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REVAMMING VEIL PIERCING FOR ALL LIMITED LIABILITY ENTITIES: FORCING THE COMMON LAW DOCTRINE INTO THE STATUTORY AGE

Rebecca J. Huss*

This is an exciting time in business organizational law. The availability of new types of limited liability entities (LLEs) provides an opportunity to re-evaluate doctrines that have become entrenched in common law.¹ In every state, legislatures have created new and more flexible entities in which to hold assets. The two “new” entity forms that have been universally adopted are the limited liability company (LLC) and limited liability partnership (LLP).² Now that the provisions of these LLE statutes are beginning to settle into some semblance of stability, it is time to consider the application of common law “corporate” doctrines to these entities.³

Although there is evidence that allowing individuals to be shielded from personal liability for entity debts is a net benefit to society, there are costs generated by this system.⁴ One of these costs is that some creditors will not be paid if the entity has insufficient assets. The limited liability system assigns the risk of this nonpayment to these creditors. Under certain circumstances, courts have created exceptions to the general limited liability rule to redress unfairness in this risk allocation system. One common law doctrine that has developed to eliminate the

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² LLE in this paper refers to LLCs and LLPs. Corporations are treated outside the definition of an LLE although they clearly are entities with limited liability protection.

³ “New” entity is a somewhat broad way to describe LLPs as they are simply general partnerships that have elected to take advantage of certain limited liability protections provided for by LLP provisions. See infra text accompanying note 12 (description of the LLP entity). Some states have also adopted provisions allowing the general partners of limited partnerships to take advantage of a limited liability shield. These entities are referred to as “limited liability limited partnerships” or LLLPs. See infra text accompanying notes 13-20 (discussion of LLPs and LLLPs).

⁴ During the early years after LLC statutes were adopted, the amendment of the statutes was a regular occurrence. Since the amendments that occurred after the “check the box” regulations were implemented, providing more certainty as to the tax treatment of LLCs, states have continued to amend LLC provisions but with fewer wholesale changes. See infra notes 9-11 and accompanying text.

⁵ Professor Thompson states that “the continued judicial preference for limited liability in corporate groups . . . may reflect a society-wide judgment that the benefits of limited liability exceed its costs.” Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise, 47 VAND. L. REV. 1, 23 (1994). See infra text accompanying notes 37-76 (discussion of limited liability).
limited liability shield is referred to as "piercing the corporate veil" (hereinafter referred to as piercing the veil or veil piercing). Unfortunately, the veil piercing doctrine is not consistently applied by the courts.\(^5\) Interest holders and creditors alike are unable to determine the circumstances in which the theory can be applied successfully because of the differences in standards used by the courts. The veil piercing theory as it has been applied is so seriously flawed that the time has come to reconsider the use of the common law concept at all. It is time for the adoption of a coherent method to deal with the perceived unfairness in risk allocation for all entities with limited liability protection.

This paper proposes that legislatures adopt a statutory provision codifying the best aspects of the veil piercing doctrine in order to provide courts with a framework to apply the doctrine consistently. Along with a new statutory framework, the increased use of existing fraudulent transfer provisions and the implementation of other statutory reforms is recommended to provide creditors with a remedy in appropriate circumstances.

To provide support for the implementation and increased use of statutory provisions, this paper begins with a brief history and description of the new LLEs and discusses some of the basic theories supporting limited liability. A general overview of the veil piercing doctrine and its likely application to these new entities follows.\(^6\) Finally, this paper argues that the time is ripe to explore and implement ideas for accomplishing the goals of veil piercing in a more consistent manner.

I. NEW LIMITED LIABILITY ENTITIES

A. History of New Limited Liability Entities

The LLC is an entity form that combines the management flexibility and tax advantages of the partnership structure with limited liability protection for interest holders similar to the protection provided to shareholders of corporations. Unlike the corporate structure, which has existed in the United States since before the U.S. was a sovereign


6. As few courts have decided cases concerning the application of the doctrine to LLEs, one must look to statutory language and make analogies to issues raised in corporate cases to determine what factors a court is likely to consider.
nation, LLCs are a recent phenomenon. The first U.S. LLC statute was passed in 1977 by the state of Wyoming, although similar entity forms have been available and are relatively common outside the U.S.

The uncertain tax status of LLCs hampered the adoption of LLC statutes in the 1980s and early 1990s. After almost a decade of interaction between private parties interested in LLCs and the IRS, on January 1, 1997, the IRS implemented “check the box” rules that allow any business entity that is not required to be treated as a corporation for federal tax purposes to essentially choose the manner in which it will be taxed. Even prior to the check the box rules, however, the growth in


9. Between 1980 and 1988, the Internal Revenue Service’s (IRS) position relating to the tax classification of LLCs remained unclear leaving the federal tax status of LLCs in limbo during that time. Hamill, supra note 7, at 1468-69. Due to this uncertain tax status, there was limited use and slow development of LLC statutes during the 1980s. Id. at 1469. Then, on September 2, 1988, the IRS issued a Revenue Ruling that permitted a Wyoming LLC to be classified as a partnership based on its application of a specified set of factors relating to the entity’s “non-corporate” status. Rev. Rul. 88-76, 1988-2 C.B. 360. Thus, the IRS would apply a set of factors to classify each LLC for tax purposes, including (1) limited liability, (2) continuity of life, (3) free transferability of ownership, (4) centralized management, (5) association of members and (6) entity formed to carry on business. William H. Copperthwaite, Jr., *Limited Liability Companies: The Choice for the Future*, 103 COM. L.J. 222, 224 (1998). In order to make certain that the IRS would treat an entity as a partnership, the attorney involved in the process had to make certain that each LLC lacked at a minimum two of the first four characteristics. Much of the commentary on LLCs prior to 1997 discussed issues relating to these corporate attributes. After the 1988 Revenue Ruling, several states passed LLC statutes, although the use of LLCs was complicated by the individual application of the IRS’ factors to determine partnership tax treatment.

10. Treas. Reg. § 301.7701-1 (1997) et seq. (WESTLAW through January 1, 2001). See also Hamill, supra note 7, at 1474-83 (describing the interaction of the IRS with interested parties, including committees of the American Bar Association). Note that under Internal Revenue Code § 7704, certain publicly held partnerships will be treated as corporations for tax purposes. 26 U.S.C § 7704 (2001) (West, WESTLAW
LLC filings can only be viewed as tremendous, and it is likely that the trend will be that increasing numbers of LLCs will be formed.  

An LLP is a general partnership that has elected to take advantage of a limited liability protection provision. The history of LLPs is shorter than that of LLCs, with the first statute providing for LLPs enacted in Texas in 1991. Unlike the LLC provisions that stand as separate sections of a state’s code, provisions providing for LLPs are generally added to a state’s existing partnership act.

It is important to briefly discuss limited liability limited partnerships (LLLPs). Historically, limited partnership (LP) statutes provided that at least one partner (the general partner) would be subject to unlimited liability. To limit the risk of liability to the ultimate interest holders, most general partners in LPs would consist of an entity with a liability

through Pub. L. No. 106-580, approved 12-29-2000). The “check the box” rules free the practitioner from the task of structuring LLC documents in a manner calculated to pass the IRS factors relating to corporate characteristics and provide certainty as to the tax treatment of the entity.  

11. Susan Pace Hamill, The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question, 95 Mich. L. Rev. 393, 395 (1996). Professor Hamill provides an appendix setting forth the approximate number of new LLC filings in several states. Id. at 440-46. See also James G. Leyden, Jr., A Key State’s Approach to LLCs: Delaware can be Different, Bus. L. TODAY, May-June 2000, at 51. More than 100,000 LLCs have been formed under Delaware law in comparison with approximately 290,000 Delaware corporations. Id. After the check the box rules, there was another wave of amendments to state LLC statutes to reflect the ability of the entities to maintain partnership classification regardless of the application of the IRS’ corporate characteristic factors. See generally Laurel Wheeling Farrar & Susan Pace Hamill, Dissociation from Alabama Limited Liability Companies in the Post Check-The-Box Era, 49 Ala. L. Rev. 909 (1988). Although the National Conference of Commissioners on Uniform State Laws (NCCUSL) has developed a Uniform Limited Liability Company Act (ULLCA), most states have not yet been receptive to adopting the provisions as a whole, and there are still significant differences in individual state LLC statutes. Kathleen D. Fuentes, Limited Liability Companies and Opting-Out of Liability: A New Standard for Fiduciary Duties?, 27 SETON HALL L. REV. 1023, 1024 (1997). Some commentators dispute the usefulness of having states adopt a uniform LLC act. See, e.g., Larry E. Ribstein & Bruce H. Kobayashi, Uniform Laws, Model Laws and Limited Liability Companies, 66 U. Colo. L. Rev. 947 (1995) (asserting that the ULLCA is unnecessary and is likely to make LLC law less efficient). In some states it is still not possible to form a single member LLC, and there are significant differences in how states treat LLCs for state tax purposes. See generally Carol J. Miller et al., Limited Liability Companies Before and After the January 1997 IRS “Check-the-Box” Regulations: Choice of Entity and Taxation Considerations, 25 N. Ky. L. REV. 585 (1998). See also generally Bruce P. Ely & Peter C. Bond, State Taxation of LLCs, LLPs and LLCs, An Update, 2 BUS. ENTITIES 38 (2000).  


shield, usually a corporation.\textsuperscript{14} Limited partners were at risk for personal liability for LP obligations only if they participated in the control of the business and if the creditor reasonably believed that they were acting as general partners.\textsuperscript{15} As LP statutes developed, safe harbor provisions were drafted delineating the types of activities that a limited partner could participate in without losing limited liability status.\textsuperscript{16}

A state that has adopted LLP language allows the general partner of the LP to have the same type of protection that is available to general partners electing LLP status.\textsuperscript{17} The treatment of limited partners in a LLP is complicated by the states’ adoption of language in the Revised Uniform Limited Partnership Act (RULPA), providing that the Uniform Partnership Act provisions only apply to cases not provided for in the RULPA.\textsuperscript{18} As the RULPA includes specific rules relating to the personal liability of a limited partner to a creditor, it appears that the judiciary would respect those RULPA rules.\textsuperscript{19} Due to the difference in the way that limited partners have historically lost their limited liability status and the lack of universal adoption of provisions allowing LPs to become LLLPs, the focus in this paper will be on LLCs and LLPs.\textsuperscript{20}

\textbf{B. Description of LLCs and LLPs}

In addition to establishing an entity by filing a simple short document with the relevant governmental authority, most members of LLCs enter into “Operating Agreements” that define the relationship among the members. Operating Agreements generally include provisions relating to the allocation of membership interests, tax benefits and profits as well

\textsuperscript{14} Cases have consistently held that the use of a corporation to act as a general partner of a limited partnership is valid absent fraud. \textit{E.g.}, Frigidaire Sales Corp. v. Union Prop., Inc., 562 P.2d 244 (Wash. 1977) (illustrating the ability of a corporation to act as a general partner of a limited partnership).

\textsuperscript{15} Bishop, supra note 12, at 111.

\textsuperscript{16} See, \textit{e.g.}, REV. UNIF. LTD. P'SHIP ACT § 303 (1976) (amended 1985) [hereinafter RULPA].

\textsuperscript{17} The LP files the necessary forms to elect LLP status and the general partners of the LP are covered by the same limited liability language as partners in LLPs. See, \textit{e.g.}, ARIZ. REV. STAT. ANN. § 29-1026 (West, WESTLAW through 2000 2d Reg. Sess. and 5th Spec. Sess.) (stating that as to limited partnerships, which are limited liability partnerships, the section on partner liability (including the language relating to entity formalities) will apply to “general partners and to any of its limited partners who, … are liable for the debts or obligations of the partnership”); DEL. CODE ANN. tit. 6, § 17-214 (WESTLAW through 2000 Reg. Sess.); MO. ANN. STAT. § 359.172 (West, WESTLAW through 2d Reg. Sess. of the 90th General Assemb. (2000)).

\textsuperscript{18} RULPA § 1103 (1985).

\textsuperscript{19} Bishop, supra note 12, at 111.

\textsuperscript{20} As of January 1, 2001, only sixteen states had statutory provisions relating to the LLLP form. Dem A. Hopkins, \textit{LLLPs - A New Limited Liability Option}, CCH Limited Liability Company Guide: LLC Advisor, Nov. 16, 2000, at 4. This article also discusses the fact that some states appear to recognize LLLPs without a specific statutory provision. \textit{Id.}
as set forth the management structure of the LLC.\textsuperscript{21} There are two different general structures for the management of LLCs.\textsuperscript{22} In the first structure, the members retain the right to manage the entity. In the second structure, the members provide for one or more managers to manage the entity. The ability of all of the members to be involved in the management of the entity without losing their limited liability status (unlike limited partners of an LP) is considered to be a significant advantage of the LLC structure.\textsuperscript{23} The management and control of an entity may be a significant issue if there is a claim that the limited liability shield should be pierced in order to access the assets of an individual member.

A general partnership establishes itself as an LLP by filing a document with the relevant governmental authority. The remainder of the provisions of a state’s partnership act will continue to apply to a LLP as if it was a general partnership. Unlike LLCs, where there is still uncertainty as to the guidelines that will be placed on individual members and their relationships, the standards that have applied to general partners will likely apply in LLPs without change. A reflection of this is that qualification of a general partnership as an LLP does not require any substantive modification of such entity’s general partnership agreement.\textsuperscript{24} In fact, some provisions, including the Revised Uniform Partnership Act, specifically provide that a general partnership that files for LLP status is the same entity before and after registration.\textsuperscript{25}

Some states have imposed additional requirements on general partnerships desiring to obtain LLP status. Several states have adopted mandatory insurance requirements for LLPs.\textsuperscript{26} Some of these insurance

\begin{itemize}
\item \textsuperscript{21} Unlike corporation statutes, LLC statutes generally do not provide for specific corporate formalities, such as annual meetings for interest holders; thus, even if an Operating Agreement is not required by the relevant state statute, as a practical measure it is necessary for the members to enter into some type of agreement relating to the organization of the entity.
\item \textsuperscript{22} State statutes generally require that if an LLC is to be manager managed, that fact must be set out in the Articles of Organization filed with the Secretary of State’s office. What will be most striking to someone who is familiar with standard features of corporate codes is not what is similar but what appears to be missing in LLC statutes. For example, generally there are no safeguards for interest holders in the entities to have a say in the management of the entity absent the election of the entity to be member managed. This “lack of protection” illustrates the flexibility that parties have in forming LLCs.
\item \textsuperscript{23} Initially, the tax benefits available by using this new entity were considered the primary reason for the explosion in use of LLCs. In addition, there are significant advantages to the business and management provisions found in LLC statutes. Hamill, supra note 11, at 395.
\item \textsuperscript{24} The agreement would, of course, have to be amended to reflect the entity’s new status as an LLP and the new name, but all other issues such as contribution, profit and loss allocations are not impacted by the addition of the limited liability shield.
\item \textsuperscript{25} RUPA § 201(b) (1997).
\item \textsuperscript{26} See, e.g., AK. STAT. § 32.05.565 (Matthew Bender, WESTLAW through Third Spec. Sess. of the Twenty-First Leg. (2000)); CAL. CORP. CODE § 16956 (West, WESTLAW through 1999-2000 Reg. Sess.)
\end{itemize}
requirements apply only if the LLP partners are licensed to provide professional services, and there are often alternatives to insurance. The minimum monetary requirements also vary considerably, with some of the limits determined by the number of partners.

C. Liability Provisions of LLCs and LLPs

Common among all LLC statutes are provisions articulating the general rule that members and managers of LLCs will not be responsible for the LLCs’ debts or liabilities solely because of their status as members or managers. Unlike corporate statutes’ liability provisions that have developed a commonality throughout the long history of corporate law, the language used in liability provisions of LLC statutes varies significantly among the states. One distinction can be made by analyzing who will be covered by the provisions. The coverage can range from members alone to members, managers, agents and employees. As in the case of officers and directors of corporations, members


27 See, e.g., WASH. REV. CODE ANN. § 25.05.125 (West, WESTLAW through 2000 2d Spec. Sess.). Initially, it was thought that professionals such as attorneys and accountants would be the most likely to utilize LLP provisions, even though most statutes do not limit their use to professional partnerships. See Hester, supra note 12, § 1.

28 See 15 PA. CONS. STAT. § 8206 (West, WESTLAW through 2000 Reg. Sess.).

29 For a case interpreting the liability language of the Delaware statute, see Pepsi-Cola Bottling Co. v. Handy, No. 1973-S, 2000 WL 364199 (Del. Ch. Mar. 15, 2000) emphasizing that the liability protection for members will not be in force until the LLC is properly formed. In addition, members must be cautious to take appropriate actions to preserve their limited liability status upon dissolution of an entity. For an example of a situation where a former member of an LLC was held liable for a debt, see New Horizons Supply Cooperative v. Haack, 590 N.W.2d 282 (Wis. Ct. App. 1999). Outside the scope of this article is the issue of what liability members and managers owe to the other members of the LLC. See generally Richard A. Booth, Fiduciary Duty, Contract and Waiver in Partnerships and Limited Liability Companies, 1 J. SMALL & EMERGING BUS. L. 55 (1997); Fuentes, supra note 11, at 1023 (considering the liability issue under Delaware and New York statutes).


31 Id. at 14. In addition, the language used to describe the coverage varies with the most common phrase, including the word “solely,” to define the limitation on liability. Id. Similar to corporations, members may have certain liabilities to the LLC itself. See Harvey Gelb, Liabilities of Members and Managers of Wyoming Limited Liability Companies, 31 LAND & WATER L. REV. 133, 137 (1996) (analyzing one state statute). Under state statutes, members can be held liable for contributions to the LLC that have been listed as made or scheduled to be made in the future. If a member receives a return of capital, under some state statutory provisions, such member may be liable for the equivalent sum if it is needed to discharge certain liabilities of specified creditors. Id. at 138. See also Pepsi-Cola Bottling Co., 2000 WL 364199, at *5 (discussing the impact of improper distribution). Members not acting under an authorized LLC (due to the involuntary
and managers of LLCs will not be able to shield themselves from claims relating to their personal conduct outside the scope of their roles in such LLCs.\textsuperscript{32}

The shield of limited liability that is created by individual state provisions for LLPs can also vary significantly. Many states have adopted an approach that will shield LLP partners from liabilities, debts or obligations incurred by the entity arising from the negligence, malpractice, wrongful act or misconduct committed by another partner, employee or agent of the partnership.\textsuperscript{33} A partner's own negligence, malpractice, wrongful act or misconduct (or someone under his or her direct supervision) may be excluded from the limited liability shield.\textsuperscript{34} The trend appears to be to provide for a greater shield of protection in LLPs - similar to the limited liability shield found in LLCs.\textsuperscript{35} The narrower scope of liability protection allowed under LLP provisions versus LLC provisions may be partially explained by the expected use of LLPs primarily by professionals, where it would be a violation of the professional's rules of conduct to allow a person to limit the scope of his or her malpractice.\textsuperscript{36}

dissolution of the entity, for example) are likely to be held jointly and severally liable for all debts and liabilities of the entity. Gelb, \textit{supra}, at 139. One advantage of most LLC statutes is that unlike LLP limited liability provisions, LLC statutes generally are structured similarly to corporation statutes that provide for retroactive limited liability protection for the entity's interest holders when the members take necessary steps to cure an issue such as administrative dissolution.

32. Karin Schwindt, \textit{Limited Liability Companies: Issues in Member Liability}, 44 \textit{UCLA L. REV.} 1541, 1548 (1997). There have been situations in which officers of companies are held liable for actions taken within the course of their employment. Liability for fraud related to the Medicare system has recently caused officers in health care companies concern. Margaret Graham Tebo, \textit{Guilty by Reason of Title}, 86 A.B.A.J. 44, 44 (May 2000). There is also the possibility that corporate officers will be held personally liable for patent infringement. Joseph M. Sauer, \textit{A Tear in the Corporate Veil: The Liability of Corporate Officers for Patent Infringement}, 37 DUQ. L. REV. 89 (1998). The application of corporate-type agency law to impose personal liability on members of LLCs is another area that has not yet been significantly developed. It has been argued, and there is some limited case law supporting the proposition, that LLC members should be treated similarly to officers, directors and shareholders of corporations in this context. Kendal R. Hoopes, Note, \textit{Corporations - Managers and Members of Limited Liability Companies Will Be Held to Corporate Agency and Personal Liability Principles}, \textit{Water, Waste, & Land}, Inc. v. Lanham, 935 P.2d 997 (Colo. 1998), 34 \textit{LAND & WATER L. REV.} 463, 470 (1999). In these cases, the courts appear to apply common law agency principles to the activities of the members, regardless of statutory provisions relating to the limited liability of the LLC. Unlike the doctrine of piercing the corporate veil (where application of the doctrine will always be to the detriment of the member), the application of agency principles can benefit members of an LLC. Under general agency principles, the principal (in this case the LLC itself) will be liable for the agreement contracted on its behalf. \textit{Id.} at n.94.

33. Hester, \textit{supra} note 12, \textsection 2.

34. \textit{Id.} This liability coverage is sometimes referred to as a "partial shield." \textit{Id.} The use of partial shield coverage is on the decline.

35. \textit{Id.} Twenty-two states plus the District of Columbia have expanded protection in their LLP statutes. \textit{Id.} Sometimes this liability coverage is referred to as "full-shield" liability. \textit{See id.} The NCCUSL also took this approach in the Uniform Limited Liability Partnership Act. \textit{Id.}

36. \textit{See supra} notes 12 and 27.
II. THEORIES OF LIMITED LIABILITY

For purposes of this paper, “limited liability” refers to the ability of a shareholder of a corporation or interest holder of a LLE to risk only the capital that such individual invests into the entity. Some commentators view limited liability as a privilege provided to interest holders by states that allow for the formation of these entities under corporate and other entity codes. Others view limited liability as just one more contractual term among creditors and owners. The theories supporting limited liability can be organized into arguments based on democratic principles and arguments based on economic principles. There has been more emphasis in recent decades on the economic arguments supporting limited liability, but in order to understand the historical basis of limited liability, it is necessary to also briefly consider the democratic justifications for limited liability. Though the commentary in this area has primarily related to corporations, the analysis can be applied to all entities that have limited liability protection.

A. The Democratic Theory of Limited Liability

It is difficult to determine the exact scope of limited liability for U.S. shareholders in the eighteenth century, but the general rule in the early nineteenth century was that shareholders had unlimited liability. The imposition of unlimited liability on shareholders was based on the belief that creditors would not extend necessary capital to manufacturing and


39. Id. at 82.

40. Although the arguments in this paper are divided into democratic and economic principles, some theories in these two arguments overlap.

41. As important as economic models are to explain limited liability, Professor Thompson has stated that the principles “undoubtedly . . . do not capture fully the entire benefit of limited liability.” Thompson, supra note 4, at 22-23. Professor Thompson continues by stating that “the continued judicial preference for limited liability in corporate groups . . . may reflect a society-wide judgment that the benefits of limited liability exceed its costs.” Id. at 23.

industrial concerns without this security. This view changed with time, and by the 1840s most state legislatures had adopted provisions that provided shareholders limited liability protection. Commentators discussing the democratic theory of limited liability often refer to this historical development of corporate codes in the nineteenth century as the event that triggered the almost universal adoption of provisions providing limited liability to shareholders. The idea behind the limited liability provisions was that persons of modest means would be encouraged to act in an entrepreneurial manner. In addition, it was believed that entry into business markets would be more competitive if limited liability for shareholders was the general rule.

B. The Economic Theory of Limited Liability

A commonly cited rationale for allowing limited liability for entities based on economic principles is described by Frank H. Easterbrook and Daniel R. Fischel in their book, *The Economic Structure of Corporate Law.* Easterbrook and Fischel analyze the relationship between limited liability and the theory of the firm. This theory advances the idea that limited liability reduces the costs that arise due to the separation of agents and owners of capital and the specialization inherent in corpora-

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43. Presser, supra note 42, § 1.03.
44. Id. An exception to the general rule providing limited liability protection to shareholders was applied to most bank shareholders who were subject to a double liability system (initial investment in entity plus the par value of the stock) until the imposition of a federal system of deposit insurance in 1933. Lisa Lamkin Broome, *Redistributing Bank Insolvency Risks: Challenges to Limited Liability in the Bank Holding Company Structure,* 26 U.C. Davis L. Rev. 935, 941 (1993). There were attempts to revive unlimited liability in some states, but they ultimately failed. Blumberg, supra note 5, §§ 1.04.6.
45. Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy and Economics,* 97 NW. U. L. Rev. 148, 155 (1992). Limited liability for corporate shareholders was not the universal view, and debate and pockets of liability continued into the twentieth century. Gabaldon, supra note 37, at 1997. See also Blumberg, supra note 5, § 2.01 (discussing the survival of shareholder liability in specified situations including double liability for shareholders generally, pro rata liability in California and shareholder liability for wage claims).
46. Presser, supra note 45, at 155. One way to bridge the democratic and economic arguments is to consider the fact that small businesses create most of the new jobs in the U.S. According to the U.S. Small Business Administration, small businesses provide about 75% of the net new jobs. Office of Advocacy, U.S. Small Business Administration, at http://www.sba.gov/advo/stats/sbfaq.html (last visited Feb. 12, 2001). Without limited liability protection some people with limited means may not start or expand these businesses.
47. Presser, supra note 45, at 155.
49. See Easterbrook & Fischel, supra note 48, at 41. Professors Easterbrook and Fischel also discuss the connection between limited liability and the cost of capital to the firm. See id. at 41-47.
Easterbrook and Fischel's discussion raises several issues that are impacted by limited liability.\footnote{See also Blumberg, supra note 5, §§ 4.02, 4.03 (discussing many of these same costs as theoretical advantages and disadvantages of limited liability). But see Richard A. Booth, Limited Liability and the Efficient Allocation of Resources, 89 NW. U. L. REV. 140, 147 (1994) (arguing why the economic arguments set forth by Professors Easterbrook and Fischel should fail). Professor Booth also raises additional arguments supporting limited liability but finds that they ultimately fail as well. Id. at 149. In support of limited liability, Professor Booth discusses the importance of limited liability's role as a contracting device shifting the burden of negotiation for personal liability to creditors. Id. at 157.}

A. Monitoring Costs. Limited liability will reduce monitoring costs for investors. Investors monitor their agents to a greater degree the more risk they bear.\footnote{Easterbrook & Fischel, supra note 48, at 41, 42. Monitoring agents will be limited to the risk that an investor has in the firm. Monitoring shareholders under limited liability will be limited, as the individual wealth of the other shareholders does not impact the probability that a particular shareholder will be required to pay off a judgment. Id. at 42.} By reducing the amount of risk to investors, investors will expend fewer resources on the monitoring of agents. If an unlimited liability structure is used, investors will also need to expend resources to monitor other interest holders.\footnote{Id. at 43. Shares in this discussion would also refer to other types of ownership interests, such as partnership or limited liability company interests.}

B. Market Benefits. With limited liability, shares in entities are homogeneous commodities and can reflect a single market price.\footnote{Ribstein, supra note 38, at 99. In order to accept that limited liability supports market efficiency, it is necessary to accept the theory known as the Efficient Capital Market Hypothesis (ECMH), which holds in varying degrees that securities prices reflect all available information. The weak version of ECMH holds that past price information is not predictive of future price movements. The semi-strong version of ECMH provides that all publicly available information is quickly reflected in the market price of the security. Under the strong version of ECMH, all information, even non-public information, is reflected in the market price of securities. William A. Klein & John C. Coffee, Jr., BUSINESS ORGANIZATION AND FINANCE, LEGAL AND ECONOMIC PRINCIPLES 395 (2000).} Allowing all investors to trade on the same terms, the price of the shares is based on all available information about the entity.\footnote{Ribstein, supra note 38, at 100 (arguing that efficient market pricing reduces a firm's cost of capital because of lower investor information costs).} By facilitating the free transferability of shares and pricing of shares (according to all available information), a limited liability system supports market informational efficiency.\footnote{Easterbrook & Fischel, supra note 48, at 42. If investors are able to sell their interests, existing managers in poorly-run firms can be displaced by investors who assemble a voting majority to install new managerial teams. Id.} Using this analysis, entities can also benefit from a lower cost of capital.\footnote{Id.}

C. Management Efficiency. Limited liability and the increased transferability of shares provide incentives for managers to act efficiently.\footnote{Id.} If individual interest holders can sell their shares, it is possible for the
management team to be replaced when new investors install their own managerial choices.\textsuperscript{59}

\textbf{D. Supports Diversification.} Limited liability allows for a more efficient diversification of investors' portfolios.\textsuperscript{60} Under an unlimited liability regime, investors would reduce the number of investments to minimize the risk of losing their individual wealth due to a claim against one of the companies.

\textbf{E. Investment Benefits.} Finally, limited liability protection aids management in making optimal decisions on investments.\textsuperscript{61} Managers can invest in any project with positive net present value, including higher risk ventures, because investors will not lose more than their investment if such project fails.\textsuperscript{62}

Support for an economic justification for limited liability is based on the premise that there is not a simple shifting of loss from interest holders to creditors, but instead there is a change in behavior due to the limited liability status of interest holders.\textsuperscript{63} In addition, there is an argument that even if there was a 100\% shift in loss, voluntary creditors possess a comparative advantage over interest holders because of their ability to monitor at least some of an entity’s managerial activities.\textsuperscript{64} If interest holders are granted limited liability protection, creditors and interest holders can be viewed as engaging in a risk sharing arrangement.\textsuperscript{65}

The economic benefits concurrent with limited liability appear to be reduced if an entity is closely held, due to the lack of separation between management and the risk bearers. Due to the close relationship between the management and interest holders, there is no cost savings in connection with the monitoring of agents, and because many closely held entities restrict the transfer of interests, the capital markets may not reflect the limited liability advantage.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. at 43. Investors can cut risk by holding a diversified portfolio of assets. Id. If limited liability was not available, investors would be more likely to only invest in a few entities and there would be a variance in share valuation based not on the inherent value of the entity but on the personal wealth of the shareholder. Gabaldon, supra note 37, at 1405.
\item \textsuperscript{61} EASTERBROOK & FISCHEL, supra note 48, at 43. Professors Easterbrook and Fischel recognize that the cost savings due to limited liability can be significantly reduced in close corporations, and they discuss the use of the doctrine of piercing the corporate veil to illustrate this distinction. Id. at 55.
\item \textsuperscript{62} Id. at 44. Investments in projects with positive net present values are considered beneficial uses of capital. Id. With portfolio diversification, investors are also able to hedge against the risk of one project failing. Id.
\item \textsuperscript{63} Id. at 45.
\item \textsuperscript{64} Id. at 46.
\item \textsuperscript{65} Creditors often require interest holders to provide personal guarantees or security in order to manage this risk.
\item \textsuperscript{66} EASTERBROOK & FISCHEL, supra note 48, at 55.
\end{itemize}
Some commentators disagree with the view that limited liability for closely held entities is less justified. These commentators emphasize the ability of parties in closely held companies to diversify investments and bear loss. An argument can be made that by using venture capital and debt, a closely held entity can have significant separation between management and risk bearers, thereby causing the participants in such an entity to act more like their public entity counterparts and thus gaining the ability to apply the cost savings of limited liability in a similar fashion.

Theoretically, entities that have limited liability protection are more likely to have insufficient assets available to pay creditors' claims. Some commentators have proposed reducing or even eliminating limited liability coverage. Supporting these proposals is the theory that limited liability creates a moral hazard because interest holders are able to receive all the benefits of risky activities without all the costs. Proponents of limited liability recognize that this externality of risk may impose undesirable social costs, but they minimize the magnitude of risk externalization and do not accept the premise that abolishing limited liability would reduce the moral hazard. Commentators advocating a change in the limited liability status of interest holders generally propose alternative liability rules, including pro rata liability. These arguments focus on the inefficiencies created by limited liability, such as

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68. E.g., Leebron, supra note 67, at 1626. Even if closely held corporation shareholders are granted limited liability, Professor Leebron would subject the grant to three constraints, including the requirement that shareholders/managers of closely held corporations have an obligation to provide adequate insurance to cover claims of foreseeable tort victims. Id. at 1636. Cf. Ribstein, supra note 38, at 101. Professor Ribstein discusses the benefits of limited liability to closely held companies and argues that limited liability serves an important function in closely held firms. Id. at 106.

69. EASTERBROOK & FISCHEL, supra note 48, at 49. See also BLUMBERG, supra note 5, § 4.03 et seq. (discussing theoretical disadvantages to limited liability, including the distinction between tort and contract creditors).


71. EASTERBROOK & FISCHEL, supra note 48, at 50.

72. Id. The externality of risk can be limited to involuntary creditors. Id.
incentives to "misinvest" by over-investing in hazardous industries and under-investing in precautionary ones. Some commentators who propose eliminating limited liability in tort may not extend these arguments to contract claims. The basis for retaining limited liability for interest holders in contract claims is that the parties have already efficiently allocated the risks of the transaction. One way that courts have resolved the potential problems relating to limited liability is by invoking the doctrine of veil piercing to impose unlimited liability in individual cases.

III. THE DOCTRINE OF PIERCING THE VEIL

Regardless of the innovative proposals of some commentators, the ability of investors to choose an entity with limited liability protection appears to be firmly entrenched in U.S. law. There have always been exceptions to this general rule regarding limited liability, including the liability of shareholders for failure to pay full consideration for their shares and, in certain cases, liability for debts to corporate employees. The courts' ability to pierce the veil of an entity is based on their general authority to apply equitable principles. Although courts use a variety of methods to determine when piercing is appropriate, the result is that an entity's shield of limited liability protection is disregarded to reach an individual interest holder's assets when such result is deemed to be in the interest of "fairness." In such cases, the actions (or inactions) of an interest holder result in the removal of the shield of limited liability and allow creditors to access such interest holder's assets.

73. Hansmann & Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, supra note 70, at 1882-85.
74. E.g., id. at 1919. Thus, even if Professors Hansmann and Kraakman and other proponents of eliminating limited liability in tort claims were successful in changing this rule, limited liability for contractual claims and the doctrine of piercing the corporate veil (as it applies to contract claims) would remain a tool for courts to use as necessary. See infra notes 77-161 and accompanying text (discussing piercing the veil).
75. Id.
76. Coffey, supra note 70, at 73.
77. See Leebron, supra note 67, at 1566. "[F]ew topics are liable to strike the reader as less likely to produce changes in the law than an analysis of limited liability. No principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy." Id. (citations omitted).
78. Presser, supra note 42, § 1.01. See also Klein & Coffee, supra note 56, at 139.
79. The legal basis for courts piercing the veil is obscure. Easterbrook & Fischel, supra note 48, at 54.
80. Veil piercing is commonly used to reach the assets of individual interest holders. Creditors may reach the assets of "sister" corporations through what is sometimes referred to as a process of "reverse piercing." This can be referred to as "enterprise liability." The veil piercing doctrine is also known as the doctrine of corporate disregard.
The question of whether to apply the doctrine of piercing the veil to new forms of LLEs in the same manner as it is applied to corporations is complicated by the lack of uniformity in the application of the theory to corporations themselves. A description of the various "rules" relating to the doctrine of piercing the veil is difficult to define because of the seemingly random manner in which courts have applied the doctrine. Commentators have described the rationale for piercing the veil as vague and illusory and application of the doctrine itself as "[i]ke lightning . . . rare, severe, and unprincipled."\(^\text{81}\) Perhaps the only common element among piercing cases is that there must be an underlying claim against the entity.\(^\text{82}\)

Several theories relate to the development of the veil piercing doctrine.\(^\text{83}\) It is not surprising that commentators are unable to agree on the historical underpinnings of the doctrine, given that there is no consensus among commentators and the courts as to which situations the doctrine should be applied.\(^\text{84}\) Theories relating to veil piercing historically have utilized broad and intuitive approaches to articulate the proper circumstances for the doctrine’s application.\(^\text{85}\) One theory


\(^{82}\) As Professor Clark states, "cases attempting to pierce the corporate veil are unified more by the remedy sought — subjecting to corporate liabilities the personal assets directly held by shareholders — than by repeated and consistent application of the same criteria for granting the remedy." Robert Charles Clark, The Duties of the Corporate Debtor to its Creditors, 90 HARV. L. REV. 505, 541 (1977).

\(^{83}\) See PRESSER, supra note 42, § 1.02. It is important to note that other than the references to the application of the doctrine of piercing the corporate veil to LLCs (and to a lesser extent LLPs), it is unusual to have any statutory basis for the application of this doctrine. This stands in contrast to the universal use of language in statutes providing for limited liability protection of shareholders. An exception to this general rule is in the Texas Business Corporation Act provision that sets out the circumstances under which shareholders will be liable. See TEX. BUS. CORP. ACT ANN. art. 2.21 (West, WESTLAW through 1999 Reg. Sess.). See also Thompson, supra note 81, at 1042.

\(^{84}\) The term "piercing the veil" has been traced to a 1912 article by Professor Wormser. Alting, supra note 81, at 192 (citing I. Maurice Wormser, Fencing the Veil of the Corporate Entity, 12 COLUM. L. REV. 496 (1912)). The application of the doctrine is not confined to the United States. Many other countries have developed similar theories. Jose Engracia Antunes, The Liability of Polycorporate Enterprises, 13 CONN. J. INT’L L. 197, 215 (1999). See also Proceedings Fourth Annual International Business Law Symposium: Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing and Successor Liability, 10 FLA. J. INT’L L. 221 (1993).

\(^{85}\) PRESSER, supra note 42, § 1.03(4) (contrasting two broad and intuitive approaches with Frederick Powell’s three-pronged test).
buttressing the courts' ability to pierce the veil is the purported perversion of the corporate privilege based on the state's allowance of the corporate form. As with the theories supporting limited liability, the law and economic arguments relating the appropriate uses (and non-uses) of the piercing doctrine have developed in recent decades.

A. Themes in Veil Piercing

Each state (and sometimes even an individual court within a state) has a different view on the appropriate circumstances for piercing the veil. Legal scholarship has attempted to determine the decisional structure of the cases and has developed some common themes. Perhaps the most widely held belief is that it is easier to pierce the veil in a case involving a tort creditor versus a contract creditor. In court opinions that adopt this distinction, it is considered equitable to provide more protection for the tort creditor, who generally does not choose to do business with the tortfeasor, than for a contract creditor, who has the capacity to negotiate for protection prior to entering into a relationship with an entity. It is possible for contract creditors to obtain personal guarantees from interest holders or increase their costs when dealing with entities with limited liability protection.

Another common theme is that piercing occurs in situations where there is a parent-subsidiary relationship. One theoretical foundation for piercing in a parent-subsidiary relationship is based on the doctrine of agency where the parent acts as a principal and the subsidiary as its agent. It is more common, however, for a court to find that a creditor need simply show that the parent company exercised control over the subsidiary in order to pierce the subsidiary's veil. One study showed

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86. Id. § 1.02.
87. Id. § 1.04.
88. See also infra note 158 (discussing piercing by federal courts).
89. Professor Thompson's study found that this belief is empirically unfounded. Thompson, supra note 81, at 1058-59; Thompson, supra note 4, at 23-4.
90. PRESSER, supra note 42, § 1.05[3]. Professor Presser suggests that courts ought to pierce less frequently in contract cases and cites several jurisdictions in which that theory appears to have gained acceptance. Presser, supra note 45, at 168. The distinction between voluntary and involuntary creditors is one that has also been analyzed in connection with priorities in bankruptcy. See infra notes 212-221 and accompanying text.
91. Cohen-Whelan, supra note 8, at 356.
92. See Thompson, supra note 81, at 1047. Professor Thompson's study did not find a single case where piercing occurred in a publicly held corporation. See id.
93. PRESSER, supra note 42, § 1.05[4].
94. Miller, supra note 81, at 80. Professor Miller also states that such control must be accompanied by fraudulent, illegal or other improper conduct that creates an injustice. Id. This type of conduct is described in the factors discussed in notes 102, 103 and accompanying text.
that a court is more likely to pierce the veil if an individual, rather than
another entity, is to be liable. Case law tends to treat piercing against
individuals and entities the same, so it is difficult to analyze why
individuals are more likely to be impacted by the doctrine. The higher
level of legal sophistication in companies with multiple entities may
serve to protect against the application of some of the factors that courts
apply, specifically the lack of corporate formalities. In addition, courts
may also consider the multiple roles of some individuals as employees of
the parent as well as the subsidiary entity. It is difficult to determine in
this context whether such personnel were acting within the scope of
their employment for the parent or for the subsidiary.

A final general theme is that application of the doctrine seems to be
limited to entities that are closely held. An empirical study that
reviewed 1600 cases from the 1960s to 1990 did not find a single
successful piercing case targeting a public corporation. It is clear that
mere overlap of ownership in an entity group, or interest ownership, will
not be sufficient to pierce the veil. Regardless of the increased
likelihood of piercing in corporations with few or single shareholders, it
is well established that there are no grounds for *per se* piercing based on
the closely held status of an entity.

These themes should have a neutral impact on LLEs, given the
expansion in the numbers and uses of these entities. Initially, it
appeared that LLEs were used primarily as an alternative to S corpora-
tions, or general or limited partnerships, so there were some limitations
on the complexity of the entity. Because the adoption of LLE statutes
by all fifty states and the District of Columbia has resolved any possible
issue of recognition of LLEs, and the certainty of tax treatments of LLCs
has increased, these forms are being utilized by a wide range of actors,
including joint ventures of large corporate organizations. Given that
LLEs will likely be used for the same reasons that corporations were

95. Thompson, supra note 81, at 1038.
97. Thompson, supra note 81, at 1047.
98. Id. at 1071.
99. Cf. Gevurtz, supra note 96, at 863 (discussing closely held corporations). Professor Thompson's study also found that it is more likely for piercing to occur as the number of shareholders decreases. Thompson, supra note 81, at 1054.
100. See Nikhil Deogun & Betsy McKay, *Coca and P&G Plan to Create $4.2 Billion Juice and Snack Company*, WALL ST. J., Feb. 21, 2001, at B1 (formation of limited liability company to develop and market juices, juice-based drinks and snacks). In fact, there may be some disadvantages to using the LLC form with partnership tax treatment if the persons forming the entity believe that they will be soliciting venture capital financing. Steven F. Carman, *Venture-Cap-Funds Escrow Investments in LLCs: Benefits of the LLC Form, Such as Flow-Through Taxation, are of Little Value to Venture Funds*, NAT'L L. J., Dec. 14, 1998, at B13.
used in the past, it does not appear that the doctrine of veil piercing will be applied to LLEs in any greater or lesser degree as a result of these themes.

B. Factors in Veil Piercing

Courts tend to apply similar factors when analyzing the appropriateness of veil piercing. In addition to the factors listed below, it is common for courts to pierce the limited liability shield only if the entity has been used to perpetuate a fraud or if a failure to pierce would promote injustice. The elements of fraud or injustice are at the core of veil piercing, and although they can be viewed as separate concepts, courts tend to use the terms interchangeably when discussing this aspect of veil piercing. The types of actions or behaviors that constitute fraud are not generally defined by the courts, although certain types of representations appear to arise frequently in piercing cases involving contract claims. These representations can be broken down into three categories: (1) representations concerning the entity’s financial status, (2) representations relating to the entity’s performance, and (3) representations that someone besides the entity will stand behind the debt. Courts commonly find that “failure to pierce would promote injustice” when supporting the piercing claims of tort creditors. Given the nature of LLEs and the policies supporting veil piercing, it would appear to be appropriate to pierce the veil of LLEs only if this fraud factor is available or if there is a strong argument that failure to pierce would promote injustice. In addition to this fraud/injustice aspect of piercing, courts also use non-fraud factors to analyze the appropriateness of veil piercing. These factors can be divided into three general categories: compliance with corporate formalities, undercapitalization and instrumentality or alter ego.

1. Corporate Formalities

The first factor courts generally look to in determining whether to pierce the corporate veil is whether the entity followed formalities and

101. Professor Gevurtz refers to this use of factors as the “template” approach. Gevurtz, supra note 96, at 856. Professor Gevurtz also discusses judicial holdings that explain their decision to pierce by using perjorative reasoning or a character test. Id. at 855.
102. Id. at 871-873.
103. Id.
104. See infra Part IV and accompanying notes (discussing alternatives to the common law system that may more consistently accomplish the policy goals of veil piercing).
kept adequate records of its business. An example of this type of conduct is the failure to have or maintain records of shareholder or director meetings. Critics say that it is inappropriate for courts to use this factor to pierce the veil in the corporate context because there is no connection between the conduct (failing to keep records) and the wrong leading to the piercing. One way to consider this issue is to determine why legislatures include certain formality requirements in corporate codes. Although there are certainly provisions in modern corporate codes that are intended to protect creditors, such as restrictions on the issuance of dividends, many corporate formalities cited by courts are clearly intended to protect shareholders. The argument supporting the application of this factor in veil piercing is that record-keeping formalities assist in determining the conduct of shareholders and the corporation at the time the cause of action arose.

The application of this factor in the LLE context is especially problematic given the flexibility LLE provisions have relating to entity formalities. Unlike in the development of the shareholder protections in corporate codes, it appears improbable, at least in the short term, that states will amend their LLC statutes in a manner that would remove the flexibility of members to choose the formalities the entities must follow. Considering the language in state statutes that addresses the application of this factor to LLCs, the significant freedom LLCs have to set the level of formalities and the questionable utility of this factor in the corporate context, courts should refrain from using this factor to pierce the veil of an LLC. LLPs are also not required to engage in actions similar to corporate formalities, and this factor would appear to be equally irrelevant if a court is considering piercing the veil of an LLP.

105. Gevurg, supra note 96, at 867.
106. Id. Some commentators have criticized the use of this factor as being theoretically unsound. Professor Thompson's study found the use of this factor as less important than other factors that have a more substantive impact on an entity's status. Thompson, supra note 81, at 1067.
107. Gevurg, supra note 96, at 870. An example of a corporate formality intended to protect shareholders is the requirement of annual shareholders meetings for the purpose of electing directors.
108. Id. at 879.
109. One of the perceived advantages to LLCs is the ability of the members to eliminate these types of formalities. See supra note 21.
110. Carter G. Bishop, Unincorporated Limited Liability Business Organizations: Limited Liability Companies and Partnerships, 29 SUFFOLK U. L. REV. 985, 1036 (1995) (stating that in the case of Massachusetts LLCs, the "failure to observe the usual company formalities should not constitute a ground for piercing the liability shield because an LLC may often be a small and informal operation").
111. Id. at 1026. When discussing the application of veil piercing to LLPs, Professor Bishop asserts that, due to the fundamental differences between full-shield Massachusetts LLPs and corporations, there should be modifications in the application of the doctrine. Id.
2. Undercapitalization

Some courts also consider undercapitalization of the entity to be an important factor in the application of the doctrine of veil piercing. If a court adopts the privilege theory, it is likely that it will give more weight to the undercapitalization factor, as an argument can be made that the "spirit" of the privilege is abused when the entity does not act in the public's interest. In contrast, if the contractual relationship theory is used to support the establishment of a corporation, it is less likely that the court will consider undercapitalization to be a significant factor. Under this theory, states should have a limited role in determining adequate capitalization, as the ability to establish an entity with limited liability protection merely reflects a contractual relationship among the interest holders. The state allows for this classification because such arrangements are viewed as an efficient way to provide support for such contractual relationships.

Unlike the factor of corporate formalities, it is possible to directly apply the undercapitalization factor to LLEs. For all LLPs and LLCs that choose to be classified as partnerships, pass-through taxation gives them less incentive to maintain a capital reserve for later distribution. One challenge for courts is to determine what level of capitalization is sufficient, given the widely divergent needs of businesses and the inability to determine what level of risk a particular business operator should be willing to accept. Although commentators have discussed theoretical tests for inadequate capitalization, it is difficult to formulate

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112. Professor Thompson's study found that undercapitalization was cited less frequently than instrumentality and alter ego. Thompson, supra note 81, at 1063. If inadequate capitalization is the primary factor supporting veil piercing, a more focused remedy would be to establish capitalization requirements to provide a minimum level of assets to be available for creditors. Seeinfra notes 190-206 and accompanying text.


114. PRESSER, supra note 42, § 1.02.

115. Fox, supra note 113, at 1159.

116. PRESSER, supra note 42, § 1.02.

117. Id.

118. Cohen-Whelan, supra note 8, at 357.

119. Id.

120. The cases are not at all clear on how to define inadequate capitalization. Gevurtz, supra note 96, at 888. See also infra notes 190-206 and accompanying text (discussing minimum capitalization or insurance requirements as an alternative to the veil piercing doctrine).
a test that is able to take into account unexpected tort liabilities. If there are no minimum capitalization or insurance requirements for a particular business, it is problematic to base the decision to pierce solely on undercapitalization. Given the ability of contract creditors to determine the level of capitalization, or even to require a minimal level of capitalization, there is a logical argument that this factor should only be applied in tort cases where the creditor does not have the opportunity to protect itself from the (in hindsight) unreasonable risks that an entity takes if such entity is undercapitalized.

3. Instrumentality or Alter Ego

The final general category of factors that courts consider in the context of veil piercing is whether one entity treats another entity’s assets as its own. This is referred to as “instrumentality” or “alter ego,” and it relates to the control or domination of an entity by its interest holders. Proof of commingling of funds or assets may be used to illustrate the domination of the entity. The language used by courts to describe the control or domination behavior is varied and is used somewhat interchangeably. Courts may encounter difficulties when applying this factor because there is a fine line between proper management and improper domination of an entity by its interest holders.

The specific problem with applying this factor to LLEs is the fact that statutory provisions support flexibility in LLE management. Some statutes specifically provide for decentralized management as a default

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121. Leebron, supra note 67, at 1635.
122. Cf. Gevurtz, supra note 96, at 882. Generally, undercapitalization functions as just one of a number of factors used as justification for piercing the corporate veil. In certain situations, however, inadequate capitalization alone has been used as an independent ground for piercing the corporate veil. Leebron, supra note 67, at 1634. Historically, it was common for state codes to contain provisions relating to minimum levels of capital. Galbadon, supra note 37, at 1397. There are still some states that have minimum capital requirements; however, the amount required is quite low. For example, the minimum capital requirement is $1000 in Alaska and Texas. AK. STAT. § 10.10.030 (State of Alaska and Matthew Bender, WESTLAW through 3d Spec. Sess. of the Twenty-First Leg. (2000)); TEX. BUS. CORP. ACT ANN. art. 3.02 (West, WESTLAW through 1999 Reg. Sess.). In contrast, several states require minimum insurance or another form of security in order to take advantage of LLP provisions. See supra notes 26-28 and accompanying text.
123. Professor Gevurtz has described this factor in connection with two multi-part tests, each which contains an element of fraud. Gevurtz, supra note 96, at 862.
124. Id. at 864.
125. Miller, supra note 81, at 91.
126. LLC statutes were specifically established to allow for flexibility of the partnership management model with the advantage of limited liability. See supra notes 22, 23 and accompanying text (discussing the management structures of LLCs).
rule\textsuperscript{127} while others make centralized management the default.\textsuperscript{128} Should the application of this factor depend on which management structure is selected by a state as the default rule?\textsuperscript{129} The problem with any type of test using management structure as the dividing line is that in practice it is unlikely that the majority of LLCs or LLPs will lie clearly on one side or the other of the spectrum. Interest holders are likely to take advantage of LLE provisions in part because they allow for a hybrid organizational structure. Certainly, just as in the corporate context where shareholders may require supermajority voting for important decisions, interest holders are likely, even in a centrally managed entity, to acquire some role in the management and control of the LLE. Given this background relating to the passage of LLE provisions, any domination of the LLE management by the interest holders, absent other equitable issues, would appear to be an inappropriate factor for the courts to use to pierce the veil to the detriment of the interest holders. Perhaps application of this factor should not be based on how the entity is being run, but rather on the motivation behind the management of the entity. This would bring the discussion back to the factors that almost all courts consider—whether there has been fraud or whether failure to pierce would promote injustice.

C. Statutory Language Relating to Piercing the Veil

Some state legislatures have adopted language indicating the anticipated use of the piercing doctrine against interest holders of LLEs. Many state LLC statutes have addressed the piercing issue specifically, with fewer states dealing with this issue in their LLP provisions. It is perhaps no surprise that most of the states that have dealt with the issue for LLPs have language in their LLC acts as well. States have taken different approaches to deal with veil piercing in their LLE acts.\textsuperscript{130} There is relatively little written legislative history for LLC and LLP provisions, so it is difficult to determine the issues that were considered in connection with veil piercing language, and the intent of legislatures in some cases may only be inferred.

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\textsuperscript{127} Cohen-Whelan, supra note 8, at 354.  
\textsuperscript{128} Fox, supra note 113, at 1168.  
\textsuperscript{129} Id. at 1172.  
\textsuperscript{130} Given the rapid amendment of LLE provisions, this paper does not attempt to provide a comprehensive listing of all the states that fit within these categories but merely sets forth examples of some of the language used. For a listing of LLP provisions, see 5 STATE LIMITED LIABILITY COMPANY & PARTNERSHIP LAWS (Michael A. Bamberger & Arthur J. Jacobson eds., 1995).
\end{flushleft}
There are several categories of statutes that relate to veil piercing. In the first category are statutes that explicitly provide that the corporate doctrine of veil piercing should apply to LLEs. Minnesota's LLC statute exemplifies this category and provides that "case law that states the conditions and circumstances under which the veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.

Other statutes specifically reference a particular factor courts may use in determining whether piercing is appropriate but do not explicitly reference the doctrine. This type of language is reflected in the Uniform Limited Liability Company Act (ULLCA) which states that "the failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." Given that there would be no reason to discuss this

131. For a chart listing various provisions relating to the liability of members, see 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES app. 12-1 (West Group 1995).

132. For LLCs: COLO. REV. STAT. ANN. § 7-80-107 (West, WESTLAW through 2001 1st Reg. Sess.) ("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"); N.D. CENT. CODE § 10-32-29 (LEXIS through 1999 Reg. Sess.) ("the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies"); WIS. STAT. ANN. § 183.0304 (West, WESTLAW through 2001 Act 15, published 8/31/01) ("nothing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter").

For LLLPs: COLO. REV. STAT. ANN. § 7-64-1009 (West, WESTLAW through 2001 1st Reg. Sess.) (tracking the same language as the LLC statute but adding a provision clarifying that failure to observe the formalities or requirements relating to the management of its business is not in itself a ground for imposing personal liability on the partners for the debts of the LLP); N.D. CENT. CODE § 45-22-09 (LEXIS through 1999 Reg. Sess.) (tracking the same language as the LLC statute and adding a provision stating that "the use of informal procedures or arrangements for the management and for the conduct of business is not a ground for piercing the limited liability shield").

133. MINN. STAT. ANN. § 322B.303 (West, WESTLAW through 2000 Reg. Sess.). See also the Minnesota LLP provision tracking the LLC language stating: "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 partnerships." MINN. STAT. ANN. § 323.14 (West, WESTLAW through 2000 Reg. Sess.).


135. ULLCA § 303(b) (1995). The comments following this section in the ULLCA do not discuss this subsection of the act. An interesting example of a statute that has been revised to utilize this type of language is the West Virginia Code. An earlier version of the statute stated that members have "the same rights and liabilities as directors of corporations so organized or registered." W. VA. CODE § 31-1A-33 (Michie
factor absent the application of the doctrine, it is reasonable to infer that the legislature intended courts to apply the piercing doctrine with the modification provided in the statute. Some LLP provisions use similar language; however, unlike the ULLCA, the Uniform Limited Liability Partnership Act (ULLPA) does not provide language relating to liability and formalities.¹³⁶

In addition, there are provisions that do not specifically name the piercing doctrine or reference factors used in its application, but which include statements equating the liability shield of members and shareholders. In states with this type of statute, it is possible to infer that members should be treated the same as shareholders in situations where the veil piercing doctrine can be applied.¹³⁷ Some of these statutes combine references to the liability shield with a piercing factor. California law, for example, states that members will be held liable "under the same or similar circumstances and to the same extent as a shareholder of a corporation may be personally liable...except that the failure to hold meetings of members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish...liability."¹³⁸

The final category involves statutes that lack any provision whatsoever related to veil piercing. The majority of states' LLE statutes fall into this category.¹³⁹ There are several ways to interpret the lack of a specific provision relating to veil piercing. The first is to consider the

Butterworth, WESTLAW 1995). The current West Virginia act specifically references the failure to observe corporate formalities. See W. VA. CODE § 31B-3-303(b) (Matthew Bender, WESTLAW through 2000 1st Exec. Sess.).


¹³⁷ Schwindt, supra note 32, at 1554.

¹³⁸ CAL. CORP. CODE § 17101(b) (West, WESTLAW through 1999-2000 Reg. Sess. and 1st Exec. Sess.). The statutory language relating to corporate formalities will only apply where the articles of organization or operating agreement do not expressly require the holding of meetings of members or managers. See also WASH. REV. CODE ANN. § 25.15.060 (West, WESTLAW through 2000 2d Spec. Sess.).

¹³⁹ Klein, supra note 8, at 134 n.12. Note that there are LLC provisions that include special provisions relating to the personal liability of professionals or for tax liability. See, e.g., IND. CODE ANN. § 23-18-3-4 (West, WESTLAW through 2001 1st Reg. Sess.) ([a] person rendering professional services as a member, a manager, or an employee...is personally liable for the consequences of the person's acts or omissions to the extent provided by Indiana law or the laws of another state where the person is considered responsible); OHIO REV. CODE ANN. § 1705.48(D) (West, WESTLAW through 124th G.A.) ("This chapter does not affect any statutory or common law of this or another state that pertains to the relationship between an individual who renders a professional service and a recipient of that service, including, but not limited to, any contract or tort liability arising out of acts or omissions committed or omitted during the course of rendering the professional service."). For a tax provision, see NEB. REV. STAT. § 21.2612 (WESTLAW through 2000 Reg. Sess.) ("The members of a limited liability company shall be liable in the same manner as a corporate officer for unpaid taxes imposed upon a limited liability company when management is reserved to the members.").
lack of such a provision as a neutral element in determining whether courts should pierce the veil of LLEs. After all, the courts developed the veil piercing doctrine to provide an equitable remedy outside of the corporation statute. Why should the plain language of the provisions providing for limited liability for members somehow preclude the adoption of this theory for LLEs? Another argument is that courts could interpret the lack of a statutory provision as an indication that the legislature has considered the doctrine and rejected the applicability of the doctrine to LLEs. The doctrine is widely known to legislatures, as is illustrated by the number of states that have adopted specific language. Why should the lack of such a provision not be deemed to be a statement on the legislature's part? Certainly the rapid passage of LLE legislation can be seen as an attempt by individual states to provide more opportunities for limited liability protection.

More LLP provisions are silent on the application of the veil piercing doctrine than LLC provisions. As most states adopted LLP language subsequent to LLC language, it is possible that legislatures are still considering the impact of corporate doctrines to this type of entity. Unlike LLC statutes, the adoption of LLP provisions did not require state legislatures to draft entirely new provisions with the accompanying consideration of corporate common law theories. It is also possible that the corporate attributes of the LLC entity form were deemed to require attention to this type of detail versus the relatively short amendments to a state's general partnership act. Certainly the narrower scope of the limited liability shield in some LLP statutes may be part of the reason that the application of the piercing doctrine was not considered as an integral part of the process. Finally, the fact that the ULLPA does not contain language relating to the doctrine should be considered a possible reason for the relatively small number of states that have dealt with this issue in their LLP provisions.

D. LLE Case Law

Unlike the plethora of cases that interpret the application of piercing the veil to corporations, there are very few cases that have considered the issue in the context of an LLC, and to date there is no case in which a court pierced the veil of an LLP. In cases that have dealt with the

140. Bahls, supra note 8, at 61.
141. Gelb, supra note 31, at 142. See also Schwindt, supra note 32, at 1555.
142. Much of this is to be expected as the LLC has only come into widespread use in the past decade. A search of the Westlaw database in February 2001 did not find any case that involved the piercing of the veil of an LLP.
doctrine as it applied to LLCs, there has been limited discussion of the factors used to determine whether piercing should occur.

Given the paucity of case law relating to U.S. LLCs, some commentators have utilized foreign entities with similar structures to make analogies of what courts may do when faced with the question of piercing these types of entities. One often-cited case is Gallinger v. North Star Hospital Mutual Assurance, Ltd., in which the Eighth Circuit considered the appropriateness of piercing the veil of an entity that was established in Bermuda. The Bermudan legislation limited the liability of each member to the premiums or any unpaid portion thereof due to the company. The Minnesota test that the Gallinger court utilized required that, in addition to showing undercapitalization or lack of formalities, a court would have to find that there was an element of injustice or fundamental unfairness to the plaintiff. The court found that strict common law fraud was not necessary to fulfill the second element, but it was necessary to present evidence that the entity had been operated as a constructive fraud or in an unjust manner. The Gallinger court did not find that this second element was met and instead pointed to legislation that limited the liability of the members of the entity from the time of its formation. One commentator analyzing this case argues that the result of Gallinger would have been different had a corporation been involved and that the decision would have had the effect of raising the bar for piercing LLCs using Minnesota law. This case is especially interesting given that Minnesota is one of the states that includes a provision in its LLC statute providing that this common law doctrine may be applied to LLCs. In a later case applying Minnesota law to a Minnesota LLC, a court followed the Minnesota LLC act provision and applied the Minnesota law on piercing but reversed the trial court's decision to pierce the veil because the appellate court did not find any evidence that a member's misleading statements concerning property ownership were intended to mislead the plaintiff.

143. In addition to the Gallinger case discussed infra notes 144-148 and accompanying text, see also Abu-Nassar v. Elders Futures Inc., No. 88 Civ. 7906, 1991 WL 45062 (S.D.N.Y. Mar. 28, 1991) (involving a Lebanese LLC where the court refused to summarily dismiss the piercing claim because there were outstanding factual issues relating to alter ego, undercapitalization and lack of formalities).
144. 64 F.3d 422 (8th Cir. 1995).
145. Id. at 424.
146. Id. at 427.
147. Id.
148. Id. at 428.
149. Klein, supra note 8, at 149.
150. See MINN. STAT. ANN. § 322B.303 (West, WESTLAW through 2000 Reg. Sess.).
A few courts have applied the doctrine to LLCs without even considering the defendant's status as an LLC as opposed to a corporation. In *In re Multimedia Communications Group Wireless Associates of Liberty County Georgia, L.C.* 152 for example, where the defendants included Nevada and Florida LLCs as well as corporations formed in Florida and outside the U.S., the court applied Florida veil piercing law to find that the entities were not alter egos of each other, despite facts showing a common business location, personnel, computer network and a lack of corporate formalities.153

In *Ditty v. Checkrite, Ltd.* 154 a Utah federal district court considering whether to hold an individual member personally liable under a veil piercing analysis simply stated that "most commentators assume that the doctrine applies to limited liability companies."155 The *Ditty* court did not pierce the veil of the entity and found that the fact that the individual played an active role in the business was "only marginally probative of the factors considered when determining whether to pierce the corporate veil."156 A federal district court in Louisiana in *Hollowell v. Orleans Regional Hospital* recognized that the lack of state law requirements relating to formalities, such as annual election of directors, keeping minutes or holding meetings, would help determine whether veil piercing was appropriate.157

152. 212 B.R. 1006 (Bankr. M.D. Fla. 1997).

153. *Id.* at 1010 (requiring that (1) the shareholder treat the corporation as an alter ego (2) the corporate form is used fraudulently or for an improper purpose and (3) that such use of the corporate form caused injury to the claimant). See also, e.g., *Santer v. Fort McDowell Sand and Gravel*, 218 B.R. 941 (Bankr. D. Ariz. 1998) (analyzing piercing the veil of an entity that is described only as a limited liability company, the court used corporate terminology without any discussion of the appropriateness of using the theory on an LLC); *Marina, LLC v. Burton*, No. CA 97-1013, 1998 WL 240364 (Ark. Ct. App. May 6, 1998) (finding no error in the refusal to pierce the limited liability veil of Marina, LLC, given that the movant was aware of the status of the financing and that Marina, LLC, was a new entity, with no further discussion on applicability of the doctrine to LLCs); *New England Nat'l LLC v. Kabro*, No. 550014, 2000 WL 254590 (Conn. Super. Ct. Feb. 23, 2000) (determining whether a Connecticut court had personal jurisdiction over two LLCs organized under New York law and the individual members, the court found sufficient facts to pierce the veil of one of the entities and hold personally liable one of the individuals without discussing the appropriateness of applying the veil piercing theory); *Litchfield Asset Mgmt. v. Howell*, No. CV980076827, 2000 WL 1785122, at *1, *5 (Conn. Super. Ct. Nov. 14, 2000) (referencing the *Kabro* case and stating that the veil piercing theory would apply in the case of a limited liability company and finding that it was appropriate to "reverse pierce" to access funds invested in a second LLC by a controlling manager); *Leisure Resort Tech., Inc. v. Trading Cove Assoc.*, No. CV000091180, 2000 WL 1682535 (Conn. Super. Ct. Oct. 13, 2000) (declining to pierce the veil of a LLC when plaintiff alleged mere conclusions of law without addressing status of the entity as a LLC); *Vidal, Reynolds & Moya, Inc. v. Mountain Springs Co.*, 248 A.D.2d 247 (N.Y. App. Div. 1998) (using a piercing analysis to reject a request for a trial on the issue without discussing the applicability of the doctrine to the LLC).


155. *Id.* at 1335 (providing a lengthy list of articles supporting this statement).

156. *Id.* at 1336.

The difficulty in interpreting the results of cases dealing with veil piercing in the context of LLCs is that the treatment of the issue has been cursory at best, and in many instances the cases are unreported and do not have precedential value. Many of the cases have also involved a federal court’s interpretation of state law.

E. The Future of Veil Piercing

There is disagreement as to whether courts are currently using the veil piercing doctrine on a more permissive basis. One commentator expects that more veil piercing litigation can be expected with the increased use of LLCs. It is possible, however, that due to the perceived flexible nature of the entity and the interpretation of a legislature’s intent, courts could find that facts that would support piercing in a corporate context may be less persuasive in determining

158. Compare Presser, supra note 42, § 1.06 (“there appears to be a much greater willingness to pierce the veil than there has been for years”) with Thompson, supra note 81, at 1049-1050 (finding no trend over time and that the percentage of cases where courts pierce the corporate veil has been relatively constant through the 1960s, 1970s and 1980s). Federal courts have developed common law regarding the doctrine of piercing the veil, although these courts looked to state law for guidance so long as state law did not conflict with federal interests. Recently, courts’ application of personal liability under federal statutory schemes has come under a great deal of scrutiny. Specialized rules relating to piercing the veil are derived directly from the language of federal statutes that specify enterprise or other status based liability. See generally H. Lowell Brown, Parent-Subsidary Liability Under the Foreign Corrupt Practices Act, 50 BAYLOR L. REV. 1 (1998).

The language of federal statutes may specifically impose liability on an entity in a capacity different than that of ownership. Gevurtz, supra note 96, at 904. For example, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), liability may be imposed on an “operator” of a facility. “Operator” has been interpreted as the person that controls the activities of the facility in question. Such persons have included parent corporations. Constance S. Chandler and Rebecca J. Groser, An Issue Ripe for Supreme Court Review: Whether Congress Intended to Alter the Common Law Principles of Corporate Limited Liability When Enacting CERCLA, 4 MO. ENVTL. L. & POL’Y REV. 14 (1996) (discussing whether the standard of liability derives from common law principles of corporate law, including veil piercing, or from a direct application of the statutory definitions of CERCLA). The Supreme Court of the United States addressed the question and determined that a parent corporation could be held directly liable as an “operator” for its involvement in the management of a subsidiary facility independent of the ownership relationship. See Aron M. Bookman, Transcending Common Law Principles of Limited Liability of Parent Corporations for the Environment, 18 VA. ENVT'L L. 555, 556 (1998) (discussing United States v. Bestfoods, 524 U.S. 51 (1998)). See also Cynthia Nance, Affiliated Corporation Liability Under the WARN Act, 52 RUTGERS L. REV. 495, 505 (2000) (“[o]f the fifteen WARN Act cases addressing affiliated corporation liability, seven use some form of state veil piercing jurisprudence”).

Federal common law regarding veil piercing is as confused as that of individual states. Notably, there appears to be a trend by some federal courts to allow for veil piercing to occur with greater ease in the federal context. Presser, supra note 42, § 3.01. See also Presser, supra note 45, at 175. Given that the theoretical basis for assigning liability is federal statutory language, it appears unlikely that LLCs will be able to avoid the application of the doctrine in the federal context with any greater frequency than other types of entities.

159. Miller, supra note 81, at 86. Professor Miller does not explain why she believes that more litigation should be expected with LLCs but only highlights that LLCs are able to use the flow through tax treatment traditionally associated with partnerships. Id.
whether to pierce the veil of LLEs. Many commentators who believe that courts are likely to apply the doctrine to LLCs agree that a mechanical application of the same factors used in the corporate context is inappropriate. Given the relatively few cases in which U.S. courts have considered piercing an LLC's limited liability veil, it is too early to make a blanket statement on how courts will handle this issue given the differences between the LLC and corporate structures. There has been little discussion of the application of the piercing concept to LLPs. However, given the similarity of the limited liability protection, it is likely just a matter of time before an attempt is made to pierce the veil of an LLP, and the same problems with the application of the doctrine will be encountered.

IV. ALTERNATIVES TO THE COMMON LAW VEIL PIERCING DOCTRINE

State legislatures in the U.S. have overwhelmingly agreed that interest holders can obtain limited liability protection by utilizing a variety of entity forms. Due to the cost to creditors inherent in limited liability systems that protect interest holders, courts have developed limited liability exceptions such as the veil piercing doctrine. Legislatures should now consider codifying veil-piercing standards in order to provide creditors with an equitable remedy and interest holders with clear guidelines on proper conduct. There are several alternatives to the current common law approach to veil piercing that can apply such a remedy more consistently. The two primary statutory alternatives discussed in this paper are the adoption of a statutory provision to codify veil piercing common law and the utilization of existing fraudulent transfer provisions. If legislatures want to provide additional protection for creditors, they may consider other statutory measures, such as requiring minimum capitalization or insurance for all entities with


162. See Hamilton, supra note 12, at 1097 (discussing the application of the veil piercing concepts to LLPs); Bishop, supra note 110, at 1026 (discussing the likelihood of applying the piercing concept to LLPs formed under Massachusetts law).
limited liability protection or changing the bankruptcy laws to give involuntary creditors superpriority.163

A. Statutory Provision

One alternative to the current common law system for veil piercing is the adoption of a uniform statutory provision articulating the circumstances under which an interest holder of an entity will lose the limited liability shield. The parameters of the provision could be drafted in a variety of ways, but in order for the provision to be useful, it would need to have specific standards to provide certainty for interest holders, creditors and the courts. One proposed test, the Matheson/Eby test, specifies fraud, conflicted exchanges and insolvency distributions as the circumstances under which the limited liability shield would be removed as to claims by voluntary creditors.164 In order for a court to apply the Matheson/Eby test, an entity must be or become insolvent.165 Fraud under the Matheson/Eby test is limited to an owner (defined as anyone who by reason of an ownership interest is entitled to share in the profits of an entity) who fraudulently misrepresents the assets of the entity in any material aspect.166 A conflicted exchange under the Matheson/Eby test is the transfer to an owner (or other organization in which the owner has a material financial interest) for less than reasonably equivalent value.167 Any distribution to an owner that renders an entity insolvent is the final trigger for that owner's losing the limited liability shield under the Matheson/Eby test.168

The Matheson/Eby test is a good starting point for drafting a statutory version of veil piercing. The Matheson/Eby test could be strengthened by the addition of provisions similar to those found in the

163. The ability of creditors to use these alternatives is impacted by the creditor's status as involuntary or voluntary. Of course, implementing safeguards to protect individuals, specifically involuntary tort creditors, is limited only by one's creativity. Certainly, changes in the U.S. system to provide for increased safety regulations or universal health care would decrease the likelihood of an individual being injured in the first place or reduce the economic cost of such injuries to individuals, but these types of solutions are beyond the scope of this paper.

164. 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, 182 (2000). The proposed test specifically provides that the common law doctrine would be inapplicable in jurisdictions adopting the model act. Id. at 185.

165. Id. at 184.

166. Id.

167. Id. at 183. Presumably, "reasonably equivalent value" could be interpreted in the same manner as the phrase has been interpreted in fraudulent transfer cases.

168. Id. An LLE is insolvent when it is "unable to pay its debts in the ordinary course of business."
Uniform Fraudulent Transfer Act (discussed below). Specifically, any proposed test should, as much as feasible, include definitions for the application of concepts such as "value" and "transfer." Such an act also would need to include time limits for bringing an action under any statutory provision and specifically articulate judicial remedies.

One of the challenges for any statutory provision covering veil piercing is to allow interest holders who act inappropriately to waive limited liability without unduly restricting the ability of parties to allocate business risks. Commentators focused on the externalities generated by the limited liability system probably would not accept a statute unless it ensured that tort creditors had some basis for utilizing the statute in cases of fraud. 169

B. Fraudulent Transfer Laws

Creditors who are unable to utilize the veil piercing doctrine may still be able to collect from interest holders who behave in a fraudulent manner through the application of fraudulent transfer laws. 170 Most states have adopted a statutory fraudulent transfer act. 171 Although no one provision has been universally adopted, the two most common types of provisions are based on the Uniform Fraudulent Transfer Act (UFTA) and the older Uniform Fraudulent Conveyance Act (UFCA). 172 As the majority of states have adopted the UFTA, the focus in this section will be on the UFTA's provisions. 173

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169. Matheson and Eby recognize that their model act as currently stated will not cover the claims of tort claimants or claims based on statutory liabilities, as the act's application is restricted to voluntary creditors. The apparent basis for such a restriction is that these involuntary claimants do not place any reliance on the apparent validity of transfers or assets of the business. Id. at 186. In order to provide some protection for involuntary creditors, the Matheson/Eby test's provisions waiving limited liability for conflicted exchanges and insolvency distributions could be applied regardless of the status of the creditor.

170. Clark, supra note 82, at 542. This article, among other issues, discusses the interrelation between fraudulent conveyance and piercing the corporate veil. As discussed below, one of the major barriers to the use of a fraudulent transfer act is that it will be necessary for the creditor to show that there was a transfer. There may be an indefinite number of unfair transactions and it may be difficult or costly to prove that there was a lack of fair consideration for such transfers. Id. at 343. As with veil piercing, the application of fraudulent transfer law achieves justice between unsecured creditors and debtors. See generally Marie T. Reilly, The Latent Efficiency of Fraudulent Transfer Law, 57 La. L. Rev. 1213 (discussing the fact that the predominant view of commentators justifying fraudulent transfer law has a strong moralistic flavor).

171. Jeffrey L. LaBine, Michigan's Adoption of the Uniform Fraudulent Transfer Act: An Examination of the Changes Effected to the State of Fraudulent Conveyance Law, 45 Wayne L. Rev. 1479, 1488 (1999). The Uniform Fraudulent Transfer Act has been adopted by thirty-eight jurisdictions. Id. Non-UFTA jurisdictions have adopted the Uniform Fraudulent Conveyance Act or continue to depend on common law. Id.

172. Id. at 1481. These uniform acts were developed by the NCCUSL to respond to ambiguities in fraudulent conveyance law. The UFTA was developed to address issues that arose in the application of the UFCA. Id. at 1487-88.

173. The UFTA preserved the essential approach and structure of the UFCA, however there are new
The UFTA provides creditors with a series of remedies when an entity has fraudulently transferred assets. The key to the application of the UFTA is determining whether a transfer is fraudulent. Transactions in which an entity transferred funds with the intent to hinder, delay or defraud creditors illustrate the most straightforward application of the UFTA. In addition, the UFTA includes "constructive fraud" provisions to deal with the challenge of proving intent to defraud, such as the use of a "balance sheet test" to determine insolvency. If a debtor does not receive reasonably equivalent value in exchange for incurring an obligation or making a transfer while the debtor is insolvent, the creditor can avoid or set aside such transfer. The successful application of these constructive fraud provisions of the UFTA allows a remedy for creditors regardless of a debtor's intent.

As to transfers to insiders, the UFTA provides that a creditor can set aside any transfer to an insider who has reasonable cause to believe that a debtor is insolvent where the transfer is payment for an antecedent debt occurring when the debtor is actually insolvent. A creditor must prove that an insider had reasonable cause to believe that a debtor is insolvent in order to utilize this section of the UFTA.

Remedies available to discourage such transfers include the entry of judgment for the value of the assets or the extent of the creditors claim,
injunctive relief against further disposition by the debtor and/or transferor, and a provision that allows "any other relief the circumstances may require."180 Although there are time limits in the UFTA that require creditors to act promptly, provisions in the act allow creditors to begin a proceeding based on the UFTA prior to a time that a claim has been litigated and reduced to final judgment.181 In addition, the UFTA recognizes and remains flexible in the incorporation of equitable principles to reflect individual situations that arise under the act. By retaining equity as a part of the application of the UFTA, judges will still have discretion to avoid a transfer if the facts warrant such a remedy.

As discussed above, the fraudulent actions of an interest holder are at the heart of the veil piercing doctrine.182 By using fraudulent transfer provisions to combat actual and constructive fraud, courts are able to accomplish the goal of veil piercing — fairness — by limiting a debtor’s ability to shift risk to a creditor.183 Risk allocation between creditors and debtors is at the center of the debate relating to limited liability. An interest holder’s ability to externalize risk through the application of a limited liability shield is destroyed through the application of the veil piercing theory. In the same manner, an interest holder’s ability to externalize risk by increasing the level of risk to creditors through transactions that interfere with a creditor’s ability to collect on its claims is one way to view fraudulent conveyance law.184 Of course, by avoiding a transfer, the subsequent transferee may have to absorb the loss.185

180. UNIF. FRAUDULENT TRANSFER ACT § 7(a)(3)(iii), 7A U.L.A. 339 (1999). Other possible remedies include the “appointment of a receiver to take charge of the asset transferred or of other property of the transferee,” or a court “may levy execution on the asset transferred or its proceeds” if a creditor has obtained a judgment on a claim against the debtor. UNIF. FRAUDULENT TRANSFER ACT §§ 7(a)(3)(ii), 7(b), 7A U.L.A. 339-40 (1999).

181. A claim will be extinguished under the UFTA if it is not made within (1) four years after a transfer is made if there was actual intent (or within one year after the transaction could have reasonably been discovered); (2) four years for other transfers if constructive fraud is involved; or (3) one year after a transfer is made if the transfer is made to an insider for an antecedent debt. UNIF. FRAUDULENT TRANSFER ACT § 9, 7A U.L.A. 359 (1999). Holders of unliquidated tort claims or contingent claims may be creditors under the UFTA. UNIF. FRAUDULENT TRANSFER ACT §§ 1(3), (4), 7A U.L.A. 275, 301 (1999). Section 4(a) of the UFTA states that a creditor’s claim may arise “before or after the transfer was made or the obligation was incurred.” UNIF. FRAUDULENT TRANSFER ACT § 4, 7A U.L.A. 301 (1999).

182. See supra note 102 et seq. and accompanying text (discussing fraud as a factor in veil piercing). As Professor Clark states, the doctrine of piercing the corporate veil may be seen as an application “of the same notions of securing the moral obligations of debtors to creditors which are at work in fraudulent conveyance law.” Clark, supra note 82, at 505.


185. Section 8 of the UFTA sets out the defenses, liability and protection of transferees and specifically allows for a good faith transferee to have certain protections in the assets transferred. UNIF. FRAUDULENT TRANSFER ACT § 8, 7A U.L.A. 351.
Unless the transfer is to an insider, the loss is merely shifted from one creditor to another.\textsuperscript{186} It is important to note that a transfer will be avoided only if it was made for less than reasonably equivalent value. A later-in-time creditor who takes an asset for less than reasonably equivalent value could be viewed as assuming the risk of having a transfer undone.\textsuperscript{187} Depending on your perspective, the allocation of loss to transferees may be too narrow or too broad due to certain protections that transferees have under the UFTA.

Fraudulent conveyance law has a narrower scope than veil piercing. There must be a transfer of some type, and a creditor must obtain knowledge of such transfer in a timely manner. It can be difficult to determine whether "reasonably equivalent value" has been provided, especially in situations where there are multiparty transactions.\textsuperscript{188} If a transfer is made while the entity is solvent, a creditor will have the same difficulties of proving actual fraudulent intent as under a veil piercing claim.

The advantage of utilizing fraudulent conveyance law over the veil piercing common law is the relative uniformity of fraudulent conveyance law and the articulation of specific standards in such laws. The defined terms incorporated in the UFTA provide interest holders with a set of standards to utilize to determine whether a creditor could successfully challenge a particular transfer. Although certain interest holders may still decide to make a transfer, the possible repercussions to the parties of such a transfer are known, with the remedies set forth in the statute. Having a statutory provision to interpret provides the judicial branch with the tools it needs to consistently provide remedies to creditors. Although there are many criticisms of fraudulent conveyance law, such laws at least attempt to provide a framework for the judicial process.

\textsuperscript{186} Even given this imperfect loss shifting, using fraudulent conveyance law can at least shift loss from involuntary to voluntary creditors. \textit{See id.}

\textsuperscript{187} \textit{Id.} \textsection 8(a). Section 8(a) states that a transfer that was made with actual intent is not voidable "against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." \textit{Id.} Due to this saving language, subsequent transferees will be shielded from the application of the avoidance remedy. \textit{See id.}

\textsuperscript{188} Allen J. Litman, \textit{Multiple Intent, Veil-Piercing, and Burdens and Benefits: Fraudulent Conveyance Law and Multiparty Transactions, 39 U. MIAMI L. REV. 307, 312 (1985).} An example of such a multiparty problem is a guarantee by a subsidiary for a debt of a sister company where a security interest secures the guaranty. Courts have adopted several doctrines to assist in applying the concept of reasonably equivalent value, including one doctrine that relates to the "identity of interests" of the parties – essentially one aspect of the veil piercing doctrine. \textit{Id.} at 339. For a further discussion on analyzing risk of guaranty liability, see Zaretsky, \textit{ supra} note 174, at 1192-99. For an extensive discussion on applying fraudulent transfer law to intercorporate guarantees, see Jack F. Williams, \textit{The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System, 15 CARDOZO L. REV. 1403 (1994).}
rather than require judges to rely on the tangled web of decisions that constitute the common law on veil piercing.  

C. Minimum Capital Requirements/Insurance

One theory that historically was used to attempt to guarantee that funds were available to creditors is the imposition of minimum capital requirements on entities with limited liability protection.  

The idea of requiring “adequate” capital in exchange for the right to do business remains a part of current corporate law for specified industries.  

An argument can be made that the barriers these requirements create for new entities seeking to enter the market will be offset by the efficiencies to society as a whole by the protection that the requirements provide.  

If the goal is to provide for a greater amount of assets to be available to creditors, it is necessary to consider minimum capital requirements in connection with mandatory insurance.  

Even if regulators decide that insurance is not required to cover all possible losses, the requirement of mandatory insurance could reduce some of the risk that involuntary creditors would be required to assume under the current system.

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189. One argument that fraudulent transfer law alone does not adequately protect creditors is based on the proof difficulties inherent in such laws. Tung, supra note 183, at 568.

190. Most states currently do not require minimum capital requirements for corporations. Hamilton, supra note 12, at 1076. As discussed above, undercapitalization has been used as a factor to support veil piercing. See supra notes 112-117 and accompanying text.


Another example is that certain financial requirements are applied to owners and operators of waste management facilities. John H. Turner, The U.S. EPA 40 C.F.R. Part 258 Financial Test/Corporate Guarantees—New Environmentally Protective, Cost-Effective Mechanisms for the Demonstration of Financial Responsibility, 9 FORDHAM ENVTL. L.J. 567 (1998). This article includes a description of the mechanisms indorsed by the Environmental Protection Agency that can be used to demonstrate financial responsibility, including surety bonds, insurance or a corporate financial test. Id. at 588.

192. But see Matheson & Eby, supra note 164, at 177 (arguing that minimum capitalization requirements are not supported in a discussion on the undercapitalization factor in veil piercing).

193. Coffey, supra note 70, at 90. Essentially, assuming bankruptcy of the entity, the only way that a tort victim can be reimbursed under the current system is through the relatively low priority that such an unsecured creditor is given under the bankruptcy system. By providing for some insurance coverage, the tort victim may be able to recoup at least some of its losses.
The requirement of mandatory liability insurance for entities is an idea that has been explored in connection with proposals to eliminate limited liability.\footnote{194}{See Hansmann & Kraakman, supra note 70, at 1927. See also TEX. REV. CIV. STAT. ANN. art. X, § 6132b-3.08 (West, WESTLAW through 1999 Reg. Sess.) (requiring that LLPs maintain $100,000 in funds that is segregated for the purposes of satisfying judgments against the partnership or carry at least $100,000 in liability insurance).} Unlimited liability can be viewed as a method under which interest holders provide insurance to creditors of an entity.\footnote{195}{Thompson, supra note 4, at 21. Using this premise, the value of the ownership interests in an entity would be reduced to reflect the fact that the interest holders are essentially issuing insurance to tort creditors. Id.} Minimum insurance requirements still exist under some state laws. For example, several states require entities to maintain a specified level of insurance or security in order to maintain status as an LLP.\footnote{196}{See supra notes 26-28 and accompanying text.}

Although insurance requirements are more common for entities rendering certain professional services, the concept could be applied across industries.\footnote{197}{See, e.g., WASH. REV. CODE ANN. § 25.05.125 (West, WESTLAW through 2000 Second Spec. Sess.) (designating insurance requirements for partners in LLPs that are required to be licensed to perform professional services).} The insurance market for liability coverage has matured considerably since the beginning of widespread provision of limited liability protection for shareholders, and liability insurance is available for most businesses.\footnote{198}{See supra note 48, at 52. See also Louis De. Alessi, Why Corporations Insure, 25 ECON. INQUIRY 429 (1987) (analyzing why corporations insure).}

One advantage of insurance over minimum capital requirements is that minimum insurance levels would be set to cover expected losses thus leaving to interest holders decisions relating to the appropriate capitalization level and mix of the entity.\footnote{199}{Coffey, supra note 70, at 90.} Provisions for insurance alternatives, such as segregated funds or minimum net worth requirements, would continue to give entities some flexibility in allocating their resources.

An initial difficulty with minimum capital requirements or insurance coverage is the inflexibility of the standards.\footnote{200}{See supra text accompanying note 27 (discussing the alternatives to insurance requirements).} Given the wide variety of possible tort losses across industries and geography (or even differences in the average amount of voluntary debt held by entities), it would be extremely difficult for regulators to set standards that provide an optimal amount of protection for creditors without damping the

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\footnote{194}{See Hansmann & Kraakman, supra note 70, at 1927. See also TEX. REV. CIV. STAT. ANN. art. X, § 6132b-3.08 (West, WESTLAW through 1999 Reg. Sess.) (requiring that LLPs maintain $100,000 in funds that is segregated for the purposes of satisfying judgments against the partnership or carry at least $100,000 in liability insurance). Many entities already carry insurance. An explanation for a corporation's incentive to insure is found in Easterbrook & Fischel, supra note 48, at 52. See also Louis De. Alessi, Why Corporations Insure, 25 ECON. INQUIRY 429 (1987) (analyzing why corporations insure).}

\footnote{195}{Thompson, supra note 4, at 21. Using this premise, the value of the ownership interests in an entity would be reduced to reflect the fact that the interest holders are essentially issuing insurance to tort creditors. Id.}

\footnote{196}{See supra notes 26-28 and accompanying text.}

\footnote{197}{See, e.g., WASH. REV. CODE ANN. § 25.05.125 (West, WESTLAW through 2000 Second Spec. Sess.) (designating insurance requirements for partners in LLPs that are required to be licensed to perform professional services).}

\footnote{198}{Hansmann & Kraakman, supra note 70, at 1888, 1926.}

\footnote{199}{Coffey, supra note 70, at 90.}

\footnote{200}{See supra text accompanying note 27 (discussing the alternatives to insurance requirements).}

\footnote{201}{Hansmann & Kraakman, supra note 70, at 1927. An example of the failure to determine a workable regulatory capital standard is the experience of the banking agencies' failure to standardize a measure linking a bank's capital adequacy to its level of interest rate risk. Ransom, supra note 191, at 445.}
ability of parties to enter an industry and successfully become an efficient firm. The application of insurance coverage and capital requirements for entities with involvement in more than a single type of industry may also serve to make these types of provisions so complex that the inefficiencies could overcome the benefit of providing resources for creditors. The process of determining the amount of insurance coverage would require regulators to make assumptions about the average risk that firms in particular industries are willing to take. Some firms certainly would be over- or under-insured if a regulator made these types of determinations. Given the non-standard language of policy exclusions, regulators would also need to set out minimal standards for the coverage of the policies.

In addition to the difficulties of determining appropriate levels of capitalization or insurance, another issue that would need to be resolved is what should happen if an entity fails to maintain capitalization or insurance at the minimum statutory level. Rational arguments can be made that the failure to meet any such level should totally eliminate the limited liability protection of the entity. Equally credible arguments can be made that the impact of such a failure should be that interest holders are personally liable only up to the amount of minimal capitalization or insurance that is required.

In order to encourage compliance with capitalization requirements or mandatory insurance coverage, personal liability could be imposed on management employees or controlling interest holders of entities that do not comply with the statutory norm. The difficulty would lie in the borderline cases — how much “control” does a member of an entity need to have before being deemed to be part of this group? Would restrictions on the type of decisions that a member has the right to vote on be considered when determining this control? One alternative is to require at least one individual to be named as potentially personally

202. Hansmann & Kraakman, supra note 70, at 1927. In the bankruptcy context, courts have defined unreasonably small capital in several ways. Garrick A. Hollander, Defining “Unreasonably Small Capital” in Fraudulent Conveyance Cases: Ratio Analysis May Provide an Answer, 49 BUS. L. 1185, 1197 (1994). Various ways to define capital include insolvency analysis, cash flow analysis, working capital analysis and a variety of other factors relating to a business’ ability to survive. Id.

203. Thompson, supra note 4, at 21 (pointing out that there has been extensive litigation over the interpretation of insurance policy provisions that exclude environmental claims).

204. This assumes that the statutory scheme requires an entity to maintain a set level at all times.

205. By lifting the limited liability veil in its entirety, an argument can be made that creditors are being overcompensated. Clark, supra note 82, at 547, 548.

206. Hansmann & Kraakman, supra note 70, at 1927. Professors Hansmann and Kraakman specifically discuss corporate officers and directors but of course when dealing with the various types of LLEs it would be necessary to craft any such statute to include the various types of parties that are involved in all of the available entities.
liable for breaches of these statutory limits, but of course such a system could cause entities to select an individual that is most judgment-proof to act in such capacity. Violation of these statutory norms could also be a trigger for the elimination of limited liability protection for all the interest holders of an entity. Such a provision would certainly encourage interest holders to confirm that the entity in which they invested is in compliance with the statute. One problem with such a serious consequence for a perhaps minor breach (for example, the insurance coverage is just below the statutory requirement) is that the benefits of limited liability, specifically the reduction in monitoring costs, would likely be seriously impacted.

D. Superpriority in Bankruptcy for Tort Claims

Piercing the veil is obviously not necessary if the entity has sufficient assets to meet its obligations. Generally, the doctrine is applied in situations where the entity is insolvent and may have already filed for bankruptcy protection. Although uninsured tort claims do not frequently arise in bankruptcy, such claims can be substantial. The U.S. Bankruptcy Code sets forth priorities that determine the order in which creditors have access to the assets of an insolvent entity. The Bankruptcy Code gives certain unsecured priority claims (including some wages, contributions to employee benefit plans and tax liabilities) and secured claims priority over unsecured claims. There is active debate as to the efficiency of the bankruptcy priority system as well as the impact that the bankruptcy law has on risk taking.

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210. 11 U.S.C.A. § 506 (West, WESTLAW through P.L. 107-26, approved 8-17-01). Secured claims take priority only to the extent that the claim is secured by specified collateral. Id. § 506(a). If a claim is only partially secured by collateral, the claim is deemed to have priority only to the extent of the secured amount of the debt. Id.

211. Steven L. Schwarcz, The Easy Case for the Priority of Secured Claims in Bankruptcy, 47 DUKE L.J. 425 (1997) (arguing that there are advantages to unsecured debtors supporting the priority of secured claims); Bebchuk & Fried, supra note 208 (following up on an earlier article discussing, among other issues, the economic costs that arise from providing full priority to secured claims in bankruptcy). This article also contains a footnote with an extensive listing of writings relating to the issue of efficiency benefits of the priority rules. Id. at 1381 n.5. See Lucian Arye Bebchuk & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 YALE L.J. 857 (1996) (offering two rules of partial priority to be considered as alternatives to the rules of full priority). For a technical discussion of the impact of bankruptcy law on
related to this topic is the ability of an entity to grant a security interest to a creditor (who thus increases its security for a debt or becomes secure) to the detriment of involuntary creditors.212

Given that voluntary creditors have the ability to allocate risk through their investigation of debtors and can require security for their risk, legislatures could provide certain involuntary creditors with additional protection by giving tort victims superpriority under the bankruptcy laws.213 Allowing superpriority of tort creditors does not in and of itself increase the amount of assets available for all creditors but merely reallocates this risk.214 Some commentators who argue that the bankruptcy system should be changed focus on the ability of voluntary creditors to diversify their losses and the relative efficiency of voluntary creditors as monitors of tort risks.215 There are arguments that it will be inefficient, and perhaps for smaller creditors impracticable, for creditors to take on this monitoring role; however, it seems to be a natural extension of the activities of creditors who investigate the management of entities with which they conduct business.216 In fact, the current priority system reduces the incentive of a secured creditor to monitor the debtor and attempt to enforce covenants relating to risk that are included in loan documents.217 One of the many potential problems with this idea is that creditors may set forth such stringent restrictions on a management’s ability to take risks that an entity’s ability to develop is stifled. Certainly, a secured creditor that loses its priority in bankruptcy is likely to charge a higher rate for its increased risk.218

A less dramatic change to the bankruptcy code would be to allow involuntary creditors priority over unsecured voluntary creditors.219
Other options are to allow for partial priority of secured creditors or to set aside a portion of a debtor’s collateral for unsecured creditors.

Any change to allow for priority for involuntary tort creditors will need to take into account the relative efficiencies of secured debt. A higher cost for financing could mean that entities have fewer liquid assets available for distribution to all creditors.

V. RECOMMENDATIONS AND CONCLUSION

The result of the introduction of new limited liability entity forms and the subsequent amendment of rules relating to them is that there are no real differences among entities in regard to the liability protection available to their interest holders. The universality of the liability protection among all the entities means that all interest holders, whether partners, members or shareholders, can be treated the same with respect to the exceptional situations that warrant the loss of limited liability. Rather than apply the flawed veil piercing doctrine to these new entities at 1920. One way to resolve this issue is to consider whether the victim could have reasonably understood to have “contracted with the firm in substantial awareness of the risks of injury involved.” Id. at 1921. Clearly, some voluntary creditors, such as employees and small suppliers, will have fewer methods to ensure their protection than financial creditors. Tung, supra note 183, at 555. Consumer creditors also are difficult to protect. Although consumers generally have the ability to choose who they deal with, they generally can not determine the financial status of the entity that may ultimately be liable for their contract claims.

220. Bebchuk & Fried, supra note 208, at 1328 (discussing the cost and availability of financing under partial priority).


222. The additional cost of the financing would decrease the availability of assets for other investment opportunities both within and outside of the entity.

223. For an argument that it is time to scrap the multitude of alternate forms of business organizations for a “limited entity” statute for small business, see Dale A. Oesterle & Wayne M. Gazur, What’s in a Name?: An Argument for a Small Business “Limited Liability Entity” Statute (With Three Subsets of Default Rules), 32 WAKE FOREST L. REV. 101 (1997). An alternative proposed by Professor Ribstein is statutory authorization for “Contractual Entities” in which owner liability as well as other terms would be governed solely by such entity’s filed operating agreement. Larry E. Ribstein, Limited Liability Unlimited, 24 DEL. J. CORP. L. 407 (1999). See also William A. Klein & Eric M. Zolt, Business Form, Limited Liability, and Tax Regimes: Lurching Toward a Coherent Outcome, 66 U. COLo. L. REV. 1001, 1041 (1995) (proposing that lawmakers start from scratch to create a set of state laws for business associations based on limited liability and tax regimes). Note that the Klein and Zolt article was published prior to the adoption of the “check-the-box” rules that allow for the election by any non-corporate entity of partnership or corporate tax treatment.

224. In fact, the commentary that supports the application of the veil piercing theory to LLCs supports this proposition. See supra notes 159-61. Cf. Klein & Zolt, supra note 223, at 1036. After an examination of the various arguments relating to limited liability, Klein and Zolt stated that “the most important proposition that emerges [from such discussion]... is that none suggest that deciding whether to grant limited liability should turn on the choice of business form.” Id. Just as granting limited liability no longer turns on the choice of business form, it does not make sense that the application of a theory that eliminates this attribute should turn on the same choice.
and continue to apply the theory to corporations, legislatures should consider the underlying policy issues supporting veil piercing and implement solutions that directly address those concerns. Legislatures have demonstrated their willingness to break with established rules relating to corporations and partnerships and reshape the environment in which entities do business. The adoption of a statutory provision to codify veil piercing and the increased use of existing statutory language relating to fraudulent transfers, along with other statutory reforms, can address the underlying policy concerns relating to limited liability and provide courts with a structure that allows for the provision of a remedy in a more consistent manner.