

**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 2010 Limited Liability Entities program. The volume of case law overtook the author's ability to prepare a comprehensive survey for the past twelve months, and the author is endeavoring to catch up on the "backlog" of cases in her possession. Past surveys of LLP and LLC cases may be accessed at the author's faculty profile page at the Baylor Law School web site at <http://www.baylor.edu/law/>. Additional surveys will be posted on the site periodically.

I. Limited Liability Partnerships

A. Diversity Jurisdiction

Lee v. Brown, No. 3:08-CV-01206 CSH, 2009 WL 3157542 (D. Conn. Sept. 25, 2009) (stating that rule that partnership has citizenship of each of its partners for purposes of diversity jurisdiction applies to LLPs).

B. Standing or Capacity to Sue or Be Sued

Raskov v. Stapke & Harris, No. B215351, 2010 WL 522780 (Cal. App. 2 Dist. Feb. 16, 2010) (rejecting attempt to analogize State Bar's termination of LLP's certificate of registration to suspended corporation for purposes of determining firm's standing to defend itself in declaratory judgment action because rule in corporate context is statutory rule limited to corporations).

C. Pro Se Representation

J & J Sports Productions, Inc. v. Sunsets on Sand, LLP, No. 10-cv-12-wmc, 2010 WL 1740803 (W.D. Wis. April 29, 2010) (holding LLP could not appear pro se through partner who was not licensed attorney, and noting that purpose of engaging in business as LLP is to limit recovery to entity's assets rather than assets of partners and requirement that LLP be represented by counsel did not preclude partner from continuing to defend herself individually).

D. Limited Liability of Partners

Henry v. Masson, __ S.W.3d __, 2010 WL 5395640 (Tex. App. 2010). Henry and Masson were partners in an orthopedic surgery practice. They formed their practice as an LLP in 2001, and personal disputes led to litigation in 2003. During a hearing in the case, they agreed in principle to wind up the LLP and sever all ties between them. Additional disputes and issues arose, and another suit was filed. In an attempt to resolve all their differences, they executed a settlement agreement. Litigation ensued over alleged breaches of the settlement agreement. Among the issues addressed in this appeal was a claim by Masson that the trial court erred in ordering Henry and Masson to make capital contributions to the partnership to allow the partnership to pay out funds it had taken in that actually belonged to two new entities formed by the parties. Masson based his argument on the fact that the partnership was an LLP and the provision of the

Texas Revised Partnership Act providing that partners in an LLP are protected from individual liability for the debts and obligations of the partnership incurred while the partnership is an LLP. The court stated that neither the partnership agreement nor the statute prevented the trial court from ordering contributions to the partnership during winding up. According to the court, the payments the trial court ordered Henry and Masson to make were capital contributions to discharge debts of the partnership during winding up, not an adjudication of individual liability for the debts or obligations as contemplated by the statute. The court relied upon the partnership agreement, which provided that if no partner agreed to lend funds needed to discharge the partnership's debts, obligations, and liabilities as they came due, each partner was required to timely contribute the partner's proportionate share of funds needed. Masson argued that this provision was not intended to apply in the winding up process and that reference elsewhere in the partnership agreement to payment of the partnership's debts upon dissolution "to the extent funds are available" evidenced the partners' intent that they would not be required to make additional capital contributions during the winding up. The court stated that the phrase relied upon by Masson appeared in a section referring to steps to be taken after the sale of partnership property, and the funds mentioned are funds received from the sale of partnership property. The court did not interpret the agreement to mean that sale of partnership property was the only source of funds to pay debts. The court also rejected Masson's argument that the reference in the capital contribution provision to payment of debts as they become "due and payable" was evidence that the parties did not intend to require capital contributions during winding up. The court stated that "due and payable" simply modified the type of debt to be paid and did not limit the provision to "operational" status of the partnership.

J & J Sports Productions, Inc. v. Sunsets on Sand, LLP, No. 10-cv-12-wmc, 2010 WL 1740803 (W.D. Wis. April 29, 2010) (noting that purpose of engaging in business as LLP is to limit recovery to entity's assets rather than assets of partners and requirement that LLP be represented by counsel did not preclude partner from continuing to defend herself individually).

Eddinger v. United States, No. 3:10-cv-148, 2010 WL 1485951 (N.D.N.Y. April 14, 2010) (granting summary judgment in favor of partner in LLP because no allegation or evidence showed that partner engaged in misconduct or directly supervised errant partner or that partnership agreement limited statutory protection provided by LLP, and partners in New York LLP are not liable for partnership debt, obligation, or liability absent wrongful conduct committed by partner himself, partner's direct supervision of someone who engaged in wrongful conduct, or limitation of scope of liability protection by partnership agreement).

Vohra v. Cadigan Arbor Park, No. G040387, 2010 WL 1102428 (Cal. App. 4 Dist. March 25, 2010) (relying on California statutory provisions that provide partner in LLP is not liable for debts, obligations, or liabilities of partnership absent personal tort liability and that partner is not proper party in action against LLP, and holding trial court did not err in non-suiting partner in LLP where there was no evidence partner had any personal involvement in partnership's dealings with plaintiff).

E. Foreign LLPs

Total Holdings USA, Inc. v. Curran Composites, Inc., C.A. No. 4494-VCS, 2009 WL 3238186 (Del. Ch. Oct. 9, 2009) (interpreting governing law provisions of Section 15-106 of Delaware Revised Uniform Partnership Act and commenting regarding application of Section 15-106(b) to LLPs).

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. 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: *V & M Star, LP v. Centimark Corporation*, 596 F.3d 354 (6th Cir. 2010); *Zambelli Fireworks Manufacturing Co., Inc. v. Wood*, 592 F.3d 412 (3rd Cir. 2010); *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009); *Hukic v. Aurora Loan Services*, 588 F.3d 420 (7th Cir. 2009). A few cases have arisen in which the courts have discussed the different approach taken in the Class Action Fairness Act. A recent court of appeals opinion in this context is *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698 (4th Cir. 2010) (holding LLC is "unincorporated association" within meaning of 28 U.S.C. § 1332(d)(10), which changed traditional rule for determining citizenship of unincorporated associations for diversity jurisdiction purposes in Class Action Fairness Act context so that LLC is citizen of state of organization and state where its principal place of business is located). See also *Kurth v. Arcelormittal USA, Inc.*, Cause No. 2:09-CV-108RM, 2009 WL 3346588 (N.D. Ind. Oct. 14, 2009) (noting that rule that LLC's citizenship is determined by citizenship of its members for purposes of diversity jurisdiction does not apply under Class Action Fairness Act and holding Indiana LLC was citizen of Indiana under CAFA rule that unincorporated association is citizen of state in which its principal place of business is located and state under whose laws it is organized).

B. Personal Jurisdiction

Hotel 71 Mezz Lender LLC v. Falor, 926 N.E.2d 1202 (N.Y. 2010). The court held that the non-resident defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs were subject to attachment in New York. The court concluded that a court with jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York. The court found that the intangible property plaintiff sought to attach – the membership interests in out-of-state LLCs – was akin to intangible contract rights, and thus was clearly assignable and transferable so as to be "property" under the relevant New York attachment statute. The court analyzed the situs of the property and determined that the situs of the uncertificated membership interests, similar to debt, was wherever the defendants were located. Because the interests were uncertificated, the court rejected the argument that the interests were analogous to stock. The court also concluded that the appointment of a receiver for the interests was warranted due to the complexity of the defendants' interests in various LLCs, the defendants' disregard for previous discovery orders, the precarious financial condition of the defendants, and the lack of marketability of the interests.

PT China LLC v. PT Korea LLC, C.A. No. 4456-VCN, 2010 WL 761145 (Del. Ch. Feb. 26, 2010). Wang, a Singapore resident, sought dismissal of breach of fiduciary duty and breach of contract claims against him on the basis that he was not subject to personal jurisdiction in Delaware. Wang was the sole member and manager of a Delaware LLC which was one of two members of another Delaware LLC, Pine Tree Holdings I LLC ("PT Holdings"). Wang was a member of the management committee of PT Holdings, which was the managing member and minority interest holder of yet another Delaware LLC, Pine Tree Equity LLC ("PT Equity"). The agreements governing these entities included a master joint venture agreement to which Wang was a party. The claims in issue against Wang were various alleged breaches of fiduciary duty to PT Holdings and breaches of provisions of the PT Equity operating agreement and the

master joint venture agreement. Wang did not contest his status as a manager of PT Holdings for purposes of Section 18-109 of the Delaware LLC Act, which provides that a manager of a limited liability company is deemed to consent to the personal jurisdiction of Delaware courts for any suit “involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company . . .” A “manager” is defined for purposes of Section 18-109 to include any person who “participates materially in the management of the limited liability company.” The court noted that even if a person is served pursuant to Section 18-109, the exercise of personal jurisdiction must still be consistent with due process.

With respect to the breach of fiduciary duty claims, the court cited Delaware case law in the LLC and corporate context for the proposition that service under Section 18-109 is consistent with due process where an action relates to a manager’s fiduciary duties. Wang did not contest this point but argued instead that the fiduciary duty claims were not supported by the alleged facts and were otherwise duplicative of the breach of contract claims. The court found that sufficient facts had been pled to support a reasonable inference that Wang usurped business opportunities, disclosed confidential information for his own benefit, and misappropriated resources of PT Holdings. As to Wang’s contention that the fiduciary duty claims were duplicative of the breach of contract claims, the court stated that under Delaware law “a contractual claim will preclude a fiduciary duty claim, so long ‘as the duty sought to be enforced arises from the parties’ contractual relationship.’” The court couched the question as whether there existed an independent basis for the fiduciary duty claims apart from the contractual claims, even if both were related to the same or similar conduct. The court permitted the fiduciary duty claims to stand because they arose independently under Wang’s duty of loyalty to PT Holdings. The court pointed out that Wang did not argue that Wang’s duties were limited by any of the governing agreements, and the court additionally noted that Wang’s fiduciary duties arose under a different agreement (i.e., the PT Holdings LLC agreement) from those which governed the breach of contract claims, and may therefore could be considered distinct in scope.

With respect to the breach of contract claims, while Wang did not contest that Section 18-109 encompasses service on managers for matters that involve or relate to the LLC, Wang claimed that the exercise of personal jurisdiction over him pursuant to Section 18-109 would not comport with due process. The court stated that the exercise of personal jurisdiction under Section 18-109 would be consistent with due process in this circumstance because “(1) the allegations focused on the defendant’s rights, duties, and obligations as the manager of a limited liability company; (2) the matter was inextricably bound up in Delaware law; and (3) Delaware has a strong interest in providing a forum for disputes relating to the actions of managers of a limited liability company formed under its law in discharging their managerial functions.” Wang argued that the breach of contract claims did not implicate his rights, duties, and obligations as manager of PT Holdings and, because the joint venture agreement was not governed by Delaware law, were not inextricably bound up in Delaware law. The court disagreed, finding that the contract claims involved Wang’s management of both PT Holdings and PT Equity and that, under the totality of the circumstances—including the fact that the breach of contract claims were intertwined with Wang’s management of Delaware LLCs, the potential usefulness of his involvement in the suit, and Delaware’s interest in adjudicating disputes involving the management of its LLCs—the court had personal jurisdiction over Wang to hear the breach of contract claims.

Kirby Morgan Dive Systems v. Hydrospace Ltd., No. CV 09-4934 PSG (FFMx), 2010 WL 234791 (C.D. Cal. Jan. 13, 2010) (holding evidence supported exercise of personal jurisdiction over sole owner and managing director of Scottish LLC on basis that individual was LLC’s alter ego where evidence showed LLC was under total control of individual, LLC was undercapitalized, and injustice would result if individual were not held personally liable for arbitration award because plaintiff would not be able to fully recover and individual could circumvent arbitrator’s injunctive relief through operation of his other businesses).

Vichi v. Koninklijke Philips Electronics N.V., Civil Action No. 2578-Vcp, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009). Vichi made a loan to a Delaware LLC which was a subsidiary of a joint venture between two foreign companies. The LLC went bankrupt and defaulted on the loan to Vichi. Vichi then sued various parties. Among other claims, Vichi brought breach of fiduciary duty claims against an individual citizen of Singapore who resided in China and was an officer of the joint venture and employed by a subsidiary of the joint venture that was the sole member and manager of the LLC. The individual successfully moved for dismissal of the claims against him for lack of personal jurisdiction because neither the Delaware long-arm statute nor the implied consent provision of the LLC statute provided a basis to exercise jurisdiction over him. The court determined that the formation of the LLC in Delaware and the alleged breaches of fiduciary duty owed to the LLC provided no basis for specific jurisdiction over the individual as to any of the claims asserted against him. The implied consent provision of the LLC statute did not apply because the individual was not a manager of the LLC appointed pursuant to the operating agreement nor did he participate materially in its management. The individual was employed by the sole member and manager of the LLC but had no personal stake in the LLC. No specific facts were alleged showing the individual personally participated materially in the management of the LLC rather than acting at the direction of and as a representative for the member/manager and its parent.

Boston Scientific Corporation v. Wall Cardiovascular Technologies, LLC, 647 F.Supp.2d 358 (D. Del. 2009) (rejecting argument that Texas LLC was subject to personal jurisdiction in Delaware as alter ego of Delaware LLC because record did not show sufficient level of control, absence of corporate formalities, or fraud, injustice, or inequity in use of corporate form; recognizing separate legal existence of LLC and its members under Texas law and rejecting argument that personal jurisdiction over LLC is proper in any forum in which LLC's members are subject to jurisdiction).

Citrin Holdings, LLC v. Minnis, 305 S.W.3d 269 (Tex. App 2009) (holding New York resident and Delaware LLC wholly owned by New York resident were subject to specific jurisdiction in Texas based on multiple Texas contacts and Texas-based contractual obligations; holding two other foreign LLCs were subject to specific jurisdiction in Texas based on activities in Texas attributable to the LLCs).

More Cupcakes, LLC v. Lovemore LLC, No. 09 C 3555, 2009 WL 3152458 (N.D. Ill. Sept. 24, 2009) (holding fiduciary shield doctrine did not shield sole owners and operators of LLC engaged in business transactions in Illinois from personal jurisdiction because doctrine does not apply to persons with ownership in corporation who have discretion to choose whether to do business in Illinois).

Taddeo v. American Invsco Corporation, No. 2:08-CV-01463-KJD-RJJ, 2009 WL 2951118 (D. Nev. Sept. 8, 2009) (rejecting LLC manager's argument that he was protected by fiduciary shield doctrine and finding exercise of personal jurisdiction over individual appropriate based on considerable activity directed at forum and acts of fraud and personal tort liability alleged).

C. Service of Process

J & J Sports Productions, Inc. v. Royster, No. RWT 10cv569, 2010 WL 1741354 (D. Md. April 28, 2010) (holding Maryland LLC statute authorizes forfeited LLC to be sued; finding no governing case law squarely addressing how to serve LLC that has been forfeited, noting varying approaches by courts addressing service of process on forfeited corporations, and concluding delivery of summons and complaint to registered agent of forfeited LLC less than one year after forfeiture is effective service on LLC).

Previte v. Piunno, 933 N.E.2d 1127 (Ohio App. 2010) (holding that plaintiff's attempts to serve process on LLC by service on Secretary of State and service on LLC's agent as party defendant were ineffective as to LLC).

393 Lefferts Partners, LLC v. New York Avenue at Lefferts, LLC, 890 N.Y.S.2d 330 (App. Div. 2d Dept. 2009) (statement of managing member that he was out of office for many days and did not see summons and complaint (which had been served on Secretary of State and forwarded to LLC's address pursuant to LLC statute) on his desk was not reasonable excuse for LLC's default).

Bryden v. Lakeside Ventures, LLC, 218 P.3d 61 (Mont. 2009) (holding kitchen manager of LLC restaurant had apparent authority to accept service of process on LLC under rule permitting service on LLC by leaving copy of complaint and summons at office or business of company with person in charge of such office).

Myan Management Group, L.L.C. v. Adam Sparks Family Revocable Trust, 292 S.W.3d 750 (Tex. App. 2009) (holding discrepancies in names on cross-claim, citation, and return did not render service improper where LLC designators varied only slightly and did not suggest different entity than that listed in petition was served).

818 Asset Management, Inc. v. Neiman, 22 So.3d 659 (Fla. App. 2009) (per curiam opinion discussing propriety of service of process on LLC by substituted service on secretary of state).

Zollo v. Springer, No. NNHCV095030989S, 2009 WL 3740734 (Conn. Super. Oct. 19, 2009) (holding that LLC may be served under provision regarding service of process on corporation in addition to methods provided under other provisions of law).

Technipower, LLC v. Mustang Vacuum Systems, LLC, No. CVV095007190S, 2009 WL 3645708 (Conn. Super. Oct. 8, 2009) (discussing application of Connecticut long-arm statutes to foreign LLC and concluding defendant LLC was subject to personal jurisdiction under provision applicable to foreign partnerships but that provision applicable to foreign corporations does not apply to foreign LLCs).

Pasquariello Electric Corp. v. Nyberg, No. CV085024983, 2009 WL 3739445 (Conn. Super. Oct. 7, 2009) (discussing application of Connecticut long-arm and service of process statutes to foreign LLCs).

Interior Environments, Inc. v. WA445 Associates, LLC, No. CV065003285, 2009 WL 3644739 (Conn. Super. Sept. 24, 2009) (addressing service of process provisions applicable to LLCs in context of mechanic's lien limitations issue).

LVNV Funding, LLC v. Boyles, __ So.3d __, 2009 WL 3415306 (Ala. Civ. App. 2009) (holding individual who signed affidavit in which she claimed to be attorney in fact for LLC was not managing or general agent for purposes of rule addressing service of process on LLC; holding that Delaware LLC's failure to register to do business in Alabama did not relieve plaintiff of complying with requirements set forth in rule regarding service of process on LLC).

Lizarzu v. Vallejos, Civil Action No. 1:08cv858, 2009 WL 3055443 (E.D. Va. Sept. 22, 2009) (finding LLCs were properly served under Virginia statutes through substituted service on clerk of State Corporation Commission).

D. Venue

Williamsburg Developers, LLC v. J. Jill, LLC, No. CV-H 7971, 2010 WL 972781 (Conn. Super. March 8, 2010) (applying venue statute governing actions between foreign corporations to action between foreign LLCs).

Eldon v. Brown, Civil No. 08-5422 (RBK/AMD), 2010 WL 415317 (D.N.J. Jan. 29, 2010) (noting that corporation is considered to reside in any district in which it is subject to personal jurisdiction for venue purposes and LLC is treated as corporation for venue purposes).

In re Fountainebleau Las Vegas Holdings, LLC, No. 09-21481-BKC-AJC, 2009 WL 3669648 (Bankr. S.D. Fla. Oct. 26, 2009) (discussing management structures of LLCs and “working down corporate trail” of various LLCs to determine that Board of Managers of parent LLC exerted substantial control over member-managed LLC debtor subsidiaries and that principal place of business of debtors for venue purposes was Florida since major decisions affecting debtors occurred in Florida).

E. Standing/Authority to Sue

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

In re South Canaan Cellular Investments, LLC (South Canaan Cellular Investments, LLC v. Lackawaxen Telecom, Inc.), 427 B.R. 85 (Bankr. E.D. Penn. 2010) (indicating that claim for breach of implied covenant of good faith and fair dealing in LLC operating agreements should be asserted by LLC members rather than by LLCs, but concluding, assuming LLCs had standing, that LLCs failed to state cause of action for breach in any event).

In re Cline, PCM Interest Holding, LLC v. Donovan, 901 N.Y.S.2d 2 (App. Div. 1st Dept. 2010) (holding co-member of LLC was entitled to file answer to judicial dissolution petition based on disputed operating agreement and factual issue raised as to whether individual or entity to whom individual had assigned his membership interest had standing to maintain proceeding).

Gulf Coast Asphalt Co., L.L.C. v. Chevron U.S.A., Inc., Civil Action No. 09-0187-CG-M, 2010 WL 1416460 (S.D. Ala. March 22, 2010) (holding parent of LLC did not have standing to assert LLC’s claim because Alabama law does not permit LLC members to claim damages when LLC is injured and LLC member has no interest in specific LLC property).

Taitt v. Secretary, Department of Treasury, No. 09-12576, 2010 WL 1541495 (E.D. Mich. March 10, 2010) (concluding that member of LLC did not have standing to sue on behalf of LLC under Michigan LLC statute).

In re Real Property Located at 4720 N. Nesting Lane, No. 2 CA-CV 2009-0100, 2010 WL 716106 (Ariz. App. March 1, 2010) (holding LLC member lacked standing to assert claim as “injured person” under forfeiture statute where claim was based on judgment obtained by LLC rather than member).

Kelly v. Porter, Inc., 687 F.Supp.2d 632 (E.D. La. 2010) (holding sole member of LLC had no ownership in vessel owned by LLC (refusing to “reverse veil pierce”) and thus had no standing to pursue action for damages to vessel).

Ruotolo v. Ruotolo, No. CV095026804, 2009 WL 5698124 (Conn. Super. Dec. 29, 2009) (holding that ex-wife had standing to bring fraud claims in her individual capacity against ex-husband as sole managing member).

In Re Abbott (Marcantonio v. Abbott), Bankruptcy No. 09-20282 (ASD), Adversary No. 09-2033, 2009 WL 5184710 (Bankr. D. Conn. Dec. 22, 2009) (citing provisions of Connecticut LLC statute regarding LLC property and holding plaintiff could not assert conversion or statutory theft claim with regard to assets that were property of LLC rather than plaintiff).

Sealy v. Clifton, LLC, 890 N.Y.S.2d 598 (App. Div. 2d Dept. 2009) (holding surviving member of two-member LLC lacked standing to bring action for partition of LLC property in member's individual capacity and action for winding up does not support notice of pendency because member has no interest in specific LLC property).

In the Matter of Settoon Towing LLC, Civil Action No. 07-1263, 2009 WL 4730969 (E.D. La. Dec. 4, 2009) (dismissing claims brought by LLC for injuries to its members because LLC is distinct legal entity from its members and, just as members are not proper parties in actions against LLC, LLC should not be permitted to sue for personal injuries to its members).

Smith v. Neil, 20 So.3d 1271 (Ala. 2009). Smith alleged that she was employed by an LLC and was promised an option to purchase an interest in the LLC after one year of service. She further alleged that after she reached an agreement to purchase the LLC, the owners sold it to another party. Smith brought various claims individually and on behalf of the LLC against the prior and new owners, and the trial court dismissed all the claims, including claims against the former owners, who had not filed a motion to dismiss. Based on Smith's counsel's concession that Smith had no claim against the new owner if Smith never purchased the LLC, the court affirmed the trial court's dismissal of the claims against the new owner. The court also affirmed the dismissal of Smith's claims on behalf of the LLC because Smith did not allege any ownership interest in the LLC and thus lacked standing to sue on its behalf. However, the court found no basis for dismissal of Smith's individual claims against the former owners of the LLC, and the court reversed the trial court's sua sponte dismissal of those claims and remanded for further proceedings.

Laverty v. Massad, 661 F.Supp.2d 55 (D. Mass. 2009) (stating that LLC member cannot bring action in member's name to enforce rights or redress injuries of LLC and plaintiff lacked standing to extent he purported to do so).

Wilcox v. Weber Insurance, 982 A.2d 1053 (Conn. 2009) (holding managing member and another member sufficiently alleged interests in automobile and umbrella insurance policies so as to have standing to sue insurer that refused to defend and indemnify in connection with accident involving dump truck owned by LLC).

Felton v. Teel Plastics, Inc., 664 F.Supp.2d 937 (W.D. Wis. 2009) (dismissing breach of fiduciary duty claim brought by individual minority member of LLC because claim belonged to LLC rather than individual).

Wilcox v. Webster Insurance, Inc., No. CV075010093, 2009 WL 2872805 (Conn. Super. Aug. 5, 2009) (holding individual members of LLC established classical aggrievement so as to have standing to sue insurance company where members were seeking to enforce their own rights as well as the rights of their LLC).

F. Pro Se Representation

The courts continue to hold that an LLC must be represented in court by licensed counsel. Among the decisions to that effect are:

Souffrant v. Denhil Oil, LLC, No. 10-80246-CIV, 2010 WL 1541192 (S.D. Fla. April 16, 2010).

Isaacs v. Wells, No. 2:10CV162 DAK, 2010 WL 1404432 (D. Utah April 6, 2010).

Coast Investment Group, LLC v. Arizona Department of Housing, No. CV 09-1733-PHX-JAT, 2010 WL 1417946 (D. Ariz. April 5, 2010).

Taitt v. Secretary, Department of Treasury, No. 09-12576, 2010 WL 1541495 (E.D. Mich. March 10, 2010) (concluding that nothing in Michigan LLC statute or check-the-box regulations altered law providing that artificial entities must be represented by counsel in federal court).

R.E. Loans, LLC v. Eagle Group Brokers, LLC, No. 3:08cv76/MCR/MD, 2010 WL 785668 (N.D. Fla. March 4, 2010).

Chase Bank USA, N.A. v. Cardello, 896 N.Y.S.2d 856 (Civ. Ct. 2010).

Q1, LLC v. County of Sacramento, No. 2:08-cv-1564 JAM KJN PS, 2010 WL 682534 (E.D. Cal. Feb. 23, 2010).

Wisconsin Laborers Health Fund v. CDB Enterprise, LLC, No. 09-cv-619-bbc, 2009 WL 5097170 (W.D. Wis. Dec. 16, 2009).

Super 8 Worldwide, Inc. v. KNR Hotels, LLC, Civil Action No. 09-3302 (JLL), 2009 WL 4911942 (D.N.J. Dec. 11, 2009).

In re Heal, No. 09-13206, 2009 WL 4510128 (Bankr. N.D. Cal. Nov. 30, 2009) (striking pro se litigant's pleadings in collection action because litigant acquired judgment from LLC, which can only appear in court through licensed counsel, and company cannot avoid effect of rule by "assignment" of its rights to principal).

Lawrence Frumusa Land Development, LLC v. Arnold, 421 B.R. 110 (W.D.N.Y. 2009).

Temple v. Eighth Judicial District Court, No. 54386, 2009 WL 3429743 (Nev. 2009).

Lippenberger v. Canal Properties, No. CGC 05444673, 2009 WL 335685 (Cal. App. 1 Dist. Oct. 20, 2009).

Burbank Holdings, LLC v. United States, No. 2:08-CV-01588-KJD-RJJ, 2009 WL 3571284 (D. Nev. Sept. 9, 2009).

Taitt v. Secretary, Civil Action No. 09CV-12576, 2009 WL 3164899 (E.D. Mich. Aug. 17, 2009).

G. Derivative Suits

CML V, LLC v. Bax, C.A. No. 5373-VCL, 2010 WL 4347927 (Del. Ch. Nov. 3, 2010). In a lengthy analysis, the court concluded that, unlike creditors of an insolvent Delaware corporation, the creditors of an insolvent Delaware LLC do not have standing to sue derivatively for breach of fiduciary duty to the LLC. A creditor of an insolvent LLC asserted derivative claims on behalf of the LLC for breach of fiduciary duty by the managers in connection with certain acquisitions and sales by the LLC. The court dismissed the claims for lack of standing because the Delaware LLC statute states that the plaintiff in a derivative suit must be a member or assignee. The court acknowledged that this conclusion “might surprise wizened veterans of the debates over corporate creditor standing,” but the court pointed out that the LLC was not a corporation, and the court concluded the plain language of the LLC statute dictated this result. The court contrasted the exclusive language of the LLC statute with the non-exclusive language in the Delaware General Corporation Law, and the court also traced the development of the derivative suit provisions in the Delaware limited partnership statutes since the LLC derivative suit provision was based on the provision in the Delaware Revised Uniform Limited Partnership Act. Although the court was not able to discern why NCCUSL drafted the derivative suit provisions of the 1976 Revised Uniform Limited Partnership Act in exclusive terms (and noted that the uniform language may simply have resulted from a desire to avoid use of the passive voice), the court found it significant that Delaware adopted such language faced with a clear choice between the non-exclusive provisions of Delaware’s prior limited partnership statute and the exclusive language of RULPA. The court rejected the implicit assumption in dicta of two chancery court opinions that a creditor of an insolvent alternative entity can sue derivatively for breach of fiduciary duty, and the court found nothing absurd about the application of differing legal principles to corporations and LLCs. According to the court, barring creditor derivative standing does not conflict with the overarching purpose or structure of the LLC statute because of the contractarian emphasis of the statute. The court stated that creditors can protect themselves contractually and that limiting creditors to their negotiated rights and denying them the additional right to sue derivatively on behalf of an insolvent entity is consistent with the contractarian approach taken by the LLC statute. The court pointed out various provisions of the LLC statute that appear to have been drafted with creditors in mind and that allow creditors to avail themselves of additional rights and protections. The court characterized the provision of the LLC statute allowing creditors to enforce contribution obligations under certain circumstances as satisfying any equitable desire to enable LLC creditors to enforce subscription agreements and removing any impetus for an experiment with LLCs similar to the evolution of the corporate trust fund doctrine and eventual corporate creditor derivative action. In sum, according to the court, “In light of the expansive contractual and statutory remedies that creditors of an LLC possess, it does not create an absurd or unreasonable result to deny derivative standing to creditors of an insolvent LLC” and, rather than frustrating any legislative purpose of the LLC statute, such an outcome “fulfills the statute’s contractarian spirit.”

Newlands v. NRT Associates, LLC, No. CV084027098, 2010 WL 1665283 (Conn. Super. March 25, 2010). The plaintiff, a one-third member of an LLC, brought this action against the other two members, claiming that the other members had committed various wrongs against him. The court analyzed whether the plaintiff had standing to bring the claims in his individual capacity or was required to assert the claims in a derivative action on behalf of the LLC. The plaintiff argued that Connecticut law did not support the application of principles of corporate law governing derivative and direct claims, but the court concluded that the corporate law pertaining to derivative actions applies to LLCs. The court next analyzed the nature of the plaintiff’s claims and concluded that they were properly brought as direct claims. The plaintiff alleged that the majority members assumed control of the LLC to their benefit and the plaintiff’s detriment by, among other things, depriving him of certain sums due to him, failing to provide him with business and financial information about the LLC, preventing him from participating in the LLC, and wrongfully making

payments from the LLC to another entity in which the defendant members were the sole shareholders. The court concluded that all of these alleged acts involved separate and distinct harm to the plaintiff and were properly brought as direct rather than derivative claims.

Winning Streak, Inc. v. Winning Streak Sports, LLC, No. 100,725, 2010 WL 348272 (Kan. App. 2010) (rejecting members' argument that claims alleged by individual were derivative in nature and that trial court thus erred in instructing jury on claims brought by individual where no objections to instruction were made, members took position throughout trial that individual asserting claims was not member, and individual presented evidence supporting theory that duties were owed to individual; concluding evidence supported finding that individual had only .96% interest in LLC based on company records of contributions to LLC and absence of oral or written operating agreement specifying membership percentages).

Trover v. 419 OCR, Inc., 921 N.E.2d 1249 (Ill. App. 2010). The plaintiff, a member of two LLCs, filed a derivative suit alleging various claims on behalf of the LLCs against fellow members of the LLCs and two non-member entities affiliated with the member defendants. The defendants sought to compel arbitration based on broadly worded arbitration clauses in the LLC operating agreements. The court found that the dispute in question, which involved a land transaction, fell within the scope of the arbitration clauses, but the court concluded that the non-member defendants were not bound by the arbitration clauses and thus could not enforce the arbitration clauses as to the counts against them. Further, the court held that the LLCs were not bound by the arbitration clauses because they were not parties to the operating agreements. The court relied in part on the statutory authorization for a derivative suit and the unlikelihood that the defendant members would have brought the derivative actions naming themselves as defendants.

Cottone v. Selective Surfaces, Inc., 892 N.Y.S.2d 466 (App. Div. 2d Div. 2009) (holding unsigned written agreement did not conclusively establish plaintiff was not entitled to acquire ownership interest in LLC until completion of five years service, and variance between terms of alleged oral agreement and unsigned written agreement created issue of fact as to terms of oral agreement precluding dismissal of derivative claims asserted by plaintiff for acts occurring prior to time plaintiff would have had right to acquire ownership interest under unsigned written agreement; dismissing derivative claim on behalf of LLC for fraudulent conveyance of LLC's own assets because LLC was alleged transferor rather than creditor and thus did not have standing to assert fraudulent conveyance claim under Debtor and Creditor Law).

Karmaloop, Inc. v. Sneider, No. 083580F, 2010 WL 1050951 (Mass. Super. Jan. 6, 2010) (holding plaintiff did not have standing to bring derivative claims on behalf of corporation that was surviving entity in merger with LLC because plaintiff did not and never did own stock in surviving corporation; recognizing plaintiff could pursue direct claim against corporation as to whether he should receive stock or not; finding plaintiff could not adequately and fairly prosecute claims on behalf of corporation, assuming arguendo he otherwise had standing to bring derivative claim, because he was asserting major claims on his own behalf in same suit and thus had substantial conflict of interest in bringing claims against corporation for personal gain and bringing claims on behalf of corporation derivatively; concluding derivative claims sought to be added by plaintiff after close of discovery were for purposes of helping plaintiff settle direct claims and noting that 95% to 99% of shareholders had filed affidavits that they did not want plaintiff's derivative action brought).

Chang v. Johnson, No. C059949, 2009 WL 4693847 (Cal. App. 3rd Dist. Dec. 10, 2009). An LLC member brought a derivative suit on behalf of the LLC seeking a declaration that the LLC was the rightful owner of a building, and the court held that the plaintiff lacked standing to pursue the action. The plaintiff alleged that demand was futile because the defendants were the alleged majority owner of the LLC and

another company owned by the majority owner. The court first concluded that the building in issue had been converted to condominium units pursuant to the terms of the LLC operating agreement and that the LLC was an empty shell with nothing to manage and thus no manager. In addition, the court concluded that the plaintiff had not made demand or alleged demand futility with regard to the managers of the LLC as required by statute. The plaintiff's allegations of demand futility and service of the complaint related to an individual who was the alleged majority owner, and there was no evidence that this individual was a manager. The court discussed the role of managers and members and stated that demand on a majority interest holder or majority member did not satisfy the demand requirement with respect to a manager-managed LLC.

Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, No. 07 CVS 20852 (N.C. Super. Nov. 13, 2009) (concluding that complaint alleged with sufficient particularity actions and controversies of which plaintiff complained and demands made by plaintiff and declining to dismiss plaintiff's derivative claims for breach of fiduciary duty).

Vichi v. Koninklijke Philips Electronics N.V., Civil Action No. 2578-Vcp, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009). Vichi made a loan to a Delaware LLC which was a subsidiary of a joint venture between two foreign companies. The LLC went bankrupt and defaulted on the loan to Vichi. Vichi then sued various parties. Among other claims, Vichi brought breach of fiduciary duty claims against an individual citizen of Singapore who resided in China and was an officer of the joint venture and employed by a subsidiary of the joint venture that was the sole member and manager of the LLC. The individual successfully moved for dismissal of the claims against him for lack of personal jurisdiction because neither the Delaware long-arm statute nor the implied consent provision of the LLC statute provided a basis to exercise jurisdiction over him. However, the court stated that even if it had not dismissed the claims against him for lack of personal jurisdiction, it would have dismissed the breach of fiduciary duty claims for failure to state a claim because Vichi failed to establish that his fiduciary claims were cognizable under Delaware law. The court stated that creditors of a Delaware corporation that is insolvent or in the zone of insolvency have no right to assert direct breach of fiduciary claims, and the court concluded that the same rule applies in the LLC context. The court then analyzed whether Vichi's fiduciary claim was direct or derivative based on who suffered the alleged harm and who would receive the benefit of recovery. The court found that Vichi alleged that the individual breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore concluded that Vichi's breach of fiduciary duty claims were direct, and Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims.

Firehouse Gallery, LLC v. Phillips, No. 8:09-CV-698-T-17-MAP, 2009 WL 4015575 (M.D. Fla. Nov. 19, 2009) (holding derivative claim on behalf of Delaware LLC was not properly pled because Delaware law requires demand futility to be plead with particularized factual allegations and plaintiff did not plead demand futility but merely argued demand futility was evident on face of record).

Lola Cars International Limited v. Krohn Racing, LLC, CA Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681 (Del. Ch. Nov. 17, 2009). Lola Cars International, Ltd. ("Lola") and Krohn Racing, LLC ("Krohn") formed a Delaware LLC and agreed to equal representation on the governing board although Lola owned a 51% interest in the LLC and Krohn held a 49% interest. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the LLC's CEO. Lola brought two suits against Krohn and Hazell, and the defendants moved to dismiss both of Lola's complaints. Among Lola's claims were claims that Hazell breached his fiduciary duties of loyalty and care, and Krohn aided and abetted Hazell's

disloyalty. Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by the Delaware LLC statute. The court noted that it relies on corporate precedent in interpreting this requirement and that demand is considered excused in the corporate context when allegations in the complaint create a reason to 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 court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion and his use of LLC assets for Krohn's benefit in violation of his duty of loyalty to the LLC. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Mathis v. ERA Franchise Systems, Inc., 25 So.2d 298 (Miss. 2009). Mathis, a 50% member of an LLC, sued the other member and several other parties alleging claims that included derivative claims. Mathis argued that he was entitled to bring claims of a derivative nature in a direct action relying on case law in the closely-held corporation context. In *Derouen v. Murray*, the Mississippi Supreme Court determined that an action by one shareholder against another was a derivative action but stated in a footnote that it could be brought as a direct action, relying on the American Law Institute Principles of Corporate Governance. The court stated that the question is left to the discretion of the trial judge, however, and concluded that the complexity of the instant case militated against application of the doctrine. The court stated that cases in other jurisdictions revealed that the doctrine is usually employed in purely intracorporate disputes, and this case involved claims against current and former owners as well as defendants who were never owners or members of the LLC. Given the number of parties and the existence of counterclaims and cross-claims, the court thought it likely that a direct recovery would interfere with a fair distribution of the recovery or expose the entity to a multiplicity of actions. Further, one of the parties asserted that it was owed money by the LLC, making it a potential creditor that would be prejudiced by direct recovery by Mathis. Mathis argued that he should be given leave to amend to assert a derivative action and that he should not be required to make demand because demand would be futile. Because Mathis never presented these arguments to the trial court and made clear that he was only interested in proceeding directly, the trial court did not err in dismissing the derivative claims with prejudice. Finally, Mathis argued that he should be allowed to proceed with the claims that were not derivative, but the trial judge did not specify which claims were dismissed as being derivative in nature. The court analyzed the various claims relying on principles found in Fletcher's Cyclopaedia of the Law of Corporations and the ALI Principles of Corporate Governance and concluded that all of the claims except for certain claims against a former member were derivative.

Natomas Gardens Investment Group LLC v. Sinadinis, No. CIV. S-08-2308 FCD/KJM, 2009 WL 3055213 (E.D. Cal. Sept. 14, 2009) (disqualifying attorney from representing both LLC and its officer in derivative action and directing LLC to retain independent counsel without prior ties to LLC or other parties to case).

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. Gene sought to recover the fair value of his interests in the LLCs but Gene conceded that the claims for fair value of the interests in certain of the LLCs should be pursued in arbitration, and the court determined that the claims for fair value in the remaining LLCs were also subject to arbitration. In addition to seeking to recover the fair value of his LLC interests, Gene asserted derivative claims for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard. The

defendants moved to stay the derivative claims. The court stated that it would consider any preclusive effects of a pending arbitration elsewhere on the action before the court as well as any burden imposed by both litigating and arbitrating at the same time in different forums. The LLCs subject to the derivative claims did not have arbitration clauses in their agreements. Ultimately, the court denied the defendants' motion to stay on the basis that the LLCs, the LLC agreements, and the claims involved in the derivative claims were sufficiently different and distinct from those that were being arbitrated. The court did not find that a significant risk of inconsistent judgments would be caused by allowing the litigation on the derivative claims to continue while arbitration began on the other claims.

Ward v. Gamble, No. CV085017829S, 2009 WL 2781541 (Conn. Super. July 23, 2009) (noting that Connecticut LLC statute is silent on applicability of derivative actions to LLCs and concluding that there is no functional or material difference between corporations and LLCs that would justify treating them differently with respect to rules regarding derivative suits; holding that derivative action was available even if LLC had not been formed at time of events alleged because Connecticut statute explicitly authorizes derivative actions for unincorporated associations; analyzing plaintiff member's claims and concluding that plaintiff did not have option to bring them directly or derivatively, but could only proceed derivatively; rejecting plaintiff member's claim that he could not fairly and adequately represent the interests of the other members even though plaintiff was minority member who accused remaining members of wrongdoing because all members would share in any monetary recovery of LLC).

H. Necessary Parties

Peterson v. Woldeyohannes, No. CV040834966S, 2009 WL 4686026 (Conn. Super. Nov. 13, 2009) (recognizing that corporate entities are not necessary parties where court is piercing entity veil to hold owner personally liable but stating that court lacked jurisdiction to enter plaintiff's requested relief of constructive trust over assets of LLC that was alter ego of member defendant because LLC was not a party and owner of assets involved in constructive trust must be a party to the suit).

I. Stay of Proceedings

Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Investors, L.L.C., C.A. No. 4353-VCP, 2009 WL 3335332 (Del. Ch. Oct. 15, 2009). The defendants sought a stay of this proceeding in which the plaintiff, Choice Hotels International, Inc. ("Choice"), sought a determination, under Section 18-110 of the Delaware LLC statute, of the rightful manager of a single purpose Delaware LLC owning property in Ohio. Choice asserted that it validly removed Klein from his position as the sole manager of the LLC and that Choice was the manager of the LLC. In two separate suits filed in Maryland, Choice sued the LLC and Klein, and the LLC and Klein sued Choice. These suits related to loans from Choice to Klein pursuant to which Klein pledged his interest in the LLC as security for the loans. Klein allegedly defaulted on the loans, and Choice purported to foreclose on Klein's membership interest in the LLC, remove Klein as the manager of the LLC, and appoint itself as the replacement manager. Choice contended that the statutory policy behind a summary action under Section 18-110 of the Delaware LLC statute superseded application of the conventional *McWane* analysis giving preference to a first-filed action and that Section 18-110 required the court to give precedence to the summary Delaware action. Section 18-110 provides that the Court of Chancery "may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and . . . may determine the person or persons entitled to serve as managers . . ." The court noted that the purpose of Section 18-110 is "to expeditiously resolve uncertainty" within an LLC. Thus, the Court of Chancery will ordinarily deny a motion to stay a Section 18-110 action. However, citing Delaware precedent, the court acknowledged that when faced with a request

to stay a summary action, the court balances the *McWane* policies of comity and promotion of the efficient administration of justice against the policies underlying the summary nature of the Delaware action. Under the *McWane* doctrine, an action will be stayed if the following three questions are answered in the affirmative: (1) whether there is a prior action pending elsewhere related to the action in Delaware; (2) whether such other suit involves the same parties and issues; and (3) whether the foreign court is capable of doing prompt and complete justice. The court answered each of these questions in the affirmative and further found that there was a significant risk that proceeding with the Delaware action would unnecessarily waste time, effort, and expense or result in inconsistent and conflicting rulings. The court thus held that the *McWane* policies of comity and the orderly and efficient administration of justice supported granting a stay of the Delaware action. The court next considered whether the balance of potential harms weighed in favor of staying or not staying the action. The court noted that the LLC had just one asset, and that the LLC could be expected to maintain its business as usual during the Maryland action. Thus, the court concluded that, under the circumstances, the first-filed rule applied and principles of comity and promoting the efficient administration of justice required that the Delaware action be stayed.

J. Arbitration

Abbey v. Fortune Drive Associates, LLC, No. A124684, 2010 WL 1553616 (Cal. App. 1 Dist. April 20, 2010). The sole manager and owner of a majority interest in a Delaware LLC concluded that it would be in the best interest of the LLC to remove a minority member, Abbey, who owned a 2.98% interest and had expressed disagreement with a restructuring of the LLC approved by the other members. The sole manager/majority member initiated an amendment of the operating agreement to provide for the termination of a member upon the vote of other members and to set the financial terms under which the termination would occur. The amendment also contained a provision requiring any dispute over a termination to be arbitrated and requiring the arbitrator in such a dispute to value the ownership interest of the terminated member. The operating agreement provided that it could generally be amended by a majority vote of the LLC's membership interests, but certain enumerated "major decisions" required a two-thirds vote of the membership interests. The provision authorizing amendment of the agreement placed no substantive limits on amendment of the agreement. All members other than Abbey consented to the amendment and to Abbey's termination pursuant to it. The LLC commenced arbitration, and Abbey sought to stay the arbitration on the basis that he was not bound by the arbitration provision of the amendment. The court recognized that Delaware law governed the internal affairs of the LLC but determined that California law on contract interpretation applied under both the Federal Arbitration Act and state arbitration law. The court noted that the LLC did not appear to argue for application of Delaware law to the issue of contract interpretation and had not demonstrated the result would be different under Delaware law. The court recognized the emphasis on freedom of contract under Delaware LLC law, referring to the operating agreement as the "heart and soul of an LLC," but relied upon California case law dealing with amendment of a contract to conclude that the arbitration provision was beyond the intent of the parties in permitting majority amendment of the operating agreement. The court stated that Delaware's grant of freedom to the members to structure their operating agreement at the outset of the LLC does not necessarily mean that the members have the same broad authority to amend the agreement after formation if the amendment is less than unanimous. The court stated that general principles of contract law include certain common law constraints on amendment of a contract by less than all parties. The court stated that the members' expectations constrain the changes that can be made without consent of all members, and that the requirement of definiteness and the obligation of the parties to act in good faith and deal fairly limit the scope of amendments. As a matter of traditional contract interpretation, based on the intent of the parties, the court concluded that the arbitration clause, adopted in the circumstances presented, went beyond the scope of amendments anticipated by the members. The court noted that the operating agreement contained no restriction on fiduciary duties and that the members thus

owed the traditional fiduciary duties owed by directors of a corporation, but the court stated that whether the arbitration provision violated the members' fiduciary duties and the implied covenant of good faith and fair dealing was a substantial question not raised by the parties and not addressed by the court.

Cotton Creek Circles, LLC v. San Luis Valley Water Co., 689 S.E.2d 675 (Va. 2010) (concluding that broad arbitration clause in LLC operating agreement, which conferred on arbitrators power to resolve "any dispute with respect to" the operating agreement included authority to settle dispute over proper interpretation and application of non-compete clause in operating agreement).

Kolsky v. Jackson Square, LLC, 28 So.2d 965 (Fla. App. 2010) (holding that dispute fell within scope of arbitration clause in LLC operating agreement and that non-signatories as well as defendant member could compel plaintiff member to arbitrate claims asserted by plaintiff).

Trover v. 419 OCR, Inc., 921 N.E.2d 1249 (Ill. App. 2010). The plaintiff, a member of two LLCs, filed a derivative suit alleging various claims on behalf of the LLCs against fellow members of the LLCs and two non-member entities affiliated with the member defendants. The defendants sought to compel arbitration based on broadly worded arbitration clauses in the LLC operating agreements. The court found that the dispute in question, which involved a land transaction, fell within the scope of the arbitration clauses, but the court concluded that the non-member defendants were not bound by the arbitration clauses and thus could not enforce the arbitration clauses as to the counts against them. Further, the court held that the LLCs were not bound by the arbitration clauses because they were not parties to the operating agreements. The court characterized this issue as one of first impression in Illinois and stated that Illinois law and the facts of the case required a different result from *Elf Atochem North America, Inc. v. Jaffari*, in which the Delaware Supreme Court concluded that an LLC was bound to arbitrate by an arbitration clause in the operating agreement even though the LLC was not a signatory to the agreement. In *Jaffari*, the arbitration clause covered all disputes, and the court specified that the members of the LLC were the real parties and that the LLC was simply a joint business vehicle for the members. In distinguishing the law and facts of this case from that involved in *Jaffari*, the court emphasized that the arbitration clauses here specified that the controversy must be "between the parties," and the court relied upon the separate legal existence of an LLC under the Illinois LLC statute, the LLC's power to sue and be sued, the recitation in the operating agreements that the agreements were by and among specified parties that did not include the LLC, and the signatures (which did not refer to or purport to bind the LLCs) at the end of the agreements. The court also pointed to a provision of the operating agreements that gave the managing member authority to sign contracts on behalf of the LLCs when authorized by the members, thus indicating that the drafters understood what was necessary to contractually bind the LLCs. The court also relied on the statutory authorization for a derivative suit and the unlikelihood that the defendant members would have brought the derivative actions naming themselves as defendants. The court concluded that a fraud claim brought by the plaintiff individually against the other members was subject to the arbitration clause, and a defendant member who was not an original signatory of the operating agreements but was subsequently admitted as a member was entitled to enforce the arbitration clause under the terms of the agreements.

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case involved two different versions of Section 18-603 of the Delaware Limited Liability Company Act. For LLC agreements entered into before July 31, 1996, the statute permitted a member to resign with six months' notice. For LLC agreements entered into after July 31, 1996, the statute prohibits resignation before dissolution and winding up unless the LLC agreement states otherwise. Gene sought an award of fair value for his interest in the pre-

1996 and post-1996 LLCs, but Gene ultimately conceded that the claims for fair value of the interests in the post-1996 LLCs should be pursued in arbitration. Gene also asserted derivative claims for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard. The defendants moved to dismiss the fair value claims against one LLC on the basis that the claims were not ripe and against the remaining LLCs on the basis that they were subject to arbitration. The defendants also moved to stay the derivative claims. With respect to the arbitration issue, the court ultimately granted the defendants' motion to dismiss the fair value claims against the remaining pre-1996 LLCs because arbitration was appropriate. The court divided the arbitrability question into "procedural" and "substantive" arbitrability relying on *James & Jackson, LLC v. Willie Gary, LLC*. The procedural arbitrability question revolved around whether or not the parties complied with the arbitration provisions of the LLC agreement. A presumption exists that procedural arbitrability questions are answered by arbitrators, not by the courts. The court noted that substantive arbitrability was less clear-cut and included a determination of both the scope of an arbitration provision and the broader issues of whether the contract and/or the arbitration clause were valid and enforceable. The court relied upon a recent chancery court opinion for the proposition that the court must first address the question of who decides whether the parties agreed to submit a particular dispute to arbitration or to a court. According to that decision, courts presume the parties did not intend to arbitrate arbitrability unless there is clear and unmistakable evidence to the contrary. Clear and unmistakable evidence that the parties intended to arbitrate arbitrability exists if the arbitration clause: (1) generally refers all disputes to arbitration, and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability. The arbitration clause in the present case stated that any controversy "arising out of or relating to" the agreement shall be settled by arbitration. The court interpreted "arising out of or relating to" broadly, and found the arbitration clause sufficient to satisfy the first prong of the test by generally referring all disputes to arbitration. The provision also satisfied the second prong by requiring that the arbitration be conducted in accordance with the rules of the American Arbitration Association. Gene argued that his request for an award of fair value was based on Section 18-604 of the LLC statute and not the LLC agreement. He further argued that the breach of fiduciary duty claims did not arise out of the LLC agreements because the agreements were "bare bones." Gene relied on *Parfi Holding AB v. Mirror Image Internet, Inc.* for the proposition that "actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract." Essentially, Gene asked the court to decide whether his claims arose out of, or related to, the LLC agreements. The court found that if it answered that question, it would undermine the *Willie Gary* test. Although the court admitted that common sense required some minor inquiry into whether the arbitration clause covered the underlying dispute, it said that, if there was a colorable basis that the dispute is covered by the arbitration clause and the clause satisfies the *Willie Gary* test, then the question of substantive arbitrability should be answered by the arbitrator rather than the court. The court decided that since LLCs were creatures of contract, Gene's request for fair value of his interest was, to some degree, related to the existence of the agreement and its terms. Finally, the court noted that the policy of the court was to defer to arbitration when in doubt.

Googla Home Decor LLC v. Uzkiy, No. 09-CV-1049 (CPS)(RML), 2009 WL 2922845 (E.D.N.Y. Sept. 8, 2009) (holding arbitration clause in LLC operating agreement employing "arising out of or relating to" language was broad clause creating presumption of arbitrability, and concluding arbitration clause encompassed breach of fiduciary duty claim as well as disputes concerning who exercised majority control and had authority under operating agreement to take certain acts).

K. Claim Preclusion

Arlin-Golf, LLC v. Village of Arlington Heights, No. 09 C 1907, 2010 WL 918071 (N.D. Ill. March 9, 2010) (stating that LLCs are in privity with their owners for purposes of res judicata).

L. Nature of LLC

Flatt v. United States Securities and Exchange Commission, No. 10-60073-MC, 2010 WL 1524328 (S.D. Fla. April 14, 2010) (holding that customer protections in Right to Financial Privacy Act did not provide basis to quash SEC subpoena of LLC's bank records because LLC is not individual or partnership and thus is not included in definition of "customer" under RFPFA).

United States ex rel. DeKort v. Integrated Coast Guard Systems, 705 F.Supp.2d 519 (N.D. Tex. 2010). In this False Claims Act case, the relator alleged that Lockheed Martin Corporation ("Lockheed") and Northrup Grumman Ship Systems, Inc. ("Northrup"), the members of Integrated Coast Guard Systems ("ICGS"), a Delaware limited liability company, should be held jointly liable as members of a joint venture. The relator alleged that Lockheed and ICGS, as well as ICGS's web site, referred to ICGS as a "joint venture" between Lockheed and Northrup and used the term "partners" to describe Lockheed and Northrup. The relator argued that the defendants should be estopped to deny that they were a joint venture in light of their repeated public admissions. The court rejected the attempt to hold the defendants jointly liable. The court stated that ICGS was a limited liability company under Delaware law, not a partnership or joint venture, and thus joint and several liability did not apply. Further, estoppel would require that the Coast Guard was unaware of ICGS's actual legal form, acted in reliance on this misunderstanding, and was harmed as a result. The relator made no such allegations.

Massey v. Saunders, No. X08CV075004743S, 2010 WL 1565558 (Conn. Super. March 16, 2010) (striking all ten counts of plaintiff's complaint because of failure to plead alternative and potentially inconsistent claims separately, including claims that plaintiff was member of LLC or partner in partnership with defendants, and noting that fact that plaintiff's reference in complaint to entity with designation of "LLC" in its name as "limited liability corporation" and failure to actually allege LLC's status was symptomatic of lack of precision in asserting claims).

Kelly v. Porter, Inc., 687 F.Supp.2d 632 (E.D. La. 2010) (holding LLC could not recover non-pecuniary damages such as loss of enjoyment or emotional damages).

Big Bucks Preserve, LLC v. Columbia Gulf Transmission Co., No. Civ. A. 08-2021, 2009 WL 5173929 (W.D. La. Dec. 30, 2009) (stating that LLC with rights under hunting lease may not recover damages for negligent or intentional infliction of emotional distress, mental or emotional harm, or loss of enjoyment of hunting season, and rejecting LLC's argument that its own veil should be pierced on basis that its individual sole member and manager was its alter ego because member should not be permitted to avail himself of benefits which would flow from not being organized as LLC once he has availed himself of obvious benefits from use of business entity).

Range Resources-Appalachia, LLC v. Blaine Township, Civil Action No. 09-355, 2009 WL 3515845 (W.D. Pa. Oct. 29, 2009) (holding township disclosure ordinance requiring corporations to submit extensive disclosure statement in order to do business in township was not preempted by Pennsylvania LLC statute).

People v. Highgate LTC Management, LLC, 887 N.Y.S.2d 298 (App. Div. 3rd Dept. 2009). An LLC that operated a rehabilitation and extended care facility was convicted of various crimes based on the failure of the LLC's employees to provide required care to a patient and falsification of records regarding such care. The court held that an LLC can be held criminally responsible for the acts of its employees committed in the scope of employment. The LLC argued that the doctrine of respondeat superior does not apply to crimes that require specific intent and that the statutory provision of the Penal Code making respondeat superior applicable to corporations must be strictly construed and cannot apply to unincorporated associations such as LLCs. The court rejected these arguments, relying on case law involving corporations and unincorporated associations. Though the court acknowledged that the Penal Code provision applying respondeat superior liability to corporations is inapplicable to an LLC, the court stated that "long-standing analogous principles that have evolved through case law remain dispositive."

Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 23 So.3d 175 (Fla. App. 2009). The court held that a ten-year commercial lease did not satisfy a Florida statute applicable to conveyances of real property because it lacked two subscribing witnesses as required by the statute for a lease of more than one year. Though the lease was properly executed under the Florida LLC statute, the court agreed with the views of the Real Property, Probate and Trust Law Section of the Florida Bar expressed in its amicus curiae brief and held that the lease must also comply with the statutory two-witness requirement. Recognizing that an LLC is not a corporation, the court rejected the argument that an exception in the statute for corporations applied to the LLC.

In the Matter of MCI Worldcom Network Services, Inc., 912 N.E.2d 920 (Mass. 2009) (holding that LLCs are not eligible for utility exemption available to companies organized as corporations and rejecting LLC's argument that it should benefit from parent's corporate form).

M. Formation or Failure to Form LLC

Alkanani v. Aegis Defense Services, LLC, Civil Action No. 09-1607 (RWR), 2010 WL 489543 (D.D.C. Feb. 8, 2010) (granting summary judgment in favor of LLC on basis that Delaware LLC was not formed until after time of alleged incident giving rise to complaint, relying on provision of Delaware LLC statute stating that LLC is formed at time of filing of initial certificate of formation in office of Secretary of State).

Phillips v. Schifino, C.A. No. 3644-VCL, 2009 WL 5174328 (Del. Ch. Dec. 18, 2009) (denying motion for summary judgment in case involving start-up venture to be conducted through Delaware LLC, noting that it was not even clear whether central document relied upon by parties should be treated as LLC agreement within meaning of LLC statute and that resolving case would likely "require a hard slog through cryptic documents and conflicting testimony").

Douglas v Mundell, No. 1 CA-CV 06-0603, 2009 WL 2766746 (Ariz. App. Sept. 1, 2009) (affirming trial court's dismissal of LLC organizer's claims against Arizona Corporation Commission and its individual members for damages based on alleged failure to process filings in timely manner, failure to correctly inform filers of statutory publication requirements and enforce requirements, and collection of unlawful expedited filing fees).

N. Pre-Formation Transactions

Duray Development, LLC v. Perrin, 792 N.W.2d 749 (Mich. App. 2010). An individual signed a contract on behalf of an LLC prior to the filing of the articles of organization and sought to avoid personal liability on the contract under the doctrines of de facto corporation and corporation by estoppel. The court discussed the Michigan de facto corporation doctrine at length and concluded that the corporate and LLC statutes should be interpreted in a consistent manner, that the de facto corporation doctrine should be extended to LLCs, and that the elements of the doctrine were satisfied with respect to the LLC in question. The court also discussed the application of the corporation by estoppel doctrine to LLCs and concluded that it may reasonably be extended to LLCs. Though the court stated that the record supported a finding of LLC by estoppel, the court concluded that the trial court did not commit plain error in failing to do so because the individual asserting the doctrine on appeal did not raise it in the trial court, and the trial court did not make a clear and obvious mistake in failing to raise the doctrine sua sponte since there was no precedent on the application of the doctrine to LLCs at the time.

Onuss Ortak Nokta Uluslararası Haberleşme Sistem Servis Bilgisayar Yazılım Danismanlık ve Ticaret Limited Sirketi v. Terminal Exchange, LLC, No. 09-80720-CIV-MARRA, 2010 WL 935972 (S.D. Fla. March 10, 2010) (finding that complaint lacked allegations that would permit imposing pre-existing liability on LLC that was not in existence at time of transaction; refusing to consider fictitious name registration relied upon by defendants (to show that they contracted on behalf of existing LLC rather than LLC not yet formed) because name registration was not part of or relied upon in plaintiff's pleadings, and denying motion to dismiss claims against individual defendants under common law promoter liability and Florida statute imposing liability on persons who purport to act on behalf of LLC knowing there was no organization of an LLC).

Alkanani v. Aegis Defense Services, LLC, Civil Action No. 09-1607 (RWR), 2010 WL 489543 (D.D.C. Feb. 8, 2010) (granting summary judgment in favor of LLC on basis that Delaware LLC was not formed until after time of alleged incident giving rise to complaint, relying on provision of Delaware LLC statute stating that LLC is formed at time of filing of initial certificate of formation in office of Secretary of State).

In the Matter of Hausman, 921 N.E.2d 191 (N.Y. 2009). The grandchildren of a decedent argued that property conveyed to an LLC prior to the decedent's death was not conveyed to a valid LLC and that it should be part of the estate subject to their distributive interests as stated in the decedent's will. The decedent's two living children executed articles of organization for an LLC on October 4, 2001, but the articles of organization were not filed with the Department of State until November 16, 2001. On November 2, 2001, two weeks before the articles of organization were filed, the decedent deeded the property to the LLC. The court saw no principled reason why the de facto corporation doctrine should not apply to LLCs, and the court thus agreed with the parties that it did. The de facto corporation doctrine may be invoked when there exists (1) a law under which the corporation may be organized, (2) an attempt to organize the corporation, and (3) an exercise of corporate powers thereafter. Under the New York LLC statute, articles of organization must be executed and filed to form an LLC. Here, no attempt to file the articles of organization was made before conveyance of the property. The decedent's son argued that a de facto entity may exist even where it has failed to make an attempt to file statutorily required organizational papers, but the court concluded that merely executing articles of organization and an operating agreement is insufficient to meet the requirements of a de facto entity. Because it was undisputed that there was no bona fide attempt to comply with the ministerial but essential requirement of filing the articles of organization prior to the time of the conveyance, there was no entity in existence capable of receiving title to the property.

Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. App. 2009). The plaintiffs asserted claims for breach of contract, unfair and deceptive trade practices, unjust enrichment, constructive trust, and common law fraud based on the defendants' solicitation of money from the plaintiffs for the purpose of purchasing properties. The parties agreed that the venture would be organized as an LLC, and the plaintiffs alleged that one of the defendants, Browder, represented to them that the LLC was formed when it was not. Several properties were deeded to the non-existent LLC, and the court characterized these deeds as void because the LLCs were non-existent. An LLC was formed by one of the defendants almost two years after the litigation was commenced, but the record did not indicate whether new deeds had been executed after the formation of the LLC. The court first held that there were fact issues precluding summary judgment on the breach of contract claim. Both parties agreed that some contractual arrangement was entered, but there were fact issues as to what the terms were and whether they were breached. The court granted summary judgment in favor of the defendants on the constructive trust issue, stating that it was difficult to see how a remedy or judgment could be rendered against the LLC, should it later be determined to be the owner of the properties, since the LLC was not formed at the time the complaint was filed. The court held that constructive trust could not be imposed on the individual defendants because they did not come into possession or control of the legal title to the properties deeded to the non-existent LLC. With regard to the unfair or deceptive acts or practices claims, the court held that the alleged deceptive practices (marketing memberships in a fictitious LLC) were merely assertions that the defendants asked plaintiffs to invest in a business arrangement, and these capital raising ventures among sophisticated business persons fell outside the scope of the North Carolina Unfair and Deceptive Trade Practices Act. Also, the court held that the allegations did not show that the acts or statements were "in or affecting commerce" and did not allege an actual, concrete injury in fact. Finally, the court concluded that the trial court correctly granted summary judgment against the plaintiffs on the fraud claim because there was no evidence that Browder had any knowledge of the falsity of the representation that the LLC had been formed. Further, while agreeing with the plaintiffs that whatever undefined relationship existed, it created a fiduciary relationship based on the funds entrusted to Browder, the court stated that a constructive fraud claim requires more than a fiduciary relationship, and the plaintiffs did not show that the defendants participated in a transaction through which they sought to benefit themselves.

722 W. 43rd St. LLC v. Ali, No. B211263, 2009 WL 302001 (Cal. App. 2 Dist. Sept. 23, 2009) (permitting LLC to amend complaint to allege that it had been formed and had adopted contract although it had not yet been formed and lacked capacity to sue at time complaint was filed because LLC may enforce contract made on its behalf before formation if it has adopted or succeeded to contract and lack of capacity is legal disability that can be cured during pendency of litigation).

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

Howard v. Turnbull, 316 S.W.3d 431 (Mo. App. 2010) (holding that LLC rather than its owners receive benefit for purposes of unjust enrichment when third party pledges collateral to secure LLC's debt, and plaintiff could not recast potential breach of contract claim against LLC as claim for unjust enrichment against LLC's owners because unjust enrichment cannot be used to make LLC owners liable for LLC's obligations absent circumstances that would justify piercing LLC's veil).

Losh Family, LLC v. Kertsman, 228 P.3d 793 (Wash. App. 2010) (holding LLC members referred to in assignment of lease as "William and Teresa Grover as individuals, dba Grover International, LLC" were personally liable as assignees notwithstanding signature for assignee was "Grover International, LLC by William Grover member").

HSBC Bank USA, National Association v. Laniado, 897 N.Y.S.2d 514 (App. Div. 2d Dept. 2010) (holding unambiguous terms of written credit agreement obligated LLC officer who signed on behalf of LLC and as guarantor and conflicting assertion that bank representative assured LLC officer he would not be personally liable was insufficient to raise triable fact as to whether officer intended to bind himself individually).

Trotter v. Charles M. Fife, Jr. & Associates, LLC, 36 So.2d 426 (La. App. 2010) (affirming trial court's judgment against individual member of LLC because fraud was perpetrated by individual and Louisiana law does not allow individual guilty of fraud to hide behind mantle of protection from personal liability ordinarily provided by LLC).

Bur-Cam Group, LLC v. Pearson, No. 3:10cv240, 2010 WL 1565521 (M.D. Pa. April 19, 2010) (denying LLC member's motion to dismiss claim against member because plaintiff alleged that member participated directly in fraud perpetrated on plaintiff and used company as means of executing scheme).

A&E Engine and Compression, Inc. v. Miss-Lou Petroleum, LLC, No. 2009 CA 1254, 2010 WL 1005870 (La. App. March 19, 2010) (recognizing limited liability of managing members, employees, and agents of LLC and concluding that petition did not state cause of action against individual where petition alleged actions were taken by individual in representative capacity on behalf of LLC, but giving plaintiff opportunity to amend petition to state cause of action against individual based on any fraud, breach of professional duty, or other negligent or wrongful act committed by individual).

Tatro v. Citigroup, Inc., C.A. No. 09-631S, 2010 WL 1444866 (D.R.I. March 15, 2010) (recognizing limited liability of LLC manager under Georgia law and dismissing claims against manager because complaint did not allege facts plausibly suggesting direct knowledge or personal involvement by manager in alleged fair credit reporting violations by LLC).

Department of Agriculture v. Appletree Marketing, L.L.C., 779 N.W.2d 237 (Mich. 2010) (holding sole manager and member of LLC could be held personally liable for common law or statutory conversion without "piercing corporate veil" because Michigan law has long held that corporate officials may be held personally liable for individual tortious acts in course of business regardless of whether acts were for personal benefit or corporation's benefit).

Braucher v. Swagat Group, L.L.C., 702 F.Supp.2d 1032 (C.D. Ill. 2010) (recognizing that LLC members are not liable for tortious acts of LLC under Illinois law and granting summary judgment in favor of members of LLC that operated hotel on claims by guests of hotel who allegedly became ill due to bacteria in hotel pool; rejecting argument that members of LLC who personally signed hotel franchise agreement along with LLC were liable for tortious act of LLC; recognizing that LLC member who was hotel manager and maintained spa and pool might have personal liability for his own actions but was not liable simply as member of LLC).

White v. Marshall, 693 F.Supp.2d 873 (E.D. Wis. 2009) (discussing and applying standard required to hold corporate officer and owner liable for infringement of corporation as if LLC owner and manager in case were corporate officer and concluding claim against LLC manager survived motion to dismiss inasmuch as complaint alleged individual was managing director, general manager, and significant owner of infringing LLC and thus would have had supervisory role over content of web sites in issue and arguable direct financial interest in alleged infringement).

Allen v. Dackman, 991 A.2d 1216 (Md. 2010). The plaintiffs alleged that they were injured by lead paint while living at a property owned by an LLC, and the issue addressed by the court was whether a member of the LLC could be held liable for the injuries. The member argued that he could not be liable as a matter of law because he only dealt with the property through the LLC and never visited the property, never intended to lease it to anyone, was unaware that the plaintiffs were occupying the property until after the LLC acquired it, and successfully took legal action to remove the plaintiffs. The court concluded that the member could be held liable under the Baltimore Housing Code, which imposes liability on an individual who “owns, holds, or controls” the title to a dwelling. The court concluded that a reasonable trier of fact could find that the member controlled title to the property. The court based this conclusion on evidence that the member was responsible for running the day-to-day affairs of the LLC, executed the deed certification when the LLC acquired the property, signed the complaint removing the plaintiffs, and signed the deed when the LLC sold the property. The court disagreed with the member that his status as an LLC member necessarily shielded him from liability under the facts of this case. The court concluded that a reasonable trier of fact could find that the member personally committed, inspired, or participated in the alleged tort and would thus be liable under principles applicable to corporate officers and agents who personally commit, inspire, or participate in torts in the name of the corporation. Although the Baltimore Housing Code was silent on the liability of LLC members while expressly providing that a corporation’s violation shall be deemed to be the violation of the individual directors, officers, or agents who authorized, ordered, or performed any of the acts, the court did not view the omission of LLCs from the ordinance as reflecting an intent to exclude LLC members from personal liability because the provision of the Housing Code on liability of corporate directors and officers was enacted prior to the recognition of LLCs in Maryland.

Nordby v. Anesthesia Associates Torrington, LLC, No. CV094008584S, 2010 WL 1495695 (Conn. Super. Feb. 11, 2010) (striking former employee’s age discrimination claim against individual members of LLC where former employee referred to LLC and its members collectively as her employer, alleged that LLC acted by and through its members, and did not allege how any individual member acted as employer separate from LLC).

Coronado City Views, LLC v. Regatta Bay, LLC, No. D053210, 2010 WL 453555 (Cal. App. 4th Dist. Feb. 10, 2010) (holding that members of Arizona LLC waived issue regarding their personal liability for conduct of Arizona LLC because they included no citation to Arizona authority and California LLC statute requires application of law of state of organization to question of personal liability of members of foreign LLC).

Dzurilla v. All American Homes, LLC, Civil Action No. 5:07-CV-239-KSF, 2010 WL 55923 (E.D. Ky. Jan. 4, 2010) (stating that courts treat LLCs like corporations for liability analysis and that member or manager of LLC, like shareholder or officer of corporation acting as agent of corporation, may be held liable for their own tortious conduct and concluding that fact issue existed as to whether parent of LLC was liable for its own acts).

NFT Parcel A LLC v. Marix, No. EDCV 09-287-VAP (VBKX), 2009 WL 5215373 (C.D. Cal. Dec. 22, 2009). Members of an LLC who guaranteed the LLC’s debt in connection with the LLC’s purchase of real estate argued that there was a fact question as to whether or not they were true guarantors on the basis of evidence that the LLC was a mere instrumentality of the guarantors and because the creditor investigated the financial status of the guarantors but not the LLC. The court held that the instrumentality argument failed because the conclusory allegations of ownership and control lacked sufficient specificity to create a genuine issue of fact. Further, even assuming the assertions were supported by admissible evidence, more than mere ownership and control of a primary debtor is required to show that a guaranty is a sham attempt to avoid the

anti-deficiency laws. With respect to the argument that a fact issue as to the members' status as true guarantors was created by the creditor's examination of financial information of the guarantors but not the primary debtor LLC, the court noted that the parties had not identified any authority addressing whether a fact question may be created as to whether a purported guarantor who is protected from personal liability by the corporate form of the primary debtor is a true guarantor based on the creditor's examination of financial information of the guarantors only and not the primary debtor. The court concluded that the California Supreme Court would likely find that such evidence would be insufficient to create fact question.

LJ Charter, L.L.C. v. Air America Jet Charter, Inc., No. 14-08-00534-CV, 2009 WL 4794242 (Tex. App. Dec. 15, 2009) (holding two individual members of LLC liable for fraud based on principle that agents are personally liable for fraudulent or tortious acts committed while in service of their LLC).

Telerent Leasing Corp. v. Boaziz, 686 S.E.2d 520 (N.C. App. 2009) (holding personal liability of individual was issue for jury where individual signed leases once as lessee on behalf of LLCs and again as co-lessee).

Thomas v. Capital Medical Management Associates, LLC, 985 A.2d 51 (Md. App. 2009) (concluding individual and her LLC were parties to contract signed by individual on behalf of "Capitol Radiology, DBA Laurel Radiology" where plaintiff averred that it entered agreement with individual and LLC directly as separate entities, pleading did not place agency in issue, and defendants did not plead any negative defenses).

Brophy v. Ament, No. CIV 07-0751 JB/KBM, 2009 WL 5206020 (D.N.M. Nov. 20, 2009) (acknowledging liability protection of LLC members but stating that corporate agents are liable for their own tortious acts and LLC members/employees thus had potential personal liability for their own tortious conduct).

Aqua Thick, Incorporated v. Wild Flavors, Incorporated, No. 08 C 6278, 2009 WL 4544696 (N.D. Ill. Dec. 1, 2009) (rejecting argument that managing member of LLC is liable to same extent as officer or director of corporation who participated in tortious act because legislature removed from current LLC statute provisions in prior statute that made managing member liable for LLC's acts to same extent as director of Illinois corporation in analogous circumstances).

J. Stan Developments, LLC v. Lindo, No. 2008-CA-001796, 2009 WL 3878084 (Ky. App. Nov. 20, 2009). The court affirmed a judgment holding the sole member of an LLC personally liable for violations of Kentucky securities laws. The member argued that he could not be liable unless the LLC veil was pierced, but the court interpreted the LLC statute and securities laws to provide for liability based on the member's own participation in the transaction in issue.

Reserves Development Corporation v. Esham, C.A. No. 07C-12-123 PLA, 2009 WL 3765497 (Del. Super. Nov. 10, 2009). An individual contracted to purchase property intending for an LLC to take title to the property. The plaintiffs deeded the property to an LLC formed by the individual and several others, and the plaintiffs later sued the individual for payment of amounts owed under the purchase agreement and for homeowners' association assessments accrued after the closing. The court determined that a payment obligation under the agreement survived the closing, but there were material fact issues as to who had liability for the obligation. The record raised a genuine issue of material fact as to whether the parties' conduct gave rise to an implied novation that would relieve the individual of liability.

Dover Phila Heating & Cooling, Inc. v. SJS Restaurants, Ltd., 923 N.E.2d 220 (Ohio App. 2009) (recognizing limited liability of LLC members under Ohio law and finding no evidence to show LLC member was liable for LLC's debt).

Arime Pty, Ltd. v. Organic Energy Conversion Company, LLC, No. C09-5436BHS, 2009 WL 3484062 (W.D. Wash. Oct. 26, 2009) (noting that Washington LLC statute permits imposing personal liability on member or manager for member's or manager's own torts).

BCI Construction, Inc. v. Whelan, 888 N.Y.S.2d 272 (App. Div. 3rd Dept. 2009) (recognizing that agent who contracts for non-existent principal may be held personally liable on contract, but finding that member who signed on behalf of LLC that was mistakenly identified as "Halfmoon Construction, LLC" rather than "Halfmoon Constructors, LLC" was not personally liable where there was no allegation that plaintiff was misled or prejudiced by such misnomer).

O'Neal v. Campbell, Civil Action No. 5:09cv110-DCB-JMR, 2009 WL 3489868 (S.D. Miss. Oct. 23, 2009) (finding plaintiff employed by LLC had adequately alleged claim against LLC members as "employers" under Fair Labor Standards Act based on allegations regarding managerial and supervisory responsibilities).

Lippenberger v. Canal Properties, No. CGC 05444673, 2009 WL 335685 (Cal. App. 1 Dist. Oct. 20, 2009) (concluding LLC member was personally liable for fees for legal services rendered at his request, notwithstanding that fee agreement was not in writing, regardless of whether member or LLC was client).

Blue Star Corporation v. CFK Properties, LLC, 980 A.2d 1270 (Me. 2009). The court reviewed the record as it bore on the issue of whether the sole owner and president of an LLC was liable as the LLC's alter ego or based on the individual's own participation in wrongful acts. The court found that there were unresolved factual issues and vacated the trial court's summary judgment that the individual could not be held individual liable for participation in wrongful acts causing damage to the plaintiff.

831 Bartholomew Investments-A, L.L.C. v. Margulis, 20 So.3d 532 (La. App. 2009) (recognizing limited liability of LLC members under Louisiana LLC statute along with statute's preservation of potential personal liability for fraud, negligence or other wrongful act, and concluding complaint did not adequately allege facts supporting fraud or unfair or deceptive acts or practices of individuals so as to state cause of action against them for personal liability).

Domestic Construction, LLC v. Bank of America, N.A., No. CV07-5357BHS, 2009 WL 2853255 (W.D. Wash. Sept. 1, 2009) (recognizing limited liability of LLC members under Washington law subject to exceptions for member's own torts, contributions member has agreed to make, return of wrongful distributions, and veil piercing, and concluding numerous questions of fact regarding business relationship of LLC and individual (including evidence of commingling of assets and disrespect of corporate form) precluded summary judgment in favor of individual on personal liability issue).

Jongebloed v. Texas Lottery Commission, No. 03-08-00154-CV, 2009 WL 2837698 (Tex. App. Aug. 31, 2009). The court concluded that the Texas Lottery Commission failed to establish that the appellant, Jongebloed, was an "officer, director, or owner" of an LLC licensed by the Commission to sell lottery tickets. The Commission relied upon Jongebloed's status as such to hold him personally liable under the lottery statute for lottery sales proceeds owed to the Commission by the LLC. The LLC's 2001 license renewal application filed in 2001 identified Jongebloed as vice president of the LLC, but Jongebloed argued

that he was not an officer, director, or owner in 2002 when the LLC's liability accrued. He presented evidence that he severed any ties with the LLC in 2000 and that any LLC filings to the contrary were in error. The court reviewed the evidence and found that the Commission's findings, on their face, did not support its legal conclusion that Jongebloed was a member of the LLC when the lottery proceeds became due. The court stated that membership in an LLC is an interest in personal property akin to stock ownership or a partnership interest. Although the Commission made findings that Jongebloed had been identified in LLC filings as a vice president (i.e., an officer) and manager (which the court characterized as "essentially the equivalent of a director"), the Commission made no findings that he was ever a member. The court stated that being a manager or officer of an LLC does not mean one is also a member. Managers and officers may, but need not be, members, and managers and officers do not by that status alone have a membership interest in the entity. In fact, the Commission conceded that Jongebloed's liability did not stem from being an "owner," but rather depended upon his status as an "officer or director." Jongebloed offered evidence that he resigned from the LLC in 2000, but the Commission took the position on appeal that he remained a manager and director of the LLC until a written record of the resignation was furnished to the Commission in 2003. In response to the Commission's suggestion that a resignation as an LLC manager must be in writing to be effective, the court noted that the Texas Limited Liability Company Act includes no requirement that a manager's resignation be in writing. In any event, the court noted that Jongebloed's resignation had been memorialized in a written resolution of the managing member in which Jongebloed's resignation was accepted and recognized by the LLC as of September 1, 2000. The court addressed the Commission's argument that the meaning of "officer and director" for purposes of the provision of the lottery statute imposing personal liability was affected by the LLC's compliance with notice requirements in another provision of the statute. The court concluded that the terms "officer" and "director" would normally exclude a person like Jongebloed who had resigned his position two years before the relevant events whether the court applied the plain meaning of the terms "officer" and "director" or a technical meaning that such terms may have acquired in the law of business entities. The court could not discern from the statutory scheme of the lottery statute any intent on the part of the legislature to include former officers, directors, and owners among the licensee's "officers, directors, and owners" who can be held personally liable if notice of such an individual's resignation was not provided to the Commission as required by a separate provision of the statute. Thus, the LLC's failure to notify the Commission of Jongebloed's resignation could not cause him to remain an "officer" or "director" subject to personal liability under the statute.

Harris v. Kupersmith, No. FSTCV086000995S, 2009 WL 3286108 (Conn. Super. Aug. 31, 2009) (finding allegations that LLC member personally participated in tortious acts sufficient to support claim to impose personal liability on member).

Tumosa v. Curtis, No. X07CV085023851, 2009 WL 3086391 (Conn. Super. Aug. 25, 2009) (holding principle that corporate officer is personally liable for torts committed by officer applies equally to LLCs and individual who allegedly personally participated in tortious activities was not shielded from liability by provision of LLC statute that states member or manager is not liable for liability of LLC solely by reason of being member or manager).

ODP, LLC v. Shelterlogic, LLC, No. X09CV064020086, 2009 WL 2783692 (Conn. Super. July 31, 2009) (holding that individuals who were members and managers of LLC, as agents of LLC, were shielded from liability for civil conspiracy by intracorporate conspiracy doctrine because their conduct did not fall within "scope of employment" or "scope of agency" exception, which recognizes distinction between collaborative acts done in pursuit of employer's business and private acts done by persons who happen to be at workplace).

P. LLC Veil Piercing

Naples v. Keystone Building and Development Corporation, 990 A.2d 326 (Conn. 2010). The plaintiffs sued an LLC and its individual principal for breach of a construction contract and violations of Connecticut new home warranty and unfair trade practices statutes. On appeal, the plaintiffs argued that the trial court erred in its decision not to pierce the veil of the LLC and hold the individual principal liable. The court discussed the instrumentality and identity tests and noted that it was clear that the plaintiffs satisfied the first required element of the instrumentality test, i.e., that the individual controlled the affairs of the LLC, acknowledging the plaintiffs' reliance on the close relationship between the individual's personal finances and those of his LLC and the individual's failure to comply with corporate formalities by failing to maintain minutes and other records such as an operating agreement. The piercing claim failed, however, because the evidence did not show that the individual used his control to commit fraud or wrong or to perpetrate a violation of a statutory or legal duty or a dishonest or unjust act in violation of the plaintiffs' rights and causing injury or unjust loss. The court stated that the plaintiffs failed to point to any evidence that the LLC did not serve a legitimate business purpose or that failing to pierce its veil would perpetrate injustice, such as by wrongfully denying them compensation or damages. For the same reasons, the claim under the identity rule also failed.

United States ex rel. DeKort v. Integrated Coast Guard Systems, 705 F.Supp.2d 519 (N.D. Tex. 2010). In this False Claims Act case, the relator alleged that Integrated Coast Guard Systems, a Delaware LLC, operated as an alter ego of Lockheed Martin and Northrup Grumman Ship Systems, its two members, and that for purposes of the project in issue in the case the LLC and its two members were one and the same. Although not yet addressed in the Fifth Circuit, the court followed other circuits that have held that federal common law (rather than the law of the state where a corporation is incorporated) governs the veil piercing question in a False Claims Act case. Relying on a list of factors developed by the Fifth Circuit for determining the existence of an alter ego situation, the court concluded that the relator's pleadings were sufficient to withstand dismissal of the alter ego claim. The court pointed to allegations that the LLC had no employees of its own and was operated by employees of its members, that the LLC's board was dominated by directors of the boards of its members, that the LLC was grossly undercapitalized, that the LLC and its members had common business departments, and that the members executed the actions giving rise to the allegations of wrongdoing in the suit.

Cornerstone Home Builders, Inc. v. Guyers Development, LLC, No. A09-1178, 2010 WL 1541344 (Minn. App. April 20, 2010) (noting that corporate veil piercing principles apply to LLCs under Minnesota law, discussing evidence of insufficient capitalization, failure to observe corporate formalities, insolvency at time of transaction, facade for individual dealings, and fundamental unfairness, and concluding trial court did not err in piercing LLC veil and holding members personally liable for fraud and negligent misrepresentation in real estate development dispute).

In re Liberty Coal Company, LLC (Frazier v. Sikeston Board of Municipal Utilities), No. 09-CV-0371-MJR, 2010 WL 1415998 (S.D. Ill. March 31, 2010) (applying Colorado law to veil piercing claim involving Colorado LLC under Illinois choice of law rules, finding no evidence of fraud, illegality, or wrongdoing required to pierce LLC's veil, stating that undercapitalization without associated fraud or wrongdoing is insufficient to pierce veil, and rejecting argument that LLC's inability to satisfy obligations alone demonstrates defeat of rightful claims constituting fraud or wrongdoing because legitimate purpose of law of limited liability is to shield LLC members from individual liability when LLC cannot satisfy its obligations to creditors).

In re Ekstrom, No. 08-07750-SSC, 2010 WL 1254893 (Bankr. D. Ariz. March 23, 2010). The court rejected the debtor's argument that a bank whose loan was secured by property owned by an LLC was a secured creditor of the debtor's estate. The debtor argued that the debtor's "equitable interest" was sufficient to render the bank a secured creditor for purposes of the proposed reorganization plan because the debtor borrowed the funds from the bank, made all payments on the debt, and held a 100% interest in the LLC. However, the LLC, which was originally owned by the debtor, his wife, and another LLC owned by the debtor's wife, was transferred to a limited partnership in which the debtor and his wife were each 49.5% limited partners and the wife's LLC was the 1% general partner. The debtor's interest in the limited partnership was transferred to a living trust. Thus, the debtor was essentially asking the court to disregard several legal entities to treat the bank as a secured creditor of the debtor. The court noted that the debtor was an experienced businessman who created numerous LLCs for estate planning purposes. Having enjoyed the benefits of limited liability, the court stated that the debtor must now accept the consequences of the estate planning. The court saw no basis to create the remedy of substantive consolidation or reverse veil piercing without appropriate notice, hearing, and consideration on the merits. Although the debtor borrowed funds from the bank, the bank received the bargained-for security when the LLC hypothecated its property as collateral for the debtor's obligations. The court did not find it necessary to fashion relief for the bank. Though it had a valid lien on the LLC's property, the property was not property of the bankruptcy estate, and the bank was not a secured creditor of the debtor and could not vote as such on the plan.

Gasstop Two, LLC v. Seatwo, LLC, 225 P.3d 1072 (Wyo. 2010). A commercial landlord obtained a judgment against an LLC for amounts owed on space leased by the LLC for a Burger King franchise, and the landlord asserted that the trial court erred in not piercing the veil of the LLC to impose personal liability on the member for the judgment. The Wyoming Supreme Court discussed veil piercing law as it applies to LLCs and held that the trial court properly applied the law. The court listed the following corporate veil piercing factors used in LLC cases: fraud, inadequate capitalization, failure to observe company formalities, and intermingling the business and finances of the company and member to such an extent that there is no distinction between them. The court then set forth with approval the trial court's findings and analysis with regard to the facts as they related to several factors. First, the trial court found that the failure of the business was not due to undercapitalization, but rather was due to poor location, lack of customers, and poor traffic count. In any event, the trial court stated that undercapitalization alone is not a basis to pierce the LLC veil. Next, the trial court addressed the fact that the members themselves as opposed to the LLC held the Burger King franchise. The trial court stated that the evidence indicated that the LLC could not hold the franchise because Burger King required individuals to hold the franchise. The trial court stated that the members used the franchise consistent with the needs of the LLC and that there was no commingling of funds or misuse of the franchise for the members' benefit. Thus, the trial court concluded that the fact that the members held the franchise in their own names was not sufficient to show a lack of formalities in operating the LLC. The trial court also addressed testimony regarding equipment of the LLC that secured a bank loan. The trial court concluded that the LLC made a good faith effort to liquidate the equipment and that the bank approved the LLC's action in donating the equipment for a tax credit when they were unable to sell the equipment. Finally, the trial court found there was no indication that the LLC was used to defraud anyone or that it was simply used as an alter ego for the personal business ventures of the members. The trial court stated that the members used the LLC to operate a Burger King on property owned by the landlord and followed required formalities. The trial court noted that the LLC kept separate accounting statements, filed proper paperwork with the Secretary of State, filed separate tax returns, only made small payments to the members on two occasions as employees of the business, and followed all relevant formalities under the law. The supreme court concluded that none of the trial court's findings of fact were clearly erroneous and that the trial court correctly applied the applicable law in declining to pierce the LLC's veil.

Better Foods Land Investment Co. v. Bowler, No. 38957-6-II, 2010 WL 780003 (Wash. App. March 9, 2010) (recognizing that Washington LLC statute provides for limited liability of members but also provides that court may consider factors and policies in corporate veil piercing case law, and holding that assertion of statutory provision on limited liability of members and prior ruling denying motion to pierce for purposes of subjecting LLC members to arbitration did not constitute prima facie defense to veil piercing claim in litigation in which members sought to vacate default judgment against them).

Benco Construction Services, Inc. v. AJ's Construction, LLC, Civil Action No. 09-cv-286, 2010 WL 724363 (M.D. La. March 1, 2010) (stating that corporate veil piercing principles apply to LLC and concluding LLC was alter ego of its members based on evidence of commingling of LLC and personal funds, failure to follow formalities (i.e., LLC had no office and no bookkeeper, did not have its own phone number, website, letterhead, or advertising, did not have member meetings, and did not file annual reports with the Secretary of State), undercapitalization, and failure to follow normal accounting practices).

Mike Building & Contracting, Inc. v. Just Homes, LLC, 901 N.Y.S.2d 458 (N.Y. Sup. 2010) (concluding plaintiff failed to establish elements necessary to pierce LLC veil and hold individual members personally liable, noting that formalities required for LLC's management are more flexible than those for corporation, that no single person dominated LLC or was its alter ego, that LLC had no need for independent place of business, and there was no indication of fraudulent or illegal purpose).

Partners Coffee Company, LLC v. Oceana Services and Products Company, 700 F.Supp.2d 720 (W.D. Penn. 2010) (noting that Pennsylvania courts have found that LLC veil may be pierced to same degree as corporation, discussing alter ego theory, and concluding that claim against LLC's member and related entity must be dismissed where allegations consisted of nothing more than list of factors necessary to pierce veil and factual allegations to support contention of liability were absent).

McWilliams Ballard, Inc. v. Level 2 Development, 697 F.Supp.2d 101 (D.D.C. 2010) (finding plaintiff had sufficiently alleged facts supporting inference of unity of ownership and interest between LLC, affiliated LLC, and individual members, managers, and officers of LLCs, and had sufficiently alleged facts demonstrating that equity and justice justified maintaining claim against individuals and related LLC on basis that they were liable for LLC borrower's indebtedness to lender under alter ego theory).

ORX Resources, Inc. v. MBW Exploration, L.L.C., 32 So.3d 931 (La. App. 2010). The court held that the Louisiana LLC statute allows for the piercing of an LLC's veil under standards applicable to corporations. Applying factors used to determine whether to apply the alter ego doctrine, the court concluded that the activities of the member of the LLC in issue merited piercing the veil of the LLC based on the following: there was commingling of the LLC's funds with the funds of another company of the member; the LLC was undercapitalized and did not have a separate bank account; the LLC was not yet recognized as an LLC by the Louisiana Secretary of State at the time it began contracting with the plaintiff; and (while the court acknowledged that LLCs are not bound by corporate laws to hold regular meetings) the LLC's failure to hold a meeting in over a year was evidence that the member was operating the LLC at his leisure and direction.

Kelly v. Porter, Inc., 687 F.Supp.2d 632 (E.D. La. 2010) (holding sole member of LLC had no ownership in vessel owned by LLC (refusing to "reverse veil pierce") and thus had no standing to pursue action for damages to vessel).

Klein v. Weidner, Civil Action No. 08-3798, 2010 WL 571800 (E.D. Pa. Feb. 17, 2010) (acknowledging that formality and record-keeping requirements are less stringent in LLC context, but finding LLC's veil should be pierced and its assets treated as those of member where LLC observed no formalities, its assets were routinely and overwhelmingly used to pay personal expenses, and stated intention of member was to hide assets from judgment).

DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp.2d 405 (S.D.N.Y. 2010) (noting that Delaware law would apply to attempts to pierce Delaware LLC and Uruguayan law would apply to attempts to pierce Uruguayan companies that were members of Delaware LLC, but applying New York law because parties only cited New York law, and concluding allegations were insufficient to support piercing veil of LLC and its entity members).

Smith v. Delta International Machinery Corp., 893 N.Y.S.2d 580 (App. Div. 2d Dept. 2010) (holding plaintiffs failed to raise issue of triable fact as to whether veil of LLC should be pierced to hold managing member liable where plaintiffs showed that managing member dominated LLC but made no showing of any failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, or use of corporate funds for personal purposes).

Intercity Development, LLC v. Rose, No CV084016602S, 2010 WL 1006098 (Conn. Super. Feb. 11, 2010) (holding that attorney's charging lien for services rendered to LLC's member and commonly owned LLC did not extend to fund resulting from judgment in favor of LLC because treating LLC as same client as its member and commonly owned LLC would violate principle that LLC is distinct entity from its member and that member is shielded from liability for debts of LLC).

Sovereign Bank v. ACG II, LLC, No. 08cv1600 (WVE), 2010 WL 363336 (D. Conn. Jan. 25, 2010) (stating that Delaware law governed veil piercing of Delaware LLC, discussing elements of Delaware alter ego doctrine, and dismissing veil piercing counts because of failure to allege fraudulent purpose or abuse of corporate form beyond torts and contractual claims underlying complaint).

Kirby Morgan Dive Systems v. Hydrospace Ltd., No. CV 09-4934 PSG (FFMx), 2010 WL 234791 (C.D. Cal. Jan. 13, 2010) (holding evidence supported exercise of personal jurisdiction over sole owner and managing director of Scottish LLC on basis that individual was LLC's alter ego where evidence showed LLC was under total control of individual, LLC was undercapitalized, and injustice would result if individual were not held personally liable for arbitration award because plaintiff would not be able to fully recover and individual could circumvent arbitrator's injunctive relief through operation of his other businesses).

River Rock Development v. Paik, No. C057850, 2010 WL 46783 (Cal. App. 3d. Dist. Jan. 7, 2010) (holding that veil piercing of Arizona LLCs was governed by Arizona law by virtue of California LLC statutory governing law provision, Arizona LLC statute does not preclude application of common law corporate alter ego doctrine to LLC members and managers, Arizona test for alter ego liability requires such unity of interest and ownership that separate personalities of owners and corporation do not exist and observance of corporate form would sanction fraud or promote injustice, and that substantial evidence supported finding of unity or interest, ownership, and control and fraud or injustice).

Acadian Energy Resources, LLC v. Carpenter, Civil Action No. 2:09-00150, 2009 WL 5217679 (S.D. W. Va. Dec. 31, 2009) (holding allegations sufficed to state fraudulent transfer claim based on alter ego allegation that treated LLC and related parties as "debtor").

Big Bucks Preserve, LLC v. Columbia Gulf Transmission Co., No. Civ. A. 08-2021, 2009 WL 5173929 (W.D. La. Dec. 30, 2009) (stating that LLC with rights under hunting lease may not recover damages for negligent or intentional infliction of emotional distress, mental or emotional harm, or loss of enjoyment of hunting season, and rejecting LLC's argument that its own veil should be pierced on basis that its individual sole member and manager was its alter ego because member should not be permitted to avail himself of benefits which would flow from not being organized as LLC once he has availed himself of obvious benefits from use of business entity).

Federal Trade Commission v. Bronson Partners, LLC, 674 F.Supp.2d 373 (D. Conn. 2009) (applying alter ego doctrine to Texas LLC owned in equal shares by husband and wife and concluding evidence showed that LLC was alter ego of husband, and thus liable for false advertising claims against husband, based on evidence that LLC paid personal expenses of husband and wife, monies of husband and wife were indistinguishable from LLC's monies, corporate form was ignored and membership meetings were not held, and husband exercised full control over LLC).

NFT Parcel A LLC v. Marix, No. EDCV 09-287-VAP (VBKX), 2009 WL 5215373 (C.D. Cal. Dec. 22, 2009). Members of an LLC who guaranteed the LLC's debt in connection with the LLC's purchase of real estate argued that there was a fact question as to whether or not they were true guarantors on the basis of evidence that the LLC was a mere instrumentality of the guarantors. The court held that the instrumentality argument failed because the conclusory allegations of ownership and control lacked sufficient specificity to create a genuine issue of fact. Further, even assuming the assertions were supported by admissible evidence, more than mere ownership and control of a primary debtor is required to show that a guaranty is a sham attempt to avoid the anti-deficiency laws. The correct inquiry, according to the court, was whether the purported debtor is anything other than an instrumentality of the guarantors and whether such instrumentality actually removed the individuals from their status and obligations as debtors. The court noted that members of the LLC debtor were not otherwise personally liable for the LLC's debts and that the guarantors provided no contrary evidence, such as evidence of inadequate capitalization, that the LLC was created for the sole purpose of the note, or that the creditor insisted that the LLC take title to the property in lieu of the guarantors.

In re HRM Holdings, LLC (Seidel v. Hospital Resources Management LLC), 421 B.R. 244 (Bankr. N.D. Tex. 2009). The bankruptcy trustee sought to pierce the veil of the debtor LLC and hold several affiliated LLCs liable as a single business enterprise based on actual fraud consisting of the debtor LLC's failure to notify creditors that it was terminating its business operations. The bankruptcy court applied corporate veil piercing principles in the LLC context, noting that "Texas courts and other jurisdictions have applied the same state law principles for veil-piercing that they have applied to corporations." The trustee's original complaint had simply asserted the single business enterprise theory as a basis of liability without specifying fraud, and the court found the complaint deficient based on the Texas Supreme Court's rejection of the single business enterprise veil piercing theory in *SSP Partners v. Gladstrong Investments (USA) Corporation*. The court gave the trustee the opportunity to specify actual fraud as a basis to hold the affiliated defendants liable to the debtor's creditors. According to the second amended complaint, the management of the LLC engineered the transfer of all the debtor LLC's assets to the defendant LLCs without notifying the creditors of the debtor LLC. The court concluded that the failure to give the statutorily required notice of winding up could constitute actual fraud under the Texas veil piercing statutes, but the court found that the second amended complaint failed to specify who the perpetrators of the fraud were and how the fraud benefitted the defendants. The court gave the trustee a final opportunity to further amend its complaint and admonished the trustee to examine the Texas veil piercing statutes and the *SSP Partners* case when and if deciding to draft a third amended complaint.

Peterson v. Woldeyohannes, No. CV040834966S, 2009 WL 4686026 (Conn. Super. Nov. 13, 2009) (recognizing that corporate entities are not necessary parties where court is piercing entity veil to hold owner personally liable but stating that court lacked jurisdiction to enter plaintiff's requested relief of constructive trust over assets of LLC that was alter ego of member defendant because LLC was not a party and owner of assets involved in constructive trust must be a party to the suit).

L'Heureux Enterprises, Inc. v. Port City Java, Inc., No. 06 CVS 3367, 2009 WL 4644629 (N.C. Super. Sept. 4, 2009) (granting LLC member's motion for summary judgment on veil piercing claim against member where there was no forecast of evidence of complete control and no allegation or showing of inadequate capitalization, failure to comply with corporate formalities, or excessive fragmentation).

In re BHS&B Holdings LLC (Official Committee of Unsecured Creditors v. Bar Harbour Masters Ltd.), 420 B.R. 112 (Bankr. S.D.N.Y. 2009). This case arose out of the bankrupt Steve & Barry's clothing stores and the subsequent bankruptcy filing by the purchaser, BH S&B Holdings, LLC ("Holdings") and its subsidiaries. The Official Committee of Unsecured Creditors (the "Committee") sought to recover money for the estate through veil piercing, breach of fiduciary duty, and equitable subordination or recharacterization claims. Holdings was owned by another LLC ("Holdco"), and an intermediate holding LLC ("Intermediate Holdco") was later interposed between Holdings and Holdco. The entire structure was formed and funded by York Capital Management ("York"), four entities collectively referred to as "Bay Harbour", Steve and Barry's co-founders (Steven Shore and Barry Prevor), and Hilco SB LLC. Among other claims, the Committee alleged that Bay Harbour's and York's domination and control of Holdings via Holdco gave rise to a veil piercing claim and that Bay Harbour, York, and individual employees of these entities should be liable for debts and obligations of the debtor. The court stated, and the parties agreed, that the veil piercing claims were governed by Delaware law since Holdings, Holdco, and most of the other entities were Delaware entities. The court discussed at length the Committee's veil piercing claims. Initially, the court discussed how many veils must be pierced, i.e., whether each separate entity's veil had to be pierced or whether it was only necessary to pierce Holdings's veil to reach Bay Harbour, York and their employees. The court concluded that it did not need to reach the question of whether each entity's veil must be separately pierced because the court found the Committee had not adequately pled its veil piercing claim. The court discussed the allegations regarding inadequate capitalization, failure to observe corporate formalities, and whether Holdings was a facade such that equity and fairness required piercing the veil. With respect to inadequate capitalization, the court concluded that, even assuming Holdings was inadequately capitalized, the complaint did not support an inference that Holdings served an illegitimate purpose. The court stated that it is a rare instance in which the veil should be pierced because of undercapitalization, and the circumstances here were not unusual enough to support veil piercing. With respect to corporate formalities, the court noted that somewhat less emphasis is placed on formalities in the LLC context than the corporate context because fewer such formalities are required for LLCs. The court observed that the Delaware LLC statute requires little more than a proper certificate of formation, maintenance of a registered agent and registered office in Delaware, and maintenance of certain records. Also, the Delaware law permits non-natural persons to serve as managers of an LLC whereas the directors of a corporation must be natural persons. The court stated that wholly-owned subsidiaries may share officers, directors, and employees with their parent without giving rise to an inference that the subsidiary is a mere instrumentality. That Holdings's parent retained decision-making authority was also insufficient to pierce the veil. Furthermore, since Holdings was an LLC, the lack of officers or a board of managers other than its parent was not necessarily a persuasive veil piercing factor. The court commented that the Delaware LLC statute permits members of an LLC to be other entities, thus impliedly permitting those entities to serve in an entity capacity in which they continue to owe fiduciary duties to their own members. None of the allegations suggested impropriety or abuse of the corporate form, and the failure to hold board meetings did not support piercing because

Delaware law did not require Holdings to hold board meetings or observe other formalities. The remaining allegations (that Holdings lacked a CEO until a few weeks before the bankruptcy filing, that CFO duties were outsourced, and that its management was kept in the dark) were either not required under Delaware LLC law or were too conclusory to survive a motion to dismiss. In sum, the Committee failed to plead adequate facts supporting an inference that Holdings's failure to observe corporate formalities was so severe as to overcome the presumption of independence from its parents. Finally, the court found the allegations insufficient to show that Holdings was a sham and existed as a vehicle for fraud or injustice. Again, the court emphasized the conclusory nature of the allegations, that an overlap in ownership, officers, and directors is common and permissible, and that Delaware law permitted Holdings's parent to be the sole manager.

Capricorn Investors III, L.P. v. CoolBrands International, Inc., 897 N.Y.S.2d 668 (N.Y. Sup. 2009). The court discussed the plaintiff's veil piercing allegations with respect to two Delaware LLCs and concluded that the plaintiffs failed to plead particularized facts sufficient to sustain a piercing claim. The plaintiff made particularized allegations of commingling and disregard of formalities, but the court noted that the assertion that the LLCs had no officers or directors and did not hold meetings were not persuasive veil piercing factors where there was no allegation that management was required to be centralized in a board. The court also stated that failure to pay an LLC tax or fee is not "undercapitalization" of the entity. The court concluded that allegations regarding the LLCs' lack of email address or letterhead, communications being sent to the managing member, and overlapping ownership constituted a sufficient pleading of domination factors, but there were insufficient allegations of the use of domination and control to perpetrate a wrong against the plaintiff.

Boston Scientific Corporation v. Wall Cardiovascular Technologies, LLC, 647 F.Supp.2d 358 (D. Del. 2009) (rejecting argument that Texas LLC was subject to personal jurisdiction in Delaware as alter ego of Delaware LLC because record did not show sufficient level of control, absence of corporate formalities, or fraud, injustice, or inequity in use of corporate form; recognizing separate legal existence of LLC and its members under Texas law and rejecting argument that personal jurisdiction over LLC is proper in any forum in which LLC's members are subject to jurisdiction).

Longhi v. Mazzoni, 914 N.E.2d 834 (Ind. App. 2009) (treating LLC and predecessor corporation as same entity for purposes of analyzing conduct relating to plaintiff's claim that evidence was sufficient to pierce veil of LLC to impose liability on individual who was 1% member and manager of LLC, and finding sufficient evidence of undercapitalization of entity and use of entity by individual to promote fraud to support trial court's decision to pierce veil).

Otero v. Vito, Civil Action No. 5:07-cv-405(CAR), 2009 WL 3063426 (M.D. Ga. Sept. 22, 2009). Although the undisputed evidence showed that various entities, including numerous LLCs, were used to defeat justice and evade contractual or tort responsibilities, the court was precluded from exercising the equitable power of piercing the veil on behalf of a creditor seeking recovery from the entities to satisfy the debt of the individual who created and controlled the entities because the Georgia Supreme Court has held that reverse veil piercing is not permitted under Georgia law. The court, however, used the alter ego finding in connection with a finding that transfers of money, real property, and personal property from the individual to the entities were fraudulent under the Georgia Uniform Fraudulent Transfer Act.

In re Hecker, 414 B.R. 499 (Bankr. D. Minn. 2009). The court determined that the debtor could not use reverse veil piercing to claim a homestead exemption in property occupied by the debtor but owned by an LLC that was wholly owned by another LLC in which the debtor held a majority interest. The debtor asked the court to disregard the formalities and exercise the court's equitable power to "reverse pierce" the

veil of the entities in order to deem the debtor the owner of the property so that he could claim an exemption under the Minnesota statute. The court noted that Minnesota extends the doctrine of corporate veil piercing to LLCs under the Minnesota LLC statute, and the court examined two prominent Minnesota reverse piercing homestead exemption cases. The court distinguished the debtor's situation in this case from the other cases in which reverse piercing was permitted to allow a homestead exemption because the companies created by the debtor were part of a large web of interconnected businesses whereas the two other cases examined by the court involved family farmers whose only business was farming. The parent LLC was an investment business owning over 50 properties. There was no allegation of undercapitalization, failure to observe corporate formalities, nonpayment of dividends, siphoning of funds, nonfunctioning officers and directors, or absence of corporate records. The subsidiary LLC that owned the debtor's residence was formed to acquire properties, including properties for future commercial development, without the debtor's wife gaining an interest in the properties. The court concluded that the facts did not support the conclusion that either of these LLCs was the debtor's alter ego. Furthermore, the court found that the debtor did not meet his burden of demonstrating that reverse piercing the veils of the LLCs would not adversely affect shareholders and creditors. There were five other owners of the parent LLC. These owners, consisting of trusts for the benefit of the debtor's children and a corporation owned by the debtor, were characterized by the court as separate legal entities whose interests would be diminished in value by recognizing a homestead exemption. Furthermore, the creditors of the LLCs and the corporate member of the parent LLC would be adversely affected. The court discussed the fact that creditors of the corporation and the LLCs would not have expected that the property might be exempt as a homestead since the property was owned by an LLC owned by another LLC owned by four trusts and another corporate entity. Furthermore, the property was recreational property until the eve of bankruptcy when the debtor tried to make it his homestead. Finally, the court concluded that the debtor failed to demonstrate that it would be unfair and unjust not to pierce the veil. In the other cases examined by the court, the parties seeking the homestead exemption would have been entitled to the exemption prior to incorporating, and the question was whether the debtors lost their homestead exemption by incorporating. In this case, the property was not the debtor's homestead prior to formation of the LLCs, and it was only on the eve of bankruptcy that the debtor decided to move into the home and claim it as his homestead.

Blue Star Corporation v. CFK Properties, LLC, 980 A.2d 1270 (Me. 2009). The court reviewed the record as it bore on the issue of whether the sole owner and president of an LLC was liable as the LLC's alter ego or based on the individual's own participation in wrongful acts. The court applied corporate veil piercing principles as if the LLC were a corporation without discussing the fact that the entity was an LLC. The court found that there were unresolved factual issues and vacated the trial court's summary judgment that the veil could not be pierced and that the individual could not be held individual liable for participation in wrongful acts causing damage to the plaintiff.

Auntie Ruth's Furry Friends' Home Away From Home, Ltd. v. GCC Property Management, LLC, No. A08-1602, 2009 WL 2926485 (Minn. App. Sept. 15, 2009) (refusing to disregard separate existence of commonly owned corporation and LLC for purposes of applying right of first refusal provision of lease contract and holding that transfer of property from corporation to commonly controlled LLC constituted sale of property triggering right of first refusal).

Domestic Construction, LLC v. Bank of America, N.A., No. CV07-5357BHS, 2009 WL 2853255 (W.D. Wash. Sept. 1, 2009) (recognizing limited liability of LLC members under Washington law subject to exceptions for member's own torts, contributions member has agreed to make, return of wrongful distributions, and veil piercing, and concluding numerous questions of fact regarding business relationship of LLC and individual (including evidence of commingling of assets and disrespect of corporate form)

precluded summary judgment in favor of individual on personal liability issue; finding questions of fact as to whether individual was sole member of LLC and whether personal and LLC assets were commingled precluded court from ruling as matter of law that individual did not owe fiduciary duty to co-joint venturer of LLC).

Harris v. Kupersmith, No. FSTCV086000995S, 2009 WL 3286108 (Conn. Super. Aug. 31, 2009) (finding allegations of lack of formalities, use of employees and assets of LLC for personal purposes, and evidence of unity of interest and ownership and lack of independence were sufficient to support claim to pierce veil of LLC and hold member liable).

911 Management, LLC v. United States, 657 F.Supp.2d 1186 (D. Ore. 2009) (granting IRS motion for summary judgment on issues of whether LLC was nominee and alter ego of LLC's members under state law so as to permit IRS levy against LLC's bank account with respect to tax liability of members).

In re Supplement Spot, LLC (Floyd v. Option One Mortgage Corporation), 409 B.R. 187 (Bankr. S. D. Tex. 2009). The bankruptcy trustee brought an action to avoid payments that were made from an account funded by the debtor LLC's business operations. The account was styled "Marcella Ortega dba Young Again Nutrients," and Marcella Ortega was president of the debtor LLC. The payments challenged by the trustee were payments on mortgage debts of Ortega, and the court held that they were avoidable as fraudulent transfers. In order to find that the payments were fraudulent transfers, the court had to find that the account was the property of the debtor LLC. The account was listed as an asset of the debtor LLC and contained funds generated by the LLC's business, but the mortgage company claimed that Ortega mistakenly turned over the account to the trustee. The court found that the evidence was sufficient to support the finding that the account was the LLC's property based on an inference drawn under the "uncalled witness rule." Under this rule, the fact that the mortgage company failed to call Ortega as a witness allowed an inference that her testimony would be unfavorable to the mortgage company. Alternatively, the court found that the account was properly considered property of the LLC because the court could pierce the "individual veil" and view the account as property of the LLC. The court explained that a court may sometimes "pierce the corporate veil" to determine whether the activities and property of a corporation should be attributed to its individual principal or principals, but stated that the court here was being asked to do the opposite—to "pierce the individual veil" and attribute property of Ortega to the debtor LLC. The court noted that courts generally protect the individual assets from the reach of a corporation's bankruptcy, but cited the corporate alter ego doctrine as a basis to treat individual property as corporate property. The court stated that it would treat the account as property of the LLC because Ortega herself disregarded the separation between the LLC's funds and her funds by using the account exclusively to pay her personal expenses when the account was funded exclusively by the LLC's business. Further, the court noted that injustice would result if the account were not treated as the property of the debtor because the fraudulent transfers, if not avoided, would seriously hinder the trustee's ability to administer the bankruptcy case.

Q. Authority of Member, Manager, or Agent

Protective Life Insurance Company v. B & K Enterprizes LLC, No. 08-C-312, 2010 WL 1368660 (E.D. Wis. March 31, 2010) (discussing authority of LLC manager in winding up and concluding neither former manager, who was key man insured under policy owned by LLC, nor new manager had authority to transfer ownership of policy to insured without consideration for his personal purposes, and attempt to do so was void).

BCIJ, LLC v. LeFevre, No. 8:09-CV-551-T-17EAJ, 2010 WL 1142032 (M.D. Fla. March 24, 2010) (stating that manager is agent of LLC for purpose of LLC's business and denying LLC's motion to dismiss claims against it because plaintiff's allegation of actions taken by managing member in capacity as such support reasonable inference of direct participation by LLC).

Lopes v. Vieira, 688 F.Supp.2d 1050 (E.D. Cal. 2010) (examining management provisions of LLC operating agreement and California LLC statute and concluding defunct LLC, though it continued to exist as entity under California law until dissolved in accordance with law, could not assert attorney-client privilege because it had no officer or manager to assert or waive privilege).

Ly v. Jimmy Carter Commons, LLC, 691 S.E.2d 852 (Ga. 2010). An LLC sought to enjoin foreclosure on its property and to cancel the security deed and various loan documents on which the foreclosure proceedings were based on the grounds that the manager who executed the loan documents on behalf of the LLC was not authorized to do so. Two individuals, Byun and Choi, were the members and managers of the LLC, and Byun signed the loan documents on behalf of the LLC. The operating agreement required both Byun and Choi to approve the loan transaction, and the lender was supplied with unanimous written consents signed by Byun and purportedly signed by Choi in connection with the original loan and a subsequent modification. The trial court determined that it was undisputed that Choi had no dealings with the lender and did not authorize the loan, that Choi's signatures on the written consents were forged, and that the consents were ineffective to authorize Byun alone to bind the LLC. The Georgia Supreme Court concluded that there was a fact question requiring reversal of the summary judgment even if the undisputed evidence relied upon by the trial court was true. The lender testified that the consent documents were prepared by the lawyers for the lender and sent to the LLC to be signed by Byun and Choi, that the consent documents were brought to the closing with both Byun's and Choi's apparent signatures, that it was represented that Choi had signed the documents, and that the lender believed that Choi had signed them. This testimony created a fact issue as to whether the lender knew Choi's signatures were forged and whether the lender was justified in assuming that the documents authorized Byun's unilateral actions on behalf of the LLC. The court relied upon provisions of the Georgia LLC statute addressing the binding effect of the act of a manager. Under these provisions, the act of a manager binds the LLC unless the manager acting has no authority and the person with whom the manager is dealing knows of the lack of authority, and no act of a manager in contravention of a restriction on authority binds the LLC to persons having knowledge of the restriction. Based on these provisions, the court stated Byun's unauthorized act as a manager of the LLC could still bind the LLC if the lender did not know that the manager lacked authority. The court cited agency case law for the proposition that the lender's belief that the consent documents authorized Byun's action must be reasonable.

West Town Line Associates, LLC v. Mack & Meldrum Associates, LLC, No. 288384, 2010 WL 785938 (Mich. App. March 9, 2010) (concluding that managing member had authority to bring suit on behalf of LLC under operating agreement and Michigan LLC statute and that lawsuit is not "transaction" within meaning of interested manager provision of statute).

Cammarota v. Cammarota, No. CV065003413, 2010 WL 1225088 (Conn. Super. Feb. 25, 2010) (concluding that defendant, who was sole and managing member of LLC that operated bar, had authority to sell LLC's entire bar business, but plaintiff, member's brother, who initially was sole beneficial owner of bar but then sold 50% interest in bar to defendant, was entitled to half of proceeds and could pursue unjust enrichment claim).

United States v. Kerr McGee Oil & Gas Corporation, Civil Action No. 04-cv-01224-MSK-CBS, 2010 WL 582393 (D. Colo. Feb. 17, 2010) (discussing authority of member of dissolved LLC law firm to pursue attorney's lien on behalf of dissolved firm against client who continued to be represented by other member of dissolved firm and concluding that notice of attorney's lien was not so legally deficient as to warrant sanctions in absence of dispositive authority construing relevant provisions of LLC statute and that arguments relative to interpretation of LLC statute would be best decided through dispositive motions in state litigation addressing members' dispute over agreed distribution of cases of dissolved law firm rather than under guise of Rule 11 in action in which fees were allegedly earned).

Meeccorp Capital Markets, LLC v. Oliver, Civil No. 09-2067 (DWF/RLE), 2010 WL 330324 (D. Minn. Jan. 21, 2010) (stating that Minnesota has largely eliminated defense of ultra vires in litigation with entities such as LLC that may have engaged in actions allegedly beyond entity's power and fact that guaranty was not approved by board of governors of LLC does not permit LLC to raise lack of such approval as defense in action by party to which LLC provided guaranty provided guaranty was otherwise lawful, noting representations in central loan documents regarding due authorization and enforceability of documents even if ultra vires could be raised, and concluding that arguments about authority of individual to obligate LLC went to merits such that motion to dismiss did not present proper procedural vehicle to resolve issue).

Thomas v. Capital Medical Management Associates, LLC, 985 A.2d 51 (Md. App. 2009) (concluding individual and her LLC were parties to contract signed by individual on behalf of "Capitol Radiology, DBA Laurel Radiology" where plaintiff averred that it entered agreement with individual and LLC directly as separate entities, pleading did not place agency in issue, and defendants did not plead any negative defenses).

Lynn v. Romar Marina Club, LLC, Civil Action No. 07-0173-KD-C, 2009 WL 4667387 (S.D. Ala. Dec. 1, 2009). Lynn, who was represented by Hix, an attorney, in various transactions, alleged certain claims against an LLC in which Hix was a member on the theory that Hix was acting as the agent of the LLC in connection with a contract to purchase a marina. The court rejected Lynn's claims because the operating agreement specifically vested management and control of the LLC in its manager. Hix was not a manager and the operating agreement provided that members who were not managers "shall not participate in the day-to-day control of the business affairs of the LLC, transact any business on behalf of the LLC, or have any power or authority to bind or obligate the LLC." Members could only receive power and authority to act on behalf of the LLC by a specific grant or approval, and Hix testified that he had not received such authorization. Lynn failed to rebut this evidence. With regard to Lynn's alternative common law agency theory, the evidence did not show that Hix acted as the LLC's agent in the marina matter or that the LLC was involved in or had any knowledge of the matter. The court stated that liability based on agency cannot be presumed; rather, a principal is liable for the acts of an agent only if the agent acted with express actual authority, implied actual authority, apparent authority, or ratified authority. After reviewing the evidence, the court concluded that a reasonable jury could not find Lynn's agency argument persuasive. Since the LLC's motion for summary judgment showed that no agency relationship existed and Lynn did not present substantial evidence of the alleged agency, the court granted summary judgment in favor of the LLC.

A. Stemer & E. Stokar Partnership v. Excel Development I, LLC, 918 N.E.2d 714 (Ind. App. 2009) (remanding for trial court to consider whether eviction action filed by 50% member of member-managed LLC landlord over objection of other 50% member was authorized and stating that dismissal of action would be required if members are at impasse because member who filed action would not be authorized to do so and action would not be properly before trial court).

In re Player Wire Wheels, Ltd., 421 B.R. 864 (Bankr. N.D. Ohio 2009). The debtor was a single-member LLC whose sole member had died. The member had pledged his membership interest to his ex-wife to secure a note executed in the divorce settlement. The ex-wife claimed that she owned the membership interest when the estate defaulted in paying the note. This opinion addressed a dispute over who had authority to file bankruptcy on behalf of the LLC. The court concluded that the ex-wife did not, under the pledge agreement and escrow arrangement in place, automatically succeed to the membership interest upon default in payment of the note. The court concluded that, as of the date of the petition, the executors had authority to act on behalf of the LLC and that, if both executors of the deceased member were required to join in the bankruptcy petition, the proxy given by one to the other satisfied that requirement.

Pint v. Breckner, No. 08-CV-5340(JMR/SRN), 2009 WL 4042905 (D. Minn. Nov. 19, 2009). Pint and Nelson each owned 50% of a Minnesota LLC, and Pint sought to invalidate a mortgage given by Nelson to Breckner on LLC property in Florida. The operating agreement required that a mortgage be approved by 67% of the members, and Pint did not approve the mortgage. The parties disagreed on whether Minnesota or Florida law governed the dispute. The mortgage contained a choice of law provision specifying that Minnesota law governed the mortgage except for procedural matters related to perfection and enforcement by the mortgagee of its rights and remedies against the property, which would be governed by Florida law. The court characterized the dispute as concerning the validity and rights accrued under the mortgage and, as such, governed by Florida law. Under Florida law, the court concluded the mortgage was valid, but the court commented that the mortgage would have been valid applying Minnesota law as well. The court relied on provisions of the Florida LLC statute regarding the binding effect of a member's acts in the ordinary course of business. The court stated that the mortgage appeared to be in the ordinary course of business of the LLC because the LLC was a real estate investment company, and Pint failed to show that Breckner knew Nelson lacked authority. Breckner relied upon representations by Nelson and did not know of Pint's interest in the LLC. The court rejected the argument that the mortgage failed for lack of consideration because Florida law recognizes securing pre-existing third party debt as sufficient consideration for a mortgage, and money was loaned to Nelson. The court also rejected the argument that Breckner should have known about Pint's interest and Nelson's lack of authority. The court concluded that there was no duty imposed on Breckner to review the governing documents of the LLC, and there was no evidence Breckner knew or had notice Nelson lacked authority to grant a mortgage.

In re Fountainebleau Las Vegas Holdings, LLC, No. 09-21481-BKC-AJC, 2009 WL 3669648 (Bankr. S.D. Fla. Oct. 26, 2009) (discussing management structures of LLCs and "working down corporate trail" of various LLCs to determine that Board of Managers of parent LLC exerted substantial control over member-managed LLC debtor subsidiaries and that principal place of business of debtors for venue purposes was Florida since major decisions affecting debtors occurred in Florida).

In re Beatrice Biodiesel, LLC (Lange v. Home Federal Savings Bank), Bankruptcy No. BK08-41927-TLS, Adversary No. A09-4009-TJM, 2009 WL 3255087 (Bankr. D. Neb. Oct. 7, 2009). The bankruptcy trustee challenged the validity of a deed of trust signed by an individual as vice-president and secretary of the LLC borrower. The individual was an officer of a corporation that was the sole member and manager of the LLC. The trustee argued that the Nebraska LLC statute requires that instruments of encumbrance be executed by a manager to be valid. The court held that the trustee's interpretation of the statute was too narrow and that it was more reasonable to infer that the statutory language was not intended to describe the only persons authorized to obligate an LLC but rather to assure third parties that such a document signed by a manager was in fact valid and binding on the LLC. Because the manager of the LLC was a corporate entity that could only act through officers and agents, and the individual was in fact

authorized to act on behalf of the manager and the LLC in connection with the financing transaction, the court concluded that the deed of trust was properly executed and could not be set aside.

People v. Highgate LTC Management, LLC, 887 N.Y.S.2d 298 (App. Div. 3rd Dept. 2009). An LLC that operated a rehabilitation and extended care facility was convicted of various crimes based on the failure of the LLC's employees to provide required care to a patient and falsification of records regarding such care. The court held that an LLC can be held criminally responsible for the acts of its employees committed in the scope of employment. The LLC argued that the doctrine of respondeat superior does not apply to crimes that require specific intent and that the statutory provision of the Penal Code making respondeat superior applicable to corporations must be strictly construed and cannot apply to unincorporated associations such as LLCs. The court rejected these arguments, relying on case law involving corporations and unincorporated associations. Though the court acknowledged that the Penal Code provision applying respondeat superior liability to corporations is inapplicable to an LLC, the court stated that "long-standing analogous principles that have evolved through case law remain dispositive."

BankPlus v. Kinwood Capital Group, L.L.C., Civil Action No. 3:08cv498 DPJ-JCS, 2009 WL 3062457 (S.D. Miss. Sept. 18, 2009). The court interpreted the Mississippi LLC statute and concluded that a conveyance of real property by an LLC member who lacked authority to do so was void and did not pass title to a subsequent bona fide purchaser for value. Under the Mississippi LLC statute, every member is an agent of the LLC for the purpose of conducting its business, and the act of a member for apparently carrying on in the usual way the business of the LLC binds the LLC unless the member lacks authority and the person with whom the member is dealing knows that the member has no authority. The statute further provides that no act of a manager or member in contravention of a restriction on authority binds the LLC to persons with knowledge of the restriction. The member in this case was not authorized to convey title to the LLC's property, and he conveyed the property to another LLC owned by him. Thus, the grantee knew the member lacked authority. The question, however, was whether a subsequent bona fide purchase obtained clear title. The court stated that this was a question of first impression in Mississippi, and the court looked to forgery cases and LLC cases outside of Mississippi for guidance. The court concluded that the legislature intended to protect LLCs from unauthorized acts by the members and that the conveyance by the unauthorized member was void ab initio. The court acknowledged that its conclusion was a close call and stated that it would be tempted to certify the question to the Mississippi Supreme Court if it had authority to do so. The court further noted that the issue was well-defined and would receive de novo review at the next stage of appeal.

R. Admission of Member

Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo. App. 2010). Birkenmeier discussed with the Kellers the formation of an LLC. The Kellers' lawyer drafted an agreement for the formation of an LLC, but Birkenmeier never signed a final version and testified that he believed the parties had an oral agreement with details to be worked out later. The Kellers filed articles of organization forming a Missouri LLC. Birkenmeier testified that he believed he was a member of the LLC pursuant to an oral agreement. After the Kellers transferred the assets of the LLC to another company they owned, Birkenmeier sued the Kellers, the LLC. On appeal, Birkenmeier complained of the trial court's summary judgment against him on breach of fiduciary duty claims against the Kellers. The court of appeals concluded that Birkenmeier never became a member and thus was not owed fiduciary duties. The court stated that formation of the LLC did not establish that Birkenmeier was ever a member. Under the Missouri LLC statute, a member is a person that signs or is otherwise a party to the operating agreement at the time the LLC is formed and is identified as a member in the operating agreement and any person subsequently admitted as a member in accordance with the statute and the operating agreement. The court pointed out that a formal operating

agreement was never finalized, and Birkenmeier's testimony showed that the terms of an agreement had not been defined and worked out. The court acknowledged that an operating agreement may be oral, but stated that there must still be an agreement and that the record showed there was no agreement as to material terms. Absent such an agreement, Birkenmeier could not have been a member when the LLC was formed, and he had no claim for breach of fiduciary duty.

Spurlock v. Begley, 308 S.W.3d 657 (Ky. 2010). An LLC member, Griffin, orally announced his intention to give another individual, Begley, a 25% interest in the LLC in order to pay off a \$75,000 note from the LLC to Begley. This agreement was never reduced to writing. Begley later entered into an agreement with Spurlock regarding the purchase by Spurlock of Begley's interest in the LLC. A bare-bones agreement referring to the transfer of 25% ownership in the LLC was prepared. 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 supreme court discussed the provisions of the Kentucky LLC statute regarding membership and ownership. The court noted that the LLC statute does not speak of "owners," but instead refers to such persons as "members." The court stated that the evidence at trial made clear that Begley was not a member because there was no evidence of an operating agreement and no evidence that all of the members consented in writing to his membership as required by the statute in the absence of a provision governing admission to membership in the operating agreement. The court pointed out that a member may assign the economic rights associated with a membership interest, and if the non-transferring members do not approve of the transfer, the interest is divided into its economic rights, which are transferred, and the governance rights, which are not transferred. The court said that the statutory provisions lead to the conclusion that simply acquiring economic rights does not, in and of itself, equate to "ownership" or "membership" in the LLC. At most, the evidence showed that Begley had an economic interest in the LLC, and the court stated that such an interest did not equate to an "ownership interest." Begley drafted the agreement to sell his "25 percent ownership" of the LLC, and the court noted that Kentucky courts have long held that a contract susceptible to two meanings will be construed against the drafter. The court stated that "ownership" and "membership" are synonymous in the context of LLCs, that Begley had no ownership interest to convey to Spurlock, and that there was thus a failure of consideration. In addition, the court held that the jury instructions submitted by the trial court were incorrect and that the trial court should have submitted Spurlock's requested instruction that "a member (owner) of a Kentucky limited liability company means a person who has been admitted to membership as set forth within the limited liability company's operating agreement or, if an operating agreement does not so provide in writing, upon the written consent of all members."

Cottone v. Selective Surfaces, Inc., 892 N.Y.S.2d 466 (App. Div. 2d Div. 2009) (declining to dismiss plaintiff's claim for constructive trust and accounting where plaintiff alleged that he became minority member of defendant LLC and was thus owed fiduciary duty by managing member; holding unsigned written agreement did not conclusively establish plaintiff was not entitled to acquire ownership interest in LLC until completion of five years service, and variance between terms of alleged oral agreement and unsigned written agreement created issue of fact as to terms of oral agreement precluding dismissal of derivative claims asserted by plaintiff for acts occurring prior to time plaintiff would have had right to acquire ownership interest under unsigned written agreement; holding alleged oral agreement under which plaintiff allegedly acquired interest in LLC was not barred by one-year provision of statute of frauds since alleged agreement was essentially employment agreement without fixed duration and was capable of being performed within one year).

Domestic Construction, LLC v. Bank of America, N.A., No. CV07-5357BHS, 2009 WL 2853255 (W.D. Wash. Sept. 1, 2009) (denying LLC’s motion for summary judgment that two individuals were never members of LLC because fact issue was raised by LLC’s foreign qualification registration in Washington naming individuals as two of its three members).

Jongebloed v. Texas Lottery Commission, No. 03-08-00154-CV, 2009 WL 2837698 (Tex. App. Aug. 31, 2009). The court concluded that the Texas Lottery Commission failed to establish that the appellant, Jongebloed, was an “officer, director, or owner” of an LLC licensed by the Commission to sell lottery tickets. The Commission relied upon Jongebloed’s status as such to hold him personally liable under the lottery statute for lottery sales proceeds owed to the Commission by the LLC. The LLC’s 2001 license renewal application filed in 2001 identified Jongebloed as vice president of the LLC, but Jongebloed argued that he was not an officer, director, or owner in 2002 when the LLC’s liability accrued. He presented evidence that he severed any ties with the LLC in 2000 and that any LLC filings to the contrary were in error. The court reviewed the evidence and found that the Commission’s findings, on their face, did not support its legal conclusion that Jongebloed was a member of the LLC when the lottery proceeds became due. The court stated that membership in an LLC is an interest in personal property akin to stock ownership or a partnership interest. Although the Commission made findings that Jongebloed had been identified in LLC filings as a vice president (i.e., an officer) and manager (which the court characterized as “essentially the equivalent of a director”), the Commission made no findings that he was ever a member. The court stated that being a manager or officer of an LLC does not mean one is also a member. Managers and officers may, but need not be, members, and managers and officers do not by that status alone have a membership interest in the entity.

S. LLC Property/Interest of Member

Lairsen v. Figuerado, Civil Action No. 5:09-67-JMH, 2010 WL 1740881 (E.D. Ky. April 27, 2010) (holding that prohibition on recovery of commission by unlicensed broker in transactions involving real estate applied to sale of interest in LLC because one of LLC’s major assets was leasehold of real property).

In re Burgess, No. 310-02023, 2010 WL 1686829 (Bankr. M.D. Tenn. April 26, 2010) (holding automatic stay in bankruptcy of individual debtor who was sole member of LLC did not extend to action against LLC because LLC is entity separate from debtor and debtor’s membership interest did not provide debtor with interest in LLC’s specific property).

Suttles v. Vestin Realty Mortgage I, Inc., 317 S.W.3d 412 (Tex. App. 2010). A judgment debtor sought a turnover order and receiver for ownership interests in businesses of the judgment debtors, but the court held that the evidence relied upon by the judgment creditor failed to show that the judgment debtors owned non-exempt property that cannot be readily attached or levied on by ordinary process. The judgment debtor relied upon records obtained from the Secretary of State listing one of the judgment debtors as a director, member, or officer of various businesses. The court cited provisions of the Texas Business Organizations Code for the proposition that a person’s right to manage a company is not an “ownership interest.” Specifically, the statute provides that a person need not be a shareholder to be a director of a corporation. With respect to an LLC, the court cited provisions of the statute stating that the right to participate in management of an LLC is not a membership interest and a person may be a member of an LLC without acquiring a membership interest. The court also held that county records showing an LLC as owner of the residence of the judgment debtors, and a deed conveying the residence from another company to the LLC, were not evidence that the judgment debtors owned the LLC.

In re Abbott (Marcantonio v. Abbott), Bankruptcy No. 09-20282 (ASD), Adversary No. 09-2033, 2010 WL 1257500 (Bankr. D. Conn. March 25, 2010) (holding transfer of property belonging to LLC whose sole member was debtor in Chapter 7 bankruptcy was not grounds for denial of discharge because, while debtor's membership interest in LLC was property of debtor and debtor's estate, liquidation of LLC's assets involved property of LLC and thus was not property of debtor or his estate).

In re Ekstrom, No. 08-07750-SSC, 2010 WL 1254893 (Bankr. D. Ariz. March 23, 2010). The court rejected the debtor's argument that a bank whose loan was secured by property owned by an LLC was a secured creditor of the debtor's estate. The debtor argued that the debtor's "equitable interest" was sufficient to render the bank a secured creditor for purposes of the proposed reorganization plan because the debtor borrowed the funds from the bank, made all payments on the debt, and held a 100% interest in the LLC. However, the LLC, which was originally owned by the debtor, his wife, and another LLC owned by the debtor's wife, was transferred to a limited partnership in which the debtor and his wife were each 49.5% limited partners and the wife's LLC was the 1% general partner. The debtor's interest in the limited partnership was transferred to a living trust. Thus, the debtor was essentially asking the court to disregard several legal entities to treat the bank as a secured creditor of the debtor. The court noted that the debtor was an experienced businessman who created numerous LLCs for estate planning purposes. Having enjoyed the benefits of limited liability, the court stated that the debtor must now accept the consequences of the estate planning. The court saw no basis to create the remedy of substantive consolidation or reverse veil piercing without appropriate notice, hearing, and consideration on the merits. Although the debtor borrowed funds from the bank, the bank received the bargained-for security when the LLC hypothecated its property as collateral for the debtor's obligations. The court did not find it necessary to fashion relief for the bank. Though it had a valid lien on the LLC's property, the property was not property of the bankruptcy estate, and the bank was not a secured creditor of the debtor and could not vote as such on the plan.

Julian v. Julian, Civil Action No. 1892-VCP, 2010 WL 1068192 (Del. Ch. March 22, 2010). The court interpreted language in a stockholder agreement governing valuation of the stock of a corporation that held real estate directly and indirectly through LLCs in which the corporation was a part owner. The court held that "real estate held by" the corporation, as that phrase was used in the stockholder agreement, was an ambiguous term that was intended under the circumstances to include land held indirectly through the LLCs and other joint ventures in addition to property owned directly by the corporation.

Gulf Coast Asphalt Co., L.L.C. v. Chevron U.S.A., Inc., Civil Action No. 09-0187-CG-M, 2010 WL 1416460 (S.D. Ala. March 22, 2010) (holding parent of LLC did not have standing to assert LLC's claim because Alabama law does not permit LLC members to claim damages when LLC is injured and LLC member has no interest in specific LLC property).

Meadow Springs, LLC v. IH Riverdale, LLC, 690 S.E.2d 842 (Ga. 2010) (holding that provisions of LLC operating agreement granting member option to invest with respect to real estate development involved interests in personalty and that success on member's claims might entitle member to damages for its share of profits and losses and perhaps constructive trust on profits but did not involve realty and thus was not interest sufficient for filing of *lis pendens*).

Meadowsweet Dairy, LLC v. Hooker, 898 N.Y.S.2d 276 (App. Div. 3rd Dept. 2010) (holding Department of Agriculture had jurisdiction over LLC under provisions regulating selling and giving of dairy products because members did not have ownership interest in specific LLC property, i.e., dairy products produced by LLC, and such products must thus be sold or given to members who received them; concluding

LLC violated provisions requiring permit to sell or make available raw milk for consumption where members contributed amounts to LLC and received raw dairy products as dividends).

Winning Streak, Inc. v. Winning Streak Sports, LLC, No. 100,725, 2010 WL 348272 (Kan. App. 2010) (concluding evidence supported finding that individual had only .96% interest in LLC based on company records of contributions to LLC and absence of oral or written operating agreement specifying membership percentages).

Kelly v. Porter, Inc., 687 F.Supp.2d 632 (E.D. La. 2010) (holding sole member of LLC had no ownership in vessel owned by LLC (refusing to “reverse veil pierce”) and thus had no standing to pursue action for damages to vessel).

Intercity Development, LLC v. Rose, No CV084016602S, 2010 WL 1006098 (Conn. Super. Feb. 11, 2010) (holding that attorney’s charging lien for services rendered to LLC’s member and commonly owned LLC did not extend to fund resulting from judgment in favor of LLC because treating LLC as same client as its member and commonly owned LLC would violate principle that LLC is distinct entity from its member and that member is shielded from liability for debts of LLC).

In Re Abbott (Marcantonio v. Abbott), Bankruptcy No. 09-20282 (ASD), Adversary No. 09-2033, 2009 WL 5184710 (Bankr. D. Conn. Dec. 22, 2009) (citing provisions of Connecticut LLC statute regarding LLC property and holding plaintiff could not assert conversion or statutory theft claim with regard to assets that were property of LLC rather than plaintiff).

Sealy v. Clifton, LLC, 890 N.Y.S.2d 598 (App. Div. 2d Dept. 2009) (holding surviving member of two-member LLC lacked standing to bring action for partition of LLC property in member’s individual capacity and action for winding up does not support notice of pendency because member has no interest in specific LLC property).

Hinson v. M/V Chimera, 661 F.Supp.2d 614 (E.D. La. 2009) (acknowledging close family relationship between owners of LLC that owned vessel but questioning whether indirect sharing of profits from LLC interest, which occurred by operation of community property law, alone creates joint venture between non-member spouse and LLC, and concluding that there was insufficient evidence to create triable issue that family was engaged in joint venture regarding vessel that would preclude all family members from holding maritime lien).

T. Fiduciary Duties of Members and Managers

CML V, LLC v. Bax, C.A. No. 5373-VCL, 2010 WL 4347927 (Del. Ch. Nov. 3, 2010).

In a lengthy analysis, the court concluded that, unlike creditors of an insolvent Delaware corporation, the creditors of an insolvent Delaware LLC do not have standing to sue derivatively for breach of fiduciary duty to the LLC. A creditor of an insolvent LLC asserted derivative claims on behalf of the LLC for breach of fiduciary duty by the managers in connection with certain acquisitions and sales by the LLC. The court dismissed the claims for lack of standing because the Delaware LLC statute states that the plaintiff in a derivative suit must be a member or assignee. The court acknowledged that this conclusion “might surprise wizened veterans of the debates over corporate creditor standing,” but the court pointed out that the LLC was not a corporation, and the court concluded the plain language of the LLC statute dictated this result. The court contrasted the exclusive language of the LLC statute with the non-exclusive language in the Delaware General Corporation Law, and the court also traced the development of the derivative suit provisions in the

Delaware limited partnership statutes since the LLC derivative suit provision was based on the provision in the Delaware Revised Uniform Limited Partnership Act. Although the court was not able to discern why NCCUSL drafted the derivative suit provisions of the 1976 Revised Uniform Limited Partnership Act in exclusive terms (and noted that the uniform language may simply have resulted from a desire to avoid use of the passive voice), the court found it significant that Delaware adopted such language faced with a clear choice between the non-exclusive provisions of Delaware's prior limited partnership statute and the exclusive language of RULPA. The court rejected the implicit assumption in dicta of two chancery court opinions that a creditor of an insolvent alternative entity can sue derivatively for breach of fiduciary duty, and the court found nothing absurd about the application of differing legal principles to corporations and LLCs. According to the court, barring creditor derivative standing does not conflict with the overarching purpose or structure of the LLC statute because of the contractarian emphasis of the statute. The court stated that creditors can protect themselves contractually and that limiting creditors to their negotiated rights and denying them the additional right to sue derivatively on behalf of an insolvent entity is consistent with the contractarian approach taken by the LLC statute. The court pointed out various provisions of the LLC statute that appear to have been drafted with creditors in mind and that allow creditors to avail themselves of additional rights and protections. The court characterized the provision of the LLC statute allowing creditors to enforce contribution obligations under certain circumstances as satisfying any equitable desire to enable LLC creditors to enforce subscription agreements and removing any impetus for an experiment with LLCs similar to the evolution of the corporate trust fund doctrine and eventual corporate creditor derivative action. In sum, according to the court, "In light of the expansive contractual and statutory remedies that creditors of an LLC possess, it does not create an absurd or unreasonable result to deny derivative standing to creditors of an insolvent LLC" and, rather than frustrating any legislative purpose of the LLC statute, such an outcome "fulfills the statute's contractarian spirit."

Related Westpac LLC v. JER Snowmass LLC, C.A. No. 5001-VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010). The operating member of two LLCs formed for a land development project in Colorado sued the other member of the LLCs seeking to require the defendant member to pay damages and meet future capital calls on the theory that the defendant's refusal to give consents and to meet the capital calls made by the operating member was "unreasonable." According to the plaintiff, when the funding needs for the project exceeded the agreed upon budget, the defendant refused to meet capital calls and give its consent to various major decisions. The court dismissed the complaint because the operating agreements, while prohibiting the defendant from unreasonably withholding consent to certain decisions, did not constrain the defendant's decisions as to the decisions in issue in the case. The court stated that the plaintiff's express breach of contract claim failed because it was clearly contrary to the bargain it made. The operating agreement preserved for the defendant the freedom to withhold consent to the decisions in issue if that was in the defendant's self-interest whereas the defendant's consent in other situations was subject to the commonplace standard that consent "shall not be unreasonably withheld." The plaintiff's effort to have the court recognize an implied reasonableness condition as part of the operating agreement's implied covenant of good faith and fair dealing was similarly rejected by the court on the basis that the express bargain covered the subject and implying such an obligation would override the express bargain. Additionally, the defendant had no contractual obligation to pay damages for failing to fund capital calls. The operating agreements provided that a member who did not fund a capital call did not have any personal liability, the other member's sole remedy being to revoke its contribution or fund the non-contributing member's share. For similar reasons, the court rejected the plaintiff's unjust enrichment and breach of fiduciary duty claims. The court stated that the plaintiff sought to deprive the defendant of the freedom it preserved under its contract by imposing a fiduciary duty to act in the reasonable best interests of the LLCs at all times. The court stated that to do so would nullify the parties' express bargain. According to the court, "[w]hen a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement,

the fiduciary duty claim must fall, otherwise ‘the primacy of contract law over fiduciary law in matters involving ... contractual rights and obligations [would be undermined].’” Thus, the plaintiff failed to state a claim for breach of fiduciary duty.

In re Hydrogen, L.L.C., 431 B.R. 337 (Bankr. S.D.N.Y. 2010). The Committee of Unsecured Creditors in this case asserted various claims against officers and directors of the debtor, an Ohio LLC, and its parent corporation. The claims included claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, deepening insolvency, unjust enrichment, and equitable subordination.

With respect to the breach of fiduciary duty claim, the court engaged in a choice of law analysis under New York law and concluded that Ohio law (the law of the debtor LLC’s state of formation) governed the claim under the internal affairs doctrine. The court stated that officers and directors of the debtor LLC clearly owed a fiduciary duty to the LLC under Ohio law, but the court found no Ohio law directly addressing whether officers and directors of the parent of a wholly-owned subsidiary owe fiduciary duties to the subsidiary. Based on the weight of authority around the country holding that officers and directors of a parent corporation owe no fiduciary duties to a wholly-owned subsidiary, the court concluded that there was no basis for the proposition that the defendants who served only as officers and directors of the parent owed any fiduciary duty to the LLC. Furthermore, the court concluded that the allegations were too vague and general to allege a breach of fiduciary duty even if the court were to find that such duties existed. The court noted that the complaint also alleged breach of fiduciary duties to creditors of the debtor LLC and that Ohio case law is split as to whether directors and officers owe any fiduciary duty to the corporation’s creditors upon the corporation’s insolvency. The court found it unnecessary to reach the question of whether the Ohio Supreme Court would recognize the existence of any fiduciary duty to creditors.

With respect to the aiding and abetting breach of fiduciary duty claim, the court noted that case law in the Southern District of New York is split as to what choice of law principle applies. Under the internal affairs doctrine, Ohio law would apply to the claim, but New York law would apply under tort conflict of laws principles because the principal place of business of the debtor LLC was in New York, and New York would be the locus of the aiding and abetting claim. The court proceeded to analyze the aiding and abetting claim under both Ohio and New York law and found that the claim would not survive dismissal under either law. The court stated that it was unsettled whether Ohio law recognizes aiding and abetting liability generally, and aiding and abetting breach of fiduciary duty in particular. In any event, the court found that the complaint contained only conclusory assertions that the defendants aided and abetted breaches of fiduciary duty without any factual enhancement supporting the two elements of the claim required to the extent it has been recognized in Ohio. Although a cause of action for aiding and abetting breach of fiduciary duty is clearly recognized in New York, the claim failed to survive dismissal because the breach of fiduciary duty on which the aiding and abetting was premised was deficiently pled.

With respect to the deepening insolvency claim, the court applied an interest analysis under New York choice of law principles on the basis that deepening insolvency is a tort cause of action. Giving the greatest weight to the place where the tort was committed (which the court concluded most likely occurred in the context of management decisions made at the debtor LLC’s principal place of business in New York), the court concluded that New York law should govern. Because New York does not recognize deepening insolvency as an independent cause of action and no viable cause of action to which the theory of damages could attach withstood dismissal, the court dismissed the deepening insolvency claim as well.

The Committee’s unjust enrichment claim was based on allegedly excessive bonuses and other compensation, and the court performed an interest analysis under New York choice of law principles and concluded that the law of the place where the actions giving rise to the unjust enrichment were taken should govern. Given that the compensation decisions were likely made in New York where the debtor LLC’s principal place of business was located, the court applied New York law. The court concluded that the

complaint failed to contain adequate allegations supporting the third element of the claim, namely that “equity and good conscience militate against” allowing the defendants to retain the payments.

The Committee sought equitable subordination of any claims of the defendants under Section 510 of the Bankruptcy Code. To state a claim for equitable subordination, the complaint must allege that the defendant-claimants engaged in “inequitable conduct” that caused injury to the creditors or conferred an unfair advantage on the defendant-claimant. The court specified the following three paradigms in which inequitable conduct has been found: (1) fraud, illegality, or breach of fiduciary or other legally recognized duties, (2) undercapitalization, and (3) control or use of the debtor as a mere instrumentality or alter ego to benefit another. Because the complaint failed to adequately allege the breach of fiduciary duty and unjust enrichment claims and contained no relevant allegations as to control or use of the debtor as an instrumentality, the court turned to the remaining paradigm for inequitable conduct, i.e., undercapitalization. Although the complaint contained some allegations of undercapitalization, the court nevertheless concluded that the complaint failed to adequately allege inequitable conduct, relying on case law holding that undercapitalization alone is not a sufficient allegation of inequitable conduct. Given the deficiency or absence of pleadings with respect to the other types of inequitable conduct, the court dismissed the equitable subordination claim.

Risk Management Services, L.L.C. v. Moss, 40 So.2d 176 (La. App. 2010). An LLC and two of its members brought an action for declaratory judgment and damages against Moss, the third member, whom the other members had expelled. The plaintiffs sought a declaratory judgment that the expulsion was valid and binding and that Moss was liable for damages for breach of fiduciary duty and unfair trade practices. The plaintiffs prevailed on these claims, and the court of appeals affirmed. With respect to the breach of fiduciary duty claims, the court concluded that the record revealed a reasonable factual basis for the jury’s findings that Moss acted grossly negligently or intentionally in failing to exercise care as a manager, breached his duty of care as a manager, and breached his duty of loyalty. The court discussed the fiduciary duty standards under Louisiana LLC law and reviewed the evidence which showed that Moss acted with reckless disregard for the LLC’s interests in his neglect in overseeing a major service contract, efforts to compete with the LLC, and refusal to sign a confidentiality agreement for several months after he left the LLC offices but was still a member of the LLC. The court also concluded there was no error in the jury’s determination that Moss engaged in unfair trade practices based on evidence that Moss’s commitment to a major service contract of the LLC had waned and Moss’s efforts to take business and employees from the LLC.

Entertainment Merchandising Technology, L.L.C. v. Houchin, 720 F.Supp.2d 792 (N.D. Tex. 2010). Several individuals began to work on a gaming system invention, and an LLC was formed after discussions among them as to formation of an entity that would have some involvement with the invention. The defendant contacted a patent attorney and engaged the attorney on behalf of the LLC. After the defendant obtained a patent for the invention naming the defendant as the sole inventor, the plaintiffs brought an action for a declaratory judgment that they were the co-inventors and co-owners of the invention and asserting various state law causes of action, including breach of fiduciary duty. The plaintiffs argued the defendant owed a fiduciary duty based on his capacity as an officer of the LLC “analogous to the fiduciary relationship between partners or corporate officers and shareholders.” The court stated that no Texas court has held that fiduciary duties exist between members of an LLC as a matter of law and that whether such a fiduciary relationship exists is typically a question of fact. The court concluded that, whether or not a fiduciary duty arose out of any position defendant held with the LLC, the four-year statute of limitations barred the breach of fiduciary duty claim. Thus, the court granted summary judgment in favor of the defendant on the claim.

Kuroda v. SPJS Holdings, L.L.C., Civil Action No. 4030-CC, 2010 WL 925853 (Del. Ch. March 16, 2010). Kuroda became involved with several individuals whose relationship was governed by a series of agreements and contracts that formed a complex web of interrelated companies and partnerships, the purpose of which was to establish an efficient structure to manage and provide investment advice to certain funds. Kuroda was a non-managing member of an LLC that was created to serve as the general partner of the funds. As such, Kuroda had no decision-making authority in connection with the funds or the LLC. Through an entity of which he was a shareholder, Kuroda provided investment analyst and consulting services to the investment manager of the funds. In the course of performing these services, Kuroda acquired high-level proprietary and confidential information. The consulting agreement between the investment manager and the entity through which Kuroda rendered services, and certain other documents, included confidentiality provisions. Tension developed between Kuroda and other individuals involved in the investment activities, and Kuroda announced that he was resigning as a consultant to the investment manager and intended to establish his own fund. Kuroda then launched a fund that directly competed with the funds with which he was previously involved. Kuroda sued for unpaid consulting fees, and the defendants counterclaimed for misappropriation of trade secrets, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing based on various alleged acts. The defendants alleged that Kuroda violated fiduciary duties that arose from the terms of the consulting agreement between the investment manager and the corporation through which Kuroda provided consulting services as well as duties that arose through Kuroda's role in the LLC and his "central role" in the overall structure of the business endeavor. The court held that Kuroda did not owe fiduciary duties to anyone who had alleged harm. Because Kuroda was neither a manager nor a controlling member of the LLC, the court held he had no fiduciary duties based on his non-managing member role in the LLC. The court also stated that, no matter how "central" Kuroda was to the entire business endeavor, his centrality was governed by contractual duties rather than fiduciary duties. Citing Shakespeare and Lewis Carroll, the court emphatically rejected the notion that Kuroda should be characterized as a fiduciary, concluding that if the "defendants wanted everyone to enjoy a red rose of fiduciary duty, they should not have planted white roses of contractual obligations and now ask [the court] to paint over them." Thus, the court dismissed the counterclaim for breach of fiduciary duty.

Cline v. Grelock, C.A. No. 4046-VCN, 2010 WL 761142 (Del. Ch. March 2, 2010). Two friends, Cline and Grelock, co-owned a short-lived Delaware LLC that operated a towing and recovery service. The business operated unsuccessfully, and the relationship between Grelock and Cline deteriorated. After about seven months, Grelock unilaterally dissolved the LLC, and he and his wife formed a new LLC that provided similar services. The new LLC used a vehicle purchased by the original LLC, a trade name and logo used by the original LLC, and a customer list of the original LLC consisting of three customers. Cline sued for damages and an ownership interest in the new LLC, and Grelock sued to enforce the capital contribution Cline allegedly promised to make to the original LLC. The parties disputed their ownership percentages in the original LLC, with Cline claiming he owned a 50% interest. The tax records for the original LLC reflected equal ownership, but Grelock claimed that Cline had never made the required \$25,000 capital contribution. Cline did not dispute the fact that he never made his capital contribution, but he claimed that he never signed the LLC agreement that required it. The only contribution that Cline made was as a co-guarantor of the loan for the truck that the original LLC purchased. The court found that it was unreasonable for Cline to claim he was a 50% owner when he did not make a capital contribution. The court acknowledged that Grelock acted improperly and breached his fiduciary duty in connection with his unilateral dissolution of the original LLC and use of its assets in the new LLC, but Cline was unable to prove any damages. Cline argued alternatively that he was entitled to an ownership interest in the new LLC as a wrongfully excluded co-owner of the dissolved LLC. After agreeing that a former partner (or member of an LLC) may be held accountable for profits earned using partnership assets, the court determined that Cline

failed to show what his interest should be or how the court should calculate it. Moreover, the court was not persuaded that a person who failed to make a capital contribution should be allowed to claim an interest in a successor company. The court concluded that Cline's failure to make a capital contribution precluded him from asserting an equity interest or, alternatively, that the amount of capital which Cline reasonably should have contributed far exceeded any value fairly attributable to the original LLC, including its assets now being used for the new LLC's benefit. Thus, although the court did not condone Grelock's conduct, Cline could not recover because he did not prove that he was harmed (or, if harmed, what his recovery should be). Grelock's wrongful conduct, however, precluded Grelock from recovering on his claim to compel Cline to pay his capital contribution for the benefit of the original LLC. Finally, the court ordered Grelock and his wife to exercise all good faith efforts to obtain Cline's release from the guaranty of the loan on the truck purchased by the original LLC and now being used by the new LLC. Furthermore, the court said that if the Grelocks were unable to secure Cline's release, they must individually indemnify and hold Cline harmless from any claim arising out of the guaranty. The court assessed the costs of the action against Grelock because of his breach of fiduciary duty.

In re South Canaan Cellular Investments, LLC (South Canaan Cellular Investments, LLC v. Lackawaxen Telecom, Inc.), 427 B.R. 85 (Bankr. E.D. Penn. 2010). The debtors, two Delaware LLCs, sued Coughlin, a member of the LLCs, and Lackawaxen Telecom, Inc. ("LTI"), a corporation of which Coughlin was president and a shareholder, for breach of fiduciary duty based on Coughlin's obtaining information from the LLCs regarding the LLCs' indebtedness to a bank and LTI's purchase of the indebtedness from the bank. The LLCs argued that Coughlin's use of the information to secretly purchase the bank loan at a time when the LLCs were negotiating with the bank to resolve the loan breached Coughlin's fiduciary duties in various respects. The court discussed fiduciary duties under Delaware law and dismissed the plaintiffs' claims because the allegations did not state a cause of action for breach of fiduciary duty because the complaint did not allege that Coughlin was a managing or controlling member or that the operating agreements imposed on him any fiduciary duties. The court noted the flexibility provided by the Delaware LLC statute to define duties but assumed that the operating agreement was silent on duties since the operating agreement was not attached to the complaint and the complaint did not allege that the operating agreement imposed any duties. The court rejected the plaintiffs' argument that all members of an LLC owe fiduciary duties to the LLC as a matter of common law. Analogizing to corporate and limited partnership case law, and relying on Delaware LLC cases, the court concluded that Delaware common law does not impose fiduciary or other related duties on LLC members who are neither managers nor controlling members. The complaint did not allege that Coughlin exercised any control or management duties involving the LLCs, either directly or through an agent, nor that he had any right to do so, and the court stated that he had owed no fiduciary duties to the LLCs as a mere minority member. The court thus dismissed the plaintiffs' various claims against Coughlin for breach of the duties of loyalty, candor and disclosure, good faith, care, fiduciary duty, and good faith and fair dealing. The court also dismissed the claim against LTI for aiding and abetting Coughlin's breach of fiduciary duty since the breach of fiduciary duty claims failed. The court dismissed the plaintiffs' claim for breach of the implied contractual covenant of good faith and fair dealing, finding it difficult to apply Delaware law without the operating agreements and stating that the court must dismiss unless the LLCs demonstrated that it was clear from the contract that the parties would have agreed to proscribe the act complained of had they thought to negotiate the matter. Furthermore, the court believed that any claim for breach of an implied covenant in the operating agreements should be asserted by the LLC members rather than by the LLCs. In any event, assuming the LLCs had standing and that the absence of the underlying agreements was not dispositive, the court concluded that the LLCs failed to state a cause of action because the Delaware LLC statute permits LLC members to lend money to the LLC and transact other business with the LLC on the same terms as a non-member unless the operating agreement provides otherwise. In the absence of any allegation that the operating agreements provided otherwise, the court stated

that Coughlin was free to become a creditor of the LLCs and it was not persuasive to argue that he breached an implied covenant by having an entity of which he was president become a creditor by assignment of the loan. Additionally, the court relied upon the statutory provisions governing access by the LLC members to information about the LLC. The court pointed out that an LLC manager need not disclose confidential information if the manager believes it will be harmful to the LLC, and the court found the Delaware statute to implicitly recognize that non-fiduciaries obtaining information may make use of the information for their own benefit. The court stated that the good faith implied in all contracts primarily imposes a duty not to use contract rights unreasonably, but that non-managing members may generally act in their self-interest. The court stated that Coughlin's demand for information under the Delaware LLC statute could have been refused by the LLCs if disclosure would be harmful, and the LLCs must have concluded that disclosure of the limited and general information disclosed four months prior to the assignment of the loan would not be harmful. Furthermore, the court pointed out the information was not the subject of any confidentiality agreement. As Coughlin was under no fiduciary obligation to the LLCs and was free to act in his self-interest, free to become a creditor of the LLCs, and was accused of no more than using limited and general information he either had a statutory right to obtain (or, if not, that the LLCs elected not to deny him), the court concluded that the LLCs stated no cause of action for breach of an implied contractual covenant of good faith and fair dealing.

In re Mervyn's Holdings, LLC (Mervyn's LLC v. Lubert-Adler Group IV, LLC), 426 B.R. 488 (Bankr. D. Del. 2010). The court determined that the debtor's complaint against Target Corporation alleged facts sufficient to support collapsing the transactions surrounding the sale of Mervyn's (including execution of a sale agreement, stripping of real estate assets, increasing the rent under leases, and conversion of the debtor from a corporation to an LLC) so as to state a claim based on fraudulent transfer. The court noted in particular that the conversion of the debtor into an LLC was particularly significant because it enabled Target to transfer its membership interest, which was a major factor in the fraudulent transfer claim. The court also determined that, while no California court has directly and explicitly stated that a sole member of an LLC owes the company fiduciary duties, the California Supreme Court would likely find a sole member owes such duties to the LLC. The court concluded that California law clearly imposes duties on an LLC member to the LLC's creditors when the LLC is insolvent. The complaint alleged that the debtor was or became insolvent at the time the sale agreement was executed due to the stripping of real estate assets; therefore, Target, which was in control of the debtor, owed fiduciary duties to the LLC's creditors. Target attempted to rely on an exculpation clause in the debtor's operating agreement, but the court stated that the exculpatory clause was an affirmative defense and, as such, could not form the basis for a dismissal. The court held that the California four-year statute of limitations for breach of fiduciary duty rather than the Delaware three-year statute applied under the Delaware internal affairs choice of law rule, and the Delaware "borrowing" statute was inapplicable.

PT China LLC v. PT Korea LLC, C.A. No. 4456-VCN, 2010 WL 761145 (Del. Ch. Feb. 26, 2010). Wang, a Singapore resident, sought dismissal of breach of fiduciary duty and breach of contract claims against him on the basis that he was not subject to personal jurisdiction in Delaware. Wang was the sole member and manager of a Delaware LLC which was one of two members of another Delaware LLC, Pine Tree Holdings I LLC ("PT Holdings"). Wang was a member of the management committee of PT Holdings, which was the managing member and minority interest holder of yet another Delaware LLC, Pine Tree Equity LLC ("PT Equity"). The agreements governing these entities included a master joint venture agreement to which Wang was a party. The claims in issue against Wang were various alleged breaches of fiduciary duty to PT Holdings and breaches of provisions of the PT Equity operating agreement and the master joint venture agreement. Wang did not contest his status as a manager of PT Holdings for purposes of Section 18-109 of the Delaware LLC Act, which provides that a manager of a limited liability company

is deemed to consent to the personal jurisdiction of Delaware courts for any suit “involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company . . .” A “manager” is defined for purposes of Section 18-109 to include any person who “participates materially in the management of the limited liability company.” The court noted that even if a person is served pursuant to Section 18-109, the exercise of personal jurisdiction must still be consistent with due process. With respect to the breach of fiduciary duty claims, the court cited Delaware case law in the LLC and corporate context for the proposition that service under Section 18-109 is consistent with due process where an action relates to a manager’s fiduciary duties. Wang did not contest this point but argued instead that the fiduciary duty claims were not supported by the alleged facts and were otherwise duplicative of the breach of contract claims. The court found that sufficient facts had been pled to support a reasonable inference that Wang usurped business opportunities, disclosed confidential information for his own benefit, and misappropriated resources of PT Holdings. As to Wang’s contention that the fiduciary duty claims were duplicative of the breach of contract claims, the court stated that under Delaware law “a contractual claim will preclude a fiduciary duty claim, so long ‘as the duty sought to be enforced arises from the parties’ contractual relationship.’” The court couched the question as whether there existed an independent basis for the fiduciary duty claims apart from the contractual claims, even if both were related to the same or similar conduct. The court permitted the fiduciary duty claims to stand because they arose independently under Wang’s duty of loyalty to PT Holdings. The court pointed out that Wang did not argue that Wang’s duties were limited by any of the governing agreements, and the court additionally noted that Wang’s fiduciary duties arose under a different agreement (i.e., the PT Holdings LLC agreement) from those which governed the breach of contract claims, and may therefore could be considered distinct in scope.

Kelly v. Blum, C.A. No. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010). The plaintiff, who was a founding member, manager, and officer of a Delaware LLC, challenged the merger of the LLC into an affiliate of the controlling members of the LLC whereby the plaintiff’s interest was cashed out. The complaint sought a declaratory judgment that the merger was void based on non-compliance with notice requirements of the LLC agreement and also alleged breach of fiduciary duty claims against the managers and controlling members, a claim for breach of the implied covenant of good faith and fair dealing, and other claims. The court held that the plaintiff lacked standing to assert his derivative claims because he was cashed out in the merger, but the plaintiff also alleged direct claims that the defendant members and managers of the LLC violated their fiduciary duties of loyalty and care to the plaintiff in approving a self-interested merger on terms unfair to the plaintiff. The court pointed out that Delaware cases interpreting the Delaware LLC statute have concluded that managers and members owe traditional fiduciary duties of loyalty and care to each other and the LLC in the absence of a contrary provision in the LLC agreement. The court stated that, given the contractual freedom provided by the LLC statute, provisions expanding, restricting, or eliminating the operation of traditional fiduciary duties should be clear and unambiguous. The LLC agreement in this case provided in a section entitled “Duties” that the board of managers “shall manage the Company in a prudent and businesslike manner. . .” The LLC agreement also contained an exculpatory clause eliminating the managers’ liability for all conduct except “willful or fraudulent misconduct or willful breach of . . . contractual or fiduciary duties under this Agreement.” The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the defendant managers entered into the merger to profit from squeezing out the plaintiff and obtaining control of property held by the LLC as alleged by the plaintiff, a direct duty of loyalty claim sufficient to survive a motion to dismiss was stated. With respect to the exculpatory provision, the court noted that the Delaware LLC statute permits members to limit or eliminate a manager’s or member’s liability for breach of contract and fiduciary duties except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC agreement

to require plaintiff to allege a “willful” breach of the defendant managers’ fiduciary duties to have a valid claim. The court did not determine whether “willful” required “evil intent to harm” or “acting recklessly and outside the bounds of reason” as the defendant managers asserted, but found that the plaintiff had satisfied this standard by alleging facts sufficient to suggest that the defendant managers actually and specifically intended to extinguish the plaintiff’s membership interest, knowing that such action would harm the plaintiff. The court also held that the controlling members owed the plaintiff, as a minority member, traditional fiduciary duties, including the duty not to cause the LLC to enter into a transaction that would benefit the controlling members at the expense of the minority member. The court found that the plaintiff sufficiently alleged facts that, if true, showed that the controlling members, with the aid of their appointed managers, effected the merger to benefit themselves at the expense of the plaintiff. Thus, the plaintiff stated a direct claim against the managers and controlling members, and the court denied the defendants’ motion to dismiss these claims. The court also addressed the plaintiff’s claim that the controlling members’ parent aided and abetted the alleged breaches of fiduciary duties discussed above. The court found that the plaintiff sufficiently alleged the parent’s knowing participation in the breaches of fiduciary duty by the other defendants through the acts of the parent’s officers and its two wholly-owned subsidiaries that directly harmed the plaintiff. Thus, the motion to dismiss this claim was denied. The court dismissed the plaintiff’s claim for a declaratory judgment invalidating a loan agreement between the LLC and one of the controlling members because the plaintiff consented to the loan and pledged his membership interest in the LLC to obtain the loan.

Chiu v. Chiu, 896 N.Y.S.2d 132 (App. Div. 2nd Dept. 2010) (stating that complaint stated cause of action for breach of fiduciary duty by alleging fact in sufficient detail to show that managing member of LLC owed plaintiff fiduciary duty that was breached by failing to make full disclosure of all material facts referable to operation and management of LLC, but three year statute of limitations applicable when damages are sought for breach of fiduciary duty barred recovery for any alleged breach occurring more than three years before commencement of action).

DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp.2d 405 (S.D.N.Y. 2010). DirecTV entered into a joint venture agreement with an individual, Avila, under which the parties formed an LLC in which DirecTV had a 45% membership interest, and an LLC formed by Avila (“Park 610”) had a 55 % membership interest. DirecTV made it clear that it was critical that Avila not transfer any of his ownership interest in the LLC without DirecTV’s written agreement, and the joint venture agreement made a change in control a default under the contract. When the joint venture agreement was being negotiated, Avila represented that he was the sole owner of the two entities that were the members of Park 610, but he was actually in the process of arranging a transfer of ownership of one of the entities, and he eventually allowed his shares in the other entity to be pledged to or deposited with a third party to secure his obligations under the agreement with the purchaser of the other entity. The court dismissed certain breach of contract claims, and Park 610 and related defendants argued that breach of fiduciary duty claims should be dismissed as well, but the court declined to do so. The parties cited a mix of Delaware and New York case law on fiduciary duties without explaining which jurisdiction’s law should apply, but the court concluded the outcome would be the same under either state’s law. The court stated that LLC members owe each other traditional fiduciary duties owed by directors to a corporation in the absence of provisions in an LLC agreement explicitly disclaiming the duties. Similarly, the court stated that the manager of an LLC owes the traditional duties of loyalty and care (which include a duty of disclosure and candor) to the members in the absence of a contrary provision in the LLC agreement. The court held that DirecTV sufficiently alleged that Park 610, as a member, and Avila, as a manager, breached their fiduciary duties to DirecTV by failing to disclose material facts regarding the transfer of a significant ownership stake in Park 610. The court also concluded that allegations of an individual’s acts done to advance the indirect transfer of ownership of Park 610 were

sufficient to allege aiding and abetting liability. The court rejected the argument that the fiduciary duty claim was duplicative of the breach of contract claims. The court also rejected the argument that an ethics provision in the agreement limited the fiduciary obligations of the parties.

Christopher's Partner, LLC v. Christopher's of Colonie, LLC, 893 N.Y.S.2d 689 (App. Div. 3rd Dept. 2010) (holding member who had made loan to LLC secured by LLC's assets was entitled to seize assets to protect its interest as creditor without breaching fiduciary duty notwithstanding provision of operating agreement that prohibited member from taking action that would make it impossible to carry on LLC's business in ordinary course where operating agreement allowed members to make loans to LLC, New York LLC statute states that member who becomes creditor has same rights and obligations as person who is not member, and LLC agreed member had right to accelerate LLC's debt under loan agreement such that member was exercising rights belonging to it as secured creditor).

One to One Interactive, LLC v. Landrith, 920 N.E.2d 303 (Mass. App. 2010). Landrith, Ian Karnell, Jeremi Karnell, and Donnelly founded an LLC engaged in a digital marketing business. After disputes developed between the members, they negotiated the terms of a buy-out of Landrith and memorialized the terms on a proposed term sheet. However, after the LLC made payments for a period of time pursuant to the terms of the proposed term sheet, the LLC informed Landrith that his interest was grossly overvalued and that the proposed term sheet was not a binding contract, and the parties ended up in litigation. Landrith prevailed on breach of fiduciary duty claims, and the Karnells contended on appeal that a breach of fiduciary duty analysis did not apply because the proposed term sheet was a controlling contract on point. The court stated that the Karnells could not now argue that they did not have a fiduciary duty to Landrith when they had argued that Landrith owed and breached fiduciary duties to the LLC and the other members, and they had suggested the fiduciary duty instruction given by the judge. The Karnells also argued that the LLC and the other members did not owe a fiduciary duty to Landrith once the proposed term sheet was signed by Landrith, but the court stated that the problem with this contention was that the LLC did not actually redeem Landrith's interest and thereafter sent Landrith a K-1 declaring that he was a member. The court also held that there was sufficient evidence for the jury to find that the Karnells breached their fiduciary duties based on proof of various improper actions, including maneuvering to renege on their deal with Landrith and use of improper tactics to pressure him to accept less than he was entitled to under the contract, such as subjecting him to an unexpected tax obligation while failing to make a distribution to enable Landrith to pay the tax unless he accepted a buy-out at an amount specified in an appraisal obtained by the LLC rather than the amount specified in the proposed term sheet. The court relied upon case law in the closely held corporation context regarding the fiduciary duties of shareholders. The court also agreed with the trial judge that the discharge of the LLC's debt in bankruptcy did not as a matter of law extinguish Landrith's claim against the Karnells for breach of fiduciary duty regarding his reasonable expectations of benefits from the ownership of his interest.

Colborne Corporation v. Weinstein, ___ P.3d ___, 2010 WL 185416 (Colo. App. 2010, pet. granted). The plaintiff, a creditor of a Colorado LLC, sought to hold the managers and members of an LLC liable for an unlawful distribution. The creditor argued that the managers were liable for breach of a common law fiduciary duty owed to the creditor and that members were liable under the Colorado LLC statute, which provides for liability of the members to the LLC in the event the members knowingly receive an impermissible distribution. The plaintiff argued that the court should follow Colorado case law in the corporate area by analogy, but the trial court dismissed the plaintiff's claims because there was no appellate decision extending either the statutory interpretation of the corporate statute or the common law limited fiduciary duty of directors to members or managers of an LLC. The court of appeals reversed the trial court on both issues. With respect to the fiduciary duty claim, case law postdating the trial court's dismissal came

into play. After the trial court dismissed the case, a division of the Colorado Court of Appeals held in *Sheffield v. Trowbridge* that managers of an insolvent LLC owe to creditors the same fiduciary duty owed by directors and officers of an insolvent corporation, i.e., the limited duty to avoid favoring their own interests over creditors' claims. The defendants did not argue that *Sheffield v. Trowbridge* was wrongly decided but merely challenged the sufficiency of the pleadings with regard to whether the managers favored their own interests over the plaintiff's. The court concluded that the allegation that the managers authorized distributions to themselves as members when the distributions rendered the LLC unable to meet its financial obligations was sufficient to state a claim that the managers favored their own interests over the LLC's creditors.

Mattern & Associates, L.L.C. v. Seidel, 678 F.Supp.2d 256 (D. Del. 2010) (stating that employee, as agent, owes employer duty of loyalty under Pennsylvania law and that evidence supported jury's conclusion that minority member/employee breached his fiduciary duties).

Bankston v. Singleton, Civil Action No. 09-0594, 2009 WL 5196143 (W.D. La. Dec. 30, 2009) (stating that members and managers of LLC owed statutory and contractual duties and holding breach of duty claims fell within "related to" jurisdiction of court in member/manager's bankruptcy).

In re ALH Holding LLC, 675 F.Supp.2d 462 (D. Del. 2009). The issue in this case was whether the members of the "Supervisory Board" of a Delaware LLC breached their fiduciary duties in approving the sale of the LLC's subsidiaries on a piece-meal basis. After the LLC became financially distressed and the Board was not successful in finding a buyer for the LLC as a whole, the Board approved the piece-meal sale of its three operating divisions. In this consolidated action of two actions brought by the parties against one another, the court discussed the duties owed under Delaware law, the freedom to contract regarding such duties in the operating agreement, the application of default and contractual standards to the facts of the case, and the operation of the statutory indemnification provisions in the absence of any provision in the operating agreement. The court recognized the contractual freedom LLC members have to expand, restrict, and eliminate duties and stated: "In addition to any contractual limitations upon fiduciary duties that the members of an LLC might agree upon, the business judgment rule protects directors from spurious claims against their exercise of discretion in an effort to 'promote the full and free exercise of the managerial power granted to Delaware directors.'" The court analyzed the claims in light of the operating agreement, which provided that a manager or representative serving on the supervisory board was not liable for damages to the LLC or its members for any act in good faith, but such persons were liable for their own fraud, criminal action, bad faith, or gross negligence. The court characterized the provision as imposing the traditional duty of care but retaining only a subset of the duty of loyalty in its prohibition against bad faith actions. The court discussed the concepts of bad faith and gross negligence under Delaware corporate law and concluded that neither bad faith nor gross negligence had been established in connection with the Board's decision to sell the operating divisions. The court alternatively examined the record for compliance with the unmodified duty of loyalty, stating that by default the directors of an LLC owe a fiduciary duty of loyalty to the LLC and its members. The court examined arguments that the sale was an interested transaction and that a majority of the board lacked independence because three of the Board's five members were appointed and employed by the majority member of the LLC. The court commented that the majority member of the LLC owed the fiduciary duty of loyalty to the LLC and its members because of its controlling interest, but the court rejected the arguments that the sale involved self-dealing or interested behavior because the members similarly situated to the majority member received proportionate benefits. The court also concluded that the majority member's employment of a majority of the Board of the LLC did not itself overcome the presumption of the business judgment rule. Having found no breach of fiduciary duty on the part of the Board, the court turned to their claim for indemnification. The court noted that the Delaware LLC statute permits the members of an LLC

to contract to indemnify members and managers and grants the contracting parties broad authority to determine the nature and extent of indemnification, but the operating agreement in this case contained no provision regarding indemnification. The Board members who were sued for breach of fiduciary duty sought a declaration confirming the LLC's authority to indemnify them, and the court stated that such a declaration would presumably allow the Board members to use their majority position to indemnify themselves. The court refused to sanction an interested transaction of this nature absent a pre-existing provision in the operating agreement. Finally, the court rejected the claim that the breach of fiduciary duty claims were brought in bad faith so as to support an award of attorney's fees in favor of the prevailing parties. Among the reasons the court cited in support of its conclusion that bad faith had not been demonstrated was the failure of the Board to obtain a fairness opinion. Although the court had earlier acknowledged that a fairness opinion was not required as part of the sale process, the court stated that the claims were not "meritless" in light of the failure to do so, and the court commented that a fairness opinion might well have obviated the need for the litigation altogether.

Acadian Energy Resources, LLC v. Carpenter, Civil Action No. 2:09-00150, 2009 WL 5217679 (S.D. W. Va. Dec. 31, 2009) (holding allegations sufficed to state breach of fiduciary duty claim against LLC manager for breach of manager's duty to insolvent LLC's creditor).

Ruotolo v. Ruotolo, No. CV095026804, 2009 WL 5698124 (Conn. Super. Dec. 29, 2009) (holding that ex-wife had standing to bring fraud claims in her individual capacity against ex-husband as sole managing member, that ex-wife sufficiently alleged elements of fraud in view of fiduciary duties owed by ex-husband to LLCs and to ex-wife as fellow member, that ex-wife properly plead claim for breach of implied covenant of good faith and fair dealing, and that Connecticut LLC statutory provision imposing duty to account in connection with interested member or manager transactions did not of itself provide for imposition of constructive trust).

Health Robotics, LLC v. Bennett, Civil Action No. 09-cv-0627, 2009 WL 5033966 (E.D. Pa. Dec. 22, 2009) (applying Delaware law to breach of fiduciary duty claims based on Pennsylvania statutes providing that law of state of organization applies to internal affairs of foreign LLC; finding that plaintiff LLC successfully pled existence of fiduciary duty owed to Delaware LLC by defendants who were issued equity certificates in LLC, but noting that court need not consider whether other plaintiffs (who were members of LLC) were owed fiduciary duty by defendants because plaintiffs only pled that duty was owed to LLC; dismissing claims for breach of fiduciary duty because plaintiffs failed to alleged harm to LLC resulting from alleged breach of fiduciary duty).

Pointer v. Castellani, 918 N.E.2d 805 (Mass. 2009). Pointer, a minority member of a Massachusetts LLC who was terminated as its president, sued the other three members and the LLC alleging that the defendants engaged in a freeze-out, breached their fiduciary duty, breached Pointer's employment agreement and the covenant of good faith and fair dealing, and interfered with an advantageous relationship. The defendants counterclaimed, alleging that Pointer usurped a company opportunity, breached his fiduciary duty, breached his employment contract, and breached the implied covenant of good faith and fair dealing in relation to the operating agreement and employment contract. Pointer had been employed in the granite business operated by the LLC prior to its acquisition by the LLC. When the granite business was acquired by the LLC, Pointer joined with Castellani, Woodberry, and Herbert to form the LLC. Castellani and Woodberry owned 51% of the LLC, Pointer owned 43%, and Herbert owned 6%. Pointer became president of the LLC, and Herbert acted as chief financial officer. Castellani, Pointer, and Herbert were the managers of the LLC. The operating agreement stated that the purpose of the LLC was to operate a quarry business and allowed members to conduct any other business or activity without being accountable. The operating

agreement contemplated dealings with members and their affiliates and required that such dealings be at arm's length and on commercially reasonable terms. Pointer had an employment contract that only allowed his removal without one year's notice on certain grounds, including dishonest or disloyal behavior, material breach of the operating agreement, or substantial failure to perform his duty. The employment agreement required Pointer to work exclusively for the LLC, but the agreement also stated that Pointer could perform services for another company that he formed with another investor to purchase a residential subdivision that the owner of the granite business insisted on selling when the granite business was sold. Although Pointer did not disclose to the other members of the LLC the extent of his ownership in the company that owned the subdivision and another company that later acquired real estate from the LLC, the trial judge found that all the participants knew that Pointer was involved in other real estate activities that were relevant to the suit. The investor with whom Pointer formed the company to purchase the subdivision at the time the granite business was acquired by the LLC also had an interest in purchasing a piece of property acquired by the LLC in the acquisition of the granite business. Ultimately, Pointer joined with this other investor in acquiring the LLC's tract of land in order to pursue a real estate development opportunity. This transaction and certain other actions of Pointer were the basis of the defendants' defense as well as their counterclaims. Pointer's claims were based on the hiring of a new chief executive officer and the termination of Pointer's employment. The defendants argued that the termination of Pointer's employment was justified based on alleged improper business practices of Pointer that had come to light as well as his participation in the transaction involving the sale of the LLC's real estate, and the defendants further asserted that the real estate transaction constituted improper self-dealing and usurpation of a corporate opportunity by Pointer.

The Massachusetts Supreme Court applied Massachusetts case law on closely held corporations in analyzing the claims and determined that the trial judge did not err in finding for Pointer on his freeze-out and wrongful termination claims. The court stated that a breach of fiduciary duty through a freeze-out occurs when the "reasonable expectations" of a shareholder are frustrated. The court acknowledged that the majority shareholders are permitted a measure of discretion in hiring and firing employees and that a court must allow the controlling group an opportunity to demonstrate a "legitimate business purpose" for its actions. The court reviewed the reasons offered by the defendants for Pointer's termination and concluded that the defendants did not establish a legitimate business purpose. According to the court, the trial court did not err in finding that only one of the allegations of improper business practices involved actual misconduct on Pointer's part and that termination was not necessary in that regard because all the owners had to do was talk to Pointer about the matter for it to be corrected.

With regard to the self-dealing and usurpation of corporate opportunity claims, the court upheld the trial court's decision in favor of Pointer. The court concluded that provisions of the operating agreement defining a limited purpose of the LLC and permitting members to conduct other businesses and activities supported the trial court's conclusion that the real estate development activity in which Pointer was involved was not a corporate opportunity of the LLC. The court characterized the defendants' reliance on a provision of the operating agreement imposing on managers the fiduciary duty of a director of a corporation as misplaced because there would first have to be a corporate opportunity for Pointer to breach a duty. The court pointed out that the record supported the trial judge's conclusion that the remaining members had no interest in the real estate and that there was sufficient information available to the members regarding the relationship of the LLC's piece of property to the development opportunity to allow them to take action if they had been interested in doing so. The court acknowledged that the sale of the LLC's property was unquestionably a corporate opportunity once the LLC decided to sell, but the court rejected the defendants' challenge to the trial court's finding that Pointer engaged in unfair self dealing in the transaction. Although Pointer did not reveal that he owned 50% of the entity purchasing the property from the LLC, he did not participate in the vote on the sale and the transaction was negotiated between Castellani and Pointer's fellow investor. The record showed that the other members knew that Pointer owned part of the entity acquiring the property and that Pointer and his fellow investor were assembling parcels of land for development.

Although Pointer did not disclose that his fellow investor was pursuing the parcel at a discounted price as compared to the price specified in an option held by the investor, the record showed that the members were aware they could hold out for a higher price in the future but preferred to sell rather than risk the deal falling apart. There was also expert testimony that the price was a commercially reasonable price. The court thus held that the trial judge did not err in concluding that the transaction was fundamentally fair.

The court upheld the trial court's finding that Castellani, Woodberry, Herbert, and the new CEO were liable for interference with Pointer's employment contract with the LLC because they terminated Pointer for cause that was contrived.

The court found no error in the trial court's conclusion that Pointer was entitled to indemnification under the indemnification provisions of the operating agreement, which required indemnification of managers and members unless their action or inaction was the result of active and deliberate dishonesty. The defendants argued that the trial judge's findings indicated that Pointer was, at the very least, dishonest, but the court cited statements by the trial court that its decision did not include any findings that Pointer committed actions in bad faith or with deliberate dishonesty.

Finally, the court discussed the remedy for a freeze-out and remanded for further proceedings because the court concluded that the trial judge's order for a forced sale of the LLC violated the court's holding in *Brodie v. Jordan*, in which the court held that a forced buy-out of a shareholder was improper without some authorization from the shareholders. The court stated that Pointer was entitled to damages or other equitable relief that would put Pointer in the position he would have been in had the freeze-out not occurred and compensate him for the denial of his reasonable expectations.

Cottone v. Selective Surfaces, Inc., 892 N.Y.S.2d 466 (App. Div. 2d Div. 2009) (declining to dismiss plaintiff's claim for constructive trust and accounting where plaintiff alleged that he became minority member of defendant LLC and was thus owed fiduciary duty by managing member; holding breach of fiduciary duty claims asserted by alleged minority member of LLC were not time-barred because plaintiff's claims were subject to six-year statute of limitations based on equitable relief sought rather than three-year statute of limitations applicable when damages are sought).

New England Fertility Institute, LLC v. Frank, No. CV085020525S, 2009 WL 4852430 (Conn. Super. Nov. 17, 2009). The court discussed the claims and counterclaims in a dispute between parties that included two members of an LLC, and the court determined that the defendant's unclean hands defense should be stricken because the defense neither related to the subject matter of the underlying litigation nor did the plaintiff's claims (which in essence involved misappropriation of funds by the defendant and others) rely on the alleged fraud (several alleged bad acts by the plaintiff in the management of the LLC). The court also concluded that the defendant's counterclaims (which were based on the alleged malfeasance of the defendant's fellow member and a request for judicial dissolution of their LLC) raised different factual and legal issues than those alleged in the plaintiff's complaint and involved only some of the parties to the suit. Furthermore, the counterclaims could not be construed as a setoff; therefore, the counterclaims were dismissed.

Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, No. 07 CVS 20852 (N.C. Super. Nov. 13, 2009). A minority member of a North Carolina LLC sought to inspect records of the LLC, asserted various claims against the majority member and manager of the LLC, and sought appointment of a receiver to manage the LLC. The court first addressed the defendants' argument that the plaintiff failed to state a claim upon which relief could be granted based on the limited liability of members and managers of an LLC. The court reviewed the rule that a member or manager is not liable for the obligations of the LLC but may be liable by reason of the person's own conduct. The court also reviewed the protection provided by the business judgment rule and the limitations on the scope of that rule as well as the limitations on exculpation

that can be provided by the operating agreement. The court stated that the complaint contained allegations supporting the claim that LLC managers took actions in conflict with the interests of the LLC or entered into transactions from which they derived an improper personal benefit, thus alleging claims for which the defendants could be held liable. The court declined to dismiss the plaintiff's derivative claims for breach of fiduciary duty. The defendant in essence argued that the plaintiff lacked standing, but the court concluded that the complaint alleged with sufficient particularity the actions and controversies of which the plaintiff complained and the demands made by the plaintiff. The court next examined the plaintiff's claim for judicial dissolution and concluded that the complaint alleged facts suggesting that dissolution may be reasonably necessary for the protection of the rights and interests of the minority and that the assets of the LLC were being misapplied or wasted. The court rejected a motion by the defendants to stay the proceeding while an accounting firm engaged by the LLC undertook an investigation of the plaintiff's claims because it did not appear to the court that the investigation would address all of the plaintiff's claims. Finally, the court addressed the plaintiff's motion for appointment of a receiver to manage the LLC and determined that the motion did not present such a rare and drastic situation involving a solvent, active business that receivership was the only proper remedy. The plaintiff argued that a receiver should oversee expenditures to prevent unauthorized distributions, but the court concluded that imposing a partial receivership in this case would be inconsistent with the generally limited application of receiverships.

In re Lawrence (Curreli v. Lawrence), Bankruptcy No. 6:08-bk-00961-ABB, Adversary No. 6:08-ap-00083-ABB, 2009 WL 3486063 (Bankr. M.D. Fla. Oct. 28, 2009) (holding statutory fiduciary duties of loyalty and care owed by managing member under Florida law do not arise to level of fiduciary duty required for nondischargeability of debt purposes under bankruptcy law because duties of LLC managing member did not involve administration of technical or express trust or control of segregated res).

Vichi v. Koninklijke Philips Electronics N.V., Civil Action No. 2578-Vcp, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009). Vichi made a loan to a Delaware LLC which was a subsidiary of a joint venture between two foreign companies. The LLC went bankrupt and defaulted on the loan to Vichi. Vichi then sued various parties. Among other claims, Vichi brought breach of fiduciary duty claims against an individual citizen of Singapore who resided in China and was an officer of the joint venture and employed by a subsidiary of the joint venture that was the sole member and manager of the LLC. The individual successfully moved for dismissal of the claims against him for lack of personal jurisdiction because neither the Delaware long-arm statute nor the implied consent provision of the LLC statute provided a basis to exercise jurisdiction over him. However, the court stated that even if it had not dismissed the claims against him for lack of personal jurisdiction, it would have dismissed the breach of fiduciary duty claims for failure to state a claim because Vichi failed to establish that his fiduciary claims were cognizable under Delaware law. The court stated that creditors of a Delaware corporation that is insolvent or in the zone of insolvency have no right to assert direct breach of fiduciary claims, and the court concluded that the same rule applies in the LLC context. The court then analyzed whether Vichi's fiduciary claim was direct or derivative based on who suffered the alleged harm and who would receive the benefit of recovery. The court found that Vichi alleged that the individual breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore concluded that Vichi's breach of fiduciary duty claims were direct, and Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims.

In re BHS&B Holdings LLC (Official Committee of Unsecured Creditors v. Bar Harbour Masters Ltd.), 420 B.R. 112 (Bankr. S.D.N.Y. 2009). This case arose out of the bankrupt Steve & Barry's clothing

stores and the subsequent bankruptcy filing by the purchaser, BH S&B Holdings, LLC (“Holdings”) and its subsidiaries. The Official Committee of Unsecured Creditors (the “Committee”) sought to recover money for the estate through veil piercing, breach of fiduciary duty, and equitable subordination or recharacterization claims. Holdings was owned by another LLC (“Holdco”), and an intermediate holding LLC (“Intermediate Holdco”) was later interposed between Holdings and Holdco. The entire structure was formed and funded by York Capital Management (“York”), four entities collectively referred to as “Bay Harbour”, Steve and Barry’s co-founders (Steven Shore and Barry Prevor), and Hilco SB LLC. Among other claims, the Committee alleged that Holdco as well as Bay Harbour and York employees and officers of Holdings breached their fiduciary duties to Holdings. The court stated, and the parties agreed, that the breach of fiduciary duty claims were governed by Delaware law since Holdings, Holdco, and most of the other entities were Delaware entities. The court concluded that the Committee failed to sufficiently allege breach of fiduciary duty claims. The court first noted that a manager of an LLC owes the traditional duties of loyalty and care to the members of an LLC under Delaware law, but parent corporations do not owe wholly-owned subsidiaries fiduciary duties. The court stated that when directors sit on the board of a wholly-owned subsidiary, the fiduciary duties run to the parent rather than the subsidiary. Thus, Delaware law does not embrace the concept that a director of a wholly-owned subsidiary owes a duty to second-guess the judgment of its parent corporation. Further, the court noted exculpatory provisions in the Holdco operating agreement (which exculpated managers from liability except for acts or omissions constituting fraud, willful misconduct, bad faith, or gross negligence), and provisions of the Holdings operating agreement indemnifying the member (except for gross negligence, willful breach of the agreement, or willful violation of law). The court stated that the Delaware LLC statute permits provisions eliminating or limiting liabilities to a person who is a party to the operating agreement or is otherwise bound by the agreement, and the court characterized a creditor as a person who may be “otherwise bound” by an agreement that expressly waives fiduciary duties when the creditor steps into the shoes of an equity holder. In this case, however, the Holdco operating agreement limited the Bay Harbour board manager’s fiduciary duties to Holdco or its unitholders to the type of fiduciary duties of loyalty and care owed by directors and officers of a business corporation under the Delaware General Corporation Law, necessitating an analysis of the fiduciary obligations under the corporate statute. The court stated that Delaware courts have found that the standard for breach of the duty of care is “gross negligence” and that the exculpatory clauses thus did not eliminate the duty of care. Even if the employees of Bay Harbour and York owed fiduciary duties to Holdings, the court found the Committee’s pleadings did not adequately allege breaches of the duties of loyalty and care. The pleadings failed to overcome the presumption of the business judgment rule. There was no allegation that the individuals were interested in the alleged wrongful transactions, and the Committee did not demonstrate that the individuals failed to act in good faith, in the honest belief that the action was in the best interest of the company, or on an informed basis. The court found the duty of loyalty allegations against the Bay Harbour and York employees deficient as well. With regard to the duty of care claims against Holdings’s officers, the court concluded that the Committee had standing to assert the claims and that the officers may have owed a duty to Holdings, but the Committee’s pleadings failed to overcome the presumption of the business judgment rule.

Moede v. Pochter, No. 07 C 1726, 2009 WL 4043418 (N.D. Ill. Nov. 20, 2009). An LLC member sued the other members for breach of the operating agreement and violation of the Illinois LLC statute in connection with a sale of the LLC’s property and demand for distributions. The court found the demand by one of the members that money be distributed to him and certain other members before any moneys were paid out to other members “violative of his obligations” and “profoundly disturbing.” Because the member who made the demand was a lawyer, the court found his advancement of his own self-interest in preference to that of a fellow non-manager member particularly unacceptable. The court also found that a claim based on violation of the Illinois LLC statute against the members who demanded and accepted the preferential

distribution survived summary judgment. The court recognized that the operating agreement superseded the statutory provisions on voting and distributions, but characterized the claim as one for breach of fiduciary duty by the members receiving the preferential distribution to the other member. The court noted an Illinois case holding that non-managing members of a manager-managed LLC owe no duty to the LLC or other members by virtue of being members (favorably citing criticism of the case in a footnote, but declining to opine on whether the case was correctly decided). The court stated, however, that the focus of the claim was the fiduciary obligations owed under other provisions of the statute (dealing with member-managed LLCs).

Lola Cars International Limited v. Krohn Racing, LLC, CA Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681 (Del. Ch. Nov. 17, 2009). Lola Cars International, Ltd. (“Lola”) and Krohn Racing, LLC (“Krohn”) formed a Delaware LLC and agreed to equal representation on the governing board although Lola owned a 51% interest in the LLC and Krohn held a 49% interest. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell’s services as the LLC’s CEO. Lola brought two suits against Krohn and Hazell, and the defendants moved to dismiss both of Lola’s complaints. Among Lola’s claims were claims that Hazell breached his fiduciary duties of loyalty and care, and Krohn aided and abetted Hazell’s disloyalty. Krohn moved to dismiss Lola’s fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by the Delaware LLC statute. The court noted that it relies on corporate precedent in interpreting this requirement and that demand is considered excused in the corporate context when allegations in the complaint create a reason to 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 court denied Krohn’s motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion and his use of LLC assets for Krohn’s benefit in violation of his duty of loyalty to the LLC. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

In re Lawrence (Curreli v. Lawrence), Bankruptcy No. 6:08-bk-00961-ABB, Adversary No. 6:08-ap-00083-ABB, 2009 WL 3486063 (Bankr. M.D. Fla. Oct. 28, 2009) (holding that fiduciary duties of care and loyalty imposed on managing member under Florida LLC statute did not constitute express or technical trust required by bankruptcy law for purposes of exception to discharge provision).

Searing v. Grocki, No. X03CV084041080S, 2009 WL 3839295 (Conn. Super. Oct. 21, 2009) (stating that cases cited by plaintiffs to support claim that every member of an LLC owes a fiduciary duty to every other member did not adequately support their argument; holding that allegations of misconduct by some members of LLC as against other members of LLC did not occur in “conduct of trade or commerce” for purposes of Connecticut Unfair Trade Practices Act).

Junge v. Bartles, Docket No. 285035, 2009 WL 3365842 (Mich. App. Oct. 20, 2009). The plaintiff and two other individuals were each 1/3 members of an LLC, and the plaintiff sued the other two members for conversion of his membership interest and oppression after the defendants gave the plaintiff a check for his membership interest, promised him additional funds collected in the future, and formed another entity that took over the business of the LLC. The court of appeals concluded that the trial court erred in finding that the defendants converted the membership interest of the plaintiff because the plaintiff received compensation for his interest in the form of a check, which he accepted, and the promise by the defendants to pay additional amounts as receivables were collected. The court of appeals did not disturb the trial court’s finding of oppression, however. The Michigan LLC statute provides for various types of relief for a member who establishes that the managers or members in control engaged in “willfully unfair and oppressive

conduct,” i.e., a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. The court of appeals upheld the trial court’s determination that plaintiff was entitled to the equitable remedy of one-third of the book value of the LLC based on the defendants’ creation of a new entity to step into the shoes of the LLC by doing the exact same work, with the same employees, for the same customers. The court of appeals characterized the award as equitable relief rather than a “money judgment” for purposes of the statute providing for interest on money judgments. Therefore, the trial court did not err in failing to award statutory interest.

DC Xpress, L.L.C. v. Briggs, __ S.W.3d __ 2009 WL 3199213 (Ark. App. 2009) (noting that proof of gross negligence or willful conduct was necessary to hold LLC manager liable for breach of fiduciary duty, commenting that chief operating officer’s pursuit of other business ventures did not constitute breach of duty of loyalty where other business did not compete with or injure LLC, and finding trial court’s failure to find for plaintiff on breach of fiduciary duty claim against managing member was not clearly erroneous).

Abdalla v. Qadorh-Zidan, 913 N.E.2d 280 (Ind. App. 2009). The Abdallas and Zidans formed five LLCs and a corporation. Each family owned 50% of each LLC, and the two families were also the sole directors and shareholders of the corporation. After a dispute developed, the Zidans sold their membership interests to the Abdallas. After receiving K-1 Schedules for the year ending on the date they sold their interests, the Zidans asked to see the books of the LLCs and corporation for the period during which they were members and shareholders. Eventually, the Zidans filed a complaint alleging breach of fiduciary duty, negligence, and declaratory relief to inspect the books and records of the LLCs and corporation for the period during which they were members of the LLCs and shareholders of the corporation. The Abdallas filed a motion for summary judgment arguing that they did not owe the Zidans any duties in connection with the preparation of the tax data and that the Zidans were not entitled to inspect the companies’ books. The trial court denied the motion for summary judgment, and the Abdallas filed an interlocutory appeal. The parties’ main argument focused on whether a fiduciary duty existed between the companies and the former members and shareholders. The Abdallas relied upon the LLC operating agreements, which provided that a member who assigns all of his interest in the LLCs no longer has any rights or privileges of a member. In addition, the Zidans acknowledged in various agreements that they were relinquishing all of their rights, title and interest as members and shareholders. The Abdallas also argued that the fiduciary relationship of the Zidans with the companies terminated when they sold their interests, regardless of the contractual language, in the absence of a dissolution of the companies because there was no winding up phase which would continue the existence of the duties. The Zidans acknowledged that fiduciary duties generally terminate when a member of an LLC or shareholder of a close corporation transfers his interest, but argued that fiduciary duties remain intact with respect to resolution of pre-separation business. They claimed that a fiduciary relationship covered the preparation of the tax return completed after the Zidans’ involvement in the companies ended because the tax return addressed the period during which they were members and shareholders. The court noted that it had determined in a prior case that “common law fiduciary duties, similar to ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs” and that the Indiana Supreme Court had held that shareholders in closely-held corporations owe each other fiduciary duties. The court characterized the question in this case as one of first impression, i.e., “whether a company owes a continuing fiduciary duty to a former shareholder or member to fairly and accurately report the company’s financial results to the IRS for a year in which the former shareholder held stock in the corporation or was a member of the LLC.” The court reviewed case law in the partnership and corporate context and concluded that the Abdallas owed the Zidans a fiduciary duty with respect to the period during which the Zidans were members of the LLC and shareholders of the corporation. To hold otherwise, said the court, would give the Abdallas the freedom to allocate tax burdens to the Zidans and retain tax benefits for themselves without allowing the Zidans any recourse. The court also affirmed the trial court’s denial of the Abdallas’ motion for summary

judgment on the Zidans' negligence claim. The Abdallas argued that the claim sounded in ordinary negligence and that corporate directors and members can only be held liable in the case of willful misconduct or gross negligence. Because the Abdallas failed to proffer any summary judgment evidence that they did not commit willful misconduct or gross negligence other than a self-serving affidavit; therefore, the trial court's denial of their motion was proper.

ZRII, LLC v. Wellness Acquisition Group, Inc., Civil Action No. 4374-VCP, 2009 WL 2998169 (Del. Ch. Sept. 21, 2009). A Delaware LLC alleged various causes of action against former officers, employees, and contractors based on an alleged scheme to take over and destroy the LLC's business. The claims included breach of fiduciary duty claims against three officers of the LLC. The court stated that the individuals owed fiduciary duties to the LLC identical to those typically owed by a company's directors. Further, the individuals admitted that they owed fiduciary duties to the LLC. For purposes of the motion before the court, the issue was whether the LLC demonstrated a reasonable probability of success on the merits of their breach of fiduciary duty claim so as to support preliminary injunctive relief. The court found that the LLC had met its burden based on evidence that the officers participated in a conspiracy to harm the LLC and its controlling member by misappropriating information and helping employees stage a lock-out of the controlling member and other employees not involved in the scheme. The defendants argued that they were no longer constrained by loyalty concerns after they resigned from the LLC, but the court stated that the fact that they ceased to owe fiduciary duties when they resigned did not mean that the conspiracy could not continue after their resignation and did not absolve them from responsibility for their own acts and those of their co-conspirators after their resignation in furtherance of the conspiracy.

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. Among other claims, asserted derivative claims for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard. The defendants argued that Gene failed to state a claim for aiding and abetting a breach of fiduciary duty against Richard because the claim failed to state a breach of fiduciary duty by Francis. The court noted that aiding and abetting a breach of fiduciary duty requires (1) knowledge of the breach of a duty, and (2) participation in the wrongful conduct. In this case, Gene alleged a breach of fiduciary duty because the defendants' management company suddenly increased the fees it charged to a few of the LLCs by 400%. The court denied the defendants' motion to dismiss, stating that the allegations that Richard consented to the increase in fees (which benefitted a company controlled by Richard and Francis) were sufficient to support a reasonable inference that Richard participated in the alleged wrongdoing. Finally, the court noted that the fact that one of the defendants could have increased the fees on his own did not negate a reasonable inference that the other may have been involved in the decision.

In re Yellowstone Mountain Club, LLC (Credit Suisse v. Official Committee of Unsecured Creditors), 415 B.R. 769 (D. Mont. 2009) (setting forth fiduciary duties of LLC members and managers under Montana law and keeping record open for individual who was managing member and controlling shareholder of controlling member of debtor LLCs to pursue and present additional evidence on breach of fiduciary duty and other claims against individual).

Domestic Construction, LLC v. Bank of America, N.A., No. CV07-5357BHS, 2009 WL 2853255 (W.D. Wash. Sept. 1, 2009) (finding questions of fact as to whether individual was sole member of LLC and whether personal and LLC assets were commingled precluded court from ruling as matter of law that individual did not owe fiduciary duty to co-joint venturer of LLC).

Cheney v. IPD Analytics, L.L.C., No. 08-23188-CIV, 2009 WL 3806171 (S.D. Fla. Aug. 28, 2009). An LLC member with a 2.5% interest in the LLC sought summary judgment on a breach of fiduciary duty claim asserted against the member by the LLC. The member claimed that he owed no duty to the LLC as a mere employee of the company. The LLC argued that he owed a duty based on his role as an agent of the company. The court found no evidence in the record that the member was authorized to act on the LLC's behalf and thus no evidence of an agency relationship. The court therefore granted summary judgment in favor of the member on the breach of fiduciary duty claim.

In re Supplement Spot, LLC (Floyd v. Option One Mortgage Corporation), 409 B.R. 187 (Bankr. S. D. Tex. 2009). The bankruptcy trustee brought an action to avoid payments that were made from an account funded by the debtor LLC's business operations. The account was styled "Marcella Ortega dba Young Again Nutrients," and Marcella Ortega was president of the debtor LLC. The payments challenged by the trustee were payments on mortgage debts of Ortega, and the court held that they were avoidable as fraudulent transfers. The court also stated that Ortega, as president of the LLC, had a fiduciary relationship with the LLC's creditors since the LLC was insolvent at the time of the mortgage payments. The court relied on corporate case law for the proposition that corporate officers have fiduciary duties to creditors when the corporation is insolvent. The court rejected the trustee's claim for breach of fiduciary duty against the mortgage company, however, because there was no evidence the mortgage company knew Ortega was breaching a fiduciary duty. The court stated that the transferee of a fraudulent transfer is liable for breach of fiduciary duty only where the transferee knew the transferor was breaching a fiduciary duty. Because the trustee sued only the mortgage company, and not Ortega, for breach of fiduciary duty, the trustee could not pursue any claim for breach of fiduciary duty.

U. Inspection and Access to Information

In re South Canaan Cellular Investments, LLC (South Canaan Cellular Investments, LLC v. Lackawaxen Telecom, Inc.), 427 B.R. 85 (Bankr. E.D. Penn. 2010). The debtors, two Delaware LLCs, sued Coughlin, a member of the LLCs, and Lackawaxen Telecom, Inc. ("LTI"), a corporation of which Coughlin was president and a shareholder, for breach of fiduciary duty based on Coughlin's obtaining information from the LLCs regarding the LLCs' indebtedness to a bank and LTI's purchase of the indebtedness from the bank. The LLCs argued that Coughlin's use of the information to secretly purchase the bank loan at a time when the LLCs were negotiating with the bank to resolve the loan breached Coughlin's fiduciary duties in various respects. The court concluded that Coughlin did not owe any fiduciary duty to the LLCs because he was not a managing or controlling member. In rejecting the argument that Coughlin breached an implied covenant of good faith and fair dealing in the operating agreements, the court relied in part upon the statutory provisions governing access by the LLC members to information about the LLC. The court pointed out that an LLC manager need not disclose confidential information if the manager believes it will be harmful to the LLC, and the court found the Delaware statute to implicitly recognize that non-fiduciaries obtaining information may make use of the information for their own benefit. The court stated that the good faith implied in all contracts primarily imposes a duty not to use contract rights unreasonably, but that non-managing members may generally act in their self-interest. The court stated that Coughlin's demand for information under the Delaware LLC statute could have been refused by the LLCs if disclosure would be harmful, and the LLCs must have concluded that disclosure of the limited and general information disclosed four months prior to the assignment of the loan would not be harmful. Furthermore, the court pointed out the information was not the subject of any confidentiality agreement. As Coughlin was under no fiduciary obligation to the LLCs and was free to act in his self-interest, free to become a creditor of the LLCs, and was accused of no more than using limited and general information he either had a statutory right to obtain (or,

if not, that the LLCs elected not to deny him), the court concluded that the LLCs stated no cause of action for breach of an implied contractual covenant of good faith and fair dealing.

In re Resource Energy Technologies, LLC, 419 B.R. 746 (Bankr. W.D. Ky. 2010) (holding efforts to obtain discovery from members of debtor LLC in state court litigation did not violate automatic stay as an act to obtain possession of or exercise control over property of debtor LLC's estate even though discovery request encompassed documents of debtor LLC because discovery order applied only to non-debtor members and they had right to inspect and copy any LLC record as members of LLC).

Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, No. 07 CVS 20852 (N.C. Super. Nov. 13, 2009). A minority member of a North Carolina LLC sought to inspect records of the LLC, asserted various claims against the majority member and manager of the LLC, and sought appointment of a receiver to manage the LLC. With respect to the plaintiff's claim for inspection of records, the court noted that managers have a limited right to keep some information confidential and that the plaintiff's request was broadly phrased, but the court pointed out that the statute expressly permits disclosure of general financial information, and the plaintiff alleged that the defendants failed to respond to the request at all. The court could not conclude as a matter of law that the complaint failed to give sufficient notice of the nature and basis of the claim or that it appeared beyond a reasonable doubt that the plaintiff could not prove any set of facts in support of its claim for relief.

In re Resource Energy Technologies, LLC, 419 B.R. 746 (W.D. Ky. 2009) (holding discovery order entered in state court requiring members of debtor LLC to turn over documents of LLC did not violate automatic stay because members have rights to access, inspect, and copy LLC information under Kentucky law in their capacities as members and such action is not an act to obtain possession of or exercise control over property of the estate).

Hankerson v. Hankerson Management Company, No. 1 CA-CV 08-0753, 2009 WL 3835290 (Ariz. App. Nov. 17, 2009). A member of several LLCs made a request to inspect and copy various records as authorized by the LLC operating agreements and Arizona law, and a dispute developed as to whether there was compliance with the request. The court concluded that the evidence supported the trial court's determination that the member was given full access to the companies' books and records. Neither the operating agreements nor Arizona law required the books and records to be provided in any particular format. The member complained that he was not provided the books in electronic format, but there was evidence that he was provided a compact disc with the general ledgers and that the books were later produced in electronic format. The court also found that there was a reasonable basis for a discretionary award of attorneys' fees as authorized by Arizona statute in an action arising out of a contract.

Abdalla v. Qadorh-Zidan, 913 N.E.2d 280 (Ind. App. 2009). The Abdallas and Zidans formed five LLCs and a corporation. Each family owned 50% of each LLC, and the two families were also the sole directors and shareholders of the corporation. After a dispute developed, the Zidans sold their membership interests to the Abdallas. After receiving K-1 Schedules for the year ending on the date they sold their interests, the Zidans asked to see the books of the LLCs and corporation for the period during which they were members and shareholders. Eventually, the Zidans filed a complaint alleging breach of fiduciary duty, negligence, and declaratory relief to inspect the books and records of the LLCs and corporation for the period during which they were members of the LLCs and shareholders of the corporation. They also sought discovery of the information used to prepare the K-1 Schedules. The Abdallas filed a motion for summary judgment arguing that they did not owe the Zidans any duties in connection with the preparation of the tax data and that the Zidans were not entitled to inspect the companies' books. The trial court denied the motion

for summary judgment, and the Abdallas filed an interlocutory appeal. The parties' main argument focused on whether a fiduciary duty existed between the companies and the former members and shareholders. The court reviewed case law in the partnership and corporate context and concluded that the Abdallas owed the Zidans a fiduciary duty with respect to the period during which the Zidans were members of the LLC and shareholders of the corporation. To hold otherwise, said the court, would give the Abdallas the freedom to allocate tax burdens to the Zidans and retain tax benefits for themselves without allowing the Zidans any recourse. The court then addressed the Abdallas' contention that the Zidans had no right of access to the companies' books because they were no longer members or shareholders of the companies. The court acknowledged that the statutes provided "members" and "shareholders" access to the books and records, but emphasized that the Zidans were not seeking access to current financial information. The court concluded that the Zidans had the right to inspect the records of the companies for the tax year 2006, when the Zidans were still members and shareholders, in order to ensure the correctness of the K-1 Schedules.

Cheney v. IPD Analytics, L.L.C., No. 08-23188-CIV, 2009 WL 3806171 (S.D. Fla. Aug. 28, 2009). An LLC member with a 2.5% interest in the LLC sought summary judgment on a records inspection claim and asserted that he had no obligation to comply with any restrictions the LLC sought to impose before allowing access. The LLC had conditioned access to the requested documents on express assurance that the information would not be shared with any person. The court noted that the Florida statute grants unrestricted access to the LLC's records but also limits that access by giving the manager of the LLC discretion to withhold such information if the manager in good faith believes such disclosure is not in the best interest of the LLC. The LLC member argued that there was no evidence in the record that would support a finding that the manager of the LLC "reasonably" and in "good faith" believed disclosure of the documents would not be in the best interest of the LLC. The court stated that a pending claim against the LLC member for breach of his employment agreement's non-competition clause was sufficient to create an issue of fact as to whether the manager's actions were "reasonable" and in "good faith."

V. Interpretation of Operating Agreement

Related Westpac LLC v. JER Snowmass LLC, C.A. No. 5001-VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010). The operating member of two LLCs formed for a land development project in Colorado sued the other member of the LLCs seeking to require the defendant member to pay damages and meet future capital calls on the theory that the defendant's refusal to give consents and to meet the capital calls made by the operating member was "unreasonable." According to the plaintiff, when the funding needs for the project exceeded the agreed upon budget, the defendant refused to meet capital calls and give its consent to various major decisions. The court dismissed the complaint because the operating agreements, while prohibiting the defendant from unreasonably withholding consent to certain decisions, did not constrain the defendant's decisions as to the decisions in issue in the case. The court stated that the plaintiff's express breach of contract claim failed because it was clearly contrary to the bargain it made. The operating agreement preserved for the defendant the freedom to withhold consent to the decisions in issue if that was in the defendant's self-interest whereas the defendant's consent in other situations was subject to the commonplace standard that consent "shall not be unreasonably withheld." The plaintiff's effort to have the court recognize an implied reasonableness condition as part of the operating agreement's implied covenant of good faith and fair dealing was similarly rejected by the court on the basis that the express bargain covered the subject and implying such an obligation would override the express bargain. Additionally, the defendant had no contractual obligation to pay damages for failing to fund capital calls. The operating agreements provided that a member who did not fund a capital call did not have any personal liability, the other member's sole remedy being to revoke its contribution or fund the non-contributing member's share. For similar reasons, the court rejected the plaintiff's unjust enrichment and breach of fiduciary duty claims. The court stated that

the plaintiff sought to deprive the defendant of the freedom it preserved under its contract by imposing a fiduciary duty to act in the reasonable best interests of the LLCs at all times. The court stated that to do so would nullify the parties' express bargain. According to the court, "[w]hen a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement, the fiduciary duty claim must fall, otherwise 'the primacy of contract law over fiduciary law in matters involving ... contractual rights and obligations [would be undermined].'" Thus, the plaintiff failed to state a claim for breach of fiduciary duty.

In re Hickory Ridge, LLC, No. 07-1251, 2010 WL 1727968 (Bankr. N.D. W.Va. April 27, 2010) (commenting that statement in LLC's articles of organization that its operating agreement must be in writing and that no oral agreement would be valid effectively undercut argument made by dissociated member that operating agreement was orally modified to waive statutory dissociation provisions).

Abbey v. Fortune Drive Associates, LLC, No. A124684, 2010 WL 1553616 (Cal. App. 1 Dist. April 20, 2010). The sole manager and owner of a majority interest in a Delaware LLC concluded that it would be in the best interest of the LLC to remove a minority member, Abbey, who owned a 2.98% interest and had expressed disagreement with a restructuring of the LLC approved by the other members. The sole manager/majority member initiated an amendment of the operating agreement to provide for the termination of a member upon the vote of other members and to set the financial terms under which the termination would occur. The amendment also contained a provision requiring any dispute over a termination to be arbitrated and requiring the arbitrator in such a dispute to value the ownership interest of the terminated member. The operating agreement provided that it could generally be amended by a majority vote of the LLC's membership interests, but certain enumerated "major decisions" required a two-thirds vote of the membership interests. The provision authorizing amendment of the agreement placed no substantive limits on amendment of the agreement. All members other than Abbey consented to the amendment and to Abbey's termination pursuant to it. The LLC commenced arbitration, and Abbey sought to stay the arbitration on the basis that he was not bound by the arbitration provision of the amendment. The court recognized that Delaware law governed the internal affairs of the LLC but determined that California law on contract interpretation applied under both the Federal Arbitration Act and state arbitration law. The court noted that the LLC did not appear to argue for application of Delaware law to the issue of contract interpretation and had not demonstrated the result would be different under Delaware law. The court recognized the emphasis on freedom of contract under Delaware LLC law, referring to the operating agreement as the "heart and soul of an LLC," but relied upon California case law dealing with amendment of a contract to conclude that the arbitration provision was beyond the intent of the parties in permitting majority amendment of the operating agreement. The court stated that Delaware's grant of freedom to the members to structure their operating agreement at the outset of the LLC does not necessarily mean that the members have the same broad authority to amend the agreement after formation if the amendment is less than unanimous. The court stated that general principles of contract law include certain common law constraints on amendment of a contract by less than all parties. The court stated that the members' expectations constrain the changes that can be made without consent of all members, and that the requirement of definiteness and the obligation of the parties to act in good faith and deal fairly limit the scope of amendments. As a matter of traditional contract interpretation, based on the intent of the parties, the court concluded that the arbitration clause, adopted in the circumstances presented, went beyond the scope of amendments anticipated by the members. The court noted that the operating agreement contained no restriction on fiduciary duties and that the members thus owed the traditional fiduciary duties owed by directors of a corporation, but the court stated that whether the arbitration provision violated the members' fiduciary duties and the implied covenant of good faith and fair dealing was a substantial question not raised by the parties and not addressed by the court.

Graham v. Dietze, Nos. A-08-796, A-09-088, 2010 WL 1600562 (Neb. App. April 20, 2010). Dietze and Graham were engaged in an ophthalmology practice through an LLC formed to perform eye surgery and a partnership that rented medical equipment and real estate to the ophthalmology practice. In November of 2003, Graham received a notice of expulsion, the intent of which was to expel him from the ophthalmology practice. He did not receive any formal notices of termination of his interests, and there was no dissolution of the entities. Though there was no expulsion provision in the agreements, he was effectively excluded from the practice and was not involved in the entities after January, 2004. Thus, the trial court concluded that Graham's interest should be valued as of December 31, 2003, based on equitable principles. The trial court appointed an expert to value Graham's interests as of that date and entered judgment for Graham in those amounts. On appeal, the court agreed with Dietze that the action was an action at law for breach of contract (and thus reviewable as an action at law) rather than an accounting (an equitable action subject to de novo review) as argued by Graham. In any event, the court concluded that the trial court erred in applying equitable principles contrary to the plain language of the articles of organization and operating agreement of the LLC and the partnership agreement governing the partnership. The court agreed with Graham that he continued to be entitled to share in the profits of the entities after he was excluded because he retained his interests in them, and the agreements entitled him to profits based on his 50% ownership interests. The agreements did not provide for expulsion or involuntary termination or transfer of a member's or partner's interest, and none of the parties sought judicial dissolution or expulsion. Thus, Graham remained a member and partner and was entitled to his share of post-exclusion profits. The court pointed out that the LLC agreement did not require Graham to perform surgeries in order to share in distributions and further provided that members were not expected to devote full time and attention to the affairs of the LLC, but were only required to devote time and attention "reasonable and appropriate in the member's good faith judgment under prevailing circumstances." Because Graham was prevented from performing surgeries and was not provided financial information, he was unable to devote any time and attention to the LLC. As to the partnership, the partnership agreement had no provision requiring that the partners participate in the day-to-day affairs to share in the profits. The court pointed out that the division and distribution of profits of a Nebraska LLC is governed by the operating agreement and that the relations of partners in a partnership are governed by the partnership agreement. Graham was thus entitled to his 50% of the profits of each entity for the time period after his exclusion from the businesses.

Pateley Associates I, LLC v. Pitney Bowes, Inc., 704 F.Supp.2d 140 (D. Conn. 2010) (discussing and interpreting scope of indemnification provision of Delaware LLC agreement and concluding provision obligated LLC to indemnify its sole member for costs of defending CERCLA action thus triggering indemnification clause in sublease binding sublessee to indemnify LLC).

Risk Management Services, L.L.C. v. Moss, 40 So.2d 176 (La. App. 2010). An LLC and two of its members brought an action for declaratory judgment and damages against Moss, the third member, whom the other members had expelled. The plaintiffs sought a declaratory judgment that the expulsion was valid and binding and that Moss was liable for damages for breach of fiduciary duty and unfair trade practices. The plaintiffs prevailed on these claims, and the court of appeals affirmed. With respect to the expulsion of Moss, the court concluded that expulsion was permitted although the operating agreement did not contain an explicit procedure for expulsion. The dissolution provisions of the operating agreement set forth several causes of dissolution, including the consent of all members and a list of various events, including expulsion, that terminate the continued membership of a member unless all members consent in writing to continue the LLC after such an event. The court stated that the agreement provided for the act of expulsion based on this provision, and the court rejected Moss's argument that the operating agreement required unanimous consent of the members to dissolve the LLC on expulsion of a member. Further, the court found that equity

considerations mentioned in the LLC statute would require that a provision for expulsion be included in this type of agreement. Thus, the court concluded that Moss was properly expelled by the other members.

Kuroda v. SPJS Holdings, L.L.C., Civil Action No. 4030-CC, 2010 WL 925853 (Del. Ch. March 16, 2010). Kuroda became involved with several individuals whose relationship was governed by a series of agreements and contracts that formed a complex web of interrelated companies and partnerships, the purpose of which was to establish an efficient structure to manage and provide investment advice to certain funds. Kuroda was a non-managing member of an LLC that was created to serve as the general partner of the funds. As such, Kuroda had no decision-making authority in connection with the funds or the LLC. Through an entity of which he was a shareholder, Kuroda provided investment analyst and consulting services to the investment manager of the funds. In the course of performing these services, Kuroda acquired high-level proprietary and confidential information. The consulting agreement between the investment manager and the entity through which Kuroda rendered services, and certain other documents, included confidentiality provisions. Tension developed between Kuroda and other individuals involved in the investment activities, and Kuroda announced that he was resigning as a consultant to the investment manager and intended to establish his own fund. Kuroda then launched a fund that directly competed with the funds with which he was previously involved. Kuroda sued for unpaid consulting fees, and the defendants counterclaimed for misappropriation of trade secrets, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing based on various alleged acts. After concluding that Kuroda did not owe any of the parties who had alleged harm any fiduciary duties (because Kuroda was not a manager or controlling member), the court addressed the counterclaim against Kuroda for breach of confidentiality provisions contained in the fund agreements. Although Kuroda was not identified as a party in the fund agreements, the defendants argued that Kuroda was bound by the confidentiality provisions in the agreements because he authorized the managing members of the LLC to make the promises on his behalf. This argument was based on the LLC agreement signed by Kuroda, which provided that the managing members had the authority to act on behalf of the LLC and to enter into and perform all contracts and other undertakings deemed necessary, advisable, or incidental to carry out the purposes of the LLC. The LLC agreement also provided that each member appointed each managing member as the member's representative and attorney-in-fact to execute any instrument or document necessary or desirable to accomplish the business and objectives of the LLC. The court rejected the argument that these provisions permitted the managing members to bind Kuroda to the fund agreements. According to the court, the provisions relied upon did not give the managing members authority to bind individual members, as opposed to the LLC itself, to any kind of contract. The court stated that the boilerplate provision appointing the managing members as attorney-in-fact for the members could include authority to sign documents or agreements that require pro forma the signature of all members, but not a major agreement that would impose new rights and obligations on Kuroda. Thus, the court dismissed the counterclaim for breach of contract. The court also dismissed the counterclaim against Kuroda for breach of the implied covenant of good faith and fair dealing. The defendants contended that the LLC agreement included the following implied promises: not to misappropriate trade secrets; not to cause the entity through which Kuroda provided consulting services to commit a material breach of the consulting agreement's confidentiality provision; not to commit, or cause the LLC to commit, a material breach of the fund agreements' confidentiality provisions; and not to engage in conduct destructive to the business of the LLC and the funds. 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 that has the effect of preventing the other party from receiving the fruits of the bargain. The implied covenant cannot be invoked to override the express terms of the contract. Further, rather than constituting a free floating duty, the implied covenant can only be used conservatively to ensure that the parties' reasonable expectations are fulfilled. General allegations of bad faith conduct are insufficient to allege a claim for breach of the implied covenant; a party must allege a specific implied contractual

obligation and how the violation denied the party the fruits of the contract. The court believed that implying a confidentiality provision in the LLC agreement would override its express terms. The defendants included confidentiality provisions in other agreements involved in the business arrangement while excluding duties relating to confidentiality from the LLC agreement. The court stated that the defendants' "somewhat muddled discussion of other wellsprings for the duty of confidentiality—including the common law, fiduciary duties, and contractual intentions—cannot cloud the fact that the LLC Agreement specifically excluded any duties relating to confidentiality...." The court noted that the defendants appeared to be going to great lengths to avoid the argument that Kuroda had contractual obligations under the consulting agreement, which contained a provision mandating arbitration in Tokyo. Finding the defendants did not state a claim for breach of the implied contractual covenant of good faith and fair dealing, the court dismissed the claim.

Great Investment Properties v. Bentley, No. 9-09-36, 2010 WL 892122 (Ohio App. March 15, 2010). Great Investment Properties, L.L.C. ("GIP") and Bentley were members of an LLC who stipulated that their disputes could not be resolved and that the LLC should be dissolved. GIP was appointed liquidating trustee. The assets of the LLC were sold, and the members could not agree on the disbursement of the funds. After a bench trial in which the trial court entered an order as to the distribution of the assets of the LLC, Bentley appealed. First, Bentley argued that the trial court erred in interpreting the operating agreement with respect to whether payments by Freyhof (the sole member of GIP) to the LLC were loans or capital contributions and whether GIP was allowed to take offsets against Bentley's initial capital investment prior to distributing the remaining assets. The court examined provisions of the operating agreement regarding capital contributions and loans and concluded that the trial court did not err in characterizing the payment by Freyhof as a loan. The operating agreement did not require additional capital contributions without the written consent of all members, and the agreement permitted, but did not require, loans by a member to the LLC. In concluding that there was sufficient evidence to support the trial court's conclusion that Freyhof's payments were loans rather than capital contributions, the court did not find Freyhof's use of the word "contributions" in his testimony dispositive. With respect to the interest rate on the loans, the court concluded that there was not sufficient evidence to support the trial court's finding that the interest rate on the loans should be calculated at 12% rather than the statutory rate of 10% applicable in the absence of a written contract. The court reviewed the evidence with respect to numerous other disputed obligations of Bentley to the LLC and concluded that the evidence supported the trial court's findings.

In re South Canaan Cellular Investments, LLC (South Canaan Cellular Investments, LLC v. Lackawaxen Telecom, Inc.), 427 B.R. 85 (Bankr. E.D. Penn. 2010). The debtors, two Delaware LLCs, sued Coughlin, a member of the LLCs, and Lackawaxen Telecom, Inc. ("LTI"), a corporation of which Coughlin was president and a shareholder, for breach of fiduciary duty based on Coughlin's obtaining information from the LLCs regarding the LLCs' indebtedness to a bank and LTI's purchase of the indebtedness from the bank. The LLCs argued that Coughlin's use of the information to secretly purchase the bank loan at a time when the LLCs were negotiating with the bank to resolve the loan breached Coughlin's fiduciary duties in various respects. The court discussed fiduciary duties under Delaware law and dismissed the plaintiffs' claims because the allegations did not state a cause of action for breach of fiduciary duty because the complaint did not allege that Coughlin was a managing or controlling member or that the operating agreements imposed on him any fiduciary duties. The court noted the flexibility provided by the Delaware LLC statute to define duties but assumed that the operating agreement was silent on duties since the operating agreement was not attached to the complaint and the complaint did not allege that the operating agreement imposed any duties. The court dismissed the plaintiffs' various claims against Coughlin for breach of the duties of loyalty, candor and disclosure, good faith, care, fiduciary duty, and good faith and fair dealing, and the court also dismissed the claim against LTI for aiding and abetting Coughlin's breach of fiduciary duty since the breach of fiduciary duty claims failed. The court dismissed the plaintiffs' claim for

breach of the implied contractual covenant of good faith and fair dealing, finding it difficult to apply Delaware law without the operating agreements and stating that the court must dismiss unless the LLCs demonstrated that it was clear from the contract that the parties would have agreed to proscribe the act complained of had they thought to negotiate the matter. Furthermore, the court believed that any claim for breach of an implied covenant in the operating agreements should be asserted by the LLC members rather than by the LLCs. In any event, assuming the LLCs had standing and that the absence of the underlying agreements was not dispositive, the court concluded that the LLCs failed to state a cause of action because the Delaware LLC statute permits LLC members to lend money to the LLC and transact other business with the LLC on the same terms as a non-member unless the operating agreement provides otherwise. In the absence of any allegation that the operating agreements provided otherwise, the court stated that Coughlin was free to become a creditor of the LLCs and it was not persuasive to argue that he breached an implied covenant by having an entity of which he was president become a creditor by assignment of the loan. Additionally, the court relied upon the statutory provisions governing access by the LLC members to information about the LLC. The court pointed out that an LLC manager need not disclose confidential information if the manager believes it will be harmful to the LLC, and the court found the Delaware statute to implicitly recognize that non-fiduciaries obtaining information may make use of the information for their own benefit. The court stated that the good faith implied in all contracts primarily imposes a duty not to use contract rights unreasonably, but that non-managing members may generally act in their self-interest. The court stated that Coughlin's demand for information under the Delaware LLC statute could have been refused by the LLCs if disclosure would be harmful, and the LLCs must have concluded that disclosure of the limited and general information disclosed four months prior to the assignment of the loan would not be harmful. Furthermore, the court pointed out the information was not the subject of any confidentiality agreement. As Coughlin was under no fiduciary obligation to the LLCs and was free to act in his self-interest, free to become a creditor of the LLCs, and was accused of no more than using limited and general information he either had a statutory right to obtain (or, if not, that the LLCs elected not to deny him), the court concluded that the LLCs stated no cause of action for breach of an implied contractual covenant of good faith and fair dealing.

In re Mervyn's Holdings, LLC (Mervyn's LLC v. Lubert-Adler Group IV, LLC), 426 B.R. 488 (Bankr. D. Del. 2010) (stating that exculpatory clause was affirmative defense and, as such, could not form basis for dismissal of breach of fiduciary duty claims against LLC's member).

Cotton Creek Circles, LLC v. San Luis Valley Water Co., 689 S.E.2d 675 (Va. 2010) (concluding that broad arbitration clause in LLC operating agreement, which conferred on arbitrators power to resolve "any dispute with respect to" the operating agreement included authority to settle dispute over proper interpretation and application of non-compete clause in operating agreement).

546-552 West 146th Street LLC v. Arfa, 894 N.Y.S.2d 427 (App. Div. 1st Dept. 2010) (interpreting indemnification provision of LLC operating agreement that substantially tracked LLC statute to require indemnification upon resolution of action or proceeding for which indemnification is sought and stating that requiring defendants to await resolution of all related claims would eviscerate right to indemnification).

Henderson v. Henderson Investment Properties, L.L.C., 227 P.3d 568 (Idaho 2010) (interpreting attorney's fees provision of LLC operating agreement and concluding (i) members' action for judicial dissolution was not action to enforce provisions of agreement and thus did not support award of attorney's fees, and (ii) award of attorney's fees was not supported by operating agreement in members' successful defense of declaratory judgment action seeking declaration that members were dissociated because claim was attempt to enforce statutory right and did not involve any alleged violation of operating agreement).

West Town Line Associates, LLC v. Mack & Meldrum Associates, LLC, No. 288384, 2010 WL 785938 (Mich. App. March 9, 2010) (interpreting operating agreement provisions regarding capital calls and loans and concluding that provisions were ambiguous because repayment of loan by managing member might be considered conducting “business and affairs” such that capital call could be made and direct obligation of LLC created by loan would be shifted to members; concluding that managing member had authority to bring suit on behalf of LLC under operating agreement and Michigan LLC statute and that lawsuit is not “transaction” within meaning of interested manager provision of statute).

Ross v. Thomas, No. 09 Civ. 5631(SAS), 2010 WL 743912 (S.D.N.Y. March 2, 2010) (granting defendant member’s motion to dismiss plaintiff economic interest owners’ claim that defendant breached put option provision of Delaware LLC’s agreement where plaintiffs claimed approvals obtained by LLC for development of real estate project triggered put option but such approvals were still subject to appeal and thus were not “decided” as required by provision of LLC agreement triggering put option).

Cammarota v. Cammarota, No. CV065003413, 2010 WL 1225088 (Conn. Super. Feb. 25, 2010) (concluding that defendant, who was sole and managing member of LLC that operated bar, had authority to sell LLC’s entire bar business, but plaintiff, member’s brother, who initially was sole beneficial owner of bar but then sold 50% interest in bar to defendant, was entitled to half of proceeds and could pursue unjust enrichment claim; evidence did not warrant finding that defendant’s conduct was performed in bad faith so as to constitute breach of “covenant of bad faith and fair dealing” as it related to contractual relationship created when defendant acquired 50% interest).

Kelly v. Blum, C.A. No. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010). The plaintiff, who was a founding member, manager, and officer of a Delaware LLC, challenged the merger of the LLC into an affiliate of the controlling members of the LLC whereby the plaintiff’s interest was cashed out. The complaint sought a declaratory judgment that the merger was void based on non-compliance with notice requirements of the LLC agreement and also alleged breach of fiduciary duty claims against the managers and controlling members, a claim for breach of the implied covenant of good faith and fair dealing, and other claims.

The court first addressed the plaintiff’s contention that the merger was void because the plaintiff did not receive adequate notice of its approval by written action as required by the LLC agreement and because the merger closed before the notice period required by the LLC agreement elapsed. The court noted that parties may impose requirements with respect to a merger beyond the default approval required by the Delaware LLC statute, as was done in the LLC agreement in this case. The LLC agreement provided that any written consent not executed by any member “must be delivered to such Member no less than five (5) business days prior to the effective date of such consent.” The LLC agreement also provided that in the event a notice was given by fax, a confirmation copy must be sent on the same day of the fax “by first class mail.” The plaintiff asserted that the defendants that approved the merger technically violated this notice provision because the confirmation copy was sent by overnight commercial delivery service the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it might not apply as the provisions could be construed as ambiguous), the notice was in “substantial compliance,” relying on corporate case law on substantial compliance with notice provisions.

With respect to the plaintiff’s claims that the defendant members and managers of the LLC violated their fiduciary duties of loyalty and care to the plaintiff in approving a self-interested merger on terms unfair to the plaintiff, the court pointed out that Delaware cases interpreting the Delaware LLC statute have concluded that managers and members owe traditional fiduciary duties of loyalty and care to each other and the LLC in the absence of a contrary provision in the LLC agreement. The court stated that, given the contractual freedom provided by the LLC statute, provisions expanding, restricting, or eliminating the

operation of traditional fiduciary duties should be clear and unambiguous. The LLC agreement in this case provided in a section entitled “Duties” that the board of managers “shall manage the Company in a prudent and businesslike manner. . .” The LLC agreement also contained an exculpatory clause eliminating the managers’ liability for all conduct except “willful or fraudulent misconduct or willful breach of . . . contractual or fiduciary duties under this Agreement.” The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the defendant managers entered into the merger to profit from squeezing out the plaintiff and obtaining control of property held by the LLC as alleged by the plaintiff, a direct duty of loyalty claim sufficient to survive a motion to dismiss was stated. With respect to the exculpatory provision, the court noted that the Delaware LLC statute permits members to limit or eliminate a manager’s or member’s liability for breach of contract and fiduciary duties except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC agreement to require plaintiff to allege a “willful” breach of the defendant managers’ fiduciary duties to have a valid claim. The court did not determine whether “willful” required “evil intent to harm” or “acting recklessly and outside the bounds of reason” as the defendant managers asserted, but found that the plaintiff had satisfied this standard by alleging facts sufficient to suggest that the defendant managers actually and specifically intended to extinguish the plaintiff’s membership interest, knowing that such action would harm the plaintiff. The court also held that the controlling members owed the plaintiff, as a minority member, traditional fiduciary duties, including the duty not to cause the LLC to enter into a transaction that would benefit the controlling members at the expense of the minority member. The court found that the plaintiff sufficiently alleged facts that, if true, showed that the controlling members, with the aid of their appointed managers, effected the merger to benefit themselves at the expense of the plaintiff. Thus, the plaintiff stated a direct claim against the managers and controlling members, and the court denied the defendants’ motion to dismiss these claims.

With respect to the plaintiff’s claim that the controlling members breached their implied contractual covenant of good faith and fair dealing under the LLC agreement by approving the merger, not seeking alternative strategies for the LLC, and allowing the LLC to enter into affiliated or self-interested transactions, the court noted that the plaintiff must allege a “specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract.” The court found that the plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. Additionally, the court noted that the LLC agreement expressly addressed affiliated and self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

Whittington v. Dragon Group, L.L.C., Civil Action No. 2291-VCP, 2010 WL 692584 (Del. Ch. Feb. 15, 2010) (concluding that LLC member’s three-year delay in bringing suit to force his siblings to recognize his interest in LLC was not barred by laches in context where analogous statute of limitations was twenty years (because claim was based on contract under seal), member had previously sued siblings and received what he thought was favorable ruling, and member had repeatedly asserted his interest before filing suit by attempting to settle matter by selling his interest to his siblings).

DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp.2d 405 (S.D.N.Y. 2010). DirecTV entered into a joint venture agreement with an individual, Avila, under which the parties formed an LLC in which DirecTV had a 45% membership interest, and an LLC formed by Avila (“Park 610”) had a 55 % membership interest. DirecTV made it clear that it was critical that Avila not transfer any of his ownership interest in the LLC without DirecTV’s written agreement, and the joint venture agreement made a change in control a default under the contract. When the joint venture agreement was being negotiated, Avila represented that he was the sole owner of the two entities that were the members of Park 610, but he was actually in the process of arranging a transfer of ownership of one of the entities, and he eventually allowed

his shares in the other entity to be pledged to or deposited with a third party to secure his obligations under the agreement with the purchaser of the other entity. Park 610 and Avila argued that DirecTV failed to allege a breach of the change of control provision of the joint venture agreement, which provided that a change in control occurs where “any Person (other than the Person who controls a Member on the Date hereof) become[s] the beneficial owner, directly, or indirectly, of more than 50% of the then outstanding voting shares or other equity rights of a Member.” The pleadings alleged that two entities each owned 50% of the outstanding shares or other equity rights of Park 610; therefore, the allegation that the shares owned by one of the entity members were transferred were insufficient to show a change in control because the transfer did not result in an outside person acquiring more than 50% of the outstanding shares or equity rights of Park 610. There was also an argument, however, over the sufficiency of allegations relating to a change in control based on changes in “beneficial ownership.” The term “beneficial owner” was undefined in the joint venture agreement, and DirecTV argued that the term should be interpreted in accordance with the definition of the term under Section 13(d) of the Securities Exchange Act of 1934. Park 610 and Avila argued that this was not a proper definition, but they did not offer an alternative. The court mentioned case law addressing the meaning of “beneficial owner” for purposes of Section 16 of the Exchange Act and ultimately determined that it was plausible that the parties intended the widely known Section 13(d) definition to govern. At a minimum, the court concluded that the term was ambiguous and should not be definitively construed without an opportunity for DirecTV to offer extrinsic evidence. The court also addressed whether the allegations were sufficient to state a claim for violation of a restriction on transfer in the joint venture agreement. Although ownership of one of the parent companies of Park 610 was transferred by Avila to another party, the provision only prohibited attempts by a member, i.e., Park 610 or DirecTV, to transfer an interest in the LLC. It did not prevent the transfer of ownership interests in Park 610 or DirecTV. Thus, this claim for breach of contract was dismissed. Another provision of the joint venture agreement addressed by the court was an ethics provision containing a conflicts of interest clause. Park 610 and related defendants argued that DirecTV did not sufficiently allege a breach of this provision, and the court agreed. DirecTV’s argument hinged in part on veil piercing principles, and the court noted that Delaware law would apply to attempts to pierce Park 610’s veil since it was a Delaware LLC, and Uruguayan law would apply to attempts to pierce the Uruguayan companies that were members of Park 610. Since the only case law cited by the parties was New York law, however, the court applied New York law to the issue. The allegations were insufficient to support piercing the veil of Park 610 and its entity members, and the breach of contract claim based on the ethics clause was dismissed. Park 610 and related defendants argued that breach of fiduciary duty claims should be dismissed as well, but the court declined to do so. The court held that DirecTV sufficiently alleged that Park 610, as a member, and Avila, as a manager, breached their fiduciary duties to DirecTV by failing to disclose material facts regarding the transfer of a significant ownership stake in Park 610. The court also concluded that allegations of an individual’s acts done to advance the indirect transfer of ownership of Park 610 were sufficient to allege aiding and abetting liability. The court rejected the argument that the fiduciary duty claim was duplicative of the breach of contract claims. The court also rejected the argument that the ethics provision limited the fiduciary obligations of the parties.

Christopher’s Partner, LLC v. Christopher’s of Colonie, LLC, 893 N.Y.S.2d 689 (App. Div. 3rd Dept. 2010) (holding member who had made loan to LLC secured by LLC’s assets was entitled to seize assets to protect its interest as creditor without breaching fiduciary duty notwithstanding provision of operating agreement that prohibited member from taking action that would make it impossible to carry on LLC’s business in ordinary course where operating agreement allowed members to make loans to LLC, New York LLC statute states that member who becomes creditor has same rights and obligations as person who is not member, and LLC agreed member had right to accelerate LLC’s debt under loan agreement such that member was exercising rights belonging to it as secured creditor).

In the Matter of 1545 Ocean Avenue, LLC, 893 N.Y.S.2d 590 (App. Div. 2d Dept. 2010). Two LLCs (“Crown Royal” and “Ocean Suffolk”) formed an LLC to purchase and develop some property. Crown Royal and Ocean Suffolk each contributed 50% of the capital, and the operating agreement provided for two managers, Van Houten (a member of Ocean Suffolk) and King (a member of Crown Royal). There were some disagreements between King and Van Houten, and eventually King announced that he wanted to withdraw his investment. There were discussions about a possible buy-out by Ocean Suffolk of Crown Royal’s interest and vice versa, but no agreement was reached. Van Houten viewed King as having resigned, and Van Houten continued work on the project. Crown Royal sought judicial dissolution of the LLC on the sole basis of deadlock between the managers. Van Houten and Ocean Suffolk argued that business was being done in accordance with the operating agreement and that the only significant dissension stemmed from the inability of the parties to agree on a buy-out. Crown Royal did not dispute that the project was near completion when the proceeding was commenced. The court analyzed whether the circumstances met the sole standard for judicial dissolution specified in the LLC statute, i.e., that is was “not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.” The court stressed that the standard should not be confused with the standard for judicial dissolution of corporations or partnerships and stated that the standard for LLCs was unresolved under New York law. The court approached the matter initially as a contract-based analysis and noted that the operating agreement did not contain any specific provisions relating to dissolution. Because the operating agreement did not require regular meetings, but only required meetings to be held at such times as the managers from time to time determined, the court rejected Crown Royal’s argument that the failure of the parties to hold meetings was a basis for dissolution. The record showed that the managers communicated regularly without the formality of meetings. In analyzing the argument that the managers’ disagreements resulted in a deadlock, the court noted that deadlock itself was not a basis for judicial dissolution. The court found it necessary to consider the managers’ disagreement in light of the operating agreement and the continued ability of the LLC to function. Because the operating agreement of the LLC in this case permitted any one manager to take action permitted under the agreement, thus allowing each manager to take unilateral action in furtherance of the business, the agreement avoided the possibility of a deadlock. The court noted case law in other jurisdictions addressing the “reasonably practicable” standard and ultimately concluded that a petitioning member seeking judicial dissolution under the New York LLC statute must establish, in the context of the terms of the operating agreement or articles of organization, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible. The court concluded that judicial dissolution was inappropriate in this case. The dispute between the managers was not shown to prevent the LLC from achieving its purpose. The project was almost complete and, despite complaints made by Crown Royal, the record indicated that it ratified the efforts of Van Houten. A claim relating to the hiring of a construction company of Van Houten’s to perform work on the project was not deemed by the court to be a basis for judicial dissolution. The court stated that a derivative claim was available to Crown Royal if it was truly aggrieved by Van Houten’s actions as manager, but such remedy was not a basis for dissolution unless the wrongful acts giving rise to the derivative claim were contrary to the contemplated functioning and purpose of the LLC.

Green Clinic, L.L.C. v. Finley, 20 So.3d 1094 (La. App. 2010). An orthopaedic surgeon who was a member of an LLC transferred his entire membership interest to the surgeon’s professional corporation as permitted by the operating agreement, and the professional corporation thereby became a member of the LLC with all the rights and obligations of the assigning member. The operating agreement contained a non-competition clause, and the surgeon signed the operating agreement on February 25, 2003. The surgeon assigned his membership interest to the professional corporation on September 1, 2003, pursuant to a transfer agreement in which the professional corporation agreed to be bound by all the terms and conditions of the operating agreement. The case law in effect when the operating agreement was executed was legislatively

overruled effective August 15, 2003, in a manner that broadened the scope of non-compete agreements, and the court held that the law in effect when the corporation agreed to be bound by the operating agreement applied to the LLC's effort to obtain injunctive relief to enforce the agreement. The court concluded that the non-compete clause prohibited the surgeon, as the employee of his professional corporation, from being employed as a physician for a competing practice in designated parishes for a period of 24 months after the termination of the professional corporation's membership in the LLC.

Trover v. 419 OCR, Inc., 921 N.E.2d 1249 (Ill. App. 2010). The plaintiff, a member of two LLCs, filed a derivative suit alleging various claims on behalf of the LLCs against fellow members of the LLCs and two non-member entities affiliated with the member defendants. The defendants sought to compel arbitration based on broadly worded arbitration clauses in the LLC operating agreements. The court found that the dispute in question, which involved a land transaction, fell within the scope of the arbitration clauses, but the court concluded that the non-member defendants were not bound by the arbitration clauses and thus could not enforce the arbitration clauses as to the counts against them. Further, the court held that the LLCs were not bound by the arbitration clauses because they were not parties to the operating agreements. The court characterized this issue as one of first impression in Illinois and stated that Illinois law and the facts of the case required a different result from *Elf Atochem North America, Inc. v. Jaffari*, in which the Delaware Supreme Court concluded that an LLC was bound to arbitrate by an arbitration clause in the operating agreement even though the LLC was not a signatory to the agreement. In *Jaffari*, the arbitration clause covered all disputes, and the court specified that the members of the LLC were the real parties and that the LLC was simply a joint business vehicle for the members. In distinguishing the law and facts of this case from that involved in *Jaffari*, the court emphasized that the arbitration clauses here specified that the controversy must be "between the parties," and the court relied upon the separate legal existence of an LLC under the Illinois LLC statute, the LLC's power to sue and be sued, the recitation in the operating agreements that the agreements were by and among specified parties that did not include the LLC, and the signatures (which did not refer to or purport to bind the LLCs) at the end of the agreements. The court also pointed to a provision of the operating agreements that gave the managing member authority to sign contracts on behalf of the LLCs when authorized by the members, thus indicating that the drafters understood what was necessary to contractually bind the LLCs. The court also relied on the statutory authorization for a derivative suit and the unlikelihood that the defendant members would have brought the derivative actions naming themselves as defendants. The court concluded that a fraud claim brought by the plaintiff individually against the other members was subject to the arbitration clause, and a defendant member who was not an original signatory of the operating agreements but was subsequently admitted as a member was entitled to enforce the arbitration clause under the terms of the agreements.

Mattern & Associates, L.L.C. v. Seidel, 678 F.Supp.2d 256 (D. Del. 2010) (concluding \$150,000 payment called for under LLC agreement in event of breach of non-compete provision was enforceable liquidated damages provision under Pennsylvania law; concluding jury could properly infer that sufficient nexus existed between minority member's post-employment acts and LLC's legitimate business interests to warrant protection of non-compete provision in LLC agreement and thus declining to disturb jury's finding that provision was enforceable).

Dunbar v. Willis, No. D054146, 2010 WL 336406 (Cal. App. 4th Dist. Jan. 28, 2010). Stephen Willis and his uncle, Dr. Stanley Willis, were members of an LLC that owned a hotel. During his lifetime, Dr. Willis transferred his membership interest to a revocable trust. After his death, the successor trustees of his trust petitioned the court for approval of certain proposed actions, including dissolution of the LLC, sale of the hotel, and distribution of the assets to the named beneficiaries of the trust. Stephen opposed the petition and asserted an immediate right to purchase Dr. Willis's former interest in the LLC. The court analyzed the

provisions of the operating agreement defining “membership interest” (which included the right to vote on or participate in management) and “member” (which included a trust) as well as provisions addressing transfer of a membership interest (which permitted the transfer of a member’s membership interest to a trust) and a purchase right triggered by the death of a member. The court concluded that the transfer by Dr. Willis of his membership interest to his trust resulted in the trust’s becoming a member for purposes of the agreement, and the court distinguished a court of appeals decision in the partnership context in which the court held that a trust was not an entity and could not be a partner in a partnership. The court acknowledged that a trust is not a real party in interest and is more accurately viewed as a vehicle whereby a trustee manages property for the benefit of beneficiaries, but the court interpreted the operating agreement and concluded that the parties did not intend the death of a trustee to trigger the purchase rights associated with the death of a member because the operating agreement explicitly permitted a member to transfer his entire interest to a trust and defined a member to include a trust. The court also rejected an argument by Stephen that, because the trust was a revocable trust, the membership interest was essentially owned by Dr. Willis at the time of his death. The court further rejected Stephen’s argument that the trustee’s powers expired under the operating agreement and the trust was not a permissible transferee. The operating agreement permitted a transfer to a trust for the benefit of Dr. Willis, and Stephen argued that the trust no longer benefitted Dr. Willis after his death. However, the court pointed out that the trust was not a transferee upon Dr. Willis’s death; the trustees merely retained ownership of the trust assets. Stephen did not point to any provisions showing that once a membership interest was transferred to a permissible transferee the transfer can be later invalidated. The court concluded that the trustees’ powers to act after Dr. Willis’s death depended upon the trust instrument and were not limited by a provision in the operating agreement stating that a deceased member’s legal representative may exercise the member’s rights for purposes of settling the estate. Finally, the court concluded that the parties did not intend to restrict transfers of economic interests in the LLC, and the trustees were thus permitted to transfer economic interests to the gift beneficiaries who fell outside the permissible transfer categories for the transfer of a membership interest. Because the operating agreement specifically restricted transfer of a membership interest, the court found the logical conclusion was that the parties did not intend to limit or restrict transfer of economic interests. The court interpreted a reference to “any part” of a member’s membership interest to refer to a percentage rather than a component part of the interest.

Whittington v. Dragon Group, L.L.C., 991 A.2d 1 (Del. 2009). The Delaware Supreme Court decided, as a matter of first impression, that the typed word “seal” next to an individual signatory’s name was sufficient to create a “specialty contract,” i.e., a contract under seal, which is subject to a twenty-year statute of limitations under Delaware law rather than the three-year statute of limitations applicable to regular contracts. The dispute in this case involved the rights of family members with respect to a Delaware LLC. The plaintiff brought this action against the LLC, the plaintiff’s siblings, and other family members to enforce his rights as an alleged member of the LLC, and the chancery court concluded that the plaintiff’s rights were ultimately predicated on a global settlement agreement entitled “Agreement in Principle” (“AIP”) entered into by the plaintiff and his siblings in 2001 during prior litigation between the parties. The terms of the AIP were never carried out because of ongoing disputes between the parties. The chancery court held that the plaintiff’s equitable action to enforce his rights under the AIP was barred by laches by analogy to the statute of limitations applicable in an action at law on the contract. The plaintiff argued that the AIP was a contract under seal to which the common law twenty-year statute of limitations would apply. The typed word “seal” appeared next to each party’s signature, but the chancery court determined that more than a minimal reference to a seal was required for contracts other than documents of debt, such as mortgages or promissory notes, to escape the three-year statute of limitations. The Delaware Supreme Court reviewed conflicting trial court decisions in Delaware and case law in other states and noted that many states have enacted statutes that address the issue of what constitutes a contract under seal. In the absence of legislative

guidance in Delaware, the Delaware Supreme Court was persuaded by a decision of the Delaware Orphan's Court in a 1940 case. Under this rule, the presence of the word "seal" next to an individual's name (in contrast to a corporation) is all that is required to create a sealed instrument regardless of whether there is any indication in the rest of the contract that it was intended to be a sealed instrument. Thus, the court remanded to the chancery court for reconsideration of its holding by applying the twenty-year statute of limitations for purposes of analogy in determining the laches issue. Justice Jacobs dissented, arguing that it is unreasonable and unadvisable in today's commercial environment to subject parties to commercial contracts to the risk of litigation for twenty years without requiring at least minimally persuasive evidence (i.e., more than use of the boilerplate term "seal") that the parties intended that result.

Ruotolo v. Ruotolo, No. CV095026804, 2009 WL 5698124 (Conn. Super. Dec. 29, 2009) (holding ex-wife stated breach of contract claim against ex-husband based on allegation that they agreed to share equally in ownership, assets, and income of their LLCs, that ex-wife sufficiently alleged grounds for punitive damages for breach of contract, and that ex-wife properly plead claim for breach of implied covenant of good faith and fair dealing).

Phillips v. Schifino, C.A. No. 3644-VCL, 2009 WL 5174328 (Del. Ch. Dec. 18, 2009) (denying motion for summary judgment in case involving start-up venture to be conducted through Delaware LLC, noting that it was not even clear whether central document relied upon by parties should be treated as LLC agreement within meaning of LLC statute and that resolving case would likely "require a hard slog through cryptic documents and conflicting testimony").

In re ALH Holding LLC, 675 F.Supp.2d 462 (D. Del. 2009). The issue in this case was whether the members of the "Supervisory Board" of a Delaware LLC breached their fiduciary duties in approving the sale of the LLC's subsidiaries on a piece-meal basis. After the LLC became financially distressed and the Board was not successful in finding a buyer for the LLC as a whole, the Board approved the piece-meal sale of its three operating divisions. In this consolidated action of two actions brought by the parties against one another, the court discussed the duties owed under Delaware law, the freedom to contract regarding such duties in the operating agreement, the application of default and contractual standards to the facts of the case, and the operation of the statutory indemnification provisions in the absence of any provision in the operating agreement. The court recognized the contractual freedom LLC members have to expand, restrict, and eliminate duties and stated: "In addition to any contractual limitations upon fiduciary duties that the members of an LLC might agree upon, the business judgment rule protects directors from spurious claims against their exercise of discretion in an effort to 'promote the full and free exercise of the managerial power granted to Delaware directors.'" The court analyzed the claims in light of the operating agreement, which provided that a manager or representative serving on the supervisory board was not liable for damages to the LLC or its members for any act in good faith, but such persons were liable for their own fraud, criminal action, bad faith, or gross negligence. The court characterized the provision as imposing the traditional duty of care but retaining only a subset of the duty of loyalty in its prohibition against bad faith actions. The court discussed the concepts of bad faith and gross negligence under Delaware corporate law and concluded that neither bad faith nor gross negligence had been established in connection with the Board's decision to sell the operating divisions. The court alternatively examined the record for compliance with the unmodified duty of loyalty and rejected the arguments that the sale involved self-dealing or interested behavior because the members similarly situated to the majority member received proportionate benefits. The court also concluded that the majority member's employment of a majority of the Board of the LLC did not itself overcome the presumption of the business judgment rule. Having found no breach of fiduciary duty on the part of the Board, the court turned to their claim for indemnification. The court noted that the Delaware LLC statute permits the members of an LLC to contract to indemnify members and managers and grants the contracting

parties broad authority to determine the nature and extent of indemnification, but the operating agreement in this case contained no provision regarding indemnification.

Pointer v. Castellani, 918 N.E.2d 805 (Mass. 2009). Pointer, a minority member of a Massachusetts LLC who was terminated as its president, sued the other three members and the LLC alleging that the defendants engaged in a freeze-out, breached their fiduciary duty, breached Pointer's employment agreement and the covenant of good faith and fair dealing, and interfered with an advantageous relationship. The defendants counterclaimed, alleging that Pointer usurped a company opportunity, breached his fiduciary duty, breached his employment contract, and breached the implied covenant of good faith and fair dealing in relation to the operating agreement and employment contract. Pointer had been employed in the granite business operated by the LLC prior to its acquisition by the LLC. When the granite business was acquired by the LLC, Pointer joined with Castellani, Woodberry, and Herbert to form the LLC. Castellani and Woodberry owned 51% of the LLC, Pointer owned 43%, and Herbert owned 6%. Pointer became president of the LLC, and Herbert acted as chief financial officer. Castellani, Pointer, and Herbert were the managers of the LLC. The operating agreement stated that the purpose of the LLC was to operate a quarry business and allowed members to conduct any other business or activity without being accountable. The operating agreement contemplated dealings with members and their affiliates and required that such dealings be at arm's length and on commercially reasonable terms. Pointer had an employment contract that only allowed his removal without one year's notice on certain grounds, including dishonest or disloyal behavior, material breach of the operating agreement, or substantial failure to perform his duty. The employment agreement required Pointer to work exclusively for the LLC, but the agreement also stated that Pointer could perform services for another company that he formed with another investor to purchase a residential subdivision that the owner of the granite business insisted on selling when the granite business was sold. Although Pointer did not disclose to the other members of the LLC the extent of his ownership in the company that owned the subdivision and another company that later acquired real estate from the LLC, the trial judge found that all the participants knew that Pointer was involved in other real estate activities that were relevant to the suit. The investor with whom Pointer formed the company to purchase the subdivision at the time the granite business was acquired by the LLC also had an interest in purchasing a piece of property acquired by the LLC in the acquisition of the granite business. Ultimately, Pointer joined with this other investor in acquiring the LLC's tract of land in order to pursue a real estate development opportunity. This transaction and certain other actions of Pointer were the basis of the defendants' defense as well as their counterclaims. Pointer's claims were based on the hiring of a new chief executive officer and the termination of Pointer's employment. The defendants argued that the termination of Pointer's employment was justified based on alleged improper business practices of Pointer that had come to light as well as his participation in the transaction involving the sale of the LLC's real estate, and the defendants further asserted that the real estate transaction constituted improper self-dealing and usurpation of a corporate opportunity by Pointer.

The Massachusetts Supreme Court applied Massachusetts case law on closely held corporations in analyzing the claims and determined that the trial judge did not err in finding for Pointer on his freeze-out and wrongful termination claims.

With regard to the self-dealing and usurpation of corporate opportunity claims, the court upheld the trial court's decision in favor of Pointer. The court concluded that provisions of the operating agreement defining a limited purpose of the LLC and permitting members to conduct other businesses and activities supported the trial court's conclusion that the real estate development activity in which Pointer was involved was not a corporate opportunity of the LLC. The court characterized the defendants' reliance on a provision of the operating agreement imposing on managers the fiduciary duty of a director of a corporation as misplaced because there would first have to be a corporate opportunity for Pointer to breach a duty. The court pointed out that the record supported the trial judge's conclusion that the remaining members had no interest in the real estate and that there was sufficient information available to the members regarding the

relationship of the LLC's piece of property to the development opportunity to allow them to take action if they had been interested in doing so. The court acknowledged that the sale of the LLC's property was unquestionably a corporate opportunity once the LLC decided to sell, but the court rejected the defendants' challenge to the trial court's finding that Pointer engaged in unfair self dealing in the transaction. Although Pointer did not reveal that he owned 50% of the entity purchasing the property from the LLC, he did not participate in the vote on the sale and the transaction was negotiated between Castellani and Pointer's fellow investor. The record showed that the other members knew that Pointer owned part of the entity acquiring the property and that Pointer and his fellow investor were assembling parcels of land for development. Although Pointer did not disclose that his fellow investor was pursuing the parcel at a discounted price as compared to the price specified in an option held by the investor, the record showed that the members were aware they could hold out for a higher price in the future but preferred to sell rather than risk the deal falling apart. There was also expert testimony that the price was a commercially reasonable price. The court thus held that the trial judge did not err in concluding that the transaction was fundamentally fair.

The court upheld the trial court's finding that Castellani, Woodberry, Herbert, and the new CEO were liable for interference with Pointer's employment contract with the LLC because they terminated Pointer for cause that was contrived.

The court found no error in the trial court's conclusion that Pointer was entitled to indemnification under the indemnification provisions of the operating agreement, which required indemnification of managers and members unless their action or inaction was the result of active and deliberate dishonesty. The defendants argued that the trial judge's findings indicated that Pointer was, at the very least, dishonest, but the court cited statements by the trial court that its decision did not include any findings that Pointer committed actions in bad faith or with deliberate dishonesty.

Bootheel Ethanol Investments, L.L.C. v. Semo Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 4891960 (E.D. Mo. Dec. 10, 2009). A member of an LLC sued the other member after the other member withdrew its capital contribution in violation of the provisions of the operating agreement. The court in a prior opinion held that the Missouri LLC statute precluded the plaintiff member from enforcing the operating agreement in this regard because the statute states that a member's obligation to make a contribution shall not be enforceable by a third party creditor of the LLC or any other member unless the member so obligated has specifically agreed to such enforcement or the obligation has been assigned by the LLC to the creditor seeking to enforce the obligation. The plaintiff member argued that the statute applied only to an obligation to make a capital contribution and not to an obligation not to withdraw the contribution once made, but the court concluded that the statute applied to both situations. The court also addressed the plaintiff's argument that it was entitled to sue the defendant on the basis of a provision of the operating agreement entitling the plaintiff member to sue a member to recover wrongfully withdrawn capital contributions in order to satisfy loans to the LLC made by the plaintiff member. This provision was enacted by the plaintiff member as sole member of the LLC after the Secretary of State's dissolution of the defendant member. The court stated that the new provision would take the statutory provision prohibiting a member's enforcement of capital contributions out of play if the new provision was validly enacted, but the court pointed out that if the plaintiff was the sole member and could unilaterally amend the operating agreement, then the defendant was not a member, and the provision giving one member the right to sue another member would not apply. The court next addressed various provisions of the operating agreement as they impacted the plaintiff member's argument that it made an oral agreement with the LLC's operations manager altering the due date of the plaintiff's loan to the LLC. The court examined provisions addressing the payment of such loans under the operating agreement, the authority to make major decisions, and limited liability of the members and determined that the specific provisions of the operating agreement regarding repayment of loans trumped other more general provisions of the agreement and that the alleged oral agreement with the operations manager, if established, would result in the plaintiff's claim on the loan being ripe. Finally, the court

addressed fraudulent transfer claims by the plaintiff member against individuals who facilitated the defendant member's withdrawal of its capital contribution. The court noted that the fraudulent transfer statute is directed at fraudulent transfers by debtors rather than those who have facilitated the transfers and that there thus did not appear to be a cause of action against the individuals under the Missouri Uniform Fraudulent Transfer Act. Because this issue was not addressed by the parties, however, the court allowed each party to submit additional briefing.

Moede v. Pochter, No. 07 C 1726, 2009 WL 4043418 (N.D. Ill. Nov. 20, 2009). An LLC member sued the other members for breach of the operating agreement and violation of the Illinois LLC statute in connection with a sale of the LLC's property and demand for distributions. The court concluded that one of the members did not comply with the operating agreement in approving the sale of the property, but the other members who did not know of the transaction and did not participate in selling the property did not breach the agreement.

Prehall v. Weigel, 221 P.3d 157 (Or. App. 2009). The plaintiff formed a real estate development LLC with the defendants and entered an operating agreement providing for their ownership percentages and profit sharing in accordance with those percentages. The parties executed a second operating agreement providing for different percentages based on the defendants' representation that the bank required the defendants to have a greater ownership percentage. The plaintiffs claimed that the defendants orally agreed that the original percentages would be reinstated after the loan had been paid. Ultimately, the parties executed a third operating agreement that provided for the same ownership percentages as the second operating agreement, but a different formula for the division of profits. The plaintiffs sued the defendants asserting claims for breach of the oral agreement to reinstate their original ownership and profit sharing percentages, breach of fiduciary duty, fraud, and an accounting. The plaintiffs sought damages in an amount to be determined in an accounting and based on the provisions of the first operating agreement. The defendants asserted various affirmative defenses. The trial court denied the plaintiffs a jury trial on the basis that the relief requested was equitable because it in essence sought rescission of the second and third operating agreements and an accounting. The court of appeals analyzed the plaintiff's claims and concluded that they were legal and that the trial court erred in denying plaintiff a jury trial. The court did not view the requested accounting as the type that sounds in equity, and the court rejected the argument that the plaintiff's claims required rescission of the second and third operating agreements. The court concluded that the plaintiff's requested remedy of damages on each of his claims provided adequate relief at law and made it unnecessary for the court to invoke its equity jurisdiction.

Lola Cars International Limited v. Krohn Racing, LLC, CA Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681 (Del. Ch. Nov. 17, 2009). Lola Cars International, Ltd. ("Lola") and Krohn Racing, LLC ("Krohn") formed a Delaware LLC and agreed to equal representation on the governing board although Lola owned a 51% interest in the LLC and Krohn held a 49% interest. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the LLC's CEO. Lola brought two suits against Krohn and Hazell, and the defendants moved to dismiss both of Lola's complaints. Lola's first complaint alleged that Krohn breached the LLC operating agreement, Hazell breached his fiduciary duties of loyalty and care, and Krohn aided and abetted Hazell's disloyalty. Lola's second complaint relied on a termination clause in the operating agreement. Among the relief sought by Lola under its first complaint was judicial dissolution, and Krohn argued that judicial dissolution was inappropriate because the operating agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. Assuming that judicial dissolution as provided by statute can be contractually eliminated, the court concluded that the self-termination options and lack of explicit provision for judicial dissolution in the operating agreement did not render statutory judicial dissolution unavailable. The court thus denied the

defendants' motion to dismiss the claim for judicial dissolution. Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the operating agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract, but the court determined that Krohn's refusal to even consider replacing him or attend board meetings to discuss the matter allowed the court a reasonable inference of a breach of the implied covenant. In its second complaint, Lola sued to enforce the termination clause in the operating agreement, which allowed a member to terminate the agreement after a breach by the other by notifying the breaching party of the breach and the consequences of a failure to rectify the breach. Under this provision of the agreement, the breaching party had 21 days to rectify the breach before the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, thus entitling Lola to terminate the agreement. Also, Lola contended that it should receive the right to manage and control the LLC after termination of the agreement because of its majority position. Lola requested temporary and permanent injunctive relief prohibiting Hazell and Krohn from interfering with Lola's control of the LLC or acting as its agents. The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the operating agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola moved for leave to file a supplemental complaint, alleging that it sent Krohn a letter giving notice that Krohn had materially breached the agreement and outlining the consequences of Krohn's failure to rectify its breach and that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

Academic Imaging, LLC v. Soterion Corp., 352 Fed.Appx. 59, 2009 WL 3805807 (6th Cir. 2009). Academic Imaging, LLC ("Academic") and Soterion Corp. ("Soterion") each owned a 50% interest in an LLC. After a fallout, Soterion sought a buy-out under the push-pull provisions of the operating agreement. Soterion sent a letter outlining the proposed terms of the buy-out, the purchase price of which took into account Soterion's "unmatched additional capital contributions." Academic accepted the offer, and a purchase agreement in which Soterion agreed to sell its interest to Academic was subsequently executed. After the buy-out, Academic discovered that Soterion had withdrawn funds from the LLC prior to the closing. Academic and the LLC filed suit against Soterion for breach of contract, conversion, and breach of fiduciary duty. The court concluded that the conversion claim failed because the existence of a breach of contract claim precluded asserting the same claim as a tort claim for conversion. The court concluded that the plaintiff's breach of fiduciary duty claim that Soterion took advantage by misrepresentation and non-disclosure of material facts was a claim that could be asserted independently of the breach of contract claim. Though the purchase agreement contained an integration clause, the plaintiffs were entitled to introduce the letter to show how Soterion's alleged breach of fiduciary duty induced Academic to agree to the buy-out on Soterion's terms. The plaintiffs also asserted a wrongful distribution claim on the basis that Soterion withdrew funds contrary to the terms of the operating agreement, but the court held that the plaintiffs could not use the letter to support its wrongful distribution claim. The plaintiffs relied upon the letter to create a fact issue as to whether the disputed amount was a loan or a capital contribution, and the plaintiffs could not do so without using the letter to add a term to the unambiguous purchase agreement. The fraud exception to the parol evidence rule was inapplicable because no misrepresentations of fact were alleged in this claim. At most, the alleged understanding that the funds in issue would be re-characterized as a contribution after the buy-out was a false promise that was not written into the purchase agreement and was also barred by the parol evidence rule. Because the plaintiffs pointed to no evidence in the record beyond the letter to support the contention that the repayment of the funds in issue was contrary to the operating agreement, there was no issue of material fact, and summary judgment on the wrongful distribution claim was appropriate.

St. Paul Fire and Marine Insurance Company v. Yang Ming (America) Corporation, C.A. No. 2:08-1623-PMD, 2009 WL 3698120 (D.S.C. Nov. 3, 2009) (interpreting indemnification provisions of operating agreement relating to member's use of chassis contributed to LLC under arrangement whereby members who contributed chassis retained ownership of chassis but all members were entitled to use of any chassis contributed).

Mitchell Company, Inc. v. Campus, Civil Action No. 08-0342-KD-C, 2009 WL 3527744 (S.D. Ala. Oct. 23, 2009) (interpreting withdrawal and buyout provisions of LLC agreements, finding LLCs were bound by valuation reached by appraiser chosen by LLCs pursuant to terms of agreement after LLC and withdrawn member were unable to agree on fair value, and granting withdrawn member specific performance of agreement).

JD Factors, LLC v. Freightco, LLC, Cause No. 1:09-CV-95, 2009 WL 3401965 (N.D. Ind. Oct. 16, 2009). The defendant LLC sought to amend its answer in a collection suit to assert that a member's bankruptcy resulted in his dissociation and termination as vice-president and that his remaining rights as a member or former member now belonged to his bankruptcy trustee. The plaintiff argued that the defendant should be denied leave to amend on the basis that the proposed amendment was contrary to law. The plaintiff argued that the amended allegations violated the automatic stay provisions and were premised on an ipso facto clause prohibited by Section 365(e)(1). The court rejected the plaintiff's arguments, noting that the bankrupt member's services as vice-president may well be more akin to a personal services contract than an executory contract that is freely assignable to the trustee. The court stated that the plaintiff did not cite any authority for its assertion that service as an officer of a company rises to the level of "property" of the bankruptcy estate. The court found it reasonable to infer that the member's termination as vice-president did not violate the automatic stay. Additionally, the court stated that the ipso facto clause in the operating agreement was not necessarily unenforceable given that the Indiana LLC statute provides that no person can become a member without the consent of all members unless otherwise provided in the operating agreement. In any event, the plaintiff did not challenge the statement in the proposed amendment that the bankrupt member's remaining rights as a member inure to the bankruptcy trustee. Thus, the court concluded that the proposed amendment was not "contrary to law" and that leave to amend should be granted.

Herschend v. Hill, No. 07-3426-CV-S-ODS, 2009 WL 3230620 (W.D. Mo. Oct. 1, 2009) (discussing effect of jury verdict and finding that operating agreement and letters pertaining to buy-sell provision were intertwined and constituted one contract, that plaintiffs were entitled to only one recovery of damages related to two alleged breaches, and that plaintiffs were not entitled to declaratory judgment on issue submitted by plaintiffs and lost).

Abdalla v. Qadorh-Zidan, 913 N.E.2d 280 (Ind. App. 2009). The Abdallas and Zidans formed five LLCs and a corporation. Each family owned 50% of each LLC, and the two families were also the sole directors and shareholders of the corporation. After a dispute developed, the Zidans sold their membership interests to the Abdallas. After receiving K-1 Schedules for the year ending on the date they sold their interests, the Zidans asked to see the books of the LLCs and corporation for the period during which they were members and shareholders. Eventually, the Zidans filed a complaint alleging breach of fiduciary duty, negligence, and declaratory relief to inspect the books and records of the LLCs and corporation for the period during which they were members of the LLCs and shareholders of the corporation. The Abdallas filed a motion for summary judgment arguing that they did not owe the Zidans any duties in connection with the preparation of the tax data and that the Zidans were not entitled to inspect the companies' books. The trial court denied the motion for summary judgment, and the Abdallas filed an interlocutory appeal. The parties' main argument focused on whether a fiduciary duty existed between the companies and the former members

and shareholders. The Abdallas relied upon the LLC operating agreements, which provided that a member who assigns all of his interest in the LLCs no longer has any rights or privileges of a member. In addition, the Zidans acknowledged in various agreements that they were relinquishing all of their rights, title and interest as members and shareholders. The Abdallas also argued that the fiduciary relationship of the Zidans with the companies terminated when they sold their interests, regardless of the contractual language, in the absence of a dissolution of the companies because there was no winding up phase which would continue the existence of the duties. The court reviewed case law in the partnership and corporate context and concluded that the Abdallas owed the Zidans a fiduciary duty with respect to the period during which the Zidans were members of the LLC and shareholders of the corporation. To hold otherwise, said the court, would give the Abdallas the freedom to allocate tax burdens to the Zidans and retain tax benefits for themselves without allowing the Zidans any recourse. The court then concluded that the Zidans had the right to inspect the records of the companies for the tax year 2006, when the Zidans were still members and shareholders, in order to ensure the correctness of the K-1 Schedules.

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff (“Gene”) sued his brothers (“Francis” and “Richard”) after he resigned as a member of several of the LLCs. The case involved two different versions of Section 18-603 of the Delaware Limited Liability Company Act. For LLC agreements entered into before July 31, 1996, the statute permitted a member to resign with six months’ notice. For LLC agreements entered into after July 31, 1996, the statute prohibits resignation before dissolution and winding up unless the LLC agreement states otherwise. Gene sought an award of fair value for his interest in the pre-1996 LLCs and an award of fair value for Gene’s interest in the post-1996 LLCs, but Gene ultimately conceded that the claims for fair value of the interests in the post-1996 LLCs should be pursued in arbitration. The defendants moved to dismiss the fair value claims on the basis that they were subject to arbitration, and the court granted the defendants’ motion to dismiss the fair value claims against the remaining pre-1996 LLCs because arbitration was appropriate. The court divided the arbitrability question into “procedural” and “substantive” arbitrability relying on *James & Jackson, LLC v. Willie Gary, LLC*. The procedural arbitrability question revolved around whether or not the parties complied with the arbitration provisions of the LLC agreement. A presumption exists that procedural arbitrability questions are answered by arbitrators, not by the courts. The court noted that substantive arbitrability was less clear-cut and included a determination of both the scope of an arbitration provision and the broader issues of whether the contract and/or the arbitration clause were valid and enforceable. The court relied upon a recent chancery court opinion for the proposition that the court must first address the question of who decides whether the parties agreed to submit a particular dispute to arbitration or to a court. According to that decision, courts presume the parties did not intend to arbitrate arbitrability unless there is clear and unmistakable evidence to the contrary. Clear and unmistakable evidence that the parties intended to arbitrate arbitrability exists if the arbitration clause: (1) generally refers all disputes to arbitration, and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability. The arbitration clause in the present case stated that any controversy “arising out of or relating to” the agreement shall be settled by arbitration. The court interpreted “arising out of or relating to” broadly, and found the arbitration clause sufficient to satisfy the first prong of the test by generally referring all disputes to arbitration. The provision also satisfied the second prong by requiring that the arbitration be conducted in accordance with the rules of the American Arbitration Association. Gene argued that his request for an award of fair value was based on Section 18-604 of the LLC statute and not the LLC agreement. He further argued that the breach of fiduciary duty claims did not arise out of the LLC agreements because the agreements were “bare bones.” Gene relied on *Parfi Holding AB v. Mirror Image Internet, Inc.* for the proposition that “actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract.” Essentially, Gene asked the court to decide whether his claims arose out of, or related to, the LLC agreements. The court found

that if it answered that question, it would undermine the *Willie Gary* test. Although the court admitted that common sense required some minor inquiry into whether the arbitration clause covered the underlying dispute, it said that, if there was a colorable basis that the dispute is covered by the arbitration clause and the clause satisfies the *Willie Gary* test, then the question of substantive arbitrability should be answered by the arbitrator rather than the court. The court decided that since LLCs were creatures of contract, Gene's request for fair value of his interest was, to some degree, related to the existence of the agreement and its terms. Finally, the court noted that the policy of the court was to defer to arbitration when in doubt.

Googla Home Decor LLC v. Uzkiy, No. 09-CV-1049 (CPS)(RML), 2009 WL 2922845 (E.D.N.Y. Sept. 8, 2009) (holding arbitration clause in LLC operating agreement employing "arising out of or relating to" language was broad clause creating presumption of arbitrability, and concluding arbitration clause encompassed breach of fiduciary duty claim as well as disputes concerning who exercised majority control and had authority under operating agreement to take certain acts).

W. Transfer of Interest/Buy-Out of Member

Spurlock v. Begley, 308 S.W.3d 657 (Ky. 2010). An LLC member, Griffin, orally announced his intention to give another individual, Begley, a 25% interest in the LLC in order to pay off a \$75,000 note from the LLC to Begley. This agreement was never reduced to writing. Begley later entered into an agreement with Spurlock regarding the purchase by Spurlock of Begley's interest in the LLC. A bare-bones agreement referring to the transfer of 25% ownership in the LLC was prepared. 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 supreme court discussed the provisions of the Kentucky LLC statute regarding membership and ownership. The court noted that the LLC statute does not speak of "owners," but instead refers to such persons as "members." The court stated that the evidence at trial made clear that Begley was not a member because there was no evidence of an operating agreement and no evidence that all of the members consented in writing to his membership as required by the statute in the absence of a provision governing admission to membership in the operating agreement. The court pointed out that a member may assign the economic rights associated with a membership interest, and if the non-transferring members do not approve of the transfer, the interest is divided into its economic rights, which are transferred, and the governance rights, which are not transferred. The court said that the statutory provisions lead to the conclusion that simply acquiring economic rights does not, in and of itself, equate to "ownership" or "membership" in the LLC. At most, the evidence showed that Begley had an economic interest in the LLC, and the court stated that such an interest did not equate to an "ownership interest." Begley drafted the agreement to sell his "25 percent ownership" of the LLC, and the court noted that Kentucky courts have long held that a contract susceptible to two meanings will be construed against the drafter. The court stated that "ownership" and "membership" are synonymous in the context of LLCs, that Begley had no ownership interest to convey to Spurlock, and that there was thus a failure of consideration. In addition, the court held that the jury instructions submitted by the trial court were incorrect and that the trial court should have submitted Spurlock's requested instruction that "a member (owner) of a Kentucky limited liability company means a person who has been admitted to membership as set forth within the limited liability company's operating agreement or, if an operating agreement does not so provide in writing, upon the written consent of all members."

Ross v. Thomas, No. 09 Civ. 5631(SAS), 2010 WL 743912 (S.D.N.Y. March 2, 2010) (granting defendant member's motion to dismiss plaintiff economic interest owners' claim that defendant breached put option provision of Delaware LLC's agreement where plaintiffs claimed approvals obtained by LLC for

development of real estate project triggered put option but such approvals were still subject to appeal and thus were not “decided” as required by provision of LLC agreement triggering put option).

Dixon v. Malouf, 894 N.Y.S.2d 127 (App. Div. 2d Dept. 2010) (holding plaintiff was not entitled to specific performance of transfer of LLC interest because plaintiff’s evidence failed to establish absence of triable issues of fact regarding whether he had funds necessary to purchase defendant’s interest).

In Soon Lee v. Lee Kin, No. B217381, 2010 WL 427128 (Cal. App. 2d Dist. Feb. 8, 2010) (discussing gift causa mortis of LLC interest).

Bougalis v. Bougalis, No. A09-491, 2010 WL 431471 (Minn. App. Feb. 2, 2010) (holding that there had not been irrevocable gift of LLC interest, notwithstanding donee’s payment of income tax on income of LLC and letter from donor’s accountant referring to donee’s ownership percentage, because donor never relinquished control over interest).

DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp.2d 405 (S.D.N.Y. 2010). DirecTV entered into a joint venture agreement with an individual, Avila, under which the parties formed an LLC in which DirecTV had a 45% membership interest, and an LLC formed by Avila (“Park 610”) had a 55 % membership interest. DirecTV made it clear that it was critical that Avila not transfer any of his ownership interest in the LLC without DirecTV’s written agreement, and the joint venture agreement made a change in control a default under the contract. When the joint venture agreement was being negotiated, Avila represented that he was the sole owner of the two entities that were the members of Park 610, but he was actually in the process of arranging a transfer of ownership of one of the entities, and he eventually allowed his shares in the other entity to be pledged to or deposited with a third party to secure his obligations under the agreement with the purchaser of the other entity. Park 610 and Avila argued that DirecTV failed to allege a breach of the change of control provision of the joint venture agreement, which provided that a change in control occurs where “any Person (other than the Person who controls a Member on the Date hereof) become[s] the beneficial owner, directly, or indirectly, of more than 50% of the then outstanding voting shares or other equity rights of a Member.” The pleadings alleged that two entities each owned 50% of the outstanding shares or other equity rights of Park 610; therefore, the allegation that the shares owned by one of the entity members were transferred were insufficient to show a change in control because the transfer did not result in an outside person acquiring more than 50% of the outstanding shares or equity rights of Park 610. There was also an argument, however, over the sufficiency of allegations relating to a change in control based on changes in “beneficial ownership.” The term “beneficial owner” was undefined in the joint venture agreement, and DirecTV argued that the term should be interpreted in accordance with the definition of the term under Section 13(d) of the Securities Exchange Act of 1934. Park 610 and Avila argued that this was not a proper definition, but they did not offer an alternative. The court mentioned case law addressing the meaning of “beneficial owner” for purposes of Section 16 of the Exchange Act and ultimately determined that it was plausible that the parties intended the widely known Section 13(d) definition to govern. At a minimum, the court concluded that the term was ambiguous and should not be definitively construed without an opportunity for DirecTV to offer extrinsic evidence. The court also addressed whether the allegations were sufficient to state a claim for violation of a restriction on transfer in the joint venture agreement. Although ownership of one of the parent companies of Park 610 was transferred by Avila to another party, the provision only prohibited attempts by a member, i.e., Park 610 or DirecTV, to transfer an interest in the LLC. It did not prevent the transfer of ownership interests in Park 610 or DirecTV. Thus, this claim for breach of contract was dismissed.

One to One Interactive, LLC v. Landrith, 920 N.E.2d 303 (Mass. App. 2010). Landrith, Ian Karnell, Jeremi Karnell, and Donnelly founded an LLC engaged in a digital marketing business. After disputes developed between the members, they negotiated the terms of a buy-out of Landrith and memorialized the terms on a proposed term sheet. However, after the LLC made payments for a period of time pursuant to the terms of the proposed term sheet, the LLC informed Landrith that his interest was grossly overvalued and that the proposed term sheet was not a binding contract, and the parties ended up in litigation. Landrith prevailed on breach of fiduciary duty claims, and the Karnells contended on appeal that a breach of fiduciary duty analysis did not apply because the proposed term sheet was a controlling contract on point. The court stated that the Karnells could not now argue that they did not have a fiduciary duty to Landrith when they had argued that Landrith owed and breached fiduciary duties to the LLC and the other members, and they had suggested the fiduciary duty instruction given by the judge. The Karnells also argued that the LLC and the other members did not owe a fiduciary duty to Landrith once the proposed term sheet was signed by Landrith, but the court stated that the problem with this contention was that the LLC did not actually redeem Landrith's interest and thereafter sent Landrith a K-1 declaring that he was a member. The court also held that there was sufficient evidence for the jury to find that the Karnells breached their fiduciary duties based on proof of various improper actions, including maneuvering to renege on their deal with Landrith and use of improper tactics to pressure him to accept less than he was entitled to under the contract, such as subjecting him to an unexpected tax obligation while failing to make a distribution to enable Landrith to pay the tax unless he accepted a buy-out at an amount specified in an appraisal obtained by the LLC rather than the amount specified in the proposed term sheet. The court relied upon case law in the closely held corporation context regarding the fiduciary duties of shareholders. The court also agreed with the trial judge that the discharge of the LLC's debt in bankruptcy did not as a matter of law extinguish Landrith's claim against the Karnells for breach of fiduciary duty regarding his reasonable expectations of benefits from the ownership of his interest.

Dunbar v. Willis, No. D054146, 2010 WL 336406 (Cal. App. 4th Dist. Jan. 28, 2010). Stephen Willis and his uncle, Dr. Stanley Willis, were members of an LLC that owned a hotel. During his lifetime, Dr. Willis transferred his membership interest to a revocable trust. After his death, the successor trustees of his trust petitioned the court for approval of certain proposed actions, including dissolution of the LLC, sale of the hotel, and distribution of the assets to the named beneficiaries of the trust. Stephen opposed the petition and asserted an immediate right to purchase Dr. Willis's former interest in the LLC. The court analyzed the provisions of the operating agreement defining "membership interest" (which included the right to vote on or participate in management) and "member" (which included a trust) as well as provisions addressing transfer of a membership interest (which permitted the transfer of a member's membership interest to a trust) and a purchase right triggered by the death of a member. The court concluded that the transfer by Dr. Willis of his membership interest to his trust resulted in the trust's becoming a member for purposes of the agreement, and the court distinguished a court of appeals decision in the partnership context in which the court held that a trust was not an entity and could not be a partner in a partnership. The court acknowledged that a trust is not a real party in interest and is more accurately viewed as a vehicle whereby a trustee manages property for the benefit of beneficiaries, but the court interpreted the operating agreement and concluded that the parties did not intend the death of a trustee to trigger the purchase rights associated with the death of a member because the operating agreement explicitly permitted a member to transfer his entire interest to a trust and defined a member to include a trust. The court also rejected an argument by Stephen that, because the trust was a revocable trust, the membership interest was essentially owned by Dr. Willis at the time of his death. The court further rejected Stephen's argument that the trustee's powers expired under the operating agreement and the trust was not a permissible transferee. The operating agreement permitted a transfer to a trust for the benefit of Dr. Willis, and Stephen argued that the trust no longer benefitted Dr. Willis after his death. However, the court pointed out that the trust was not a transferee upon Dr. Willis's

death; the trustees merely retained ownership of the trust assets. Stephen did not point to any provisions showing that once a membership interest was transferred to a permissible transferee the transfer can be later invalidated. The court concluded that the trustees' powers to act after Dr. Willis's death depended upon the trust instrument and were not limited by a provision in the operating agreement stating that a deceased member's legal representative may exercise the member's rights for purposes of settling the estate. Finally, the court concluded that the parties did not intend to restrict transfers of economic interests in the LLC, and the trustees were thus permitted to transfer economic interests to the gift beneficiaries who fell outside the permissible transfer categories for the transfer of a membership interest. Because the operating agreement specifically restricted transfer of a membership interest, the court found the logical conclusion was that the parties did not intend to limit or restrict transfer of economic interests. The court interpreted a reference to "any part" of a member's membership interest to refer to a percentage rather than a component part of the interest.

Martinez v. American Steelway Industries, LLC, 20 So.3d 526 (La. App. 2009) (holding withdrawn member of LLC was entitled to summary judgment on fair value of his interest based on uncontradicted evidence of his capital contributions and other member's admission that LLC had no assets other than withdrawn member's capital contributions).

Academic Imaging, LLC v. Soterion Corp., 352 Fed.Appx. 59, 2009 WL 3805807 (6th Cir. 2009). Academic Imaging, LLC ("Academic") and Soterion Corp. ("Soterion") each owned a 50% interest in an LLC. After a fallout, Soterion sought a buy-out under the push-pull provisions of the operating agreement. Soterion sent a letter outlining the proposed terms of the buy-out, the purchase price of which took into account Soterion's "unmatched additional capital contributions." Academic accepted the offer, and a purchase agreement in which Soterion agreed to sell its interest to Academic was subsequently executed. After the buy-out, Academic discovered that Soterion had withdrawn funds from the LLC prior to the closing. Academic and the LLC filed suit against Soterion for breach of contract, conversion, and breach of fiduciary duty. The court concluded that the conversion claim failed because the existence of a breach of contract claim precluded asserting the same claim as a tort claim for conversion. The court concluded that the plaintiff's breach of fiduciary duty claim that Soterion took advantage by misrepresentation and non-disclosure of material facts was a claim that could be asserted independently of the breach of contract claim. Though the purchase agreement contained an integration clause, the plaintiffs were entitled to introduce the letter to show how Soterion's alleged breach of fiduciary duty induced Academic to agree to the buy-out on Soterion's terms. The plaintiffs also asserted a wrongful distribution claim on the basis that Soterion withdrew funds contrary to the terms of the operating agreement, but the court held that the plaintiffs could not use the letter to support its wrongful distribution claim. The plaintiffs relied upon the letter to create a fact issue as to whether the disputed amount was a loan or a capital contribution, and the plaintiffs could not do so without using the letter to add a term to the unambiguous purchase agreement. The fraud exception to the parol evidence rule was inapplicable because no misrepresentations of fact were alleged in this claim. At most, the alleged understanding that the funds in issue would be re-characterized as a contribution after the buy-out was a false promise that was not written into the purchase agreement and was also barred by the parol evidence rule. Because the plaintiffs pointed to no evidence in the record beyond the letter to support the contention that the repayment of the funds in issue was contrary to the operating agreement, there was no issue of material fact, and summary judgment on the wrongful distribution claim was appropriate.

Mitchell Company, Inc. v. Campus, Civil Action No. 08-0342-KD-C, 2009 WL 3527744 (S.D. Ala. Oct. 23, 2009) (interpreting withdrawal and buyout provisions of LLC agreements, finding LLCs were bound by valuation reached by appraiser chosen by LLCs pursuant to terms of agreement after LLC and withdrawn

member were unable to agree on fair value, and granting withdrawn member specific performance of agreement).

Junge v. Bartles, Docket No. 285035, 2009 WL 3365842 (Mich. App. Oct. 20, 2009). The plaintiff and two other individuals were each 1/3 members of an LLC, and the plaintiff sued the other two members for conversion of his membership interest and oppression after the defendants gave the plaintiff a check for his membership interest, promised him additional funds collected in the future, and formed another entity that took over the business of the LLC. The court of appeals concluded that the trial court erred in finding that the defendants converted the membership interest of the plaintiff because the plaintiff received compensation for his interest in the form of a check, which he accepted, and the promise by the defendants to pay additional amounts as receivables were collected. The court of appeals did not disturb the trial court's finding of oppression, however. The Michigan LLC statute provides for various types of relief for a member who establishes that the managers or members in control engaged in "willfully unfair and oppressive conduct," i.e., a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. The court of appeals upheld the trial court's determination that plaintiff was entitled to the equitable remedy of one-third of the book value of the LLC based on the defendants' creation of a new entity to step into the shoes of the LLC by doing the exact same work, with the same employees, for the same customers. The court of appeals characterized the award as equitable relief rather than a "money judgment" for purposes of the statute providing for interest on money judgments. Therefore, the trial court did not err in failing to award statutory interest.

Herschend v. Hill, No. 07-3426-CV-S-ODS, 2009 WL 3230620 (W.D. Mo. Oct. 1, 2009) (discussing effect of jury verdict and finding that operating agreement and letters pertaining to buy-sell provision were intertwined and constituted one contract, that plaintiffs were entitled to only one recovery of damages related to two alleged breaches, and that plaintiffs were not entitled to declaratory judgment on issue submitted by plaintiffs and lost).

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case involved two different versions of Section 18-603 of the Delaware Limited Liability Company Act. For LLC agreements entered into before July 31, 1996, the statute permitted a member to resign with six months' notice. For LLC agreements entered into after July 31, 1996, the statute prohibits resignation before dissolution and winding up unless the LLC agreement states otherwise. Gene sought an award of fair value for his interest in the pre-1996 and post-1996 LLCs, but Gene ultimately conceded that the claims for fair value of the interests in the post-1996 LLCs should be pursued in arbitration. The defendants moved to dismiss the fair value claims against one LLC on the basis that the claims were not ripe and against the remaining three LLCs on the basis that they were subject to arbitration. With respect to ripeness, the defendants relied upon the fact that Gene filed his fair value claim only two days after his resignation from the LLC. The Delaware LLC statute provides an LLC a "reasonable" time after resignation of a member to determine and distribute the resigning member's LLC interest. The court denied the defendants' motion to dismiss for lack of ripeness because it was reasonable to infer that the members would not have agreed on the value of the business regardless of how long the plaintiff waited to file suit in view of the fact that the family members were engaged in litigation regarding valuation and other business issues. Also, the court noted that the timing of the commencement of the suit was not critical when the valuation was based on facts as they existed at the time of the member's resignation. Finally, the court noted that dismissing the claim would be inefficient because Gene could simply re-file the action the next day. With respect to the arbitration issue, the court ultimately

granted the defendants' motion to dismiss the fair value claims against the remaining pre-1996 LLCs because arbitration was appropriate.

X. Capital Contributions and Contribution Obligations

Related Westpac LLC v. JER Snowmass LLC, C.A. No. 5001-VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010). The operating member of two LLCs formed for a land development project in Colorado sued the other member of the LLCs seeking to require the defendant member to pay damages and meet future capital calls on the theory that the defendant's refusal to give consents and to meet the capital calls made by the operating member was "unreasonable." According to the plaintiff, when the funding needs for the project exceeded the agreed upon budget, the defendant refused to meet capital calls and give its consent to various major decisions. The court dismissed the complaint because the operating agreements, while prohibiting the defendant from unreasonably withholding consent to certain decisions, did not constrain the defendant's decisions as to the decisions in issue in the case. The court stated that the plaintiff's express breach of contract claim failed because it was clearly contrary to the bargain it made. The operating agreement preserved for the defendant the freedom to withhold consent to the decisions in issue if that was in the defendant's self-interest whereas the defendant's consent in other situations was subject to the commonplace standard that consent "shall not be unreasonably withheld." The plaintiff's effort to have the court recognize an implied reasonableness condition as part of the operating agreement's implied covenant of good faith and fair dealing was similarly rejected by the court on the basis that the express bargain covered the subject and implying such an obligation would override the express bargain. Additionally, the defendant had no contractual obligation to pay damages for failing to fund capital calls. The operating agreements provided that a member who did not fund a capital call did not have any personal liability, the other member's sole remedy being to revoke its contribution or fund the non-contributing member's share. For similar reasons, the court rejected the plaintiff's unjust enrichment and breach of fiduciary duty claims. The court stated that the plaintiff sought to deprive the defendant of the freedom it preserved under its contract by imposing a fiduciary duty to act in the reasonable best interests of the LLCs at all times. The court stated that to do so would nullify the parties' express bargain. According to the court, "[w]hen a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement, the fiduciary duty claim must fall, otherwise 'the primacy of contract law over fiduciary law in matters involving ... contractual rights and obligations [would be undermined].'" Thus, the plaintiff failed to state a claim for breach of fiduciary duty.

Racing Investment Fund 2000 v. Clay Ward Agency, Inc., 320 S.W.3d 654 (Ky. 2010). The Kentucky Supreme Court held that a provision of an LLC operating agreement requiring the members to contribute to pay expenses of the LLC as determined by the manager did not alter the limited liability of the members and did not authorize the trial court to order a capital call to satisfy the unpaid portion of an agreed judgment against the LLC. The trial court and court of appeals had concluded that the capital call provision 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, and the trial court ordered that a capital call be issued to each member for the member's pro rata balance owed on an agreed judgment against the LLC. The Kentucky Supreme Court disagreed. The court characterized the capital call provision as a "not-uncommon, on-going capital infusion provision" designed to assure members would contribute additional capital as deemed necessary by the manager. The court acknowledged that the manager could have made a capital call but stated that the provision was not a debt collection mechanism by which a court could order a capital call and effectively abrogate the liability shield. The court stated that assumption of personal liability by an LLC member is so antithetical to the purpose of an LLC that any such assumption must be stated in unequivocal

terms leaving no doubt as to the member's intent to forego liability protection. The capital call provision here did not satisfy that standard.

Great Investment Properties v. Bentley, No. 9-09-36, 2010 WL 892122 (Ohio App. March 15, 2010). Great Investment Properties, L.L.C. ("GIP") and Bentley were members of an LLC who stipulated that their disputes could not be resolved and that the LLC should be dissolved. GIP was appointed liquidating trustee. The assets of the LLC were sold, and the members could not agree on the disbursement of the funds. After a bench trial in which the trial court entered an order as to the distribution of the assets of the LLC, Bentley appealed. First, Bentley argued that the trial court erred in interpreting the operating agreement with respect to whether payments by Freyhof (the sole member of GIP) to the LLC were loans or capital contributions and whether GIP was allowed to take offsets against Bentley's initial capital investment prior to distributing the remaining assets. The court examined provisions of the operating agreement regarding capital contributions and loans and concluded that the trial court did not err in characterizing the payment by Freyhof as a loan. The operating agreement did not require additional capital contributions without the written consent of all members, and the agreement permitted, but did not require, loans by a member to the LLC. In the course of its discussion, the court noted that Freyhof and his wholly-owned LLC, as well as Bentley and an LLC solely owned by Bentley, failed to respect legal formalities and blurred the distinctions between "corporate" and personal action. Thus, in analyzing the nature of Freyhof's payment as a loan or capital contribution, the court did not consider the fact that Freyhof, who was not himself a member, made the payment in question to the LLC rather than GIP. Similarly, the court concluded that obligations owed to the LLC by Bentley's wholly-owned LLC were the personal obligations of Bentley and could properly be offset against amounts owed by the LLC to Bentley for the repayment of his initial investment. In concluding that there was sufficient evidence to support the trial court's conclusion that Freyhof's payments were loans rather than capital contributions, the court did not find Freyhof's use of the word "contributions" in his testimony dispositive. With respect to the interest rate on the loans, the court concluded that there was not sufficient evidence to support the trial court's finding that the interest rate on the loans should be calculated at 12% rather than the statutory rate of 10% applicable in the absence of a written contract. The court reviewed the evidence with respect to numerous other disputed obligations of Bentley to the LLC and concluded that the evidence supported the trial court's findings.

West Town Line Associates, LLC v. Mack & Meldrum Associates, LLC, No. 288384, 2010 WL 785938 (Mich. App. March 9, 2010) (interpreting operating agreement provisions regarding capital calls and loans and concluding that provisions were ambiguous because repayment of loan by managing member might be considered conducting "business and affairs" such that capital call could be made and direct obligation of LLC created by loan would be shifted to members).

Winning Streak, Inc. v. Winning Streak Sports, LLC, No. 100,725, 2010 WL 348272 (Kan. App. 2010) (concluding evidence supported finding that individual had only .96% interest in LLC based on company records of contributions to LLC and absence of oral or written operating agreement specifying membership percentages).

Bootheel Ethanol Investments, L.L.C. v. Semo Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 4891960 (E.D. Mo. Dec. 10, 2009). A member of an LLC sued the other member after the other member withdrew its capital contribution in violation of the provisions of the operating agreement. The court in a prior opinion held that the Missouri LLC statute precluded the plaintiff member from enforcing the operating agreement in this regard because the statute states that a member's obligation to make a contribution shall not be enforceable by a third party creditor of the LLC or any other member unless the member so obligated has specifically agreed to such enforcement or the obligation has been assigned by the LLC to the creditor

seeking to enforce the obligation. The plaintiff member argued that the statute applied only to an obligation to make a capital contribution and not to an obligation not to withdraw the contribution once made, but the court concluded that the statute applied to both situations. The court also addressed the plaintiff's argument that it was entitled to sue the defendant on the basis of a provision of the operating agreement entitling the plaintiff member to sue a member to recover wrongfully withdrawn capital contributions in order to satisfy loans to the LLC made by the plaintiff member. This provision was enacted by the plaintiff member as sole member of the LLC after the Secretary of State's dissolution of the defendant member. The court stated that the new provision would take the statutory provision prohibiting a member's enforcement of capital contributions out of play if the new provision was validly enacted, but the court pointed out that if the plaintiff was the sole member and could unilaterally amend the operating agreement, then the defendant was not a member, and the provision giving one member the right to sue another member would not apply. The court addressed fraudulent transfer claims by the plaintiff member against individuals who facilitated the defendant member's withdrawal of its capital contribution and noted that the fraudulent transfer statute is directed at fraudulent transfers by debtors rather than those who have facilitated the transfers. Though the court stated that there did not appear to be a cause of action against the individuals under the Missouri Uniform Fraudulent Transfer Act, the court allowed each party to submit additional briefing on this issue.

Y. Improper Distributions

Lee v. Yum, No. 1 CA-CV 08-0575, 2010 WL 989907 (Ariz. App. March 8, 2010) (explaining that two remaining members were entitled to dissolve LLC upon death of third member, but estate of deceased member had rights of assignee and was entitled to receive distributions from LLC during continuation of business and upon completion of winding up; therefore, remaining members acted in violation of implied covenant of good faith and fair dealing by making distributions to themselves while making no distribution to deceased member's estate and transferring assets of dissolved LLC to new LLC formed by remaining members without valuation or determination of estate's interest in dissolved LLC).

Colborne Corporation v. Weinstein, ___ P.3d ___, 2010 WL 185416 (Colo. App. 2010, pet. granted). The plaintiff, a creditor of a Colorado LLC, sought to hold the managers and members of an LLC liable for an unlawful distribution. The creditor argued that the managers were liable for breach of a common law fiduciary duty owed to the creditor and that members were liable under the Colorado LLC statute, which provides for liability of the members to the LLC in the event the members knowingly receive an impermissible distribution. The plaintiff argued that the court should follow Colorado case law in the corporate area by analogy, but the trial court dismissed the plaintiff's claims because there was no appellate decision extending either the statutory interpretation of the corporate statute or the common law limited fiduciary duty of directors to members or managers of an LLC. The court of appeals reversed the trial court on both issues. With respect to the statutory liability of the members, the court held that case law in the corporate context allowing creditors of the corporation to enforce the liability of directors "to the corporation" for wrongful distributions should also apply to extend standing to creditors of an LLC who sue members under the LLC statutory provision providing for liability of the members "to the [LLC]." The court gave three reasons for relying on the corporate case law: (1) the corporation and LLC statutes are closely related statutory schemes that frequently, as in this case, employ identical language; (2) the legislature directed the courts to apply case law applicable to corporations in determining personal liability in the LLC context (i.e., the LLC statute provides that corporate veil piercing case law is applicable in determining liability of LLC members); and (3) the reasoning for extending standing to creditors is just as applicable to an LLC as it is to a corporation. The defendants argued that the plaintiff did not have standing to sue because the corporate cases extended standing to all creditors as a group, and the plaintiff did not file suit on behalf of all creditors. The court refused to dismiss the case merely because the plaintiff failed to expressly state

that it was the only unpaid creditor. The court expressed no opinion as the standing of the plaintiff if the defendants on remand presented evidence that other unpaid creditors existed.

Moede v. Pochter, No. 07 C 1726, 2009 WL 4043418 (N.D. Ill. Nov. 20, 2009). An LLC member sued the other members for breach of the operating agreement and violation of the Illinois LLC statute in connection with a sale of the LLC's property and demand for distributions. The court found the demand by one of the members that money be distributed to him and certain other members before any moneys were paid out to other members "violative of his obligations" and "profoundly disturbing." Because the member who made the demand was a lawyer, the court found his advancement of his own self-interest in preference to that of a fellow non-manager member particularly unacceptable. The court also found that a claim based on violation of the Illinois LLC statute against the members who demanded and accepted the preferential distribution survived summary judgment. The court recognized that the operating agreement superseded the statutory provisions on voting and distributions, but characterized the claim as one for breach of fiduciary duty by the members receiving the preferential distribution to the other member.

Academic Imaging, LLC v. Soterion Corp., 352 Fed.Appx. 59, 2009 WL 3805807 (6th Cir. 2009). Academic Imaging, LLC ("Academic") and Soterion Corp. ("Soterion") each owned a 50% interest in an LLC. After a fallout, Soterion sought a buy-out under the push-pull provisions of the operating agreement. Soterion sent a letter outlining the proposed terms of the buy-out, the purchase price of which took into account Soterion's "unmatched additional capital contributions." Academic accepted the offer, and a purchase agreement in which Soterion agreed to sell its interest to Academic was subsequently executed. After the buy-out, Academic discovered that Soterion had withdrawn funds from the LLC prior to the closing. Among other claims, the plaintiffs asserted a wrongful distribution claim on the basis that Soterion withdrew funds contrary to the terms of the operating agreement, but the court held that the plaintiffs could not use the letter to support its wrongful distribution claim. The plaintiffs relied upon the letter to create a fact issue as to whether the disputed amount was a loan or a capital contribution, and the plaintiffs could not do so without using the letter to add a term to the unambiguous purchase agreement. The fraud exception to the parol evidence rule was inapplicable because no misrepresentations of fact were alleged in this claim. At most, the alleged understanding that the funds in issue would be re-characterized as a contribution after the buy-out was a false promise that was not written into the purchase agreement and was also barred by the parol evidence rule. Because the plaintiffs pointed to no evidence in the record beyond the letter to support the contention that the repayment of the funds in issue was contrary to the operating agreement, there was no issue of material fact, and summary judgment on the wrongful distribution claim was appropriate.

Pryor v. Tavana, No. HHDCV074028579, 2009 WL 4069567 (Conn. Super. Oct. 30, 2009) (finding weekly payments to LLC members were in nature of ownership draws rather than salary or wages where payments were frequently made to one member's wife and tax records showed payments as ownership draw, and excess paid to one member was thus required to be repaid to equalize distributions during dissolution).

Z. Withdrawal, Expulsion, or Termination of Member

In re Hickory Ridge, LLC, No. 07-1251, 2010 WL 1727968 (Bankr. N.D. W.Va. April 27, 2010). Van Wagner, the managing member of an LLC, filed a Chapter 7 bankruptcy petition for the LLC in 2007. In 2008, Van Wagner filed his own Chapter 11 bankruptcy petition, and the case was converted to a Chapter 7 case in 2009. In 2010, Van Wagner sought to convert the LLC's Chapter 7 case to a Chapter 11 case. The court denied the motion to convert the LLC's case because Van Wagner was dissociated as a member by reason of his own bankruptcy and no longer had any management authority on behalf of the LLC. The court reviewed the provisions of the West Virginia LLC statute (under which bankruptcy of a member is an event

of dissociation unless otherwise provided by the operating agreement) and the operating agreement of the LLC (which did not override the statutory dissociation provision). The operating agreement provided that the bankruptcy of a member dissolved the LLC absent a vote to continue, and the operating agreement characterized the bankrupt member as an “Incapacitated Member.” If the remaining members continued the business of the company, they had the option to redeem the interest of the bankrupt member or allow the member’s successor in interest to continue as an assignee or a substituted member. Thus, Van Wagner was a dissociated member, and his membership interest was property of his bankruptcy estate. The court found that Van Wagner’s membership interest and rights as managing member were controlled by his Chapter 7 trustee and that Van Wagner did not have authority to make management decisions for the LLC at the time of the hearing on the motion to convert. The court commented that Van Wagner’s trustee had not attempted to exercise any management authority over the LLC, and the court stated that it was expressing no opinion as to whether the trustee was entitled to exercise such control. The court also noted that the statement in the LLC’s articles of organization that its operating agreement must be in writing and that no oral agreement would be valid effectively undercut the argument made by Van Wagner on behalf of the LLC that its operating agreement was orally modified to waive the statutory dissociation provisions.

In re Wyatt & McAlister, PLLC, No. 09-04354EE, 2010 WL 1709920 (Bankr. S.D. Miss. April 23, 2010). Wyatt and McAlister formed a Mississippi PLLC to practice law, and McAlister sent a resignation letter to Wyatt after various disputes arose between them. Wyatt argued that McAlister resigned as a member, but McAlister contended she only resigned as an employee of the firm and not as a member. Wyatt filed a Chapter 7 bankruptcy petition on behalf of the LLC, and McAlister sought dismissal of the bankruptcy because Wyatt’s 50% vote did not give him the authority to file the petition. The court reviewed the statutory provisions on dissolution and dissociation and found no evidence that the LLC was dissolved or that McAlister became dissociated. Wyatt argued that McAlister voluntarily withdrew by her resignation letter, but the letter stated that she resigned her employment as an attorney and that she was maintaining her 50% equity interest in the firm until she and Wyatt could reach an agreement on dissolution. The court found that McAlister’s clear intent was to resign as an attorney employed by the firm but to maintain her status as a member. Even if she attempted to withdraw, the court stated that the statute prevented her from doing so because the statute provides that no member has the power to withdraw from an LLC unless the certificate of formation or limited liability company agreement provides that the member has the power to withdraw. The certificate of formation did not so provide, and the LLC had no formal operating agreement. In sum, because McAlister was a member and did not vote in favor of the LLC’s bankruptcy filing, the filing of the petition was not authorized, and the court dismissed the case.

Graham v. Dietze, Nos. A-08-796, A-09-088, 2010 WL 1600562 (Neb. App. April 20, 2010). Dietze and Graham were engaged in an ophthalmology practice through an LLC formed to perform eye surgery and a partnership that rented medical equipment and real estate to the ophthalmology practice. In November of 2003, Graham received a notice of expulsion, the intent of which was to expel him from the ophthalmology practice. He did not receive any formal notices of termination of his interests, and there was no dissolution of the entities. Though there was no expulsion provision in the agreements, he was effectively excluded from the practice and was not involved in the entities after January, 2004. Thus, the trial court concluded that Graham’s interest should be valued as of December 31, 2003, based on equitable principles. The trial court appointed an expert to value Graham’s interests as of that date and entered judgment for Graham in those amounts. On appeal, the court agreed with Dietze that the action was an action at law for breach of contract (and thus reviewable as an action at law) rather than an accounting (an equitable action subject to de novo review) as argued by Graham. In any event, the court concluded that the trial court erred in applying equitable principles contrary to the plain language of the articles of organization and operating agreement of the LLC and the partnership agreement governing the partnership. The court agreed with Graham that he

continued to be entitled to share in the profits of the entities after he was excluded because he retained his interests in them, and the agreements entitled him to profits based on his 50% ownership interests. The agreements did not provide for expulsion or involuntary termination or transfer of a member's or partner's interest, and none of the parties sought judicial dissolution or expulsion. Thus, Graham remained a member and partner and was entitled to his share of post-exclusion profits. The court pointed out that the LLC agreement did not require Graham to perform surgeries in order to share in distributions and further provided that members were not expected to devote full time and attention to the affairs of the LLC, but were only required to devote time and attention "reasonable and appropriate in the member's good faith judgment under prevailing circumstances." Because Graham was prevented from performing surgeries and was not provided financial information, he was unable to devote any time and attention to the LLC. As to the partnership, the partnership agreement had no provision requiring that the partners participate in the day-to-day affairs to share in the profits. The court pointed out that the division and distribution of profits of a Nebraska LLC is governed by the operating agreement and that the relations of partners in a partnership are governed by the partnership agreement. Graham was thus entitled to his 50% of the profits of each entity for the time period after his exclusion from the businesses.

Risk Management Services, L.L.C. v. Moss, 40 So.2d 176 (La. App. 2010). An LLC and two of its members brought an action for declaratory judgment and damages against Moss, the third member, whom the other members had expelled. The plaintiffs sought a declaratory judgment that the expulsion was valid and binding and that Moss was liable for damages for breach of fiduciary duty and unfair trade practices. The plaintiffs prevailed on these claims, and the court of appeals affirmed. With respect to the expulsion of Moss, the court concluded that expulsion was permitted although the operating agreement did not contain an explicit procedure for expulsion. The dissolution provisions of the operating agreement set forth several causes of dissolution, including the consent of all members and a list of various events, including expulsion, that terminate the continued membership of a member unless all members consent in writing to continue the LLC after such an event. The court stated that the agreement provided for the act of expulsion based on this provision, and the court rejected Moss's argument that the operating agreement required unanimous consent of the members to dissolve the LLC on expulsion of a member. Further, the court found that equity considerations mentioned in the LLC statute would require that a provision for expulsion be included in this type of agreement. Thus, the court concluded that Moss was properly expelled by the other members.

Chiu v. Chiu, 896 N.Y.S.2d 131 (App. Div. 2d Dept. 2010) (affirming dismissal of cause of action for expulsion of LLC member because default provisions of New York LLC law applied in absence of provision in articles of organization or operating agreement on expulsion, and no statutory provision authorizes court to impose expulsion remedy).

Henderson v. Henderson Investment Properties, L.L.C., 227 P.3d 568 (Idaho 2010) (interpreting attorney's fees provision of LLC operating agreement and concluding award of attorney's fees was not supported by operating agreement in members' successful defense of declaratory judgment action seeking declaration that members were dissociated because claim was attempt to enforce statutory right and did not involve any alleged violation of operating agreement).

Martinez v. American Steelway Industries, LLC, 20 So.3d 526 (La. App. 2009) (holding withdrawn member of LLC was entitled to summary judgment on fair value of his interest based on uncontradicted evidence of his capital contributions and other member's admission that LLC had no assets other than withdrawn member's capital contributions).

Bluewater Logistics, LLC v. Williford, __ So.3d __, 2009 WL 4801017 (Miss. App. 2009). Four individuals formed an LLC of which they were equal members and for which they all worked as employees. The LLC agreement contained a provision permitting the LLC to redeem any member's interest upon a vote of 75% of the members. Three of the members met and voted to oust the fourth member, Williford, and Williford filed a complaint for preliminary and permanent injunctive relief preventing his ouster. Temporary injunctive relief was granted. Prior to trial, the LLC and the remaining members filed a motion to dissolve the temporary injunction on the basis that the LLC no longer wished to buy Williford's interest and that the action was based on Williford's desire to remain a member. The LLC also filed an amended answer asserting that the members met and desired to fire Williford and purchase his interest but that the decision to purchase Williford's interest had been rescinded. The matter proceeded to trial at which the LLC's attorney argued that the only relief Williford requested was to remain a member so that there was no issue ripe for trial. Williford's attorney argued that there had been no formal written rescission of the decision to oust Williford. The remaining members testified that Williford would be allowed to remain a member but was still terminated as an employee. The chancery court found that Williford was entitled to receive 25% of the value of the LLC. The LLC and the remaining members appealed, and the court of appeals concluded that the LLC's motion to dissolve the injunction clearly rescinded Williford's ouster and confirmed Williford's firing as an employee. Williford argued that there was no separation of his status as employee and member and that he could not be terminated as an employee and retained as a member. The court disagreed based on evidence that the status as employee and member were separate, including evidence that one of the other members had stopped working for the LLC at the time of trial but retained her status as a member. Thus, the LLC was able to terminate Williford as an employee while allowing him to retain his status as a member. The court rejected the argument that the chancery court's relief was authorized by provisions of the Mississippi LLC statute providing for appraisal and payment of the fair market value of a member's interest because such provisions only applied in the case of a merger, disposition of assets leaving the LLC without a significant business activity, or other action to the extent provided by the certificate of formation or LLC agreement. Because the company agreement provided for appraisal and payment of fair market value of a member's interest only in the event of an ouster, and the ouster was rescinded, the provision did not apply.

Mitchell Company, Inc. v. Campus, Civil Action No. 08-0342-KD-C, 2009 WL 3527744 (S.D. Ala. Oct. 23, 2009) (interpreting withdrawal and buyout provisions of LLC agreements, finding LLCs were bound by valuation reached by appraiser chosen by LLCs pursuant to terms of agreement after LLC and withdrawn member were unable to agree on fair value, and granting withdrawn member specific performance of agreement).

JD Factors, LLC v. Freightco, LLC, Cause No. 1:09-CV-95, 2009 WL 3401965 (N.D. Ind. Oct. 16, 2009). The defendant LLC sought to amend its answer in a collection suit to assert that a member's bankruptcy resulted in his dissociation and termination as vice-president and that his remaining rights as a member or former member now belonged to his bankruptcy trustee. The plaintiff argued that the defendant should be denied leave to amend on the basis that the proposed amendment was contrary to law. The plaintiff argued that the amended allegations violated the automatic stay provisions and were premised on an ipso facto clause prohibited by Section 365(e)(1). The court rejected the plaintiff's arguments, noting that the bankrupt member's services as vice-president may well be more akin to a personal services contract than an executory contract that is freely assignable to the trustee. The court stated that the plaintiff did not cite any authority for its assertion that service as an officer of a company rises to the level of "property" of the bankruptcy estate. The court found it reasonable to infer that the member's termination as vice-president did not violate the automatic stay. Additionally, the court stated that the ipso facto clause in the operating agreement was not necessarily unenforceable given that the Indiana LLC statute provides that no person can become a member without the consent of all members unless otherwise provided in the operating agreement.

In any event, the plaintiff did not challenge the statement in the proposed amendment that the bankrupt member's remaining rights as a member inure to the bankruptcy trustee. Thus, the court concluded that the proposed amendment was not "contrary to law" and that leave to amend should be granted.

Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Investors, L.L.C., C.A. No. 4353-VCP, 2009 WL 3335332 (Del. Ch. Oct. 15, 2009). The defendants sought a stay of this proceeding in which the plaintiff, Choice Hotels International, Inc. ("Choice"), sought a determination, under Section 18-110 of the Delaware LLC statute, of the rightful manager of a single purpose Delaware LLC owning property in Ohio. Choice asserted that it validly removed Klein from his position as the sole manager of the LLC and that Choice was the manager of the LLC. In two separate suits filed in Maryland, Choice sued the LLC and Klein, and the LLC and Klein sued Choice. These suits related to loans from Choice to Klein pursuant to which Klein pledged his interest in the LLC as security for the loans. Klein allegedly defaulted on the loans, and Choice purported to foreclose on Klein's membership interest in the LLC, remove Klein as the manager of the LLC, and appoint itself as the replacement manager. Choice contended that the statutory policy behind a summary action under Section 18-110 of the Delaware LLC statute superseded application of the conventional *McWane* analysis giving preference to a first-filed action and that Section 18-110 required the court to give precedence to the summary Delaware action. Section 18-110 provides that the Court of Chancery "may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and . . . may determine the person or persons entitled to serve as managers . . ." The court noted that the purpose of Section 18-110 is "to expeditiously resolve uncertainty" within an LLC. Thus, the Court of Chancery will ordinarily deny a motion to stay a Section 18-110 action. However, citing Delaware precedent, the court acknowledged that when faced with a request to stay a summary action, the court balances the *McWane* policies of comity and promotion of the efficient administration of justice against the policies underlying the summary nature of the Delaware action. Under the *McWane* doctrine, an action will be stayed if the following three questions are answered in the affirmative: (1) whether there is a prior action pending elsewhere related to the action in Delaware; (2) whether such other suit involves the same parties and issues; and (3) whether the foreign court is capable of doing prompt and complete justice. The court answered each of these questions in the affirmative and further found that there was a significant risk that proceeding with the Delaware action would unnecessarily waste time, effort, and expense or result in inconsistent and conflicting rulings. The court thus held that the *McWane* policies of comity and the orderly and efficient administration of justice supported granting a stay of the Delaware action. The court next considered whether the balance of potential harms weighed in favor of staying or not staying the action. The court noted that the LLC had just one asset, and that the LLC could be expected to maintain its business as usual during the Maryland action. Thus, the court concluded that, under the circumstances, the first-filed rule applied and principles of comity and promoting the efficient administration of justice required that the Delaware action be stayed.

Julian v. Julian, Civil Action No. 4137-VCP, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009). Three brothers owned and operated several LLCs together, and the plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case involved two different versions of Section 18-603 of the Delaware Limited Liability Company Act. For LLC agreements entered into before July 31, 1996, the statute permitted a member to resign with six months' notice. For LLC agreements entered into after July 31, 1996, the statute prohibits resignation before dissolution and winding up unless the LLC agreement states otherwise. Gene sought an award of fair value for his interest in the four pre-1996 LLCs and an award of fair value for Gene's interest in the three post-1996 LLCs, but Gene ultimately conceded that the claims for fair value of the interests in the post-1996 LLCs should be pursued in arbitration. The defendants moved to dismiss the fair value claims against one LLC on the basis that the claims were not ripe and against the remaining three LLCs on the basis that they were subject to arbitration.

With respect to ripeness, the defendants relied upon the fact that Gene filed his fair value claim only two days after his resignation from the LLC. The Delaware LLC statute provides an LLC a “reasonable” time after resignation of a member to determine and distribute the resigning member’s LLC interest. The court denied the defendants’ motion to dismiss for lack of ripeness because it was reasonable to infer that the members would not have agreed on the value of the business regardless of how long the plaintiff waited to file suit in view of the fact that the family members were engaged in litigation regarding valuation and other business issues. Also, the court noted that the timing of the commencement of the suit was not critical when the valuation was based on facts as they existed at the time of the member’s resignation. Finally, the court noted that dismissing the claim would be inefficient because Gene could simply re-file the action the next day. With respect to the arbitration issue, the court ultimately granted the defendants’ motion to dismiss the fair value claims against the remaining three pre-1996 LLCs because arbitration was appropriate.

AA. Dissolution and Winding Up

Resort Point Custom Homes, LLC v. Tait, C.A. No. S08C-04-020-ESB, 2010 WL 1443274 (Del. Super. April 7, 2010). Resort Point Builders, LLC, a Delaware LLC in the construction business, dissolved when disputes among its members developed. The members of the dissolved LLC parted ways by forming two new LLCs and dividing the ongoing projects of the dissolved LLC between the two new LLCs. A certificate of cancellation was filed for the dissolved LLC. Among the projects divided between the two new LLCs were projects involving plumbing services provided by Tait. One of the new LLCs sought to collect amounts owed by Tait on two projects assigned to the new LLC, and Tait denied that he owed any amounts to the new LLC and sought to offset an amount owed to him on another project by the dissolved LLC. The court discussed the dissolution provisions of the Delaware LLC statute, in particular the requirement that a dissolved LLC “pay or make reasonable provision to pay all claims and obligations” and the requirement that the assets be distributed to creditors and members. The court noted that the newly formed LLCs were neither creditors nor members and that the only provision that was made for Tait’s claim was a letter telling him to send his bills to the new LLC with which he had no contractual relationship. The court stated that this alone did not seem an appropriate way to handle the claims of Tait and other creditors, but the court concluded that it could not rule as a matter of law that the dissolved LLC did not comply with the statutory dissolution requirements, and the matter would have to be determined at trial. The court stated that the new LLC would have the burden of proving that it acquired the contractual rights to the projects on which it claimed amounts from Tait in compliance with the Delaware LLC statute.

Protective Life Insurance Company v. B & K Enterprizes LLC, No. 08-C-312, 2010 WL 1368660 (E.D. Wis. March 31, 2010) (discussing authority of LLC manager in winding up and concluding neither former manager, who was key man insured under policy owned by LLC, nor new manager had authority to transfer ownership of policy to insured without consideration for his personal purposes, and attempt to do so was void).

Valley Forge Insurance Co. v. APL Co. Pte. Ltd., No. CV 09-09323 MMM (VBKx), 2010 WL 960341 (C.D. Cal. March 16, 2010) (noting that, consistent with California law that provides for continued existence of dissolved corporation, Illinois LLC continues to exist after dissolution for purposes of winding up its affairs and may prosecute and defend actions and proceedings).

Simko v. Simko, No. CV084023605S, 2010 WL 1508287 (Conn. Super. March 11, 2010). The plaintiff filed a petition for judicial dissolution of an LLC law firm, alleging that he was a member of the LLC and that substantial differences with the other member made it not reasonably practicable to carry on the business of the firm. The other member and the LLC argued that the plaintiff lacked standing because

he had dissociated from the firm by forming a new LLC with another attorney. The court held that the defendants' exhibits, consisting of correspondence from the plaintiff to the firm and the firm's liability insurer regarding his intent to form a new firm and departure from the firm, did not reveal any written notice given to the other member at least 30 days prior to the date on which the plaintiff filed the judicial dissolution action. Because the LLC statute (which governed because the law firm had no formal operating agreement) defines an event of dissociation by voluntary act of a member as taking place by giving thirty days' notice to the other members, and no such notice appeared on the record, the defendants did not establish that the plaintiff had dissociated from the LLC and lacked standing when he filed the complaint. Additionally, the court stated that the issue of the plaintiff's dissociation would be an issue of fact even were more evidence of dissociation placed before the court.

Lee v. Yum, No. 1 CA-CV 08-0575, 2010 WL 989907 (Ariz. App. March 8, 2010) (explaining that two remaining members were entitled to dissolve LLC upon death of third member, but estate of deceased member had rights of assignee and was entitled to receive distributions from LLC during continuation of business and upon completion of winding up; therefore, remaining members acted in violation of implied covenant of good faith and fair dealing by making distributions to themselves while making no distribution to deceased member's estate and transferring assets of dissolved LLC to new LLC formed by remaining members without valuation or determination of estate's interest in dissolved LLC).

Thor Merritt Square, LLC v. Bayview Malls LLC, C.A. No. 4480-VCP, 2010 WL 972776 (Del. Ch. March 5, 2010). The plaintiffs purchased a shopping center from two Delaware LLCs pursuant to a contract that made the LLCs responsible for all costs incurred in connection with the work required to bring a JC Penney store in the shopping center into compliance with the fire code. In connection with this obligation, the LLCs deposited approximately \$250,000 into an escrow account pursuant to an escrow agreement. The escrow agreement provided that the LLCs were obligated to complete and pay for the work, whether or not the escrowed money was sufficient to pay for it. Almost immediately after purchasing the shopping center, the LLCs distributed virtually all of their assets to their members. The LLCs, however, failed to perform the remedial work required under their contract with the plaintiffs. When the LLCs failed to respond to the plaintiffs' demands to perform the work, the plaintiffs arranged to have the work completed, which cost over \$1 million. The plaintiffs notified the LLCs of the completion and cost of the work. Shortly before such notification, however, the defendants had filed certificates of cancellation terminating the LLCs' legal existence. After learning of the filing of the certificates of cancellation, the plaintiffs filed this action seeking nullification of the LLCs' certificates of cancellation on the basis that the defendants had failed to make reasonable provision for the unmaturing contract claims of the LLCs prior to the filing as required by the Delaware LLC statute. The defendants moved to dismiss the action, contending that the escrow agreement constituted reasonable provision for the LLCs' unmaturing contract claims and that the LLC statute cannot be read to require an entity to make reasonable provision for claims that it could not anticipate until after its certificate of cancellation was filed. The plaintiffs argued that the defendants were liable for all costs of the remedial work, that the cost of the work exceeded the escrow, and that the defendants knew before the filing of the certificates of cancellation that the cost of the work would exceed the escrow. These allegations were sufficient to withstand a motion to dismiss. The defendants also argued that it was pointless to nullify the filing of the LLCs' certificates of cancellation because any claims that the plaintiffs could make against the LLCs would be time-barred. The plaintiffs argued that their claims would not be time-barred, and the court held that the defendants had not shown otherwise.

Cline v. Grelock, C.A. No. 4046-VCN, 2010 WL 761142 (Del. Ch. March 2, 2010). Two friends, Cline and Grelock, co-owned a short-lived Delaware LLC that operated a towing and recovery service. The business operated unsuccessfully, and the relationship between Grelock and Cline deteriorated. After about

seven months, Grelock unilaterally dissolved the LLC, and he and his wife formed a new LLC that provided similar services. The new LLC used a vehicle purchased by the original LLC, a trade name and logo used by the original LLC, and a customer list of the original LLC consisting of three customers. Cline sued for damages and an ownership interest in the new LLC, and Grelock sued to enforce the capital contribution Cline allegedly promised to make to the original LLC. The parties disputed their ownership percentages in the original LLC, with Cline claiming he owned a 50% interest. The tax records for the original LLC reflected equal ownership, but Grelock claimed that Cline had never made the required \$25,000 capital contribution. Cline did not dispute the fact that he never made his capital contribution, but he claimed that he never signed the LLC agreement that required it. The only contribution that Cline made was as a co-guarantor of the loan for the truck that the original LLC purchased. The court found that it was unreasonable for Cline to claim he was a 50% owner when he did not make a capital contribution. The court acknowledged that Grelock acted improperly and breached his fiduciary duty in connection with his unilateral dissolution of the original LLC and use of its assets in the new LLC, but Cline was unable to prove any damages. Cline argued alternatively that he was entitled to an ownership interest in the new LLC as a wrongfully excluded co-owner of the dissolved LLC. After agreeing that a former partner (or member of an LLC) may be held accountable for profits earned using partnership assets, the court determined that Cline failed to show what his interest should be or how the court should calculate it. Moreover, the court was not persuaded that a person who failed to make a capital contribution should be allowed to claim an interest in a successor company. The court concluded that Cline's failure to make a capital contribution precluded him from asserting an equity interest or, alternatively, that the amount of capital which Cline reasonably should have contributed far exceeded any value fairly attributable to the original LLC, including its assets now being used for the new LLC's benefit. Thus, although the court did not condone Grelock's conduct, Cline could not recover because he did not prove that he was harmed (or, if harmed, what his recovery should be). Grelock's wrongful conduct, however, precluded Grelock from recovering on his claim to compel Cline to pay his capital contribution for the benefit of the original LLC. Finally, the court ordered Grelock and his wife to exercise all good faith efforts to obtain Cline's release from the guaranty of the loan on the truck purchased by the original LLC and now being used by the new LLC. Furthermore, the court said that if the Grelocks were unable to secure Cline's release, they must individually indemnify and hold Cline harmless from any claim arising out of the guaranty. The court assessed the costs of the action against Grelock because of his breach of fiduciary duty.

United States v. Kerr McGee Oil & Gas Corporation, Civil Action No. 04-cv-01224-MSK-CBS, 2010 WL 582393 (D. Colo. Feb. 17, 2010) (discussing authority of member of dissolved LLC law firm to pursue attorney's lien on behalf of dissolved firm against client who continued to be represented by other member of dissolved firm and concluding that notice of attorney's lien was not so legally deficient as to warrant sanctions in absence of dispositive authority construing relevant provisions of LLC statute and that arguments relative to interpretation of LLC statute would be best decided through dispositive motions in state litigation addressing members' dispute over agreed distribution of cases of dissolved law firm rather than under guise of Rule 11 in action in which fees were allegedly earned).

Lopes v. Vieira, 688 F.Supp.2d 1050 (E.D. Cal. 2010) (examining management provisions of LLC operating agreement and California LLC statute and concluding defunct LLC, though it continued to exist as entity under California law until dissolved in accordance with law, could not assert attorney-client privilege because it had no officer or manager to assert or waive privilege).

A.B. Medical Services, PLLC v. Travelers Indemnity Company, 895 N.Y.S.2d 759 (N.Y. Sup. 2009) (holding sole member of professional LLC may wind up affairs of LLC although member was disqualified).

from practicing medicine due to suspension of member's license, and instant action to recover assigned benefits for services provided to LLC's assignor was permitted as part of winding up process).

Glen Seed Ltd. v. Vannet, No. 09-cv-309-slc, 2009 WL 3712663 (W.D. Wis. Nov. 4, 2009) (recognizing that Wisconsin law provides that dissolved LLC continues until winding up is completed and concluding that licensing contracts with LLC whose affairs had not been wound up still existed notwithstanding that articles of dissolution had been filed for LLC).

Naples v. Olin, 887 N.Y.S.2d 378 (App. Div. 3rd Dept. 2009) (holding that respondent member's filing of articles of dissolution did not prevent petitioner member's continued performance under operating agreement and entitle petitioner member to additional compensation where petitioner member commenced proceeding to wind up affairs of LLC and thus implicitly conceded that dissolution had occurred).

BB. Judicial or Administrative Dissolution

J & J Sports Productions, Inc. v. Royster, No. RWT 10cv569, 2010 WL 1741354 (D. Md. April 28, 2010) (holding Maryland LLC statute authorizes forfeited LLC to be sued; finding no governing case law squarely addressing how to serve LLC that has been forfeited, noting varying approaches by courts addressing service of process on forfeited corporations, and concluding delivery of summons and complaint to registered agent of forfeited LLC less than one year after forfeiture is effective service on LLC).

In re Cline, PCM Interest Holding, LLC v. Donovan, 901 N.Y.S.2d 2 (App. Div. 1st Dept. 2010) (holding co-member of LLC was entitled to file answer to judicial dissolution petition based on disputed operating agreement and factual issue raised as to whether individual or entity to whom individual had assigned his membership interest had standing to maintain proceeding).

Henderson v. Henderson Investment Properties, L.L.C., 227 P.3d 568 (Idaho 2010) (interpreting attorney's fees provision of LLC operating agreement and concluding (i) members' action for judicial dissolution was not action to enforce provisions of agreement and thus did not support award of attorney's fees, and (ii) award of attorney's fees was not supported by operating agreement in members' successful defense of declaratory judgment action seeking declaration that members were dissociated because claim was attempt to enforce statutory right and did not involve any alleged violation of operating agreement).

Simko v. Simko, No. CV084023605S, 2010 WL 1508287 (Conn. Super. March 11, 2010). The plaintiff filed a petition for judicial dissolution of an LLC law firm, alleging that he was a member of the LLC and that substantial differences with the other member made it not reasonably practicable to carry on the business of the firm. The other member and the LLC argued that the plaintiff lacked standing because he had dissociated from the firm by forming a new LLC with another attorney. The court held that the defendants' exhibits, consisting of correspondence from the plaintiff to the firm and the firm's liability insurer regarding his intent to form a new firm and departure from the firm, did not reveal any written notice given to the other member at least 30 days prior to the date on which the plaintiff filed the judicial dissolution action. Because the LLC statute (which governed because the law firm had no formal operating agreement) defines an event of dissociation by voluntary act of a member as taking place by giving thirty days' notice to the other members, and no such notice appeared on the record, the defendants did not establish that the plaintiff had dissociated from the LLC and lacked standing when he filed the complaint. Additionally, the court stated that the issue of the plaintiff's dissociation would be an issue of fact even were more evidence of dissociation placed before the court.

Cammarota v. Cammarota, No. CV065003413, 2010 WL 1225088 (Conn. Super. Feb. 25, 2010) (concluding that defendant, who was sole and managing member of LLC that operated bar, had authority to sell LLC's entire bar business, but plaintiff, member's brother, who initially was sole beneficial owner of bar but then sold 50% interest in bar to defendant, was entitled to half of proceeds and could pursue unjust enrichment claim; dissolution of LLC as it related to plaintiff, who was owner of 50% interest in bar but was not named principal or member, was fruitless).

The Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Companies, LLC, C.A. No. 4916-VCN, 2010 WL 718628 (Del. Ch. Feb. 22, 2010). An LLC member sought judicial dissolution of a Delaware LLC on equitable grounds, and the court denied such relief, distinguishing *Haley v. Talcott* and *In re Arrow Investment Advisors, LLC*. The court distinguished this case from *Haley* because the court in *Haley* found that the members of the LLC had envisioned co-equal management and, under the circumstances of that case, one of the members had become unable to influence the management of the LLC. In this case, the intention was that one of the members would have 100% voting control over the LLC, and the court did not find it compelling that another member of the LLC disagreed with how that member was managing the LLC. The court acknowledged that the *Arrow Investment* opinion suggested that, in unusual circumstances, the court's equitable powers may be invoked in the absence of deadlock and despite a broadly defined purpose. The court pointed out, however, that the court in *Arrow Investment* held that, where judicial dissolution is requested because of alleged breaches of fiduciary duty, the petition fails to state a claim unless such breaches have been proven in a plenary action and there exists some basis for a dissolution notwithstanding whatever relief was granted in that plenary action. According to the court, whether the manager breached any fiduciary duties owed to the member in this case had little effect on whether the LLC was carrying out the broad business purposes for which it had been organized. In addition, the court concluded that the member seeking dissolution had not alleged the type of absolute frustration or futility required for the court to order judicial dissolution of the LLC in the absence of unachievable business purpose and/or deadlock. The court stated that the petition did not suggest that the member's grievances (most of which appeared to the court to be remediable through breach of fiduciary duty claims) could not be resolved through less extreme judicial remedies than judicial dissolution of the LLC.

In the Matter of 1545 Ocean Avenue, LLC, 893 N.Y.S.2d 590 (App. Div. 2d Dept. 2010). Two LLCs ("Crown Royal" and "Ocean Suffolk") formed an LLC to purchase and develop some property. Crown Royal and Ocean Suffolk each contributed 50% of the capital, and the operating agreement provided for two managers, Van Houten (a member of Ocean Suffolk) and King (a member of Crown Royal). There were some disagreements between King and Van Houten, and eventually King announced that he wanted to withdraw his investment. There were discussions about a possible buy-out by Ocean Suffolk of Crown Royal's interest and vice versa, but no agreement was reached. Van Houten viewed King as having resigned, and Van Houten continued work on the project. Crown Royal sought judicial dissolution of the LLC on the sole basis of deadlock between the managers. Van Houten and Ocean Suffolk argued that business was being done in accordance with the operating agreement and that the only significant dissension stemmed from the inability of the parties to agree on a buy-out. Crown Royal did not dispute that the project was near completion when the proceeding was commenced. The court analyzed whether the circumstances met the sole standard for judicial dissolution specified in the LLC statute, i.e., that is was "not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." The court stressed that the standard should not be confused with the standard for judicial dissolution of corporations or partnerships and stated that the standard for LLCs was unresolved under New York law. The court approached the matter initially as a contract-based analysis and noted that the operating agreement did not contain any specific provisions relating to dissolution. Because the operating agreement did not require regular meetings, but only required meetings to be held at such times as the managers from time to time

determined, the court rejected Crown Royal's argument that the failure of the parties to hold meetings was a basis for dissolution. The record showed that the managers communicated regularly without the formality of meetings. In analyzing the argument that the managers' disagreements resulted in a deadlock, the court noted that deadlock itself was not a basis for judicial dissolution. The court found it necessary to consider the managers' disagreement in light of the operating agreement and the continued ability of the LLC to function. Because the operating agreement of the LLC in this case permitted any one manager to take action permitted under the agreement, thus allowing each manager to take unilateral action in furtherance of the business, the agreement avoided the possibility of a deadlock. The court noted case law in other jurisdictions addressing the "reasonably practicable" standard and ultimately concluded that a petitioning member seeking judicial dissolution under the New York LLC statute must establish, in the context of the terms of the operating agreement or articles of organization, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible. The court concluded that judicial dissolution was inappropriate in this case. The dispute between the managers was not shown to prevent the LLC from achieving its purpose. The project was almost complete and, despite complaints made by Crown Royal, the record indicated that it ratified the efforts of Van Houten. A claim relating to the hiring of a construction company of Van Houten's to perform work on the project was not deemed by the court to be a basis for judicial dissolution. The court stated that a derivative claim was available to Crown Royal if it was truly aggrieved by Van Houten's actions as manager, but such remedy was not a basis for dissolution unless the wrongful acts giving rise to the derivative claim were contrary to the contemplated functioning and purpose of the LLC.

Aracaju, Inc. v. True North, Inc., No. 1 CA-CV 09-0133, 2010 WL 98670 (Ariz. App. Jan. 12, 2010). A father and son jointly owned several LLCs, and the son filed suit seeking a receiver to protect and preserve the LLC's assets and a judicial dissolution. The father agreed that the court should appoint a receiver to preserve and protect the LLC's assets and asserted various counterclaims. The trial court then entered an order amending and continuing the receivership and authorizing the receiver to wind up the business of the LLCs. The court of appeals agreed with the father that the trial court improperly expanded the receiver's authority without a trial or evidentiary hearing because the LLC statute does not allow a court ordered liquidation prior to entry of a judgment of dissolution. The court held that the more specific provisions of the LLC statute regarding the court's authority to wind up and liquidate the assets and business of an LLC control over the more general receivership provisions, and the trial court thus did not have authority to authorize the receiver to wind up and liquidate the LLCs prior to issuance of a judgment of dissolution. Furthermore, assuming the court could have properly appointed a liquidating receiver prior to resolution of the claim for dissolution, the court concluded that the trial court erred by granting the motion to modify the receivership order without an evidentiary hearing because there were conflicting affidavits regarding the grounds for such relief.

OLP, L.L.C. v. Burningham, 225 P.3d 177 (Utah 2009). The Utah Supreme Court concluded that the Utah LLC statute does not displace common law claims or remedies available to an LLC member and affirmed a judgment in favor of an LLC member against his fellow member for damages based on repudiation of their agreement to equally own and operate an LLC. Wilson and Burningham formed an LLC to which they contributed equal amounts of cash, and they orally agreed to share equal control and ownership. After disputes between the members developed and the parties were unable to agree whether amounts provided by a company owned by Burningham were loans or capital contributions, Wilson sued Burningham seeking legal and equitable remedies for breach of fiduciary duty, repudiation, breach of contract, and other contract-related claims. Burningham asserted a counterclaim for judicial dissolution and argued that the damages should be determined in an accounting and should be limited to the balance of each member's capital account as provided by the default ownership provisions of the LLC statute. The trial court

allowed Wilson's claims to be tried to a jury, and the jury awarded damages based on a finding that Burningham repudiated the LLC agreement. Burningham argued that the trial court erred by not applying the LLC statute to the computation of damages, but the supreme court held that the LLC statute did not supersede common law tort and contract claims and that members of an LLC can choose either to pursue common law claims or to dissolve the LLC under the statute and receive their interest in the LLC after an accounting and winding up. The court rejected the argument that the "exclusivity rule" should apply to disputes among members in the LLC context as it has historically applied to the remedy of an accounting in the partnership context. The court held that a member may sue another member for repudiating the LLC and that such an action is a separate claim for damages that does not require formal dissolution and winding up. The court explained that common law repudiation is applicable in an LLC contract dispute when one member refuses to perform the agreement and thereby abandons the purpose of the contract. A party need not disavow the LLC's existence to repudiate the contract. Based on the jury's finding that Burningham repudiated the contract to form and operate the LLC as equal members, the court concluded that Burningham abandoned his ability to seek resolution of the dispute according to the LLC's governing documents or the default provisions of the LLC statute. With a finding of repudiation, the court said there was no LLC and no requirement for dissolution and winding up. There was also no need for an accounting because the jury's factual determinations in the determining the legal issues were binding.

Sealy v. Clifton, LLC, 890 N.Y.S.2d 598 (App. Div. 2d Dept. 2009) (holding surviving member of two-member LLC lacked standing to bring action for partition of LLC property in member's individual capacity and action for winding up does not support notice of pendency because member has no interest in specific LLC property; motion for leave to add claims for dissolution and accounting were properly granted where nothing in record indicated that LLC had been wound up).

Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, No. 07 CVS 20852 (N.C. Super. Nov. 13, 2009) (examining plaintiff's claim for judicial dissolution and concluded that complaint alleged facts suggesting that dissolution may be reasonably necessary for protection of rights and interests of minority and that assets of LLC were being misapplied or wasted).

Lola Cars International Limited v. Krohn Racing, LLC, CA Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681 (Del. Ch. Nov. 17, 2009). Lola Cars International, Ltd. ("Lola") and Krohn Racing, LLC ("Krohn") formed a Delaware LLC and agreed to equal representation on the governing board although Lola owned a 51% interest in the LLC and Krohn held a 49% interest. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the LLC's CEO. Lola brought two suits against Krohn and Hazell, and the defendants moved to dismiss both of Lola's complaints. Lola's first complaint alleged that Krohn breached the LLC operating agreement, Hazell breached his fiduciary duties of loyalty and care, and Krohn aided and abetted Hazell's disloyalty. Lola sought the following relief: (1) dissolution of the LLC and appointment of a liquidating receiver; (2) an injunction to prohibit the LLC from taking action outside the ordinary course of business; and (3) damages against Krohn and Hazell. Krohn argued that the LLC should not be dissolved under the Delaware LLC statute because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business" of the LLC. Krohn interpreted the reasonable practicability standard to mean that the business had been abandoned or its purpose was not being pursued. The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*, under which the court considers the following factors: (1) whether the members' vote is deadlocked at the board level; (2) whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition. The court found all three *Fisk* factors were at issue in this case. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the operating agreement contained

a buy-out provision in event of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the LLC could continue in light of its financial condition because Lola had been providing significant additional capital to keep the LLC running. Additionally, Lola's claims of Hazell's mismanagement and disloyalty, together with the LLC's poor performance and Hazell's apparent entrenchment, supported the reasonable conclusion that dissolution may be appropriate. Krohn also argued that judicial dissolution was inappropriate because the operating agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. Assuming that judicial dissolution as provided by statute can be contractually eliminated, the court concluded that the self-termination options and lack of explicit provision for judicial dissolution in the operating agreement did not render statutory judicial dissolution unavailable. The court thus denied the defendants' motion to dismiss the claim for judicial dissolution.

Pryor v. Tavana, No. HHDCV074028579, 2009 WL 4069567 (Conn. Super. Oct. 30, 2009) (finding grounds for judicial dissolution of LLC because it had essentially ceased operations).

Naples v. Olin, 887 N.Y.S.2d 378 (App. Div. 3rd Dept. 2009) (holding that respondent member's filing of articles of dissolution did not prevent petitioner member's continued performance under operating agreement and entitle petitioner member to additional compensation where petitioner member commenced proceeding to wind up affairs of LLC and thus implicitly conceded that dissolution had occurred).

Saunders v. Firtel, 978 A.2d 487 (Conn. 2009). The court held that the trial court's order of judicial dissolution of an LLC based on an implied finding that it was not reasonably practicable for the two members to carry on the business was well-supported by the evidence where the two members each owned 50% of the LLC, the defendant member unilaterally lowered the rent payments for the property owned by the LLC, the defendant member arranged a loan from the LLC to a company controlled by the defendant member, the defendant unilaterally authorized certain expenditures, the defendant did not equally compensate the plaintiff for distributions from the LLC, and the members had ceased to have any business or personal relationship. The trial court also found that the members made accusations against each other of theft, breach of fiduciary duty, larceny, and other improper and criminal conduct. The court stated that such ill will was not conducive to a working business relationship and further supported the conclusion that it was not reasonably practicable for the members to carry on the business of the LLC.

CC. Accounting

Prehall v. Weigel, 221 P.3d 157 (Or. App. 2009). The plaintiff formed a real estate development LLC with the defendants and entered an operating agreement providing for their ownership percentages and profit sharing in accordance with those percentages. The parties executed a second operating agreement providing for different percentages based on the defendants' representation that the bank required the defendants to have a greater ownership percentage. The plaintiffs claimed that the defendants orally agreed that the original percentages would be reinstated after the loan had been paid. Ultimately, the parties executed a third operating agreement that provided for the same ownership percentages as the second operating agreement, but a different formula for the division of profits. The plaintiffs sued the defendants asserting claims for breach of the oral agreement to reinstate their original ownership and profit sharing percentages, breach of fiduciary duty, fraud, and an accounting. The plaintiffs sought damages in an amount to be determined in an accounting and based on the provisions of the first operating agreement. The defendants asserted various affirmative defenses. The trial court denied the plaintiffs a jury trial on the basis that the relief requested was equitable because it in essence sought rescission of the second and third operating agreements and an accounting. The court of appeals analyzed the plaintiff's claims and concluded

that they were legal and that the trial court erred in denying plaintiff a jury trial. The court did not view the requested accounting as the type that sounds in equity, and the court rejected the argument that the plaintiff's claims required rescission of the second and third operating agreements. The court concluded that the plaintiff's requested remedy of damages on each of his claims provided adequate relief at law and made it unnecessary for the court to invoke its equity jurisdiction.

DD. Professional LLCs

In the Matter of Cramer, 225 P.3d 881 (Wash. 2010) (adopting Bar Disciplinary Board's recommendation of disbarment of attorney who dissolved PLLC and formed new professional services corporation after notifying Department of Revenue that he was ceasing practice upon revocation of PLLC's registration for failure to pay taxes).

United States v. Kerr McGee Oil & Gas Corporation, Civil Action No. 04-cv-01224-MSK-CBS, 2010 WL 582393 (D. Colo. Feb. 17, 2010) (discussing authority of member of dissolved LLC law firm to pursue attorney's lien on behalf of dissolved firm against client who continued to be represented by other member of dissolved firm and concluding that notice of attorney's lien was not so legally deficient as to warrant sanctions in absence of dispositive authority construing relevant provisions of LLC statute and that arguments relative to interpretation of LLC statute would be best decided through dispositive motions in state litigation addressing members' dispute over agreed distribution of cases of dissolved law firm rather than under guise of Rule 11 in action in which fees were allegedly earned).

In re Law Offices of James Sokolove, LLC, 986 A.2d 997 (R.I. 2010). A national law firm with a complex referral system sought to register and practice law as a Rhode Island LLC. Several law firms challenged the application on the basis that the LLC's proposed arrangement would involve fee-splitting based on client referrals in violation of the Rhode Island Rules of Professional Conduct. The court approved the application and granted the application of the LLC to practice law as a limited liability entity.

A.B. Medical Services, PLLC v. Travelers Indemnity Company, 895 N.Y.S.2d 759 (N.Y. Sup. 2009) (holding sole member of professional LLC may wind up affairs of LLC although member was disqualified from practicing medicine due to suspension of member's license, and instant action to recover assigned benefits for services provided to LLC's assignor was permitted as part of winding up process).

EE. Foreign LLC – Failure to Qualify to Do Business

Williamsburg Developers, LLC v. J. Jill, LLC, No. CV-H 7971, 2010 WL 972781 (Conn. Super. March 8, 2010) (noting absence of case law addressing whether foreign LLC that has commenced action before obtaining certificate of authority may cure defect by later filing certificate, discussing split in Connecticut case law as to whether foreign corporation must have certificate of authority to transact business at time action is commenced to avoid dismissal, and concluding that foreign LLC that commenced action and subsequently obtained certificate of authority prior to defendant's filing motion to dismiss was entitled to maintain action).

Chase Bank USA, N.A. v. Cardello, 896 N.Y.S.2d 856 (Civ. Ct. March 4, 2010) (stating that LLC's failure to register to do business in New York as required by statute, where LLC was assignee of more than 100 assignments and presumably intended to embark on course of collecting debts in New York, rendered assignment of judgment ineffective).

Motohouse International, LLC v. PPG Industries, Inc., Civil No. 09cv1265-L(JMA), 2010 WL 476652 (S.D. Cal. Feb. 4, 2010) (stating that foreign LLC transacting intrastate business in California shall not maintain any action, suit, or proceeding in California court until it has registered with California Secretary of State, but permitting plaintiff foreign LLC that registered after filing its lawsuit to maintain suit).

Modern Motors, LLC v. Yelder, No. 2009-CA-000648-MR, 2010 WL 323305 (Ky. App. Jan. 29, 2010) (analyzing variance between Kentucky foreign qualification provisions of LLC statute and rules of procedure and concluding foreign LLC that failed to qualify to transact business in Kentucky could assert compulsory counterclaim because provision of procedural rules requiring assertion of compulsory counterclaim controlled over provision of Kentucky LLC statute that precluded foreign LLC from asserting any claim in Kentucky proceeding).

CACV of Colorado, LLC v. Hillman, No. 14-09-18, 2009 WL 4263330 (Ohio App. Nov. 30, 2009) (remanding for determination of whether foreign LLC was registered to transact business as required to maintain action in Ohio court).

DB Land Holdings, L.L.C. v. Town of Fredonia, No. 1 CA-CV 08-0797, 2009 WL 3878296 (Ariz. App. Nov. 19, 2009) (holding foreign LLC had standing to appeal, although it was not registered to transact business in Arizona when its complaint and appeal were filed, where LLC registered and cured any defect regarding standing to maintain its appeal).

Mobilevision Medical Imaging Services, LLC v. Sinai Diagnostic & Interventional Radiology, P.C., 885 N.Y.S.2d 631 (App. Div. 2d Dept. 2009) (holding lower court's action staying proceeding for 45 days to afford LLC opportunity to comply with foreign qualification requirement was proper because case law interpreting foreign qualification provision in corporate statute supported contention that LLC was entitled to reasonable opportunity to cure noncompliance with foreign qualification requirement before dismissal of proceeding).

LVNV Funding, LLC v. Boyles, __ So.3d __, 2009 WL 3415306 (Ala. Civ. App. 2009) (holding that Delaware LLC's failure to register to do business in Alabama did not relieve plaintiff of complying with requirements set forth in rule regarding service of process on LLC).

FF. Foreign LLC – Governing Law

New Times Media, LLC v. Bay Guardian Co., Inc., C.A. No. 10-72-GMS-LPS, 2010 WL 2573957 (D. Del. June 28, 2010). A judgment creditor obtained a multi-million dollar judgment in California against New Times Media, LLC (“New Times”), a Delaware LLC. New Times did not pay the judgment, and the judgment creditor was granted a charging order by the California court against the interests of New Times in sixteen wholly-owned non-debtor entities, fourteen of which were Delaware entities. The charging order gave the judgment creditor the option to foreclose on the entities. New Times sought a permanent injunction prohibiting the judgment creditor from foreclosing on the sixteen wholly-owned entities of New Times. New Times argued that the Federal Anti-Injunction Act did not apply to the case but sought remand of the case to the Delaware Chancery Court in the event the court determined that the Act applied. New Times argued that its claim was valid in Delaware state court and that there was no other available forum offering a sufficient remedy. The judgment creditor asserted a counterclaim for enforcement of the California judgment against New Times. The court determined that the magistrate had properly concluded that the judgment creditor's request for a permanent injunction should be denied because the Anti-Injunction Act required the court to refrain from granting an injunction staying the California state proceedings. The court also

determined that the magistrate correctly concluded that remand should be denied. The court stated that California state court offered a sufficient remedy, noting that the California proceedings remained ongoing and that the California court had not ruled on the choice of law issue so that New Times was free to advocate that Delaware law should govern. Furthermore, the court stated that the request for remand incorrectly assumed the Anti-Injunction Act is jurisdictional, and the Act is not strictly jurisdictional. Finally, the court concluded that the magistrate correctly determined that the judgment creditor's counterclaim, which effectively demanded that the court register the California judgment, should be dismissed. The court stated that the magistrate correctly distinguished between giving a state court judgment full faith and credit, which means giving it preclusive effect, from registration of the judgment, which requires the court to adopt the judgment as its own. Because only a judgment rendered by a federal court may be registered in a federal court, the judgment creditor failed to state a claim.

In re Hydrogen, L.L.C., 431 B.R. 337 (Bankr. S.D.N.Y. 2010). The Committee of Unsecured Creditors in this case asserted various claims against officers and directors of the debtor, an Ohio LLC, and its parent corporation. The claims included claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, deepening insolvency, unjust enrichment, and equitable subordination. With respect to the breach of fiduciary duty claim, the court engaged in a choice of law analysis under New York law and concluded that Ohio law (the law of the debtor LLC's state of formation) governed the claim under the internal affairs doctrine. With respect to the aiding and abetting breach of fiduciary duty claim, the court noted that case law in the Southern District of New York is split as to what choice of law principle applies. Under the internal affairs doctrine, Ohio law would apply to the claim, but New York law would apply under tort conflict of laws principles because the principal place of business of the debtor LLC was in New York, and New York would be the locus of the aiding and abetting claim. The court analyzed the aiding and abetting claim under both Ohio and New York law and found that the claim would not survive dismissal under either law. With respect to the deepening insolvency claim, the court applied an interest analysis under New York choice of law principles on the basis that deepening insolvency is a tort cause of action. Giving the greatest weight to the place where the tort was committed (which the court concluded most likely occurred in the context of management decisions made at the debtor LLC's principal place of business in New York), the court concluded that New York law should govern. The Committee's unjust enrichment claim was based on allegedly excessive bonuses and other compensation, and the court performed an interest analysis under New York choice of law principles and concluded that the law of the place where the actions giving rise to the unjust enrichment were taken should govern. Given that the compensation decisions were likely made in New York where the debtor LLC's principal place of business was located, the court applied New York law.

Abbey v. Fortune Drive Associates, LLC, No. A124684, 2010 WL 1553616 (Cal. App. 1 Dist. April 20, 2010) (recognizing that Delaware law governed internal affairs of Delaware LLC but determining that California law on contract interpretation applied under Federal Arbitration Act and state arbitration law).

In re Mervyn's Holdings, LLC (Mervyn's LLC v. Lubert-Adler Group IV, LLC), 426 B.R. 488 (Bankr. D. Del. 2010) (applying California law to claims that LLC's member breached fiduciary duties to LLC and its creditors and holding that California four-year statute of limitations for breach of fiduciary duty rather than Delaware three-year statute applied under Delaware internal affairs choice of law rule, and Delaware "borrowing" statute was inapplicable).

In re Liberty Coal Company, LLC (Frazier v. Sikeston Board of Municipal Utilities), No. 09-CV-0371-MJR, 2010 WL 1415998 (S.D. Ill. March 31, 2010) (applying Colorado law to veil piercing claim involving Colorado LLC under Illinois choice of law rules).

DirectTV Latin America, LLC v. Park 610, LLC, 691 F.Supp.2d 405 (S.D.N.Y. 2010) (noting that Delaware law would apply to attempts to pierce veil of Delaware LLC, and Uruguayan law would apply to attempts to pierce Uruguayan companies that were members of Delaware LLC, but applying New York law since parties only cited New York law).

Coronado City Views, LLC v. Regatta Bay, LLC, No. D053210, 2010 WL 453555 (Cal. App. 4th Dist. Feb. 10, 2010) (holding that members of Arizona LLC waived issue regarding their personal liability for conduct of Arizona LLC because they included no citation to Arizona authority and California LLC statute requires application of law of state of organization to question of personal liability of members of foreign LLC).

Sovereign Bank v. ACG II, LLC, No. 08cv1600 (WWE), 2010 WL 363336 (D. Conn. Jan. 25, 2010) (stating that Delaware law governed veil piercing of Delaware LLC).

River Rock Development v. Paik, No. C057850, 2010 WL 46783 (Cal. App. 3d. Dist. Jan. 7, 2010) (holding that veil piercing of Arizona LLCs was governed by Arizona law by virtue of California LLC statutory governing law provision).

Health Robotics, LLC v. Bennett, Civil Action No. 09-cv-0627, 2009 WL 5033966 (E.D. Pa. Dec. 22, 2009) (applying Delaware law to breach of fiduciary duty claims based on Pennsylvania statutes providing that law of state of organization applies to internal affairs of foreign LLC).

In re BHS&B Holdings LLC (Official Committee of Unsecured Creditors v. Bar Harbour Masters Ltd.), 420 B.R. 112 (Bankr. S.D.N.Y. 2009) (stating that veil piercing and breach of fiduciary duty claims involving Delaware LLCs were governed by Delaware law).

Pint v. Breckner, No. 08-CV-5340(JMR/SRN), 2009 WL 4042905 (D. Minn. Nov. 19, 2009) (acknowledging that Minnesota law governed internal affairs of Minnesota LLC; analyzing choice of law provision in mortgage executed by LLC member whose authority to do so was disputed and concluding Florida law governed dispute where mortgage choice of law provision specified that Minnesota law governed mortgage except for procedural matters related to perfection and enforcement by mortgagee of its rights and remedies against the property, which would be governed by Florida law).

GG. Charging Order

In re LaHood (LaHood v. Covey), 437 B.R. 330 (C.D. Ill. 2010). The judgment creditor of an LLC member claimed that it obtained a lien on the member's membership interest by serving a citation to discover assets pursuant to the general judgment collection procedures in the Illinois statutes. The bankruptcy court concluded that the general provision for perfecting a judgment lien by service of a citation to discover assets is trumped by the charging order provision and that the charging order is the exclusive mechanism for impressing a judgment lien upon a judgment debtor's interest under Illinois law. The judgment creditor appealed, and the district court reversed the bankruptcy court on this issue. The district court reviewed the general statutory provision for perfection of a judgment lien by citation and the charging order provision in the Illinois LLC statute and noted that the issue was one of first impression on which "there is very little authority that is even marginally relevant." The court considered *Dowling v. Chicago Options Associates, Inc.*, an Illinois appellate court decision in which the only issue was whether a public sale by the sheriff was required and the validity of a lien on a membership interest by service of a citation to discover assets was not challenged, and *Bobak Sausage Co. v. Bobak Orland Park, Inc.*, an unpublished federal district court

opinion in which the court acknowledged the charging order provision in the course of determining that a public sale by the sheriff should not be the only method of disposal of an LLC interest that has been subjected to a judgment lien under the general citation provision. The court stated that these cases arguably stand for the proposition that liens against a member's LLC interest may be created through the service of a citation or by obtaining a charging order, and the court thus disagreed with the bankruptcy court's conclusion that the judgment creditor could not have created a lien via service of citation. The court remanded for the bankruptcy court to determine whether the citation complied with the statutory requirements to create a valid lien. The court stated that the next logical issue, assuming the judgment creditor complied with the citation statute, would be how the lien would be treated in terms of satisfaction or remedy. The court noted a Virginia bankruptcy decision, *In re Pischke*, that addressed the priority of a charging order lien versus a lien created under the general procedure for execution on intangibles and suggested that the failure to obtain a charging order may prevent a judgment creditor from obtaining priority status in terms of execution or satisfaction of the judgment. Under this rationale, said the court, the judgment lien would not be entitled to priority absent a charging order because the provision of the charging order statute stating that the statute provides the exclusive remedy by which a judgment creditor of a member may satisfy a judgment out of the judgment debtor's LLC interest would be rendered meaningless if a judgment creditor who obtained a lien by citation could satisfy the lien or obtain a remedy. The court commented that *Pischke* indicated that it may be possible for a judgment creditor to obtain relief from the automatic stay to seek a charging order, but the court stated that whether such an opportunity was appropriate in this case was not before the court. In light of its conclusion that the judgment creditor could have created a valid lien by serving its citation and the theoretical possibility that a charging order might still be obtained to allow satisfaction of such a lien, the court remanded the matter to the bankruptcy court for further proceedings consistent with the court's opinion.

New Times Media, LLC v. Bay Guardian Co., Inc., C.A. No. 10-72-GMS-LPS, 2010 WL 2573957 (D. Del. June 28, 2010). A judgment creditor obtained a multi-million dollar judgment in California against New Times Media, LLC ("New Times"), a Delaware LLC. New Times did not pay the judgment, and the judgment creditor was granted a charging order by the California court against the interests of New Times in sixteen wholly-owned non-debtor entities, fourteen of which were Delaware entities. The charging order gave the judgment creditor the option to foreclose on the entities. New Times sought a permanent injunction prohibiting the judgment creditor from foreclosing on the sixteen wholly-owned entities of New Times. New Times argued that the Federal Anti-Injunction Act did not apply to the case but sought remand of the case to the Delaware Chancery Court in the event the court determined that the Act applied. New Times argued that its claim was valid in Delaware state court and that there was no other available forum offering a sufficient remedy. The judgment creditor asserted a counterclaim for enforcement of the California judgment against New Times. The court determined that the magistrate had properly concluded that the judgment creditor's request for a permanent injunction should be denied because the Anti-Injunction Act required the court to refrain from granting an injunction staying the California state proceedings. The court also determined that the magistrate correctly concluded that remand should be denied. The court stated that California state court offered a sufficient remedy, noting that the California proceedings remained ongoing and that the California court had not ruled on the choice of law issue so that New Times was free to advocate that Delaware law should govern. Furthermore, the court stated that the request for remand incorrectly assumed the Anti-Injunction Act is jurisdictional, and the Act is not strictly jurisdictional. Finally, the court concluded that the magistrate correctly determined that the judgment creditor's counterclaim, which effectively demanded that the court register the California judgment, should be dismissed. The court stated that the magistrate correctly distinguished between giving a state court judgment full faith and credit, which means giving it preclusive effect, from registration of the judgment, which requires the court to adopt the

judgment as its own. Because only a judgment rendered by a federal court may be registered in a federal court, the judgment creditor failed to state a claim.

Olmstead v. Federal Trade Commission, 44 So.3d 76 (Fla. 2010). The Florida Supreme Court answered a certified question from the Eleventh Circuit Court of Appeals regarding the rights of a judgment creditor of a single member LLC and concluded that the Florida LLC charging order statute does not preclude a judgment creditor from using the remedy of execution on the interest of a single member of an LLC to reach all of the member's right, title, and interest in the LLC. The court reviewed the concepts of membership, a membership interest, assignment, and the charging order under the Florida LLC statute and concluded that the assignee of a single member of an LLC becomes a member without the consent of anyone other than the transferor member because the set of "all members other than the member assigning the interest" (whose consent is required under the statute to admit an assignee of a member) is empty. The court then concluded that the charging order remedy is not the exclusive remedy of a judgment creditor of an LLC member because the charging order provision does not state that the charging order is the exclusive remedy, in contrast to the Florida general and limited partnership statutes, which explicitly provide that the charging order is the exclusive remedy by which a judgment debtor of a partner may satisfy a judgment out of the judgment debtor's interest. The court noted that there is a general execution provision in Florida that applies to various forms of real and personal property, including "stock in corporations," and the court stated that an LLC is a type of corporate entity the ownership interests of which can reasonably be understood to fall within the scope of "corporate stock." The appellant judgment debtors did not contend that the execution statute did not by its terms extend to an ownership interest in an LLC or that the challenged order did not comport with the requirements of the execution statute. They relied only upon the exclusivity of the charging order provision. Because the court concluded that there was no basis to infer that the charging order statute provides the sole remedy for a judgment creditor against a judgment debtor's interest in a single member LLC, it does not displace the general execution remedy with respect to such an interest. Thus, the court held that a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single member LLC to satisfy a judgment. A strenuous and lengthy dissenting opinion argued that the majority's reasoning applied with equal force to multi-member LLCs.

Vanderhorst v. 6105 N. Dixie Drive, LLC, No. 23491, 2009 WL 4893184 (Ohio App. Dec. 18, 2009). An LLC member brought an action seeking the court-ordered sale of the LLC and a court order determining and ordering distribution of the member's interest. Judgment creditors of the member who had obtained charging orders intervened in the suit. Another creditor of the member moved to intervene on the basis of an agreement in which the member provided the creditor with "Secured Collateral" by "assigning 100% of his interest" in the LLC. The assignment under this agreement was prior in time to the charging orders, and the issue was whether the assignment merely granted a security interest or was a conveyance of the membership interest. If the agreement conveyed the membership interest, the charging order holders acquired no rights. A magistrate granted summary judgment in favor of the judgment creditors who held the charging orders on the basis that the agreement merely granted a security interest in the membership interest, but the court of appeals concluded that there was a fact issue in this regard because the agreement contained elements and characteristics of both an assignment and a security interest.

HH. Divorce of Member

In re Marriage of Busch, 310 S.W.3d 253 (Mo. App. 2010) (discussing husband's obligations under property agreement awarding wife one half-interest in husband's ownership interests in LLCs or providing

for alternative means of handling interests if interests could not be divided in kind and concluding trial court erred in entering judgment on pleadings against wife in wife's action to enforce agreement).

Silva v. Silva, 859 N.Y.S.2d 704 (N.Y. Sup. 2010) (refusing to enjoin, under *pendente lite* provision of domestic relations law, sale of property owned by LLC in which divorcing spouses each held 35% interest because property being sold was property of LLC and not marital asset, and stating that spouse who appeared to be disgruntled member would not be permitted to use domestic relations law as vehicle to litigate business decision of LLC with which she disagreed).

Amaraneni v. Amaraneni, No. 2009 CA 1179, 2010 WL 502958 (La. App. Feb. 12, 2010) (holding trial court did not err in rejecting husband's argument that goodwill of LLC was attributable to personal qualities and including goodwill in valuation of marital community's fifty percent interest in LLC).

Gulbrandsen v. Gulbrandsen, 22 So.2d 640 (Fla. App. 2009) (holding judgment in divorce proceeding awarding wife 12.5% interest in LLC and any successor entities was overly broad because law allows court to award spouse one-half of other spouse's interest in closely held corporation, which should not be diluted by non-arms'-length transaction, but subsequent transaction on arms'-length basis should be permitted so long as transaction provides proportionate interests or value as between spouses).

II. Receivership

In re Fastech Production, LLC, No. 09-82175-TRC, 2010 WL 1463401 (Bankr. E.D. Okla. April 9, 2010) (concluding court order entered in federal receivership of debtor LLC simply removed LLC's members and managers from management of daily operations of facilities and properties owned by LLC and did not prohibit or enjoin members from authorizing bankruptcy filing once receiver was appointed).

Aracaju, Inc. v. True North, Inc., No. 1 CA-CV 09-0133, 2010 WL 98670 (Ariz. App. Jan. 12, 2010). A father and son jointly owned several LLCs, and the son filed suit seeking a receiver to protect and preserve the LLC's assets and a judicial dissolution. The father agreed that the court should appoint a receiver to preserve and protect the LLC's assets and asserted various counterclaims. The trial court then entered an order amending and continuing the receivership and authorizing the receiver to wind up the business of the LLCs. The court of appeals agreed with the father that the trial court improperly expanded the receiver's authority without a trial or evidentiary hearing because the LLC statute does not allow a court ordered liquidation prior to entry of a judgment of dissolution. The court held that the more specific provisions of the LLC statute regarding the court's authority to wind up and liquidate the assets and business of an LLC control over the more general receivership provisions, and the trial court thus did not have authority to authorize the receiver to wind up and liquidate the LLCs prior to issuance of a judgment of dissolution. Furthermore, assuming the court could have properly appointed a liquidating receiver prior to resolution of the claim for dissolution, the court concluded that the trial court erred by granting the motion to modify the receivership order without an evidentiary hearing because there were conflicting affidavits regarding the grounds for such relief.

Wilt v. Kenyon, C.A. No. 4833-VCN, 2009 WL 5247496 (Del. Ch. Dec. 31, 2009) (finding counsel for parties (the only two members of a Delaware LLC) reached settlement agreement regarding appointment of receiver and scope of receiver's duties in connection with dissolution and liquidation of LLC).

Mooring Capital Fund, LLC v. Comstock North Carolina, LLC, No. 07 CVS 20852 (N.C. Super. Nov. 13, 2009). A minority member of a North Carolina LLC sought to inspect records of the LLC, asserted

various claims against the majority member and manager of the LLC, and sought appointment of a receiver to manage the LLC. The court determined that the plaintiff's motion for appointment of a receiver to manage the LLC did not present such a rare and drastic situation involving a solvent, active business that receivership was the only proper remedy. The plaintiff argued that a receiver should oversee expenditures to prevent unauthorized distributions, but the court concluded that imposing a partial receivership in this case would be inconsistent with the generally limited application of receiverships.

JJ. Bankruptcy

In re Hydrogen, L.L.C., 431 B.R. 337 (Bankr. S.D.N.Y. 2010). The Committee of Unsecured Creditors in this case asserted various claims against officers and directors of the debtor, an Ohio LLC, and its parent corporation. The claims included claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, deepening insolvency, unjust enrichment, and equitable subordination of any claims of the defendants under Section 510 of the Bankruptcy Code. To state a claim for equitable subordination, the complaint must allege that the defendant-claimants engaged in "inequitable conduct" that caused injury to the creditors or conferred an unfair advantage on the defendant-claimant. The court specified the following three paradigms in which inequitable conduct has been found: (1) fraud, illegality, or breach of fiduciary or other legally recognized duties, (2) undercapitalization, and (3) control or use of the debtor as a mere instrumentality or alter ego to benefit another. Because the complaint failed to adequately allege the breach of fiduciary duty and unjust enrichment claims and contained no relevant allegations as to control or use of the debtor as an instrumentality, the court turned to the remaining paradigm for inequitable conduct, i.e., undercapitalization. Although the complaint contained some allegations of undercapitalization, the court nevertheless concluded that the complaint failed to adequately allege inequitable conduct, relying on case law holding that undercapitalization alone is not a sufficient allegation of inequitable conduct. Given the deficiency or absence of pleadings with respect to the other types of inequitable conduct, the court dismissed the equitable subordination claim.

In re Hickory Ridge, LLC, No. 07-1251, 2010 WL 1727968 (Bankr. N.D. W.Va. April 27, 2010). Van Wagner, the managing member of an LLC, filed a Chapter 7 bankruptcy petition for the LLC in 2007. In 2008, Van Wagner filed his own Chapter 11 bankruptcy petition, and the case was converted to a Chapter 7 case in 2009. In 2010, Van Wagner sought to convert the LLC's Chapter 7 case to a Chapter 11 case. The court denied the motion to convert the LLC's case because Van Wagner was dissociated as a member by reason of his own bankruptcy and no longer had any management authority on behalf of the LLC. The court reviewed the provisions of the West Virginia LLC statute (under which bankruptcy of a member is an event of dissociation unless otherwise provided by the operating agreement) and the operating agreement of the LLC (which did not override the statutory dissociation provision). The operating agreement provided that the bankruptcy of a member dissolved the LLC absent a vote to continue, and the operating agreement characterized the bankrupt member as an "Incapacitated Member." If the remaining members continued the business of the company, they had the option to redeem the interest of the bankrupt member or allow the member's successor in interest to continue as an assignee or a substituted member. Thus, Van Wagner was a dissociated member, and his membership interest was property of his bankruptcy estate. The court found that Van Wagner's membership interest and rights as managing member were controlled by his Chapter 7 trustee and that Van Wagner did not have authority to make management decisions for the LLC at the time of the hearing on the motion to convert. The court commented that Van Wagner's trustee had not attempted to exercise any management authority over the LLC, and the court stated that it was expressing no opinion as to whether the trustee was entitled to exercise such control. The court also noted that the statement in the LLC's articles of organization that its operating agreement must be in writing and that no oral agreement

would be valid effectively undercut the argument made by Van Wagner on behalf of the LLC that its operating agreement was orally modified to waive the statutory dissociation provisions.

In re Burgess, No. 310-02023, 2010 WL 1686829 (Bankr. M.D. Tenn. April 26, 2010) (holding automatic stay in bankruptcy of individual debtor who was sole member of LLC did not extend to action against LLC because LLC is entity separate from debtor and debtor's membership interest did not provide debtor with interest in LLC's specific property).

In re Wyatt & McAlister, PLLC, No. 09-04354EE, 2010 WL 1709920 (Bankr. S.D. Miss. April 23, 2010). Wyatt and McAlister formed a Mississippi PLLC to practice law, and McAlister sent a resignation letter to Wyatt after various disputes arose between them. Wyatt argued that McAlister resigned as a member, but McAlister contended she only resigned as an employee of the firm and not as a member. Wyatt filed a Chapter 7 bankruptcy petition on behalf of the LLC, and McAlister sought dismissal of the bankruptcy because Wyatt's 50% vote did not give him the authority to file the petition. The court noted that it has generally been held that an LLC falls within the definition of a corporation under the Bankruptcy Code and that the court should look to the state law of the state of organization to determine authority to file a voluntary bankruptcy petition. The court concluded that the LLC in this case was member-managed because its certificate of formation stated that the LLC was not managed by a manager or managers, and the statute provides for management by the members unless the certificate of formation vests management in a manager or managers. Likewise, voting was governed by the statutory default rule because the certificate of formation did not provide otherwise, and the LLC did not have an operating agreement. Under the statute, an action required or permitted to be taken by the members of an LLC may be taken on a majority vote of all of the members. Thus, if McAlister was still a member at the time the petition was filed, the filing of the petition required her vote. The court reviewed the statutory provisions on dissolution and dissociation and found no evidence that the LLC was dissolved or that McAlister became dissociated. Wyatt argued that McAlister voluntarily withdrew by her resignation letter, but the letter stated that she resigned her employment as an attorney and that she was maintaining her 50% equity interest in the firm until she and Wyatt could reach an agreement on dissolution. The court found that McAlister's clear intent was to resign as an attorney employed by the firm but to maintain her status as a member. Even if she attempted to withdraw, the court stated that the statute prevented her from doing so because the statute provides that no member has the power to withdraw from an LLC unless the certificate of formation or limited liability company agreement provides that the member has the power to withdraw. In sum, because McAlister was a member and did not vote in favor of the LLC's bankruptcy filing, the filing of the petition was not authorized, and the court dismissed the case.

In re Fastech Production, LLC, No. 09-82175-TRC, 2010 WL 1463401 (Bankr. E.D. Okla. April 9, 2010) (concluding court order entered in federal receivership of debtor LLC simply removed LLC's members and managers from management of daily operations of facilities and properties owned by LLC and did not prohibit or enjoin members from authorizing bankruptcy filing once receiver was appointed).

In re Abbott (Marcantonio v. Abbott), Bankruptcy No. 09-20282 (ASD), Adversary No. 09-2033, 2010 WL 1257500 (Bankr. D. Conn. March 25, 2010) (holding transfer of property belonging to LLC whose sole member was debtor in Chapter 7 bankruptcy was not grounds for denial of discharge because, while debtor's membership interest in LLC was property of debtor and debtor's estate, liquidation of LLC's assets involved property of LLC and thus was not property of debtor or his estate).

In re Ekstrom, No. 08-07750-SSC, 2010 WL 1254893 (Bankr. D. Ariz. March 23, 2010). The court rejected the debtor's argument that a bank whose loan was secured by property owned by an LLC was a

secured creditor of the debtor's estate. The debtor argued that the debtor's "equitable interest" was sufficient to render the bank a secured creditor for purposes of the proposed reorganization plan because the debtor borrowed the funds from the bank, made all payments on the debt, and held a 100% interest in the LLC. However, the LLC, which was originally owned by the debtor, his wife, and another LLC owned by the debtor's wife, was transferred to a limited partnership in which the debtor and his wife were each 49.5% limited partners and the wife's LLC was the 1% general partner. The debtor's interest in the limited partnership was transferred to a living trust. Thus, the debtor was essentially asking the court to disregard several legal entities to treat the bank as a secured creditor of the debtor. The court noted that the debtor was an experienced businessman who created numerous LLCs for estate planning purposes. Having enjoyed the benefits of limited liability, the court stated that the debtor must now accept the consequences of the estate planning. The court saw no basis to create the remedy of substantive consolidation or reverse veil piercing without appropriate notice, hearing, and consideration on the merits. Although the debtor borrowed funds from the bank, the bank received the bargained-for security when the LLC hypothecated its property as collateral for the debtor's obligations. The court did not find it necessary to fashion relief for the bank. Though it had a valid lien on the LLC's property, the property was not property of the bankruptcy estate, and the bank was not a secured creditor of the debtor and could not vote as such on the plan.

In re Resource Energy Technologies, LLC, 419 B.R. 746 (Bankr. W.D. Ky. 2010) (holding efforts to obtain discovery from members of debtor LLC in state court litigation did not violate automatic stay as an act to obtain possession of or exercise control over property of debtor LLC's estate even though discovery request encompassed documents of debtor LLC because discovery order applied only to non-debtor members and they had right to inspect and copy any LLC record as members of LLC).

In re Brisbin (Oliver Holdings, Inc. v. Brisbin), Bankruptcy No. 08-12236-SSC, Adversary No. 08-AP-937, 2010 WL 276755 (Bankr. D. Ariz. Jan. 19, 2010). The plaintiff sought to have its investment in an LLC declared nondischargeable, relying in part on Arizona securities laws. The plaintiff argued that its investment in an Arizona LLC was an "investment contract" under Arizona law. The court noted that the plaintiff appeared to argue that the operating agreement was the security rather than the membership interest, and the court stated that there was no legal basis for the argument that the operating agreement was a security. The court stated that no LLC in Arizona would be able to operate without fear of a lawsuit years after the interest was purchased if the court accepted the plaintiff's argument. Applying Arizona case law and the *Howey* test, the court concluded that the membership interest in this case was a security, but the court found the plaintiff failed to establish the elements for a non-dischargeable debt because the plaintiff failed to show that the defendant made a material misrepresentation or omission, that the plaintiff justifiably relied on any material misrepresentation or omission, that the defendant had the requisite intent to defraud, or that the defendant proximately caused the plaintiff's loss.

Bankston v. Singleton, Civil Action No. 09-0594, 2009 WL 5196143 (W.D. La. Dec. 30, 2009) (stating that members and managers of LLC owed statutory and contractual duties and holding breach of duty claims fell within "related to" jurisdiction of court in member/manager's bankruptcy; holding member's claim for dissolution of LLC fell within "related to" jurisdiction of court in LLC's bankruptcy).

In re Ginsberg (Koplin v. Ginsberg), Bankruptcy No. 08 B 30836, Adversary No. 09 A 188, 2009 WL 4891815 (Bankr. N.D. Ill. Dec. 16, 2009) (creditor failed to allege willfulness for purposes of willful injury non-dischargeability provision where complaint alleged that member of LLC (who was also attorney for LLC, but was not managing member and had no authority to act on LLC's behalf) advised other members of LLC that creditor of LLC should be paid from proceeds of transaction in which LLC engaged and thus

complaint not only failed to allege willfulness but it actually alleged that member had no intent to injure and unsuccessfully tried to stop other members from doing so).

In re Player Wire Wheels, Ltd., 421 B.R. 864 (Bankr. N.D. Ohio 2009). The debtor was a single-member LLC whose sole member had died. The member had pledged his membership interest to his ex-wife to secure a note executed in the divorce settlement. The ex-wife claimed that she owned the membership interest when the estate defaulted in paying the note. This opinion addressed a dispute over who had authority to file bankruptcy on behalf of the LLC. The court concluded that the ex-wife did not, under the pledge agreement and escrow arrangement in place, automatically succeed to the membership interest upon default in payment of the note. The court concluded that, as of the date of the petition, the executors had authority to act on behalf of the LLC and that, if both executors of the deceased member were required to join in the bankruptcy petition, the proxy given by one to the other satisfied that requirement.

In re Player Wire Wheels, Ltd., 421 B.R. 851 (Bankr. N.D. Ohio 2009). The court held that the ex-wife of a deceased sole member of an LLC to whom the membership interest had been pledged to secure the husband's divorce-related promissory note was a party in interest who could object to the Chapter 11 plan proposed for the LLC on the ground that the plan undervalued the membership interest, but the ex-wife was not entitled to vote on the plan because she was not a creditor or an equity owner. The court found that the ex-wife did not yet own the membership interest because her claim of entitlement to the membership interest, which was based on the estate's default in paying the note, had not yet been adjudicated. The ex-wife argued that proposal of a plan was premature because she intended to propose a plan after prevailing in the proceeding to establish her right to the membership interest. However, it appeared that she would be entitled to no more than 60% of the membership units if she prevailed in the proceeding and would be required to reach a consensus with the executors in order to propose a plan. Finally, even if the ex-wife were deemed to hold an equity interest in the LLC, the court concluded that it would meet the statutory requirement that each holder of an interest retain a value that is not less than the amount the holder would receive if the debtor were liquidated under Chapter 7 of the Bankruptcy Code.

In re Lawrence (Curreli v. Lawrence), Bankruptcy No. 6:08-bk-00961-ABB, Adversary No. 6:08-ap-00083-ABB, 2009 WL 3486063 (Bankr. M.D. Fla. Oct. 28, 2009) (holding statutory fiduciary duties of loyalty and care owed by managing member under Florida law do not arise to level of fiduciary duty required for nondischargeability of debt purposes under bankruptcy law because duties of LLC managing member did not involve administration of technical or express trust or control of segregated res).

In re BH S&B Holdings LLC (Official Committee of Unsecured Creditors v. Bar Harbour Masters Ltd.), 420 B.R. 112 (Bankr. S.D.N.Y. 2009). This case arose out of the bankrupt Steve & Barry's clothing stores and the subsequent bankruptcy filing by the purchaser, BH S&B Holdings, LLC ("Holdings") and its subsidiaries. The Official Committee of Unsecured Creditors (the "Committee") sought to recover money for the estate through veil piercing, breach of fiduciary duty, and equitable subordination or recharacterization claims. The court analyzed the Committee's pleadings with respect to its claim that a loan by a Holdings affiliate should be equitably subordinated or recharacterized as equity and found that the Committee had not sufficiently pled facts supporting the factors relevant to either claim. The Committee was given leave to amend its pleadings on the equitable subordination claim, but the recharacterization claim was dismissed with prejudice.

In re Resource Energy Technologies, LLC, 419 B.R. 746 (W.D. Ky. 2009) (holding discovery order entered in state court requiring members of debtor LLC to turn over documents of LLC did not violate automatic stay because members have rights to access, inspect, and copy LLC information under Kentucky

law in their capacities as members and such action is not an act to obtain possession of or exercise control over property of the estate).

In re Longview Aluminum, L.L.C. (Brandt v. Tabet Divito & Rothstein, LLC), 419 B.R. 351 (Bankr. N.D. Ill. 2009). The trustee sought to recover payments from the LLC debtor to an LLC member (Forte) who owned a 12% interest and was one of five members of the LLC's board of managers. Because the payments were within a year of the bankruptcy, but not within 90 days, the payments were not recoverable unless Forte was an insider. The court noted that an LLC fits within the definition of a "corporation" for purposes of the Bankruptcy Code but that no consensus has developed with respect to the appropriate approach to determine whether a member or manager of an LLC is an insider of the LLC. The court described two conflicting approaches in the case law. One approach focuses on the alleged insider's control of the debtor, and Forte relied upon this approach to argue he was not an insider. The other approach focuses on the similarity of the alleged insider's position to the per se categories of an insider. The trustee advocated that this test be applied, and the court chose to follow this approach as the better interpretation of the statute. Under the definition of an "insider," a corporate director or officer is an insider regardless of their ability to control the corporation. Forte's position as one of five managers gave him a position equivalent to a director according to the court. The debtor was a Delaware LLC, and the court found Forte's position as a manager and member of the LLC accorded him the same relationship to the LLC as a director has to a corporation.

In re Lull (Kotoshiro v. Zapara), Bankruptcy No. 06-00898, Adversary No. 08-90074, 2009 WL 3853210 (Bankr. D. Hawaii Nov. 17, 2009). The court found that an individual ("Zapara") was a statutory per se "insider" of the debtor, another individual, by virtue of her co-membership with the debtor in an LLC. Zapara was an insider of the LLC, which the court stated may be treated as a corporation for purposes of insider analysis, and the LLC was an affiliate of the debtor. Thus, Zapara, as an insider of an affiliate of the debtor, was an insider of the debtor.

In re Lawrence (Curreli v. Lawrence), Bankruptcy No. 6:08-bk-00961-ABB, Adversary No. 6:08-ap-00083-ABB, 2009 WL 3486063 (Bankr. M.D. Fla. Oct. 28, 2009) (holding that fiduciary duties of care and loyalty imposed on managing member under Florida LLC statute did not constitute express or technical trust required by bankruptcy law for purposes of exception to discharge provision).

JD Factors, LLC v. Freightco, LLC, Cause No. 1:09-CV-95, 2009 WL 3401965 (N.D. Ind. Oct. 16, 2009). The defendant LLC sought to amend its answer in a collection suit to assert that a member's bankruptcy resulted in his dissociation and termination as vice-president and that his remaining rights as a member or former member now belonged to his bankruptcy trustee. The plaintiff argued that the defendant should be denied leave to amend on the basis that the proposed amendment was contrary to law. The plaintiff argued that the amended allegations violated the automatic stay provisions and were premised on an ipso facto clause prohibited by Section 365(e)(1). The court rejected the plaintiff's arguments, noting that the bankrupt member's services as vice-president may well be more akin to a personal services contract than an executory contract that is freely assignable to the trustee. The court stated that the plaintiff did not cite any authority for its assertion that service as an officer of a company rises to the level of "property" of the bankruptcy estate. The court found it reasonable to infer that the member's termination as vice-president did not violate the automatic stay. Additionally, the court stated that the ipso facto clause in the operating agreement was not necessarily unenforceable given that the Indiana LLC statute provides that no person can become a member without the consent of all members unless otherwise provided in the operating agreement. In any event, the plaintiff did not challenge the statement in the proposed amendment that the bankrupt

member's remaining rights as a member inure to the bankruptcy trustee. Thus, the court concluded that the proposed amendment was not "contrary to law" and that leave to amend should be granted.

In re Phoenix Turf Farms, LLC (Phoenix Turf Farms, LLC v. Hansen Mueller Co.), Bankruptcy No. 07-40545-JJR-12, Adversary No. No. 09-40004-JJR, 2009 WL 3350337 (Bankr. N.D. Ala. Oct. 15, 2009) (denying claim by LLC debtor for punitive damages and attorney's fees because Section 362(k)(1) provides for punitive damages and attorney's fees for willful violation of stay only by individual debtor).

Neary v. Stamat, No. 08 C 6543, 2009 WL 2916834 (N.D. Ill. Sept. 2, 2009) (discussing how income from single-member LLCs should be treated for purposes of question of debtors' Statement of Financial Affairs regarding gross income received by debtors and declining to resolve whether question required debtors to report only their personal profit from LLCs or total income of LLCs because of substantial disparity between debtors' statement and tax return even assuming debtors were only required to report personal profit from LLCs).

In re The Heritage Organization, L.L.C., Bankruptcy No. 04-35574-BJH-11, Adversary No. 04-3338, 2006 WL 6508182 (Bankr. N.D. Tex. Jan. 6, 2006) (noting inclusive and flexible nature of definition of "insider" under Bankruptcy Code, stating that fact that debtor was LLC rather than corporation was "distinction without a difference" for purposes of analyzing status of debtor's president as insider, and concluding that debtor's president was insider as matter of law (even though debtor's president did not exercise same control that president of a company would normally enjoy) just as officer of corporation is insider as matter of law).

KK. Fraudulent Transfer

Murphy v. RMTS Associates, LLC, 897 N.Y.S.2d 417 (App. Div. 1st Dept. 2010) (holding fraud alleged by LLC member in fraudulent conveyance claim related to majority member's transfer of all of LLC's assets was not so gross and wanton as to justify punitive damages).

In re Mervyn's Holdings, LLC (Mervyn's LLC v. Lubert-Adler Group IV, LLC), 426 B.R. 488 (Bankr. D. Del. 2010). The court determined that the debtor's complaint against Target Corporation alleged facts sufficient to support collapsing the transactions surrounding the sale of Mervyn's (including execution of a sale agreement, stripping of real estate assets, increasing the rent under leases, and conversion of the debtor from a corporation to an LLC) so as to state a claim based on fraudulent transfer. The court noted in particular that the conversion of the debtor into an LLC was particularly significant because it enabled Target to transfer its membership interest, which was a major factor in the fraudulent transfer claim.

Klein v. Weidner, Civil Action No. 08-3798, 2010 WL 571800 (E.D. Pa. Feb. 17, 2010) (finding member's transfer of LLC interest to member's wife was fraudulent under actual and constructive fraud provisions of Pennsylvania Uniform Fraudulent Transfer Act).

Acadian Energy Resources, LLC v. Carpenter, Civil Action No. 2:09-00150, 2009 WL 5217679 (S.D. W. Va. Dec. 31, 2009) (holding allegations sufficed to state fraudulent transfer claim based on alter ego allegation that treated LLC and related parties as "debtor").

Cottone v. Selective Surfaces, Inc., 892 N.Y.S.2d 466 (App. Div. 2d Div. 2009) (dismissing derivative claim on behalf of LLC for fraudulent conveyance of LLC's own assets because LLC was alleged

transferor rather than creditor and thus did not have standing to assert fraudulent conveyance claim under Debtor and Creditor Law).

Bootheel Ethanol Investments, L.L.C. v. Semo Ethanol Cooperative, No. 1:08CV59SNLJ, 2009 WL 4891960 (E.D. Mo. Dec. 10, 2009). A member of an LLC sued the other member after the other member withdrew its capital contribution in violation of the provisions of the operating agreement. Among the plaintiff member's claims were fraudulent transfer claims against individuals who facilitated the defendant member's withdrawal of its capital contribution. The court noted that the fraudulent transfer statute is directed at fraudulent transfers by debtors rather than those who have facilitated the transfers and that there thus did not appear to be a cause of action against the individuals under the Missouri Uniform Fraudulent Transfer Act. Because this issue was not addressed by the parties, however, the court allowed each party to submit additional briefing.

Otero v. Vito, Civil Action No. 5:07-cv-405(CAR), 2009 WL 3063426 (M.D. Ga. Sept. 22, 2009). Although the undisputed evidence showed that various entities, including numerous LLCs, were used to defeat justice and evade contractual or tort responsibilities, the court was precluded from exercising the equitable power of piercing the veil on behalf of a creditor seeking recovery from the entities to satisfy the debt of the individual who created and controlled the entities because the Georgia Supreme Court has held that reverse veil piercing is not permitted under Georgia law. The court, however, used the alter ego finding in connection with a finding that transfers of money, real property, and personal property from the individual to the entities were fraudulent under the Georgia Uniform Fraudulent Transfer Act. Proof of actual intent to hinder, delay, or defraud his creditors was established by the debtor's affidavit in which he explained that he used layered corporations, LLCs, and trusts as part of a coordinated strategy to protect personal assets from attachment by creditors. Even in the absence of the admissions of the debtor, the court reviewed evidence of five of eleven factors indicating actual fraudulent intent under the Georgia Uniform Fraudulent Transfer Act. Although the court stated that the complex web of trusts, corporations, and LLCs had not yet been completely untangled, and all of the hurdles set up by the debtor had not been completely removed, the court concluded that enough was known to warrant summary judgment in favor of the creditor.

Dearborn Street Building Associates LLC v. D & T Land Holdings, LLC, No. 1:07-cv-1056, 2009 WL 3011245 (W.D. Mich. Sept. 16, 2009) (noting Michigan Uniform Fraudulent Transfer Act does not explicitly define "insider" with respect to LLC, but concluding that transfer was to "insider" where sale was between LLCs with common member and member personally benefitted from transaction).

In re Supplement Spot, LLC (Floyd v. Option One Mortgage Corporation), 409 B.R. 187 (Bankr. S. D. Tex. 2009). The bankruptcy trustee brought an action to avoid payments that were made from an account funded by the debtor LLC's business operations. The account was styled "Marcella Ortega dba Young Again Nutrients," and Marcella Ortega was president of the debtor LLC. The payments challenged by the trustee were payments on mortgage debts of Ortega, and the court held that they were avoidable as fraudulent transfers. In order to find that the payments were fraudulent transfers, the court had to find that the account was the property of the debtor LLC. The account was listed as an asset of the debtor LLC and contained funds generated by the LLC's business, but the mortgage company claimed that Ortega mistakenly turned over the account to the trustee. The court found that the evidence was sufficient to support the finding that the account was the LLC's property based on an inference drawn under the "uncalled witness rule." Under this rule, the fact that the mortgage company failed to call Ortega as a witness allowed an inference that her testimony would be unfavorable to the mortgage company. Alternatively, the court found that the account was properly considered property of the LLC because the court could pierce the "individual veil" and view the account as property of the LLC. The court explained that a court may sometimes "pierce the

corporate veil” to determine whether the activities and property of a corporation should be attributed to its individual principal or principals, but stated that the court here was being asked to do the opposite—to “pierce the individual veil” and attribute property of Ortega to the debtor LLC. The court noted that courts generally protect the individual assets from the reach of a corporation’s bankruptcy, but cited the corporate alter ego doctrine as a basis to treat individual property as corporate property. The court stated that it would treat the account as property of the LLC because Ortega herself disregarded the separation between the LLC’s funds and her funds by using the account exclusively to pay her personal expenses when the account was funded exclusively by the LLC’s business. Further, the court noted that injustice would result if the account were not treated as the property of the debtor because the fraudulent transfers, if not avoided, would seriously hinder the trustee’s ability to administer the bankruptcy case.

LL. Creditor’s Rights

In re LaHood (LaHood v. Covey), 437 B.R. 330 (C.D. Ill. 2010). The judgment creditor of an LLC member claimed that it obtained a lien on the member’s membership interest by serving a citation to discover assets pursuant to the general judgment collection procedures in the Illinois statutes. The bankruptcy court concluded that the general provision for perfecting a judgment lien by service of a citation to discover assets is trumped by the charging order provision and that the charging order is the exclusive mechanism for impressing a judgment lien upon a judgment debtor’s interest under Illinois law. The judgment creditor appealed, and the district court reversed the bankruptcy court on this issue. The district court reviewed the general statutory provision for perfection of a judgment lien by citation and the charging order provision in the Illinois LLC statute and noted that the issue was one of first impression on which “there is very little authority that is even marginally relevant.” The court considered *Dowling v. Chicago Options Associates, Inc.*, an Illinois appellate court decision in which the only issue was whether a public sale by the sheriff was required and the validity of a lien on a membership interest by service of a citation to discover assets was not challenged, and *Bobak Sausage Co. v. Bobak Orland Park, Inc.*, an unpublished federal district court opinion in which the court acknowledged the charging order provision in the course of determining that a public sale by the sheriff should not be the only method of disposal of an LLC interest that has been subjected to a judgment lien under the general citation provision. The court stated that these cases arguably stand for the proposition that liens against a member’s LLC interest may be created through the service of a citation or by obtaining a charging order, and the court thus disagreed with the bankruptcy court’s conclusion that the judgment creditor could not have created a lien via service of citation. The court remanded for the bankruptcy court to determine whether the citation complied with the statutory requirements to create a valid lien. The court stated that the next logical issue, assuming the judgment creditor complied with the citation statute, would be how the lien would be treated in terms of satisfaction or remedy. The court noted a Virginia bankruptcy decision, *In re Pischke*, that addressed the priority of a charging order lien versus a lien created under the general procedure for execution on intangibles and suggested that the failure to obtain a charging order may prevent a judgment creditor from obtaining priority status in terms of execution or satisfaction of the judgment. Under this rationale, said the court, the judgment lien would not be entitled to priority absent a charging order because the provision of the charging order statute stating that the statute provides the exclusive remedy by which a judgment creditor of a member may satisfy a judgment out of the judgment debtor’s LLC interest would be rendered meaningless if a judgment creditor who obtained a lien by citation could satisfy the lien or obtain a remedy. The court commented that *Pischke* indicated that it may be possible for a judgment creditor to obtain relief from the automatic stay to seek a charging order, but the court stated that whether such an opportunity was appropriate in this case was not before the court. In light of its conclusion that the judgment creditor could have created a valid lien by serving its citation and the theoretical possibility that a charging order might still be obtained to allow

satisfaction of such a lien, the court remanded the matter to the bankruptcy court for further proceedings consistent with the court's opinion.

Olmstead v. Federal Trade Commission, 44 So.3d 76 (Fla. 2010). The Florida Supreme Court answered a certified question from the Eleventh Circuit Court of Appeals regarding the rights of a judgment creditor of a single member LLC and concluded that the Florida LLC charging order statute does not preclude a judgment creditor from using the remedy of execution on the interest of a single member of an LLC to reach all of the member's right, title, and interest in the LLC. The court reviewed the concepts of membership, a membership interest, assignment, and the charging order under the Florida LLC statute and concluded that the assignee of a single member of an LLC becomes a member without the consent of anyone other than the transferor member because the set of "all members other than the member assigning the interest" (whose consent is required under the statute to admit an assignee of a member) is empty. The court then concluded that the charging order remedy is not the exclusive remedy of a judgment creditor of an LLC member because the charging order provision does not state that the charging order is the exclusive remedy, in contrast to the Florida general and limited partnership statutes, which explicitly provide that the charging order is the exclusive remedy by which a judgment debtor of a partner may satisfy a judgment out of the judgment debtor's interest. The court noted that there is a general execution provision in Florida that applies to various forms of real and personal property, including "stock in corporations," and the court stated that an LLC is a type of corporate entity the ownership interests of which can reasonably be understood to fall within the scope of "corporate stock." The appellant judgment debtors did not contend that the execution statute did not by its terms extend to an ownership interest in an LLC or that the challenged order did not comport with the requirements of the execution statute. They relied only upon the exclusivity of the charging order provision. Because the court concluded that there was no basis to infer that the charging order statute provides the sole remedy for a judgment creditor against a judgment debtor's interest in a single member LLC, it does not displace the general execution remedy with respect to such an interest. Thus, the court held that a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single member LLC to satisfy a judgment. A strenuous and lengthy dissenting opinion argued that the majority's reasoning applied with equal force to multi-member LLCs.

Suttles v. Vestin Realty Mortgage I, Inc., 317 S.W.3d 412 (Tex. App. 2010). A judgment debtor sought a turnover order and receiver for ownership interests in businesses of the judgment debtors, but the court held that the evidence relied upon by the judgment creditor failed to show that the judgment debtors owned non-exempt property that cannot be readily attached or levied on by ordinary process. The judgment debtor relied upon records obtained from the Secretary of State listing one of the judgment debtors as a director, member, or officer of various businesses. The court cited provisions of the Texas Business Organizations Code for the proposition that a person's right to manage a company is not an "ownership interest." Specifically, the statute provides that a person need not be a shareholder to be a director of a corporation. With respect to an LLC, the court cited provisions of the statute stating that the right to participate in management of an LLC is not a membership interest and a person may be a member of an LLC without acquiring a membership interest. The court also held that county records showing an LLC as owner of the residence of the judgment debtors, and a deed conveying the residence from another company to the LLC, were not evidence that the judgment debtors owned the LLC.

Hotel 71 Mezz Lender LLC v. Falor, 926 N.E.2d 1202 (N.Y. 2010). The court held that the non-resident defendants' membership interests in numerous Delaware, Georgia, and Florida LLCs were subject to attachment in New York. The court concluded that a court with jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the

property is outside New York. The court found that the intangible property plaintiff sought to attach – the membership interests in out-of-state LLCs – was akin to intangible contract rights, and thus was clearly assignable and transferable so as to be “property” under the relevant New York attachment statute. The court analyzed the situs of the property and determined that the situs of the uncertificated membership interests, similar to debt, was wherever the defendants were located. Because the interests were uncertificated, the court rejected the argument that the interests were analogous to stock. The court also concluded that the appointment of a receiver for the interests was warranted due to the complexity of the defendants’ interests in various LLCs, the defendants’ disregard for previous discovery orders, the precarious financial condition of the defendants, and the lack of marketability of the interests.

Acadian Energy Resources, LLC v. Carpenter, Civil Action No. 2:09-00150, 2009 WL 5217676 (S.D. W. Va. Dec. 31, 2009) (denying intervention petition of judgment creditor of party in action in which issues included dispute over judgment debtor’s ownership interest in LLC and looting of LLC).

MM. Securities Laws

Elipas v. Jedynek, No. 07 C 3026, 2010 WL 1286795 (E.D. Ill. March 26, 2010). The plaintiffs, investors in an LLC, alleged various federal and Illinois securities laws violations. The plaintiffs sought summary judgment against Cummings, one of two members of the LLC’s Executive Committee and a consultant to the LLC. Cummings never had any face-to-face meetings with the plaintiffs but was involved in many facets of the fundraising process. He reviewed, approved, and executed the operating agreement and was aware it would be furnished to investors. The plaintiffs’ motion for summary judgment, however, was not based on statements in the operating agreement, but rather on statements made by the other two individual defendants who were reselling their own equity in the LLC. Cummings did not dispute that the two other individual defendants committed fraud but denied that he had knowledge of it at the time. The court discussed “controlling person” liability under the Illinois securities law and concluded that the plaintiffs failed to show there was no disputed fact as to whether Cummings acted in concert with the other two individuals in the sales of their securities. The court also discussed primary liability and noted that scienter is not required under the Illinois provisions in question. The plaintiffs alleged that Cummings failed to disclose several material facts, but the court concluded that the plaintiffs failed to show that reasonable minds could not differ on the question of materiality.

In re Brisbin (Oliver Holdings, Inc. v. Brisbin), Bankruptcy No. 08-12236-SSC, Adversary No. 08-AP-937, 2010 WL 276755 (Bankr. D. Ariz. Jan. 19, 2010). The plaintiff sought to have its investment in an LLC declared nondischargeable, relying in part on Arizona securities laws. The plaintiff argued that its investment in an Arizona LLC was an “investment contract” under Arizona law. The court noted that the plaintiff appeared to argue that the operating agreement was the security rather than the membership interest, and the court stated that there was no legal basis for the argument that the operating agreement was a security. The court stated that no LLC in Arizona would be able to operate without fear of a lawsuit years after the interest was purchased if the court accepted the plaintiff’s argument. Applying Arizona case law and the *Howey* test, the court concluded that the membership interest in this case was a security, but the court found the plaintiff failed to establish the elements for a non-dischargeable debt because the plaintiff failed to show that the defendant made a material misrepresentation or omission, that the plaintiff justifiably relied on any material misrepresentation or omission, that the defendant had the requisite intent to defraud, or that the defendant proximately caused the plaintiff’s loss.

J. Stan Developments, LLC v. Lindo, No. 2008-CA-001796, 2009 WL 3878084 (Ky. App. Nov. 20, 2009). The court affirmed a judgment holding the sole member of an LLC personally liable for violations

of Kentucky securities laws. The member argued that he could not be liable unless the LLC veil was pierced, but the court interpreted the LLC statute and securities laws to provide for liability based on the member's own participation in the transaction in issue.

Gordon v. Elite Consulting Group L.L.C., No. 08-CV-10772, 2009 WL 4042911 (E.D. Mich. Nov. 19, 2009). The plaintiff brought state and federal securities fraud claims against a Florida LLC and several individuals involved in the LLC. Redman, who was the registered agent and a manager of the LLC, argued that she was employed by another company that offers corporate services such as acting as registered agent and filing corporate documents of formation and dissolution, and that the plaintiff failed to sufficiently allege that she was a "controlling person" who shared liability with the LLC. The court held that the plaintiff had alleged plausible claims that Redman participated in the day-to-day operations and possessed the power to control the alleged misrepresentations and omissions based on actions that must be taken by members under Florida law, such as approving and signing the articles of dissolution, and other filings signed by her as "managing member." The court held that Redman could not be held liable as an aider and abetter under federal law, and her alleged own acts of "quickly" forming and dissolving the LLC and other companies did not plausibly support the requisite elements of reliance and proximate cause.

NN. Worker's Compensation

Van Dyke v. CMI Terex Corporation, 689 S.E.2d 459 (N.C. App. 2009). The sole shareholder (a corporation) of the sole member (another corporation) of a Delaware LLC that employed a worker who was killed in an industrial accident sought summary judgment based on the exclusivity provision of the Workers' Compensation Act. The court stated that, under Delaware law, the member-manager's liability is inseparable from the LLC's when the member-manager is conducting the LLC's business, and the corporate member would be protected by the exclusivity provisions for its actions in conducting the LLC's business. The party moving for summary judgment, however, was the member's shareholder. The court stated that the shareholder was shielded from liability for the acts of the corporation but not from liability for its own negligent acts or conduct. In this case, the plaintiff did not allege claims against any party but the shareholder. Unlike *Hamby v. Profile Prods., LLC*, in which the North Carolina Supreme Court held that the member-manager was entitled to the protections of the exclusivity provision because it was conducting the employer's business, the plaintiff in this case alleged that the shareholder acted negligently (by failing to provide proper warnings, operating procedures, and instructions on machinery and failing to exercise reasonable care with regard to procedures and equipment) out of its own interest, not in its management or conduct of the LLC's business. The court of appeals stated that it could not determine whether the shareholder's liability was inseparable from that of the LLC and thus could not hold that denial of summary judgment was in error.

OO. Right to Financial Privacy

Flatt v. United States Securities and Exchange Commission, No. 10-60073-MC, 2010 WL 1524328 (S.D. Fla. April 14, 2010) (holding that customer protections in Right to Financial Privacy Act did not provide basis to quash SEC subpoena of LLC's bank records because LLC is not individual or partnership and thus is not included in definition of "customer" under RFPFA).

PP. Real Estate Transfer Laws

Lairsen v. Figuerado, Civil Action No. 5:09-67-JMH, 2010 WL 1740881 (E.D. Ky. April 27, 2010) (holding that prohibition on recovery of commission by unlicensed broker in transactions involving real estate applied to sale of interest in LLC because one of LLC's major assets was leasehold of real property).

Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 23 So.3d 175 (Fla. App. 2009). The court held that a ten-year commercial lease did not satisfy a Florida statute applicable to conveyances of real property because it lacked two subscribing witnesses as required by the statute for a lease of more than one year. Though the lease was properly executed under the Florida LLC statute, the court agreed with the views of the Real Property, Probate and Trust Law Section of the Florida Bar expressed in its amicus curiae brief and held that the lease must also comply with the statutory two-witness requirement. Recognizing that an LLC is not a corporation, the court rejected the argument that an exception in the statute for corporations applied to the LLC. The court also agreed with the amicus argument that the bare failure of the landlord to have his signature witnessed does not give rise to an estoppel because such a result would effectively render the statutory two-witness requirement unenforceable. Thus, the court of appeals affirmed the trial court's denial of specific performance. The court determined, however, that the lessee might still have a claim for breach of contract against the landlord, citing case law that permitted a party under some circumstances to pursue a claim for damages under a deed or lease that was defective under the statute requiring two witnesses where the document otherwise complied with the requirements of the statute of frauds.

Alcazar Tenants' Association v. Smith Property Holdings, L.P., 981 A.2d 1202 (D.C. App. 2009) (holding that multi-step transfer of real property ownership involving various LLCs and other entities did not constitute "sale" within meaning of provisions of District of Columbia Rental Housing Conversion and Sale Act as statute existed at time).

QQ. Wage and Employment Statutes

O'Neal v. Campbell, Civil Action No. 5:09cv110-DCB-JMR, 2009 WL 3489868 (S.D. Miss. Oct. 23, 2009) (finding plaintiff employed by LLC had adequately alleged claim against LLC members as "employers" under Fair Labor Standards Act based on allegations regarding managerial and supervisory responsibilities).

RR. Insurance

In re American Wood Concepts, LLC (State Auto Property and Casualty Co. v. Strauss), Bankruptcy No. 08-50791, Adversary No. 09-5011, 2010 WL 1609690 (Bankr. W.D. Mo. April 20, 2010) (holding insurer of LLC was relieved of liability for losses arising from fire on LLC's premises due to LLC member's failure to provide insurer opportunity to question him where policy gave insurer right to examine under oath "any insured," which unambiguously included "members" without limiting "members" to majority members or excluding minority members).

Protective Life Insurance Company v. B & K Enterprizes LLC, No. 08-C-312, 2010 WL 1368660 (E.D. Wis. March 31, 2010) (discussing authority of LLC manager in winding up and concluding neither former manager, who was key man insured under policy owned by LLC, nor new manager had authority to transfer ownership of policy to insured without consideration for his personal purposes, and attempt to do so was void).

Solheim Roofing, LLC v. Grange Mutual Casualty Company, Action No. 05-CI-01395, 2010 WL 323296 (Ky. App. Jan. 20, 2010). The court held that a 1% member of an LLC was a contemplated insured under a motor vehicle liability insurance policy issued to an LLC where the policy applied to “members of a limited liability company” in instances where the named insured was an LLC. The court acknowledged that an LLC is a separate entity from its members but stated that naming an LLC as an insured would be essentially meaningless unless coverage extended to some person or persons associated with the LLC. The court held that the member must be considered an “insured of the first class” under the policy since she was an owner/member of the LLC, but the court concluded, as a matter of first impression, that the policy could limit its coverage to accidents arising out of the operations of the LLC and that the policy in this case did so.

Wilcox v. Weber Insurance, 982 A.2d 1053 (Conn. 2009) (holding managing member and another member sufficiently alleged interests in automobile and umbrella insurance policies so as to have standing to sue insurer that refused to defend and indemnify in connection with accident involving dump truck owned by LLC).

Motorists Mutual Insurance Company v. Brickner, Nos. 09AP-281, 09AP-282, 2009 WL 2940196 (Ohio App. Sept. 10, 2009) (interpreting term “you” in automobile insurance policy to apply to LLC or any of three members listed on declaration page as named insured).

SS. Statute of Frauds

Cottone v. Selective Surfaces, Inc., 892 N.Y.S.2d 466 (App. Div. 2d Div. 2009) (holding alleged oral agreement under which plaintiff allegedly acquired interest in LLC was not barred by one-year provision of statute of frauds since alleged agreement was essentially employment agreement without fixed duration and was capable of being performed within one year).

Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 23 So.3d 175 (Fla. App. 2009). The court held that a ten-year commercial lease did not satisfy a Florida statute applicable to conveyances of real property because it lacked two subscribing witnesses as required by the statute for a lease of more than one year. Though the lease was properly executed under the Florida LLC statute, the court agreed with the views of the Real Property, Probate and Trust Law Section of the Florida Bar expressed in its amicus curiae brief and held that the lease must also comply with the statutory two-witness requirement. Recognizing that an LLC is not a corporation, the court rejected the argument that an exception in the statute for corporations applied to the LLC. The court also agreed with the amicus argument that the bare failure of the landlord to have his signature witnessed does not give rise to an estoppel because such a result would effectively render the statutory two-witness requirement unenforceable. Thus, the court of appeals affirmed the trial court’s denial of specific performance. The court determined, however, that the lessee might still have a claim for breach of contract against the landlord, citing case law that permitted a party under some circumstances to pursue a claim for damages under a deed or lease that was defective under the statute requiring two witnesses where the document otherwise complied with the requirements of the statute of frauds.

TT. Unfair Trade Practices

Risk Management Services, L.L.C. v. Moss, 40 So.2d 176 (La. App. 2010) (concluding there was no error in jury’s determination that manager engaged in unfair trade practices based on evidence of waning commitment to major service contract of LLC efforts to take business and employees from LLC).

Searing v. Grocki, No. X03CV084041080S, 2009 WL 3839295 (Conn. Super. Oct. 21, 2009) (holding that allegations of misconduct by some members of LLC as against other members of LLC did not occur in “conduct of trade or commerce” for purposes of Connecticut Unfair Trade Practices Act).

Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. App. 2009). The plaintiffs asserted claims for breach of contract, unfair and deceptive trade practices, unjust enrichment, constructive trust, and common law fraud based on the defendants’ solicitation of money from the plaintiffs for the purpose of purchasing properties. The parties agreed that the venture would be organized as an LLC, and the plaintiffs alleged that one of the defendants, Browder, represented to them that the LLC was formed when it was not. Several properties were deeded to the non-existent LLC, and the court characterized these deeds as void because the LLCs were non-existent. With regard to the unfair or deceptive acts or practices claims, the court held that the alleged deceptive practices (marketing memberships in a fictitious LLC) were merely assertions that the defendants asked plaintiffs to invest in a business arrangement, and these capital raising ventures among sophisticated business persons fell outside the scope of the North Carolina Unfair and Deceptive Trade Practices Act. Also, the court held that the allegations did not show that the acts or statements were “in or affecting commerce” and did not allege an actual, concrete injury in fact.

UU. Tortious Interference

Pointer v. Castellani, 918 N.E.2d 805 (Mass. 2009) (upholding trial court’s finding that members and CEO of LLC were liable for interference with minority member’s employment contract with LLC because they terminated minority member for cause that was contrived).

VV. Intracorporate Conspiracy

ODP, LLC v. Shelterlogic, LLC, No. X09CV064020086, 2009 WL 2783692 (Conn. Super. July 31, 2009) (holding that individuals who were members and managers of LLC, as agents of LLC, were shielded from liability for civil conspiracy by intracorporate conspiracy doctrine because their conduct did not fall within “scope of employment” or “scope of agency” exception, which recognizes distinction between collaborative acts done in pursuit of employer’s business and private acts done by persons who happen to be at workplace).

WW. Conversion/Merger/Reorganization

In re Mervyn’s Holdings, LLC (Mervyn’s LLC v. Lubert-Adler Group IV, LLC), 426 B.R. 488 (Bankr. D. Del. 2010). The court determined that the debtor’s complaint against Target Corporation alleged facts sufficient to support collapsing the transactions surrounding the sale of Mervyn’s (including execution of a sale agreement, stripping of real estate assets, increasing the rent under leases, and conversion of the debtor from a corporation to an LLC) so as to state a claim based on fraudulent transfer. The court noted in particular that the conversion of the debtor into an LLC was particularly significant because it enabled Target to transfer its membership interest, which was a major factor in the fraudulent transfer claim.

In re Estate of Upjohn, Docket No. 278668, 2010 WL 624413 (Mich. App. Feb. 23, 2010) (concluding that Delaware corporation that converted to Delaware LLC in 2004 did not “cease to exist or function” within meaning of clause in decedent’s will because Delaware conversion statute provided that conversion of Delaware corporation into Delaware LLC resulted in continuation of existence of converting corporation in form of LLC and facts did not suggest that entity ceased to function after its conversion).

Karmaloop, Inc. v. Sneider, No. 083580F, 2010 WL 1050951 (Mass. Super. Jan. 6, 2010) (holding plaintiff did not have standing to bring derivative claims on behalf of corporation that was surviving entity in merger with LLC because plaintiff did not and never did own stock in surviving corporation; recognizing plaintiff could pursue direct claim against corporation as to whether he should receive stock or not).

Michael's Finer Meats, LLC v. Alfery, 649 F.Supp.2d (S.D. Ohio 2009) (holding Ohio merger statute did not automatically pass benefits of non-competition agreement from corporation to surviving LLC if agreement was not otherwise assignable, but agreement in question was likely assignable where it did not contain language prohibiting assignment, same family remained in control of successor LLC, and agreement was necessary to protect goodwill of new LLC and employer who signed agreement).

Tracfone Wireless, Inc. v. Access Telecom, Inc., 642 F.Supp.2d 1354 (S.D. Fla. 2009) (noting effect of conversion with respect to vesting of property of converting entity in converted entity but holding that conversion of Florida corporation into LLC did not take effect prior to assignment of intellectual property rights on same day as conversion, and conversion thus had no bearing on ownership of intellectual property rights no longer owned by converting entity).

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

Leedreau, LLC v. Commissioner of Internal Revenue, T.C. Summ. Op. 2009-05, 2009 WL 4824207 (U.S. Tax. Ct. Dec. 15, 2009). The sole member of a Massachusetts LLC that was disregarded for federal income tax purposes challenged the IRS determination that she was personally liable for employment taxes owed by the LLC. The member argued that she was not liable because she was not a responsible officer and had leased the LLC to a third party who operated the LLC and was authorized to use the taxpayer identification number of the LLC. The court concluded that the member was liable on the basis that she was the sole member and the LLC was a disregarded entity during all of the taxable periods at issue. The court found it irrelevant that the member allowed a third party to use the taxpayer identification number associated with her solely owned LLC. Although the court acknowledged that a disregarded entity is treated as a corporation for purposes of employment taxes related to wages after January 1, 2009, the periods involved in this case predated this amendment.

YY. Passive Activity Rules

Newell v. Commissioner of Internal Revenue, T.C. Memo 2010-23, 2010 WL 538207 (U.S. Tax Ct. 2010) (relying on *Garnett* and holding that managing member's interest in California LLC was interest of "general partner" for purposes of passive activity rules and that member's losses were properly deducted because member materially participated in LLC).

Hegarty v. Commissioner of Internal Revenue, T.C. Summ. Op. 2009-153, 2009 WL 3188789 (U.S. Tax. Ct. Oct. 6, 2009). Consistent with its holding in *Garnett v. Commissioner*, the court found that LLC members may materially participate in the LLC business under any of the seven tests listed in Section 1.269-5T(a)(1)-(7), and the court held that the taxpayers participated in the business for more than 100 hours during the year in question and that their participation was not less than that of any other individual so that they materially participated in the business during the year in question.

ZZ. Gift Tax

Petter v. Commissioner of Internal Revenue, T.C. Memo 2009-280, 2009 WL 4598137 (U.S. Tax Ct. 2009) (discussing various aspects of LLC's structure and formula clauses in transfer documents for valuing LLC membership interests gifted to charities and concluding clauses were valid).

AAA. Attorney Liability, Disqualification

In the Matter of Cramer, 225 P.3d 881 (Wash. 2010) (adopting Bar Disciplinary Board's recommendation of disbarment of attorney who dissolved PLLC and formed new professional services corporation after notifying Department of Revenue that he was ceasing practice upon revocation of PLLC's registration for failure to pay taxes).

McCully, Inc. v. Baccaro Ranch, 778 N.W.2d 115 (Neb. 2010) (holding that lawyer's representation of individual in preparation of documents creating LLC five years previously did not disqualify lawyer from representing opposing party in this case because preparation of LLC documents was not "the same or a substantially related matter" with regard to case).

BBB. Attorney Client Privilege

Lopes v. Vieira, 688 F.Supp.2d 1050 (E.D. Cal. 2010) (examining management provisions of LLC operating agreement and California LLC statute and concluding defunct LLC, though it continued to exist as entity under California law until dissolved in accordance with law, could not assert attorney-client privilege because it had no officer or manager to assert or waive privilege).

Natomas Gardens Investment Group LLC v. Sinadinos, No. CIV. S-08-2308 FCD/KJM, 2009 WL 3055213 (E.D. Cal. Sept. 14, 2009) (disqualifying attorney from representing both LLC and its officer in derivative action and directing LLC to retain independent counsel without prior ties to LLC or other parties to case).