

AN LLC BY ANY OTHER NAME IS STILL NOT A CORPORATION

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Samantha J. Prince^{*} and *Joshua P. Fershée*[†]

ABSTRACT

Business entities have their own unique characteristics. Entrepreneurs and lawyers who represent them select an entity structure based on the business's current and projected needs. The differing needs of each business span across myriad topics such as capital requirements, taxation, employee benefits, and personal liability protection. These choices present advantages and disadvantages many of which are built into the type of entity chosen.

It is critically important that people, especially lawyers, recognize the difference between entities such as corporations and limited liability companies (LLCs). It is an egregious, nearly unforgivable, error in our view to call an LLC a "limited liability corporation." In part, this is because lawyers should try to get things right, but it is also because conflating the two entity types can lead to unpredictable outcomes. Perhaps more important, it could lead to incorrect and unjust outcomes. A prime example lies within the veil piercing context.

Lest you think that this is not a prevalent occurrence, there are nearly 9,000 references to the phrase "limited liability corporation" in court cases. Practicing attorneys are not the only people messing this up. Judges, legislators, federal and state agency officials, and media pundits are also getting it wrong. Most recently, Justice Samuel Alito scribed an op-ed that was published in the Wall Street Journal where he misused the term. Even the TV show Jeopardy! allowed as correct the answer, "What is a limited liability corporation?," during one episode.

Enter artificial intelligence. AI relies on information it can find, and therefore AI generators, like ChatGPT, replicate the incorrect term. With a proliferation of users

^{*} Samantha J. Prince is an Assistant Professor of Law at Penn State Dickinson Law. She earned her LL.M. (Tax) from Georgetown University Law Center; J.D. Widener Commonwealth Law; and her B.S. in Chemistry from Muhlenberg College. On behalf of both authors, we thank Brandon Beck, Taylor Haberle, Kaci McNeave, and Jeannie Perez for research assistance. We also thank Professors Ann Lipton and Sam Brunson for alerting us to some of the examples we used herein. The authors are both music fans and do not apologize for the smattering of lyrical references throughout the article.

[†] Joshua P. Fershée is Dean and Professor of Law at Creighton University School of Law. Many of his contributions to this article are based on his writing for the Business Law Prof Blog. https://lawprofessors.typepad.com/business_law/ Thank you to my co-bloggers and countless readers for their insights, critiques, and suggestions. Particular thanks to Joan Heminway, Steve Bainbridge, Jeff Lipshaw, Tom Rutledge, Keith Bishop, and Elaine Waterhouse Wilson for helping the cause (and asking good questions).

and programs using ChatGPT and other AI, the use of incorrect terminology will balloon and exacerbate the problem. Perhaps one day, AI can be used to correct this problem, but that cannot happen until there is widespread understanding of the distinct nature of LLCs and a commitment to precise language when talking about them.

This article informs of the looming harms of misidentifying and conflating LLCs with corporations. Additionally, it presents a warning together with ideas on how to assist with correcting the use of incorrect terminology in all contexts surrounding LLCs.

TABLE OF CONTENTS

ABSTRACT.....	1
I. INTRODUCTION	4
II. BACKGROUND	6
III. SOURCES OF CONFLATION.....	9
A. Lawyers & Judiciary	9
1. Lawyers.....	9
a. Blogs.....	9
b. Transactional Documents	11
c. Court Documents	13
2. Judiciary	15
a. Misnaming.....	15
b. Jurisdiction.....	17
c. Veil Piercing	19
B. Legislators	27
C. Governmental Administrative Agencies	29
1. PTO	30
2. FTC	31
3. SEC	32
4. DoL	33
5. IRS	34
6. Miscellaneous.....	35
D. Media & Non-lawyer Service Providers	37
E. Artificial Intelligence.....	40
IV. LOOMING HARMS OF MISIDENTIFYING OR CONFLATING ENTITIES	42
V. SOLUTIONS	44
VI. CONCLUSION.....	50

I. INTRODUCTION

“What is the difference between a limited liability company and a limited liability corporation?” ChatGPT responds with “A limited liability company (LLC) and a limited liability corporation (LLC) are actually two different names for the same type of business structure...”¹ A *woe’s me* moment occurred.²

U.S. Supreme Court Justice Samuel Alito wrote an op-ed entitled “ProPublica Misleads Its Readers” and while defending his connection to, and cases involving Paul Singer that he did not recuse himself from, stated, “The entities that ProPublica claims are connected to Mr. Singer all appear to be either limited liability corporations or limited liability partnerships.”³ And then we each thought, *I lost a vital part of me*.⁴

The term limited liability corporation is a misnomer. Limited liability corporations do not exist. LLC is an abbreviation for a limited liability *company*. A limited liability company is a business entity with its own set of unique characteristics. While it shares some characteristics of a corporation, it is neither the same as a corporation nor a subset of a corporation. Labeling an LLC as a limited liability “corporation” is just flat out wrong. But it is not just about being precise or imprecise—although precision is of the utmost importance for attorneys and judges—getting the terminology wrong can lead to unpredictable, incorrect, and unjust outcomes. It can also lead to more work for the lawyer and the client. And, certainly, it contributes to confusion for all.⁵

ChatGPT did not get this erroneous information out of thin air and Justice Alito is not the only member of the judiciary to have gotten it wrong. There are now 8,606 references to the phrase “limited liability corporation” across all fifty state court systems, federal courts, the District of Columbia, Puerto Rico, USVI, the Eastern Cherokee Trial Court, and the Navajo Supreme Court. All thirteen Circuits and the United States Supreme Court are represented.⁶ When you remove federal courts, this number drops to 2,410, though that may be misleading given the variations in state-

¹ ChatGPT screenshot on file with the authors. AI and ChatGPT are hot topics in the news for getting things wrong and right. We do not endeavor to dig into the ways that such generators are used, nor do we take a stance on whether it is useful or not for various tasks. Our focus is on the use of AI as it pertains to the misuse and replication of limited liability “corporation” rather than “company,” and any adjacent misuses such as the use of the term incorporation, shareholder, etc.

² HOT MULLIGAN, *EQUIP SUNGLASSES* (you’ll be fine 2020). *See also*, Psalm 120 for the more original reference to the concept of “woe to me.”

³ Samuel A. Alito, Jr, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (Jun. 20, 2023, 6:25pm), <https://www.wsj.com/articles/propubica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda>.

⁴ HOLDING ABSENCE, AFTERLIFE (The Greatest Mistake of My Life 2021).

⁵ *About WEHOIT*, WEHOIT, LLC, <https://www.whoit.com/> (last visited July 12, 2023). WEHOIT, LLC, describes itself as a “licensed Limited Liability Corporation” on its website.

⁶ *See*, Daimler AG v. Bauman, 571 U.S. 117 (2014).

level reporting. Unfortunately, despite our best efforts, there are ninety new examples across state courts in the past twelve months.

And it is not solely judges that are mislabeling LLCs. There is a litany of other guilty parties as well. Practicing attorneys, the judiciary, legislators, federal and state agency officials, and media pundits all represent groups who have mislabeled LLCs. One would think that the FTC and SEC, two agencies that deal with businesses of all sizes and types would get it right, but we have uncovered a copious number of examples where both of those agencies have referred to LLCs erroneously using the dreaded “corporation” word.

Why does this happen? We don’t know. We’re expressly not saying that people are unintelligent or incompetent. But it is clearly not a priority for too many people, so we’re trying to point out how important this is. We believe that once people see the problem, they can’t unsee it. That’s why we’re here.

For example, in the high-profile case brought by the FTC and several state attorneys general against “pharma bro” Martin Shkreli, Vyera Pharmaceuticals, LLC, Phoenixus AG, and Kevin Mulleady, the complaint identifies Vyera as a “privately-held, for-profit limited liability corporation that is wholly owned by Phoneixus AG.”⁷ It continues on to say that Vyera is *incorporated* in Delaware.⁸ (Note LLCs are *organized* not *incorporated* because they are not corporations.) And when the FTC reported the case/proceeding on its website, it listed Vyera as a Delaware limited liability “corporation.”⁹

It seems that such errors are pervasive.¹⁰ And there are other adjacent errors like those shown above such as coupling the term “incorporate” with the formation of an LLC rather than using the precise term which is “organize” or “form.” Another flagrant misuse is using the term “pierce the corporate veil” when applying to LLCs. Since LLCs are not corporations, they have no *corporate* veil to pierce. Rather, to be accurate

⁷ Redacted Amended Complaint for Injunctive and Other Equitable Relief at 10, *FTC v. Vyera Pharms., LLC*, 479 F. Supp. 3d 31 (S.D.N.Y. 2020) (No. 1:20-cv-00706-DLC).

⁸ *Id.*

⁹ FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/161-0001-vyera-pharmaceuticals-llc> (last visited July 12, 2023). While the state websites did not replicate this error, two of them referred to Vyera as a “corporate defendant” which it is not, it is an LLC. Press Release, Commonwealth of Virginia Office of Attorney General, Attorney General Herring Helps Secure \$40 Million From Vyera Pharmaceuticals, Bans Corporate Executive from Pharmaceutical Industry for Seven Years (Dec. 7, 2021).

¹⁰ In fact, less than 24 hours after the first draft of this article was posted to SSRN, a prominent business law attorney and blogger noted another recent opinion making a related error. Keith P. Bishop, *The Too Too Unpardonable Fault Of Conflating LLCs And Corporations*, Cal. Corp. & Secs (Aug. 10, 2023), <https://www.calcorporatelaw.com/the-almost-unpardonable-sin-of-conflating-llcs-and-corporations>.

one should use the term “pierce the liability veil,” “pierce the entity veil,” or simply “pierce the veil.”¹¹

This article reports the myriad sources of the use of the erroneous term, limited liability corporation, including numerous examples. It then discusses the harms of misidentifying LLCs or conflating LLCs with corporations. The article concludes with suggested solutions for how we can fix this issue before it becomes even more rampant through the replication of the term by AI processing tools such as ChatGPT.

II. BACKGROUND

The limited liability company (LLC) has evolved from a rarely used entity choice to become the leading business entity of choice.¹² Back in 1988, the Internal Revenue Service (IRS) determined that LLCs could have pass-through tax status.¹³ The IRS later created the check-the-box regime, in 1997, which allowed LLCs (and other entities) to be taxed under what was traditionally tax treatment available only for partnerships.¹⁴

The appeal of the LLC is multifaceted. The option of having pass-through tax status for the entity is one significant part of the appeal. An LLC was not technically required to obtain pass-through tax status for all of an entity’s “owners,” but the LLC provided a streamlined option that like nothing before it. Beyond that, the LLC provides its members limited liability protection.

Prior to the 1997 ruling, for all “owners” of an entity to have limited liability and pass-through tax treatment, there were two primary choices. One, was an S corporation, which came with the required corporate formalities (because it is a corporation) plus additional limitations. The other was a limited partnership, with a corporation as the general partner. The LLC provided a more fluid, and less formal, entity structure that more accurately represented the needs and desires of the members.

¹¹ Not to be conflated with the rock band Pierce the Veil from San Diego whose name sadly did not come from the business entity piercing context but rather from the sociology context. The band’s founder and lead singer, Vincent Fuentes, learned about the term while at San Diego State University. “The name comes from a phrase that I learned during a sociology class in college. To Pierce the Veil means to go directly to the source of a problem and completely cut it out. This idea has helped me through a lot of problems in my life that I may have otherwise never gotten over. If something is truly bothering you or causing you pain, just go to the heart of the problem and get rid of it at the root. It can be a breath of fresh air.” <https://ptv-knowledge.tumblr.com/FAQ>

¹² Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK L. REV. 459, 460 (2009) (“[T]he corporation was unquestionably the dominant entity of choice for an operating business [until 1997].”).

¹³ Rev. Rul. 88-76, 1988-2 C.B. 360, obsoleted by Rev. Rul. 98-37, 1998-2 C.B. 133.

¹⁴ T.D. 8697, 1997-1 C.B. 215.

Because of this, LLCs have often been viewed as “hybrid” entities.¹⁵ This is accurate in the sense that some LLCs have similarities to partnerships and corporations. Thinking about LLCs as hybrids is accurate, but potentially misleading, in that the LLC is its own entity; it is not a combination of two other types. Too often, courts (and practitioners and laypeople) treat LLCs as corporations with pass-through tax status. That’s not quite right.

As the Delaware Chancery Court has observed, “[T]here is nothing absurd about different legal principles applying to corporations and LLCs.”¹⁶ Nonetheless, LLCs are far too often conflated with corporations. But why?

LLCs and corporations may be connected, in part to the nomenclature of the business world, in which “company” and “corporation” are often used interchangeably. Oddly enough, a corporation is a company, and an LLC is also a company, but an LLC is not and cannot be a corporation.

Going back to a time well before LLCs, corporations existed only by grant of government charter. In England, there had been a history of granting limited liability only to entities engaging in a business that had some connection to providing a public good, such as a railroad or a bridge.¹⁷ There were many “unlimited-liability corporations” at that time, and that trend came to the United States. Early entity law, therefore, had distinctions between limited liability corporations and unlimited liability corporations—both of which were corporate entities.

By the mid-1800s, though, the term “corporation” signaled to the world that the business/entity had limited liability. This was (and is) in contrast to general partnerships, which retain the concept of personal liability for the partners. It is thus possible that the “limited liability corporation” error, when used in reference to LLCs, is loosely connected to the limited/unlimited liability corporation distinction from the early 1800s, but this is not an especially compelling theory.

Back in 2011, Dean (then-Professor) Fershee observed that many courts

¹⁵ *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at *4 (Tenn. Ct. App. Nov. 21, 2003) (stating that the LLC is a “relatively new form of business entity, a hybrid” that has “some of the benefits of partnerships and some of the benefits of a corporation”); Larry E. Ribstein, *Are Partners Fiduciaries*, 2005 U. ILL. L. REV. 209, 248 (2005) (citing the same).

¹⁶ *CML V, LLC v. Bax*, 6 A.3d 238, 249 (Del. Ch. 2010).

¹⁷ E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARVARD L. REV. 1351, 1351 (1948). “Notable contemporary observers, including the Presidents of Columbia and Harvard, viewed limited liability corporation as the greatest single discovery of modern times, surpassing steam and electricity.”; Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 29, 2019), <https://corpgov.law.harvard.edu/2019/08/29/a-new-understanding-of-the-history-of-limited-liability-an-invitation-for-theoretical-reframing/>.

seem to view LLCs as close cousins to corporations, and many even appear to view LLCs as subset or specialized types of corporations. A May 2011 search of Westlaw's "ALLCASES" database provides 2,773 documents with the phrase "limited liability corporation," yet most (if not all) such cases were actually referring to LLCs—limited liability *companies*. As such, it is not surprising that courts have often failed to treat LLCs as alternative entities unto themselves. It may be that some courts didn't even appreciate that fact.¹⁸

By 2015, that number had increased to 4,575 cases.¹⁹ That number is now 8,606.²⁰ That means more than 4,000 new cases have made this error in the past eight years.

Perhaps the most egregious of those cases – because it is a United States Supreme Court case—is *Daimler AG v. Bauman*.²¹ Justice Ginsberg was the author, joined by Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan. Justice Sotomayor filed a concurring opinion. The entire court either embraced or acquiesced to an incorrect characterization of the LLC. And as shown above, Alito is *still* mislabeling an LLC as a "limited liability corporation."

For example, the opinion stated, "MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation."²² The court continued, "Jurisdiction over the lawsuit was predicated on the California contacts of *Mercedes-Benz USA, LLC (MBUSA)*, a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey."²³ An LLC is, of course, not a corporation, and thus cannot be incorporated. It would have been "formed" or "organized" in Delaware.

As mentioned, the entire court at least acquiesced; we can hope that the three new Justices will help change course. *Daimler AG* is, thankfully, the only United States Supreme Court case that refers to a "limited liability corporation."²⁴

The error occurs in multiple ways, but there are few that occur more often than the others. Many errors occur in case captions, which are mostly an aesthetic mistake and a harmless error. Similarly, some cases incorrectly refer to the LLC as a corporation in

¹⁸ Joshua P. Fershee, *LLCs and Corporations: A Fork in the Road*, 1 HARV. BUS. L. REV. ONLINE 82 (2011).

¹⁹ Joshua Fershee, *Wrong: U.S. Supreme Court & 4575 Other Cases Say an LLC is a Corporation*, BUS. L. PROF BLOG (Sept. 8, 2015), https://lawprofessors.typepad.com/business_law/2015/09/the-us-supreme-court-doesnt-know-an-llc-is-a-limited-liability-company.html.

²⁰ Westlaw search for "limited liability corporation" across all federal and state cases.

²¹ *Daimler* *supra* note 6.

²² *Id.*

²³ *Id.* (emphasis added).

²⁴ *Id.*

the body of the case, but the reference is merely for identification purposes. These errors, too, are largely harmless (though still wrong).

There are other circumstances where the risk of harm is greater. In cases in which a court's jurisdiction is an issue, corporations and LLCs have different tests that can lead to very different outcomes. Similarly, in veil piercing cases, corporations and LLCs usually have a different test, some distinctions are subtle, some major, and all significant. Before exploring the risks and harms that loom, it is important to survey the sources of conflation.

III. SOURCES OF CONFLATION

Erroneous labeling of LLCs typically arises in conflating them with corporations. Such conflation emanates from a variety of places extending beyond lawyers and government. In the past, legislators have erroneously labeled LLCs, but thankfully the more current trend is for legislators to fix erroneous court case results by enacting statutes, but there is still much work to be done. Our focus in this Part covers the ways that lawyers and judiciary, legislators, governmental agencies, media, and artificial intelligence misuse terminology surrounding LLCs.

A. Lawyers & Judiciary

1. Lawyers

When lawyers get this wrong, the error proliferates because lawyers interact with laypeople, other lawyers, governmental officials, and members of the judiciary. Lawyers communicate with other clients and potential clients through blogs and newsletters. They also draft contracts which are seen by other lawyers, clients, managers of clients, and could be seen by judges and clerks.²⁵ Additionally, litigators file pleadings, including briefs, which are read by judges, clerks, the media, and other individuals in society. When lawyers do not use the proper terminology—are imprecise—bad things can happen. This Section covers myriad examples of lawyers getting it wrong and it does not matter the size or prestige of the firm. No particular group appears to be immune to the fallacy of the limited liability corporation. *Rich or poor, large or small, the undertaker takes them all.*²⁶

a. Blogs

Blogs and firm newsletters are purportedly excellent ways to gain new clients or provide existing clients with ideas for new services. Lawyers show they are experts in certain areas when seeking to help clients. And some get it right, but it is particularly

²⁵ If the company is publicly traded, all documents are available in the SEC's EDGAR database for anyone who has internet access to see.

²⁶ ACCEPT, THE UNDERTAKER (Nuclear Blast 2021).

disconcerting to see incorrect terminology when lawyers are purporting to be experts. Take for example a firm that lists its areas of expertise as: Business Consulting, Corporate and Business Law, Tax Services, and Accounting Services. These are all highly technical areas where precision matters. And this particular firm also blogs on its website. Yet, and we have a feeling you know where this is going, these experts titled a blog post, “Starting a new Limited Liability Corporation in San Diego.”²⁷ The first line reads “There is a lot for a new business person to learn when starting a new Limited Liability Corporation in San Diego or Southern California.”²⁸ As if that was not enough to give us consternation, reading on, “Starting a new Limited Liability Corporation in San Diego is much more than just downloading some inexpensive forms and contracts from some website and launching into business. The Limited Liability Corporation or LLC corporate documents should include an ‘operating agreement.’”²⁹ Agree that the LLC needs an operating agreement, but the operating agreement is *not* a “corporate” document.

Moving on to another example from a named partner in a firm, the blog post “Limited Liability Corporation Versus a Sole Proprietorship” was a stand-out.³⁰ “Yet many new businesses are started without proper understanding of the financial and legal ramifications of their entity choice. There are many legal ways to structure a new business, such as partnerships, S Corporations and regular corporations. However, the most common forms are the Limited Liability Corporation (LLC) and the Sole Proprietorship.”³¹

Some additional winning content here: “Every state in the US allows limited liability corporation establishment.”³² This page uses the erroneous term seven times.³³

²⁷ Janathan Allen, *Starting a new Limited Liability Corporation in San Diego*, ALLEN BARREN, INC., (July 30, 2021), <https://allenbarron.com/starting-a-new-limited-liability-corporation-in-san-diego/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Kenneth J. Bloom, *Limited Liability Corporation Versus a Sole Proprietorship*, BLOOM, BLOOM & ASSOCIATES, P.C., <http://bloomlawfirm.com/articles/31/limited-liability-corporation-versus-sole-proprietorship> (last visited July 13, 2023).

³¹ *Id.*

³² FULLER, CHLOUBER & FRIZZELL, LLP, <https://www.legalok.com/corporate> (last visited July 12, 2023).

³³ *Id.*

Sadly, the examples seem to be endless.³⁴ Erroneous linking of the term “incorporation” with LLC formation is also rampant.³⁵ It is possible that the attorneys are not writing these posts themselves. Some firms outsource writing their blogs. However, if your name is going on it and you are holding yourself out as an expert, you are endorsing the content.

b. Transactional Documents

Lawyers draft copious amounts of transactional documents such as LLC operating agreements and contracts. Numerous examples of erroneous terminology mentioned throughout this article exist. And there are likely even more than we know of because so many are not posted on the internet for all of us to see.³⁶

In two distinct companies’ operating agreements—Interactive One and Atlas Growth Partners GP, LLC, the companies are properly labeled as limited liability companies throughout, until you get to the included Joinder Agreement which uses the erroneous term.³⁷ We found a couple of operating agreements where, the entire

³⁴ Maurice R. Johnson, *S-Corporation vs. Limited Liability Corporation: What’s the difference?*, GOOSMANN LAW FIRM (November 17, 2022), <https://www.goosmannlaw.com/blog/2022/november/s-corporation-vs-limited-liability-corporation-w/>; *Set up Limited Liability Corporations Hilton Head, Bluffton and Okatie, SC*, FRASER LAW FIRM LLC, <https://hiltonheadislandlaw.com/service/limited-liability-corporations/> (last visited July 13, 2023); *What is a Limited Liability Corporation?*, GULOTTA & GULOTTA, PLLC, <https://gulottagulotta.com/what-is-a-limited-liability-corporation/> (last visited July 13, 2023); Kumar Law Firm PLLC, *Key Terms for your LLC Operating Agreement*, AUSTIN TX BUS. L. BLOG (Mar. 28, 2023), https://thekumarlawfirm.com/lawyer/2023/03/28/Business-Law/Key-Terms-for-Your-LLC-Operating-Agreement_bl53653.html (Mar. 28, 2023); *Is an LLC arrangement right for you?*, BRENT BLACKSTOCK PLC (May 6, 2022), <https://www.brentblackstock.com/blog/2022/05/is-an-llc-arrangement-right-for-you/>; *Business Law*, BHATTA LAW & ASSOC., PLLC, <https://bhattalaw.com/practice-area/business-law/> (last visited July 13, 2023); stevenlowe, *What Can the Right Operating Agreement Do for Your LLC?*, LOWE & ASSOCIATES. (June 4, 2019), <https://lowelaw.com/what-can-the-right-operating-agreement-do-for-your-llc/>; *is an LLC arrangement right for you?*, BRENT BLACKSTOCK PLC (May 6, 2022), <https://www.brentblackstock.com/blog/2022/05/is-an-llc-arrangement-right-for-you/>; *LLP vs LLC*, THE BERGLUND GROUP (Mar. 18, 2023), <https://www.berglundgroup.com/insights/llp-vs-llc>.

³⁵ *Incorporating a Business as an LLC: All You Need to Know as a Business Owner*, THE DOYLE LAW OFFICES, <https://thedoylowlawoffices.com/blog/incorporating-a-business-as-llc/> (last visited July 13, 2023); Legal Entity Management, *Limited Liability Companies*, BERKMAN SOLUTIONS (June 28, 2020), <https://www.berkmansolutions.com/articles/entities/llc>; *What Is A Limited Liability Company (LLC), How Can Business Owners Incorporate One (Or Do I Need A Lawyer) and Can Foreign Investors Own A LLC In Florida?*, TREMBLY LAW FIRM, <https://tremblylaw.com/what-is-a-limited-liability-company-llc-and-how-can-business-owners-form-one/> (last visited July 13, 2023).

³⁶ A great place to find and search out legal documents is on the SEC’s EDGAR database. This, of course, only contains disclosures relative to public companies.

³⁷ AMEND. NO.1 TO AMENDED AND RESTATED LTD. LIAB. CO. OPERATING AGREEMENT OF INTERACTIVE ONE, LLC (NOV. 4, 2010), <https://www.sec.gov/Archives/edgar/data/1041657/000095012311010821/w81308exv3w22.htm>; AMENDED AND RESTATED LTD. LIAB. CO. AGREEMENT (Feb. 11, 2013), <https://www.sec.gov/Archives/edgar/data/1572702/000119312515348507/d84322dex36.htm>.

document is correct until you get to the *signature* line!³⁸ Of course there are some examples where the term is misused right up front in the preamble.³⁹

M&A lawyers are getting it wrong too.⁴⁰ In an Agreement and Plan of Merger between General Electric Company, National Broadcasting Company, and some other companies, one of the recitals defines Telemundo Network Group, LLC as “a Delaware limited liability corporation.”⁴¹ All of these companies have very high paid attorneys and in-house counsel. And there are others. Aspirational Consumer Lifestyle Corp and Wheels Up Partners Holdings LLC executed an Agreement and Plan of Merger.⁴² All of the entities involved including the subsidiaries created to implement the merger are outlined in the Form 8-K press release, including more than one Delaware LLC.⁴³ One of them was properly defined and the other was erroneously listed with the word corporation. The Agreement itself contained the correct language.⁴⁴

Counsel at other big companies have used the bad terminology as well. Take Google. Google LLC is a Delaware limited liability corporation as per its Managed Google Play Agreement for Android users, except we know it isn’t.⁴⁵ And how about Blackrock? Blackrock’s sample form Distribution Agreement defines in its preamble Blackrock Investments, LLC as a “Delaware limited liability corporation.”⁴⁶

³⁸ AMENDED AND RESTATED LTD. LIAB. CO. AGREEMENT OF CITYCENTER HOLDINGS, LLC (Apr. 29, 2009), <https://www.sec.gov/Archives/edgar/data/1372786/000119312511260109/d233905dex32.htm>; OPERATING AGREEMENT OF WELLS REIT II – UNIVERSITY CIRCLE, LLC (Aug. 9, 2005), <https://www.sec.gov/Archives/edgar/data/1252849/000119312511189547/dex374.htm>.

³⁹ *LLC Agreement*, BURNING MAN PROJECT https://burningman.org/about/history/brc-history/afterburn/02-2/org/llc_agreement/ (last visited July 14, 2023); LTD. LIAB. CO. AGREEMENT OF ARTIST ARENA INT’L., LLC (Jan. 4, 2011), <https://www.sec.gov/Archives/edgar/data/931401/000119312512023465/d219435dex3206.htm>; AMENDED AND RESTATED LTD. LIAB. CO. AGREEMENT OF MW1 LLC (May 7, 2009), <https://www.sec.gov/Archives/edgar/data/819527/000119312509105460/dex99k.htm>.

⁴⁰ SPONSOR SUPPORT AGREEMENT (Feb. 77, 2023), https://www.colombierspac.com/sec-filings/content/0001213900-23-015556/ea174289ex10-2_colombier.htm.

⁴¹ AGREEMENT & PLAN OF MERGER (Oct. 11, 2011), <https://transition.fcc.gov/transaction/nbc-telemundo/exhibit6.pdf>.

⁴² AMENDMENT NO.1 TO AGREEMENT & PLAN OF MERGER (Feb. 1, 2021), https://content.edgar-online.com/ExternalLink/EDGAR/0001104659-21-062060.html?hash=12140b021edb86eb96de7b39cfebb90f43278f6a9c954f743a01117e4b36cdbe&dest=TM2114100D3_EX2-1_HTM#TM2114100D3_EX2-1_HTM.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ANDROID: MANAGED GOOGLE PLAY AGREEMENT (Mar. 2021), <https://www.android.com/enterprise/terms/>.

⁴⁶ DISTRIB. AGREEMENT (2019), <https://www.sec.gov/Archives/edgar/data/1761055/000119312519062427/d717594dex995a.htm>; *See also*, New Leaf Data Services, LLC’s Master Subscription Agreement identifying itself as a “Connecticut limited liability corporation.” *Terms and Conditions*, HEMP BENCHMARKS, <https://www.hempbenchmarks.com/terms/> (last visited July 13, 2023). Connect Charlie’s distributor agreement defining its parent company, Posh Tech, LLC as a “California

c. Court Documents

Litigation lawyers draft pleadings that need to set forth the identification of the parties as well as the applicable law. These pleadings are relied upon by other lawyers such as opposing counsel, and members of the judiciary. In the next section, examples of the judiciary getting it wrong abound. Sometimes the errors start with the lawyers who prepared the pleadings or transactional documents. Having already discussed transactional documents *supra*, we now turn to court-filed documents.

All too often complaints will improperly identify a party in the caption as a limited liability corporation.⁴⁷ This is pervasive and still ongoing. And some lawyers are models of consistency and replicate the error into the body of the complaint itself.⁴⁸

As discussed in the next section, the Pennsylvania Supreme Court case, *Mortimer v. McCool* conflates LLCs with corporations from beginning to end. But where did the conflation start? Did it start with the lawyers? Yes, yes it did. In the brief for the appellant for the Pennsylvania Superior Court, the Statement of Questions Involved starts with numerous references of LLCs being subject to piercing the “corporate veil,” and being “corporate forms.”⁴⁹ And it goes from there. Sometimes proper usage occurs, and other times erroneous terminology and conflation occurs.

In quoting one of the owners from deposition testimony (here we see a layperson misusing the terminology and being quoted within a court-filed document without being corrected or noted as incorrect), that one of the LLCs was a “shell corporation” to hold the liquor license. Taking this information from the owner, the appellant states: “Rather, the McCool’s misused their corporate form from the outset by creating it to be ‘a shell corporation designed just to own the license,’ while its alter ego company received inflated rent payments, then committed various frauds in an effort to preclude a drunk driving victim from recovering on her judgment.”⁵⁰ Later, the brief states: “The facts before the Superior Court establish that the McCools have abused their privileges of incorporation by using their corporate forms to perpetrate fraud, defeat public convenience, and circumvent the law requiring their corporate veils to be pierced

limited liability corporation.” CONNECT CHARLIE, <https://connectcharlie.com/pages/distribution-or-wholesale> (last visited July 13, 2023); Teradek, LLC also identifying itself as a “California limited liability corporation” in its non-disclosure agreement. TERADEK: NON-DISCLOSURE AGREEMENT, <https://teradek.com/pages/reseller-nda> (last visited July 14, 2023).

⁴⁷ See e.g., Granum v. Granum complaint <https://casetext.com/brief/20cv374820-bryan-granum-vs-robert-granum-ii-et-al-complaint-unlimited-fee-applies>

⁴⁸ *Id.*

⁴⁹ Appellant’s brief *Mortimer v. McCool*, 2019 WL 5849459 (Pa.Super.) (Appellate Brief); Superior Court of Pennsylvania, Eastern District. [https://1.next.westlaw.com/Document/Iea743e79022a11ea76eb9e71287f4ea/View/FullText.html?VR=3.0&RS=cblt1.0&__lrTS=20230718142510067&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/Iea743e79022a11ea76eb9e71287f4ea/View/FullText.html?VR=3.0&RS=cblt1.0&__lrTS=20230718142510067&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

⁵⁰ *Id.*

pursuant to the alter ego theory or on equitable principals.”⁵¹ The McCools could not have abused their privileges of incorporation because an LLC is not “incorporated” and it is not a “corporate form.” Further, the LLC cannot be subject to the law regarding “corporate veils to be pierced” because an LLC is not a corporation. More on this in Part II.A.2.c.

Unfortunately, the appellant’s brief is not the only faulty one in this case. The appellee’s brief makes the following statement: “Limited liability companies are treated in the same manner as corporations.”⁵² Um, no they are not. As the Pennsylvania Supreme Court noted, the “governing statute at all relevant times was the Limited Liability Company Law of 1994.”⁵³ To be fair, this case was a case of first impression; still, no need to conflate here. And to continue to call piercing “piercing the corporate veil” when discussing LLCs is wrong.

Then there is an amicus brief. In the Table of Authorities it cites a case that has an LLC but despite the case opinion being correct, this brief spells out “Limited Liability Corporation” instead of simply leaving LLC at the end of the company name.⁵⁴ A deeper look into the brief shows some errors such as, “Unfortunately, in the present matter, the Court of Common Pleas either overlooked or misapprehended significant and relevant factors in reaching the incorrect determination that the organization in question, 340 Associates, LLC qualifies as a ‘corporation’ with the accompanying immunity of its owners from liability for the negligence of its ‘operator’.”⁵⁵ And worse,

⁵¹ *Id.* This assertion was also elaborated upon in the Appellant’s Reply Brief: “A thorough review of Pennsylvania jurisprudence fails to reveal any corporate liquor licensee quite like 340 Associates, LLC: a company created by its officers/members for the admitted purpose of being a ‘shell corporation designed just to own the license;’ a company that never intended to operate or supervise its licensed establishment; and, a company that never intended to earn a profit. R.103a-53. Appellant submits that Appellees’ use of this ‘shell corporation,’ under these special and limited circumstances, is not lawful and must not be condoned by our courts.” [https://1.next.westlaw.com/Document/Iae7ddba2022511ea812e8c769f754212/View/FullText.html?listSource=RelatedInfo&navigationPath=%2fRelatedInfo%2fv4%2fkeycite%2fnav%2f%3fguid%3dIae7ddba2022511ea812e8c769f754212%26srh%3d%26kw%3dt&list=Filings&rank=1&originationContext=docHeader&contextData=\(sc.RelatedInfo\)&transitionType=Document&needToInjectTerms=False&docSource=7343a7f460fd473793d9e7e588c2f334&ppcid=4191c571b2a64724bb114186fe915f20](https://1.next.westlaw.com/Document/Iae7ddba2022511ea812e8c769f754212/View/FullText.html?listSource=RelatedInfo&navigationPath=%2fRelatedInfo%2fv4%2fkeycite%2fnav%2f%3fguid%3dIae7ddba2022511ea812e8c769f754212%26srh%3d%26kw%3dt&list=Filings&rank=1&originationContext=docHeader&contextData=(sc.RelatedInfo)&transitionType=Document&needToInjectTerms=False&docSource=7343a7f460fd473793d9e7e588c2f334&ppcid=4191c571b2a64724bb114186fe915f20)

⁵² Appellee’s brief [https://www.westlaw.com/Document/Iae7dfc2022511ea812e8c769f754212/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Iae7dfc2022511ea812e8c769f754212/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

⁵³ *Mortimer v McCool* fn 6. Due to the formation dates of the LLCs at issue in this case, the 1994 law was applicable. However, it should be noted that in 2016, Pennsylvania repealed that law and enacted the Pennsylvania Uniform Limited Liability Company Act.

⁵⁴ [https://1.next.westlaw.com/Document/Iea743e74022a11ea76eb9e71287f4ea/View/FullText.html?listSource=RelatedInfo&navigationPath=%2fRelatedInfo%2fv4%2fkeycite%2fnav%2f%3fguid%3dIea743e74022a11ea76eb9e71287f4ea%26srh%3d%26kw%3dt&list=Filings&rank=5&originationContext=docHeader&contextData=\(sc.RelatedInfo\)&transitionType=Document&needToInjectTerms=False&docSource=c017f5e904a4461f8c613563ffcb2ba&ppcid=7e60895f43624bbd94c97020afc0ab17](https://1.next.westlaw.com/Document/Iea743e74022a11ea76eb9e71287f4ea/View/FullText.html?listSource=RelatedInfo&navigationPath=%2fRelatedInfo%2fv4%2fkeycite%2fnav%2f%3fguid%3dIea743e74022a11ea76eb9e71287f4ea%26srh%3d%26kw%3dt&list=Filings&rank=5&originationContext=docHeader&contextData=(sc.RelatedInfo)&transitionType=Document&needToInjectTerms=False&docSource=c017f5e904a4461f8c613563ffcb2ba&ppcid=7e60895f43624bbd94c97020afc0ab17) citing to *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC* 846 A.2d 1264, (Pa. Super. 2004)(in place of LLC the brief spells out “limited liability corporation.”)

⁵⁵ *Id.*

“A corporation or limited liability company is an entity existing only when created **and functioning** in accordance with the Pennsylvania Corporation Statutes contained in Title 15 of Purdon’s Statutes and the myriad of judicial decisions interpreting these statutes.”⁵⁶ Again, LLCs are governed by the Limited Liability Company Act in Pennsylvania.

2. Judiciary

As we hope is clear by this point, LLCs are not a type of modified corporations.⁵⁷ LLCs are unique and distinct entities.⁵⁸ Unfortunately, courts, ranging as high as our nation’s highest court continue to conflate LLCs and corporations.⁵⁹

Dean Fershée has previously noted in the Harvard Business Law Review Online that too many judges

seem to view LLCs as close cousins to corporations, and many even appear to view LLCs as subset or specialized types of corporations. A May 2011 search of Westlaw’s “ALLCASES” database provides 2,773 documents with the phrase “limited liability corporation,” yet most (if not all) such cases were actually referring to LLCs—limited liability *companies*. As such, it is not surprising that courts have often failed to treat LLCs as alternative entities unto themselves. It may be that some courts didn’t even appreciate that fact. (footnotes omitted).⁶⁰

a. Misnaming

As noted *supra*, there are more than 8,000 court cases that misname LLCs as corporations, including the previously mentioned *Daimler AG* case by the United States Supreme Court.⁶¹ This misnaming can create a host of problems.

⁵⁶ *Id.*

⁵⁷ Joshua Fershée, *You Can’t Pierce the Corporate Veil of an LLC Because It Doesn’t Have One*, BUS. LAW PROF BLOG (Oct. 15, 2013).

⁵⁸ Larry Ribstein, *An academic’s day in court*, TRUTH ON THE MKT. (Dec. 20, 2011), <http://truthonthemarket.com/2011/12/20/an-academics-day-in-court/>.

⁵⁹ Joshua Fershée, *Wrong: U.S. Supreme Court & 4575 Other Cases Say an LLC is a Corporation*, BUS. LAW PROF BLOG (Sept. 8, 2015), https://lawprofessors.typepad.com/business_law/2015/09/the-us-supreme-court-doesnt-know-an-llc-is-a-limited-liability-company.html.

⁶⁰ Joshua P. Fershée, *LLCS AND CORPORATIONS: A FORK IN THE ROAD IN DELAWARE?*, 1 HARV. BUS. LAW REV. ONLINE 83 (2011).

⁶¹ *Daimler supra* note 6 at 752; *see also*, e.g., *Drummond v Alsaloussi et al*, 2023 WL 4882692 (U.S. Dist. Ct. S.D. Fl. Aug. 1, 2023); *Holland v Khedr Properties, LLC*, 2023 WL 4873624 (U.S. Dist. Ct. C.D. California, Western Div. July 27, 2023); *Cauley v. Ruane*, 2023 WL 4873621 (U.S. Dist. Ct. C.D. California, Western Div. July 27, 2023); *State v. Morello*, 547 S.W.3d 881 (Tex. 2018); *Jones v. Marquis Properties, LLC*, 212 F. Supp. 3d 1010 (D. Colo. 2016); *Richardson v. UN Empress Properties*,

And we will start with California because California and its courts have been known to misname frequently.⁶² As an example, a California court order granting a motion for final settlement in an antitrust class action suit omitted (at least arguably) LLCs as “person(s)” in the settlement’s definitions. The following clause appears multiple times in the Settlement Agreement:

(w) “Person(s)” means an individual, corporation, *limited liability corporation*, professional corporation, limited liability partnership, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and any spouses, heirs, predecessors, successors, representatives or assignees of any of the foregoing.⁶³

A reference to “limited liability corporation” equates to referencing a “corporation,” not an LLC. Granted, the “limited liability corporation” language was almost certainly *intended* to cover “limited liability *companies*” or LLCs, but it likely does not. The fact that the definition includes all “unincorporated associations,” may mean it includes LLCs, but that is neither clear nor definitive. In the United States Court of Appeals for the Fourth Circuit, a court found that a limited liability company is an “unincorporated association” for purposes of § 1332(d)(10), which goes to jurisdictional determinations related to subject matter jurisdiction.⁶⁴ However, in other contexts, “unincorporated associations” are organizations that are “not a legal entity separate from the persons who compose it.”⁶⁵ At a minimum, this creates unnecessary, and unwanted, room for confusion and argument.

A settlement that is being reviewed by the court should correct such an error. Also, there is great risk this is more rampant than we know because clauses like this are often pulled from prior settlements.

LLC, No. A-4680-08T1, 2010 WL 1426495 (N.J. Super. Ct. App. Div. Apr. 7, 2010); *Purchase Partners II, LLC v. Max Cap. Mgmt. Corp.*, 19 Misc. 3d 1123(A), 862 N.Y.S.2d 817 (Sup. Ct. 2008); *Connecticut Light & Power Co. v. Westview Carlton Grp., LLC*, 108 Conn. App. 633, 950 A.2d 522 (2008).

⁶² Joshua Fershée, *Bang Head Here: California and the LLC as a “Corporation”*, Business Law Prof Blog (Oct. 9, 2018), https://lawprofessors.typepad.com/business_law/2018/10/bang-head-here-california-and-the-llc-as-a-corporation.html; Joshua Fershée, *Dear California: LLCs are Not Corporations. Or Are They?*, Business Law Prof Blog (May 18, 2016), https://lawprofessors.typepad.com/business_law/2016/05/dear-california-llcs-are-not-corporations-or-are-they-.html

⁶³ IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION, 2019 WL 3856413, Slip Copy (N.D.Cal. Aug. 16, 2019) (emphasis added).

⁶⁴ *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010) (“Accordingly, we agree with the district court that, under § 1332(d)(10), Express Check’s citizenship for purposes of CAFA is that of the State under whose laws it is organized and the State where it has its principal place of business.”)

⁶⁵ Black’s Law Dictionary, 119 (Brian A. Garner, ed.) (7th ed., West 1999).

Precedent matters. Wording matters. Precision matters. As a Pennsylvania opinion stated, “[I]t remains for the lower courts in future cases to consider its application consistently with the approach described above, in harmony with prior case law, mindful of the salutary public benefits of limited liability, and with an eye always toward the interests of justice.”⁶⁶ Poor and inaccurate language choices in opinions cannot lead to “harmony.” They instead create murky situations that become murkier as each case interprets and applies imprecise language that creates imprecise law.

b. Jurisdiction

There are no courts that are immune from conflating entities. Delaware is a leader in business law and the chosen origin for many, many entities and would seem like a place that should be better than most with regard to understanding, distinguishing, and describing entities. They are often not.

Take, for example, a diversity jurisdiction case that started out on track:

Plaintiffs brought this action under federal diversity jurisdiction, 28 U.S.C. § 1332(a)(1), asserting that complete diversity of citizenship exists among the parties. In Defendants’ Motion to Dismiss, however, they argue that complete diversity of the parties is lacking. Federal jurisdiction under § 1332(a)(1) requires complete diversity of citizenship, meaning that “no plaintiff can be a citizen of the same state as any of the defendants.”⁶⁷

But the court continues

A natural person is a citizen of “the state where he is domiciled,”¹ and a corporation is a citizen of the state where it maintains its principal place of business, as well as the state where it is incorporated. For purposes of § 1332, the citizenship of a **limited liability corporation** (“LLC”) is determined “by the citizenship of each of its members.” *Id.* Plaintiff Cliffs Natural Resources Inc. is incorporated in Ohio, and Plaintiff CLF Pinnoak LLC is **incorporated** in Delaware and maintains its principal place of business in Ohio. Third Am. Compl. ¶¶ 3–4, ECF No. 162. In moving to dismiss this action for lack of jurisdiction, Defendants assert that Seneca Coal Resources, LLC, a Delaware **corporation**, includes members who are Ohio citizens, thus destroying complete diversity as required for § 1332.⁶⁸

⁶⁶ *Mortimer v. McCool*, 255 A.3d 261, 288 (Pa. 2021).

⁶⁷ *Cliffs Nat. Res. Inc. v. Seneca Coal Res., LLC*, No. CV 17-567, 2018 WL 2012900, at *1 (D. Del. Apr. 30, 2018)(internal citations omitted).

⁶⁸ *Id.* (internal case citations omitted)

The court makes multiple errors here.⁶⁹ For example, citizenship for an LLC—a “limited liability company”—is determined by the citizenship of its members. Corporations have other rules. Also, an LLC is formed, not incorporated. And it’s a Delaware LLC. Like in most states, in Delaware there’s an entire act just for LLCs.⁷⁰

This is a rather run of the mill goof that started with the complaint and then was carried through into the court’s analysis. Ultimately, the court gets back on track, even referring to LLCs correctly later in the opinion. Still, we expect more of Delaware, and we think that it is fair to hold them to a standard of precision.

There are spots where jurisdiction for LLCs (limited liability *companies*) is not just misnaming the entity. In the United States Court of Appeals for the Sixth Circuit, for example, at least one case got it quite wrong:

Jurisdiction in this case is found under the diversity statute 28 U.S.C. § 1332. John Kendle is a citizen of Ohio; defendant **WHIG Enterprises, LLC is a Florida corporation** with its principal place of business in Mississippi; defendant Rx Pro Mississippi is a Mississippi corporation with its principal place of business in Mississippi; defendant Mitchell Chad Barrett is a citizen of Mississippi; defendant Jason Rutland is a citizen of Mississippi. R. 114 (Second Am. Compl. at ¶¶ 3, 5) (Page ID #981–82). Kendle is seeking damages in excess of \$75,000. *Id.* at ¶¶ 50, 54, 58, 64, 71 (Page ID #992–95). The district court issued an order under Rule 54(b) of the Federal Rules of Civil Procedure that granted final judgment in favor of Mitchell Chad Barrett, and so appellate jurisdiction is proper. R. 170 (Rule 54(b) Order) (Page ID #3021).⁷¹

An LLC is not a corporation, as we all know. And for purposes of diversity jurisdiction, “a limited liability company is a citizen of any state of which a member of the company is a citizen.”⁷² Thus, where the LLC is formed does not matter and the LLC’s principal place of business does not matter. All that matters is the citizenship of each LLC member.

In this case, the opinion indicates that Kendle and Rutland are “co-owners” of WHIG Enterprises. The opinion suggests there may be other owners (i.e., members). The opinion refers to the plaintiff suing “WHIG Enterprises, LLC, two of its co-

⁶⁹ In addition to the errors in the text, we note that the court should have noted that the statute applies, regardless of gender. And notably this error clearly emanated from the complaint, but the court should have fixed it in its opinion.

⁷⁰ <http://delcode.delaware.gov/title6/c018/index.shtml>

⁷¹ *Kendle v. Whig Enterprises, LLC*, No. 18-3574, 2019 WL 148420, at *3 (6th Cir. Jan. 9, 2019). This is another case where the erroneous terminology was born in the complaint and was not fixed in the court opinion.

⁷² *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004).

owners, and another affiliated entity.”⁷³ The opinion later refers to Rutland as “another WHIG co-owner.”⁷⁴ If we want to know whether diversity jurisdiction is proper, though, we’ll need to know ALL of WHIG’s members and their residency.

Now, it may well be that there is diversity among the parties, but we don’t know, and neither, apparently, did the court. That may not be an issue in this case, but if people start modeling their bases for jurisdiction on the *Kendle* description, things could get ugly. Fortunately, some cases remind us to check diversity for all members in an LLC.⁷⁵

c. Veil Piercing

How judges discuss LLCs is important in the veil piercing context, and judicial opinions can provide some learning opportunities.⁷⁶ Take, for example, the case of *McKee v. Whitman & Meyers, LLC*.⁷⁷ In *McKee*, the plaintiff filed a complaint claiming several violations of the Fair Debt Collection Practices Act against defendants Whitman & Meyers, LLC and Joseph M. Goho. Those defendants failed to appear and defend the action, which resulted in a default judgment. Defense counsel, then, finally responded.

This case provides a number of challenges. To start, the court insists on referring to the LLC as “corporate,” even though the defendant entity is an LLC.

Defense counsel admits that he was under the mistaken assumption that default was to be taken against the *corporate* entity only. *See* Item 17. However, default was entered as to both the *corporate* and individual defendants on July 3, 2014 (Item 9). Defense counsel did not move to vacate the default and in fact did not respond in any way until the default judgment was entered on September 17, 2014.⁷⁸

Sometimes the parties tee up judges for such errors. Here, the plaintiff argued that “the court should pierce the corporate veil and hold defendant Goho personally liable.”⁷⁹ The court’s response: “[T]here is nothing on the face of the complaint or in

⁷³ *Kendle supra* note 71 at *1.

⁷⁴ *Id.*

⁷⁵ *Thermoset Corporation v. Building Materials Corp. of America et al*, 2017 WL 816224 (11th Cir., March 2, 2017).

⁷⁶ Based on writing from this blog post: Joshua Fershée, *Courts and the LLC, End of the Year Edition*, BUS. LAW PROF BLOG (Dec. 30, 2014), https://lawprofessors.typepad.com/business_law/2014/12/courts-and-the-llc-end-of-the-year-edition.html.

⁷⁷ *McKee v. Whitman & Meyers, LLC*, 13-CV-793-JTC, 2014 WL 7272748 (W.D.N.Y. Dec. 18, 2014).

⁷⁸ *Id.* at *1 (emphasis added) (accepting “the explanation of defense counsel as evidence of a careless lack of attention to procedural detail rather than an egregious and willful default on the part of defendant Goho [the individual and apparent owner of the LLC]”).

⁷⁹ *Id.*

the record that would support individual liability for defendant Goho on the basis of corporate veil-piercing . . .”⁸⁰

The court is correct on the liability question, but the court should have also said, “This is because there is no corporation named as a party to this case, so there is no corporate veil to pierce.” The court would have been correct to explain that even if the plaintiffs meant for the court to pierce the limited liability veil of the LLC, the allegations were insufficient for that, too.

High-level state courts are not immune either.⁸¹ The Supreme Court of Wyoming, for example, decided to pierce the limited liability veil of a single-member LLC where Green Hunter Wind Energy, LLC (LLC), had a single member: Green Hunter Energy, Inc. (Corp).⁸² In that case, the LLC had entered a services contract with Western Ecosystems Technology, Inc. (Western). The court determined that veil piercing—which allowed Western to recover the LLC’s debts from the corporate member—was proper for several reasons. It is not at all clear the court was correct.

The court started out right, as it often does. It explained that the rule for piercing the veil of a limited liability company is comprised of three basic factors 1) fraud; 2) undercapitalization; and 3) “intermingling the business and finances of the company and the member to such an extent that there is no distinction between them.” The court noted correctly that a failure to follow company formalities was no longer a factor because of changes to the state’s LLC statute.⁸³

And then a plot twist. The court ignored the rule it stated for piercing the LLC’s veil because:

It makes good business sense for a contract creditor to try to obtain a guarantee from the member or retainer from the limited liability company itself. But we are mindful of the reality of the marketplace that many businesses are not in a position—competitively or economically—to insist on guarantees. For that reason, we decline Appellant’s invitation to find piercing inappropriate in this case because Western did not protect itself from Appellant’s misuse of the LLC by

⁸⁰ *Id.*

⁸¹ Joshua Fershée, *Wyoming S.C. Makes LLC Veil Piercing Easier, Says LLCs can have “Corporate Assets”*, BUS. LAW PROF BLOG (Nov. 14, 2014), https://lawprofessors.typepad.com/business_law/2014/11/wyoming-sc-makes-llc-veil-piercing-easier-says-llcs-can-have-corporate-assets.html.

⁸² *Greenhunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 2014 WY 144 (Wyo. 2014). <https://law.justia.com/cases/wyoming/supreme-court/2014/s-14-0036.html>

⁸³ A factor for corporate veil piercing is the failure to follow corporate formalities, such as regular meetings, minutes at those meetings, etc. However, LLCs are not required to have such formalities and therefore using the failure to follow them as a factor in deciding whether the LLC should/can be pierced makes no sense.

attempting to obtain a guarantee or other form of security. To do so would invite abuse of entities, as is the case here.

The court here is, it seems, saying that an LLC and a corporation cannot be distinct. This is beyond mere misidentifying an entity. *It is completely ignoring one.* If a party is unable to “competitively or economically” secure a guarantee, the party should not enter the contract. If the legislature wants to create guarantees or minimum capitalization requirements for any or all entities, it can do so. If a state does not want to allow single-member LLCs, that is a legislative decision, too (though it would likely be wrong). Absent a change in state law, though, courts should respect the entity.

The court also stated that “the district court correctly concluded that the LLC failed to adequately capitalize the LLC, that LLC was undercapitalized at all times relevant to this suit and the LLC lacks corporate assets.”⁸⁴ This doesn’t make sense. Again, if Western knew the finances of the LLC at the time of contracting (as it could and should have), then it accepted the risk that it was undercapitalized. The LLC simply existed and Western did not seek to avoid the risk of dealing with such an entity. More important: LLCs cannot have “corporate assets.” A limited liability company can have LLC assets or entity assets, but not corporate ones.

Even more outrageous is that the court incorrectly suggested that the tax filings of the parent corporation and a subsidiary LLC can be a factor in the veil piercing analysis. For a single-member LLC, for federal tax purposes, the LLC will, at least typically, be a disregarded entity. As such, the LLC will usually (if not always) look like part of the parent corporation. To even consider the tax filing necessarily makes one factor automatically weigh toward piercing.

Early in the opinion, the court says, “Piercing seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”⁸⁵ The court here seems to be trying to make veil-piercing law in LLCs more predictable. If followed, they would be, in a potentially dangerous way: it could make veil-piercing of a single-member LLC the norm. Liability protection for single-member LLCs would be lacking. When the legislature allowed for single-member LLCs, we can safely assume that it did so in order to provide that liability protection. As such, when the court extends into a position where it disregards any liability protection for the single member, it is rewriting the law in the state—which is the job of the legislature, not the court.

Some judges have made clear that an LLC’s status as a disregarded entity for IRS tax purposes is insufficient to support veil piercing. Even then, though, the journey is perilous. Here is an example:

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89 (1985) (internal quotation marks omitted)).

Plaintiff . . . failed to provide any case law supporting his theory of attributing liability to Aegis LLC because of the existence of a pass-through tax structure of a disregarded entity. Pl.’s Opp’n. [50]. Between 2006 and 2008, when 100% of Aegis LLC’s shares were owned by Aegis UK, Aegis LLC was treated as a disregarded entity by the IRS and the taxable income earned by Aegis LLC was reflected in federal and District of Columbia tax returns filed by Aegis UK. Day Decl. Oct. 2012 [48–1] at ¶ 37. In the case of a limited liability *corporation* with only one owner, the limited liability corporation must be classified as a disregarded entity. Instead of filing a separate tax return for the limited liability *corporation*, the owner would report the income of the disregarded entity directly on the owner’s tax return. Moreover, determining whether *corporate* formalities have been disregarded requires more than just recognizing the tax arrangements between a corporation and its shareholders. Given the above analysis, the undersigned finds that there is no unity of ownership and interest between Aegis UK and Aegis LLC.⁸⁶

The case correctly explains that it is not appropriate to use pass-through tax status to find a unity of interest and ownership in a way that will support veil piercing. But the court then misses the very nature of LLCs by calling the LLC a “limited liability corporation.” It is a limited liability *company*, which is not a corporation, as we hope is clear by now.

Moreover, to use the court’s language, while it is true that “determining whether corporate formalities have been disregarded requires more than just recognizing the tax arrangements between a corporation and its shareholders,” the premise of the case has to do with an *LLC*’s status. A judge should know the difference and make that clear in their language. A more accurate statement would be: “Determining whether LLC formalities have been disregarded requires more than just recognizing the tax arrangements between an LLC and its members.”

Back to state high courts and erroneous use of critical terminology in the veil piercing context. A 2021 Pennsylvania Supreme Court case, *Mortimer v. McCool*, was a big reminder of how necessary this article is.⁸⁷ The opinion begins, “In this case, we examine the doctrine of ‘piercing the corporate veil,’ an area ‘among the most confusing in corporate law.’”⁸⁸ Naturally, this case surrounds veil piercing an LLC.

⁸⁶*Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 1, 9-10 (D.D.C. 2013) (emphasis added). <http://leagle.com/decision/In%20FDCO%2020130927A88.xml/ALKANANI%20v.%20AEGIS%20DEFENSE%20SERVICES,%20LLC> (citations omitted)

⁸⁷ *Mortimer* *supra* note 67 at 265.

⁸⁸ *Id.*

The opinion then proceeds to define “the corporations,” which include TA Properties and 340 Associates even though the court notes both of these entities are “limited liability companies.”⁸⁹ In a footnote, the court (incorrectly) refers to “[t]he corporate parties, but correctly notes the applicable law as the “Limited Liability Company Law of 1994, Act of Dec. 7, 1994, P.L. 703, No. 106, codified as amended at 15 Pa.C.S. §§ 8901, et seq. (repealed and replaced in 2016).”⁹⁰ The opinion repeatedly refers to “piercing the corporate veil” and calls the LLCs corporations or corporate.

The *Mortimer* court gets many of the business law concepts before it right, with imprecise references to corporations and corporate law sprinkled in. For example, the court explains

Appellees turn next to *corporate* formalities. Although Pennsylvania law imposes very few requirements upon limited liability companies, the record established that 340 Associates and McCool Properties had separate operating agreements; maintained separate books and bank accounts; filed taxes separately; and had distinct revenue streams. Moreover, corporate formalities are relevant only where the lack of observance is associated with abuse of the corporate form. Indeed, the *Corporations* Code itself provides that “[t]he failure of a ... limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a partner, member or manager of the entity for a debt, obligation or other liability of the entity.”⁹¹

Except, LLCs do not and *cannot* have “corporate” formalities, and although the code citation was correct in the opinion, it was not the “Corporations Code,” it was the “Associations Code.” Ironically, the opinion expresses frustration with veil piercing law, which is a reasonable frustration. The court explains “[a]nd so, too, we encounter (and sometimes experience) frustration with the imprecision of the law of piercing. But a rigidly formalistic approach only subverts the goal of equity.” This very opinion unintentionally, and unfortunately, adds to the imprecision.⁹²

Similarly, the Supreme Court of Appeals of West Virginia had the opportunity in 2014 to address the role (if any) of veil piercing of West Virginia LLCs.⁹³ The state statute was silent on the subject, but the court determined veil piercing was an option.

⁸⁹ *Id.* at 267.

⁹⁰ *Id.* at n.6.

⁹¹ *Id.* at 276 (emphasis added).

⁹² *Id.* at 286.

⁹³ See Joshua Fershée, *More LLC Veil Piercing Forced into State Statutes*, Business Law Prof Blog (May 13, 2014), https://lawprofessors.typepad.com/business_law/2014/05/more-llc-veil-piercing-forced-into-state-statutes.html

It was close, though, as the West Virginia Circuit Court took on the following question with the corresponding answer:

Does West Virginia's version of the Uniform Limited Liability Company Act, codified at W. Va. Code § 31B *et. seq.*, afford complete protection to members of a limited liability company against a plaintiff seeking to pierce the corporate veil?

*ANSWER: YES*⁹⁴

Under West Virginia LLC law:

[T]he debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager. . . 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.⁹⁵

The Supreme Court of Appeals of West Virginia took the certified question and decided that veil piercing was, in fact, allowed for West Virginia LLCs.⁹⁶ It was necessary for the court to answer the question, but the rationale was not very satisfying. The Supreme Court explained, in the syllabus, the law on veil piercing for corporations, as follows:

[T]o 'pierce the corporate veil' in order to hold the shareholder(s) actively participating in the operation of the business personally liable ..., there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement)." Syllabus point 3, in part, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986).⁹⁷

⁹⁴ Kubican v. The Tavern, LLC, 2012 WL 8523515 (W.Va.Cir.Ct.)

⁹⁵ W. VA. CODE § 31B-3-303 [1996].

⁹⁶ Kubican v. The Tavern, LLC, 752 S.E.2d 299, 313 (W. Va. 2013), <http://www.courtswv.gov/supreme-court/docs/fall2013/12-0507.pdf>.

⁹⁷ *Id.*

For LLCs, the court eliminated the “disregard of formalities requirement” in part one but kept the rest of the corporate veil-piercing test the same. The court provided:

To pierce the veil of a limited liability company in order to impose personal liability on its member(s) or manager(s), it must be established that (1) there exists such unity of interest and ownership that the separate personalities of the business and of the individual member(s) or managers(s) no longer exist and (2) fraud, injustice, or an inequitable result would occur if the veil is not pierced.⁹⁸

The problem, though, is that part one of the LLC test is the same as that of the corporate veil piercing test, minus the explanation that part one is “the disregard of formalities requirement.” The court is comfortable saying that the veil piercing test:

is a fact driven analysis that must be applied on a case-by-case basis, and, pursuant to W.Va. Code § 31B-3-303(b) (1996) (Repl. Vol. 2009), 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 may not be a ground for imposing personal liability on the member(s) or manager(s) of the company.⁹⁹

However, now the “unity of interest and ownership” test for LLCs no longer looks at corporate formalities and looks simply to other factors to make the determination. The court notes the nineteen factors that can be used in corporate veil-piercing cases, like undercapitalization, commingling of funds, etc., and explains that similar considerations may apply for LLCs. The court is right to point out that other states have made the same determination on similar statutes, but that doesn’t make those decisions correct.¹⁰⁰ In addition, West Virginia’s veil-piercing test under *Laya*¹⁰¹ stated more clearly than other states have that corporate formalities are the main issue for the unity of interest test.

Courts continue to look to veil piercing to rectify harms such as commingling of funds or using entity funds for personal endeavors. This does not inherently warrant veil piercing. Instead, courts can find such uses of funds fraudulent transfers or improper uses of entity funds that the member needs to pay back. That is not veil piercing; that is simply requiring the member to put back in the entity that which was wrongfully withdrawn.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. LAW REV. 77 (2005); Stephen M. Bainbridge, *Why not just abolish LLC veil piercing?*, ProfessorBainbridge.com (Mar. 17, 2017).

¹⁰¹ *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986).

Further, there are other arguments that can be made to hold LLC members liable for the entity's debts. If the members pay directly the bills for the entity, it may be that the members have become guarantors for the entity. In the *Kubican* case, the allegation was that the members used the entity credit cards for things like visits to the chiropractor, dinners, and even a trip to Myrtle Beach. Again, though, if true, all of those funds should be returned to the entity to pay any claims the plaintiff is awarded from the LLC, but it does not need to be that the limited liability veil must be disregarded in full.

This LLC veil piercing confusion is an on-going problem for Minnesota, too.¹⁰² For example, one Minnesota court upheld a decision to pierce the limited liability veil of Alpha Law Firm, LLC. The appellate court found the court below "did not abuse its discretion by piercing Alpha's corporate veil."¹⁰³ Again, though, the LLC did not have such a veil because it was not a corporation.

This should be easier to keep straight in Minnesota than most places. Minnesota law expressly allows for LLC veil piercing and states that the corporate law concept applies to the LLC. And it also calls it "piercing the veil" in the LLC statute, which makes clear the veil is an LLC veil, and not a corporate one. The statute says:

Subd. 2. Piercing the veil. The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.¹⁰⁴

This is an admittedly challenging space. As *Guava* points out, when a statute brings corporate veil piercing into the LLC world, it can be awkward. Another excerpt from *Guava* explains:

Hansmeier next challenges the district court's decision to pierce on the merits. "In certain circumstances, it is possible to 'pierce the corporate veil' and hold a shareholder personally liable." Veil piercing applies to LLCs as well as corporations. Minn. Stat. § 322B.303, subd. 2 (2014). A court may pierce a corporate veil when there is fraud or when the shareholder is the "alter ego" of the corporation.¹⁰⁵

Because LLCs do not have shareholders (they have members), that part is confusing. The court keeps vacillating between corporate and LLC concepts, which makes things even more challenging. The court needed to take the time to set the LLC

¹⁰² Joshua Fershée, *LLCs Still Don't have Corporate Veils. Really.*, BUSINESS LAW PROF BLOG (Aug. 25, 2015), https://lawprofessors.typepad.com/business_law/2015/08/llcs-still-dont-have-corporate-veils-really-.html

¹⁰³ *Guava LLC v. Merkel*, No. A15-0254, 2015 WL 4877851, at *8 (Minn. Ct. App. Aug. 17, 2015).

¹⁰⁴ MINN. STAT. ANN. § 322B.303(2)

¹⁰⁵ *Guava*, 2015 WL 4877851, at *6. (citations omitted)

standard and separate the concepts between the entities, so that future courts do not continue this cycle.

A 2011 Minnesota case provides and even bigger, and more dangerous, misapplication of veil piercing rules to an LLC.¹⁰⁶ The case sets up the facts as follows:

Center Pointe Apartments (the property) is owned by Brooklyn Center Leased Housing Associates Limited Partnership. The partnership includes one general partner and two limited partners, each of which is a *limited liability corporation*. The general partner is Brooklyn Center Housing, LLC (BCH) in which appellant Hyder Jaweed is the sole member. His brother, appellant Asgher Ali, has no legal interest in BCH, the partnership, or the property.¹⁰⁷

Once again, we see an LLC misnamed as a corporation. The court then begins down that path of corporate veil piercing law for LLCs. The court cites to the statute and tells us, “The shareholders of a corporation ordinarily are not personally liable for the corporation’s debts.”¹⁰⁸ Using corporate law, the court provides the following determination:

Although the record does not support the district court’s finding that five of the eight *Victoria Elevator* factors are present in this case, the presence of several critical factors supports the district court’s exercise of its equitable powers to pierce the corporate veil. For example, corporate formalities have not been observed, there were no functioning officers and directors, and the corporation was a mere façade for individual dealings.¹⁰⁹

The problem, of course, was that an LLC is not required to follow corporate formalities. Minnesota law, at the time, did not account for this inconsistency.¹¹⁰ That has, thankfully, been changed,¹¹¹ but these and similar cases continue to provide faulty guidance, dissonance, and confusion.

B. Legislators

Likely one of the problems for lawyers and judges is that some statutes have it wrong. For example, numerous Washington state statutes use the term “limited liability

¹⁰⁶ *Kromrey v. Ali*, No. A10-785, 2011 WL 500025, at *1 (Minn. Ct. App. Feb. 15, 2011)

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Id.* at *2 (citing the state law for corporations, Minn. Stat. § 302A.425 (2010)).

¹⁰⁹ *Id.*

¹¹⁰ See MINN. STAT. § 322B.303(2) (2003) (“The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.”) (Repealed by Laws 2014, c. 157, art. 1, § 91, eff. Jan. 1, 2018).

¹¹¹ MINN. STAT. ANN. § 322C.0304 (West).

corporation.”¹¹² One does so in the context of entity conversion.¹¹³ This statute outlines reporting requirements when significant events occur and uses the example: “For example, if your business is changing from a sole proprietorship to a corporation, or from a corporation to a limited liability corporation, you must notify the department and may be required to file a new escrow agent application...”¹¹⁴

It certainly does not help when the country’s most populated state conflates LLCs with Corporations. California Revised Uniform Limited Liability Company Act falls within the California Corporations Code.¹¹⁵ One can easily see how this creates a mess with regard to all entities. Title 1 is for Corporations; Title 2 for Partnerships; Title 2.6 the Revised Uniform Limited Liability Company Act; Title 3 Unincorporated Associations...” Yet, Partnerships and LLCs are *not* corporations and *are* “unincorporated.” It is misleading to have this section of the code called “Corporations” and then include unincorporated entities within it. And lawyers know the phrase *expressio unius est exclusion alterius* which means that the expression of one thing is the exclusion of another. If you list “unincorporated” separate from partnerships and LLCs you are signaling that they are not unincorporated. What a mess.

This concern becomes clear in an “unpublished/noncitable” decision that was published on Westlaw. The opinion states:

A corporation—including a limited liability corporation—may be served by effecting service on its agent for service of process. (Code Civ. Proc., § 416.10, subd. (a); see also Corp. Code, § 17701.16, subd. (a) [allowing service on limited liability corporations under Code Civ. Proc., § 413.10 et seq.].)

*12 One of the ways a limited liability corporation can be served is by substituted service. (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 4:172, p. 4–26.) This requires that a copy of the summons and complaint be left at the office of the person to be served (or, in some cases, at the mailing address of

¹¹² 19 Wash. Rev. Code Ann. §19.146.010 (Mortgage Broker Practices Act); 19 Wash. Rev. Code Ann. §19.160.010 (Business Regulations, Miscellaneous, Business Telephone Listings); 19 Wash. Rev. Code Ann. §19.355.010 (Business Regulations, Miscellaneous, Locksmith Services); 24 Wash. Rev. Code Ann. § 24.06045 (Corporations and Associations (Nonprofit), Nonprofit Miscellaneous and Mutual Corporations Act); 61 Wash. Rev. Code Ann. §61.24 (Mortgages, Deeds of Trust, and Real Estate Contracts, Deeds of Trust); 70 Wash. Rev. Code Ann. § 70.44.315 (Public Health and Safety, Public Hospital Districts); 23B Wash. Rev. Code Ann. § 23B.11.110 (Washington Business Corporation Act, Merger and Share Exchange); 30A Wash. Rev. Code Ann. § 30A.04.010 (Washington Commercial Bank Act, General Provisions)

¹¹³ WASH. ADMIN. CODE § 208-680-275(1)(b) (2023).

¹¹⁴ *Id.*

¹¹⁵ California is not the only state to do this but happy to report that the majority do not do this. Other examples include: Idaho, Kansas, Michigan, New Mexico, North Dakota, Oklahoma, South Dakota, and Virginia.

the person to be served), in the presence of a person who is apparently in charge, “and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left.” (Code Civ. Proc., § 415.20, subd. (a).)¹¹⁶

Wrong. First, even in California, an LLC is a “limited liability company.” It says so right in the act. Cal. Corp. Code § 17701.01 (West): “This title may be cited as the California Revised Uniform Limited Liability Company Act.” In California, the LLC Act, as noted above, is part of the California Corporations Code. Cal. Corp. Code §§ 17701.16 - 17713.13 (West). For that matter, so are partnerships, under Title 2.

There has been some, but not enough, movement in state legislatures to fix statutory errors. Former Kentucky House Member Scott Brinkman helped our cause. He sponsored a bill that passed amending the Kentucky Limited Liability Company Act to change some terminology including to change the phrase ‘limited liability corporation’ to ‘limited liability company’ in the definition of ‘Business’.¹¹⁷ We can hope that things improve moving forward.

C. Governmental Administrative Agencies

Government administrative agencies interact with businesses of all sizes and entity types. They are responsible for enforcing laws against such businesses. We have noticed that large federal agencies such as the Patent and Trademark Office (PTO), Federal Trade Commission (FTC), Securities Exchange Commission (SEC), Department of Labor (DoL), and the Internal Revenue Service (IRS) have all used the term “limited liability corporation” in myriad ways.¹¹⁸ State agencies are not immune to the problem. But before heading down the path of despair, we will start on a positive note by discussing the PTO.

¹¹⁶ City of Fontana v. Bani, LLC, No. E062018, 2016 WL 2864971, at *11-12 (Cal. Ct. App. May 12, 2016).

¹¹⁷ KY. REV. STAT. § 11A.010.

¹¹⁸ Additionally, the U.S. Environmental Protection Agency in a complaint against Norlite, LLC described the Norlite as “a foreign limited liability corporation incorporated in the State of Delaware...” Letter from Dore LaPosta, Dir. Enf’t & Compliance Assurance Div., U.S. Env’t Prot. Agency, to Darrell Monk, Plant Manager, Norlite, LLC (Jan. 30, 2020), [https://yosemite.epa.gov/oarm/alj/ALJ_Web_Docket.nsf/Filings-and-Attachments/50969515CB6A4C31852585280067FAF4/\\$File/Norlite201004Complaint.pdf](https://yosemite.epa.gov/oarm/alj/ALJ_Web_Docket.nsf/Filings-and-Attachments/50969515CB6A4C31852585280067FAF4/$File/Norlite201004Complaint.pdf); and, the U.S. Department of Housing and Urban Development (HUD) in its Regulatory Agreement for Multifamily Projects lists actions requiring prior HUD written approval, one of which is: Except from permissible withdrawals of Surplus Cash, pay any compensation, including wages or salaries, or incur any obligation to do so, to any officer, director, stockholder, trustee, beneficiary, partner, member, manager (in the case of a Borrower formed as a Limited Liability Company or Limited Liability Corporation), or Principal of Borrower, or to any nominee thereof.”

1. PTO

We formally thank and appreciate the U.S. Patent and Trademark Office for stating the following in its July 2022 Trademark Manual of Examining Procedure:

Most states recognize an entity commonly identified as a “limited liability company” or “LLC.” The entity has attributes of both a corporation and a partnership. Therefore, the USPTO will accept “limited liability company” as an entity designation. The examining attorney may accept appropriate variations of this entity, with proof that the entity exists under the law of the relevant state. For example, some states recognize an entity identified as a “low-profit-limited-liability company” or “L3C,” which combines the features of a for-profit LLC and a nonprofit organization.

If “LLC” or “L3C” appears in the applicant’s name, but the entity is listed as a corporation, the examining attorney must inquire as to whether the applicant is a limited liability company or a corporation.

...

Limited Liability Corporation. A business organization known as a “limited liability corporation” is currently not recognized in any jurisdiction. If an applicant’s entity type is identified as a limited liability corporation, the examining attorney must inquire as to whether the applicant is a limited liability company or a corporation. If the applicant believes that it is a limited liability corporation, then the applicant must provide proof that such a legal entity exists under the appropriate state statute.¹¹⁹

Preach! As discussed *infra*, change will not happen if people are not held accountable. This is the kind of accountability we ask for from judges and are over the moon to see it here from a federal agency.

However, the above-referenced messaging did not filter through and reach other attorneys at the PTO. *It’s so sad to say.*¹²⁰ The Deputy General Counsel for General Law at the PTO executed an order on April 30, 2019 to suspend a former registered patent agent.¹²¹ The order’s stipulated facts section misnames both of the LLCs it lists.¹²² As part of the agreed upon sanctions, the OED Director was to publish a notice in the Official Gazette, part of which states: “Respondent founded Sinorica, a Maryland

¹¹⁹ USPTO Trademark Manual of Examining Procedure §803.03(h) July 2022.

¹²⁰ THE MIGHTY MIGHTY BOSS TONES, SO SAD TO SAY (Pay Attention, 2000).

¹²¹ In the Matter of Ming Chow, Proceeding No. D2018-27, Final Order (April 30, 2019). https://foia.documents.uspto.gov/oed/0996_dis_2019-04-30.pdf

¹²² *Id.*

Limited Liability Corporation ('Sinorica'), in 2006. Respondent's son founded another Maryland Limited Liability Corporation, which has done business as Thoughts to Paper ('TTP')."¹²³ So, despite the PTO refusing to acknowledge "limited liability corporations," the Deputy General Counsel allowed the misnaming to occur in two sections of the Order, and for it to permeate into the Official Gazette.

2. FTC

As early as 1998, the FTC was filing complaints against LLCs and referring to at least one of them as "a joint venture limited liability corporation."¹²⁴ When we did a search, there were 90 examples of erroneous use. Much of the misuse is coming from FTC staff attorneys filing complaints. As noted *supra* in the introduction, Shkreli's company, Vyera Pharmaceuticals, LLC when sued by the FTC was referred to as a "limited liability corporation" that was "incorporated" in Delaware.¹²⁵

Cases where terms are misused are prevalent. Tech support scam "Trothsolutions LLC" was labeled as a "Nevada limited liability corporation" in the FTC drafted complaint.¹²⁶ In the FTC's suit against Safariland, LLC, the complaint stated this particular defendant was a "limited liability corporation."¹²⁷ In the complaint against Flagship Resort Development Corporation and Atlantic Palace Development, LLC, the FTC's caption states that Atlantic Palace is a "New Jersey limited liability corporation."¹²⁸ Interestingly, in the body of the complaint itself, Atlantic Palace is listed as a "limited liability company" not a "corporation."¹²⁹ All of these cases have case summaries on the FTC website that replicate the erroneous term.

One more example lies within the complaint brought by the FTC against myfreemedicine.com, LLC, a "California limited liability corporation," and Geoffrey J. Hasler, individually as a "member of Myfreemedicine.com, LLC."¹³⁰ Here we see the incorrect term used to describe the entity, but the correct term used to describe the

¹²³ *Id.*

¹²⁴ FED. TRADE COMM'N, 21ST REPORT (FY 1998) (1999), <https://www.ftc.gov/reports/21st-report-fy-1998>.

¹²⁵ *Supra* note 7.

¹²⁶ FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3018-x170034-troth-solutions> (last visited July 12, 2023).

¹²⁷ Federal Trade Commission's Complaint, In the matter of Axon Enterprises, Inc. & Safariland, LLC, FTC Docket No. 9389 (Jan. 23, 2020). <https://www.ftc.gov/legal-library/browse/cases-proceedings/1810162-axon-enterprise-safariland-matter>

¹²⁸ Plaintiff's Complaint for Civil Penalties, Permanent Injunction, & Other Relief, United States v. Flagship Resort Develop, Co. v. Atlantic Palace Develop, LLC (D.N.J. Feb. 16, 2005). <https://www.ftc.gov/sites/default/files/documents/cases/2005/02/050216flagshipresortcmplt.pdf>

¹²⁹ *Id.* at 2.

¹³⁰ Plaintiff's Complaint for Injunctive & Other Equitable Relief, FTC v. Myfreemedicine.com, LLC, No. CV5 1607 (W.D. Wash. Oct. 17, 2005).

individual owner.¹³¹ The incorrect term is used in both the caption and body of the complaint.¹³²

3. SEC

“The SEC has a three-part mission: Protect Investors, Maintain fair, orderly, and efficient markets, facilitate capital formation. [We] think it needs to add: ‘Ensure proper entity identification.’”¹³³

Searches through the SEC website indicate 263 misuses of the term. These misuses show in complaints/actions brought by the SEC, in speeches made by SEC officials, and in documents filed with the SEC by practitioners. This last observation allows us to reiterate that lawyers need to exercise care when drafting documents, particularly because these documents get filed electronically and are available for all eyes and all AI to read. See examples of practitioner errors *supra* in Part III.A.1.

Numerous complaints with faulty terminology brought by the SEC are out there. In one complaint, an individual was described as the “owner or partial owner of several limited liability corporations ostensibly involved in the construction business.”¹³⁴ One entity defendant was listed in the same matter as a “limited liability corporation.”¹³⁵ A litany of complaints and actions list defendant LLCs with the same erroneous terminology.¹³⁶

As an example, in a 2023 administrative proceeding against Ensign Peak Advisors, Inc. and The Church of Jesus Christ of Latter-Day Saints, the SEC stated that Ensign Peak, the Church’s investment manager:

failed to file with the Commission certain required forms (“Forms 13F”) that would have disclosed the size of the Church’s equity portfolio to

¹³¹ *Id.*

¹³² *Id.*

¹³³ Joshua Fershée, *The SEC Needs to Crack Down on Incorrect Entity Types*, BUS. L. PROF BLOG (Aug. 14, 2018), https://lawprofessors.typepad.com/business_law/2018/08/the-sec-needs-to-crack-down-on-incorrect-entity-types-.html.

¹³⁴ Complaint for Violations of The Federal Securities Laws at 9, Securities & Exchange Commission v. Arkadiy Dubovoy, No. 15 Civ. (Aug. 10, 2015).

¹³⁵ *Id.* at 13.

¹³⁶ AST Investment Services, Inc. & PGIM Investments LLC, Investment Advisors Act Release No. 5346 (Sept. 16, 2019); Putnam Investment Management, LLC & Zachary Harrison, Investment Advisors Act Release No. 5050 (Sept. 27, 2018); Performance Capital Management, LLC & Silicon Mountain Holdings, Inc., Exchange Act Release No. 90972 (Jan. 22, 2021); Complaint, Securities & Exchange Commission v. Joseph Cimino, No. 7:21-cv-01375 (S.D.N.Y. Feb. 17, 2021).

<https://www.sec.gov/litigation/complaints/2021/comp25031.pdf>

<https://www.sec.gov/litigation/opinions/2021/34-90972.pdf>

<https://www.sec.gov/litigation/admin/2018/ia-5050.pdf>

<https://www.sec.gov/litigation/admin/2019/ia-5346.pdf>

the Commission and the public. Instead, the Church and Ensign Peak created thirteen limited liability corporations (“LLCs”), including twelve similar LLCs (the “Clone LLCs”) with addresses located throughout the U.S., for the sole purpose of filing Forms 13F and preventing public disclosure by Ensign Peak of the Church’s equity securities holdings.¹³⁷

In 2020, Jeffrey Nick, Professional Accounting Fellow, Office of the Chief Accountant in a presentation to OCA staff spoke of a fact pattern relating to the consolidation analysis for a voting interest entity: “This legal entity, a limited liability corporation with governing provisions that are the functional equivalent of a regular corporation, had its equity ownership divided between two investors, of which the reporting entity was one.”¹³⁸ We sorrowfully highlight not only the misuse of the LLC term but the comment that LLCs are the “functional equivalent of a regular corporation.”¹³⁹ This statement should clarify whether these provisions were part of an operating agreement and if not, then he is misstating the law.

Earlier, in 1999, Deputy Chief Accountant, Jane B. Adams, in a list of GAAP accounting problem areas discussed the “[a]pplication of the equity method of accounting to limited liability corporations.”¹⁴⁰ This is quite frustrating, but we press on.

4. DoL

The DoL adds to the pile by using the incorrect term as well. There are twenty examples in enforcement actions, which granted is much less than the FTC and SEC but still the errors are egregious. One noteworthy example is in a 2006 advisory opinion written by Louis J. Campagna, Chief of Division of Fiduciary Interpretations.¹⁴¹ Chief Campagna chose to use an odd abbreviation for an S Corporation and then follows up with the term “limited liability corporation” when referring to an LLC.¹⁴²

You represent that Salon Services and Supplies, Inc. is a Washington state ‘S’ Corporation (“S Company”) which is 68% owned by Miles and Sydney Berry, a marital community (M). The other 32% is owned by a

¹³⁷ SEC Release No. 96951 / February 21, 2023, <https://www.sec.gov/files/litigation/admin/2023/34-96951.pdf>

¹³⁸ Jeffrey Nick, Pro. Acct. Fellow, U.S. Sec. & Exch. Comm’n, Remarks before 2020 AICPA Conf. on Current SEC & PCAOB Developments (Dec. 7, 2020).

¹³⁹ *Id.*

¹⁴⁰ Jane B. Adams, Deputy Chief Acct., U.S. Sec. & Exch. Comm’n, 27th Ann. Nat’l AICPA Conf. on Current SEC Developments (Dec. 8, 1999).

¹⁴¹ Letter from Louis J. Campagna, Chief, Div. of Fiduciary Interpretations, to Debra C. Buchanan, Guidant Legal Group, PLLC (Jan. 6, 2006), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2006-01a>.

¹⁴² *Id.*

third-party, George Learned (“G”). Miles Berry (Berry) proposes to create a limited liability corporation (“LLC”) that will purchase land, build a warehouse and lease the property to S Company.¹⁴³

Additionally, on dol.gov, there is a page called “Myths about Misclassification.”¹⁴⁴ This page is intended to clarify complicated legal issues surrounding worker classification. Ironically, this page replicates the erroneous term “limited liability corporation” twice.¹⁴⁵ The FAQ or “myth” is “I have my own employer identification number (EIN) or paperwork stating that I am performing services as a Limited Liability Corporation (LLC) or other business entity. This means that I am an independent contractor.” The DoL responds but fails to correct the terminology within the question. Granted we acknowledge the DoL was more concerned with the misclassification issue, however, precision counts and the myth/question could have been stated correctly to being with.

5. IRS

Props go to the IRS for not mislabeling LLCs with any prevalence. We could find only one instance attached to the IRS and it appears in a December 2021 press release regarding the sentencing of a former Netflix executive.¹⁴⁶ While not to spend much time speculating as to why the IRS comes out a winner here, it is likely because the entity structure truly matters to the IRS for taxation purposes and therefore it makes sense that this agency would be more accurate.

However, the IRS does not get off scott free, as it plays a unique role in all of this confusion. Back in 2016, Dean Fershée argued that the IRS should “stop using state-law designations.”¹⁴⁷ This is because entities are creatures of state law. How the federal or state government tax such entities does not change that fact. It is time to start using more precise language that makes that clear.

State law is the origin of all entity types (barring, perhaps, a few minor exceptions), and references to “C Corps” and “S Corps” are not really on target, though they are reasonably clear when only talking about tax issues. This is unnecessary under today’s tax code where entities have check-the-box options that most entity types can choose whatever tax treatment they wish. An LLC can elect to be taxed under subchapter S—

¹⁴³ *Id.*

¹⁴⁴ Wage & Hour Div., *Myths About Misclassification*, U.S. DEPT. OF LABOR <https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail> (last visited July 13, 2023).

¹⁴⁵ *Id.*

¹⁴⁶ Press Release, IRS, Former Netflix executive sentenced to 30 months for bribes and kickbacks from Netflix vendors (Dec. 14, 2021), <https://www.irs.gov/compliance/criminal-investigation/former-netflix-executive-sentenced-to-30-months-for-bribes-and-kickbacks-from-netflix-vendors>.

¹⁴⁷ https://lawprofessors.typepad.com/business_law/2016/07/let-corps-be-corps-follow-up-on-entity-tax-status.html. He reiterated that argument again in 2019. https://lawprofessors.typepad.com/business_law/2019/01/i-dont-care-what-the-irs-says-there-are-no-federal-entities.html

make an S election—by filing Form 2553.¹⁴⁸ The IRS should be able to keep its role clear, without including entity in the type of taxation (more on this in Part V *infra*).

6. Miscellaneous

Et tu Delaware? A quick google search landed on the term “foreign limited liability corporation”—which is *not a thing*—on Delaware.gov’s “Business First Steps” page.¹⁴⁹ Delaware, the state in which more than a million business entities have their “legal home,” really needs to fix this error. Thankfully, you can find use of the proper terminology on the Delaware Division of Corporations links, such as the “New Entities” page which contains form links, including one for “foreign limited liability company.”¹⁵⁰

The problem is that there are attorneys out there using the phrase “foreign limited liability corporation incorporated in Delaware” now.¹⁵¹ While we cannot know for sure why these attorneys are getting this wrong, if they have seen the phrase on Delaware’s sites, that could explain it.

Another error found in the Delaware.gov sites appears in the sample corporate files for Certificate of Merger, which erroneously refers to the Limited Liability Corporation Act of the State of Delaware, which does not exist.¹⁵² The Michigan.gov site contains an error as well. On its “Corporate Office Liability” FAQ page, question and answer number 5 really is a head-spinner:

5. My divorce decree states that I am not liable. Why am I being billed/assessed? A: Based on a review of the corporation’s account, the Department will attempt to collect the debt from all officers, managers, members and/or partners of a corporation, limited liability corporation, partnership, limited partnership or limited liability partnership

¹⁴⁸ Note that an LLC that elects to be taxed under Subchapter S must meet the requirements therein.

¹⁴⁹ *Corporations - Legal Entity Formation*, DELAWARE.GOV, <https://firststeps.delaware.gov/corporations/> (last visited July 13, 2023).

¹⁵⁰ *New Entities*, DELAWARE.GOV, <https://corp.delaware.gov/newentit09/> (last visited July 13, 2023); ILLINOIS.GOV, <https://www.illinois.gov/business.html> (last visited July 13, 2023). Illinois.gov Business page (provided by the Office of the Secretary of State) has a large block called “Corporation & Limited Liability Corporation Online Filings” that when you click on it indeed takes you to a page with that title.

¹⁵¹ As recent as June 16, 2023, the Commonwealth of Kentucky Public Protection Cabinet Department of Financial Institutions filed an Administrative Action against several defendants, one of which was Plutus Lending LLC, “a foreign limited liability corporation organized in Delaware.” Administrative Complaint at 1, Dept. of Fin. Inst. v. Plutus Fin. Inc., No. 2023-AH-0012 (June 16, 2023). <https://kfi.ky.gov/Documents/Plutus%20Financial%20INC.%20dba%20Abra%20and%20William%20John%20Barhydt%202023-AH-00012.pdf>.

¹⁵² DELAWARE DIV. OF CORPORATIONS: CERTIFICATE OF MERGER (July 2004), <https://corpfiles.delaware.gov/Cert%20-%20DE%20LLC09.pdf>.

responsible for the filing or payment of Michigan taxes during the period(s) in question.¹⁵³

The Maryland Department of Transportation's Small Business Enterprise (SBE) Program Certification Application has a check box for the type of entity/business structure applying and the LLC is listed as Limited Liability Corporation.¹⁵⁴ Same thing goes for the Texas Department of Transportation's Business Opportunity Programs.¹⁵⁵ Several other states do as well.¹⁵⁶ We are happy to report the authors' resident states are on the correct side of this. One agency that has it correct is the Pennsylvania Department of Transportation.¹⁵⁷ And so does the City of Omaha, which used LLC and did not write out what it could stand for.¹⁵⁸ This would seemingly be more user-friendly for small business owners to understand and complete.

Like many cities, the city of Milwaukee's Office of Equity & Inclusion requires small businesses that wish to be certified as an SBE complete a certification /application.¹⁵⁹ And it provides a handy checklist that one can use depending on the type of entity. Sadly, it lists "limited liability corporation" as one of the entities—as the LLC option.¹⁶⁰ In a draft, the Government of District of Columbia Department of Transportation lays out goal setting methods that discusses its SBE program. Problematically it states a "small business may be a ... Limited Liability Corporation,

¹⁵³ *Corporate Officer Liability Frequently Asked Questions*, MICHIGAN DEPT. OF TREASURY, <https://www.michigan.gov/taxes/collections/corporate-officer-liability-frequently-asked-questions> (last visited July 13, 2023).

¹⁵⁴ MARYLAND DEPT. OF TRANSP.: SMALL BUS. ENTER. (SBE) PROGRAM CERTIFICATION (2022). https://www.mdot.maryland.gov/MBE_DOCS/SBE_APPLICATION_2023_March%202023.pdf.

¹⁵⁵ TEXAS DEPT. OF TRANSP. BUS. OPPORTUNITY PROGRAMS SECTION, SMALL BUS. ENTER. (SBE) CERTIFICATION APPLICATION (2001). <https://ftp.dot.state.tx.us/pub/txdot-info/cmd/bop/certifap.pdf>.

¹⁵⁶ MISSOURI REGIONAL CERTIFICATION COMMITTEE, SMALL BUS. ENTER. (SBE) PROGRAM "DECLARATION OF CERTIFICATION" (2022). <https://www.modot.org/sites/default/files/documents/SBE%2520Declaration%2520of%2520Certification-Final%5B1%5D.pdf>.

¹⁵⁷ PENNSYLVANIA DEPT. OF TRANSP.: SMALL BUS. ENTER. (SBE) CERTIFICATION APPLICATION (2020). <https://www.pennndot.pa.gov/about-us/EqualEmployment/Documents/SBE%20Certification%20Application.pdf>.

¹⁵⁸ CITY OF OMAHA, NEBRASKA, AUTHORIZATION FOR TIER I/II EMERGING SMALL BUS. (ESB) OR SMALL BUS. (SB) (2020). https://humanrights.cityofomaha.org/images/SEB/Tier_I-II_Application_2023.pdf.

¹⁵⁹ *Small Business Development*, CITY OF MILWAUKEE, <https://city.milwaukee.gov/Equity-and-Inclusion/Certification> (last visited July 13, 2023); *See also* CITY OF HOUSTON: SMALL BUS. ENTER. (SBE) CERTIFICATION APPLICATION (2017); Miami-Dade, MIAMI-DADE COUNTY: INTERNAL SERVICES DEPT. (ISD) SMALL BUS. DEVELOP. (2014); CITY OF PHOENIX: CERTIFICATION APPLICATION (2012).

<https://www.houstontx.gov/obo/docsandforms/sbeapplication.pdf>
<http://www.miamidade.gov/smallbusiness/library/forms/sbe-certification-application-personal-financial-statement-forms.pdf>

<https://www.phoenix.gov/eodsite/documents/certapppdf1012.pdf>

¹⁶⁰ *SBE New Certification Document Checklist*, MILWAUKEE OFFICE OF SMALL BUS. DEVELOP., <https://city.milwaukee.gov/ImageLibrary/Groups/daEBEP/certApps/SBECertificationDocumentChecklist.pdf> (last visited July 14, 2023).

or any other legally formed entity.”¹⁶¹ A limited liability corporation is not a “legally formed entity.” The Metropolitan Development Housing Agency (Nashville) has a diversity business enterprise directory, and every LLC is listed as a “limited liability corporation.”¹⁶²

Other municipalities have errors as well. In a contract between the City of Tamarac, Florida, and Lhoist North America of Alabama, LLC, the company was described as an “Alabama Limited Liability corporation duly registered as a Florida Foreign Limited Liability corporation.”¹⁶³ Yet another municipality had it right mostly and then gave in to the error near the end of the page.¹⁶⁴

D. Media & Non-lawyer Service Providers

Various media outlets have mislabeled LLCs. For instance, on the long-standing popular game show Jeopardy!, the question “Per the National Small Business Association, more than 30% of U.S. small businesses operate as these, LLCs.” The contestant was given credit for the answer “limited liability corporation.”¹⁶⁵

On one episode of the HBO crime drama *The Wire*, there is a conversation between Detective Freamon and Detective Roland Pryzbylewski (Prez) where Freamon asks Prez to “track down the name of all front companies, limited partnerships and LLCs.”¹⁶⁶ Prez responds with “huh?” and Freamon explains “limited liability corporations.”¹⁶⁷ The entirety of the conversation uses corporate terminology and then ultimately shows a paper with a big red circle around the words “Triple B-LLC.”¹⁶⁸

¹⁶¹ *Goal Setting Methodology*, GOV’T OF THE DISTRICT OF COLUMBIA, https://ddot.dc.gov/sites/default/files/dc/sites/ddot/publication/attachments/FY_2016-2018_FHWA_Goal_Methodology_11-19-15vs.pdf (last visited July 14, 2023).

¹⁶² METROPOLITAN DEVELOPMENT HOUSING AGENCY: DIVERSITY BUS. ENTERPRISE DIRECTORY (2022). <https://www.nashville-mdha.org/wp-content/uploads/2022/11/MDHA-DBE-Website-Directory10272022.pdf>

¹⁶³ CITY OF TAMARAC, FLA., RES. NO. R-2020-095 (Sept. 3, 2020) (on file with the authors).

¹⁶⁴ *What is the difference between a business being sole proprietor and a Limited Liability Company (LLC)?*, FALMOUTH MAINE, <https://www.falmouthme.org/town-clerk/faq/what-is-the-difference-between-a-business-being-sole-proprietor-and-a-limited> (last visited July 13, 2023).

¹⁶⁵ Joshua Fershée, *Jeopardy Doesn’t Know LLCs are not Corporations, but Courts are Improving*, BUS. LAW PROF BLOG (Dec. 1, 2020), https://lawprofessors.typepad.com/business_law/2020/12/jeopardy-doesnt-know-llcs-are-not-corporations-but-courts-are-improving.html.

¹⁶⁶ Sam Menefee-Libey, *The Wire - Chasing the Paper Trail*, YOUTUBE (Oct. 25, 2011), <https://www.youtube.com/watch?v=ShWe-4mtV8w>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Proliferators of erroneous language are sites like [contractsounsel.com](https://www.contractsounsel.com), [lawinsider](https://www.upcounsel.com), [upcounsel](https://www.upcounsel.com),¹⁶⁹ and [pandadoc](https://www.pandadoc.com).¹⁷⁰ These sites provide real life examples of various documents so that people can use them to create their own documentation. On [contractsounsel](https://www.contractsounsel.com), one can find a sample “limited liability agreement” which by law in most states is an operating agreement so why not just call it that? But more egregious is the agreement description:

The limited liability agreement is not the same as the form one files to create a limited liability corporation--this agreement dictates how a limited liability company will be operated.

The purpose of a limited liability agreement is to set clear expectations between the participating parties of how a limited liability corporation will be run. This agreement may include terms guidance on how management is hired, bookkeeping and records responsibilities, and what to do in the event of a bankruptcy or dissolution.¹⁷¹

Thankfully the model agreement itself does not contain an error in this respect.

Ebizfiling has an article entitled “8 Stupid errors in an LLC operating agreement.”¹⁷² Some snip snap going on here as well as referring to members as partners. “An operating agreement is the foundation of every limited liability corporation (LLC), and it guarantees that partners are treated equitably.”¹⁷³ One might say that there are more errors within this post than they realize.

A plethora of websites seeking to help entrepreneurs are mislabeling with regularity.¹⁷⁴ For instance, John Boitnott scribed an article for Inc. entitled “5 Reasons why an LLC is the Right Structure for your Startup.”¹⁷⁵ The next line reads “Limited Liability Corporations (or LLCs) are very attractive to the early stage startup.” The

¹⁶⁹ *LLC Bylaws Sample: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/llc-bylaws-sample> (last visited July 13, 2023).

¹⁷⁰ On [pandadoc](https://www.pandadoc.com) a quick find on the operating agreement templates shows three templates using the wrong language. *Operating Agreement Templates*, PANDADOC, <https://www.pandadoc.com/operating-agreement-templates/> (last visited July 13, 2023).

¹⁷¹ *Limited Liability Agreement*, CONTRACTSCOUNSEL, <https://www.contractsounsel.com/us/limited-liability-agreement> (last visited July 13, 2023).

¹⁷² Pallavi Dadhich, *8 Stupid errors in an LLC operating agreement*, EBIZFILING (Mar. 10, 2023), <https://ebizfiling.com/blog/errors-in-an-operating-agreement/>.

¹⁷³ *Id.*

¹⁷⁴ Ophthalmic Mutual Insurance Company helps its clients by sharing some FAQs on its website. The question “Do I need entity coverage for my limited liability corporation or partnership?” stands out. *Do I need entity coverage for my limited liability corporation or partnerships?*, OPHTHALMIC MUTUAL INS. CO., <https://www.omic.com/policyholder/do-i-need-entity-coverage-for-my-limited-liability-corporation-or-partnership/> (last visited July 13, 2023).

¹⁷⁵ John Boitnott, *5 Reasons Why an LLC is the Right Structure for Your Startup*, INC. (Feb. 20, 2015), <https://www.inc.com/john-boitnott/5-reasons-why-an-llc-is-the-right-structure-for-your-startup.html>.

Shopify staff scribed an article explaining how to form a limited liability company.¹⁷⁶ They get the term right in the title but then use the wrong term in the first line of the article.¹⁷⁷ Even the SBDC is not immune. The SBDC Roanoke Region provides an Operating Agreement template for Virginia LLCs.¹⁷⁸ While the document itself does not use the wrong term, the launch page does.¹⁷⁹

The type of articles that contain these errors transcend business-related self-help advice posts.¹⁸⁰ For instance, the Washington Post published an article about Justice Thomas's wife's prior real estate firm, Ginger, Ltd., which was later to become Ginger Holdings, LLC outlining concerns about the Justice's errors in reporting financial disclosures.¹⁸¹ The error was not about misnaming the LLC. It was that Justice Thomas continued to report the corporate entity that no longer existed. The real issue as pertains to this article, it appears, is in the journalism, which talks about "state incorporation records" when referring to both a corporation and an LLC:

That year, the family real estate company was shut down and a separate firm was created, state incorporation records show. The similarly named firm assumed control of the shuttered company's land leasing business, according to property records. Since that time, however, Thomas has continued to report income from the defunct company — between \$50,000 and \$100,000 annually in recent years — and there is no mention of the newer firm, Ginger Holdings, LLC, on the forms.¹⁸²

An article published by the Fort Worth Star-Telegram, entitled, "What is an LLC – Ultimate Guide to Limited Liability Companies," written to help individuals who would like to start up a company, uses the proper and erroneous terms interchangeably.¹⁸³ Reading this article makes one feel like they are watching a tennis

¹⁷⁶ *What Is an LLC? How to Form a Limited Liability Company*, SHOPIFY (Jan. 8, 2022), <https://www.shopify.com/ph/blog/what-is-an-llc>.

¹⁷⁷ *Id.*

¹⁷⁸ *Virginia Operating Agreement Template*, ROANOKE REG'L SBDC, <https://www.roanokesmallbusiness.org/resources/operating-agreement> (last visited July 13, 2023).

¹⁷⁹ *Id.*

¹⁸⁰ An article in the Business Journal uses the term "foreign limited liability corporation" for an LLC organized in Delaware. *Federal Street Building Sells for \$4.7M*, THE BUS. J., (MidJune 2020), <https://businessjournaldaily.com/article/federal-street-building-sells-for-4-7m/>; Laura Newpoff, *A Guide to Ohio's new Limited Liability Corporation rules*, COLUMBUSCEO (May 24, 2022, 8:00AM), <https://www.columbusceo.com/story/business/briefs/2022/05/24/how-ohios-new-llc-rules-affect-businesses/9613505002/>.

¹⁸¹ Shawn Boburg & Emma Brown, *Clarence Thomas has for years claimed income from a defunct real estate firm*, THE WASH. POST (Apr. 16, 2023, 8:00AM), <https://www.washingtonpost.com/investigations/2023/04/16/clarence-thomas-ginger-financial-disclosure/>.

¹⁸² *Id.*

¹⁸³ Anna Miller, *What is an LLC—Ultimate Guide to Limited Liability Companies*, FORT WORTH STAR-TELEGRAM, (May 17, 2023, 11:30AM), <https://www.star-telegram.com/news/business/article275506841.html>.

match. This could be because it was written by a marketing person at Paradise Media, who perhaps thinks mixing up words—using company and corporation interchangeably—is a good idea to avoid repetition rather than a lawyer who knows consistent and precise use of terms is important. Even more important is how many local news venues published this article¹⁸⁴ due to their relationship with McClatchy Media Network—a company that states it has “30 growing markets” and “over 65 million monthly readers.”¹⁸⁵ Talk about replicating the error and producing more faulty fodder for AI. A favorite is this advice: “For LLCs, Louisiana has certain name guidelines. Your Limited Liability Corporation’s name must contain the words ‘Limited Liability Company’ or an acronym like ‘LLC’ or ‘L.L.C.’”¹⁸⁶

E. Artificial Intelligence

When asked what a “limited liability corporation” is, ChatGPT responded: “A limited liability corporation (LLC) is a type of business structure that combines the flexibility and tax benefits of a partnership or sole proprietorship with the limited liability protection of a corporation.”¹⁸⁷ It then proceeded to list some key features of LLCs, which were accurate including proper use of LLC-related terms like “members” and “organized.”¹⁸⁸ Interestingly, when asked during the same session what the difference is between a limited liability company and a limited liability corporation, it came through with a *mea culpa*: “I apologize for the confusion in my previous response. The correct term is ‘limited liability company’ (LLC), not ‘limited liability

¹⁸⁴ Numerous virtually identical pieces were also written by Paradise Media authors and published by various McClatchy Media Network sites. Anna Miller, *7 Easy Steps to Start an LLC – Start Your Business Today*, THE STATE (May 11, 2023, 11:30AM), <https://www.thestate.com/news/business/article275303726.html>; Anna Miller, *What is an LLC - A Complete Guide [2023]*, THE NEWS & OBSERVER (May 17, 2023, 12:30PM), <https://www.newsobserver.com/news/business/article275506631.html>; Anna Miller, *How to Start an LLC in 2023 - A Comprehensive Overview*, THE KANSAS CITY STAR, (May 11, 2023, 10:30AM), <https://www.kansascity.com/news/business/article275304276.html>; Anna Miller, *How to Start an LLC in 7 Steps - 2023 Complete Guide*, THE FRESNO BEE (May 22, 2023, 9:30AM), <https://www.fresnobee.com/news/business/article275660506.html>; Anna Miller, *How to Register a Business: A Full-Fledged Guide (2023)*, THE CHARLOTTE OBSERVER (May 11, 2023, 11:00AM), <https://www.charlotteobserver.com/news/business/article275301871.html>; Anna Miller, *Ultimate Guide to What Is an LLC - 2023*, LEXINGTON HERALD LEADER (May 23, 2023, 9:00AM), <https://www.kentucky.com/news/business/article275686361.html>; Anna Miller, *How to Register a Business in the US: 2023 Guide*, LEXINGTON HERALD LEADER (May 16, 2023), <https://www.kentucky.com/news/business/article275276026.html>; Anna Miller, *How to Start an LLC in Florida in 7 Steps - FL LLC*, MIAMI HERALD (July, 13, 2023, 2:50AM), <https://www.miamiherald.com/software-business/article268021282.html>.

¹⁸⁵ MCCLATCHY, <https://www.mcclatchy.com/> (last visited July 13, 2023).

¹⁸⁶ *How to Start LLC in Louisiana 7 Steps Guide 2023*, MANAGEMENT LIBRARY (Apr. 27, 2023), <https://management.org/how-to-start-llc-in-louisiana>.

¹⁸⁷ ChatGPT screenshot on file with the authors.

¹⁸⁸ *Id.*

corporation.’ ‘Limited liability company’ is the correct and commonly used terminology. I apologize for any misunderstanding caused.”¹⁸⁹

AI text generators like ChatGPT have become *en vogue* of late.¹⁹⁰ Claude.ai is another text generator and when posed the same questions did a little better than ChatGPT. Well, kinda. When asked what LLC stands for, it gets the term right but then defines it as a “corporate structure.”¹⁹¹ It then lists, mostly correctly, key features. Claude.ai did not bite when asked what a “limited liability corporation” is, rather it answered what a limited liability company is by listing all of the same features as with the prior question with the addition of “perpetual existence.”¹⁹² When asked what the difference is between a limited liability company and a limited liability corporation, it responded:

There is no difference between a limited liability company (LLC) and a limited liability corporation (LLC). They are the same type of business structure. The term “limited liability corporation” is technically incorrect – the proper term is just “limited liability company.” But the two terms are sometimes used interchangeably, incorrectly referring to an LLC as a corporation.”¹⁹³ It then proceeds to provide where the “confusion stems from.”¹⁹⁴

It is important to note where this information is coming from. As described by ChatGPT itself, its task is to

process input text data through transformers. These transformers rely on self-attention mechanisms, that allow the model to analyze word relationships in sentences and access their importance. This optimizes the handling and understanding of extended sequences and dependencies. *The model is trained on large amounts of text data, such as online articles, books, and other sources.* (emphasis added)¹⁹⁵

ChatGPT scours the internet for sources, keywords, etc. in order to generate what the user is asking it to create. One obvious problem with this, in the context of this article, is that the more it finds “limited liability corporation,” the more it will replicate that erroneous terminology found in blog posts, operating agreements, contracts, and

¹⁸⁹ *Id.*

¹⁹⁰ ChatGPT launched on March 14, 2023. See, Roman Yankovskiy, *Is Artificial Intelligence Capable of Writing a Law Journal Article?*, ZAKON [The Statute] (3), 126-133 (March 2023).

¹⁹¹ Screenshots on file with the authors.

¹⁹² *Id.* Notably, the list of key features indicates pass through taxation even though an LLC can elect out of this type of taxation.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 127.

pleadings, etc.¹⁹⁶ ChatGPT “cannot independently evaluate the accuracy of the data on which it has been trained,” therefore it is not likely it will always fix or avoid making the error. Had we not asked above the difference between the correct and incorrect terms above, ChatGPT would have failed to have fixed the problem.

Another problem is the currency of the data it is pulling from. ChatGPT 3.5 uses data that was collected in June 2021; ChatGPT 4.0 was trained on data collected in September 2021.¹⁹⁷ Claude.ai uses a dataset as of December 2022. Either way, text generators could take some time before this article and others like it can influence its responses.¹⁹⁸

There are other ways AI impacts word-usage. For example, think about autofill on products such as MS Word or Outlook. All Microsoft products will let you type the wrong term and there is no autofill after typing in “limited liability co.” And Grammarly allows the erroneous term to make it past its grammar check. But we are pleased to report that Apple messenger gets it right with its prompts on the iPhone. When one types in “limited liability co” it prompts to choose “companies” or “company” to complete the last word.

IV. LOOMING HARMS OF MISIDENTIFYING OR CONFLATING ENTITIES

A significant part of law school is learning to be precise. Most law students have strong language skills and often have strong vocabularies. But law school teaches us about precision with language and “terms of art.” We learn about defined terms in statutes and agreements that modify (or limit) what a word might otherwise mean. It takes some time to learn, or at least internalize, that a term might mean “this and only this” in certain legal contexts.

¹⁹⁶ Lawyers are exploring the best ways to use AI. *See generally*, Zach Warren, *Generative AI in law firms: For many, such technologies are still a great unknown*, REUTERS (May 23, 2023, 12:56PM), <https://www.reuters.com/legal/transactional/generative-ai-law-firms-many-such-technologies-are-still-great-unknown-2023-05-23/>; Ilona Logvinova, *Legal Innovation and generative AI: Lawyers emerging as ‘pilots,’ content creators, and legal designers*, MCKINSEY & CO. (May 11, 2023), <https://www.mckinsey.com/featured-insights/in-the-balance/legal-innovation-and-generative-ai-lawyer-s-emerging-as-pilots-content-creators-and-legal-designers>; However, caution is to be had. *See* articles regarding Steven A. Schwartz, a lawyer who let AI do his legal research and the cases it provided—which he used in his filed brief—were non-existent. And note that a Texas judge has banned legal filings that are drafted mostly by AI unless it has been checked for accuracy. *Judge Brantley Starr*, U.S. DIST. CT. N. DIST. OF TEXAS, <https://www.txnd.uscourts.gov/judge/judge-brantley-starr> (last visited July 13, 2023); Sara Merken, *Another US judge says lawyers must disclose AI use*, REUTERS (June 8, 2023, 6:35PM), <https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08/>.

¹⁹⁷ *Models*, OPENAI API, <https://platform.openai.com/docs/models/gpt-4> (last visited July 13, 2023).

¹⁹⁸ There are numerous other articles and blog posts that point out the misuse, many of which were written by Dean Fershée.

For example: when one hears about “renewable energy,” what it means to be renewable is not an especially challenging concept in the most basic sense. Most people would agree that wind, solar, and hydro power are renewable sources. Certainly, in seeking a comprehensive definition, it gets more challenging, but the basic concept it is likely easy for most folks to grasp. In the legal sense, though, our colloquial or conversational definitions are irrelevant.

For a renewable portfolio standard (RPS), which is a government-imposed renewable energy requirement, what counts as renewable is what the statute says counts as renewable. Therefore, certain types of what would typically be considered renewable power are, for statutory purposes, not. In Maine, for example, the current RPS counts only “incremental hydro power,” which was hydro power put in place after a certain date.

More dramatically, in West Virginia, their now-repealed, and fully voluntary, renewable “mandate” counted “clean coal” as renewable energy. By even the most generous of traditional definitions, coal is not renewable.¹⁹⁹ But for purposes of the statute, it was. In the legal world, words often have specific meanings, and those meanings matter.

Staying closer to the subject at hand, consider a 2023 California case, *CSHV 1999 Harrison, LLC v. County of Alameda*:

The tax advantages of “the LLC form of business is the ability, assuming proper organization, to avoid the double taxation of corporate income and shareholder dividends by having an eligible LLC elect to be treated as a partnership for federal tax purposes without being subject to as many restrictions as ‘subchapter S corporations.’”²⁰⁰ - Moreover, a ‘single-member’ LLC . . . has the option of electing either to be taxed as an association (i.e., a corporation) or, like a sole proprietorship, to be disregarded as an entity separate from its owner. 26 C.F.R. § 301.7701–3(a) (2003). If the single-member LLC elects to be taxed as a sole proprietorship, the LLC itself does not pay taxes and does not have to file a separate tax return. 26 C.F.R. 301.7701–2(a) (2003); Cal. Rev & Tax Code § 23038(b)(2)(B)(iii) Rather, the single member reports all LLC profits or losses on a personal tax return as if the business was a sole proprietorship.”²⁰¹

¹⁹⁹ *Coal Explained*, U.S. ENERGY INFO. ADMIN. (Oct. 19, 2022), <https://www.eia.gov/energyexplained/coal/#:~:text=Coal%20takes%20millions%20of%20years,millions%20of%20years%20to%20form.Coal%20is%20formed%20from%20dirt%20and%20rock%20layers%20covered%20by%20plants%20over%20millions%20of%20years.>

²⁰⁰ *CSHV 1999 Harrison, LLC v. County of Alameda*, No. A163369, 8 (Cal. Ct. App. May 31, 2023).

²⁰¹ *Id.* (Citations omitted.)

This description is not as precise as it should be. Here, it may not matter that the word “elect” is being used as a synonym for “choose.” But in tax law, especially in this context, “elect” means that a choice has been made. For instance, though, a choice could be made, but no action is needed to accept the default rule.

To clarify, a single-member LLC is, by default, taxed as an entity disregarded as separate from its owner (a sole proprietorship). Therefore, an individual reports their LLC income and expenses on their Form 1040 Schedule C. Similarly, by default, LLCs with more than one member are taxed pursuant to subchapter K as a partnership. Thus, under the default rules, two LLCs may pay income tax differently based on the ownership structure, even though for state-law purposes, each LLC is the same entity type.

Furthermore, despite the default rules, an LLC can (is allowed, but not required, to) affirmatively elect to be taxed as an S-Corporation, pursuant to Subchapter S, or a C-Corporation, pursuant to Subchapter C, rather than accept the default taxation position of being taxed pursuant to Subchapter K. To elect to be taxed under Subchapter S, the LLC must file IRS Form 2553. To elect to be taxed under Subchapter C, the LLC must complete IRS Form 8832. Note, again, that the IRS uses state entity types to describe tax classifications, which we do not like.

All of this is to say that precision matters for lawyers, and what may be acceptable language for laypeople, is often not acceptable for lawyers and judges. Further, the language that lawyers and judges use has a significant influence on how others speak. When lawyers and judges are careful, and specific, it increases the odds others will be, too.

V. SOLUTIONS

As shown *supra* in Part III.A.2, sometimes the judiciary gets it wrong and sometimes points out how the statute’s current language is erroneous. When this occurs, one hopes that the state legislature acts. Quite often this arises in the veil piercing context. For instance, in the *Kubican* case, the West Virginia Supreme Court used corporate veil piercing criteria in making its decision.²⁰² This ruling provided the impetus for the West Virginia legislature to enact a new law clarifying the liability of LLC members and managers.²⁰³

A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager nor for fines, fees or penalties individually assessed against another member or manager for acts unrelated to the business of the limited liability company. It is the intent and policy of the Legislature

²⁰² *Kubican supra* note 96.

²⁰³ W. VA. CODE § 31B-3-303(d) (2022).

to modify the applicability of the “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013) with respect to any claim against a limited liability company arising after the effective date of the reenactment of this section during the regular session of the Legislature, 2022.

This law clarifies that a lack of following operational formalities will not be grounds for imposing personal liability. Additionally, it outlines what will create liability for LLC members or managers.²⁰⁴

The judiciary can assist with correcting errors both within its community and more broadly across lawyers and their staffs. Judges have the power to tell plaintiffs that a request to “pierce the corporate veil” of an LLC is a failure to state a redressable claim. Additionally, judges could require that plaintiffs and defendants be properly identified, i.e., not permit an LLC to be called a “limited liability corporation.” In these cases, the courts could, and probably should, allow counsel to amend the complaint to get the language right. The more judges push back on erroneous language, the more chance we have that lawyers will stop making the error. But until there is a consequence for conflating LLCs and corporations (like going to the trouble to amend a complaint, refiling, and re-serving it), attorneys and courts will continue to get it wrong. That is why the fact that the USPTO requires an explanation in a further filing when someone lists their entity type erroneously is so important.

We are glad to say that some judges are helping the cause. The Honorable Aida M. Delgado-Colón, for example, has stressed that LLCs are not corporations and even required a party to refer to their legal entity correctly.²⁰⁵ Judge Delgado-Colón stated:

Pursuant to this Court’s *sua sponte* obligation to inquire into its own subject matter jurisdiction and noticing the unprecedented increase in foreclosure litigation in this District, the Court ordered plaintiff to

²⁰⁴ (1) A provision to that effect is contained in the articles of organization, and a member so liable has consented in writing to the adoption of the provision or to be bound by the provision; (2) The member against whom liability is asserted has personally guaranteed the liability or obligation of the limited liability company in writing; (3) There is any tax liability of the limited liability company, which the law of the state or of the United States imposes liability upon the member; (4) The member commits actual or constructive fraud which causes injury to an individual or entity. §31B-3-303(c)(1)-(4). The “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013) shall apply to a claim asserted against a limited liability company for the purpose of determining personal liability of all or specified members or managers only if (1) the company is not adequately capitalized for the reasonable risks of the corporate undertaking and (2) the company does not carry liability insurance coverage for the primary risks of the business, with minimum limits of \$100,000 liability insurance, or such higher amount as may be specifically required by law. W. VA. CODE § 31B-3-303(d) (2022).

²⁰⁵ REVERSE MORTGAGE FUNDING, LLC, PL., v. THE ESTATE OF ANGEL RAFAEL ANTONINI-NAZARIO, et al, Defendants., CV 16-3092 (ADC), 2020 WL 881019, at *1 (D.P.R. Feb. 20, 2020).

clarify whether it is a corporation or a limited liability company (“LLC”).²⁰⁶

The opinion continued:

Here, the Court cannot ascertain that diversity exists among the parties. Rule 11(b) of the Federal Rules of Civil Procedure holds attorneys responsible for “assur[ing] that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper purpose. Despite Rule 11’s mandate, the Court finds significant inconsistencies among plaintiff’s representations, which to this date remain unclear. As noted at ECF No. 53, plaintiff has repeatedly failed to explain why its alleged principal place of business is in New Jersey instead of Michigan. **To make matters worse, plaintiff now claims to be a “limited liability corporation” under Delaware law.**²⁰⁷

Because the court was “unable to determine that complete diversity exists between the parties,” the Court dismissed “without prejudice the amended complaint for lack of subject matter jurisdiction.”²⁰⁸

There are not nearly enough cases holding attorneys and parties accountable for LLC accuracy, but this is a nice start. It would be even more helpful if a court would lay out the state of veil piercing law between LLCs and corporations. They could explain that in certain circumstances, it is possible to ‘pierce the corporate veil’ to hold a shareholder personally liable for a corporation’s debt. A court is allowed to pierce a corporate veil when there is fraud or when the shareholder is deemed the “alter ego” of the corporation. Veil piercing applies to LLCs as well as corporations. Therefore, a court is allowed to pierce the veil of an LLC when there is fraud or when the member is the “alter ego” of the LLC. However, the evidence of what constitutes alter ego in the LLC setting will be different because LLCs and corporations are different entities with different obligations and procedures.

Human errors are one thing, but AI will be an increasing part of the problem and it needs to be part of the solution. AI needs to flag corporate references to LLCs as incorrect and take measures to use or suggest correct terms. MS Word and Grammarly could add “limited liability corporation” to their grammar checks and either flag “corporation” as being incorrect or autocorrect it when it follows “limited liability.” Numerous articles and posts can be found that misuse limited liability corporation and

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citations omitted.)

²⁰⁸ *Id.*

at the bottom say “powered by Grammarly.”²⁰⁹ This signals that if Grammarly would flag this as incorrect or fix it, we would have less erroneous term usage out there.

Along those lines, governmental agencies, law firms, and judges could program MS Word on all their in-house computers to autocorrect it. On a higher level, Westlaw and Lexis could and probably should yellow flag cases that misuse the terminology as they could be not simply misusing the term but could be erroneously applying the law.

Here are some concrete and easily implemented suggestions for those working with and writing about LLCs.²¹⁰ Think of it as an LLC checklist designed to help fix the use of erroneous terminology. *We could be heroes.*²¹¹

- Do a global search for “limited liability corporations.” Unless the context is related to the early days of corporations (and that will not be the case very often), a global change to “limited liability companies” is likely needed. Start here, because “corporations” in this phrase is almost always wrong.
- Consider (strongly) doing a global search for “corp” so you catch all versions of “corporation” and “corporate.” When talking about an LLC, that should probably be replaced with “company” or “entity” or something similar (e.g., “piercing the entity veil,” “the LLC’s entity structure”).
- Similarly, when talking about multiple business forms, do a “corp” search and choose “entity” as your modifier so it applies to corporations. LLCs, limited partnerships, etc. (e.g., “entity governance,” not “corporate governance”).
- Double check entity statutes to make sure the citation is to the right one. Too often LLC cases cite to a corporations statute (not the LLC statute) because the case they are citing was about a corporation.
- Finally, consider whether corporate law should be applied at all to LLCs in that circumstance. This goes more to substance than mechanics, but it is worth checking whether you are accepting an argument that need not, or should not, apply.

Ultimately, the internet needs to be fixed, too.²¹² Data that feeds processing tools like ChatGPT and others that entrepreneurs and attorneys may rely upon for document generation has to start using the correct terminology. Governmental agency websites need to purge places where mislabeling occurs and start using the proper term.

²⁰⁹ See e.g., Howard Jaros, *Full Time RV Living: Making Money While Enjoying the Lifestyle*, YOURFULLTIMERVIVING.COM (Nov. 23, 2022), <https://yourfulltimervliving.com/full-time-rv-living-making-money-while-enjoying-the-lifestyle/>; *How to Determine The Legal Structure of Your Business*, GRIND SUCCESS (July 2, 2023), <https://grindsuccess.com/business-legal-structure/>.

²¹⁰ This list is based on one from Dean Fershée’s blog post in 2018. https://lawprofessors.typepad.com/business_law/2018/05/an-llc-checklist-proposal-.html

²¹¹ DAVID BOWIE, *HEROES* (Heroes 1977).

²¹² We acknowledge this is a tall order, but we are looking at a small part of what needs to be fixed on the Internet.

The IRS can help here, too. Federal code provisions are not, at least in most cases, linked to any particular state law entity (under the check the box regime), so state entities should be recognized as state entities, and federal tax status should be noted with regard to federal tax status. If the IRS did so, it would be easier for people to understand the concept behind state entity status.²¹³ Thus, it would be more accurate to say that we have, for example, C Tax corporations, S Tax LLCs, and K Tax LLCs. Using such language would tell us federal tax status, as well as the state-entity type, separating the tax and entity concepts. We would likely see some doctrinal improvements if we used language that makes clear that tax treatment and entity type are separate issues in today's federal tax world, too.

The goal is not to abolish corporate tax. Rather, the proposal is to have entities choose from options that are linked the Internal Revenue Code, and not to a particular entity. Thus, we would have (1) entity taxation, called C Tax, where an entity chooses to pay tax at the entity level, which would be Subchapter C taxation; (2) pass-through taxation, called K Tax, which is what we usually think of as partnership tax but is simply taxation pursuant to Subchapter K; and (3) we get rid of S corps, which can now be LLCs, anyway, which would allow an entity to choose to be taxed pursuant to Subchapter S.

Furthermore, states should ensure that their LLC statutes either stand alone or are embodied within a "Corporations and Unincorporated Associations Code"²¹⁴ or a "Corporations and Other Companies Code"²¹⁵ and not within a "Corporations Code." As mentioned *supra*, California is one of many violators here and should correct the title of its code to be more general or inclusive of both Corporations *and* Unincorporated business entities. The less that people see the word 'corporations' around LLCs the better.

It would make a lot more sense if the Corporations Code were called what it is: the Business Entities Code. As currently structured, LLCs and partnerships are arguably types of corporations under California law. One could argue the headings don't change

²¹³ This problem is often exacerbated in the public company space. Far too often, people think a "C Corp" always means "publicly traded corporation," but that's not right. In most instances, a publicly traded corporation is a "C Corp," but not all C Corps are publicly traded.

²¹⁴ Numerous states title their Business Codes more responsibly. *See e.g.*, PA Title 15 Corporations and Unincorporated Associations Code which includes Chapter 88, the Pennsylvania Uniform Limited Liability Company Act of 2016; Alabama's Business and Nonprofit Entity Code contains distinct chapters for different entities such as corporations (Chapter 2) and LLCs (Chapter 5/5A); Washington D.C.'s Business Organizations Code (Title 29) also contains distinct chapters for entities such as corporations (Chapter 3) and LLCs (Chapter 8).

²¹⁵ *See e.g.*, NEBRASKA REV. STATUTES Chapter 21.

the meaning or intent of the laws.²¹⁶ The problem with that is that the code text says otherwise: “This act shall be known as the Corporations Code.”²¹⁷

To reinforce that notion, the Code Commission notes from the 2014 main volume explain:

This code was listed in the appendices of Code Commission reports showing code classification as the “Corporations, Partnerships, and Associations Code.” The 14 syllables of that title appear to make it impractical, but no shorter phrase indicative of the full subject-scope has been found. Therefore, resort has been had to the rhetorical device of synecdoche, and the entire code designated by the name of longest part.

Still, even if it were accurate to say LLCs and partnerships are “types” of corporations under the California code (and we’ll never agree to that), one thing is clear: an LLC is a limited liability company, which is, at a minimum, a specific type of “corporation” under California law. To these authors, “14 syllables” does not seem “impractical,” where the cost is imprecision. “Business Entities,” “Entities,” or “Associations” Code would all be short, and more accurate, options.

Also, while we are at it, let’s request states like Arizona, New Hampshire, and Washington to fix the way their business codes are structured, as well. In all three the LLC Act is within the Partnerships title.²¹⁸ In New Jersey, the Revised Uniform Limited Liability Company Act is housed within Title 42 – Partnership and Partnership Associations.²¹⁹ LLCs are not Partnerships OR Partnership Associations!

Finally, states can fix problems by updating their statutes to make their standards clear. As discussed *supra*, Minnesota law at one time used a corporate veil piercing standard for LLCs that used a lack of corporate formalities as one factor that would support piercing. The state LLC statute, however, did not require LLCs to follow the same formalities as corporations. The legislature fixed that problem by expressly excluding corporate formalities as a reason for LLC veil piercing. Minnesota law now provides:

Subd. 2. Effect of lack of formalities. The failure of a limited liability company to observe formalities relating exclusively to the management

²¹⁶ See CAL. CORP. CODE § 6 (West) (“Title, division, part, chapter, article, and section headings contained herein do not in any manner affect the scope, meaning, or intent of the provisions of this code.”).

²¹⁷ CAL. CORP. CODE § 1 (West).

²¹⁸ Arizona Title 29 Partnerships; Chapter 7 is where the Arizona Limited Liability Company Act is housed; New Hampshire Title XXVIII Partnerships, Chapter 304-C New Hampshire Revised Limited Liability Company Act; Washington Title 25 Partnerships/Chapter 25.15 LLC Act

²¹⁹ N.J. STAT. REV. Title 42/Chapter 2C LLC Act

of its internal affairs is not a ground for imposing liability on the members, managers, or governors for the debts, obligations, or other liabilities of the company.

Subd. 3. Piercing the veil. Except as relates to the failure of a limited liability company to observe any formalities relating exclusively to the management of its internal affairs, the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.²²⁰

In an ideal world, legislatures would address such issues before courts need to address them, but at least Minnesota acted to solve the problem directly and clearly. Other states should follow suit and do so sooner rather than later.

CONCLUSION

People who train lawyers and professionals who work with LLCs, such as law and business professors, really need to get this right.²²¹ Precision is an imperative for lawyers. We have an ethical responsibility in serving our clients, and this includes duties of competence²²² and diligence.²²³ Being accurate often touches both of these obligations, and we can be precise without being rigid.

In a world that demands, and correctly, that lawyers and courts use less legalese and more plain language, our calls for precision may seem “old school.” We don’t see it that way. In fact, being precise is not the same as being formalistic. In fact, it is likely that a pursuit of formality, as opposed to precision, has played a role in the misnaming of entities and veil piercing doctrine. Blindly repeating corporate law cases and corporate law language in the LLC context is inhibiting progress and creating unnecessary complexity.

No matter who you are—practicing lawyer, judge, clerk, law student, law professor, legislator, administrative agency employee, media, other professionals that touch the legal field—we have given you a roadmap to fixing this issue.

²²⁰ MINN. STAT. ANN. § 322C.0304 (West).

²²¹ We are doing our part, but we need help emphasizing the error and importance in the classroom. And it works! For example, one of Prof. Prince’s (now former) students reported that during his internship he noted that all of the firm templates for LLC documents used the wrong term. He took the initiative to alert the firm partner and fixed every one of the templates. He ended up being hired by the firm after graduation.

²²² Model Rules of Professional Conduct, Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”)

²²³ Model Rules of Professional Conduct, Rule 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”)

Business law is complex, so getting the labels right is especially important. A little vigilance will go a long way. And as the S.O.S. Band said in the 1980s, *[t]ake your time do it right*.²²⁴ That's all we ask.

²²⁴ S.O.S. BAND, TAKE YOUR TIME (DO IT RIGHT), (S.O.S. 1980).