

# Piercing the LLC Veil

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## Veil Piercing in Business Corporations

In Louisiana, a corporation is a juridical person, created by law, with a personality distinct from that of its members.<sup>1</sup> Historically, the major attraction in utilizing a corporation has been, and still is, the limited liability granted to officers, directors and shareholders thereof.<sup>2</sup>

In addition to the limited liability, incorporation provides the enterprise with the advantages of (i) perpetual or indefinite duration, (ii) centralized management, (iii) ease of ownership and transferability thereof, (iv) ease of contracting, (v) access to needed capital through the sale of stock, and (vi) in general, a broad flexibility in conducting business.<sup>3</sup> Thus, since a corporation is a legal entity distinct from its managers and shareholders, it remains unaffected by changes in management or ownership.<sup>4</sup>

Since the prime attraction for incorporations is limited liability, the situations where such limited liability can be lost should be recognized. It is important that incorporated businesses be made aware of the risk of losing this limited liability if they do not maintain and operate their business as a juridical person separate from themselves, individually, and with due respect to the separate proprietary interest of the creditors of the corporation in its assets. The rights of creditors are entitled to priority over the rights of the shareholders in those assets.<sup>5</sup>

Generally, while a shareholder of a corporation is not personally liable either for contractual obligations of the corporation or for wrongful acts or omissions by the corporation or by persons acting on behalf of the corporation, there are numerous occasions when, not only shareholders, but also incorporators, officers, and directors of a corporation may become personally liable for debts, obligations, and wrongful acts or omissions by the corporation or by persons acting on its behalf.<sup>6</sup>

The courts have established certain theories or doctrines under which the corporate veil may be pierced by creditors of the corporation to pursue shareholders personally. Most prominent among these are the alter ego theory and the single business enterprise theory. The Louisiana Supreme Court has identified five non-exclusive factors to be used in determining whether to apply the alter ego doctrine in the corporate veil piercing context (sometimes referred to in the jurisprudence as the “Riggins Factors”):

- 1) commingling of corporate and shareholder funds;

- 2) failure to follow statutory formalities for incorporating and transacting corporate affairs;
- 3) undercapitalization;
- 4) failure to provide separate bank accounts and bookkeeping records; and
- 5) failure to hold regular shareholder and director meetings.<sup>7</sup>

Other cases have looked to an expanded list of facts and circumstances and used characterizations of those facts and circumstances to justify their holdings. Specifically, courts have held that if the corporate entity is invoked to frustrate the ends of justice, it will be disregarded, leaving the shareholders personally chargeable with the acts and obligations of the purported corporation.<sup>8</sup> Although the corporate entity has also been disregarded in the name of “promising justice” or “avoiding inequities,” the concept of separation of the corporate entity from its shareholders is the general rule, which is firmly established, and this principle is disregarded only in exceptional circumstances.<sup>9</sup>

Thus, the corporate entity has been subject to attack where there has been commingling of corporate and shareholder funds, failure to follow statutory formalities for incorporation, undercapitalization, failure to observe statutory formalities for organization and transaction of company affairs, failure to provide separate bank accounts and bookkeeping records, failure to hold regular shareholder or directors’ meetings, shareholder fraud, or failure to conduct business on a corporate footing and, thereby, disregarding the corporate entity to such an extent that the corporation ceases to be distinguishable from its shareholders. If the court pierces the corporate veil, the shareholders will be held personally liable for the obligations of the purported corporation.<sup>10</sup>

Louisiana courts have also held that a distinct corporate entity may be disregarded when a corporation is so organized and controlled as to make it merely an instrumentality of another corporation.<sup>11</sup> This theory, known as the Single Business Entity theory, has not yet been adopted by the Louisiana Supreme Court; however, it has been recognized and applied by all five Louisiana appellate courts, all three Louisiana federal district courts, and the Fifth Circuit Court of Appeals as a viable legal theory under Louisiana law. Among the factors that have been considered by the courts in the application of the single business enterprise theory are: (a) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control; (b) common directors and officers; (c) unified administrative control of corporations whose business functions are similar or supplementary; (d) directors and officers of one corporation acting independently in the interest of that corporation; (e) one corporation financing another corporation; (f) inadequate capitalization; (g) one corporation causing the incorporation of another affiliated corporation; (h) one corporation paying the salaries and other expenses or losses of another corporation; (i) one corporation receiving no business other than that given it by its affiliated corporations; (j) one corporation using the property of another corporation as its own; (k) noncompliance with corporate formalities; (l) common employees; (m) services rendered by the employees of one corporation on behalf of another corporation; (n) common offices; (o) centralized accounting; (p) undocumented transfers of funds between corporations; (q) unclear allocation of profits and losses between corporations; and (r) excessive fragmentation of a single business enterprise into separate corporations.<sup>12</sup>

Finally, the corporate form will not shield a person who has intentionally inflicted harm<sup>13</sup> nor will it shield a professional from negligence or malpractice by statute.<sup>14</sup>

There are well over 100 reported decisions dealing with corporate veil piercing in Louisiana.<sup>15</sup>

The difficulty in this area is the lack of certainty in the outcome in a corporate veil piercing case. While Professors Morris and Holmes, in their Treatise on Business Organizations, put forth a brilliant and scholarly effort to arrive at a method for predicting outcomes in corporate veil piercing cases, they acknowledge the lack of consistency in the methodologies employed by the courts and the fact that the state of the jurisprudence allows the courts to simply decide what they believe is fair and equitable and pull from the jurisprudence what they need to justify their holdings:

The bottom line on the black letter law is that the courts have not identified any particular factors that would justify or preclude veil-piercing in and of themselves, and they have said explicitly that a number of common practices – e.g., sole shareholding and low capitalization, are acceptable. However, it remains true that most of the factors that a court will consider “under the totality of circumstances” in a veil piercing case are things that are common in most small business corporations: low capitalization and informality of management. Thus, depending on whether a court wishes to pierce the veil, it can emphasize either the claimant-oriented side of the rules (for example, that undercapitalization is a factor that supports veil-piercing) or defense-oriented side (that minimal capitalization is acceptable, and that shareholders are entitled to form a corporation for the very purpose of avoiding liability). Using this technique, courts are able to make whatever decision they consider, without explaining what they are doing and why. The only thing they must show is that they have considered an unweighted list of “factors” under the “totality of circumstances” in what is “primarily” a factual inquiry. [ftnote omitted]. Practically any result can be reconciled with that sort of law.<sup>16</sup>

## Footnotes

<sup>1</sup> La. C.C. Art. 24.

<sup>2</sup> 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1.

<sup>3</sup> 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1.

<sup>4</sup> 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1.

<sup>5</sup> La. R.S. 12:62, 63, 92, & 96. La. C.C. Art. 2056. 11 U.S.C. 548.

<sup>6</sup> 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1.

<sup>7</sup> *Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164, 1168 (La.1991) (citing *Kingsman Enterprises v. Bakerfield Elec. Co.*, 339 So.2d 1280 (La.App. 1st Cir.1976); *Smith–Hearron v. Frazier, Inc.*, 352 So.2d 263 (La. App. 2d Cir.1977), writ denied, 353 So.2d 1337 (La.1978)).

- 8 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1.
- 9 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 1:1. *Kingsman Enterprises v. Bakerfield Electric Company*, 339 So.2d 1280 (La. app. 1st Cir. 1976); *Liberto v. Villard*, 386 So. 2d 930 (La. Ct. App. 3d Cir. 1980); *Andrew Martin Marine Corp. v. Stork-Werkspoor Diesel B.V.*, 480 F. Supp. 1270 (E.D. La. 1979); *Withers v. Timber Products, Inc.*, 574 So. 2d 1291 (La. Ct. App. 3d Cir. 1991); *K.B.R., Inc. v. L.A. Smoothie Corp.*, 1995 WL 632016 (E.D. La. 1995); *Pel-Star Energy, Inc. v. U.S. Dept. of Energy*, 890 F. Supp. 532, 544 n. 14 (W.D. La. 1995), *dismissed by C & F Packing Co., Inc. v. H & M Food Systems Co., Inc.*, 70 F.3d 1289 (Fed. Cir. 1995). *See, Riggins v. Dixie Shoring Co., Inc.*, 590 So. 2d 1164 (La. 1991), distinguished by, *Cashman Scrap & Salvage LLC v. Bois d'Arc Energy, Inc.*, 413 Fed. Appx. 758 (5th Cir. 2011); *Huard v. Shreveport Pirates, Inc.*, 147 F.3d 406 (5th Cir. 1998); *Morales v. Bayou Concessions Salvage, Inc.*, 2004 WL 2381525 (E.D. La. 2004). *But see, Lopez v. TDI Services, Inc.*, 631 So. 2d 679 (La. Ct. App. 3d Cir. 1994).
- 10 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 2:2. *See also, G.G. Morris, Piercing the Corporate Veil in Louisiana*, 52 La L. Rev. 271 (1991).
- 11 *Green v. Champion Ins. Co.*, 577 So.2d 249, 257-58, (La. App. 1st Cir. 1991)*Southern Capitol Enterprises, Inc. v. Conseco Services, L.L.C.*, 476 F. Supp. 2d 589 (M.D. La. 2007).
- 12 *Id.*
- 13 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 2:7.
- 14 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, § 2:7. *See also, W.J. Spano Company, Inc. v. Mitchell*, 05-2115, 943 So.2d 1131 (La. App. 1st Cir. 9/15/06).  
See Morris & Holmes on Business Organizations, Louisiana Civil Law Treatise, West Group, 1999, Vol. 8, §32.07 @ p. 75.
- 15 See Morris & Holmes on Business Organizations, Louisiana Civil Law Treatise, West Group, 1999, Vol. 8, §32.02 @ p. 61.
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## Veil Piercing in Limited Liability Companies<sup>1</sup>

Since 1992, the limited liability company has been available as a form of business under Louisiana law. The Limited Liability Company or “LLC” is an unincorporated association having one or more members that is organized and existing under the LLC statute.<sup>2</sup> It is a juridical entity, distinct from its members, and unless otherwise stated in its articles of organization, its existence is perpetual.<sup>3</sup> Furthermore, an LLC may be organized to conduct business for any lawful purpose, unless a more limited purpose is stated in its articles of organization.<sup>4</sup>

One or more persons capable of contracting may form a limited liability company by filing the articles of organization, or a multiple original thereof, and the initial report with the Secretary of State.<sup>5</sup> A “person” means a natural person, corporation, partnership, limited partnership, domestic or foreign limited liability company, joint venture, trust, estate, or association.<sup>6</sup>

There are several characteristics of an LLC in regard to the liability of its members, taxation, management structure, and allocation of profits and losses that make an LLC an attractive form of business entity. An LLC with more than one member may elect to be taxed as either a partnership, a C Corporation or an S Corporation. An LLC with only a single member may elect to be taxed as either a sole proprietorship (commonly referred to as a “disregarded entity”), a C Corporation or an S Corporation.<sup>7</sup> If taxed as a sole proprietorship, a partnership or an S Corporation, it will enjoy the flow-through characteristics of those tax regimes, thus allowing the members of the LLC to avoid the double taxation generally imposed on C corporations. LLCs also provide their members flexibility in the design of their management structure. The members of an LLC can choose to have a centralized (manager managed) or a decentralized (member managed) form of management, unlike a corporation which must have centralized management, along with many other corporate formalities.<sup>8</sup> Additionally, unlike a limited partnership which must have at least one general partner with unlimited liability, an LLC, much like a corporation, offers limited liability to all of its members.<sup>9</sup> Unless the members provide otherwise

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<sup>1</sup> See generally, 2 Holliday, Norman & Baringer, Louisiana Corporations West Group Practice Series, §§ 21:1 to 21:238.

<sup>2</sup> La. R.S. 12:1301.

<sup>3</sup> La. C.C. Art. 24; La. R.S. 12:1303(B).

<sup>4</sup> La. R.S. 12:1302.

<sup>5</sup> La. R.S. 12:1304.

<sup>6</sup> La. R.S. 12:1301(A)(18).

<sup>7</sup> 26 CFR 301.7701-2(b)(1); Rev. Proc. 2002-69 (IRB 2002-4, Nov. 4, 2002). The LLC composed of husband and wife in a community property state as members can also elect to be taxed as a partnership if the spouses so choose.

<sup>8</sup> La. R.S. 12:1311 & 12:1312.

<sup>9</sup> La. R.S. 12:1320.

in a written operating agreement, profit, losses, distributions and voting rights in the LLC are allocated among the members by heads. *i.e.* two members: one-half to each; three members: one-third to each.

Much like the Louisiana Business Corporation Laws (the “LBCL”), the Louisiana limited liability company statutes (the “LLC Laws”) do not expressly address the concepts of piercing the limited liability veil (in this context, the “LLC veil”) that have developed in the jurisprudence over the years.<sup>10</sup> However, unlike the LBCL, the LLC Laws contain an affirmative declaration relative to the source of liability of members, managers, employees and agents of an LLC, and they carve out specific situations which are excepted from the immunity from liability granted to such persons. These exceptions may give rise to personal liability for the debts and obligations of the LLC.

With increasing frequency since the adoption of the LLC Laws in 1992, the courts in Louisiana have had to deal with the question of whether the corporate veil piercing cases and theories should apply with equal force in the LLC context. Many of the early cases dealing with this issue have done little more than pay lip service to the distinctions between the LLC Laws and the LBCL in determining whether corporate veil piercing theories should apply to LLCs.<sup>11</sup>

In May of 1998, we had the first reported decision to address the issue of “piercing the veil” of limited liability under the Louisiana LLC Law. *Hollowell, et al v. Orleans Regional Hospital, et al*, 1998 WL 283298 (E.D.La.), 14 IER Cases 225 (May 29, 1998), involved a case brought under the WARN Act (29 U.S.C. §§2101-2109) in connection with employment terminations that occurred in advance of the ultimate closing of Orleans Regional Hospital (“ORH”), a psychiatric and substance abuse treatment facility in New Orleans.

ORH was a Louisiana limited liability company, as were co-defendants, Brentwood Behavioral Healthcare, L.L.C. (“Brentwood”) and Magnolia Health Systems (“MHS”). The opinion was rendered by District Judge Mary Anne Vial Lemmon in connection with the court’s ruling on cross motions for summary judgment. The plaintiffs’ claims included claims against individual members of the LLCs which were premised upon several different arguments, including: (i) that individuals could be liable under the WARN Act; (ii) that the limited liability veil of the LLCs could be pierced and the individual members held liable, personally, under the “alter ego” theory of liability borrowed from the corporate law cases; and (iii) that the co-defendants, but not the individual defendants, could be held directly liable under the WARN Act if they, along with ORH, were a “single business enterprise” within the meaning of the WARN Act.

After concluding that individuals could not be liable under the WARN Act, the court went on to address the applicability of the “alter ego” theory to LLCs and the “single business enterprise” theory under the WARN Act to the individuals and the codefendants. The court first noted that “[n]o case has

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<sup>10</sup> La. R.S. 13:301 *et seq.*

<sup>11</sup> *Hollowell v. Orleans Reg’l Hosp.*, CIV.A. 95-4029, 1998 WL 283298 (E.D. La. May 29, 1998) *aff’d sub nom. Hollowell v. Orleans Reg’l Hosp. LLC*, 217 F.3d 379 (5th Cir. 2000); *Anderson v. Petro-Hunt Corporation, et al*, 1998 WL 23773 (E.D. La. 1998); *Imperial Trading Co., Inc. V. Uter, et al*, 2001-0506 ( La. App. 1 Cir. 12/20/02), 837 So.2d 663; *Hamilton v. AAI Ventures, L.L.C.*, 99-1849 ( La. App. 1st Cir. 9/22/00), 768 So.2d 298; *Curole v. Ochsner Clinic, LLC*, 811 So.2d 92 ( La. App. 2002); *Lee v. Clinical Research Center of Florida, L.C.*, 889 So.2d 317, ( La. App. 2004); *Martin, et al. v. Spring Break '83 Production, LLC, et al*, No. 09-7520 (E.D. La., 6/24/11), 797 F.Supp.2d 719.

yet explicitly held that the ‘veil’ of protection from liability afforded by the limited liability company form of business in Louisiana may be ‘pierced’ in the same manner as the ‘veil’ of protection afforded Louisiana corporations.” The court suggested that several commentators around the country “agree that the limited liability company ‘veil’ may be ‘pierced’ in the same manner as the corporate ‘veil’.” The court cited Professor Susan Kalinka of the LSU Law School for her comments that: (i) “[t]he same policy considerations in piercing the veil of a corporation apply to an LLC;” **Susan Kalinka, Louisiana Limited Liability Companies & Partnerships: A Guide To Business and Tax Planning**, §1.32, at 64 (1997), in 9 **Louisiana Civil Law Treatise** (1997); (ii) the analyses between corporate veil piercing and limited liability veil piercing may not completely overlap, noting that “[b]ecause the Louisiana LLC law requires fewer formalities such as annual elections of directors, keeping minutes, or holding meetings, failure to follow these formalities should not serve as grounds for piercing the veil of an LLC.” *Id.*; and (iii) that “a court may use a veil-piercing theory to hold members of an LLC liable for the LLC’s obligations, especially if the LLC is thinly capitalized or underinsured.” Susan Kalinka, *The Louisiana Limited Liability Company After "Check-The-Box"*, 57 LA. L.REV. 715, 794 (1997).

The court also cited J. William Callison & Maureen A. Sullivan, Limited Liability Companies: A State-By-State Guide To Law & Practice at §15.28 (1996 & Supp. 1997), for their statements that: “[t]o the extent that the corporate concept of ‘piercing the corporate veil’ applies to Louisiana LLCs, members can be liable to creditors who are able to pierce the corporate-type protection afforded by the LLC. Courts might pierce the LLC form and hold members personally liable if respect for the LLC form would work injustice.”

Judge Lemmon disposed of the issue by saying that:

[w]ith this caveat in mind, this court holds that under Louisiana law the “veil” of protection afforded ORH by its Limited Liability Company form may be “pierced” if in fact ORH was operating as the “alter ego” of ORH’s members or if ORH’s members were committing fraud or deceit on third parties through ORH. Moreover, the veil provided by the corporate status of ORH’s members may also be pierced in like fashion. These questions necessarily involve a fact-intensive review of the relationships among all of the members of ORH in order to make a determination of whether ORH was the “alter ego” of its members or, alternatively, whether ORH’s members were using ORH to commit fraud. Accordingly, the court declines to grant summary judgment to any of the defendants, or in favor of the plaintiffs, on the plaintiffs “veil piercing” claims.

Thus, while the court at least acknowledged that there are distinctions between the LBCL and the LLC Law which may need to be considered in applying the corporate type veil piercing theories to LLCs, because it was able to avoid having to apply the law to the facts in the summary judgment context, definitive guidance as to the significance of those distinctions was not readily apparent from the opinion.

Finding that because, under the WARN Act, application of the “single business enterprise” theory of liability calls for courts look to state corporate law, among other things, Judge Lemmon found that “the determination whether several entities are to be treated as a “single business enterprise” for purposes of WARN Act liability overlaps, in no small degree, the factors to be considered in

determining whether ORH's 'veil' may be 'pierced'. Consequently, summary judgment was, likewise, inappropriate on the plaintiff's "veil piercing" claims premised on the "single business enterprise" theory.

In its conclusion, the court indicated that

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[a]ccordingly, the following issues remain for trial:

- (1) Plaintiff's damages;
- (2) Whether any or all of the non-ORH defendants, excluding the individual defendants, and ORH operated a "single business enterprise" in light of the following factors:
  - (a) common ownership;
  - (b) common directors and/or officers;
  - (c) de facto exercise of control;
  - (d) unity of personnel policies emanating from a common source; and
  - (e) the dependency of operations.
- (3) Whether ORH was the "alter ego" of any or all of the non-ORH defendants, including the individual defendants, and whether the members of ORH were the "alter egos" of their shareholders, in light of the following factors:
  - (a) commingling of funds;
  - (b) failure to follow statutory formalities for formation and transaction of affairs;
  - (c) under capitalization;
  - (d) failure to provide separate bank accounts and bookkeeping records; and
  - (e) failure to hold regular required meetings.
- (4) Whether ORH's members acted through ORH to commit fraud or deceit, and whether shareholders of ORH's members acted in similar fashion.

Other than the general reference to Kalinka's comment about the lack of complete overlap between corporate and LLC veil piercing, the court did not undertake an in depth analysis of the distinctions between the LLC statute and the LBCL in this content. As noted above, at least two of those distinctions which are significant include:

- (a) That La. R.S. 12:§1319C provides that "[f]ailure of the limited liability company to keep or maintain any of the records or information required pursuant to this Section shall not be grounds for imposing liability on any person for the debts and obligations of the limited liability company;" and



(b) That §1320A provides that “the liability of members, managers, employees, or agents, as such, of a limited liability company ... shall at all times be determined solely and exclusively by the provisions of this Chapter.”

In *Anderson v. Petro-Hunt Corporation, et al*, 1998 WL 23773 (E.D.La. 1998), Judge McNamara of the Eastern District allowed discovery to proceed on the issue of whether an LLC and a corporation were members of a single business enterprise, considering factors, such as:

- (a) corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control;
- (b) common directors and officers;
- (c) unified administrative control of corporations whose business functions are similar or supplementary;
- (d) directors and officers of one corporation act independently in the interest of that corporation;
- (e) corporation financing another corporation;
- (f) inadequate capitalization;
- (g) corporation causing the incorporation of another affiliated corporation;
- (h) corporation paying the salaries and other expenses or losses of another corporation;
- (i) receiving no business other than that given it by its affiliated corporations;
- (j) corporation using the property of another corporation of (sic) [as] its own;
- (k) noncompliance with corporate familiarities (sic) [formalities];
- (l) common employees;
- (m) services rendered by the employees of one corporation on behalf of another corporation;
- (n) common offices;
- (o) centralized accounting;
- (p) undocumented transfers of funds between corporations;
- (q) unclear allocation of profits and losses between corporations;
- (r) excessive fragmentation of a single business enterprise into separate corporations.

Citing *Green v. Champion Ins. Co.*, 577 So.2d 249, 257-58, (La. App. 1st Cir. 1991); see also, factors set forth under Colorado jurisprudence in *Newport Steel Corp. v. Thompson*, 757 F.Supp. 1152 (D. Colo. 1990).

An opinion by Judge Parro of the 1<sup>st</sup> Circuit, in *Imperial Trading Co., Inc. V. Uter, et al*, 2001-0506 (La.App. 1 Cir. 12/20/02), 837 So.2d 663, hinted at a certain degree of recognition of the need for attention to detail in the LLC statute. This case involved a suit on open account by a supplier against several LLC’s and some of their members. The plaintiff obtained a judgment in the trial court against three of the LLC members, individually; a Ms. Menzie, who received a distribution of some \$263,852.48 from the LLC’s in the context of her withdrawal from the LLC’s at a time when it was clear they were on the verge of insolvency, Mr. Jack Menzie, a manager who, although separate in

property with his wife, was held solidarily liable for authorizing the distribution to Ms. Menzie, and a Mr. Uter, who took distributions in the form of ten different checks which he alleged to be reimbursements for legitimate business expenses of the LLC's. The trial court found two LLC's liable to the plaintiff on the open account. It found that the withdrawals by Ms. Menzie occurred at the time of her withdrawal from the companies and rendered the entities unable to pay their indebtedness to the plaintiff. The trial court had thus found a violation of R.S. 12:1327(A), and that accordingly, the LLC's were entitled to a return of the money. The trial court held Mr. Menzie solidarily liable with Ms. Menzie. The trial court also found Uter liable for the withdrawal of funds which it deemed to be for his own personal use and benefit.

Judgment was rendered in favor of the plaintiff and against the individual defendant LLC members for the amount of the improper withdrawals they each had received, however, the trial court refrained from holding Uter solidarily liable under §1328(A) for the distribution to Ms. Menzie. Even though Uter was a manager with Mr. Menzie, the trial court found that he was unaware of the distribution to Ms. Menzie at the time it occurred, and he testified that he told her to put it back when he discovered it later. The plaintiff had also sought to hold the individual members liable, in solido, for the full amount of the open account on general limited liability veil piercing theories, but the trial court had rejected those claims.

On appeal, the 1<sup>st</sup> Circuit Court of Appeal found that the trial court's failure to find for the plaintiff on the general veil piercing claims of fraud or deceit, failure to conduct business on a business footing, and disregarding the company entities was a finding of fact which was adequately supported by the record as to which there was no manifest error. In a footnote, the court interestingly noted that: "[i]n so ruling, we render no opinion as to whether veil-piercing is available in the case of limited liability companies as it is in the case of corporations," while it had acknowledged in an earlier footnote that "this court seemingly applied the single business enterprise theory, although treated as an application of the alter ego doctrine, to ignore the separate status of a limited liability company to reach the assets of its majority member," in *Hamilton v. AAI Ventures, L.L.C.*, 99-1849 (La.App. 1<sup>st</sup> Cir. 9/22/00), 768 So.2d 298. *Id.* at 837 So.2d 669.<sup>1</sup> In reaching its conclusion that the record adequately supported the trial court's conclusions on the general limited liability veil piercing theories, Judge Parro's opinion analyzes §1320 and concludes with the statement that: [t]hus, generally, under LSA-R.S. 12:1320(B), members of a limited liability company may not be assessed with personal liability for the debts and obligations of their limited liability companies to third parties absent proof of fraud." *Id.* Upon a brief review of the case law on corporate veil piercing, the court's conclusion was simply that: "[a]fter a thorough review of the record, we conclude that reasonable support exists for finding that Imperial failed to prove that the limited liability companies were disregarded from their members or that the actions of the members were fraudulent." *Id.* at 670.

The court of appeal affirmed the judgment against Ms. Menzie upon a thorough review of the evidence which supported the trial court's conclusion that the distribution to her rendered the entities unable to pay their indebtedness to Imperial, resulting in a violation of §12:1327(A)(1). Judge Parro

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<sup>1</sup> Judge Parro's choice of words leaves this writer with the impression that he was not so certain he would apply the corporate veil piercing principles to LLC's quite so readily, and that he was not altogether impressed with the opinion in *Hamilton v. AAI Ventures, L.L.C.*

began with a detailed analysis of the applicable statutory provisions of §§1324 and 1325 and concluded that the record adequately supported the trial court's findings and there was no manifest error.

Similarly, Judge Parro conducted a detailed analysis of the provisions of §§1312, 1327 and 1328 of the LLC Law to affirm the trial court's holding that Mr. Menzie was solidarily liable for the distribution to his wife, even though they were separate in property. Noting that where the LLC is managed by managers pursuant to §1312, liability under §1328 falls on each manager. He found that "although the record does not reveal a knowing violation of LSA-R.S. 12:1327, it reasonably supports a finding that such distributions were made without the exercise of reasonable care and inquiry as to whether they were wrongful, as defined by LSA-R.S. 12:1327," as it was obvious that Mr. Menzie had assented to the distribution to Ms. Menzie.

In affirming the trial court's findings of liability on the part of Mr. and Ms. Menzie, Judge Parro footnoted his holding by noting that "the right to pursue such recovery [of the unlawful distribution under §§1327 & 1328] was assigned to Imperial by virtue of a settlement agreement executed by the members of the limited liability companies involved in this case. Although questioned early on in these proceedings, the right of Imperial to assert this claim has not been raised on appeal." Thus, although there was no express statement to that effect, it appears that either the parties had earlier raised the issue, or Judge Parro recognized the potential for an issue of whether a creditor has the right to sue under §1328 for recovery of a distribution rendered unlawful by §1327.

Upon review of the evidence and the trial court's holding as to Uter's liability, the court of appeal found the record did not support the trial court's findings because Uter's evidence to the effect that the funds were taken to reimburse him for legitimate business expenses of the entities was largely uncontradicted. Accordingly, the ruling of the trial court on that issue was reversed.

Finally, the court of appeal rejected the arguments of the plaintiff that the LLC members were liable under agency principles. Once again, Judge Parro walked through the detailed analysis of the statute and the applicable case law. He noted that generally, an agent is held to have bound himself personally when he acts beyond his authority without informing the third party of the extent of his powers, or where he enters into an agreement without disclosing his agency capacity or the identity of his principal. See LSA-C.C. arts. 3013 and 3021; *Frank's Door & Building Supply, Inc. v. Double H. Construction Company, Inc.*, 459 So.2d 1273, 1275 (La. App. 1<sup>st</sup> Cir. 1984). The court noted that the agent has the burden of proving that he disclosed his agency status and the identity of his principal; however, "express notice of the agent's status and the principal's identity is not required to escape personal liability if the agent proves that sufficient evidence of the agency relationship was known by the third party so as to put him on notice of the principal-agent relationship." The court of appeal then concluded that although there appeared to have been some confusion as to the exact type of entity or entities with whom Imperial was dealing, the record reasonably supported a finding that "Imperial's representatives knew or reasonably should have known that Uter and Menzie were acting in a representative capacity, as opposed to individual capacity." 837 So.2d at 672.

Judge Parro's reasoned opinion in *Imperial Trading Co.* represented, at the time, perhaps the most thorough analysis of the liability of members and managers to third parties under the Louisiana LLC Law. Two years earlier, in September of 2000, the 1<sup>st</sup> Circuit decided the case of *Hamilton v. AAI Ventures, L.L.C., et al.*, 1999-1849 (La. App. 1 Cir. 9/22/00), 768 So.2d 298, the case which Judge Parro characterized as having "seemingly applied the single business theory, although treated as an application

of the alter ego doctrine, to ignore the separate status of a limited liability company to reach the assets of its majority members.” In contrast to *Imperial Trading Co.*, which subjected each theory of liability and the factual findings of the trial court to intricate analysis, *AAI Ventures* seems to be more a case of blurring the lines of distinction among the various veil piercing theories to come up with a justification for the result the court desired to achieve.

According to the summary of the facts, the membership of AAI Ventures, L.L.C. consisted at various times of Insulation Sales and Service, Inc. (ISS), a large commercial insulation company, Winter Environmental Services, Allain Contractors, and Merit Environmental Services, Inc., with ISS being the majority interest holder at all times. AAI was formed for the purpose of performing asbestos abatement work at the casino in New Orleans, and in 1994, was awarded the asbestos subcontract for the project. Hamilton entered a professional services agreement to provide general management services to AAI related to the asbestos contract and ultimately sued AAI, ISS, Vic and V.J. Reno (ultimate shareholders of ISS’s parent company seeking to recover an incentive payment due him under the professional services agreement. The trial court held ISS and AAI solidarily liable to Hamilton based on its findings that “AAI was a shell corporation, with no employees nor capital . . . ISS is a shareholder of AAI.”

The court surveyed the cases of *Riggins v. Dixie Shoring Company, Inc.*, 590 So.2d 1164 (La. 1991), [for the proposition that there are limited exceptions to the rule of non-“liability of shareholders for the debts of a corporation, among them being the “alter ego” concept]; *McDonough Marine Service v. Doucet*, 95-2087 (La.App.1Cir. 6/28/96), 694 So.2d 305, [in support of the statement that “Louisiana courts have allowed the piercing of the corporate veil under only two exceptional circumstances, namely where the shareholders acting through the corporation commit fraud or deceit on a third party and where the shareholders have failed to conduct the business on a corporate footing, disregarding the corporate entity to such extent that they and it become indistinguishable”]; *Jones v. Briley*, 593 So.2d 391 (La. App. 1 Cir. 1991), [in most of the cases in which Louisiana courts have allowed a piercing of the corporate veil, there exists one majority stockholder, either an individual or a corporation, which is found to be operating the corporation as its “alter ego” or as an instrumentality of the shareholder]; and *Green v. Champion Insurance Company*, 577 So.2d 249 (La. App. 1 Cir. 1991), writ denied, 580 So.2d 668 (1991), [the legal fiction of a distinct corporate entity may be disregarded when a corporation is so organized and controlled as to make it merely an instrumentality or adjunct of another corporation, if one corporation is wholly under the control of another - the fact that it is a separate entity does not relieve the latter from liability and in such instance, the former corporation is merely an alter ego or a business conduit of the latter - when corporations represent precisely the same single interest, the court is free to disregard their separate corporate identity].

The court then found that a reasonable factual basis could be found in the record to support the trial court’s holding. Vic Reno testified that AAI was formed for a single purpose, performing asbestos removal in the New Orleans casino project. Before the casino project, AAI had never performed asbestos abatement. “An organizational chart of R-Square (ISS’s parent) and its affiliate companies illustrates the overlap of the Renos and ISS in the total corporate existence and the disregard for separate corporate entities. Individuals associated with the project testified they were unsure of co-workers job titles or record employers, employees of one organization were housed at the offices of other organizations, workers on the casino project were employees of various businesses, including AAI, ISS, AKT (owned in part by the Renos) and AAI had no employees (AAI’s accounting was handled by ISS).” On the basis of this evidence, the court of appeal concluded: “[b]ased on a totality of the circumstances, the district court could have found that there was a corporation financing a limited

liability company, inadequate capitalization (“thin corporation”), common employees, services rendered by the employees of one corporation on behalf of another corporation, common offices, and centralized accounting. See *Green*, 577 So.2d at 257-258. In short, the court never discussed the base question of whether there were perhaps any legislative distinctions in the LLC Law which would either support or negate the application of the corporate veil piercing concepts in the LLC context.

In *Egle v. Egle*, No. 01-0927, 2002 WL 181981 (La.App. Feb. 6, 2002), the court found an ex-wife had raised the possibility that defendants were solidarily liable with her ex-husband in a case where the ex-wife alleged the ex-husband hid community assets and diverted them to a number of corporations and LLCs owned by him as a single business enterprise.

In *Hesni v. Williams & Boshea, L.L.C.*, No. Civ. A. 01-3745, 2002 WL 373273 (E.D. La. March 7, 2002), in the context of considering a fraudulent joinder assertion, the court could not conclude that there was no possibility of personal liability of an LLC member given evidence of commingling of funds and failure to follow statutory formalities required for formation. In *Curole v. Ochsner Clinic, LLC*, 811 So.2d 92 (La.App. 2002), the court found allegations of the petition insufficient to require an inquiry into whether the LLC veil should be pierced to hold a CEO of the LLC personally liable. In *Iron Workers Local 58 v. Citizens Bank*, No. Civ. A. 02-1848, 2002 WL 31427329 (E.D. La. Oct. 25, 2002), the court held that allegations that an LLC was formed to evade paying the plaintiffs money owed under a collective bargaining agreement, when liberally construed, were sufficient to avoid a Rule 12(b)(6) motion to dismiss, and the individual organizer of the LLC might have personal liability under the alter ego or successor liability theories.

In *Ehle v. Williams & Boshea, L.L.C.*, No. Civ. A 01-3757, 2002 WL 3733271 (E.D.La. March 7, 2002), the court held the joinder of an individual who claimed he could not be liable because he was a member of an LLC was not fraudulent where there was evidence the LLC was never formed and the plaintiff asserted claims based upon negotiations to form the LLC.

In *F & G Investments, L.L.C. v. 1313 Hickory, Ltd.*, 8097 So.2d 1004 (La. App. 2002), the lessor of premises occupied by an LLC sought to hold the individual who signed the lease liable on the lease, arguing that the individual signed the lease in his personal capacity. Though the signature form was somewhat ambiguous, the court found the lease as a whole did not indicate that the individual was signing in his personal capacity. The lease stated that it was between two LLCs, a space for the individual to sign as surety was left blank, and the court construed the ambiguity against the plaintiff since the words under the signature lines were provided by the plaintiff.

In *Wirthman-Tag Construction Company, L.L.C. v. Hotard*, 804 So.2d 856 (La.App. 2001), two individuals signed a construction contract on behalf of a business that was not designated as an LLC. The individuals claimed that the other parties knew of the agency relationship and understood the individuals were signing in a representative capacity. The court found there was a triable issue of fact on the issue.

See *Lee v. Clinical Research Center of Florida, L.C.*, 889 So.2d 317, (La. App. 2004). After his employment was terminated, Lee filed suit against Clinical Research Center of Florida, L.C. (CRC Florida) and various other LLCs for breach of his employment contract with CRC Florida. Lee argued all of the defendant entities were part of a “single business enterprise” with CRC Florida and were therefore liable for the alleged breach of CRC Florida’s contract with him. The court discussed the

single business enterprise doctrine, under which a court may disregard the corporate separateness of affiliated corporations when they integrate their resources to achieve common business purposes and do not operate as separate entities. All of the defendant entities in the case were LLCs and the court analyzed CRC Florida's relationship with each other entity and concluded CRC Florida was not doing business as a single business enterprise with any of the other defendant LLCs. The use of a centralized accounting system by two LLCs was insufficient to constitute a single business enterprise where the LLCs maintained a separate financial identity, had their own books, maintained separate bank accounts, earned their own income, paid their own expenses, and filed separate tax returns. Web site advertising that two LLCs were affiliated was insufficient to establish the two LLCs were a single business enterprise where the two LLCs conducted different types of research, did not use the same standard operating procedures, and did not use the same institutional review boards. Common membership was insufficient to establish a single business enterprise where the common members did not have sufficient controlling interests to amount to substantial identity of ownership. Loans by one LLC to another were insufficient to establish a single business enterprise where the loans were documented, arm's length transactions.

In *Kinkle v. R.D.C., L.L.C.*, 04-1092 (La.App. 3d Cir. 12/08/04), 889 So.2d 405, the 3<sup>rd</sup> Circuit decided a case governed by prior law regarding the effect of the death of a member. Under that prior law, the LLC dissolved on the death of a member unless it was continued upon the unanimous consent of the remaining members. In *Kinkle*, a member died and the remaining members unanimously consented to continue the LLC. While the LLC had made monthly distributions to the decedent member during his life, the LLC ceased making distributions after his death. The succession representative sued arguing that in her capacity as succession representative, she was entitled to a proportionate portion of all interim distributions from the time of the decedent's death, in addition to an accounting of all distributions made to the members from the date of death. The court held that under §1333, the legal representative was entitled to distributions to the same extent that the decedent was entitled, but the legal representative was not entitled to an accounting. The court held that the right to inspect a Louisiana LLC's books and records is reserved to the members under §1319(B)(1).

In *In re Delta Starr Broadcasting, L.L.C.*, 2006 U.S. Dist. Lexis 4477(02/03/06) Judge Sarah Vance reversed a ruling of the Bankruptcy Court for the Eastern District in which the Bankruptcy Court had held a Chapter 11 petition not duly authorized where one of the two out of three members who voted to approve the filing had transferred his membership interest to another entity ten days before he signed an affidavit attesting to his authorization, and the vote was not taken at a formal meeting of members with proper notice to the members. As to the transfer of the membership interest and the effect of the same on the vote of the transferor member ten days later, Judge Vance correctly analyzed Louisiana LLC law on the point as follows:

Louisiana Revised Statutes Annotated section 12:1330, part of the Louisiana limited liability company statute, provides that a membership interest in an LLC is assignable, but that the assignee of a membership interest is not entitled to exercise any membership rights until he is properly admitted as a member of the LLC. See La. Rev. Stat. Ann §12:1330. Under section 12:1332, the assignee of a membership interest can become a member of the LLC only if the other members unanimously consent in writing. *Id.* §12:1332. Unless and until the assignee becomes a member of the LLC, the assignor continues to be the member. *Id.*

Accordingly, the transferor member retained the right to vote to approve the bankruptcy filing even after he executed the assignment of his membership interest. As to the lack of a formal meeting, Judge Vance again properly analyzed the LLC statute finding that, in contrast to the corporate laws, the LLC statute does not expressly require formal meetings with formal notice of the meeting. Citing Professor Susan Klinka, Judge Vance found no such requirement applied, and thus the Chapter 11 petition was properly authorized.

In September of 2007, the 2<sup>nd</sup> Circuit decided a case involving an action to collect on open account brought against the owner of an LLC for supplies purchased for the LLC. Finding that the defendant took no steps at the beginning of the course of business relationship to disclose to the plaintiff the legal nature of his businesses or his relationship with them; that the defendant used only his trade names, and failed to include the LLC designation in the name on his business documents, his business cards (the business card used by the defendant simply named him as owner for the two businesses with no indication of a limited liability status) and business checks; and that the plaintiff never knew of the existence of the LLC until the day of trial, the trial court, as affirmed by the court of appeal, held that the individual was liable on the debt based upon the law of mandate. *Irrigation Mart, Inc. v. Gray*, 42,442-CA(La.App. 2 Cir. 9/19/07); 965 So.2d 988. *Id.* A mandatary who contracts in the name of the principal within the limits of his authority does not bind himself personally for the performance of the contract. *La.C.C. art. 3016*. However, a mandatary who contracts in his own name without disclosing his status as a mandatary does bind himself personally, for the performance of the contract. *La.C.C. art. 3017*. Generally, an agent will be held to have bound himself personally when he enters into an agreement without disclosing the identity of his principal. *American Bank and Trust of Coushatta v. Boggs and Thompson*, 36,157 (La.App.2d Cir. 06/12/02), 821 So.2d 585.

In August of 2007, the 4<sup>th</sup> Circuit Court of Appeal decided *Roth v. Voodoo BBQ, LLC*, 2007-0295 (La.App. 4 Cir. 8/1/07); 964 So.2d 1095, which sustained the dismissal with prejudice (on a peremptory exception of no cause of action) of the individual managers of Voodoo BBQ from a suit on a lease between Roth and the LLC. Allegations in the petition against the managers were that they entered the premises after hurricane Katrina and removed equipment belonging to the LLC. The allegations against the LLC were that it failed to “adequately secure the premises” as required by the lease. Relying upon La.R.S. 12:1320 and the court’s own decision in *Curole v. Ochsner Clinic, LLC*, 01-1734 (La.App. 4 Cir. 2/20/02), 811 So.2d 92, the court held that insofar as the petition for damages did not sufficiently allege any wrongful conduct on the parts of the managers that is separable from their roles as managers of the Voodoo BBZ, Roth failed to allege a cognizable cause of action against them as individuals. “Particularly, we note that the thrust of the litigation is a breach of contract suit against Voodoo BBQ, and that the property and equipment that Doody and Strobel are alleged to have removed from the leased premises did not belong to the Roths, but presumably to Voodoo BBQ. In *Curole v. Ochsner Clinic, LLC*, the court had ruled that “to have meaning within the entire statute, the phrase “or other negligent or wrongful acts by such person’ must refer to acts done outside one’s capacity as a member, manager, employee or agent of the **limited liability company**.” (Emphasis in original text).

Can an officer and stockholder of a professional corporation be personally bound to a contract entered into by his P.C. which he signed only in his representative capacity on behalf of the P.C.? Apparently, the answer is yes, as the 2<sup>nd</sup> Circuit so ruled in an interesting case involving a professional services and non-competition agreement between an LLC medical clinic and a physician’s professional corporation (through which the physician practiced medicine) as a member of the LLC which owned the

clinic. In *Regional Urology, LLC v. Price, M.D. Regional Urology, LLC v. Price, M.D.*, 42,789-CA (La.App. 2 Cir. 9/26/07); 966 So.2d 1087, the 2<sup>nd</sup> Circuit was simply unwilling to allow a medical doctor to circumvent the non-compete agreement, which although express in terms of an intention to bind the individual physician/member, was not signed by the physician in his individual capacity. In *Regional Urology*, the doctor signed a non-compete agreement only in his representative capacity as agent for his professional corporation. The agreement was express in stating that in the event of termination of [the] Agreement for any reason, Physician, Physician Corporation, and Physician Company shall not solicit any patients of the Company, either individually or as employee, owner, or equity interest holder, of any entity within the Parishes of Caddo and Bossier, Louisiana . . .” Dr. Price’s relationship with the plaintiff ended and he filed articles of organization for a new entity, David Price, M.D., LLC domiciled in Claiborne parish. The plaintiff found out that defendant was practicing under his new LLC in prohibited parishes and sought to enforce the non-compete agreement. Dr. Price took the position that that since he had not signed in his individual capacity, the non-compete agreement could not be enforced against him individually, or against his new LLC. The court disagreed with him and enjoined him from practicing in prohibited parishes individually or as the employee, owner, or equity interest holder of any entity, stating, Dr. Price cannot avoid his contractual obligation not to compete by establishing a corporate identity in another parish as a means to continue practicing in Caddo or Bossier parishes. Relying upon the Supreme Court decision in *Glazer v. Commission on Ethics for Public Employees*, 431 So.2d 752 (La. 1983), the court ruled that Dr. Price was bound by the agreement executed only in the name of his professional corporation.

A juridical person, such as a corporation, is distinct from its members. La.C.C. art. 24. However, the privilege of separate corporate identity is not without its limits. *Glazer v. Commission on Ethics for Public Employees*, 431 So.2d 752, 757-758 (La. 1983). Courts have found it appropriate to disregard the corporate existence or “pierce the corporate veil” in cases where observing the fiction of a separate identity should involve a “study of the just and reasonable limitations upon the exercise of the privilege or separate capacity under the particular circumstances in view of the proper use and functions.” *Id.* Competing policies supporting the recognition of a separate corporate existence and those justifying piercing must be weighed to determine if there is some misuse of the corporate privilege or other justification for limiting it under the facts of a particular situation. *Id.*

The court also relied upon *Trost v. O’Connor*, 2006-1281 (La.App. 3d Cir. 4/4/07), 955 So.2d 246, stating that:

Mr. O’Connor, an independent contractor, signed a non-competition agreement and then tried to avoid the obligation not to compete by forming L.L.C.’s and even selling one to his son in an effort to avoid the imposition of a permanent injunction. He was not successful. The courts recognized Mr. O’Connor’s actions as attempts to circumvent his contractual obligations.

Dr. Price’s formation of a new L.L.C. in Claiborne Parish immediately upon termination of his relationship with Regional Urology and his argument that he is not individually bound because his professional medical corporation



was the independent contractor are attempts to circumvent his contractual obligations under the noncompetition agreement. Just as the court in *O'Connor* recognized that Mr. O'Connor was the controlling party behind the L.L.C.'s he formed, we recognize that Dr. Price is the controlling party with regard to his medical practice, regardless of its formation as a corporate entity. It is the intent of the Amendment to the Service Agreement to restrict Dr. Price, or any other physician associated as a Member with Regional Urology, from competing with Regional Urology in the parishes of Caddo and Bossier by forming his own urological practice upon termination of his relationship with Regional Urology. Dr. Price cannot avoid his contractual obligation not to compete by establishing a corporate identity in another parish as a means to continue practicing in Caddo or Bossier. By voluntarily signing the Amendment, Dr. Price and his professional medical corporation agreed to its provisions.

The Supreme Court denied writs to review this decision on February 15, 2008.

In *Orx Resources, Inc. v. MBW Exploration, L.L.C. & Washauer*, 2009-0662 (La.App. 4 Cir. 2/10/10), 32 So.3d 931, the Fourth Circuit Court of Appeal held that: (i) the alter-ego theory of corporate veil piercing applied to MBW Exploration, L.L.C., (ii) LLC member, Washauer, was the alter ego of the LLC, and (iii) thus could be held personally liable for LLC's debt.

ORX, an oil and gas operating company, partnered with other entities, including MBW, to share in the expense and potential profits of the venture to explore and develop the Clovelly Prospect in Lafourche Parish. The parties entered into a Joint Operating Agreement (“JOA”) and the Clovelly Prospect Participation Agreement (“Participation Agreement”). Mr. Washauer signed these documents in October of 2003 and December of 2004, respectively, on behalf of MBW, in his capacity as a “Managing Member.” However, MBW did not come into existence until July of 2005, when its articles of organization were filed with the Louisiana Secretary of State.

The JOA provided that ORX was to serve as the “Operator” drilling a well within the Clovelly Prospect. It further provided that the non-operating working interest partners, like MBW, would pay their proportionate share of the costs in exchange for a corresponding working interest ownership share in the Clovelly Prospect. The Participation Agreement provided that MBW had a working interest in the Clovelly Prospect whereby MBW would share in 2.5% of the costs incurred, and would gain a proportionate share of the returns, if any, produced by the well.<sup>1</sup>

Later, ORX submitted an Authorization for Expenditure (“AFE”) to MBW for approval, which Mr. Washauer signed in his own name. Additionally, he paid MBW's participation fee with a check drawn from the account of another entity, MBW Properties, LLC. Later, on another well project, Mr. Washauer signed an AFE on MBW's behalf and paid the full amount of MBW's share of an ORX cash call invoice of \$59,325 with a personal check.

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<sup>1</sup> Note that the obligation to pay future operating costs was contained in the JOA, while the conveyance of the oil and gas working interest (an immovable) was contained in the Participation Agreement.

The well proved to be unsuccessful, and was ultimately plugged. MBW's unpaid share of expenses for said project amounted to \$84,220.01, for which ORX demanded payment and ultimately filed suit for breach of contract against both MBW and Mr. Washauer. The trial court granted summary judgment in favor of ORX holding Washauer personally liable for the MBW debt under the alter-ego theory.

Washauer asserted on appeal that Louisiana's LLC law does not impose member liability that parallels a shareholder's potential exposure created by disregarding certain business formalities; and that the failure to follow certain formalities is not a ground for imposing liability on members or managers for the debts and obligations of the LLC under La. R.S. 12:1319(C). Lastly, Washauer maintained that the 4<sup>th</sup> circuit had never allowed the veil of an LLC to be pierced, and had previously held that absent particularized claims of fraud, breach of a professional duty or other negligent or wrongful act done outside of one's capacity as a member, the limitation of liability afforded to LLC members cannot be disregarded in favor of individual liability, citing *Curole v. Ochsner Clinic, L.L.C.*, 01-1734 (La.App. 4 Cir. 02/20/02), 811 So.2d 92; and *Roth v. Voodoo BBQ*, 07-0295, (La.App. 4 Cir. 08/01/07), 964 So.2d 1095.

The court reviewed the LLC statutes, noting that general Louisiana LLC law pursuant to La. R.S. 12:1320(B) provides that:

- members are not personally liable for the debts, obligations and other liabilities of the LLC to third parties, and
- a LLC member is not a proper party in any proceeding against the LLC.

The court noted, further, that third parties can bring claims against members and managers for “any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any such person because of any fraud practiced upon it by him.” *La. R.S. 12:1320(D)*.

The court reviewed La. R.S. 12 § 1320, entitled Liability to Third parties of Members and Managers, which states:

- A. The liability of members, managers, employees, or agents, as such, of a limited liability company organized and existing under this Chapter shall at all times be determined solely and exclusively by the provisions of this Chapter.
- B. Except as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.
- C. A member, manager, employee, or agent of a limited liability company is not a proper party to a proceeding by or against a limited liability company, except when the object is to enforce such a person's rights against or liability to the limited liability company.

D. Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any such person because of any fraud practiced upon it by him.

The court noted that in *Curole*, it was explained that “[t]o have meaning within the entire statute, the phrase ‘or other negligent or wrongful act by such person’ must refer to acts done outside one’s capacity as a member, manager, employee, or agent of the limited liability company.” *Curole*, p. 7–8, 811 So.2d at 97. The court in *Curole* had further stated that the provisions of La. R.S. 12:1320(D) provide for the piercing of a LLC’s veil when the situation so warrants. There the court found that at the time “... the only case applying Louisiana law allowing the veil of an [*sic*] limited liability company to be pierced in the same way that the veil of a corporation is pierced is *Hollowell v. Orleans Reg’l Hosp.*, 217 F.3d 379, 381 (5th Cir.2000). In *Hollowell*, the court held that a court may allow the piercing of the veil of a limited liability company based on a totality of the circumstances review.

Therefore, the court in *ORX* interpreted that:

“a totality of the circumstances review” encompasses the possibility that a district court can allow a district court to pierce the veil of a LLC under the alter ego doctrine. Furthermore, as the Louisiana Supreme Court has explained the veil of an entity can be pierced “... where the corporation is found to be simply the “alter ego” of the shareholder. It usually involves situations where fraud or deceit has been practiced by the shareholder acting through the corporation.” *Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164, 1168 (La.1991) (citing LSA–R.S. 12:95; *Dillman v. Nobles*, 351 So.2d 210 (La.App. 4th Cir.1977); *Bossier Millwork & Supply Co. v. D. & R. Const. Co., Inc.*, 245 So.2d 414 (La.App. 2d Cir.1971)). The Supreme Court further reasoned that “[i]n order properly to disregard the corporate entity, one of the primary components which justifies piercing the veil is often present: to prevent the use of the corporate form in the defrauding of creditors.” *Id.*, 590 So.2d at 1169 (citing *Liberto v. Villard*, 386 So.2d 930 (La.App. 3d Cir.1980)).

The court in *ORX* then held that applying this standard in the instant matter, “piercing the veil of an LLC is justified to prevent the use of the LLC form to defraud creditors.” Based upon its *de novo* review of the trial court’s granting of summary judgment, the court of appeal found that the district court did not err in determining that the alter ego theory of corporate veil piercing applied to a Louisiana limited liability company, under the facts of this case, where they felt it appeared that Mr. Washauer used MBW as a shell and tried to avoid paying a legitimate debt of the LLC.

The Louisiana Supreme Court has identified five non-exclusive factors to be used in determining whether to apply the alter ego doctrine:

- 1) commingling of corporate and shareholder funds;

- 2) failure to follow statutory formalities for incorporating and transacting corporate affairs;
- 3) undercapitalization;
- 4) failure to provide separate bank accounts and bookkeeping records; and
- 5) failure to hold regular shareholder and director meetings.

*Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164, 1168 (La.1991) (citing *Kingsman Enterprises v. Bakerfield Elec. Co.*, 339 So.2d 1280 (La.App. 1st Cir.1976); *Smith–Hearron v. Frazier, Inc.*, 352 So.2d 263 (La.App. 2d Cir.1977), writ denied, 353 So.2d 1337 (La.1978)).

The court of appeal in *ORX* went through a detailed discussion of how the Riggins factors resolved that Mr. Washauer could be held personally liable for MBW's indebtedness to ORX by piercing the veil of the LLC. The first Riggins factor it considered was whether commingling of “corporate and shareholder” funds occurred. Washauer asserted that while neither of MBW's check payments to ORX were made directly by MBW, both payments included notations that they were being paid on MBW's behalf. The record apparently reflected that these payments were interest free loans made to MBW. In analyzing this first Riggins factor, the court noted that “our jurisprudence allows a shareholders and/or LLC members to make interest free loans to corporations/LLCs without this act being grounds for invoking the alter ego doctrine”. ORX contended that funds were commingled as evidenced by the fact that the two (2) payments made by MBW to ORX were made through third parties. MBW Properties, LLC paid the participation fee of \$6,826.00, and Mr. Washauer himself paid the initial cash call of \$59,325.00. No payments were made by MBW itself to ORX.

The second Riggins factor to be considered was whether Mr. Washauer failed to follow statutory formalities for incorporating and transacting corporate affairs. Mr. Washauer argued that he had complied with all statutory requirements in forming MBW. The court, however, took note of the fact that MBW was not formed until July of 2005, when agreements with ORX, purporting to be executed by MBW were executed in October of 2003 and December of 2004. The court took note that under La. R.S. 12:1310, when immovable property is acquired by an individual—who is acting in any capacity for and in the name of any LLC—and the LLC is later issued a certificate of organization, the LLC's existence is retroactive to the date of acquisition of the interest in the immovable property. Thus, when MBW acquired a 2.50% interest in the Clovelly Prospect, which included oil, gas and mineral leases, MBW acquired an interest in immovable property because a mineral lease is a mineral right equating to an incorporeal immovable. Thus, the court found that while MBW was issued its certificate of organization on July 20, 2005, its creation was retroactive to the date it acquired its interest in the Clovelly Prospect, October 20, 2003.<sup>2</sup>

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<sup>2</sup> Note here that the court did not distinguish between the retroactive effect of §1310 as it applies to the vesting of title to an immovable in the LLC versus the effect of the LLC existence relative to the undertaking of the obligations under the JOA. §1310, by its terms, is limited to the effect as it relates to the vesting of title to immovable property, not the retroactive effect of the formation of the LLC for all purposes, such as the question of whether or not Washauer was an agent for another at the time he signed the JOA. If the formation of the LLC was not retroactive for the latter purpose, then wouldn't Washauer be liable under the law of Mandate for acting beyond the scope of the mandatary's authority, since the mandatary did not exist. Wouldn't this have been a cleaner reason to hold Washauer liable?

ORX contended that in Louisiana, an LLC is not formed until “the articles of organization are signed and filed with the secretary of state.” La. R.S. 12:1304(B). Thus, MBW did not exist until July 20, 2005, when the statutory formalities were met. While Mr. Washauer signed the JOA (in January of 2003) and the Participation Agreement (in December of 2004), MBW did not exist, and ORX argued that this evidenced that he did not observe statutory formalities in creating MBW.

The third Riggins factor to be reviewed by the court in ORX was whether MBW was undercapitalized. MBW maintained that it was capitalized by the payments made on its behalf to ORX, and argued that our jurisprudence allows individuals to create minimally capitalized entities like LLCs to limit their individual liability. ORX countered that MBW never owned any assets apart from its working interest in the Clovelly Prospect wells. It argued, further, that MBW never used its own capital to pay its expenses for this venture; and that MBW was thus not capitalized at all.

The fourth Riggins factor reviewed by the court was whether MBW failed to provide separate bank accounts and bookkeeping records.<sup>3</sup> Washauer argued that after issuing a check for \$59,325.00 to ORX on MBW's behalf, he did not see the point in creating a checking account and getting a tax ID for a one time investment. He anticipated that the initial check was going to be the last payment made relative to the Clovelly Prospect. He further contended that evidence of a common bank account is not sufficient to prove that an LLC entity was disregarded to the extent that it became indistinguishable from its members. ORX countered that a lack of a banking account and other accounting records evidenced that MBW and Washauer failed to maintain separate accounts.

The fifth Riggins factor addressed by the court was the failure to hold regular “shareholder meetings.” Washauer argued that LLCs are not required to comply with corporate formalities. Under Louisiana LLC law, members or managers of LLCs do not have to hold meetings, keep minutes or act through formal resolutions. He argued that ORX knew that it was only contracting with MBW because all documents executed between the entities identified MBW as the signatory and indicated that Mr. Washauer was signing the documents on behalf of MBW. Nothing in the JOA indicated that he was signing the document on his own behalf. Lastly, he argued that no correspondence related to the Clovelly Prospect was sent directly to him, nor did ORX make “cash calls” or AFEs to him personally. ORX did not dispute that LLC's are not required to observe the above-referenced formalities, yet it argued that, in this instance Mr. Washauer's admission that he has only held informal MBW meetings and/or discussions on the creation and operation of MBW, and that he has not spoken to MBW's other member about MBW in over a year further evidenced that the corporate veil should be pierced. ORX

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<sup>3</sup> Note that there was no indication in the opinion as to whether Washauer argued or the court took notice of La.R.S. 12:1319C, which provides that:

Failure of the limited liability company to keep or maintain any of the records or information required pursuant to this Section [Records and information required to be maintained, including financial statements] shall not be grounds for imposing liability on any person for the debts and obligations of the limited liability company.

avered that the totality of the circumstances supported piercing the corporate veil where Mr. Washauer signed an AFE in December of 2004 in his own name, and he had not provided a reason for MBW's refusal to pay a valid debt.<sup>4</sup>

The court found that in applying the Riggins factors, under a *de novo* review, Mr. Washauer's activities on behalf of MBW did merit the piercing of the veil of this LLC. It concluded that commingling of the LLC's funds occurred with the funds of Mr. Washauer and a separate company of his. It found that this commingling occurred because MBW was undercapitalized, and did not have a separate bank account to transact its own affairs. Furthermore, it found that at the time MBW began contracting with ORX, it was not yet recognized as an LLC by the Louisiana Secretary of State. Lastly, it found that while LLC's are not bound by corporate laws to hold regular meetings, the fact that MBW had not had a meeting in over a year further evidenced that Mr. Washauer was operating MBW at his leisure and direction. Thus, the court of appeal held that the district court did not err in determining that MBW was being operated as the alter ego of Mr. Washauer under the Riggins factors, and therefore, could be held personally liable jointly and solidarily with MBW.

In this writer's view, the *ORX* case is somewhat troubling in that it hints of a reluctance of the court to recognize material differences between the corporate statutes and the LLC statute which, in this writer's view, reflect a legislative intent to make it more difficult to impose liability upon members of an LLC than is the case with corporations. The *ORX* opinion reflects two instances of the court of appeal applying corporate law concepts to LLCs that appear to be contrary to the LLC law.

First, the court engaged in a dialogue regarding absence of books and records which runs contrary to La.R.S. 12:1319C, which provides that the failure of the LLC to keep or maintain any of the records or information §1319 [includes three years tax returns and financial statements, among other things] shall not be grounds for imposing liability on any person for the debts and obligations of the limited liability company.

Second, and most importantly, there was no finding of fraud. Not only is §1320 is express in stating affirmatively that a member's liability "shall be determined solely and exclusively by the provisions of this Chapter" [*Emphasis added*] (a provision not found in the corporate law), and this definitive legislative statement is followed in §1320D by limited exceptions for: "any fraud practiced upon [a third party], because of any breach of professional duty or other negligent or wrongful act by such [member, manager, employee or agent], or in derogation of any right which the limited liability company may have against such person because of fraud practiced upon it by him." *Riggins* was developed by the Supreme Court in the corporate context. While fraud is not included within the 5 "Riggins factors," the Supreme Court in *Riggins* did say that: "[i]n order properly to disregard the corporate entity, one of the primary components which justifies piercing the veil is often present: to prevent the use of the corporate form in the defrauding of creditors." *Riggins*, 590 So.2d at 1169 (citing *Liberto v Villard*, 386 So.2d 930 (La.App. 3<sup>rd</sup> Cir. 1980)). Therefore, it seems to this writer that if we are going to apply alter ego, single business enterprise, or any corporate veil piercing theories in the LLC setting, the courts should be bound by the legislation which very clearly expresses an intention that member liability for the debts of the LLC in this context be limited to situations in which fraud is found. There was no finding of fraud in *ORX*.

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<sup>4</sup> Note that in 2004 MBW still had not been legally formed.

It would seem to this writer that this case could have been decided on the sole basis of the fact that Washauer signed the JOA on behalf of a non-existent LLC (i.e. a non-existent juridical person), and as such, he could only have acted in a personal capacity, thus obligating himself to the obligations under the JOA. §1310, which renders the formation of the LLC retroactive for the purpose of title to the immovable, is clearly a provision adopted for the purpose of furthering the stability of titles to immovable property and the public records doctrine. If the legislature had intended it to apply for other purposes, such as to shield a purported agent/mandatory against liability for *ultra vires* acts for a juridical entity that does not exist, it certainly knows how to write such a statute. Nothing in §1310 suggests that it has retroactive effect for purposes of anything other than title to immovable property. Therefore, it rendered the assignment of the working interest under the Participation Agreement effective retroactive to the date of the assignment, but it arguably had no retroactive effect to somehow eliminate liability for Washauer's undertaking the obligations under the JOA as a mandatory exceeding his authority.

In *Prasad V. Bullard, et al*, 10-291 (La.App. 5 Cir. 10/12/10), 51 So.3d 35, the court held that a client's assertion that a member who was the sole member of an LLC contractor, by itself, was insufficient to pierce the limited liability veil and require the member to submit to arbitration under an agreement executed between the client and LLC. Plaintiff, Chandan Prasad ("Dr. Prasad"), entered into a contract with Bullard Capital, L.L.C., d/b/a Contract Services, to complete the construction of a house. A dispute regarding the construction contract arose and, pursuant to the contract, Dr. Prasad submitted an arbitration demand to the American Arbitration Association ("AAA"). The arbitration demand asserted claims against Bullard Capital, L.L.C. ("Bullard Capital"), Contract Services, L.L.C. ("Contract Services"), and defendant, Sid Bullard, as the principal for both companies and "his misrepresentations, misallocation of funds, [and] commingling of assets between the identified organizations." In the answer, Mr. Bullard challenged the jurisdiction and venue of the AAA as it related to him personally on the basis he was not a party to the contract between Dr. Prasad and Bullard Capital. Dr. Prasad subsequently filed a Petition for Declaratory Judgment and Order Compelling Sid Bullard to Arbitrate in the 24th Judicial District Court. Dr. Prasad asserted that, although Mr. Bullard did not sign the contract, he was bound to the contract, including the arbitration provision, as the sole member in Bullard Capital and Contract Services and under the theories of piercing the corporate veil, alter ego, and third party beneficiary. As such, Dr. Prasad sought a declaratory judgment and order compelling Mr. Bullard to submit to arbitration. The trial court rendered judgment finding Bullard bound to the contract. On appeal, the court of appeal found that Dr. Prasad had offered no evidence to support his claims that Mr. Bullard is bound under the theories of piercing the corporate veil and/or alter ego. The only allegation of fact in the petition relating to piercing the corporate veil was that Mr. Bullard was the sole member in Bullard Capital. The court held that the mere involvement of a sole member is insufficient to pierce the "corporate veil."

In *Martin, et al. v. Spring Break '83 Production, LLC, et al*, No. 09-7520 (E.D. La., 6/24/11), 797 F.Supp.2d 719, plaintiffs sued multiple defendants, against Spring Break '83 Production, LLC; Spring Break '83 Distribution, LLC; Big Sky Motion Pictures, LLC ("Big Sky"); Spring Break Louisiana; George Bours; John Hermansen; Mars Callahan; and Randy Chortkoff (collectively, the "Defendants"). Plaintiffs alleged that Defendants had failed to pay wages to Plaintiffs for work on a movie, claiming breach of contract and unpaid wages claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and the Louisiana Wage Payment Act ("LWPA"), La.Rev.Stat. § 23:631. (Rec. Doc. 42 at 2, 3, 4). Plaintiffs also sought to extend liability to Big Sky under the theory

that Spring Break Louisiana was merely an alter ego of Big Sky. Defendants argued that Spring Break Louisiana was Plaintiffs' only employer during the production of the movie, and thus the only party liable for the wages.

After reviewing the provisions of La.R.S. 12:1320(B) [“[e]xcept as otherwise specifically set forth ..., no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company”], and without discussion of any differences between LLCs and corporations which might have a bearing on its application to LLCs, the district court went on to summarize the law applicable to piercing the “corporate veil” as follows:

In order to hold an individual liable for their actions as an agent of the corporation, the plaintiff must successfully pierce the corporate veil. However, courts are very reluctant to permit such an action. *Prasad v. Bullard*, 51 So.3d 35, 40 (La.App. 5 Cir. 10/12/2010) (quoting *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 359 (5th Cir.2003)). At least one of four general circumstances must be satisfied before a court will pierce the corporate veil. First, a court will pierce the corporate veil if a third party is a victim of fraud, breach of professional duty, negligence, or another wrongful act by the individual member of the LLC. *Id.* Second, a court will pierce the corporate veil if the members of the LLC use the corporate form to “ ‘defeat public convenience, justify wrong, protect fraud, or defend crime.’ ” *Glazer*, 431 So.2d at 757 (quoting *U.S. v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (E.D.Wis.1905)). Third, a court will pierce the corporate veil if adherence to the corporate form would clearly result in inequity. *Id.* (citing *Watson v. Big T Timber Co.*, 382 So.2d 258 (La.App. 3 Cir.1980); *Liberto v. Villard*, 386 So.2d 930 (La.App. 3 Cir.1980); *Smith v. Moore*, 347 So.2d 316 (La.App. 4 Cir.1977)). Fourth, a court will pierce the corporate veil if it finds evidence of misuse of corporate privilege. *Glazer*, 431 So.2d at 758 (citing *Ballentine, Corporations*, § 122 (Rev. Ed.1946), p. 293).

On the basis of this summary of the jurisprudence in the area of corporate law, and without going into any discussion of the *Riggins* case or the five “Riggins factors” discussed above, the court of appeal in *Martin v. Spring Break ‘83 Production, L.L.C., et al* went on to hold that:

. . . this Court declines to pierce the corporate veil<sup>5</sup> to hold individual employees of Spring Break Louisiana liable for the causes of action

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<sup>5</sup> It should not be overlooked that La.R.S. 12:1301 defines the term “limited liability company” as meaning “an entity that is an unincorporated association having one or more members that is organized and existing under this Chapter. No limited liability company organized under this Chapter shall be deemed, described as, or referred to as an incorporated entity, corporation, body corporate, body politic, joint stock company, or joint stock association.” Although the court may have considered it not germane given the court’s rejection of the application of the veil piercing theories on the failure of proof of facts to even warrant their application, this court failed to address the numerous statutory distinctions between LLCs and corporations which, under the Louisiana’s system of civil law should be the beginning point of the discussion, and, in this writer’s view, limit veil piercing to circumstances where fraud can be found.



stemming from the actions of Spring Break Louisiana. Accordingly, insofar as the individual defendants acted merely as members of Spring Break Louisiana and not as employers of Plaintiffs, the individual defendants are not liable to Plaintiffs for breach of contract or unpaid wages.

*Martin v. Spring Break '83 Production, L.L.C.*, 797 F.Supp.2d @ 725. The court so held on the basis of its finding that the “[p]laintiffs [had] not made allegations or presented evidence that satisfy any of the corporate veil-piercing factors discussed above.” *Id.*

The court in *Martin* then proceeded to address whether Spring Break Louisiana was the alter ego of Big Sky. Here, the court did cite *Prasad v. Bullard*, supra, and *Riggins v. Dixie Shoring Co., Inc.*, supra, and discuss the five Riggins factors. Ultimately, the court held that the plaintiffs failed to either allege the existence of the five Riggins factors or provide evidence tending to support a finding that they existed. Therefore, it held Spring Break Louisiana was not an alter ego of Big Sky under Louisiana law.

While the court’s ultimate holdings that the non-employer parties were not liable to the plaintiffs were, in this writer’s opinion correct, the concern here is that the opinion represents one more step in the development of a building jurisprudence that blurs the clear statutory distinctions between the corporate law and the LLC law in Louisiana. It remains the opinion of this writer that the LLC statute is clear in providing that the limited liability veil of the LLC should not be pierced absent a finding of fraud.

Thus, as noted earlier, the opinion of Judge Parro in the First Circuit Court of Appeal’s decision in the case of *Imperial Trading Co., Inc. v. Uter*, , was perhaps the first to undertake a thorough analysis of the statutory distinctions between LLCs and corporations recognizing that such distinctions might warrant a different approach from the corporate veil piercing cases.<sup>12</sup>

It appears that the legislature expressed just such an intention when it provided in La. R.S. 12:1320(A) that “[t]he liability of members, managers, employees, or agents, as such, of a limited liability company...shall at all times be determined solely and exclusively by the provisions of this Chapter.” [*Emphasis added*]. La. R.S. 12:1320(B) provides: [e]xcept as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.” [*Emphasis added*].

In 1993, La. R.S. 12:1320(A) and La. R.S. 12:1320(B) were amended as follows: “[t]he liability of members, managers, employees, or agents, **as such**, of a limited liability company...shall at all times be determined solely and exclusively by the provisions of this Chapter.” [*Bold font indicates phrase added by 1993 amendments*]. La. R.S. 12:1320(B) provides: [e]xcept as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable **in such capacity** for a debt, obligation, or liability of the limited liability company.” [*Bold font indicates phrase added by 1993 amendments*]. In their original form, if La. R.S. 12:1320(A) & La. R.S. 12:1320(B) were read and applied literally, then they might suggest that in determining the liability of agents and employees of the LLC, a court would have to disregard the Civil Code provisions on Mandate. If the original forms of these provisions were read literally, they might also be read to exclude enforcement of ordinary contractual obligations of members, managers, employees and agents of the LLC. It would

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<sup>12</sup> *Imperial Trading Co., Inc. v. Uter, et al*, 2001-0506 (La. App. 1 Cir. 12/20/02).

seem a bit unlikely that this was intended, but, at the very least, these provisions appear to indicate a legislative intent to make it more difficult to “pierce the veil” of limited liability in the LLC context. The 1993 amendments added the phrases “as such” and “in such capacity” to alleviate such concerns.<sup>13</sup>

Comparing these provisions to the Louisiana corporation statutes, the only comparable provision is found in La. R.S. 12:93(B) of the LBCL which provides: [a] shareholder of a corporation organized after January 1, 1929, shall not be liable personally for any debt or liability of the corporation.”

La. R.S. 12:1320(D) of the LLC statute allows for the preservation of the rights which any person may have by law against (and the liability of) members, managers, employees or agents of the LLC arising out of “any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against such person because of fraud practiced upon it by him.” [*Emphasis added*].<sup>14</sup>

Read in the aggregate, the provisions of La. R.S. 12:1320 make for a strong argument that, except for the specific provisions elsewhere in the LLC statute giving rise to liability of a member or manager<sup>15</sup>, the legislature intended that the LLC veil could only be pierced in the case of fraud or claims arising under the La. Civil Code provisions on Offenses and Quasi Offenses. Other than veil piercing actions premised in fraud, it would not appear that the typical corporate veil piercing theories, such as the alter ego theory and the single business enterprise theory, are premised upon those provisions of the Civil Code, nor would they otherwise fit within the classification of a “negligent or wrongful act by such person.”

Additionally, it is noteworthy in this context that La. R.S. 12:1319(C) provides that “[f]ailure of the limited liability company to keep or maintain any of the records or information required pursuant to this Section shall not be grounds for imposing liability on any person for the debts and obligations of the limited liability company.”

Because there are no real statutory procedural formalities required in the operation of an LLC, as compared to those applicable to corporations [such as the requirements for shareholders' and directors' meetings (La. R.S. 12:73 & 81), records of these proceedings (La. R.S. 12:103) and criminal sanctions

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<sup>13</sup> See Morris & Holmes on Business Organizations, Louisiana Civil Law Treatise, West Group, 1999, Vol. 8, §44.06 @ p. 495.

<sup>14</sup> See the discussion of *Riggins v. Dixie Shoring Co., Inc.*, 590 So.2d 1164, 1168 (La. 1991) and the Riggins Factors at Section 1:5. Riggins was developed by the Supreme Court in the corporate context. While fraud is not included within the five "Riggins Factors," the Supreme Court in Riggins did say that: "[i]n order properly to disregard the corporate entity, one of the primary components which justifies piercing the veil is often present: to prevent the use of the corporate form in the defrauding of creditors." *Riggins*, 590 So.2d at 1169 (citing *Liberto v Villard*, 386 So2d 930 (La. App. 3rd Cir. 1980)). Therefore, it seems to this writer that if courts are going to apply the alter ego theory, the single business enterprise, or any of the corporate veil piercing theories in the LLC setting, the courts should be bound by the LLC legislation which very clearly expresses an intention that member liability for the debts of the LLC in this context be limited to situations in which fraud is found.

<sup>15</sup> Such as §1328 regarding Liability upon wrongful distribution and §1314 regarding Duties of members and managers.

for failure to maintain such records (La. R.S. 12:172C)]<sup>16</sup>, it would seem unlikely that there would be many veil-piercing cases alleging the failure to follow LLC formalities. The design of the LLC Laws, the scholarly writings of the time when the LLC Law was enacted all seem to support this suggestion.

The LLC laws relative to unlawful distributions by LLCs and the liability of members and managers for authorizing and/or receiving them further bolster the argument that the legislature intended to make it more difficult to pierce the LLC veil when compared to piercing the corporate veil. For example, see the provisions of §1327 placing restrictions on the authority of an LLC to make distributions to its members. This is comparable to the provisions of §§55 and 63 of the LBCL dealing with redemptions and dividends.

La. R.S. 12:1327(A) provides as follows:

A. No distribution shall be made if, after giving effect to the distribution:

(1) The limited liability company would not be able to pay its debts as they become due in the usual course of business.

(2) The limited liability company's total assets would be less than the sum of its total liabilities plus, unless the articles of organization or a written operating agreement provides otherwise, the amount that would be needed if the limited liability company were to be dissolved at the time of the distribution to satisfy the preferential rights of other members upon dissolution which are superior to the rights of the member receiving the distribution.

(3) The authorization or payment thereof would be contrary to any restrictions contained in the articles of organization or a written operating agreement.

La. R.S. 12:1328, which outlines the liability of members and managers for distributions rendered unlawful by §1327, is comparable to the provisions of La. R.S. 12:92 and La. R.S. 12:93 of the LBCL; however, it is noteworthy that La. R.S. 12:92 and La. R.S. 12:93 speak in terms of **liability to creditors** of the corporation, while LA. R.S. 12:1328 speaks only in terms of **liability to the company**, in the LLC context. La. R.S. 12:1328 provides as follows:

A. Each member, if management is reserved to the members, or manager, if management is vested in one or more managers pursuant to R.S. 12:1312, who knowingly, or without the exercise of reasonable care and inquiry, votes for or assents to a distribution in violation of the articles of organization, an operating agreement, or R.S. 12:1327 shall be jointly and severally ***liable to the limited liability company*** for the amount of the distribution that exceeds the amount that could have been distributed

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<sup>16</sup> It is often overlooked by many practitioners that R.S. 12:§172C exposes officers, directors and agents of corporations to fines of up to five hundred dollars or imprisonment for up to six months, or both, for violation of the duty under R.S. 12:§103 to, among other things, "keep at its registered office...[r]ecords of the proceedings of the shareholders, of the directors, and of committees of the board."

without violating R.S. 12:1327, the articles of organization, or an operating agreement. Each member shall be liable to the limited liability company for the amount which the member received in violation of this Section. (*Emphasis added*).

B. Each member or manager liable under Subsection A of this Section for an unlawful distribution shall be entitled to a contribution from each other member or manager who could be held liable under such Subsection.

C. An action to enforce liability under this Section must be brought within two years from the date of which the effect of the distribution is measured under R.S. 12:1327, except that a member or manager held liable under Subsection A of this Section solely because of having voted for or assented to an unlawful distribution may bring an action to enforce his right of contribution under this Section within two years from the date of payment by the member or manager on account of such liability. These time limits shall not be subject to suspension on any ground, nor to interruption except by timely suit.

In contrast, La. R.S. 12:92 and La. R.S. 12:93 impose joint and several liability upon any director (§92) authorizing, and any shareholder (§93) receiving, an unlawful distribution from a corporation, which liability is “to the corporation, *or to creditors of the corporation*, or to both.” (*Emphasis added*)

As it is clear that the LLC Law represents a combination of provisions borrowed from both corporate law and partnership law, and in light of the fact that this provision is clearly one which was borrowed from the corporate law, the distinction made between La. R.S. 12:92 & La. R.S. 12:93, on the one hand, and La. R.S. 12:1328, on the other, was clearly not accidental. Therefore, quite clearly, creditors have the statutory right to sue directors and shareholders where unlawful distributions are made by a corporation to the prejudice of the rights of the creditor; but creditors do not have the right to sue the members and managers of an LLC under the same circumstances. Once again, when viewed in light of the other provisions of the LLC Law indicating an intent to make it more difficult to “pierce the veil” of limited liability, that would certainly seem to have been the intention of the legislation. If the courts interpret these provisions to preclude direct actions by the creditors against members and managers under La. R.S. 12:1328 it can be expected that LLCs may become more likely targets of the involuntary bankruptcy petition since such an interpretation would not preclude actions brought by a bankruptcy trustee on behalf of the LLC pursuant to 11 U.S.C. §§541, 544 and 704. One might also question the effect of La. R.S. 12:1320(A), La. R.S. 12:1320(B), La. R.S. 12:1327, and La. R.S. 12:1328 on the rights of creditors to bring a revocatory action under Civil Code Article 2036. While the revocatory action is generally considered to be Louisiana’s equivalent to the common law fraudulent conveyance action, it is noteworthy that while such unlawful distributions often do arise in cases of fraud on the rights of creditors, the revocatory action does not, per se, require a finding of fraud.<sup>17</sup> Therefore, it remains to be seen what the courts will do with these issues. Since La. R.S. 12:1320(A) tells us that liability of members in their capacity as such “shall at all times be determined solely and exclusively by the provisions of this Chapter,” and La. R.S. 12:1327 and La. R.S. 12:1328 specifically address the liability of members in the context of unlawful distributions to members relative to creditor’s rights, there is

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<sup>17</sup> *In re Goldberg*, 277 B.R. 251 (Bankr. M.D. La. 2002).

room to argue that the LLC statute eliminated the revocatory action as to LLCs except for those where fraud can be found. It is also noteworthy that there are added advantages to creditors who can bring actions under La. R.S. 12:92 and La. R.S. 12:93 in that the creditor can sue any director that authorized the improper distribution, in addition to the person who received the benefit of it (which cannot be done under the revocatory action unless this is the same person who received the unlawful distribution), and there is a two year prescriptive/peremptive period which applies to the action under La. R.S. 12:92 and La. R.S. 12:93 instead of the one year prescription/three year peremptive period applicable to the revocatory action.

Professors Morris and Holmes, in their Louisiana Civil Law Treatise on Business Organizations support the notion that there are clear indications of legislative intent to make it more difficult to pierce the limited liability veil of an LLC than it is to pierce the corporate veil. They comment that:

The limited liability provisions of the LLC statute are written more aggressively than those of either the corporation statute or the partnership in commendam chapter of the Civil Code. Those laws say simply that the covered owners – shareholders or partners in commendam – bear no liability for the debts of the business entity, except for their obligation to pay what they agreed to pay for their ownership interests. They say nothing about the exclusivity of their respective “no liability” rules, nor anything about the liability of officers, employees or agents of corporations and partnerships. Issues of that sort have been left to the jurisprudence or to other bodies of law, where the law has recognized several liability-imposing exceptions, both for owners and non-owners, to its general rule of nonliability.<sup>18</sup>

They comment further that: [t]he limited liability provision of the LLC statute seems designed to provide a rule against personal liability for LLC participants that is more bulletproof than that traditionally applied under corporation law.”<sup>19</sup>

Recent judicial decisions evidence an awakening in the courts to this significant distinction in the LLC laws. In *Matherne, et al v. Barnum*, 2011-0827 (La. App. 1 Cir. 3/19/12), 94 So.3d 782, the Mathernes contracted with defendants, Mayhew Barnum (“Barnum”) and his construction company, Barnum Construction, L.L.C. (Barnum L.L.C.), for the design and construction of a bulkhead, boat slip with lift, and deck with walkways at their waterfront property (hereafter sometimes referred to as “the work”). After the work was completed in July 2006, the Mathernes built their dream house on the river, with a walkway connecting the house to the work. The Mathernes sued Barnum and Barnum LLC for damages for breach of contract, alleging that Barnum did not design or build the work in a good and workmanlike manner, free from defects in materials and workmanship.

After a bench trial the trial court found that an oral construction contract existed between the Mathernes and Barnum on behalf of Barnum L.L.C.; but pierced the limited liability veil of Barnum L.L.C., and rendered judgment holding Barnum personally liable for the damages caused by his faulty

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<sup>18</sup> See Morris & Holmes on Business Organizations, Louisiana Civil Law Treatise, West Group, 1999, Vol. 8, §44.06 @ p. 493

<sup>19</sup> *Id.* @ p. 494.

workmanship. The trial court additionally found that Barnum L.L.C. was “merely a sham entity” at the time that the construction contract was entered into and throughout the time when the work occurred and afterward. Thereafter, the trial court determined that Barnum had not performed the construction contract in a workmanlike manner and that he had breached the contract.

Barnum argued on appeal that the trial court erred in finding that he was personally liable, since the construction contract at issue was between the Mathernes and Barnum L.L.C., not Barnum personally. Essentially, Barnum maintained that the Mathernes' claim against him was based solely on his status as the sole member of Barnum L.L.C. and, as such, he was insulated from personal liability for any debt or obligation of his company.

The court of appeal held that “without a doubt, statutory law found in La. R.S. 12:1320(B) insulates a member of a limited liability company from personal liability for a debt or obligation of the limited liability company; however, Subsection D of this same statute clearly provides a cause of action against a member of a limited liability company because of any breach of professional duty, as well as for any fraud or other negligent or wrongful act by such person.”<sup>20</sup>

The court looked to the basic law in regard to a contractor's liability for failure to properly perform a construction contract in La. C.C. art. 2769:

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

The court then concluded:

We find that the record more than adequately demonstrates that Barnum was engaged in the construction profession when he designed and constructed the work for the Mathernes. He was not acting solely in his capacity as a member of the limited liability company. Thus, pursuant to La. R.S. 12:1320(D), Barnum was subject to personal liability arising from his own negligence in performing the construction. . . . See *Regions Bank*, 997 So.2d at 740–41.

A case arising in a similar context, *Ogea v. Merritt*, 2012-1028 (La. App. 3 Cir. 2/6/13) 109 So.3d 516, represents perhaps the first reported Louisiana case to truly recognize and declare that the LLC statute makes clear that the legislature intended to make it more difficult to hold members and managers of LLCs liable for the debts of the LLC than is the case with shareholders under the corporate law. In *Ogea*, the plaintiff sued an LLC and its sole member under the New Home Warranty Act based on the faulty construction of a home built by the LLC. The member argued that the contract for the construction of the home was with the LLC and that general corporate law provided no basis for him, as a member of the LLC, to be personally liable for the debts of the LLC. The plaintiff alleged that the member was personally liable for the construction defects in her home because he personally performed

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<sup>20</sup> Citing *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 43,604 (La. App.2d Cir.11/5/08), 997 So.2d 734, 740, writ denied. 2009–0016 (La. 3/13/09), 5 So.3d 119, the court noted that La. R.S. 12:1320 was not intended to shield professionals from liability for personal negligence.

and supervised the construction work. The court of appeals reviewed the provisions of the Louisiana LLC statute providing for limited liability of members and managers and stressed that an LLC is an unincorporated association rather than a corporation. The LLC statute provides that LLC members are liable for their own negligent or wrongful acts and "further specifically limits the parameters for deciding liability of an LLC member to the LLC law itself, thereby precluding consideration of other laws that may be similar in some way." (*Emphasis added*). Thus, the court concluded "that the legislature intended for the personal liability of LLC members of LLCs to be different from the personal liability of corporate shareholders." [*Emphasis added*]. In the appeal court's view, the LLC statute limits an LLC member's personal liability for the debts, obligations, or liabilities of the LLC unless the debt, obligation, or liability at issue results from the member's personal actions as specified in the statute. The member attempted to distinguish other LLC cases relied upon by the court on the basis that the member here was not a professional, but the court stated that the statute specifically references "any breach of a professional duty" and "any...other negligent or wrongful act" of a member and makes no distinction between professional and non-professional members. In support of their argument, the defendants directed the court of appeal to *Curole v. Ochsner Clinic, L.L.C.*, 01-1734, pp. 7-8 ( La. App. 4 Cir. 2/20/02), 811 So.2d 92, 97, where the court concluded that "[t]o have meaning within the entire statute, the phrase 'or other negligent or wrongful act by such person' must refer to acts done outside one's capacity as a member, manager, employee, or agent of the limited liability company." The defendants urged that Mr. Merritt's alleged acts of negligence were not within the scope of subsection (D) because all the work he performed was to fulfill Merritt LLC's contractual obligations to Ms. Ogea. They concluded that because any negligence or wrongful acts by him were not "outside" his capacity as a member of Merritt LLC, he could not be held personally liable for those acts. Because the plaintiff alleged that the member engaged in negligent acts with regard to the construction of her home, the court of appeal concluded that the plaintiff stated a cause of action against the member.

The 3<sup>rd</sup> Circuit in *Ogea* then focused upon the provisions of the LLC statute indicating special rules applicable to LLCs that are not applicable to corporations, including (i) the definition provisions of La. R.S. 12:1301(10) [defining LLC as an unincorporated association, not as a corporation, & providing "[n]o limited liability company organized under this Chapter shall be deemed, described as, or referred to as an incorporated entity [or] corporation"]; (ii) La. R.S. 12:1320 [the liability of LLC members is governed "solely and exclusively by the provisions of this Chapter"]; (iii) La. R.S. 12:1320(B) [no member of an LLC is liable for the debt of the LLC, "[e]xcept as otherwise specifically set forth in this Chapter"]; and (iv) La. R.S. 12:1320(D) ["Nothing in the [LLC law] shall be construed as being in derogation of any rights which any person may have against" an LLC member for "fraud ... [or] any breach of professional duty or other negligent or wrongful act by such person"].

The 3<sup>rd</sup> Circuit then held:

The LLC law defines an LLC as an unincorporated association, not as a corporation, and specifically provides that LLC members are liable for their own negligent or wrongful acts. It further specifically limits the parameters for deciding the liability of an LLC member to the LLC law itself, thereby precluding consideration of other laws that may be similar in some way. We conclude, therefore, that the legislature intended for the personal liability of LLC members of LLCs to be different from the personal liability of corporate shareholders. In our view, the legislature limits the personal liability of an LLC member for the debts, obligations, or liabilities of the LLC unless the debt, obligation, or liability at issue is

the result of the member's own personal actions as specified in La. R.S. 12:1320(D). See *Matherne v. Barnum*, 11–827 ( La. App. 1 Cir. 3/19/12), 94 So.3d 782, writ denied, 12–865 ( La. 6/1/12), 90 So.3d 442; *W.J. Spano Co., Inc. v. Mitchell*, 05–2115 ( La. App. 1 Cir. 9/15/06), 943 So.2d 1131; *Regions Bank v. Ark–La–Tex Water Gardens, L.L.C.*, 43,604 ( La. App. 2 Cir. 11/5/08), 997 So.2d 734, writ denied, 09–16 ( La. 3/13/09), 5 So.3d 119. (*Emphasis added*).

The court noted further:

[t]o encourage commerce, the legislature has limited personal liability for some debts incurred or acts performed on behalf of business entities. However, La. R.S. 12:1320 was not intended to shield professionals from liability for personal negligence. *Regions Bank*, 997 So.2d at 740.

The defendants in *Ogea* argued that Mr. Merritt should be treated differently from the defendant members in *Matherne*, *Spano*, and *Regions Bank* because he is not a professional. The court of appeal rejected this argument based on its reading of §1320 D which specifically references “any breach of professional duty” and “any ... other negligent or wrongful act” by a member; and §1320D makes no distinction between professional members and non-professional members. Inasmuch as the member did not assign error to the trial court's factual finding that he was negligent in the work he performed, the court of appeals found no error in the trial court's assessment of personal liability against the member. Further, the member did not assign error to the trial court's finding that he committed fraud when he represented to the plaintiff that the LLC had insurance; therefore, fraud was another basis for the member's personal liability. The member argued that the trial court erred in finding that he personally was a “builder” under the New Home Warranty Action (NHWA), but the court stated that it need not address this argument because the member's personal liability arose from personal negligence as a member of the LLC, rendering the question of whether the member met the definition of a builder under the NHWA irrelevant.

In an opinion issued on December 10, 2013, the Louisiana Supreme Court overturned the 3<sup>rd</sup> Circuit Court of Appeal’s decision in *Ogea*, citing the appellate court’s interpretation of La. R.S. 12:1320.<sup>21</sup> The main issue before the Supreme Court was whether or not Mr. Merritt could be held personally liable. The Court started its analysis by recognizing the general rule contained in La. R.S. 12:1320(B) which states that “no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.” To find Mr. Merritt liable personally would require Ms. Ogea to prove that an exception to the general rule in La. R.S. 12:1320(B) applied. The three issues before the Court that might allow for Mr. Merritt to be personally liable were whether Mr. Merritt’s failure to deliver proof of insurance to Ms. Ogea’s counsel until the day of trial constituted fraud, whether Mr. Merritt, a contractor, had a professional duty to Ms. Ogea that was breached by him, and whether Ms. Ogea had a claim against Mr. Merritt for a “negligent or wrongful act.” In interpreting the exceptions, the Supreme Court said:

[A] determination of the meaning of the exceptions embodied in La. R.S. 12:1320(D) has two components. As a first component, we must determine whether Ms.

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<sup>21</sup> *Ogea v. Merritt*, 2013-1085 (La. 12/10/13), 130 So.3d 888.



Ogea is a person who “by law” has a cause of action against Mr. Merritt individually. *See* La. R.S. 12:1320(D). Understood in its ordinary sense, the phrase “by law” indicates that we may look outside La. R.S. 12:1320 for the origin of a cause of action and for the corresponding burden of proof. *See* La. R.S. 1:3. However, as a second and integral component, Ms. Ogea can recover against Mr. Merritt personally only if her cause of action arises from “any fraud practiced upon [her]” or “any breach of professional duty or other negligent or wrongful act.” *See* La. R.S. 12:1320(D). In sum, and as will be seen in the more detailed factors necessary to apply each exception to the record before us, the exceptions to limited liability within La. R.S. 12:1320(D) are confined to certain circumscribed subjects of the law, such as fraud, but the definitions for those subjects are not contained within that statute itself.<sup>22</sup>

On the first issue, whether Mr. Merritt’s failure to deliver proof of insurance to Ms. Ogea’s counsel until the day of trial constituted fraud, the Court found that there is “nothing in the record to support the conclusion that Mr. Merritt’s failure to provide proof of insurance to counsel until the day of trial resulted in ‘an unjust advantage’ for Mr. Merritt or ‘a loss or inconvenience’ to Ms. Ogea.”<sup>23</sup> In reaching this conclusion, the Court turned to the definition of fraud in the Civil Code since La. R.S. 12:1320 did not define fraud. The Court found that since Ms. Ogea never introduced the insurance policy into evidence there was no proof that the policy would have covered defects in workmanship; therefore, this issue was dismissed by the Supreme Court on the basis that Ms. Ogea failed to carry her burden of proof.

On the Second issue, whether Mr. Merritt, a contractor, had a professional duty to Ms. Ogea that he breached, the Court determined that because the phrase “any breach of professional duty” is not defined within the LLC statutes, a court must look elsewhere for its meaning. The Court found that “[w]hen the LLC statutes were enacted, ‘professional’ had a clearly defined technical meaning within the law of business entities;” *citing* JAMES S. HOLLIDAY, JR. & H. BRUCE SHEVES, LOUISIANA PRACTICE SERIES: LOUISIANA CONSTRUCTION LAW §1:9 pp. 10-11 (2013) for the proposition that:

Since 1964, professional law corporations have been possible in Louisiana. In 1968, with recodification of Louisiana’s corporate laws, professional medical corporations were also permitted. Since then, Louisiana has enacted statutory provisions for professional corporations for the dental, accounting, chiropractic, nursing, architectural, optometry, psychology, veterinary medicine and architectural-engineering professions. (Footnotes omitted).<sup>24</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Although not mentioned by the Supreme Court in its opinion, it is worthy of noting that each of the separate chapters of Title 12 containing statutory provisions for each of the respective professional corporations authorized under the law contain the following provision under the title: “Liability of incorporators, subscribers, shareholders, directors, officers and agents:”

Nothing in this Chapter shall be construed as in derogation of any rights which any person may by law have against an incorporator, subscriber, shareholder, director, officer or agent of the corporation, because of any fraud practiced upon him, or because of any breach of professional duty or other negligent or wrongful act,

Finding no evidence that Mr. Merritt was a member of one of these legislatively recognized professions, the Court turned to the record to determine whether he was licensed under the contractor's licensing statutes. Finding that the record revealed that the LLC was a licensed contractor and that there was no evidence Mr. Merritt was so licensed, the Court found that it could not reach the issue of whether such licensing might elevate an individual to the status of a "professional" as contemplated by the legislature. The Court noted that "[w]e do not suggest that mere licensure results in one being considered a professional; but it may be one factor to consider." As such, the Court held Ms. Ogea failed to carry her burden of proving that Mr. Merritt was liable to her for a breach of professional duty.

On the third and final issue, whether Ms. Ogea had a claim against Mr. Merritt for a "negligent or wrongful act," the Court found Mr. Merritt was not liable to Ms. Ogea for any negligent or wrongful acts. In reaching this determination the court turned to other areas of Louisiana law to find the meaning of "negligent" and "wrongful acts." In doing so, the Court established a four factor test to assist judges and practitioners in determining whether or not a party's acts were "negligent or wrongful" so as to remove the protective shield that an LLC offers. The Court stated that the four factors are:

- 1) whether a member's conduct could be fairly characterized as a traditionally recognized tort;
- 2) whether a member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable;
- 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC; and
- 4) whether the conduct at issue was done outside the member's capacity as a member.<sup>25</sup>

The Court then proceeded to analyze these factors.

The first factor, "The Tort Factor," favors a finding of personal liability if the claimant can prove that the respondent committed a tort against the claimant. However, this is with limitation. The Court framed the issue here as "whether a member of an LLC can be held personally liable for conduct undertaken in furtherance of the LLC's contract."<sup>26</sup> As the Court noted, "when applying the tort factor to the facts of record, the member's tort duty embodied in La. R.S. 12:1320(D) must be something more than the duty inherent in the LLC's contract not to engage in poor workmanship; otherwise, the general rule of limited liability in La. R.S. 12:1320(B) would be negated in any case where an LLC had a contractual duty to the claimant not to engage in poor workmanship."<sup>27</sup> The Court found that "a showing of poor workmanship arising out of a contract entered into by the LLC, in and of itself, does

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by such person, or in derogation of any right which the corporation may have against any of such persons because of any fraud practiced upon it by him.

This language is identical in all respects with §1320D, with the exception of the substitution of LLC terminology, such as "members" and "managers" in lieu of "officers" and "shareholders."

<sup>25</sup> *Ogea v. Merritt*, 2013-1085 (La. 12/10/13).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

not establish a ‘negligent or wrongful act’ under La. R.S. 12:1320(D).”<sup>28</sup> The Court found that Ms. Ogea only showed at trial that his conduct, while poorly performed, was undertaken in furtherance of the legitimate goals of the contract with the LLC. Accordingly, this factor favored the upholding of the protections of the LLC.

The second factor, “The Criminal Conduct Factor,” favors a finding of personal liability if the claimant can prove that the conduct at issue constitutes a crime. The defendant need not actually be “convicted of the crime to establish the factor of criminal conduct as a ‘negligent or wrongful act.’”<sup>29</sup> The exception in La. R.S. 12:1320(D) only requires “that the claimant demonstrates by a preponderance of the evidence the existence of ‘any *rights* which [the claimant] *may* by law have against a member.’”<sup>30</sup> Where a civil claimant can show that a “member’s criminal conduct has established a right of recovery in favor of the claimant, that situation weighs in favor of holding the member personally liable for the conduct.”<sup>31</sup> The Court found nothing in the record to suggest any criminal conduct on the part of Mr. Merritt. Accordingly, this factor favored the upholding of the protections of the LLC. The Court has noted that engaging in the business of contracting without license is a crime and commented that “if a member of an LLC personally acts in the capacity as a contractor without proper licensing authority accorded to himself or the LLC, that situation would weigh in favor of holding the member personally liable”<sup>32</sup>

The third factor, “The Contract Factor,” favors a finding of no personal liability if the claimant can prove that “the member’s conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC.”<sup>33</sup> The Court reasoned that since “an obligee is a ‘person’ (La. C.C. art. 1756) and an LLC is a ‘juridical person,’ ( La. C.C. art. 24, *supra*), it follows that if the reason a member is engaged in the conduct at issue is to satisfy a contractual obligation of the LLC, then the member should be more likely to qualify for the protections of the general rule of limited liability in La. R.S. 12:1320(B).” The Court found that “Mr. Merritt’s actions in preparing the ‘pad’ and supervising the concrete subcontractor were in furtherance of a contract binding on the LLC.” Accordingly, this favors upholding the protections of the LLC.

The fourth and final factor, “The Factor of Acting Inside or Outside of the LLC,” favors a finding of personal liability if the claimant can prove there was a duty owed by the respondent, outside of his capacity as a member, that was breached. The Court cited *Petch v. Humble*, 41,301 (La. App. 2 Cir. 8/23/06), 939 So.2d 499, 504:, with approval for the proposition “that the phrase ‘or other negligent or wrongful act by such person’ must refer to acts that are either done outside one’s capacity as a member, manager, employee, or agent of a limited liability company or which while done in one’s capacity as a member, manager, employee, or agent of a limited liability company also violate some

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

*personal duty* owed by the individual to the injured party.”<sup>34</sup> The Court found “no record evidence to suggest Mr. Merritt acted outside the structure of the LLC.”<sup>35</sup> Accordingly, this factor favored the upholding of the protections of the LLC. Thus, the Court reversed the court of appeals decision and concluded that Mr. Merritt was not personally liable to Ms. Ogea.

Cases decided since the Supreme Court’s decision in Ogea:

In *Nunez v. Pinnacle Homes, L.L.C.*, 13–1302 (3 Cir. 04/02/14) 135 So.3d 1283, a homeowner brought suit against an LLC construction company and its owner for breach of warranties and contract, alleging that company failed to build homeowner’s new house at elevation required by law. The trial court, in a decision rendered prior to the holding in *Ogea*, found that the defendant, Allen Lenard, committed professional negligence by not properly calculating and/or supervising the amount of dirt that would be required to bring the property to proper grade/elevation, and by failing to have an elevation shot performed after the dirt work was completed and prior to beginning construction on plaintiff’s home. The trial court held that as the licensed contractor on the job, it was Mr. Lenard’s responsibility to ensure that these things were done and done correctly. Therefore, the court found Mr. Lenard personally liable to the plaintiff, citing [LSA R.S. 12:1320\(D\)](#); and [Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.](#), 997 So.2d 734, (La.App. 2 Cir. 11/5/08), *writ denied*, [5 So.3d 119 \(La.3/13/2009\)](#). The Court of Appeal held that:

Defendant asserts that the finding of personal liability was incorrectly founded on the fact that Lenard holds a contractor’s license rather than on any affirmative action or failure to act by Lenard. The trial court, however, found personal involvement and inaction by Lenard which it found constituted a “breach of professional duty or other negligent or wrongful act.” *Id.* This factual finding is based on Lenard’s own testimony, and we will not overturn it absent manifest error. Finding none, we find no error in the trial court’s conclusion that Plaintiff carried her burden of proof in this regard.

Judge Amy, of the 3<sup>rd</sup> Circuit, dissented from the holding relying upon the Supreme Court’s *Ogea* decision. The dissenting opinion read as follows:

Under the facts of this case, I do not see that Mr. Lenard, who testified that he is a licensed contractor, may be considered a “professional” within the context of the statute. Rather, I view the breach of professional duty exception as one that must arise within the context of those professions whose members owe separate, non-contractual duties to their clients. Otherwise, \*1290 it seems to me that any member/manager/employee of an LLC working within that LLC’s business could be held personally liable upon a finding that he or she was “professionally negligent” as was determined in this case. It is my view that such a broad reaching

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

application would circumvent, and render meaningless, the limitation of liability otherwise provided by [La.R.S. 12:1320\(B\)](#).

Recently, in *Ogea v. Merritt*, 13–1085 (La.12/10/13), 130 So.3d 888, 900, the supreme court specifically refrained from reaching the question of whether a general contracting license “elevates an individual to the status of a ‘professional’ as contemplated by the legislature[.]” It noted, however, that at the time the LLC statutes were enacted, the term “professional” had a defined meaning within the body of business law and that statutory provisions existed for the creation of a variety of professional corporations. *Id.* Those professional corporations are designated within Revised Statutes Title 12 and include professional corporate entities for law, medical, dental, accounting, chiropractic, nursing, architecture, optometry, psychology, veterinary medicine, occupational therapy, and social work. Contracting is not included among those professional corporations listed in Title 12. Additionally, and again within the context of the limited liability law, the supreme court observed that the definition of “business” makes a distinction between a “trade” and a “profession.” *Id.* at 899. *See also* [\(A\)\(2\)](#). *See also* [La.R.S. 37:2150](#) (which references the “contracting vocation ”)(emphasis added). Given the lack of indicia that contractors owe separate, non-contractual duties to their clients as members of traditionally accepted professions may, I do not find that the plaintiff has demonstrated that the “breach of professional duty” exception applies to Mr. Lenard in his personal capacity.

Alternatively, [La.R.S. 12:1320\(D\)](#) provides for a cause of action against an LLC member for “other negligent or wrongful act by such person[.]” In analyzing this exception, the supreme court identified four factors to be considered in balancing the limitation of liability provided by the statute while also affording the terms “negligent” and “wrongful” acts their commonly understood meaning:

- 1) whether a member's conduct could be fairly characterized as a traditionally recognized tort;
- 2) whether a member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable;
- 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC; and
- 4) whether the conduct at issue was done outside the member's capacity as a member.

*Ogea*, 130 So.3d at 901. It is the last two factors that I find determinative of this case.

Certainly, in my opinion, the complained-of conduct here (the supervision of his own employees or of subcontractors in the elevation aspect of the

construction) was required by or in furtherance of the contract between the plaintiff and the LLC. On this point, the supreme court remarked that, since an LLC is a juridical person, “it follows that if the reason a member is engaged in the conduct at issue is to satisfy a contractual obligation of the LLC, then the member should be more likely to qualify for the protections of the \*1291 general rule of limited liability[.]” *Ogea* at 904. In this case, the contract at issue was, in fact, entered into between the plaintiff and the LLC. Further, it is clear from the testimony that the elevation/foundation work was tasked to that company. Thus, in my opinion, Mr. Lenard's role in the supervision of his own employees and/or subcontractors in that aspect of the home construction was in furtherance of that contract.

As for the final element of whether Mr. Lenard's conduct arose inside or outside of the LLC, it seems to me that, while perhaps ultimately negligent, that conduct was again within the context of the LLC's business. There is no indication that Mr. Lenard was acting in his own personal capacity. Although the plaintiff testified that the signature on the underlying contract was that of Mr. Lenard, the contract lists the parties as the plaintiff and the contracting company. It did not list Mr. Lenard personally as the contractor.

Notably, the trial court rendered judgment in this case prior to the supreme court's release of *Ogea*. However, the reasons for ruling in this case essentially reveal a finding of poor workmanship for which Mr. Lenard, as contractor, was responsible. Yet, *Ogea*, 130 So.3d at 905, explains that “a showing of poor workmanship arising out of a contract entered into by the LLC, in and of itself, does not establish a ‘negligent or wrongful act’ under [La.R.S. 12:1320\(D\)](#). To hold that poor workmanship alone sufficed to establish personal liability would allow the exception in [La.R.S. 12:1320\(D\)](#) to negate the general rule of limited liability in [La.R.S. 12:1320\(B\)](#).”

In *Hector v. Mo-Dad Environmental Serv., LLC*, 13–1184 (La.App. 3 Cir. 3/5/14) 134 So.3d 133, the 3<sup>rd</sup> Circuit affirmed a trial court judgment holding members of an LLC personally liable by looking to the traditional veil piercing concepts such as the *Riggins* factors. Mo-Dad had been hit with a judgment for workmen’s compensation benefits but carried no workmen’s compensation coverage. The plaintiff therefore sued the members of the company individually when the judgment was not satisfied. On the impact of *Ogea* in this arena, the 3<sup>rd</sup> Circuit had this to say:

The supreme court recently explored the concept of piercing the company veil of a limited liability company and observed that a limited liability company and its members are wholly separate persons. *Ogea v. Merritt*, 13–1085 (La.12/10/13), 130 So.3d 888. The supreme court, citing

*Charming Charlie, Inc. v. Perkins Rowe Associates, L.L.C.*, 11–2254 (La.App. 1 Cir. 7/10/12), 97 So.3d 595, recognized that piercing the company veil results in personal liability of the owner of the LLC, explaining that:

**\*\*6** in narrowly defined circumstances, when individual member(s) of a juridical entity such as an LLC mismanage the entity or otherwise thwart the public policies justifying treating the entity as a separate juridical person, the individual member(s) have been subjected to personal liability for obligations for which the LLC would otherwise be solely liable. When individual member(s) are held liable under such circumstances, it is said that the court is “piercing the corporate veil.”

*Id.* at 895.

However, the supreme court did not further address the piercing the corporate veil doctrine, because it was neither relied upon by the lower courts nor invoked by the plaintiff.

The court then proceeded to review the traditional veil piercing concepts of the alter ego theory citing extensively from *Charming Charlie, Inc. v. Perkins Rowe Associates, L.L.C.*, 11–2254 (La.App. 1 Cir. 7/10/12), 97 So.3d 595, and *Riggins v. Dixie Shoring Co., INC.*, 590 So.2d at 1164, *Imperial Trading, Inc. v. Uter*, 837 So.2d at 669-670, and *Dishon v. Ponthie*, 05-659 (La.App. 3 Cir. 12/30/05, 918 So.2d 1132, writ denied, 06-599 (La. 5/5/06), 927 So.2d 317. The court also cited *ORX Resources, Inc. v. MBW Exploration, L.L.C.*, for the proposition that Louisiana Revised Statutes 12:1320(D) provides for piercing the company veil and imposes liability on a member as justification to prevent the use of a limited liability company in defrauding creditors. *ORX Resources, Inc. v. MBW Exploration, L.L.C.*, 09–662 (La.App. 4 Cir. 2/10/10), 32 So.3d 931, writ denied, 10–530 (La.5/7/10), 34 So.3d 862. However, there is no specific discussion of whether the court of appeal determined that fraud had or had not been proven. The court reviewed the facts which, in this writer’s words, indicated that the individual members were fast and footloose with the use of multiple companies in their businesses with funds transferred and advanced between and among them. Some of the companies had workmen’s compensation coverage and one of the principals testified he thought the company which the plaintiff had worked for had coverage; but as it turned out it did not. The court of appeal affirmed the trial court’s decision holding the members personally liable, concluding:

Clearly, these businesses were not operated as separate entities from either each other or their members. There was extensive commingling of funds between the entities and members. Furthermore, Bill was completely funding the operations of Global personally. He admitted that he never received any distributions or profits from Global. It appears that these companies were set up to avoid liability, but no efforts were made to treat these companies as separate entities. The avoidance of their responsibility to Sherman is not what the law intended, especially in a case like this where the manner in which business was conducted between the different entities and the members fostered a situation in which workers’ compensation insurance was not purchased for Global.

It would appear that although in *Ogea*, the Supreme Court provided the proper statutory analysis, at least the 3<sup>rd</sup> Circuit Court of Appeal does not take *Ogea* to affect a court's right to resort to the traditional alter ego theory to find a member personally liable for the LLC's debt. As noted above, the 3<sup>rd</sup> Circuit commented in the *Mo-Dad* case that "the supreme court did not further address the piercing the corporate veil doctrine, because it was neither relied upon by the lower courts nor invoked by the plaintiff." In this writer's view, it appears the 3<sup>rd</sup> Circuit misses the Supreme Court's point entirely, which is believed to be that these cases must be decided by reference to the LLC statute. To do otherwise is to ignore the provisions of La. R.S. 12:1320(A) that "[t]he liability of members, managers, employees, or agents, as such, of a limited liability company...shall at all times be determined solely and exclusively by the provisions of this Chapter." [*Emphasis added*]; and La. R.S. 12:1320(B) which provides: [e]xcept as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company."