THE LIMITS OF LIMITED LIABILITY: VEIL PIERCING AND OTHER BASES OF PERSONAL LIABILITY OF OWNERS, GOVERNING PERSONS, AND AGENTS OF TEXAS BUSINESS ENTITIES

ELIZABETH S. MILLER
Professor of Law
Baylor University School of Law
Waco, Texas

State Bar of Texas
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CHAPTER 4

Elizabeth S. Miller is a Professor of Law at Baylor University School of Law where she teaches Business Organizations, Business Planning, and related courses. Professor Miller speaks and writes extensively on business organizations topics. She frequently appears on continuing legal education programs and is co-author of a three-volume treatise on *Business Organizations* published by Thomson Reuters/West as part of its Texas Practice Series (Vols. 19, 20, and 20A) and a one-volume treatise that is part of the *Texas Methods of Practice* subset of the Texas Practice Series (Vol. 13). Professor Miller has served as Chair of the LLCs, Partnerships and Unincorporated Entities Committee of the Business Law Section of the American Bar Association as well as the Partnership and Limited Liability Company Law Committee of the Business Law Section of the State Bar of Texas. She has also served as Chair of the Business Law Section of the State Bar of Texas. Professor Miller has been involved in the drafting of legislation affecting Texas business organizations for many years and has served in an advisory or membership capacity on the drafting committees for numerous prototype, model, and uniform statutes and agreements relating to unincorporated business organizations. She is an elected member of the American Law Institute, a Fellow of the American Bar Foundation and the Texas Bar Foundation, and a recipient of the Jean Allard Glass Cutter Award presented by the Business Law Section of the American Bar Association and the Martin I. Lubaroff Award presented by the LLCs, Partnerships and Unincorporated Entities Committee of the ABA Business Law Section.

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I. Introduction

Sole proprietors and partners in a traditional general partnership enjoy no protection from the debts and liabilities of the business. The various business entities that provide some type of liability protection do so under slightly varying approaches. These variations are discussed below.

II. Corporations

A. Limited Liability of Shareholders, Directors, and Officers

A corporation is well-recognized for its complete liability shield. Unless a shareholder, director, or officer is liable on some independent legal basis (e.g., is personally a tortfeasor or guarantor), such parties ordinarily have no liability for corporate debts and obligations. "The corporate form normally insulates shareholders, officers, and directors from liability for corporate obligations; but when these individuals abuse the corporate privilege, courts will disregard the corporate fiction and hold them liable individually." *See Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986). Disregard of the corporate fiction in this manner is also referred to as "piercing the corporate veil."

B. Piercing the Corporate Veil

A short discussion cannot do justice to the developments in the area of corporate veil piercing in Texas over the last 30 years; however, a brief summary is provided below.

1. <u>Alter Ego Theory</u>

Traditionally, most veil-piercing cases were premised on the alter ego theory. The Texas Supreme Court has described this basis for piercing the corporate veil as follows: "Under the alter ego theory, courts disregard the corporate entity when there exists such unity between the corporation and individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice." *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990), citing *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). The total dealings between the shareholder and the corporation are relevant in determining whether there is an alter ego relationship. *Id.*; *see also Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571 (Tex. 1975). The supreme court has stated that the evidence may include "'the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.'" *Mancorp, Inc. v. Culpepper*, 802 S.W.2d at 228, citing *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). The alter ego theory has been affected by legislative developments described below. In a case in which a claimant seeks to impose liability on a shareholder for a corporate obligation arising out of a contract, the claimant must meet the actual fraud standard described below. Additionally, as discussed below, the role of corporate formalities in a veil-piercing analysis is now addressed by statute.

The Texas Supreme Court has distinguished between "jurisdictional veil piercing" (i.e, piercing for purposes of exercising personal jurisdiction) and "substantive veil piercing" (i.e., piercing for purposes of imposing liability) and stated that they involve different elements of proof. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007). Specifically, the court has stated that "fraud – which is vital to piercing the corporate veil under Section 21.223 of the Business Organizations Code – has no place in assessing contacts to determine personal jurisdiction." *Id.* at 175. The relevant factors for jurisdictional veil piercing were described by the court as follows:

> To 'fuse' the parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.

Id. at 175 (citing *BMC Software*, 83 S.W.3d at 799).

2. <u>The Emergence of "Sham to Perpetrate a Fraud"and the Legislative Response (Statutory Actual Fraud Requirement in Cases Arising Out of a Contract)</u>

The Texas Supreme Court articulated what many believed was an unprecedented and unduly broad approach to veil piercing in *Castleberry v. Branscum*, 721 S.W.2d 270 (1986). In that case, the court recognized the "sham to perpetrate a fraud" basis for piercing the corporate veil.[1] This theory was distinct from alter ego, explained the court, and was a basis to pierce the corporate veil if "recognizing the separate corporate existence would bring about an inequitable result." To prove there has been a sham to perpetrate a fraud, the court stated that tort claimants or contract creditors need only show constructive fraud. The court described constructive fraud as "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests."

The Texas legislature reacted to the *Castleberry* opinion by amending the Texas Business Corporation Act (the "TBCA"). As a result of amendments to Article 2.21 of the TBCA in 1989 and several subsequent legislative sessions, veil piercing is now addressed by statute in Texas in such a way that piercing the corporate veil to impose personal liability for a contractual, or contractually-related, obligation of a corporation is quite difficult. The post-*Castleberry* amendments to Article 2.21 of the TBCA provided that a shareholder or affiliate may not be held liable for a contractual obligation of the corporation, or any matter relating to or arising from the contractual obligation, unless the shareholder or affiliate used the corporation to perpetrate an actual fraud for the direct personal benefit of the shareholder or affiliate. Tex. Bus. Corp. Act art. 2.21A(2) (expired eff. Jan. 1, 2010). This provision has been carried forward in the corporate provisions of the Business Organizations Code (the "BOC"). Tex. Bus. Orgs. Code § 21.223(a)(2) and (b). By protecting "affiliates" (of the shareholders and of the corporation) as well as shareholders, the statute protects affiliated entities and non-shareholder directors and officers of the corporation to the extent a veil-piercing theory might be relied upon to impose liability on such persons for a contractually related obligation of the corporation. *Phillips v. United Heritage Corp.*, 319 S.W.3d 156 (Tex.App.–Waco 2010, no pet.).

A 1998 court of appeals case illustrates the difficulty plaintiffs may have in meeting these standards to pierce the veil. In *Menetti v. Chavers*, 974 S.W.2d 168 (Tex.App.–San Antonio 1998, no pet.), the plaintiffs sued their builder alleging breach of contract and various tort and DTPA claims. The court determined that all the claims arose from or related to the construction contract and required a showing of actual fraud to pierce the corporate veil. The court acknowledged that the evidence indicated the defendants were poor bookkeepers and took little effort to preserve the corporate fiction; however, there was no evidence that the defendants made any fraudulent misrepresentations (the theory of actual fraud pursued by the plaintiffs). Thus, the plaintiffs were unable to impose liability based upon the alter ego theory. In addition, the court held that, since Article 2.21 required actual fraud to pierce the veil on the basis of "alter ego, ... sham to perpetrate a fraud, or other similar theory," the lack of actual fraud precluded liability under all of the other theories pleaded by the plaintiffs, including sham to perpetrate a fraud, denuding, trust fund doctrine, and illegal purposes.

There has been some disagreement among litigants as to how "actual fraud" should be defined when a veil-piercing issue is submitted to the jury. *See, e.g., Latham v. Burgher*, 320 S.W.3d 602, 606-07 (Tex.App.–Dallas 2010, no pet.) (holding "dishonesty of purpose or intent to deceive" was sufficient definition of "actual fraud" for veil-piercing purposes and trial court did not err in refusing to submit instruction based on common law fraud); *Dick's Last Resort of the West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 909-10 (Tex.App.–Dallas 2008, pet. denied) (rejecting argument that actual fraud instruction should include elements of tort of common law fraud); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 584-85 (Tex.App.–Houston [1st Dist.] 2007, pet. denied) (stating that actual fraud can be concealment or failure to disclose material facts and holding trial court did not abuse its discretion in defining actual fraud based on such theory rather than requiring finding of material misrepresentation); *In re Arnette (Ward Family Found. v. Arnette)*, 2011 WL 2292314

[1] The court listed six "bases" to disregard the separate corporate existence: (1) when the fiction is used as a means of perpetrating fraud (i.e., sham to perpetrate a fraud); (2) where a corporation is organized and operated as a mere tool or conduit of another (i.e., alter ego); (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify a wrong. The court then noted in a footnote that "[i]nadequate capitalization is another basis for disregarding the corporate fiction," thus raising the possibility that inadequate capitalization was itself enough to disregard a corporation's separate existence. In previous cases, the court had referred to inadequate capitalization as a factor to be considered in a veil-piercing analysis but not as an independent basis to pierce the veil. In *SSP Partners v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444 (Tex. 2008), the supreme court listed the six bases set forth above without mentioning inadequate capitalization.

(Bankr. N.D. Tex. June 7, 2011) (discussing actual fraud standard under Section 21.223 of BOC and stating that actual fraud for purposes of statute is not the same as common law tort of fraud and simply requires proof of dishonesty of purpose or intent to deceive).

The Texas Supreme Court has discussed the "narrowly prescribed...circumstances under which a shareholder can be held liable for corporate debts" under TBCA Article 2.21 and BOC Sections 21.223-21.226. *Willis v. Donnelly*, 199 S.W.3d 262, 271-73 (Tex. 2006). Donnelly argued that Willis and his wife were personally liable for the breach of a letter agreement under which two corporations formed by Willis were obligated to issue stock to Donnelly. After describing the circumstances leading to the amendment of Article 2.21 (i.e., the business community's displeasure with the flexible approach to veil piercing embraced in *Castleberry*), the court relied upon BOC Sections 21.223-21.225 to reject Donnelly's claim that the Willises were liable for breach of the agreement based on an implied ratification of the agreement. The court pointed out that the statute precludes holding a shareholder liable for any contractual obligation of the corporation on the basis of alter ego, actual or constructive fraud, sham to perpetrate a fraud, or *other similar theory* unless the shareholder causes the corporation to be used to perpetrate an actual fraud on the obligee for the shareholder's direct personal benefit or the shareholder expressly agrees to be personally liable for the obligation. The jury rejected Donnelly's fraud claim, and the court concluded that the Willises did not expressly agree to assume personal liability under the contract. According to the court, "[t]o impose liability against the Willises under a common law theory of implied ratification because they accepted the benefits of the letter agreement would contravene the statutory imperative that, absent actual fraud or an express agreement to assume personal liability, a shareholder may not be held liable for contractual obligations of the corporation." The court held that Donnelly's characterization of his theory as "ratification" rather than "alter ego" was simply asserting another "similar theory" of derivative liability that is covered by the statute.

BOC Section 21.223, like its predecessor (Article 2.21 of the TBCA), does not specify that liability based upon alter ego, sham to perpetrate a fraud, or other veil-piercing theories must be accompanied by actual fraud if the underlying claim is based upon a tort or statutory liability that does not arise out of a contract of the corporation. *See Love v. State*, 972 S.W.2d 114, 117-18 (Tex.App.–Austin 1998, pet. denied); *Farr v. Sun World Savings Ass'n*, 810 S.W.2d 294, 296 (Tex.App.–El Paso 1991, no writ); *Western Horizontal Drilling, Inc. v. Jonnet Energy Corp.*, 11 F.3d 65, 68 n. 4 (5th Cir. 1994); *Nordar Holdings, Inc. v. Western Sec. (USA) Ltd.*, 969 F.Supp. 420, 422 and 423 n. 2 (N.D.Tex.1997). Bar committee commentary, however, characterizes the constructive fraud standard as "questionable" in the context of tort claims and suggests that the amendments should be considered by analogy in the context of tort claims, in particular contractually based tort claims. Tex. Bus. Corp. Act art. 2.21, Comment of Bar Committee–1996. The statute was amended in 1997 to make clear that the corporate veil may not be pierced to hold a shareholder or affiliate liable on a claim "relating to or arising from" a contractual obligation of the corporation absent actual fraud on the part of the shareholder or affiliate.

Although actual fraud may not be required to pierce the corporate veil in the context of a non-contractual obligation, veil piercing has traditionally been predicated on notions of justice and fairness. Thus, the plaintiff should nevertheless be required to establish that injustice or inequity will result if the separate corporate existence is recognized. *See SSP Partners v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444 (Tex. 2008) (stating that there must be evidence of abuse or injustice to disregard the corporate form and rejecting the single business enterprise theory because the factors do not reflect illegitimate use of limited laibility); *Matthews Constr. Co., Inc. v. Rosen,* 796 S.W.2d 692 (Tex. 1990) (stating that "[w]hen the corporate form is used as an essentially unfair device – when it is used as a sham – courts may act in equity to disregard the usual rules of law in order to avoid an inequitable result"); *Mancorp, Inc. v. Culpepper,* 802 S.W.2d 226 (Tex. 1990) (stating that courts may disregard the corporate entity under the alter ego theory "when there exists such unity between the corporation and individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice"); *Lucas v. Texas Indus., Inc.,* 696 S.W.2d 372 (Tex. 1984) (noting policy reasons that courts are less reluctant to pierce the veil in tort cases than breach of contract cases but refusing to pierce the corporate veil in the tort case in question in the absence of evidence that the corporate form caused the plaintiff to fall victim to a "basically unfair device by which ... [the] corporate entity was used to achieve an inequitable result").

The statutory actual fraud standard applicable in a veil-piercing case does not protect corporate shareholders/officers from liability for their own torts, even though such torts may have occurred while acting on behalf of the corporation in the context of a contractual transaction between the corporation and the plaintiff. *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex.App–San Antonio 2008, no pet.); *Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 32 (Tex.App.–San Antonio 2003, pet. denied); *Kingston v. Helm*, 825 S.W.3d 755, 764-67 (Tex.App.–Corpus Christi 2002, pet. denied); *but see* Glenn D. West and Adam D. Nelson, Corporations, 57 SMU L. REV. 799, 805-08 (2004) (disagreeing with application of agency law to impose liability on corporate officer in *Gore v. Scotland Golf, Inc.*); Glenn D. West and Susan Y. Chao, Corporations, 56 SMU L. REV. 1395, 1403-08 (2003) (disagreeing with application of agency law to impose liability on corporate officer in *Kingston v. Helm*).

3. De-Emphasis of Corporate Formalities

The Texas legislature has also addressed the relevance of failure to follow corporate formalities in the veil-piercing context. Traditionally, the failure to follow corporate formalities has been a factor in alter ego veil-piercing cases; however, Section 21.223(a)(3) of the BOC, like its predecessor (Article 2.21A(3) of the TBCA), provides that failure to follow corporate formalities is not a "basis" to hold a shareholder or affiliate liable for any obligation of the corporation.[2] Courts have generally interpreted this provision to mean that failure to follow corporate formalities is no longer a "factor" in veil piercing. *See, e.g., TransPecos Banks v. Strobach*, 487 S.W.3d 722 (Tex. App.—El Paso 2016, no pet.); *TMX Fin. Holdings, Inc. v. Wellshire Fin. Services, LLC*, 2016 WL 5920776 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, no pet.); *Gurganus v. Furniss*, 2016 WL 3745684 (N.D. Tex. July 13, 2016); *Sparling v. Doyle*, 2014 WL 12489990 (W.D. Tex. Oct. 23, 2014); *In re Abraham*, 2014 WL 3406513 (S.D. Tex. July 7, 2014); *In re Atlas Fin. Mortg., Inc.*, 2014 WL 172283 (Bankr. N.D. Tex. Jan. 14, 2014); *Hernandez v. Frazier*, 2012 WL 12895761 (W.D. Tex. Sept. 14, 2012), report and recommendation adopted, 2013 WL 12142682 (W.D. Tex. Jan. 31, 2013); *In re Gregg*, 2012 WL 4506776 (Bankr. E.D. Tex. Sept. 28, 2012); *Lonrho PLC v. Starlight Investments, LLC*, 2012 WL 4215754 (S.D. Tex. Sept. 18, 2012); *Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 458 (Tex. App.—Dallas 2012, pet. denied); *Burchinal v. PJ Trailers-Seminole Mgmt. Co., LLC*, 372 S.W.3d 200, 217 (Tex.App.–Texarkana 2012, no pet.); *Penhollow Custom Homes, LLC v. Kim,* 320 S.W.3d 366 (Tex.App.–El Paso 2010, no pet.); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 428 (Tex.App.–Houston [1st Dist.] 2007, pet. granted, judgm't vacated w.r.m.); *Sparks v. Booth,* 232 S.W.3d 853, 868-69 (Tex.App.–Dallas 2007, no pet.); *Hoffman v. Dandurand*, 180 S.W.3d 340, 347 (Tex.App.–Dallas 2005, no pet.); *Carone v. Retamco Operating, Inc.*, 138 S.W.3d 1, 13 (Tex.App.–San Antonio 2004, pet. denied); *Hall v. Timmons*, 987 S.W.2d 248, 250 n. 2 (Tex.App.–Beaumont 1999, no pet.); *In re Ryan (Bale v. Ryan)*, 443 B.R. 395, 407 (Bankr. N.D. Tex. 2010); *Hunt*

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[2] In addition to the veil-piercing provisions contained in BOC Section 21.231, which are applicable generally to Texas corporations, there are special provisions in Subchapter C (Sections 21.101-21.109) and Subchapter O (Sections 21.701-21.732) of Chapter 21 of the BOC. These provisions permit closely held corporations to operate pursuant to a shareholders' agreement that dispenses with traditional corporate features if certain requirements are met.

BOC Section 21.101allows shareholders of a closely held corporation to structure the corporation to alter or dispense with traditional corporate rules and norms if certain conditions and requirements set forth in the statute are met. BOC Section 21.107 states that the existence or performance of a shareholders' agreement shall not be grounds for imposing personal liability on a shareholder for the obligations of the corporation by disregarding the separate corporate entity even if, pursuant to the agreement, the corporation operates as if it were a partnership or fails to observe corporate formalities otherwise applicable.

The requirements under BOC Sections 21.101-21.109 are somewhat simpler than those imposed under the close corporation provisions found in Subchapter O (Sections 21.701-21.732) of the BOC. In order to be a "close corporation" governed by Subchapter O, the certificate of formation of the corporation must contain the following statement: "This corporation is a close corporation." Additionally, a close corporation that operates pursuant to a shareholders' agreement under Subchapter O must file a statement of operation as a close corporation with the Secretary of State. Subchapter O of Chapter 21 of the BOC also contains a provision that protects shareholders of these special statutory "close corporations" against veil piercing. This protective provision states that neither the failure of a close corporation to observe usual formalities or the statutory requirements prescribed for an ordinary corporation, nor the performance of a shareholders' agreement that treats the close corporation as if it were a partnership or in a manner that otherwise is appropriate only among partners, is a factor in determining whether to impose personal liability on the shareholders for an obligation of the close corporation by disregarding the separate corporate existence or otherwise. Tex. Bus. Orgs. Code § 21.730.

v. Stephens, 2002 WL 32341814 *5 (Tex.App.–Eastland 2002, no pet.)(not designated for publication); *Eckhardt v. Hardeman*, 1999 WL 33226 * 4 n. 4 (Tex.App.–Austin Jan. 28, 1999, pet. denied)(not designated for publication); *In re Arnette (Ward Family Found. v. Arnette)*, 2011 WL 2292314 (Bankr. N.D. Tex. June 7, 2011); *see also Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 233 (Tex. 1990)(Hecht, J., dissenting); *but see Schlueter v. Carey*, 112 S.W.3d 164, 170 (Tex. App.--Fort Worth 2003, pet. denied) (considering failure to follow corporate formalities along with other evidence of alter ego and interpreting TBCA article 2.21 as providing individual may not be held liable under alter ego theory "based simply" on corporation's failure to follow corporate formalities). Some cases, however, continue to recite failure to follow corporate formalities as a factor in veil piercing without referencing or discussing the statutory provision. *See, e.g., S-Line LLC v. B2B Supply*, 2015 WL 4745069 (N.D. Tex. Aug. 10, 2015); *Freilich v. Green Energy Res., Inc.*, 297 F.R.D. 277, 282 (W.D. Tex. 2014) ; *In re Simons Broad., LP*, 2013 WL 9542015 (W.D. Tex. Nov. 19, 2013). The suggested instruction for defining the alter ego basis of holding a shareholder liable in *Texas Pattern Jury Charges* conspicuously omits any reference to "failure to follow corporate formalities." *See* PJC 108.2.

In *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007), the Texas Supreme Court distinguished between "jurisdictional veil piercing" and "substantive veil piercing" and stated that they involve different elements of proof. In that case, the court suggested that failure to follow corporate formalities would be relevant in determining if a parent and subsidiary were "fused" for purposes of jurisdictional piercing. *See also 99869 Canada, Inc. v. Glob. Sec. Networks, Inc.*, 2016 WL 6820394 (S.D. Tex. Nov. 17, 2016); *TMX Fin. Holdings, Inc. v. Wellshire Fin. Services, LLC*, 2016 WL 5920776 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, no pet.); *PT Intermediate Holding, Inc. v. LMS Consulting, LLC*, 2015 WL 5438964 (Tex. App.—San Antonio Sept. 16, 2015, pet. denied); *Act Trading F.Z.E. v. Triple Canopy, Inc.*, 2015 WL 293996 (Tex. App.—Fort Worth Jan. 22, 2015, no pet.); *Weatherford Artificial Lift Sys., Inc. v. A & E Sys. SDN BHD*, 470 S.W.3d 604, 611 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Mt. McKinley Ins. Co. v. Grupo Mexico*, 2013 WL 1683641 (Tex. App.—Corpus Christi Apr. 18, 2013, no pet.); *Mikuni Corp. v. Foster*, 2012 WL 170603 (Tex. App.—Houston [1st Dist.] Jan. 19, 2012, no pet.).

4. <u>The Rise and Fall of the Single Business Enterprise Theory</u>

In the mid 1980s, the "single business enterprise" veil-piercing theory emerged in Texas. As described in *Paramount Petroleum Corp. v. Taylor Rental Center*, 712 S.W.2d 534, 536 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), the single business enterprise theory allowed a claimant to reach the assets of one or more affiliates of a corporation to satisfy the liability of the corporation on the basis that the corporation and its affiliates "integrated their assets to achieve a common business purpose." The court in *Paramount Petroleum* identified a number of factors that would support a finding that separate corporations should be treated as a single business enterprise. Over the next couple of decades, the formulation of the single business enterprise theory articulated in *Paramount Petroleum* made its way into the mainstream of Texas veil-piercing jurisprudence. For example, in *Superior Derrick Services, Inc. v. Anderson*, 831 S.W.2d 868 (Tex.App.—Houston [14th Dist.] 1992, writ denied), the court, in addressing whether the evidence was sufficient to hold one corporation ("Superior") jointly and severally liable for the debt of another corporation ("Champion") on the basis that they operated as a single business enterprise, stated:

> The "single business enterprise" theory involves corporations that "integrate their resources to achieve a common business purpose...." *Paramount Petroleum Corp. v. Taylor Rental Center*, 712 S.W.2d 534, 536 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). In determining whether two corporations had not been maintained as separate entities, the court may consider the following factors: (1) common employees; (2) common offices; (3) centralized accounting; (4) payment of wages by one corporation to another corporation's employees; (5) common business name; (6) services rendered by the employees of one corporation on behalf of another corporation; (7) undocumented transfers of funds between corporations; and (8) unclear allocation of profits and losses between corporations. *Id.*

831 S.W.2d at 874.

Though some of the factors were absent, the court found the evidence sufficient to uphold the finding that the two corporations in question operated as a single business enterprise.

> The evidence showed that a Superior stockholder formed Champion, Superior provided office space for Champion in the same building as Superior's offices, Superior provided Champion with all forms necessary for business, performed services for Champion, and that Superior paid all of Champion's bills, expenses, and employee salaries. In our opinion, this is sufficient to show that the two corporations did not operate as "separate entities but rather integrate[d] their resources to achieve a common business purpose...."

831 S.W.2d at 875.

After the single business enterprise theory was set forth in *Paramount Petroleum* in 1986, Texas courts of appeals applied the theory in a significant number of cases; however, the Texas Supreme Court did not directly address the validity of the theory until a few years ago. In *SSP Partners v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444 (Tex. 2008), the Texas Supreme Court rejected the single business enterprise theory as inconsistent with veil-piercing principles under Texas law. Prior to its opinion in *SSP Partners*, the Texas Supreme Court had expressly refrained from endorsing or rejecting the single business enterprise theory as a means of imposing liability. *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87 (Tex. 2003) ("We need not decide today whether a theory of 'single business enterprise' is a necessary addition to the theory of alter ego for disregarding corporate structure or the theories of joint venture, joint enterprise, or partnership for imposing joint and several liability."); *see also Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 704 (Tex. 2007) ("We do not reach the question of, and express no opinion on, whether the single-business enterprise theory is a viable doctrine to pierce the veil of an entity such as [the parent corporation of an entity that had allegedly breached a fiduciary duty to the plaintiff]."). In *Southern Union*, the court stated that it need not address the parameters of the single business enterprise theory because, whatever label was applied, the plaintiff's attempt to treat various entities as a single entity was encompassed within Article 2.21 of the TBCA, and the plaintiff failed to satisfy the actual fraud standard imposed by the statute.

In *SSP Partners v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444 (Tex. 2008), the Texas Supreme Court pointed out that abuse and injustice are not components of the single business enterprise theory as set forth in *Paramount Petroleum*, and the court stated that there must be evidence of "inequity" or "injustice" (something beyond a subjective perception of unfairness by an individual judge or juror) to disregard the corporate structure. The court stated that there was nothing abusive or unjust about the single business enterprise factors identified in *Paramount Petroleum*, such as sharing of names, offices, accounting, employees, services, and finances. "Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace," according to the Texas Supreme Court in *SSP Partners*. Citing Article 2.21 of the TBCA, which employs a strict approach to veil piercing and requires actual fraud to disregard the corporate structure in certain cases, the court concluded that the single business enterprise theory is fundamentally inconsistent with the approach taken by the legislature in Article 2.21. The court thus held that the theory as set forth in *Paramount Petroleum* will not support the imposition of one corporation's liability on another.

The court's opinion in *SSP Partners* raises a number of potential questions. Is the single business enterprise theory a basis to hold an affiliate liable for a corporation's liability if the claimant establishes actual fraud (in a case arising out of a contract) or "inequity" or "injustice" (in a tort or other non-contract case) in addition to the single business enterprise factors? Is the sham to perpetrate a fraud basis for piercing the veil available to reach the assets of a corporation's non-shareholder affiliate (such that the single business enterprise factors may be superfluous) if the claimant establishes actual fraud (in a contract case) or constructive fraud (in a tort or other non-contract case)? Is it possible to reach the assets of a non-shareholder affiliate pursuant to the alter ego basis for piercing the veil? Though the issue has not often been discussed by Texas courts, some cases indicate that the alter ego doctrine is not available to impose liability on a party other than a shareholder of the corporation. *See Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 325-26 (5th Cir. 2006) (stating that "[t]he great weight of Texas precedent indicates that, for the alter ego doctrine to apply against an individual..., the individual must own stock in the corporation"). Other cases seem to suggest that veil piercing may extend to persons in management roles even if they are not shareholders. While making the point that courts have never indiscriminately applied the alter ego doctrine to "arguably responsible bystanders," a Texas court recently described the alter ego doctrine as applying to "owners and operators of the firm, including 'shareholders, officers, and directors' who would ordinarily be insulated from liability for corporate obligations." *Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46 (Tex.App.–Houston [1st Dist.] 2013, pet. denied), citing *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (1986).

Some plaintiffs have tried to resuscitate their single business enterprise claims by arguing that the factors are accompanied by evidence of actual fraud. In *Big Easy Cajun Corp. v. Dallas Galleria Ltd.*, 293 S.W.3d 345 (Tex.App.–Dallas 2009, pet. denied), a lessor obtained a judgment against a lessee for breach of the lease after the lessee defaulted on the lease and abandoned the premises. The lessor then brought suit against various corporations seeking to hold the corporations liable under the single business enterprise theory for the judgment obtained against the lessee. The jury found for the plaintiff on the single business enterprise claim, and the trial court entered judgment in favor of the plaintiff on the claim. During the pendency of the appeal, the Texas Supreme Court issued its opinion in *SSP Partners v. Gladstrong Investments (USA) Corporation*, and the plaintiff argued that it proved more than the single business enterprise theory discussed in *SSP Partners*, i.e., that it obtained an implicit finding of actual fraud. The court of appeals concluded that the trial court's judgment in favor of the plaintiff must be reversed, however, because the supreme court rejected the fundamental theory of liability the plaintiff submitted to the jury.

In the bankruptcy case of *In re HRM Holdings, LLC (Seidel v. Hosp. Res. Mgmt. LLC)*, 421 B.R. 244 (Bankr. N.D. Tex. 2009), the trustee sought to pierce the debtor LLC's veil 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, but the court found the complaint deficient based on *SSP Partners* and gave the trustee the opportunity to specify actual fraud as a basis to hold the affiliated defendants liable to the debtor's creditors.

In a recent decision of the Houston First Court of Appeals, the court appeared to somewhat equate the concept of a single business enterprise to that of an alter ego relationship when analyzing "the first consideration in piercing the corporate veil [under an alter ego theory]– whether the persons or entities sought to be charged with liability are the alter egos of the primary debtor." *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497 (Tex.App.–Houston [1st Dist.] 2012, pet. dism'd). Relying on *SSP Partners*, the court of appeals stated that piercing the corporate veil to impose liability under the alter ego theory requires a two-prong showing: (i) that the persons or entities upon whom a claimant seeks to impose liability are alter egos of the debtor, and (ii) that the corporate fiction was used for illegitimate purposes, i.e., to perpetrate fraud. The court stated that whether the persons or entities sought to be charged are alter egos of the primary debtor can be assessed using the single business enterprise factors. The court concluded that the parties sought to be charged were part of a single business enterprise and were alter egos of each other. With respect to the second prong, the court characterized the separate bases for piercing the corporate veil identified in *Castleberry* as "criteria" for meeting the second prong and concluded that the second prong was met based on evidence of five of the six criteria.

In *Clapper v. American Realty Investors, Inc.*, 2016 WL 302313 (N.D. Tex. Jan. 25, 2016), the plaintiffs brought suit against various defendants seeking to hold them liable under the single business enterprise theory. The plaintiffs argued that *SSP Partners* did not completely eliminate the single business enterprise theory, but instead held that there must be a showing of actual fraud. The court rejected the plaintiffs' reliance on *Tryco Enters., Inc. v. Robinson* because that case sought to pierce the veil on the basis of alter ego. The court dismissed the plaintiffs' single business enterprise claims against multiple entities as to which the defendants did not also plead alter ego or any other veil-piercing theory.

Prior to the *SSP Partners* opinion, numerous courts had concluded that the single business enterprise theory fell within the scope of TBCA Article 2.21A(2), which required a showing of actual fraud in order to hold a shareholder or affiliate liable for a corporation's contractual or contractually-related obligation on the basis of alter ego, actual fraud, constructive fraud, sham to perpetrate a fraud, "or other similar theory." *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87-89 (Tex. 2003); *Olympic Fin. Ltd. v. Consumer Credit Corp.*, 9 F.Supp.2d 726 (S.D. Tex. 1998); *Nordar Holdings, Inc. v. W. Sec. (USA) Ltd.*, 969 F.Supp. 420

(N.D. Tex. 1997). These cases illustrate the difficulty a plaintiff faces in a veil-piercing case when the statutory actual fraud standard is applicable. In each of these cases, the plaintiff's veil-piercing claim failed for lack of a showing of actual fraud. *But see Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413 (Tex.App.–Houston [1st Dist.] 2007, pet. granted, judgm't vacated w.r.m.)(holding actual fraud is required to impose liability in a case arising out of a contract under the single business enterprise theory; while defendant failed to preserve error regarding single business enterprise instruction that omitted actual fraud element, evidence was sufficient to sustain jury's finding of actual fraud in connection with alter ego liability). In the tort context, where the corporate statutes do not require actual fraud in order to pierce the veil, the single business enterprise theory proved a potent weapon. *See, e.g., N. Am. Van Lines v. Emmons*, 50 S.W.3d 103 (Tex.App.–Beaumont 2001, no pet.);[3] *Hall v. Timmons*, 987 S.W.2d 248 (Tex.App.–Beaumont 1999, no pet.); *Nichols v. Pabtex, Inc.*, 151 F.Supp.2d 772 (E.D. Tex. 2001). If the single business enterprise theory has any continuing application in the tort context, however, it appears clear that the single business enterprise factors would have to be accompanied by some type of inequity or injustice.

In addition to relying upon the single business enterprise theory to impose liability, courts of appeals relied upon the theory to impute the contacts of a related party for purposes of imposing personal jurisdiction. *See, e.g., Bridgestone Corp. v. Lopez*, 131 S.W.3d 670 (Tex.App.–Corpus Christi 2004, pet. granted, judgm't vacated w.r.m.); *El Puerto De Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V.*, 82 S.W.3d 622 (Tex.App.–Corpus Christi 2002, pet. dim'd w.o.j.). In *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007), however, the Texas Supreme Court rejected the single business enterprise theory as a basis for piercing in the personal jurisdiction context. *See also Munro v. Lucy Activewear, Inc.*, 2016 WL 4257750 (W.D. Tex. Jan. 14, 2016); *Fisher v. Blue Cross & Blue Shield of Texas, Inc.*, 2015 WL 5603711 (N.D. Tex. Sept. 23, 2015).

5. Reverse Corporate Veil Piercing

Occasionally, a party will attempt to use the alter ego doctrine to characterize the assets of a corporation as the assets of its shareholder. Such "reverse piercing" may be sought in order to hold a corporation liable for the controlling shareholder's debt. *See Chao v. Occupational Safety and Health Review Comm'n*, 401F.3d 355, 364-66 (5th Cir. 2005); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243-44 (5th Cir. 1990); *Seghers v. Bizri*, 2007 WL 700899 (N.D. Tex. 2007); *In re Boyd (Rodriguez v. Four Dominion Drive, LLC)*, 2012 WL 5199141 (Bankr. W.D. Tex. 2012); *In re Bass (Roberts v. J. Howard Bass & Assocs., Inc.)*, 2011 WL 560418 (Bankr. W.D. Tex. Feb. 15, 2011); *In re Moore (Cadle Company v. Brunswick Homes, LLC)*, 379 B.R. 284 (Bankr. N.D. Tex. 2007); *Wilson v. Davis*, 305 S.W.3d 57 (Tex.App.–Houston [1st Dist.] 2009, no pet.); *Hyde-Way, Inc. v. Davis*, 2009 WL 2462438 (Tex.App.–Ft. Worth 2009, pet. denied); *Valley Mech. Contractors, Inc. v. Gonzales*, 894 S.W.2d 832 (Tex.App.–Corpus Christi 1995, no pet.). Reverse piercing is also used in the divorce context to permit the court to reach corporate assets and divide them as part of the community estate. *See Boyo v. Boyo*, 196 S.W.3d 409, 419-21 (Tex.App.–Beaumont 2006, no pet.); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 516-18 (Tex.App.–San Antonio 2001, pet. denied); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 952 (Tex.App.–Fort Worth 1985, writ dism'd). A peculiar application of reverse piercing occurred in *In re Smith*, 192 S.W.3d 564 (Tex. 2006). In that case, a judgment

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[3] In *North American Van Lines v. Emmons*, 50 S.W.3d 103 (Tex.App.–Beaumont 2001, no pet.), the court held that the single business enterprise theory is distinct from the alter ego theory and that the evidence supported the jury's finding that a parent and subsidiary constituted a "single business enterprise" even though the evidence was insufficient to establish alter ego. According to the court, the alter ego theory "generally involves proof of fraud," whereas the single business enterprise theory "relies on equity analogies to partnership principles of liability." The single business enterprise theory "looks to see if principles of equity support a holding that the two entities should be treated as one for purposes of liability for their acts." The court found that the control the parent exercised over its subsidiary was "part of the normal framework of a parent/subsidiary relationship" and did not require a finding of alter ego. However, the court concluded that the evidence was sufficient for the jury to find that the parent and subsidiary were operated as a single business enterprise. The evidence included the following: common officers, common employees, the subsidiary was created so that the parent's agents in Texas could pool their authority and create a broader coverage in the state, the parent described its relationships with its agents as a mutually dependent and cooperative enterprise, the parent received all the profits from the subsidiary, the van driver was wearing a uniform with the parent company's name on it for a move purportedly on behalf of the subsidiary, the parent performed various administrative functions for the subsidiary, and the accident report described the driver as a driver of the parent company.

creditor in a post-judgment net worth proceeding (for purposes of determining the amount of security required to be posted by the judgment debtor in order to suspend enforcement of the judgment) argued that the net worth of a closely held corporation of which the judgment debtor was a shareholder should be included in the net worth of the judgment debtor shareholder on the basis of a finding of alter ego. The Texas Supreme Court held that an alter ego finding is relevant in determining the judgment debtor's net worth because "'[a]lter ego applies when there is such unity between corporation and individual that the separateness of the corporation has ceased.'" Applying alter ego in the manner applied in this case would seem to result in a "double counting" of net worth since the judgment debtor's shares in the corporation would already be included in the judgment debtor's net worth, but that issue was not raised in the opinion.

Faced with a reverse piercing claim aimed at reaching the assets of a Texas LLC to satisfy a judgment against an individual whose wife was the sole shareholder of a corporation that was a 50% member of the LLC, a Texas bankruptcy court sounded a cautious note regarding the application of reverse piercing principles. *See In re Moore (Cadle Co. v. Brunswick Homes, LLC)*, 379 B.R. 284 (Bankr. N.D. Tex. 2007). The court rather perfunctorily concluded that whether an entity is an LLC or a corporation is a distinction without a difference for purposes of applying veil-piercing principles, and the court then proceeded to discuss in some depth the roots of reverse corporate veil piercing in Texas and the policy concerns that courts should recognize in applying reverse piercing principles.

In *Moore*, the bankruptcy court traced the development of the doctrine of reverse piercing in Texas, noting that the doctrine has not been addressed by the Texas Supreme Court and has "rather thin roots" in Texas. The court reviewed the Texas Supreme Court's decision in *Castleberry* and the legislature's response, pointing out that the legislature "aborted" the course the common law had taken and created a tougher standard with the enactment of Article 2.21 of the TBCA. The court noted that the statutory standards in Article 2.21 generally encompass only traditional piercing (i.e., an effort to impose a liability of the corporation on a shareholder). The court observed that the "affiliate" reference in the statute arguably encompasses reverse piercing situations involving a corporate shareholder and its subsidiary, but the statute does not literally apply to an effort to hold a corporation liable for the debt of an *individual*. The court was troubled, however, that reverse piercing has made its way into the mainstream at the same time the legislature has been limiting the availability of traditional veil piercing and without close examination by the courts of the potential results of the doctrine's application. The court concluded that it was required to recognize the remedy of reverse corporate veil piercing inasmuch as the Fifth Circuit Court of Appeals has concluded that the remedy is available under Texas law, but the court noted policy concerns that would support a cautious approach to reverse piercing. Relying upon case law in other jurisdictions, the court stated that reverse veil piercing "should only be applied when it is clear that it will not prejudice non-culpable shareholders or other stakeholders (such as creditors) of the corporation."

Once the bankruptcy court in *Moore* concluded that reverse corporate veil piercing is a remedy that is available under Texas law, the court faced the question of whether an individual must be an owner of a corporation in order to apply the alter ego doctrine to hold the corporation liable for a debt of the individual. Mr. Moore was active in the affairs of the LLC that was alleged to be his alter ego, and his wife was the sole shareholder of a corporation that was a 50% owner of the LLC, but Mr. Moore was not himself an owner of the LLC. Based on Fifth Circuit case law addressing the ownership question in a reverse piercing context, the court in *Moore* held that an ownership interest is required to disregard the separateness of an individual and a corporation, but the ownership interest may exist in a *de facto* manner, such as where the actual record holder of shares in a corporation holds them as a sham for the individual.

Another bankruptcy court likewise concluded that it is possible to apply the alter ego theory to an individual who does not directly own any shares in the corporation if it can be shown that the individual was at least a *de facto* owner. *In re Bass (Roberts v. J. Howard Bass & Assocs., Inc.)*, 2011 WL 560418 (Bankr. W.D. Tex. Feb. 15, 2011). The court thus refused to dismiss a reverse piercing alter ego claim seeking to reach the assets of two corporations in which the debtor was involved but which were purportedly owned by the debtor's wife and son. One of the corporations was formed under the laws of the Cayman Islands, and the court acknowledged that the reverse piercing claim would be governed by Caymanian law. However, the fact that Texas law did not apply to that corporation was not sufficient to conclude that the claim should be dismissed because the court examined veil-piercing cases under the law of the United Kingdom and found no reason to conclude that the reverse piercing claim would not be recognized under the law of the Cayman Islands. *See also In re Juliet Homes, L.P.*, 2011 WL 6817928 (Bankr. S.D. Tex. Dec. 28, 2011);

Bramante v .McClain, 2007 WL 4555943 (W.D. Tex. Dec. 18, 2007).

In *In re Ward*, 558 B.R. 771 (Bankr. N.D. Tex. 2016), the bankruptcy court rejected the plaintiff's argument that reverse veil piercing was an independent cause of action that may be brought as a stand-alone claim. The plaintiff attempted to distinguish common-law veil piercing from statutorily based alter ego. The court disagreed, stating that §21.223 of the Business Organizations Code limited the use of alter ego rather than providing a statutory basis for it. The court clarified that reverse piercing, which is accomplished under a common-law alter-ego theory, is a remedy, not an independent cause of action. The court held that the plaintiff needed to have a judgment in-hand or an underlying claim that would support a recovery under a reverse-piercing theory.

C. Liability of Directors and Shareholders for Wrongful Distributions

The BOC imposes limitations on distributions to shareholders and provides for joint and several personal liability of directors to the extent a distribution approved by the directors exceeds the statutory limitations. Tex. Bus. Orgs. Code §§ 21.301, 21.303, 21.316(a). A "distribution" is a transfer of the corporation's property (including cash or the issuance of debt) to shareholders in the form of a dividend, a purchase or redemption of any of the corporation's shares, or a payment in liquidation of all or a portion of the corporation's assets. Tex. Bus. Orgs. Code § 21.002(6)(A). Generally, a corporation is not permitted to make a distribution if the corporation would be insolvent after the distribution or if the distribution exceeds the surplus of the corporation. Tex. Bus. Orgs. Code §§ 21.301(1)(B), 21.303(b). "Surplus" is the amount by which the net assets of the corporation exceed the stated capital. Tex. Bus. Orgs. Code § 21.002(12); *see also* Tex. Bus. Orgs. Code § 21.002(9), (11) (defining "net assets" and "stated capital"). In certain cases, the surplus limitation is replaced by a net assets limitation. Tex. Bus. Orgs. Code § 21.301(1)(A), (2). In the winding up context, the surplus and insolvency limitations do not apply so long as all of the liabilities of the corporation are paid or discharged or there is adequate provision made for their payment or discharge. Tex. Bus. Orgs. Code §§ 21.303(b), 11.053(a), (c). A corporation may also place additional restrictions on distributions in its certificate of formation. Tex. Bus. Orgs. Code § 21.303(a).

Under the BOC, directors who vote for or assent to an impermissible distribution are personally liable to the corporation for the amount by which the distribution exceeds the amount that was permitted to be distributed. Tex. Bus. Orgs. Code § 21.316(a); *see also In re Sherali*, 490 B.R. 104 (Bankr. N.D. Tex. 2013) (holding that sole director/officer of corporation was personally liable under the Texas Business Corporation Act and BOC for distributions he caused the corporation to make to himself as sole shareholder in 2006 through 2011 and that the liability was nondischargeable in bankruptcy as it arose from a defalcation in a fiduciary capacity). Because the directors' liability is to the corporation, it appears that a creditor who desires to pursue the directors on this basis would be required to assert the claim derivatively on behalf of the corporation. *See Smith v. Chapman*, 897 S.W.2d 399 (Tex.App.–Eastland 1995, no pet.).

There are several defenses a director may assert to liability for an impermissible distribution under the BOC. A director is not liable for the amount of a distribution that exceeded the statutory limitations to the extent a distribution of all or any part of the excess amount would have been permissible after the director authorized the distribution. Tex. Bus. Orgs. Code § 21.316(b). In essence, the violation can be retroactively cured by an increase in the surplus of the corporation after the distribution. In addition, a director may escape liability for authorizing an impermissible distribution if the director, in good faith and ordinary care, relied on certain types of financial information or other information or reports provided by certain persons. Tex. Bus. Orgs. Code § 21.316(c). The statute of limitations for an action to hold a director liable for authorizing an impermissible distribution under Section 21.316 of the BOC is two years from "the date the alleged act giving rise to the liability occurred." Tex. Bus. Orgs. Code § 21.317. It is not entirely clear whether the statute refers to the date of the distribution itself or the date on which the directors authorized the distribution.

The BOC provides that a shareholder may be held liable in contribution to a director who is held liable for authorizing an impermissible distribution. Tex. Bus. Orgs. Code § 21.318(a), (b). Under this provision, it is not clear whether or how a creditor would be able to assert a claim against the shareholder since the shareholder's liability is phrased in terms of liability to the directors. Further, a shareholder only has liability if the shareholder knew the distribution was improper. Tex. Bus. Orgs. Code § 21.318(a).

The liability of the directors and shareholders under the BOC with respect to an impermissible distribution is exclusive of any other liability to the corporation or a creditor of the corporation except for liability under Chapter 24 of the Texas Business and Commerce Code (the Texas Uniform Fraudulent Transfer Act) or the United States Bankruptcy Code. Tex. Bus. Orgs. Code §§ 21.316(d), (e), 21.318(c). The provisions specifying exclusivity of the statutory bases of liability were added to the Texas Business Corporation Act in 1991, thus preempting other common-law bases of liability (such as the trust fund and denuding doctrines) that had been applied by Texas courts with respect to wrongful distributions. *See Smith v. Chapman*, 897 S.W.2d 399 (Tex.App.–Eastland 1995, no pet.); *In re LaJet, Inc.*, 1994 WL 577357 (E.D. La. Oct. 13, 1994). As the statute suggests, however, the Texas Uniform Fraudulent Transfer Act and the Bankruptcy Code contain provisions that may be asserted where distributions to shareholders deprive the corporation of assets needed to pay the corporation's creditors. Recovery of distributions from shareholders under these provisions would not present many of the obstacles present under the BOC. For example, under Section 24.006(a) of the Texas Uniform Fraudulent Transfer Act, a creditor could pursue recovery directly from a shareholder who received a distribution from an insolvent corporation regardless of whether the shareholder knew that the corporation was insolvent. Tex. Bus. & Com. Code § 24.006(a).

D. Liability of Directors and Officers for Debts Incurred After Tax Forfeiture of Corporation

Chapter 171 of the Texas Tax Code sets forth procedures for administrative forfeiture of the privileges of a corporation when the corporation fails to pay its franchise tax or file required reports. Forfeiture of a Texas corporation's privileges is followed by forfeiture of the corporation's charter (i.e., its certificate of formation) if the corporation's default is not cured. Among the effects of forfeiture of a corporation's privileges is personal liability of directors and officers for certain corporate obligations. Under the Tax Code, "[i]f the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." Tex. Tax Code § 171.255(a). A director or officer has an affirmative defense to liability with respect to any debt created or incurred over the director's objection or without the director's knowledge if the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt. Tex. Tax Code § 171.255(c). Note that once a corporation's privileges are forfeited (the first step in a forfeiture of the corporation's charter), Section 171.255 provides that the personal liability of officers and directors extends back to debts created or incurred after the report, tax, or penalty was due and continues until the privileges are revived. Revival of a corporation's charter and corporate privileges does not affect the liability of a director or officer for debts incurred before the corporate privileges are revived. Tex. Tax Code § 171.255(d). The specific inclusion of liability for "any tax or penalty" imposed by Chapter 171 of the Tax Code after the forfeiture does not limit the scope of the debts for which directors and officers have personal liability under Section 171.255. The statute expressly provides that officers and directors are liable for "each debt" incurred under the specified circumstances, in addition to the liability for taxes and penalties. *See Bosch v. Cirro Group, Inc.*, No. 03-11-01625-CV, 2012 WL 5949481 (Tex.App.–Dallas Nov. 28, 2012, pet. denied).

In a number of cases, courts have wrestled with when a debt was incurred or created for purposes of Section 171.255 or its statutory predecessor. *See, e.g.*, *Schwab v. Schlumberger Well Surveying Corp.*, 154 Tex. 379, 198 S.W.2d 79 (1946) (holding debt was created or incurred when original promissory note was executed before forfeiture rather than when subsequent renewal notes were executed); *Cain v. State*, 882 S.W.2d 515 (Tex.App.–Austin 1994, no writ) (applying rule of strict construction and holding debt for amounts expended by State of Texas to plug wells was created or incurred when State expended funds, rather than date of prior authorization by State to expend funds to plug wells, because debt was unliquidated obligation prior to actual expenditure); *River Oaks Shopping Center v. Pagan*, 712 S.W.2d 190 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding post-forfeiture breach and damages related back to execution of lease so that debt was created or incurred on date of execution of lease); *Rogers v. Adler*, 697 S.W.2d 674 (Tex.App.–Dallas 1985, writ ref'd n.r.e.) (holding debt was created when contract was entered into prior to forfeiture rather than when judgment was entered after forfeiture); *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.3d 109 (Tex.App.–Dallas 1984, no writ) (holding corporate debts arising from failure to adhere to leasing contract related back to, and were created or incurred, when rental agreement was entered into rather than at the time defaults occurred).

Several recent cases have examined the issue of when a debt was created or incurred for purposes of liability of officers and directors under Section 171.255. In *Hovel v. Batzri*, 480 S.W.3d 132 (Tex. App.–Houston [1st Dist.] 2016, pet. filed), homeowners who had contracted with an LLC to build their home sued the LLC homebuilder for breach of contract and DTPA violations, and the LLC's privileges were forfeited due to failure pay franchise taxes. The forfeiture occurred after the suit was filed but before any determination of liability. The plaintiffs obtained a default judgment against the LLC and then sought to hold the sole manager of the LLC personally liable for the LLC's debt under Section 171.255 of the Texas Tax Code. The trial court granted the manager's motion for summary judgment, and the court of appeals affirmed because there was no dispute that the contract was executed pre-forfeiture, and the breach, tortious conduct, and injury occurred pre-forfeiture. The plaintiffs argued that a debt does not come into existence until it is liquidated, relying in part on a narrow definition of "debt" adopted by the legislature in 1987. According to the plaintiffs, their damages remained unliquidated until they obtained the default judgment, and no debt was created or incurred until the default judgment issued during the forfeiture. Conversely, the LLC manager argued that the 1987 narrow definition of "debt" is no longer significant because the legislation enacting it has been repealed. The manager asserted a broad definition of "debt" that includes unliquidated obligations such that the LLC's debt was created or incurred before the forfeiture, when the acts or omissions that gave rise to the plaintiffs' claim occurred, and the default judgment related back to that time. Characterizing Section 171.255 as a penal statute such that any ambiguity must be "strictly construed" in favor of the party penalized by it, the court discussed numerous cases decided before the adoption of the definition of "debt" in 1987. The pre-1987 case law strictly construed the statute to treat debts as created or incurred at the time the relevant contractual obligations were incurred rather than at a later date when the obligations were breached or became due. Consistent with strict construction and this broad approach to "create or incur," the pre-1987 case law applied a "relation-back" doctrine. Next the court of appeals discussed the legislature's adoption and repeal of a narrow definition of "debt" and the subsequent case law in which the "relation-back" doctrine was applied inconsistently. The definition of "debt" adopted in the Tax Code in 1987 was "any legally enforceable obligation measured in a certain amount of money which must be performed or paid within an ascertainable period of time or on demand." This definition precluded corporations from deducting their contingent and unfixed losses from their taxable corporate surplus and thus increased revenue for the State. The definition also eliminated the ambiguity in "debt" and precluded courts from giving it a broad meaning. In 2008, the legislature repealed the definition of "debt" when it amended the Tax Code to adopt an entirely new method of calculating the franchise tax. After the repeal of the definition, the "relation-back" doctrine reemerged, and courts again concluded that a judgment-debt is created or incurred when the conduct or contract occurs, even if the obligation is unliquidated at that time. With the historical context above in mind, the court of appeals considered whether the trial court erred by concluding that the LLC's debt in this case was not a debt created or incurred during forfeiture and, as a result, the manager did not have individual liability under Section 171.255. Applying the rule of strict construction and relying on a pre-1987 Texas Supreme Court case defining the terms "created" and "incurred," the court of appeals in this case concluded that the debt evidenced by the default judgment obtained by the plaintiffs against the LLC was created or incurred pre-forfeiture at the time that the parties established their contractual and other obligations. Thus, the court held that the manager was not individually liable for the LLC's debt. The court identified public policy goals of Section 171.255 and concluded that its interpretation did not run afoul of these public policy considerations.

In a vigorous and lengthy dissenting opinion, Justice Keyes differed in her interpretation of how the principle of "strict construction" affects the interpretation of Section 171.255 as well as how to interpret the case law defining "debt" for purposes of the statute. Justice Keyes would have held the manager personally liable in this case on the basis that this was a judgment debt for wrongful acts of the entity that occurred prior to forfeiture with knowledge of the manager although the debt was not reduced to a legally enforceable obligation until after forfeiture. In Justice Keyes' view, this is one of the types of debts for which officers and directors may be held personally liable under Section 171.255.

In a case involving an employment contract that required yearly payments, the court of appeals held that the debt was created when the contract was signed rather than when each payment became due. *Beesley v. Hydrocarbon Separation, Inc.*, 358 S.W.3d 415, 423 (Tex.App.–Dallas 2012, no pet.) (discussing other cases in which a debt was deemed to be created or incurred when the underlying contract was originally entered into rather than when a later breach, judgment, or renewal occurred). In *Taylor v. First Community Credit Union*, 316 S.W.3d 863 (Tex.App.–Houston [14th Dist.] 2010, no pet.), the court of appeals held an officer/director of a forfeited automobile dealership personally liable to a credit union for damages resulting from the corporation's breach of a dealership agreement on the basis that the debt was created or incurred when the agreement was breached, which occurred after the dealership's franchise tax report was due, rather than when the dealership entered into the contract in 2003, before the franchise tax was due. The court discussed a number of other cases dealing with the timing of when a debt is created or incurred for purposes of Section 171.255, and the court found earlier cases in which courts had based the creation or incurrence on the execution of the original contract were either distinguishable on their facts or impacted by a definition of "debt" adopted by the legislature in 1987. A holding that the execution of the dealer agreement in this case created a debt under Section 171.255 when no breach had occurred and no money was owed at that time would have conflicted with the statutory definition, and the court therefore declined to follow case law pre-dating the definition that would have equated the creation of the debt with entering into the contract. The definition relied upon by the court in *Taylor* was repealed in 2008 when the new margin tax provisions took effect, and there is currently no statutory definition of "debt" in Chapter 171 of the Tax Code. In *Endsley Electric, Inc. v. Altech, Inc.*, 378 S.W.3d 15 (Tex.App.–Texarkana 2012, no pet.), a contractor sued an electrical subcontractor and the subcontractor's officers for breach of contract, and the court of appeals held there was no evidence that the liability was created or incurred after the corporate forfeiture so as to hold the officers of the subcontractor liable under Section 171.255 of the Tax Code. The contract was signed in October 2008 and completed in March or April 2010. The suit was filed on April 14, 2010, the subcontractor's charter was forfeited by the Secretary of State under Section 171.309 of the Tax Code for failure to pay franchise taxes on January 28, 2011, and the judgment in the suit was entered in August 2011.

In *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497 (Tex.App.–Houston [1st Dist.] 2012, pet. dism'd), concurring and dissenting justices expressed differing views on whether James and Sharon Dixon, the owners and officers of a forfeited corporation, had personal liability under Section 171.255 of the Tax Code with respect to amounts owed by the corporation on a judgment stemming from violations of the Fair Labor Standards Act. The corporation's charter was forfeited after the jury verdict and shortly before the judgment was entered. The majority found it unnecessary to reach the issue of the Dixons' liability under Section 171.255 because it concluded the record supported personal liability based on veil-piercing findings. The dissenting justice did not believe that the record supported personal liability on veil-piercing grounds and thus analyzed whether the Dixons had personal liability as officers under Section 171.255, i.e., whether the FLSA liability at issue was a debt "created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." The dissenting justice concluded that the debt for unpaid overtime wages was created or incurred on the paydays for the pay periods in which the overtime labor was performed and that there was thus no liability for these amounts under Section 171.255 since the paydays preceded the event occasioning the forfeiture of corporate privileges. On the other hand, the dissent concluded that the Dixons did have personal liability under Section 171.255 for the statutory penalties and attorney's fees included in the judgment, reasoning that these amounts were not created or incurred until the trial court determined the amount of these awards in its judgment, which was entered after the forfeiture. In a lengthy analysis of the application of Section 171.255, the concurring justice concluded that the Dixons had personal liability for the entire amount of damages in the FLSA suit on the basis that the debt was not created until the judgment was entered after the corporation's forfeiture. The concurring justice reasoned that the damages were not the type of debt to which the relation-back doctrine applies and were not a sum certain (as required under the definition of "debt" in effect at the time) until the judgment in the FLSA lawsuit was entered.

In *Segarra v. Implemetrics Inc.*, Civil Action No. 4:13-CV-217, 2013 WL 5936602 (S.D. Tex. Nov. 5, 2013), the court held that the defendant corporation's "debt" to the plaintiff for violations of Title VII of the Civil Rights Act of 1964 and the Family and Medical Leave Act would arise if and when the court entered judgment on the claims. The plaintiff's allegations of discrimination spanned from August 2009 until September 2011. The corporation forfeited its privileges on February 8, 2008, and revived its privileges on October 24, 2011. The plaintiff thus sought to hold two individuals who were directors and officers of the corporation liable under Section 171.255 for the corporation's discrimination. The court likened a judgment debt more to an administrative penalty than to a contract, and the court stated that administrative penalties have been found to be created or incurred when assessed, whereas contractual debts are incurred when the parties enter into the contract regardless of the date of eventual default or judgment. Thus, the court dismissed the claims against the individual officers and directors and stated that the plaintiff could sue them to hold them personally liable under Section 171.255 if he obtained a judgment against the corporation and the corporation's privileges were forfeited at that time. *See also Lucky Dawg Movers, Inc. v. Wee Haul, Inc.*, No. 05-10-00222-CV, 2011 WL 5009792 (Tex.App.–Dallas Oct. 21, 2011, no pet.) (addressing whether a judgment rendered after corporate privileges were reinstated based on conduct that occurred while the privileges were forfeited could constitute a "debt" (under the repealed definition of "debt" that was in effect at the time of the suit) for which a director could be personally liable and concluding that the damages sustained as a result of the corporation's deceptive acts were assessed only when the jury returned its verdict, not at the time of the acts).

Under Section 171.255(c), a director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred over the director's objection or without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the corporation's affairs would not have revealed the intention to create the debt. Courts have concluded that a director relying on an exception to liability under this provision has the burden of proof, i.e., that the exceptions are affirmative defenses. *See Priddy v. Rawson*, 282 S.W.3d 588 (Tex.App.–Houston [14th Dist.] 2009, pet. denied); *In re Trammell*, 246 S.W.3d 815 (Tex.App.–Dallas 2008, no pet.); *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879 (Tex.App.–Dallas 2007, no pet.); *see also Surber v. Woy*, No. 02-12-00452-CV, 2014 WL 1704258 (Tex.App.–Fort Worth Apr. 30, 2014, no pet. h.).

In *Anderson Petro-Equipment, Inc. v. State*, No. 03-13-00176-CV, 2013 WL 5858010 (Tex.App.–Austin Oct. 22, 2013, pet. denied), the State of Texas sought to impose liability on a corporate officer for money spent by the state to plug a well drilled by the corporation. The corporation ceased production on the well in 2002, and the corporation became noncompliant with Texas law when it failed to plug the well within 12 months of ceasing production. The corporation's charter was forfeited for failure to pay its franchise taxes in 2005. In 2006, the Texas Railroad Commission sent notice to the corporation to plug the well, and the Commission spent state funds to plug the well in 2009. Later in 2009, the state sued the corporation and an individual officer to recover the money spent to plug the well. The state relied on Section 171.255 to impose liability on the officer. The officer argued that his liability was extinguished when the corporation forfeited its charter. (The court noted that the officer did not contend that Section 171.255 can never be used to impose individual liability for plugging costs, but limited his contention to whether his liability was extinguished when the corporation's charter was forfeited assuming such potential liability exists.) The officer conceded that, for purposes of Section 171.255, the debt was created or incurred long after the corporation's taxes were due and its privileges were forfeited, but the officer argued that his liability, if any, ceased to exist once the corporation's charter was forfeited. The court understood the officer's argument to be that because a corporation could not be liable for a post-dissolution claim under Article 7.12 of the TBCA, neither could an individual officer of the corporation. The court stated that the officer's argument seemed to conflate the requirements for corporate liability contained in Article 7.12 of the TBCA, which addresses the corporation's liability for "existing claims," with the Tax Code requirements for an officer's individual liability for corporate "debts." The court pointed out that the Tax Code does not make any reference to forfeiture of the corporate charter, and the court found no language in the statute suggesting that an officer is liable only for debts incurred during the window of time after the corporation has failed to pay its franchise taxes but before it has forfeited its charter. The court stated that Section 171.255(a) clearly and unambiguously states that an officer is liable for debts incurred during the time period after the relevant tax was due (for which the privileges are later forfeited) and before the privileges are revived. Because the corporate debt for which the officer was liable in this case was created or incurred after the tax was due and the privileges were never revived, the officer was personally liable.

Some courts have concluded that "debts" for which directors and officers may have personal liability under Section 171.255 do not include tort liability based on negligence. *Williams v. Adams*, 74 S.W.3d 437 (Tex.App.–Corpus Christi 2002, pet. denied); *Suntide Sandpit, Inc. v. H & H Sand and Gravel, Inc.*, No. 13-11-00323-0CV, 2012 WL 2929605 (Tex.App.–Corpus Christi July 19, 2012, pet. denied). In *Segarra v. Implemetrics, Inc.*, Civil Action No. 4:13-CV-217, 2013 WL 5936602 (S.D. Tex. Nov. 5, 2013), the court appeared to accept that the plaintiff's employment discrimination claims could give rise to a "debt" under Section 171.255(a) but concluded the debt would not be created or incurred until entry of a judgment.

E. Liability for Committing or Knowingly Participating in Tortious or Fraudulent Acts

It is well-established that corporate officers may be held personally liable when they commit or knowingly participate in tortious or fraudulent acts even though the conduct occurred while the officer was acting on behalf of the corporation. *See, e.g., Gore v. Scotland Golf, Inc*., 136 S.W.3d 26, 32 (Tex.App.–San Antonio 2003, pet. denied); *Kingston v. Helm*, 825 S.W.3d 755, 764-67 (Tex.App.–Corpus Christi 2002, pet. denied). In *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.–Houston [14th Dist.] 2011, no pet.), the court noted that Texas law is unsettled as to whether an agent of a corporation or LLC can be held individually liable for the tort of negligent hiring or supervision, i.e., whether an agent owes a duty to third parties to properly hire or supervise other agents of the principal.

F. Liability on Corporation's Contract as Agent of Partially Disclosed Principal or as Guarantor

An agent is not liable on a contract entered into on the principal's behalf if the agent discloses the agent's representative capacity and the identity of the principal. Conversely, if the representative capacity of the agent and the identity of the agent's principal are not disclosed to the other party to the contract at the time the contract is entered into, the agent is personally liable on the contract. Restatement (Third) of Agency §§ 6.01, 6.02 (2006); Restatement (Second) of Agency §§ 320, 322 (1957). There are numerous Texas cases applying these principles in the context of contracts entered into by corporate agents. The common corporate practice of doing business under assumed or trade names creates some peril for officers and other agents who contract under the assumed or trade name of the corporation without disclosing the actual legal name of the corporation. *See*, *e.g., John C. Flood of DC, Inc. v. SuperMedia, L.L.C.*, 408 S.W.3d 645 (Tex.App.–Dallas 2013, pet. denied); *Lake v. Premier Transp.*, 246 S.W.3d 167 (Tex.App.– Tyler 2007, no pet.); *Wynne v. Adcock Pipe and Supply*, 761 S.W.2d 67 (Tex.App.–San Antonio 1988, no writ); *A To Z Rental Center v. Burris,* 714 S.W.2d 433 (Tex.App.–Austin 1986, writ ref'd n.r.e.). The filing of an assumed name certificate that discloses the legal name of the corporation does not in itself protect agents who contract in the assumed name of the corporation because Texas courts have stated that actual knowledge or reason to know the principal's identity is the test of disclosure and that third parties have no duty to search for this information. *Wynne v. Adcock Pipe and Supply*, 761 S.W.2d 67 (Tex.App.–San Antonio 1988, no writ); *A To Z Rental Center v. Burris,* 714 S.W.2d 433 (Tex.App.–Austin 1986, writ ref'd n.r.e.).

Even if an agent discloses the identity of the principal and signs a contract indicating the agent's representative capacity, the language of the contract may subject the agent to liability as a guarantor or party to the contract. *See 84 Lumber Co., L.P. v. Powers*, 393 S.W.3d 299 (Tex.App.–Houston [1st Dist.] 2012, pet. denied) (holding individual who signed credit application as president of corporation liable as personal guarantor of the corporation's debt based on language above the signature line stating that the signatory personally guaranteed the credit account of the corporation); *Wholesale Builders Supply, Inc. v. Green-Source Dev., L.L.C.*, 2013 WL 6175210 (Ohio App. Nov. 21, 2013) (holding individual who signed LLC credit application personally liable based on language in the credit application stating that the signatory was "both personally and corporately liable for the total of purchases by you or anyone designated to sign for your purchases on your account"). Corporate and LLC representatives should be vigilant when signing credit applications and other contracts on behalf of the corporation or LLC in order to avoid subjecting themselves to personal liability under provisions that may be interpreted to obligate signatories in their individual capacities.

III. Limited Liability Companies

A. Limited Liability of Members and Managers

A limited liability company (LLC) provides its members and managers a full liability shield. The BOC provides for limited liability of members and managers except to the extent the company agreement specifically provides otherwise. Tex. Bus. Orgs. Code § 101.114. Under the prior tax classification regulations, it was, on occasion, preferable to subject a member (such as a corporation formed for this purpose) to liability in order to possess another corporate characteristic deemed desirable in that particular instance. With the advent of the "check-the-box" approach, there would not ordinarily be any reason to waive a member's limited liability. In addition to expressly providing for limited liability of LLC members, the BOC states that a member of an LLC is not a proper party to proceedings by or against an LLC except where the object is to enforce a member's right against or liability to the LLC. Tex. Bus. Orgs. Code § 101.113. LLC members or managers are liable for their own fraudulent or tortious acts even if the acts are committed in the service of the LLC. *In re Williams,* 2011 WL 240466 (Bankr. W.D. Tex. Jan. 24, 2011); *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex.App.–San

Antonio 2008, no pet.); *LJ Charter, L.L.C. v. Air America Jet Charter, Inc.*, 2009 WL 4794242 (Tex.App.–Houston [14th Dist.] Dec. 15, 2009, pet. denied). In *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.–Houston [14th Dist.] 2011, no pet.), the court noted that Texas law is unsettled as to whether an agent of a corporation or LLC can be held individually liable for the tort of negligent hiring or supervision, i.e., whether an agent owes a duty to third parties to properly hire or supervise other agents of the principal.

B. Piercing (and Reverse Piercing) the Limited Liability Company Veil

1. Piercing the LLC Veil to Impose Liability on a Member

Generally the courts should respect the principle that the LLC is an entity separate and distinct from its members just as a corporation is an entity separate and distinct from its shareholders. *See Ingalls v. Standard Gypsum, L.L.C.*, 70 S.W.3d 252 (Tex.App.—San Antonio 2001, pet. denied) (analogizing to corporate parents and subsidiaries in rejecting argument that LLC's members were included with LLC as "employer" under the Workers' Compensation Act). Of course, it is possible to "pierce the veil" of a corporation and hold a shareholder liable for a corporate debt or obligation under certain circumstances. Like the predecessor Texas Limited Liability Company Act ("TLLCA"), the LLC provisions of the BOC as originally enacted did not address whether or under what circumstances a claimant may "pierce" the liability shield of an LLC in order to hold a member liable for a debt or other liability of the LLC. In 2011, the BOC was amended to provide that Sections 21.223-21.226, which include strict standards for piercing the corporate veil in a case arising out of a contract of the corporation, apply to LLCs.[4] *See* Tex. Bus. Orgs. Code § 101.002. One Texas commentator has argued that the statutory limitation of liability in the Texas LLC statute was intended to be absolute, i.e., that the legislature did not address veil piercing in the LLC statute because it did not intend for veil piercing to occur in the LLC context. *See* Byron F. Egan, *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 TEX. J. BUS. L. 71, 173 (2007). Courts in Texas and other jurisdictions have thus far refused to hold that the statutory liability shield of an LLC is absolute, and the courts have predictably borrowed from the corporate veil-piercing jurisprudence in addressing LLC veil piercing.[5]

If the Texas LLC statute does not reflect a legislative intent to preclude veil piercing, then the Texas courts are faced with determining the standards for piercing the LLC veil. Effective September 1, 2011, the BOC makes clear that a member may not be held liable for an obligation of the LLC arising out of a contract of the LLC unless the strict standards of Section 21.223 are met. Tex. Bus. Orgs. Code § 101.002. Further, failure of the LLC to follow any formality required by the BOC or its governing documents is not a basis to hold a member liable for any type of obligation of the LLC. *Id.*

Even before the amendment of the BOC to incorporate by reference the provisions of Sections 21.223-21.226 of the BOC, courts in Texas defined the

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[4] Legislation that would have incorporated by reference in the LLC statutes the standards from the corporate statutes was introduced in the 2009 legislative session. S.B. 1773 passed the Senate but died on the House calendar at the end of the session when the House process became stalled by a dispute over voter identification legislation. In the 2011 legislative session, a similar bill, S.B. 323, was passed by the legislature and signed by the governor. This bill became effective September 1, 2011.

[5] The LLC veil-piercing cases in jurisdictions other than Texas are too numerous to cite in this paper, but some of the cases are cited in Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 405, 420-24 (2009). All state LLC statutes provide for limited liability of members, and some statutes specifically adopt corporate veil-piercing principles. *See, e.g.*, Cal. Corp. Code § 17101(a) & (b) (providing for limited liability of members, but adopting common law alter ego doctrine as applied to corporate shareholders except that failure to follow formalities with respect to calling and conducting meetings shall not be considered); Colo. Rev. Stat. Ann. § 7-80-107 (stating that courts shall apply case law interpreting the conditions and circumstances under which the veil of a corporation may be pierced but that the failure of an LLC to observe formalities or requirements relating to its management and affairs is not itself grounds to impose liability on members); Minn. Stat. § 322B.303 subd. 2 (providing that the case law stating the conditions and circumstances under which the veil of a corporation may be pierced applies to LLCs). In most states, as was the case in Texas until 2011, the statutes are silent regarding veil piercing. *See, e.g.*, 6 Del. Code Ann. § 18-303 (providing that a member or manager shall not be obligated personally for any LLC debt, obligation, or liability solely by reason of being a member or acting as a manager); Nev. Rev. Stat. §§ 86.371, 86.381 (providing that members have limited liability and are not proper parties in a proceeding against an LLC). Thus far, courts have recognized the concept of veil piercing in the LLC context regardless of whether the state LLC statute in issue addresses veil piercing.

veil-piercing standards in the LLC context consistently with the corporate standards. *Shook v. Walden*, 368 S.W.3d 604 (Tex. App.—Austin 2012, pet. denied) (analyzing common-law standard applicable to an LLC veil-piercing claim arising before enactment of BOC Section 101.002 and concluding courts should be guided by the corporate statutory standards rather than the more liberal standards articulated in *Castleberry v. Branscum); Copeland v. D & J Constr. LLC*, 2015 WL 512590 (N.D. Tex. 2015) (stating that BOC §§ 101.113, 101.114 do not preclude application of veil-piercing doctrines in LLC context, noting that Texas courts have applied the statutory provisions on corporate veil piercing to LLCs, and concluding plaintiff's pleadings were sufficient to support a claim of liability for breach of the LLC's contract based on veil piercing as to one individual defendant but were not sufficient as to other defendants); *Fin & Feather Club v. Leander,* 415 S.W.3d 548 (Tex. App.–Texarkana 2013, pet. denied) (relying on *Shook* for proposition that policies governing piercing of veil of corporation also apply to LLCs); *Metroplex Mailing Servs., L.L.C. v. RR Donnelly & Sons Co.,* 410 S.W.3d 889 (Tex. App.–Dallas 2013, no pet.) (relying on *Shook* for proposition that policies governing piercing of veil of corporation also apply to LLCs); *Spring St. Partners-IV, L.P. v. Lam*, 750 F.3d 427 (5th Cir. 2013) (noting that *Shook* held that a plaintiff seeking to pierce the veil of an LLC not covered by BOC Section 101.002 must meet the same requirements applicable to a corporation); *see also Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448 (Tex.App.–Dallas 2012, pet. denied) (discussing and applying case law and Section 21.223 of the BOC to claim that LLC was "sham corporation" as if LLC were corporation and concluding evidence was sufficient to support trial court's finding that LLC was not sole owner's alter ego); *Penhollow Custom Homes, LLC v. Kim,*320 S.W.3d 366 (Tex.App.–El Paso 2010, no pet.) (discussing and applying corporate veil-piercing principles to LLC as if LLC were corporation and concluding that evidence owner took owner's draw rather than salary did not demonstrate lack of separateness between entity and owner, and jury's finding of alter ego could not stand); *In re HRM Holdings, LLC (Seidel v. Hosp. Res. Mgmt. LLC)*, 421 B.R. 244 (Bankr. N.D. Tex. 2009) (applying corporate veil-piercing principles in LLC context, noting that the TLLCA contained no analog to TBCA Article 2.21 but that "Texas courts and other jurisdictions have applied the same state law principles for veil-piercing that they have applied to corporations"); *In re JNS Aviation, LLC (Nick Corp. v. JNS Aviation, Inc.)*, 376 B.R. 500, 525-27 (Bankr. N.D. Tex. 2007) (determining that corporate veil-piercing principles apply to LLCs and citing Section 21.223 of the BOC for the proposition that a judgment creditor of an LLC must satisfy the statutory actual fraud standard to pierce the LLC's veil and hold its members liable for a judgment based on the LLC's breach of contract); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590-91 (Tex.App.–Houston [1st Dist.] 2007, pet. denied) (rejecting the argument that the TLLCA creates an impenetrable liability shield, stating that cases in Texas and other jurisdictions have applied to LLCs the state law veil-piercing principles applied to corporations, and concluding that the trial court did not err in piercing the LLC veil to impose liability on an LLC member given the jury's finding of actual fraud in response to a jury charge based on the actual fraud standard in TBCA Article 2.21A(2)); *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n,* 77 S.W.3d 487, 500-01 (Tex.App.–Texarkana 2002, pet. denied) (recognizing that the entity involved in the piercing analysis was an LLC and (without discussing whether or why corporate veil-piercing principles apply to LLCs) relying on corporate veil-piercing principles and TBCA Article 2.21A(3) for the proposition that failure to follow formalities is not a factor in determining alter ego); *K-Solv, LP v. McDonald*, 2013 WL 1928798 (Tex. App.–Houston [1st Dist.] May 9, 2013, no pet.) (noting that no party argued that Tex. Bus. Orgs. Code Ann. § 101.002 applied but that plaintiff conceded it must show actual fraud for members' direct personal benefit to pierce LLC's veil and hold members liable; holding that trial court correctly granted summary judgment in favor of members based on absence of evidence of essential element of direct personal benefit); *Roustan v. Sanderson*, 2011 WL 4502265 (Tex.App.–Fort Worth Dec. 1, 2011, pet. denied) (noting that courts apply to LLCs state law principles applied to pierce corporate veil and that fraud is basis to pierce veil but concluding claimants did not plead individual used LLC itself to perpetrate fraud and did not plead any other ground for disregarding corporate structure); *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.–Houston [14th Dist.] April 14, 2011, no pet.) (recognizing that courts have applied corporate veil-piercing principles to LLCs but concluding evidence did not show unity between member and his LLCs or that injustice would result if member was not held liable); *Phillips v. B.R. Brick and Masonry, Inc.*, 2010 WL 3564820 (Tex.App.–Houston [1st Dist.] Sept. 10, 2010, no pet.) (noting that Texas has applied principles used to pierce corporate veil to LLCs and applying corporate veil-piercing cases in reviewing evidence (without reference to statutory veil-piercing standards because neither party argued that TBCA Article

2.21 or BOC Section 21.223 were applicable) and concluding evidence did not support piercing LLC veil to hold member liable to creditor of member's spouse); *Arsenault v. Orthopedics Specialist of Texarkana*, 2007 WL 3353730 (Tex.App.–Texarkana Nov. 14, 2007, no pet.) (discussing corporate alter ego and single business enterprise theories and finding no factual basis in pleading or evidence supporting existence of alter ego or single business enterprise relationship between professional LLC and its owner for purposes of plaintiff's argument that service of expert report on entity constituted service on its owner); *In re Arnette (Ward Family Found. v. Arnette)*, 2011 WL 2292314 (Bankr. N.D. Tex. June 7, 2011) (noting that Texas has applied principles used to pierce corporate veil to pierce liability shield of LLC, discussing actual fraud standard of Section 21.223, and concluding evidence supported application of alter ego but not sham to perpetrate fraud); *In re Pace (Osherow v. Hensley)*, 2011 WL 1870054 (Bankr. W.D. Tex. May 16, 2011) (noting that "corporate veil piercing law is equally applicable in the context of limited liability companies" and stating that evidence showing member solely controlled LLC and commingled funds was probably insufficient to pierce veil under alter ego theory but evidence was sufficient to establish that member used LLC to perpetrate fraud where fraudulent transfer to LLC was involved); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F.Supp.2d 579 (S.D. Tex. 2011) (noting that Texas permits application of corporate veil-piercing principles to LLCs); *In re Williams (Kwasneski v. Williams)*, 2011 WL 240466 (Bankr. W.D. Tex. Jan. 24, 2011) (noting that Texas courts have applied statutory veil-piercing provisions applicable to corporations to LLCs); *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, 2010 WL 4366990 (S.D. Tex. Oct. 27, 2010) (relying on actual fraud standard in corporate statutes in applying alter ego theory in LLC context and concluding plaintiff did not show LLC was formed for purpose of wrongful conduct); *In re Houston Drywall, Inc. (West v. Seiffert)*, 2008 WL 2754526 (Bankr. S.D. Tex. Jul. 10, 2008) (discussing and applying corporate veil-piercing principles as if LLC were corporation and concluding LLC in issue was "sham corporation") *In re Moore (Cadle Co. v. Brunswick Homes, LLC)*, 379 B.R. 284 (Bankr. N.D. Tex. 2007) (applying corporate reverse veil-piercing principles to Texas LLC and stating that whether an entity is a corporation or an LLC is a "distinction without a difference" for purposes of veil piercing); *Bramante v. McClain*, 2007 WL 4555943 (W.D. Tex. Dec. 18, 2007) (applying reverse corporate veil-piercing principles to various LLC defendants while speaking only in terms of corporations and without indicating whether the court realized that LLCs are not corporations).

In *Taurus IP, LLC v. DaimlerChrysler Corp.*, 534 F. Supp. 2d 849, 871-72 (W.D. Wis. 2008), the district court determined that TBCA Article 2.21 did not apply to a claim against an individual manager of a Texas LLC, but it appears the court was confused about the scope of the statute even with respect to corporations. The court did not believe that the statute limits alter-ego liability of an individual who is an officer or director of a corporation but not a "shareholder or owner." *Id.* at 871. (The court did not address the fact that the statute protects "affiliates" of the shareholders and of the corporation as well as shareholders, thereby protecting affiliated entities and non-shareholder directors and officers of the corporation to the extent a veil-piercing theory might be relied upon to impose liability on such persons for a contractually related obligation of the corporation. *See Phillips v. United Heritage Corp.*, 319 S.W.3d 156 (Tex. App.–Waco 2010, no pet.) Thus, it is not clear whether the court in *Taurus* would have applied the statute by analogy to the LLC manager if it had properly understood the statute's application in the corporate context.

In *Shook v. Walden*, 368 S.W.3d 604 (Tex. App.—Austin 2012, pet. denied), the Austin Court of Appeals engaged in a thorough analysis of the common-law standard applicable to an LLC veil-piercing claim arising before the addition of Section 101.002 of the BOC and concluded that courts should be guided by the corporate statutory standards rather than the more liberal standards articulated in *Castleberry v. Branscum*. The court of appeals in *Shook* noted the Wisconsin district court's opinion in *Taurus* and disagreed with that opinion. A dissenting justice in *Shook* argued that the equitable standard set forth in *Castleberry* should apply given the absence of a statutory standard.

From a policy standpoint, there is no apparent reason for courts to adopt common-law veil-piercing doctrines that provide less liability protection for an LLC member than that available to a corporate shareholder. Indeed, to the extent that courts have distinguished at all between the application of veil-piercing principles in the corporate and LLC context, they have generally indicated that certain factors that could lead to piercing the veil of a corporation may merit less consideration in the LLC context. *See, e.g., FILO America, Inc. v. Olhoss Trading Company, LLC*, 321 F. Supp. 2d 1266, 1269-70 (M.D. Ala. 2004) (concluding that it is possible to pierce the LLC veil under Alabama law and that the plaintiff stated a claim to pierce the defendant LLC's veil by alleging the members had a fraudulent purpose in the conception of their business, but noting that some factors applied in corporate veil piercing may not apply to LLCs in the same manner they apply to corporations); *In re Giampietro (AE Restaurant Assocs., LLC v. Giampietro)*, 317 B.R. 841, 848 n.10 (Bankr. D. Nev. 2004) (commenting that the factors analyzed under the corporate alter ego doctrine may carry less weight in the LLC context and that domination by an owner may not justify piercing because LLC statutes allow members to manage the LLC and illustrate a legislative intent to allow small, one-person, and family-owned businesses the freedom to operate their companies themselves and still enjoy protection from personal liability); *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323, 328 (Wyo.2002) (concluding that there was no legal or policy reason to treat LLCs differently from corporations for purposes of veil piercing but acknowledging that the precise application of the factors may differ based upon the inherently flexible and informal nature of LLCs); *D.R. Horton Inc.-New Jersey v. Dynastar Development*, L.L.C., No. MER-L-1808-00, 2005 WL 1939778, at *33-36 (N.J. Super. L. Aug. 10, 2005) (agreeing with judicial opinions and commentators that have concluded LLC veil-piercing law should be adapted to the special characteristics of LLCs and identifying adherence to corporate formalities, dominion and control by the owner, and undercapitalization as factors that should "not loom as large" in the LLC veil-piercing analysis as they do in the corporate context).

As mentioned above, even before the BOC was amended to add Section 101.002, Texas courts relied upon corporate veil-piercing principles when presented with the question of whether to pierce the LLC veil. In *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Association,* 77 S.W.3d 487 (Tex.App.—Texarkana 2002, pet. denied), the court, without discussing whether or why corporate veil-piercing principles apply to LLCs, relied upon corporate veil-piercing principles in analyzing the plaintiff's claim that an LLC was the alter ego of its member. The court cited corporate veil-piercing cases and relied upon Article 2.21A(3) of the TBCA as authority for the proposition that failure to follow formalities is not a factor in determining alter ego.

In *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573 (Tex.App.–Houston [1st Dist.] 2007, pet. denied), the court of appeals rejected the argument that the TLLCA creates an impenetrable liability shield. The plaintiff sought to hold the defendant, a one-third member of a Texas LLC, liable for purchases made by the LLC from the plaintiff. The defendant argued that the LLC veil is impenetrable because the TLLCA does not address whether or under what circumstances a litigant may pierce the veil of an LLC. The court disagreed, stating that courts in Texas and other jurisdictions have applied to LLCs the same state law principles for veil piercing that are applicable to corporations. The jury charge included a question that inquired whether the defendant caused the LLC to be used to perpetrate an actual fraud, and did perpetrate an actual fraud upon the plaintiff, primarily for her own direct personal benefit (i.e., tracking the veil-piercing provision of Article 2.21A(2) of the TBCA). The jury answered this issue in the affirmative and found damages based on unpaid invoices owed by the LLC to the plaintiff. The court of appeals found the evidence sufficient to support the jury's verdict. A dissenting justice did not challenge the proposition that corporate veil-piercing principles apply to Texas LLCs, but disagreed with the majority that the evidence was sufficient to support the jury's finding that the defendant caused the LLC to perpetrate a fraud primarily for her direct personal benefit.

In the case of *In re HRM Holdings, LLC (Seidel v. Hospital Resources Management LLC)*, 421 B.R. 244 (Bankr. N.D. Tex. 2009), the bankruptcy court applied corporate veil-piercing standards 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 bankruptcy trustee sought to pierce the debtor LLC's veil 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 trustee's first complaint had simply asserted the single business enterprise theory as a basis of liability without specifying fraud, and the court had allowed the trustee to replead and allege fraud as required by the corporate veil-piercing statutes.) 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 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.

In the case of *In re JNS Aviation, LLC (Nick Corp. v. JNS Aviation, Inc.)*, 376 B.R. 500 (Bankr. N.D. Tex. 2007), a bankruptcy court applying Texas law rejected the argument that a member's statutory liability protection under the Texas LLC statute precludes veil piercing and followed Texas cases that have applied corporate veil-piercing principles to LLCs. The court undertook a lengthy discussion of various veil-piercing theories under Texas law and found that the facts satisfied certain factors associated with several theories, but concluded that the facts best fit within the "sham to perpetrate a fraud" doctrine. The court found that shutting down the LLC without providing the statutorily required notice to the creditor, allowing the creditor to take a default judgment against the LLC, and distributing the LLC's assets to the owners who contributed the assets to a newly formed entity, was a scheme to isolate the judgment in a shell entity and constituted an actual fraud for the personal benefit of the owners of the entities.

In *Genssler v. Harris County*, __ S.W.3d. __, 2010 WL 3928550 (Tex.App.–Houston [1st Dist.] 2010, no pet.), the court analyzed the claim that an individual was liable for environmental violations committed by a group of entities that owned and operated two waste water facilities. Harris County and the State of Texas had obtained a receivership over the individual's property on the theory that the individual was the alter ego of the entities. The designators in the names of the entities indicate that the group of entities consisted of a limited partnership, two limited liability partnerships, and a limited liability company, but the court did not specify or discuss the nature of the entities. The court spoke in general terms about the separate legal existence of a "business entity" and the application of the alter ego theory when "there is such unity between the business entity and the individual that the business entity has ceased to be a separate entity, and allowing the individual to avoid liability through the use of the business entity would work an injustice." The court analyzed the evidence and concluded the entities were not the individual's alter ego because there was no evidence he diverted profits for his individual use, owned any interest in the entities, or personally paid any debts owed by the entities. There was testimony that the individual was the president, the "man in charge," and "made all the decisions," but the court stated that the individual's status as an officer or director, standing alone, was insufficient to support application of the alter ego theory.

In *Penhollow Custom Homes, LLC v. Kim,* 320 S.W.3d 366 (Tex.App.–El Paso 2010, no pet.), the court discussed and applied corporate veil-piercing principles to an LLC as if the LLC were a corporation and concluded that the jury's alter ego finding could not stand. The court concluded that there was no evidence of such unity between the LLC and its owner that the separateness of the LLC had ceased. Neither the owner's complete control over the entity nor the owner's practice of taking an owner's draw (requiring payment of quarterly estimates to the IRS) rather than a salary (which the court said would be subject to withholding for federal income tax and medicare tax purposes) demonstrated a lack of separateness between the entity and its owner, and the court thus did not have to reach the question of whether the evidence was sufficient to prove that the owner used the LLC for the purpose of perpetrating an actual fraud for his direct personal benefit.

In *Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448 (Tex.App.–Dallas 2012, pet. denied), the court discussed and applied case law and Section 21.223 of the BOC to the plaintiff's claim that an LLC was a "sham corporation" and that its sole owner was its alter ego. The court noted that mere control and ownership of all of the stock of a corporation is not sufficient to ignore the distinction between the corporation and its shareholder. There was no evidence that the LLC was organized as a mere tool or business conduit of the owner, nor was there any evidence that the LLC's property was not kept separately from the owners or that the LLC was used for personal purposes. Thus, the trial court did not err in finding that the owner was not the alter ego of the LLC.

In *Fin & Feather Club v. Leander,* 415 S.W.3d 548 (Tex. App.–Texarkana 2013, pet. denied), the court relied on *Shook v. Walden* for the proposition that the policies governing corporate veil piercing also apply to LLCs and held that there was no evidence of actual fraud, i.e., no evidence of dishonesty of purpose or intent to deceive, so as to hold a member or manager of the LLC liable. The court held that there was no evidence of the identity of the principals of the LLC but noted that the legislature specifically authorized single-member LLCs and limited the liability of a member or manager. Even if there had been evidence to establish that there was only one principal of the LLC, there was no evidence of actual fraud to support holding him liable and thus no basis to hold the sole principal liable for the LLC's debt.

In *Metroplex Mailing Services, L.L.C. v. RR Donnelly & Sons Company,* 410 S.W.3d 889 (Tex. App.–Dallas 2013, no pet.), the court held that there was no evidence to support piercing an LLC's veil to hold the sole member liable for the return of a deposit owed by the LLC. The court noted that the legislature specifically authorized single-member LLCs and that the statutory liability protection afforded members and managers only gives way when a plaintiff can show that the LLC was used for the purpose of perpetrating and did perpetrate an actual fraud for the member's or manager's direct personal benefit. The court relied on *Shook v. Walden* for the proposition that the policies governing corporate veil piercing also apply to LLCs and equated actual fraud to dishonesty of purpose or intent to deceive. The court concluded that the member's "use of a single-member LLC, as statutorily authorized by the legislature, combined with an ordinary personal loan to purchase equipment for the company's use secured by that equipment, amounts to no evidence of actual fraud even in combination with" other facts in the case. Even assuming the evidence showed that the LLC used some of the deposit as operating funds in violation of its agreement with the plaintiff and without disclosing the fact to the plaintiff, the court stated that there was no evidence that this action resulted in any direct personal benefit to the LLC's member. Additionally, although the member shut down the LLC in the face of the plaintiff's demand for its deposit (which the LLC was not yet obligated to return), the evidence showed that the LLC shut down due to declining business and not to avoid returning the deposit.

In *Spring St. Partners-IV, L.P. v. Lam*, 750 F.3d 427 (5th Cir. 2013), the Fifth Circuit Court of Appeals pointed out that the legislature specified that the BOC provisions regulating and restricting veil piercing of corporations are applicable to LLCs and their members and managers by adding Section 101.002 to the BOC in 2011and that the court of appeals in *Shook v. Walden* held that a plaintiff seeking to pierce the veil of an LLC not covered by BOC Section 101.002 must also meet the same requirements applicable to a corporation. These requirements differ depending upon whether a claimant is seeking to recover based on a tort or a contract. The claimant in this case sought to recover based on a fraudulent transfer of assets to an LLC, and the claimant argued that it was not required to prove actual fraud to pierce the LLC veil because fraudulent transfer of assets is a tort under Texas law. The court concluded that it did not have to determine whether the claimants were required to prove actual fraud or merely constructive fraud because there was "ample evidence" of the members' actual fraud. This evidence included the formation of an LLC ten days after the members' brother received notice that his debts were being accelerated, transfer of the brother's interest in another LLC to the newly formed LLC for no consideration, signing a document transferring an asset of the newly formed LLC to another family member for no consideration, failing to disclose the transfer for over a year during the pendency of litigation against the newly formed entity, attempting to evade the Texas Uniform Fraudulent Transfer Act by allowing the new LLC's charter to lapse, and attempting to evade individual liability by claiming the charter had been reinstated. The court stated that the members were acting for their direct personal benefit with respect to these actions because they had no other interest to serve.

In the case of *In re Packer*, 520 B.R. 520 (Bankr. E.D. Tex. 2014), a Texas bankruptcy court rejected a judgment creditor's claim seeking to reach the assets of several LLCs and other entities in which the debtor owned most or all of the membership interests because alter-ego claims, including reverse veil-piercing actions, are property of the bankruptcy estate that the plaintiff lacked standing to pursue. The court commented on certain aspects of veil-piercing claims directed at single-member LLCs and expressed the view that piercing should not be based on a failure to follow formalities or the election to be treated as a disregarded entity for federal income tax purposes.

In *In re Divine Ripe, L.L.C.*, 538 B.R. 300 (Bankr. S.D. Tex. 2016), the debtor LLC sought to extend the automatic stay to the LLC's member with respect to a lawsuit brought against the LLC and the member before the bankruptcy filing. The bankruptcy court explained that the automatic stay is not generally extended beyond the debtor and concluded that extension of the stay was not justified. The court noted that the evidence revealed disarray in the accounting records and financial condition of the LLC but did not believe the facts present in this case constituted the "unusual circumstances" to warrant extension of the automatic stay. The court concluded that the presence of identical allegations against the LLC debtor and its member was an insufficient ground to extend the stay to the non-debtor member in the absence of evidence of actual identity of interests such that a judgment against the member would in fact be a judgment against the debtor LLC.

In *Key v. Richards*, 2016 WL 240773 (Tex. App.–Austin 2016, no pet. h.), the court discussed statutory developments in Texas regarding veil piercing of LLCs and concluded that the jury instructions submitted in the case were derived from applicable case law and were accurate statements of the law on veil piercing. The court went on to conclude that it was not necessary to rely on veil-piercing principles to hold the owners of the LLC liable in this case because the owners were directly liable for their own participation in a fraudulent transfer. A dissenting justice pointed out that the court in *Shook v. Walden* did not actually address the argument that Texas law simply does not allow the piercing of an LLC's veil in the same manner as a business corporation, and the defendants had not preserved the argument in the case at bar. The dissenting justice characterized this as "potentially a more vexing question than one might assume initially because of the curious phrasing of section 101.002 of the Business Organizations Code, which applies to LLCs the statutory provisions governing veil-piercing of business corporations, but with the preceding qualifier, 'Subject to Section 101.114,' a reference to the general statutory limitations on the liability of LLC members." While the dissenting justice found the reference to Section 101.114 puzzling, it may be explained on the basis that section 101.114 itself qualifies the limitation on personal liability with the phrase "Except as and to the extent the company agreement specifically provides otherwise." Thus, the reference to Section 101.114 can be understood to recognize that the standard set forth in Section 101.002 need not be met to hold a member personally liable for a contractually-related obligation of the LLC if the company agreement has waived the liability protection generally provided by Section 101.114.

In *Fisher v. Blue Cross and Blue Shield of Texas, Inc.*, 2015 WL 5603711 (N.D. Tex. 2015), the court held that a genuine dispute of material fact precluded summary judgment as to veil-piercing and alter-ego theories of liability asserted against a physician and several LLCs owned by the physician. The court quoted from Fifth Circuit case law in which the Fifth Circuit pointed out that veil piercing is a remedial measure used to impose liability on an owner of a corporation or LLC and that veil-piercing and alter-ego principles apply equally to corporations and LLCs. The court further quoted the Fifth Circuit in stating that "'[s]eparate corporate structures may be ignored when 'the corporate form has been used as part of a basically unfair device to achieve an inequitable result.'" Because the claim of money had and received was quasi-contractual in nature, the court agreed that the claimant must prove that the physician "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate" to establish alter-ego liability. The court pointed out that Section 21.223(b) applies to LLCs, members, owners, and managers under Section 101.002. The court determined that there were genuine disputes of material fact as to issues related to the veil-piercing claims and denied the motion of the physician and his entities for summary judgment. *See also Paragon Office Services, LLC v. Aetna Inc.*, 2015 WL 4602943 (N.D. Tex. July 30, 2015).

In *Copeland v. D & J Construction LLC*, 2015 WL 512590 (N.D. Tex. 2015), the individual defendants contended that, as members and managers of a Texas LLC, they could not be held liable for the LLC's debts, obligations, or liabilities based on BOC §§ 101.113, 101.114. In response, the plaintiff alleged that the individual defendants could be held liable under the "corporate veil doctrine" because the LLC was the alter ego of one of the individual defendants, and the defendants were operating a sham and committing fraud upon the public. The court explained that the traditional alter-ego doctrine was changed substantially by the codification of the doctrine in Section 21.223 of the BOC, and the court noted that Texas courts have applied the statutory provisions on corporate veil piercing to LLCs. The court held that the plaintiff's pleadings, liberally construed, sufficiently alleged facts to support a finding of actual fraud (i.e., "dishonesty of purpose or intent to deceive") for purposes of piercing the corporate veil. The plaintiff asserted generally that *all* of the individual defendants' business model was to receive payment for work done but refuse to pay the workers who actually did the work. Because the plaintiff also alleged that the individual defendants agreed to hire the plaintiff for specific tasks on behalf of the LLC and then refused to pay him, the court concluded that he pled sufficient facts showing that the individual defendants had the intent to deceive him, showing actual fraud. The plaintiff also sufficiently alleged that the sole member of the LLC defendant reaped personal benefit by alleging that the member used the debit cards of the business for his personal expenses. Additionally, the plaintiff alleged that the member perpetrated fraud by hiring workers and refusing to pay them once the work was completed. The plaintiff also contended that the member did not obtain the required liability insurance for the LLC and that the lack of formality was additional evidence that the LLC was a mere front for the member to perpetuate fraud. Liberally construing the plaintiff's assertions, the plaintiff sufficiently alleged actual fraud and use of the LLC to perpetrate fraud to allow piercing the LLC's corporate veil. The plaintiff did not, however, provide facts showing that two other individual defendants perpetrated the fraud for direct benefit to themselves.

In *Ogbonna v. USPLabs, LLC*, 2014 WL 2592097 (W.D. Tex. June 10, 2014), the plaintiff sued two individuals and four LLCs asserting claims arising out of the sale of allegedly harmful dietary supplements. The plaintiff sought to impose collective liability on all these defendants based on veil piercing. The defendants sought dismissal on the basis that the plaintiff failed to adequately allege that veil piercing was warranted. The court first addressed the law governing the case and applied Texas choice-of-law principles since the events allegedly occurred in Texas. Under Texas choice-of-law rules, whether a corporation, LLC, or individual may be held liable pursuant to veil-piercing theory is governed by the law of the state in which the entity is organized. Three of the LLCs were Wyoming LLCs, and the other LLC and the two individuals were a Texas LLC and Texas residents. The court proceeded to analyze the veil piercing claims as to the Wyoming LLCs under Wyoming law and the claims against the Texas defendants under Texas law and concluded that the complaint was insufficient to allege veil-piercing claims as to both sets of defendants. With respect to the Texas veil-piercing claims, the court analyzed the veil-piercing allegations separately with respect to the plaintiff's tort claims and her claims for breach of warranty because a showing of actual fraud is required in the contract context but not the tort context. The court further broke down its analysis in the tort context to separately address alter ego and sham to perpetrate a fraud. With respect to whether the Texas defendants undertook a sham to perpetrate a fraud, the court held that the heightened pleading requirement of Rule 9(b) applied and that alleging the Texas LLCs were formed solely to escape liability for selling dangerous products and misleading customers failed to meet the particularity requirement under Rule 9(b). The allegations lumped all the LLC defendants together and did not differentiate or specify each LLC's specific connection to the alleged fraud. Although the complaint specified that the individuals controlled and managed the LLCs, the complaint contained only minimal allegations as to the individuals' roles. Because the plaintiff's breach of warranty claims sounded in contract, the court stated that the plaintiff was required to sufficiently plead actual fraud for the defendants' direct personal benefit (see Tex. Bus. Orgs. Code § 21.223). The court stated that actual fraud for this purpose means dishonesty of purpose or intent to deceive and is not equivalent to the tort of fraud. Because of the fraud component, the court stated that the heightened pleading requirement of Rule 9(b) applied. The plaintiff's allegations of actual fraud, like her allegations of sham to perpetrate a fraud, lumped all the defendants together without differentiating them and thus failed to satisfy Rule 9(b).

In *Weston Group, Inc. v. Southwest Home Health Care, L.P.*, 2014 WL 940329 (N.D. Tex. Mar. 11, 2014), the court addressed a motion to dismiss in which individual defendants argued that the plaintiff failed to state a claim against them. The individuals argued that the plaintiff must meet a heightened pleading standard (requiring particularity) applicable to a fraud claim because the plaintiff must prove "actual fraud" under the Texas Business Organizations Code to pierce the veil of the entities (which included LLCs) and hold the individuals liable. The court distinguished "actual fraud" for purposes of veil piercing, which simply requires "dishonesty of purpose or intent to deceive" and is less burdensome than a showing of common-law fraud, and the court held that the plaintiff's veil-piercing claims were not subject to the heightened pleading standard of Rule 9(b). In determining whether the plaintiff stated a claim against the individual defendants under Rule 12(b)(6), the court discussed the standard imposed by Section 21.223 with respect to a claim to pierce the veil of a Texas corporation or LLC. The court analyzed the plaintiff's complaint and concluded that the allegations were sufficient for a jury to infer actual fraud.

In *Roustan v. Sanderson*, 2011 WL 4502265 (Tex. App.–Ft. Worth Sept. 29, 2011, pet. denied), the court held that the plaintiffs did not plead or prove a ground for ignoring the limitation of liability afforded in LLCs and did not allege that the limitation should be disregarded to hold Roustan, the president of the LLC's managing member, liable for the LLC's breach of contract. The court noted that courts apply to LLCs the state law principles applied to pierce the corporate veil, and fraud is a ground for disregarding the corporate form. The plaintiffs pled that Roustan fraudulently induced them to enter a contract, but they did not plead that Roustan used the LLC itself to perpetrate a fraud and that the entity should be disregarded to hold Roustan personally liable, and they did not plead any other ground for disregarding the corporate structure.

In *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.–Houston [14th Dist.] Apr. 14, 2011, no pet.), Basurto sued Watkins for personal injuries suffered in an assault by bouncers at a bar known as The Tavern. Two LLCs (which were not defendants) were involved in the operation of The Tavern. The trial court found that Watkins was liable for negligent hiring and supervision and as the alter ego of the LLCs operating The Tavern. The court recognized that members and managers of an LLC are not liable for judgments against the LLC but that courts have applied corporate veil-piercing principles to LLCs. Thus, an LLC member may be held individually liable for obligations of the LLC if the LLC is the mere alter ego of the member. The court concluded that there was insufficient evidence that unity existed between Watkins and the entities that operated The Tavern or that injustice would result if Watkins was not held liable. Basurto presented no evidence that Watkins mingled his personal property with that of the companies or that he used either company for personal purposes. The record did not show the extent of Watkins' ownership interest, but the evidence did show he exercised extensive control. However, mere control is insufficient to impose liability. Basurto also presented no evidence of failure to follow corporate formalities, so the court said it was not necessary to determine if corporate formalities remain a factor to be considered in piercing the LLC veil, noting that a corporate shareholder cannot be held liable on the basis of failing to follow corporate formalities. Finally, Basurto argued that the entities could not have satisfied his judgment, but he failed to present any evidence to support this argument.

In *Phillips v. B.R. Brick and Masonry, Inc.*, 2010 WL 3564820 (Tex.App.–Houston [1st Dist.] Sept. 10, 2010, no pet.), the creditor of an individual obtained a favorable veil-piercing verdict against the individual's spouse based on her operation of an LLC of which the spouse was the sole member. The jury charge included three corporate veil-piercing theories: alter ego, evading an existing obligation, and sham to perpetrate a fraud. The court noted that Texas has applied corporate veil-piercing principles to LLCs, and the court applied corporate veil-piercing cases in reviewing the sufficiency of the evidence to support the verdict. Because neither party argued that TBCA Article 2.21 or BOC Section 21.223 were applicable, the court stated that it would review the sufficiency of the evidence solely with reference to the jury instruction (there having been no objection to the instruction in the trial court). The court concluded that the evidence did not support piercing the LLC veil to hold the member liable to the creditor of the member's spouse. Although there was evidence that the member's spouse improperly used the LLC to avoid paying his obligation to the creditor, there was no evidence that the member or the LLC had any obligation to the creditor, and there was no evidence that the member was acting as the LLC's alter ego, used the LLC to avoid any obligation she had to the creditor, or acted with "dishonesty of purpose or intent to deceive."

In *In re Arnette (Ward Family Foundation v. Arnette)*, 2011 WL 2292314 (Bankr. N.D. Tex. June 7, 2011), the debtor was the president, sole shareholder, and sole decision maker of a corporation and the sole member and sole decision maker of an LLC. The plaintiff in this adversary proceeding sought to hold the debtor liable for claims against the entities under veil-piercing theories. The plaintiff asserted fraud, breach of contract, and various other claims against the debtor and his entities in connection with over $1.7 million lent to the entities by the plaintiff. The court noted that Texas has applied the principles used to pierce the corporate veil to pierce the liability shield of an LLC, and the court applied the same standards to the corporation and LLC in this case. First the court addressed the question of whether the actual fraud standard of Section 21.223 of the BOC applied to the claims in this case, i.e., whether the claims were tort claims outside the scope of the statute or were based on a contractual obligation of the entities. The court concluded that the plaintiff had satisfied the actual fraud standard assuming it applied. The court stated that "actual fraud" within the meaning of the statute is not the same as the common law tort of fraud and simply requires proof of dishonesty of purpose or intent to deceive. The court described how the debtor was dishonest in his dealings with the plaintiff and intended to mislead the plaintiff in order to induce the plaintiff to invest in the debtor's entities. The court also had no doubt that the debtor used the entities to perpetrate a fraud that primarily served to directly benefit him. The court did not, however, find that the sham to perpetrate a fraud theory applied in this case because neither of the debtor's entities were resorted to as a means of evading an existing legal obligation. Both entities existed before the plaintiff invested, and the debtor did not transfer assets among his companies with the purpose of using the corporate form to shield those assets from creditors. The court did conclude that the evidence supported a finding of alter ego based on evidence that included a showing of blended finances of the debtor and his two entities, sole ownership and control by the debtor of the entities, commingling of funds of the entities with his personal funds, the debtor's taking of loans and distributions to fund his lifestyle rather than any regular salary, and occasional use of the entities for personal purposes without proper documentation. The court also found that the plaintiff proved that the debtor defrauded the plaintiff through the entities and that the entities were out of business and had no assets to satisfy a judgment.

In *In re Williams*, 2011 WL 6180060 (Bankr. W.D. Tex. Dec. 11, 2011), the plaintiffs sought to establish that their claim against the debtors, Norman and Joan Williams, was nondischargeable. Norman and Jean Williams were the sole owners, managers, and employees of Williams Building Consultants, LLC, and the plaintiffs' claim was based on the breach of a construction contract between the LLC and the plaintiffs. The court concluded that the plaintiffs had a breach of contract claim against the debtors even though the contract was with their LLC. The court stated that the debtors completely disregarded the corporate form throughout the negotiations and closing process and that the LLC was "essentially a sham corporation." The LLC had no employees, no significant assets, and very little money in the bank. Mrs. Williams testified the LLC was created for the sole purpose of building the home purchased by the plaintiffs. The LLC did not file separate tax returns from the debtors. The debtors consistently referred to their home building business in terms of "we" rather than the LLC. The plaintiffs always understood the debtors to be the sellers of the property rather than the LLC. On this basis, the court allowed the plaintiffs' claim against the debtors. The court determined that the debt was dischargeable, rejecting the plaintiffs' argument that the debt was based on false pretenses, false representations, or actual fraud of the debtors.

In *In re Pace (Osherow v. Hensley)*, 2011 WL 1870054 (Bankr. W.D. Tex. May 16, 2011), the court determined that the transfer of a condominium from the debtor's corporation to an LLC owned by Hensley, a friend of the debtor, was a fraudulent transfer. The court then proceeded to analyze whether Hensley was jointly and severally liable with his LLC under veil-piercing theories. The court relied upon corporate veil-piercing principles, noting that "corporate veil piercing law is equally applicable in the context of limited liability companies." The court stated that the evidence showed that Hensley solely controlled the LLC and commingled funds but stated that this evidence was probably insufficient to pierce the veil under an alter ego theory. Nevertheless, the court found the evidence sufficient to establish that Hensley used the LLC to perpetrate a fraud. The court based this conclusion on its previous finding that Hensley did not act in good faith in connection with the transfer of the condo and helped the debtor carry out a fraudulent transfer. Therefore, Hensley was jointly and severally liable with the LLC.

In *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, 2010 WL 4366990 (S.D. Tex. Oct. 27, 2010), the court relied on the actual fraud standard in Section 21.223 of the BOC in applying the alter ego theory in the LLC context and concluded the plaintiff did not show that the LLC was formed for the purpose of wrongful conduct.

In *In re Houston Drywall, Inc. (West v. Seiffert)*, 2008 WL 2754526 (Bankr. S.D. Tex. Jul. 10, 2008), the bankruptcy court concluded that an LLC general partner of a limited partnership was a "sham corporation," and that the individuals in control of the LLC were thus personally liable for breaches of fiduciary duties as general partners of the limited partnership. Although the court identified and referred to the general partner as a limited liability company in reciting the facts earlier in the opinion, the court discussed and applied corporate veil-piercing principles to the LLC as if it were a corporation.

The bankruptcy court in *In re Supplement Spot, LLC (Floyd v. Option One Mortgage Corporation)*, 409 B.R. 187 (Bankr. S. D. Tex. 2009) discussed and applied corporate case law as if the debtor, a Texas LLC, were a corporation, and the court characterized as "individual piercing" (although the result was actually consistent with traditional piercing) its conclusion that an account held in the name of the LLC debtor's president was property of the LLC. In this case, 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 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.

In *DDH Aviation, LLC v. Holly*, 2005 WL 770595 (N.D. Tex. March 31, 2005), the court relied upon Texas corporate veil-piercing principles in analyzing whether to pierce the veil of a Texas LLC. The opinion states that DDH was initially "formed as a corporation but later altered its business form to become a limited liability company." The court does not indicate when the change in form took place or what events took place while DDH was a corporation versus an LLC. At one point in the opinion, the court identifies DDH as a "limited liability corporation." Thus, it is not clear that the court made a conscious decision to apply corporate veil-piercing principles to an LLC or whether the court even recognized the distinction between an LLC and a corporation. *See also Arsenault v. Orthopedics Specialist of Texarkana*, 2007 WL 3353730 (Tex.App.–Texarkana Nov. 14, 2007, no pet.) (finding no pleading or evidence supporting alter ego and single business enterprise veil-piercing claims against owner of professional LLC).

Courts in other jurisdictions have generally relied on corporate veil-piercing principles in the LLC context. See, e.g., *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 178-84 (2d Cir. 2008) (stating Delaware corporate veil-piercing principles apply to LLCs and concluding questions of whether single member LLC was operated as alter ego of its member and whether LLC was operated with overall element of injustice or unfairness were questions for factfinder at trial); *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323, 327-28 (Wyo. 2002) (concluding no legal or policy reason exists to distinguish LLCs from corporations for purposes of veil piercing but acknowledging precise application of factors may differ based on inherently more flexible and informal nature of LLCs). For additional cases in other states that have addressed veil piercing of LLCs, see Elizabeth S. Miller, *More Than a Decade of LLP and LLC Case Law: A Cumulative Survey of Cases Dealing With Limited Liability Partnerships and Limited Liability Companies*, June 2007, and subsequent case law updates available at http://www.baylor.edu/law.

2. Piercing the LLC Veil in the Personal Jurisdiction Context

Piercing the LLC veil is also addressed in a number of cases involving a court's exercise of personal jurisdiction. *See, e.g., Mt. McKinley Insurance Company v. Grupo Mexico, S.A.B. De C.V.*, 2013 WL 1683641 (Tex. App.–Corpus Christi 2013, no pet.); *Haferkamp v. Grunstein*, 2012 WL 1632009 (Tex. App.–Eastland 2012, pet. denied); *Gonzalez v. Lehtinen*, 2008 WL 668600 (Tex.App.– Corpus Christi 2008, pet. denied); *Wolf v. Summers-Wood, L.P.*, 214 S.W.3d 783 (Tex.App.–Dallas 2007, no pet.); *Morris v. Powell*, 150 S.W.3d 212 (Tex.App.–San Antonio 2004, no pet.); *Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810 (Tex.App.—Texarkana 2001, no pet.); *Royal Mortgage Corp. v. Montague*, 41 S.W.3d 721 (Tex.App.—Ft. Worth 2001, no pet.); *Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC*, 2009 WL 1469808 (N.D. Tex. 2009) *Taurus IP, LLC v. DaimlerChrysler Corporation*, 519 F.Supp.2d 905 (W.D. Wis. 2007); *Quebecor World (USA), Inc. v. Harsha Assocs. L.L.C.*, 455 F.Supp.2d 236 (W.D. N.Y. 2006); *LaSalle Bank N.A. v. Mobile Hotel Properties, LLC,* 274 F.Supp.2d 1293 (S.D. Ala. 2003); *XL Vision, LLC v. Holloway*, 850 So.2d 1063 (Fla. App. 2003); *International Bancorp, L.L.C. v. Societe des Bains de Mer et du Cercle des Entrangers a Monaco*, 192 F.Supp.2d 467 (E.D. Va. 2002); *ING (U.S.) Securities, Futures & Options, Inc. v. Bingham Inv. Fund, L.L.C.*, 934 F.Supp. 987 (N.D. Ill.1996). The Texas Supreme Court's analysis of the distinction between "jurisdictional piercing" and "substantive piercing" presumably applies as well in the LLC context. *See PHC-Minden, L.P. v. Kimberly-Clark Corp*., 235 S.W.3d 163 (Tex. 2007).

3. Reverse LLC Veil Piercing

"Reverse piercing," i.e., holding the LLC liable for a member's obligation, or otherwise treating the LLC's assets as the assets of the owner, has been recognized in some cases in Texas and other states.

A judgment creditor sought to reverse pierce the veil of an LLC to impose liability on the LLC for the creditor's judgment against an individual debtor in the case of *In re Moore (Cadle Company v. Brunswick Homes, LLC)*, 379 B.R. 284 (Bankr. N.D. Tex. 2007). The court discussed the development of both traditional and reverse corporate veil-piercing under Texas law and concluded that the doctrine of reverse veil piercing is applicable under Texas law although the doctrine has "rather thin roots" in Texas. Noting that neither the Texas Supreme Court nor the Texas legislature has opined on reverse veil piercing, the court relied upon Fifth Circuit case law that has recognized the doctrine under Texas law. The court, however, was troubled by the fact that the doctrine of reverse piercing has evolved and been accepted into the mainstream of Texas veil-piercing jurisprudence at the same time the Texas legislature has been limiting traditional veil piercing and without meaningful discussion of what the doctrine in substance accomplishes. The court concluded that the concept should be applied only when it is clear that it will not prejudice non-culpable shareholders or other stakeholders (such as creditors) of the corporation. The court applied corporate veil-piercing principles to the LLC in issue, stating that whether an entity is a corporation or an LLC is a "distinction without a difference" for purposes of veil piercing. The fact that reverse piercing was sought with respect to an individual who was not a record or nominal equity owner of the LLC did not preclude the claim since the plaintiffs sought to establish that the individual had a *de facto* interest in the LLC. The court concluded that fact issues precluded summary judgment for the LLC on the reverse veil-piercing claim and a claim for constructive trust on the LLC's assets. The court held that the ten-year statute of limitations for enforcement of a judgment applied to the reverse alter ego and constructive trust claims since the claims were being pursued to collect a judgment.

In *In re Packer*, 520 B.R. 520 (Bankr. E.D. Tex. 2014), a Texas bankruptcy court rejected a judgment creditor's claim seeking to reach the assets of several LLCs and other entities in which the debtor owned most or all of the membership interests because alter-ego claims, including reverse veil-piercing actions, are property of the bankruptcy estate that the plaintiff lacked standing to pursue.

In *In re Shuomali*, 2016 WL 4991490 (Bankr. E.D. Tex. Sept. 16, 2016), judgment creditors of an individual sought to reverse pierce various LLCs in which the individual owned all or substantially all of the assets. The court noted that reverse veil piercing in the LLC context is particularly problematic when the LLC is managed by one or a few members because corporate formalities are often disregarded in those cases. The court stated that the same limitations on reverse veil piercing for corporations applied in the LLC context, and that the corporate veil may not be pierced based on a failure to follow corporate formalities. The court found that the LLCs were independent legal entities and had not been compromised.

In *In re Boyd (Rodriguez v. Four Dominion Drive, LLC)*, 2012 WL 5199141 (Bankr. W.D. Tex. 2012), the bankruptcy trustee of the individual debtor sought to treat the debtor and his law firm, a professional LLC, as a single entity based on reverse veil-piercing principles. The court assumed that the corporate alter ego doctrine applied in this context and held that the trustee's reverse veil-piercing claim was not a "core" proceeding but conceivably fell within the court's "related to" jurisdiction.

In *Bramante v. McClain*, 2007 WL 4555943 (W.D. Tex. Dec. 18, 2007), the plaintiffs, judgment creditors of an individual, sought to reverse pierce numerous LLCs on the basis that the LLCs were the alter egos of the individual under Texas veil-piercing principles. The LLCs sought summary judgment, arguing that there was no evidence of unity between the LLCs and the individual because the plaintiffs could not show that the individual had an ownership interest in, or control over, the LLCs. The court, however, found that the plaintiffs raised a fact question based on summary judgment evidence that the individual created a group of entities that ultimately became the LLC defendants in the case. Evidence that the individual was the sole owner of the entities that ultimately became the LLC defendants constituted evidence sufficient to raise a fact question regarding the individual's ownership and control of the LLCs. The court also found that the plaintiffs had raised a fact question as to whether the individual judgment debtor used entities owned by him to fraudulently transfer assets to the LLCs. Further, the court concluded that the plaintiffs stated a claim against the LLCs for conspiring by agreement to commit fraudulent transfers to avoid collection on the judgment. The court found no authority, however, supporting liability beyond the amounts actually transferred. *See also Rocklon, LLC v. Paris*, 2016 WL 6110911 (Tex. App.—Beaumont Oct. 20, 2016, no pet.) (applying reverse piercing principles to justify temporary injunction until trial to keep the member from distributing assets of the LLC)*; In re Juliet Homes, L.P.*, 2011 WL 6817928 (Bankr. S.D. Tex. Dec. 28, 2011) (concluding allegations adequately stated claim for reverse veil piercing under Texas law where trustee sought to count assets of non-debtor entities as assets of their owner-debtors for purposes of asserting fraudulent and preferential transfer claims against the non-debtor entities).

As amended in 2007, the charging order provision of the LLC statute provides that "[a] creditor of a member or of any other owner of a membership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company." Tex. Bus. Orgs. Code § 101.112(f); *see also* Tex. Rev. Civ. Stat. art. 1528n, art. 4.06E (expired eff. Jan. 1, 2010). This provision might be interpreted to preclude reverse piercing of a Texas LLC by a member's creditor. On the other hand, a creditor of an LLC member could presumably still resort to the fraudulent transfer statutes to recover property fraudulently transferred to the LLC, and it might similarly be argued that disregard of the LLC's separate existence under reverse piercing principles is not precluded by the charging order provision.

Cases applying reverse piercing principles in the LLC context in other jurisdictions include *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298 (Conn. App. 2002); *Great Neck Plaza, L.P. v. Le Peep Restaurant, LLC*, 37 P.3d 485 (Colo. App. 2001); *In re Schwab*, 378 B.R. 854 (Bankr. D. Minn. 2007); *A.G. Dillard, Inc. v. Stonehaus Constr., LLC*, 2016 WL 3213630 (Va. June 2, 2016); *Sky Cable, LLC v. Coley*, 2016 WL 3926492 (W.D. Va. July 18, 2016). *See also In re Turner (Kendall v. Turner),* 335 B.R. 140 (Bankr. N.D. Cal. 2005); . *Cf. In re Bianchini (Bianchini v. Ryan)*, 346 B.R. 593 (Bankr. D. Conn. 2006) (commenting that many jurisdictions permit both offensive and defensive reverse piercing, but declining to allow debtor to benefit by disregarding record title to property placed in LLC for unjust purposes).

C. Liability of Members for Wrongful Distributions

The BOC prohibits a distribution by an LLC to its members if the distribution would leave the LLC insolvent using a balance sheet test. The statute provides that an LLC may not make a distribution to a member if, immediately after the distribution, the company's total liabilities (excluding liabilities to members for unpaid distributions) would exceed the company's total assets. Tex. Bus. Orgs. Code § 101.206(a), (b)(1). If the LLC has any liability for which recourse is limited to specific assets of the LLC, the liability is excluded from the calculation. Tex. Bus. Orgs. Code § 101.206(b)(2). Likewise, the calculation includes the fair value of an asset subject to a liability for which recourse of the creditor is limited only to the extent that the fair value of the asset exceeds the liability. Tex. Bus. Orgs. Code § 101.206(c).

The BOC provides that a member who impermissibly receives a distribution has no obligation to return it to the LLC unless the member knew that it violated the statutory restriction. Tex. Bus. Orgs. Code § 101.206(d). The statute does not expressly grant creditors the right to enforce the return of a distribution to the LLC, but a court might recognize a creditor's standing to bring a derivative action to do so. The statute does not affect any obligation a member may have to return a distribution under "other state or federal law." Tex. Bus. Orgs. Code § 101.206(e). Thus, the United States Bankruptcy Code (11 U.S.C. §§ 101 et seq.) and Texas Uniform Fraudulent Transfer Act (Tex. Bus. & Com. Code §§ 24.001 et seq.) present creditors with other means to pursue recovery. *See In re Brentwood Lexford Partners, LLC*, 202 B.R. 255 (Bankr. N.D.Tex. 2003) (holding certain excess cash-flow distributions to LLC members were fraudulent transfers because they were made with intent to hinder or delay collection of a note owed by the LLC). Knowledge or intent is not always required under these other fraudulent transfer provisions. *See* Tex. Bus. & Com. Code § 24.006(a).

In 2009, the BOC was amended to clarify that the limitation on distributions to LLC members does not include payments to members for reasonable compensation or reasonable payments in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. Tex. Bus. Orgs. Code § 101.206(f). In addition, the statute was amended to make clear that a distribution that is in compliance with Chapter 11 of the BOC does not violate the limitation on distributions. Tex. Bus. Orgs. Code § 101.206(a). In other words, an LLC that is winding up might technically be insolvent as a result of a distribution but would not violate the limitation on distributions if "adequate provision" has been made for the payment of the remaining liabilities, such as by the assumption of the liabilities by a purchaser of the LLC's assets. *See* Tex. Bus. Orgs. Code § 11.053(a).

The limitation on distributions under the BOC is primarily for the protection of creditors but also protects members from the undue depletion of LLC assets. Additionally, the company agreement may impose stricter requirements on members to return distributions. The statute expressly provides that it does not affect any obligation of the members under the company agreement to return a distribution. Tex. Bus. Orgs. Code § 101.206(e). Release of a member's obligation to return an impermissible distribution requires consent of all members unless otherwise provided by the company agreement. Tex. Bus. Orgs. Code § 101.154. A creditor who acts in reliance on an enforceable obligation to return a distribution may enforce the obligation even though it has been settled or released if the obligation is stated in a document that is signed by the member and the document has not been amended or canceled to evidence the release or settlement. Tex. Bus. Orgs. Code § 101.155.

D. Liability of "Directors and Officers" for Debts Incurred After Tax Forfeiture of LLC

As discussed in II.D. above, forfeiture of a corporation's privileges due to failure to pay franchise taxes or file required reports results in personal liability of directors and officers for certain corporate debts. Under the Tax Code, "[i]f the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." Tex. Tax Code § 171.255(a). Issues arising in interpreting and applying these provisions are further discussed in II.D. above. Although these provisions are expressed in corporate terms, they also apply to other taxable entities, such as limited partnerships and limited liability companies. Tex. Tax Code § 171.2515(b). The statute does not state who is a "director" or "officer" of an LLC for purposes of Section 171.255. The Public Information Report required by the Tax Code to be filed annually by a corporation or LLC requires the entity to list each officer and director of the entity. Tex. Tax Code 171.203. The instructions to the Public Information Report state that an LLC should list its managers, its members, if the LLC is member-managed, and its officers, if any. *See Bruce v. Freeman Decorating Servs., Inc.*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex.App.–Houston [14th Dist.] Aug. 15, 2011, pet. denied) (rejecting argument that Section 171.255 only applies to corporations and holding individual who signed LLC's Public Information Reports in years preceding forfeiture and who was listed as officer and/or director of LLC in such reports could reasonably be inferred to be officer or director at time debt at issue was created or incurred and was personally liable for amounts owed for services provided to LLC after forfeiture).

E. Liability for Committing or Knowingly Participating in Tortious or Fraudulent Acts

As noted above in Section II.E., it is well-established that corporate officers may be held personally liable when they commit or knowingly participate in tortious or fraudulent acts even though the conduct occurred while the officer was acting on behalf of the corporation. *See, e.g., Gore v. Scotland Golf, Inc.*, 136 S.W.3d 26, 32 (Tex.App.–San Antonio 2003, pet. denied); *Kingston v. Helm*, 825 S.W.3d 755, 764-67 (Tex.App.–Corpus Christi 2002, pet. denied). Similarly, Texas courts have held that LLC members and managers are liable for their own fraudulent or tortious acts even if the acts are committed in the service of the LLC. *See Nwokedi v. Unlimited Restoration Specialists*, 428 S.W.3d 191 (Tex.App.–Houston [1st Dist.] 2014, pet. denied) (holding controlling member of LLC was personally liable for knowingly participating in LLC's fraud in relation to LLC's contract and fraudulent transfers of LLC assets based on the principle that a corporate officer who knowingly participates in tortious or fraudulent acts may be held individually liable to third persons even though the officer was acting as an agent of the corporation); *see also In re Arnette,* 454 B.R. 663 (Bankr. N.D. Tex. 2011); *In re Williams,* 2011 WL 240466 (Bankr. W.D. Tex. Jan. 24, 2011); *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex.App.–San Antonio 2008, no pet.); *LJ Charter, L.L.C. v. Air America Jet Charter, Inc.*, 2009 WL 4794242 (Tex.App.–Houston [14th Dist.] Dec. 15, 2009, pet. denied). In *Watkins v. Basurto*, 2011 WL 1414135 (Tex. App.–Houston [14th Dist.] 2011, no pet.), the court noted that Texas law is unsettled as to whether an agent of a corporation or LLC can be held individually liable for the tort of negligent hiring or supervision, i.e., whether an agent owes a duty to third parties to properly hire or supervise other agents of the principal.

F. Liability on LLC's Contract as Agent of Partially Disclosed Principal or as Guarantor

As noted above in Section II.F., an agent is not liable on a contract entered into on the principal's behalf if the agent discloses the agent's representative capacity and the identity of the principal. Conversely, if the representative capacity of the agent and the identity of the agent's principal are not disclosed to the other party to the contract at the time the contract is entered into, the agent is personally liable on the contract. Restatement (Third) of Agency §§ 6.01, 6.02 (2006); Restatement (Second) of Agency §§ 320, 322 (1957). There are numerous Texas cases applying these principles in the context of contracts entered into by corporate agents. The common corporate practice of doing business under assumed or trade names creates some peril for officers and other agents who contract under the assumed or trade name of the corporation without disclosing the actual legal name of the corporation. *See, e.g., John C. Flood of DC, Inc. v. SuperMedia, L.L.C.*, 408 S.W.3d 645 (Tex.App.–Dallas 2013, pet. denied); *Lake v. Premier Transp.*, 246 S.W.3d 167 (Tex.App.– Tyler 2007, no pet.); *Wynne v. Adcock Pipe and Supply*, 761 S.W.2d 67 (Tex.App.–San Antonio 1988, no writ); *A To Z Rental Center v. Burris,* 714 S.W.2d 433 (Tex.App.–Austin 1986, writ ref'd n.r.e.). The filing of an assumed name certificate that discloses the legal name of the corporation does not in itself protect agents who contract in the assumed name of the corporation because Texas courts have stated that actual knowledge or reason to know the principal's identity is the test of disclosure and that third parties have no duty to search for this information. *Wynne v. Adcock Pipe and Supply*, 761 S.W.2d 67 (Tex.App.–San Antonio 1988, no writ); *A To Z Rental Center v. Burris,* 714 S.W.2d 433 (Tex.App.–Austin 1986, writ ref'd n.r.e.). These basic agency principles have application in the LLC as well as the corporate context. *See, e.g., Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998) (holding member-managers of LLC personally liable under common law of agency with respect to contract entered into on behalf of LLC where LLC was partially disclosed principal).

Even if an agent discloses the identity of the principal and signs a contract indicating the agent's representative capacity, the language of the contract may subject the agent to liability as a guarantor or party to the contract. *See 84 Lumber Co., L.P. v. Powers*, 393 S.W.3d 299 (Tex.App.–Houston [1st Dist.] 2012, pet. denied) (holding individual who signed credit application as president of corporation liable as personal guarantor of the corporation's debt based on language above the signature line stating that the signatory personally guaranteed the credit account of the corporation); *Wholesale Builders Supply, Inc. v. Green-Source Dev., L.L.C.*, 2013 WL 6175210 (Ohio App. Nov. 21, 2013) (holding individual who signed LLC credit application personally liable based on language in the credit application stating that the signatory was "both personally and corporately liable for the total of purchases by you or anyone designated to sign for your purchases on your account"). Corporate and LLC representatives should be vigilant when signing credit applications and other contracts on behalf of the corporation or LLC in order to avoid subjecting themselves to personal liability under provisions that may be interpreted to obligate signatories in their individual capacities.

IV. Limited Partnerships

In the 1990s and early 2000s, limited partnerships increased in popularity for franchise tax reasons. Effective January 1, 2008, limited partnerships generally became subject to the new franchise tax (the so-called "margin tax"). Limited partnerships that qualify as "passive" under the new margin tax provisions are exempt from the margin tax, but operating businesses that are structured as limited partnerships are subject to the margin tax. The issues associated with liability protection in the limited partnership form are more complicated than they are in the corporate or LLC form. With the elimination of the state tax advantage that limited partnerships previously enjoyed and given the additional complexities associated with owner liability protection, limited partnerships have decreased in popularity, at least for operating businesses.

A. General Partner Personal Liability

General partners in a limited partnership have joint and several personal liability for all the debts and obligations of the partnership. Corporate or LLC general partners are commonly used to minimize this disadvantage; however, this technique complicates the structure and involves some additional expense (legal and filing fees associated with formation of an additional entity, franchise tax obligations of the entity general partner, accounting fees associated with filing an additional tax return, etc.). Liability issues associated with this more complicated structure are further discussed below.

B. Limited Partner Limited Liability; Statutory Exceptions

Under the Texas Revised Limited Partnership Act ("TRLPA"), a limited partner was not liable for partnership debts and obligations unless (i) the limited partner was also a general partner, (ii) the limited partner participated in the control of the business and a person transacting business with the limited partnership reasonably believed, based upon the limited partner's conduct, that the limited partner was a general partner, or (iii) the limited partner permitted its name to be used in the partnership name and a creditor extended credit to the partnership without knowledge that the limited partner was not a general partner.[6] Tex. Rev. Civ. Stat. art. 6132a-1, § 3.03 (expired eff. Jan. 1, 2010). Section 153.102 of the Business Organizations Code ("BOC") carries forward these rules with one exception. The prohibition on use of a limited partner's name in the limited partnership name (and the resulting potential liability if the limited partner's name is so used) has not been carried forward in the BOC. *See* Tex. Bus. Orgs. Code §§ 5.055, 153.102.

The risk associated with participation in the control of the business may appear at first blush to be a substantial threat to a limited partner's liability protection; however, the statute's lengthy laundry list of activities that are deemed not to constitute participation in the control of the business provides a limited partner substantial leeway in this area.[7] Tex. Bus. Orgs. Code §§ 153.103. The list of specified activities that are not deemed to constitute participation in the control of the business is not an exclusive list; therefore, other activities not specified in the list may also be determined to fall outside the scope of participation in the control of the business. Tex. Bus. Orgs. Code §§ 153.104. Even if a limited partner's activities fall outside the safe harbor and

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[6] There were certain exceptions to the TRLPA prohibition on use of a limited partner's name in the partnership name. The TRLPA permitted a limited partner's name to be used in the partnership name in the following circumstances: (i) the limited partner's name was also the name of a general partner, or (ii) the business of the limited partnership had been carried on under that name prior to admission of the limited partner. Tex. Rev. Civ. Stat. art. 6132a-1, § 1.03(1) (expired eff. Jan. 1, 2010).

[7] The limited partnership statutes of most other states contain similar provisions exposing a limited partner to liability for participation in the control of the business and providing safe harbor activities that do not constitute participation in the control of the business. The new Uniform Limited Partnership Act (2001) ("ULPA 2001"), which is a complete revision of the prior Revised Uniform Limited Partnership Act (1976 with 1985 amendments), provides for limited liability of limited partners without regard to whether they participate in the control of the business. As of early 2017, ULPA 2001 had been adopted in twenty states and the District of Columbia.

constitute participation in the control of the business, the reliance test provides another hurdle a creditor must overcome to hold the limited partner liable as a general partner. Tex. Bus. Orgs. Code § 153.102(b).

The statutory laundry list of capacities and powers that do not constitute participation in control by a limited partner is quite broad. For example, the provision states that a limited partner does not participate in control so as to risk liability for the partnership's obligations if the limited partner acts as (1) a contractor for or an officer or other agent or employee of the partnership; (2) a contractor for or an agent or employee of a general partner; (3) an officer, director, or shareholder of a corporate general partner; (3) a partner of a partnership that is a general partner; (4) a member or manager of an LLC general partner; (5) or any similar capacity with any person that is a general partner. Tex. Bus. Orgs. Code § 153.103(1) and (2). This provision is frequently relied upon to involve limited partners in management of the limited partnership through ownership and management of a corporate or LLC general partner.

C. Risk Associated With Complexity of Corporate or LLC General Partners

As noted above, corporate or LLC general partners are frequently used to avoid exposing individuals to liability as general partners. Often-times, one or more individuals involved in the corporate or LLC general partner are limited partners who must avoid "participating in control" of the business of the partnership to preserve their liability protection as limited partners. The statutory carve-outs regarding participation in control permit a limited partner to act as shareholder, officer, or director of a corporate general partner, or a member or manager of an LLC general partner, and, theoretically, there should be little risk in doing so. However, the practical down-side is the complexity that comes with this approach. Consider the proper signature form for a limited partnership contract being executed by an individual acting as president of the corporate general partner:

XYZ Enterprises, LTD.
By: XYZ Management, Inc., general partner

By: ______________________________
Jane Jones, president

It would not be surprising if Jane Jones forgot one or more designations involved in the various agency relationships reflected above. If Jane Jones is sloppy in this regard, there may then be an issue as to the capacity in which she was acting or appeared to be acting, and her liability protection may be jeopardized. It may be easier for Jane Jones to understand and remember her role if she is simply appointed an officer of the limited partnership. Though there was no explicit provision in the TRLPA regarding officers of a limited partnership, Section 3.03 recognized that a limited partner may serve as an "agent" of the limited partnership without thereby "participating in control" of the partnership, and there was nothing in the TRLPA that would appear to preclude the partnership agreement from providing for officer/agents. Section 3.103 of the BOC expressly provides for the election or appointment of officers by any type of domestic entity, including a limited partnership. In 2009, a new section was added to the BOC to make the partnership's authority to appoint officers under Section 3.103 even clearer. Tex. Bus. Orgs. Code § 151.004. The list of capacities in which a limited partner may serve without risking liability as a general partner (which already included acting as an agent or employee of the limited partnership) was also amended to add a specific reference to acting as an officer. Tex. Bus. Orgs. Code § 153.103(1)(A).

The risk attendant to structures in which a limited partner is careless while relying on the statutory safe harbors is illustrated by *OCP, S.A. v. Colorado OTR, LP*, 2013 WL 6491170 (S.D. Tex. Dec. 10, 2013). In that case, the plaintiff sought to hold Harris personally liable on breach-of-contract and warranty claims arising out of the plaintiff's purchase of 42 off-the-road tires from a limited partnership. The jury found that Harris, a limited partner, participated in the control of the limited partnership and that the plaintiff reasonably believed that Harris was a general partner based on his conduct. Harris argued that there was no evidence that he participated in the control of the business so as to render him liable because he engaged only in conduct protected by the safe harbor provisions of Section 153.103(1)(A), (B), and (E) of the BOC. Specifically, Harris claimed that he was acting at all times in his capacity as the managing member of the LLC general partner or as president and CEO of the limited partnership. At trial, however, the evidence showed that Harris, while negotiating a contract with the plaintiff, signed correspondence identifying himself as "Partner–Colorado OTR LP," not as an agent, employee, or officer of the partnership. Further, he handed out business cards representing himself as "partner." The plaintiff's witnesses testified that they believed Harris was the person in charge at the limited partnership's business and that they were unaware that he was president of the company. The court concluded that this was ample evidence to support the jury's findings that Harris participated in the control of the limited partnership as if he were a general partner and that, as a result of his conduct, the plaintiff reasonably believed that Harris was a general partner when the plaintiff agreed to the contract.

In *Humphreys v. Medical Towers, Ltd.,* 893 F.Supp. 672 (S.D. Tex.1995), aff'd without opinion, 100 F.3d 952 (5th Cir.1996), a building manager brought a sexual harassment suit against her employer, a limited partnership that owned the building. The plaintiff also sued an individual, Lawson, who was a limited partner and the sole shareholder and president of the corporate general partner. The court acknowledged that Section 3.03 of the TRLPA provided that a limited partner was not liable for the obligations of the partnership unless the limited partner participated in the control of the business and a person transacting business with the partnership reasonably believed that the limited partner is a general partner. The court also acknowledged that Section 3.03 stated that a limited partner did not participate in the control of the business by acting as an officer, director, or shareholder of a corporate general partner. Nevertheless the court denied Lawson's motion for summary judgment. In support of its conclusion that there were fact issues on this matter the court noted the following: the plaintiff's assertion that Lawson controlled all aspects of the business; the plaintiff's assertion that she reasonably believed him to be a general partner since he reported to no one else and had complete control of the limited partnership; the plaintiff's assertion that Lawson never said he was merely a limited partner and that she did not see any document stating that he was merely a limited partner; deposition testimony from the bookkeeper of the partnership that Lawson was the general partner; deposition testimony from the stationary engineer that Lawson owned the building.

A New York bankruptcy court engaged in a lengthy analysis of Section 17-303 of the Delaware Revised Uniform Limited Partnership Act in the case of *In re Adelphia Communications Corp.*, 376 B.R. 87 (Bankr. S.D. N.Y. 2007). Section 17-303 of the Delaware limited partnership statute, like the BOC and predecessor TRLPA provisions, provides that a limited partner is not liable for the obligations of a limited partnership unless the limited partner is also a general partner or, in addition to the exercise of the rights and powers of a limited partner, participates in the control of the business. The Delaware statute also provides, like the Texas provisions, that a limited partner who participates in the control of the business is liable only to persons who transact business with the partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner. The New York bankruptcy court concluded, however, that this provision can result in liability to a third party based on the limited partner's acting as a *de facto* general partner even if the third party has actual knowledge of the limited partner's "on paper" status as a limited partner.

In *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468 (Tex.App.–Dallas 2008, pet. denied), investors in several limited partnerships sued the mezzanine lender, Wells Fargo, who also became a limited partner of the master partnership. The trial court dismissed the plaintiffs' suit against Wells Fargo on the basis that the plaintiffs did not have standing to sue for injuries suffered by the partnerships. The plaintiffs argued that the limited partnerships were set up to perpetuate fraud and that the entities should be ignored so that the plaintiffs could sue Wells Fargo in their own capacities. The court stated that it would have to ignore the rules in Section 3.03(a) of the TRLPA to accept the argument made by the plaintiffs because nothing in the TRLPA provided an exception for a limited partner to sue the limited partnership or another limited partner directly when the entities were allegedly part of a fraudulent scheme. To the extent the plaintiffs argued that Wells Fargo was a *de facto* general partner, the court concluded that they failed to plead any facts that would establish Wells Fargo acted as a general partner or participated in the control of the business, or that the plaintiffs conducted business with Wells Fargo because they reasonably believed it was a general partner.

D. Veil Piercing of Limited Partnership or Entity General Partners

1. <u>Piercing (and Reverse Piercing) the Limited Partnership Veil</u>

There is little case law dealing with veil piercing of limited partnerships, presumably because there is always at least one general partner who has personal liability for the debts and obligations of the partnership (absent an LLP registration, which is a relatively recent phenomenon and is not available to limited parnerships in all states). When veil piercing of the limited partnership has been pursued, it has tended to involve a reverse piercing claim to hold the limited partnership liable with respect to liabilities of the general partner. For example, in *Carr v. Weiss*, 984 S.W.2d 753 (Tex.App.—Amarillo 1999, pet. denied), the general partner of an Oklahoma limited partnership was held liable for damages and constructive trust arising out of breach of an oral agreement to purchase and jointly own an apartment complex. The limited partnership, which held title to the apartment complex, was found to be the general partner's alter ego and thus jointly and severally liable with the general partner. In *Northern Tankers (Cyprus) Ltd. v. Backstrom*, 967 F.Supp. 1391 (D.Conn.1997), a federal maritime case, the court applied the alter ego theory to reverse pierce various entities the court found were fraudulently created as personal investment vehicles for an individual. The court was apparently referring to a group of entities that owned substantial real estate and personal property in Colorado. The group consisted of a grantor trust, two corporations, a limited partnership, and two LLCs. The court specifically found that the limited partnership and its corporate general partner were "alter egos" of the individual and expressly disregarded their "corporate" existence. In *C. F. Trust, Inc. v. First Flight Ltd. P'shp*, 580 S.E.2d 806 (Va. 2003), the Virginia Supreme Court held that Virginia recognizes the concept of outsider reverse veil-piercing and that the concept can be applied to limited partnerships.

In *Lifshutz v. Lifshutz*, 61 S.W.2d 511 (Tex.App.–San Antonio 2001, pet. denied), the trial court pierced the veil of various corporate and partnership entities in which the husband's ownership interests were separate property in order to reach and characterize assets of the entities as community property. On appeal, the court held that the Texas Revised Partnership Act did not permit a court to award assets of a partnership to a non-partner spouse in a divorce action, relying on Section 5.01 of the TRPA (dealing with partnership property) and the commentary to that section.

As amended in 2007, the charging order provision of the limited partnership statute provides that "[a] creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership." Tex. Bus. Orgs. Code § 153.256(f); *see also* Tex. Rev. Civ. Stat. art. 6132a-1,§ 7.03(e) (expired Jan. 1, 2010). This provision might be interpreted to preclude reverse piercing of a Texas limited partnership by a partner's creditor. On the other hand, a creditor of a partner could presumably still resort to the fraudulent transfer statutes to recover property fraudulently transferred to the limited partnership, and it might similarly be argued that disregard of the limited partnership's separate existence under reverse piercing principles is not precluded by the charging order provision.

Several Texas courts of appeals have held that traditional corporate veil-piercing principles are inapplicable to a partnership. In *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*, 77 S.W.3d 487, 499-500 (Tex.App.—Texarkana 2002, pet. denied), the court reasoned that "there is no veil that needs piercing, even when dealing with a limited partnership, because the general partner is always liable for the debts and obligations of the partnership to third parties." In *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468 (Tex.App.–Dallas 2008, pet. denied), the court relied upon *Pinebrook Properties* and similarly concluded that alter ego or other corporate veil-piercing principles are inapplicable to a limited partnership because the general partner is always liable for the debts and obligations of the partnership and there is thus no veil that needs piercing. In *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46 (Tex.App.–Houston [1st Dist.] 2013, pet. denied), the court noted that "Texas courts have uniformly declined to apply the alter-ego theory to pierce a limited partnership's 'veil' to impose the entity's liabilities on a limited partner," and the court concluded that "[t]o impose a limited partnership's liability on its limited partner in this case under the guise of the equitable veil-piercing doctrine would eviscerate the statutory framework governing the limitation of liability of limited partnerships as expressed in section 153.102(b)" of the BOC. The claimant did not assert that the limited partner could be held liable under Section 153.102, and the court of appeals held that the trial court erred in applying equitable veil-piercing principles to impose liability on the limited partner. *See also Seidler v. Morgan*, 277 S.W.3d 549 (Tex.App.–Texarkana 2009, pet. denied) (stating that veil-piercing claim against individual who was officer and shareholder of corporate general partner would have to occur through general partner and not limited partnership because veil piercing is inapplicable to limited partnerships); *Waller v. DB3 Holdings, Inc.*, 2008 WL 373155 (N.D. Tex. Feb. 12, 2008) (stating that parties who sought to hold limited partner liable were essentially disregarding formal statutory rules and advancing what appeared to be veil-piercing theory, commenting that claimants cited no authority for such proposition, and noting that at least one court has rejected application of veil piercing to limited partnerships (citing *Pinebrook Properties*)); *In re Heritage Org., L.L.C. (Faulkner v. Kornman)*, 413 B.R. 438 (Bankr. N.D. 2009) (noting that it was unclear if alter ego theory applies to limited partnerships in Delaware and finding reasoning in *Pinebrook Properties* persuasive given similarity between Texas and Delaware limited partnership statutes); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F.Supp.2d 579 (S.D. Tex. 2011) (noting that veil-piercing theories do not apply to Texas limited partnerships to reach limited partners but holding limited partners liable for breach of covenant not to sue because limited partners signed covenant in individual capacities).

The reasoning that veil-piercing principles do not apply to a limited partnership because there is always a general partner with personal liability for the debts and obligations of the partnership obviously raises the question of the applicability of veil piercing to limited liability partnerships. Texas courts have not discussed that issue. One court appears to have confused LLPs and limited partnerships in concluding that the alter ego theory would not apply to the relationship between an LLP and one of its partners. *See Skidmore Energy, Inc. v. KPMG*, 2004 WL 3019097 (N.D. Tex. 2004) (citing *Pinebrook Properties* in support of statement that alter ego liability was inapplicable to relationship between KPMG LLP and its Moroccan member firm because KPMG is not corporate entity but rather is LLP organized under Delaware law). *Cf. Joiner v. Coast Paper & Supply*, 2008 WL 2895851 (Tex.App.–Corpus Christi 2008, no pet.) (analyzing personal jurisdiction with respect to individuals who were limited partners as well as officers and shareholders of corporate general partner of limited partnership and citing *Pinebrook Properties* for proposition that alter ego doctrine is not applicable "'with regard to a limited liability partnership [sic] because there is no veil that needs piercing'").

A Texas bankruptcy court applied the alter ego doctrine to a limited partnership and concluded it was a "straw man" for the benefit of individuals who would not otherwise be able to collect on a judgment against the debtors because the individuals were co-defendants with the debtors. *In re Sewell (Alvarado Land Dev., Inc. v. Sewell)*, 413 B.R. 562 (Bankr. E.D. Tex. 2009). The court recognized the principle that a limited partnership is an entity separate and distinct from its partners, but stated that Texas law allows the separateness of the entity to be ignored if the limited partnership is used as a straw man for the purpose of obtaining an impermissible result under Texas law. Relying on corporate veil-piercing principles, the court concluded that the limited partnership, assuming it paid and was assigned the judgment that it was trying to collect against the debtors, was acting as a straw man for individuals who were also judgment debtors and thus was not a creditor with standing to bring an action against the debtors.

In *Genssler v. Harris County*, __ S.W.3d. __, 2010 WL 3928550 (Tex.App.–Houston [1st Dist.] 2010, no pet.), the court analyzed the claim that an individual was liable for environmental violations committed by a group of entities that owned and operated two waste water facilities. Harris County and the State of Texas had obtained a receivership over the individual's property on the theory that the individual was the alter ego of the entities. The designators in the names of the entities indicate that the group of entities consisted of a limited partnership, two limited liability partnerships, and a limited liability company, but the court did not specify or discuss the nature of the entities. The court spoke in general terms about the separate legal existence of a "business entity" and the application of the alter ego theory when "there is such unity between the business entity and the individual that the business entity has ceased to be a separate entity, and allowing the individual to avoid liability through the use of the business entity would work an injustice." The court analyzed the evidence and concluded the entities were not the individual's alter ego because there was no evidence he diverted profits for his individual use, owned any interest in the entities, or personally paid any debts owed by the entities. There was testimony that the individual was the president, the "man in charge," and "made all the decisions," but the court stated that the individual's status as an officer or director, standing alone, was insufficient to support application of the alter ego theory.

The bankruptcy court in the case of *In re Adelphia Communications Corp.*, 376 B.R. 87 (Bankr. S.D. N.Y. 2007) concluded that there was nothing in the nature of a limited partnership (though the court mistakenly referred to a limited partnership as a limited liability partnership) that would preclude recourse to veil piercing as an equitable remedy in appropriate circumstances, but commented that veil piercing may not be used as an "end run" around the proof required under the statute to hold a limited partner liable based upon the limited partner's participation in the control of the partnership, and the court further commented that a claimant likely would not be able to meet the more stringent requirements to pierce the partnership veil if the claimant could not meet its burden to establish liability under the statutory provisions.

2. Piercing the Entity General Partner

The use of entity general partners to shield upstream parties from liability has become common. *See, e.g., Peterson Grp., Inc. v. PLTQ Lotus Grp., LP*, 417 S.W.3d 46 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *Ted Trout Architect Assocs., Ltd. v. Basaldua*, 2013 WL 4318695 (Tex App.–Houston [14th Dist.] 2013, no pet.). Often these entities are formed for the sole purpose of serving as general partner of the limited partnership, and the activities of such an entity thus consist solely of acting in a managerial capacity for the partnership. One question that may arise in such a case is what level of capitalization is appropriate to avoid being characterized as "undercapitalized" for veil-piercing purposes. There is not a great deal of case law addressing this or other veil-piercing issues in this context. In the cases in which the issue has arisen, some courts have been more receptive to veil-piercing arguments than others.

In *Paul Steelman, Ltd. v. Omni Realty Partners*, 885 P.2d 549 (Nev.1994), the Nevada Supreme Court was not troubled by a corporate general partner that was capitalized with only a $200 receivable. In that case, a partnership creditor sought to hold the shareholders of the corporate general partner personally liable for a partnership debt. The court acknowledged that the corporation was formed to shield individuals from liability as general partners. The plaintiff claimed that the corporate general partner should be pierced because it was intentionally undercapitalized. Although the corporation was only capitalized with a $200 receivable, the court stated that the real value of the corporation was best measured by the collective expertise of its shareholders. The court noted that the record established that the manner of capitalization was not uncommon for corporations of its type and that the limited partnership itself was adequately capitalized. The court stated that undercapitalization is only one factor to be considered in a piercing case and concluded that, assuming *arguendo* the corporation was undercapitalized, there was no showing the corporation was a sham designed to perpetuate fraud or injustice.

In *Pinebrook Properties, Ltd. v. Brookhaven Lake Owners Ass'n,* 77 S.W.3d 487 (Tex.App.—Texarkana 2002, pet. denied), the court of appeals found that there was no evidence to support the trial court's finding that an LLC general partner was the alter ego of the LLC's member. The court recognized that an LLC is a separate entity that provides liability protection to its members but went on to analyze whether there was evidence to support the trial court's alter ego finding. The court of appeals apparently assumed that the corporate alter ego doctrine was applicable to an LLC; however, the court found no evidence to support the finding that the LLC general partner was the alter ego of its member. (The court cited corporate veil-piercing cases and relied on Article 2.21 of the TBCA in the course of its discussion. The LLC statute was silent at that time with respect to veil-piercing standards in the LLC context; however, as discussed above, most courts have looked to the law in the corporate context both before and after the addition of Section 101.002 of the BOC.) The standard the court applied was whether there was evidence of a unity of interest between Musgrave, the LLC's member, and the LLC such that the separateness had ceased to exist and holding only the LLC as the general partner liable would result in injustice. The evidence of alter ego presented was that the LLC had no checking account and had not filed a tax return, and that Musgrave had sent a letter under his own signature without designating any representative capacity. A second letter signed without designating any representative capacity was also argued to show lack of regard for the "corporate" structure. Additionally, there was evidence that the LLC's only source of income was contributions or loans from Musgrave, and Musgrave once made a statement characterizing himself as the owner of the property owned by the limited partnership. The court noted that the evidence clearly showed that the LLC had never had the need, or been required, to file a tax return. (Presumably, the LLC was a disregarded entity for tax purposes under the check-the-box rules because Musgrave was its sole member.) The court stated that lack of corporate formalities is not a factor in determining alter ego (relying on Article 2.21A(3) of the TBCA and corporate case law) and held that there was no evidence of alter ego, pointing to the absence of evidence of any commingling of funds or that Musgrave disregarded the "corporate" structure, the fact that Musgrave was not the only manager of the LLC, and the absence of evidence that the LLC was used for personal purposes. The court's comment that the evidence revealed Musgrave was not the only manager of the LLC might lead to an inference that serving as the sole manager and member of an LLC would constitute evidence of lack of separateness. There is no reason, however, that a single member/manager LLC should be any more susceptible to veil piercing than a sole shareholder/director corporation. Both are authorized by statute, and such a structure in and of itself should not constitute any evidence of lack of separateness. *See Fin & Feather Club v. Leander,* 415 S.W.3d 548 (Tex. App.–Texarkana 2013, pet. denied) (holding there was no evidence of actual fraud to support piercing the LLC veil even if evidence established that there was only one principal of the LLC; noting that the legislature specifically authorized single-member LLCs); *Metroplex Mailing Servs., L.L.C. v. RR Donnelly & Sons Co.,* 410 S.W.3d 889 (Tex. App.–Dallas 2013, no pet.) (noting that the legislature specifically authorized single-member LLCs and holding that there was no evidence that the LLC's sole member used the LLC to commit actual fraud for the member's direct personal benefit).

A federal district court applying Texas law in *Humphreys v. Medical Towers, Ltd.,* 893 F.Supp. 672 (S.D. Tex.1995), aff'd without opinion, 100 F.3d 952 (5th Cir.1996), concluded that the sole shareholder and president of a corporate general partner was not entitled to summary judgment on the plaintiff's veil-piercing claim. In that case, a building manager brought a sexual harassment suit against her employer, a limited partnership. The general partner was a corporation. The plaintiff sued the sole shareholder and president of the corporate general partner, alleging he was personally liable because he exercised control of the business and was the alter ego of the corporate general partner. With respect to the alter ego claim, the plaintiff pointed out that the defendant was the corporation's sole shareholder, that the corporation was undercapitalized, that it derived all of its income from the limited partnership, and that it paid some of the defendant's personal expenses. On this basis, and with little discussion, the court found that the plaintiff had raised a fact issue so as to avoid summary judgment.

Another federal district court in Texas went into greater detail in addressing the potential viability of veil-piercing claims aimed at corporate general partners of two limited partnerships that owned and operated nursing homes. In *Autrey v. 22 Texas Services Inc.*, 79 F.Supp.2d 735 (S.D. Tex. 2000), a wrongful death case arising out of the death of a nursing home resident, much of the court's attention was focused on the possible undercapitalization of the corporate general partners in issue. In the case of the corporate general partner of one of the limited partnerships, the court was concerned that the corporate general partner had a net worth of "only" $42,000 and little in the way of liquid assets when it bore "one hundred percent of the liability for the operation of numerous nursing homes." However, because the plaintiffs did not present evidence of the financial condition at the time of incorporation, the court concluded that the plaintiffs had not conclusively established undercapitalization. The corporate general partner of the other limited partnership defendant was incorporated with an initial capitalization of "only" $25,000 and had a negative net worth six months after formation. The court concluded that engaging in the ownership of forty-nine nursing homes while also maintaining no net assets amounted to a disputable issue regarding undercapitalization. (The overall picture was not helped by the apparent precarious financial condition of the limited partnership itself, which the court pointed out in footnotes.) As further damaging evidence, the court pointed out that the corporate general partners had no employees, office space, or expenses. In addition, with respect to the corporate general partner of one of the defendant partnerships, the court found it suspicious that there were apparently individuals who were non-functioning corporate officers.

When considering whether the corporations were adequately capitalized, the court in *Autrey* stressed that the corporate general partners were responsible for 100% of the liabilities of their respective limited partnerships. A critical step in the analysis is missing, however, if the inquiry focuses solely on whether the general partner has sufficient assets to meet the potential liabilities and obligations of the partnership. Assessment of whether a corporate general partner is adequately capitalized for its business of managing a limited partnership should include consideration of the assets and insurance of the limited partnership itself. In this regard, the defendants in the *Autrey* case argued that a combined $21,000,000 in liability insurance made the weak balance sheets of the corporate general partners of the two defendant limited partnerships irrelevant. The court, however, found more fact issues. First, the court noted that there were possible issues as to the policies' coverage of the occurrences in question. In addition, the court found significant the fact that there were questions as to whether the corporate general partners themselves were covered by the insurance, as to whether the corporate general partners secured and paid for the insurance, and whether the insurance coverage would have "transformed [the corporate general partners] into financially responsible corporate entities." With respect to the issue of injustice, the court accepted, for purposes of deciding defendants' motion for summary judgment, the plaintiff's argument that, if proved, the effort to avoid personal liability by creating sham corporate shields constitutes a type of injustice that would satisfy that element of the piercing standard.

The veil-piercing law applied by the court in *Autrey* was Pennsylvania law because the corporate general partners were incorporated in Pennsylvania. There is little to suggest, however, that the court would have approached the issue any differently under Texas law. As discussed above, under Texas law, piercing to impose liability on a shareholder for a liability of the corporation that relates to or arises out of a contractual obligation is by statute subject to a stringent actual fraud standard. Tex. Bus. Orgs. Code § 21.223(a)(2), (b); *see also* Tex. Bus. Corp. Act art. 2.21A(2) (expired eff. Jan. 1, 2010). This statutory actual fraud standard is not applicable, however, to a claim that does not relate to or arise out of a contractual obligation of the corporation. Thus, even under Texas law, it does not appear that the court would have been required to apply the statutory standard to the alter ego claim. Conceivably, it might be argued that the wrongful death claim, which was based on negligent care of the nursing home resident, arose out of the nursing home's contract to provide care to the resident. It is certainly not clear that the statute may be read that broadly. That the case involved a tort claim, that the limited partnerships were in the nursing home business, and that the limited partnerships themselves may have been severely undercapitalized probably explain the court's tone. Nevertheless, the discussion highlights areas that merit consideration in structuring a limited partnership with an entity general partner. *See also House v. 22 Texas Services, Inc.*, 60 F.Supp.2d 602 (S.D. Tex. 1999), another wrongful death case against the same limited partnerships involved in the *Autrey* case. In that case, the court pierced the corporate veil of the corporate general partners to exercise personal jurisdiction over certain individual defendants who were shareholders and officers of the corporate general partners.

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

E. Liability of Partners of Limited Partnership for Wrongful Distributions

The BOC prohibits a distribution to partners of a limited partnership if the distribution would leave the partnership insolvent using a balance sheet test. The statute provides that a limited partnership may not make a distribution to a limited partner if, immediately after the distribution, the partnership's total liabilities (excluding liabilities to partners for unpaid distributions) would exceed the partnership's total assets. Tex. Bus. Orgs. Code § 153.210(a). If the limited partnership has any liability for which recourse is limited to specific assets of the partnership, the liability is excluded from the calculation, and the calculation includes the fair value of an asset subject to a liability for which recourse of the creditor is limited only to the extent that the fair value of the asset exceeds the liability. Tex. Bus. Orgs. Code § 153.210(a).

The BOC provides that a limited partner who impermissibly receives a distribution has no obligation to return it unless the partner knew that it violated the statutory restriction. Tex. Bus. Orgs. Code § 153.112. The statute does not expressly grant creditors the right to enforce the return of a distribution to the partnership, but a court might recognize a creditor's standing to bring a derivative action to do so. The statute does not affect any obligation a limited partner may have to return a distribution under "other applicable law." Tex. Bus. Orgs. Code § 153.112. Thus, the United States Bankruptcy Code (11 U.S.C. §§ 101 et seq.) and Texas Uniform Fraudulent Transfer Act (Tex. Bus. & Com. Code §§ 24.001 et seq.) present creditors with other means to pursue recovery. Knowledge or intent is not always required under these other fraudulent transfer provisions. *See, e.g.,* Tex. Bus. & Com. Code § 24.006(a).

In 2009, the BOC was amended to clarify that the limitation on distributions to partners of a limited partnership does not include payments to partners for reasonable compensation or reasonable payments in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. Tex. Bus. Orgs. Code § 153.210(b). In addition, the statute was amended to make clear that a distribution that is in compliance with Chapter 11 of the BOC does not violate the limitation on distributions. Tex. Bus. Orgs. Code § 153.210(a). In other words, a limited partnership that is winding up might technically be insolvent as a result of a distribution but would not violate the limitation on distributions if "adequate provision" has been made for the payment of the remaining liabilities, such as by the assumption of the liabilities by a purchaser of the partnership's assets. *See* Tex. Bus. Orgs. Code § 11.053(a).

The limitation on distributions under the BOC is primarily for the protection of creditors but also protects partners from the undue depletion of the limited partnership's assets. Additionally, the partnership agreement may impose stricter requirements on limited partners to return distributions. The statute expressly provides that it does not affect any obligation of the limited partners under the partnership agreement to return a distribution. Tex. Bus. Orgs. Code § 153.112. Release of a partner's obligation to return an impermissible distribution requires consent of all partners unless otherwise provided by the partnership agreement. Tex. Bus. Orgs. Code § 153.203. A creditor who acts in reliance on an enforceable obligation to return a distribution may enforce the obligation even though it has been settled or released if the obligation is stated in a document that is signed by the partner and the document has not been amended or canceled to evidence the release or settlement. Tex. Bus. Orgs. Code § 153.204(a). A general partner continues to be liable to third parties to the same extent as a general partner in a general partnership notwithstanding any compromise or release of the general partner's liability by the other partners. Tex. Bus. Orgs. Code § 153.204(a).

F. Liability of "Directors and Officers" for Debts Incurred After Tax Forfeiture of Limited Partnership

As discussed in II.D. above, forfeiture of a corporation's privileges due to failure to pay franchise taxes or file required reports results in personal liability of directors and officers for certain corporate debts. Under the Tax Code, "[i]f the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." Tex. Tax Code § 171.255(a). Issues arising in interpreting and applying these provisions are further discussed in II.D. above. Although these provisions are expressed in corporate terms, they also apply to other taxable entities, such as limited partnerships and limited liability companies. Tex. Tax Code § 171.2515(b). The statute does not state who is a "director" or "officer" of a limited partnership for purposes of Section 171.255.

G. Liability for Committing or Knowingly Participating in Tortious or Fraudulent Acts

As noted in Section II.E, it is well-established that corporate officers may be held personally liable when they commit or knowingly participate in tortious or fraudulent acts even though the conduct occurred while the officer was acting on behalf of the corporation. *See, e.g., Gore v. Scotland Golf, Inc*., 136 S.W.3d 26, 32 (Tex.App.–San Antonio 2003, pet. denied); *Kingston v. Helm*, 825 S.W.3d 755, 764-67 (Tex.App.–Corpus Christi 2002, pet. denied). Similarly, as discussed in Section III.E., Texas courts have held that LLC members and managers are liable for their own fraudulent or tortious acts even if the acts are committed in the service of the LLC. *See Nwokedi v. Unlimited Restoration Specialists*, 428 S.W.3d 191 (Tex.App.–Houston [1st Dist.] 2014, pet. denied) (holding controlling member of LLC was personally liable for knowingly participating in LLC's fraud in relation to LLC's contract and fraudulent transfers of LLC assets based on the principle that a corporate officer who knowingly participates in tortious or fraudulent acts may be held individually liable to third persons even though the officer was acting as an agent of the corporation). These principles would apply as well to officers and agents in the limited partnership context.

H. Liability on Limited Partnership's Contract as Agent of Partially Disclosed Principal or as Guarantor

As noted above in Sections II.F. and III.F., an agent is not liable on a contract entered into on the principal's behalf if the agent discloses the agent's representative capacity and the identity of the principal. Conversely, if the representative capacity of the agent and the identity of the agent's principal are not disclosed to the other party to the contract at the time the contract is entered into, the agent is personally liable on the contract. Restatement (Third) of Agency §§ 6.01, 6.02 (2006); Restatement (Second) of Agency §§ 320, 322 (1957). The principles discussed in those sections would apply to officers and agents of a limited partnership as well.

Even if an agent discloses the identity of the principal and signs a contract indicating the agent's representative capacity, the language of the contract may subject the agent to liability as a guarantor or party to the contract. *See 84 Lumber Co., L.P. v. Powers*, 393 S.W.3d 299 (Tex.App.–Houston [1st Dist.] 2012, pet. denied) (holding individual who signed credit application as president of corporation liable as personal guarantor of the corporation's debt based on language above the signature line stating that the signatory personally guaranteed the credit account of the corporation); *Wholesale Builders Supply, Inc. v. Green-Source Dev., L.L.C.*, 2013 WL 6175210 (Ohio App. Nov. 21, 2013) (holding individual who signed LLC credit application personally liable based on language in the credit application stating that the signatory was "both personally and corporately liable for the total of purchases by you or anyone designated to sign for your purchases on your account"). Entity representatives should be vigilant when signing credit applications and other contracts on behalf of the entity in order to avoid subjecting themselves to personal liability under provisions that may be interpreted to obligate signatories in their individual capacities.

V. LLPs and Limited Partnership LLPs

A registered limited liability partnership (LLP) is a partnership that has availed itself of statutory procedures so as to alter the traditional rule that general partners have personal liability for all partnership debts and obligations. The statutory provisions applicable to general partnerships (or those applicable to limited partnerships in the case of a limited partnership that has registered as an LLP) continue to apply to a partnership after it registers as an LLP–it is the same entity as it was prior to registration. Sections 152.801-152.805 of the BOC merely modify the rule regarding liability of partners and specify the requirements for obtaining and maintaining LLP status.

Texas was the first jurisdiction to pass LLP legislation in 1991. The concept was quickly copied in other states, and all states and the District of Columbia added LLP provisions to their partnership statutes. The major accounting firms were a significant force in lobbying for such legislation across the country. Although the states were quick to borrow the LLP concept from Texas, they were not reluctant to vary and refine it, and there are significant variations in the LLP statutes around the country. For example, most states, like Texas, permit any type of partnership to become an LLP, while a few states permit only professional partnerships to become LLPs. Some states limit the liability protection provided by an LLP to liabilities arising out of some type of tortious or wrongful conduct, while LLPs in Texas and many other states provide partners liability protection extending to contractual obligations of the partnership. The differences among the states should be considered if a business will have dealings or contacts outside of Texas. For instance, New York statutes provide that a non-professional LLP's liability shield will not be respected in New York.

A. General Rule: Full Liability Limitation

The feature that distinguishes an LLP from a partnership that is not an LLP is the limitation on the personal liability of partners in an LLP. The BOC provides that a partner in an LLP is not individually liable for debts and obligations of the partnership incurred while the partnership is an LLP. Tex. Bus. Orgs. Code § 152.801(a). As originally enacted, the Texas LLP provisions only shielded partners from liability arising out of the errors, omissions, negligence, incompetence, or malfeasance of other partners or representatives of the partnership. In 1997, the LLP provisions were amended to provide protection from all debts and obligations of the partnership as a general rule. Thus, the current language generally shields partners from tort and contract obligations of the partnership. Language was also added to prevent indirect attempts to hold partners liable through indemnity and contribution. The LLP provisions do not shield a partner from liability imposed by law or contract independently of the partner's status as a partner, such as when a partner personally commits a tort or personally guarantees a contractual obligation. Tex. Bus. Orgs. Code § 152.801(e)(2). The limitation of partner liability also does not affect the liability of the partnership to pay its obligations out of partnership property or the manner in which service of citation or other civil process may be served in an action against a partnership. Tex. Bus. Orgs. Code § 152.801(e)(1).

B. Exceptions to Tort-Type Liability Protection Before September 1, 2011

As mentioned above, as originally enacted, the Texas LLP provisions only shielded partners from liability arising out of the errors, omissions, negligence, incompetence, or malfeasance of other partners or representatives of the partnership. Even this protection was subject to certain exceptions. Under these exceptions, a partner's liability was not limited with respect to another's errors, omissions, negligence, incompetence, or malfeasance if such occurred under the partner's supervision, the partner was directly involved in the specific activity, or the partner had notice or knowledge and failed to take reasonable steps to prevent or cure the situation. When the 1997 amendments broadened the liability protection to all debts and obligations of the partnership, the language dealing with the exceptions to the protection from tort-type liabilities was retained. Though the construction of the TRPA provision was awkward, the apparent intent was to retain the pre-1997 exceptions from tort-type liability protection, i.e., a partner's liability for another's errors, omissions, negligence, incompetence, or malfeasance if such occurred under the partner's supervision, the partner was directly involved in the specific activity, or the partner had notice or knowledge and failed to take reasonable steps to prevent or cure the situation. *See* Tex. Rev. Civ. Stat. art. 6132b-3.08(a)(2) (expired eff. Jan. 1, 2010). When these provisions were carried forward in the BOC, this principle was stated in a less awkward fashion. *See* Tex. Bus. Orgs. Code § 152.801(b) as in effect before September 1, 2011.

The exceptions to an LLP partner's protection from liability presented some interesting questions of interpretation. First, a partner who "supervised" or "directed" the errant partner or partnership representative was not shielded from liability. Did this mean that managing partners were always liable? The Comments to the 1991 amendments suggest that the answer to this question is "no" and that the supervision was required to be fairly specific for liability to attach to a supervising partner. *See* Tex. Rev. Civ. Stat. art. 6132b, § 15 (expired Jan. 1, 1999), Source and Comments by Alan R. Bromberg (Vernon Supp. 2009). Additionally, a partner was not shielded from liability if the partner was "directly involved" in the activity or had "notice or knowledge" of and "failed to take reasonable steps to prevent or cure" the errors, omissions, negligence, incompetence, or malfeasance.

Arguably, the provisions imposing liability with respect to supervision, direct involvement, and notice or knowledge stated nothing more than the principle that persons are always liable for their own torts. Given the revolutionary effect of the LLP provisions on the traditional rule of partner personal liability, it is somewhat understandable that the legislation included this sort of reassuring language. The provisions were initially drafted with the thought that only professional partnerships would be LLPs. Although the provisions were ultimately not limited to professional partnerships, it was nevertheless recognized that professional firms would be the primary beneficiaries of the provisions. That said, the resulting LLP provisions were somewhat anomalous given the approach of the professional corporation statutes to liability issues. The Texas Professional Corporation Act expressly disavowed any implication that a supervisory duty was created by the terms of the statute. That act stated that "a shareholder of a professional corporation, as such, shall have no duty to supervise the manner or means whereby the officers or employees of the corporation perform their respective duties." Tex. Rev. Civ. Stat. art. 1528e § 5 (expired eff. Jan. 1, 2010). Chapter 303 similarly states that a shareholder of a professional corporation is not required to supervise the performance of duties by an officer or employee of the corporation and further states that a shareholder of a professional corporation has no greater liability than a shareholder of a for-profit corporation. Tex. Bus. Orgs. Code § 303.002. The BOC, like the predecessor Texas Professional Corporation Act, makes clear that the individual professional and the corporation have liability for the individual professional's errors, omissions, negligence, incompetence, or malfeasance. Tex. Bus. Orgs. Code § 301.010. The extent to which the LLP liability protection for errors, omissions, negligence, incompetence, or malfeasance differed from that provided by a professional corporation is debatable, but the different articulation appeared to present opportunities for plaintiffs to target partners in addition to the errant partner or employee.

In *Software Publishers Association v. Scott & Scott, LLP*, 2007 WL 92391 (N.D. Tex. 2007), the court declined to dismiss claims against the managing partner of an LLP law firm that allegedly engaged in cybersquatting and copyright and trademark infringement and dilution. The court noted the provision of the Texas LLP statute providing for liability of a partner who was directly involved in the specific activity in which the negligence or malfeasance of another occurred or who had notice or knowledge of negligence or malfeasance at the time of the occurrence and failed to take reasonable steps to prevent or cure the negligence or malfeasance. The court also pointed out that the liability of a partner independent of his partner status is not affected by the statute. The plaintiff alleged that the managing partner "controlled" the activities of the law firm complained of in the complaint. The court found this allegation sufficient to survive a motion to dismiss because the allegation supported recovery under the theory that the managing partner was directly involved in the wrongful conduct or had knowledge of the wrongful conduct but failed to take reasonable steps to prevent it. In the course of its discussion, the court commented that no limited liability partnership law in any state extends so far as to shield a partner from his own wrongful conduct.

In *Rhodes Colleges, Inc. v. Johnson*, 2012 WL 627273 (N.D. Tex. 2012), the court applied the LLP statute in effect before September 1, 2011, to claims based on allegedly defamatory statements published before the 2011 amendments. The plaintiff sought to hold Van Wey, a partner in an LLP law firm, liable for allegedly defamatory statements posted on the firm's website by another partner, Johnson. Van Wey maintained that she was not supervising or directing Johnson, nor was she in any way directly involved in Johnson's actions. Van Wey stated that she was unaware of the content Johnson added to the firm website, and Van Wey adduced evidence that she did not regularly monitor the site. The plaintiff failed to present evidence that would enable a reasonable trier of fact to find that any of the exceptions in Section 152.801(b) of the BOC (as in effect before September 1, 2011) applied, and the court thus granted summary judgment in favor of Van Wey.

In *Garcia v. Jenkins/Babb LLP*, 2013 WL 3789830 (N.D. Tex. 2013), the court dismissed the plaintiff's attempt to hold Babb, a partner of an LLP law firm, vicariously liable under the Fair Debt Collections Practices Act. The collection efforts at issue were taken by another partner, and the plaintiff argued that Babb, as a principal of the LLP, "was aware or should have been aware of the actions taken by" the other partner and that Babb "had a duty to oversee [those] actions." The complaint, however, did not allege that Babb participated in or was even aware of the other partner's actions with regard to the collection efforts against the plaintiff. The events giving rise to the plaintiff's claim occurred before September 1, 2011, and the court thus applied Section 152.801 of the BOC as in effect before the amendment. The court stated that the complaint asserted no facts to support a finding that any of the exceptions in Section 152.801(b) applied in this case, and the court dismissed the claim against Babb.

A Connecticut court held that two partners in a three partner LLP law firm did not have liability for the third partner's wrongful acts toward a client where the two partners shared no benefit in the dealings of the third partner in question, did not have supervision or control over him, and did not know of the matter until after it occurred. *See Kus v. Irving*, 735 A.2d 946 (Conn. Super. 1999).

C. Expiration or Termination of Protection

A partnership must be an LLP at the time a debt or obligation is incurred for the liability limitations to apply. A 2010 decision by the Fifth Circuit Court of Appeals concluded that the partners of a partnership that was registered as an LLP at the time of the trademark infringement underlying a later judgment against the partnership were not protected from personal liability because the partnership was not registered as an LLP at the time the judgment was entered. *See Evanston Insurance Company v. Dillard Department Stores Inc.*, 602 F.3d 610 (5th Cir. 2010). The reasoning of the court is questionable, and the legislature amended the LLP provisions in 2011 to make clear that an obligation is incurred while the partnership is an LLP if the obligation relates to an action or omission occurring while the partnership is an LLP or the obligation arises under a contract or commitment entered into while the partnership is an LLP. Tex. Bus. Orgs. Code § 152.801(c).

An annual renewal of the registration was required to maintain LLP status under the law as it was in effect before January 1, 2016. Effective January 1, 2016, the Business Organizations Code was amended to replace the annual renewal feature with an annual report requirement. Before January 1, 2016, an LLP's failure to file a renewal by the one-year anniversary date of its registration resulted in an automatic lapse of LLP status and loss of the associated liability protection. There was no procedure to retroactively restore the lapse in liability protection. As amended, the statute requires an LLP to file an annual report. The annual report is due on June 1 of each year, but the failure to file the report by that date will not result in automatic loss of LLP status. Tex. Bus. Orgs. Code §152.806(a), (b). Instead, the LLP will have a period of one year to cure the delinquency. If the delinquent report is not filed by May 31 of the following year, the LLP's registration will automatically terminate. BOC §152.806(c). After involuntary termination of the registration, there is a three-year period during which the registration may be retroactively reinstated. Tex. Bus. Orgs. Code §152.806(e)-(h). Thus, the risk of a lapse in liability protection is substantially lessened under the new annual reporting scheme. The 2015 amendments also include a provision regarding the effect of acceptance by the Secretary of State of an LLP registration and a provision specifying a "substantial compliance" standard with respect to the registration and annual reporting requirements. Effective January 1, 2016, an LLP registration that is accepted by the Secretary of State is an effective registration and is conclusive evidence of the satisfaction of all conditions precedent to an effective registration. Tex. Bus. Orgs. Code § 152.802(c-1) (eff. Jan. 1, 2016). Additionally, except in a proceeding by the state to terminate an LLP's registration, the registration continues in effect so long as there has been substantial compliance with the registration and annual reporting requirements of the statute. Tex. Bus. Orgs. Code § 152.802(k) (eff. Jan. 1, 2016). This standard should mitigate potential liability concerns arising from minor compliance errors, such as an error in reporting the number of partners.

D. Name

An LLP's name must contain an appropriate designator such as the abbreviation "LLP." The BOC states that an LLP's name must contain the phrase "limited liability partnership" or an abbreviation of the phrase. Tex. Bus. Orgs. Code §§ 5.063, 152.803. An LLP that is careless about use of the designator in its dealings with third parties might expect a plaintiff to make an issue of it even though the partnership name specified in the application filed with the Secretary of State contains the required designator.

E. Insurance or Financial Responsibility Before September 1, 2011

Although common in the first generation of LLP statutes, insurance requirements were dropped from most LLP statutes that included such a requirement relatively soon after the development of LLP statutes. Texas was slower to drop its requirement for insurance or financial responsibility. Until September 1, 2011, the Texas LLP provisions still included an insurance or financial responsibility requirement. Tex. Bus. Orgs. Code § 152.804 (repealed eff. Sept. 1, 2011). Under the Texas provision, an LLP was required to carry at least $100,000 of liability insurance designed to cover the kinds of errors, omissions, negligence, incompetence, or malfeasance for which liability is limited. In lieu of carrying such insurance, an LLP could choose to provide $100,000 of funds specifically designated and segregated for the satisfaction of judgments against the partnership. Such funds were required to be in cash, certificates of deposit, or U.S. treasury obligations deposited in trust or in bank escrow, or the funds could be represented by a bank letter of credit or insurance company bond. There were a number of troublesome issues of interpretation associated with compliance with the insurance or financial responsibility requirement, particularly if an LLC was relying on insurance to satisfy the requirement, as was the case for most LLPs. The insurance requirement provided a plaintiff potential opportunities to make an issue of policy exclusions, deductibles, nature and timing of coverage, etc. in an attempt to attack the liability protection. The elimination of the insurance and financial responsibility requirement eliminated these avenues of attack on an LLP's liability shield.

In *Edward B. Elmer, M.D., P.A. v. Santa Fe Properties, Inc.*, 2006 WL 3612359 (Tex.App.–San Antonio 2006, no pet.), the court concluded that an LLP's failure to carry the required insurance rendered the liability shield ineffective even though the liability in issue stemmed from breach of a lease and thus was not the type of liability that would have been covered by the insurance. The plaintiff sued the partnership and its two partners for breach of a commercial lease. The plaintiff obtained a judgment against the partnership, and that judgment was severed and became final. After the plaintiff was not able to collect the judgment from the partnership, the plaintiff obtained a summary judgment against one of the partners. The partner appealed arguing that the plaintiff's suit against the partner was barred because the plaintiff initially obtained judgment against the partnership alleging it was an LLP. The court held that the partner was not protected from individual liability because the partnership was not a properly registered limited liability partnership under the Texas Revised Partnership Act at the time it incurred the lease obligations. The Texas LLP provisions required that an LLP carry insurance or meet certain financial responsibility requirements. The court noted that, unlike the limited partnership statute, the LLP provisions contained no substantial compliance language. Therefore, the court concluded that strict compliance with the statute was required. Although the partner itself carried errors and omissions insurance, the court pointed out that the policy did not appear to cover the partnership or the other partner. Because the partnership did not have the required insurance or other forms of financial responsibility designated by the statute, it was not a properly registered LLP, and the partner was not protected from liability.

In *Fleming v. Kirklin Law Firm, P.C.*, 2015 WL 7258700 (Tex. App.–Houston [14th Dist.] 2015, no pet.), the plaintiffs prevailed on breach of contract claims against a law firm for breach of two referral agreements entered into in 2001. The plaintiffs sought to hold an individual partner liable for the breaches in addition to the firm on the basis that the firm had failed to comply with the statutory requirements for maintenance of LLP status. The parties disagreed as to whether the Texas Revised Partnership Act applied to the dispute. Assuming without deciding that the Texas Revised Partnership Act applied, the court of appeals held that the trial court did not err in refusing to hold the individual partner liable for the contractual obligations of the firm because the law firm was registered as an LLP and presented evidence, which the plaintiffs failed to refute, that the firm had complied with the financial responsibility requirements of the Texas Revised Partnership Act.

F. LLP Case Law

There is little case law addressing the issues discussed above. In *Apcar Investment Partners VI, Ltd. v. Gaus*, 161 S.W.3d 137 (Tex.App.–Eastland 2005, no pet.), the court acknowledged the liability protection afforded partners in an LLP, but the partners were held personally liable on a lease executed by the partnership in its LLP name because the lease was executed more than three years after the initial registration had expired. The court found the language of the LLP statute clearly required the partnership to be registered when the lease obligation was incurred for the partners to avoid liability on the lease. As discussed above, the annual renewal feature that was in effect when this case was decided has been replaced by an annual reporting requirement. The annual reporting provisions provide more opportunities to cure a failure to comply with the annual filing requirements.

In *Bennett v. Cochran*, 2004 WL 852298 (Tex.App.– Houston [14th Dist.] 2004, no pet.), a partner in a law firm LLP argued the other partner had orally agreed to pay half of all expenses of the partnership. The court noted that partners in an LLP have no personal liability for the debts and obligations of the partnership and concluded there was no evidence the partners agreed to be personally liable for the expenses and overhead of the partnership as opposed to merely having their partnership interests equally burdened by the financial obligations of the partnership.

In *Edward B. Elmer, M.D., P.A. v. Santa Fe Properties, Inc.*, 2006 WL 3612359 (Tex.App.–San Antonio 2006, no pet.), the court concluded that an LLP's failure to carry the required insurance rendered the liability shield ineffective. As noted above, the insurance requirement was eliminated from the Texas LLP statute effective September 1, 2011.

In *Software Publishers Association v. Scott & Scott, LLP*, 2007 WL 92391 (N.D. Tex. 2007), the court declined to dismiss claims against the managing partner of an LLP law firm that allegedly engaged in cybersquatting and copyright and trademark infringement and dilution because the complaint alleged that the managing partner "controlled" the activities of the law firm complained of in the complaint. This allegation was sufficient to survive a motion to dismiss because the allegation supported recovery under the theory that the managing partner was directly involved in the wrongful conduct or had knowledge of the wrongful conduct but failed to take reasonable steps to prevent it. As noted above, the Texas LLP provisions were amended in 2011 to eliminate the language providing for liability of a partner based on the partner's supervision of, direct involvement in, or notice or knowledge of another's errors, omissions, negligence, incompetence, or malfeasance.

In *Rhodes Colleges, Inc. v. Johnson*, 2012 WL 627273 (N.D. Tex. 2012), the plaintiff sought to hold Van Wey, a partner in an LLP law firm, liable for allegedly defamatory statements posted on the firm's website by another partner, Johnson. Van Wey maintained that she was not supervising or directing Johnson, nor was she in any way directly involved in Johnson's actions. Van Wey stated that she was unaware of the content Johnson added to the firm website, and Van Wey adduced evidence that she did not regularly monitor the site. The plaintiff failed to present evidence that would enable a reasonable trier of fact to find that any of the exceptions in section 152.801(b) of the BOC (as in effect before September 1, 2011) applied, and the court thus granted summary judgment in favor of Van Wey.

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In *Fleming v. Kirklin Law Firm, P.C.*, 2015 WL 7258700 (Tex. App.–Houston [14th Dist.] 2015, no pet.), the plaintiffs prevailed on breach of contract claims against a law firm for breach of two referral agreements entered into in 2001. The plaintiffs sought to hold an individual partner liable for the breaches in addition to the firm on the basis that the firm had failed to comply with the statutory requirements for maintenance of LLP status. The parties disagreed as to whether the Texas Revised Partnership Act applied to the dispute. Assuming without deciding that the Texas Revised Partnership Act applied, the court of appeals held that the trial court did not err in refusing to hold the individual partner liable for the contractual obligations of the firm because the law firm was registered as an LLP and presented evidence, which the plaintiffs failed to refute, that the firm had complied with the financial responsibility requirements of the Texas Revised Partnership Act.

In *Evanston Insurance Company v. Dillard Department Stores Inc.*, 602 F.3d 610 (5th Cir. 2010), the court concluded that the partners were personally liable for a judgment against the partnership even though the trademark infringement on which the judgment was based occurred when the partnership was an LLP. The LLP dissolved and allowed its registration to expire during the pendency of the law suit against the partnership, and the court concluded that the partners were not protected from liability on the judgment. In this case, Dillard Department Stores, Inc. ("Dillard's") sued a law firm, Chargois & Ernster, L.L.P., in 2003 for federal and state trademark infringement, cyberpiracy, and various business torts based on the law firm's use of the Dillard's name and logo on a website developed by the law firm to solicit clients with claims against Dillard's. The law firm was registered as a Texas LLP. Early in 2004, while the litigation with Dillard's was ongoing, the partners executed a separation agreement providing for dissolution of the partnership, and they did not renew the firm's LLP registration when it expired in July, 2004. In November, 2004, the court entered a final judgment against "Chargois & Ernster, L.L.P." Dillard's was unable to collect the judgment, and Dillard's filed a complaint against the two partners of the law firm in 2008. Each partner was served, and Dillard's sought summary judgment declaring that the partners were personally liable on the judgment against the law firm. The district court granted summary judgment, and the partners appealed. The partners argued that they were protected from liability under the provisions of the Texas Revised Partnership Act. The court rejected the partners' argument that they were protected from liability under the LLP provision of the Texas Revised Partnership Act that provided a partner is not liable for a debt or obligation of the partnership incurred while the partnership is an LLP. (This provision is now found in Section 152.801 of the Business Organizations Code.) The partners argued that the law firm's debt was incurred when the infringing website was created in 2003, at which time the firm was registered as an LLP. Noting that the terms "debt" and "incurred" were not defined in the statute, the court found, however, that a plain reading of the statute supported the argument of Dillard's that the debt was incurred when the judgment was entered in 2004, at which time the LLP registration had expired. The court stated that the underlying conduct gave rise to the possibility of a future debt, but that a debt was not incurred at that time because the conduct might have gone undetected, might have been adjudged innocent, or Dillard's might have opted not to sue. The parties did not rely on another provision of the LLP statute that stated a partner was not personally liable for "errors, omissions, negligence, incompetence, or malfeasance committed" by another while the partnership is a registered LLP, but the court considered it significant that liability of a partner was limited in that provision for malfeasance "committed" while the partnership is an LLP. The court stated that the legislature's use of different language created a regime in which partners could be held liable for debts and obligations incurred when the partnership is not a registered LLP but would not bear liability for one another's "independent malfeasance" committed while it is an LLP. Thus, the court concluded that the partners in this case were not protected from personal liability because the law firm was not registered as an LLP at the time its debt was incurred. The parties apparently did not raise, and the court did not address, commentary to the LLP provision of the Revised Uniform Partnership Act stating that "[p]artnership obligations under or relating to a tort are generally incurred when the tort conduct occurs" so as to prevent a culpable partnership from engaging in wrongful conduct and then filing an LLP registration to sever vicarious liability of the partners for future injury or harm caused by conduct prior to the filing. Uniform Partnership Act (1997) (U.L.A.) § 306, cmt.3. The court also did not discuss how its interpretation squared with the provisions addressing the liability of an incoming partner or a withdrawing partner. See Tex. Bus. Orgs. Code §§ 152.304(b), 152.505(a). As noted above, the legislature amended the LLP provisions in 2011 to make clear that an obligation is incurred while the partnership is an LLP if the obligation relates to an action or omission occurring while the partnership is an LLP or the obligation arises under a contract or commitment entered into while the partnership is an LLP. Tex. Bus. Orgs. Code § 152.801(c).

In *Henry v. Masson*, 333 S.W.3d 825 (Tex.App.–Houston [1st Dist.] 2010, no pet.), Henry and Masson, who were partners in an orthopedic surgery practice organized as an LLP in 2001, became embroiled in disputes leading to litigation during which they agreed in principle to wind up the partnership and sever all ties between them. Eventually, they executed a settlement agreement, but 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 liability protection provided partners in an LLP under the Texas Revised Partnership Act. 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.

A few cases addressing the liability protection of partners in LLPs in other states have appeared, but there is nothing approaching a well-developed body of case law in this area. In a questionable opinion, *Ederer v. Gursky*, 881 N.E.2d 204 (N.Y. 2007), New York's highest court concluded that the liability protection provided by LLP registration under New York's partnership statute applies only to the liability of partners to third parties and not to other partners. A withdrawn partner sued the partnership and its partners for breach of contract and an accounting of funds owed the withdrawn partner under a withdrawal agreement between the partner and the partnership. The partners claimed that they did not have personal liability because the partnership was an LLP, but the court concluded that the New York LLP liability shield only applies to debts and liabilities to third parties and does not protect partners from liability for obligations of the partnership to other partners nor eliminate the right to an accounting. The New York LLP provisions state that "[e]xcept as provided by subdivisions (c) and (d) of this section, no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner." Subdivision (c) excludes from the liability shield "any negligent or wrongful act or misconduct committed by [a partner] or by any person under his or her direct supervision and control while rendering professional services on behalf of" the LLP. Subdivision (d) allows partners to opt out of or limit the scope of the liability protection. The court reviewed the background and history of LLP legislation and rejected the defendants' argument that the statutory protection from liability for "any debts" applies to debts of the partnership to the partners as well as debts to third parties. The court concluded that the liability protection under the LLP provisions is restricted to liability to third parties because the phrase "any debts" is part of a provision that has always governed only a partner's liability to third parties and is part of Article 3 of the New York Uniform Partnership Act ("Relations of Partners to Persons Dealing with the Partnership") rather than Article 4 ("Relations of Partners to One Another"). The court also rejected the defendants' arguments reconciling the right to an accounting in a winding up with their interpretation of the LLP provisions. The dissenting opinion pointed out that a former partner is a third party where a partnership is concerned and argued that there is no good reason to treat him more favorably than any other third party. The dissenting opinion also points out how the majority's approach results in odd and perverse results where a withdrawn partner is able to hold remaining partners personally liable for his share when the business of a partnership goes badly after the partner withdraws and before the partner is paid his share. Among the amendments to the Business Organizations Code in the 2009 legislative session was an amendment to Section 152.801(a) making explicit the intended scope of that provision, which is to protect partners in an LLP from all liabilities and obligations of the partnership, including liabilities and obligations to the partners, unless the partners agree otherwise.

Additional LLP cases decided in jurisdictions other than Texas include: *Mortgage Grader, Inc. v. Ward &*

Olivo, L.L.P., 139 A.3d 30 (N.J. 2016) (concluding that disciplinary rule requiring LLP law firms in New Jersey to maintain malpractice insurance does not apply during winding up if no legal services are being provided; LLP is not required to maintain tail coverage during winding up; neither disciplinary rule nor LLP statute authorizes trial court to convert LLP to non-LLP as penalty for failure to maintain insurance); *Cooke-Zwiebach v. Oziel*, 962 N.Y.S.2d 64 (N.Y. App. Div. 2013) (holding record did not establish that partner of LLP had supervisory control over attorney who engaged in misconduct nor did record establish that partner had knowledge or reason to know of other attorney's malfeasance, as detailed in lower court's opinion at 2011 WL 6141670); *Largo Realty, Inc. v. Purcell*, 928 N.E.2d 999 (Mass. App. 2010) (describing protection of partners in LLP from personal liability for partnership's debts, obligations, and liabilities and concluding complaint failed to allege facts providing basis for relief against partner and employee individually); *Scarborough v. Napoli, Kaiser & Bern, LLP*, 880 N.Y.S.2d 800 (N.Y. App. Div. 4th Dept. 2009) (noting that each partner, employee, or agent of LLP may be individually liable for his or her negligent or wrongful act and holding defendant associates in LLP law firm failed to establish as matter of law that they committed no negligent or wrongful act for which they could be individually liable in legal malpractice action); *Santos v. 304 West 56th Street Realty LLC*, 862 N.Y.S.2d 435 (N.Y. Sup. 2008) (stating complaint must be dismissed as to general partner of defendant LLP in negligence action since partner of partnership which is LLP is not liable for liabilities of LLP); *Red River Wings, Inc. v. Hoot, Inc.*, 751 N.W.2d 206 (N.D. 2008) (relying upon veil-piercing provision of North Dakota LLP statute and stating evidence of participation of LLP partners in takeover of limited partnership in which LLP was limited partner supported trial court's implicit finding that it would be inequitable if LLP partners' acts were treated as those of LLP alone and trial court did not err in holding partners of LLP liable); *Kuslansky v. Kuslansky, Robbins, Stechel, and Cunningham, LLP*, 858 N.Y.S.2d 213 (N.Y.A.D. 2 Dept. 2008) (relying on *Ederer v. Gursky* (which held that LLP liability shield applies only to partner's liability to third parties) in rejecting argument of partners in LLP that they were shielded from liability for withdrawn partner's claim to recover value of withdrawn partner's interest under partnership agreement); *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal.App.4th 384 (Cal. App. 2007) (commenting that individual partners in LLP are not vicariously liable for partnership obligations that do not arise from their personal misconduct or guarantees); *Connolly v. Napoli, Kaiser & Bern, LLP*, 817 N.Y.S.2d 872 (N.Y. Sup. 2006) (noting potential liability of LLP partners for personal participation in alleged wrongdoing); *Groth v. Ace Cash Express, Inc.*, 623 S.E.2d 208 (Ga. App. 2005) (concluding signatures of LLP partners on behalf of partnership did not bind them individually as guarantors); *Colliers, Dow and Condon, Inc. v. Schwartz*, 871 A.2d 373 (Conn. App. 2005) (holding that LLP partner did not have personal liability on agreement executed by partner on behalf of LLP); *Dow v. Jones*, 311 F.Supp.2d 461 (D. Md. 2004) (rejecting argument that attempt to hold dissolved LLP with no assets liable was disguised attempt to pierce the LLP veil, and stating that action against the LLP served purpose because LLP was required to have insurance and action could establish claim for purposes of coverage under policy); *Griffin v. Fowler*, 579 S.E.2d 848 (Ga. App. 2003) (denying LLP partners' motion for summary judgment regarding liability for another partner's alleged malpractice and breach of fiduciary duty on the basis that there were legal services performed prior to the partnership's registration as an LLP); *Dow v. Donovan*, 150 F.Supp.2d 249 (D. Mass. 2001) (refraining from deciding the "unsettled" question of what proof would be necessary to hold individual partners liable for Title VII gender discrimination claims); *Lewis v. Rosenfeld*, 138 F.Supp.2d 466 (S.D. N.Y. 2001), dism'd on other grounds on reconsideration, 145 F.Supp.2d 341 (S.D. N.Y.2001) (acknowledging that partners in New York LLP could not be held vicariously liable for liabilities of the partnership when the plaintiff had not alleged that any of the tortious acts were committed by the defendants or any individual acting under their control); *Schuman v. Gallet, Dreyer & Berkey, L.L.P.*, 719 N.Y.S.2d 864 (N.Y. A.D. 1 Dept. 2001) (holding general release of LLP and partners was sufficient to release partner in his capacity as partner but did not release partner from negligence, breach of fiduciary duty, and legal malpractice alleged against partner individually because partner is liable for any negligent or wrongful act committed by partner or under partner's supervision or control under New York LLP provisions); *Kus v. Irving*, 736 A.2d 946 (Conn. Super. 1999) (concluding that two law firm partners who did not have any supervision or control over third partner/wrongdoer were protected from liability under Connecticut LLP statute, which protects partners from liability for partnership debts and obligations except for partner's own negligence, wrongful acts, or misconduct or that of any person under partner's direct supervision or control, even if there was evidence of violation of supervisory duty under Rule 5.1, because LLP statute supersedes the rule except where the other person is under the partner's "direct supervision and control"); *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486 (Colo. App. 1997) (holding that LLP partner was protected from liability for wrongful termination claim and noting that a party seeking to hold a partner in a Colorado LLP liable for alleged improper actions of the partnership must proceed as if attempting to "pierce the corporate veil"). *See also Fischer v. OBG Cameron Banfill LLP*, 2010 WL 3733882 (S.D.N.Y. 2010) (holding evidence did not support piercing LLP's veil to impose liability on its "sole equity partner," but equity partner's instructing writer of libelous letter to compose letter made him jointly liable on libel claim as knowing participant); *Edlinger v. U.S.*, 2010 WL 1485951 (N.D.N.Y. 2010) (holding physician partner in LLP did not engage in wrongful act or directly supervise other partner who engaged in wrongful act); *J & J Sports Prods., Inc. v. Sunsets on Sand, LLP*, 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); *Edlinger v. United States*, 2010 WL 1485951 (N.D.N.Y. 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*, 2010 WL 1102428 (Cal. App. 4 Dist. 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); *U.S. Claims, Inc. v. Saffren & Weinberg, LLP*, 2009 WL 2179738 (E.D. Pa. 2009) (discussing Pennsylvania LLP provisions and concluding that partner in LLP is liable for partnership's breach of contract executed by another partner and not resulting from any error, omission, negligence, incompetence, or malfeasance by that partner); *iCore Networks, Inc. v. McQuade Brennan LLP*, 2009 WL 36596 (E.D. Va. 2009) (holding plaintiff's complaint sufficiently alleged partner's individual duty to client of LLP accounting firm); *iCore Networks, Inc. v. McQuade Brennan LLP*, 2008 WL 4550988 (E.D. Va. 2008) (recognizing limited liability of LLP partner and holding conclusory allegation that partner "assumed responsibility" for LLP accounting firm's performance was insufficient to allege individual duty by partner to client); *City of Bridgeport v. C.J. Fucci, Inc.*, 2007 WL 1120537 (Conn. Super. 2007) (stating that partner in LLP may be held liable for his or her own negligence but other partners may not be held liable for that partner's negligence simply because they are both members of the partnership); *Campbell v. Lichtenfels*, 2007 WL 447919 (Conn. Super. 2007) (imposing personal liability on partner for malpractice claim against partnership in absence of proof that partnership filed certificate of limited liability partnership with Secretary of State); *Chamberlain v. Irving*, 2006 WL 3290446 (Conn. Super. 2006) (stating that partners in LLP have limited liability even if designator is not used and third party does not know partnership is LLP); *Cordier v. Tkach*, 2006 WL 2407051 (Cal. App. 2 Dist. 2006) (holding that partner in LLP could not be held liable on contract of firm entered while partnership was registered as LLP because partner was not party in his individual capacity and California LLP provisions insulated partner from liability under agreement); *Dean Foods Company v. Pappathanasi,* 2004 WL 3019442 (Mass. Super. 2004) (concluding LLP as entity was liable for negligence and negligent misrepresentation based on legal opinion issued by firm, but negligence was entity's collective negligence, and no act of any individual partner standing alone was basis to hold individual partner liable); *Mantell v. Samuelson*, 4 Misc.3d 134(A), 2004 WL 1587555 (N.Y. Sup. App. 2004) (dismissing complaint against partners of LLP law firm in suit by court reporter to recover fees because partners in LLP are not liable for partnership debts); *Colliers, Dow & Condon, Inc. v. Schwartz*, 2004 WL 1246004 (Conn. Super. 2004) (concluding plaintiff was not entitled to judgment against LLP partner because partners in LLP are clearly protected from personal liability); *Rashti v. Miod*, 2003 WL 22995264 (Cal.App. 2003) (stating that issue of whether individual partner of LLP can be held liable for discriminatory action in which partner personally participated would appear to be unsettled in view of statutory language indicating partners may be liable in some situations, and concluding that action seeking to hold partners liable for employment discrimination claim could not be deemed frivolous where action was based on decision in which partner reputedly participated); *Megadyne Info. Sys. v. Rosner, Owens & Nunziato*, 2002 WL 31112563 (Cal.App. 2002) (concluding there were fact questions about extent of law firm LLP partners' involvement in matters that were subject of breach of fiduciary duty claim precluding summary judgment in favor of partners); *Liberty Mutual Ins. Co. v. Gardere Wynne, L.L.P.*, 1994 WL 707133 (D. Mass. 1994) (noting, in support of its decision to transfer venue to Texas, that there would be difficult issues under the Texas LLP statute governing the litigation of the merits of the case).

In some cases, courts have erroneously applied the rules regarding the limited liability of a limited partner in a limited partnership when analyzing the liability protection of a general partner in an LLP. *See United States v. 175 Inwood Assocs. LLP,* 330 F.Supp.2d 213 (E.D. N.Y. 2004) (holding that LLP provisions do not protect general partners from personal liability if partnership assets are insufficient to satisfy judgment, relying on non-LLP case law and mistakenly characterizing such case law as involving LLPs); *Schaufler v. Mengel, Metzger, Barr & Co., L.L.P.*, 745 N.Y.S.2d 291 (N.Y. Sup. 2002) (stating that defendants had submitted insufficient evidence to establish that managing partner of accounting firm had no liability as a matter of law on buy-out agreement negotiated with plaintiff partner because the limited partnership act imposes joint and several personal liability on a general partner and on a limited partner who participates in the control of the business); *Damaska v. Kandemir*, 760 N.Y.S.2d 842, withdrawn 2004 WL 852298 (N.Y. A.D. 1 Dept. 2003) (stating that "[a] partner in a limited liability partnership may be held liable for tortious conduct committed by another partner or individual working for the entity if the partner participates in the control of the business [citing *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, and thereby perpetuating the confusion between a limited partnership and an LLP] or if the person for whose conduct the partner is called upon to answer was, at the time of the misconduct, rendering professional services on behalf of the partnership under the partner's direct supervision and control").

G. Limited Partnership LLP

A limited partnership may become an LLP by complying with the applicable provisions of Chapter 152, as modified by Chapter 153 of the BOC. *See* Tex. Bus. Orgs. Code §§ 152.805, 153.351-153.353. Specifically, a limited partnership may register as an LLP by following the procedures specified in Chapter 152 of the BOC and in the partnership's agreement or, if the partnership agreement does not contain provisions in this respect, with the consent of the partners required to amend the agreement. Tex. Bus. Orgs. Code § 153.351. The BOC requires the name of a limited partnership registered as an LLP to contain the phrase "limited liability partnership" or an abbreviation of that phrase in addition to the required limited partnership designator. Tex. Bus. Orgs. Code § 5.055(b). The phrase "limited liability limited partnership," or an abbreviation of that phrase, satisfies the requirements for both the limited partnership and limited liability partnership designators. Tex. Bus. Orgs. Code § 5.055(c). When applying the registration requirements found in Chapter 152, an application by a limited partnership to become an LLP must be executed by at least one general partner, and all other references to partners mean general partners only. Tex. Bus. Orgs. Code § 153.352. The filing fee is $200 per general partner. Tex. Bus. Orgs. Code §§ 4.155(12), 4.158(1). If a limited partnership is an LLP, the liability limitations of the LLP provisions apply to its general partners and to any limited partners who, under other provisions of the limited partnership statutes, are liable for the debts and obligations of the limited partnership. Tex. Bus. Orgs. Code § 153.353. Thus, if a limited partner would otherwise be liable for participating in the control of the partnership, the limited partner should be protected in an LLP limited partnership even though the creditor reasonably believed the limited partner was a general partner.

Currently, a number of states do not expressly provide for limited partnership LLPs, and there is considerable variation among the statutes that do. Thus, the LLP shield of a limited partnership that has registered in Texas may not be recognized in all states. The new Uniform Limited Partnership Act (2001) ("ULPA 2001"), which is a complete revision of the prior Revised Uniform Limited Partnership Act (1976 with 1985 amendments), provides that a limited partnership may elect LLP status. As of the beginning of 2017, ULPA 2001 had been adopted in twenty states and the District of Columbia.

H. Piercing the LLP Veil

Texas courts have not directly addressed the application of veil-piercing principles to limited liability partnerships. In *Genssler v. Harris County*, __ S.W.3d. __, 2010 WL 3928550 (Tex.App.–Houston [1st Dist.] 2010, no pet.), the court analyzed the claim that an individual was liable for environmental violations committed by a group of entities that owned and operated two waste water facilities. Harris County and the State of Texas had obtained a receivership over the individual's property on the theory that the individual was the alter ego of the entities. The designators in the names of the entities indicate that the group of entities consisted of a limited partnership, two limited liability partnerships, and a limited liability company, but the court did not specify or discuss the nature of the entities. The court spoke in general terms about the separate legal existence of a "business entity" and the application of the alter ego theory when "there is such unity between the business entity and the individual that the business entity has ceased to be a separate entity, and allowing the individual to avoid liability through the use of the business entity would work an injustice." The court analyzed the evidence and concluded the entities were not the individual's alter ego because there was no evidence he diverted profits for his individual use, owned any interest in the entities, or personally paid any debts owed by the entities. There was testimony that the individual was the president, the "man in charge," and "made all the decisions," but the court stated that the individual's status as an officer or director, standing alone, was insufficient to support application of the alter ego theory.

I. Liability of Partners of LLP for Wrongful Distributions

The LLP statutes of some states impose limitations on distributions to partners by an LLP and provide for liability to return improper distributions. The Texas LLP provisions do not contain any such provisions; however, creditors may look to the Texas Uniform Fraudulent Transfer Act as a means to recover distributions to partners by an insolvent LLP. *See* Tex. Bus. & Com. Code §§ 24.001 et seq. In addition, if an LLP is a debtor in bankruptcy, distributions to partners may be recoverable under the fraudulent transfer provisions of the Bankruptcy Code.

In 2013, the TUFTA was amended to address a glitch that arose in the definition of "insolvency" with the advent of limited liability partnerships. Before September 1, 2013, the TUFTA provided that a partnership is insolvent "if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts." Tex. Bus. & Com. Code. § 24.003(c) (repealed Sept. 1, 2013). Thus, the statute essentially included each general partner's net worth in determining the partnership's solvency. The term "general partner" is not defined in the TUFTA, but partners in a general partnership registered as an LLP are still technically general partners under the BOC, albeit with liability protection, just as general partners in a limited partnership registered as an LLP are general partners with liability protection. Tex. Bus. Orgs. Code Ann. § 1.002(33). With respect to a transfer by an LLP prior to September 1, 2013, a court would likely interpret the term "general partner" as used in the TUFTA definition of insolvency to mean a partner with personal liability for the obligations of the partnership, as that is the obvious assumption underlying the use of the term "general partner" in that context. That approach, however, creates inconsistencies in the use of the term in other provisions of TUFTA, such as the definition of "insider," in which "general partner" would include a general partner with liability protection in an LLP. *See* Tex. Bus. & Com. Code § 24.002(7). Repeal of the special definition of insolvency for a partnership in the TUFTA means that partnerships will be subject to the same insolvency analysis as other entities and is thus consistent with the current entity theory of partnerships. The amendment to the TUFTA also leads to treatment of an LLP under the TUFTA that is consistent with the treatment of an LLP under the fraudulent transfer provisions of the Bankruptcy Code inasmuch as the assets of a partner of an LLP apparently would not be taken into account in determining insolvency of an LLP under the Bankruptcy Code. Although the Bankruptcy Code contains a definition of insolvency for a partnership that is similar to the repealed definition of the TUFTA, an LLP is apparently a "corporation" rather than a "partnership" under the Bankruptcy Code. *See* 11 U.S.C. § 101(9)(A)(ii) and *In re Rambo Imaging, L.L.P.*, 2008 WL 2778846 (Bankr. W.D. Tex. 2008).

J. Liability of "Directors and Officers" for Debts Incurred After Tax Forfeiture of Limited Liability Partnership

As discussed in II.D. above, forfeiture of a corporation's privileges due to failure to pay franchise taxes or file required reports results in personal liability of directors and officers for certain corporate debts. *See* Tex. Tax Code § 171.255. Issues arising in interpreting and applying these provisions are further discussed in II.D. above. Although these provisions are expressed in corporate terms, they also apply to other taxable entities, such as LLCs, limited partnerships, and limited liability partnerships. Tex. Tax Code § 171.2515(b). The statute does not state who is a "director" or "officer" of a partnership for purposes of Section 171.255.

K. Liability for Committing or Knowingly Participating in Tortious or Fraudulent Acts

As noted in Section II.E, it is well-established that corporate officers may be held personally liable when they commit or knowingly participate in tortious or fraudulent acts even though the conduct occurred while the officer was acting on behalf of the corporation. *See,* *e.g., Gore v. Scotland Golf, Inc*., 136 S.W.3d 26, 32 (Tex.App.–San Antonio 2003, pet. denied); *Kingston v. Helm*, 825 S.W.3d 755, 764-67 (Tex.App.–Corpus Christi 2002, pet. denied). Similarly, as discussed in Section III.E., Texas courts have held that LLC members and managers are liable for their own fraudulent or tortious acts even if the acts are committed in the service of the LLC. *See Nwokedi v. Unlimited Restoration Specialists*, 428 S.W.3d 191 (Tex.App.–Houston [1st Dist.] 2014, pet. denied) (holding controlling member of LLC was personally liable for knowingly participating in LLC's fraud in relation to LLC's contract and fraudulent transfers of LLC assets based on the principle that a corporate officer who knowingly participates in tortious or fraudulent acts may be held individually liable to third persons even though the officer was acting as an agent of the corporation). These principles would apply as well to partners in the LLP context. *See* Tex. Bus. Orgs. Code § 152.801(d)(2).

L. Liability on Limited Partnership's Contract as Agent of Partially Disclosed Principal or as Guarantor

As noted above in Sections II.F. and III.F., an agent is not liable on a contract entered into on the principal's behalf if the agent discloses the agent's representative capacity and the identity of the principal. Conversely, if the representative capacity of the agent and the identity of the agent's principal are not disclosed to the other party to the contract at the time the contract is entered into, the agent is personally liable on the contract. Restatement (Third) of Agency §§ 6.01, 6.02 (2006); Restatement (Second) of Agency §§ 320, 322 (1957). The principles discussed in those sections would apply to partners of an LLP as well. *See* Tex. Bus. Orgs. Code § 152.801(d)(2).

Even if an agent discloses the identity of the principal and signs a contract indicating the agent's representative capacity, the language of the contract may subject the agent to liability as a guarantor or party to the contract. *See 84 Lumber Co., L.P. v. Powers*, 393 S.W.3d 299 (Tex.App.–Houston [1st Dist.] 2012, pet. denied) (holding individual who signed credit application as president of corporation liable as personal guarantor of the corporation's debt based on language above the signature line stating that the signatory personally guaranteed the credit account of the corporation); *Wholesale Builders Supply, Inc. v. Green-Source Dev., L.L.C.*, 2013 WL 6175210 (Ohio App. Nov. 21, 2013) (holding individual who signed LLC credit application personally liable based on language in the credit application stating that the signatory was "both personally and corporately liable for the total of purchases by you or anyone designated to sign for your purchases on your account"). Entity representatives should be vigilant when signing credit applications and other contracts on behalf of the entity in order to avoid subjecting themselves to personal liability under provisions that may be interpreted to obligate signatories in their individual capacities.