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## THE NEW YORK LLC ACT AT TWENTY: IS PIERCING STILL “ENVELOPED IN THE MIDST OF METAPHOR”?

Miriam R. Albert\*

### I. INTRODUCTION

One hallmark feature of the corporate form of business organization is limited liability for shareholders, generally restricting shareholder liability for the corporation’s contract or tort obligations to the amount of that shareholder’s capital contribution.<sup>1</sup> A mythical “corporate veil” protects shareholders’ personal assets from the reach of corporate creditors.<sup>2</sup> A judge can order this veil to be disregarded or pierced, when a shareholder engages in certain prohibited conduct that typically reflects upon the shareholder’s lack of respect for the corporate structure.<sup>3</sup> Corporate creditors will not be required to honor the separateness of the corporation from its owners if the owners themselves fail to honor that separateness.<sup>4</sup> Offering corporate credi-

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<sup>1</sup> Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991) (“A fundamental principle of corporate law is that shareholders in a corporation are not liable for the obligations of the enterprise beyond the capital that they contribute in exchange for their shares.”).

<sup>2</sup> According to the court in *Morris v. New York State Department of Taxation & Finance*, a leading New York Court of Appeals case on piercing:

The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners.

623 N.E.2d 1157, 1161 (N.Y. 1993).

<sup>3</sup> See *id.* at 1161 (“The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party such that a court in equity will intervene.”).

<sup>4</sup> The Second Circuit offered this commentary on challenges inherent in piercing: “The

tors access to owners' assets is an enticing option in the context of a limited liability vehicle like a corporation.<sup>5</sup> Consequently, piercing the corporate veil is a frequently litigated area of corporate law.<sup>6</sup>

The tax consequences of the corporate structure, with a tax payable at the entity level and at the shareholder level, however, can make the corporate structure less appealing.<sup>7</sup> A number of alternative forms of business have evolved over time to avoid the double taxation consequence of incorporation while maintaining limited liability for owners, including S Corporation elections for corporations,<sup>8</sup> lim-

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jury must decide whether—considering the totality of the evidence—the policy behind the presumption of corporate independence and limited shareholder liability—encouragement of business development—is outweighed by the policy justifying disregarding the corporate form—the need to protect those who deal with the corporation.” *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991) (internal citations omitted).

<sup>5</sup> However, the doctrine is unavailable as an independent cause of action against the corporation. *See Morris*, 623 N.E.2d at 1160. “However in this context, ‘independent’ does not mean ‘separate’; rather, the Court of Appeals emphasized that the cause of action is not independent because it ‘assumes that the corporation itself is liable for the obligation sought to be imposed.’” *Sensitive Touch v. Halaas Med. Servs., PLLC*, No. 600553/2009, 2009 WL 4756393, at \*1 (N.Y. Sup. Ct. N.Y. County Dec. 11, 2009).

<sup>6</sup> *See Thompson, supra* note 1, at 1036 (“Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood.”).

<sup>7</sup> The corporation earnings are taxed at the corporate level, and at the shareholder level if the earnings are distributed to the shareholders. 26 U.S.C.A. § 11 (West 2014).

<sup>8</sup> *See generally* 26 U.S.C.A. §§ 1361-1379 (West 2014). S corporations were the first form of business that sought to capture the benefits of the limited liability for owners with pass-through tax treatment. To elect S corporation status, an entity must relinquish a large degree of flexibility, and cannot:

- (A) have more than 100 shareholders,
- (B) have as a shareholder a person (other than an estate, a trust described in subsection (c)(2), or an organization described in subsection (c)(6)) who is not an individual,
- (C) have a nonresident alien as a shareholder, and
- (D) have more than 1 class of stock.

26 U.S.C.A. § 1361. New York permits S corporation treatment to corporations which are federal S corporations, with some differences:

At the corporate level, New York S corporation treatment means a reduction in the corporate tax rate to the differential rate, with a fixed dollar minimum tax which is not less than \$100 for Article 9-A taxpayers and \$250 for Article 32 taxpayers. The differential rate is the difference between the corporate rate under Article 9-A or Article 32 and the Article 22 (personal income tax) equivalent rate. There is not the complete exemption from regular corporate tax that applies at the federal level.

N.Y. STATE DEP'T OF TAXATION & FIN., NEW YORK TAX TREATMENT OF S CORPORATIONS AND THEIR SHAREHOLDERS 5 (2000), available at <http://www.nytaxexperts.com/pdf/new-york-publications/New-York-Tax-Treatment-of-S-Corporation-and-their-sharholders.pdf>.

ited liability companies, limited liability partnerships and limited liability limited partnerships. Of these, the limited liability company (“LLC”) continues to gain ground in New York as a popular way to achieve the limited liability for owners, without the burden of double taxation.<sup>9</sup>

In 1977, Wyoming became the first state to enact an LLC statute.<sup>10</sup> In 1988, the Internal Revenue Service (“IRS”) confirmed the pass-through nature of LLC taxations, so LLCs pay no entity-level tax and income; and gains, losses, and deductions flow through to the owners.<sup>11</sup> This was followed by the IRS’s “check the box” regulations,<sup>12</sup> which allowed unincorporated associations, including LLCs, to elect to be taxed like partnerships, and has likely contributed to the increasing popularity of LLCs.<sup>13</sup> The number of filings to create LLCs is undoubtedly significant in all states, and can equal or exceed filings to create new corporations in some states.<sup>14</sup> In New York, 21,182 new domestic LLCs were created in 2000 and 75,992 new domestic corporations were created.<sup>15</sup> In 2013, the number of new domestic LLCs had risen to 70,238, while the number of new domestic corporations had fallen to 69,665.<sup>16</sup>

The LLC is a hybrid form of business, combining features of both corporations and partnerships; that said, other than the corporate-like limited liability highlighted by its very name, the LLC more closely resembles a partnership.<sup>17</sup> The LLC’s component forms of

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Further, New York City does not recognize federal or New York state S elections. *Id.* at 7.

<sup>9</sup> According to the New York Department of State, the number of new domestic LPs has dropped from 824 in 2000 to 324 in 2013; the number of new domestic LLPs has dropped from 485 in 2000 to 204 in 2013. During that period, the number of new domestic LLCs has risen from 21,182 to 70,238. Angela Persaud, NYS-Dep’t of State, Div. of Corps., State Records & UCC (on file with author).

<sup>10</sup> See WYO. STAT. ANN § 17-15-103 (1977) (repealed by laws 2010, Ch. 94, 3). Florida was next, in 1982. See FLA. STAT. § 608.401 (West 2002). No other state enacted LLC legislation until 1990, arguably due to the uncertainty surrounding the tax consequences of this new form of business.

<sup>11</sup> See Rev. Rul. 88-76, 1988-2 C.B. 360.

<sup>12</sup> See Treas. Reg. § 301.7701-3(a) (2006).

<sup>13</sup> See David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA L. REV. 427, 448-49 (1998); see also *supra* note 9.

<sup>14</sup> See REVISED UNIF. LTD. LIAB. CO. ACT (2006) (prefatory note) [hereinafter REV. UNIF. LTD. LIAB. CO. ACT].

<sup>15</sup> See *supra* note 9.

<sup>16</sup> See *id.*

<sup>17</sup> Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New*

business have structural differences, including owner liability and tax treatment.<sup>18</sup> Accordingly, the LLC does not fit easily and comprehensively into the entirety of existing doctrine from either the corporate or partnership form.<sup>19</sup> For example, some LLCs fall within the definition of “security” for purposes of the federal securities laws, and some do not.<sup>20</sup> Likewise, concluding whether and to what extent to hold LLC members liable for entity debts is far from clear. Is an LLC more like a corporation, with limited shareholder liability, or more like a partnership, with unlimited personal liability for all entity debts?

Every state now has LLC legislation, although there is disparity in the scope and content of these statutes. As a result, similarly situated litigants who participate in or transact business with LLCs may have different outcomes from state to state, and perhaps more troubling, even within a given state.<sup>21</sup>

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*Business Order*, 32 J. CORP. L. 529, 552 (2007).

<sup>18</sup> Steven C. Bahls, *Application of Corporate Common Law Doctrine to Limited Liability Companies*, 55 MONT. L. REV. 43, 62 (1994) (“The problem with applying the corporate test for piercing the corporate veil to limited liability companies is that corporate governance statutes, unlike limited liability company statutes, provide for centralized management by mandating management by a board of directors instead of management by owners.”).

<sup>19</sup> According to Professor Bahls:

Determination of whether corporate doctrines apply, or whether corresponding (but different) doctrines in partnership law apply, is difficult because limited liability companies share some attributes of corporations and some attributes of partnerships. The problem is compounded because most states have neither codified nor, by statute, rejected these common law doctrines for limited liability companies.

*Id.* at 45.

<sup>20</sup> The threshold issue triggering the application of the federal securities laws is whether the instrument in question satisfies the statutory definition of “security.” See 15 U.S.C.A. §§ 77b(a)(1), 78c(10) (West 2012). The term “security” is defined broadly in both the Securities Act of 1933 15 U.S.C. § 77b(a)(1) and the Securities Exchange Act of 1934. 15 U.S.C.A. § 78c(10). Neither definition explicitly includes LLCs, but each includes the term “investment contract.” Under *SEC v. W.J. Howey Co.*, any interest that “involves an investment of money in a common enterprise with profits to come solely from the efforts of others” is an investment contract, thereby included within the definition of “security” and subject to the rules and regulations of the federal securities laws. 328 U.S. 293, 301 (1946); see Miriam R. Albert, *The Howey Test Turns 64: Are the Courts Grading This Test on a Curve?*, 2 WM. & MARY BUS. L. REV. 1, 19 (2011). If an LLC is member-managed, each member will participate in the management of the enterprise, and thus the profits will not come solely or even predominantly from the efforts of others. However, in a manager-managed LLC, the non-manager members are passive investors, and their interests could well be considered securities.

<sup>21</sup> See *Why States Should Adopt RULLCA*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20RULLCA> (last visited

Piercing the corporate veil continues to be a popular topic for commentators,<sup>22</sup> and as Justice Cardozo noted, is “still enveloped in the mists of metaphor.”<sup>23</sup> Early scholarship on LLCs focused on the wisdom of importing entire corporate law concepts, like piercing the corporate veil, and applying them to this new hybrid entity, without questioning whether the concepts were a good fit.<sup>24</sup> The application of corporate law veil piercing to LLCs has some vocal critics. Commentators argue that the piercing cases are not consistent, and that courts apply “nominal” tests that are “singularly unhelpful” and that the “arbitrariness of these nominal tests casts further doubt on the utility of the doctrine.”<sup>25</sup> Professor Stephen Bainbridge is a particu-

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Mar. 7, 2015) (“The existing state LLC statutes, however, are far from uniform and many have been amended on a patchwork basis and have not kept up with the LLC cases and other legal developments.”).

According to Professor Thompson, “[w]hen piercing does occur, the courts’ reasoning varies with the context, and decisions reflect the differing impact of various statutory policies affecting limited liability.” Thompson, *supra* note 1, at 1039. See also Bainbridge, *infra* note 24, at 91. But see Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063, 1070 (2006).

<sup>22</sup> In 1998, one commentator evaluating LLC piercing under Delaware law stated, “the Delaware courts will soon feel great pressure to find a way to pierce the veils of LLCs. This is true even if the courts have to invent a common law of LLC piercing or apply contractual doctrines.” Cohen, *supra* note 13, at 429. See *infra* Part III, for a discussion of the approaches New York courts take to piercing the LLC veil.

<sup>23</sup> *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.), *reh’g denied*, 155 N.E. 914 (N.Y. 1927).

<sup>24</sup> According to Professor Bahls:

One unanswered question is whether common law doctrines applicable to corporations are applicable to limited liability companies. . . . Determination of whether corporate doctrines apply, or whether corresponding (but different) doctrines of partnership law apply, is difficult because limited liability companies share some attributes of corporations and some of partnerships. The problem is compounded because most states have neither codified nor, by statute, rejected these common law doctrines for limited liability companies.

Bahls, *supra* note 18, at 45.

According to Professor Bainbridge:

On the one hand, corporate veil piercing cases are highly fact-specific. On the other hand, the facts often tell us little about the likely outcome. Successful corporate veil piercing claims seem to differ only in degree, but not in kind, from unsuccessful claims. Unfortunately, there is no evidence to date that matters will improve as the vague corporate law standards are exported to the LLC setting.

Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 91-92 (2005).

<sup>25</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 109 (1985).

larly vocal critic, arguing the doctrine is vague and arbitrarily applied.<sup>26</sup>

Twenty years ago, the New York Limited Liability Company Law was enacted, including § 609(a), which explicitly disclaims liability of members, managers, and agents for the debts and obligations of the LLC.<sup>27</sup> However, New York courts have held that this limitation on liability is not absolute, and certain conduct on the part of the owners can erode the liability shield.<sup>28</sup> The statute provides that the members will not have personal liability for LLC debts *solely* because of their role as owners in the LLC.<sup>29</sup> The statute does not say that members will never have liability, just that any liability will not be as a result of their owner status, leaving open the question of when members will be liable for debts of the LLC.<sup>30</sup>

Neither the language of § 609(a) itself or its legislative history offers any guidance on what factors a court should use to determine whether to pierce an LLC. Since LLCs are a blend of partnerships and corporations, the relevant inquiry is to determine whether, for purposes of owner liability, an LLC is more like a corporation, with its default rule of limited liability, or more like a partnership, where partners have unlimited personal liability for all partnership debts.<sup>31</sup> Unlike the Model Business Corporation Act (“MBCA”), and the states that have adopted it, New York’s Business Corporation Law (“BCL”) has no statutory limitation on liability equivalent to § 609.<sup>32</sup> However, New York has a well-established body of case law permitting courts to disregard shareholder limited liability based on shareholder conduct. New York courts, like others across the country, be-

<sup>26</sup> Bainbridge, *supra* note 24, at 77; *but see* Rapp, *supra* note 21, at 1070.

<sup>27</sup> N.Y. LTD. LIAB. CO. LAW § 609(a) (McKinney 2007) [hereinafter LTD. LIAB].

<sup>28</sup> *See infra*, Part III.B.

<sup>29</sup> LTD. LIAB. § 609(a) (emphasis added).

<sup>30</sup> *Id.* § 609(b).

<sup>31</sup> *See* N.Y. P’SHIP LAW § 26 (McKinney 2014). “It would be unfair to allow LLCs to possess the positive aspects of limited liability in a corporate setting without also carrying the negative possibility of piercing.” Karin Schwandt, *Limited Liability Companies: Issues in Member Liability*, 44 UCLA L. REV. 1541, 1552 (1997).

<sup>32</sup> *See State Corporation Laws*, USLEGAL, <http://corporations.uslegal.com/basics-of-corporations/state-corporation-laws/> (last visited Mar. 10, 2015). MCBA § 6.22 is the corporate equivalent of both § 609(a) and § 3.04(b) of the RULLCA, on which § 609 is based. Compare REV. UNIF. LTD. LIAB. CO. ACT § 304(b), with MODEL BUS. CORP. ACT § 6.22 (2006). MBCA § 6.22(b) provides limited liability for shareholders for corporate debts, a provision that according to the MBCA Official Comments “underlies modern corporate law.” The last clause of MBCA § 6.22(b) specifically recognizes that shareholder liability is possible by the conduct of the shareholder. BUS. CORP. ACT § 6.22; *see also infra* Part III.A.

gan by applying corporate principles of piercing the corporate veil when evaluating claims to pierce an LLC. The complete lack of statutory guidance on the factors necessary to pierce LLCs leaves judges with tremendous discretion, resulting in some uneven and sometimes insupportable results.<sup>33</sup>

Part II of this Article explores the history of LLC veil piercing doctrine, starting with an exploration of the approach set out in the Revised Uniform Limited Liability Company Act (“RULLCA”) and a brief look at the approaches states take to piercing the LLC veil, with a close examination of the NYLLCA.<sup>34</sup> Part III reviews the New York case law on piercing the corporate veil and the evolution of this doctrine by state and federal courts in the context of LLCs. The article concludes with some suggestions for refining the continuing development of the LLC piercing doctrine in New York in a thoughtful and deliberate manner so as to avoid inconsistent and arbitrary results.

## II. HISTORY OF THE LLC VEIL PIERCING DOCTRINE

By 1996, every state had some sort of LLC legislation. This timing is likely tied to the work of the Uniform Law Commission (ULC)<sup>35</sup> which in 1995, promulgated the original Uniform Limited

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<sup>33</sup> According to Professor Bainbridge:

Courts are now routinely applying the corporate law doctrine of veil piercing to limited liability companies (LLCs). This extension of a seriously flawed doctrine into a new arena is not required by statute and is insupportable as a matter of policy. The standards by which veil piercing is effected are vague, leaving judges great discretion. The result has been uncertainty and lack predictability . . .

Bainbridge *supra* note 24, at 77.

According to another commentator:

A common refrain in the literature is an attack on the use of conclusory terms, such as “alter ego” and “instrumentality,” providing no insight into the nature of the factors considered. Commentators lament that the same facts appear in cases providing relief and cases denying relief in an unpatterned mingling of relevant with neutral facts that has stymied constructive analysis. The law is presented as offering completely antithetical doctrines which courts are at liberty to utilize or ignore, depending on the results desired.

Thompson, *supra* note 1, at 1037. See *infra* Part III.B for a discussion of the New York courts’ issues with terminology.

<sup>34</sup> LTD. LIAB. § 609(a).

<sup>35</sup> The ULC is also known as the National Conference of Commissioners on Uniform State Law. The organization was created in 1892 and according to the organization—it pro-



Liability Company Act (ULLCA),<sup>36</sup> blending concepts from partnership and corporate law.<sup>37</sup> Since LLCs are a combination of corporations and partnerships, it is unsurprising that the ULC and state legislators have leaned on both corporate and partnership statutory norms in crafting structures to govern this hybrid.

### A. Revised Uniform Limited Liability Act

In 2006, the ULC released the Revised Uniform Limited Liability Company Act,<sup>38</sup> a “comprehensive, fully integrated ‘second generation’ LLC statute that takes into account the best elements of the ‘first generation’ LLC statutes and two decades of legal developments in the field.”<sup>39</sup> On the topic of limited liability for owners, the RULLCA provides a blanket statement disclaiming member-liability arising “solely” by reason of the membership in the LLC.<sup>40</sup> This

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vides states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” *See About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 13, 2015).

<sup>36</sup> This first-generation model LLC act was amended in 1996 to take into account the then newly adopted federal tax “check-the-box” regulations. *See* 26 Treas. Reg. § 301.7701-2 (2014). *See infra* notes 38-40 and accompanying text.

<sup>37</sup> According to the ULC:

ULLCA’s drafting relied substantially on the then recently adopted Revised Uniform Partnership Act (“RUPA”), and this reliance was especially heavy with regard to member-managed LLCs. ULLCA’s provisions for manager-managed LLCs comprised an amalgam fashioned from the 1985 Revised Uniform Limited Partnership Act (“RULPA”) and the Model Business Corporation Act (“MBCA”). ULLCA’s provisions were also significantly influenced by the then-applicable federal tax classification regulations, which classified an unincorporated organization as a corporation if the organization more nearly resembled a corporation than a partnership.

REV. UNIF. LTD. LIAB. CO. ACT (2006) (prefatory note).

<sup>38</sup> REV. UNIF. LTD. LIAB. CO. ACT.

<sup>39</sup> *See supra* note 35.

<sup>40</sup> *See* REV. UNIF. LTD. LIAB. CO. ACT § 304. Section 304, Liability of Members and Managers reads as follows:

(a) The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:

(1) are solely the debts, obligations, or other liabilities of the company; and

(2) do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.

leaves open the possibility of liability for owners for matters that do not arise “solely” from their ownership status. The ULC comments provide context on this issue, indicating that the intent is to shield members and managers from obligations of the LLC, but not to release them from claims arising from their own bad conduct.<sup>41</sup>

While this is entirely consistent with the MBCA and corporate law principles generally, the reality is that LLCs are not corporations, although they share many characteristics. A doctrine that is appropriate for corporations may not be appropriate for the hybrid LLC. Yet, the ULC treats LLCs exactly like corporations in almost all respects. The exception is in the need to adhere to company formalities. The ULC comment notes the importance placed on the “disregard of corporate formalities”<sup>42</sup> in a corporate piercing analysis, and argues that this factor is inappropriate when considering piercing an LLC, “because informality of organization and operation is both common and desired.”<sup>43</sup> A number of states, not including New York, have picked up this idea and have legislatively eliminated or diminished the importance of adhering to formalities as a part of an LLC piercing analysis.<sup>44</sup>

The ULC has missed an opportunity to offer needed clarity and guidance on when and how this corporate law concept of limited liability could and should be eroded in the context of LLCs. The drafters implicitly noted the need for this guidance, when commenting that courts “regularly (and sometimes almost reflexively) apply

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(b) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations, or other liabilities of the company.

*Id.*

<sup>41</sup> See *id.* (comment on § 304).

<sup>42</sup> *Id.* (comment on § 304).

<sup>43</sup> *Id.* (comment on § 304).

<sup>44</sup> See *infra* notes 51-53 and accompanying text. Professor Bahls cites the Comments of the Limited Liability Company Subcommittee on this issue:

The failure of a limited liability company to observe the formalities customarily followed by business corporations or requirements relating to the exercise of its powers or management of its business and affairs is not a ground for courts disregarding the separate entity status of [a limited liability company] or for imposing personal liability on the members for liabilities of the limited liability company. Courts should not pierce the limited liability company “veil” merely as a result of failure to follow normal formalities required of a corporation.

Bahls, *supra* note 18, at 63 n.115.

that doctrine to limited liability companies.”<sup>45</sup> This is far from a ringing endorsement of the appropriateness of such applications; yet the ULC offers no substantive help to counter the “reflexive” application of the doctrine to LLCs. Many courts follow the ULC approach and treat LLCs exactly like corporations. They may do so intentionally or perhaps carelessly, but in any event, they weaken the logic supporting the developing LLC piercing case law.<sup>46</sup>

## B. State Statutory Approaches to LLC Piercing

States have reacted to the RULLCA’s implicit authorization of the LLC veil piercing with a variety of statutory approaches. There are language differences between and among the various state LLC statutes, in terms of how each limits member liability for LLC debts.<sup>47</sup> No state statute expressly addresses the issue of piercing. The case law bears out that this should not be interpreted to mean that the relevant lawmakers in fact intended that the doctrine not apply.<sup>48</sup>

In 1997, Professor Thompson categorized state LLC laws into sometimes overlapping groups, based on the degree and scope of insulation each provided.<sup>49</sup> His first group of LLC statutes contained language that insulates members from any and all liabilities of the LLC.<sup>50</sup> His second group of LLC statutes limits this protection to liabilities arising from members acting as members, or for liabilities arising “solely” from the members’ status, with various iterations of

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<sup>45</sup> REV. UNIF. LTD. LIAB. CO. ACT § 304 (comment on § 304).

<sup>46</sup> See *infra* notes 93-95 and accompanying text.

<sup>47</sup> In 1997, Professor Thompson did a comprehensive survey of the states’ LLC laws. At that time, he found the various states’ liability provisions to be “much less uniform than parallel provisions in corporate statutes and some LLC statutes arguably create broader insulation than is currently available at corporate law.” Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 14 (1997).

<sup>48</sup> *Kaycee Land & Livestock v. Flahive*, 46 P.2d 323, 327 (Wyo. 2002); see also Bahls, *supra* note 18, at 61.

<sup>49</sup> See Thompson, *supra* note 47, at 14-18.

<sup>50</sup> *Id.* at 14-15. Of the thirteen states in Professor Thompson’s Category A (insulating from liability with no “specific reference to any limits on the insulation”), nine would still be in that category. See Arkansas (ARK. CODE ANN. § 4-32-304 (West 1993)); Colorado (COLO. REV. STAT. § 7-80-705 (West 1990)); Florida (FLA. STAT. ANN. § 608.4227 (West 2002)); Louisiana (LA. REV. STAT. ANN. § 12:1320 (West 1993)); Michigan (MICH. COMP. LAWS ANN. § 450.4501(4) (West 2010)); Nevada (NEV. REV. STAT. ANN. § 86.371 (West 1995)); Texas (TEX. BUS. ORG. CODE § 101.114 (Vernon 2006)); Utah (UTAH CODE ANN. § 48-2c-601 (West 2001)); and Wyoming (WYO. STAT. ANN. § 17-29-304 (West 2010)).

who other than members are entitled to this protection.<sup>51</sup> Another group of LLC statutes indicates that despite the statute's protection, members can become liable as a result of their own conduct.<sup>52</sup> And finally, a handful of LLC statutes expressly piggybacked their LLC protection onto such states' existing corporate law protection by referencing their corporate law principles, and legislating that LLC members should be treated like shareholders in a corporation.<sup>53</sup>

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<sup>51</sup> Thompson, *supra* note 47, at 17. Of the twenty-nine states in Professor Thompson's Categories B and C (insulating from liability arising "solely" from specified activities or membership status), twenty-eight would still be in that category and five more from other categories should now be included here. See Alaska (ALASKA STAT. ANN. § 10.50.265 (West 1997)); Arizona (ARIZ. REV. STAT. ANN. § 29-651 (West 1992)); California (CAL. CORP. CODE § 17703.04 (2014)); Connecticut (CONN. GEN. STAT. ANN. § 34-133 (West 1997)); Delaware (DEL. CODE ANN., tit. 6 § 18-303 (West 1994)); District of Columbia (D.C. CODE ANN. § 29-803.04 (West 2013)); Georgia (GA. CODE ANN. § 14-11-303 (West 2009)); Hawaii (HAW. REV. STAT. § 428-303 (1996)); Idaho (IDAHO CODE ANN. § 30-6-304 (West 2008)); Kentucky (KY. REV. STAT. ANN. § 275.150 (West 2012)); Maine (ME. REV. STAT., tit. 31 § 1544 (2011)); Maryland (MD. CODE ANN., CORPS. & ASS'NS § 4A-301 (West 1992)); Massachusetts (MASS. GEN. LAWS ANN., ch. 156C § 22 (2003)); Minnesota (MINN. STAT. ANN. § 322B.303 (1993)); Mississippi (MISS. CODE ANN. § 79-29-311 (West 2011)); Missouri (MO. ANN. STAT. § 347.057 (Vernon 1993)); Montana (MONT. CODE ANN. § 35-8-304 (West 2013)); New Hampshire (N.H. REV. STAT. ANN. § 304-C:23 (2013)); New Jersey (N.J. STAT. ANN. § 42:2C-30 (2012) (no longer covers agents)); New York (N.Y. LTD. LIAB. CO. LAW § 609(a) (McKinney 1994)); North Dakota (N.D. CENT. CODE ANN. § 10-32-29 (West 1993)); Oklahoma (OKLA. STAT. ANN., tit. 18 § 2022 (1992)); Oregon (OR. REV. STAT. ANN. § 63.165 (West 1999)); Pennsylvania (15 PA. CONS. STAT. ANN. § 8922 (Purdon 2001)); Rhode Island (R.I. GEN. LAWS ANN. § 7-16-23 (West 1992)); South Carolina (S.C. CODE ANN. § 33-44-303 (1996)); Virginia (VA. CODE ANN. § 13.1-1019 (West 2006)); and West Virginia (W. VA. CODE ANN. § 31B-3-303 (West 1996)).

The following four statutes now fall into Categories B and C: Iowa (IOWA CODE ANN. § 489.304 (2009)); Kansas (KAN. STAT. ANN. § 17-7688 (West 2014)); Nebraska (NEB. REV. STAT. ANN. § 21-129 (West 2011)); and South Dakota (S.D. CODIFIED LAWS § 47-34A-303 (1998)). And the Washington statute does not provide insulation for members or managers and should no longer be in this category. See WASH. REV. CODE ANN. § 25.15.060 (West 1995).

<sup>52</sup> Thompson, *supra* note 47, at 17. Of the eight states in Professor Thompson's Category D (including an affirmative statement that participants can become liable through their own conduct), nine would still be in that category. North Carolina should also be moved to Categories B and C from Category D (N.C. GEN. STAT. ANN. § 57D-3-30 (West 2014)). See Alabama (ALA. CODE § 10A-5-3.02 (2009); this statute will be repealed as of January 1, 2017); Indiana (IND. CODE ANN. § 23-18-3-3 (West 1993)); Tennessee (TENN. CODE ANN. § 48-217-101 (West 2012)); New Mexico (N.M. STAT. ANN. § 53-19-13 (West 1993)); Ohio (OHIO REV. CODE ANN. § 1705.48 (West 2010)); Vermont (11 VT. STAT. ANN. § 3043); and Wisconsin (WIS. STAT. ANN. § 183.0304 (West 2013)).

<sup>53</sup> Thompson, *supra* note 47, at 17. Of the seven states in Professor Thompson's Category E(1) and (2) (explicitly requiring corporate principles to LLCs), five would still be in that category: California (CAL. CORP. CODE § 17703.04(2)(b)); Minnesota (MINN. STAT. ANN. § 322B.303); North Dakota (N.D. CENT. CODE ANN. § 10-32-29(3)); Washington (WASH. REV. CODE ANN. § 25.15.060); and Wisconsin (WIS. STAT. ANN. § 183.0304). Neither the Hawaii statute (HAW. REV. STAT. § 428-303) nor the Illinois statute (805 ILL. COMP. STAT. ANN.

This latter approach has arguably the benefit of being easy to apply. That said, depending on how clearly and consistently articulated the relevant state corporate piercing doctrine is, the seemingly easy application of corporate law piercing principles to LLCs may not be terribly helpful. And even in the absence of express statutory authority mandating the application of corporate piercing factors to LLCs, many courts implicitly do so,<sup>54</sup> engaging in what Professor Bainbridge calls a “perfunctory” analysis, where these courts “simply assume the corporate law standard applies and have done with it.”<sup>55</sup> These courts fail to consider any differences at all between corporations and LLCs.<sup>56</sup>

### C. New York’s Limited Liability Company Law

The New York Limited Liability Company Law (“NYLLCL”) became law on July 26, 1994, and under § 1403 thereof, became law 90 days later.<sup>57</sup> The law is a blend of New York partnership and corporate law.<sup>58</sup> The law was designed to make New

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180/10-10) contains such a provision. See HAW. REV. STAT. § 428-303; 805 ILCS 180/10-10. For further discussion on the change in Illinois’ law, see Chad Brigham, *Just How Limited is the Illinois Limited Liability Company?*, 26 S. ILL. L.J. 53, 55 (2001).

<sup>54</sup> Bainbridge, *supra* note 24, at 82 (citing *Stone v. Frederick Hobby Assoc. II*, No. CV000181620S, 2001 WL 861822, at \*6 (Conn. Super. Ct. July 10, 2001); *Advanced Tel. Sys. Inc. v. Com-Net Prof’l Mobile Radio LLC*, 59 Pa. D. & C.4th 286, 289 (Pa. Ct. Com. Pl. 2002)).

<sup>55</sup> Bainbridge, *supra* note 24, at 82; Thompson, *supra* note 47, at 17.

<sup>56</sup> Some states have followed the RULLCA’s exclusion of a failure to follow corporate formalities as grounds for piercing. Professor Thompson’s Category E(3) lists nine statutes that carve out provisions of corporate law from LLC piercing. Two states have come out of this category; Colorado (COLO. REV. STAT. ANN. § 7-80-705) no longer has such a provision, and neither does Maine (ME. REV. STAT. tit. 31, § 1544). The remaining seven states are joined by another eight states in carving out failure to follow company formalities as grounds for liability. See California (CAL. CORP. CODE § 17703.04 (2)(b)); District of Columbia (D.C. CODE ANN. § 29-803.04); Hawaii (HAW. REV. STAT. § 428-303); Illinois (805 ILL. COMP. STAT. ANN. 180/10-10); Iowa (IOWA CODE ANN. § 489.304(2)); Oregon (OR. REV. STAT. ANN. § 63.165); Idaho (IDAHO CODE ANN. § 30-6-304); Montana (MONT. CODE ANN. § 35-8-304); New Jersey (N.J. STAT. ANN. § 42:2C-30); South Carolina (S.C. CODE ANN. § 33-44-303); South Dakota (S.D. CODIFIED LAWS § 47-34A-303(b)); Tennessee (TENN. CODE ANN. § 48-217-101); Washington (WASH. REV. CODE ANN. § 25.15.060); West Virginia (W. VA. CODE ANN. § 31B-3-303); Wyoming (WYO. STAT. ANN. § 17-29-304(b)).

<sup>57</sup> Memorandum from the Office of G. Oliver Koppell, New York Attorney General to Attorneys, Paralegals & Law Students (Dec. 7, 1994), available at [http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real\\_estate\\_finance/Effective-memos/E-34.%20Limited%20liability%20company%20law.pdf](http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/Effective-memos/E-34.%20Limited%20liability%20company%20law.pdf) (providing an overview of New York’s Limited Liability Company Law).

<sup>58</sup> “The law is based on existing New York law and practice, borrowing heavily from ex-

York “aggressively hospitable to business.”<sup>59</sup> The NYLLCL had significant support; the Legislative Bill and Veto Jacket for the NYLLCA contains a variety of memoranda in support of the bill totaling over 200 pages.<sup>60</sup>

The introduction to the NYLLCL indicates that it is amending “the partnership law, the business corporation law, the arts and cultural affairs law, the tax law, the general city law, the administrative code of the city of New York, the codes and ordinances of the city of Yonkers and the public health law, in relation to limited liability companies and the registration of limited liability partnerships.”<sup>61</sup>

Section 609 contains a modified version of the RULLCA, providing that members and managers of LLCs are not liable for the debts and obligations of the LLC “solely” by reason of such status.<sup>62</sup> The statute has been cited in fifty-two New York cases, many of which for the proposition that individual owners are not responsible for LLC debts.<sup>63</sup>

The text of § 609 has not changed in the twenty years since its

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isting New York Partnership Law, especially the recently enacted New York Revised Limited Liability Partnership Act . . . and where applicable the Business Corporation Law.” *See* New York Bill Jacket, 1994 S.B. 7511-A, Ch. 576, at 00006 (memorandum in support of S.B. 7511-A).

<sup>59</sup> *See id.* at 000032 (memorandum filed with S.B. 7511-A). “Unlike partnerships, however, the LLC offers one major non-tax benefit which will make it a very desirable form of business organization. This is the protection of members for the debts and other obligations of the LLC.” *Id.* at 000029.

<sup>60</sup> The Legislative Bill and Jacket Veto contains only one explicit reference to § 609, in a letter from the State Education Department to the Counsel to the Governor, raising concerns not about § 609, but rather about how the bill applies to various professions licensed under the Education Law. *See id.* at 00052 (Memorandum from the State Education Department to the Counsel to the Governor).

<sup>61</sup> Limited Liability Company Law, 1994 Sess. Law News of N.Y., Ch. 576 (S. 7511-A, A. 11317-A) (McKinney).

<sup>62</sup> *See* LTD. LIAB. § 609(a). Section 609(a) reads:

(a) Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.

*Id.*

<sup>63</sup> *See, e.g.,* Broadway 26 Waterview LLC v. Bainton, McCarthy & Siegel, LLC, 941 N.Y.S.2d 620 (App. Div. 1st Dep’t 2012).

enactment. However, various bills have been proposed to amend the section, most recently, the 2013 New York Senate Bill No. 5885 which proposed adding provisions to increase penalties for wage payment violations by LLCs.<sup>64</sup> The bill requires that the ten members with the largest percentage ownership in an LLC be personally liable for all debts, wages, or salaries due and owing to any of its laborers, servants or employees, for services performed by them for such limited liability company. The legislative history for the proposed amendment offers this justification:

The Wage Theft Prevention Act was enacted in 2010 to provide the Department of Labor with the tools necessary to ensure that workers across the State of New York are paid the wages to which they are entitled. However, many employees are still vulnerable to wage theft by unscrupulous employers. This bill would better ensure that all New York workers receive the wages they have rightfully earned.<sup>65</sup>

This proposed bill reflects legislative effort to further move LLCs towards the corporation part of their hybrid nature, as New York's BCL § 630 contains a similar provision holding the ten largest corporate shareholders personally liable for debts, wages and salaries owed to employees.<sup>66</sup> This effort to move LLCs further in alignment with New York corporate law may prove to be insignificant as the legislative history of the bill notes that a bill similar to 5885 died in the Labor Committee in both Houses.

### III. NEW YORK LLC PIERCING CASES

#### A. Piercing the Corporate Veil under New York Law

The doctrine of piercing corporations is well-established under New York case law. *Morris v. N.Y. State Department of Taxation & Finance*<sup>67</sup> is a leading New York Court of Appeals case setting out the elements of a successful corporate piercing claim, providing that

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<sup>64</sup> S.B. 5885, 2013 Leg., 237th Sess. (N.Y. 2013).

<sup>65</sup> NEW YORK COMMITTEE REPORT, S.B. 5885, 2013 Leg., 237th Sess. (N.Y. 2013).

<sup>66</sup> N.Y. BUS. CORP. LAW § 630 (McKinney 1984).

<sup>67</sup> 623 N.E.2d 1157 (N.Y. 1993).

courts may pierce the corporate veil and erode or eliminate shareholder limited liability when necessary “to prevent fraud or achieve equity.”<sup>68</sup> That said, corporate piercing is not undertaken lightly in New York.<sup>69</sup> New York courts will pierce the corporate veil and hold shareholders liable for the corporation’s debts only when “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.”<sup>70</sup>

The decision to pierce is a fact-intensive one, with no bright-line test or rigid rules available to achieve consistent results.<sup>71</sup> *Morris* offers no guidance on how to apply its two prongs, and so several case law tests have been developed to fill that gap. New York courts consider a number of factors that support a finding of the domination or unity of interest required to pierce a corporate veil under *Morris*.<sup>72</sup>

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<sup>68</sup> *Id.* at 1160 (quoting *Int’l Aircraft Trading Co. v. Mfrs. Trust Co.*, 79 N.E.2d 249, 252 (N.Y. 1948)).

<sup>69</sup> According to one district court judge, “New York courts are reluctant to disregard the corporate form, and will do so only when it ‘has been used to achieve fraud, or when the corporation has been so dominated by an individual or corporation . . . and its separate identity so disregarded, that it primarily transacted the dominator’s business rather than its own and can be called the other’s alter ego.’ ” *Allison v. Clos-ette Too, LLC*, No. 14 Civ. 1618(LAK)(JCF), 2014 WL 4996358, at \*5 (S.D.N.Y. Sept. 15, 2014) (quoting *Bridge-stone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 17-18 (2d Cir. 1996)).

<sup>70</sup> *Morris*, 623 N.E.2d at 1160-61. The federal courts frame the issue slightly differently:

A party urging piercing of a corporate veil must generally prove that “(1) the owner has exercised such control that the corporation has become a mere instrumentality of the owner, which is the real actor; (2) such control has been used to commit a fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to plaintiff.”

*Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052 (2d Cir. 1997) (quoting *Wm Passalacqua Builders*, 933 F.2d at 138).

<sup>71</sup> “Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when this power may be exercised.” *Morris*, 623 N.E.2d at 1160. And because the inquiry is so fact-intensive, the theory of veil piercing “is not well suited for resolution on a pre-answer, pre-discovery motion to dismiss.” *BT Ams. Inc. v. ProntoCom Mktg. Inc.*, 859 N.Y.S.2d 893 (Sup. Ct. N.Y. County 2008).

<sup>72</sup> *Wm. Passalacqua Builders*, 933 F.2d at 139. The factors include:

(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discre-



The factors set out in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*<sup>73</sup> have been used in various iterations by both the New York state and federal courts.<sup>74</sup> The Second Circuit has noted that there is no “mechanical” rule to dictate how many or to what degree the piercing factors must be present, and further that courts will apply the “overarching principle” that liability will be imposed to reach an equitable result.<sup>75</sup> Accordingly, courts utilize varying numbers of the *Passalacqua* factors when evaluating piercing claims.<sup>76</sup>

As previously noted, one area where corporate piercing doctrine differs from LLC piercing is in the need to follow company formalities; whether corporate shareholders are following requisite corporate formalities is the first of the *Passalacqua* factors.<sup>77</sup> When a corporate shareholder fails to follow basic corporate formalities, it becomes unfair to require creditors to honor the separate nature of the corporation when its owner has not done the same.<sup>78</sup> Some state

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tion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

*Id.*

<sup>73</sup> 933 F.2d 131 (2d Cir. 1991).

<sup>74</sup> See *Last Time Beverage Corp. v. F & V Distribution Co., LLC*, 951 N.Y.S.2d 77 (App. Div. 2d Dep’t 2012); *East Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 884 N.Y.S.2d 94 (App. Div. 2d Dep’t 2009); *BT Americas Inc.*, 859 N.Y.S.2d 893. Courts can select only a few of the *Passalacqua* factors. See, e.g., *Bd. of Managers of Caton Court Condo. v. Caton Dev. LP*, 983 N.Y.S.2d 201, 41 Misc.3d 1231(A), at \*8 (Sup. Ct. Kings County 2013) (“Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds.” (internal citations omitted)).

<sup>75</sup> *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (2d Cir. 1996).

<sup>76</sup> See, e.g., *Bd. of Managers of Caton*, 983 N.Y.S.2d 201. Commentators have weighed in with proposed factors tests designed for the specifics of piercing LLCs. See Cohen, *supra* note 13, at 490-91. See also John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners’ Limited Liability Protection*, 75 WASH. L. REV. 147, 156 (2000).

<sup>77</sup> *Wm. Passalacqua Builders*, 933 F.2d at 139.

<sup>78</sup> According to the Second Circuit:

Application of these many precedents to the literally infinite variety of situations which might warrant a court to pierce the corporate veil can be difficult, particularly in the case of small privately held corporations where the trappings of sophisticated corporate life are rarely present. In

statutes, and the RULLCA, explicitly carve out failure to follow corporate formalities from the list of factors to consider when piercing an LLC.<sup>79</sup> The NYLLCL does not do so, but some New York courts have weighed in on the decreased need for adherence to formalities in the context of an LLC.<sup>80</sup>

### **B. Piercing the LLC Veil under New York Case Law**

Unlike a small number of other states, the NYLLCL does not expressly authorize the whole scale application of corporate veil piercing to LLCs.<sup>81</sup> Instead, § 609 provides that members of LLCs are not liable for the company's debts solely because of their owner status.<sup>82</sup> Although the language of the statute contains no limitations on this liability protection, New York courts began hearing claims to pierce LLCs within a few years of the enactment of § 609. In the absence of direction from the legislature, courts have been left to their own devices when adjudicating these claims. Almost ten years after the enactment of § 609, one court implicitly acknowledged the continuing lack of clarity in this area, and to support its view that it seems "likely that a corporate standard would be applied" to LLC piercing cases, the court had to reference a "learned treatise" for the proposition that LLC members ought to have the same protections as

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such instances, preoccupation with questions of structure, financial and accounting sophistication or dividend policy or history would inevitably beckon the end of limited liability for small business owners, many, if not most, of whom have chosen the corporate form to shield themselves from unlimited liability and potential financial ruin. Nevertheless, a close examination of the many cases reveals common characteristics broadly utilized by reviewing courts in deciding whether to disregard the corporate form. In each case, the evidence demonstrated an abuse of that form either through on-going fraudulent activities of a principal, or a pronounced and intimate commingling of identities of the corporation and its principal or principals, which prompted the reviewing courts, driven by equity, to disregard the corporate form.

William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 601 (2d Cir. 1989).

<sup>79</sup> See *supra* note 56 and accompanying text.

<sup>80</sup> Capricorn Investors III, L.P. v. Coolbrands Int'l, Inc., 897 N.Y.S.2d 668, 24 Misc. 3d 1224(A), at \*5 (Sup. Ct. N.Y. County 2009) ("LLCs generally have operating agreements, which may include meeting requirements, or other such formalities. Plaintiff's assertion that the LLCs have no officers or directors, and did not hold board or executive committee meetings are not persuasive veil piercing factors for an LLC, where plaintiff does not argue that management was required to be centralized in a board.").

<sup>81</sup> See *supra* note 53 and accompanying text.

<sup>82</sup> LTD. LIAB. § 609(a).

corporate shareholders.<sup>83</sup>

Since 2005, New York case law has explicitly provided that its LLCs are subject to piercing.<sup>84</sup> What is unclear, and somewhat inconsistent, is both the approaches courts take when evaluating LLC piercing claims, and in some cases, the elements required to pierce an LLC.<sup>85</sup> The early LLC piercing cases relied on *Morris* for the proposition that piercing was permitted in the LLC context, anchoring their analysis around *Morris*' two prongs, presumably as a matter of equity. The courts also use some variation of the *Passalacqua* factors for this very fact-intensive evaluation.<sup>86</sup> To date, no court has offered context or justification for the application of these corporate law principles to an LLC.<sup>87</sup> This could be an intentional choice by these courts, concluding that in the context of piercing, LLCs are more like corporations than partnerships. *Morris*' goal "to prevent fraud or achieve equity" was not anchored to a corporate landscape.<sup>88</sup> Or it could be, as Professor Bainbridge said, that the courts are just assuming corporate piercing principles do apply.<sup>89</sup>

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<sup>83</sup> *Zulawski v. Taylor*, 815 N.Y.S.2d 496, 11 Misc. 3d 1058(A), at \*4 (Sup. Ct. Erie County 2005) (citing 1 N.Y. PRAC., NEW YORK LIMITED LIABILITY COMPANIES AND PARTNERSHIPS § 3.3). One court did just what the "learned treatise" drafters had suggested and explicitly held that the corporate law of piercing applies to LLCs. *See Retropolis Inc. v. 14th St. Dev. LLC*, 797 N.Y.S.2d 1, 17 A.D.3d 201, 211 (App. Div. 1st Dep't 2005).

<sup>84</sup> *See Retropolis*, 17 A.D.3d at 211.

<sup>85</sup> "In light of the predominant trend for courts to import the corporate law regime into the LLC context, it is not surprising that a similar multitude of standards is emerging in the latter setting." Bainbridge, *supra* note 24, at 87.

<sup>86</sup> The district court in *Jiaying Hongyu Knitting v. Morgan*, No. 11 Civ. 09342(AJN), 2013 WL 81320 (S.D.N.Y. Jan. 8, 2013), relied on *William Wrigley Jr. Co.*, 890 F.2d at 601, for the list of factors, which is much shorter than full *Passalacqua* list:

A court may consider several factors in making this determination: (1) the intermingling of corporate and personal funds, (2) undercapitalization of the corporation, and (3) failure to maintain separate books and records or other formal legal requirements for the corporation. While there is no set rule as to how many of these factors must be present in order to pierce the corporate veil, the general principle followed by the courts has been that liability is imposed when doing so would achieve an equitable result.

890 F.2d 594, 600-01 (internal citations omitted).

<sup>87</sup> *See also Williams Oil Co., v. Randy Luce E-Z Mart One, LLC*, 757 N.Y.S.2d 341, 302 A.D.2d 736, 739 (App Div. 3d Dep't 2003) (holding that piercing may be appropriate to hold the general manager of an LLC liable if the two prong test articulated by the *Morris* court is satisfied, offering no justification for applying this corporate law concept to an LLC).

<sup>88</sup> *Morris*, 623 N.E.2d at 1160 (quoting *Int'l Aircraft Trading Co.*, 79 N.E.2d at 252).

<sup>89</sup> Bainbridge, *supra* note 24, at 82; Thompson, *supra* note 47, at 17. Some states have followed the RULLCA's exclusion of a failure to follow corporate formalities as grounds for piercing. Professor Thompson's Category E(3) lists nine statutes that carve out provisions of

The hybrid nature of the LLC reflects both its corporate and its partnership law characteristics. New York courts seem to have latched on to the hybrid nature of LLCs, initially borrowing corporate veil piercing principles to adjudicate LLC piercing claims until case law began to establish a body of LLC veil piercing doctrine. During this evolution, courts have continually overlapped corporate, partnership, and LLC terminology in LLC piercing cases. Some courts were careful with their language, and did not mix corporate and LLC terminology.<sup>90</sup> The word choice of other courts seemingly blended LLCs into some variation of a corporation by incorrectly using corporate law terminology when evaluating LLCs piercing claims.<sup>91</sup> While

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corporate law from LLC piercing. Two states have come out of this category. Colorado no longer has such a provision, and neither does Maine. *See* COLO. REV. STAT. § 7-80-705); ME. REV. STAT. tit. 31 § 1544. The remaining seven states are joined by another eight states in carving out failure to follow company formalities as grounds for liability. *See* California (CAL. CORP. CODE § 17703.04 (2(b)); District of Columbia (D.C. CODE ANN. § 29-803.04); Hawaii (HAW. REV. STAT. § 428-303); Illinois (805 ILL. COMP. STAT. ANN. 180/10-10); Iowa (IOWA CODE § 489.304(2)); Oregon (OR. REV. STAT. ANN. § 63.165); Idaho (IDAHO CODE ANN. § 30-6-304); Montana (MONT. CODE ANN. § 35-8-304); New Jersey (N.J. STAT. ANN. § 42:2C-30); South Carolina (S.C. CODE ANN. § 33-44-303); South Dakota (S.D. CODIFIED LAWS § 47-34A-303(b)); Tennessee (TENN. CODE ANN. § 48-217-101); Washington (WASH. REV. CODE ANN. § 25.15.060); West Virginia (W. VA. CODE ANN. § 31B-3-303); Wyoming (WYO. STAT. ANN. § 17-29-304(b)).

<sup>90</sup> The Supreme Court, Kings County, chose its words carefully and correctly when it said “generally, a corporation (or in this case, a limited liability company) exists independently of its owners (members) who are not personally liable for corporate obligations.” *Kleinman v. Blue Ridge Foods, LLC*, 934 N.Y.S.2d 34, 32 Misc. 3d 1219(A), at \*9 (Sup. Ct. Kings County 2011).

<sup>91</sup> *See, e.g., Clos-Ette Too, LLC*, 2014 WL 4996358, at \*6 (noting the LLC status of defendant Clos-Ette, LLC, yet referring to the LLC as a corporation and to the individual defendant as a “corporate” officer); *Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, No. 13-cv-6437 (AJN), 2014 WL 4058236, at \*7 (S.D.N.Y. Aug. 15, 2014) (referring to the LLC as “the dominated corporation” and evaluating whether the LLC had an “independent corporate purpose”); *501 Fifth Ave. v. Alvona*, 973 N.Y.S.2d 137, 138 (App. Div. 1st Dep’t 2013) (noting the “individual defendants are not owners of the corporate defendant” when referring to the LLC); *Conason v. Megan Holdings, LLC*, 972 N.Y.S.2d 223, 226 (App. Div. 1st Dep’t 2013) (finding the lower court properly pierced the “corporate veil” and that there was evidence that the individual defendant had “abandoned the corporate form”); *Millennium Constr., LLC v. Loupolover*, 845 N.Y.S.2d 110, 44 A.D.3d 1016, 1016 (App. Div. 2d Dep’t 2007) (finding no basis to pierce the LLC and hold the “sole shareholder” liable); *Kamar v. AKW Holdings, LLC*, 859 N.Y.S.2d 903, 19 Misc. 3d 1113(A), at \*10 (Sup. Ct. Kings County 2008) (referring to the “corporate” veil of the entity sought to be pierced).

In *Jiaxing Hongyu Knitting Co. v. Allison Morgan LLC*, No. 11 Civ. 09342(AJN), 2013 WL 81320 (S.D.N.Y. Jan. 8, 2013), the court notes one party’s “fundamental misunderstanding of the law” in raising an equitable estoppel claim. *Id.* at \*8. Yet this court, when evaluating whether to pierce an LLC, never mentions the LLC status of the defendant, referring to the entity as “the corporate defendant” and a corporation, and to the owner as a “controlling shareholder.” *Id.*

these distinctions are arguably a matter of semantics, they are illustrative of at least an underlying failure to facially see LLCs as an entity separate and apart from corporations.<sup>92</sup>

The first cases under § 609 were decided in 2001. The courts in these early cases ignored the need for any discussion on whether the LLCs could be pierced, and simply applied the corporate piercing rules as if the LLC was instead a corporation; they offered no context or support for their choice, never even noting that the entity sought to be pierced was an LLC and not a corporation. These opinions read as if the entity in question was a New York corporation. For example, the 2001 case *NetTech Solutions, LLC v. ZipPark.com*,<sup>93</sup> the first reported New York case to explore the application of piercing to LLCs, reads like a corporate veil piercing case.<sup>94</sup> In evaluating the LLC piercing claim, the district court relied on the traditional corporate law concept of piercing with the same two prongs required by *Morris*, and found that the required domination was both present and used to commit a wrongdoing.<sup>95</sup> Thus, the court refused to dismiss a contract claim against the individual defendant. The court offered no support, context, or rationale for its decision to apply corporate law to

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In an action to recover rent allegedly owed by an LLC, the court comments that “[n]one of the proposed individual defendants, former partners of defendant, were signatories to the original lease, and thus they cannot be held liable for the rent arrears.” *Broadway 26 Water-view LLC v. Bainton, McCarthy & Siegel*, 941 N.Y.S.2d 620, 620 (App. Div. 1st Dep’t 2012). Since the defendant is an LLC, it is not possible for any of these proposed individual defendants to be “partners” of the defendant LLC.

The district court in *Michaels v. Banks* fails to differentiate between LLCs or corporations in its determination of whether to pierce. The court noted that “[b]ecause the breached contract for which plaintiffs seek damages was between plaintiffs and a corporate entity, Aloha LLC, Banks and Kingston will be liable only if the Aloha LLC corporate veil is pierced, making them individually responsible.” *Michaels v. Banks*, 901 F. Supp. 2d 354, 357 (N.D.N.Y. 2012) (emphasis added). Thus, the court included an LLC as a “corporate entity,” which arguably supports its decision to rely exclusively on corporate law to adjudicate the LLC piercing claim.

In *Matias ex rel. Palma v. Mondo Properties LLC*, 841 N.Y.S.2d 279 (App. Div. 1st Dep’t 2007), the court is careful in its only footnote to correct the caption of the case, saying that defendant WDJ Realty VI LLC was “incorrectly identified in the caption as WDJ Realty IV Corp.” *Id.* at 280 n.1. Yet that same court refers to an interest in the defendant companies, as “an officer and a shareholder” of the entities. *Id.*

<sup>92</sup> Professor Bainbridge refers to this as “an irresistible impulse.” See Bainbridge, *supra* note 24, at 82.

<sup>93</sup> *NetTech Solutions, LLC v. ZipPark.com*, No. 01 Civ. 2683(SAS), 2001 WL 1111966 (S.D.N.Y. Sept. 20, 2001).

<sup>94</sup> See *id.*

<sup>95</sup> Oddly, the court cited *Cary Oil v. MG Refining & Mktg., Inc.*, 90 F. Supp. 2d 401, 415 (S.D.N.Y. 2000), rather than *Morris*.

an LLC, seemingly believing that the corporate law of piercing was available in its entirety to LLCs.<sup>96</sup>

The court in *Westmoreland Associates, LLC v. Kispert*<sup>97</sup> was the first to specifically reference § 609(a) and offer any justification for piercing an LLC veil. The court noted that despite the protections of § 609(a), “if a corporate veil can be pierced under appropriate circumstances, an LLC veil should be piercable [sic] as well.”<sup>98</sup> The court relied on *Morris* for the idea that piercing is an equitable remedy, and that it should be used to prevent fraud or injustice, not just by owners of corporations.<sup>99</sup> While the court is to be commended for offering some support for its extension of corporate veil piercing doctrine to LLCs, and while it is also true that, as the court points out, the petitioner’s corporate or LLC status is irrelevant to whether there exists sufficient domination that is used to commit fraud or injustice, the fact remains that LLCs are not corporations.<sup>100</sup> And to apply corporate law to LLCs in a manner that Professor Bainbridge would call “unthinking” may be ill advised.<sup>101</sup>

The 2005 Appellate Division decision, *Retropolis, Inc. v. 14th Street Development LLC*,<sup>102</sup> clearly and completely eliminated any doubt that piercing LLCs is permissible under New York law.<sup>103</sup> The *Retropolis* court said “Plaintiff seeks to avoid the statutory bar to such a cause of action by using the doctrine of piercing the corporate veil, which applies to limited liability companies.”<sup>104</sup> However, the *Retropolis* court fails to offer context, precedent, or other support for its conclusion, other than a “see e.g.,” reference to *Williams Oil Co., Inc. v. Randy Luce E-Z Mart One, LLC*.<sup>105</sup> This reliance seems odd,

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<sup>96</sup> *NetTech Solutions, LLC*, 2001 WL 1111966, at \*11.

<sup>97</sup> *Westmoreland Assocs., LLC v. Kisper*, No. 082774/99, 2002 WL 31777885 (N.Y. City Civ. Ct. Queens County Sept. 20, 2002).

<sup>98</sup> *Id.* at \*4.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (“[T]he corporate or LLC status of the petitioner is irrelevant. Petitioner is a landlord regardless of whether it’s a corporation, LLC or natural person.”).

<sup>101</sup> Bainbridge, *supra* note 24, at 78-79 (“The obvious question is whether courts should export the corporate veil piercing doctrine to the LLC context. Some LLC statutes seem to command the courts to do so. Even in the absence of such a statutory command, however, courts are routinely applying the corporate law doctrine to LLCs. Most are doing so in a way that can only be described as unthinking.”).

<sup>102</sup> 797 N.Y.S.2d 1, 17 A.D.3d 209 (App. Div. 1st Dep’t 2005).

<sup>103</sup> *Id.* at 211.

<sup>104</sup> *Id.* at 210 (emphasis added).

<sup>105</sup> 757 N.Y.S.2d 341, 302 A.D.2d 736 (App. Div. 3d Dep’t 2003).

since the *Williams* court, when considering whether to pierce an LLC, simply said:

While we acknowledge that upon a finding to pierce the corporate veil, personal liability may be imposed if plaintiff can show (1) [Luce] exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury, as a factual question, the result must await a trial.<sup>106</sup>

The *Williams* court, at most, implicitly sanctions piercing in the context of LLCs, but does not adjudicate whether to pierce the LLC at issue, finding that to be a factual matter that must wait for trial.<sup>107</sup> Yet, the *Retropolis* court uses it as its sole basis for its statement that piercing somehow applies to LLCs. The *Retropolis* court then offers language from *Morris*, that “[i]n so doing, plaintiff bears ‘a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.’”<sup>108</sup> Thus, while *Retropolis* makes it clear that New York LLCs are subject to piercing, the case offers no support for that conclusion, and more saliently, no clarity on specific factors that should be used when considering piercing an LLC.

Despite these admitted deficiencies, after *Retropolis*, through the magic of *stare decisis*, LLCs were now clearly open to piercing claims. *Retropolis* has been cited forty-nine times in the past nine years.<sup>109</sup> The language that piercing the corporate veil “applies” to LLCs has been picked up in nine cases.<sup>110</sup> The Eastern District has

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<sup>106</sup> *Id.* at 739.

<sup>107</sup> *Id.*

<sup>108</sup> *Retropolis*, 17 A.D.3d at 210 (citing *TNS Holdings v. MKI Sec. Corp.* 703 N.E.2d 749, 751 (N.Y. 1998)).

<sup>109</sup> See, e.g., *Sensitive Touch*, 2009 WL 4756393, at \*1; *Bd. of Managers of Arches at Cobble Hill Condo. v. Hicks & Warren, LLC*, 856 N.Y.S.2d 22, 18 Misc. 3d 1103(A) (Sup. Ct. Kings County 2007); *Quebecor World (USA), Inc., v. Harsha Assocs., L.L.C.*, 445 F. Supp. 2d 236, 243 (W.D.N.Y. 2006); *Matias ex rel. Palma*, 841 N.Y.S.2d 279; *Colonial Sur. Co. v. Lakeview Advisors, LLC*, 941 N.Y.S.2d 371, 373 (App. Div. 4th Dep’t 2012).

<sup>110</sup> *Colonial Sur. Co.*, 941 N.Y.S.2d 371; *Sensitive Touch*, 2009 WL 4756393; *Bd. of Managers of Arches at Cobble Hill Condo.*, 856 N.Y.S.2d 22; *Hearst Mags. v. McCaffery*, No. 101303/2011, 2012 WL 7658628 (N.Y. Sup. Ct. N.Y. County Aug. 31, 2012); *Quebecor World (USA), Inc.*, 445 F. Supp. 2d 236; 2626 BWAY LLC v. Broadway Metro Assocs., LP,

twice gone beyond both the letter and arguably the spirit of the *Retropolis* court's language. First, in *In re Shore to Shore Realty, Inc.*,<sup>111</sup> the district court noted that: "[w]here appropriate, a plaintiff may seek to pierce the corporate veil of a corporation or an LLC to hold its owners liable for the debts of the corporation or LLC."<sup>112</sup> The court cited *Jackson v. Corporategear, LLC*,<sup>113</sup> for this proposition, but the *Jackson* court simply mentioned in a footnote that the defendant was an LLC and offered no support for the proposition that LLCs can be pierced.<sup>114</sup>

Second, the Eastern District further broadened its interpretation of *Retropolis*, in *In Re Stamou*,<sup>115</sup> the court cited *Retropolis* to support its conclusion that "[t]he doctrine of piercing the corporate veil applies to limited liability companies just as it does to corporations."<sup>116</sup> There is a substantive difference between the *Retropolis* court finding that the doctrine is "applicable" to LLCs in general, and the *Stamou* court finding the doctrine applies "just as it does" to corporations. Oddly, the *Stamou* court offers only § 609 to support its broadening of *Retropolis*, when clearly § 609 stands for nothing of the sort.<sup>117</sup>

Another federal court misstatement of precedent appears in *Monteleone v. The Leverage Group*.<sup>118</sup> The district court somehow concludes that "[c]ourts apply the same veil-piercing analysis to LLC defendants as to corporations,"<sup>119</sup> by relying on *MAG Portfolio Consultant, GmbH v. Merlin Biomed Group LLC*,<sup>120</sup> which says no such thing.<sup>121</sup> The court in *MAG Portfolio* evaluated the unity of interest

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No. 10586/2010, 2011 WL 3631959 (N.Y. Sup. Ct. N.Y. County Aug. 11, 2011); *In re Stamou*, No. 8-09-2013-78895 (REG), 2013 WL 209473 (Bankr. E.D.N.Y. Jan. 17, 2013); *Kleinman*, 32 Misc.3d 1219(A).

<sup>111</sup> No. 8-08-72767-reg., 2011 WL 350526 (Bankr. E.D.N.Y. Feb. 1, 2011).

<sup>112</sup> *Id.* at \*5.

<sup>113</sup> No. 04 Civ. 10132(DC), 2005 WL 3527148, at \*2 (S.D.N.Y. Dec. 21, 2005).

<sup>114</sup> The court looks at piercing in the context of whether a bankruptcy trustee has standing to assert claims based upon piercing the corporate veil or alter ego theories. The court's only oblique reference to piercing an LLC is from its comment in a footnote that *Corporategear* is, in fact, an LLC. *Id.* at \*4 n.1.

<sup>115</sup> No. 8-09-78895 (REG), 2013 WL 209473 (E.D.N.Y. Jan. 17, 2013).

<sup>116</sup> *Id.* at \*7 (finding the *Morris* test met and piercing the LLC veil) (emphasis added).

<sup>117</sup> *Id.*

<sup>118</sup> No. CV 08-1986 (CPS) (SMG), 2009 WL 249801 (E.D.N.Y. Jan. 28, 2009).

<sup>119</sup> *Id.* at \*3.

<sup>120</sup> 268 F.3d 58 (2d Cir. 2001).

<sup>121</sup> *Id.*



and injury prongs with appropriate precedent support.<sup>122</sup> With respect to the factors necessary to determine whether to pierce the LLC, the court remanded, and noted that “the hearing was very brief and involved precious little fact finding, while our case law teaches determining whether to pierce the corporate veil is a very fact specific inquiry involving a multitude of factors.”<sup>123</sup> The court never held that the corporate piercing analysis applies to LLCs. Yet after *Monteleone*, other federal courts continue to use corporate law piercing concepts when evaluating claims to pierce LLCs.<sup>124</sup>

The application of piercing to LLCs in state courts has also developed by courts simply adding parenthetical references to LLCs into existing precedents dealing with corporate veil piercing. These courts are choosing their words carefully, unlike some of their judicial colleagues.<sup>125</sup> But query whether simply adding a parenthetical reference to LLCs into a reiteration of existing corporate law piercing precedent is viable without any other support or precedent. In *Grammas v. Lockwood Associates*,<sup>126</sup> an often-cited piercing case, plaintiff buyers sought to hold the defendant sellers liable for fraud and breach of warranty.<sup>127</sup> The Supreme Court, Appellate Division specifically and expressly noted that “a party may seek to hold a member of an LLC individually liable despite this statutory proscription [§ 609] by application of the doctrine of piercing the corporate veil.”<sup>128</sup> The *Grammas* court went on to essentially create new law by reframing existing corporate piercing doctrine as applying to piercing LLCs with just its addition of the words “[or LLC]” to lan-

<sup>122</sup> *Id.* at 63. For the unity of interest and injury prongs from *Morris*, the court cites *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997), rather than *Morris*; for the *Passalacqua* factors, the court cited *Freeman*, 119 F.3d at 1053, which restates *Passalacqua*.

<sup>123</sup> *MAG Portfolio*, 268 F.3d at 64.

<sup>124</sup> The Southern District pierced the LLC veil in *Push, Inc. v. Production Advisors, Inc.*, as if both defendants were corporations, although one was an LLC. No. 09 Civ. 4722(NRB), 2010 WL 1837776 (S.D.N.Y. Apr. 15, 2010). In *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010), the court applied *Morris* and found no grounds to dismiss the complaint alleging PLLCV against the defendant LLC. See also *Atateks Foreign Trade, Ltd. v. Private Label Sourcing, LLC*, 402 F. App'x 623 (2d Cir. 2010) (affirming the district court's decision to pierce the “corporate” veil of an LLC); *Xiotech Corp. v. Express Data Prods. Corp.*, 11 F. Supp. 3d 225 (N.D.N.Y. 2014) (finding no grounds to pierce the LLC veil, based solely on corporate law principles).

<sup>125</sup> See *supra* note 91 and accompanying text.

<sup>126</sup> 944 N.Y.S.2d 623 (App. Div. 2d Dep't 2012).

<sup>127</sup> *Id.* at 624.

<sup>128</sup> *Id.* at 625.

guage authorizing piercing the corporate veil from *East Hampton Union Free School District v. Sandpebble Builders*.<sup>129</sup> However, the *Grammas* court's apparent efforts to adapt the corporate law doctrine to LLCs by conforming the language to include LLCs were not entirely successful or consistent, since it failed to change the term "shareholder" to owner, as shown by the court:

In order to state a viable cause of action under the doctrine of piercing the corporate veil, the "plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice.'"<sup>130</sup>

*Grammas* has been relied on extensively.<sup>131</sup> And the *Grammas* court's approach of simply adding "[or LLC]" to create piercing law for LLCs has been adopted in four other cases.<sup>132</sup> Like *Grammas*, none of the subsequent cases offer any legal support or justification for this extension by semantics of the doctrine of piercing to LLCs.<sup>133</sup>

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<sup>129</sup> *Id.* (modifying *East Hampton Union Free Sch. Dist.*, 944 N.E.2d 1135, 1136 (N.Y. 2011)).

<sup>130</sup> *Id.* The court purports to quote from *East Hampton Union Free School District*, but East Hampton does not have the "[or LLC]" addition.

<sup>131</sup> See, e.g., *Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuworth, LLC v. Comprehensive Mental Assessment & Med. Care, P.C.*, 974 N.Y.S.2d 93 (App. Div. 2d Dep't 2013) (citing *Grammas* and finding that the defendant "dominated the plaintiff limited liability company, and engaged in acts amounting to an abuse of the privilege of doing business in that form so as to perpetrate a wrong or injustice on them," relying on *Grammas* to support piercing the veil).

<sup>132</sup> The courts in *Blum v. Spaha Capital Management, LLC*, No. 13 Civ. 3795 (GWG), 2014 WL 4545925 (S.D.N.Y. Sept. 12, 2014), *De Sole v. Knoedler Gallery, LLC*, No. 12 Civ. 2313 (PGG)(HBP), 2013 WL 592666 (S.D.N.Y. Feb. 14, 2013); and *Sutton Apts. Corp. v. Bradhurst 100 Dev. LLC*, No. 104289/10, 2012 WL 2534881 (N.Y. Sup. Ct. N.Y. County June 18, 2012), all relied on the *Grammas* adjustment to *East Hampton*, attributing the quote to *Grammas*.

<sup>133</sup> The *Blum* court offered a parenthetical "alteration in original" after the quote from *Grammas* as its only justification for extending the principle of piercing from corporations to LLCs. *Blum*, 2014 WL 4545925. In *Board of Managers of Caton*, the court adopted the *Grammas* court's approach, yet attributed the quote with the addition of the "[or LLC]" language to the *East Hampton Union Free* court. 41 Misc. 3d 1231(A), at \*8. The court did not include the parenthetical "alteration in original."

Another court also used a parenthetical addition to implicitly support its application of piercing the corporate veil to LLCs; the Supreme Court, Appellate Division noted that "[i]n order to state a claim for alter-ego liability plaintiff is generally required to allege: 'complete domination of the corporation [here PFLLC] in respect to the transaction attacked.'" *Baby Phat Holding Co., LLC v. Kellwood Co.*, 997 N.Y.S.2d 67, 70 (App. Div. 1st Dep't 2014).

Other New York state courts have embraced the power of the parenthetical as a way to bring LLCs into otherwise purely corporate doctrine. The court in *Kleinman v. Blue Ridge Foods, LLC*<sup>134</sup> found that the LLC's obligations under an employment contract with plaintiff should not be imputed to the sole owner of the LLC, based on corporate piercing but adds in: "[g]enerally, a corporation (or in this case, a limited liability company) exists independently of its owners (members), who are not personally liable for the corporate obligations."<sup>135</sup>

The court in *Last Time Beverages Corp. v. F&V Distribution Co., LLC*<sup>136</sup> took the same tactic and added in "[or limited liability company]" into the corporate law piercing precedent it relied on.<sup>137</sup> But the *Last Time Beverage* court offered some additional context, applying some of the *Passalacqua* factors, noting that:

In piercing F & V's limited liability company veil and imposing liability on Hornell, the referee and the Supreme Court properly considered several factors, including that: (1) Hornell and F & V had overlapping ownership, officers, and personnel; (2) both companies shared the same office space with other commonly-owned business entities; (3) both companies failed to observe certain formalities such as keeping certain records; and (4) F & V was not adequately capitalized, without a substantial loan from Hornell, to undertake this business venture.<sup>138</sup>

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The court makes absolutely no distinction between PFLLC (the defendant LLC) and a corporation.

<sup>134</sup> *Kleinman v. Blue Ridge Foods, LLC*, No. 9603/2011, 2011 WL 2899428 (N.Y. Sup. Ct. Kings County July 7, 2011).

<sup>135</sup> *Id.* at \*13.

<sup>136</sup> *Last Time Beverage Corp. v. F & V Distrib. Co.*, 951 N.Y.S.2d 77, 98 A.D.3d 947 (App. Div. 2d Dep't 2012).

<sup>137</sup> *Id.* at 950.

The corporate or limited liability company veil will be pierced "to achieve an equitable result," among other instances, "[w]hen a corporation [or limited liability company] has been so dominated by . . . another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego."

*Id.* (quoting *Austin Powder Co. v. McCullough*, 628 N.Y.S.2d 855, 216 A.D.2d 825, 827 (App. Div. 3d Dep't 1995)).

<sup>138</sup> *Id.* at 951 (citing *Wm. Passalacqua Builders*, 933 F.2d at 139).

So the *Last Time Beverage* court engaged in legal analysis and found a substantive basis for concluding that the LLC veil should be pierced, and did not simply add in parentheses to corporate law principles to support its holding.<sup>139</sup>

Even before *Retropolis*, New York courts did not decline to pierce an LLC simply because of its LLC status. Rather, the courts that decline to pierce do so because they find that the corporate law requirements for piercing have not been met.<sup>140</sup> Inexplicably, however, after *Retropolis*, some New York state courts continue to apply the corporate piercing doctrine to evaluate LLC piercing claims, rather than choosing to explore, expand and develop a doctrine specifically for the hybrid LLC.

#### IV. CONCLUSION

Professors Easterbrook and Fischel posit that corporate veil piercing “seems to happen freakishly. Like lightning, it is rare, severe and unprincipled.”<sup>141</sup> The same can arguably be said about LLC veil piercing. The hybrid LLC has the benefit of corporate law and partnership law underpinnings, and the extensive bodies of statutory and case law associated with these two well-established forms of business. But with no statutory guidance on when and how to pierce

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<sup>139</sup> *Id.* at 950.

<sup>140</sup> See, e.g., *Avila v. Distinctive Dev. Co.*, 991 N.Y.S.2d 89, 91 (App. Div. 2d Dep’t 2014) (finding that the complaint did not allege that the individual defendant “abused the privilege of doing business in the *corporate* form”) (emphasis added); *Bd. of Managers of Arches*, 18 Misc. 3d 1103(A), at \*5 (finding plaintiff’s piecing theory predicated on nothing more than “speculation, innuendo, and conjecture”); *Bd. of Managers of Park Slope Views Condo. v. Park Slope View, LLC*, 972 N.Y.S.2d 142, 39 Misc. 3d 1221(A), at \*9 (Sup. Ct. Kings County 2013) (finding “the complaint fails to include any allegation of fact which would allow a piercing of the *corporate* veil”) (emphasis added); *F&M Precise Metals, Inc. v. Goodman*, 798 N.Y.S.2d 344, 4 Misc. 3d 1023(A), at \*2-3 (Sup. Ct. Nassau County 2004) (evaluating whether “a cause of action to pierce the *corporate* veil can be made out from within the four corners of the pleading, together with Plaintiff’s evidence in opposition to the motion” and concluding that the piercing claim should be dismissed) (emphasis added); *Millennium Constr.*, 44 A.D.3d at 1016 (finding no basis to pierce the LLC and hold the “sole shareholder” liable); *Sudano v. Nayci Contracting Assocs., LLC*, 867 N.Y.S.2d 20, 20 Misc. 3d 1118(A) (Sup. Ct. Kings County 2008); *Country Pointe at Dix Hills Home Owners Ass’n v. Beechwood Org.*, 873 N.Y.S.2d 510, 21 Misc. 3d 1110(A), at \*6 (Sup. Ct. Suffolk County 2008) (declining to pierce the LLC veil since the plaintiff has failed to meet the “heavy burden” of showing domination leading to inequitable consequences); *Rakus, Inc. v. 3 Red G, LLC*, 906 N.Y.S.2d 783, 26 Misc. 3d 1206(A) (Sup. Ct. Kings County 2010); *Doubet, LLC v. Trs. of Columbia Univ.*, 934 N.Y.S.2d 33, 32 Misc. 3d 1209(A), at \*17 (Sup. Ct. N.Y. County 2011) (declining to pierce the LLC veil after applying corporate doctrine only).

<sup>141</sup> Easterbrook & Fischel, *supra* note 25, at 89.

LLCs, the courts take the arguably logical step of applying corporate piercing law to these hybrid forms of business, that are, after all, a blend of corporate law and partnership law. But does the corporate law doctrine fit? Is the only relevant difference between a corporation and an LLC the decreased need to rigidly adhere to corporate formalities?

Twenty years after the enactment of the NYLLCL, the doctrine of LLC piercing is cobbled together based on corporate law principles resulting in the *Retropolis* decision. The doctrine advances through a judicial affinity for parentheticals and misapplications of precedent. At both the state and federal level, courts have not been careful with their language, showing that they either do not understand that LLCs are not corporations, do not believe the two forms of business are truly different from one another, or, with respect to piercing, just do not care. But LLCs are not corporations and LLC piercing requires a clear, thoughtful, and predictable standard that recognizes the differences.<sup>142</sup>

When we as lawyers, judges, and students of the law engage in statutory construction, there are certain things that are sacrosanct. The meaning of words is one. Our system of precedents requires that we thoughtfully build our doctrine, with careful and appropriate layering of case law to anchor the doctrine. Our courts should be thoughtful and deliberate in the further development of this doctrine, in a way that promotes fairness while honoring the legislative intent of the NYLLCL. New York LLC piercing decisions will thus be supportable as a matter of law and not just convenience.

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<sup>142</sup> See Gregory Bell, *Veil Piercing and LLCs: Supporting the Case for a Meaningful, Legislated Standard*, 52 S. TEX. L. REV. 615, 632-36 (2011).