercing principles to LLCs and concluding that defendants failed to show that LLC derivative plaintiff was sham or that piercing veil was necessary or appropriate).

Mackin v. Jila Construction, LLC, No. CV085008444, 2009 WL 1055479 (Conn. Super. March 25, 2009) (finding probable cause for purposes of prejudgment remedy against individual sole member of LLC based on veil piercing principles where evidence included failure of LLC to obtain its own construction contractor license, commingling of funds, and failure of LLC to file required annual reports).

Middlesex Retirement System, LLC v. Board of Assessors of Billerica, 903 N.E.2d 210 (Mass. 2009). The court rejected the argument that real property owned by a Delaware LLC should be deemed to be owned by the LLC's member, a governmental entity, and thus exempt from property tax. The court noted that an LLC interest is personal property under Delaware law and a member has no interest in specific LLC property, and the court found no basis to treat the LLC as an instrumentality of its member, the Middlesex Retirement System (MRS). The LLC's operating agreement recited a purpose that was purely business in nature, and the LLC did not purport to undertake any governmental function of MRS. The LLC was engaged in the business of owning and managing commercial real estate and functioned as a business enterprise distinct from MRS. Thus, applying a functional approach (focusing on the stated purposes and actual workings of the LLC), the LLC was not a governmental instrumentality. The court also concluded that the LLC was not the alter ego of MRS. The court saw no reason that the alter ego doctrine should not apply to LLCs as well as corporations, but noted that the LLC did not argue that any of the relevant factors were present.

Stone v. Advance America, Cash Advance Centers, Inc., No. 08cv1549 WQH (WMC), 2009 WL 765665 (S.D. Cal. March 20, 2009) (holding plaintiff failed to submit any evidence rebutting showing by Delaware LLC and Delaware corporation that LLC was not alter ego of corporation for purposes of exercise of personal jurisdiction).

Chicago Title Company v. Metropolitan Property Holdings, LLC, No. B206217, 2009 WL 711767 (Cal. App. 2 Dist. March 19, 2009). That no documentary tax was paid on a transfer of realty from an individual to an LLC in reliance on an exemption for transfers that do not result in a change of title did not constitute substantial evidence that the individual and LLC were "one and the same" for other purposes. The court noted that the argument advanced by the California Franchise Tax Board, which sought to reach the LLC's assets to satisfy tax liabilities of an individual owner, was a third party "reverse piercing" claim, and that a court of appeals in California had recently declined to accept the doctrine of outsider reverse piercing of the corporate veil.

Kranich v. TCAC, LLC, No. CV065000476S, 2009 WL 941973 (Conn. Super. March 16, 2009) (declining to apply “dual capacity” doctrine to commonly owned LLCs for purposes of availing LLC landowner of LLC employer’s protection under worker’s compensation exclusivity provision, but finding fact issues precluded summary judgment on commonly owned LLC’s claim that veil piercing or alter ego theories resulted in treatment of both entities as single “employer” protected by exclusivity provision).

Farina v. Perotti, No. CV084032655, 2009 WL 941846 (Conn. Super. March 12, 2009). Farina sought to compel Perotti to participate in arbitration based on an arbitration clause contained in the LLC agreement of Hometown Waste, LLC (“Hometown Waste”). The members of Hometown Waste were Farina and HTW Funding, LLC (“HTW”). Farina alleged that Perotti used HTW to control Hometown Waste and that Perotti should be bound by the arbitration clause in the Hometown Waste LLC agreement though he was not a signatory to the agreement. The court denied Farina’s application to compel Perotti to arbitrate because the stipulation of the parties contained information regarding the ownership of the LLCs but no information as to agency or misuse so as to determine if Perotti was bound by the arbitration clause on veil piercing principles.

Atlantic Consulting & Engineering, LLC v. Red Coat Realty, LLC, No. CV085019156S, 2009 WL 864504 (Conn. Super. March 9, 2009) (applying identity and instrumentality veil piercing theories and finding probable cause to pierce two defendant LLCs for purposes of granting prejudgment remedy against LLCs and individual 50% managing member of LLCs).

In re LmcD, LLC (Schwab v. Damenti’s, Inc.), 405 B.R. 555 (Bankr. M.D. Pa. 2009). A master ice carver, McDonald, formed a Pennsylvania LLC for the purpose of showcasing the work of various ice artisans. The LLC incurred far more debt than revenue from admission fees and donations, and the LLC filed a Chapter 7 bankruptcy. The trustee sought to pierce the LLC veil and hold McDonald and his wife liable for the LLC’s debts. The trustee also sought to use veil piercing to hold a corporation owned by McDonald liable for the LLC’s debts. The trustee argued that the McDonalds and the LLC were alter egos of each other and that McDonald’s interest in the corporation, a restaurant, could be reverse pierced so as to hold the restaurant liable for the debts of McDonald. Additionally, the trustee relied on the single entity, or enterprise, theory to hold the restaurant liable for the LLC’s debts on the basis that they advanced the business of the LLC on a joint basis. The court noted that the Pennsylvania LLC statute makes clear that the equitable remedy of “piercing” is available with respect to an LLC, and the court analyzed the issues of undercapitalization, adherence to company formalities, intermingling of affairs, and use of the corporate form to perpetrate fraud in order to determine whether the McDonalds should be held liable for the LLC’s debts. The court found that the LLC was undercapitalized with an initial capital contribution of \$25,000, but stated that undercapitalization was not alone dispositive. The court found that the LLC well-documented its fundamental dealings with the government based on the LLC’s certificate of organization, registration of fictitious name, application for employer ID number, bank account documentation, commercial lease, certificate of occupancy, food and beverage license, tax returns, and separate books. The court reviewed evidence of intermingling of McDonald’s personal and corporate affairs and concluded that there may have been intermingling of their identities, but there was no evidence of commingling of assets, financial records, or employees. The court also found that the facts showing that the McDonalds may not have run their businesses on a strictly separate basis did not amount to fraud that would overcome the presumption against piercing. The court next analyzed the same factors to determine whether reverse piercing of the restaurant was justified, and the court concluded that the evidence did not overcome the presumption against piercing in that regard. Finally, the court considered the trustee’s argument that the restaurant was liable for the LLC’s debts based on the single entity theory. The court noted that the theory has not yet been adopted in Pennsylvania, and the court stated that the Pennsylvania Supreme Court might be reluctant to adopt the theory, but the court also stated that the stage had been set to adopt the theory based on the Third Circuit’s consideration of reverse piercing under Pennsylvania law, which could lead to “triangular piercing” of commonly controlled entities. The court concluded, however, that the evidence did not satisfy the elements of the single entity theory so as to hold the restaurant liable for the LLC’s debts even assuming the Pennsylvania Supreme Court would accept the theory.

Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC, 310 Fed.Appx. 858, 2009 WL 383680 (6th Cir. 2009) (holding LLC could invoke arbitration clause in agreement entered by commonly owned corporation where corporation was mere instrumentality or alter ego of LLC under either Tennessee or Delaware law).

Wheaton Equipment Company v. Franmar, Inc., No. CV08-276-S-EJL, 2009 WL 464337 (D. Idaho Feb. 24, 2009) (exercising personal jurisdiction over LLC based on its status as alter ego of individual owner of LLC and commonly owned corporation).

In re Western States Wholesale Natural Gas Antitrust Litigation (Heartland Regional Medical Center v. Oneok, Inc.; Breckenridge Brewery of Colorado, LLC v. Oneok, Inc.; Learjet, Inc. v. Oneok, Inc.; J.P. Morgan Trust Company v. The Williams Companies, Inc.), Nos. 2:03-CV-014310-PMP-PAL, 2:07-CV-00987-PMP-PAL, 2:07-CV-01351-PMP-PAL, 2:06-CV-00233-PMP-PAL, 2:05-CV-01331-PMP-PAL, 2009 WL 455555, 2009 WL 455653, 2009 WL 455658, 2009 WL 455663 (D. Nev. Feb. 23, 2009) (holding, in consolidated multi-district litigation arising out of energy crisis of 2000-2001, that indirect partially owned subsidiary LLC's contacts could not be imputed to parent North Carolina LLC for purposes of exercise of personal jurisdiction under alter ego theory where parent LLC did not control daily operations of subsidiary and plaintiff failed to establish fraud or injustice would result from failure to pierce veil even assuming lack of separateness were established).

In re Kosinski (Douglas v. Kosinski), Bankruptcy No. 06-12691-JNF, Adversary No. 06-1400, 2009 WL 261538 (Bankr. D. Mass. Feb. 4, 2009) (applying corporate veil piercing principles to LLC and concluding member/manager of LLC could be held liable for LLC's debts under Massachusetts law, noting absence of corporate records, thin capitalization or insolvency, and use of LLC to promote fraud).

Norwalk Preservation Trust, Inc. v. Norwalk Inn & Conference Center, Inc., Nos. FSTCV074010609S, FSTCV074010628S, FSTCV0740106228S, 2009 WL 455674 (Conn. Super. Jan. 23, 2009) (discussing veil piercing and finding corporation was alter ego of related LLC such that corporation could be held jointly responsible with LLC for state-ordered repairs and maintenance of LLC's property given complete lack of formality between LLC and corporation (i.e., undocumented loans from corporation to LLC, use of LLC's property by corporation without paying rent, etc.) and corporation's holding itself out as owner of LLC's property).

In re Houston Drywall, Inc. (West v. Seiffert), Bankruptcy No. 05-95161-H4-7, Adversary No. 06-03415, 2008 WL 2754526 (Bankr. S.D. Tex. July 10, 2008). The bankruptcy court concluded that an LLC general partner of a limited partnership was a "sham corporation," and that the individuals in control of the LLC were thus personally liable for breaches of fiduciary duties as general partners of the limited partnership. Although the court identified and referred to the LLC as a limited liability company in reciting the facts earlier in the opinion, the court discussed and applied corporate veil piercing principles to the LLC as if it were a corporation. The court stated that the corporate veil may be pierced when: (1) there is such a unity that the separateness of the corporation has ceased to exist and (2) the facts are such that adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, promote injustice. Seiffert created the LLC to replace the initial general partner of the limited partnership. Although Seiffert's daughter was the sole member of the LLC and served as a manager and president, the court found that Seiffert, who held positions as a manager and vice president, had complete control over the LLC. Seiffert's daughter simply did as her father instructed. The court found that there was no separateness between the LLC and Seiffert and his daughter. Both individuals had "plenary authority" to take all actions they deemed necessary. Though such a grant of power is not alone sufficient to constitute unity between a corporation and individual, the court stated that the power was used to "fleece unknowing limited partners" of the limited partnership while attempting to protect Seiffert and his daughter from personal liability. Seiffert formed the LLC to replace the initial general partner without notifying all of the owners of limited partnership interests in the limited partnership and saw to it that his daughter was the sole owner of the LLC while he remained in complete control. He used his position as manager of the LLC and president of the limited partnership to transfer the partnership's only valuable unencumbered asset to himself, his three daughters, and other insiders. The court stated that allowing Seiffert and his daughter to escape liability by hiding behind the corporate veil of the LLC would unjustly benefit Seiffert and his daughters at the expense of the trustees of bankrupt limited partners who were excluded from the distribution of the partnership's asset. Thus, the court treated Seiffert and his daughter as general partners for purposes of analyzing breach of fiduciary duty claims against them.

MeccaTech, Inc. v. Kiser, No. 8:05CV570, 2008 WL 1774992 (D. Neb. April 15, 2008) (finding LLC was alter ego of related bankrupt corporation under Nebraska and federal law based on transfer of corporation's assets to LLC and

commingling of assets and personnel, but automatic stay did not apply to claims against LLC because claims were not applicable to all creditors).

Diemer v. Sleeper, No. 2006-452, 2007 WL 5313318 (Vt. 2007) (holding defendants failed to preserve claim that separate existence of LLC and its sole owners should be disregarded for purposes of Declaration of Condominium prohibition on ownership of more than two rental units).

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

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

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

the court “is not obligated to pierce the corporate veil of a corporation that is comprised of only one shareholder or member because, quite obviously, that one member must dominate the corporate entity if the business is to function and be profitable.” The court characterized veil piercing as an extraordinary exception to the principle of limited liability of shareholders and members of a corporate entity and stated that, under the plaintiff’s logic, the members of a small, closely held corporation would be individually liable in any instance where they are accused of a fraudulent breach of contract.

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

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

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

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

In re The Heritage Organization, L.L.C. (Faulkner v. Kornman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008). Prior to filing bankruptcy, the debtor, a Delaware LLC, provided estate and tax planning strategies to extremely wealthy individuals. The trustee filed this action against two individuals, Kornman and Walker, and numerous entities affiliated in some way with Kornman. Kornman was the former CEO and president of the manager of the LLC, and Walker was a long-time employee of various Kornman-controlled entities. Various defendants sought summary judgment on fraudulent transfer, preference, breach of fiduciary duty, and veil piercing claims asserted by the trustee. The trustee argued that each of the entities affiliated with Kornman should be liable for the LLC’s debts under one or more of the following theories: (1) single business

enterprise, (2) alter ego, and (3) sham to perpetrate injustice. The court stated that Texas looks to the law of the jurisdiction of formation when determining the liability of an owner under a veil piercing claim. With the exception of a Tennessee corporation and a Texas corporation, the entity defendants were all Delaware LLCs, corporations, and limited partnerships. The court concluded that Delaware does not separately recognize the single business enterprise theory or sham to perpetrate injustice or fraud. Rather, the concepts involved in these theories are subsumed in the alter ego analysis under Delaware law. The court granted summary judgment in favor of all the entities on the single business enterprise theory because it is not recognized as a stand-alone theory in Delaware or Tennessee, and the theory was rejected by the Texas Supreme Court after the court's hearing on the summary judgment motions. The court also granted summary judgment in favor of all the entities other than the Texas corporation on the sham to perpetrate injustice/fraud claim because Delaware and Tennessee do not recognize that theory as a separate basis to pierce the veil. The court found genuine issues of material fact precluded summary judgment on the trustee's alter ego claim. The court recognized that the debtor was an LLC rather than a corporation but noted that emerging LLC case law illustrates that situations resulting in a piercing of the LLC veil are similar to those that warrant piercing the corporate veil. The court stated that actual fraud was not required to pierce the veil based upon the alter ego theory under Delaware law, and the court characterized the test under Delaware law as: (1) whether the entities in question operate as a single economic entity, and (2) whether there was an overall element of injustice or unfairness. The court noted that, in an alter ego analysis involving an LLC, "somewhat less emphasis is placed on whether the LLC observed internal formalities because fewer such formalities are legally required," but stated that the failure of commonly-owned entities to follow legal formalities when contracting with each other is tantamount to a declaration that the entities are one in the same. The court pointed to evidence that Kornman's entities dealt informally with one other as raising a fact issue on the first prong of the alter ego test. With respect to the second prong (that the entities were used to effectuate fraud or for an unfair or inequitable purpose), the court pointed to the LLC's failure to disclose to its clients concerns raised by the IRS regarding the LLC's high risk estate and tax planning strategies, the LLC's distributions of millions of dollars to its members after the IRS raised concerns, and the LLC's continued distributions after the filing of multi-million dollar claims against the LLC.

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

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

Ronald A. Chisholm (U.S.A.) Inc. v. Anpro Trading, L.L.C., Civil Action No. 06-3300, 2008 WL 4691213 (E.D. La. Oct. 22, 2008). The sole member of an LLC sought dismissal of the plaintiff's attempt to hold the member personally liable on a contract of the LLC. The plaintiff argued that the totality of the circumstances demonstrated that it was entitled to pierce the veil, but the only specific contentions were that the LLC was undercapitalized and failed to follow formalities. The evidence of undercapitalization was testimony by the member that he would write a check from the LLC to himself for salary in whatever figure he thought the LLC could allow itself, and the initial capitalization of the LLC was \$1,000. The court held that this evidence did not establish undercapitalization per se, and the court stated that the plaintiff did not provide any other evidence concerning the LLC's financial status to establish de facto undercapitalization. With regard to formalities, the plaintiff relied upon the LLC's failure to hold annual meetings. The member testified that the organizational documents permitted meetings to be held in person or by telephone and did not require minutes. When asked whether the informal meetings were held by telephone or otherwise, the member testified that the meetings were basically him having a meeting with himself. The court stated that, because the LLC was a single member LLC, the failure to hold meetings did not raise a fact issue with regard to adherence to corporate formalities.

The court found that the undisputed facts established “substantial compliance” with corporate formalities. The court also stated that courts have usually applied more stringent standards for piercing the corporate veil where the liability is based on contract because the party seeking relief is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity whose shareholders have limited liability. The plaintiff offered no evidence rebutting this presumption, and the court granted the member’s motion for summary judgment.

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

Q. Authority of Members and Managers

In re Metcalf Associates-2000, L.L.C. (IAS Partners, Ltd. v. Chambers), 213 P.3d 751 (Kan. App. 2009). In this judicial dissolution action, Chambers, a 50% member of an LLC, appealed the district court’s judgment dissolving the LLC. Chambers argued that the statutory requirements for dissolution had not been met, but the appeals court affirmed the judgment on the basis that the LLC was deadlocked and faced potential irreparable injury. Hayes controlled the two entities that collectively owned the 50% of the LLC not owned by Chambers. The LLC was managed by a corporation owned equally by Chambers and Hayes. The relationship between Chambers and Hayes soured, and they could not agree on anything related to the corporation’s sole function, i.e., management of the LLC. In the course of its opinion, the court addressed the validity of a capital call made by Chambers. Purporting to act as general manager of the LLC, Chambers had made a capital call and contributed his part, which, if recognized as valid, would have reduced the membership shares of the members controlled by Hayes, who did not contribute. The appeals court agreed with the district court that Chambers had no authority to make the capital call because the manager of the LLC was a corporation. Though Chambers was president of the corporation as well as a 50% shareholder, the court concluded that the evidence supported the district court’s finding that Chambers did not have authority to initiate the capital call. The district court noted that the bylaws of the corporation did not authorize the president to act beyond authority granted by the board of directors, and the board did not authorize a capital call or other acts of Chambers as a manager.

River City Rentals, LLC v. Bays, No. 4:08-CV-00104-R, 2009 WL 2753304 (W.D. Ky. Aug. 26, 2009) (stating that individual could not have been acting as agent for LLC before its formation because earliest time of admission of member is date LLC is formed and nothing in Kentucky LLC statute allows individual to act as LLC’s agent before LLC is formed; therefore, alleged fraudulent misrepresentation made to individual prior to LLC’s formation could not be asserted by LLC because misrepresentation must be made to plaintiff or plaintiff’s agent).

Yates v. Portofino Real Estate Properties Company, LLC, Civil Action No. 08-cv-00324-PAB-MJW, 2009 WL 2588833 (D. Colo. Aug. 17, 2009) (finding complaint largely failed to specify how individual’s statements and actions were attributable to LLC where plaintiffs alleged that individual was LLC’s registered agent but failed to explicitly allege he was LLC’s manager although plaintiffs argued in response to motion to dismiss that individual was manager whose acts bound LLC under Colorado LLC statute).

Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC, C.A. No. 4380-VCN, 2009 WL 2356881 (Del. Ch. July 30, 2009). Evans, an individual who was the sole member and manager of an LLC, signed a lock-up agreement in which he agreed not to pledge or transfer certain stock owned by the LLC for a specified period of time. The agreement was signed by the individual and did not refer to the LLC. Below the individual’s name, the title “Chief Executive Officer” appeared, but no company name was provided. The plaintiff sought a declaration that the lock-up agreement did not prohibit a pledge of the shares to the plaintiff. The defendant sought to avoid the pledge of the shares to the plaintiff based on the lock-up agreement. The court found that Evans executed the lock-up agreement in his personal capacity and that the agreement did not bind the LLC. The parties agreed that Evans signed the agreement in his personal capacity, and the court commented that the inclusion of the title “Chief Executive Officer” did not change the result because there was nothing on the face of the agreement to indicate an intent on the part of Evans to act in that capacity. The stock in question was the property of the LLC rather than Evans because a member has no interest in specific LLC property. Evans could not encumber property he did not own. The court acknowledged that the defendant and Evans may have intended that the lock-up agreement prohibit the very conduct in which Evans engaged, but the court

concluded the agreement did not indicate any intent to bind anyone other than Evans. The defendant argued that the agreement prohibited Evans from pledging shares regardless of who owned them by virtue of the phrase prohibiting transfers “directly or indirectly.” The court stated that it did not need to reach that question because its task was complete in determining that the LLC was not bound by the agreement and the defendant thus could not prevent the LLC’s transfer of its shares to the plaintiff. The court noted that it might well be that Evans violated the lock-up agreement by pledging the LLC’s shares, but Evans was not before the court, and determining whether he violated the agreement was not necessary.

Cplash v. Rochester Oral & Maxillofacial Surgery Associates, LLC, 881 N.Y.S.2d 270 (App. Div. 4th Dept. 2009). The appellate court held that the lower court did not err in concluding that the plaintiff, a co-equal member of a member-managed LLC, had standing to seek dissolution of the LLC on the basis that it was not reasonably practicable to carry on the business in conformity with the operating agreement notwithstanding the plaintiff’s submission of a letter of resignation. The court concluded that the other member’s act of appointing as LLC counsel an attorney who accepted plaintiff’s resignation did not bind the LLC because the appointment of counsel was not sanctioned by a majority vote of the members nor was it apparently carrying on the business of the LLC in the usual way. Accordingly, the lawyer was not authorized to represent the LLC and could not accept the letter of resignation. Further, assuming, arguendo, that the lawyer was properly appointed LLC counsel, the court stated that he was not retained to address general business matters and was not authorized by the operating agreement to act on the LLC’s behalf. Finally, there was no indication that the purported resignation letter concerned the plaintiff’s membership in the LLC as opposed to his employment with the company.

T.W. Herring Investments, LLC v. Atlantic Builders Group, Inc., 975 A.2d 264 (Md. App. 2009) (discussing provisions of North Carolina Limited Liability Company Act dealing with actual and apparent authority of manager and person to whom authority is delegated by manager and concluding LLC’s verified answer, which was verified by individual who was not LLC manager, was valid and sufficient because it was doubtful affidavit required written authorization from manager, there was no requirement that existence of authorization be recited in affidavit, and written authorization might in fact exist).

Adams v. McFadden, 296 S.W.3d 743 (Tex. App. 2009). The trial court entered a judgment against an LLC based on the acts of an individual. The appellants argued that the pleadings and evidence did not support piercing the corporate veil and that the LLC was a limited liability *company* rather than a limited liability *corporation*. The court pointed out that the individual testified that the company was a limited liability *corporation* and that she was the president and sole stockholder. The court applied the rule that a person’s status as vice-principal of a corporation is sufficient to impute liability to the corporation on the basis that the acts of the vice-principal are the acts of the corporation itself. A corporate officer is among the types of corporate agent classified as a vice-principal. Since the undisputed evidence established that the individual was a vice-principal, her acts were imputed to the “corporation.”

B.A.S.S. Group, LLC v. Coastal Supply Co., Inc., Civil Action No. 3743-VCP, 2009 WL 1743730 (Del. Ch. June 19, 2009). A disloyal employee (Burkett) who embezzled funds from his employer (Coastal Supply Co., Inc. or “Coastal”), formed an LLC with a friend (Webb) and used the embezzled funds to purchase property for the LLC. When Coastal discovered the embezzlement, it fired Burkett and entered a restitution agreement with him, which included transferring the property from the LLC to Coastal. Webb then commenced this action to void the transfer of the property to Coastal and to obtain other relief for alleged breaches of fiduciary duty by Burkett. Coastal counterclaimed for unjust enrichment and conversion and sought relief in the form of a constructive trust over the property or a money judgment. Both sides sought summary judgment. The court granted Coastal’s motion for summary judgment on its unjust enrichment and conversion claims and denied the motion of the LLC and Webb for avoidance of the transfer of the property and breach of fiduciary duty. Webb and the LLC argued that the transfer of the property from the LLC to Coastal was void or voidable because Burkett lacked authority and the LLC did not receive any consideration. The court first analyzed the actual authority of Burkett and concluded that there were factual issues bearing on the matter of actual authority that precluded summary judgment. The court examined the provisions of the LLC agreement and concluded that there was an issue as to whether Burkett acted in “good faith” for purposes of a provision of the agreement that designated Burkett as an “Authorized Person” with power of attorney to act for both members. Under the provision, any representation or action of the Authorized Person acting in good faith pursuant to the power of attorney was binding as

to both members. Webb argued Burkett did not act in good faith because he transferred the property solely for his own benefit. Coastal argued that Burkett acted in good faith because he protected the LLC from potential tort liability for conversion and potential criminal liability for receiving stolen property. The court noted that “much ink has been spilt analyzing the concept of good faith” in Delaware. The parties provided the court little guidance as to the meaning of “good faith” in this context, but the court noted that a fiduciary in the corporate context does not act in good faith if the fiduciary acts subjectively believing that the fiduciary’s actions are not in the best interest of the corporation. Because there were disputed issues of fact concerning Burkett’s state of mind as well as the reasonableness of his actions, the court denied summary judgment. Further, the court concluded that denial of summary judgment was supported by the fact that a more contextually specific definition of good faith might need to be applied. The court also found fact issues bearing on Burkett’s apparent authority to transfer the property. The court described apparent authority as requiring reasonable reliance on indicia of authority originated by the principal. The court stated that Coastal perhaps could have reasonably believed Burkett had authority, but it was less clear whether Coastal relied upon anything the LLC or Webb did or did not do in forming its arguably reasonable belief that Burkett had authority to transfer the property. Coastal maintained it did not know Webb was a member and did not ask for or examine the LLC agreement before it obtained the deed, but Burkett controverted that assertion to some extent, and the court commented that Coastal might have a difficult time proving the defense of apparent authority. In any event, the court found that factual disputes precluded summary judgment on the issue of apparent authority as well as actual authority.

In re Wilburgene, LLC (Wilburgene, LLC v. Kwon), 406 B.R. 558 (D. Utah 2009). The debtor LLC sought to avoid foreclosure under a trust deed encumbering the LLC’s property on the basis that the individual who executed the trust deed, Kwon, was not a member or, if he was a member, lacked authority to execute the trust deed. The trust deed secured personal debt of Kwon. The LLC was formed as a member-managed LLC with Kwon and Sandbulte listed as the initial members, and the purpose of the LLC was to purchase some property. Sandbulte delegated most of the initial formation and operation duties to Kwon without much oversight, and Kwon signed a number of documents on behalf of the LLC as either its manager or member. Sandbulte contributed capital to be used toward the purchase of the property, and the remainder of the purchase price was financed by a bank. A couple years after the LLC was formed, Kwon borrowed money from the Blosch Group. A few months later, Kwon defaulted on the note, and the Blosch Group allowed Kwon to execute an amended note secured by the LLC’s property. Kwon signed the trust deed in issue as manager of the LLC, but there was no meeting of Sandbulte and Kwon to authorize the pledge of the LLC’s property to secure Kwon’s debt. Prior to accepting the trust deed, one of the members of the Blosch Group checked the website of the Utah Department of Commerce for corporate and business information relating to the LLC and learned that Kwon was a member and the registered agent for the LLC. The Blosch Group also obtained a copy of the articles of organization and a title report on the property showing it was encumbered by a priority lien in favor of the bank that provided the financing for the purchase of the property by the LLC. After rejecting the LLC’s argument that Kwon was never a member of the LLC, the court analyzed the issue of Kwon’s authority as a member to execute the trust deed. The LLC relied upon a provision of the Utah LLC statute that provides each member of a member-managed LLC is an agent of the LLC whose acts for apparently carrying on the ordinary course of business bind the LLC to a person who does not have knowledge of the member’s lack of authority, but whose acts outside the ordinary course of business bind the LLC only if the act is authorized by the members. The Blosch Group relied upon another provision of the statute that provides that any member of a member-managed LLC may sign, acknowledge, and deliver a document transferring or affecting the LLC’s interest in real or personal property, and the document is conclusive in favor of a person who gives value without knowledge of the person’s lack of authority unless the articles of organization expressly limit the member’s authority. The court distinguished a Utah Supreme Court case in the limited partnership context because, while the language in the Utah Limited Partnership Act contains language regarding a partner’s apparent authority in the ordinary course of business, and lack thereof outside the ordinary course, that is similar to the language in the LLC statute, the limited partnership statute does not contain the specific exception in the LLC statute regarding documents transferring interests in LLC property. The court did comment, however, that the Utah Supreme Court’s discussion of the policy of apparent authority in the limited partnership case was helpful to the court and appeared to encompass the Blosch Group within the types of persons who should be protected. Having concluded that Kwon was a member of the LLC and that the specific statutory provision on documents transferring interests in LLC property governed the matter, the court determined that the trust deed would be conclusive in favor of the Blosch Group if it did not know of Kwon’s lack of authority and gave value because the articles of organization did not limit Kwon’s authority to sign, acknowledge, and deliver an document transferring the LLC’s interest in property. The court found that value need not be given *to the LLC*

and that value was given in exchange for the trust deed in the form of the loan to Kwon and/or the forbearance in taking legal action against Kwon when the Blosch Group accepted the trust deed and an amended note after the original note was in default. Though the court acknowledged that the result might seem harsh, it noted that the situation could have been avoided if the other member had made sure Kwon was not a member or had monitored Kwon's control over the assets, disavowed Kwon's right to sign the loan documents for the LLC in financing the LLC's property, and taken other precautionary steps. With regard to the issue of knowledge, the court found that there was a disputed issue of fact regarding the extent of the Blosch Group's knowledge of Kwon's lack of authority. The court also asked the parties for additional briefing on the appropriate definition of knowledge, i.e., whether it should be restricted to actual knowledge or should include constructive or inquiry knowledge.

In re Kindred (Thomas v. Murphy), Bankruptcy No. 6:08-bk-02334-KSJ, Adversary No. 6:08-ap-00171, 2009 WL 1788401 (Bankr. M.D. Fla. June 5, 2009) (rejecting challenge to trustee's standing to assert claims on behalf of LLCs equally owned by debtor and individual defendant because trustee was seeking rescission of operating agreements by which defendant assumed managerial control of each LLC and, if successful, could establish standing to assert claims on behalf of LLCs).

In re 210 West Liberty Holdings, LLC, No. 08-677, 2009 WL 1522047 (Bankr. N.D. W. Va. May 29, 2009). The court examined the terms of an LLC's operating agreement and concluded that the LLC's bankruptcy filing was authorized under either the terms of the original operating agreement or an amended operating agreement executed a year later. The court noted that the West Virginia LLC statute governs relations among the members, managers, and LLC except to the extent the operating agreement provides otherwise, and the West Virginia LLC statute does not specifically address the filing of an LLC's bankruptcy petition or list the matter among the non-waivable provisions. The amended operating agreement gave a specified member the sole authority to file a bankruptcy petition on behalf of the LLC, and that member filed the LLC's Chapter 11 petition. Poe, an individual who invested in the LLC after its formation and claimed to be a member of the LLC, argued that the filing of the LLC's bankruptcy petition was unauthorized because the amended operating agreement was invalid, and Poe, as a managing member, did not consent to the bankruptcy filing. Assuming, without deciding, that Poe was a managing member of the LLC and that the original operating agreement still governed the LLC, the court found that the bankruptcy filing was authorized. When the original operating agreement was executed, the LLC had only four members: Campbell, Foster, Briel, and Athey. Each had a 25% membership interest, and each was a manager, with Campbell named as the tie-breaking vote. The operating agreement specified certain matters requiring a unanimous vote and provided that all other decisions would be made by a majority vote, with each member having a vote in proportion to his or her membership interest. Bankruptcy was not listed in the matters requiring a unanimous vote. Before the bankruptcy filing, Athey and Briel resigned as managing members and were dissociated from the LLC. Thus, under Poe's theory, the only managing members were Campbell, Foster, and Poe. The court concluded that Poe's negative vote would not be sufficient to defeat the majority vote necessary to authorize a bankruptcy filing because: (1) both Campbell and Foster authorized the filing, (2) Campbell and Foster had a minimum of 50% membership interest in the LLC, and (3) the original operating agreement designated Campbell as the tie-breaking vote.

Azarkman v. Noora Nicca, LLC, No. B208467, 2009 WL 1273055 (Cal. App. 2 Dist. May 11, 2009) (holding party may rely on designation of agent for service of process on LLC filed with Secretary of State where party does not know that members were embroiled in dispute over LLC's management and authority that included dispute regarding validity of designation of agent).

Cement-Lock v. Gas Technology Institute, 618 F.Supp.2d 856 (N.D. Ill. 2009). The plaintiffs filed a derivative suit on behalf of a Delaware LLC based on an alleged fraudulent scheme to deprive the LLC of millions of dollars in intellectual property. The court addressed the propriety of the action as a derivative action and concluded that the action was proper and was not barred by unclean hands. The court's analysis of the defendants' unclean hands argument required the court to determine whether the conduct of certain members of plaintiff Cement-Lock ("CL"), an Illinois LLC, should be imputed to CL. The court determined that the prior Illinois Limited Liability Company Act governed the acts of CL's members and that the terms of CL's operating agreement controlled the scope of the members' authority under that statute. The operating agreement granted to managing members the exclusive authority to act for and bind CL. That authority could be delegated, but there was no evidence of any delegation. Because the individuals in question

were not managing members or mere proxies for managing members, their misconduct was not attributable to CL. The court also was not persuaded that the knowledge or conduct of the individuals in question should be imputed to CL under common law.

Sanitary District No. 4-Town of Brookfield v. City of Brookfield, 767 N.W.2d 316 (Wis. App. 2009) (interpreting LLC operating agreements and Wisconsin LLC statutes and concluding that neither statute nor agreements in issue required authorization or action by members to be reduced to written form and thus signatures on behalf of LLCs on annexation petition were valid where signatures were verbally authorized at meetings of LLC members).

Gaunce v. Wertz, No. 1:06-CV-00095-R, 2009 WL 803843 (W.D. Ky. March 25, 2009). Several members of a Kentucky LLC claimed that the managing member breached the operating agreement by undertaking certain business ventures in excess of his authority. The managing member argued that he had the exclusive right to manage the business because a majority in interest of the members agreed that he would be the managing member; however, the operating agreement provided that no contract, obligation, or liability could be entered on behalf of the LLC without the consent of a majority interest, and the court concluded that the plain language of the agreement required that a member must have consent of a majority interest to enter a contract, obligation, or liability. Whether the managing member's role as managing member gave him authority to take certain actions without consent of a majority interest could not be resolved on a motion to dismiss. The court also concluded that the issue of whether the operating agreement implicitly required the managing member to provide the plaintiffs an accounting on demand could not be resolved on a motion to dismiss.

Hess Corporation v. Suraci Metal Finishing, LLC, No. CV085017362, 2009 WL 323649 (Conn. Super. Jan.14, 2009) (discussing agency powers of LLC members and managers and concluding that genuine issues of material fact existed as to whether contract signed by LLC's CFO was valid and enforceable contract of LLC).

In re Oasis, LLC, No. 08-31522 TEC, 2009 WL 5753355 (Bankr. N.D. Cal. Nov. 7, 2008) (expressing view that 50% member did not have authority to file bankruptcy petition where operating agreement provided that LLC was managed by members and "all decisions" must be approved by members holding majority of outstanding interests, and stating that it was doubtful that post-petition email from other member constituted unanimous vote required to amend operating agreement, nor did it evidence majority approval of the bankruptcy because it could not serve as pre-petition formal vote and interpreting email as ratification would contradict other member's sworn statement that he did not consent to bankruptcy).

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

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

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

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

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

R. Admission of Member

River City Rentals, LLC v. Bays, No. 4:08-CV-00104-R, 2009 WL 2753304 (W.D. Ky. Aug. 26, 2009) (stating that individual could not have been acting as agent for LLC before its formation because earliest time of admission of member is date LLC is formed and nothing in Kentucky LLC statute allows individual to act as LLC's agent before LLC is formed; therefore, alleged fraudulent misrepresentation made to individual prior to LLC's formation could not be asserted by LLC because misrepresentation must be made to plaintiff or plaintiff's agent).

In re Wilburgene, LLC (Wilburgene, LLC v. Kwon), 406 B.R. 558 (D. Utah 2009). The debtor LLC sought to avoid foreclosure under a trust deed encumbering the LLC's property on the basis that the individual who executed the trust deed, Kwon, was not a member or, if he was a member, lacked authority to execute the trust deed. The trust deed secured personal debt of Kwon. The LLC was formed as a member-managed LLC with Kwon and Sandbulte listed as the initial members, and the purpose of the LLC was to purchase some property. Sandbulte delegated most of the initial formation and operation duties to Kwon without much oversight, and Kwon signed a number of documents on behalf of the LLC as either its manager or member. Sandbulte contributed capital to be used toward the purchase of the property, and the remainder of the purchase price was financed by a bank. A couple years after the LLC was formed, Kwon borrowed money from the Blosch Group. A few months later, Kwon defaulted on the note, and the Blosch Group allowed Kwon to execute an amended note secured by the LLC's property. Kwon signed the trust deed in issue as manager of the LLC, but there was no meeting of Sandbulte and Kwon to authorize the pledge of the LLC's property to secure Kwon's debt. Prior to accepting the trust deed, one of the members of the Blosch Group checked the website of the Utah Department of Commerce for corporate and business information relating to the LLC and learned that Kwon was a member and the registered agent for the LLC. The Blosch Group also obtained a copy of the articles of organization and a title report on the property showing it was encumbered by a priority lien in favor of the bank that provided the financing for the purchase of the property by the LLC. The court rejected the LLC's argument that Kwon was never a member of the LLC. The LLC argued that Kwon was not a member because he had made no monetary contribution to the LLC and thus did not have an economic interest in the LLC. The court pointed out, however, that Kwon signed both the operating agreement and articles of organization as a member. Additionally, he signed numerous other documents on behalf of the LLC as a member or manager, and the LLC had taken no action to invalidate any of those acts. The court stated that reading the Utah LLC statute to equate membership as synonymous with having an "interest in the company" (defined in the statute as the member's economic rights, including the right to receive a distribution and a portion of the net assets of the LLC upon dissolution and winding up) contradicted the provisions of the statute that specify how a person becomes a member (by signing the operating agreement or articles of organization). The court also stated that the LLC's argument failed to take into account the possibility that Kwon may have provided other types of investment in the LLC such as services. The court questioned why the LLC's minutes reflected the removal of Kwon as a member if he was not already a member, and the court concluded that how the public perceived the LLC and who represented it was as much or more compelling than whether Kwon had an economic interest.

Komen v. Carr, No. 61331-6-I, 2009 WL 1058628 (Wash. App. April 20, 2009). Three individuals formed an LLC to operate a car dealership, and a fourth individual, Komen, who was involved in another car dealership with the members wanted to become a member when he found out about the new LLC. An initial meeting resulted in a preliminary agreement entitled “Komen Non-binding Proposal” that was memorialized in a handwritten note. Over the next several months, communications back and forth between the attorneys for the parties, as well as between the individuals themselves, failed to produce a formal agreement. Komen eventually sued the members and the LLC for specific performance of an alleged contract making him a member. He based his claim on a letter signed by the four individuals during the course of the negotiations. The court concluded that the trial court’s summary judgment was proper because the undisputed evidence showed there was an absence of mutual assent among the parties to be bound by the same bargain at the same time. The court concluded that the three members expressly manifested their intent that any legal obligations would be deferred until an LLC agreement was executed; therefore, their preliminary negotiations and agreements, including the signed letter, did not constitute a contract.

Seramur v. Life Care Centers of America, Inc., No. E-2008-01364-COA-R3-CV, 2009 WL 890885 (Tenn. Ct. App. April 2, 2009) (holding plaintiff’s alleged agreement with defendant, as part of plaintiff’s employment, that plaintiff would receive one-fourth ownership interest in undetermined facility operated by defendant was unenforceable “agreement to agree” where defendant furnished plaintiff blank LLC operating agreement that did not identify specific facility, formal operating agreement was never completed or signed, and there were approximately 230 facilities operated by defendant itself or by partnerships or LLCs affiliated with defendant at time plaintiff left defendant’s employment).

Mickman v. American International Processing, L.L.C., Civil Action No. 3869-VCP, 2009 WL 891807 (Del. Ch. March 23, 2009). Mickman sought to inspect the books and records of an LLC, and the LLC opposed her efforts and sought summary judgment on the basis that she was not a member or manager of the LLC. The Delaware LLC statute confers inspection rights upon each member and manager of an LLC, and the written operating agreement did not identify Mickman as a member. The LLC argued that the court should look for guidance to corporate law, under which only shareholders listed on the stock ledger are recognized as record holders for purposes of inspection rights, and that, where a written operating agreement exists, only members listed in the operating agreement should be recognized as members with a right to inspect the LLC’s books and records. The court rejected the analogy to corporate law, pointing out that the Delaware Supreme Court case principally relied upon by the LLC dealt only with stock corporations. Further, the court stated that the policy considerations underlying the Delaware Supreme Court’s decision in that case did not translate readily to the circumstances in this case. Inasmuch as LLCs are generally created on a less formal basis than corporations and are basically creatures of contract, the court stated that it was reasonable to consider evidence beyond the four corners of the operating agreement, where, as in this case, admissible evidence suggests the parties intended for the plaintiff to be a member. Although the operating agreement did not list the plaintiff as a member, other documents signed by the two members listed in the LLC agreement, one of which was the plaintiff’s husband, supported a reasonable inference that the plaintiff was a member. The other documents included the LLC’s tax return and the K-1’s of the members as well as an Offer of Compromise to the IRS signed by the plaintiff’s husband. The LLC argued that the representations in these documents were mistakes, but the court stated that they raised factual issues that could not be determined at the summary judgment stage.

Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. App. 2009). In 1983, four Mazloom brothers (Iraj, Ahmad, Manooch, and Aboli) incorporated a business in which they were equal shareholders, though no stock certificates were ever issued. Iraj served as Secretary-Treasurer and worked as an employee of the corporation until 1996 when he was removed and excluded from participating in the business by the other brothers. In 2000, articles of dissolution were filed for the corporation without Iraj’s knowledge or consent. On the same day, Ahmad, Manooch, and Aboli filed articles of organization for an LLC. In 2002, Iraj contacted an attorney to help him clarify his interest in the LLC, and the attorney prepared articles of amendment for the LLC stating that the LLC received all of the dissolved corporation’s assets and goodwill and that the shareholders were to retain their respective ownership in the LLC as they had in the corporation. The articles of amendment went on to state that, through inadvertence or mistake, Iraj was not transferred over as a shareholder of the LLC and that the amendment was to correct the error and acknowledge that Iraj owned 25% of the LLC. The articles of amendment were signed by Manooch and Aboli and filed with the South Carolina Secretary of State. In 2003, Ahmad sold his interest in the LLC to Manooch and Aboli without notice to Iraj. The bill of sale recited that Ahmad, Manooch, and Aboli each owned 1/3 of the LLC. Later in 2003, Manooch and Aboli entered into

a contract for the sale of all the LLC's assets. Iraj did not know of the sale and did not receive any share of the sale proceeds. Iraj filed a complaint against Manooch and Aboli in 2004. The case was referred to a special master who found that Iraj owned a 25% interest in the LLC and awarded him a sum from the sale of the assets and for unpaid cash distributions. The brothers argued that the special master erred in finding that Iraj owned 25% of the LLC because they claimed Iraj transferred his 25% interest in the predecessor corporation to a niece in 1985. The court of appeals reviewed the evidence and upheld the finding that Iraj retained his 25% ownership interest in the corporation and LLC. The court concluded that a preponderance of the evidence supported the special master's conclusion and that the brothers were estopped from denying the facts in the articles of amendment.

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

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

S. LLC Property/Interest of Member

In re Goreham, No. BK-09-80917-TLS, 2009 WL 3018648 (Bankr. D. Neb. Sept. 16, 2009). The trustee unsuccessfully attempted to avoid a transfer of a non-debtor LLC's property under Section 547(b) of the Bankruptcy Code. The debtor was the sole member of an LLC that owned a piece of real estate. Within ninety days before the bankruptcy filing, the debtor caused the LLC to transfer the real estate to a corporation that belonged to the debtor's son. The court refused to set aside this transfer, holding that although the debtor's interest in the LLC was his personal property and thus property of his bankruptcy estate, the LLC's underlying property was not. The transfer made by the LLC could not be avoided as a preferential transfer under Section 547(b) because it was not attributable to the debtor.

Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC, C.A. No. 4380-VCN, 2009 WL 2356881 (Del. Ch. July 30, 2009). Evans, an individual who was the sole member and manager of an LLC, signed a lock-up agreement in which he agreed not to pledge or transfer certain stock owned by the LLC for a specified period of time. The agreement was signed by the individual and did not refer to the LLC. Below the individual's name, the title "Chief Executive Officer" appeared, but no company name was provided. The plaintiff sought a declaration that the lock-up agreement did not prohibit a pledge of the shares to the plaintiff. The defendant sought to avoid the pledge of the shares to the plaintiff based on the lock-up agreement. The court found that Evans executed the lock-up agreement in his personal capacity and that the agreement did not bind the LLC. The parties agreed that Evans signed the agreement in his personal capacity, and the court commented that the inclusion of the title "Chief Executive Officer" did not change the result because there was nothing on the face of the agreement to indicate an intent on the part of Evans to act in that capacity. The stock in question was the property of the LLC rather than Evans because a member has no interest in specific LLC property. Evans could not encumber property he did not own. The defendant argued that the agreement prohibited Evans from pledging shares regardless of who owned them by virtue of the phrase prohibiting transfers "directly or indirectly." The court stated that it did not need to reach that question because its task was complete in determining that the LLC was not bound by the agreement and the defendant thus could not prevent the LLC's transfer of its shares to the plaintiff. The court noted that it might well be that Evans violated the lock-up agreement by pledging the LLC's shares, but Evans was not before the court, and determining whether he violated the agreement was not necessary.

In re Aldape Telford Glazier, Inc., 410 B.R. 60 (Bankr. D. Idaho 2009). The sole member of two dissolved LLCs filed bankruptcy under Chapter 7 and listed the assets of the LLCs as its own. The court discussed the dissolution and winding up provisions of the Idaho LLC statute (applying the LLC statute in effect prior to adoption of the Idaho's Uniform Limited Liability Company Act in 2008 because the LLCs were formed prior to 2008 and had not elected to be governed by the new statute) and concluded that the sole member of the two dissolved LLCs could not treat the assets of the dissolved LLCs as its own prior to completion of the winding up process. The court found that the bankruptcy petition should be dismissed because it improperly combined the financial affairs of separate legal entities and constituted an impermissible "joint" petition.

In re Greeson, No. 09-11328, 2009 WL 1542770 (Bankr. D. Kan. June 2, 2009). The debtor was the sole member of an LLC engaged in excavation and dirt work. After the LLC's lender repossessed the LLC's truck, the sole member dissolved the LLC and the member's lawyer filed a notice of cancellation of the articles of organization with the Kansas Secretary of State. The member then commenced this bankruptcy case, taking the position that the assets of the dissolved LLC became the member's assets, subject to the liens of the lender and the IRS. After the court questioned the validity of that position, the member executed documents pursuant to which the LLC transferred its equipment and accounts receivable to the member, subject to liens of the lender and the IRS. The member also assumed the debts of the LLC. The member sought to continue to operate the business of the LLC and to utilize its pre-petition accounts receivable. The court first addressed whether any of the LLC's property was property of the member's estate. The court found that the LLC was properly organized, noting that the absence of an operating agreement did not invalidate the validity of the separate entity status of the LLC. Having determined that the LLC was legally organized, the court discussed the status of the LLC's assets in light of the member's attempt to dissolve the LLC. The court described the statutory requirements in a winding up of a dissolved LLC and pointed out that the Kansas LLC statute requires a dissolved LLC to pay or make reasonable provision for payment of all claims and liabilities before distributing assets to the members. The lender relied upon the trust fund doctrine for the proposition that the creditors retained an

equitable interest in the LLC's property and the member's interest in the LLC's property was thus not property of the estate. The court concluded, however, that the transferred property was property of the member's estate based upon Sections 541 and 1306 of the Bankruptcy Code. Section 541 provides that all legal and equitable interests of the debtor on the date of filing become property of the estate, and Section 1306 expands the Chapter 13 estate to include all property the debtor acquires post-petition. The court stated that the member retained an interest in the property, albeit an interest encumbered by prior liens and claims of creditors. The court characterized the transfer of the LLC's property to the member as violating the pertinent provisions of the LLC statute, but stated that the bare act of transfer placed the property within the estate. Given that the lender and the IRS could vindicate their rights against the assets in the bankruptcy process, the court concluded that the trust fund doctrine did not apply. The court distinguished the situation with respect to the truck which the member sought to reclaim. The truck was titled in the LLC with the lender's lien noted on the title, and the transfer of ownership of the vehicle did not comply with the Kansas certificate of title statute. Thus, the court concluded that the title to the truck could not have been transferred without the lender's consent and remained property of the LLC rather than the member's bankruptcy estate.

Middlesex Retirement System, LLC v. Board of Assessors of Billerica, 903 N.E.2d 210 (Mass. 2009). The court rejected the argument that real property owned by a Delaware LLC should be deemed to be owned by the LLC's member, a governmental entity, and thus exempt from property tax. The court noted that an LLC interest is personal property under Delaware law and a member has no interest in specific LLC property, and the court found no basis to treat the LLC as an instrumentality of its member, the Middlesex Retirement System (MRS). The LLC's operating agreement recited a purpose that was purely business in nature, and the LLC did not purport to undertake any governmental function of MRS. The LLC was engaged in the business of owning and managing commercial real estate and functioned as a business enterprise distinct from MRS. Thus, applying a functional approach (focusing on the stated purposes and actual workings of the LLC), the LLC was not a governmental instrumentality. The court also concluded that the LLC was not the alter ego of MRS.

In re Harder (Harder v. Premierwest Bank), 413 B.R. 827 (Bankr. D. Or. 2009). The debtor, Harder, owned interests in hundreds of single purpose LLCs formed to own or operate assisted living facilities. Harder sought injunctive relief against secured lenders of the LLCs in order to facilitate his successful reorganization. The secured lenders opposed the request, relying on the fact that Harder did not own the assisted living facilities because each facility was owned by a separate legal entity. The court agreed, noting that the membership interests owned by Harder were defined as personal property under the Oregon LLC statute and that the statute explicitly provides that a member is not a co-owner of and has no interest in specific LLC property. Further, Harder had assigned his interests in the LLCs to a workout specialist; therefore, the secured lenders argued that not even Harder's interests in the LLCs were part of his bankruptcy estate. Again, the court agreed. In sum, the court stated that Harder chose to conduct his investment affairs through hundreds of LLCs, which were separate legal entities under state law and the Bankruptcy Code. The property of the LLCs was not property of the bankruptcy estate. Harder argued that the restructuring of the LLCs was in effect a restructuring of his personal interests in his global business affairs, but the court pointed out that he transferred away all of his interests in the entities on the eve of his bankruptcy petition. The court stated that it must follow the Bankruptcy Code although it understood the appeal of bringing all the LLCs under the protection of the bankruptcy court and the hardship the court's ruling may cause to other investors in the LLCs and the individual entities.

Parsons & Whittemore Enterprises Corporation v. Cello Energy, LLC, Civil Action No. 07-0743-CG-B, 2009 WL 323081 (S.D. Ala. Feb. 7, 2009) (applying rule against perpetuities to option to purchase LLC interest).

Pride Mobility Products Corp. v. Dylewski, Civil Action No. 3:08-cv-0231, 2009 WL 249356 (M.D. Pa. Jan. 27, 2009) (dismissing LLC member's claims for conversion and civil theft against LLC's creditor because LLC's assets were assets of LLC rather than member, and member failed to allege that LLC's creditor acquired or possessed any of member's 50% membership interest or that member's interest was otherwise taken from him).

Baird v. Macklin, 6 Pa. D. & C. 5th 193, 2008 WL 5600765 (Pa. Com. Pl. Dec. 11, 2008). A minority member of an LLC filed suit against the other two members seeking an accounting, partition of property, and a dissolution of the LLC. The court dismissed the plaintiff's claim for partition on the basis that there was no way a claim for partition could be cured by amendment. The real property the plaintiff sought to partition was held in the name of the LLC, and the

court stated that both the LLC statute and the operating agreement prohibited the individual members from holding title to LLC property in their individual names.

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

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

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

T. Fiduciary Duties of Members and Managers

In re General Growth Properties, Inc., 409 B.R. 43 (Bankr. S.D.N.Y. 2009). The court declined to dismiss the bankruptcy cases filed by numerous direct or indirect subsidiaries of General Growth Properties, Inc. ("GGP"), a publicly traded REIT and ultimate parent of approximately 750 wholly-owned debtor and non-debtor subsidiaries, joint venture subsidiaries, and affiliates (the "GGP Group"). The GGP Group was engaged primarily in shopping center ownership and management. Creditors of certain subsidiaries structured as special purpose entities ("SPEs") sought to dismiss the bankruptcies filed by these SPEs on bad faith grounds. Most of the SPEs for which dismissal was sought were structured as LLCs. The court described the financing arrangements in which the SPEs were involved and typical SPE documentation, including provisions regarding independent managers who were required to approve a bankruptcy filing by the SPE. The court discussed the "independent manager" provisions of the operating agreements of the SPEs, which required unanimous consent of the managers before an SPE could file bankruptcy. The operating agreements provided that, to the extent permitted by law, the independent managers shall consider only the interests of the entity, including its creditors, in voting on bankruptcy, and further provided that the independent managers shall have a fiduciary duty of loyalty and care similar to that of a director under the Delaware General Corporation Law. The court stated that the drafters of the operating agreements may have attempted to create impediments to a bankruptcy filing, but Delaware law provides that directors of a solvent corporation are required to consider the interests of shareholders in exercising their fiduciary duties. The court pointed out that the *Gheewalla* decision of the Delaware Supreme Court rejected the proposition that directors of a Delaware corporation have duties to creditors when operating in the zone of insolvency and held that directors of a solvent corporation must continue to discharge their duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholders. Because there was no contention that the SPEs were insolvent, the creditors were not assisted by Delaware law in their contention that the independent managers should have considered only the interests of the secured creditor when making their decisions to file the Chapter 11 petitions. The court stated that creditors were mistaken if they believed that the independent managers could serve on the board solely for the purpose of voting "no" to a bankruptcy filing based on the desires of a secured creditor because the Delaware cases stress that directors and managers owe their duties to the corporation and, ordinarily, the shareholders.

In re Metcalf Associates-2000, L.L.C. (IAS Partners, Ltd. v. Chambers), 213 P.3d 751 (Kan. App. 2009). In this judicial dissolution action, Chambers, a 50% member of an LLC, appealed the district court's judgment dissolving the LLC. Chambers argued that the statutory requirements for dissolution had not been met, but the appeals court affirmed the judgment on the basis that the LLC was deadlocked and faced potential irreparable injury. In the course of its opinion, the court was critical of conduct on the part of Chambers relating to the marketing of property of the LLC, and the court determined that Chambers made an unauthorized capital call. Chambers sought recovery of his litigation expenses pursuant to provisions of the LLC and corporate statutes permitting corporate officers and LLC members to be indemnified for expenses in suits against them. The district court denied recovery on the basis that Chambers acted in bad faith and thus did not qualify for indemnity under the corporate statute, which permits recovery only if a person

has acted in good faith, or the LLC statute, which allows recovery only to successful litigants or as authorized in the operating agreement. Chambers challenged the district court's finding that he acted in bad faith, but the appeals court found there was ample evidence that Chambers was acting in his own interests and contrary to those of the LLC.

Emprise Bank v. Rumisek, 215 P.3d 621 (Kan. 2009) (holding that former member of LLC was not entitled to damages for breach of manager's fiduciary duties based on conduct after member surrendered his interest and was no longer member).

In re New Towne Development, LLC, 410 B.R. 225 (Bankr. M.D. La. 2009) (noting that certain claims in state court may not belong to debtor because Louisiana law recognizes that members may urge claims against other members for breach of fiduciary duties).

JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp.2d 1013 (D. Nev. 2009). Eight real estate companies formed an LLC for the purpose of acquiring and developing real estate, and the LLC entered a credit agreement. The LLC executed various collateral documents including an agreement under which it granted a security interest in acquisition agreements between the LLC and its members under which each member agreed to purchase specified portions of the land. The lender alleged that it had filed a financing statement perfecting its security interest in personal property, such as the acquisition agreements and the LLC operating agreement. The members allegedly refused to purchase the land as required under the acquisition and operating agreements, and the LLC defaulted under the credit agreement and collateral documents. The lender filed suit alleging causes of action for breach of contract against the members and their parent companies, breach of fiduciary duty against the members and their parent companies, intentional interference with contractual relationships against the parent companies, and constructive trust. The court dismissed claims that the members breached fiduciary duties to the LLC because the operating agreement contained a provision that "neither the Members nor their respective Managers shall have any fiduciary duties to any other Member or Managers or [the LLC] or the General Manager." The court noted that the Nevada legislature restricted the elimination of fiduciary duties for partnership agreements but not for LLC operating agreements and pointed out that Nevada had not adopted the provision of the Revised Uniform Limited Liability Company Act stating that an operating agreement may not eliminate the duties of loyalty or care or any other fiduciary duty. The court stated that an amendment of the Nevada LLC statute allowing an operating agreement to limit or eliminate any and all liabilities for breach of contract and breach of duties of a member, manager, or other person suggested that the Nevada legislature's intent was to allow parties to an operating agreement to limit or eliminate fiduciary duties even though the provision did not take effect until October 1, 2009 (after the events in this case and after the court's opinion). Because no allegation or contract demonstrated that the parent companies of the members were bound to act for the benefit of the LLC, the court also dismissed the breach of fiduciary duty claims against the parent companies. The court stated that directors of an insolvent corporation owe a fiduciary duty to the company's creditors under the corporate case law of many states and concluded that "the Nevada Supreme Court would extend the insolvency exception to limited liability companies." Based on allegations regarding the LLC's insolvency and the management and control of the LLC, the court stated that it was possible that the defendant members and their parent companies caused the managers of the LLC to breach fiduciary duties, and the lender had stated a claim as it related to an alleged breach of fiduciary duty owed to the LLC's lenders.

Utzler v. Braca, 972 A.2d 743 (Conn. App. 2009). The court of appeals upheld the trial court's findings that the defendant was liable to the plaintiff for an LLC's breach of contract under veil piercing principles and that the defendant was liable for breach of fiduciary duty. The plaintiff invested in the building of a luxury home by entering into a contract with an LLC controlled by the defendant. In return for the plaintiff's investment, the plaintiff was to receive the return of his investment plus 25% of the profit when the home was sold. Although the defendant nominally conducted his construction business through a number of business entities, the court stated that each of these companies was in fact his alter ego. Throughout the venture, the defendant treated the plaintiff's investment as if it were his personal fund available for his personal needs. Despite an express provision in the investment contract that the plaintiff's investment was to be used solely for the project, the defendant used funds contributed by the plaintiff for an unrelated project. He regularly deposited funds that he received from the plaintiff and from the financing for the project into a commingled bank account from which he made withdrawals for purposes unrelated to the project. In addition, the plaintiff diverted building resources to another project and for personal purposes. The court discussed the instrumentality

rule and concluded that the record amply supported the trial court's findings that the defendant's wrongful diversions of funds violated the investment contract, that the breach caused a loss of the plaintiff's investment, and that the defendant was personally liable under the instrumentality rule. The defendant did not dispute that he owed a fiduciary duty to the plaintiff, but argued that the trial court improperly found that he had breached the duty. The court stated that many of the facts that proved the defendant's breach of contract, i.e., using funds provided by the plaintiff and the lender for purposes other than the project, such as personal expenses and expenses related to other properties, and subjecting the project property to a third mortgage to secure a loan on other properties, also proved a breach of fiduciary duty. Additionally, the court pointed to the trial court's finding that hiring the defendant's relatively inexperienced son as the realtor for the property was unfair, dishonest, and involved a pattern of self-dealing and conflicts. Thus, the court was persuaded that the record supported the finding that the defendant had not met his burden of showing that he dealt fairly with the plaintiff, and the trial court properly found he breached his fiduciary duty.

Bernards v. Summit Real Estate Management, Inc., 213 P.3d 1 (Or. App. 2009). Two individuals (Walter Bernards and Jerry Bernards) who were members of two member-managed LLCs (Greenbrier Apartment Buildings, LLC ("Greenbrier") and Pioneer Ridge Apartments, LLC ("Pioneer Ridge")), brought a derivative suit against the other members for breach of fiduciary duty based on the defendant members' refusal to take legal action against Summit Real Estate Management, Inc. ("Summit"), the management company for the apartment complexes owned by the LLCs, and McKenna, one of Summit's officers, after McKenna admitted embezzling approximately \$172,000 from Greenbrier and \$160,000 from Pioneer Ridge. The LLC operating agreements required unanimous consent to authorize a member to resort to legal action on behalf of the LLC where the amount exceeded \$5,000, and the other members refused to consent without explanation. After a direct action by Walter Bernards against Summit and McKenna was dismissed, the plaintiffs filed amended complaints adding Jerry Bernards as a plaintiff and adding derivative claims against the member defendants. The defendant members moved to dismiss the claims against them on the basis that the plaintiffs failed to allege facts showing or implying that the defendants breached their fiduciary duties or otherwise failed to act in good faith, on an informed basis, and in the best interest of the LLCs.

The plaintiffs argued that they need only allege that they made demand on the defendants to cause the LLCs to sue in their own right and that the demand was refused or ignored or the reason that demand was not made. The plaintiffs asserted that no allegation of wrongdoing was necessary, and that, if it was, the complaints alleged facts from which wrongdoing could be inferred. The court of appeals concluded that an allegation of either demand refusal or demand futility was necessary but not sufficient to state a derivative claim against LLC members. The court held that an allegation of facts sufficient to show bad faith, gross negligence, fraud, or willful or wanton misconduct was also required. The court noted that the pleading requirements in the Oregon statute requiring an allegation of demand refusal or demand futility are subject to variation by contract because the statute begins with the phrase "Except as otherwise provided in writing in the articles of organization or any operating agreement,...." The court stated that the members had altered the pleading requirements by agreeing in the operating agreement that a member shall not be liable to the other members or the LLC for honest mistakes of judgment or for action or inaction taken in good faith for a purpose reasonably believed to be in the best interest of the LLC provided that such mistake, action, or inaction does not constitute gross negligence, fraud, or willful or wanton misconduct. The court stated that the plaintiffs' claims against the defendant members were claims for breach of contract, and the contract insulated the members from liability short of the wrongful conduct described in the operating agreement. The court also pointed out that it had held that wrongful conduct is a necessary element of a derivative action in the context of derivative actions by shareholders against directors and that the LLC statute and the corporate statute on derivative actions are identical with the exception of the introductory clause in the LLC statute permitting variation of the pleading requirements by contract. The court discussed the case law in the corporate context requiring a party to rebut the business judgment rule to avoid the pre-litigation demand requirement. The court acknowledged that the present case involved demand refusal rather than demand futility, but the court could find no reason to conclude that one context requires an allegation of wrongdoing and the other does not. Thus, the court concluded that, unless plaintiffs' complaints alleged facts showing that the member defendants' action in refusing to institute legal proceedings against Summit and McKenna was not the exercise of business judgment – or, in the more specific language of the operating agreements, that the member defendants' decision was made in bad faith or amounted to gross negligence, fraud, or willful or wanton misconduct – the complaints did not state a claim.

The court rejected the argument of the defendants that the complaints would fall short even if they contained allegations of wrongful conduct. In this regard, the defendants argued that the provision of the operating agreements requiring unanimous consent for legal action replaced the pleading requirements for a derivative action and gave each

member the unfettered ability to block any legal action on behalf of the LLC. The court stated that parties to a contract are bound by a requirement of good faith and fair dealing, and the operating agreement expressly provided for liability for bad faith, gross negligence, fraud, or willful or wanton conduct. Thus, the court said the agreement confirmed that consent could not be withheld except for a valid reason.

The court of appeals agreed with the trial court that the complaints did not allege facts from which a factfinder could conclude that the defendants acted with gross negligence or in bad faith. The court stated that the plaintiffs had to allege facts sufficient to overcome the presumption afforded by the business judgment rule that the defendants acted for the benefit of the LLC – that they acted with the requisite culpability required by the operating agreement. Further, the court stated that, due to the unanimous consent requirement of the operating agreement, the plaintiffs had to allege facts demonstrating that *all* of the members acted with the requisite culpability. If even one of the members refused to proceed for a valid business reason, the LLCs could not bring the action against Summit and McKenna. According to the court, the scant facts alleged did not support an inference of wrongdoing as opposed to a mere possibility. The court discussed case law in the corporate context regarding the refusal to bring legal action when a right of recovery is clear and concluded that the plaintiffs had not presented facts sufficient to support an inference that legal action by the LLC would have led to “clear recovery” as that concept was interpreted by the court. Thus, dismissal of the plaintiffs’ complaint was proper.

B.A.S.S. Group, LLC v. Coastal Supply Co., Inc., Civil Action No. 3743-VCP, 2009 WL 1743730 (Del. Ch. June 19, 2009). A disloyal employee (Burkett) who embezzled funds from his employer (Coastal Supply Co., Inc. or “Coastal”), formed an LLC with a friend (Webb) and used the embezzled funds to purchase property for the LLC. When Coastal discovered the embezzlement, it fired Burkett and entered a restitution agreement with him, which included transferring the property from the LLC to Coastal. Webb then commenced this action to void the transfer of the property to Coastal and to obtain other relief for alleged breaches of fiduciary duty by Burkett. Coastal counterclaimed for unjust enrichment and conversion and sought relief in the form of a constructive trust over the property or a money judgment. Both sides sought summary judgment. The court granted Coastal’s motion for summary judgment on its unjust enrichment and conversion claims and denied the motion of the LLC and Webb for avoidance of the transfer of the property and breach of fiduciary duty. Webb and the LLC argued that the transfer of the property from the LLC to Coastal was void or voidable because Burkett lacked authority and the LLC did not receive any consideration. The court first analyzed the actual authority of Burkett and concluded that there were factual issues bearing on the matter of actual authority that precluded summary judgment. The court examined the provisions of the LLC agreement and concluded that there was an issue as to whether Burkett acted in “good faith” for purposes of a provision of the agreement that designated Burkett as an “Authorized Person” with power of attorney to act for both members. Under the provision, any representation or action of the Authorized Person acting in good faith pursuant to the power of attorney was binding as to both members. Webb argued Burkett did not act in good faith because he transferred the property solely for his own benefit. Coastal argued that Burkett acted in good faith because he protected the LLC from potential tort liability for conversion and potential criminal liability for receiving stolen property. The court noted that “much ink has been spilt analyzing the concept of good faith” in Delaware. The parties provided the court little guidance as to the meaning of “good faith” in this context, but the court noted that a fiduciary in the corporate context does not act in good faith if the fiduciary acts subjectively believing that the fiduciary’s actions are not in the best interest of the corporation. Because there were disputed issues of fact concerning Burkett’s state of mind as well as the reasonableness of his actions, the court denied summary judgment. Further, the court concluded that denial of summary judgment was supported by the fact that a more contextually specific definition of good faith might need to be applied.

Gadin v. Societe Captrade, Civil Action No. 08-CV-3773, 2009 WL 1704049 (S.D. Tex. June 17, 2009). In 2005, the plaintiff and Societe Captrade (“Captrade”) formed an LLC with the plaintiff owning 35% and Captrade owning 65%. From 2005 until 2008, the plaintiff managed the LLC, and relations with Captrade and its principals were cordial. In 2008, Captrade hired an outside manager. The plaintiff alleged that there was an attempt to purchase his membership interest at an under-valued price, that he was forced to resign from the LLC, and that Captrade and its principals took clients, records, and financial information from the LLC. The plaintiff brought claims for breach of fiduciary duty, minority member oppression, and an accounting. Captrade sought dismissal of the breach of fiduciary duty claim on the basis that the plaintiff failed to state facts showing that a member of an LLC owes another member a fiduciary duty or that there was more than a subjective trust by the plaintiff in Captrade so as to support an informal fiduciary relationship. The plaintiff responded that he used his personal credit, business contacts, and name in order to

fund the start-up and business operations of the LLC and that he relied upon the representations by Captrade and its principals that his investment of time and resources would make his stake in the LLC profitable. The court reviewed the formal and informal types of fiduciary relationship recognized under Texas law and noted that the Texas Limited Liability Company Act does not directly address the duties owed by managers and members. The court stated that Texas courts have not yet held that a fiduciary duty exists as a matter of law among members in an LLC and noted that, where fiduciary duties among members have been recognized in other jurisdictions, the duties have been based on state-specific statutes. The court denied Captrade's motion to dismiss "[b]ecause the existence of a fiduciary duty is a fact-specific inquiry that takes into account the contract governing the relationship as well as the particularities of the relationships between the parties." The court noted that Captrade's motion to dismiss did not address the plaintiff's claim for minority member oppression.

Fornshell v. Roetzel & Andress, L.P.A., Nos. 92132, 92161, 2009 WL 1629715 (Ohio App. June 11, 2009) (noting that LLC, like partnership, involves fiduciary relationship which imposes duty on members to exercise utmost good faith and honesty in all dealings and transactions related to LLC, but rejecting argument that LLC's law firm owed duty to LLC's minority owner).

In re Kindred (Thomas v. Murphy), Bankruptcy No. 6:08-bk-02334-KSJ, Adversary No. 6:08-ap-00171, 2009 WL 1788401 (Bankr. M.D. Fla. June 5, 2009) (holding breach of fiduciary duty claim by LLC and 50% member against law firm was duplicative of professional malpractice claim and was barred by two-year statute of limitations but breach of fiduciary duty claim against lawyer who was also other 50% member was subject to four-year statute of limitations because claim alleged breach of fiduciary duty in capacity as co-owner and manager of LLC separate and apart from claim for breach of fiduciary duties as attorney).

Yessenow v. Hudson, No. 2:08-CV-353 PPS, 2009 WL 1543495 (N.D. Ind. June 2, 2009) (stating that LLC members owe fiduciary duties to one another similar to shareholders in closely-held corporation or partners in partnership).

Stevensen 3rd East, LC v. Watts, 210 P.3d 977 (Utah App. 2009). An LLC manager appealed after a jury found that he breached his fiduciary duty of care as a manager of a real estate development LLC and caused damage to the LLC. The manager claimed that the trial court erred in instructing the jury regarding the standard of care for an LLC manager and the measure of damages for a breach of fiduciary duty. The trial court instructed the jury that the "standard of care which a defendant manager, who is also a builder and a real estate developer, must exercise is that amount of skill and learning ordinarily possessed and exercised by other members of the defendant's profession practicing in the same or similar circumstances." The court further instructed the jury that "the Defendant has a duty not to act in a manner which would constitute gross negligence or willful misconduct by a builder and real estate developer practicing his profession in this community." The instruction also stated that the defendant was not held to a standard of perfection and that the law did not demand exceptional skill, learning, and caution. The instruction concluded by stating that the defendant "may make an error in judgment or a mistake in the performance of services, or disagree with other members of the builder and real estate development community without being grossly negligent or engaging in willful misconduct." The court held that the instruction did not erroneously advise the jury regarding the standard of care of the defendant. The court relied upon the statutory standard of care for a corporate director, i.e., the care of an ordinarily prudent person in a like position under similar circumstances. The court also noted that the corporate statute provides that a director is not liable to the corporation for any action unless the director's breach of duty constitutes gross negligence, willful misconduct, or intentional infliction of harm on the corporation. Since the LLC was created for the sole purpose of developing a particular piece of real estate, the court concluded it was not error for the trial court to compare the manager's performance as a manager with that of other managers engaged in the business of building and developing real estate. With respect to damages, the court held that the breach of fiduciary duty claim sounded in tort because, "[l]ike the fiduciary duties of general partners or corporate officers, a limited liability company manager's duty arises from the corporate relationship itself, independent of any contractual duties." According to the court, Utah courts have approached damages in a breach of fiduciary duty case as described in the Restatement of Torts, varying the exact measure of damages based on the type of fiduciary relationship involved and the extent to which other areas of substantive law apply to the relationship. In this case, the jury instruction on damages was based on the Model Utah Jury Instruction pertaining to the measure of damages for a business tort. The court found this was the correct analogy, but

stated that the trial court erred in failing to instruct the jury to limit the damages to the pecuniary loss to the LLC as measured by lost net profits or any other consequential losses for with the breach of fiduciary duty was the cause. The court concluded, however, that it was not reasonably likely that this error affected the jury's verdict.

Ledford v. Peebles, 568 F.3d 1258 (11th Cir. 2009). A Georgia LLC was owned 50-50 by an entity ("Dyna-Vision"), which supplied the capital for the LLC, and three other individuals (the "Active Members"), who ran the company and marketed its product. The Active Members bought out Dyna-Vision's interest pursuant to a put and call provision in the operating agreement and then sold the assets of the LLC to a third party (Peebles) who had financed the purchase by the Active Members of Dyna-Vision's interest. Dyna-Vision and three of its members (the "Dyna-Vision Group") sued the Active Members in state court and Peebles in federal court based on representations to the Dyna-Vision Group by the Active Members and Peebles that Peebles was not financing the purchase of Dyna-Vision's interest. The Dyna-Vision Group lost both cases on summary judgment. In the state court action, the Georgia Court of Appeals issued an opinion in 2005 in which it held in favor of the Active Members on all claims by the Dyna-Vision Group except one claim involving a dispute over the transfer of some real estate. (The Georgia Court of Appeals found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with Peebles under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered by Peebles' agreement with the Active Members to make a loan to finance the Active Members' purchase of Dyna-Vision's interest and to purchase the LLC's assets after the Active Members' purchase of the Dyna-Vision interest. The court also rejected Dyna-Vision's fraud claim, finding that the involvement of the third party in financing the buy-out of Dyna-Vision's interest was not material to Dyna-Vision's decision whether to buy or sell under the put and call provision. Finally, the court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members' freedom to restrict and eliminate fiduciary duties under the Georgia LLC act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with the LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.) The Georgia Supreme Court denied the Dyna-Vision Group's petition for review. In this opinion, the Eleventh Circuit Court of Appeals addressed the Dyna-Vision Group's appeal of the federal district court's summary judgment in favor of Peebles and the district court's denial of sanctions against Peebles under the Private Securities Litigation Reform Act. In the federal court action, the Dyna-Vision Group asserted against Peebles federal and state securities fraud claims. The Eleventh Circuit also affirmed the district court's summary judgment in favor of Peebles on a claim that Peebles aided and abetted a breach of fiduciary duty by the Active Members to certain plaintiffs. The alleged breaches of fiduciary duty related to property owned by an LLC formed by the Active Members and three of Dyna-Vision's members. When suitable property for the site for the LLC owned by Dyna-Vision and the Active Members (the "operating LLC") was located, another LLC was formed by the Active Members and three of Dyna-Vision's members to purchase the property (the "leasing LLC"). Later, when the operating LLC needed additional working capital, it obtained a loan that refinanced several prior unsecured loans as well as existing indebtedness incurred by the leasing LLC to purchase the property for the site, and the operating LLC executed a deed of trust for the property owned by the leasing LLC. When the bank discovered that the property was owned by the leasing LLC rather than the operating LLC, it prepared a warranty deed for execution by the leasing LLC's members. The leasing LLC and two of its members who claimed that they did not know what they were signing when they were asked to sign the warranty deed claimed that the Active Members breached their fiduciary duties by failing to disclose the nature of the document they were being asked to sign and by failing to convey the property back to the leasing LLC before the sale of Dyna-Vision's interest in the operating LLC. The district court had held that there was no cause of action under Georgia law for aiding and abetting a breach of fiduciary duty, but a Georgia case subsequently recognized such a cause of action, and the Eleventh Circuit thus analyzed the merits of the claim against Peebles. Assuming, based on the opinion of the Georgia Court of Appeals in Dyna-Vision's state court action, that the Georgia LLC statute imposes a fiduciary duty on members and managers by virtue of the provision requiring a member of manager to act in a manner he or she believes in good faith to be in the best interests of the LLC and with the care of an ordinarily prudent person under similar circumstances, the Eleventh Circuit concluded that there was no breach of fiduciary duty by the Active Members, and, as a result, Peebles did not aid and abet any breach of fiduciary duty. Given the representations that were made to the bank to induce it to make the loan to the operating LLC, the court stated that the individuals did what they promised to do. As for the failure of the operating LLC to convey the property back to the leasing LLC, the court stated that the statutory fiduciary duties actually obligated the Active Members, as managers of the operating LLC, not to do so.

Lieberman v. Mossbrook, 208 P.3d 1296 (Wyo. 2009) (agreeing with district court that remaining members did not breach fiduciary duties to withdrawn member by failing to provide copies of tax returns, minutes, or reports of ownership distributions the LLC made after member withdrew because withdrawn member was furnished with copy of last K-1 and had no right to requested information thereafter).

Norrie v. Lane, No. B196062, 2009 WL 1522558 (Cal. App. 2 Dist. June 2, 2009). Norrie and Lane formed a real estate development LLC with Norrie as the sole managing member. Lane became dissatisfied with Norrie's management, and eventually Lane obtained an arbitration award removing Norrie as managing member and specifying the profit shares of Lane and Norrie in the event of the sale or development of certain property of the LLC known as "445 Manhattan." The arbitration award was confirmed by the trial court, and thereafter Lane listed the 445 Manhattan property for sale. Norrie moved for appointment of a receiver to require Lane to comply with the judgment entered on the arbitration award, arguing that a receiver was necessary to complete the sale or development and sale of 445 Manhattan and to distribute the proceeds in accordance with the judgment. He asserted that Lane's failure to develop 445 Manhattan and willingness to sell the property at a loss, coupled with a plan to make Norrie responsible for 100% of the loss was a breach of fiduciary duty to the LLC and Norrie. Lane opposed the motion and explained the process by which he had listed and reduced the selling price of the property. Although a third party bid on the property, Lane outbid the third party and was planning to purchase the property himself. Norrie replied that Lane was in breach of his fiduciary duty in selling the property to himself. The court denied the motion for a receiver, and Norrie appealed. While the appeal was pending, Norrie brought an action, individually and derivatively on behalf of the LLC, against Lane's wife because Lane's wife had been the buyer of 445 Manhattan. Norrie alleged that Lane's wife conspired with Lane to breach his fiduciary duty to develop 445 Manhattan and to act as a straw buyer so that it would appear that a third party was developing 445 Manhattan. The trial court dismissed the action against Lane's wife, and Norrie appealed the dismissal. The appeals were consolidated, but Norrie expressly abandoned his earlier appeal of the order in the receiver proceeding. The court of appeals addressed whether Norrie stated a cause of action for aiding and abetting a breach of fiduciary duty, and stated that Norrie sufficiently alleged the existence of a fiduciary duty on the part of Lane because the California LLC statute states that the fiduciary duties a manager owes to the LLC and its members are those of a partner to a partnership and the partners. (The court noted that the LLC was a Delaware LLC, but the court applied California law because the operating agreement called for the application of California law.) However, the court concluded that Norrie had not, and could not, allege that Lane's sale of the property to his wife constituted a breach of his fiduciary duty. Based on the California partnership statute, the court described the fiduciary duties of a partner as including refraining from dealing with the conduct of the partnership business as or on behalf of a party having an adverse interest to the partnership and discharging the partner's duties and exercising rights consistently with the obligation of good faith and fair dealing. In rejecting the assertion that Lane breached a fiduciary duty, the court pointed out that the partnership statute provides that a partner does not violate a duty or obligation merely because the partner's conduct furthers his own interest and also permits a partner to transact business with the partnership with the same rights and obligations as those of a person who is not a partner. Moreover, the court concluded that Norrie was collaterally estopped from relitigating the issue by the denial of relief in the receivership proceeding. In arguing about the appointment of a receiver, the parties set forth detailed information about the conduct of the sale and the proceeds, and the trial court found that Lane did not violate the terms of the arbitration award and judgment based thereon. Norrie abandoned this appeal in the receivership proceeding, so the order became final, and Norrie was barred by collateral estoppel from relitigating the propriety of the sale. The court also rejected Norrie's argument that his complaint stated a cause of action for breach of the covenant of good faith and fair dealing because the covenant does not prohibit a party from doing what is expressly permitted by an agreement, and the court concluded that Lane had authority to sell the property under the provisions of the operating agreement.

Sheffield Services Company v. Trowbridge, 211 P.3d 714 (Col. App. 2009). Trowbridge, a non-member manager of a Colorado LLC that owned residential real estate lots, contracted on behalf of the LLC to sell the lots to the plaintiff. The contract required the LLC to complete the requirements of a subdivision agreement between the LLC and the city. After the closing of the sale of the lots, the purchaser was forced to assume the obligations of the LLC under the subdivision agreement because the LLC did not fulfill its obligations and the city would not issue building permits until there was compliance with the subdivision agreement. The plaintiff sued the LLC and Trowbridge for breach of contract and wrongful attempt to deplete the LLC's assets. The plaintiff challenged the trial court's ruling that an LLC manager is not subject to the common law duty imposed on corporate officers and directors to avoid favoring personal

interests over those of the corporation's creditors. The court of appeals stated that an insolvent corporation's directors and officers are "trustees" for corporate creditors, and the court could find no reason not to extend the same common law trustee doctrine to LLC managers. Thus, the court concluded that an insolvent LLC's manager owes a common law duty to the LLC's creditors to avoid favoring personal interests over those of creditors. The court distinguished the personal liability resulting from a breach of this duty from the personal liability that may be imposed by applying the common law doctrine of corporate veil piercing. The trial court found that Trowbridge made certain preferential distributions to one of the members, but made no findings as to whether the LLC was insolvent or whether the plaintiff was a creditor at the time of the distribution. Thus, the court of appeals remanded for further findings and a determination of whether Trowbridge breached a common law duty owed to the LLC's creditors.

In re Meeks (Ailinani v. Meeks), Bankruptcy No. 08-40854, Adversary No. 08-04085, 2009 WL 1391706 (Bankr. S.D. Ill. May 14, 2009) (discussing whether bankrupt member owed fiduciary duty to fellow member for purposes of exception to discharge for debt arising from defalcation in fiduciary capacity and concluding that whether relationship of inequality existed between members and when that relationship may have begun and ended were material questions of fact).

In re SAI Holdings Limited (SAI Administrative Claim and Creditor Trust v. Benecke-Kaliko AG), Bankruptcy No. 06-33227, Adversary No. 08-3036, 2008 WL 6192000 (Bankr. N.D. Ohio Nov. 10, 2008). An LLC member argued that there was no basis to find that it owed a fiduciary duty to the LLC, citing Ohio case law for the proposition that a fiduciary duty of a shareholder of a closely held corporation arises only if the shareholder is a majority or controlling shareholder. The court stated the case law was not applicable since the entity in this case was an LLC. The court cited Ohio case law for the proposition that an LLC, like a partnership, involves a fiduciary relationship that imposes on members a duty to exercise the utmost good faith and honesty in all dealings and transactions related to the LLC. Additionally, the court stated that fiduciary duties are imposed on managers under the Ohio LLC statute, which provides that "[a] manager of a limited liability company shall perform his duties as manager in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the company, and with the care that an ordinarily prudent person in a similar position would use under similar circumstances." The court stated that Ohio law makes no distinction between a member or manager with a majority interest as compared to one with a minority interest in imposing such fiduciary responsibilities. The operating agreement named the LLC member as a "managing" member and provided that the managing members shall act through their designees on the executive committee. Thus, the court held that the LLC member owed fiduciary duties as a member and manager of the LLC, and the allegations that the LLC member breached those duties by attempting to terminate a sales agreement without cause in an attempt to force another member to sell its interest, failing to pay commissions owed to the LLC, and disparaging the LLC's management in order to lower its value stated a claim for breach of fiduciary duty.

Olson v. Halvorsen, C.A. No. 1884-VCL, 2009 WL (Del. Ch. May 13, 2009) (rejecting terminated member's claim for breach of fiduciary duty in connection with claim for fair value of interest because Delaware LLC statute permits members to rely in good faith on terms of LLC agreement and terminated member was paid amounts owed in accordance with terms of LLC agreement and thus could show no deprivation of value to which he was entitled).

In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. April 23, 2009). A minority member of an LLC brought an action for judicial dissolution of the LLC on the basis that the current managers failed to fulfill the LLC's original business plan and breached their fiduciary duties to the LLC. With respect to the petitioner's allegations of breaches of fiduciary duty, the court stated that the important policy function served by the demand rule in the context of derivative claims cannot be lightly bypassed by resort to an action for judicial dissolution. Because dissolution is a remedy of last resort and because of the limitations imposed on derivative actions, the court stated that a plaintiff only states a claim for dissolution premised on breaches of fiduciary duty where the pleadings allege that: (1) the plaintiff has proven the fiduciary breaches in a plenary action; and (2) there remains a rational basis for a dissolution remedy notwithstanding the remedy granted in the plenary action. The court additionally concluded that the petitioner's attempt to raise fiduciary duty claims in this judicial dissolution action was an improper attempt to bypass the dispute resolution procedure set forth in the LLC agreement, which required that "any questions, issues, or disputes arising out of or relating to the Agreement" be handled by negotiation, followed by mandatory mediation and, finally, binding arbitration.

Kaplan v. O.K. Technologies, L.L.C., 675 S.E.2d 133 (N.C. App. 2009). Kaplan, Olivier, and Bowman formed a North Carolina LLC in which Kaplan owned a 51% interest, Olivier owned a 43% interest, and Bowman owned a 6% interest. Later, a fourth member, Meschan, was admitted. As a result of Meschan's admission, Kaplan owned 41.5%, Olivier owned 37.5%, Meschan owned 15%, and Bowman owned 6%. Kaplan provided all the capital and financing for the LLC. The LLC was managed by the members, and the operating agreement specified that management decisions would be made by a majority in interest. In litigation that ensued after a dispute between Kaplan and the other members, Olivier and Bowman asserted breach of fiduciary duty claims against Kaplan. They argued that Kaplan's relationship with them was a fiduciary relationship based on (1) Kaplan's role as a member-manager; (2) Kaplan's control deriving from his minority interest coupled with his control over the company's finances and operations; and (3) Kaplan's role as a member in a closely-held LLC. The court rejected these arguments. First, the court stated that the North Carolina LLC statute does not create fiduciary duties among members. The court compared members of an LLC to shareholders of a corporation and stated that members do not generally owe a duty to each other or the company. The court stated that Kaplan's 41.5% interest made him a minority member, and he thus did not fit within the exception that a controlling shareholder owes a duty to minority shareholders. The court also rejected the argument that Kaplan's status as a manager of the LLC created a fiduciary duty to the members. The court pointed out that the North Carolina LLC statute requires a manager to discharge his duties as manager in good faith with the care of an ordinary prudent person and in a manner reasonably believed to be in the best interest of the LLC. The court stated that this provision created a duty to the LLC, and the court analogized managers to corporate directors. Accordingly, the court held that managers of an LLC owe a fiduciary duty to the LLC and not to individual managers or members. The court also rejected the argument that Kaplan made the LLC completely dependent upon his financing and thus exercised such domination and control as to create a fiduciary relationship. Kaplan provided financing as provided by the operating agreement, and the other three members formed an alliance that represented a majority and had the power to make management decisions; therefore, the argument that Kaplan exercised domination and control was unconvincing. Finally, the court rejected the argument that Kaplan's relationship with Olivier and Bowman was fiduciary in nature by virtue of their status as members in a closely-held LLC. Olivier and Bowman argued that the relationship between members of a closely-held LLC is like the fiduciary relationship between partners in a partnership. The court rejected this argument based on provisions in the operating agreement limiting the liability of the members as permitted by the North Carolina LLC statute. The court stated that the operating agreement clearly limited the members' liability to three situations. Olivier and Bowman argued that Kaplan's conduct fell within two of the situations for which liability was not eliminated, but the court stated that Kaplan's liability would extend only to the LLC assuming *arguendo* that he breached his duties under the operating agreement.

Bay Center Apartment Owner, LLC v. Emery Bay PKI, LLC, C.A. No. 3658-VCS, 2009 WL 1124451 (Del. Ch. April 20, 2009). Bay Center Apartments Owner, LLC ("Bay Center") and Emery Bay PKI, LLC ("PKI") formed Emery Bay Member, LLC, a Delaware LLC ("Emery Bay") to develop a condominium project. PKI, which was owned and managed by Alfred Nevis ("Nevis"), was designated managing member of Emery Bay. Bay Center and PKI each made initial capital contributions, and Bay Center, through a separate agreement, sold the property being developed to Emery Bay North, LLC ("EB North"), an LLC wholly owned by Emery Bay, in exchange for a promissory note from Emery Bay. Emery Bay's LLC Agreement (the "LLC Agreement") provided for PKI to manage the project, but the details of its day-to-day management duties were defined in a separate Development Management Agreement. Under the LLC Agreement, PKI was required to cause EB North to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated Emery Bay ETI, LLC ("ETI"), as the Development Manager. After a number of problems allegedly resulting from mismanagement by PKI's affiliates, the project failed and was put into receivership. In this case, Bay Center sued Nevis, PKI, ETI, and Emery Bay. Bay Center's most direct approach, a breach of contract claim, was limited because PKI was the only defendant that was a party to the LLC Agreement. Thus, Bay Center sought to expand its remedial options by bringing claims for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting a breach of fiduciary duty. The defendants moved to dismiss all of Bay Center's claims except those based on breach of contract. With respect to Bay Center's breach of fiduciary claims, the court looked to the provisions of the LLC Agreement regarding the fiduciary obligations of the members. One section of the LLC Agreement provided that members owed each other the fiduciary duties that exist between members of a Delaware LLC except where the LLC Agreement provided otherwise; however, the very next section of the LLC Agreement provided that a member owed the other member no duty of any kind that was not imposed by the LLC Agreement itself. The court found that the defendants' position that the LLC eliminated their fiduciary duties was not the only reasonable

interpretation of these provisions, which was the standard for the defendants to prevail on their motion to dismiss. The court stated that the existence of fiduciary duties under the first provision could be reconciled with the second provision's apparent elimination of duties by viewing the second provision as carving out only the duties that are not traditional, default duties imposed by the first provision. The court stated that this interpretation was more reasonable than the defendants' interpretation because the defendants could not explain how their interpretation did not render the first provision meaningless. Further, the court noted that the intent to eliminate fiduciary duties must be plain and unambiguous. With respect to Bay Center's allegation that Nevis breached his fiduciary duty to Bay Center even though he was not a member or an officer of Emery Bay, the court stated that Nevis could be subject to fiduciary duties under the *In re USACafes* line of cases. In the *USACafes* case, the chancery court held that "those affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners." The defendants did not challenge the general applicability of this doctrine in the LLC context, but argued that this type of liability can only be imposed in circumstances not present in this case. The court noted that there was some uncertainty regarding the full scope of the duties owed by a controlling affiliate, but the court stated that the cases in practice have not ventured beyond "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The court stated that limiting the application of *USACafes* to this duty provides a rational and disciplined way of protecting investors in alternative entities with managing members who are themselves entities, while not subjecting all the individuals who work for managing members to wide-ranging causes of action. The court found that Bay Center sufficiently pled that Nevis exerted direct control over Emery Bay's property and used such control to stave off personal liability. Thus, the motion to dismiss the breach of fiduciary duty claim against Nevis was denied. The defendants' challenge to Bay Center's claims that Nevis and ETI aided and abetted breaches of fiduciary duty rested on the argument that PKI and Nevis owed no fiduciary duties to Bay Center; therefore, the court denied the motion to dismiss the aiding and abetting claims. Finally, the court addressed Bay Center's common law fraud allegations, which were based on silence by PKI and Nevis in the face of a duty to speak. The court stated that a defendant must have a duty to speak that arises by operation of law, not purely by contract, to commit common law fraud through silence. For purposes of the motion to dismiss, the court considered PKI to be subject to the traditional fiduciary duties of directors of a Delaware corporation, which include a duty to disclose fully and fairly all material information within their control when they seek shareholder action. Because the LLC Agreement required Bay Center's consent for any refinancing or restructuring of loans and the allegations included PKI's failure to notify Bay Center of numerous loan modifications, the court held that Bay Center adequately pled its fraud claim against PKI. The court also concluded that Bay Center stated a fraud claim against Nevis based on his alleged participation in the fraud because it is settled Delaware law that "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant."

In re Hughes; In re Weber (The Business Backer, LLC v. Weber), Bankruptcy Nos. 08-1125, 08-1228, Adversary No. 08-78, 08-77 (Bankr. N.D. W.Va. April 20, 2009). A creditor who extended credit under a financing arrangement with an LLC argued that the debtors, a member and a manager of an LLC, engaged in acts inappropriate for the winding up of the LLC and were liable for breach of a fiduciary duty to the creditor based on a provision of the West Virginia LLC statute providing that a member or manager who, with knowledge of the dissolution of the LLC, subjects the LLC to liability by an act not appropriate for winding up is liable to the LLC for any damage caused. The court concluded that the debtors' relationship with the creditor under the financing agreement did not constitute an express or technical trust as required under federal common law for a fiduciary relationship. Moreover, the court stated that the statutory source of the alleged fiduciary duty was only applicable in the context of a dissolution and winding up, and the creditor had made no showing that the LLC was in the process of dissolving or winding up. Though the LLC's status as an LLC had been revoked for failure to file its annual report, it had been reinstated and was, as of January 2009, still a licensed LLC. Although the LLC had liquidated two of its business operations, the court said it was still poised to continue business operations in the future.

Patmon v. Hobbs, 280 S.W.3d 589 (Ky. App. 2009). A member of a Kentucky LLC brought suit, in her own name and the LLC's name, against the LLC's managing member, Hobbs, after learning that Hobbs had diverted three build-to-suit leases of the LLC to another company owned by Hobbs. The court concluded that, in the absence of contrary provisions in the LLC agreement, Kentucky law imposes a common law fiduciary duty of loyalty on officers and members of an LLC because LLCs are similar to partnerships and corporations. The court stated that a breach of duty of loyalty claim is based on the existence of a fiduciary duty in the principal-agent relationship. The court stated

that Hobbs, as managing member, had a duty to act in the interests of the LLC and a basic duty of faithfulness and loyalty to the LLC, because members of a Kentucky LLC are generally members for the purpose of the LLC's business, and every manager is an agent of the LLC where the articles of organization vest authority in a manager or managers. The court noted that the Kentucky LLC statute provides that a member or manager is not liable to the LLC for any act or failure to act on behalf of the LLC unless the act or omission constitutes wanton or reckless misconduct, and the statute further provides that a member or manager shall account to the LLC and hold as trustee any profit or benefit derived from use of the LLC's property, including confidential or proprietary information, without consent of a majority of the disinterested managers or a majority in interest of the members. The court stated that the leases constituted confidential or proprietary information, and Hobbs did not obtain the requisite consent to divert the leases to his other company. The court next analyzed the duty of loyalty by analogizing to the partnership context and concluded that Hobbs violated his duty of loyalty to his fellow members and the LLC. The court further analyzed how the doctrine of misappropriation of corporate opportunity affected the analysis because the trial court relied upon the doctrine to limit the amount of damages awarded. Hobbs relied upon cases from other jurisdictions to argue that the opportunities did not exist for the LLC based on financial inability to undertake the opportunities. The court examined the corporate opportunity doctrine and concluded, as a matter of first impression, that the business opportunity doctrine applies under Kentucky law. The court then analyzed whether the LLC had the ability to undertake the opportunities diverted by Hobbs. The court concluded that, regardless of the LLC's ability to complete the project, Hobbs should have informed the other members. The court also concluded that it was possible that the LLC could have sold the opportunity and profited in that manner had Hobbs satisfied his duty of loyalty to the LLC, and it was not possible to conclude at this stage whether the LLC would have been able to complete or sell the leases. The court stated that it was clear that Hobbs had breached his statutory and common law duty of loyalty, the first prong of the business opportunity doctrine, and the plaintiff must now have an opportunity to address the issue of whether the LLC had the ability to undertake the project. The court remanded for the trial court to determine a remedy for Hobbs's breach of fiduciary duty and held that, at a minimum, Hobbs was required to hold in trust all benefits and profits derived by him as a result of his misuse of the build-to-suit leases. The court also commented that the trial court was authorized, based on Hobbs's misconduct, to order the dissolution of the LLC and would need to decide, in the interest of justice, the percentages to be used in dividing the assets among the members.

Kumar v. Kumar, Civil Action No. 1:07CV263-DAS, 2009 WL 902035 (N.D. Miss. March 31, 2009). Mr. and Mrs. Kumar were equal members of a Mississippi LLC that operated a Holiday Inn. The operating agreement did not require either of them to work at the Holiday Inn, but it required them to "diligently promote and support" the LLC's business and to be "faithful to each other in all transactions related to" the LLC. The operating agreement provided in various provisions that a member was not permitted to receive any distributions, withdrawals, loans, or salaries without unanimous consent of the members. Mr. and Mrs. Kumar both worked at the Holiday Inn until Mrs. Kumar filed for divorce. After their separation, Mrs. Kumar stopped working at the hotel. Eventually, Mrs. Kumar filed an action for injunctive relief, appointment of a receiver, breach of contract, breach of fiduciary duties, misappropriation and conversion, and dissolution. The court found it evident that Mr. Kumar violated the terms of the operating agreement, but the court also found that Mrs. Kumar was aware of many of the violations and that many similar violations occurred while she worked at the hotel. In fact, Mrs. Kumar also violated the agreement. Thus, the court examined the actions of both parties, one year at a time, in order to properly apportion the damages. Based on the Mississippi LLC statute (which requires a manager to discharge his duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC) and the operating agreement (which required the parties to be "faithful to each other" in transactions involving the LLC), the court concluded that Mr. Kumar breached his fiduciary duty to Mrs. Kumar by taking a salary and making distributions to himself and his relatives without her consent following the separation. The court concluded that the damages to which Mrs. Kumar was entitled for Mr. Kumar's misappropriation and conversion of LLC funds must be reduced by the personal benefit received by Mrs. Kumar from the LLC. The court stated that once the amount of benefits received by each party was calculated, the party that received the greater benefit would have his or her benefit reduced by the other's benefit, and one-half of that final number would be owed to the other party. The court noted that the action by Mrs. Kumar was a derivative action, but stated that a chancellor may treat a derivative suit as a direct action and order individual recovery as long as it will not prejudice creditors and other interested parties.

Cement-Lock v. Gas Technology Institute, 618 F.Supp.2d 856 (N.D. Ill. 2009). The plaintiffs filed a derivative suit on behalf of a Delaware LLC based on an alleged fraudulent scheme to deprive the LLC of millions of dollars in intellectual property. The jury found that various individual and corporate defendants breached their fiduciary duties to the LLC, and the court in this opinion reviewed the evidence supporting the jury's finding. The LLC's operating agreement contained a provision regarding fiduciary duties that required a member of the operating board to act in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC and its members, and that exculpated the operating board for any act or failure to act within the scope of its authority except where the claim is based on fraud, gross negligence, or bad faith. The court determined that Delaware law applied to the breach of fiduciary duty claims and, in addition to instructing the jury regarding the terms of the operating agreement, instructed the jury that the individual defendants were entitled to the protection of the business judgment rule. The court described various positions held by two individuals, Borys and Dunne, in the LLC and related entities which provided the basis for fiduciary duties owed by Borys and Dunne to the LLC. The court noted that, "under Delaware law, an agent has a fiduciary duty of good faith, fair dealing, and loyalty—similar to those of a corporate director—only limited by the scope of the agency relationship." The court reviewed the evidence regarding licensing negotiations with the LLC and found the record revealed a legally sufficient evidentiary basis for the jury's finding that Borys and Dunne breached their fiduciary duties during the negotiations. The court also reviewed the evidence relating to Lau, who served as president of the LLC and a member of its board of managers at the same time he was also president of another entity involved in the licensing negotiations. The court stated that Lau's roles on both sides of the license negotiations supported an inference of a conflict of interest, and the jury was entitled to conclude that Lau's conduct injured the LLC. The court noted that there appeared to be no dispute that one of the corporate defendants owed the LLC fiduciary duties as a member of the LLC, but found that the plaintiffs did not satisfy their burden of proof that other non-member corporate defendants owed fiduciary duties to the LLC. The court rejected the argument that the non-member corporate defendants' mere involvement in the LLC's business created fiduciary duties. The plaintiffs suggested that the corporations were vicariously liable for the actions of the breaches of fiduciary duty committed by the individual defendants, but the court rejected this basis of holding the corporate defendants liable because the plaintiffs failed to point to any specific evidence that the individual defendants were acting within their scope of authority as agents of the corporations when they committed their breaches of fiduciary duty. The court also rejected the notion that the corporate member was itself an agent of the other corporations, stating that the court had determined in a previous opinion that the mere fact that the member was a subsidiary of another corporation was not sufficient to pierce the member's corporate veil. To the extent that Borys and Dunne fraudulently concealed information while acting in the course of authority as agent for any of the corporate defendants, the court stated that such corporate defendant could be held liable for the tort; however, the court did not reach a conclusion on this issue because the parties did not address it in any detail.

Mitchell v. Smith, No. 1:08-CV-103 TS, 2009 WL 891908 (D. Utah March 31, 2009) (dismissing member's claim for breach of fiduciary duty against fellow members because claim stated no basis for existence of fiduciary duty other than member status and Utah LLC statute provides that, unless otherwise provided in LLC's articles of organization or operating agreement, non-manager members of manager-managed LLCs owe no fiduciary duties to LLC or other members solely by reason of acting as member, and organizational documents of manager-managed LLC in issue contained no provisions imposing fiduciary duties on members).

Laugh Factory, Inc. v. Basciano, 608 F.Supp.2d 549 (S.D.N.Y. 2009). The court dismissed a breach of fiduciary duty claim against an individual non-member for diverting revenue from an LLC on the basis that he did not owe a fiduciary duty to the LLC. According to the court, a manager member of an LLC owes a fiduciary duty to the other members under New York law, and management vests in the members who actually manage the LLC where no managers are appointed in the articles of organization. However, the court concluded that the plaintiffs failed to set forth a legal basis for bringing a breach of fiduciary duty claim against the individual non-member in his personal capacity. To the extent the individual was acting on behalf of an entity that was a member of the LLC when performing bookkeeping and other activities for the LLC, the court stated that the entity might be considered a managing member which breached its duties; however, the court rejected the suggestion that the individual somehow became a manager member by operation of law.

Smead v. Danzi, No. G040931, 2009 WL 808467 (Cal. App. 4 Dist. March 30, 2009) (stating cross claim by LLC against member was not barred by LLC's "bylaws" because California LLC statute does not permit indemnification

for breach of fiduciary duties specified in statute and co-member's claim for misappropriation of assets fell outside of allowable limits of indemnification under statute).

Collins v. Winex Investments, LLC, Civil No. 08cv51-L(CAB), 2009 WL 861738 (S.D. Cal. March 27, 2009) (holding that allegations about individual defendants' agency relationship with defendant LLC and defendants' repeated refusals to allow plaintiff investors in LLC to liquidate investment were sufficient to give notice of factual circumstances of plaintiffs' fiduciary duty claim, and stating that defendants failed to cite authority for proposition that facts could not as matter of law give rise to fiduciary relationship or breach of fiduciary duty).

Terminal Properties, Inc. v. Hampton Propane Terminal, L.C., No. 07-2155, 2009 WL 776652 (Iowa App. March 26, 2009). One of the members of an Iowa LLC contended that a vote by the LLC's members to ratify a security agreement was invalid because it was based on votes of interested members. The court reviewed the general standards of conduct for managers of an LLC that require a manager to discharge the manager's duties in good faith and a manner believed to be in the best interest of the LLC. The court noted that these obligations are identical to those of corporate directors and officers. The court also stated that, by analogy, member-managers of LLCs are entitled to the same presumptions applied to decisions of corporate directors, i.e., that the decisions are presumed to be informed, in good faith, and in the best of interests of the company. The court stated that the purpose of this business judgment rule is to limit second-guessing of business decisions which have been made by those whom the corporation has chosen to make them. The court set forth the provisions of the LLC statute dealing with approval of conflict of interest transactions in the LLC context and concluded that the focus of the appeal was limited and did not include the issue of the alleged conflicts of interest. A majority of the member-managers agreed to the course of action that led to the disputed security agreement, and the district court found that the settlement of the lien created by the security agreement was in the best interests of the LLC. Given that the resolution of the transaction was in the best interests of the LLC and was approved by a majority of the members, the court concluded that it would not interfere, and the district court did not err in concluding the action was legal, valid, and binding.

Gaunce v. Wertz, No. 1:06-CV-00095-R, 2009 WL 803843 (W.D. Ky. March 25, 2009). Several members of a Kentucky LLC sued the initial managing member for breach of fiduciary duty, alleging that the managing member acted against the best interests of the plaintiffs and the LLC and utilized assets for personal purposes. The managing member argued that he did not owe any fiduciary duties to the plaintiffs under Kentucky law. The plaintiffs argued that Kentucky law treats members of a member-managed LLC as if they were general partners of a partnership with respect to fiduciary duties. In the absence of case law discussing whether a member or manager of a Kentucky LLC owes any fiduciary duties to other members, the court focused on the statutory provision that states a member or manager is not liable to the LLC or members for an act or failure to act on behalf of the LLC unless the act or omission constitutes wanton or reckless misconduct. Based on this provision, the court concluded that the plaintiffs could not bring a fiduciary duty claim, but could bring a claim for wanton or reckless misconduct if the facts supported it.

Sutherland v. Sutherland, No. 2399-VCL, 2009 WL 857468 (Del. Ch. March 23, 2009). Assuming, arguendo, that a corporate charter provision required interested directors to be treated as disinterested directors for purposes of approving corporate transactions, the court concluded such a provision would not be enforceable under Delaware law. Though expressly prohibited by Section 102(b)(7) of the Delaware General Corporation Law, the court noted that such a provision would be permissible under the Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act because freedom of contract is the guiding and overriding principle of those statutes.

Stair v. Calhoun, No. 07-CV-03906 (JFB)(ETB), 2009 WL 792189 (E.D.N.Y. March 23, 2009) (holding that claims for breach of fiduciary and statutory duties could not be resolved at motion to dismiss stage because it was unclear whether LLC operating agreement, if binding, would bar plaintiff's claims, and plaintiff's claims included allegations that defendants breached duties of loyalty and care which are unwaivable under Virgin Islands LLC statute).

Bushi v. Sage Health Care, PLLC, 203 P.3d 694 (Idaho 2009). Three psychiatrists who were members of a professional LLC formed under the Idaho Limited Liability Company Act became disillusioned with the fourth member, Bushi, because he was dating a nurse practitioner employed by the LLC. There was also an issue between the members regarding Bushi's unauthorized use of the LLC's line of credit for personal expenses. After a meeting at which the other

members told Bushi they wanted him out because of his relationship with the nurse practitioner, Bushi became concerned about his future with the LLC and joined another psychiatry group. Bushi and the other members failed to agree regarding the terms of a buy-out of Bushi's interest, and Bushi's lawyer informed the other members that Bushi would continue as a member and retain his financial rights until a mutually acceptable dissociation and buy-out agreement had been reached. The operating agreement provided that a member could be dissociated by a majority vote of the other members upon the happening of certain events (such as loss of the member's license or conviction of a felony), none of which had occurred, but the operating agreement also provided that it could be amended with the consent of all but one member. The members other than Bushi voted to amend the operating agreement to require mandatory dissociation upon an affirmative vote by all but one of the members, and the members other than Bushi then voted to dissociate Bushi. Applying the formula in the operating agreement, the LLC's accountant determined the value of Bushi's interest, and the LLC tendered payment to Bushi, which he refused. Bushi filed suit asserting various claims including claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. The trial court granted the other members' motion for summary judgment, finding that the members did not breach their contract with Bushi by amending the operating agreement to allow his involuntary termination, that the members were entitled to summary judgment on Bushi's claims against them for breach of the covenant of good faith and fair dealing and breach of fiduciary duty, and that the provisions on dissociation and valuation were clear and unambiguous and that the LLC's valuation followed the provisions. On appeal, the supreme court upheld the trial court's summary judgment against Bushi on the breach of implied covenant of good faith and fair dealing claim, but reversed the summary judgment on the breach of fiduciary duty claim. With respect to the breach of implied covenant of good faith and fair dealing claim, the court stated that contract terms are not overridden by the implied covenant of good faith and fair dealing, and Bushi could identify no specific term of the operating agreement that was breached by amending the agreement to involuntarily dissociate him. With regard to the breach of fiduciary duty claim, the court discussed the Idaho LLC statutes and stated that the original LLC statute (which is repealed effective July 1, 2010) identifies certain duties that members owe to one another, but does not use the term "fiduciary," does not state that it is an exhaustive list, and does not address the conduct at issue in the case. In 2008, the legislature adopted the revised Uniform Limited Liability Company Act, which explicitly provides that members of an LLC owe each other the fiduciary duties of loyalty and care, but the LLC in this case was governed by the prior act because it was formed prior to July 1, 2008 and had not elected to be subject to the new act. The court stated that it appeared that a majority of courts considering the issue have concluded that members of an LLC owe one another fiduciary duties of trust and loyalty, and the court concluded that members of an LLC owe one another fiduciary duties under the original act because it provides that the principles of law and equity supplement the act unless displaced by particular provisions of the act. The court stated that whether a fiduciary duty has been breached is a question of fact and discussed case law from other jurisdictions illustrating that actions taken in accordance with the operating agreement can still be a breach of fiduciary duty if improperly motivated to obtain financial gain. If the members acted in bad faith in order to advance their personal financial interests, they would be liable to Bushi despite their technical compliance with the operating agreement. Drawing all reasonable inferences in Bushi's favor, the court could not conclude that there was no genuine issue of material fact with regard to the members' motivation in dissociating Bushi.

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The minority member of a Missouri LLC sued the majority member for breach of the operating agreement based on the majority member's withdrawal of its capital contribution without the consent of the minority member in violation of the operating agreement. Relying on the statutory provision that a member's capital contribution shall not be enforceable by any other member unless the obligated member has specifically agreed or consented to such enforcement, the court stated that the statute precluded a claim for enforcement of that part of the operating agreement given the absence of a specific agreement allowing one member to enforce another member's capital contribution. The court also rejected the minority member's claim that the majority member's withdrawal of its capital contribution breached its fiduciary duty to the minority member. The court stated that the minority member failed to point to any provision of the operating agreement that imposed a fiduciary duty on the majority member, and, even if the majority member owed a duty of good faith and fair dealing as a "majority shareholder," the duty was based on its status as a member. Both the operating agreement and the statute provided that a member is not liable to another member "solely by reason of acting in his capacity as a member." Assuming the duty of care owed to the LLC and, indirectly, its members, was violated, the court stated that the harm would have to be remedied through a derivative suit. There was no direct harm to the minority member since the LLC's inability to repay a loan from the minority member's would harm the member in a capacity other than as a member, and any fiduciary duty would not extend to the member in the capacity

as an outsider. Since the plaintiff's claims for breach of the operating agreement and breach of fiduciary duty failed, claims for civil conspiracy based on those causes of action failed as well.

Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. App. 2009). In 1983, four Mazloom brothers (Iraj, Ahmad, Manooch, and Aboli) incorporated a business in which they were equal shareholders, though no stock certificates were ever issued. Iraj served as Secretary-Treasurer and worked as an employee of the corporation until 1996 when he was removed and excluded from participating in the business by the other brothers. In 2000, articles of dissolution were filed for the corporation without Iraj's knowledge or consent. On the same day, Ahmad, Manooch, and Aboli filed articles of organization for an LLC. In 2002, Iraj contacted an attorney to help him clarify his interest in the LLC, and the attorney prepared articles of amendment for the LLC stating that the LLC received all of the dissolved corporation's assets and goodwill and that the shareholders were to retain their respective ownership in the LLC as they had in the corporation. The articles of amendment went on to state that, through inadvertence or mistake, Iraj was not transferred over as a shareholder of the LLC and that the amendment was to correct the error and acknowledge that Iraj owned 25% of the LLC. The articles of amendment were signed by Manooch and Aboli and filed with the South Carolina Secretary of State. In 2003, Ahmad sold his interest in the LLC to Manooch and Aboli without notice to Iraj. The bill of sale recited that Ahmad, Manooch, and Aboli each owned 1/3 of the LLC. Later in 2003, Manooch and Aboli entered into a contract for the sale of all the LLC's assets. Iraj did not know of the sale and did not receive any share of the sale proceeds. Iraj filed a complaint against Manooch and Aboli in 2004. The case was referred to a special master who found that Iraj owned a 25% interest in the LLC and awarded him a sum from the sale of the assets and for unpaid cash distributions. The brothers argued that the special master erred in finding that Iraj owned 25% of the LLC because they claimed Iraj transferred his 25% interest in the predecessor corporation to a niece in 1985. The court of appeals reviewed the evidence and upheld the finding that Iraj retained his 25% ownership interest in the corporation and LLC. The court concluded that a preponderance of the evidence supported the special master's conclusion and that the brothers were estopped from denying the facts in the articles of amendment. The court also found that Iraj's action for dissolution and accounting was not barred by laches. With respect to damages, the court found that the special master erred in not basing the value of the LLC on the fair market value as established by the arm's length sale of the LLC, and the court modified the award accordingly. With respect to the claim for lost cash distributions, the court noted that the South Carolina LLC statute requires distributions prior to winding up to be made in equal shares and provides for personal liability on the part of a member who assents to an unlawful distribution. The court found the evidence supported the special master's findings of lost cash distributions. Finally, the court found that the evidence supported an award of punitive damages for breach of fiduciary duties. The court concluded that the breach of fiduciary action was timely filed, that there was misconduct on the part of the brothers warranting an award of punitive damages, and that the amount was appropriate in light of the factors set forth by the United States Supreme Court in *Gamble v. Stevenson*.

Luria v. Board of Directors of Westbriar Condominium Unit Owners Association, 672 S.E.2d 837 (Va. 2009). The plaintiff, a condominium owners association, argued that Luria, the managing member of two LLCs that were used to hold title and manage the development of the condominium project, owed the plaintiff a fiduciary duty as a creditor of the LLCs. The plaintiff contended that Luria breached his duty to the plaintiff by making a series of improper transfers and draws between 1996 and the end of 2002. The plaintiff relied upon the corporate trust fund doctrine articulated in Virginia case law. Luria argued that the Virginia Supreme Court has never imposed on a managing member of an LLC a fiduciary duty to a third party creditor and also argued that the plaintiff was not a creditor. The court determined that the plaintiff did not become a creditor until 2003. Thus, assuming, without deciding, that Luria, as the managing member of the LLC, owed a fiduciary duty to the plaintiff as a creditor of the LLCs, Luria did not breach the duty by making improper distributions because the trial court found that the improper distributions occurred before 2003.

WAKA, LLC v. Humphrey, 73 Va. Cir. 310, 2007 WL 6013199 (Va. Cir. Ct. May 2, 2007). The majority members of an LLC terminated the membership of the plaintiff on the ground that he failed to pay a required capital contribution or perform equivalent services as specified in the LLC operating agreement. The plaintiff alleged that the majority members breached their fiduciary duty to the plaintiff as a member of the LLC. The majority members claimed their sole fiduciary duty was to the LLC as an entity and that they did not owe a duty to the plaintiff as an individual member. The court stated that duties of members can be defined in the articles of organization, an operating agreement, or the LLC statute. The LLC's articles of organization and operating agreement were silent regarding fiduciary duties among members; therefore, the court examined the statute. The court agreed with the majority members that the absence

of language defining fiduciary duties among members demonstrated that the legislature did not intend to impose fiduciary duties among members. The court pointed out that the Virginia LLC statute defines a manager's duty to the LLC itself but, unlike the Virginia Uniform Partnership Act, which expressly defines partners' duties to the partnership and the other partners, the LLC statute does not address duties of members to one another. The court rejected the plaintiff's argument that a member-managed LLC operates essentially as a general partnership and that member-managers owe common law fiduciary duties to LLC members. The court noted that the term "manager" in the LLC statute encompasses a member participating in management for purposes of the statutory duty to exercise good faith business judgment. Thus, the court concluded that the statutory standard of conduct is the same for a manager regardless of whether the manager is also a member, and member-managers owe duties to the LLC but not to the individual members.

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

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

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

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

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

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

member of the LLC as well as officers of the LLC, on the trustee's breach of fiduciary duty/gross negligence claims against them. The operating agreement contained a broad exculpation clause as follows:

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

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

Kahn v. Portnoy, Civil Action No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008). The plaintiff, a "shareholder" of a publicly traded Delaware LLC, brought a derivative action against the directors of the LLC alleging that the directors breached their fiduciary duties to the LLC by approving a transaction designed to benefit one of the directors and certain entities affiliated with the director. The directors moved to dismiss the action on the basis that the directors acted in accordance with their duties under the LLC agreement. The court found that there was more than one reasonable interpretation of the LLC agreement and denied the motion to dismiss because the court was not at liberty to choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). The LLC agreement provided that the duties of the directors would be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law unless otherwise specifically provided for in the LLC agreement. Section 7.5(a) of the LLC agreement modified the duties of directors of a Delaware corporation by providing that "[i]t shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence." Adopting a reasonable interpretation that was most favorable to the plaintiff, the court found that the sentence read in context could be interpreted to apply only to board decisions that involved a conflict of interest between a shareholder and the board or a shareholder and the LLC because the prior sentence of Section 7(a) specifically referred to such situations. The challenged transaction did not involve such a conflict, and, therefore, at least one reasonable interpretation of the provision did not alter the duty of loyalty in this case. Further, the court stated that

the “clear and convincing” standard in the provision did not necessarily alter the pleading standard. The court proceeded to analyze whether the plaintiff stated a claim for breach of the directors’ duty of loyalty under corporate law as altered by exculpatory provisions in the LLC agreement. The LLC agreement contained two “arguably conflicting” exculpatory provisions, which the court was unable to explain as “anything other than poor drafting or a strategy that ‘if one exculpatory provision is good, then two must be better.’” One provision eliminated personal director liability for money damages for a breach of duty subject to certain exceptions including breach of a director’s duty of loyalty to the LLC or shareholders, as modified by the agreement, and acts or omissions not in good faith. Another provision of the LLC agreement, which applied “notwithstanding anything to the contrary” in the agreement, eliminated monetary liability of directors absent a final judgment that the person acted in “bad faith” or engaged in certain other types of misconduct. The court discussed the concept of bad faith and the factual allegations and concluded that the plaintiff alleged sufficient facts to establish a showing for purposes of Rule 12(b)(6) that the directors acted in “classic, quintessential bad faith.”

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

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

that issue was not before the court. Finally, the court concluded that the petition alleged the defendant's breach of an oral agreement not to contact certain adjusters regarding the decision of the second plaintiff to leave the firm.

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

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

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

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

Satterfield v. Ennis, Civil Action No. 08-cv-00751-ZLW-CBS, 2008 WL 4649026 (D. Colo. Oct. 20, 2008) (observing that Colorado LLC statute "does not appear to mandate that co-members of a limited liability company owe

fiduciary duties to one another” but concluding that plaintiff’s pro se pleading, liberally construed, was sufficient to allege existence and breach of fiduciary duty of co-members of LLC and of successor LLCs of LLC that expelled plaintiff).

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

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

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

Downs v. Rosenthal Collins Group, L.L.C., 895 N.E.2d 1057 (Ill. App. 2008). The plaintiff sought indemnification from an LLC for attorney’s fees incurred in successfully defending an earlier action against him by the LLC for breach of fiduciary duty and breach of contract. The plaintiff was the CEO and a member of the LLC, and the operating agreement of the LLC provided that the LLC “shall indemnify each Member for any act performed by such Member with respect to Company matters permitted by this Agreement and/or Majority Approval, but in no event for

fraud, willful misconduct, negligence, or an intentional breach of this Agreement.” The plaintiff asserted that all actions underlying the complaint were taken with respect to LLC matters and that he was entitled to indemnification for his defense costs in the prior suit because the claims were dismissed against him as factually and legally without merit. The court of appeals affirmed the trial court’s dismissal of the plaintiff’s claim for indemnification because the operating agreement did not specifically address attorney’s fees. The court stated that an indemnification agreement must be strictly construed with respect to attorney’s fees, and the court found no language in the operating agreement indicating the parties’ intent to include attorney’s fees.

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

U. Inspection and Access to Information

Mickman v. American International Processing, L.L.C., Civil Action No. 3869-VCP, 2009 WL 2244608 (Del. Ch. July 28, 2009). A member sought photocopies of the general ledgers of two LLCs under the Delaware LLC statute and LLC operating agreements. The court analyzed the provision in the LLC operating agreements, which provided members “access to all books and records” upon one day’s written notice. The court looked to the corporate context for guidance and concluded that “access to all books and records” includes the right to obtain photocopies of general ledgers. The court first concluded that the broad term “all books and records” includes general ledgers, noting that courts have construed the narrower terms “books and records” and “books of accounts” to include general ledgers. The court next discussed whether “access” included the right to obtain photocopies. Relying on cases in the corporate context, the court construed “access” to have its ordinary meaning, which includes the right to make photocopies. The court noted that the plaintiff satisfied the demand requirement under the operating agreements and that the operating agreements did not contain a proper purpose requirement. The court also commented that the plaintiff’s offer to enter a confidentiality agreement should minimize any genuine concern about an improper purpose. Because the LLC agreement provided the plaintiff with a contractual right to copies of the LLCs’ general ledgers, it was not necessary for the court to address the plaintiff’s additional arguments for inspection rights under the LLC statute. The court denied the plaintiff’s request for attorney’s fees and costs, finding that the LLCs did not act in bad faith or vexatiously in resisting the plaintiff’s demand because the LLCs had at least a colorable basis for denying that the plaintiff was a member.

Jakks Pacific, Inc. v. THQ/Jakks Pacific, LLC, C.A. No. 4295-VCL, 2009 WL 1228706 (Del. Ch. May 6, 2009). The plaintiff brought an action to inspect a Delaware LLC’s books and records pursuant to Section 18-305 of the Delaware LLC Act. The LLC was formed by the plaintiff and defendant THQ, Inc. (“THQ”) to develop and sell wrestling-based video games pursuant to a license from World Wrestling Entertainment (“WWE”). The license would expire on December 31, 2009; however, the LLC had an option to extend the term of the license agreement for a five-year period. Pursuant to the LLC agreement, THQ operated the LLC on a day-to-day basis, and the plaintiff was entitled to a guaranteed preferred return based on an income stream related to the license agreement contributed by the plaintiff to the LLC. The preferred return was based upon historical sales data such that it would approximate 49% of the profits

of the LLC during the distribution period. The current distribution period began July 1, 2006 and ended December 31, 2009. The parties had been unable to establish a preferred return rate for the current distribution period, and the issue was submitted to an arbitrator as required under the LLC Agreement. Although extensive discovery was conducted in the arbitration, the plaintiff made a demand for financial documents, and the LLC complied with the request. Subsequently, the plaintiff made another demand for a broad range of documents relating to the LLC and THQ. THQ responded that the plaintiff's request was overly broad but that THQ was willing to make a limited production, subject to the plaintiff's agreement to certain conditions. The plaintiff refused the offer and brought this action to enforce its rights under Section 18-305 of the Delaware LLC statute. The plaintiff offered three purposes for which it needed the demanded documents: (1) to aid it in negotiating the preferred return for the next distribution period, (2) to value its interest in the LLC, and (3) to investigate alleged mismanagement and wrongdoing by THQ in managing the affairs of the venture. The court concluded that the plaintiff had failed to demonstrate a proper purpose for its demand. With respect to the first purpose offered by the plaintiff, the court reasoned that any future distribution period was "highly speculative" due to uncertainty regarding the LLC's ability to renew the license from WWE. The court commented that, if the LLC were later able to extend the license, a books and records demand might then be appropriate. According to the court, "a demand in order to satisfy a purpose so disconnected from the likely course of events is not 'reasonably related' to [the plaintiff's] interest in the LLC." The second purpose offered by the plaintiff (that it needed the documents to value its interest in the LLC), would ordinarily be a proper purpose for a demand, but here the court stated that it was largely meaningless because the plaintiff only had an interest in the preferred return and had no residual equity interest. The value of the plaintiff's interest in the LLC was simply the present value of the preferred return for the current distribution period. Thus, once the arbitrator determined the preferred return rate, the calculation of the value of the plaintiff's interest would be a matter of simple arithmetic, and further documents would not be required to determine what the value of that interest was. Thus, the court concluded that the production of further documents could not reasonably serve the purpose of valuing the plaintiff's interest in the LLC. Finally, the court stated that a member is required to offer a credible basis to suspect mismanagement or wrongdoing to support an allegation of mismanagement under a Section 18-305 inspection action, and the court found that the plaintiff failed to do so. The court found that the testimony of the plaintiff's two witnesses on the subject of mismanagement offered no credible basis to infer that THQ breached any of its duties under the LLC Agreement.

Mickman v. American International Processing, L.L.C., Civil Action No. 3869-VCP, 2009 WL 891807 (Del. Ch. March 23, 2009). Mickman sought to inspect the books and records of an LLC, and the LLC opposed her efforts and sought summary judgment on the basis that she was not a member or manager of the LLC. The Delaware LLC statute confers inspection rights upon each member and manager of an LLC, and the written operating agreement did not identify Mickman as a member. The LLC argued that the court should look for guidance to corporate law, under which only shareholders listed on the stock ledger are recognized as record holders for purposes of inspection rights, and that, where a written operating agreement exists, only members listed in the operating agreement should be recognized as members with a right to inspect the LLC's books and records. The court rejected the analogy to corporate law, pointing out that the Delaware Supreme Court case principally relied upon by the LLC dealt only with stock corporations. Further, the court stated that the policy considerations underlying the Delaware Supreme Court's decision in that case did not translate readily to the circumstances in this case. Inasmuch as LLCs are generally created on a less formal basis than corporations and are basically creatures of contract, the court stated that it was reasonable to consider evidence beyond the four corners of the operating agreement, where, as in this case, admissible evidence suggests the parties intended for the plaintiff to be a member. Although the operating agreement did not list the plaintiff as a member, other documents signed by the two members listed in the LLC agreement, one of which was the plaintiff's husband, supported a reasonable inference that the plaintiff was a member. The other documents included the LLC's tax return and the K-1's of the members as well as an Offer of Compromise to the IRS signed by the plaintiff's husband. The LLC argued that the representations in these documents were mistakes, but the court stated that they raised factual issues that could not be determined at the summary judgment stage.

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

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

V. Interpretation of Operating Agreement

Olson v. Halvorsen, 986 A.2d 1150 (Del. 2009). The Delaware Supreme Court affirmed the chancery court's judgment that the one-year provision of the statute of frauds provision applied to an unsigned LLC agreement and precluded enforcement of an earn-out provision that could not be performed in one year. The court held that the Delaware LLC statute's recognition of oral and implied agreements does not preclude application of the statute of frauds but instead gives maximum effect to LLC agreements by treating them like other contracts. The court concluded that the statute of frauds and LLC statute can be construed together and that the legislative text and legislative history of the LLC statute gave no indication the legislature intended to render the statute of frauds inapplicable.

In re SageCrest II, LLC (SageCrest II, LLC v. Topwater Exclusive Fund, III, LLC), 414 B.R. 9 (D. Conn. 2009). The court concluded that a redemption provision in the operating agreement of a Delaware LLC was ambiguous with respect to whether members who exercised their redemption right continued to be members of the LLC until they received payment for their interests. Two members of the LLC who exercised their redemption right under the agreement and did not receive payment for their interests claimed they were creditors of the LLC. The parties disputed what it meant to be "redeemed" under the agreement and acknowledged that the terms "redeemed" and "redemption" were undefined terms in the operating agreement and under the Delaware LLC Act. The court discussed definitions of the terms but concluded that many of the "ordinary" definitions were not necessarily applicable in the context of the particular business circumstances, which involved membership interests in an LLC that had investments in real estate and other illiquid ventures. The court noted that Black's Law Dictionary does not discuss payment in its definition of "redemption." The court concluded that a reasonable third person reading the redemption provision of the operating agreement in question might be uncertain of the meaning of the terms "redeem" and "redemption" and could understand redemption to mean either that members of the LLC are redeemed on the effective date of redemption or are redeemed on the date upon which they are paid their redemption prices. Given that uncertainty, parol evidence was admissible to assist the court in a proper interpretation.

In re General Growth Properties, Inc., 409 B.R. 43 (Bankr. S.D.N.Y. 2009). The court declined to dismiss the bankruptcy cases filed by numerous direct or indirect subsidiaries of General Growth Properties, Inc. ("GGP"), a publicly traded REIT and ultimate parent of approximately 750 wholly-owned debtor and non-debtor subsidiaries, joint venture subsidiaries, and affiliates (the "GGP Group"). The GGP Group was engaged primarily in shopping center ownership and management. Creditors of certain subsidiaries structured as special purpose entities ("SPEs") sought to dismiss the bankruptcies filed by these SPEs on bad faith grounds. Most of the SPEs for which dismissal was sought were structured as LLCs. The court described the financing arrangements in which the SPEs were involved and typical SPE documentation, including provisions regarding independent managers who were required to approve a bankruptcy filing by the SPE. The court discussed the "independent manager" provisions of the operating agreements of the SPEs, which required unanimous consent of the managers before an SPE could file bankruptcy. The operating agreements provided that, to the extent permitted by law, the independent managers shall consider only the interests of the entity, including its creditors, in voting on bankruptcy, and further provided that the independent managers shall have a fiduciary duty of loyalty and care similar to that of a director under the Delaware General Corporation Law. The court stated that the drafters of the operating agreements may have attempted to create impediments to a bankruptcy filing, but Delaware law provides that directors of a solvent corporation are required to consider the interests of shareholders in exercising their fiduciary duties. The court pointed out that the *Gheewalla* decision of the Delaware Supreme Court rejected the proposition that directors of a Delaware corporation have duties to creditors when operating in the zone of insolvency and held that directors of a solvent corporation must continue to discharge their duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholders. Because there was no contention that the SPEs were insolvent, the creditors were not assisted by Delaware law in their contention that the independent managers should have considered only the interests of the secured creditor

when making their decisions to file the Chapter 11 petitions. The court stated that creditors were mistaken if they believed that the independent managers could serve on the board solely for the purpose of voting “no” to a bankruptcy filing based on the desires of a secured creditor because the Delaware cases stress that directors and managers owe their duties to the corporation and, ordinarily, the shareholders. The court also addressed the discharge and replacement of the original independent managers of some of the SPEs before the decision to file bankruptcy and concluded there was no impropriety in doing so. The operating agreements of the SPEs permitted the independent managers to be supplied by a “nationally recognized company that provides professional independent directors, managers and trustees,” and Corporation Service Company (“CSC”) supplied at least two independent managers who served on the boards of over 150 SPEs. According to the court, these managers did not appear to have any expertise in the real estate business, and some of the lenders thought that the independent managers were obligated to protect their interests alone. The CSC-appointed managers were terminated from the SPE boards prior to the bankruptcy filings and did not learn of their termination until after the filings. Testimony for the SPEs explained that the decision to replace the independent managers was based on a desire by the SPE stockholders and members to have the potential bankruptcies of the SPEs assessed by independent managers with known experience in restructuring environments and complex business decisions. The court concluded that the record did not lead to the conclusion that the admittedly surreptitious firing of independent managers constituted subjective bad faith on the part of the SPEs requiring dismissal of the cases. The organizational documents did not prohibit the action taken or purport to interfere with the rights of the owners to appoint independent managers. Further, the court stressed that, as discussed earlier in the opinion, the independent managers did not have a duty to prevent the SPEs from filing a bankruptcy case. Rather, as managers of solvent companies charged with the duties of directors of Delaware corporations, they had a duty to act in the interests of “the corporation and its shareholders.”

Moede v. Pochter, No. 07 C 1726, 2009 WL 2748954 (N.D. Ill. Aug. 27, 2009) (holding that breach of contract question which depended upon reasonableness of member’s delay in making capital contribution was fact question where operating agreement did not specify date by which member’s contribution must be made; rejecting claim that member did not own 50% interest in LLC until member made capital contribution because agreement clearly specified that member owned 50% interest and Illinois statute provides for member’s liability for contribution obligation and contains no provision for forfeiture of member’s interest).

Emprise Bank v. Rumisek, 215 P.3d 621 (Kan. 2009) (looking to Delaware law for guidance and holding members who were called upon to honor personal guaranties of LLC indebtedness were entitled to indemnification from LLC under terms of operating agreement and Kansas law).

JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp.2d 1013 (D. Nev. 2009). Eight real estate companies formed an LLC for the purpose of acquiring and developing real estate, and the LLC entered a credit agreement. The LLC executed various collateral documents including an agreement under which it granted a security interest in acquisition agreements between the LLC and its members under which each member agreed to purchase specified portions of the land. The lender alleged that it had filed a financing statement perfecting its security interest in personal property, such as the acquisition agreements and the LLC operating agreement. The members allegedly refused to purchase the land as required under the acquisition and operating agreements, and the LLC defaulted under the credit agreement and collateral documents. The lender filed suit alleging causes of action for breach of contract against the members and their parent companies, breach of fiduciary duty against the members and their parent companies, intentional interference with contractual relationships against the parent companies, and constructive trust.

The defendants claimed that the lender lacked standing to enforce the operating agreement and that the breach of contract claim against the members thus failed as to the operating agreement. The defendants argued that the operating agreement precluded enforcement of its provisions by a creditor and that none of the collateral documents contained an assignment of the operating agreement. Further, the defendants argued that the LLC could not pledge rights in the operating agreement because it was not a party. The court noted that the plain language of the operating agreement provided that no creditor could enforce its provisions, but the lender alleged that the collateral documents granted the lender a security interest in the operating agreement and that the lender could thus enforce any rights of the LLC under the operating agreement. (The lender argued that Sections 9406(4) and 9408(1) of the Nevada UCC rendered ineffective the provision of the operating agreement denying a creditor the right to enforce the operating agreement, but the court noted that, assuming this argument was correct, the lender had a security interest only if it was granted that right.) The

lender relied upon language in the deed of trust, under which the LLC conveyed “all contract rights...relating to the Real Property.” Although the LLC was not a party to the operating agreement, the court stated that a provision granting the LLC a right to recover in the event of a default by a member or the general manager could be enforced by the lender if the LLC conveyed a security interest in those rights. The court thus analyzed whether the rights under the operating agreement related to the real property and concluded that the provision was ambiguous. Because it was not clear whether the parties intended to convey a security interest in the operating agreement, the lender’s claim for breach of the operating agreement survived the motion to dismiss.

The court dismissed claims that the members breached fiduciary duties to the LLC because the operating agreement contained a provision that “neither the Members nor their respective Managers shall have any fiduciary duties to any other Member or Managers or [the LLC] or the General Manager.” The court noted that the Nevada legislature restricted the elimination of fiduciary duties for partnership agreements but not for LLC operating agreements and pointed out that Nevada had not adopted the provision of the Revised Uniform Limited Liability Company Act stating that an operating agreement may not eliminate the duties of loyalty or care or any other fiduciary duty. The court stated that an amendment of the Nevada LLC statute allowing an operating agreement to limit or eliminate any and all liabilities for breach of contract and breach of duties of a member, manager, or other person suggested that the Nevada legislature’s intent was to allow parties to an operating agreement to limit or eliminate fiduciary duties even though the provision did not take effect until October 1, 2009 (after the events in this case and after the court’s opinion). Because no allegation or contract demonstrated that the parent companies of the members were bound to act for the benefit of the LLC, the court also dismissed the breach of fiduciary duty claims against the parent companies.

Mickman v. American International Processing, L.L.C., Civil Action No. 3869-VCP, 2009 WL 2244608 (Del. Ch. July 28, 2009). A member sought photocopies of the general ledgers of two LLCs under the Delaware LLC statute and LLC operating agreements. The court analyzed the provision in the LLC operating agreements, which provided members “access to all books and records” upon one day’s written notice. The court looked to the corporate context for guidance and concluded that “access to all books and records” includes the right to obtain photocopies of general ledgers. The court first concluded that the broad term “all books and records” includes general ledgers, noting that courts have construed the narrower terms “books and records” and “books of accounts” to include general ledgers. The court next discussed whether “access” included the right to obtain photocopies. Relying on cases in the corporate context, the court construed “access” to have its ordinary meaning, which includes the right to make photocopies. The court noted that the plaintiff satisfied the demand requirement under the operating agreements and that the operating agreements did not contain a proper purpose requirement. The court also commented that the plaintiff’s offer to enter a confidentiality agreement should minimize any genuine concern about an improper purpose. Because the LLC agreement provided the plaintiff with a contractual right to copies of the LLCs’ general ledgers, it was not necessary for the court to address the plaintiff’s additional arguments for inspection rights under the LLC statute. The court denied the plaintiff’s request for attorney’s fees and costs, finding that the LLCs did not act in bad faith or vexatiously in resisting the plaintiff’s demand because the LLCs had at least a colorable basis for denying that the plaintiff was a member.

Bernards v. Summit Real Estate Management, Inc., 213 P.3d 1 (Or. App. 2009). Two individuals (Walter Bernards and Jerry Bernards) who were members of two member-managed LLCs (Greenbrier Apartment Buildings, LLC (“Greenbrier”) and Pioneer Ridge Apartments, LLC (“Pioneer Ridge”)), brought a derivative suit against the other members for breach of fiduciary duty based on the defendant members’ refusal to take legal action against Summit Real Estate Management, Inc. (“Summit”), the management company for the apartment complexes owned by the LLCs, and McKenna, one of Summit’s officers, after McKenna admitted embezzling approximately \$172,000 from Greenbrier and \$160,000 from Pioneer Ridge. The LLC operating agreements required unanimous consent to authorize a member to resort to legal action on behalf of the LLC where the amount exceeded \$5,000, and the other members refused to consent without explanation. After a direct action by Walter Bernards against Summit and McKenna was dismissed, the plaintiffs filed amended complaints adding Jerry Bernards as a plaintiff and adding derivative claims against the member defendants. The defendant members moved to dismiss the claims against them on the basis that the plaintiffs failed to allege facts showing or implying that the defendants breached their fiduciary duties or otherwise failed to act in good faith, on an informed basis, and in the best interest of the LLCs.

The plaintiffs argued that they need only allege that they made demand on the defendants to cause the LLCs to sue in their own right and that the demand was refused or ignored or the reason that demand was not made. The plaintiffs asserted that no allegation of wrongdoing was necessary, and that, if it was, the complaints alleged facts from

which wrongdoing could be inferred. The court of appeals concluded that an allegation of either demand refusal or demand futility was necessary but not sufficient to state a derivative claim against LLC members. The court held that an allegation of facts sufficient to show bad faith, gross negligence, fraud, or willful or wanton misconduct was also required. The court noted that the pleading requirements in the Oregon statute requiring an allegation of demand refusal or demand futility are subject to variation by contract because the statute begins with the phrase “Except as otherwise provided in writing in the articles of organization or any operating agreement,....” The court stated that the members had altered the pleading requirements by agreeing in the operating agreement that a member shall not be liable to the other members or the LLC for honest mistakes of judgment or for action or inaction taken in good faith for a purpose reasonably believed to be in the best interest of the LLC provided that such mistake, action, or inaction does not constitute gross negligence, fraud, or willful or wanton misconduct. The court stated that the plaintiffs’ claims against the defendant members were claims for breach of contract, and the contract insulated the members from liability short of the wrongful conduct described in the operating agreement. The court also pointed out that it had held that wrongful conduct is a necessary element of a derivative action in the context of derivative actions by shareholders against directors and that the LLC statute and the corporate statute on derivative actions are identical with the exception of the introductory clause in the LLC statute permitting variation of the pleading requirements by contract. The court discussed the case law in the corporate context requiring a party to rebut the business judgment rule to avoid the pre-litigation demand requirement. The court acknowledged that the present case involved demand refusal rather than demand futility, but the court could find no reason to conclude that one context requires an allegation of wrongdoing and the other does not. Thus, the court concluded that, unless plaintiffs’ complaints alleged facts showing that the member defendants’ action in refusing to institute legal proceedings against Summit and McKenna was not the exercise of business judgment – or, in the more specific language of the operating agreements, that the member defendants’ decision was made in bad faith or amounted to gross negligence, fraud, or willful or wanton misconduct – the complaints did not state a claim.

The court rejected the argument of the defendants that the complaints would fall short even if they contained allegations of wrongful conduct. In this regard, the defendants argued that the provision of the operating agreements requiring unanimous consent for legal action replaced the pleading requirements for a derivative action and gave each member the unfettered ability to block any legal action on behalf of the LLC. The court stated that parties to a contract are bound by a requirement of good faith and fair dealing, and the operating agreement expressly provided for liability for bad faith, gross negligence, fraud, or willful or wanton conduct. Thus, the court said the agreement confirmed that consent could not be withheld except for a valid reason.

The court of appeals agreed with the trial court that the complaints did not allege facts from which a factfinder could conclude that the defendants acted with gross negligence or in bad faith. The court stated that the plaintiffs had to allege facts sufficient to overcome the presumption afforded by the business judgment rule that the defendants acted for the benefit of the LLC – that they acted with the requisite culpability required by the operating agreement. Further, the court stated that, due to the unanimous consent requirement of the operating agreement, the plaintiffs had to allege facts demonstrating that *all* of the members acted with the requisite culpability. If even one of the members refused to proceed for a valid business reason, the LLCs could not bring the action against Summit and McKenna. According to the court, the scant facts alleged did not support an inference of wrongdoing as opposed to a mere possibility.

Israeli v. Dott, Gallina S.R.L., 632 F.Supp.2d 866 (W.D. Wis. 2009) (holding forum selection clause in price list attached to LLC operating agreement of Wisconsin LLC applied to claims for breach of operating agreement, breach of fiduciary duties, and breach of statutory obligations where claims were based on alleged overcharge by defendant member of products listed in price list and even though clause was written in Italian and plaintiff member did not know Italian because clause itself, which selected Italian venue, was not unconscionable).

Rahman v. Park, 880 N.Y.S.2d 704 (App. Div. 2d Dept. 2009) (holding individual who provided funds to LLC member to increase member’s interest in LLC and entered side agreement with LLC member to obtain one-third of member’s interest was not bound by arbitration clause in operating agreement, even though side agreement contained provision whereby individual agreed to be bound by operating agreement, because side agreement contemplated judicial resolution of claims (as evidenced by reference to court of competent jurisdiction in confidentiality clause) and contained clause specifying that side agreement controlled in event of conflict between side agreement and operating agreement).

Arfa v. Zamir, 880 N.Y.S.2d 635 (App. Div. 1st Dept. 2009) (holding put provision in LLC operating agreement was unambiguous and expressly authorized exercise of put any time after removal of initial manager at price which included “Upside” calculated as specified in agreement).

MNY 260 Park Avenue, LLC v. Max 260 Park Avenue South, LLC, 882 N.Y.S.2d 90 (App. Div. 1st Dept. 2009) (holding plaintiffs demonstrated dilution was improper due to failure to adhere to requirements set forth in LLC agreement regarding qualifications of funding member).

Van Zyl v. Aviatour, Inc., No. 8:09-cv-151-T-23TGW, 2009 WL 2025159 (M.D. Fla. July 9, 2009) (concluding that forum selection clause contained in “Operating Agreement for Management” of Texas LLC and specifying certain courts in Florida as exclusive forum was not unreasonable).

WIS-Bay City, LLC v. Bay City Partners, LLC, No. 3:08 CV 1730, 2009 WL 1661649 (N.D. Ohio June 12, 2009). Two entities formed an LLC and executed an operating agreement providing for common and preferred units. One entity received 40% ownership of the LLC in the form of preferred units as well as 100% control until repayment of a \$9 million loan from that member to the LLC. The operating agreement provided that so long as at least one preferred unit is outstanding, the holder of the common units “shall not undertake to challenge the actions of the holders of Preferred Units. They do not have standing and shall not initiate any action in law or in equity to challenge, enjoin, file for protection under federal bankruptcy laws, or in any way inhibit the actions of holders of Preferred Units which are consistent with the Preferred Unit holders’ actions to pay...the Interim Credit Facility.” The preferred unit holder argued that this provision was binding and precluded claims for breach of fiduciary duty and usury asserted by the common unit holder. The common unit holder argued that the provision was unenforceable. The operating agreement contained an Ohio choice of law provision, and the court applied Ohio law to determine the enforceability of the provision. The preferred unit holder did not dispute that the parties cannot contract to divest a court of jurisdiction in advance of a breach, but argued that the provision was not an absolute bar of the right to sue. The preferred unit holder argued that the provision merely affected timing and that the common unit holder was free to sue after it satisfied its obligations under the agreement. The court found the obligation to pay in full before the common unit holder could ask a court to define its obligation to pay is effectively a bar to suit and unenforceable under Ohio law. It enabled the preferred unit holder to unilaterally interpret the note and other financing documents executed by the LLC, and the common unit holder’s obligations thereunder, without giving the common unit holder any legal redress.

Gilbert Street Developers, LLC v. La Quinta Homes, LLC, 174 Cal.App.4th 1185, 94 Cal.Rptr.3d 918 (Cal. App. 4th Dist. 2009) (holding question of whether arbitrators had power to determine their own jurisdiction was for courts because arbitration clause in LLC operating agreement stating that arbitration would be “conducted in accordance with the Rules of the American Arbitration Association existing at the date thereof” did not clearly and unmistakably provide that arbitrators had power to determine their own jurisdiction; holding that arbitration clause encompassing any dispute arising out of LLC operating agreement “exclusive of matters which are expressly within the discretion of the Members” did not require arbitration of dispute regarding application of push-pull buy-out provision because numerous choices or discretionary decisions by members were involved in process described in buy-out provision).

Ledford v. Peebles, 568 F.3d 1258 (11th Cir. 2009). A Georgia LLC was owned 50-50 by an entity (“Dyna-Vision”), which supplied the capital for the LLC, and three other individuals (the “Active Members”), who ran the company and marketed its product. The Active Members bought out Dyna-Vision’s interest pursuant to a put and call provision in the operating agreement and then sold the assets of the LLC to a third party (Peebles) who had financed the purchase by the Active Members of Dyna-Vision’s interest. Dyna-Vision and three of its members (the “Dyna-Vision Group”) sued the Active Members in state court and Peebles in federal court based on representations to the Dyna-Vision Group by the Active Members and Peebles that Peebles was not financing the purchase of Dyna-Vision’s interest. The Dyna-Vision Group lost both cases on summary judgment. In the state court action, the Georgia Court of Appeals issued an opinion in 2005 in which it held in favor of the Active Members on all claims by the Dyna-Vision Group except one claim involving a dispute over the transfer of some real estate. (The Georgia Court of Appeals found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with Peebles under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered by Peebles’ agreement with the Active Members to make a loan to finance the Active Members’ purchase of Dyna-Vision’s interest and to

purchase the LLC's assets after the Active Members' purchase of the Dyna-Vision interest. The court also rejected Dyna-Vision's fraud claim, finding that the involvement of the third party in financing the buy-out of Dyna-Vision's interest was not material to Dyna-Vision's decision whether to buy or sell under the put and call provision. Finally, the court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members' freedom to restrict and eliminate fiduciary duties under the Georgia LLC act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with the LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.) The Georgia Supreme Court denied the Dyna-Vision Group's petition for review. In this opinion, the Eleventh Circuit Court of Appeals addressed the Dyna-Vision Group's appeal of the federal district court's summary judgment in favor of Peeples and the district court's denial of sanctions against Peeples under the Private Securities Litigation Reform Act. In the federal court action, the Dyna-Vision Group asserted against Peeples federal and state securities fraud claims. In the course of an extensive discussion of the evidence and the inferences to be drawn therefrom, the court commented on an argument raised by the Dyna-Vision Group for the first time on appeal. The Dyna-Vision Group argued that the Active Members breached a provision in the operating agreement that prohibited pledge of an interest in the LLC without the consent of the members when Peeples loaned them the funds for the purchase of Dyna-Vision's interest. The Dyna-Vision Group argued that Dyna-Vision would have refused to sell its interest if it had known about the breach and would have asserted the breach as an affirmative defense if the Active Members then sued for specific performance. The court noted that a pledge by an Active Member in violation of the provision would have been rendered "void and of no effect" by the provision. If the lender attempted to seize the interest to satisfy the debt, the members could claim the pledge was void, but if the loan was paid and no seizure of the interest occurred, the members could not have suffered injury on account of the breach of the transfer restriction, nor could a member use the breach as a basis for a lawsuit against the breaching member. The court also acknowledged that the purpose of the right of first refusal provision in the operating agreement was to prevent either Dyna-Vision or the Active Members from selling their interests to a third party if the other side objected, but the court reiterated the observation of the Georgia Court of Appeals that the right of first refusal provision became moot once the put and call provision was invoked because Dyna-Vision was no longer an owner possessing a right of first refusal once it failed to elect to purchase the Active Members' interests.

Norrie v. Lane, No. B196062, 2009 WL 1522558 (Cal. App. 2 Dist. June 2, 2009). Norrie and Lane formed a real estate development LLC with Norrie as the sole managing member. Norrie challenged the sale of the LLC's real estate to Lane's wife as a breach of fiduciary duty and alleged that Lane's wife conspired with Lane to breach his fiduciary duty to develop the property and to act as a straw buyer so that it would appear that a third party was developing the property. The court of appeals concluded that Norrie had not, and could not, allege that Lane's sale of the property to his wife constituted a breach of his fiduciary duty based on the duties of a manager as described by the California partnership statute. The court also rejected Norrie's argument that he could amend his complaint to allege interference with contractual relations against Lane's wife based on interference with the LLC operating agreement. Norrie relied upon a provision that required consent of all members for disposition of substantially all of the LLC's assets. Assuming Lane did not have authority as sole managing member to sell the property and that they disagreed as members about whether the property should be sold, a tie-breaker provision in the agreement gave a third party and Lane authority to break the tie. The third party tie-breaker designated in the operating agreement was involved in the sale of the property; therefore, the court concluded that the sale of the property did not breach the provisions of the agreement. The court rejected Norrie's argument that his complaint stated a cause of action for breach of the covenant of good faith and fair dealing because the covenant does not prohibit a party from doing what is expressly permitted by an agreement.

In re 210 West Liberty Holdings, LLC, No. 08-677, 2009 WL 1522047 (Bankr. N.D. W. Va. May 29, 2009). The court examined the terms of an LLC's operating agreement and concluded that the LLC's bankruptcy filing was authorized under either the terms of the original operating agreement or an amended operating agreement executed a year later. The court noted that the West Virginia LLC statute governs relations among the members, managers, and LLC except to the extent the operating agreement provides otherwise, and the West Virginia LLC statute does not specifically address the filing of an LLC's bankruptcy petition or list the matter among the non-waivable provisions. The amended operating agreement gave a specified member the sole authority to file a bankruptcy petition on behalf of the LLC, and that member filed the LLC's Chapter 11 petition. Poe, an individual who invested in the LLC after its formation and

claimed to be a member of the LLC, argued that the filing of the LLC's bankruptcy petition was unauthorized because the amended operating agreement was invalid, and Poe, as a managing member, did not consent to the bankruptcy filing. Assuming, without deciding, that Poe was a managing member of the LLC and that the original operating agreement still governed the LLC, the court found that the bankruptcy filing was authorized. When the original operating agreement was executed, the LLC had only four members: Campbell, Foster, Briel, and Athey. Each had a 25% membership interest, and each was a manager, with Campbell named as the tie-breaking vote. The operating agreement specified certain matters requiring a unanimous vote and provided that all other decisions would be made by a majority vote, with each member having a vote in proportion to his or her membership interest. Bankruptcy was not listed in the matters requiring a unanimous vote. Before the bankruptcy filing, Athey and Briel resigned as managing members and were dissociated from the LLC. Thus, under Poe's theory, the only managing members were Campbell, Foster, and Poe. The court concluded that Poe's negative vote would not be sufficient to defeat the majority vote necessary to authorize a bankruptcy filing because: (1) both Campbell and Foster authorized the filing, (2) Campbell and Foster had a minimum of 50% membership interest in the LLC, and (3) the original operating agreement designated Campbell as the tie-breaking vote.

In re NextMedia Investors, LLC, C.A. No. 4067-VCS, 2009 WL 1228665 (Del. Ch. May 6, 2009). In this suit for judicial dissolution of an LLC and appointment of a liquidating trustee, the court analyzed an attempted amendment of the LLC agreement to extend the date of dissolution of the LLC by four years. The LLC agreement contained a provision that prohibited an amendment that would "adversely affect any Member" without the consent of each member to be adversely affected. The petitioners argued that the proposed amendment created an adverse effect and required the consent of all members for adoption because it extended the term of the LLC and, therefore, the members' investment period. Since the petitioners had not given their consent, they argued that the amendment was ineffective and the LLC had dissolved. The LLC countered that the petitioners' interpretation of the amendment provisions of the LLC agreement was not reasonable or, in the alternative, another reasonable interpretation existed rendering the agreement ambiguous. Further, the petitioners argued that whether they were adversely affected was a fact issue. The court found that the plain language of the amendment provision of the LLC agreement supported one reasonable meaning and thus could not be considered ambiguous. The court agreed with the petitioners that the dissolution provision could not be amended without the consent of all members because all members would be adversely affected by the extension of the term of the LLC, which would deny them the ability to withdraw from the LLC on the investment horizon that was originally contemplated by the LLC agreement. The court rejected the LLC's argument that the approval of the amendment by a majority of the members established that the amendment did not have an objectively adverse effect. Such a reading, the court stated, would convert the amendment provision into a class voting provision, but its plain language granted each individual member a consent right. After finding petitioners' interpretation to be reasonable, the court addressed the LLC's alternative reading of the amendment provision, which would require consent only if the board of managers subjectively intended that a proposed amendment adversely affect the members. The LLC's proposed reading was based on a technical reading of the words "to affect" to require intention or purpose. The court rejected this interpretation as inconsistent with the plain meaning of the provision, stating that the LLC's interpretation required "an awkward linguistic leap." The court also rejected the LLC's argument that the petitioners were not entitled to summary judgment because they had not provided the court with the factual basis to conclude that they were adversely affected by the proposed amendment. The LLC's position was that the petitioners must prove to the court, as an issue of fact, that they were adversely affected by the proposed amendment in order to demonstrate that their consent was required. The LLC offered affidavits from its officers indicating that a liquidation of its assets upon the original dissolution date would have resulted in no distributions to the LLC's equity holders because of the depressed market prices of those assets. The court, however, held that adverse effect for purposes of the amendment section was necessarily a "before-the-fact question" that is best judged by who can reasonably be expected to be adversely affected. The court stated that whether an amendment triggers an individual approval right "depends not on an empirical, factual assessment of whether a member is correct about the effect of a change in the contract, but on whether the proposed contractual amendment would alter an economically meaningful term. If it does, the individual approval right [of the amendment provision] is implicated." The court concluded that a change to the lifespan of the entity like the one proposed was clearly a triggering amendment. Thus, the petitioners were entitled to dissolution. The court declined to appoint a liquidating trustee, however. Under the terms of the LLC agreement, the board of managers was authorized to liquidate the LLC. If the board of managers did not conduct the liquidation, the Class A members were entitled to appoint a liquidator. Under the LLC agreement, this right was subject to the right of any member or creditor to apply to a court in respect of the dissolution of the LLC,

and the court interpreted this language together with Section 18-803 of the Delaware LLC statute to require the petitioners at least to show cause as to why the Class A members should be denied their right to appoint the liquidating trustee.

Olson v. Halvorsen, C.A. No. 1884-VCL, 2009 WL (Del. Ch. May 13, 2009). The dispute in this case arose among the founders of a hedge fund when one of the founders was removed. The hedge fund originally consisted of three Delaware entities (two LLCs and a limited partnership), each of which was governed by a written agreement. A fourth entity, an LLC, was subsequently formed, and an LLC agreement for that entity was drafted but never signed. The unsigned LLC agreement contained a multi-year earnout provision not found in the other agreements. The other agreements provided that a departing member was entitled only to the balance in his capital account and accrued compensation upon leaving the firm. When the plaintiff was removed from his position with the hedge fund, he was paid the amount of his capital account and accrued compensation as required by each of the agreements. The plaintiff sought enforcement of the earnout provision in the unsigned agreement, but, in a prior opinion, the court determined that the earnout provision was not enforceable because it violated the one-year provision of the statute of frauds. In this opinion, the court addressed the plaintiff's claim for fair value of his interests under provisions of the Delaware Revised Limited Partnership Act and Delaware Limited Liability Company Act providing for the payment of fair value to withdrawing partners and members. The court stated that the statutory fair value provisions do not govern where parties have an agreement that conflicts with the statute. In this case, the parties had reached an initial oral agreement that conflicted with the fair value statutes by providing that a member would only receive his accrued compensation and capital account balance upon leaving the hedge fund. When the parties memorialized their agreements in writing for the original three entities, all of the agreements were consistent with the original agreement regarding what a departing member would be paid. The court concluded that the initial oral agreement regarding payment to a departing member continued to apply to the subsequently formed LLC and became the original agreement governing its operation. This oral agreement was an enforceable LLC agreement because it could be completed within one year. The court found that the plaintiff failed to prove the existence of any superseding agreement that conflicted with the parties' oral agreement, and the plaintiff was thus entitled to nothing more than the balance of his capital account and accrued compensation. The court rejected alternative claims of promissory estoppel, civil conspiracy, unjust enrichment, and breach of fiduciary duty. The court found that the plaintiff failed to prove any of the elements required for estoppel, and the other claims failed because the plaintiff did not show deprivation of value to which he was entitled since he was paid in accordance with the terms of the agreements.

In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. April 23, 2009). A minority member of an LLC brought an action for judicial dissolution of the LLC on the basis that the current managers failed to fulfill the LLC's original business plan and breached their fiduciary duties to the LLC. The LLC was formed "for the purpose of acting as an investment advisor to certain investment funds and for such other lawful business as the Management Committee chooses to pursue." After the LLC encountered difficulties, it sent a report to its members showing that it was operating at a loss and indicating that its management committee had decided to explore additional, investment-related business avenues. The petitioner alleged that judicial dissolution was warranted because the managers had mismanaged the LLC so as to prevent and frustrate the successful achievement of the business plan, goals, and objectives of the LLC. The court concluded that the petitioner's allegations fell far short of demonstrating the showing required under the judicial dissolution provision of the Delaware LLC statute, under which the court has discretion to decree dissolution when it is not reasonably practicable to carry on the business in conformity with the LLC agreement. The court stated that judicial dissolution is a remedy to be granted sparingly and is not to be employed merely because the LLC's business has not gone smoothly or events have not turned out exactly as the owners originally envisioned. Rather, judicial dissolution is reserved for "situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill." The court rejected the petitioner's argument that the LLC should be dissolved because it was not meeting the projections contained in the original business plan and was pursuing strategies not part of that business plan. The court stated that it could not reasonably infer that it had become impracticable for the LLC to provide a return to its investors by engaging in "such...lawful business as the Management Committee chooses to pursue." Giving effect to the broad purpose clause did not signal that it would never be impracticable to operate an entity created to pursue any lawful business because judicial "[d]issolution of an entity chartered for a broad business purpose remains possible upon a strong showing that a confluence of situationally

specific adverse financial, market, product, managerial, or corporate governance circumstances make it nihilistic for the entity to continue,” i.e., upon “a showing that the perpetuation of the entity, irrespective of its managers’ intentions to pursue a business line allowed by its governing instrument, was obviously futile and would not result in business success.” Without speculating on what exact circumstances would suffice, the court concluded that the petitioner could not state a claim for dissolution simply by alleging that a two-year-old LLC with a broad purpose clause experienced some adversity. The court noted that an important reason for a broad purpose clause is to ensure an entity has flexibility to adapt in the face of changing circumstances. Turning to the petitioner’s allegations of breaches of fiduciary duty, the court stated that the petitioner could not bypass a derivative action by resort to an action for judicial dissolution. The court additionally concluded that the petitioner’s attempt to raise fiduciary duty claims in this judicial dissolution action was an improper attempt to bypass the dispute resolution procedure set forth in the LLC agreement, which required that “any questions, issues, or disputes arising out of or relating to the Agreement” be handled by negotiation, followed by mandatory mediation and, finally, binding arbitration.

Kaplan v. O.K. Technologies, L.L.C., 675 S.E.2d 133 (N.C. App. 2009). The court rejected the argument that the relationship between the three members of a North Carolina LLC was fiduciary in nature by virtue of their status as members in a closely-held LLC. The court rejected this argument based on provisions in the operating agreement limiting the liability of the members as permitted by the North Carolina LLC statute. The court stated that the operating agreement clearly limited the members’ liability to three situations. Two members argued that the conduct of the third member fell within two of the situations for which liability was not eliminated, but the court stated that the member’s liability would extend only to the LLC assuming *arguendo* that he breached his duties under the operating agreement.

Bay Center Apartment Owner, LLC v. Emery Bay PKI, LLC, C.A. No. 3658-VCS, 2009 WL 1124451 (Del. Ch. April 20, 2009). Bay Center Apartments Owner, LLC (“Bay Center”) and Emery Bay PKI, LLC (“PKI”) formed Emery Bay Member, LLC, a Delaware LLC (“Emery Bay”) to develop a condominium project. PKI was designated managing member of Emery Bay. Bay Center and PKI each made initial capital contributions, and Bay Center, through a separate agreement, sold the property being developed to Emery Bay North, LLC (“EB North”), an LLC wholly owned by Emery Bay, in exchange for a promissory note from Emery Bay. Emery Bay’s LLC Agreement (the “LLC Agreement”) provided for PKI to manage the project, but the details of its day-to-day management duties were defined in a separate Development Management Agreement. Under the LLC Agreement, PKI was required to cause EB North to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated Emery Bay ETI, LLC (“ETI”) as the Development Manager. After a number of problems allegedly resulting from mismanagement by PKI’s affiliates, the project failed and was put into receivership. In this case, Bay Center brought numerous claims against various parties including claims against PKI for breach of contract, breach of the contractually implied covenant of good faith and fair dealing, and breach of fiduciary duty. The defendants moved to dismiss all of Bay Center’s claims except those based on breach of contract. Although PKI did not move to dismiss the breach of contract claim against it, the court discussed the question of whether, as Bay Center argued, PKI was *obligated* to cause ETI to perform its obligations under the Development Management Agreement and *obligated* to cause Emery Bay to perform its obligations under the loan documents by virtue of the *power and authority* granted PKI under the LLC Agreement to do so. PKI argued that it was simply empowered, not required, to cause these entities to perform such obligations. The court found the LLC Agreement to be ambiguous on this point and addressed the question of whether an obligation on PKI’s part could be implied if the ambiguity was ultimately resolved against Bay Center. The court stated that Delaware courts have rightly sparingly applied the implied covenant of good faith and fair dealing in detailed, complex agreements, in order that parties not be saddled by judicial error with duties never voluntarily accepted. However, the court acknowledged that Delaware courts recognize the occasional necessity of implying contract terms to fulfill the parties’ reasonable expectations. In this case, the court found that PKI was required to act in good faith in managing Emery Bay and exercising its discretion to cause the supporting agreements to be performed, meaning PKI could not engage in “arbitrary or unreasonable conduct” that prevented Bay Center from reaping the bargained-for benefits of PKI’s project management skills and efforts. Bay Center pled facts from which it could be reasonably inferred that PKI’s actions were not in good faith. Thus, the court found that Bay Center had sufficiently pled that PKI had an implied duty of good faith to cause performance of the supporting agreements and that PKI had breached this duty. With respect to Bay Center’s breach of fiduciary claims, the court looked to the provisions of the LLC Agreement regarding the fiduciary obligations of the members. One section of the LLC Agreement provided that members owed each other the fiduciary duties that exist between members of a Delaware LLC except where the LLC

Agreement provided otherwise; however, the very next section of the LLC Agreement provided that a member owed the other member no duty of any kind that was not imposed by the LLC Agreement itself. The court found that the defendants' position that the LLC eliminated their fiduciary duties was not the only reasonable interpretation of these provisions, which was the standard for the defendants to prevail on their motion to dismiss. The court stated that the existence of fiduciary duties under the first provision could be reconciled with the second provision's apparent elimination of duties by viewing the second provision as carving out only the duties that are not traditional, default duties imposed by the first provision. The court stated that this interpretation was more reasonable than the defendants' interpretation because the defendants could not explain how their interpretation did not render the first provision meaningless. Further, the court noted that the intent to eliminate fiduciary duties must be plain and unambiguous.

Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872 (Del. Ch. 2009). Kuroda, who served as an investment advisor for a group of entities that invested in Japanese corporations, was a non-managing member of a Delaware LLC that served as the general partner of the master fund. Because of disagreements with the managing members, Kuroda decided that he could no longer serve as an advisor to the funds. After negotiations regarding Kuroda's withdrawal from the LLC failed, Kuroda filed suit alleging numerous causes of action against the LLC, the managing members, and the individuals who owned and controlled the managing members. Kuroda asserted breach of contract claims against the LLC and the managing members based on their failure to pay him incentive allocations owed, failure to honor his request to withdraw the balance of his capital account, and issuance of a Schedule K-1 that improperly assigned him taxable income. The managing members argued that the breach of contract claims against them should be dismissed because they were not liable for the LLC's purported breaches of the LLC agreement. They relied upon language in the LLC agreement that tracked the language of the Delaware Limited Liability Company Act providing that a member is not liable for the debts, obligations, and liabilities of the LLC solely by reason of being a member. Another provision of the LLC agreement exculpated members from liability to one another for any action or inaction unless the action or inaction arose out of or was attributable to gross negligence, willful misconduct, or bad faith, in which case a member would be liable. The court held that, under at least one reasonable interpretation, these provisions did not limit the liability of the managing members for the kinds of breaches alleged in Kuroda's complaint. The court stated that the provision limiting liability of the members solely by reason of being a member did not necessarily limit liability for reasons other than their member status. Additionally, breaches of the agreement could reasonably be described as "any action or inaction," and the defendants did not argue that they were exculpated from liability under the terms of the exculpation provision. The language of the exculpation provision suggested that the parties knew how to clearly define their liability to one another and chose not to limit their liability for breach of contract claims alleged in the complaint. Furthermore, the provisions of the LLC agreement allegedly breached by the managing members did not specify whether members could be held responsible for their breach. Given this ambiguity, as well as the ambiguity created by the other provisions of the agreement, the court could not conclude as a matter of law that the managing members could not be liable for the alleged breaches of the agreement. The court did dismiss a breach of contract claim against the LLC and the managing members that was based on improper assignment of taxable income on a Schedule K-1 issued to Kuroda because Kuroda, a Japanese citizen, failed to establish that he paid or even owed taxes in the U.S. or that he paid higher taxes or suffered any adverse consequence as a result of the schedule. Kuroda argued that a tax audit was a logical and reasonably foreseeable consequence of the improper Schedule K-1, but he failed to make this allegation in his complaint. Further, the court stated that such a speculative harm was not sufficient to state a claim for breach of contract even if the complaint contained this allegation. Kuroda also asserted a claim against the LLC and the managing members for breach of the implied covenant of good faith and fair dealing based on various alleged acts constituting "arbitrary, unreasonable, and/or deceitful conduct" on the part of the defendants. The court stated that the implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." The court explained that it is not a "free-floating duty," and it can only be used conservatively to ensure the "reasonable expectations" of the parties are fulfilled. The court stated that Kuroda was required to allege a specific implied contractual obligation and how the violation of that obligation denied him the fruits of the contract. The court held that Kuroda failed to adequately allege such a claim because his claim regarding the defendants' failure to pay money due under the contract was governed by the express terms of the contract, and the implied covenant of good faith and fair dealing cannot be used to override the express terms of the contract. Further, to the extent that Kuroda's claim was based upon allegations regarding the defendants' attempts to undermine his reputation, he failed to draw a connection to a specific implied obligation under the contract, and he also failed to identify any contractual benefit that he was denied as a result of such conduct.

Therefore, this claim was dismissed. The court dismissed Kuroda's claim for unjust enrichment because such a claim is not available where there is a contract that governs the relationship between the parties. Although Kuroda argued that his claims against the individuals who controlled the managing members should not be dismissed because they were not parties to the relevant contracts, the court stated that unjust enrichment could not be used to extend the obligations of a contract to persons who are not parties to the contract.

Kumar v. Kumar, Civil Action No. 1:07CV263-DAS, 2009 WL 902035 (N.D. Miss. March 31, 2009). Mr. and Mrs. Kumar were equal members of a Mississippi LLC that operated a Holiday Inn. The operating agreement did not require either of them to work at the Holiday Inn, but it required them to "diligently promote and support" the LLC's business and to be "faithful to each other in all transactions related to" the LLC. The operating agreement provided in various provisions that a member was not permitted to receive any distributions, withdrawals, loans, or salaries without unanimous consent of the members. Mr. and Mrs. Kumar both worked at the Holiday Inn until Mrs. Kumar filed for divorce. After their separation, Mrs. Kumar stopped working at the hotel. Eventually, Mrs. Kumar filed an action for injunctive relief, appointment of a receiver, breach of contract, breach of fiduciary duties, misappropriation and conversion, and dissolution. The court found it evident that Mr. Kumar violated the terms of the operating agreement, but the court also found that Mrs. Kumar was aware of many of the violations and that many similar violations occurred while she worked at the hotel. In fact, Mrs. Kumar also violated the agreement. Thus, the court examined the actions of both parties, one year at a time, in order to properly apportion the damages. The court found that Mrs. Kumar was estopped to assert breach of contract with regard to numerous transactions because both parties acted in contravention of the agreement prior to their separation, and Mrs. Kumar had knowledge and did not object to the transactions. In addition, she personally benefitted from many of the transactions following the separation. The court concluded, however, that Mr. Kumar breached the agreement following the parties' separation by failing to provide Mrs. Kumar immediate access to the books and records and by taking a salary and making distributions to himself and his relatives without Mrs. Kumar's consent. Based on the Mississippi LLC statute (which requires a manager to discharge his duties in good faith, with ordinary care, and in a manner reasonably believed to be in the best interests of the LLC) and the operating agreement (which required the parties to be "faithful to each other" in transactions involving the LLC), the court also concluded that Mr. Kumar breached his fiduciary duty to Mrs. Kumar by taking a salary and making distributions to himself and his relatives without her consent following the separation. The court concluded that the damages to which Mrs. Kumar was entitled for Mr. Kumar's misappropriation and conversion of LLC funds must be reduced by the personal benefit received by Mrs. Kumar from the LLC. The court stated that once the amount of benefits received by each party was calculated, the party that received the greater benefit would have his or her benefit reduced by the other's benefit, and one-half of that final number would be owed to the other party. Addressing other claims by Mrs. Kumar, the court determined that removal of Mr. Kumar as manager of the LLC was not warranted since the parties' relationship under the agreement was colored by their marriage and the parties had never followed the strict terms of the operating agreement. In addition, the court found that Mr. Kumar was an asset to the hotel and that his removal would be detrimental to the LLC. Based on the court's statutory authority to enforce an LLC agreement by injunction or other relief, the court entered an injunction enjoining loans by the LLC, use of the LLC's funds for personal purposes, expenditures not related to operation of the hotel, and use of LLC funds for salaries, distributions, or return of capital to the members in violation of the operating agreement.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, No. 06 CVS 6091, 2009 WL 877636 (N.C. Super. March 31, 2009) (recognizing possibility that multiple documents viewed collectively could constitute written operating agreement, but finding correspondence and email relied upon by defendant members did not rise to level of written operating agreement).

Gaunce v. Wertz, No. 1:06-CV-00095-R, 2009 WL 803843 (W.D. Ky. March 25, 2009). Several members of a Kentucky LLC claimed that the managing member breached the operating agreement by undertaking certain business ventures in excess of his authority. The managing member argued that he had the exclusive right to manage the business because a majority in interest of the members agreed that he would be the managing member; however, the operating agreement provided that no contract, obligation, or liability could be entered on behalf of the LLC without the consent of a majority interest, and the court concluded that the plain language of the agreement required that a member must have consent of a majority interest to enter a contract, obligation, or liability. Whether the managing member's role as managing member gave him authority to take certain actions without consent of a majority interest could not be resolved

on a motion to dismiss. The court also concluded that the issue of whether the operating agreement implicitly required the managing member to provide the plaintiffs an accounting on demand could not be resolved on a motion to dismiss.

Sutherland v. Sutherland, No. 2399-VCL, 2009 WL 857468 (Del. Ch. March 23, 2009). Assuming, *arguendo*, that a corporate charter provision required interested directors to be treated as disinterested directors for purposes of approving corporate transactions, the court concluded such a provision would not be enforceable under Delaware law. Though expressly prohibited by Section 102(b)(7) of the Delaware General Corporation Law, the court noted that such a provision would be permissible under the Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act because freedom of contract is the guiding and overriding principle of those statutes.

Dudley v. Dudley, No. CA2008-07-165, 2009 WL 683702 (Ohio App. March 16, 2009). A member's withdrawal from an LLC triggered a dissolution and winding up under provisions of the operating agreement that provided for dissolution and winding up upon withdrawal of a member unless all remaining members voted to continue the LLC. A unanimous vote to continue was not obtained because one of the nine remaining members voted against continuation of the LLC. The LLC and a majority of its remaining members argued, however, that a unanimous vote to continue was not necessary because a majority of the remaining members amended the operating agreement to provide for continuation of the LLC upon a majority vote of the members. The court stated that the operating agreement specifically and clearly dealt with the events triggering dissolution and continuation, and the court concluded that allowing amendment of the operating agreement after the withdrawal of a member as was attempted here would effectively render that provision meaningless and severely prejudice a withdrawing member. The court thus held that the amendment could not supersede the clear language of the operating agreement regarding dissolution.

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. The LLC's principal asset was a piece of real estate. Michael filed bankruptcy, and Richard, without seeking relief from the stay, declared the LLC dissolved, asserting that Michael's bankruptcy terminated his membership. Richard elected not to continue the business and distributed the real estate in equal shares to himself and Michael by quit claim deeds from the LLC. Richard then sought relief from the stay to foreclose the mortgage against the real estate. In this opinion, the bankruptcy court addressed a number of claims asserted by Michael, Richard, the LLC, and the Trustee. Issues regarding whether the non-economic interest of Michael became property of the bankruptcy estate or whether Richard had the right to unilaterally wind up the LLC were mooted by the fact that Richard's actions with respect to the real estate were invalid under the Illinois LLC statute and the LLC's operating agreement. The court relied upon the winding up provisions of the Illinois LLC statute requiring that the LLC's assets be applied to discharge the claims of creditors, including members who are creditors, before any surplus is distributed. The LLC's operating agreement incorporated the rule in the statute and did not make provision for distributions of encumbered assets. The court thus concluded that the distribution of the real estate violated the statute and the operating agreement and was void. The court next analyzed the Illinois LLC statute and the operating agreement and concluded that Michael's dissociation by filing for bankruptcy was not wrongful. Under the Illinois LLC statute, a dissociation is wrongful only if it is in breach of an express provision of the operating agreement. The LLC and Richard argued that Michael's filing bankruptcy without giving written notice breached provisions of the agreement requiring written notice before a member transfers any interest in the LLC. Examining various provisions of the operating agreement, the court concluded that the provisions requiring notice of a transfer applied to a voluntary transfer and that transfers by operation of law were governed by a different provision that did not contain a notice provision. The court also rejected an argument that Michael's dissociation was wrongful because Richard did not consent to the Trustee's becoming a substituted member. The court stated that the Trustee was not an assignee under the provisions of the operating agreement relied upon by Richard, that bankruptcy was expressly addressed under provisions of the operating agreement contemplating the event of a member's bankruptcy, and that Michael's dissociation by filing bankruptcy did not breach any express provision of the operating agreement.

W.R. Huff Asset Management Co., L.L.C. v. William Soroka 1989 Trust, Civ. Action No. 04-3093 (KSH), 2009 WL 606152 (D.N.J. March 9, 2009). This dispute involved interpretation of transfer restrictions in an LLC operating agreement and the fate of a decedent's interest in a lucrative investment LLC. The LLC was first organized as a limited partnership and later converted to an LLC. The terms of the operating agreement included transfer

restrictions and provided for certain familial assignments of profits or income. The agreement stated that attempted transfers in violation of the agreement were void. One of the members, Soroka, attempted to transfer his interest to a trust and died several years later. The LLC argued that the attempted transfer in violation of the agreement gave the LLC the right to acquire the interest. The court, however, concluded that the terms of the operating agreement setting forth conditions precedent to a valid transfer did not amount to a redemptive option. Under the terms of the agreement, an attempted transfer in violation of the agreement was simply void, and the member's entitlement continued as if the transfer had never been undertaken. Under the agreement, the executor of a deceased member retained the rights of the decedent with respect to the membership interest. After Soroka's death, his executor succeeded to his rights for the purpose of settling or managing his estate, and the attempted invalid transfer did not affect the executor's rights to step into Soroka's shoes. Any attempted invalid transfer by an executor would also be void and would not deprive the executor of the rights conferred under the agreement. The court found that equitable considerations dictated that Soroka's estate was entitled to the same treatment afforded the estate of a member who had previously died. In the prior situation, the executors assumed control for over two years before the estate was formally substituted as a member under the agreement. The court held that the Soroka interest terminated no earlier than the date on which the venture terminated and that the estate was entitled to the value of Soroka's capital account at the date of termination. The court rejected the estate's argument that the accrual method be used for calculating its interest where all other members were receiving payment based on the cash method specified in the operating agreement. The fact that the original limited partnership agreement provided for the accrual method of accounting was not determinative because the LLC operating agreement expressly provided for the cash method, and the limited partnership had operated on a cash basis in fact.

Sanitary District No. 4-Town of Brookfield v. City of Brookfield, 767 N.W.2d 316 (Wis. App. 2009) (interpreting LLC operating agreements and Wisconsin LLC statutes and concluding that neither statute nor agreements in issue required authorization or action by members to be reduced to written form and thus signatures on behalf of LLCs on annexation petition were valid where signatures were verbally authorized at meetings of LLC members).

Roodenburg v. Pavestone Company, L.P., 171 Cal.App.4th 185, 89 Cal.Rptr.3d 558 (Cal. App. 4th Dist. 2009) (holding that uncertainty in amount of damages did not preclude prejudgment interest on value of capital account and severance payment of resigning manager where interest was provided by terms of LLC operating agreement, and concluding interest provision in operating agreement did not involve forbearance and thus was not usurious nor was it unreasonable liquidated damage provision).

Bushi v. Sage Health Care, PLLC, 203 P.3d 694 (Idaho 2009). Three psychiatrists who were members of a professional LLC formed under the Idaho Limited Liability Company Act became disillusioned with the fourth member, Bushi, because he was dating a nurse practitioner employed by the LLC. There was also an issue between the members regarding Bushi's unauthorized use of the LLC's line of credit for personal expenses. After a meeting at which the other members told Bushi they wanted him out because of his relationship with the nurse practitioner, Bushi became concerned about his future with the LLC and joined another psychiatry group. Bushi and the other members failed to agree regarding the terms of a buy-out of Bushi's interest, and Bushi's lawyer informed the other members that Bushi would continue as a member and retain his financial rights until a mutually acceptable dissociation and buy-out agreement had been reached. The operating agreement provided that a member could be dissociated by a majority vote of the other members upon the happening of certain events (such as loss of the member's license or conviction of a felony), none of which had occurred, but the operating agreement also provided that it could be amended with the consent of all but one member. The members other than Bushi voted to amend the operating agreement to require mandatory dissociation upon an affirmative vote by all but one of the members, and the members other than Bushi then voted to dissociate Bushi. Applying the formula in the operating agreement, the LLC's accountant determined the value of Bushi's interest, and the LLC tendered payment to Bushi, which he refused. Bushi filed suit asserting various claims including claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. The trial court granted the other members' motion for summary judgment, finding that the members did not breach their contract with Bushi by amending the operating agreement to allow his involuntary termination, that the members were entitled to summary judgment on Bushi's claims against them for breach of the covenant of good faith and fair dealing and breach of fiduciary duty, and that the provisions on dissociation and valuation were clear and unambiguous and that the LLC's valuation followed the provisions. On appeal, the supreme court upheld the trial court's summary judgment against Bushi on the breach of implied covenant of good faith and fair dealing claim, but reversed the summary judgment on the breach of

fiduciary duty claim. With respect to the breach of implied covenant of good faith and fair dealing claim, the court stated that contract terms are not overridden by the implied covenant of good faith and fair dealing, and Bushi could identify no specific term of the operating agreement that was breached by amending the agreement to involuntarily dissociate him. With regard to the breach of fiduciary duty claim, the court discussed the Idaho LLC statutes and stated that the original LLC statute (which is repealed effective July 1, 2010) identifies certain duties that members owe to one another, but does not use the term “fiduciary,” does not state that it is an exhaustive list, and does not address the conduct at issue in the case. In 2008, the legislature adopted the revised Uniform Limited Liability Company Act, which explicitly provides that members of an LLC owe each other the fiduciary duties of loyalty and care, but the LLC in this case was governed by the prior act because it was formed prior to July 1, 2008 and had not elected to be subject to the new act. The court stated that it appeared that a majority of courts considering the issue have concluded that members of an LLC owe one another fiduciary duties of trust and loyalty, and the court concluded that members of an LLC owe one another fiduciary duties under the original act because it provides that the principles of law and equity supplement the act unless displaced by particular provisions of the act. The court stated that whether a fiduciary duty has been breached is a question of fact and discussed case law from other jurisdictions illustrating that actions taken in accordance with the operating agreement can still be a breach of fiduciary duty if improperly motivated to obtain financial gain. If the members acted in bad faith in order to advance their personal financial interests, they would be liable to Bushi despite their technical compliance with the operating agreement. Drawing all reasonable inferences in Bushi’s favor, the court could not conclude that there was no genuine issue of material fact with regard to the members’ motivation in dissociating Bushi.

Mickman v. American International Processing, L.L.C., Civil Action No. 3869-VCP, 2009 WL 891807 (Del. Ch. March 23, 2009). Mickman sought to inspect the books and records of an LLC, and the LLC opposed her efforts and sought summary judgment on the basis that she was not a member or manager of the LLC. The Delaware LLC statute confers inspection rights upon each member and manager of an LLC, and the written operating agreement did not identify Mickman as a member. The LLC argued that the court should look for guidance to corporate law, under which only shareholders listed on the stock ledger are recognized as record holders for purposes of inspection rights, and that, where a written operating agreement exists, only members listed in the operating agreement should be recognized as members with a right to inspect the LLC’s books and records. The court rejected the analogy to corporate law, pointing out that the Delaware Supreme Court case principally relied upon by the LLC dealt only with stock corporations. Further, the court stated that the policy considerations underlying the Delaware Supreme Court’s decision in that case did not translate readily to the circumstances in this case. Inasmuch as LLCs are generally created on a less formal basis than corporations and are basically creatures of contract, the court stated that it was reasonable to consider evidence beyond the four corners of the operating agreement, where, as in this case, admissible evidence suggests the parties intended for the plaintiff to be a member. Although the operating agreement did not list the plaintiff as a member, other documents signed by the two members listed in the LLC agreement, one of which was the plaintiff’s husband, supported a reasonable inference that the plaintiff was a member. The other documents included the LLC’s tax return and the K-1’s of the members as well as an Offer of Compromise to the IRS signed by the plaintiff’s husband. The LLC argued that the representations in these documents were mistakes, but the court stated that they raised factual issues that could not be determined at the summary judgment stage.

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The minority member of a Missouri LLC sued the majority member for breach of the operating agreement based on the majority member’s withdrawal of its capital contribution without the consent of the minority member in violation of the operating agreement. The majority member argued that the minority member lacked standing to assert the claim because the claim belonged to the LLC rather than the minority member. The court acknowledged corporate case law requiring that shareholders bring suit to redress corporate injuries derivatively, but the court pointed out that the minority member based its claim on breach of the operating agreement rather than a recovery of corporate funds, and the Missouri LLC statute expressly provides that suits to enforce the operating agreement may be brought by any member. However, the court further pointed out that the Missouri statute contains special rules regarding the enforcement of capital contributions. Relying on the statutory provision that a member’s capital contribution shall not be enforceable by any other member unless the obligated member has specifically agreed or consented to such enforcement, the court stated that the statute precluded a claim for enforcement of that part of the operating agreement given the absence of a specific agreement allowing one member to enforce another member’s capital contribution. The court rejected the minority member’s argument that it was permitted to seek damages for a collateral

consequence of the withdrawal of the capital contribution (the LLC's inability to repay the minority member's loan to the LLC) as opposed to enforcement of the capital contribution by payment of the claim. The court concluded that such a claim for damages was likewise precluded by the statute. The court acknowledged that it was not altogether clear whether the statutory provision was applicable because the minority member arguably did not seek "enforcement" of the payment of the capital contribution, but the court concluded that the claim for damages still failed even if the statute allowed it because the loan that the minority member claimed the LLC would not be able to pay was not yet due. The court also rejected the minority member's claim that the majority member's withdrawal of its capital contribution breached its fiduciary duty to the minority member. The court stated that the minority member failed to point to any provision of the operating agreement that imposed a fiduciary duty on the majority member, and, even if the majority member owed a duty of good faith and fair dealing as a "majority shareholder," the duty was based on its status as a member. Both the operating agreement and the statute provided that a member is not liable to another member "solely by reason of acting in his capacity as a member." Assuming the duty of care owed to the LLC and, indirectly, its members, was violated, the court stated that the harm would have to be remedied through a derivative suit. There was no direct harm to the minority member since the inability to repay the minority member's loan would harm the member in a capacity other than as a member, and any fiduciary duty would not extend to the member in the capacity as an outsider. Since the plaintiff's claims for breach of the operating agreement and breach of fiduciary duty failed, claims for civil conspiracy based on those causes of action failed as well. Finally, the court rejected a claim against individuals associated with the majority member, which was an entity, for tortious interference with the operating agreement because corporate officials acting in their official capacity cannot be liable for tortious interference with the corporation's own contracts, and the exceptions to that rule were not met.

Spellman v. Katz, C.A. No. 1838-VCN, 2009 WL 418302 (Del. Ch. Feb. 6, 2009). Two doctors, Spellman and Katz, each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which the parties leased space for their joint medical practice. After their relationship deteriorated, Spellman left to practice on his own, and the two were unable to agree on how to become disentangled from each other. Spellman eventually sought a judicial dissolution of the LLC pursuant to the Delaware LLC statute or an order appointing a liquidating trustee to effectuate the winding up of the LLC because the LLC had allegedly already dissolved by express will of its members pursuant to the LLC agreement. The LLC agreement provided that the LLC "shall be dissolved and its affairs wound up as soon as possible after the construction of the building had been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit" Neither member disputed that each of the preconditions to dissolution set forth in the LLC agreement had been satisfied, but Katz argued that the dissolution and winding up of the LLC was improper because the LLC agreement did not accurately reflect the original intentions of the parties regarding dissolution. Katz asserted that neither party knew that this provision was part of the LLC agreement and that the parties intended to operate the LLC for at least as long as the mortgage's interest obligation and real estate tax benefits remained available to offset profits from the practice. In support of this position, Katz pointed to the failure of either party to pursue the dissolution and winding up of the LLC following the completion of the construction of the building. Applying contract construction principles to the LLC agreement, the court concluded that the agreement was unambiguous and should be enforced in accordance with its terms. Because the LLC agreement was unambiguous on its face, the parol evidence rule precluded outside evidence to dispute its terms. Accordingly, the court held that the LLC had been dissolved by express will of its members under the LLC agreement and winding up of its affairs was necessary. With respect to Spellman's request for the appointment of a liquidating trustee pursuant to the Delaware LLC statute, the court held that there was cause for appointment of such a person because the parties were deadlocked on how to proceed with the winding up of the LLC and were not able to implement the winding up provisions of the LLC agreement.

Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (S.C. 2009). The court disagreed with the conclusion of the court of appeals that an LLC's operating agreement entitled the members to a formal accounting. The operating agreement provided that the LLC's members "shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation," but the court distinguished this requirement from the equitable remedy of an accounting sought in this case. Further, even if the statement of assets and liabilities required by the operating agreement entitled the parties to a formal accounting (as argued by the dissent), the court found that the members waived the right by refusing to communicate and cooperate with each other. Additionally, the court found no provision in the LLC statute requiring a court to order a complete accounting under the circumstances.

In re Oasis, LLC, No. 08-31522 TEC, 2009 WL 5753355 (Bankr. N.D. Cal. Nov. 7, 2008) (expressing view that 50% member did not have authority to file bankruptcy petition where operating agreement provided that LLC was managed by members and “all decisions” must be approved by members holding majority of outstanding interests, and stating that it was doubtful that post-petition email from other member constituted unanimous vote required to amend operating agreement, nor did it evidence majority approval of the bankruptcy because it could not serve as pre-petition formal vote and interpreting email as ratification would contradict other member’s sworn statement that he did not consent to bankruptcy).

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

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

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

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

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

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

The court also addressed whether the plaintiff had alleged sufficient facts to establish demand was excused in this derivative action. The court noted that corporate case law supplies the governing principles for evaluating demand

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

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

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

Baird v. Manayan, No. H032241, 2008 WL 4998341 (Cal. App. 6th Dist. Nov. 25, 2008). Manayan, an acupuncturist, entered into an operating agreement with Baird, a chiropractor, to form an LLC. Shortly after the LLC opened for business, Manayan failed to make a capital contribution and the relationship began to deteriorate. The parties agreed that Manayan would purchase Baird's interest, but Manayan failed to follow through, and Baird filed an action against Manayan. The court entered an order compelling arbitration under the operating agreement, and the arbitrator found in favor of Baird. Manayan moved to vacate or correct the award on the grounds that the underlying contract was an illegal agreement. Manayan argued that the purpose of providing chiropractic and alternative health care was illegal because neither chiropractors nor acupuncturists were permitted to operate as an LLC and were not permitted to do business together in a single practice. The court found that Manayan was equitably estopped from asserting illegality because the arrangement to operate as an LLC with Baird was the product of her own undertaking. Manayan was a

licensed attorney who undertook to draft the operating agreement and assured Baird that she would take care of all the legal prerequisites for organizing and starting the business. The court also held that Manayan waived the illegality argument by failing to raise it during the arbitration. Moreover, the court noted that Manayan did not contest the legality of the arbitration clause since she moved to compel arbitration. Thus, she had no basis to complain that the trial court viewed the improper LLC as severable from the allocation of interests in the business and no sound basis to challenge the implied finding that the agreement to purchase Baird's interest created an independent enforceable obligation.

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

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

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

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

from and sought relief for breach of the operating agreements, which called for judicial dispute resolution rather than arbitration.

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

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

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

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

contributions shall be made incrementally as agreed by the members, but the court stated that the ambiguity in the agreement was a fact issue for the jury to decide.

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

Miller v. Arnona, 993 So.2d 787 (La. App. 2008). The court set aside a default judgment in favor of one LLC member (Miller) against another member (Arnona) who removed the equipment and food from the premises of the restaurant that had been operated by the LLC before Hurricane Katrina. A few months before Hurricane Katrina, Arnona and another LLC that owned the premises where the restaurant was operated notified Miller that they were withdrawing as members of the restaurant LLC. Although the operating agreement provided that operation of the restaurant would cease if the LLC that owned the premises withdrew from the restaurant LLC, Miller continued to operate the restaurant until Hurricane Katrina. After Hurricane Katrina, Arnona removed the equipment and food from the restaurant, and Miller sued Arnona for lost profits that he estimated he could have made if he had been able to continue the restaurant. The court set aside the default judgment obtained by Miller and remanded the case for a new trial because the evidence suggested that Miller had no right to occupy the premises based on the operating agreement and Arnona had instituted eviction proceedings against Miller. The court also found that Miller's evidence of lost profits was insufficient.

W. Transfer of Interest/Buy-Out of Member

In re SageCrest II, LLC (SageCrest II, LLC v. Topwater Exclusive Fund, III, LLC), 414 B.R. 9 (D. Conn. 2009). The court concluded that a redemption provision in the operating agreement of a Delaware LLC was ambiguous with respect to whether members who exercised their redemption right continued to be members of the LLC until they received payment for their interests. Two members of the LLC who exercised their redemption right under the agreement and did not receive payment for their interests claimed they were creditors of the LLC. The parties disputed what it meant to be "redeemed" under the agreement and acknowledged that the terms "redeemed" and "redemption" were undefined terms in the operating agreement and under the Delaware LLC Act. The court discussed definitions of the terms but concluded that many of the "ordinary" definitions were not necessarily applicable in the context of the particular business circumstances, which involved membership interests in an LLC that had investments in real estate and other illiquid ventures. The court noted that Black's Law Dictionary does not discuss payment in its definition of "redemption." The court concluded that a reasonable third person reading the redemption provision of the operating agreement in question might be uncertain of the meaning of the terms "redeem" and "redemption" and could understand redemption to mean either that members of the LLC are redeemed on the effective date of redemption or are redeemed on the date upon which they are paid their redemption prices. Given that uncertainty, parol evidence was admissible to assist the court in a proper interpretation.

Gilbert Street Developers, LLC v. La Quinta Homes, LLC, 174 Cal.App.4th 1185, 94 Cal.Rptr.3d 918 (Cal. App. 4th Dist. 2009) (holding that arbitration clause encompassing any dispute arising out of LLC operating agreement "exclusive of matters which are expressly within the discretion of the Members" did not require arbitration of dispute regarding application of push-pull buy-out provision because numerous choices or discretionary decisions by members were involved in process described in buy-out provision).

Arfa v. Zamir, 880 N.Y.S.2d 635 (App. Div. 1st Dept. 2009) (holding put provision in LLC operating agreement was unambiguous and expressly authorized exercise of put any time after removal of initial manager at price which included “Upside” calculated as specified in agreement).

Ledford v. Peebles, 568 F.3d 1258 (11th Cir. 2009). A Georgia LLC was owned 50-50 by an entity (“Dyna-Vision”), which supplied the capital for the LLC, and three other individuals (the “Active Members”), who ran the company and marketed its product. The Active Members bought out Dyna-Vision’s interest pursuant to a put and call provision in the operating agreement and then sold the assets of the LLC to a third party (Peebles) who had financed the purchase by the Active Members of Dyna-Vision’s interest. Dyna-Vision and three of its members (the “Dyna-Vision Group”) sued the Active Members in state court and Peebles in federal court based on representations to the Dyna-Vision Group by the Active Members and Peebles that Peebles was not financing the purchase of Dyna-Vision’s interest. The Dyna-Vision Group lost both cases on summary judgment. In the state court action, the Georgia Court of Appeals issued an opinion in 2005 in which it held in favor of the Active Members on all claims by the Dyna-Vision Group except one claim involving a dispute over the transfer of some real estate. (The Georgia Court of Appeals found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with Peebles under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered by Peebles’ agreement with the Active Members to make a loan to finance the Active Members’ purchase of Dyna-Vision’s interest and to purchase the LLC’s assets after the Active Members’ purchase of the Dyna-Vision interest. The court also rejected Dyna-Vision’s fraud claim, finding that the involvement of the third party in financing the buy-out of Dyna-Vision’s interest was not material to Dyna-Vision’s decision whether to buy or sell under the put and call provision. Finally, the court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members’ freedom to restrict and eliminate fiduciary duties under the Georgia LLC act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with the LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.) The Georgia Supreme Court denied the Dyna-Vision Group’s petition for review. In this opinion, the Eleventh Circuit Court of Appeals addressed the Dyna-Vision Group’s appeal of the federal district court’s summary judgment in favor of Peebles and the district court’s denial of sanctions against Peebles under the Private Securities Litigation Reform Act. In the federal court action, the Dyna-Vision Group asserted against Peebles federal and state securities fraud claims. In the course of an extensive discussion of the evidence and the inferences to be drawn therefrom, the court commented on an argument raised by the Dyna-Vision Group for the first time on appeal. The Dyna-Vision Group argued that the Active Members breached a provision in the operating agreement that prohibited pledge of an interest in the LLC without the consent of the members when Peebles loaned them the funds for the purchase of Dyna-Vision’s interest. The Dyna-Vision Group argued that Dyna-Vision would have refused to sell its interest if it had known about the breach and would have asserted the breach as an affirmative defense if the Active Members then sued for specific performance. The court noted that a pledge by an Active Member in violation of the provision would have been rendered “void and of no effect” by the provision. If the lender attempted to seize the interest to satisfy the debt, the members could claim the pledge was void, but if the loan was paid and no seizure of the interest occurred, the members could not have suffered injury on account of the breach of the transfer restriction, nor could a member use the breach as a basis for a lawsuit against the breaching member. The court also acknowledged that the purpose of the right of first refusal provision in the operating agreement was to prevent either Dyna-Vision or the Active Members from selling their interests to a third party if the other side objected, but the court reiterated the observation of the Georgia Court of Appeals that the right of first refusal provision became moot once the put and call provision was invoked because Dyna-Vision was no longer an owner possessing a right of first refusal once it failed to elect to purchase the Active Members’ interests.

W.R. Huff Asset Management Co., L.L.C. v. William Soroka 1989 Trust, Civ. Action No. 04-3093 (KSH), 2009 WL 606152 (D.N.J. March 9, 2009). This dispute involved interpretation of transfer restrictions in an LLC operating agreement and the fate of a decedent’s interest in a lucrative investment LLC. The LLC was first organized as a limited partnership and later converted to an LLC. The terms of the operating agreement included transfer restrictions and provided for certain familial assignments of profits or income. The agreement stated that attempted transfers in violation of the agreement were void. One of the members, Soroka, attempted to transfer his interest to a trust and died several years later. The LLC argued that the attempted transfer in violation of the agreement gave the LLC

the right to acquire the interest. The court, however, concluded that the terms of the operating agreement setting forth conditions precedent to a valid transfer did not amount to a redemptive option. Under the terms of the agreement, an attempted transfer in violation of the agreement was simply void, and the member's entitlement continued as if the transfer had never been undertaken. Under the agreement, the executor of a deceased member retained the rights of the decedent with respect to the membership interest. After Soroka's death, his executor succeeded to his rights for the purpose of settling or managing his estate, and the attempted invalid transfer did not affect the executor's rights to step into Soroka's shoes. Any attempted invalid transfer by an executor would also be void and would not deprive the executor of the rights conferred under the agreement. The court found that equitable considerations dictated that Soroka's estate was entitled to the same treatment afforded the estate of a member who had previously died. In the prior situation, the executors assumed control for over two years before the estate was formally substituted as a member under the agreement. The court held that the Soroka interest terminated no earlier than the date on which the venture terminated and that the estate was entitled to the value of Soroka's capital account at the date of termination. The court rejected the estate's argument that the accrual method be used for calculating its interest where all other members were receiving payment based on the cash method specified in the operating agreement. The fact that the original limited partnership agreement provided for the accrual method of accounting was not determinative because the LLC operating agreement expressly provided for the cash method, and the limited partnership had operated on a cash basis in fact.

Roodenburg v. Pavestone Company, L.P., 171 Cal.App.4th 185, 89 Cal.Rptr.3d 558 (Cal. App. 4th Dist. 2009) (holding that uncertainty in amount of damages did not preclude prejudgment interest on value of capital account and severance payment of resigning manager where interest was provided by terms of LLC operating agreement, and concluding interest provision in operating agreement did not involve forbearance and thus was not usurious nor was it unreasonable liquidated damage provision).

Parsons & Whittemore Enterprises Corporation v. Cello Energy, LLC, Civil Action No. 07-0743-CG-B, 2009 WL 323081 (S.D. Ala. Feb. 7, 2009) (applying rule against perpetuities to option to purchase LLC interest).

Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (S.C. 2009). Mallon, Storen, and Historic Charleston Holdings ("HCH") formed Dixie Holdings, LLC ("Dixie") for the purpose of real estate development in Charleston. Mallon and HCH each owned 49.5% of Dixie, and Storen owned 1%. Mallon and HCH were also equal members in Dixie Developers, LLC ("Dixie Developers"), another real estate development company. In 1999, disputes regarding financial matters of Dixie arose, and the parties agreed that sales proceeds would be held in escrow pending resolution of such matters. About this time HCH sold its interest in Dixie Developers to Mallon, giving Mallon 100% of that LLC. Dixie sold its remaining two properties, and Mallon placed the sales proceeds from one of the properties ("15 Felix") in a new Dixie Developers account he had opened. Mallon refused HCH's demands to place the sale proceeds from 15 Felix in an escrow account in Dixie's name in accordance with the prior agreement. In 2002, Storen dissociated from Dixie, leaving Mallon and HCH with 50% each of that LLC. HCH filed suit against Mallon, Dixie, and Dixie Developers, individually and derivatively as a member of Dixie, seeking judicial dissolution of Dixie and a full financial accounting of both Dixie and Dixie Developers. The parties referred the case to a special master who found that HCH was entitled to half the 15 Felix sale proceeds and ordered dissolution and termination of Dixie. In this appeal, the issues considered by the court included issues related to Mallon's buyout of HCH's interest in Dixie Developers. With respect to the proceeds of the sale of 15 Felix, the court rejected arguments by Mallon that Mallon was entitled to a set off for charges associated with Dixie Developers. The court determined that Mallon's buyout of HCH's interest in Dixie Developers was an accord and satisfaction with respect to HCH's liability for charges associated with Dixie Developers based on the amendment made to the Dixie Developers operating agreement and circumstances surrounding the negotiations of the terms of the buyout. The court also determined that a lack of mutuality precluded the set off. The court rejected Mallon's claims for other expenses associated with development of the Felix Street properties based on laches and waiver.

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

agreement, and purported transferee did not execute required written agreement to be bound by agreement or pay any costs related to purported transfer).

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

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

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

X. Capital Contributions and Contribution Obligations

In re Metcalf Associates-2000, L.L.C. (IAS Partners, Ltd. v. Chambers), 213 P.3d 751 (Kan. App. 2009). In this judicial dissolution action, Chambers, a 50% member of an LLC, appealed the district court’s judgment dissolving the LLC. Chambers argued that the statutory requirements for dissolution had not been met, but the appeals court affirmed the judgment on the basis that the LLC was deadlocked and faced potential irreparable injury. Hayes controlled the two entities that collectively owned the 50% of the LLC not owned by Chambers. The LLC was managed by a corporation owned equally by Chambers and Hayes, and they could not agree on anything related to the corporation’s sole function, i.e., management of the LLC. In the course of its opinion, the court addressed the validity of a capital call made by Chambers. Purporting to act as general manager of the LLC, Chambers had made a capital call and contributed his part, which, if recognized as valid, would have reduced the membership shares of the members controlled by Hayes, who did not contribute. The appeals court agreed with the district court that Chambers had no authority to make the capital call because the manager of the LLC was a corporation. Though Chambers was president of the corporation as

well as a 50% shareholder, the court concluded that the evidence supported the district court's finding that Chambers did not have authority to initiate the capital call. The district court noted that the bylaws of the corporation did not authorize the president to act beyond authority granted by the board of directors, and the board did not authorize a capital call or other acts of Chambers as a manager.

Moede v. Pochter, No. 07 C 1726, 2009 WL 2748954 (N.D. Ill. Aug. 27, 2009) (holding that breach of contract question which depended upon reasonableness of member's delay in making capital contribution was fact question where operating agreement did not specify date by which member's contribution must be made; noting that contention that member's delay in making capital contribution deprived LLC of profits advanced claim of LLC as entity rather than that of member and holding that damages for alleged lost profits lacked factual support and were too speculative; rejecting claim that member did not own 50% interest in LLC until member made capital contribution because agreement clearly specified that member owned 50% interest and Illinois statute provides for member's liability for contribution obligation and contains no provision for forfeiture of member's interest).

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The minority member of a Missouri LLC sued the majority member for breach of the operating agreement based on the majority member's withdrawal of its capital contribution without the consent of the minority member in violation of the operating agreement. The majority member argued that the minority member lacked standing to assert the claim because the claim belonged to the LLC rather than the minority member. The court acknowledged corporate case law requiring that shareholders bring suit to redress corporate injuries derivatively, but the court pointed out that the minority member based its claim on breach of the operating agreement rather than a recovery of corporate funds, and the Missouri LLC statute expressly provides that suits to enforce the operating agreement may be brought by any member. However, the court further pointed out that the Missouri statute contains special rules regarding the enforcement of capital contributions. Relying on the statutory provision that a member's capital contribution shall not be enforceable by any other member unless the obligated member has specifically agreed or consented to such enforcement, the court stated that the statute precluded a claim for enforcement of that part of the operating agreement given the absence of a specific agreement allowing one member to enforce another member's capital contribution. The court rejected the minority member's argument that it was permitted to seek damages for a collateral consequence of the withdrawal of the capital contribution (the LLC's inability to repay the minority member's loan to the LLC) as opposed to enforcement of the capital contribution by payment of the claim. The court concluded that such a claim for damages was likewise precluded by the statute. The court acknowledged that it was not altogether clear whether the statutory provision was applicable because the minority member arguably did not seek "enforcement" of the payment of the capital contribution, but the court concluded that the claim for damages still failed even if the statute allowed it because the loan that the minority member claimed the LLC would not be able to pay was not yet due. The court also rejected the minority member's claim that the majority member's withdrawal of its capital contribution breached its fiduciary duty to the minority member. The court stated that the minority member failed to point to any provision of the operating agreement that imposed a fiduciary duty on the majority member, and, even if the majority member owed a duty of good faith and fair dealing as a "majority shareholder," the duty was based on its status as a member. Both the operating agreement and the statute provided that a member is not liable to another member "solely by reason of acting in his capacity as a member." Assuming the duty of care owed to the LLC and, indirectly, its members, was violated, the court stated that the harm would have to be remedied through a derivative suit. There was no direct harm to the minority member since the inability to repay the minority member's loan would harm the member in a capacity other than as a member, and any fiduciary duty would not extend to the member in the capacity as an outsider. Since the plaintiff's claims for breach of the operating agreement and breach of fiduciary duty failed, claims for civil conspiracy based on those causes of action failed as well.

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

Racing Investment Fund 2000 v. Clay Ward Agency, Inc., No. 2007-CA-0022820MR, 2008 WL 5102151 (Ky. App. Dec. 3, 2008). An insurance agent obtained an agreed judgment against an LLC for unpaid policy premiums,

and the LLC made partial payment and claimed it was no longer actively conducting business and had tendered the entirety of its assets. The insurance agent filed a motion to hold the LLC in contempt, and the court issued an order holding the LLC in technical contempt and ordering that the judgment be paid in 90 days. The issue was whether the LLC was required to pay the insurance agent the remaining balance based on a provision in the operating agreement that provided for routine capital calls of the members “to pay operating, administrative, or other business expenses which have been incurred, or which the Manager reasonably anticipates will be incurred” or whether dissolution of the LLC forestalled payment of the judgment. The court found that the provision in the operating agreement fell within the provision of the Kentucky LLC statute that allows members of an LLC to alter their limited liability in a written operating agreement. Because other provisions of the agreement addressing the limited liability of the members contained provisions referring to the capital call provision, the court rejected the argument that these other provisions overrode the capital call provision. The court also stated that the instant case was not about the personal liability of the LLC’s members, but rather involved an order against the LLC, a separate legal entity, to make a capital call for the purpose of complying with its obligations under the agreed judgment. The court pointed out that the dissolved LLC still existed, and the court agreed with the trial court that it was reasonable and possible for the LLC to obtain the funds necessary to pay the agreed judgment. The court stated that the LLC’s members or its manager must meet the mandates of the trial court order, and the court upheld the trial court’s finding of civil contempt.

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

Y. Improper Distributions

Mostel v. Petrycki, 885 N.Y.S.2d 397 (N.Y. Sup. 2009). The court concluded that the withdrawal of monies by a member of a Delaware LLC was a distribution subject to the three-year statute of limitations applicable to distributions rather than a misappropriation of company funds subject to the six-year statute of limitations applicable to common law fraud or fraud under the New York Debtor and Creditor Law. The plaintiff, a judgment creditor of the LLC, argued that the defendant was not acting in his official capacity as a member of the LLC when he withdrew \$300,000 of his capital investment from the LLC. The defendant argued that the withdrawal was a distribution under the New York LLC Law and the Delaware LLC Act, each of which contain a three-year statute of limitations applicable to a claim for return of a distribution. The court noted that the New York LLC Law provides that the laws of the jurisdiction of an LLC’s formation govern the LLC’s organization and internal affairs and the liability of its members and managers, and, without deciding whether New York or Delaware law governs the statute of limitations, assumed that a Delaware court would come to a conclusion similar to the conclusion of New York courts that the statute of limitations applicable to actions to return LLC distributions was intended to override other applicable law. The court distinguished a New Jersey case in which the claims against a member were characterized as embezzlement and misappropriation because the defendant in that case did not assert that the money he received was a return of capital. In the instant case, the plaintiff acknowledged that the defendant’s withdrawal was a return of his capital investment. The court rejected the argument that the member’s withdrawal of funds fell outside the New York LLC statute’s definition of “distribution,” i.e., the transfer of property by an LLC to a member in his or her capacity as a member. The plaintiff argued that the defendant was not acting in his capacity as a member because he used the withdrawn funds for personal use and withdrew them from the LLC without authority. However, the LLC operating agreement gave members the right to request a return of capital, subject to the approval of the managing member, and the agreement required no further procedures when a managing member sought a return of capital; therefore, the court concluded the defendant received a return of his capital in his capacity as a member as only members have the ability to receive a return of invested capital.

Sheffield Services Company v. Trowbridge, 211 P.3d 714 (Col. App. 2009). Trowbridge, a non-member manager of a Colorado LLC that owned residential real estate lots, contracted on behalf of the LLC to sell the lots to the

plaintiff. The contract required the LLC to complete the requirements of a subdivision agreement between the LLC and the city. After the closing of the sale of the lots, the purchaser was forced to assume the obligations of the LLC under the subdivision agreement because the LLC did not fulfill its obligations and the city would not issue building permits until there was compliance with the subdivision agreement. The plaintiff sued the LLC and Trowbridge for breach of contract and wrongful attempt to deplete the LLC's assets. The plaintiff challenged the trial court's ruling that the provision of the Colorado LLC statute imposing limitations on distributions does not provide a remedy to an LLC's creditors. The court of appeals agreed with the trial court that the Colorado LLC statute does not provide a remedy to the LLC's creditors because the statute permits the *LLC* to recover the amount of a wrongful distribution from a member. The plaintiff relied upon case law in the corporate context in which the court decided that the creditors of a corporation could assert the remedy provided by statute against directors for wrongful distributions even though the statute provides that the directors are liable to the corporation. Assuming, without deciding, that LLC creditors could assert the remedy provided in the LLC statute for wrongful distributions, the court rejected the plaintiff's claim against Trowbridge because the statute imposes liability for the return of wrongful distributions on the members rather than the managers. The court of appeals also addressed the plaintiff's challenge to the trial court's ruling that an LLC manager is not subject to the common law duty imposed on corporate officers and directors to avoid favoring personal interests over those of the corporation's creditors. The court of appeals stated that an insolvent corporation's directors and officers are "trustees" for corporate creditors, and the court could find no reason not to extend the same common law trustee doctrine to LLC managers. Thus, the court concluded that an insolvent LLC's manager owes a common law duty to the LLC's creditors to avoid favoring personal interests over those of creditors. The court distinguished the personal liability resulting from a breach of this duty from the personal liability that may be imposed by applying the common law doctrine of corporate veil piercing. The trial court found that Trowbridge made certain preferential distributions to one of the members, but made no findings as to whether the LLC was insolvent or whether the plaintiff was a creditor at the time of the distribution. Thus, the court of appeals remanded for further findings and a determination of whether Trowbridge breached a common law duty owed to the LLC's creditors.

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. The LLC's principal asset was a piece of real estate. Michael executed a note to Richard secured by Michael's LLC interest and by a mortgage on the LLC's real estate. Michael filed bankruptcy, and Richard, without seeking relief from the stay, declared the LLC dissolved, asserting that Michael's bankruptcy terminated his membership. Richard elected not to continue the business and distributed the real estate in equal shares to himself and Michael by quit claim deeds from the LLC. Richard then sought relief from the stay to foreclose the mortgage against the real estate. The bankruptcy court addressed a number of claims asserted by Michael, Richard, the LLC, and the Trustee. The court first rejected Richard's argument that the mortgage in favor of Richard merged into his interest in the real estate acquired via the quit claim deed from the LLC and thereby caused the entire debt to burden Michael's (i.e., the bankruptcy estate's) interest. The court found this argument flawed because a mortgagee must receive full title to the property for the doctrine of merger to apply, and the doctrine's effect is to extinguish or cancel indebtedness rather than shift indebtedness to a partial interest in the mortgaged property. The court next concluded that the LLC's distribution of the real estate to Richard and Michael was invalid. Issues regarding whether the non-economic interest of Michael became property of the bankruptcy estate or whether Richard had the right to unilaterally wind up the LLC were mooted by the fact that Richard's actions with respect to the real estate were invalid under the Illinois LLC statute and the LLC's operating agreement. The court relied upon the winding up provisions of the Illinois LLC statute requiring that the LLC's assets be applied to discharge the claims of creditors, including members who are creditors, before any surplus is distributed. The LLC's operating agreement incorporated the rule in the statute and did not make provision for distributions of encumbered assets. The court thus concluded that the distribution of the real estate violated the statute and the operating agreement and was void. The court also concluded that the distribution of the real estate violated the automatic stay in Michael's bankruptcy because the purpose of the deeds was to effect a merger so that the mortgage would be payable solely from Michael's interest in the real estate. On this additional basis, the court concluded that the deeds were void.

Perkins v. Brown, 901 N.E.2d 63 (Ind. App. 2009). Perkins and Brown were equal members in an LLC. After a dispute regarding the compensation system developed and Brown stopped receiving information about the business, Brown filed a complaint against Perkins and the LLC requesting a declaratory judgment as to the ownership percentages

of the members, an equitable accounting, and a dissolution and distribution of the LLC's assets in accordance with the judicially determined ownership percentages. At trial, Brown submitted evidence of his estimates of the LLC's income and expenses and was awarded a judgment against the LLC and Perkins for half of the estimated amount remaining. On appeal, Perkins argued that there was no basis to hold him personally liable to Brown because there was no evidence presented to support a veil piercing analysis or that showed unlawful distributions had been made. The court noted the provisions of the Indiana LLC statute providing for personal liability to the LLC if a member authorizes a distribution that results in the LLC's insolvency. The court held that it was error to determine the amount of damages due Brown in the dissolution without an accounting of the LLC's finances. No evidence was presented regarding the actual finances of the LLC, and the court stated that it could not be certain that the assets were distributed in accordance with the statutory provisions governing winding up without an accounting. The court remanded for an accounting and ordered the trial court to make an appropriate entry of damages due each party, including any determination of personal liability under the LLC statute, after completion of the accounting.

Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. App. 2009) (noting that South Carolina LLC statute requires distributions prior to winding up to be made in equal shares and provides for personal liability of member who assents to unlawful distribution, and holding evidence supported special master's findings of lost cash distributions owed to member who was improperly excluded from LLC).

Luria v. Board of Directors of Westbriar Condominium Unit Owners Association, 672 S.E.2d 837 (Va. 2009). The plaintiff, a condominium owners association, argued that Luria, the managing member of two LLCs that were used to hold title and manage the development of the condominium project, owed the plaintiff a fiduciary duty as a creditor of the LLCs. The plaintiff contended that Luria breached his duty to the plaintiff by making a series of improper transfers and draws between 1996 and the end of 2002. The plaintiff relied upon the corporate trust fund doctrine articulated in Virginia case law. Luria argued that the Virginia Supreme Court has never imposed on a managing member of an LLC a fiduciary duty to a third party creditor and also argued that the plaintiff was not a creditor. The court determined that the plaintiff did not become a creditor until 2003. Thus, assuming, without deciding, that Luria, as the managing member of the LLC, owed a fiduciary duty to the plaintiff as a creditor of the LLCs, Luria did not breach the duty by making improper distributions because the trial court found that the improper distributions occurred before 2003.

Final Cut, LLC v. Sharkey, No. FSTCV085007365S, 2009 WL 415527 (Conn. Super. Jan. 14, 2009) (issuing prejudgment remedies based on probable cause to conclude that members of LLC would be found personally liable to plaintiff to extent of distributions made to them by dissolved LLCs).

Casavecchia v. Mizrahi, 871 N.Y.S.2d 218 (N.Y. App. Div. 2nd Dept. 2008) (affirming judgment based on managing member's diversion of LLC funds and injunction against LLC compelling distributions).

Z. Withdrawal, Expulsion, or Termination of Member

Lieberman v. Mossbrook, 208 P.3d 1296 (Wyo. 2009). This is the fourth opinion of the Wyoming Supreme Court arising out of this litigation. In this opinion, the court considered the conversion claim of Lieberman, a withdrawn member of a Wyoming LLC that later merged into a corporation. In the prior opinions, the court determined that Lieberman remained an equity holder of the LLC after he withdrew because there was no contractual provision for a buy-out of Lieberman's interest. On remand after the third supreme court opinion, Lieberman sought a determination and recovery of the value of his interest. The district court relied upon the prior opinions of the supreme court and Lieberman's membership interest certificate to conclude that Lieberman retained his right to his proportionate equity share after his withdrawal, and the district court further concluded that Lieberman was entitled to payment of his share on the date that the LLC was merged into the corporation. Failure of the Mossbrooks, Lieberman's fellow members, to account to Lieberman for his equity interest amounted to conversion as a matter of law according to the district court. Following a trial, the court entered a judgment against the Mossbrooks for conversion in the amount of \$958,475. The court found for the Mossbrooks on other claims asserted by Lieberman, and both parties appealed. The supreme court analyzed the application of the statute of limitations on the conversion claim and determined that Lieberman's claim was not barred by the statute of limitations. The court next analyzed the law of the case as encompassed in its three prior opinions and concluded that its statements in the prior opinions were based upon an incomplete record and were of

limited value. The court stated that it had only been able to determine that Lieberman retained an equity interest in the LLC and that nothing in the previous decisions precluded the district court from determining whether a conversion had occurred and, if so, the value of the converted property. In reviewing and analyzing the district court's determination of the date of conversion and value of Lieberman's interest, the supreme court disagreed with the district court's determination that Lieberman's equity interest should be valued as of the date of the merger. The court distinguished Lieberman's situation from a transferee and concluded that Lieberman was neither a member nor an investor after the return of his capital contribution and cancellation of his membership certificate following his withdrawal. At that time, the court stated that Lieberman's interest must be treated as if "liquidated" and Lieberman was entitled under the operating agreement to liquidating distributions from the LLC in accordance with the balance in his capital account. Failure of the LLC to do so amounted to a conversion of Lieberman's interest. This result was not clear from the prior record in the case according to the court because the record did not include evidence of the cancellation of Lieberman's membership certificate. As the successor to the LLC in the merger, the corporation was liable to Lieberman for the LLC's conversion of his interest. Because the court had already remanded this case for further findings on three prior occasions, it went ahead and examined the record to determine the amount to which Lieberman was entitled based on the value of his interest at the time of his withdrawal rather than three years later when the LLC merged with the corporation. Based on unrefuted evidence of an independent appraisal secured by the Mossbrooks, the court determined that the value of Lieberman's interest at the time of the conversion was \$72,035. The supreme court found that it was error to enter judgment against the Mossbrooks personally because neither LLC members nor corporate shareholders are ordinarily liable for the acts of the company or corporation. In the absence of any evidence in the record to support piercing the veil of the LLC or successor corporation there was no basis to hold the Mossbrooks individually liable. Based on the statutes addressing the effect of a merger, the court concluded that the corporation was liable to Lieberman for the corrected amount and must be added as a party on remand. The court agreed with the district court that the Mossbrooks did not breach their fiduciary duties to Lieberman by failing to provide copies of tax returns, minutes, or reports of ownership distributions the LLC made after Lieberman withdrew. Lieberman was furnished with a copy of his last K-1 and had no right to the requested information after that.

Olson v. Halvorsen, C.A. No. 1884-VCL, 2009 WL (Del. Ch. May 13, 2009). The dispute in this case arose among the founders of a hedge fund when one of the founders was removed. The hedge fund originally consisted of three Delaware entities (two LLCs and a limited partnership), each of which was governed by a written agreement. A fourth entity, an LLC, was subsequently formed, and an LLC agreement for that entity was drafted but never signed. The unsigned LLC agreement contained a multi-year earnout provision not found in the other agreements. The other agreements provided that a departing member was entitled only to the balance in his capital account and accrued compensation upon leaving the firm. When the plaintiff was removed from his position with the hedge fund, he was paid the amount of his capital account and accrued compensation as required by each of the agreements. The plaintiff sought enforcement of the earnout provision in the unsigned agreement, but, in a prior opinion, the court determined that the earnout provision was not enforceable because it violated the one-year provision of the statute of frauds. In this opinion, the court addressed the plaintiff's claim for fair value of his interests under provisions of the Delaware Revised Limited Partnership Act and Delaware Limited Liability Company Act providing for the payment of fair value to withdrawing partners and members. The court stated that the statutory fair value provisions do not govern where parties have an agreement that conflicts with the statute. In this case, the parties had reached an initial oral agreement that conflicted with the fair value statutes by providing that a member would only receive his accrued compensation and capital account balance upon leaving the hedge fund. When the parties memorialized their agreements in writing for the original three entities, all of the agreements were consistent with the original agreement regarding what a departing member would be paid. The court concluded that the initial oral agreement regarding payment to a departing member continued to apply to the subsequently formed LLC and became the original agreement governing its operation. This oral agreement was an enforceable LLC agreement because it could be completed within one year. The court found that the plaintiff failed to prove the existence of any superseding agreement that conflicted with the parties' oral agreement, and the plaintiff was thus entitled to nothing more than the balance of his capital account and accrued compensation. The court rejected alternative claims of promissory estoppel, civil conspiracy, unjust enrichment, and breach of fiduciary duty. The court found that the plaintiff failed to prove any of the elements required for estoppel, and the other claims failed because the plaintiff did not show deprivation of value to which he was entitled since he was paid in accordance with the terms of the agreements.

Schell v. Kent, Civil No. 06-CV-425-JM, 2009 WL 948657 (D.N.H. April 6, 2009). The plaintiff and defendant formed an LLC to operate a lumber business, but the plaintiff left the LLC after a short time, and the defendant continued to operate the business for several years after the plaintiff's departure. The plaintiff was never repaid his capital contribution or the expenses he incurred on behalf of the LLC, and he brought an action asserting claims for unjust enrichment and fraud. The court found that a contract for the return of the plaintiff's capital contribution and expenses existed and that the plaintiff thus could not recover these amounts on a quasi-contract basis. Thereafter, the plaintiff proceeded with a theory of unjust enrichment based on the defendant's retention of the value of plaintiff's interest. The court stated that the parties had a relationship that would be recognized in equity as potentially giving rise to restitution if the defendant were unjustly enriched by a benefit received from the plaintiff, but the court found that the unjust enrichment claim was barred by the three-year statute of limitations. The court concluded, however, that there was sufficient evidence to support the jury's verdict in favor of the plaintiff on plaintiff's fraud claim. The essence of the fraud claim was that the defendant led the plaintiff to believe there was no money to pay him when he left the LLC and that the defendant would pay him as money became available from the sale of assets. The court described the evidence in detail and characterized it as readily supporting the conclusion that the defendant defrauded the plaintiff. The court stated that the evidence also demonstrated that the plaintiff could not have discovered the fraud until more than two and one-half years after he left the LLC.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, No. 06 CVS 6091, 2009 WL 877636 (N.C. Super. March 31, 2009). At a meeting of the members of a North Carolina PLLC law firm (the "Firm"), two of the members abruptly announced that they were leaving the Firm. During the next two weeks, they returned to work while making preparations to form a new firm. During that time, a third member announced that she was leaving the Firm to join the other two departing members in a new law practice. The departing members executed articles of organization for a new PLLC and began practice in their new firm. Shortly after the date on which the departing members ceased practicing with the Firm, one of the departing members prepared two forms of proposed form letters to be sent to Firm clients. One of the letters stated that the departing members had "withdrawn" from the firm, and the other letter stated that they were "terminating their employment." The Firm's articles of organization did not contain any provisions dealing with withdrawal or dissolution, and the members never executed a formal operating agreement. The members also did not execute a written agreement specifically reflecting whether the Firm's breakup was to constitute a withdrawal by the departing members or a dissolution of the Firm. After the Firm's breakup, representatives of the departing and remaining members met to discuss the departing members' interests in the Firm. They did not agree on the value of the departing members' interests. Brewer, one of the remaining members, undertook to perform an "accounting" and prepared a memorandum presenting the results (the "Brewer memo"). The Brewer memo repeatedly referenced the breakup as a "withdrawal" from the Firm by the departing members, though it also referred to the "winding up" of the Firm's operations by the "remaining members." It was captioned: "Re: Winding up of affairs; dissolution of partnership." The Brewer memo proposed a settlement of the financial affairs of the Firm that included retention by the departing members of their current cases without remitting to the Firm any fees subsequently recovered and retention by the Firm of any fees from unresolved contingent fee cases remaining with the firm. Final distribution checks were sent to the departing members based on Brewer's determination of the Firm's existing debts and obligations. The departing members did not inform the remaining members that they were refusing to cash the checks or that they disagreed with the Brewer memo until months later when counsel for the departing members sent a letter to Brewer referring to the departing members' "withdrawal" from the Firm. In a letter sent about a year after the departure of the departing members, counsel for the departing members referred to the breakup of the Firm as a "dissolution" and discussed the duties of the managing members in the winding up of the Firm's affairs. The Firm at all times continued to operate as a going concern and never filed articles of dissolution with the North Carolina Secretary of State. Eventually, the departing members filed suit, individually and derivatively on behalf of the Firm, seeking an accounting, liquidating distributions, damages, and injunctive relief preventing the Firm from incurring debt or practicing law in the name of the Firm except for its winding up. The remaining members asserted various affirmative defenses and counterclaims. The pivotal issues were whether the departing members were deemed to have withdrawn or a dissolution of the Firm occurred, and how the departing members' distributive shares should be valued.

As an initial matter, the court addressed a challenge to the departing members' standing to bring the action. The court determined that the departing members would be deemed members of the Firm when the action was commenced. Because the departing members did not constitute a majority of the members of the Firm, they did not have

authority to cause the Firm to bring any claims, but the court concluded that the departing members had standing to bring derivative claims on behalf of the Firm.

The court next discussed the issue of whether the departing members had withdrawn or the Firm had dissolved. The court explained that, under the North Carolina Limited Liability Company Act, the final distributions of the departing members would be limited to the fair value of each departing member's interest as of the date of withdrawal if the departing members' departure from the Firm constituted a withdrawal. In that case, the remaining members contended that the departing members would not share in any fees subsequently realized from contingent fee cases because the value of such cases at the time of the breakup was too uncertain and speculative to quantify. The court noted that the merits of that contention were not before the court, but the court acknowledged that valuation of the contingent fee cases in a withdrawal context appeared to be problematic. If, on the other hand, dissolution of the Firm had occurred, the LLC would remain in existence for purposes of winding up, and the departing members contended that they would remain members until completion of the winding up and would share in any distributions of profits realized from contingent fee cases resolved by the Firm after dissolution. The court commented that there were other issues related to this contention, such as the sharing of expenses on cases that did not produce a fee and the sharing of profits and losses from contingent fee cases retained by the departing members. After analyzing the conduct of the parties and the provisions of the North Carolina LLC Act, the court concluded that the departing members did not *de facto* withdraw from the Firm because the LLC statute does not allow a unilateral withdrawal apart from compliance with the statutory provisions on withdrawal. The statute provides that a member may withdraw *only* at the time or upon the happening of events specified in the articles of organization or a *written* operating agreement. Since the Firm's articles of organization were silent on withdrawal, and the Firm had no written operating agreement, the court concluded the departing members could not withdraw. The court rejected the argument that the collective writings and emails constituted a written operating agreement because the collection of evidence relied upon was not signed by all the departing members and did not specifically reference an agreement regarding withdrawal. The court recognized the possibility that multiple documents viewed collectively in a given case could constitute a written operating agreement, but found the correspondence relied upon in this case did not rise to the level of a written operating agreement.

The court next analyzed whether the departing members should be estopped to deny that they withdrew from the Firm. The court concluded that the situation was a case "not provided for" under the North Carolina LLC Act (because the situation was "not consistent with the spirit or letter of the Act") and was thus a candidate for the application of estoppel. The court rejected the departing members' argument that the court should apply the Uniform Partnership Act dissolution provisions by analogy, noting that the LLC statute had been amended to provide that an individual member's withdrawal does not trigger dissolution. After extensive discussion and analysis, the court concluded that the Firm breakup was treated by all concerned as a withdrawal by the departing members, that the facts of the Firm's breakup met the requirements for the application of equitable estoppel, and that the departing members were thus deemed withdrawn by estoppel.

Kumar v. Kumar, Civil Action No. 1:07CV263-DAS, 2009 WL 902035 (N.D. Miss. March 31, 2009) (acknowledging violations of operating agreement and breaches of fiduciary duty by LLC manager, but determining that removal of manager was not warranted since members' relationship under operating agreement was colored by their marriage and they had never followed strict terms of operating agreement and removal would be detrimental to LLC).

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. Michael filed bankruptcy, and Richard declared the LLC dissolved, asserting that Michael's bankruptcy terminated his membership. The bankruptcy court addressed a number of claims, including Michael's dissociation by filing bankruptcy. The court analyzed the Illinois LLC statute and the operating agreement and concluded that Michael's dissociation by filing for bankruptcy was not wrongful. Under the Illinois LLC statute, a dissociation is wrongful only if it is in breach of an express provision of the operating agreement. The LLC and Richard argued that Michael's filing bankruptcy without giving written notice breached provisions of the agreement requiring written notice before a member transfers any interest in the LLC. Examining various provisions of the operating agreement, the court concluded that the provisions requiring notice of a transfer applied to a voluntary transfer and that transfers by operation of law were governed by a different provision that did not contain a notice provision. The court also rejected an argument that Michael's dissociation was wrongful because Richard did not consent to the Trustee's becoming a substituted member. The court stated that the Trustee was not an assignee under the provisions of the operating

agreement relied upon by Richard, that bankruptcy was expressly addressed under provisions of the operating agreement contemplating the event of a member's bankruptcy, and that Michael's dissociation by filing bankruptcy did not breach any express provision of the operating agreement.

Dudley v. Dudley, No. CA2008-07-165, 2009 WL 683702 (Ohio App. March 16, 2009). A member's withdrawal from an LLC triggered a dissolution and winding up under provisions of the operating agreement that provided for dissolution and winding up upon withdrawal of a member unless all remaining members voted to continue the LLC. A unanimous vote to continue was not obtained because one of the nine remaining members voted against continuation of the LLC. The LLC and a majority of its remaining members argued, however, that a unanimous vote to continue was not necessary because a majority of the remaining members amended the operating agreement to provide for continuation of the LLC upon a majority vote of the members. The court stated that the operating agreement specifically and clearly dealt with the events triggering dissolution and continuation, and the court concluded that allowing amendment of the operating agreement after the withdrawal of a member as was attempted here would effectively render that provision meaningless and severely prejudice a withdrawing member. The court thus held that the amendment could not supersede the clear language of the operating agreement regarding dissolution.

Roodenburg v. Pavestone Company, L.P., 171 Cal.App.4th 185, 89 Cal.Rptr.3d 558 (Cal. App. 4th Dist. 2009) (holding that uncertainty in amount of damages did not preclude prejudgment interest on value of capital account and severance payment of resigning manager where interest was provided by terms of LLC operating agreement, and concluding interest provision in operating agreement did not involve forbearance and thus was not usurious nor was it unreasonable liquidated damage provision).

Bushi v. Sage Health Care, PLLC, 203 P.3d 694 (Idaho 2009). Three psychiatrists who were members of a professional LLC formed under the Idaho Limited Liability Company Act became disillusioned with the fourth member, Bushi, because he was dating a nurse practitioner employed by the LLC. There was also an issue between the members regarding Bushi's unauthorized use of the LLC's line of credit for personal expenses. After a meeting at which the other members told Bushi they wanted him out because of his relationship with the nurse practitioner, Bushi became concerned about his future with the LLC and joined another psychiatry group. Bushi and the other members failed to agree regarding the terms of a buy-out of Bushi's interest, and Bushi's lawyer informed the other members that Bushi would continue as a member and retain his financial rights until a mutually acceptable dissociation and buy-out agreement had been reached. The operating agreement provided that a member could be dissociated by a majority vote of the other members upon the happening of certain events (such as loss of the member's license or conviction of a felony), none of which had occurred, but the operating agreement also provided that it could be amended with the consent of all but one member. The members other than Bushi voted to amend the operating agreement to require mandatory dissociation upon an affirmative vote by all but one of the members, and the members other than Bushi then voted to dissociate Bushi. Applying the formula in the operating agreement, the LLC's accountant determined the value of Bushi's interest, and the LLC tendered payment to Bushi, which he refused. Bushi filed suit asserting various claims including claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. The trial court granted the other members' motion for summary judgment, finding that the members did not breach their contract with Bushi by amending the operating agreement to allow his involuntary termination, that the members were entitled to summary judgment on Bushi's claims against them for breach of the covenant of good faith and fair dealing and breach of fiduciary duty, and that the provisions on dissociation and valuation were clear and unambiguous and that the LLC's valuation followed the provisions. On appeal, the supreme court upheld the trial court's summary judgment against Bushi on the breach of implied covenant of good faith and fair dealing claim, but reversed the summary judgment on the breach of fiduciary duty claim. With respect to the breach of implied covenant of good faith and fair dealing claim, the court stated that contract terms are not overridden by the implied covenant of good faith and fair dealing, and Bushi could identify no specific term of the operating agreement that was breached by amending the agreement to involuntarily dissociate him. With regard to the breach of fiduciary duty claim, the court discussed the Idaho LLC statutes and stated that the original LLC statute (which is repealed effective July 1, 2010) identifies certain duties that members owe to one another, but does not use the term "fiduciary," does not state that it is an exhaustive list, and does not address the conduct at issue in the case. In 2008, the legislature adopted the revised Uniform Limited Liability Company Act, which explicitly provides that members of an LLC owe each other the fiduciary duties of loyalty and care, but the LLC in this case was governed by the prior act because it was formed prior to July 1, 2008 and had not elected to be subject to the new act. The court

stated that it appeared that a majority of courts considering the issue have concluded that members of an LLC owe one another fiduciary duties of trust and loyalty, and the court concluded that members of an LLC owe one another fiduciary duties under the original act because it provides that the principles of law and equity supplement the act unless displaced by particular provisions of the act. The court stated that whether a fiduciary duty has been breached is a question of fact and discussed case law from other jurisdictions illustrating that actions taken in accordance with the operating agreement can still be a breach of fiduciary duty if improperly motivated to obtain financial gain. If the members acted in bad faith in order to advance their personal financial interests, they would be liable to Bushi despite their technical compliance with the operating agreement. Drawing all reasonable inferences in Bushi's favor, the court could not conclude that there was no genuine issue of material fact with regard to the members' motivation in dissociating Bushi.

W.R. Huff Asset Management Co., L.L.C. v. William Soroka 1989 Trust, Civ. Action No. 04-3093 (KSH), 2009 WL 606152 (D.N.J. March 9, 2009). This dispute involved interpretation of transfer restrictions in an LLC operating agreement and the fate of a decedent's interest in a lucrative investment LLC. The LLC was first organized as a limited partnership and later converted to an LLC. The terms of the operating agreement included transfer restrictions and provided for certain familial assignments of profits or income. The agreement stated that attempted transfers in violation of the agreement were void. One of the members, Soroka, attempted to transfer his interest to a trust and died several years later. The LLC argued that the attempted transfer in violation of the agreement gave the LLC the right to acquire the interest. The court, however, concluded that the terms of the operating agreement setting forth conditions precedent to a valid transfer did not amount to a redemptive option. Under the terms of the agreement, an attempted transfer in violation of the agreement was simply void, and the member's entitlement continued as if the transfer had never been undertaken. Under the agreement, the executor of a deceased member retained the rights of the decedent with respect to the membership interest. After Soroka's death, his executor succeeded to his rights for the purpose of settling or managing his estate, and the attempted invalid transfer did not affect the executor's rights to step into Soroka's shoes. Any attempted invalid transfer by an executor would also be void and would not deprive the executor of the rights conferred under the agreement. The court found that equitable considerations dictated that Soroka's estate was entitled to the same treatment afforded the estate of a member who had previously died. In the prior situation, the executors assumed control for over two years before the estate was formally substituted as a member under the agreement. The court held that the Soroka interest terminated no earlier than the date on which the venture terminated and that the estate was entitled to the value of Soroka's capital account at the date of termination. The court rejected the estate's argument that the accrual method be used for calculating its interest where all other members were receiving payment based on the cash method specified in the operating agreement. The fact that the original limited partnership agreement provided for the accrual method of accounting was not determinative because the LLC operating agreement expressly provided for the cash method, and the limited partnership had operated on a cash basis in fact.

Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (S.C. 2009). Mallon, Storen, and Historic Charleston Holdings ("HCH") formed Dixie Holdings, LLC ("Dixie") for the purpose of real estate development in Charleston. Mallon and HCH each owned 49.5% of Dixie, and Storen owned 1%. Mallon and HCH were also equal members in Dixie Developers, LLC ("Dixie Developers"), another real estate development company. In 1999, disputes regarding financial matters of Dixie arose, and the parties agreed that sales proceeds would be held in escrow pending resolution of such matters. About this time HCH sold its interest in Dixie Developers to Mallon, giving Mallon 100% of that LLC. Dixie sold its remaining two properties, and Mallon placed the sales proceeds from one of the properties ("15 Felix") in a new Dixie Developers account he had opened. Mallon refused HCH's demands to place the sale proceeds from 15 Felix in an escrow account in Dixie's name in accordance with the prior agreement. In 2002, Storen dissociated from Dixie, leaving Mallon and HCH with 50% each of that LLC. HCH filed suit against Mallon, Dixie, and Dixie Developers, individually and derivatively as a member of Dixie, seeking judicial dissolution of Dixie and a full financial accounting of both Dixie and Dixie Developers. The parties referred the case to a special master who found that HCH was entitled to half the 15 Felix sale proceeds and ordered dissolution and termination of Dixie. In this appeal, the issues considered by the court included issues related to Mallon's buyout of HCH's interest in Dixie Developers and Mallon's dissociation from Dixie. With respect to the proceeds of the sale of 15 Felix, the court rejected arguments by Mallon that Mallon was entitled to a set off for charges associated with Dixie Developers. The court determined that Mallon's buyout of HCH's interest in Dixie Developers was an accord and satisfaction with respect to HCH's liability for charges associated with Dixie Developers based on the amendment made to the Dixie Developers operating agreement and circumstances surrounding the negotiations of the terms of the buyout. The court also determined that

a lack of mutuality precluded the set off. The court rejected Mallon's claims for other expenses associated with development of the Felix Street properties based on laches and waiver. The court held that Mallon's dissociation from Dixie, which did not occur until after HCH filed its complaint, was irrelevant to the matters in issue, but the special master's error in considering it was harmless because there were additional legitimate grounds upon which the special master granted relief to HCH.

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

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

AA. Dissolution and Winding Up

In re Aldape Telford Glazier, Inc., 410 B.R. 60 (Bankr. D. Idaho 2009). The sole member of two dissolved LLCs filed bankruptcy under Chapter 7 and listed the assets of the LLCs as its own. The court discussed the dissolution and winding up provisions of the Idaho LLC statute (applying the LLC statute in effect prior to adoption of the Idaho's Uniform Limited Liability Company Act in 2008 because the LLCs were formed prior to 2008 and had not elected to be governed by the new statute) and concluded that the sole member of the two dissolved LLCs could not treat the assets of the dissolved LLCs as its own prior to completion of the winding up process. The court found that the bankruptcy petition should be dismissed because it improperly combined the financial affairs of separate legal entities and constituted an impermissible "joint" petition.

Bacarella Transportation Services, Inc. v. Right Way Logistics, LLC, 639 F.Supp.2d 249 (D. Conn. 2009). The court granted summary judgment in favor of an Ohio LLC's managing member because the claim against the managing member was based on a provision of the Connecticut LLC statute allowing a claim against a member of a dissolved LLC to the extent of assets distributed to the member, and the LLC in this case was not dissolved. The court noted that the parties focused on Connecticut law even though the LLC was an Ohio LLC, but the court stated that any differences between the dissolution provisions of the two states was immaterial to the court's discussion. The court concluded that the LLC was not a dissolved LLC based on the fact that it had a certificate of good standing from the Ohio Secretary of State. The court noted that both Ohio and Connecticut law required documentation of an LLC's dissolution to be filed with the Secretary of State after the occurrence of an event of dissolution, and the certificate of good standing from Ohio was prima facie evidence that there had been no event specified in the LLC's articles of organization dissolving the LLC. Further, the court stated that the plaintiff offered no support for its argument that there can be a de facto dissolution under Connecticut or Ohio law. Even if a de facto dissolution of an LLC could be recognized under Connecticut or Ohio law, the court stated that the plaintiffs offered no evidence casting doubt on the affidavit of the managing member that the LLC remained in existence. The court listed various events that were not sufficient to give rise to a determination of a de facto dissolution even in jurisdictions recognizing de facto dissolution as an equitable principle. Thus, the court rejected the plaintiffs' argument that additional discovery of accounting documents, financial and professional status, and assets would be relevant to the question of whether the LLC had dissolved.

In re Greeson, No. 09-11328, 2009 WL 1542770 (Bankr. D. Kan. June 2, 2009). The debtor was the sole member of an LLC engaged in excavation and dirt work. After the LLC's lender repossessed the LLC's truck, the sole member dissolved the LLC and the member's lawyer filed a notice of cancellation of the articles of organization with the Kansas Secretary of State. The member then commenced this bankruptcy case, taking the position that the assets of the dissolved LLC became the member's assets, subject to the liens of the lender and the IRS. After the court questioned the validity of that position, the member executed documents pursuant to which the LLC transferred its

equipment and accounts receivable to the member, subject to liens of the lender and the IRS. The member also assumed the debts of the LLC. The member sought to continue to operate the business of the LLC and to utilize its pre-petition accounts receivable. The court first addressed whether any of the LLC's property was property of the member's estate. The court found that the LLC was properly organized, noting that the absence of an operating agreement did not invalidate the validity of the separate entity status of the LLC. Having determined that the LLC was legally organized, the court discussed the status of the LLC's assets in light of the member's attempt to dissolve the LLC. The court described the statutory requirements in a winding up of a dissolved LLC and pointed out that the Kansas LLC statute requires a dissolved LLC to pay or make reasonable provision for payment of all claims and liabilities before distributing assets to the members. The lender relied upon the trust fund doctrine for the proposition that the creditors retained an equitable interest in the LLC's property and the member's interest in the LLC's property was thus not property of the estate. The court concluded, however, that the transferred property was property of the member's estate based upon Sections 541 and 1306 of the Bankruptcy Code. Section 541 provides that all legal and equitable interests of the debtor on the date of filing become property of the estate, and Section 1306 expands the Chapter 13 estate to include all property the debtor acquires post-petition. The court stated that the member retained an interest in the property, albeit an interest encumbered by prior liens and claims of creditors. The court characterized the transfer of the LLC's property to the member as violating the pertinent provisions of the LLC statute, but stated that the bare act of transfer placed the property within the estate. Given that the lender and the IRS could vindicate their rights against the assets in the bankruptcy process, the court concluded that the trust fund doctrine did not apply. The court distinguished the situation with respect to the truck which the member sought to reclaim. The truck was titled in the LLC with the lender's lien noted on the title, and the transfer of ownership of the vehicle did not comply with the Kansas certificate of title statute. Thus, the court concluded that the title to the truck could not have been transferred without the lender's consent and remained property of the LLC rather than the member's bankruptcy estate.

In re Olympus Construction, L.C., 215 P.3d 129 (Utah 2009). The court examined the dissolution and winding up provisions of Part 13 of the Utah LLC statute and concluded that the procedures for disposing of known claims by providing notification or publication of dissolution to potential claimants need not be utilized in a judicially supervised winding up. The court noted that a voluntarily dissolved LLC must dispose of claims in accordance with either the notification or publication provisions of Part 13, but each is permissive in that the dissolved LLC may choose either or both. In an administrative dissolution, the statute requires the LLC to give notice by both notification and publication. The judicially supervised dissolution provisions also refer to the Part 13 provisions, and the court considered the effect of those provisions on a judicially supervised dissolution. The court stated that the district court has broad authority to direct the procedures for a winding up in a judicially supervised dissolution. Though the statute requires a court to direct the winding up process "in accordance with Part 13," the court concluded that it does not mandate the use of notification or publication procedures for the resolution of claims, and the supervising court may choose to adopt either or both procedures, but is not required to do so. The supervising court in a judicially supervised winding up also has the authority to appoint a receiver to wind up and liquidate the LLC's affairs, and the court may fashion a more suitable procedure for the resolution of claims through the use of a receiver. The district court in this case appointed a receiver, and the court's orders regarding resolution of claims contained detailed procedures and did not adopt the procedures specified in Part 13. Thus, the petitioner's claim did not have to be rejected within ninety days as specified in the notification procedures of Part 13, and the district court was empowered to set the deadline for acting on the claim.

Chadwick Farms Owners Association v. FHC LLC, 207 P.3d 1251 (Wash. 2009). The Washington Supreme Court interpreted the dissolution provisions of the Washington LLC statute and concluded that the LLCs in this consolidated appeal of two cases did not have the capacity to sue or be sued after the cancellation of their certificates of formation. In one of the cases, *Chadwick Farms Owners Ass'n v. FHC LLC*, the LLC was administratively dissolved and a homeowners association filed suit against the LLC. The LLC's certificate of formation was automatically cancelled two years after the administrative dissolution because the LLC did not seek reinstatement within two years after dissolution as permitted by the statute. After the cancellation of the certificate of formation, the LLC moved for summary judgment dismissing the claims against it on the basis that it ceased to exist upon cancellation of its certificate of formation. Third party defendants sued by the LLC also sought dismissal of the claims asserted by the LLC on the basis that it was a non-entity without capacity to sue after cancellation of its certificate of formation. The court of appeals held that an amendment to the dissolution provisions of the LLC statute enacted while the appeal was pending was retroactive and permitted the homeowners association's suit against the LLC, but that the amendment did not apply to permit suits

by the LLC. In the second suit, *Emily Lane Homeowners Ass'n v. Colonial Development, LLC*, the LLC voluntarily dissolved by act of its members and filed a certificate of cancellation. The court explained that dissolution, which can happen in several ways, does not terminate the existence of the LLC, but begins a period in which the LLC's affairs must be wound up. In the case of an administratively dissolved LLC, the cancellation of its certificate of formation occurs automatically if the LLC does not seek reinstatement within two years after dissolution. An LLC that voluntarily dissolves by consent of its members controls the timing of its winding up and files a certificate of cancellation that has the effect of cancelling the certificate of formation. Under the Washington LLC statute, an LLC is "a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation." Based on this language, the supreme court held that an LLC, whether administratively or voluntarily dissolved, may not prosecute or defend suits after its certificate of formation is cancelled. The court disagreed with the court of appeals that the result was altered by the enactment of a provision stating that dissolution of an LLC does not take away or impair any remedy against the LLC and requiring that an action against a dissolved LLC be commenced within three years after dissolution. The court stressed the difference between *dissolution* and *cancellation* and concluded that the statute unambiguously provides that an action by or against an LLC abates upon cancellation of the certificate of formation because the statute provides that the LLC ceases to exist at that time. In response to the argument that the statute must be applied to allow cancelled LLCs to be sued because a dissolved LLC could simply file a certificate of cancellation to avoid liability, the court pointed out that the statutes require that a dissolved LLC pay or make arrangements to pay its known claims and obligations, even if unmatured or contingent, and members who fraudulently attempt to use the provisions of the statute to avoid liability expose themselves to individual liability. Though members and managers are not generally personally liable for the LLC's obligations and liabilities, the court noted that there are exceptions, such as an individual member's liability for his or her own torts, for contributions the member has agreed to make, and for the return of improper distributions. The court also mentioned that a member may be liable under veil piercing theories in the same way that an individual may be liable under corporate veil piercing theories. The court then discussed the potential liability of a member who is responsible for winding up the affairs of an LLC and does so improperly. The statute requires a dissolved LLC to pay or make reasonable provision for the payment of all known claims and obligations, including contingent, conditional, or unmatured claims and obligations. The statute further states that a person winding up an LLC who has complied with this requirement is not personally liable to the claimants of the dissolved LLC. It follows, said the court, that personal liability to claimants may result if the persons winding up the LLC do not comply with the statute. The court noted that the parties in the *Emily Lane* case disputed whether the LLC knew or should have known prior to cancellation of the claims that were later asserted. Thus, the propriety of the winding up and possible personal liability of persons winding up the LLC remained to be determined. In the *Chadwick Farms* case, the court agreed with the court of appeals that the trial court should have granted the motion of the homeowners association to amend the complaint and add the individuals who allegedly failed to comply with the winding up requirements. If the claims asserted against the administratively dissolved LLC were valid and the LLC failed to make provision for paying them (the LLC clearly knew of them because of the pending proceeding at the time of cancellation of its certificate of formation), the LLC did not properly wind up its affairs. Nor did the LLC seek reinstatement, which would have allowed it to litigate the claims and assert its third party claims.

In re NextMedia Investors, LLC, C.A. No. 4067-VCS, 2009 WL 1228665 (Del. Ch. May 6, 2009). In this suit for judicial dissolution of an LLC and appointment of a liquidating trustee, the court analyzed an attempted amendment of the LLC agreement to extend the date of dissolution of the LLC by four years. The LLC agreement contained a provision that prohibited an amendment that would "adversely affect any Member" without the consent of each member to be adversely affected. The petitioners argued that the proposed amendment created an adverse effect and required the consent of all members for adoption because it extended the term of the LLC and, therefore, the members' investment period. Since the petitioners had not given their consent, they argued that the amendment was ineffective and the LLC had dissolved. The LLC countered that the petitioners' interpretation of the amendment provisions of the LLC agreement was not reasonable or, in the alternative, another reasonable interpretation existed rendering the agreement ambiguous. Further, the petitioners argued that whether they were adversely affected was a fact issue. The court found that the plain language of the amendment provision of the LLC agreement supported one reasonable meaning and thus could not be considered ambiguous. The court agreed with the petitioners that the dissolution provision could not be amended without the consent of all members because all members would be adversely affected by the extension of the term of the LLC, which would deny them the ability to withdraw from the LLC on the investment horizon that was originally contemplated by the LLC agreement. The court rejected the LLC's argument that the approval of the amendment by a majority of the

members established that the amendment did not have an objectively adverse effect. Such a reading, the court stated, would convert the amendment provision into a class voting provision, but its plain language granted each individual member a consent right. After finding petitioners' interpretation to be reasonable, the court addressed the LLC's alternative reading of the amendment provision, which would require consent only if the board of managers subjectively intended that a proposed amendment adversely affect the members. The LLC's proposed reading was based on a technical reading of the words "to affect" to require intention or purpose. The court rejected this interpretation as inconsistent with the plain meaning of the provision, stating that the LLC's interpretation required "an awkward linguistic leap." The court also rejected the LLC's argument that the petitioners were not entitled to summary judgment because they had not provided the court with the factual basis to conclude that they were adversely affected by the proposed amendment. The LLC's position was that the petitioners must prove to the court, as an issue of fact, that they were adversely affected by the proposed amendment in order to demonstrate that their consent was required. The LLC offered affidavits from its officers indicating that a liquidation of its assets upon the original dissolution date would have resulted in no distributions to the LLC's equity holders because of the depressed market prices of those assets. The court, however, held that adverse effect for purposes of the amendment section was necessarily a "before-the-fact question" that is best judged by who can reasonably be expected to be adversely affected. The court stated that whether an amendment triggers an individual approval right "depends not on an empirical, factual assessment of whether a member is correct about the effect of a change in the contract, but on whether the proposed contractual amendment would alter an economically meaningful term. If it does, the individual approval right [of the amendment provision] is implicated." The court concluded that a change to the lifespan of the entity like the one proposed was clearly a triggering amendment. Thus, the petitioners were entitled to dissolution. The court declined to appoint a liquidating trustee, however. Under the terms of the LLC agreement, the board of managers was authorized to liquidate the LLC. If the board of managers did not conduct the liquidation, the Class A members were entitled to appoint a liquidator. Under the LLC agreement, this right was subject to the right of any member or creditor to apply to a court in respect of the dissolution of the LLC, and the court interpreted this language together with Section 18-803 of the Delaware LLC statute to require the petitioners at least to show cause as to why the Class A members should be denied their right to appoint the liquidating trustee.

Kwon v. Yun, 606 F.Supp.2d 344 (S.D.N.Y. 2009) (interpreting Section 18-805 of Delaware Limited Liability Company Act and determining that Delaware Court of Chancery implicitly revived dissolved LLC when it appointed trustee with authority to pursue LLC's claim, finding it unnecessary to decide whether corporate law would permit appointment of trustee for such purpose because LLC statute contains no time limit during which court's authority to appoint trustee must be exercised and Court of Chancery construed its own state law to permit appointment in this case).

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. The LLC's principal asset was a piece of real estate. Michael executed a note to Richard secured by Michael's LLC interest and by a mortgage on the LLC's real estate. Heartland Bank obtained a judgment against Michael and served on Michael a Citation to Discover Assets. Michael filed bankruptcy, and Richard, without seeking relief from the stay, declared the LLC dissolved, asserting that Michael's bankruptcy terminated his membership. Richard elected not to continue the business and distributed the real estate in equal shares to himself and Michael by quit claim deeds from the LLC. Richard then sought relief from the stay to foreclose the mortgage against the real estate. The bankruptcy court addressed a number of claims asserted by Michael, Richard, the LLC, Heartland, and the Trustee. First, the court rejected Richard's argument that the mortgage in favor of Richard merged into his interest in the real estate acquired via the quit claim deed from the LLC and thereby caused the entire debt to burden Michael's (i.e., the bankruptcy estate's) interest. The court found this argument flawed because a mortgagee must receive full title to the property for the doctrine of merger to apply, and the doctrine's effect is to extinguish or cancel indebtedness rather than shift indebtedness to a partial interest in the mortgaged property. The court next concluded that the LLC's distribution of the real estate to Richard and Michael was invalid. Issues regarding whether the non-economic interest of Michael became property of the bankruptcy estate or whether Richard had the right to unilaterally wind up the LLC were mooted by the fact that Richard's actions with respect to the real estate were invalid under the Illinois LLC statute and the LLC's operating agreement. The court relied upon the winding up provisions of the Illinois LLC statute requiring that the LLC's assets be applied to discharge the claims of creditors, including members who are creditors, before any surplus is distributed. The LLC's operating agreement incorporated the rule in the statute and did not make provision for

distributions of encumbered assets. The court thus concluded that the distribution of the real estate violated the statute and the operating agreement and was void. The court also concluded that the distribution of the real estate violated the automatic stay in Michael's bankruptcy because the purpose of the deeds was to effect a merger so that the mortgage would be payable solely from Michael's interest in the real estate. On this additional basis, the court concluded that the deeds were void. After determining that Michael's dissociation by filing for bankruptcy was not wrongful and that Heartland did not obtain a lien on Michael's interest when it served him with a Citation to Discover Assets because of the exclusivity of the charging order provisions, the court concluded by pointing out that the Trustee was free to seek judicial supervision of the liquidation and distribution of the LLC's assets based on a provision of the Illinois LLC statute giving a transferee standing to apply for judicial supervision of winding up on good cause shown. The court characterized the winding up process as contemplating the sale of the LLC's real estate, payment of the debts, including the mortgage and any taxes, and equal distribution of the proceeds to Richard and the bankruptcy estate. The court stated that the winding up process could be handled consensually, but that either Richard or the Trustee could seek judicial supervision if they could not agree on the winding up process.

Dudley v. Dudley, No. CA2008-07-165, 2009 WL 683702 (Ohio App. March 16, 2009). A member's withdrawal from an LLC triggered a dissolution and winding up under provisions of the operating agreement that provided for dissolution and winding up upon withdrawal of a member unless all remaining members voted to continue the LLC. A unanimous vote to continue was not obtained because one of the nine remaining members voted against continuation of the LLC. The LLC and a majority of its remaining members argued, however, that a unanimous vote to continue was not necessary because a majority of the remaining members amended the operating agreement to provide for continuation of the LLC upon a majority vote of the members. The court stated that the operating agreement specifically and clearly dealt with the events triggering dissolution and continuation, and the court concluded that allowing amendment of the operating agreement after the withdrawal of a member as was attempted here would effectively render that provision meaningless and severely prejudice a withdrawing member. The court thus held that the amendment could not supersede the clear language of the operating agreement regarding dissolution.

Perkins v. Brown, 901 N.E.2d 63 (Ind. App. 2009). Perkins and Brown were equal members in an LLC. After a dispute regarding the compensation system developed and Brown stopped receiving information about the business, Brown filed a complaint against Perkins and the LLC requesting a declaratory judgment as to the ownership percentages of the members, an equitable accounting, and a dissolution and distribution of the LLC's assets in accordance with the judicially determined ownership percentages. At trial, Brown submitted evidence of his estimates of the LLC's income and expenses and was awarded a judgment against the LLC and Perkins for half of the estimated amount remaining. On appeal, Perkins argued that there was no basis to hold him personally liable to Brown because there was no evidence presented to support a veil piercing analysis or that showed unlawful distributions had been made. The court noted the provisions of the Indiana LLC statute providing for personal liability to the LLC if a member authorizes a distribution that results in the LLC's insolvency. The court held that it was error to determine the amount of damages due Brown in the dissolution without an accounting of the LLC's finances. No evidence was presented regarding the actual finances of the LLC, and the court stated that it could not be certain that the assets were distributed in accordance with the statutory provisions governing winding up without an accounting. The court remanded for an accounting and ordered the trial court to make an appropriate entry of damages due each party, including any determination of personal liability under the LLC statute, after completion of the accounting.

Gale v. Carnrite, 559 F.3d 359 (5th Cir. 2009). In 1999, the Gales bought all of the membership interest in a Nevada LLC that owned a condominium unit in Mexico. Because of a legal restriction on non-Mexican ownership of real property, the Gales had to purchase the outstanding membership interest in the LLC. The sole asset of the LLC was beneficial ownership of a leasehold interest in the condominium under a special trust arrangement with a Mexican bank. In the sale agreement between the seller, Carnrite, and the Gales, Carnrite included a warranty that as of the date of closing "the LLC has and will have no liabilities of any nature...including without limitation tax liabilities due or to become due." When the sale was completed in January 2000, no one reported the transaction to the Mexican government and no taxes were paid on the transfer. After the Gales used the condominium for a number of years, the LLC sold the beneficial interest in the condominium. The sale resulted in a substantial Mexican capital gains tax liability. The Gales filed suit against Carnrite for allegedly breaching the contractual warranty he gave to them regarding tax liability when they bought the LLC. The Gales alleged that Carnrite breached the warranty by failing to report and pay taxes on the

sale to the Gales. The district court entered summary judgment in favor of the Gales, finding that Carnrite breached the warranty because the parties' transaction gave rise to tax liability for the LLC. Carnrite appealed, and the first issue discussed in the opinion on appeal was the whether the Gales had standing to pursue the claim. Carnrite argued that it was the LLC rather than the Gales that were liable for the capital gains tax and that the Gales did not have standing since they suffered no injury. The Gales responded that the LLC assigned the claim to them when they filed the lawsuit in 2007. Carnrite did not dispute the usual propriety of such an assignment, but argued that the assignment was ineffective because Nevada had revoked the LLC's right to do business in 2004 for failure to pay franchise taxes and fees and file annual reports. The court concluded that the Gales had standing to pursue the claim, however, based on Nevada LLC statutes regarding dissolution and the fact that payment of the taxes ultimately fell on the Gales. The court pointed out that the Nevada LLC statutes provide that the property and assets of an LLC whose charter has been revoked must be held in trust and that dissolution proceedings should be pursued. Another statutory provision provides that dissolution does not impair a remedy or cause of action arising before dissolution and commenced within two years after the date of dissolution. Additionally, the Nevada statutes provide that the assets of a dissolved LLC may be distributed to its members. Based on these statutes, the court concluded the assets of the LLC, which included the cause of action against Carnrite, were held by the Gales in trust when its right to transact business was forfeited, and, moreover, the Gales were permitted to transfer those assets to themselves as the LLC's only members. As the parties ultimately injured and the assignees of the LLC's claims, the Gales had standing to pursue the action. After analyzing the tax liability, however, the court held that the record did not establish that Carnrite breached the terms of the warranty as worded in the contract he made with the Gales because the record indicated that Carnrite's failure to pay taxes on the transaction resulted in a tax liability of the Gales rather than the LLC.

Spellman v. Katz, C.A. No. 1838-VCN, 2009 WL 418302 (Del. Ch. Feb. 6, 2009). Two doctors, Spellman and Katz, each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which the parties leased space for their joint medical practice. After their relationship deteriorated, Spellman left to practice on his own, and the two were unable to agree on how to become disentangled from each other. Spellman eventually sought a judicial dissolution of the LLC pursuant to the Delaware LLC statute or an order appointing a liquidating trustee to effectuate the winding up of the LLC because the LLC had allegedly already dissolved by express will of its members pursuant to the LLC agreement. The LLC agreement provided that the LLC "shall be dissolved and its affairs wound up as soon as possible after the construction of the building had been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit . . ." Neither member disputed that each of the preconditions to dissolution set forth in the LLC agreement had been satisfied, but Katz argued that the dissolution and winding up of the LLC was improper because the LLC agreement did not accurately reflect the original intentions of the parties regarding dissolution. Katz asserted that neither party knew that this provision was part of the LLC agreement and that the parties intended to operate the LLC for at least as long as the mortgage's interest obligation and real estate tax benefits remained available to offset profits from the practice. In support of this position, Katz pointed to the failure of either party to pursue the dissolution and winding up of the LLC following the completion of the construction of the building. Applying contract construction principles to the LLC agreement, the court concluded that the agreement was unambiguous and should be enforced in accordance with its terms. Because the LLC agreement was unambiguous on its face, the parol evidence rule precluded outside evidence to dispute its terms. Accordingly, the court held that the LLC had been dissolved by express will of its members under the LLC agreement and winding up of its affairs was necessary. With respect to Spellman's request for the appointment of a liquidating trustee pursuant to the Delaware LLC statute, the court held that there was cause for appointment of such a person because the parties were deadlocked on how to proceed with the winding up of the LLC and were not able to implement the winding up provisions of the LLC agreement.

Final Cut, LLC v. Sharkey, No. FSTCV085007365S, 2009 WL 415527 (Conn. Super. Jan. 14, 2009) (issuing prejudgment remedies based on probable cause to conclude that members of LLC would be found personally liable to plaintiff to extent of distributions made to them by dissolved LLCs).

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

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

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

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

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

BB. Judicial or Administrative Dissolution

In re Metcalf Associates-2000, L.L.C. (IAS Partners, Ltd. v. Chambers), 213 P.3d 751 (Kan. App. 2009). In this judicial dissolution action, Chambers, a 50% member of an LLC, appealed the district court's judgment dissolving the LLC. Chambers argued that the statutory requirements for dissolution had not been met, but the appeals court affirmed the judgment on the basis that the LLC was deadlocked and faced potential irreparable injury. The LLC was managed by a corporation owned equally by Chambers and Hayes. Hayes also controlled the two entities that collectively owned the 50% of the LLC not owned by Chambers. The relationship between Chambers and Hayes soured, and the district court found that the corporate manager of the LLC was deadlocked because Hayes and Chambers, the corporation's two directors and shareholders, could not agree on anything related to the corporation's sole function, i.e., management of the LLC. Chambers argued that there was no deadlock of the LLC because there was only one manager and thus no possibility of deadlock. The court concluded, however, that the manager was itself so deadlocked that it could not legally act on any significant issue involving the management of the LLC. The court explained that the Kansas statutes providing for the dissolution of a deadlocked LLC and a deadlocked corporation differ somewhat but both require a dual showing of deadlock and irreparable injury. Under the LLC statute, owners of at least 25% in interest may petition for dissolution if the LLC's business is threatened with irreparable injury because the members are so deadlocked regarding the management of the LLC that the requisite vote for action cannot be obtained and the members are unable to terminate the deadlock. If these conditions are present, the court is required to order dissolution. Given the structure of the corporation that was the manager of the LLC, the corporation was deadlocked, and this deadlock resulted in deadlock of the LLC as well. The only escape from the deadlock of the LLC was if the members could bypass the manager and handle the business, but the equal members themselves were totally at odds. The operating agreement required the agreement of all members to sell real estate owned by the LLC, and Chambers argued there could be no deadlock because the members had not yet fulfilled the requirement that all agreed it was time to sell. The court described Chamber's conduct in marketing the property (the result of which was that only Chambers had made an offer to purchase the property) and stated that an LLC could be held hostage by unethical actors if a member could through bad faith dealings avoid a finding of deadlock whenever an operating agreement required unanimous approval for action. As opposed to a specific disagreement over the price of an LLC asset in a sale to a third party, the disagreements of Chambers and Hayes were fundamental disagreements regarding the marketing and sale of the property. The court stated that it might be possible to draft an operating agreement to require unanimous approval for every significant decision and specifically limit the situations where a court could declare a deadlock, but a provision merely requiring that the LLC's manager may not without unanimous vote of the members sell or refinance the properties of the LLC did not do so, and the district court's finding of deadlock was well supported by the record. The court stated that Chambers had a stronger argument regarding the requirement of potential irreparable harm, but the court stated that the legislature, by including the "threat" of irreparable injury, had implicitly rejected Chambers' argument that judicial dissolution was not permitted as long as an LLC is still solvent. The court agreed with the district court's conclusion that the lack of effective management posed a threat of irreparable injury to the LLC.

Cammack New Liberty, LLC v. International Greetings USA, Inc., 653 F.Supp.2d 709 (E.D. Ky. 2009) (abstaining in action alleging unlawful dissolution of LLC governed by Kentucky law because dissolution involves complex law and strong policy considerations warranting experience and expertise of Kentucky state courts).

Herrick Group & Associates LLC v. K.J.T., L.P., Civil Action No. 07-0628, 2009 WL 2596503 (E.D. Pa. Aug. 20, 2009) (discussing Nevada revival and reinstatement processes and concluding Nevada LLC that lacked capacity to sue when it filed lawsuit because its charter had been revoked thereafter cured its capacity defect when it was retroactively revived).

In re Klingerman (Klingerman v. Execucorp, LLC), Bankruptcy No. 07-02455-5-ATS, Adversary No. S-08-00017-5-AP, 2009 WL 2423992 (Bankr. E.D.N.C. Aug. 4, 2009). The debtor, Klingerman, sought liquidation of a North Carolina LLC in which he was a member on the basis that he and his co-member, Parker, were deadlocked and that Parker had taken advantage of him. Parker argued that Klingerman abandoned the business and left Parker to run it. According to Parker, the business was running well and there was no reason to dissolve it. Also, the two members disagreed on the percentage of the assets Klingerman should receive if the LLC were liquidated. The only asset of the LLC was an office building. The articles of organization of the LLC provided that each member was a manager, and the operating agreement was characterized by the court as containing mostly boilerplate provisions that did not address the problems arising when two equal managers have a falling out and cannot agree how to run the business. There was no written agreement memorializing the essence of the members' arrangement under which Klingerman would have the use of the basement and Parker the use of the first floor and no written agreement specifying what would happen if a member did not pay his share of the expenses. For the first few years, the members got along, each occupying his respective floor and paying an equal share of the expenses. The parties operated the LLC informally, without following basic formalities recognizing the distinction between LLC property and their own. In 2002, Klingerman vacated his part of the building and moved away but continued to pay his share of the expenses. Eventually Parker advised Klingerman of Parker's view that Klingerman would only be entitled to 1/3 of the proceeds if the building were sold; however, there was nothing in the articles of organization or operating agreement supporting anything other than a 50-50 allocation. The operating agreement specified that Klingerman's interest was a 50% interest, and other provisions corroborated a 50% ownership interest. There were other disputes in addition to the dispute over Klingerman's ownership interest. The court characterized the situation as a deadlock but stated that a deadlock does not necessarily require dissolution and pointed out that a court in a dissolution proceeding has broad authority under the LLC statute to take other action required to preserve the assets and carry on the business. The court stated that there were many possible ways to fashion an equitable solution to the conflict, but the court did not know the consequences that may result from a more creative solution, and the most direct solution to the impasse was dissolution. Thus, the court stated that it would appoint a receiver to liquidate the LLC. The court granted summary judgment in favor of Parker on Klingerman's breach of fiduciary duty claims, stating that Klingerman left the responsibility of running the LLC to Parker and that corporate formalities were not observed. If Parker applied LLC funds for his personal benefit, the court viewed it as a matter that could be sorted out by the receiver.

Tri-County Metropolitan Transportation v. Butler Block, LLC, 337 Fed.Appx. 708 (9th Cir. 2009) (stating that under either Delaware or Oregon law an administratively dissolved LLC remained a member of defendant, a Delaware LLC, and was thus a member whose citizenship was relevant for purposes of determining diversity jurisdiction).

MHS Venture Management Corp. v. Utilisave, LLC, 881 N.Y.S.2d 452 (App. Div. 2d Dept. 2009) (holding claim for judicial dissolution of foreign LLC is one over which New York court lacks subject matter jurisdiction and vacating order denying petition to dissolve Delaware LLC on merits because proceeding should have been dismissed for lack of subject matter jurisdiction).

In re Olympus Construction, L.C., 215 P.3d 129 (Utah 2009). The court examined the dissolution and winding up provisions of Part 13 of the Utah LLC statute and concluded that the procedures for disposing of known claims by providing notification or publication of dissolution to potential claimants need not be utilized in a judicially supervised winding up. The court noted that a voluntarily dissolved LLC must dispose of claims in accordance with either the notification or publication provisions of Part 13, but each is permissive in that the dissolved LLC may choose either or both. In an administrative dissolution, the statute requires the LLC to give notice by both notification and publication. The judicially supervised dissolution provisions also refer to the Part 13 provisions, and the court considered the effect of those provisions on a judicially supervised dissolution. The court stated that the district court has broad authority to direct the procedures for a winding up in a judicially supervised dissolution. Though the statute requires a court to direct the winding up process "in accordance with Part 13," the court concluded that it does not mandate the use of notification or publication procedures for the resolution of claims, and the supervising court may choose to adopt either or both procedures, but is not required to do so. The supervising court in a judicially supervised winding up also has the authority to appoint a receiver to wind up and liquidate the LLC's affairs, and the court may fashion a more suitable procedure for the resolution of claims through the use of a receiver. The district court in this case appointed a receiver, and the court's orders regarding resolution of claims contained detailed procedures and did not adopt the procedures

specified in Part 13. Thus, the petitioner's claim did not have to be rejected within ninety days as specified in the notification procedures of Part 13, and the district court was empowered to set the deadline for acting on the claim.

Chadwick Farms Owners Association v. FHC LLC, 207 P.3d 1251 (Wash. 2009). The Washington Supreme Court interpreted the dissolution provisions of the Washington LLC statute and concluded that the LLCs in this consolidated appeal of two cases did not have the capacity to sue or be sued after the cancellation of their certificates of formation. In one of the cases, *Chadwick Farms Owners Ass'n v. FHC LLC*, the LLC was administratively dissolved and a homeowners association filed suit against the LLC. The LLC's certificate of formation was automatically cancelled two years after the administrative dissolution because the LLC did not seek reinstatement within two years after dissolution as permitted by the statute. After the cancellation of the certificate of formation, the LLC moved for summary judgment dismissing the claims against it on the basis that it ceased to exist upon cancellation of its certificate of formation. Third party defendants sued by the LLC also sought dismissal of the claims asserted by the LLC on the basis that it was a non-entity without capacity to sue after cancellation of its certificate of formation. The court of appeals held that an amendment to the dissolution provisions of the LLC statute enacted while the appeal was pending was retroactive and permitted the homeowners association's suit against the LLC, but that the amendment did not apply to permit suits by the LLC. In the second suit, *Emily Lane Homeowners Ass'n v. Colonial Development, LLC*, the LLC voluntarily dissolved by act of its members and filed a certificate of cancellation. The court explained that dissolution, which can happen in several ways, does not terminate the existence of the LLC, but begins a period in which the LLC's affairs must be wound up. In the case of an administratively dissolved LLC, the cancellation of its certificate of formation occurs automatically if the LLC does not seek reinstatement within two years after dissolution. An LLC that voluntarily dissolves by consent of its members controls the timing of its winding up and files a certificate of cancellation that has the effect of cancelling the certificate of formation. Under the Washington LLC statute, an LLC is "a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation." Based on this language, the supreme court held that an LLC, whether administratively or voluntarily dissolved, may not prosecute or defend suits after its certificate of formation is cancelled. The court disagreed with the court of appeals that the result was altered by the enactment of a provision stating that dissolution of an LLC does not take away or impair any remedy against the LLC and requiring that an action against a dissolved LLC be commenced within three years after dissolution. The court stressed the difference between *dissolution* and *cancellation* and concluded that the statute unambiguously provides that an action by or against an LLC abates upon cancellation of the certificate of formation because the statute provides that the LLC ceases to exist at that time. In response to the argument that the statute must be applied to allow cancelled LLCs to be sued because a dissolved LLC could simply file a certificate of cancellation to avoid liability, the court pointed out that the statutes require that a dissolved LLC pay or make arrangements to pay its known claims and obligations, even if unmatured or contingent, and members who fraudulently attempt to use the provisions of the statute to avoid liability expose themselves to individual liability. Though members and managers are not generally personally liable for the LLC's obligations and liabilities, the court noted that there are exceptions, such as an individual member's liability for his or her own torts, for contributions the member has agreed to make, and for the return of improper distributions. The court also mentioned that a member may be liable under veil piercing theories in the same way that an individual may be liable under corporate veil piercing theories. The court then discussed the potential liability of a member who is responsible for winding up the affairs of an LLC and does so improperly. The statute requires a dissolved LLC to pay or make reasonable provision for the payment of all known claims and obligations, including contingent, conditional, or unmatured claims and obligations. The statute further states that a person winding up an LLC who has complied with this requirement is not personally liable to the claimants of the dissolved LLC. It follows, said the court, that personal liability to claimants may result if the persons winding up the LLC do not comply with the statute. The court noted that the parties in the *Emily Lane* case disputed whether the LLC knew or should have known prior to cancellation of the claims that were later asserted. Thus, the propriety of the winding up and possible personal liability of persons winding up the LLC remained to be determined. In the *Chadwick Farms* case, the court agreed with the court of appeals that the trial court should have granted the motion of the homeowners association to amend the complaint and add the individuals who allegedly failed to comply with the winding up requirements. If the claims asserted against the administratively dissolved LLC were valid and the LLC failed to make provision for paying them (the LLC clearly knew of them because of the pending proceeding at the time of cancellation of its certificate of formation), the LLC did not properly wind up its affairs. Nor did the LLC seek reinstatement, which would have allowed it to litigate the claims and assert its third party claims.

In re NextMedia Investors, LLC, C.A. No. 4067-VCS, 2009 WL 1228665 (Del. Ch. May 6, 2009). In this suit for judicial dissolution of an LLC and appointment of a liquidating trustee, the court analyzed an attempted amendment of the LLC agreement to extend the date of dissolution of the LLC by four years. The LLC agreement contained a provision that prohibited an amendment that would “adversely affect any Member” without the consent of each member to be adversely affected. The petitioners argued that the proposed amendment created an adverse effect and required the consent of all members for adoption because it extended the term of the LLC and, therefore, the members’ investment period. Since the petitioners had not given their consent, they argued that the amendment was ineffective and the LLC had dissolved. The LLC countered that the petitioners’ interpretation of the amendment provisions of the LLC agreement was not reasonable or, in the alternative, another reasonable interpretation existed rendering the agreement ambiguous. Further, the petitioners argued that whether they were adversely affected was a fact issue. The court found that the plain language of the amendment provision of the LLC agreement supported one reasonable meaning and thus could not be considered ambiguous. The court agreed with the petitioners that the dissolution provision could not be amended without the consent of all members because all members would be adversely affected by the extension of the term of the LLC, which would deny them the ability to withdraw from the LLC on the investment horizon that was originally contemplated by the LLC agreement. Thus, the petitioners were entitled to dissolution. The court declined to appoint a liquidating trustee, however. Under the terms of the LLC agreement, the board of managers was authorized to liquidate the LLC. If the board of managers did not conduct the liquidation, the Class A members were entitled to appoint a liquidator. Under the LLC agreement, this right was subject to the right of any member or creditor to apply to a court in respect of the dissolution of the LLC, and the court interpreted this language together with Section 18-803 of the Delaware LLC statute to require the petitioners at least to show cause as to why the Class A members should be denied their right to appoint the liquidating trustee.

In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. April 23, 2009). A minority member of an LLC brought an action for judicial dissolution of the LLC on the basis that the current managers failed to fulfill the LLC’s original business plan and breached their fiduciary duties to the LLC. The LLC was formed “for the purpose of acting as an investment advisor to certain investment funds and for such other lawful business as the Management Committee chooses to pursue.” After the LLC encountered difficulties, it sent a report to its members showing that it was operating at a loss and indicating that its management committee had decided to explore additional, investment-related business avenues. The petitioner alleged that judicial dissolution was warranted because the managers had mismanaged the LLC so as to prevent and frustrate the successful achievement of the business plan, goals, and objectives of the LLC. The court concluded that the petitioner’s allegations fell far short of demonstrating the showing required under the judicial dissolution provision of the Delaware LLC statute, under which the court has discretion to decree dissolution when it is not reasonably practicable to carry on the business in conformity with the LLC agreement. The court stated that judicial dissolution is a remedy to be granted sparingly and is not to be employed merely because the LLC’s business has not gone smoothly or events have not turned out exactly as the owners originally envisioned. Rather, judicial dissolution is reserved for “situations in which the LLC’s management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.” The court rejected the petitioner’s argument that the LLC should be dissolved because it was not meeting the projections contained in the original business plan and was pursuing strategies not part of that business plan. The court stated that it could not reasonably infer that it had become impracticable for the LLC to provide a return to its investors by engaging in “such...lawful business as the Management Committee chooses to pursue.” Giving effect to the broad purpose clause did not signal that it would never be impracticable to operate an entity created to pursue any lawful business because judicial “[d]issolution of an entity chartered for a broad business purpose remains possible upon a strong showing that a confluence of situationally specific adverse financial, market, product, managerial, or corporate governance circumstances make it nihilistic for the entity to continue,” i.e., upon “a showing that the perpetuation of the entity, irrespective of its managers’ intentions to pursue a business line allowed by its governing instrument, was obviously futile and would not result in business success.” Without speculating on what exact circumstances would suffice, the court concluded that the petitioner could not state a claim for dissolution simply by alleging that a two-year-old LLC with a broad purpose clause experienced some adversity. The court noted that an important reason for a broad purpose clause is to ensure an entity has flexibility to adapt in the face of changing circumstances. Turning to the petitioner’s allegations of breaches of fiduciary duty, the court stated that the important policy function served by the demand rule in the context of derivative claims cannot be lightly bypassed by resort to an action for judicial dissolution. Because dissolution is a remedy of last resort and because

of the limitations imposed on derivative actions, the court stated that a plaintiff only states a claim for dissolution premised on breaches of fiduciary duty where the pleadings allege that: (1) the plaintiff has proven the fiduciary breaches in a plenary action; and (2) there remains a rational basis for a dissolution remedy notwithstanding the remedy granted in the plenary action. The court additionally concluded that the petitioner's attempt to raise fiduciary duty claims in this judicial dissolution action was an improper attempt to bypass the dispute resolution procedure set forth in the LLC agreement, which required that "any questions, issues, or disputes arising out of or relating to the Agreement" be handled by negotiation, followed by mandatory mediation and, finally, binding arbitration.

In re Hughes; In re Weber (The Business Backer, LLC v. Weber), Bankruptcy Nos. 08-1125, 08-1228, Adversary No. 08-78, 08-77 (Bankr. N.D. W.Va. April 20, 2009). Debtor Hughes was the sole owner of an LLC, and debtor Weber was a manager. In 2008, the LLC entered a financing agreement in which the debtors, on behalf of the LLC, represented that the LLC was in compliance with all laws and was a validly existing business entity in good standing under the laws of West Virginia. In 2007, the LLC's status as an LLC had been revoked due to its failure to file an annual report. In January 2009, the LLC was reinstated. The creditor objected to the debtor's discharge of obligations under the financing agreement relying on the exception to discharge for a debt for money obtained by false pretenses, a false representation, or actual fraud, or a debt for money obtained by use of a statement in writing that was materially false and made by the debtor with intent to deceive. The creditor relied in part on the false representations about the LLC's compliance with laws, existence, and good standing. The court concluded that the representations were not reckless or knowingly false based on testimony by the debtors that they never received a renewal notice or notice of revocation from the State and that they believed the LLC was a validly existing LLC in good standing and were unaware of the revocation of its status at the time they signed the agreement. The creditor also objected to the debtors' discharge under the exception relating to a debt arising out of fraud or defalcation while acting in a fiduciary capacity. The creditor argued that the debtors engaged in acts inappropriate for the winding up of the LLC and were liable for breach of a fiduciary duty to the creditor based on a provision of the West Virginia LLC statute providing that a member or manager who, with knowledge of the dissolution of the LLC, subjects the LLC to liability by an act not appropriate for winding up is liable to the LLC for any damage caused. The court concluded that the debtors' relationship with the creditor under the financing agreement did not constitute an express or technical trust as required under federal common law for a fiduciary relationship. Moreover, the court stated that the statutory source of the alleged fiduciary duty was only applicable in the context of a dissolution and winding up, and the creditor had made no showing that the LLC was in the process of dissolving or winding up. As of January 2009, it was still a licensed LLC, and, although it had liquidated two of its business operations, it was still poised to continue business operations in the future.

Law v. Bioheart, Inc., No. 2:07-cv-2177, 2009 WL 693149 (W.D. Tenn. March 13, 2009) (noting Tennessee law allows certain persons to maintain legal actions in LLC's name after administrative dissolution).

Perkins v. Brown, 901 N.E.2d 63 (Ind. App. 2009). Perkins and Brown were equal members in an LLC. After a dispute regarding the compensation system developed and Brown stopped receiving information about the business, Brown filed a complaint against Perkins and the LLC requesting a declaratory judgment as to the ownership percentages of the members, an equitable accounting, and a dissolution and distribution of the LLC's assets in accordance with the judicially determined ownership percentages. At trial, Brown submitted evidence of his estimates of the LLC's income and expenses and was awarded a judgment against the LLC and Perkins for half of the estimated amount remaining. On appeal, Perkins argued that there was no basis to hold him personally liable to Brown because there was no evidence presented to support a veil piercing analysis or that showed unlawful distributions had been made. The court noted the provisions of the Indiana LLC statute providing for personal liability to the LLC if a member authorizes a distribution that results in the LLC's insolvency. The court held that it was error to determine the amount of damages due Brown in the dissolution without an accounting of the LLC's finances. No evidence was presented regarding the actual finances of the LLC, and the court stated that it could not be certain that the assets were distributed in accordance with the statutory provisions governing winding up without an accounting. The court remanded for an accounting and ordered the trial court to make an appropriate entry of damages due each party, including any determination of personal liability under the LLC statute, after completion of the accounting.

Spellman v. Katz, C.A. No. 1838-VCN, 2009 WL 418302 (Del. Ch. Feb. 6, 2009). Two doctors, Spellman and Katz, each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which

the parties leased space for their joint medical practice. After their relationship deteriorated, Spellman left to practice on his own, and the two were unable to agree on how to become disentangled from each other. Spellman eventually sought a judicial dissolution of the LLC pursuant to the Delaware LLC statute or an order appointing a liquidating trustee to effectuate the winding up of the LLC because the LLC had allegedly already dissolved by express will of its members pursuant to the LLC agreement. The LLC agreement provided that the LLC “shall be dissolved and its affairs wound up as soon as possible after the construction of the building had been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit” Neither member disputed that each of the preconditions to dissolution set forth in the LLC agreement had been satisfied, but Katz argued that the dissolution and winding up of the LLC was improper because the LLC agreement did not accurately reflect the original intentions of the parties regarding dissolution. Katz asserted that neither party knew that this provision was part of the LLC agreement and that the parties intended to operate the LLC for at least as long as the mortgage’s interest obligation and real estate tax benefits remained available to offset profits from the practice. In support of this position, Katz pointed to the failure of either party to pursue the dissolution and winding up of the LLC following the completion of the construction of the building. Applying contract construction principles to the LLC agreement, the court concluded that the agreement was unambiguous and should be enforced in accordance with its terms. Because the LLC agreement was unambiguous on its face, the parole evidence rule precluded outside evidence to dispute its terms. Accordingly, the court held that the LLC had been dissolved by express will of its members under the LLC agreement and winding up of its affairs was necessary. With respect to Spellman’s request for the appointment of a liquidating trustee pursuant to the Delaware LLC statute, the court held that there was cause for appointment of such a person because the parties were deadlocked on how to proceed with the winding up of the LLC and were not able to implement the winding up provisions of the LLC agreement.

Gale v. Carnrite, 559 F.3d 359 (5th Cir. 2009). In 1999, the Gales bought all of the membership interest in a Nevada LLC that owned a condominium unit in Mexico. Because of a legal restriction on non-Mexican ownership of real property, the Gales had to purchase the outstanding membership interest in the LLC. The sole asset of the LLC was beneficial ownership of a leasehold interest in the condominium under a special trust arrangement with a Mexican bank. In the sale agreement between the seller, Carnrite, and the Gales, Carnrite included a warranty that as of the date of closing “the LLC has and will have no liabilities of any nature...including without limitation tax liabilities due or to become due.” When the sale was completed in January 2000, no one reported the transaction to the Mexican government and no taxes were paid on the transfer. After the Gales used the condominium for a number of years, the LLC sold the beneficial interest in the condominium. The sale resulted in a substantial Mexican capital gains tax liability. The Gales filed suit against Carnrite for allegedly breaching the contractual warranty he gave to them regarding tax liability when they bought the LLC. The Gales alleged that Carnrite breached the warranty by failing to report and pay taxes on the sale to the Gales. The district court entered summary judgment in favor of the Gales, finding that Carnrite breached the warranty because the parties’ transaction gave rise to tax liability for the LLC. Carnrite appealed, and the first issue discussed in the opinion on appeal was the whether the Gales had standing to pursue the claim. Carnrite argued that it was the LLC rather than the Gales that were liable for the capital gains tax and that the Gales did not have standing since they suffered no injury. The Gales responded that the LLC assigned the claim to them when they filed the lawsuit in 2007. Carnrite did not dispute the usual propriety of such an assignment, but argued that the assignment was ineffective because Nevada had revoked the LLC’s right to do business in 2004 for failure to pay franchise taxes and fees and file annual reports. The court concluded that the Gales had standing to pursue the claim, however, based on Nevada LLC statutes regarding dissolution and the fact that payment of the taxes ultimately fell on the Gales. The court pointed out that the Nevada LLC statutes provide that the property and assets of an LLC whose charter has been revoked must be held in trust and that dissolution proceedings should be pursued. Another statutory provision provides that dissolution does not impair a remedy or cause of action arising before dissolution and commenced within two years after the date of dissolution. Additionally, the Nevada statutes provide that the assets of a dissolved LLC may be distributed to its members. Based on these statutes, the court concluded the assets of the LLC, which included the cause of action against Carnrite, were held by the Gales in trust when its right to transact business was forfeited, and, moreover, the Gales were permitted to transfer those assets to themselves as the LLC’s only members. As the parties ultimately injured and the assignees of the LLC’s claims, the Gales had standing to pursue the action. After analyzing the tax liability, however, the court held that the record did not establish that Carnrite breached the terms of the warranty as worded in the contract he made with the Gales because the record indicated that Carnrite’s failure to pay taxes on the transaction resulted in a tax liability of the Gales rather than the LLC.

Baird v. Macklin, 6 Pa. D. & C. 5th 193, 2008 WL 5600765 (Pa. Com. Pl. Dec. 11, 2008). A minority member of an LLC filed suit against the other two members seeking an accounting, partition of property, and a dissolution of the LLC. The defendant members argued that the Pennsylvania LLC statute protected them from suit in their individual capacity based on the rule that a member is not a proper party in an action by or against the LLC, but the court pointed out the exception provided in the statute where the object of the lawsuit is to enforce the right of a member by or against the LLC. In the absence of case law in Pennsylvania regarding the issue, the court reviewed dissolution cases in other jurisdictions and determined that an action for judicial dissolution appeared to be the type of lawsuit where it is appropriate to name the individual members of the LLC as parties. The court noted that the case did not involve a claim for money damages against the individual defendants and stated that the defendants' concerns about being named as individual defendants were misplaced. The court determined, however, that the manner in which the individual defendants were named was improper because the plaintiff sued them as "d/b/a" the LLC. The court stated that the plaintiffs should either name the LLC as a separate defendant or drop the LLC as a party. The court next concluded that the plaintiff failed to state a claim for judicial dissolution because the plaintiff failed to allege that it is not reasonably practicable to carry on the business in conformity with the operating agreement. The complaint did not allege a deadlock or that the business was a failure or unprofitable or that it could not be run in conformity with the operating agreement. The complaint also did not plead that any event requiring dissolution under the operating agreement had occurred. The court granted the plaintiff leave to file an amended complaint in this regard. The court dismissed the plaintiff's claim for partition on the basis that there was no way a claim for partition could be cured by amendment. The real property the plaintiff sought to partition was held in the name of the LLC, and the court stated that both the LLC statute and the operating agreement prohibited the individual members from holding title to LLC property in their individual names. With respect to the plaintiff's claim for an accounting, the court stated that it had found no Pennsylvania cases alleging a claim for an accounting in the LLC context. The court stated that a claim for an accounting was a common count in dissolution cases in other jurisdictions, and the court discussed the grounds in Pennsylvania for a separate cause of action for an accounting at law or in equity. The court concluded that the plaintiff had not sufficiently alleged a basis for an accounting, but gave the plaintiff leave to amend because the complaint alleged facts that indicated the plaintiff might have grounds for an accounting.

Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. App. 2009) (holding member's action for dissolution and accounting was not barred by laches).

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

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

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

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

and the majority voted to do so. In the absence of a deadlock, there were no grounds for judicial dissolution or receivership.

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

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

Ewie Company, Inc. v. Mahar Tool Supply, Inc., Docket No. 276646, 2008 WL 4605909 (Mich. App. Oct. 9, 2008), reversed in part, 762 N.W.2d 160 (Mich. 2009). In late 2004, Ewie, the 51% member of an LLC, notified Mahar, the 49% member, that Ewie wished to dissolve and wind up their LLC, which had been formed several years earlier to provide inventory supply and management services to a GM plant. The articles of organization stated that the term of the LLC ended on December 31, 2004, but the operating agreement also contained specific provisions regarding dissolution along with a non-competition provision and an integration clause. Mahar did not want to dissolve the LLC and refused Ewie's suggestion that Mahar buy out Ewie's share. Nevertheless, Ewie paid Mahar for its interest and notified GM that the LLC dissolved. GM terminated its contract with the LLC and awarded a new contract to PSMI,

a company formed by the principals of Ewie. After dissolution of the LLC, Ewie sold the LLC's assets to PSMI. When Mahar refused to permit the winding up of the LLC, Ewie filed suit on its own behalf and on behalf of the LLC for judicial winding up under the Michigan LLC statute. Mahar filed a counterclaim against Ewie, PSMI, and the two individual principals of those entities alleging numerous business torts and violations of the LLC statute. Ewie sought summary judgment on the basis that it was the majority member and properly sought dissolution under the articles of organization and operating agreement in light of the dissolution date of December 31, 2004. Ewie further argued that it was forced to seek judicial dissolution and that Mahar lacked standing to bring its counterclaims because the LLC dissolved on December 31, 2004, and Ewie's conduct seeking dissolution was not unfair or oppressive. Ewie argued that the non-compete provision had not been violated because it was PSMI and not Ewie that contracted with GM.

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

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

CC. Dissenter's Rights

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

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

DD. Accounting

Gaunce v. Wertz, No. 1:06-CV-00095-R, 2009 WL 803843 (W.D. Ky. March 25, 2009) (concluding that whether operating agreement implicitly required managing member to provide other members accounting on demand could not be resolved on motion to dismiss).

Historic Charleston Holdings, LLC v. Mallon, 673 S.E.2d 448 (S.C. 2009). Mallon, Storen, and Historic Charleston Holdings (“HCH”) formed Dixie Holdings, LLC (“Dixie”) for the purpose of real estate development in Charleston. Mallon and HCH each owned 49.5% of Dixie, and Storen owned 1%. Mallon and HCH were also equal members in Dixie Developers, LLC (“Dixie Developers”), another real estate development company. In 1999, disputes regarding financial matters of Dixie arose, and the parties agreed that sales proceeds would be held in escrow pending resolution of such matters. About this time HCH sold its interest in Dixie Developers to Mallon, giving Mallon 100% of that LLC. Dixie sold its remaining two properties, and Mallon placed the sales proceeds from one of the properties (“15 Felix”) in a new Dixie Developers account he had opened. Mallon refused HCH’s demands to place the sale proceeds from 15 Felix in an escrow account in Dixie’s name in accordance with the prior agreement. In 2002, Storen dissociated from Dixie, leaving Mallon and HCH with 50% each of that LLC. HCH filed suit against Mallon, Dixie, and Dixie Developers, individually and derivatively as a member of Dixie, seeking judicial dissolution of Dixie and a full financial accounting of both Dixie and Dixie Developers. The parties referred the case to a special master who found that HCH was entitled to half the 15 Felix sale proceeds and ordered dissolution and termination of Dixie. In this appeal, the issues considered by the court included whether Mallon was entitled to a full accounting for Dixie Holdings and Dixie Developers. Mallon argued that he was entitled to a full accounting for Dixie and Dixie Developers, but the court held that a full accounting was not required or appropriate and that the proper resolution was for the court to make a single determination of the parties’ rights with respect to the proceeds of the sale of 15 Felix. The court disagreed with the conclusion of the court of appeals that Dixie’s operating agreement entitled the parties to a formal accounting. The operating agreement provided that Dixie’s members “shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation,” but the court distinguished this requirement from the equitable remedy of an accounting sought in this case. Further, even if the statement of assets and liabilities required by the operating agreement entitled the parties to a formal accounting (as argued by the dissent), the court found that Mallon and HCH waived the right by refusing to communicate and cooperate with each other. Additionally, the court found no provision in the LLC statute requiring a court to order a complete accounting under the circumstances. The court stated that the statute gave the court broad discretion in fashioning a remedy in actions between members or between members and the LLC, and the court did not believe a full accounting of Dixie and Dixie Developers was an appropriate remedy in this case because Dixie Developers had no relationship to the matter other than the fact that the funds in issue were in its bank account, and the only contentious issue remaining incidental to the dissolution was the relatively simple matter of the distribution of the 15 Felix sale proceeds.

Perkins v. Brown, 901 N.E.2d 63 (Ind. App. 2009). Perkins and Brown were equal members in an LLC. After a dispute regarding the compensation system developed and Brown stopped receiving information about the business, Brown filed a complaint against Perkins and the LLC requesting a declaratory judgment as to the ownership percentages of the members, an equitable accounting, and a dissolution and distribution of the LLC's assets in accordance with the judicially determined ownership percentages. At trial, Brown submitted evidence of his estimates of the LLC's income and expenses and was awarded a judgment against the LLC and Perkins for half of the estimated amount remaining. On appeal, Perkins argued that there was no basis to hold him personally liable to Brown because there was no evidence presented to support a veil piercing analysis or that showed unlawful distributions had been made. The court noted the provisions of the Indiana LLC statute providing for personal liability to the LLC if a member authorizes a distribution that results in the LLC's insolvency. The court held that it was error to determine the amount of damages due Brown in the dissolution without an accounting of the LLC's finances. No evidence was presented regarding the actual finances of the LLC, and the court stated that it could not be certain that the assets were distributed in accordance with the statutory provisions governing winding up without an accounting. The court remanded for an accounting and ordered the trial court to make an appropriate entry of damages due each party, including any determination of personal liability under the LLC statute, after completion of the accounting.

Baird v. Macklin, 6 Pa. D. & C. 5th 193, 2008 WL 5600765 (Pa. Com. Pl. Dec. 11, 2008). A minority member of an LLC filed suit against the other two members seeking an accounting, partition of property, and a dissolution of the LLC. The court concluded that the plaintiff failed to state a claim for judicial dissolution but granted the plaintiff leave to file an amended complaint in this regard. With respect to the plaintiff's claim for an accounting, the court stated that it had found no Pennsylvania cases alleging a claim for an accounting in the LLC context. The court stated that a claim for an accounting was a common count in dissolution cases in other jurisdictions, and the court discussed the grounds in Pennsylvania for a separate cause of action for an accounting at law or in equity. The court concluded that the plaintiff had not sufficiently alleged a basis for an accounting, but gave the plaintiff leave to amend because the complaint alleged facts that indicated the plaintiff might have grounds for an accounting.

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

EE. Professional LLCs

Ma'ayergi and Associates, LLC v. Pro Search, Inc., 974 A.2d 724 (Conn. App. 2009) (holding plaintiff sole member of law firm LLC had standing to bring individual defamation claim as well as claim on behalf of LLC based on alleged harm to member's individual professional reputation in addition to alleged harm suffered by law firm).

Sagemark Companies, Ltd. v. Arch Specialty Insurance Group, 872 N.Y.S.2d 863 (N.Y. Sup. 2009). The court rejected the argument that an expired insurance policy covering an LLC for health care professional services was void and that the LLC was thus entitled to a refund of the premiums. The LLC argued that the policy was void because it was a medical malpractice policy and LLCs are prohibited from engaging in the practice of medicine. The LLC insured was engaged in management and administrative services, and the court concluded that the documentary evidence defeated the claim that the policy was a medical malpractice policy and did not show that no risk ever attached.

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, 606 F.Supp.2d 638 (S.D. Miss. 2009). The IRS issued a Notice of Levy of Wages, Salary, and Other Income to a PLLC as against a physician whose S corporation was a member of the PLLC. One of the PLLC's functions was to collect fees for services provided by its members and to remit the fees, less operating expenses, to the members. The PLLC made payments to the physician and his S corporation after the Notice of Levy was issued, and the issue analyzed by the court was whether the payments were "wages or salary payable to or received by" the physician. The PLLC argued that the payments made were advance payments of the S corporation's share of the profits as an owner of the PLLC or, alternatively, were loans as excess draws taken by the S corporation, and that the PLLC never owed an obligation to anyone other than the S corporation and could not be liable on a Notice of Levy as to the physician. The court concluded that the PLLC's relationship with the physician was not unlike a circumstance where an independent contractor is paid commissions based on the work he does

for a company. The physician performed services for his patients under the umbrella of the PLLC, and the PLLC collected fees for the services and distributed a portion of the income to the physician directly or through the S corporation. The court also made other analogies to conclude that the payments had wage-like characteristics and were subject to the continuing levy.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, No. 06 CVS 6091, 2009 WL 877636 (N.C. Super. March 31, 2009). At a meeting of the members of a North Carolina PLLC law firm (the “Firm”), two of the members abruptly announced that they were leaving the Firm. During the next two weeks, they returned to work while making preparations to form a new firm. During that time, a third member announced that she was leaving the Firm to join the other two departing members in a new law practice. The departing members executed articles of organization for a new PLLC and began practice in their new firm. Shortly after the date on which the departing members ceased practicing with the Firm, one of the departing members prepared two forms of proposed form letters to be sent to Firm clients. One of the letters stated that the departing members had “withdrawn” from the firm, and the other letter stated that they were “terminating their employment.” The Firm’s articles of organization did not contain any provisions dealing with withdrawal or dissolution, and the members never executed a formal operating agreement. The members also did not execute a written agreement specifically reflecting whether the Firm’s breakup was to constitute a withdrawal by the departing members or a dissolution of the Firm. After the Firm’s breakup, representatives of the departing and remaining members met to discuss the departing members’ interests in the Firm. They did not agree on the value of the departing members’ interests. Brewer, one of the remaining members, undertook to perform an “accounting” and prepared a memorandum presenting the results (the “Brewer memo”). The Brewer memo repeatedly referenced the breakup as a “withdrawal” from the Firm by the departing members, though it also referred to the “winding up” of the Firm’s operations by the “remaining members.” It was captioned: “Re: Winding up of affairs; dissolution of partnership.” The Brewer memo proposed a settlement of the financial affairs of the Firm that included retention by the departing members of their current cases without remitting to the Firm any fees subsequently recovered and retention by the Firm of any fees from unresolved contingent fee cases remaining with the firm. Final distribution checks were sent to the departing members based on Brewer’s determination of the Firm’s existing debts and obligations. The departing members did not inform the remaining members that they were refusing to cash the checks or that they disagreed with the Brewer memo until months later when counsel for the departing members sent a letter to Brewer referring to the departing members’ “withdrawal” from the Firm. In a letter sent about a year after the departure of the departing members, counsel for the departing members referred to the breakup of the Firm as a “dissolution” and discussed the duties of the managing members in the winding up of the Firm’s affairs. The Firm at all times continued to operate as a going concern and never filed articles of dissolution with the North Carolina Secretary of State. Eventually, the departing members filed suit, individually and derivatively on behalf of the Firm, seeking an accounting, liquidating distributions, damages, and injunctive relief preventing the Firm from incurring debt or practicing law in the name of the Firm except for its winding up. The remaining members asserted various affirmative defenses and counterclaims. The pivotal issues were whether the departing members were deemed to have withdrawn or a dissolution of the Firm occurred, and how the departing members’ distributive shares should be valued.

As an initial matter, the court addressed a challenge to the departing members’ standing to bring the action. The court determined that the departing members would be deemed members of the Firm when the action was commenced. Because the departing members did not constitute a majority of the members of the Firm, they did not have authority to cause the Firm to bring any claims, but the court concluded that the departing members had standing to bring derivative claims on behalf of the Firm.

The court next discussed the issue of whether the departing members had withdrawn or the Firm had dissolved. The court explained that, under the North Carolina Limited Liability Company Act, the final distributions of the departing members would be limited to the fair value of each departing member’s interest as of the date of withdrawal if the departing members’ departure from the Firm constituted a withdrawal. In that case, the remaining members contended that the departing members would not share in any fees subsequently realized from contingent fee cases because the value of such cases at the time of the breakup was too uncertain and speculative to quantify. The court noted that the merits of that contention were not before the court, but the court acknowledged that valuation of the contingent fee cases in a withdrawal context appeared to be problematic. If, on the other hand, dissolution of the Firm had occurred, the LLC would remain in existence for purposes of winding up, and the departing members contended that they would remain members until completion of the winding up and would share in any distributions of profits realized from contingent fee cases resolved by the Firm after dissolution. The court commented that there were other issues related to this contention,

such as the sharing of expenses on cases that did not produce a fee and the sharing of profits and losses from contingent fee cases retained by the departing members. After analyzing the conduct of the parties and the provisions of the North Carolina LLC Act, the court concluded that the departing members did not *de facto* withdraw from the Firm because the LLC statute does not allow a unilateral withdrawal apart from compliance with the statutory provisions on withdrawal. The statute provides that a member may withdraw *only* at the time or upon the happening of events specified in the articles of organization or a *written* operating agreement. Since the Firm's articles of organization were silent on withdrawal, and the Firm had no written operating agreement, the court concluded the departing members could not withdraw. The court rejected the argument that the collective writings and emails constituted a written operating agreement because the collection of evidence relied upon was not signed by all the departing members and did not specifically reference an agreement regarding withdrawal. The court recognized the possibility that multiple documents viewed collectively in a given case could constitute a written operating agreement, but found the correspondence relied upon in this case did not rise to the level of a written operating agreement.

The court next analyzed whether the departing members should be estopped to deny that they withdrew from the Firm. The court concluded that the situation was a case "not provided for" under the North Carolina LLC Act (because the situation was "not consistent with the spirit or letter of the Act") and was thus a candidate for the application of estoppel. The court rejected the departing members' argument that the court should apply the Uniform Partnership Act dissolution provisions by analogy, noting that the LLC statute had been amended to provide that an individual member's withdrawal does not trigger dissolution. After extensive discussion and analysis, the court concluded that the Firm breakup was treated by all concerned as a withdrawal by the departing members, that the facts of the Firm's breakup met the requirements for the application of equitable estoppel, and that the departing members were thus deemed withdrawn by estoppel.

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

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

FF. Foreign LLC - Failure to Qualify to Do Business

Harvest Credit Management VII, LLC v. Adams, No. 1 CA-CV 08-0517, 2009 WL 1395427 (Ariz. App. May 19, 2009) (finding fact question as to whether foreign LLC was "transacting business" in Arizona or was engaged only in activities that would not require it to obtain certificate of registration to transact business).

Glacier Water Company LLC v. Earl, No. C08-1705RSL, 2009 WL 586128 (W.D. Wash. March 5, 2009) (finding service on foreign LLC that was not registered to do business in Washington was complete where Secretary of State was served and mailed summons and complaint the following day).

Meyer v. Christie, No. 07-2230-CM, 2009 WL 331634 (D. Kan. Feb. 10, 2009) (holding that judgment as matter of law on question of Iowa LLC's capacity to sue was precluded by existence of fact question as to whether LLC was "doing business" in Kansas such that failure to register to do business would prevent it from bringing suit in Kansas).

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

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

GG. Foreign LLC – Governing Law

Cammack New Liberty, LLC v. International Greetings USA, Inc., 653 F.Supp.2d 709 (E.D. Ky. 2009) (abstaining in action alleging unlawful dissolution of LLC governed by Kentucky law because dissolution involves complex law and strong policy considerations warranting experience and expertise of Kentucky state courts).

Pactiv Corporation v. Perk-up, Inc., Civil Action No. 08-05072, 2009 WL 2568105 (D.N.J. Aug. 18, 2009) (discussing New Jersey and New York law on veil piercing and stating that choice of law issue need not be addressed at this stage of litigation because legal analysis to determine whether veil piercing is appropriate under New York and New Jersey law is substantially similar).

MHS Venture Management Corp. v. Utilisave, LLC, 881 N.Y.S.2d 452 (App. Div. 2d Dept. 2009) (holding claim for judicial dissolution of foreign LLC is one over which New York court lacks subject matter jurisdiction and vacating order denying petition to dissolve Delaware LLC on merits because proceeding should have been dismissed for lack of subject matter jurisdiction).

U.S Medical Neuroscience Investments, L.L.C. v. Morton Plan Hospital Association, Inc., No. 8:09-cv-464-T-24 MAP, 2009 WL 1651424 (M.D. Fla. June 12, 2009). The court applied Indiana law to the question of whether claims by a member of an Indiana LLC against the other member were direct or derivative and found that the action need not be brought derivatively based on Indiana case law recognizing an exception to the general rule that requires certain claims to be brought in a derivative action.

WIS-Bay City, LLC v. Bay City Partners, LLC, No. 3:08 CV 1730, 2009 WL 1661649 (N.D. Ohio June 12, 2009) (applying Ohio law to interpretation of LLC operating agreement containing Ohio choice of law provision and concluding provision requiring common unit holder to pay in full before it could ask court to define obligation to pay is effectively bar to suit and unenforceable under Ohio law).

Norrie v. Lane, No. B196062, 2009 WL 1522558 (Cal. App. 2 Dist. June 2, 2009) (noting that LLC is issue was Delaware LLC, but applying California law regarding fiduciary duties because operating agreement called for application of California law).

In re The Heritage Organization, L.L.C. (Faulkner v. Kornman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2009 WL 1349209 (Bankr. N.D. Tex. May 11, 2009). In a very lengthy and detailed opinion, the court concluded that \$46 million in distributions by the debtor, The Heritage Organization, L.L.C.

("Heritage"), to its members were recoverable by the trustee under the Bankruptcy Code and the Texas Uniform Fraudulent Transfer Act ("TUFTA"). Heritage was a Delaware LLC that, prior to its bankruptcy filing, provided tax planning strategies to extremely wealthy individuals. The trustee asserted a number of claims against various individuals and entities related to Heritage, but the largest claims sought avoidance of distributions by Heritage to insiders between April 2001 and February 2003 in the aggregate amount of \$46 million. The trustee sought recovery from three Delaware entities that were members of Heritage, and from Kornman, the individual who ultimately controlled Heritage and its members. The defendants argued that the three-year statute of limitations applicable to an impermissible distribution under the Delaware Limited Liability Company Act ("DLLCA") applied to the trustee's claim to recover the distributions made by Heritage since it was a Delaware LLC. The court held that the Delaware legislature could not limit the reach of the Texas Uniform Fraudulent Transfer Act ("TUFTA"), which contains a four-year statute of repose applicable to the fraudulent transfer claims asserted by the trustee. The court stated that a fraudulent transfer claim sounds in tort, and the court thus applied the most significant relationship test called for under Texas choice-of-law rules. The only connection between the trustee's fraudulent transfer claims and Delaware was the fact that Heritage and its members were Delaware entities. Heritage and its members were headquartered in Texas and controlled by a Texas resident, and the decision making took place in Texas. Distribution checks were drawn on and deposited in Texas banks. Furthermore, the court stated that the internal affairs rule did not apply because fraudulent transfer claims like those at issue involve the rights of creditors rather than internal corporate governance issues that are the subject of the internal affairs doctrine. The trustee was not challenging Heritage's ability to properly pay distributions to its members as a matter of corporate law or seeking to hold the members liable for Heritage's debts, which is the other purported statutory basis for the application of Delaware law. Thus, the DLLCA three-year limitations period was not applicable to the trustee's TUFTA claims.

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

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

removal from LLC because member did not identify any source of common or statutory law in Delaware or New Jersey supporting cause of action and claim simply restated essence of breach of contract claim).

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

HH. Charging Order

Wooten v. Lightburn, Civil Action No. 1:08cv00049, 2009 WL 2424686 (W.D. Va. Aug. 4, 2009). The plaintiff obtained a judgment against the defendant and sought charging order liens against the defendant's interests in Robert A. Lightburn, LLC and The Game Place, L.L.C. While both entities were identified as LLCs in the Secretary of State's records, the defendant claimed that one of them was a family limited partnership. The court stated that the discrepancy was immaterial since the Virginia statutes contain practically identical charging order remedies in the partnership and LLC contexts. The court found there was no dispute as to any material fact and that a charging order should be entered against the defendant creating a lien on his transferable interests in Robert A. Lightburn, LLC and The Game Place, L.L.C.

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 2169879 (Bankr. C.D. Ill. July 16, 2009). In a prior opinion, the bankruptcy court determined that a lender's judgment lien against an LLC member's distributional interest was not valid because the charging order remedy in the Illinois LLC statute operates to the exclusion of all other remedies. The lender had obtained a pre-petition judgment against the debtor, and the lender served the debtor with a citation that impressed a lien upon the debtor's personal property under Illinois judgment collection provisions. In this opinion, the court addressed the lender's argument that the charging order provision of the LLC statute applies only to a distributional interest and that the lender's judgment lien obtained under the general judgment collection provisions applied to the debtor's membership interest. The lender emphasized the statutory distinction between a membership interest and a distributional interest and argued that, although it did not obtain a charging order so as to obtain a lien on the distributional interest, it nevertheless obtained a citation lien on the membership interest. The court stated that the lender's implied argument that it somehow had the right to enforce its lien against the distributional interest, the only interest that mattered at this point, directly contradicted the plain language of the charging order provision. The lender's argument implied that a creditor could bypass the exclusive procedure of the charging order provision and obtain a lien on a member's distributional interest by obtaining a lien on the entire membership interest, which includes the distributional interest. Applying the rule of statutory construction that a specific provision controls over a more general one, the court concluded that the exclusive charging order provision in the LLC statute necessarily controlled over the more general statute providing for a citation lien on personal property. The court stated that the lender mischaracterized the court's prior opinion as holding that the

charging order provision operates to preclude a citation lien from attaching to a member's non-economic rights, saying the issue was not presented on the facts of this case. The court said that non-economic rights were not at issue given the LLC's dissolution, and the court questioned what good it would do the lender to have a lien on the debtor's non-economic rights when it was his distributional interest that the trustee proposed to administer. The court commented that, even assuming a judgment creditor may obtain a lien on a member's non-economic rights, lienor status does not entitle the creditor to exercise those rights. The court discussed the Illinois LLC charging order provisions and stood by its prior opinion that the "exclusive remedy" language of the statute must be interpreted as meaning "to the exclusion of all other remedies." The court discussed two other Illinois cases addressed in its previous opinion, *Dowling v. Chicago Options Associates, Inc.* and *Bobak Sausage Co. v. Bobak Orland Park, Inc.*, and stood by its view that *Dowling* did not speak to the issues before the court and that *Bobak* recognized that a broad reading of *Dowling* could not be reconciled with the charging order provisions. The court stated that if *Dowling* had any validity at all regarding LLC interests, it was valid only as it might apply to the forced sale of a member's non-economic rights in an LLC. Even to that extent, the court pointed out that the court in *Bobak* was critical of *Dowling*, since the *Bobak* court did not view a public sheriff's sale as the most appropriate way to sell a judgment debtor's non-economic interest in an LLC.

Roemmich v. Eagle Eye Development, LLC, 633 F.Supp.2d 747 (D.N.D. 2009). An LLC and one of its members obtained a judgment against another member, and the judgment creditors obtained a charging order and sought foreclosure on the judgment debtor's membership interest. The judgment creditors requested that the court allow lay testimony from the individual judgment creditor and the LLC's accountant to support the judgment creditors' claim that they had little likelihood of collecting on the judgment through LLC distributions for many years. The court found that the individuals could provide opinion testimony as lay witnesses. The judgment creditors also asked the court to allow a law professor to testify as an expert that a judicial lien charging order against the judgment debtor's interest would not produce any distributable sums toward satisfaction of the judgment for at least sixteen years and that a court-ordered foreclosure sale of the charged interest was warranted and permitted by North Dakota law. The court concluded that the law professor's testimony was inadmissible because expert testimony on legal matters is not admissible and the testimony was not necessary to sort out the factual issues of the case. The court stated that the issues were not so novel or complex as to require an expert witness to explain them to the court.

B.A.S.S. Group, LLC v. Coastal Supply Co., Inc., Civil Action No. 3743-VCP, 2009 WL 1743730 (Del. Ch. June 19, 2009). A disloyal employee (Burkett) who embezzled funds from his employer (Coastal Supply Co., Inc. or "Coastal"), formed an LLC with a friend (Webb) and used the embezzled funds to purchase property for the LLC. When Coastal discovered the embezzlement, it fired Burkett and entered a restitution agreement with him, which included transferring the property from the LLC to Coastal. Webb then commenced this action to void the transfer of the property to Coastal and to obtain other relief for alleged breaches of fiduciary duty by Burkett. Coastal counterclaimed for unjust enrichment and conversion and sought relief in the form of a constructive trust over the property or a money judgment. Both sides sought summary judgment. On the issue of unjust enrichment and conversion, the court found Coastal was entitled to judgment as a matter of law, and the court discussed the possibility of imposing a constructive trust. The court rejected the argument that Webb and the LLC were innocent parties who should not be penalized by Burkett's acts. First, the court stated that the knowledge of an officer, director, or manager of a business entity is generally imputed to the entity. Additionally, restitution is permitted in Delaware even when the party retaining the benefit is not a wrongdoer. The court indicated that it would likely impose a constructive trust over the property if the court voided the transfer for any of the reasons argued by Webb. Because unjustly obtained funds could be traced to the specific property obtained by the LLC, a constructive trust could be imposed regardless of the culpability of the LLC if the LLC was not a bona fide purchaser for value. Here, the embezzled funds could be traced directly to the property, and the LLC was not a bona fide purchaser because, regardless of whether the LLC gave any consideration for the funds received from Burkett (i.e., whether the funds were a loan or a capital contribution), the court viewed the LLC and Burkett as equally culpable because Burkett was acting on behalf of the LLC when he purchased the property, and his knowledge that he was using the embezzled funds to purchase the property was imputed to the LLC. The court rejected Webb's suggestion that a charging order upon Burkett's units in the LLC for the benefit of Coastal would be adequate. The court did not consider a charging order to be an adequate remedy because the LLC was unjustly enriched and a charging order would leave Coastal with a 50% economic interest without any voting rights and at the mercy of the controlling member who had been engaged in litigation with Coastal. The court noted that there was a question as to who should capture any upside of the

property after repayment, with interest, to Coastal of the amount of funds embezzled, but the parties did not address this issue in any detail, and the court left the issue for further consideration, if necessary, at trial.

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. The LLC's principal asset was a piece of real estate. Michael executed a note to Richard secured by Michael's LLC interest and by a mortgage on the LLC's real estate. Heartland Bank obtained a judgment against Michael and served on Michael a Citation to Discover Assets. Michael filed bankruptcy, and the bankruptcy court addressed a number of claims asserted by Michael, Richard, the LLC, Heartland, and the Trustee, including a claim by Heartland that it had a valid judgment lien against Michael's membership interest in the LLC. Inasmuch as Heartland had served on Michael a post-judgment Citation to Discover Assets, Heartland relied upon provisions of Illinois law that give rise to a lien on the judgment debtor's property when a judgment creditor properly serves a citation on the judgment debtor. The court commented that no party had referenced the charging order provisions of the Illinois LLC statute, and the court raised *sua sponte* the application of those provisions. Under the charging order provisions, a judgment creditor of an LLC member may obtain a charging order, which constitutes a lien on the judgment debtor's distributional interest, and the charging order is the judgment creditor's "exclusive remedy." The court concluded that this provision could not be interpreted to mean that the charging order was in addition to other remedies, and Heartland thus did not obtain a lien on Michael's interest when it served him with a Citation to Discover Assets. The court disapproved of a proposed compromise between the Trustee and Heartland regarding Heartland's secured status under which Heartland would receive a valid, perfected lien on 80% of the bankruptcy estate's membership interest in the LLC. The court acknowledged that the Trustee was apparently not aware of the charging order provisions when the settlement was reached, but the court stated that it was not bound by the Trustee's mistake of law and that the compromise clearly was well below the lowest point in the range of reasonableness given that the charging order provisions set forth the exclusive remedy for a judgment creditor to obtain and enforce a lien on the economic interest that flows from membership in an LLC.

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

II. Divorce of Member

Appling v. Tatum, 670 S.E.2d 795 (Ga. App. 2008) (holding father's K-1 income from LLC was includable in calculation of gross income for purposes of determining child support notwithstanding father's argument that income was not available to him because it was retained to operate business).

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

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

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

JJ. Receivership

In re Shattuck (Shattuck v. Bondurant), 411 B.R. 378 (10th Cir. (BAP) 2009) (holding bankruptcy court did not have discretion to permit individual receiver, who was not licensed attorney, to appear on behalf of LLC's receivership estate; local district court rule permitting pro se "individual" parties to appear in court did not apply to receiver in representative capacity, and, if such rule permits lay person receiver to represent artificial entity in federal court, it conflicts with law interpreting federal statute and is invalid).

Equity Trust Company v. Cole, 766 N.W.2d 334 (Minn. App. 2009). Investors in a large-scale real estate investment fraud scheme sued numerous LLCs and sought to hold several individuals who allegedly orchestrated the scheme liable as alter egos of the LLCs. The state intervened and secured the appointment of a receiver. Later, the state dismissed its complaint in intervention on the basis that it had fulfilled its obligation to protect the public interest by obtaining injunctions against the individuals involved and securing appointment of a receiver. After dismissing the state's complaint, the district court expanded the receivership to include additional entities that allegedly served as conduits for other receivership entities and ordered the attorney for individual defendants Geoff and Nancy Thompson to relinquish \$750,000 proceeds allegedly belonging to one of the entities. The district court granted default judgments against the entities and also granted the plaintiffs' request to pierce the "corporate" veils to hold the Thompsons liable under the alter ego theory. The court concluded that the district court did not abuse its discretion in piercing the veil. The court also determined that the district court had authority to expand the receivership under the general receivership statute pursuant to which the receiver was appointed and the court's general equity powers.

In re Orchards Village Investments, LLC, 405 B.R. 341 (Bankr. D. Oregon 2009). The court held that a Washington state court receivership proceeding for an Oregon LLC operating an assisted living facility in Washington could not be used to preclude the LLC from seeking federal bankruptcy protection. The receiver had been given broad authority to manage the affairs and operation of the LLC and did not consent to the LLC's bankruptcy filing. The court concluded that, under Oregon law and the LLC's operating agreement, the Chapter 11 proceeding filed by the LLC's manager was ratified by consent resolutions signed on behalf of a majority of the LLC's member ownership units. The court noted that the LLC lender's standing to argue that the LLC failed to meet governance requirements for its bankruptcy filing was questionable, but the receiver, because it acted for the benefit of equity as well as creditor interests, had standing to raise the question of the proper exercise of the LLC's authority. The court rejected the LLC lender's and receiver's request for abstention and dismissal of the bankruptcy, but did not require turnover of the LLC's assets to the LLC as debtor-in-possession in light of evidence of mismanagement of the LLC prior to the receivership. The court commented that the case "includes evidence of the regrettable tendency toward proliferation of 'special purpose entities'" and cited the LLC's handling of its residence agreements and unit ownership records as illustrating the proposition that "[w]hen handled in a sophisticated fashion, they can prove very useful, but handled less artfully, they can create a mess."

Finally, the court denied the LLC's request for use of its cash collateral and left the receiver in place to manage the assets and operations of the LLC pending confirmation of a chapter 11 plan, recognizing that this would require the LLC's equity owners to "pay to play" in bankruptcy court unless and until the LLC was able to get a plan confirmed.

In re NextMedia Investors, LLC, C.A. No. 4067-VCS, 2009 WL 1228665 (Del. Ch. May 6, 2009). The court concluded that the petitioning members were entitled to dissolution of the LLC but the court declined to appoint a liquidating trustee because the LLC agreement provided that the board of managers was authorized to liquidate LLC. If the board of managers did not conduct the liquidation, the Class A members were entitled to appoint a liquidator. Under the LLC agreement, this right was subject to the right of any member or creditor to apply to a court in respect of the dissolution of the LLC, and the court interpreted this language together with Section 18-803 of the Delaware LLC statute to require the petitioners at least to show cause as to why the Class A members should be denied their right to appoint the liquidating trustee.

Kumar v. Kumar, Civil Action No. 1:07CV263-DAS, 2009 WL 902035 (N.D. Miss. March 31, 2009) (exercising court's statutory authority to enforce LLC agreement by injunction or other relief and entering injunction prohibiting loans by LLC, use of LLC's funds for personal purposes, expenditures not related to operation of LLC's hotel, and use of LLC funds for salaries, distributions, or return of capital to members in violation of operating agreement, but concluding that appointment of receiver was not appropriate).

Securities and Exchange Commission v. Byers, No. 08 Civ. 7104(DC), 2009 WL 212928 (S.D.N.Y. Jan. 30, 2009). In this SEC enforcement action, a receiver was appointed for a Virginia LLC that was organized to raise capital to invest in a diamond mine in Namibia. The LLC was managed by another entity, and the receiver assumed control of the manager pursuant to the terms of the receivership order. The LLC's operating agreement provided that the LLC's manager could be removed at any time with cause by the vote of members holding 75% of the preferred interests. One of the investors, individually and on behalf of the preferred members, claimed to have written consents from 88.6% of the preferred members seeking to have the receiver replaced with an entity owned by the investor. The investor asserted that the preferred members did not select the receiver, that the receiver had no experience running a company like the LLC, and that the receiver had no relationship with the people running the diamond mine in which the LLC invested. The investor sought to have the receivership order modified to the extent it prohibited him from replacing the receiver as manager, arguing that a receiver cannot have more authority than the entity over which he assumes control. The investor argued that the operating agreement permitted removal and replacement of the manager, even if the person in control of the manager is a federal receiver. The court rejected this argument because it would render a federal receivership meaningless. According to the investor's reasoning, an entity subject to a receivership could simply vote to have the receiver removed and carry on its business, and, if the investor's argument were correct, the preferred members in this case could vote to replace the receiver with the defendants, who raised millions of dollar that were unaccounted for and were being investigated by the receiver. The court agreed with the SEC that there was good reason to continue the receiver's management of the LLC.

Hotel 71 Mezz Lender LLC v. Falor, 869 N.Y.S.2d 61 (N.Y. App. Div. 1st Dept. 2008). In an action to enforce personal guaranties of the defendants, the plaintiff obtained an ex parte attachment of the defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs and a subsequent order conditionally appointing a receiver for the interests. The appellate court vacated the orders because the res in an attachment proceeding must be within the jurisdiction of the court issuing the attachment. Although the defendants voluntarily submitted to the jurisdiction of any court in New York City pursuant to the terms of the guaranty, and the order of attachment was served on one of the defendants who was in New York temporarily, the court stated that it was undisputed that neither the defendant served with the order nor any of the other nondomiciliary defendants or entities in which they had an attachable interest had any tangible or intangible property in New York. The court stated that an LLC is a hybrid of a corporation and limited partnership and that owners of membership interests not represented by certificates in an LLC should have rights comparable to those of corporate shareholders and limited partners. The court stated that "the situs of shares of a corporation is either 'where the corporation exists' or where the shareholders are domiciled," and the court cited case law holding that "an interest in a limited partnership—as with a corporation—is situated where the partnership is formed and operates." The court rejected the argument in the dissent that the New York court had jurisdiction to order attachment of the interests based on the proposition that the situs of a debt is wherever the debtor can be found. With

respect to the receivership, the court stated that a court should decline to appoint a receiver where a judgment relates strictly to the internal affairs and management of a foreign corporation or LLC because such questions are of local administration and should be relegated to courts of the jurisdiction under the laws of which the corporation or LLC is organized. According to the court, “[i]nstead of appointing a receiver of defendants’ ownership and/or management interests in the foreign entities with the power to assume any management role they may have in those entities and authorizing him to seek the aid of courts of those states in which the real estate is located in executing his duties as receiver, plaintiff, now the judgment creditor, should have been relegated to the states of the companies’ situses where it could have receivers appointed upon a proper showing of necessity.” The court affirmed that part of the trial court’s order restraining the defendants from transferring or otherwise disposing of their assets, including their interests in the nondomiciliary LLCs.

KK. Bankruptcy

In re Saxby’s Coffee Worldwide, LLC (Saxby’s Coffee Worldwide, LLC v. Larson), Bankruptcy No. 09-15898 ELF, Adversary No. 09-0340, 2009 WL 4730238 (Bankr. E.D. Pa. Dec. 4, 2009). In this case, the court issued an injunction to bar actions against the owners of the debtor LLC. At the time of its bankruptcy filing, seven lawsuits were pending against the debtor’s members and entities owned by the debtor’s members. The members filed a motion for preliminary injunction under Section 105 of the Bankruptcy Code to stop the defendants from prosecuting these actions. While generally an automatic stay may not be invoked to protect non-debtors, Section 105 provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Accordingly, the court held that in this case an injunction was warranted to stop actions against members of the LLC because their time, energy, and commitment were necessary for the formulation of a reorganization plan, which would be jeopardized if the debtor’s members had to defend themselves from pending lawsuits. By contrast, the court refused to issue an injunction with respect to actions against the entities owned by the debtor’s members because these entities did not play a significant role in the operation of the debtor.

In re Goreham, No. BK-09-80917-TLS, 2009 WL 3018648 (Bankr. D. Neb. Sept. 16, 2009). The trustee unsuccessfully attempted to avoid a transfer of a non-debtor LLC’s property under Section 547(b) of the Bankruptcy Code. The debtor was the sole member of an LLC that owned a piece of real estate. Within ninety days before the bankruptcy filing, the debtor caused the LLC to transfer the real estate to a corporation that belonged to the debtor’s son. The court refused to set aside this transfer, holding that although the debtor’s interest in the LLC was his personal property and thus property of his bankruptcy estate, the LLC’s underlying property was not. The transfer made by the LLC could not be avoided as a preferential transfer under Section 547(b) because it was not attributable to the debtor.

In re Carr & Porter, LLC (Smith v. Porter), 416 B.R. 239 (Bankr. E.D. Va. 2009). An attorney, Porter, who had been the sole owner of the debtor LLC law firm, sold his interest back to the LLC. The debtor LLC agreed to pay Porter \$1 million in multiple payments and accordingly made regular installment payments to Porter until the LLC filed for bankruptcy. The trustee claimed that these payments were transfers to an insider in violation of Section 547(b) of the Bankruptcy Code and that Porter was required to turn over assets he received from the debtor. The court held that as a former member, Porter was not an insider within the meaning of Section 547(b) and granted summary judgment in his favor. Even though, after the sale of his interest, Porter remained an important attorney with the debtor, was responsible for the debtor’s most significant client, and helped obtain a loan for the debtor, Porter relinquished all of his executive authority and no longer functioned in a managerial capacity. Therefore, payments made to Porter were not transfers to an insider and did not have to be turned over to the trustee. Interestingly, the trustee failed to pursue what should have been a more viable claim – that the debt was incurred and/or the payments made by the LLC “in respect of” an LLC interest at a time when such distributions were wrongful under Virginia’s LLC statute.

In re General Growth Properties, Inc., 409 B.R. 43 (Bankr. S.D.N.Y. 2009). The court declined to dismiss the bankruptcy cases filed by numerous direct or indirect subsidiaries of General Growth Properties, Inc. (“GGP”), a publicly traded REIT and ultimate parent of approximately 750 wholly-owned debtor and non-debtor subsidiaries, joint venture subsidiaries, and affiliates (the “GGP Group”). The GGP Group was engaged primarily in shopping center ownership and management. Creditors of certain subsidiaries structured as special purpose entities (“SPEs”) sought to dismiss the bankruptcies filed by these SPEs on bad faith grounds. Most of the SPEs for which dismissal was sought

were structured as LLCs. The court described the financing arrangements in which the SPEs were involved and typical SPE documentation, including provisions regarding independent managers who were required to approve a bankruptcy filing by the SPE. The court examined the GGP Group's financial difficulties and the circumstances surrounding the filing of the bankruptcies and concluded that the record did not support dismissal of the SPE bankruptcies on bad faith grounds. The court relied upon precedent requiring a showing of both objective futility and subjective bad faith in order to dismiss on bad faith grounds, and the court concluded that neither had been established.

In support of their contention that objective bad faith was shown by premature Chapter 11 filings on the part of the SPEs, the creditors relied on cases in which Chapter 11 petitions were dismissed because the debtors were not in financial distress at the time of filing, the prospect of liability was speculative, and the evidence indicated the filing was designed to obtain a litigation advantage. The court reviewed the evidence regarding the debtors' financial distress and concluded that the record demonstrated that the debtors were in varying degrees of financial distress. The court concluded that it was not required to examine the issue of good faith as if each debtor were wholly independent, and the court rejected the creditors' argument that the SPE or bankruptcy-remote structure of the project-level debtors precluded consideration of the financial problems of the GGP Group. The court stated that the court's approach need not sacrifice the interests of the subsidiaries or their creditors in favor of the parents and their creditors, but simply included consideration of the interests of the group as well as the individual debtor.

The court discussed the "independent manager" provisions of the operating agreements of the SPEs, which required unanimous consent of the managers before an SPE could file bankruptcy. The operating agreements provided that, to the extent permitted by law, the independent managers shall consider only the interests of the entity, including its creditors, in voting on bankruptcy, and further provided that the independent managers shall have a fiduciary duty of loyalty and care similar to that of a director under the Delaware General Corporation Law. The court stated that the drafters of the operating agreements may have attempted to create impediments to a bankruptcy filing, but Delaware law provides that directors of a solvent corporation are required to consider the interests of shareholders in exercising their fiduciary duties. The court pointed out that the *Gheewalla* decision of the Delaware Supreme Court rejected the proposition that directors of a Delaware corporation have duties to creditors when operating in the zone of insolvency and held that directors of a solvent corporation must continue to discharge their duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholders. Because there was no contention that the SPEs were insolvent, the creditors were not assisted by Delaware law in their contention that the independent managers should have considered only the interests of the secured creditor when making their decisions to file the Chapter 11 petitions. The court stated that creditors were mistaken if they believed that the independent managers could serve on the board solely for the purpose of voting "no" to a bankruptcy filing based on the desires of a secured creditor because the Delaware cases stress that directors and managers owe their duties to the corporation and, ordinarily, the shareholders. Seen from the perspective of the GGP Group, the court found the filings were unquestionably not premature.

The court rejected the argument that the discharge and replacement of the original independent managers of some of the SPEs before the decision to file bankruptcy involved subjective bad faith. The operating agreements of the SPEs permitted the independent managers to be supplied by a "nationally recognized company that provides professional independent directors, managers and trustees," and Corporation Service Company ("CSC") supplied at least two independent managers who served on the boards of over 150 SPEs. According to the court, these managers did not appear to have any expertise in the real estate business, and some of the lenders thought that the independent managers were obligated to protect their interests alone. The CSC-appointed managers were terminated from the SPE boards prior to the bankruptcy filings and did not learn of their termination until after the filings. Testimony for the SPEs explained that the decision to replace the independent managers was based on a desire by the SPE stockholders and members to have the potential bankruptcies of the SPEs assessed by independent managers with known experience in restructuring environments and complex business decisions. The court concluded that the record did not lead to the conclusion that the admittedly surreptitious firing of independent managers constituted subjective bad faith on the part of the SPEs requiring dismissal of the cases. The organizational documents did not prohibit the action taken or purport to interfere with the rights of the owners to appoint independent managers. Further, the court stressed that, as discussed earlier in the opinion, the independent managers did not have a duty to prevent the SPEs from filing a bankruptcy case. Rather, as managers of solvent companies charged with the duties of directors of Delaware corporations, they had a duty to act in the interests of "the corporation and its shareholders." The court acknowledged that the creditors had been inconvenienced by the Chapter 11 filings, but rejected inconvenience as a reason to dismiss. The court stated that the fundamental protections negotiated by the creditors and the SPE structures would remain in place during the Chapter

11 cases, including the protection against substantive consolidation. Acknowledging that a principal goal of the SPE structure is to guard against substantive consolidation, the court stated that the question of substantive consolidation was entirely different from the issue of whether the board of a debtor that is part of a corporate group may consider the interests of the group along with the interests of the individual debtor when making a decision to file a bankruptcy case. The court stated that nothing in its opinion implied that the assets and liabilities of any of the SPEs could properly be substantively consolidated with those of any other entity.

In re New Towne Development, LLC, 410 B.R. 225 (Bankr. M.D. La. 2009) (refusing to confirm plan that released non-party debtors notwithstanding trustee's claim that releases would protect debtor LLC from members' indemnity claims under LLC's operating agreement and Louisiana law and noting that certain claims in state court may not belong to debtor because Louisiana law recognizes that members may urge claims against other members for breach of fiduciary duties).

In re Aldape Telford Glazier, Inc., 410 B.R. 60 (Bankr. D. Idaho 2009). The sole member of two dissolved LLCs filed bankruptcy under Chapter 7 and listed the assets of the LLCs as its own. The court discussed the dissolution and winding up provisions of the Idaho LLC statute (applying the LLC statute in effect prior to adoption of the Idaho's Uniform Limited Liability Company Act in 2008 because the LLCs were formed prior to 2008 and had not elected to be governed by the new statute) and concluded that the sole member of the two dissolved LLCs could not treat the assets of the dissolved LLCs as its own prior to completion of the winding up process. The court found that the bankruptcy petition should be dismissed because it improperly combined the financial affairs of separate legal entities and constituted an impermissible "joint" petition. The debtor argued that the trustee could pursue substantive consolidation of the debtor and the two LLCs, but the court pointed out that the prerequisites for application of the theory had not been shown, and the court considered it unreasonable to require the trustee to put forth the effort to initiate and prosecute a proceeding to achieve substantive consolidation.

In re Greeson, No. 09-11328, 2009 WL 1542770 (Bankr. D. Kan. June 2, 2009). The debtor was the sole member of an LLC engaged in excavation and dirt work. After the LLC's lender repossessed the LLC's truck, the sole member dissolved the LLC and the member's lawyer filed a notice of cancellation of the articles of organization with the Kansas Secretary of State. The member then commenced this bankruptcy case, taking the position that the assets of the dissolved LLC became the member's assets, subject to the liens of the lender and the IRS. After the court questioned the validity of that position, the member executed documents pursuant to which the LLC transferred its equipment and accounts receivable to the member, subject to liens of the lender and the IRS. The member also assumed the debts of the LLC. The member sought to continue to operate the business of the LLC and to utilize its pre-petition accounts receivable. The court first addressed whether any of the LLC's property was property of the member's estate. The court found that the LLC was properly organized, noting that the absence of an operating agreement did not invalidate the validity of the separate entity status of the LLC. Having determined that the LLC was legally organized, the court discussed the status of the LLC's assets in light of the member's attempt to dissolve the LLC. The court described the statutory requirements in a winding up of a dissolved LLC and pointed out that the Kansas LLC statute requires a dissolved LLC to pay or make reasonable provision for payment of all claims and liabilities before distributing assets to the members. The lender relied upon the trust fund doctrine for the proposition that the creditors retained an equitable interest in the LLC's property and the member's interest in the LLC's property was thus not property of the estate. The court concluded, however, that the transferred property was property of the member's estate based upon Sections 541 and 1306 of the Bankruptcy Code. Section 541 provides that all legal and equitable interests of the debtor on the date of filing become property of the estate, and Section 1306 expands the Chapter 13 estate to include all property the debtor acquires post-petition. The court stated that the member retained an interest in the property, albeit an interest encumbered by prior liens and claims of creditors. The court characterized the transfer of the LLC's property to the member as violating the pertinent provisions of the LLC statute, but stated that the bare act of transfer placed the property within the estate. Given that the lender and the IRS could vindicate their rights against the assets in the bankruptcy process, the court concluded that the trust fund doctrine did not apply. The court distinguished the situation with respect to the truck which the member sought to reclaim. The truck was titled in the LLC with the lender's lien noted on the title, and the transfer of ownership of the vehicle did not comply with the Kansas certificate of title statute. Thus, the court concluded that the title to the truck could not have been transferred without the lender's consent and remained property of the LLC rather than the member's bankruptcy estate. Having determined that the cash collateral was at least nominal

property of the debtor's estate, the court addressed the debtor's request to use the cash collateral. The court granted that request in part, subject to certain terms and conditions.

Yessenow v. Hudson, No. 2:08-CV-353 PPS, 2009 WL 1543495 (N.D. Ind. June 2, 2009) (analyzing whether breach of fiduciary duty and unjust enrichment claims against LLC member were direct or derivative because LLC was in bankruptcy proceedings and derivative claim on its behalf would be asset of bankruptcy estate that must be asserted in bankruptcy court and finding court had insufficient information to conclude whether claims were derivative).

In re 210 West Liberty Holdings, LLC, No. 08-677, 2009 WL 1522047 (Bankr. N.D. W. Va. May 29, 2009). The court examined the terms of an LLC's operating agreement and concluded that the LLC's bankruptcy filing was authorized under either the terms of the original operating agreement or an amended operating agreement executed a year later. The court noted that the West Virginia LLC statute governs relations among the members, managers, and LLC except to the extent the operating agreement provides otherwise, and the West Virginia LLC statute does not specifically address the filing of an LLC's bankruptcy petition or list the matter among the non-waivable provisions. The amended operating agreement gave a specified member the sole authority to file a bankruptcy petition on behalf of the LLC, and that member filed the LLC's Chapter 11 petition. Poe, an individual who invested in the LLC after its formation and claimed to be a member of the LLC, argued that the filing of the LLC's bankruptcy petition was unauthorized because the amended operating agreement was invalid, and Poe, as a managing member, did not consent to the bankruptcy filing. Assuming, without deciding, that Poe was a managing member of the LLC and that the original operating agreement still governed the LLC, the court found that the bankruptcy filing was authorized. When the original operating agreement was executed, the LLC had only four members: Campbell, Foster, Briel, and Athey. Each had a 25% membership interest, and each was a manager, with Campbell named as the tie-breaking vote. The operating agreement specified certain matters requiring a unanimous vote and provided that all other decisions would be made by a majority vote, with each member having a vote in proportion to his or her membership interest. Bankruptcy was not listed in the matters requiring a unanimous vote. Before the bankruptcy filing, Athey and Briel resigned as managing members and were dissociated from the LLC. Thus, under Poe's theory, the only managing members were Campbell, Foster, and Poe. The court concluded that Poe's negative vote would not be sufficient to defeat the majority vote necessary to authorize a bankruptcy filing because: (1) both Campbell and Foster authorized the filing, (2) Campbell and Foster had a minimum of 50% membership interest in the LLC, and (3) the original operating agreement designated Campbell as the tie-breaking vote.

In re Orchards Village Investments, LLC, 405 B.R. 341 (Bankr. D. Oregon 2009). The court held that a Washington state court receivership proceeding for an Oregon LLC operating an assisted living facility in Washington could not be used to preclude the LLC from seeking federal bankruptcy protection. The receiver had been given broad authority to manage the affairs and operation of the LLC and did not consent to the LLC's bankruptcy filing. The court concluded that, under Oregon law and the LLC's operating agreement, the Chapter 11 proceeding filed by the LLC's manager was ratified by consent resolutions signed on behalf of a majority of the LLC's member ownership units. The court noted that the LLC lender's standing to argue that the LLC failed to meet governance requirements for its bankruptcy filing was questionable, but the receiver, because it acted for the benefit of equity as well as creditor interests, had standing to raise the question of the proper exercise of the LLC's authority. The court rejected the LLC lender's and receiver's request for abstention and dismissal of the bankruptcy, but did not require turnover of the LLC's assets to the LLC as debtor-in-possession in light of evidence of mismanagement of the LLC prior to the receivership. The court commented that the case "includes evidence of the regrettable tendency toward proliferation of 'special purpose entities'" and cited the LLC's handling of its residence agreements and unit ownership records as illustrating the proposition that "[w]hen handled in a sophisticated fashion, they can prove very useful, but handled less artfully, they can create a mess." Finally, the court denied the LLC's request for use of its cash collateral and left the receiver in place to manage the assets and operations of the LLC pending confirmation of a chapter 11 plan, recognizing that this would require the LLC's equity owners to "pay to play" in bankruptcy court unless and until the LLC was able to get a plan confirmed.

In re New Towne Development, LLC, 404 B.R. 140 (M.D. La. 2009) (denying debtor LLC's motion to dismiss or convert Chapter 11 case due to "unusual circumstances" and finding "cause" to appoint trustee due to membership dispute that effectively paralyzed management and required neutral third party to operate LLC).

In re Meeks (Ailinani v. Meeks), Bankruptcy No. 08-40854, Adversary No. 08-04085, 2009 WL 1391706 (Bankr. S.D. Ill. May 14, 2009) (discussing whether bankrupt member owed fiduciary duty to fellow member for purposes of exception to discharge for debt arising from defalcation in fiduciary capacity and concluding that whether relationship of inequality existed between members and when that relationship may have begun and ended were material questions of fact).

In re The Heritage Organization, L.L.C. (Faulkner v. Kornman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2009 WL 1349209 (Bankr. N.D. Tex. May 11, 2009). In a very lengthy and detailed opinion, the court concluded that \$46 million in distributions by the debtor, The Heritage Organization, L.L.C. (“Heritage”), to its members, were recoverable by the trustee under the Bankruptcy Code and the Texas Uniform Fraudulent Transfer Act (“TUFTA”). Heritage was a Delaware LLC that, prior to its bankruptcy filing, provided tax planning strategies to extremely wealthy individuals. The trustee asserted a number of claims against various individuals and entities related to Heritage, but the largest claims sought avoidance of distributions by Heritage to insiders between April 2001 and February 2003 in the aggregate amount of \$46 million. The trustee sought recovery from three Delaware entities that were members of Heritage, and from Kornman, the individual who ultimately controlled Heritage and its members. The issues addressed by the court in its analysis were the existence of a triggering creditor and standing of the trustee; the governing law and applicable limitations period; the burden of proof and whether the triggering creditor must be the creditor who was hindered, delayed, or defrauded; the evidence of fraudulent intent; alleged legitimate business purposes for the distributions; and the amount of avoidable transfers and from whom they were recoverable.

The defendants argued that the three-year statute of limitations applicable to an impermissible distribution under the Delaware Limited Liability Company Act (“DLLCA”) applied to the trustee’s claim to recover the distributions made by Heritage since it was a Delaware LLC. The court held that the Delaware legislature could not limit the reach of the Texas Uniform Fraudulent Transfer Act (“TUFTA”), which contains a four-year statute of repose applicable to the fraudulent transfer claims asserted by the trustee. The court stated that a fraudulent transfer claim sounds in tort, and the court thus applied the most significant relationship test called for under Texas choice-of-law rules. The only connection between the trustee’s fraudulent transfer claims and Delaware was the fact that Heritage and its members were Delaware entities. Heritage and its members were headquartered in Texas and controlled by a Texas resident, and the decision making took place in Texas. Distribution checks were drawn on and deposited in Texas banks. Furthermore, the court stated that the internal affairs rule did not apply because fraudulent transfer claims like those at issue involve the rights of creditors rather than internal corporate governance issues that are the subject of the internal affairs doctrine. The trustee was not challenging Heritage’s ability to properly pay distributions to its members as a matter of corporate law or seeking to hold the members liable for Heritage’s debts, which is the other purported statutory basis for the application of Delaware law. Thus, the DLLCA three-year limitations period was not applicable to the trustee’s TUFTA claims.

The court discussed direct evidence of fraudulent intent in the form of evidence that the distributions were made to keep an investor from pursuing recovery of its investment in Heritage, and the court discussed circumstantial evidence relating to numerous badges of fraud. The badges of fraud or indirect evidence included the fact that the transfers were made to insiders (the members of Heritage), that there was inadequate consideration, that Heritage was threatened with suit, that there was a cumulative course of conduct giving rise to an inference of fraud, and a number of other indicia of fraudulent intent. With respect to the issue of whether Heritage received reasonably equivalent value for the distributions, the defendants argued that there was an obligation under the operating agreement to distribute “excess cash” and that payment of this antecedent debt supplied consideration. The court rejected this argument on the basis that the obligation was illusory because Kornman had absolute discretion to determine whether there was excess cash. Furthermore, even assuming there was an obligation, the court pointed out that TUFTA addressed the avoidance of both obligations and transfers, and the obligation itself would be avoidable because Heritage did not receive consideration for the obligation. The obligation to distribute excess cash was also offered as an alleged legitimate business purpose for the distributions, but the court rejected the argument and stated that Kornman was not consistent or systematic about determining distributions, and appeared to be concocting a legitimate business purpose from a provision of the operating agreement that he ignored in practice. The defendants also argued that the distributions were needed to facilitate payment of taxes by the members of Heritage since it was a pass-through entity, but the court again found this argument was concocted after the fact to justify the distributions. There was no evidence that the members actually needed the money to pay taxes, and there was no evidence the amounts had anything to do with the members’ actual or potential tax

liability. The court pointed out that the distributions far exceeded the entire taxable income for Heritage, let alone the amount of taxes that would be due from a member, in each of the years in issue.

The court determined the total amount of recoverable distributions to the members was \$46 million, which included \$4 million in cash in a safety deposit box that was in issue. In addition to determining that the transfers were recoverable from Heritage's members, the court analyzed whether any amounts could be recovered from Kornman under Section 550(a) of the Bankruptcy Code as an entity for whose benefit such transfer was made or an immediate or mediate transferee of an initial transferee. The court determined that Kornman was not an entity for whose benefit the transfers were made, but the court determined that he was a subsequent transferee of over \$11 million distributed to members of Heritage and then distributed or loaned to Kornman.

The court also concluded that certain transfers to other Kornman-controlled entities within 90 days preceding Heritage's bankruptcy filing were preferential transfers under Section 547(b) of the Bankruptcy Code.

In re Hughes; In re Weber (The Business Backer, LLC v. Weber), Bankruptcy Nos. 08-1125, 08-1228, Adversary No. 08-78, 08-77 (Bankr. N.D. W. Va. April 20, 2009). Debtor Hughes was the sole owner of an LLC, and debtor Weber was a manager. In 2008, the LLC entered a financing agreement in which the debtors, on behalf of the LLC, represented that the LLC was in compliance with all laws and was a validly existing business entity in good standing under the laws of West Virginia. In 2007, the LLC's status as an LLC had been revoked due to its failure to file an annual report. In January 2009, the LLC was reinstated. The creditor objected to the debtor's discharge of obligations under the financing agreement relying on the exception to discharge for a debt for money obtained by false pretenses, a false representation, or actual fraud, or a debt for money obtained by use of a statement in writing that was materially false and made by the debtor with intent to deceive. The creditor relied in part on the false representations about the LLC's compliance with laws, existence, and good standing. The court concluded that the representations were not reckless or knowingly false based on testimony by the debtors that they never received a renewal notice or notice of revocation from the State and that they believed the LLC was a validly existing LLC in good standing and were unaware of the revocation of its status at the time they signed the agreement. The creditor also objected to the debtors' discharge under the exception relating to a debt arising out of fraud or defalcation while acting in a fiduciary capacity. The creditor argued that the debtors engaged in acts inappropriate for the winding up of the LLC and were liable for breach of a fiduciary duty to the creditor based on a provision of the West Virginia LLC statute providing that a member or manager who, with knowledge of the dissolution of the LLC, subjects the LLC to liability by an act not appropriate for winding up is liable to the LLC for any damage caused. The court concluded that the debtors' relationship with the creditor under the financing agreement did not constitute an express or technical trust as required under federal common law for a fiduciary relationship. Moreover, the court stated that the statutory source of the alleged fiduciary duty was only applicable in the context of a dissolution and winding up, and the creditor had made no showing that the LLC was in the process of dissolving or winding up. As of January 2009, it was still a licensed LLC, and, although it had liquidated two of its business operations, it was still poised to continue business operations in the future.

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 803558 (Bankr. C.D. Ill. March 19, 2009). The LaHood brothers, Michael and Richard, were each 50% members of an Illinois LLC. The LLC's principal asset was a piece of real estate. Michael executed a note to Richard secured by Michael's LLC interest and by a mortgage on the LLC's real estate. Heartland Bank obtained a judgment against Michael and served on Michael a Citation to Discover Assets. Michael filed bankruptcy, and Richard, without seeking relief from the stay, declared the LLC dissolved, asserting that Michael's bankruptcy terminated his membership. Richard elected not to continue the business and distributed the real estate in equal shares to himself and Michael by quit claim deeds from the LLC. Richard then sought relief from the stay to foreclose the mortgage against the real estate. In this opinion, the bankruptcy court addressed a number of claims asserted by Michael, Richard, the LLC, Heartland, and the Trustee.

First, the court rejected Richard's argument that the mortgage in favor of Richard merged into his interest in the real estate acquired via the quit claim deed from the LLC and thereby caused the entire debt to burden Michael's (i.e., the bankruptcy estate's) interest. The court found this argument flawed because a mortgagee must receive full title to the property for the doctrine of merger to apply, and the doctrine's effect is to extinguish or cancel indebtedness rather than shift indebtedness to a partial interest in the mortgaged property.

The court next concluded that the LLC's distribution of the real estate to Richard and Michael was invalid. Issues regarding whether the non-economic interest of Michael became property of the bankruptcy estate or whether

Richard had the right to unilaterally wind up the LLC were mooted by the fact that Richard's actions with respect to the real estate were invalid under the Illinois LLC statute and the LLC's operating agreement. The court relied upon the winding up provisions of the Illinois LLC statute requiring that the LLC's assets be applied to discharge the claims of creditors, including members who are creditors, before any surplus is distributed. The LLC's operating agreement incorporated the rule in the statute and did not make provision for distributions of encumbered assets. The court thus concluded that the distribution of the real estate violated the statute and the operating agreement and was void. The court also concluded that the distribution of the real estate violated the automatic stay in Michael's bankruptcy because the purpose of the deeds was to effect a merger so that the mortgage would be payable solely from Michael's interest in the real estate. On this additional basis, the court concluded that the deeds were void.

The court next analyzed the Illinois LLC statute and the operating agreement and concluded that Michael's dissociation by filing for bankruptcy was not wrongful. Under the Illinois LLC statute, a dissociation is wrongful only if it is in breach of an express provision of the operating agreement. The LLC and Richard argued that Michael's filing bankruptcy without giving written notice breached provisions of the agreement requiring written notice before a member transfers any interest in the LLC. Examining various provisions of the operating agreement, the court concluded that the provisions requiring notice of a transfer applied to a voluntary transfer and that transfers by operation of law were governed by a different provision that did not contain a notice provision. The court also rejected an argument that Michael's dissociation was wrongful because Richard did not consent to the Trustee's becoming a substituted member. The court stated that the Trustee was not an assignee under the provisions of the operating agreement relied upon by Richard, that bankruptcy was expressly addressed under provisions of the operating agreement contemplating the event of a member's bankruptcy, and that Michael's dissociation by filing bankruptcy did not breach any express provision of the operating agreement.

The court next addressed Heartland's claim that it had a valid judgment lien against Michael's membership interest in the LLC. Inasmuch as Heartland had served on Michael a post-judgment Citation to Discover Assets, Heartland relied upon provisions of Illinois law that give rise to a lien on the judgment debtor's property when a judgment creditor properly serves a citation on the judgment debtor. The court commented that no party had referenced the charging order provisions of the Illinois LLC statute, and the court raised *sua sponte* the application of those provisions. Under the charging order provisions, a judgment creditor of an LLC member may obtain a charging order, which constitutes a lien on the judgment debtor's distributional interest, and the charging order is the judgment creditor's "exclusive remedy." The court concluded that this provision could not be interpreted to mean that the charging order was in addition to other remedies, and Heartland thus did not obtain a lien on Michael's interest when it served him with a Citation to Discover Assets. The court disapproved of a proposed compromise between the Trustee and Heartland regarding Heartland's secured status under which Heartland would receive a valid, perfected lien on 80% of the bankruptcy estate's membership interest in the LLC. The court acknowledged that the Trustee was apparently not aware of the charging order provisions when the settlement was reached, but the court stated that it was not bound by the Trustee's mistake of law and that the compromise clearly was well below the lowest point in the range of reasonableness given that the charging order provisions set forth the exclusive remedy for a judgment creditor to obtain and enforce a lien on the economic interest that flows from membership in an LLC.

The court concluded by pointing out that the Trustee was free to seek judicial supervision of the liquidation and distribution of the LLC's assets based on a provision of the Illinois LLC statute giving a transferee standing to apply for judicial supervision of winding up on good cause shown. The court characterized the winding up process as contemplating the sale of the LLC's real estate, payment of the debts, including the mortgage and any taxes, and equal distribution of the proceeds to Richard and the bankruptcy estate. The court stated that the winding up process could be handled consensually, but that either Richard or the Trustee could seek judicial supervision if they could not agree on the winding up process.

In re Harder (Harder v. Premierwest Bank), 413 B.R. 827 (Bankr. D. Or. 2009). The debtor, Harder, owned interests in hundreds of single purpose LLCs formed to own or operate assisted living facilities. Harder sought injunctive relief against secured lenders of the LLCs in order to facilitate his successful reorganization. The secured lenders opposed the request, relying on the fact that Harder did not own the assisted living facilities because each facility was owned by a separate legal entity. The court agreed, noting that the membership interests owned by Harder were defined as personal property under the Oregon LLC statute and that the statute explicitly provides that a member is not a co-owner of and has no interest in specific LLC property. Further, Harder had assigned his interests in the LLCs to a workout specialist; therefore, the secured lenders argued that not even Harder's interests in the LLCs were part of his

bankruptcy estate. Again, the court agreed. In sum, the court stated that Harder chose to conduct his investment affairs through hundreds of LLCs, which were separate legal entities under state law and the Bankruptcy Code. The property of the LLCs was not property of the bankruptcy estate. Harder argued that the restructuring of the LLCs was in effect a restructuring of his personal interests in his global business affairs, but the court pointed out that he transferred away all of his interests in the entities on the eve of his bankruptcy petition. The court stated that it must follow the Bankruptcy Code although it understood the appeal of bringing all the LLCs under the protection of the bankruptcy court and the hardship the court's ruling may cause to other investors in the LLCs and the individual entities.

In re Oasis, LLC, No. 08-31522 TEC, 2009 WL 5753355 (Bankr. N.D. Cal. Nov. 7, 2008) (expressing view that 50% member did not have authority to file bankruptcy petition where operating agreement provided that LLC was managed by members and "all decisions" must be approved by members holding majority of outstanding interests, and stating that it was doubtful that post-petition email from other member constituted unanimous vote required to amend operating agreement, nor did it evidence majority approval of the bankruptcy because it could not serve as pre-petition formal vote and interpreting email as ratification would contradict other member's sworn statement that he did not consent to bankruptcy).

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

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

In re Martinez (Humphries v. Martinez), Bankruptcy No. 08-41344-13-abf, Adversary No. 08-4111-13-abf, 2008 WL 5157707 (Bankr. W.D. Mo. Aug 1, 2008). The plaintiff and the debtor formed an LLC governed by an oral agreement. In a prior state court action, the court determined that a written "Partnership Agreement" that was never signed accurately reflected the parties' agreement. The parties had discussions about buying each other out, but a buy-out was not consummated, and the LLC was never dissolved. The claim in this case revolved around the debtor's withdrawal

of funds from the LLC's account without consent or authorization of the plaintiff. In a state court action, the court found the debtor liable to the plaintiff and the LLC, and the plaintiff sought to have the debt related to the withdrawal of the funds declared nondischargeable on the basis that it was a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The court stated that the plaintiff was not entitled to the relief requested because the funds taken belonged to the LLC rather than the plaintiff. However, the court proceeded to consider whether there was a fiduciary relationship between the debtor and the plaintiff. The court explained that a fiduciary relationship for purposes of the non-dischargeability provision is more narrowly defined than under general common law and requires a technical or express trust. The court stated that nothing in the parties' agreement imposed any fiduciary duty on the debtor as to LLC funds. The agreement merely provided for control and management of the LLC to be split between the parties and for adequate accounting records to be maintained. Because the agreement did not create an express or technical trust, the court stated that the LLC would not be entitled to relief for fraud or defalcation in a fiduciary capacity even if it were a party.

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

LL. Fraudulent Transfer

Labbe v. Carusone, 974 A.2d 738 (Conn. App. 2009) (affirming trial court's judgment that plaintiff failed to prove fraudulent transfer of LLC's property to defendant, LLC's former member, where defendant did not own property on date plaintiff was injured, did not have any involvement with LLC until he conveyed property to himself, transferred property to himself in accordance with agreement with LLC, and property at time of transfer had zero equity).

In re The Heritage Organization, L.L.C. (Faulkner v. Kornman), Bankruptcy No. 04-35574-BJH-11, Adversary No. 06-3377-BJH, 2009 WL 1349209 (Bankr. N.D. Tex. May 11, 2009). In a very lengthy and detailed opinion, the court concluded that \$46 million in distributions by the debtor, The Heritage Organization, L.L.C. ("Heritage"), to its members, were recoverable by the trustee under the Bankruptcy Code and the Texas Uniform Fraudulent Transfer Act ("TUFTA"). Heritage was a Delaware LLC that, prior to its bankruptcy filing, provided tax planning strategies to extremely wealthy individuals. The trustee asserted a number of claims against various individuals and entities related to Heritage, but the largest claims sought avoidance of distributions by Heritage to insiders between April 2001 and February 2003 in the aggregate amount of \$46 million. The trustee sought recovery from three Delaware entities that were members of Heritage, and from Kornman, the individual who ultimately controlled Heritage and its members. The issues addressed by the court in its analysis were the existence of a triggering creditor and standing of the trustee; the governing law and applicable limitations period; the burden of proof and whether the triggering creditor must be the creditor who was hindered, delayed, or defrauded; the evidence of fraudulent intent; alleged legitimate business purposes for the distributions; and the amount of avoidable transfers and from whom they were recoverable.

The defendants argued that the three-year statute of limitations applicable to an impermissible distribution under the Delaware Limited Liability Company Act ("DLLCA") applied to the trustee's claim to recover the distributions made by Heritage since it was a Delaware LLC. The court held that the Delaware legislature could not limit the reach of the Texas Uniform Fraudulent Transfer Act ("TUFTA"), which contains a four-year statute of repose applicable to the fraudulent transfer claims asserted by the trustee. The court stated that a fraudulent transfer claim sounds in tort, and the court thus applied the most significant relationship test called for under Texas choice-of-law rules. The only connection between the trustee's fraudulent transfer claims and Delaware was the fact that Heritage and its members were Delaware entities. Heritage and its members were headquartered in Texas and controlled by a Texas resident, and the decision making took place in Texas. Distribution checks were drawn on and deposited in Texas banks. Furthermore, the court stated that the internal affairs rule did not apply because fraudulent transfer claims like those at issue involve the rights of creditors rather than internal corporate governance issues that are the subject of the internal affairs doctrine. The trustee was not challenging Heritage's ability to properly pay distributions to its members as a matter of corporate law or seeking to hold the members liable for Heritage's debts, which is the other purported statutory basis for the application of Delaware law. Thus, the DLLCA three-year limitations period was not applicable to the trustee's TUFTA claims.

The court discussed direct evidence of fraudulent intent in the form of evidence that the distributions were made to keep an investor from pursuing recovery of its investment in Heritage, and the court discussed circumstantial evidence relating to numerous badges of fraud. The badges of fraud or indirect evidence included the fact that the transfers were made to insiders (the members of Heritage), that there was inadequate consideration, that Heritage was threatened with suit, that there was a cumulative course of conduct giving rise to an inference of fraud, and a number of other indicia of fraudulent intent. With respect to the issue of whether Heritage received reasonably equivalent value for the distributions, the defendants argued that there was an obligation under the operating agreement to distribute “excess cash” and that payment of this antecedent debt supplied consideration. The court rejected this argument on the basis that the obligation was illusory because Kornman had absolute discretion to determine whether there was excess cash. Furthermore, even assuming there was an obligation, the court pointed out that TUFTA addressed the avoidance of both obligations and transfers, and the obligation itself would be avoidable because Heritage did not receive consideration for the obligation. The obligation to distribute excess cash was also offered as an alleged legitimate business purpose for the distributions, but the court rejected the argument and stated that Kornman was not consistent or systematic about determining distributions, and appeared to be concocting a legitimate business purpose from a provision of the operating agreement that he ignored in practice. The defendants also argued that the distributions were needed to facilitate payment of taxes by the members of Heritage since it was a pass-through entity, but the court again found this argument was concocted after the fact to justify the distributions. There was no evidence that the members actually needed the money to pay taxes, and there was no evidence the amounts had anything to do with the members’ actual or potential tax liability. The court pointed out that the distributions far exceeded the entire taxable income for Heritage, let alone the amount of taxes that would be due from a member, in each of the years in issue.

The court determined the total amount of recoverable distributions to the members was \$46 million, which included \$4 million in cash in a safety deposit box that was in issue. In addition to determining that the transfers were recoverable from Heritage’s members, the court analyzed whether any amounts could be recovered from Kornman under Section 550(a) of the Bankruptcy Code as an entity for whose benefit such transfer was made or an immediate or mediate transferee of an initial transferee. The court determined that Kornman was not an entity for whose benefit the transfers were made, but the court determined that he was a subsequent transferee of over \$11 million distributed to members of Heritage and then distributed or loaned to Kornman.

Collier v. Greenbrier Developers, LLC, No. E2008-01601-COA-R3-CV, 2009 WL 1026025 (Tenn. Ct. App. April 16, 2009). Collier, the sole member of a Tennessee LLC, signed a contract to purchase real property and assigned the contract to the LLC, which purchased the property. When the LLC defaulted on payment of the debt on the property, foreclosure proceedings were commenced. The foreclosure sales were adjourned based on an extension agreement and the LLC’s execution of quit claims deeds to the property. The quit claim deeds were held in escrow for a period of time pending payment of the indebtedness, but the payment was not made, and the deeds were recorded. The LLC’s sole member filed suit to avoid the deeds under the Uniform Fraudulent Transfer Act. The member claimed that he was a creditor of the LLC based on loans he made to the LLC, and he argued that the LLC did not receive reasonably equivalent value for the deeded real property and that the LLC was rendered insolvent by the transfer. The issue on appeal was whether the member was in privity with the LLC and thus bound by the transfer of the LLC’s property under the quit claim deeds. The court rejected the argument that the member’s sole membership in and of itself constituted privity. The court referred to Tennessee case law establishing the separate legal existence of a corporation and its shareholders, officers, directors, or affiliate corporations, and noted that an LLC is a form of legal entity with attributes of both a corporation and a partnership, though formally not characterized as either one. The court also noted that an LLC has a separate existence from its members and managers and may only appear in court through counsel. The court stated that Tennessee courts have not specifically addressed whether a single member LLC and its member are in privity, but cited various provisions of the former and revised Tennessee LLC statutes distinguishing between an LLC and its members and managers, such as the provision distinguishing between a membership interest in the LLC and LLC property, the provision empowering managers and members to execute documents and conveyances of LLC property, and the provision protecting members, managers, and others from personal liability for the debts, liabilities, and obligations of the LLC. To hold that a sole member is ipso facto in privity with the LLC would erode the protections afforded the LLC structure according to the court. Having concluded that the LLC and its sole member were not automatically in privity, the court next considered whether the member’s assignment to the LLC of his interest in the contract for the purchase and sale of the property created privity. The court discussed the law regarding assignments and held that an assignment of a contract for the sale of real property, without more, does not give rise to privity of

contract or estate between the assignor and assignee because a mere assignment is not a contract. The court also relied upon the fact that the assignee stands in the shoes of the assignor, who relinquishes all rights in the thing assigned. The court stated that privity requires some action in addition to the assignment itself, such as an express warranty by the assignor or the creation of implied warranties based on receipt by the assignor of value. In the absence of value given, where the assignor retains the power of revocation, there is no effective assignment unless certain criteria are met or the assignee detrimentally relies upon the assignment. Because neither the agreement for the sale of the property nor the assignment were included in the record, the court could not determine whether privity existed between the LLC and its member. The complaint alleged only that the contract was assigned by the member to the LLC; therefore, the record did not establish privity, and the trial court's order dismissing the complaint was error.

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

MM. Creditor's Rights

In re LaHood (Heartland Bank and Trust Company v. Covey), Bankruptcy No. 07-81727, Adversary No. 07-8156, 2009 WL 2169879 (Bankr. C.D. Ill. July 16, 2009). In a prior opinion, the bankruptcy court determined that a lender's judgment lien against an LLC member's distributional interest was not valid because the charging order remedy in the Illinois LLC statute operates to the exclusion of all other remedies. The lender had obtained a pre-petition judgment against the debtor, and the lender served the debtor with a citation that impressed a lien upon the debtor's personal property under Illinois judgment collection provisions. In this opinion, the court addressed the lender's argument that the charging order provision of the LLC statute applies only to a distributional interest and that the lender's judgment lien obtained under the general judgment collection provisions applied to the debtor's membership interest. The lender emphasized the statutory distinction between a membership interest and a distributional interest and argued that, although it did not obtain a charging order so as to obtain a lien on the distributional interest, it nevertheless obtained a citation lien on the membership interest. The court stated that the lender's implied argument that it somehow had the right to enforce its lien against the distributional interest, the only interest that mattered at this point, directly contradicted the plain language of the charging order provision. The lender's argument implied that a creditor could bypass the exclusive procedure of the charging order provision and obtain a lien on a member's distributional interest by obtaining a lien on the entire membership interest, which includes the distributional interest. Applying the rule of statutory construction that a specific provision controls over a more general one, the court concluded that the exclusive charging order provision in the LLC statute necessarily controlled over the more general statute providing for a citation lien on personal property. The court stated that the lender mischaracterized the court's prior opinion as holding that the charging order provision operates to preclude a citation lien from attaching to a member's non-economic rights, saying the issue was not presented on the facts of this case. The court said that non-economic rights were not at issue given the LLC's dissolution, and the court questioned what good it would do the lender to have a lien on the debtor's non-economic rights when it was his distributional interest that the trustee proposed to administer. The court commented that, even assuming a judgment creditor may obtain a lien on a member's non-economic rights, lienor status does not entitle the creditor to exercise those rights.

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, 606 F.Supp.2d 638 (S.D. Miss. 2009). The IRS issued a Notice of Levy of Wages, Salary, and Other Income to a PLLC as against a physician whose

S corporation was a member of the PLLC. One of the PLLC's functions was to collect fees for services provided by its members and to remit the fees, less operating expenses, to the members. The PLLC made payments to the physician and his S corporation after the Notice of Levy was issued, and the issue analyzed by the court was whether the payments were "wages or salary payable to or received by" the physician. The PLLC argued that the payments made were advance payments of the S corporation's share of the profits as an owner of the PLLC or, alternatively, were loans as excess draws taken by the S corporation, and that the PLLC never owed an obligation to anyone other than the S corporation and could not be liable on a Notice of Levy as to the physician. The court concluded that the PLLC's relationship with the physician was not unlike a circumstance where an independent contractor is paid commissions based on the work he does for a company. The physician performed services for his patients under the umbrella of the PLLC, and the PLLC collected fees for the services and distributed a portion of the income to the physician directly or through the S corporation. The court also made other analogies to conclude that the payments had wage-like characteristics and were subject to the continuing levy.

Patel v. Garmo, No. 1:06-CV-469, 2009 WL 279034 (W.D. Mich. Feb. 5, 2009) (holding installment payment provision of Michigan judgment enforcement statute did not apply to LLC because installment payment provision was intended to protect individual debtors from garnishment of wages and LLC does not have wages or money due for "personal work and labor").

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

Pioneer Navigation Ltd. v. STX Pan Ocean (U.K.) Co., Ltd., No. 08 Civ. 10490(JGK), 2008 WL 5334550 (S.D.N.Y. 2008) (vacating writ of attachment against foreign LLC because individual with business address in Southern District of New York qualified as registered agent for foreign LLC and LLC was "found" in District, for purposes of attachment statute, because it had both jurisdictional presence and registered agent in District).

NN. Secured Transactions

JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp.2d 1013 (D. Nev. 2009). Eight real estate companies formed an LLC for the purpose of acquiring and developing real estate, and the LLC entered a credit agreement. The

LLC executed various collateral documents including an agreement under which it granted a security interest in acquisition agreements between the LLC and its members under which each member agreed to purchase specified portions of the land. The lender alleged that it had filed a financing statement perfecting its security interest in personal property, such as the acquisition agreements and the LLC operating agreement. The members allegedly refused to purchase the land as required under the acquisition and operating agreements, and the LLC defaulted under the credit agreement and collateral documents. The lender filed suit alleging causes of action for breach of contract against the members and their parent companies, breach of fiduciary duty against the members and their parent companies, intentional interference with contractual relationships against the parent companies, and constructive trust. The defendants claimed that the lender lacked standing to enforce the operating agreement and that the breach of contract claim against the members thus failed as to the operating agreement. The defendants argued that the operating agreement precluded enforcement of its provisions by a creditor and that none of the collateral documents contained an assignment of the operating agreement. Further, the defendants argued that the LLC could not pledge rights in the operating agreement because it was not a party. The court noted that the plain language of the operating agreement provided that no creditor could enforce its provisions, but the lender alleged that the collateral documents granted the lender a security interest in the operating agreement and that the lender could thus enforce any rights of the LLC under the operating agreement. (The lender argued that Sections 9406(4) and 9408(1) of the Nevada UCC rendered ineffective the provision of the operating agreement denying a creditor the right to enforce the operating agreement, but the court noted that, assuming this argument was correct, the lender had a security interest only if it was granted that right.) The lender relied upon language in the deed of trust, under which the LLC conveyed “all contract rights...relating to the Real Property.” Although the LLC was not a party to the operating agreement, the court stated that a provision granting the LLC a right to recover in the event of a default by a member or the general manager could be enforced by the lender if the LLC conveyed a security interest in those rights. The court thus analyzed whether the rights under the operating agreement related to the real property and concluded that the provision was ambiguous. Because it was not clear whether the parties intended to convey a security interest in the operating agreement, the lender’s claim for breach of the operating agreement survived the motion to dismiss.

OO. Securities Laws

Automated Teller Machine Advantage LLC v. Moore, No. 09 CIV 3340(RMB)(FM), 2009 WL 2431513 (S.D.N.Y. Aug. 6, 2009). The plaintiff brought a RICO action alleging that the defendants engaged in a fraudulent scheme in which they induced investment in an LLC that was to purchase and manage the placement of ATM machines. The defendants sought dismissal on the basis that the plaintiff was pleading an actionable securities fraud which the Private Securities Litigation Reform Act does not allow to be brought as a private cause of action under RICO. The defendants characterized the investors as passive investors relying on others for a profit, but the plaintiff argued that a membership interest in a closely held LLC, in particular one where members retain significant management rights, is not a security. The court applied the *Howey* investment contract test and stated that it could not determine prior to any discovery in the litigation whether the LLC membership interests were investment contracts. The court stated that it appeared from the complaint that the investors had a reasonable expectation of significant investor control based on the rights provided in the LLC agreement. The investors had the right to appoint two of the three members of the board as well as the right to remove any of their appointees. The investors also had access to the LLC’s books, records, and properties. The court concluded that whether or not the LLC membership interests were securities was a matter more appropriate for a summary judgment motion than a motion to dismiss.

In re Spectranetics Corporation Securities Litigation, Civil Case No. 08-cv-02048-REB-KLM, 2009 WL 1663953 (D. Colo. June 15, 2009) (recognizing New Jersey LLC as separate legal entity and refusing to disregard distinction between LLC and individual member for purposes of aggregating stock ownership and financial losses of each in determining lead plaintiff in securities class action).

Ledford v. Peebles, 568 F.3d 1258 (11th Cir. 2009). A Georgia LLC was owned 50-50 by an entity (“Dyna-Vision”), which supplied the capital for the LLC, and three other individuals (the “Active Members”), who ran the company and marketed its product. The Active Members bought out Dyna-Vision’s interest pursuant to a put and call provision in the operating agreement and then sold the assets of the LLC to a third party (Peebles) who had financed the purchase by the Active Members of Dyna-Vision’s interest. Dyna-Vision and three of its members (the “Dyna-Vision

Group”) sued the Active Members in state court and Peebles in federal court based on representations to the Dyna-Vision Group by the Active Members and Peebles that Peebles was not financing the purchase of Dyna-Vision’s interest. The Dyna-Vision Group lost both cases on summary judgment. In the state court action, the Georgia Court of Appeals issued an opinion in 2005 in which it held in favor of the Active Members on all claims by the Dyna-Vision Group except one claim involving a dispute over the transfer of some real estate. (The Georgia Court of Appeals found that the Active Members had no contractual duty to Dyna-Vision to disclose their arrangement with Peebles under a right of first refusal provision in the operating agreement because the right of first refusal provision was not triggered by Peebles’ agreement with the Active Members to make a loan to finance the Active Members’ purchase of Dyna-Vision’s interest and to purchase the LLC’s assets after the Active Members’ purchase of the Dyna-Vision interest. The court also rejected Dyna-Vision’s fraud claim, finding that the involvement of the third party in financing the buy-out of Dyna-Vision’s interest was not material to Dyna-Vision’s decision whether to buy or sell under the put and call provision. Finally, the court determined that the Active Members did not breach any fiduciary duty in connection with the buy-out of Dyna-Vision, relying on the members’ freedom to restrict and eliminate fiduciary duties under the Georgia LLC act and a clause in the operating agreement permitting members to engage in all other business ventures so long as they did not compete with the LLC. The court stated that this provision was broad enough to allow the Active Members to negotiate with the third party for the purpose of financing their buy-out of Dyna-Vision because the transaction did not compete with the LLC.) The Georgia Supreme Court denied the Dyna-Vision Group’s petition for review. In this opinion, the Eleventh Circuit Court of Appeals addressed the Dyna-Vision Group’s appeal of the federal district court’s summary judgment in favor of Peebles and the district court’s denial of sanctions against Peebles under the Private Securities Litigation Reform Act. In the federal court action, the Dyna-Vision Group asserted against Peebles federal and state securities fraud claims. The court first addressed *sua sponte* the issue of standing to bring the securities fraud claims and concluded that none of the plaintiffs other than Dyna-Vision itself had standing to assert the claims under Rule 10b-5 and Georgia securities law because only Dyna-Vision was a seller of a security (assuming the LLC interest was a security). The court questioned whether the LLC interest was a security but found it unnecessary to analyze the question since the court ultimately found that the essential element of reliance was lacking in any event. Like the Georgia Court of Appeals, the federal district court found, and the Eleventh Circuit agreed, that the evidence established that the Dyna-Vision Group did not have the necessary skills and experience to run the LLC without the Active Members and that Dyna-Vision thus had no choice but to sell its interest to the Active Members. In other words, the failure to disclose the involvement of Peebles did not cause Dyna-Vision to sell its interest to the Active Members, and reliance was lacking.

The Eleventh Circuit considered the district court’s refusal to sanction the plaintiffs and their attorneys under the Private Securities Litigation Reform Act (PSLRA) for prosecuting the federal securities claims in this case. The plaintiffs initially sought relief under Section 20(a) of the Exchange Act and Rule 10b-5(a) and (b), though some of the claims were abandoned on appeal. The court concluded that a reasonably competent attorney would have rejected the idea that Peebles was a controlling person and would not have filed the Section 20(a) claim against Peebles on that basis alone. Further, even if Peebles had been a controlling person, the court stated that reasonably competent counsel would not have concluded that the Active Members breached any fiduciary duty as required for the Rule 10b-5(b) non-disclosure claims, and Peebles could not have been secondarily liable. The court stated that the Active Members were not akin to corporate insiders, nor was Dyna-Vision like a corporate shareholder because Dyna-Vision had an equal voice in the conduct of the LLC’s affairs and unlimited access to its records and financial information. Further, the court pointed out that the Georgia Court of Appeals held that the operating agreement allowed the Active Members to negotiate with Peebles for the purpose of obtaining financing to fund their buy-out of Dyna-Vision’s interest. Finally, the court stated that the misrepresentations that formed the basis for the Rule 10b-5(a) claim were not actionable because Dyna-Vision did not rely on them in electing not to purchase the interests of the Active Members. The court thus held that the district court was required by the PSLRA to sanction the attorneys for the plaintiffs. The court found no basis for imposing monetary sanctions on the plaintiffs, however.

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

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

PP. Worker's Compensation

Cappella v. Suresky at Hatfield Lane, LLC, 24 Misc.3d 1225(A), 2007 WL 6830765 (N.Y. Sup. 2007) (holding prima facie defense under workers' compensation statute was established where plaintiff's corporate employer exercised complete domination and control over defendant LLC and LLC was accordingly plaintiff's employer's alter ego).

Kranich v. TCAC, LLC, No. CV065000476S, 2009 WL 941973 (Conn. Super. March 16, 2009) (declining to apply "dual capacity" doctrine to commonly owned LLCs for purposes of availing LLC landowner of LLC employer's protection under worker's compensation exclusivity provision, but finding fact issues precluded summary judgment on commonly owned LLC's claim that veil piercing or alter ego theories resulted in treatment of both entities as single "employer" protected by exclusivity provision).

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

QQ. State and Local Taxes

Fashion Valley Mall, LLC v. County of San Diego, 176 Cal.App.4th, 98 Cal.Rptr.3d 327 (Cal. App. 4th Dist. 2009) (holding reformation agreement recharacterizing process by which ownership of property was transferred from LLC member to subsidiary of LLC was ineffective to change terms of transaction for purposes of determining percentage change in ownership for property tax reassessment because agreement was sham transaction expressly done for property tax purposes only and making no provision for changes to deed or LLC agreement).

Kmart Michigan Property Services, LLC v. Dept. of Treasury, 770 N.W.2d 915 (Mich. App. 2009) (finding administrative position on state tax filing by disregarded LLC was inconsistent with Michigan statute which required single member LLC to file single business tax return regardless of classification as disregarded entity for federal purposes).

Middlesex Retirement System, LLC v. Board of Assessors of Billerica, 903 N.E.2d 210 (Mass. 2009). The court rejected the argument that real property owned by a Delaware LLC should be deemed to be owned by the LLC's member, a governmental entity, and thus exempt from property tax. The court noted that an LLC interest is personal property under Delaware law and a member has no interest in specific LLC property, and the court found no basis to treat the LLC as an instrumentality of its member, the Middlesex Retirement System (MRS). The LLC's operating agreement recited a purpose that was purely business in nature, and the LLC did not purport to undertake any governmental function of MRS. The LLC was engaged in the business of owning and managing commercial real estate and functioned as a business enterprise distinct from MRS. Thus, applying a functional approach (focusing on the stated purposes and actual workings of the LLC), the LLC was not a governmental instrumentality. The court also concluded that the LLC was not

the alter ego of MRS. The court saw no reason that the alter ego doctrine should not apply to LLCs as well as corporations, but noted that the LLC did not argue that any of the relevant factors were present.

CFM Buckley/North, LLC v. Board of Assessors of Greenfield, 902 N.E.2d 381 (Mass. 2009) (holding single member LLC whose member was charitable organization was not entitled to tax exemption because exemption was plainly limited to organizations that are incorporated and LLC is specifically defined under Massachusetts law as unincorporated organization).

JB4 Air LLC v. Department of Revenue, 905 N.E.2d 310 (Ill. App. 2009) (holding single member LLC that owned airplane used by member for personal purposes was not encompassed within term “individual” for purposes of Illinois Use Tax Act exemption).

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

RR. Campaign and Election Laws

Ognibene v. Parkes, 599 F.Supp.2d 434 (S.D.N.Y. 2009) (concluding that extending corporate contribution ban on campaign contributions to partnerships and LLCs was constitutional, and Congress’s decision to limit FEC restrictions to corporations did not render local regulation of contributions by other entities unconstitutional).

SS. Wage and Employment Statutes

Elliott v. U.S. Home Protect of Charleston LLC, C/A No. 2:08-3531-MBS, 2009 WL 2485959 (D.S.C. Aug. 13, 2009) (holding plaintiff did not meet burden of showing LLC employer should be considered “integrated employer” with other entities for purposes of satisfying Title VII requirement of 15 employees where LLC and other entities were involved in distinct businesses, had different managers, had no common owners for much of the time of plaintiff’s employment, and observed relevant LLC formalities and practices).

Alvarez v. 9ER’s Grill @ Blackhawk, L.L.C., Civil Action No. H-08-2905, 2009 WL 2252243 (S.D. Tex. July 28, 2009). The plaintiff sued two LLCs to collect unpaid overtime wages under the Fair Labor Standards Act (FLSA). The evidence showed that she was employed by only one of the LLCs. The plaintiff argued that the two LLCs were part of an “enterprise” as defined by the FLSA in order to hold the non-employer LLC jointly and severally liable as well as to aggregate the gross sales of the two LLCs to satisfy the threshold volume of gross sales required to bring an employer within the coverage of the FLSA. Relying on Eleventh Circuit precedent, the court rejected the argument that being part of the same enterprise is a basis to hold non-employer members of the enterprise liable for other members’ FLSA obligations. The non-employer LLC was thus dismissed. The court found that the two LLCs were part of an “enterprise” under the FLSA such that the gross volume of sales of the two LLCs could be aggregated to bring the employer LLC within the coverage of FLSA. The court applied the following test, which the Fifth Circuit has said will establish a single “enterprise” for FLSA purposes: (1) the corporations perform related activities (2) through unified operation of common control (3) for a common business purpose. The court concluded that the LLCs had related activities because the primary activity of both was to operate a restaurant business. The stated purpose in the articles of “incorporation” of the two LLCs was to operate a restaurant business, and each LLC in fact operated a restaurant under the same trade name with the same signature dish. The restaurants were also marketed through the same website. The court found that the LLCs met the unified operations or common control element because they were formed by the same organizer on the same day and had the same members and managing member, and they were held out to the public collectively on the website. Finally, the court concluded that the LLCs were operated for a common purpose based on the previously recited evidence that showed both LLCs were operated for the common purpose of providing not only complementary food services but also profits for the two members.

Weinstein v. Pyle Properties, Civil Action No. 2:08-CV-408, 2009 WL 2340698 (E.D. Tex. July 28, 2009) (granting defendant’s motion for summary judgment on plaintiff’s employment discrimination claim where evidence

showed plaintiff was employed by LLC rather than defendant “Pyle Properties”; though individual who did business under name Pyle Properties was member of plaintiff’s LLC employer, that connection was not sufficient to find plaintiff was employee of Pyle Properties).

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

TT. Insurance

Aqua Group LLC v. Federal Insurance Co., 621 F.Supp.2d 816 (E.D. Mich. 2009) (interpreting provisions of insurance policy referring to “managers” of LLC to refer to managers as formally defined by Michigan LLC statute rather than referring to individuals performing functions that could be described as “managerial” outside context of LLC statutes).

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

Kwok v. Transnation Title Insurance Company, 170 CalApp.4th 1562, 89 Cal.Rptr.3d 141 (Cal. App. 2 Dist. 2009) (holding transfer of title of property from LLC to its members as trustee of family trust was not distribution pursuant to dissolution where property did not devolve to members individually but was transferred by deed to trust, and

transfer thus terminated coverage under title insurance policy; noting that members of LLC never held ownership interest in property to which LLC held title and citing statutory provision that membership interest is personal property of member and member has no interest in specific LLC property).

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

UU. Statute of Frauds

Olson v. Halvorsen, 986 A.2d 1150 (Del. 2009). The Delaware Supreme Court affirmed the chancery court's judgment that the one-year provision of the statute of frauds provision applied to an unsigned LLC agreement and precluded enforcement of an earn-out provision that could not be performed in one year. The court held that the Delaware LLC statute's recognition of oral and implied agreements does not preclude application of the statute of frauds but instead gives maximum effect to LLC agreements by treating them like other contracts. The court concluded that the statute of frauds and LLC statute can be construed together and that the legislative text and legislative history of the LLC statute gave no indication the legislature intended to render the statute of frauds inapplicable.

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

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

VV. FDIC Insurance Rules

Marlowe v. Federal Deposit Insurance Corporation, Civil No. 08-5161, 2009 WL 856684 (W.D. Ark. March 30, 2009) (holding that insured status of account of family estate planning LLC should be analyzed under rule applicable to unincorporated association rather than rule applicable to corporate accounts, but noting that such analysis did not materially alter outcome of case because evidence did not support treating LLC as fiduciary or non-qualifying entity having no business purpose).

WW. Tortious Interference

JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp.2d 1013 (D. Nev. 2009). Eight real estate companies formed an LLC for the purpose of acquiring and developing real estate, and the LLC entered a credit agreement. The LLC executed various collateral documents including an agreement under which it granted a security interest in acquisition agreements between the LLC and its members under which each member agreed to purchase specified portions of the land. The members allegedly refused to purchase the land as required under the acquisition and operating

agreements, and the LLC defaulted under the credit agreement and collateral documents. The lender filed suit alleging causes of action for breach of contract against the members and their parent companies, breach of fiduciary duty against the members and their parent companies, intentional interference with contractual relationships against the parent companies, and constructive trust. With respect to claims for intentional interference with contractual relations against the parent companies of the members, the court noted that courts around the country have held that a parent corporation is privileged to interfere with contracts of its wholly-owned subsidiary if the contract threatens a present economic interest of the subsidiary unless there is clear evidence the parent employed wrongful means or acted with an improper purpose. The court stated that, even assuming the Nevada Supreme Court would adopt this privilege, dismissal of the claim for intentional interference with contractual relations was not appropriate because it was not clear from the complaint whether the parent companies intended to interfere solely based on their own self-interest or the interest of the members, or for some improper purpose or another reason.

Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872 (Del. Ch. 2009). Kuroda, who served as an investment advisor for a group of entities that invested in Japanese corporations, was a non-managing member of a Delaware LLC that served as the general partner of the master fund. Because of disagreements with the managing members, Kuroda decided that he could no longer serve as an advisor to the funds. After negotiations regarding Kuroda's withdrawal from the LLC failed, Kuroda filed suit alleging numerous causes of action against the LLC, the managing members, and the individuals who owned and controlled the managing members. Kuroda alleged claims against the individuals who controlled the managing members for contractual interference with Kuroda's rights under the LLC agreement, alleging that the individuals caused the LLC and the managing members to breach the agreement. Because a party to a contract cannot be held liable for both breaching the contract and for tortiously interfering with that contract, Kuroda was required to show that the individuals were each "a stranger to both the contract and the business relationship giving rise to and underpinning the contract." Insofar as the individuals acted within the scope of their respective roles in the entities, they could not be held liable for tortious interference with contract. Kuroda failed to make any specific factual allegations demonstrating that the individuals exceeded the scope of their authority. Kuroda's conclusory allegations were insufficient even under liberal notice pleading rules. Thus, this claim was dismissed. Kuroda also asserted a claim for tortious interference with prospective economic advantage, but all of the harm allegedly suffered by Kuroda was based on his interest in another LLC through which he did business. The court held that any claim for damages must be asserted by that entity. Plaintiff failed properly to assert a derivative claim on behalf of that entity; therefore, this claim was dismissed.

Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 398506 (E.D. Mo. Feb. 17, 2009). The court rejected a claim against individuals associated with an LLC's majority member, which was an entity, for tortious interference with the operating agreement because corporate officials acting in their official capacity cannot be liable for tortious interference with the corporation's own contracts, and the exceptions to that rule were not met.

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

XX. Conversion/Merger/Reorganization

Lieberman v. Mossbrook, 208 P.3d 1296 (Wyo. 2009). This is the fourth opinion of the Wyoming Supreme Court arising out of this litigation. In this opinion, the court considered the conversion claim of Lieberman, a withdrawn member of a Wyoming LLC that later merged into a corporation. In the prior opinions, the court determined that Lieberman remained an equity holder of the LLC after he withdrew because there was no contractual provision for a buy-out of Lieberman's interest. On remand after the third supreme court opinion, Lieberman sought a determination and recovery of the value of his interest. The district court relied upon the prior opinions of the supreme court and Lieberman's membership interest certificate to conclude that Lieberman retained his right to his proportionate equity

share after his withdrawal, and the district court further concluded that Lieberman was entitled to payment of his share on the date that the LLC was merged into the corporation. Failure of the Mossbrooks, Lieberman's fellow members, to account to Lieberman for his equity interest amounted to conversion as a matter of law according to the district court. Following a trial, the court entered a judgment against the Mossbrooks for conversion in the amount of \$958,475. The court found for the Mossbrooks on other claims asserted by Lieberman, and both parties appealed. The supreme court analyzed the application of the statute of limitations on the conversion claim and determined that Lieberman's claim was not barred by the statute of limitations. The court next analyzed the law of the case as encompassed in its three prior opinions and concluded that its statements in the prior opinions were based upon an incomplete record and were of limited value. The court stated that it had only been able to determine that Lieberman retained an equity interest in the LLC and that nothing in the previous decisions precluded the district court from determining whether a conversion had occurred and, if so, the value of the converted property. In reviewing and analyzing the district court's determination of the date of conversion and value of Lieberman's interest, the supreme court disagreed with the district court's determination that Lieberman's equity interest should be valued as of the date of the merger. The court distinguished Lieberman's situation from a transferee and concluded that Lieberman was neither a member nor an investor after the return of his capital contribution and cancellation of his membership certificate following his withdrawal. At that time, the court stated that Lieberman's interest must be treated as if "liquidated" and Lieberman was entitled under the operating agreement to liquidating distributions from the LLC in accordance with the balance in his capital account. Failure of the LLC to do so amounted to a conversion of Lieberman's interest. This result was not clear from the prior record in the case according to the court because the record did not include evidence of the cancellation of Lieberman's membership certificate. As the successor to the LLC in the merger, the corporation was liable to Lieberman for the LLC's conversion of his interest. Because the court had already remanded this case for further findings on three prior occasions, it went ahead and examined the record to determine the amount to which Lieberman was entitled based on the value of his interest at the time of his withdrawal rather than three years later when the LLC merged with the corporation. Based on unrefuted evidence of an independent appraisal secured by the Mossbrooks, the court determined that the value of Lieberman's interest at the time of the conversion was \$72,035. The supreme court found that it was error to enter judgment against the Mossbrooks personally because neither LLC members nor corporate shareholders are ordinarily liable for the acts of the company or corporation. In the absence of any evidence in the record to support piercing the veil of the LLC or successor corporation there was no basis to hold the Mossbrooks individually liable. Based on the statutes addressing the effect of a merger, the court concluded that the corporation was liable to Lieberman for the corrected amount and must be added as a party on remand.

In re Touch America Holdings, Inc., 401 B.R. 107 (D. Del. 2009) (discussing effect of restructuring of holding company and its energy and telecommunications subsidiaries involving mergers of corporations into newly formed LLCs, under Delaware and Montana law, with respect to rights to assert derivative claims against officers and directors of corporate predecessors of surviving LLCs).

Premium Allied Tool, Inc. v. Zenith Electronics Corp., No. 08 C 2527, 2009 WL 395476 (N.D. Ill. Feb. 17, 2009) (dismissing claim for declaratory judgment that corporation did not have rights under escrow agreement entered into prior to corporation's conversion to LLC because conversion of corporation to LLC under Delaware law does not affect former corporation's rights or liabilities and LLC is deemed to be same entity as former corporation).

Crandall v. Wright Wisner Distributing Corp., 872 N.Y.S.2d 802 (N.Y. App. Div. 4th Dept. 2009). After a partnership entered into construction contracts, the partnership converted to an LLC. An action was brought against the LLC by a worker injured at the construction site, and the partnership's insurer, which was unaware of the conversion, retained counsel to defend the partnership but not the LLC. A default judgment was taken against the LLC, and the court found that the LLC demonstrated a reasonable excuse for its default. The court did not reach the question of whether the answer served by the partnership should be deemed to have been served by the LLC.

Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. App. 2009). In 1983, four Mazloom brothers (Iraj, Ahmad, Manooch, and Aboli) incorporated a business in which they were equal shareholders, though no stock certificates were ever issued. Iraj served as Secretary-Treasurer and worked as an employee of the corporation until 1996 when he was removed and excluded from participating in the business by the other brothers. In 2000, articles of dissolution were filed for the corporation without Iraj's knowledge or consent. On the same day, Ahmad, Manooch, and Aboli filed articles

of organization for an LLC. In 2002, Iraj contacted an attorney to help him clarify his interest in the LLC, and the attorney prepared articles of amendment for the LLC stating that the LLC received all of the dissolved corporation's assets and goodwill and that the shareholders were to retain their respective ownership in the LLC as they had in the corporation. The articles of amendment went on to state that, through inadvertence or mistake, Iraj was not transferred over as a shareholder of the LLC and that the amendment was to correct the error and acknowledge that Iraj owned 25% of the LLC. The articles of amendment were signed by Manooch and Aboli and filed with the South Carolina Secretary of State. In 2003, Ahmad sold his interest in the LLC to Manooch and Aboli without notice to Iraj. The bill of sale recited that Ahmad, Manooch, and Aboli each owned 1/3 of the LLC. Later in 2003, Manooch and Aboli entered into a contract for the sale of all the LLC's assets. Iraj did not know of the sale and did not receive any share of the sale proceeds. Iraj filed a complaint against Manooch and Aboli in 2004. The case was referred to a special master who found that Iraj owned a 25% interest in the LLC and awarded him a sum from the sale of the assets and for unpaid cash distributions. The brothers argued that the special master erred in finding that Iraj owned 25% of the LLC because they claimed Iraj transferred his 25% interest in the predecessor corporation to a niece in 1985. The court of appeals reviewed the evidence and upheld the finding that Iraj retained his 25% ownership interest in the corporation and LLC. The court concluded that a preponderance of the evidence supported the special master's conclusion and that the brothers were estopped from denying the facts in the articles of amendment. The court also found that Iraj's action for dissolution and accounting was not barred by laches. With respect to damages, the court found that the special master erred in not basing the value of the LLC on the fair market value as established by the arm's length sale of the LLC, and the court modified the award accordingly. With respect to the claim for lost cash distributions, the court noted that the South Carolina LLC statute requires distributions prior to winding up to be made in equal shares and provides for personal liability on the part of a member who assents to an unlawful distribution. The court found the evidence supported the special master's findings of lost cash distributions. Finally, the court found that the evidence supported an award of punitive damages for breach of fiduciary duties. The court concluded that the breach of fiduciary action was timely filed, that there was misconduct on the part of the brothers warranting an award of punitive damages, and that the amount was appropriate in light of the factors set forth by the United States Supreme Court in *Gamble v. Stevenson*.

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

substantial compliance by the LLC where the payment was almost 75% of the fair value determined by the court. Finally, the court characterized the evidence of the dissenting member's vexatious conduct as ample. The dissenting member objected to the sale of the property although the LLC was dysfunctional, demanded an amount based on a value the court found unsupported by credible evidence, rejected an amount that exceeded the amount received by other members and the amount ultimately awarded, and had a past history of litigiousness and unreasonable conduct in dealing with the LLC and the members.

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

Medical Practice Solutions, LLC v. Commissioner of Internal Revenue, 132 T.C. No. 7 (U.S. Tax Ct. 2009). A single member LLC failed to pay employment taxes for several periods, and the IRS sent notices of lien and intent to levy to the LLC's member. The member claimed that only the LLC was liable for the unpaid taxes and that the check-the-box regulations, as applicable to employment taxes related to wages paid prior to January 1, 2009, were invalid. The member argued that the amended regulations, which treat a disregarded entity as a corporation for purposes of employment tax reporting and liability effective January 1, 2009, show that the prior regulations were invalid. Relying on the decisions of federal courts of appeals in *Litriello v. United States* and *McNamee v. Dept. of Treasury*, the court rejected the member's arguments.

ZZ. Passive Activity Rules

Thompson v. United States, 87 Fed.Cl. 728, 104 A.F.T.R.2d 2009-5381 (Ct. Cl. 2009). The court analyzed whether an interest in a Texas LLC classified as a partnership for federal income tax purposes should be treated as a limited partner's interest for purposes of the passive activity rules as argued by the IRS and concluded that the language in the regulations relied upon by the IRS unambiguously requires that the ownership interest be an interest in an entity that is actually a partnership under state law. Further, even if the regulation could apply to the LLC membership interest in issue such that the court had to characterize the interest as a limited or general partner's interest, the court concluded the interest would best be categorized as a general partner's interest. The court agreed with the taxpayer that the key attribute differentiating the interest of a general partner from a limited partner for purposes of the passive activity rules is the ability to participate in the control of the business rather than limited liability as argued by the IRS.

Garnett v. Commissioner of Internal Revenue, 132 T.C. No. 19, 2009 WL 1883965 (U.S. Tax Ct. 2009). The taxpayers held interests in seven LLPs and two LLCs engaged in agribusiness operations, and the issue was whether the taxpayers' interests should be considered interests in limited partnerships held as a limited partner so as to be treated as presumptively passive under the special rule of IRC Section 469(h)(2). The court rejected the taxpayers' argument that limited liability was the controlling issue. The court stated that it was necessary to look at the facts and circumstances to ascertain the nature and extent of the taxpayers' participation since they were not precluded under state law from materially participating in the business of the entities. Accordingly, the court concluded that the taxpayers held their interests as general partners for purposes of the temporary regulations.

Senra v. Commissioner of Internal Revenue, T.C. Memo. 2009-79, 2009 WL 1010855 (U.S. Tax Ct. 2009) (holding that taxpayers could not group their activities in C corporation (i.e., wages therefrom) with activities in disregarded LLC to form appropriate economic unit treated as single activity for purposes of measuring gain or loss under Section 469).

AAA. Treatment of Single Member LLC for Federal Gift Tax Purposes

Pierre v. Commissioner of Internal Revenue, 133 T.C. No. 2 (U.S. Tax. Ct. 2009). The court decided that transfers of interests in a single member LLC should be valued for gift tax purposes as transfers of interests in the LLC (and thus subject to valuation discounts for lack of marketability and control) rather than transfers of the assets of the LLC. The IRS argued that the transfers should be treated as transfers of cash and marketable securities, i.e., proportionate shares of the LLC's assets, for federal gift tax purposes because the LLC was disregarded under the check-the-box regulations. The court discussed the historical federal gift tax valuation regime and analyzed the question of whether the check-the-box regulations alter the historical regime. The court concluded that, in the absence of explicit

congressional action, the IRS could not by regulation overrule the historical gift tax valuation regime in the Internal Revenue Code and well-established judicial precedent, and the court held that the transfers in issue should thus be valued for federal gift tax purposes as transfers of interests in the LLC rather than transfers of proportionate shares of the LLC's assets.

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

Mission Primary Care Clinic, PLLC v. Director, Internal Revenue Service, 606 F.Supp.2d 638 (S.D. Miss. 2009). The IRS issued a Notice of Levy of Wages, Salary, and Other Income to a PLLC as against a physician whose S corporation was a member of the PLLC. One of the PLLC's functions was to collect fees for services provided by its members and to remit the fees, less operating expenses, to the members. The PLLC made payments to the physician and his S corporation after the Notice of Levy was issued, and the issue analyzed by the court was whether the payments were "wages or salary payable to or received by" the physician. The PLLC argued that the payments made were advance payments of the S corporation's share of the profits as an owner of the PLLC or, alternatively, were loans as excess draws taken by the S corporation, and that the PLLC never owed an obligation to anyone other than the S corporation and could not be liable on a Notice of Levy as to the physician. The court concluded that the PLLC's relationship with the physician was not unlike a circumstance where an independent contractor is paid commissions based on the work he does for a company. The physician performed services for his patients under the umbrella of the PLLC, and the PLLC collected fees for the services and distributed a portion of the income to the physician directly or through the S corporation. The court also made other analogies to conclude that the payments had wage-like characteristics and were subject to the continuing levy.

CCC. Attorney Liability, Disqualification

Reichenbaum v. Cilmi, 884 N.Y.S.2d 88 (App. Div. 2d Dept. 2009) (finding plaintiffs' complaint based on defendant lawyers' failure to disclose conflict of interest in preparing numerous LLC operating agreements did not state cause of action where factual allegations in support of breach of fiduciary duty claim were duplicative of allegations in support of legal malpractice claim, factual allegations in support of legal malpractice claim did not establish necessary element of causation that but for defendants' acts or omissions plaintiffs would not have incurred damages, and mere failure to disclose malpractice did not support fraud or deceit claim separate from underlying malpractice action).

Fornshell v. Roetzel & Andress, L.P.A., Nos. 92132, 92161, 2009 WL 1629715 (Ohio App. June 11, 2009). The court held that a law firm that represented an LLC and the LLC's majority owner owed no duty to the LLC's minority owner. The court noted that an LLC, like a partnership, involves a fiduciary relationship which imposes on members a duty to exercise the utmost good faith and honesty in all dealings and transactions related to the LLC, and the court stated that the majority owner had a fiduciary duty to deal fairly and honestly with the minority owner in all transactions. The court rejected the argument that the law firm had a duty to the minority owner, concluding that statutory changes essentially abrogated a 1994 Ohio Supreme Court case characterizing a partnership as an aggregate of individuals rather than a separate legal entity and holding that a limited partnership's attorney was in privity with and owed a duty to the partnership's owners. The court pointed out that the Ohio legislature characterized LLCs and limited partnerships as "entities" in 1994 legislation. Further, in 2006, the legislature adopted a statute addressing liability of persons providing goods and services to LLCs or members. The 2006 legislation states that, absent an express agreement otherwise, a person providing goods or services to an LLC owes no duty to, has no liability to, and is not in privity with the members or creditors of the LLC by reason of providing the goods or services to the LLC, and a person providing goods and services to a member or members owes no duty to, has no liability to, and is not in privity with the other members or the LLC.

NAMA Holdings, LLC v. Greenberg Traurig, LLP, 880 N.Y.S.2d 34 (App. Div. 1st Dept. 2009) (holding lower court correctly interpreted Nevada LLC's operating agreement and Nevada statute in concluding member had standing to bring derivative action alleging law firm and one of its partners representing LLC and its managers in other litigation had conflict of interest resulting from managers' involvement and partner's hidden financial interest in competing project; holding plaintiff may also assert individual claim against attorneys for LLC based on allegation that defendants colluded with LLC's managers to drive plaintiff from project).

In re Kindred (Thomas v. Murphy), Bankruptcy No. 6:08-bk-02334-KSJ, Adversary No. 6:08-ap-00171, 2009 WL 1788401 (Bankr. M.D. Fla. June 5, 2009) (holding breach of fiduciary duty claim by LLC and 50% member against law firm was duplicative of professional malpractice claim and was barred by two-year statute of limitations but breach of fiduciary duty claim against lawyer who was also other 50% member was subject to four-year statute of limitations because claim alleged breach of fiduciary duty in capacity as co-owner and manager of LLC separate and apart from claim for breach of fiduciary duties as attorney).

In the Matter of Loomis, 905 N.E.2d 406 (Ind. 2009) (approving order for public reprimand based on violations of disciplinary rules involving false and misleading conduct where lawyers who were merely office sharing engaged in practice under misleading trade names “Attorneys of Aboite” and “Attorneys of Aboite, LLC” without complying with requirements for practice in LLC, i.e., maintaining adequate professional liability insurance or financial responsibility and certification of LLC by State Board of Law Examiners).

Neill v. All Pride Fitness of Washougal, LLC, No. C08-542RJB, 2009 WL 1255101 (W.D. Wash. May 4, 2009) (analyzing LLC structure and Washington Rules of Professional Conduct and denying motion to disqualify counsel, who was minority non-managing member of defendant LLC, from representation of defendant LLC, its LLC subsidiary, and subsidiary’s general manager).

Hutchins v. 3 Pickwick, LLC, Civil Action No. V-08-60, 2009 WL 959973 (S.D. Tex. April 8, 2009) (denying attorney’s request to withdraw as counsel for plaintiff LLC where attorney knew of potential conflict and failed to take any action for almost one and one-half months, defendant waived any potential conflict on part of attorney, and defendant objected to attorney’s withdrawal because LLC must be represented by counsel and plaintiff LLC had not fully complied with court’s prior order for contempt and sanctions).

Gustafson v. Mazarella, No. D052342, 2009 WL 605828 (Cal. App. 4 Dist. March 10, 2009). The plaintiffs alleged that a lawyer engaged in impermissibly conflicting representation of an individual and LLC at a time when the plaintiffs were effectively also managing members of the LLC. The court stated that, in representing an organization such as an LLC, an attorney must conform the representation to the concept that the organization itself is the client, but the court held that it could not be determined as a matter of law that the attorney owed no professional duty to the plaintiffs, through the representation of members and managers of the LLC and, indirectly, another LLC that was the manager. The court said the duty could be based on legal interpretation of the operating agreements of the LLCs.

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

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

manager. After prevailing in the plaintiff's action, the attorney filed a malicious prosecution action against the plaintiff. In the attorney's malicious prosecution action, the court analyzed whether the plaintiff in the prior action had probable cause for his action. The court first discussed the plaintiff's claim that he was a co-manager of the LLC and concluded that there was ample evidence to support a good faith claim by the plaintiff that he was a co-manager of the LLC. The evidence included a borrowing authorization signed by nearly all of the members, construction documents identifying the plaintiff as a manager, and the role the plaintiff played in the development of the LLC's project. Next the court discussed and analyzed the plaintiff's claim that an attorney for an LLC owes a fiduciary duty to the members of the LLC. The court concluded that the plaintiff's claim fell well within the development of precedent that litigants are entitled to advance.

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

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

DDD. Attorney Client Privilege

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