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PIERCING THE VEIL OF A TEXAS LIMITED LIABILITY COMPANY: HOW LIMITED IS MEMBER LIABILITY?

Natalie Smeltzer*

I. INTRODUCTION

In the world of business entities, the limited liability company ("LLC") is emerging as a popular choice, combining the attractive tax advantages of a partnership with the limited liability protection of a corporation for all of its members. Texas enacted the Texas Limited Liability Company Act ("TLLCA") in 1991.1 The TLLCA provides that "a member or manager is not liable for the debts, obligations or liabilities of a limited liability company."2 Further, the statute says that "[a] member of an [LLC] is not a proper party to proceedings by or against a[n] [LLC], except where the object is to enforce a member's right against or liability to the [LLC]."3

The theory of piercing the corporate veil ("PCV") is well-developed by both the courts and statutes in Texas. Article 2.21 of the Texas Business Corporation Act ("TBCA") specifically addresses corporate veil piercing.4 However, the concept of piercing the veil in other forms of Texas business entities, such as the LLC, is not as well developed. The TLLCA does not speak to whether or under what circumstances one may pierce the LLC veil, as does the TBCA in Article 2.21.

Although the TLLCA does not address veil piercing, courts in Texas have been presented with the issue of piercing the veil of the LLC and

* J.D. Candidate 2009, SMU Dedman School of Law; B.B.A. in Accounting, summa cum laude, Harding University; Certified Public Accountant, State of Texas. This article was written as of February 2008. I would like to thank my family for their love and support. I would also like to give a special thanks to Katrina Smeltzer and Kayla Haynie for their writing guidance over the years.

1. Tex. Rev. Civ. Stat. Ann. art. 1528n (Vernon Supp. 2008); Tex. Bus. Orgs. Code Ann., tit. 3, § 101 (Vernon Supp. 2008). Effective January 1, 2006, all LLCs formed in Texas will be governed by the Texas Business Organizations Code ("TBOC") Chapter 101. Unless electing otherwise, existing LLCs will governed by the TLLCA until January 1, 2010, when all LLCs in Texas will be subject to the TBOC. Throughout this paper, references will be made to the TLLCA. Unless otherwise noted, the portions of the TLLCA cited to are substantially the same as those under TBOC Chapter 101.


holding a member or members personally liable for an LLC's liability. In response, some Texas courts have applied corporate veil piercing principles to the LLC.\(^5\) The uncertainty and novelty in application of the theory to the LLC in Texas presents several issues. First, should the LLC be treated differently than the corporation in regards to veil piercing? Additionally, should Texas courts look to how other jurisdictions have handled the LLC piercing issue? Finally, is one better off using the corporate form rather than the LLC in regards to susceptibility to veil piercing?

Because the TLLCA includes no provisions addressing veil piercing, one may be subject to pre-Article 2.21 laws in Texas when using the LLC form. However, a corporation has the protection of Article 2.21 in veil-piercing cases. In conclusion, one may be better off using the corporate form over the LLC when considering potential liability of a member with respect to an LLC. Section I sets forth a background of the LLC entity and the Texas corporate veil piercing doctrine. First, it provides a brief summary of the LLC business form and the unique and attractive attributes that it provides. Next, it discusses the evolution of Texas statutory and common law in regards to piercing the corporate veil. Section II presents a discussion of the state of the statutory and common law of veil piercing in regards to the LLC. It begins with a discussion of statutory law in various jurisdictions, and then the common law in Texas and other jurisdictions are presented through an examination of several cases addressing LLC veil piercing. Finally, this comment concludes with an analysis of Texas LLC veil piercing. The analysis first addresses how the law in Texas should develop in regards to piercing the LLC veil, and then it considers whether the LLC or the corporate form offers greater protection against veil piercing.

A. BUSINESS FORM CHOICE: THE LLC

A brief outline of the LLC as a business form is a useful starting point. In 1977, Wyoming was the first state to enact an LLC statute. By 1995, all states had enacted LLC statutes;\(^6\) although there are some material differences and many technical variations among the statutes, there is a trend toward uniformity.\(^7\) The general nature of the LLC can be described in four characteristics: "(i) limited liability; (ii) partnership tax features; (iii) chameleon management—that is, the ability to choose between centralized and direct member-management; and (iv) creditor-protection provisions."\(^8\)


6. For a further discussion on the innovation of the LLC and initial efforts to develop state legislation, see ROBERT W. HAMILTON & JONATHON R. MACEY, CASES AND MATERIALS ON CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 163 (Jesse H. Choper et al. eds., 9th ed. 2005).

7. Id.

8. HAMILTON & MACEY, supra note 6, at 166 (quoting Larry E. Ribstein, The Emergence of the Limited Liability Company, 51 Bus. Law. 1, 2-3, 6-10 (1995)).
A key purpose of choosing this business form is to capitalize on the investor protection of limited liability and the partnership tax status that avoids double taxation. In contrast to a limited partnership, no one is personally liable by default, like a general partner, for the liabilities of the LLC. Certain entities, including Texas LLCs, can choose to be taxed as partnerships under the “Check the Box” regulations if they have more than one member. Further, if it is a single member LLC, it can choose to be taxed as an individual while still maintaining the advantage of limited liability.

The owners of an LLC are referred to as “members,” and there are no restrictions on the number or type of members an LLC may have. Single member LLCs are permissible; however, as previously noted, they will not qualify for partnership tax treatment. The Texas statute is consistent in that there are generally no restrictions on who can be a member. Under the new TBOC, every member and manager has equal voting rights, unless the company agreement states differently.

Flexibility of management structure is a significant advantage to the LLC business form. An LLC can choose to be managed by its members, managers, or both. This is an advantage over a limited partnership, in which limited partners cannot participate in management without jeopardizing their liability shield. Further, because there is not a general partner with personal liability to manage, members may wish to manage. As the TBOC provides, management can be structured within these parameters, as desired, under the company agreement. Another example of the flexibility of management is seen in the powers of management. The TBOC designates all officers and managers of an LLC as agents with the authority to act on behalf of the company if the action is for the company’s business purpose. These powers are much broader and more flexible than those of a corporate director, who must normally act in agreement with the majority vote. Therefore, the LLC is more akin to a partnership, in which partners usually have unilateral power to bind the partnership.

9. Id. at 165. As a result of the new “check the box” tax rules enacted in 1997, LLCs can decide whether to be taxed as a corporation or a partnership. Id.
11. Id. at 2-3, 9
12. Id.
13. Id. at 3.
14. Id.
19. Id.
21. See id. § 101.254.
22. Id.
23. Mendell, supra note 10, at 5.
24. Id.
Finally, limited liability is a paramount advantage of the LLC. This is one of the key advantages over a limited partnership, where only the limited partners—if they do not lose their liability shield by participating in management—have limited liability. The Texas statute provides that, unless the company agreement states otherwise, "a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including . . . under a judgment, decree, or order of a court."25 In addition, the statute says that "a member of a[n LLC] is not a proper party to proceedings by or against a[n LLC], except where the object is to enforce a member's right against or liability to the [LLC]."26

B. DEVELOPMENT OF CORPORATE VEIL PIERCING THEORY IN TEXAS

A brief survey of the development, over the past several decades, of the PCV legal theory is a logical place to begin. The alter ego theory is one of the most traditional bases for disregarding the corporate entity. This theory applies "when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice."27 It is established "from the total dealings of the corporation and the individual, including the degree to which . . . corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes."28 Thus, the total dealings between the corporation and shareholder are pertinent in establishing alter ego.29

In 1986, the Texas Supreme Court took an extraordinary turn in the veil piercing doctrine in Castleberry v. Branscum by rewriting the doctrine in an unjustifiably broad manner.30 The court noted that the alter ego theory was only one way to pierce the corporate veil.31 In addition, the court recognized that "a sham to perpetrate fraud" was another, separate basis for piercing the veil.32 Further, either actual or constructive fraud would be sufficient.33 The court distinguished the two types of fraud: "[a]ctual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent.

26. Art. 1528n, § 4.03C; see also TEX. BUS. ORGS. CODE ANN. § 101.113 (Vernon Supp. 2008).
27. First Nat'l Bank v. Gamble, 132 S.W.2d 100, 103 (Tex. 1939).
29. Castleberry, 721 S.W.2d at 272.
31. Castleberry, 721 S.W.2d at 272.
32. Id.
33. Id. at 273.
because of its tendency to deceive others, to violate confidence, or to in- 
jure public interest."34 Finally, the court disregarded the distinction be- 
tween tort and contract claims.35 In summary, under the broad rewriting 
of the PCV theory, it appeared that shareholders' shield from liability for 
both tort and contract claims was left to the jury's application of a vague 
and intangible standard.36

The reaction to the Castleberry opinion was so overwhelming that the 
Texas legislature responded by amending the TBCA.37 Notably, this was 
the first attempt by any state legislature to codify the PCV theory.38 The 
amended statute makes it quite difficult to pierce the corporate veil on a 
contract claim by requiring a showing of actual fraud.39 Article 2.21A(2) 
states:

A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares . . . , or any affiliate thereof or of the corpora-
tion, shall be under no obligation to the corporation or its obligees 
with respect to: . . . any contractual obligation of the corporation or 
any matter relating to or arising from the obligation on the basis that 
the holder . . . is or was the alter ego of the corporation, or on the 
basis of actual fraud or constructive fraud, a sham to perpetrate a 
 fraud, or other similar theory, unless the obligee demonstrates that 
the holder . . . caused the corporation to be used for the purpose of 
perpetrating and did perpetrate an actual fraud on the obligee pri-
marily for the direct personal benefit of the holder . . . .40

In contrast, Article 2.21 does not necessitate a showing of actual fraud if 
the claim is not based on a contract of the corporation, but rather on a 
tort or statutory liability.41 Although actual fraud is not necessary when 
the underlying claim is not contractual, Texas courts have nevertheless 
required that the claim be founded on notions of "justice and fairness."42

While the failure to follow corporate formalities was originally a factor 
in veil piercing, the Texas legislature also addressed this in Article 
2.21A(3),43 which states: "[a] holder of shares . . . shall be under no obli-
gation to the corporation or to its obligees with respect to: . . . any obliga-
tion of the corporation on the basis of the failure of the corporation to 
observe any corporate formality . . . ."44 In accordance with 2.21(A)(3), 
Texas courts do not consider failure to follow corporate formalities a fac-

34. Id. (citing Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964)).
35. Id.
36. HAMILTON & MACEY, supra note 6, at 279.
37. Id.; see also TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 2003).
38. HAMILTON & MACEY, supra note 6, at 279.
39. TEX. BUS. CORP. ACT ANN. art. 2.21A(2) (Vernon 2003).
40. Id.
41. Miller, supra note 30, at 2; see Love v. State, 972 S.W.2d 114, 117-18 (Tex. App.— 
 Austin 1998, writ denied).
42. Miller, supra note 30, at 2.
43. TEX. BUS. CORP. ACT ANN. art. 2.21A(3) (Vernon 2003).
tor in piercing the corporate veil.\textsuperscript{45} Further, the suggested jury instruction in the \textit{Texas Pattern Jury Charges} for the alter ego theory noticeably excludes language regarding lack of corporate formalities.\textsuperscript{46}

Finally, the "single business enterprise theory" has developed in Texas case law over the past few decades.\textsuperscript{47} While the Texas Supreme Court has not approved or disapproved the theory, numerous lower courts in Texas have applied it.\textsuperscript{48} The courts have explained this theory by the concept that corporations, affiliates, or both "integrate their resources to achieve a common business purpose."\textsuperscript{49} Additionally, courts have used lists of factors to determine whether corporations were kept as separate entities.\textsuperscript{50} More recent decisions have confirmed that the single business enterprise theory appears to be a viable theory in Texas although still not spoken to by the Texas Supreme Court. Further, courts have concluded that the theory falls under 2.21A(2), therefore requiring proof of actual fraud.\textsuperscript{51} These cases prove, as in the alter ego cases, that the actual fraud standard is a tough hurdle to overcome in piercing the veil.\textsuperscript{52}

\section*{II. PIERCING THE VEIL OF AN LLC: THE STATE OF THE LAW}

\textbf{A. Statutory Law in Texas and Other Jurisdictions}

Although all fifty states have enacted LLC statutes, only a handful of them expressly speak to the issue of veil piercing.\textsuperscript{53} The Colorado statute

\textsuperscript{45} See, e.g., Carone v. Retamco Operating Inc., 138 S.W.3d 1, 113 (Tex. App.—San Antonio 2004, pet. denied); Hall v. Timmons, 987 S.W.2d 248, 250 n.2 (Tex. App.—Beaumont 1999, no pet.); Miller, supra note 30, at 3.

\textsuperscript{46} See \textit{PATTERN JURY CHARGES} 108.2; Miller, supra note 30, at 3.

\textsuperscript{47} See Miller, supra note 30, at 3-4 for an excellent discussion of the rise of the "single business enterprise theory" in Texas.

\textsuperscript{48} See S. Union Co. v. City of Edinburg, 129 S.W.3d 74, 87 (Tex. 2003) ("We need not decide today whether a theory of 'single business enterprise' is a necessary addition to ... the theory of alter ego for disregarding corporate structure and the theories of joint venture, joint enterprise, or partnership for imposing joint and several liability."); Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 235 S.W.3d 695, 704 (Tex. 2007) ("We do not reach the question of, and express no opinion on, whether the single-business enterprise theory is a viable doctrine to pierce the corporate veil . . . .").

\textsuperscript{49} Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

\textsuperscript{50} Id. ("Factors to be considered . . . include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.").

\textsuperscript{51} See Miller, supra note 30, at 3-4 (discussing recent Texas cases); see S. Union Co., 129 S.W.3d at 74; Olympic Fin. Ltd. v. Consumer Credit Corp., 9 F. Supp. 2d 726 (S.D. Tex. 1998); Nordar Holdings, Inc. v. W. Sec. (USA) Ltd., 969 F. Supp. 420 (N.D. Tex. 1997).

\textsuperscript{52} Miller, supra note 30, at 3-4 (noting that under the actual fraud standard of contracts cases, it is much harder to pierce the veil than in the context of tort cases where there is not an actual fraud requirement under Article 2.21).

\textsuperscript{53} For an analysis of various LLC statutes and the issue of veil piercing, see Karin Schwindt, Comment, \textit{Limited Liability Companies: Issues in Member Liability}, 44 UCLA
is an example of a statute which expressly speaks to veil piercing. It states:

In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

The language of the Colorado statute clearly recognizes the theory in regards to LLCs and directs the courts to apply corporate case law. Additionally, it says failure “to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company.” This language is similar to the Texas statutory provisions for corporations.

The California statute arguably offers the most precise assistance in applying the corporate veil piercing theory to an LLC. It provides that:

A member of an LLC shall be subject to liability under the common law governing alter ego liability, and shall also be personally liable . . . for any debt, obligation, or liability of the [LLC], whether . . . arising in contract, tort, or otherwise, under the same or similar circumstances and to the same extent as a shareholder of a corporation . . . except that the failure to hold meetings of members or managers or . . . observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish . . . alter ego or personal liability . . . where the articles of organization . . . do not expressly require the holding of meetings of members or managers.

The language recognizes there are differences in organization and formalities between a corporation and an LLC, and thus precludes informalities from being a factor in LLC cases despite being a factor in many corporate cases.

Some statutes simply refer LLC veil piercing cases to corporate veil piercing law with language tending to “equate[] the liability shield of

L. Rev. 1541, 1553 (1997) (categorizing the statutes into three categories: those whose language either explicitly, implicitly, or do not at all address the issue of veil piercing).


55. Id.

56. Schwindt, supra note 53, at 1553.

57. § 7-80-107(2).


60. Id.

members to the liability shield enjoyed by shareholders.\textsuperscript{62} Minnesota's statute is an example, providing that "[t]he case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies."\textsuperscript{63} Therefore, one reading a statute similar to Minnesota's would infer that an LLC member is susceptible to veil piercing because a corporate shareholder is susceptible.\textsuperscript{64}

Finally, a significant number of states, including Texas, do not speak at all to veil piercing in their LLC statutes.\textsuperscript{65} Does the absence of statutory language in these states mean the legislature did not intend for the theory to apply to the LLC, or rather that the legislature wanted to leave the theory open to the courts to develop the common law? In Texas, it appears the judiciary believes the legislature has left the doctrine to be developed by the common law.

B. COMMON LAW IN TEXAS AND OTHER JURISDICTIONS

Texas state appellate courts and bankruptcy courts have spoken on the veil piercing issue in the context of the LLC. To date, the Texas Supreme Court has not yet directly addressed veil piercing in the LLC context. Recently, the court had the opportunity to do so in \textit{McCarthy v. Wani Venture, A.S.}, but it denied review.\textsuperscript{66} The Fifth Circuit Court of Appeals and courts in other jurisdictions have also ruled on this issue. Following is an examination of both the Texas cases and cases in other jurisdictions.

1. Common Law in Texas—Applying PCV to the LLC

While the TLLCA does not address piercing the veil of the LLC, several Texas courts have. Recently, in \textit{McCarthy v. Wani Venture, A.S.}, the Houston Court of Appeals rejected the argument that the TLLCA was an absolute shelter to veil piercing allegations, concluding the same principles that apply to corporations applied to the LLC.\textsuperscript{67} This case is noteworthy in piercing of the LLC veil in Texas and could have had paramount significance if the Texas Supreme Court had granted petition for review. Claiming fraud and attempting to pierce the corporate veil, Wani Venture, A.S. ("Wani Venture"), successor in interest to Norgips USA, Inc. ("Norgips"), filed a suit against several defendants, including Marcie McCarthy.\textsuperscript{68} Triple M Supply, LLC ("Triple M"), a wallboard dis-

\begin{itemize}
\item \textsuperscript{62}Schwindt, \textit{supra} note 53, at 1554 (quoting Carter G. Bishop & Daniel S. Kleinberger, \textit{Limited Liability Companies: Tax and Business Law} ¶ 6.03[2], at 6-28 (footnotes omitted)).
\item \textsuperscript{63}§ 322B.303(2).
\item \textsuperscript{64}Schwindt, \textit{supra} note 53, at 1554.
\item \textsuperscript{65}See id.
\item \textsuperscript{66}McCarthy v. Wani Venture, A.S., 251 S.W.3d 573 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
\item \textsuperscript{67}Id. at 590-91.
\item \textsuperscript{68}Id. at 576. At trial, evidence regarding numerous intertwined companies (Caribe, Caribe I, JTM Supply, JTMM, K Cor, M Global, Triple M Operating, Triple M Supply, and WoodPal Ltd.), with basically the same three owners (Marcie McCarthy, Anthony Mos-
tributor, entered into an agreement with Norgips, a manufacturer and seller of wallboard, to be Norgips's sole East Texas distributor. 69

Marcie McCarthy, the appellant, was a one-third owner of Triple M, an LLC, and was the only remaining defendant of the original case. 70 McCarthy brought six issues on appeal, 71 including the argument that the trial court erred in holding that she was liable under the veil piercing theory for Triple M's debt. 72 Among her other issues on appeal were the definition of "actual fraud" in the jury charge and the evidence supporting a finding of actual fraud and damages. 73 The court of appeals upheld the jury instruction and found there was sufficient evidence to support the findings of fraud and damages. 74 Additionally, the court affirmed the piercing of the LLC veil. 75

The veil piercing issue in McCarthy warrants discussion and could have a substantial impact on Texas common law in this area. Basing her argument on the absence of veil piercing from the TLLCA, McCarthy contended that the veil of the LLC is "impenetrable," and therefore cannot be pierced for corporate debt. 76 The court rejected this argument. 77 Although it acknowledged that the TLLCA does not address veil piercing, the court noted that Texas courts, along with other jurisdictions, have used state law corporate veil piercing theories to pierce the LLC veil. 78 Further, the court stated that McCarthy had not only failed to present any judicial backing for her argument that corporate veil piercing theories should not be applied to LLCs, but also that the court itself could not find any judicial backing. 79 Next, the court applied Article 2.21, the corporate veil piercing law, to the facts of the case to find that the trial court was not in error. 80 It affirmed the jury's finding that McCarthy, for her

chella, and Michael Moschella), established a complicated interrelationship of business entities. Id. at 78-79. Further evidence showed that there was extensive overlapping of these entities, with money flowing from entity to entity as if it were one entity, related party transactions, and self dealing. Id. at 582-83.

69. Id. at 576. 
70. Id. 
71. Id. 
72. Id. at 589. 
73. Id. at 576. The jury charge included two questions: "(1) did McCarthy cause Triple M Supply to be used to perpetrate an actual fraud and did perpetrate an actual fraud upon Norgips, primarily for her own direct benefit and (2) what sum of money would compensate Norgips for the conduct found in answer one for unpaid Norgips wallboard invoices and attorney's fees." Id. at 584.

74. Id. at 587-88. 
75. Id. at 590. 
76. Id. 
77. Id. at 591. 

79. Id. at 591. 
80. Id. The court specifically applied the language of Article 2.21 to pierce the corporate veil "where there is a finding that the shareholder 'caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily
own benefit, perpetrated actual fraud through Triple M upon Norgips. In conclusion, the court of appeals affirmed the trial court's holding that McCarthy was liable for the LLC's debt.

The dissent did not disagree with the majority's proposition that corporate veil piercing could be applied to the LLC. Instead, the dissent disagreed with the majority's finding that there was sufficient evidence to support the jury's finding that McCarthy caused the LLC to perpetrate fraud for her direct personal benefit. Therefore, it appears both the majority and dissent in McCarthy concluded the same veil piercing principles apply to Texas LLCs as apply to Texas corporations. A petition for review by the Texas Supreme Court was filed, but the high court failed to seize on the opportunity to address the LLC veil piercing doctrine.

As cited and followed by the McCarthy court, other Texas courts have applied corporate veil piercing to the LLC. In Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners' Association, a Texas court of appeals applied the alter ego theory of corporate veil piercing to the plaintiff's attempts to pierce the veil of Pinebrook Properties Management, LLC and Pinebrook Properties, Ltd. (a limited partnership). This case was the result of a complex history of conflict in previous suits. In such previous cases, landowners and a property owner's association successfully sued Musgrave, president of an LLC which was the general partner of a Texas limited partnership, for obligations under a restrictive covenant by piercing the LLC veil on the theory of alter ego.

On appeal, Musgrave brought eight issues, most notably that the trial court erred in its conclusion that the LLC and other business entities were the alter egos of Musgrave. The court stated that alter ego is a theory for piercing the corporate veil. Further, citing Article 2.21(A)(3) as authority, the court said the failure to follow formalities is not a factor in determining whether the alter ego theory applies. However, the court of appeals concluded the trial court erred in applying the corporate

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81. Id. at 591 n.12 (citing TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon Supp. 2005)).
82. Id. at 591. The court based its affirmation on the evidence presented to the jury, "that McCarthy and her two partners (1) used Triple M Supply as a front to borrow funds and order wallboard on credit from Norgips... (2) diverted to themselves... proceeds due to Triple M Supply through the use of complex and undocumented financial transactions and the commingling of inventory and bank accounts; and (3) left Triple M Supply undercapitalized and unable to pay its creditors." Id.
83. Id. at 592-95 (Jennings, J., dissenting).
84. Id. at 592.
87. Id. at 490-93 (discussing the history of the previous cases, Musgrave I-II).
88. Id. at 493-94.
89. Id. at 491.
90. Id. at 499 (citing Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986)).
91. Id. (citing TEX. BUS. CORP. ACT ANN. art. 2.21(A)(3) (Vernon 2003)).
veil piercing theory to Pinebrook Properties, Ltd., because the limited partnership, not the LLC general partner, owned the property with the restrictive covenant that was in dispute.\textsuperscript{92} Veil piercing does not, and need not, apply to limited partnerships because of the inherent liability of the general partner for the obligations of the partnership.\textsuperscript{93} Next, the court reviewed whether the trial court had properly pierced the veil of Pinebrook Properties Management, LLC, by finding it was the alter ego of Musgrave.\textsuperscript{94} The court recognized an LLC is unique from other Texas business forms and that "[e]xcept as and to the extent the regulations specifically provide otherwise, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment decree, or order of a court."\textsuperscript{95} Then, the court applied the alter ego theory of corporate veil piercing to the relationship between Musgrave and the LLC.\textsuperscript{96} Evaluating the alter ego theory, the court also applied Article 2.21(A)(3), which provides that failure to follow corporate formalities cannot be used to pierce the corporate veil.\textsuperscript{97} The court concluded the plaintiffs did not establish sufficient evidence that the LLC was an alter ego.\textsuperscript{98} Further, the evidence they did bring only demonstrated a lack of corporate formalities which, evaluated by the court under Article 2.21(A)(3), was not adequate to create an alter ego.\textsuperscript{99} Also noteworthy was the fact the plaintiffs attempted to argue that the business entities were set up fraudulently.\textsuperscript{100} Although actual fraud supports a finding of corporate veil piercing under Article 2.21, the court noted the plaintiffs had only pleaded the alter ego theory and not the fraud theory and, therefore, that issue could not be raised.\textsuperscript{101} In conclusion, the court of appeals reversed the trial court's finding that the limited partnership and the LLC were alter egos of Musgrave.\textsuperscript{102}

Most recently, in the case of \textit{In re JNS Aviation}, a Texas bankruptcy court, relying on the \textit{McCarthy} holding, pierced the veil of an LLC under the theory the owner created a sham LLC to perpetrate a fraud.\textsuperscript{103} The plaintiff/creditor brought veil piercing claims under the single business enterprise, sham to perpetrate a fraud, evasion of an existing legal obligation, and alter ego theories.\textsuperscript{104}

\textsuperscript{92} Id. at 499-500.
\textsuperscript{93} Id. at 499 (citing Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 4.03(b) (Vernon Supp. 2008)).
\textsuperscript{94} Id. at 500.
\textsuperscript{95} Id. (quoting Tex. Rev. Civ. Stat. Ann. art. 1528n, art. 4.03(A) (Vernon Supp. 2008)).
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 500-01.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 500-01.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 501.
\textsuperscript{102} Id.
\textsuperscript{103} In re JNS Aviation, LLC, 376 B.R. 500 (Bankr. N.D. Tex. 2007).
\textsuperscript{104} Id. at 520.
The dispute originally began when the creditor sued the LLC in a Delaware federal court on the basis of breach of contract by the LLC and two individuals, when they refused to repurchase an airplane that the LLC had previously sold.\textsuperscript{105} However, between the time the suit was filed and the entry of default judgment, the LLC owners created another LLC in New Mexico and transferred assets belonging to the original LLC to the new LLC.\textsuperscript{106} The creditor filed a suit in a Texas federal district court to enforce the default judgment, but the LLC declared bankruptcy.\textsuperscript{107}

This brought the course of events to the trial in the bankruptcy court, where fraud and veil piercing claims were asserted.\textsuperscript{108} One of the main issues before the court was whether veil piercing claims were applicable to an LLC.\textsuperscript{109} The court stated that the recent Texas appellate court holding in \textit{McCarthy} countered the defendant's argument that the Texas LLC statute is a shield against veil piercing claims.\textsuperscript{110} Further, the court noted the \textit{McCarthy} court recognized the Texas statute does not speak to the theory but that Texas courts and other jurisdictions have applied corporate veil piercing statutory and case law to the LLC.\textsuperscript{111} Having established that under the \textit{McCarthy} holding corporate veil piercing principles should be applied, the court went on to discuss the Texas corporate veil piercing law.\textsuperscript{112}

After laying the roadmap for the theory and the supporting law, the court then turned to the issues of whether the facts of the case at bar were sufficient to establish any of the asserted veil piercing theories and whether the defendants, for their direct personal benefit, perpetrated an actual fraud on the plaintiff.\textsuperscript{113} The court stated its task was to "sift the facts through the outlined legal framework of veil piercing as limited by section 21.223 of the TBOC."\textsuperscript{114} The court performed a detailed analysis of the various "strands" of the doctrine and applied the facts of the case through those "strands."\textsuperscript{115} Although the facts of the case satisfied a number of alter ego and single business enterprise factors, they were not precisely compatible with those doctrines.\textsuperscript{116} In addition, the court concluded the "illegal purpose strand" of the doctrine was not the best fit for the case either.\textsuperscript{117}

The court found the facts best aligned with the sham to perpetrate a fraud strand.\textsuperscript{118} After considering the facts and the evidence, the court

\begin{thebibliography}{118}
\bibitem{105} Id. at 519.
\bibitem{106} Id.
\bibitem{107} Id. at 506.
\bibitem{108} Id.
\bibitem{109} Id. at 526.
\bibitem{110} Id.
\bibitem{111} Id.
\bibitem{112} Id. at 526-27.
\bibitem{113} Id. at 527.
\bibitem{114} Id.
\bibitem{115} See id. at 527-31.
\bibitem{116} Id. at 529-30.
\bibitem{117} Id. at 530.
\bibitem{118} Id.
\end{thebibliography}
concluded, under Texas law, the plaintiff had established a veil piercing claim under that theory.\textsuperscript{119} Next, the court found the plaintiffs suffered injury as a consequence of actual fraud resulting from the numerous transactions devised by the defendants and their companies for their own personal benefit.\textsuperscript{120} In conclusion, the court held that the LLC veil was pierced under the sham to perpetrate a fraud theory.\textsuperscript{121}

In \textit{DDH Aviation, LLC v. Holly}, the district court for the Northern District of Texas applied corporate alter ego cases and Article 2.21(A) to an LLC.\textsuperscript{122} A multitude of parties and claims comprise the history of this case.\textsuperscript{123} DDH Aviation, LLC (DDH), the plaintiff/counter-defendant, was first "formed as a corporation but later altered its business form to become a limited liability company."\textsuperscript{124} The third-party defendant in this case, Affiliated Computer Services, Inc. ("ACS"), was a corporation.\textsuperscript{125} The issue in this case of particular interest to this discussion was whether there was a foundation for the alter ego, the single business enterprise, or both of these theories of liability.\textsuperscript{126}

First, the court addressed whether DDH and ACS operated as a single business enterprise, applying the corporate veil piercing analysis to the LLC and the corporation.\textsuperscript{127} The court stated the applicable law was whether: "(i) the two corporations share a common business purpose and (ii) the corporations have integrated their resources to achieve that common business purpose."\textsuperscript{128} To establish the second element, integration of resources, the court gave an eleven-factor test.\textsuperscript{129} Finding the entities did not share a common business purpose, and further, that the plaintiffs did not even allege this, the court held the single business enterprise theory did not apply; therefore, the court did not have to analyze the integrated resources test.\textsuperscript{130}

Next, the court tackled the alter ego theory.\textsuperscript{131} Applying Texas law to DDH because it is a Texas LLC, the court said to hold DDH's shareholders liable for the LLC's actions, the third party plaintiffs must prove the

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 531 (finding that the members, through the LLC, committed actual fraud by transferring the LLC's assets and declaring bankruptcy in avoidance of creditor's default judgment).
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{123} \textit{See id.} at *1-3 for a background on the cast of characters, procedural history, and third party complaints.
  \item \textsuperscript{124} \textit{Id.} at *1. The opinion is silent as to when the entity changed from a corporation to an LLC and which incidents occurred while the entity was a corporation as opposed to an LLC.
  \item \textsuperscript{125} \textit{Id.} at *2.
  \item \textsuperscript{126} \textit{Id.} at *3.
  \item \textsuperscript{127} \textit{Id.} at *6.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.} at *3 n.9 (quoting Olympic Fin. Ltd. v. Consumer Credit Corp., 9 F. Supp. 2d 726, 728 (S.D. Tex. 1998)).
  \item \textsuperscript{130} \textit{Id.} at *6.
  \item \textsuperscript{131} \textit{Id.}
\end{itemize}
alter ego theory and also that the shareholders perpetrated an actual fraud under Article 2.21(A)(2). The court held the evidence presented was sufficient to find the necessary unity of the parties under the alter ego theory and denied the motion to dismiss allegations that DDH was the alter ego of third party defendant Deason. However, the court did not find the necessary establishment of evidence that DDH was the alter ego of ACS. In conclusion, the court applied Texas corporation case law (alter ego and single business enterprise theories) and statutory law (Article 2.21(A) of the TBCA) to a Texas LLC.

2. Texas Courts Applying the Laws of Another Jurisdiction to PCV of an LLC

A Texas bankruptcy court applied Delaware law to pierce the veil of a Delaware LLC, Final Arrangements ("FAL"), in In re Kilroy. The court identified the following three alternative theories for piercing the veil of an LLC under Delaware law: "(1) using offensive collateral estoppel under Texas law; (2) using offensive collateral estoppel under Delaware law; or (3) using the alter ego doctrine." Applying Texas and Delaware law respectively, the court held that under both theories (1) and (2), the debtor was collaterally estopped from denying the LLC was his alter ego.

Next, the court discussed the third theory, piercing the corporate veil by using the alter ego doctrine under Delaware law. After discussing Delaware case law regarding the alter ego theory, the court concluded that based on the allegations and facts of the case, the plaintiffs had pled adequate facts to support a finding. Finally, the court spoke about the application of the alter ego theory to a Delaware LLC. The debtor argued that under the Delaware Limited Liability Company Act ("DLLCA"), members or managers are not liable for the obligations, debts, and liabilities of the LLC. Acknowledging the absence of veil piercing in the DLLCA and the shortage of Delaware case law on the issue, the court determined that the Delaware Chancery Court had "nonetheless conceptually endorsed LLC veil piercing when it made spe-

132. Id. at *7 n.11 (citing Castleberry v. Branscum, 721 S.W.2d 270, 277 (Tex. 1986); Tex. Bus. Corp. Act Ann. art. 2.21(A)(2) (Vernon 2003)). The court applied Delaware law to analyze whether ACS was the alter ego of third party defendant Deason because ACS is a Delaware corporation. For the court's alter ego analysis of ACS under Delaware law, see id. at *8-9).
133. Id. at *3.
134. Id. at *8.
135. Id. at *6-8.
136. In re Kilroy, 357 B.R. 411, 425 (Bankr. S.D. Tex. 2006). The court also ruled on several other issues that are beyond the breadth of this paper. Id.
137. Id. at 425.
138. Id. at 427-28.
139. Id. at 428-29.
140. Id. at 429.
141. Id. at 430.
142. Id. at 430 (citing Del. Code Ann. tit. 6, § 18-303(a) (2006)).
cific references to corporate veil piercing in the context of LLCs."143

3. Fifth Circuit Common Law—Applying PCV to the LLC

The Fifth Circuit, when applying Louisiana law, has treated the LLC in the same manner as a corporation for veil piercing purposes.144 In Hollowell v. Orleans Regional Hospital LLC, the Fifth Circuit rejected challenges to the jury's finding of veil piercing of several entities, including an LLC.145 One of the issues on appeal was whether the veil of an LLC was pierced under the alter ego theory.146 The court reviewed this issue under Louisiana law, which is silent on piercing the veil of an LLC.147 The court noted the district court's holding that Louisiana would treat an LLC like a corporation under the alter ego veil piercing theory.148 The court stated that commentators agreed that LLCs would be treated like corporations in regards to veil piercing.149

4. A Texas Court—Respecting the LLC as a Distinct Entity

Although not explicitly rejecting application of the piercing doctrine to LLCs, a Texas appellate court respected the LLC as a separate and distinct entity and refused to impose liability on the LLC members.150 In Ingalls v. Standard Gypsum LLC, an injured employee brought a negligence claim against members of an LLC.151 The trial court granted summary judgment based on the LLC members' arguments that they were immune from the suit under the Texas Workers' Compensation Act because they were members of the LLC and as such were "employers" of the employee under the Act.152 On appeal, the court considered the issue of first impression as to whether members of an LLC could be considered "employers" for purposes of the Texas Workers' Compensation Act.153

The court discussed the limited liability shield that the TLLCA provides for its members under Article 4.03.154 The plaintiff relied heavily on Sims v. Western Waste Industries155 in which the defendant attempted

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145. Id. at 385, 388.
146. Id. at 379, 381.
147. Id. at 385.
148. Id. at 385 n.7 (noting that neither party disputed this holding of the district court).
149. Id.
151. Id.
152. Id. at 254-55.
153. Id. at 258-61.
154. Id. at 260 (citing TEX. REV. CIV. STAT. ANN. art. 1528n, § 4.03 (Vernon Supp. 2008)).
155. Sims v. W. Waste Indus., 918 S.W.2d 682, 686 (Tex. App.—Beaumont 1996, writ denied) ("We are not persuaded that the legislature ever intended parent corporations, who deliberately chose to establish a subsidiary corporation, to be allowed to assert immunity under the Texas Workers' Compensation Act by reverse piercing of the corporate veil they themselves established.").
to "reverse pierce" the corporate veil in order to assert workers' compensation immunity as a defense to a tort suit by an employee.\textsuperscript{156} The court noted the LLC is separate and distinct from its members and provides its members with a limited liability shield, in agreement with the \textit{Sims} court.\textsuperscript{157} The court acknowledged that the \textit{Sims} opinion required an independent tort separate from the employment relationship.\textsuperscript{158} In summary, the court respected the LLC as a distinct and separate entity from its members by rejecting the proposition that the members were considered "employers" under the Texas Workers' Compensation Act. The court reversed and remanded the portion of summary judgment that was based solely on one member's membership as an LLC, but did not consider whether the member had committed an independent tort.\textsuperscript{159}

5. \textit{Case Law in Other Jurisdictions Whose LLC Statutes Are Silent to Piercing}

Many state LLC statutes are silent to veil piercing, as is the Texas statute. However, the courts of those states have been presented with, and have addressed, the doctrine in the context of the LLC. Following, are a few significant cases from other jurisdictions speaking to LLC veil piercing.

In \textit{Ditty v. Checkrite, Ltd.}, a federal court in Utah applied corporate veil piercing theory to an LLC even though the Utah statute is silent with respect to LLC veil piercing.\textsuperscript{160} In that case, several individuals wrote bad checks to various retailers who referred these checks to Checkrite, a collection agency.\textsuperscript{161} There were numerous claims and cross claims under the Fair Debt Collections Practices Act and Fair Credit Reporting Act, between the plaintiffs and the defendants, the collection agency, its law firm, and attorney.\textsuperscript{162}

The plaintiffs brought a claim for personal liability against the attorney for his firm's collection activities under two theories, one being that the firm was the alter ego of the attorney.\textsuperscript{163} The court analogized the liability shield of corporate shareholders to that of LLC members, noting the Utah LLC statute provides, "neither the members, the managers, nor the employees of a limited liability company are personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company."\textsuperscript{164} However, the court also stated Utah courts will pierce the corporate veil in limited situ-

\textsuperscript{156} \textit{Ingalls}, 70 S.W.3d at 260. However, the \textit{Ingalls} court distinguished the \textit{Sims} case because \textit{Sims}, a corporate defendant, was sued under an independent tort (products liability). \textit{Id.} at 261.
\textsuperscript{157} \textit{Id.} at 260.
\textsuperscript{158} \textit{Id.} at 261.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Ditty v. Checkrite, Ltd.}, 973 F. Supp. 1320, 1324-36 (D. Utah 1997).
\textsuperscript{161} \textit{Id.} at 1324.
\textsuperscript{162} \textit{Id.} at 1325-26.
\textsuperscript{163} \textit{Id.} at 1335.
\textsuperscript{164} \textit{Id.} (quoting \textit{Utah Code Ann.} § 48-2b-109(1)).
ations.\[^{165}\] Despite the fact there is little case law regarding veil piercing of entities other than corporations, the court acknowledged that the theory applies to LLCs, as most commentators agree.\[^{166}\] The court went on to apply the corporate veil piercing doctrine to the LLC.\[^{167}\] After discussing the corporate veil piercing law, specifically the alter ego theory, the court concluded the plaintiffs did not present sufficient evidence to support a finding that the veil of the LLC should be pierced.\[^{168}\] Although the LLC entity was not disregarded, the court applied the same principles to the LLC as it would to a corporation.\[^{169}\]

The Wyoming Supreme Court, notably the first state to pass a statute creating the LLC, held that LLC veil piercing was an equitable remedy available under the Wyoming LLC Act, despite the statute’s silence, in *Kaycee Land & Livestock v. Flahive*.\[^{170}\] This case arose from a landowner’s allegations that an LLC caused environmental damage to land that it was using under a contract.\[^{171}\] The issue before the court was: “In the absence of fraud, is a claim to pierce the Limited Liability entity veil or disregard the [LLC] entity in the same manner as a court would pierce a corporate veil or disregard a corporate shield, an available remedy against a Wyoming [LLC] under Wyoming’s [LLC] Act?”\[^{172}\] First, the court discussed the evolution of the doctrine in regard to Wyoming’s corporate context.\[^{173}\] Examining the history of the doctrine, the court noted the concept is also absent from the Wyoming corporate statutes and is solely a remedy of equity founded in common law.\[^{174}\]

Next, the court reviewed the legislative history of the Wyoming LLC statute and concluded there was no evidence the legislature intended to preclude the veil piercing doctrine from being applied to the LLC.\[^{175}\] Finding no reason to treat LLCs differently from corporations, the court concluded the members should not be shielded from liability if they do not regard the LLC as a distinct and separate entity.\[^{176}\] In support of their conclusion, the court noted that the majority of commentators have

\[^{165}\] Id. (citing Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987)).
\[^{166}\] Id. at 1335-36.
\[^{167}\] Id. at 1336.
\[^{168}\] Id.
\[^{169}\] Id. at 1335-36.
\[^{171}\] Id. at 324.
\[^{172}\] Id. at 324; (citing Wyo. Stat. Ann. §§ 17-15-101 to -144 (2001)).
\[^{173}\] Id. at 325-26.
\[^{174}\] Id. at 326.
\[^{175}\] Id. at 326-28. Among other evidence of legislative intent, the court also noted one reason that the Wyoming statute does not specifically address veil piercing, while other state statutes do was the fact that Wyoming was the very first to enact a statute and did not have the advantage of years of history in which these issues arose. Id. at 326-27. Additionally, the court stated that “[i]t is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention . . . .” Id. (quoting McKinney v. McKinney, 135 P.2d 940, 942 (Wyo. 1943)).
\[^{176}\] Id. at 327.
also concluded the doctrine should apply to the LLC. Additional-ly, most courts, when presented with a case in which the facts indicate the LLC veil should be pierced but the statute is silent, have applied common law.

The court, however, stated the factors considered when piercing the corporate veil would not be identical in an LLC case. The reason for this difference is the flexibility of the LLC in regard to organizational formalities. Acknowledging it would not be feasible to set forth all of the factors that should be considered in future LLC cases, the court pointed to various commentators for appropriate factors concerning LLC veil piercing.

Finally, the court addressed the language of "in the absence of fraud." This language suggests the veil may be pierced in a fraud case notwithstanding a statute silent to specific instances in which the courts may act. Rejecting the assumption that fraud is necessary, the court stated "[f]raud is, of course, a matter of concern in suits to disregard corporate fictions, but it is not a prerequisite to such a result." Further, they held the same reasoning should be applied in the LLC context. Turning the question into a fact determination for the jury, the court concluded "[e]ach case involving the disregard of the separate entity doctrine must be governed by the special facts of that case."

Therefore, the case was remanded to the district court to conduct a "fact intensive inquiry and exercise its equitable powers" in determining whether the veil should be pierced considering the specific facts of the case.

In *D.R. Horton Inc.-New Jersey v. Dynastar Development, L.L.C.*, a New Jersey court, applying an LLC statute that is silent as to veil piercing, discussed the theory in detail and concluded the corporate doctrine should not be "mechanically applied" to the LLC. In its analysis of veil piercing for LLCs, the court first conducted a statutory analysis. The court concluded the legislature supported evolution of common law in this area, but the legislature did not intend for courts to "mechanically apply" the corporate veil piercing doctrine to the LLC.

177. *Id.* at 328 (citing various articles by expert LLC commentators).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* (quoting Amfac Mech. Supply Co. v. Federer, 645 P.2d 73, 79 (Wyo. 1982)).
185. *Id.*
186. *Id.* (quoting Opal Mercantile v. Tamblyn, 616 P.2d 776, 778 (Wyo. 1980)).
187. *Id.* at 328.
189. *Id.* at *31-32.
190. *Id.* at *33.
Next, the court looked to commentators and decisional law in other jurisdictions for guidance. Relying heavily on the Wyoming Supreme Court decision in Kaycee, the court found support for its conclusion that factors in LLC cases should not mirror those in corporate cases. As further support for this proposition, the court cited numerous commentators who agreed with the principle that the doctrine should be modified to deal with the unique attributes of the LLC. Adherence to formalities, reliance on dominance and control of the LLC (including alter ego factors), and undercapitalization were all included in the factors that should be weighed differently in LLC cases. Finally, the court applied a "modified" New Jersey corporate veil piercing test to the facts of the case and found the plaintiff failed to prove both prongs of the test. Predominantly, the plaintiff failed to prove the LLC was an alter ego or mere instrumentality of the defendant, when considering adherence to formalities and dominance and control factors with less weight than a normal corporate case. Therefore, the court held that the plaintiff did not set forth a foundation for piercing the LLC's veil.

III. ANALYSIS OF PIERCING THE VEIL OF A TEXAS LLC

With a background of the LLC entity and Texas corporate veil piercing doctrine, along with a discussion of the statutory and case law of Texas and other jurisdictions, this comment now turns to analysis of the LLC doctrine in Texas. It will first consider how Texas should develop the law in regard to piercing the LLC veil. Then it will contemplate whether the LLC or corporate form offers greater protection against veil piercing in Texas.

A. WHERE SHOULD TEXAS LLC PIERCING LAW GO FROM HERE?

Absent any statutory authority from the legislature or any mandatory common law from the Texas Supreme Court, attorneys, courts, and business persons alike are somewhat in the dark on the strength of the LLC's liability shield. While the TLLCA speaks in very general terms regarding the limited liability of members, it provides no guidance as to whether that liability shield can be pierced. In stark contrast, the legislature has provided specific guidance on piercing the veil of a corporation. The legislature, however, did not immediately speak to the doctrine in the

191. Id. at *33-37.
192. See id. at *34-36.
193. See id. at *34.
194. Id. at *35-36.
195. Id. at *36-38. The two prong test required the plaintiff to prove "(1) [the] L.L.C. was a mere instrumentality or alter ego of [defendant]; and (2) [defendant] abused the business form to perpetrate a fraud, injustice, or otherwise circumvent the law." Id. at *36.
196. Id. at *36.
197. Id. at *38.
198. TEX. REV. CIV. STAT. ANN. art. 1528n, § 4.03A, C (Vernon Supp. 2008); see also TEX. BUS. ORGS. CODE ANN. § 101.114 (Vernon 2008).
199. TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 2003).
corporate statutes. Cases addressing corporate veil piercing theories were present in Texas more than fifty years before the legislature acted.\footnote{200} Further, the legislature arguably acted only out of dire necessity, in response to the \textit{Castleberry} decision which had rewritten the doctrine so broadly it appeared any jury would be able to arbitrarily disregard the corporate entity.\footnote{201} Therefore, if the legislature holds out as long as it did on the corporate veil piercing statute, it may be decades before it addresses the LLC doctrine by statute. Further, if the legislature follows its pattern from corporation law and the Texas Supreme Court never makes a ruling that writes LLC piercing doctrine as broadly as it did with corporations in \textit{Castleberry}, then the legislature may never speak statutorily to LLC piercing. The legislature may leave it up to the courts to develop common law in the LLC area.

It is interesting that in the corporate veil piercing arena, Texas was the very first state to codify the doctrine,\footnote{202} but Texas is not taking the same lead in regard to the LLC. This comment suggests the Texas legislature should enact a statute addressing LLC veil piercing. Just as it has clarified and defined the law for corporations, the legislature should do the same for LLCs. The vagueness of the doctrine, coupled with its haphazard application by the courts, makes the LLC veil piercing doctrine an area that would greatly benefit from statutory guidance.\footnote{203} Courts would benefit from more structured guidance as they did from Article 2.21 in the corporate setting. Judges would not have to speculate whether they should strictly apply corporation common law and Article 2.21, whether they should apply a “modified LLC version” of corporation law, or whether they should disregard corporation law altogether. Further, a statute could provide specific guidance as to different types of claims, such as with contract and tort, as does Article 2.21.\footnote{204} A statute tailored to the unique attributes of the LLC would be extremely beneficial. Obviously, the LLC and the corporation have distinct, meaningful differences—the reason behind creating the LLC business form. Courts have recognized that the differentiating aspects of the LLC necessitate additional considerations when contemplating veil piercing.\footnote{205} In addition, statutes in other jurisdictions have recognized the unique aspects of the LLC and have tailor-written their statutes as such.\footnote{206} Texas should follow this lead. The California statute would be an excellent statute for Texas
to model because of its precise language and tailored application of the doctrine to the LLC.\textsuperscript{207} In drafting a statute, the legislature should address the doctrine as applied to differing causes of action, as Texas' Article 2.21 and California's LLC statute do. Further, a functional statute would speak specifically to the attributes of the LLC, such as informalities, dominance and control, and undercapitalization, as statutes such as California's and cases such as \textit{D.R. Horton Inc.-New Jersey} point out.\textsuperscript{208}

If the legislature does not enact a statute specifically addressing LLC piercing, then business persons and attorneys will continue to speculate as to how the courts will develop the common law.

Recently, in \textit{McCarthy}, a Texas appellate court was presented with the issue and concluded the same principles of corporate veil piercing should apply to LLCs.\textsuperscript{209} The court did not solely apply the corporate common law but also looked to statutory corporate law.\textsuperscript{210} The court specifically applied the corporate fraud standard in Article 2.21 to the LLC and found the member perpetrated fraud for her personal benefit.\textsuperscript{211} Additionally, the court relied upon other courts, both in Texas and other jurisdictions, which have applied the theory to the LLC.\textsuperscript{212} For example, the \textit{McCarthy} court relied upon another Texas appellate court's finding of LLC veil piercing in \textit{Pinebrook}.\textsuperscript{213} The \textit{Pinebrook} court also applied Article 2.21 of the corporation statute.\textsuperscript{214} Although the court in \textit{Pinebrook} found the veil was not pierced, the application of the corporate doctrine to the LLC was consistent with the \textit{McCarthy} application.

The \textit{McCarthy} court also relied on the Supreme Court of Wyoming's holding in \textit{Kaycee} that LLC veil piercing was an equitable remedy even though the statute was silent as to the theory.\textsuperscript{215} The \textit{Kaycee} court's analysis can be slightly distinguished from the Texas courts' pattern of analysis because it did not make any distinction between tort and contract cases as to the actual fraud requirement. In contrast, the Texas courts appear to be following Texas corporate veil piercing law, which requires actual fraud in contract cases. The Article 2.21 actual fraud requirement is helpful and should continue to be applied to the LLC as it tends to weed out arbitrary veil piercing in contract cases. The \textit{Kaycee} court recognized the corporate veil piercing doctrine should not be applied in a "cookie cutter" fashion to the LLC due to unique differences between the two entities.\textsuperscript{216} The court did not formulate a definite list of addi-

\textsuperscript{207} \textit{See id.}
\textsuperscript{208} \textit{See id.; D.R. Horton Inc.,} 2005 WL 1939778, at *31-36.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.} at 591.
\textsuperscript{212} \textit{See id. at} 590-91.
\textsuperscript{213} \textit{Id.} at 591.
\textsuperscript{215} \textit{See McCarthy,} 251 S.W.3d at 590-91.
\textsuperscript{216} \textit{Kaycee Land & Livestock v. Flahive,} 46 P.3d 323 (Wyo. 2002).
tional considerations, most likely due to the novelty of the theory in regards to the LLC and the lack of extensive common law in the area. However, for support, the court directed attention to several commentators who had spoken on the subject of applying the doctrine to the LLC.1217 The commentators’ works would be helpful in applying the doctrine in Texas as well.

Further, there appears to be unanimous support for application of both corporate common law and statutory law by the McCarthy court since the dissent did not disagree with the majority’s proposition that the corporate doctrine could be applied to the LLC.1218 The point on which the dissent disagreed with the majority was whether there was sufficient evidence of perpetration of a fraud for direct personal benefit.1219 In other words, the dissent believed the majority had used the correct “test,” but disagreed with the application of the specific facts and evidence. This case, therefore, represents unanimous support for LLC veil piercing. Unfortunately, the Texas Supreme Court denied review and at present has left Texas courts without any mandatory authority. Even though the court chose not to review the case, McCarthy will still likely have an impact on the common law. In fact, a Texas bankruptcy court relied on McCarthy only a few months after the opinion was issued.1220 The JNS Aviation court relied upon McCarthy to pierce the veil of an LLC under the theory the LLC was created to perpetrate a fraud.1221 The JNS Aviation court, just as the court in McCarthy, recognized that although the Texas LLC statute was silent regarding piercing the LLC veil, courts in Texas, and other jurisdictions have applied both corporate common law and statutory law.1222 Additionally, as in McCarthy, the court applied Article 2.21 of the corporate statute and pierced the veil under the fraud doctrine.1223

DDH Aviation is further substantiation that Texas courts are likely to apply corporate law to the LLC in the future.1224 A federal court in the Northern District of Texas analyzed both the corporate alter ego and single business enterprise doctrines in applying corporate case law and Article 2.21.1225 Precedent is clearly being established by Texas courts. Another example is a Texas bankruptcy court which pierced the veil of a Delaware LLC in In re Kilroy.1226 Although the court applied Delaware law, it is nevertheless a useful case because Delaware, like Texas, does not address veil piercing in its LLC statute. The Texas bankruptcy court acknowledged the statutory absence on the issue, but determined the

217. Id. at 327-28.
218. See McCarthy, 251 S.W.3d at 590-94.
219. Id. at 593-94.
220. See In re JNS Aviation, LLC, 376 B.R. 500 (Bankr. N.D. Tex. 2007).
221. Id. at 530-31.
222. Id.
223. See id. at 531.
225. Id.
Delaware Chancery Court had endorsed the concept.\textsuperscript{227} As the Texas courts continue down this path, codification from the legislature or endorsement and clarification from the Texas Supreme Court would be a valuable roadmap for the future to courts, attorneys, and business persons alike.

There does not appear to be a case in Texas which has explicitly rejected the concept of piercing the veil of the LLC. Although some courts have chosen not to pierce the veil, they have still acknowledged the doctrine, but held that the facts of the specific case were not sufficient to apply it.\textsuperscript{228} Refusing to impose liability on members, a Texas appellate court in \textit{Ingalls} respected the LLC as a separate and distinct entity.\textsuperscript{229} The \textit{Ingalls} court agreed with another Texas appellate court which had refused to pierce the corporate veil in \textit{Sims v. W. Waste Industries}.\textsuperscript{230} However, the \textit{Sims} case regarded a corporation and the issue of reverse piercing. The similarity between \textit{Ingalls} and \textit{Sims} was both involved Texas Workers' Compensation Act claims.\textsuperscript{231} Therefore, the court in \textit{Ingalls} reliance on \textit{Sims} was in respect to the intent of the Workers' Compensation Act, rather than whether an LLC's veil can be pierced.\textsuperscript{232} Further, although the \textit{Ingalls} court stated an LLC was separate and distinct from its members, it did not explicitly reject the possibility of LLC veil piercing.\textsuperscript{233} The case was, in essence, about other issues and was remanded to consider whether the member had committed an independent tort, which would not even require veil piercing to hold the member liable.\textsuperscript{234} Besides the fact the LLC veil piercing doctrine was not the underlying issue, there is another probable reason the court did not explicitly speak about LLC piercing. The case was tried in 2001, and there was little development in Texas case law applying the doctrine to the LLC at the time. The other major Texas cases discussed in this comment all occurred after the \textit{Ingalls} case. In conclusion, although the \textit{Ingalls} court refused to impose liability on the LLC members, the court did not reject the doctrine as applied to the LLC. Therefore, based on the brief history of the doctrine with respect to the LLC, it is suspected courts will continue to apply the doctrine to the LLC.

Case law from other jurisdictions would also be useful to the Texas courts as they develop the Texas common law. In fact, Texas courts have already looked outside of their jurisdiction for guidance. As previously

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\textsuperscript{227} See id. \\
\textsuperscript{228} See Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 500-501 (Tex. App.—Texarkana 2002, pet. denied) (applying corporate veil piercing theory and concluding that the evidence was not sufficient to support a finding that the veil was pierced). \\
\textsuperscript{230} See id. at 260; see also \textit{Sims v. W. Waste Indus.}, 918 S.W.2d 682, 686 (Tex. App.—Beaumont 1996, writ denied). \\
\textsuperscript{231} See \textit{Ingalls}, 70 S.W.3d at 254-55; \textit{Sims}, 918 S.W.2d at 683. \\
\textsuperscript{232} See \textit{Ingalls}, 70 S.W.3d at 259-61. \\
\textsuperscript{233} See id. at 261. \\
\textsuperscript{234} See id. \\
\end{tabular}
discussed, the *McCarthy* court relied on the Wyoming Supreme Court's opinion in *Kaycee*.\(^{235}\) Cases such as *Kaycee*, in which the state law applied does not have an LLC statute speaking to veil piercing, are of particular value to Texas courts and practitioners who do not have a veil piercing section of their statute to reference. In *Ditty*, a Utah court applied the corporate veil piercing doctrine to the LLC despite the LLC statute's silence on the doctrine.\(^{236}\) Notably, *Ditty* stated the same principles would apply to the LLC as apply to the corporation.\(^{237}\) *Ditty* is one of the earlier cases applying the theory to the LLC. In *Hollowell*, the Fifth Circuit, applying Louisiana law which is silent to the theory, stated Louisiana would treat an LLC like a corporation with respect to the alter ego theory.\(^{238}\)

Finally, a New Jersey court in *D.R. Horton* used a "modified" corporate veil piercing test to determine whether an LLC could be disregarded under New Jersey law, which is also silent as to the issue.\(^{239}\) Just as the *McCarthy* court had done, the court relied heavily on *Kaycee*.\(^{240}\) However, in contrast to *McCarthy*, the court centered its attention on *Kaycee*'s conclusion that the factors in the corporate cases should not be "mechanically" applied to LLCs.\(^{241}\) This is a point the Texas courts should focus on as they develop this area of common law due to the fact the two business forms are different, and those distinctions should be considered when attempting to pierce the veil. Although *Kaycee* did not create a list of specific factors, the court looked to many commentators for guidance.\(^{242}\) The *D.R. Horton* court also pointed to numerous commentaries in support of its opinion the doctrine should be tailored to the unique attributes of the LLC.\(^{243}\) Further, the *D.R. Horton* court provided a more detailed framework which would be helpful to Texas courts.\(^{244}\) The court recognized factors including adherence to formalities, reliance on dominance and control of the LLC (including alter ego factors), and undercapitalization among those that would be given different weight in respect to the LLC versus the corporation.\(^{245}\) In conclusion, case law from other jurisdictions, especially those jurisdictions in which the LLC statute does not address veil piercing, is a valuable resource for the Texas courts.

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237. See id. at 1335-36.
240. See McCarthy, 251 S.W.3d at 590-91.
244. See id. at *35-36.
245. See id.
B. Is the LLC the Best Choice in Texas?

The second point of discussion presented by the development of the doctrine with respect to the LLC is whether the LLC or the corporate form offers greater protection against veil piercing in Texas. Considering the fact the TLLCA does not address veil piercing, one may be subject to pre-Article 2.21 law in Texas when using the LLC form. Although the courts thus far have applied corporate common law and Article 2.21 in LLC cases, there is no statutory or common law authority from the Texas Supreme Court mandating application of the corporate statute to the LLC. While a corporation has the mandatory protection of Article 2.21, the LLC may not have this protection. Therefore, when considering the possibility of member liability with respect to liability of an LLC, it might be a safer choice to use the corporate form over the LLC.

The corporate and LLC business forms have distinct characteristics from one another. As noted, this has been recognized by courts in their application of the corporate veil piercing doctrine to the LLC. One of the major distinctions is the flexibility of the LLC management structure, as it can be managed by members, managers, or both. This provides for greater flexibility than the more rigid officers and directors structure of a corporation. Additionally, the Texas statute grants authority to all officers and managers of an LLC to act on behalf of the company for its business purpose. In contrast, the powers of a director of a corporation, who must normally act in agreement with the majority vote, are much narrower and more rigid. Consequently, dominance and control are factors that should not necessarily be weighed equally when attempting to pierce the LLC veil as opposed to the corporate veil. Further, an LLC is designed for more informal operations. It does not have to follow the corporate formalities of records and documentation, such as minutes and resolutions. Clearly, disregard of the LLC entity should not be identical in all situations to that of a corporation. If a certain formality is not required by the LLC statute, then not following that formality cannot equate to disregarding the entity. Therefore, in certain instances it should be more difficult to pierce the LLC veil than the corporate veil.

Notably, the Texas corporate statute offers a considerable amount of shelter against veil piercing. Article 2.21(A)(2) provides an extra “layer” of protection to corporations by limiting instances in which juries may arbitrarily pierce the veil. In contract cases, the corporate veil may only be pierced if there is sufficient evidence the shareholder, for his direct personal benefit, used the corporation to perpetrate an actual fraud. Further, according to Article 2.21(A)(3), the failure to follow

248. See id. § 101.254.
249. See id. § 101.254 (Vernon 2003).
250. See id.
corporate formalities is not considered a factor in veil piercing.251

With no provisions in the Texas LLC statute speaking about the veil piercing doctrine, and no Texas Supreme Court authority on the issue, courts may be able to arbitrarily disregard the LLC entity. At least if a business chooses the corporate form, it would have some assurance against veil piercing in situations such as contract cases or cases based solely on the lack of corporate formalities. However, an LLC does not have those protections of Article 2.21. The fact that Texas courts have applied Article 2.21 to LLCs is merely an application in specific cases. It does not necessarily mean the courts will always apply Article 2.21 to an LLC. Indeed, they have no obligation to apply it since Article 2.21 is not the statute that the entity was formed under. Without a ruling from the Texas Supreme Court stating courts must apply Article 2.21 to LLCs, it is solely an argument that could be made, but not clearly defined law. Therefore, an LLC veil might be pierced in a contract case on the basis of constructive fraud. Also, the inherent nature of an LLC is less formal than that of a corporation, and it would be more susceptible to a veil piercing theory based on disregard for formalities. While a Texas corporation has this protection under the statute, the LLC does not. Although a Texas LLC could be susceptible to piercing under that theory, the courts should look to other jurisdictions for guidance and recognize the distinctions between corporations and LLCs.252 In summary, under the current state of the law in Texas, a court may be able to arbitrarily pierce the LLC veil. Thus, one might have a stronger, or more certain, liability shield as a corporation with the protection of Article 2.21.

IV. CONCLUSION

Texas courts appear to be heading down the path of developing the common law of the veil piercing doctrine as applied to the LLC. While codification from the legislature would be ideal, at a minimum, endorsement and clarification from the Texas Supreme Court would be desirable for the courts, attorneys, and business persons. Although the Texas Supreme Court did not grant review of McCarthy, optimistically, it will have another opportunity to address the issue in the near future. As has been discussed, although there is still much fine tuning of the doctrine to come, case law from Texas and other jurisdictions, as well as commentaries on the issue, can be of great assistance to the courts, legislature, attorneys, and business persons. In the meantime, absent authority from the legislature or the Texas Supreme Court, it is worth contemplating whether the LLC or the corporate form offers greater protection against veil piercing in Texas.

251. Id. art. 2.21(A)(3).