Three Suggestions for the Texas Limited Liability Company Law

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A few years ago, I decided to teach business entity law primarily from the Texas Business Organizations Code (the “TBOC”). The Code draws heavily from the uniform acts with respect to corporations and partnerships, especially for its operative language, so students would in substance be learning law applicable in most states. But I wanted students to realize that no uniform act is ever passed as drafted. Local color enlivens local law, and all law is in a sense local.

The TBOC provisions applicable to limited liability companies, however, were drafted without the benefit of a uniform act. The Texas LLC Act was passed before the Uniform Limited Liability Company Act existed. But the LLC code was not drafted "freehand." Many of the Texas provisions resemble code applicable to corporations or limited partnerships. Others have less precedent. What I discovered, however, is that the LLC code contains some provisions that are very difficult to explain to students (well, and also to myself). In some cases the borrowed corporate or partnership provision comes with defects that are replicated in the limited liability code, and in some cases the corporate or partnership

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1 The corporate provisions obviously reflect the influence of the Revised Model Business Corporations Act (1984) and some amendments made since 1984. The general partnership and limited partnership provisions obviously reflect those of the Revised Uniform Partnership Act (1997) and Revised Uniform Limited Partnership Act (1976 & 1985), respectively, and some subsequent amendments to those acts.
3 I bring Delaware and other law into the class as needed for a complete understanding.
provisions are applied without considering the LLC's different nature. Some provisions I am just at a loss to explain.

In this paper, I describe what I believe are the three most inexplicable Texas LLC laws. The first (described in Part I) is the provision purporting to address resolution of managers', managing members', and officers' conflicts of interest. This statute is drawn to mimic exactly a provision applicable to corporations. But the statute actually contains no language addressing conflicts of interest! The second statute (in Part II) addresses agency and the LLC. This provision was taken from the partnership code but adapted to the LLC in a manner I find befuddling. Read literally, it abolishes the common law of agency as applied to agents of LLCs. The third provision (Part III) is a bit of corporate code addressing veil-piercing that does not exist in the LLC code but is being applied to LLCs by the courts as if it did. It is difficult to explain why this provision should be imported, and the code forbids it.

Each section of this paper ends with a plea to the legislature to change the provisions discussed here. I suggest ways the legislature might fix the first two; the last I leave to our representatives. If the legislature will take me up on these suggestions, I will be able to spend more class time on other equally pressing legal issues and will spend less time trying to compensate with long explanations for what are probably primarily drafting failures.

I. Conflicting Transactions Involving Governing Persons or Officers: A Drafting Error that Guts the Statute

A statute titled "Contracts or Transactions Involving Interested Governing Persons or Officers" appears at TBOC section 101.255. Despite its title, the statute's plain language actually does not address conflicted transactions at all. In fact, it addresses everything about conflicted transactions except the transactions themselves. The section should be amended as soon as possible.
The full section reads as follows:

(a) This section applies only to a contract or transaction between a limited liability company and:

(1) one or more of the company's governing persons or officers; or

(2) an entity or other organization in which one or more of the company's governing persons or officers:

   (A) is a managerial official; or

   (B) has a financial interest.

(b) An otherwise valid contract or transaction described by Subsection (a) is valid notwithstanding that the governing person or officer having the relationship or interest described by Subsection (a) is present at or participates in the meeting of the governing authority, or of a committee of the governing authority, that authorizes the contract or transaction or votes or signs, in the person's capacity as a governing person or committee member, a written consent of governing persons or committee members to authorize the contract or transaction, if:

(1) the material facts as to the relationship or interest described by Subsection (a) and as to the contract or transaction are disclosed to or known by:

   (A) the company's governing authority or a committee of the governing authority and the governing authority or committee in good faith authorizes the contract or transaction by the approval of the majority of the disinterested governing persons or committee members, regardless of whether the disinterested governing persons or committee members constitute a quorum; or

   (B) the members of the company, and the members in good faith approve the contract or transaction by vote of the members; or

(2) the contract or transaction is fair to the company when the contract or transaction is authorized, approved, or ratified by the governing authority, a committee of the governing authority, or the members of the company.
(c) Common or interested governing persons of a limited liability company may be included in
determining the presence of a quorum at a meeting of the company's governing authority or of a
committee of the governing authority that authorizes the contract or transaction.5

This section has a long history. The LLC provision is modeled on a similar provision in the
corporate code (that I have commented on elsewhere6). Understanding it requires knowledge of the state
of the common law prior to the statute's passage. Under the common law, a transaction involving a
conflict of interest between a corporation and its director or officer was voidable by a shareholder.7 The
interested director or officer was held unable to act for the corporation.8 The remainder of the board
could act for the corporation,9 the court reasoned, but because the interested director and the rest of the
board were so closely related, the courts would subject the transaction to review for "inherent fairness" to
ensure that the interested director took no "undue advantage."10 The interested director or officer had the
burden to show in court that the transaction was fair.11 This remained the state of the law when the
interested director statute was passed in Texas in 1985.12

When first passed in 1985, the corporate provision was written in the style of and with language
taken from the Delaware corporate code.13 The substantive language provided, "No contract or
transaction between a corporation and one or more of its directors or officers ... shall be void or voidable
solely for this reason ... if" certain corporate procedures are followed and those procedures meet certain

6 Val D. Ricks, Texas' So-Called "Interested Directed" Statute, 50 South Texas L. Rev. 129 (2008). The corporation
provision is found at TBOC § 21.418 (2010).
7 Tenison v. Patton, 67 S.W. 92 (Tex. 1902); see also Ricks, supra note 6, at 154-57 (reporting the state of the law
up until the passage of the first interested director statute in 1985).
8 Tenison, 67 S.W. at 95.
9 Id.
10 Id. at 95-96.
11 Id. at 96.
12 See Ricks, supra note 6, at 137 n.33 & 154-57.
13 Ricks, supra note 6, at 136 (the original statute passed in Texas had language nearly identical to the Delaware
statute).
substantive standards.\textsuperscript{14} Clearly, this statute aimed to define the effect of the conflict of interest itself. If the procedures and standards are met, then the conflict does not render the contract or transaction void or voidable. Delaware's statute still reads this way.\textsuperscript{15}

After passage of the Delaware and Texas statutes, however, courts in Delaware construed this language so that, even if the procedures and standards were met, Delaware courts would still review the transaction in some limited respect.\textsuperscript{16} Thus, Delaware courts were reviewing not only whether the procedures and standards were met, but the transaction itself. The statute was not the litigation-stopper that the some in Texas hoped it would be.

The response of the Texas legislature was to modify the statute. The hope was to strengthen it. Whereas the original statute said that "[n]o contract or transaction [with a conflict of interest] shall be void or voidable solely for this reason," the new statute says, "An otherwise valid contract or transaction [with a conflict of interest] shall be valid notwithstanding that ...."\textsuperscript{17} This sounds like a stronger approach if one stops reading there. But the statute fumbles and omits the most important part. Whereas the original statute said "void or voidable solely for this reason" (emphasis added), meaning by reason of the conflict, the new statute proclaims such a contract or transaction "valid notwithstanding that the director or officer ... is present at or participates in the meeting of the board of directors, ... or votes ...."\textsuperscript{18} Nowhere does the statute say that the contract or transaction is valid notwithstanding the conflict itself. In fact, the conflict is not mentioned in the operative language of the statute. So the plainly restrictive clause "valid notwithstanding that" inoculates the contract or transaction against the presence or participation of

\textsuperscript{15} Del. Gen. Corp. Law § 144.
\textsuperscript{16} These developments in Delaware corporate law are discussed in detail at Ricks, supra note 6, at 136-40.
\textsuperscript{17} Texas Bus. Corp. Act Ann. art. 2.35-1 (Vernon 2003).
\textsuperscript{18} TBOC § 21.418(b).
the conflicted director at a board meeting.\textsuperscript{19} And the clause saves the transaction from the actual voting of
the conflicted director.\textsuperscript{20} But against the conflict itself, the statute does nothing. Because the statute no
longer changes the effect of the common law on an interested transaction, the common law applicable to
the transaction revives.\textsuperscript{21} Under the common law, such transactions are once again voidable, and the
interested director has the burden of proving in court that they are fair.\textsuperscript{22}

In this respect, the Texas statute stands alone. The prior statute, and the statutes of all 49 other
states, limit the effect of the conflict.\textsuperscript{23} Only Texas omits a reference to the conflict. So while the statute
protects against the interested director's comparatively trivial participation at a meeting at which the
transaction is approved, or the interested director's voting for the transaction, these gnats are spit out
while the camel of the conflict itself is swallowed whole. And no one wants to swallow a camel.\textsuperscript{24}

\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} When a statute that supersedes the common law is repealed and not replaced, it is as if the statute never existed;
the common law again applies. National Carloading Corp. v. Phoenix-El Paso Exp., 176 S.W.2d 564, 570 (Tx.
1944); Galveston, H. & H.R. Co. v. Anderson, 229 S.W. 998, 1001-02 (Tx.Civ.App. 1920); see Dickson v. Navarro
County Levee Imp. Dist. No. 3, 139 S.W.2d 257, 259 (Tx. 1940); Phil H. Pierce Co. v. Watkins, 263 S.W. 905, 907
(Tx. 1924); Collins v. Warren, 63 Tex. 311 (1885); Goodrich v. Wallis, 143 S.W. 285, 286 (Tx. Civ. App. 1911).
Or, as phrased in other states' decisions, repeal of the statute revives the common law that preceded it. \textit{See}
Kelly v. Strange, 14 F.Cas. 273 (D.C.N.C. 1869); Wood v. Woods, 184 Cal.Rptr. 471, 477 (Cal.App. 1982); State v. Daley,
29 Conn. 272 (1860); Makin v. Mack, 336 A.2d 230, 234 (Del.Ch. 1975); Baum v. Thoms, 50 N.E. 357, 360 (Ind.
1898) (holding so even though a repeal of a statute did not revive a prior statute); State v. Buck, 275 N.W.2d 194,
197 (Iowa 1979); Harris v. State, 509 A.2d 120, 124 (Md. 1986); People v. Reeves, 528 N.W.2d 160, 164 (Mich.
\textsuperscript{22} Tenison v. Patton, 67 S.W. 92 (Tex. 1902); \textit{see} Ricks, \textit{supra} note 6, at 137 n.33 & 154-57.
\textsuperscript{23} \textit{See} Ricks, \textit{supra} note 6, at 134 & 134 nn. 17-21.
\textsuperscript{24} Interestingly, and oddly, the statute was amended in 2009 to refer back to subsection (a) without fixing the
problem. Prior to 2009, the statute said, "An otherwise valid contract or transaction is valid notwithstanding that ...."
TBOC § 21.418(b) (2007). As amended, the statute says, "An otherwise valid contract or transaction described by
Subsection (a) is valid notwithstanding that ...." TBOC § 21.418 (2009). The change was pointless. No one could
have doubted that subsection (b) in 2007 referred to the contract described in subsection (a). But the change fixed
nothing. The otherwise valid contract or transaction described in subsection (a) is still not made valid
notwithstanding the conflict itself; rather, it is only made valid notwithstanding the comparatively trivial presence
or participation or voting of the interested director or officer.
The corporate provision was copied into the LLC code, and changes made to the corporate provision over the years have likewise been copied into the LLC code.25 But the problem has not been fixed in either, so as the code stands, a transaction involving a conflict between a LLC and its manager, officer, or a governing member is voidable unless proved fair, and the interested manager, officer, or member has the burden of proving fairness.

This problem is so easily fixed that letting it linger is inexcusable. The only change that needs to occur is that the phrase "the conflict described in subsection (a) or" be added after the word notwithstanding in subsection (b). Until then, the plain language of the statute renders the statute's title misleading and offers no help to business people seeking to avoid litigation over conflicted transactions. Delaware's statute would be more helpful.

II. Texas LLCs and the New Theory of Agency

Many years ago, the committee that drafts code for Texas business organizations provided the legislature with a statute that addressed the agents of limited liability companies (LLCs).26 This was a curious provision. No other business entity code addresses agents. In 2003, the committee that drafted the Texas Business Organizations Code provided the legislature with an updated statute.27 The legislature passed the statute as written.28 The code still contains this provision.

26 See Charles Szalkowski, Chairman's Letter, 28-JUN Bull. Bus. L. Sec. St. B. Tex. 1 (1991) (explaining that H.B. 278, part of which became the Texas Limited Liability Company Act; see Acts 1991, 72nd Leg., ch. 901, § 46, eff. Aug. 26, 1991; was drafted by the Business Law Section's Corporation Law Committee); Bill Analysis of H.B. 278 of the 72nd Leg., § 46 (1991) ("This article ... states a member is not a proper party to a proceeding by or against Limited Liability Company").
I was surprised to find this provision. It is not needed, and courts seem to have ignored it. To date, the common law of agency has provided that LLCs could be either principal or agent, the same as every other business entity.29 A simple statement in a statute, saying this result should hold, might have codified the common law. But what was passed does not codify the common law but instead injects into agency law otherwise applicable to LLCs new concepts and rules different than the rules applicable to agents of other business structures. The statute also injects uncertainty into the law.

Try as I might, I cannot think of a good reason for any of these provisions. I recommend that the legislature amend the statute to omit references to common law agents. The TBOC says in another provision that "the powers of a [LLC] include the power to: ... elect or appoint ... agents of the entity."30 That provision is sufficient.

This Part II first describes the application of the common law of agency. Possible effects of the statute are then examined. In short, the statute provides the following: (1) the statute abrogates limitations on actual and apparent authority; under the code, all agents of LLCs have as much authority as managers31; (2) a theory of liability in addition to actual and apparent authority is applied to LLCs, the contours of which are uncertain and potentially harmful32; and (3) apparent authority is no longer applicable to agents of LLCs.33 I conclude with arguments for the recommended amendment.

A. The Common Law Applies to Texas LLCs, or Should Apply

30 TBOC § 2.101(14); see also TBOC § 2.101(16) (confirming a power to indemnify "agents of the entity").
31 See infra Part II.B.1.
32 See infra Part II.B.2.
33 See infra Part II.B.3.
The Texas LLC is a principal or agent under the common law, just as is any other principal or agent, and just as any other business entity or individual person. The common law of agency is universally applied and, with respect to its principles, uncontroversial. An agency relationship exists when one agrees with another that he will act for the other and subject to the other's control.

With respect to contractual liability, "[a]bsent actual or apparent authority, an agent cannot bind a principal." Actual authority depends on a principal's communication to the agent. Actual authority means authority "intentionally conferred by the principal upon the agent, or such as the principal either intentionally allows the agent to believe that he possessed, or by want of ordinary care on the part of the principal, allows the agent to so believe."

Apparent authority, on the other hand, is not actual authority but is a power to alter the legal relations of the principal. In Texas, apparent authority is related to estoppel. It arises from a principal's

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34 See Aqueduct, L.L.C. v. McElhenie, 116 S.W.3d 438, 441-42 (Tex. App. 2003) (holding on common law grounds that the LLC was the principle of an agent with implied actual authority), Plantation Production Properties, L.L.C. v. Meeks, 2004 WL 2005445, Memorandum Opinion **2-4 (Sept. 8, 2004) (employing common law agency principles to conclude that, though the purported agent lacked actual and apparent authority, the LLC had ratified the agency and was therefore bound by the contract). See also Bion Const., Inc. v. Grande Valley Homes, LLC, 2009 WL 4669844, Memorandum Opinion **3-4 (Dec. 9, 2009) (after passages of the TBOC but relying only on the common law of agency to resolve whether and LLC had conferred authority on an agent).


37 Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007); see Thompson v. Schmitt, 274 S.W. 554, 557 (Tex. 1925) ("One who acts in my behalf, for my advantage, by my authority, is my agent.").


39 Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007). Despite repeated assertions of apparent authority's ties to estoppel, the standard formulations do not contain a requirement that the third party suffer a detriment. See, e.g., Gaines, 235 S.W.3d at 182. The omission of this element leaves the true theory in some doubt. It is based on the
manifestation of intent to a third party that another, the apparent agent, is authorized to represent the principal: “either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise.” The third person must actually believe, reasonably, as a consequence of the principal's manifestation, that the "apparent agent" was authorized. Thus, evidence of the principal's conduct, not the agent's, establishes apparent authority. Declarations of the alleged agent, without more, do not establish apparent agency or the scope of the apparent agent's authority. Finally, the principal must have full knowledge of all material facts regarding its manifestation.

Both doctrines contain their own limitations. Both kinds of authority are limited by the content of the principal's manifestations. Actual authority is limited to that which is conferred on the agent by the principal. Apparent authority is limited to "the scope of authority that is apparently authorized."

These principles have always been applied to Texas LLCs, which courts claim can serve as agents or principals. In *Aquaduct, L.L.C. v. McElhenie* (2003), the McElhenies signed a note in favor of a

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46 Insurance Co. of North America v. Morris, 981 S.W.2d 667, 672 (Tex. 1998).
The vendor later transferred the note to Aquaduct L.L.C. Aquaduct appointed Gibraltar Mortgage as its servicing agent for the note. Later, when the McElhenies refinanced, they sent Gibraltar a partial pay-off of the note. Gibraltar registered the pay-off as a deposit to the LLC's account but never paid the LLC. Later, when Aquaduct sued on the note, the McElhenies claimed Aquaduct had been paid. The issue was whether Gibraltar as servicing agent was authorized to receive a pay-off of the loan.

The court treated the issue as a routine agency case. Citing the common law of agency, the court asked whether Gibraltar had actual or apparent authority to accept the partial pay-off on Aquaduct's behalf. After reviewing the evidence, the court affirmed that Gibraltar had implied actual authority to accept the payment. The court mentioned nothing unique about Aquaduct's status as a LLC. The court treated it as it would any other principal, whether business entity or natural person. No mention was made of the LLC's nature, and nothing appeared to depend on it.

In Beckham Resources, Inc. v. Mantle Resources, L.L.C. (2010), Beckham claimed that Mantle was Beckham's agent and had breached fiduciary duties. The court relied on the common law test for agency to determine that Mantle was not Beckham's agent: "[W]e fail to see how either of these facts prove that Mantle was transacting business for Beckham or that Beckham was exercising control over or directing the actions of Mantle, which is the fundamental test of agency."

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48 Id. at 440.
49 Id. at 441.
50 Id.
51 Id.
52 Id. at 414-42.
53 Id. at 440-43.
55 Id. at *10.
56 Id. at *12; see also id. at *10-11.
The same common law of agency that applies to corporations applies to LLCs.\textsuperscript{57} In \textit{In re Credit Suisse First Boston Mortgage Capital, L.L.C.} (2008),\textsuperscript{58} the court had to decide whether a jury trial waiver extended to a nonsignatory "on the basis of agency principles."\textsuperscript{59} Both the alleged principal and the alleged agent in the case were LLCs. Citing the practical reality that "corporations can act only through [their] agents and employees,"\textsuperscript{60} the court examined only the most common of agency principles: actual and apparent authority.\textsuperscript{61} The court even referred to the two LLCs as "two corporations."\textsuperscript{62} Clearly the court understood that the two types of entities are treated identically for purposes of agency issues.

In \textit{Preferred Fuel Distributors v. Amidhara, LLC, et al.} (2010),\textsuperscript{63} the plaintiff complained that agents of Panamerican, LLC, had committed fraud.\textsuperscript{64} The court found evidence of a false statement made by Panamerican, LLC's president with respect to a transaction later memorialized in a contract that Panamerican's president signed for the LLC. The court did not discuss at length whether the LLC was responsible for the president's statements. Instead, it cited a few cases involving corporations that indicated the common law of agency would apply.\textsuperscript{65} More directly, the court included in a parenthetical after one of those cases that "a principal may be vicariously liable for the fraudulent conduct of its agent if the agent acted with actual or apparent authority."\textsuperscript{66} Apparently on this citation alone, the court reversed a summary judgment for Panamerican, LLC, and held it subject to trial along with its agent.\textsuperscript{67}

\textsuperscript{58} \textit{In re Credit Suisse First Boston Mortgage Capital, L.L.C.}, 273 S.W.3d 843 (Tex. App. 2008).
\textsuperscript{59} \textit{Id.} at 845.
\textsuperscript{60} \textit{Id.} at 849 (citing GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1998)).
\textsuperscript{61} \textit{Credit Suisse First Boston Mortgage Capital, L.L.C.}, 273 S.W.3d at 850.
\textsuperscript{62} \textit{Id.}; see also Sanchez v. Mulvaney, 274 S.W.3d 708, 712 (Tex. App. 2008) (opining in a case dealing only with an LLC that a "corporation's agent is personally liable for his own fraudulent or tortious conduct, even when acting within the course and scope of his employment").
\textsuperscript{64} \textit{Id.} at *6.
\textsuperscript{65} \textit{Id.} at *7 (citing NationsBank v. Dilling, 922 S.W.2d 950 (Tex.1996), and Kingston v. Helm, 82 S.W.3d 755 (Tex. App. 2002)).
\textsuperscript{66} \textit{Id.} at *7 (citing NationsBank v. Dilling, 922 S.W.2d 950, 952-53 (Tex. 1996)).
\textsuperscript{67} \textit{Id.} at *9.
The Texas common law of agency has thus been applied to LLCs as it has to other business entities and also to individuals. Nothing unique about the LLC has been recognized by Texas courts as calling for any special treatment. Yet this is what the language of the statute demands.

B. How the Statute Changes the Common Law

The statute now in the TBOC addressing agents of the LLC changes the common law. The statute reads as follows:

(a) Except as provided by this title and Title 1, each governing person of a limited liability company and each officer or agent of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business.

(b) An act committed by an agent of a limited liability company described by Subsection (a) for the purpose of apparently carrying out the ordinary course of business of the company, including the execution of an instrument, document, mortgage, or conveyance in the name of the company, binds the company unless:

(1) the agent does not have actual authority to act for the company; and
(2) the person with whom the agent is dealing has knowledge of the agent's lack of actual authority.
(c) An act committed by an agent of a limited liability company described by Subsection (a) that is not apparently for carrying out the ordinary course of business of the company binds the company only if the act is authorized in accordance with this title.68

The difficulties the statute creates are catalogued in the sections that follow, which describe each subsection specifically.

1. Subsection (a): Delimiting Authority

The statute's message for agents in subsection (a) can be clarified if the language about only governing persons and officers of LLCs is discarded. Then section (a) of the statute reads as follows:

(a) ... [E]ach ... agent of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business.

What could be the purpose of such a provision? The language of the statute broadens the scope of each agent's authority. Under the common law, an agent vested with actual authority by an LLC's governing authority is an agent for purposes of carrying out that actual authority. The agent's authority is limited to what is authorized.69 Thus, the LLC's real estate agent is empowered to look for property for the LLC, but not to sign a contract, execute a mortgage, or direct the employees. The LLC's lawyer is also supposed to have a limited role. So are the common employees. They may even drive the pizza

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68 TBOC § 101.254.
69 Insurance Co. of North America v. Morris, 981 S.W.2d 667, 672 (Tex. 1998).
delivery vehicle and be servants (which are a subset of agents\(^{70}\)) able to bind the LLC to tort liability. No one with common sense would suppose such persons to have broad authority within the business.

But the statute describes their authority much more broadly. According to the statute's language, each such agent is "an agent of the company for purposes of carrying out the company's business." "[T]he company's business" is as broad as the business is broad. Agency limited only by that purpose includes everything the LLC does within the scope of its general powers\(^{71}\) and the purpose designated in its certificate of formation,\(^{72}\) which could include "any lawful purpose" for an LLC.\(^{73}\) If this is the meaning of the clause, then appointing an agent is a dangerous act. Giving any agent actual authority makes them the LLC's agent for all of the company's business, just as any manager! Why else would the statute use the same language to describe both the authority of managers and the authority of all other agents? Creating apparent authority is even more hazardous. A person does not even need to be an agent to carry

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\(^{70}\) See American Nat. Ins. Co. v. Denke, 95 S.W.2d 370, 372-73 (Tex. 1936) (adopting as law the following language from the Comment (a) to Section 250 of the Restatement of the Law of Agency: "It is only when to the relationship of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relationship of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor"); Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 134 (Tex. App. 1971) (same as Denke), writ refused n.r.e. (Dec 15, 1971); Graham v. McCord, 384 S.W.2d 897, 898-99 (Tex. App. 1964) (same as Denke); Sartain v. Southern Nat. Life Ins. Co., 364 S.W.2d 245, 250 (Tex. App. 1963) (same as Denke); Walter Irvin, Inc. v. Vogel, 158 S.W.2d 93, 96-97 (Tex. App. 1942) ("The true test in all of the cases on this question seems to be that in order to hold the principal liable it is not sufficient that he be interested only in the ultimate results to be accomplished by his representative, but he must also have the right to control the physical details as to the manner of the performance of the work."); American Nat. Ins. Co. v. Kennedy, 101 S.W.2d 825, 827-28 (Tex. App. 1937) (same as Denke). In other words, a servant is an agent subject also to the principal's control with regard to the physical details of the manner of performance. But see Ackley v. State, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980) (stating in dicta that an agent is employed for contractual dealings but a servant is not, and generally treating them as different categories). Ackley cited as authority for this distinction Gibson v. Gillette Motor Transport, 138 S.W.2d 293, 294 (Tex. App. 1940). Gibson does not make an explicit distinction between agent and servant. Ackley was apparently trying to make sense of the following two sentences from Gibson: "There was no evidence to show that Miller was an agent. The evidence does show that Miller had no actual authority. A servant needs no actual authority to bind its master to tort liability, however. There is also an old line of cases regarding workers' compensation that in defining independent contractor talks in dicta as if principal and agent and master and servant are separate categories. Century Indem. Co. v. Carnes, 138 S.W.2d 555, 556 (Tex. App. 1940), is typical.

\(^{71}\) See TBOC § 2.101.

\(^{72}\) See TBOC § 3.005(a)(3).

\(^{73}\) Id.
apparent authority. Thus, the statute may have the effect of making someone who would otherwise not be an agent at all an agent for all of the LLC's business!

This would be an unfortunate effect, but that in fact appears to be the language's meaning. The language is borrowed from the general partnership code, which has long provided that "[e]ach partner is an agent of the partnership for the purpose of its business." With regard to a general partner, such a provision is justified in part because "[e]ach partner has equal rights in the management and conduct of the business of a partnership." Each partner is thus a principal in the business—a manager. That is why each general partner is appropriately designated by the code as a "governing person." A general partner is also an owner of the general partnership. As owner, principal, and manager, a general partner is a general agent for purposes of the partnership’s business—in fact, under agency principles, the general partner has power to designate herself as such. Thus, the language in the partnership code correctly designates each partner "an agent of the partnership for the purpose of its business." This language means that, "[a]s a general rule, each partner ... is empowered to bind the partnership in the normal conduct of its business." This conclusion follows from the partner's position as owner and manager of the general partnership. This result is consistent with the common law of agency.

In the LLC context, the "purpose of its business" language has been construed to mean something similar to its meaning in the partnership code with respect to a manager of a LLC. In EZ Auto, L.L.C. v.

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74 A person with apparent authority need not be an agent because nothing in the doctrine of apparent authority requires that the so-called "apparent agent" act on the principal's behalf and subject to its control.
75 TBOC § 152.301; see, e.g., Vernon's Ann.Texas Civ.St. Art. 6132b, § 9 (1962); see also Uniform Partnership Act § 9 (1914) ("Every partner is an agent of the partnership for the purpose of its business.").
76 TBOC § 152.203(a).
77 TBOC § 1.002(35)(A) & (37).
78 TBOC § 152.051(b).
79 TBOC § 152.301.
80 Long v. Lopez, 115 S.W.3d 221, 226 (Tex. App. 2003) (citing Texas Revised Uniform Partnership Act Art. 6132b-3.02(a)); see also Hawthorne Townhomes, L.P., 282 S.W.3d 131, 139 (Tex. App. 2009) (finding on this same language that the general partner of a limited partnership was the agent of the partners).
81 Cook v. Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d 751, 757-58 (Tex. 1976) (resting on both the statutory language and the common law to determine that "[t]he extent of authority of a partner is determined essentially by the same principles as those measuring the scope of the authority of an agent").
**H.M. Jr. Auto Sales**, the initial manager of EZ Auto, Marks, bought four cars from H.M. Auto Sales (H.M.). When the draft written to pay for the third car was returned unpaid, Marks explained that EZ was having trouble with its bank account and offered a personal check. Marks also paid for the fourth vehicle with a personal check, essentially a loan by Marks to EZ. The title to this fourth vehicle was transferred to EZ, and later EZ sold the vehicle to a third party. After Marks's last check was returned unpaid for insufficient funds, H.M. sued EZ for the price of the car. At issue was whether Marks was the agent of EZ.

The court initially cited common law principles of actual and apparent authority. The rule it followed, however, was the predecessor to TBOC § 101.254, which said that "each manager of a limited liability company whose management is vested in managers is an agent of the limited liability company for purposes of its business." The court noted also that EZ's articles of organization provided that "any one manager may act on behalf of' EZ." On these grounds, the court concluded that Marks as manager had actual authority. Either the statute, on the one hand, or the articles of organization and the common law of agency, on the other, support such a conclusion. The court seemed to see no difference resulting from applying either. Both independently show that Marks had actual authority to act for the LLC in the conduct of its business. The language in the code specifies the authority of a manager.

That is why using the same language to describe the authority of all agents or "apparent agents" of a LLC is such a serious problem. Should this language apply to a non-partner, non-manager agent? Should each real estate agent, lawyer, and pizza delivery driver hired by an LLC have the authority of a

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83 Id. at *1.
84 Id.
85 Id. at *2.
86 Id. at **2
87 Id. at **2-3.
88 Texas Limited Liability Company Act Art. 1528n, art. 2.21B (Vernon 1997).
89 EZ Auto, L.L.C., at *3.
90 Id.
LLC manager? Surely not. Moreover, there is no reason in fact or law to deprive the LLC’s management of the capacity to appoint an agent with limited authority, nor does a need exist to say that, if an agent is apparently authorized for a single purpose, it is authorized for all purposes. Yet the statute says flatly that an agent or apparent agent is an agent of the LLC “for purposes of carrying out the company's business,” just as if each such agent or apparent agent was a manager of the LLC.

Perhaps not all is lost. The TBOC recognizes that its default provisions might not be for everyone and allows them to be superseded by agreement of the LLC members. On the other hand, in the absence of agreement, the code provisions apply, so agents' authority will have to be limited by affirmative agreement, a tedious chore that would be unnecessary if common law agents had not been included in this provision. Furthermore, it is not clear why (or whether) an agreement of the LLC members should be able to supersede the authority of an apparent agent. Allowing an agreement between LLC members to limit the authority of an apparent agent essentially allows principals of an LLC to mislead third parties with impunity. On the other hand, the authority named in subsection (a) is not apparent but actual authority, so perhaps this does not matter. (The rest of section 101.254 probably abrogates apparent authority, anyway.)

If giving all agents the authority of a manager is not what the code drafters were trying to do, I confess to ignorance as to why they used language that appears to reach that result. I have only been able to think of one other possible reason for lumping all agents in with others such as managers who are clearly general agents of the LLC for its broad business purposes. Perhaps the drafters meant merely to define a term agent for purposes of subsections (b) and (c). Both subsections (b) and (c) begin with a

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91 TBOC § 101.254(a).
92 TBOC § 101.052.
93 TBOC § 101.052(b).
94 See infra Parts II.B.2 & II.B.3.
reference to "an agent ... described in Subsection (a)."\textsuperscript{95} Some definition was necessary. The difficulty with this rationale is that subsection (a) could perform this function without its final clause that empowers agents so broadly: "for purposes of carrying out the company's business." If that clause were omitted from (a), subsection (a) would then say, merely, "[E]ach ... agent of a limited liability company vested with actual or apparent authority ... is an agent of the company."\textsuperscript{96} This would be tautological in the case of actual agents, but the definitional function of subsection (a) would be clear, as no language in subsection (a) would have any other substantive effect than to define the word agent as used technically in the rest of the statute. Unfortunately, this rationale therefore renders the final clause of subsection (a) superfluous, and is not a plausible construction of the statute. Subsection (a) appears to have the effect outlined above: all agents, including apparent agents, have authority equal to that of a manager.

2. Subsection (b): A Third Theory of Authority (and Not a Useful One)

Section (b) follows. Please consider while reading it that it applies to common agents of a LLC and also those who have only apparent authority.

(b) An act committed by an agent of a limited liability company described by Subsection (a) for the purpose of apparently carrying out the ordinary course of business of the company, including the execution of an instrument, document, mortgage, or conveyance in the name of the company, binds the company unless:

(1) the agent does not have actual authority to act for the company; and

(2) the person with whom the agent is dealing has knowledge of the agent's lack of actual authority.\textsuperscript{97}

\textsuperscript{95} TBOC § 101.254(b) & (c).
\textsuperscript{96} TBOC § 101.254(a).
\textsuperscript{97} TBOC § 101.254(b).
Describing the meaning of this odd provision requires some explanation. First, it is clear that this provision is not a codification of, and in fact has nothing to do with, apparent authority. As stated earlier, apparent authority arises from the principal's manifestations of intent to a third party that a person is authorized as the principal's agent. The third person must actually believe, reasonably, as a consequence of the principal's manifestation, that the "apparent agent" was authorized.

This section is inconsistent with apparent authority in several ways. Authority under the statute is established without a showing that anyone—governing person, manager, member—made a manifestation. Nor does the statute require that the third party form a reasonable belief. In fact, the third party's belief is not relevant at all under the statute. It is possible, in fact, that the third party unreasonably believe that the agent is authorized, and the section might still apply to give that agent authority, as long as the requisite act occurred. All that need be shown is that a person named in subsection (a) did an act that fits the description in (b). As long as the third party did not know—not merely believe, reasonably or unreasonably—that the agent was not authorized, the agent will still have authority under the statute even if it lacked actual authority. Clearly what the statute describes is not apparent authority.

If that were not clear enough, the mere presence of element (2) in the exception to subsection (b) also proves that what the section describes is not apparent authority. For apparent authority to exist, the third person must actually believe that the "apparent agent" is authorized, so no apparent authority could exist if (b)(2) applied. The language of (b)(2) negates apparent authority. Thus, if what section (2) described was apparent authority, no one could ever get to (b)(2). Section (b)(2) would be superfluous. Section (b) would only apply if that kind of knowledge were absent. The presence of (b)(2) thus proves that subsection (b) does not describe apparent authority.

Stated another way, an exception cannot entirely negate that to which it is an exception. If it did, then it would not be an exception but a part of the general rule. If the theory of subsection (b) is apparent authority, then that theory is fully stated in the words "for the purposes of apparently carrying out the ordinary course of business of the company." Nothing more could be needed to say it, as those are all the relevant words available in the subsection. Clause (b)(2) is phrased as an exception, but in fact the knowledge of the third person that an "apparent agent" is not authorized would mean that no apparent authority existed. If the third person knew such a thing, there would be no apparent authority left for which clause (b)(2) could be an exception. It follows that section (b) is not talking about apparent authority.

If subsection (b)'s theory is not apparent authority, then what is it? Section (b) actually extends to the agents of LLCs a theory of agency found in the general partnership code, which is (as it was for subsection (a)) the source of this language. The partnership code provides,

Unless a partner does not have authority to act for the partnership in a particular matter and the person with whom the partner is dealing knows that the partner lacks authority, an act of a partner, including the execution of an instrument in the partnership name, binds the partnership if the act is apparently for carrying on in the ordinary course: (1) the partnership business; or (2) business of the kind carried on by the partnership.¹⁰⁰

Here as well, and for the same reasons, this clause cannot logically purport to bind partnerships under the common law doctrine of apparent authority. Instead, this language is, like the language similar to that in subsection (a), meant to take account of a general partner's particular status as owner, manager, and principal of a partnership. Such a manager and general agent of a partnership has power herself to determine the scope of the partnership's business and to appoint agents to carry it forward. Such an

¹⁰⁰TBOC § 152.302(a).
agent's power need not be tied to the reasonable belief of the third party. Thus, when a Texas Court of Appeals looked at this corresponding partnership code provision, in Burns v. Gonzalez,\(^\text{101}\) though the court talked a bit about apparent authority, the court concluded that the "apparently for carrying on" language required a look not at what the principal has done, or what the other party to the transaction reasonably or unreasonably thought, but at what was apparent to the court, or a disinterested onlooker.\(^\text{102}\) That is a reasonable construction of a statute that is not simply a codification of the doctrine of apparent authority.\(^\text{103}\)

The theory described in section 101.254(b), like the one espoused in Burns, does not mention the principal at all, nor does it depend on the principal holding out the agent as having authority. Nor does it require the reasonable belief of a third party. Instead, liability appears to depend on the circumstances of the business and the transaction, something quite beyond the governing authority's control and beyond the needs of the third party. It is not actual authority, and it is not apparent authority. It threatens to reach beyond what the LLC can control. It also applies even when an ignorant third party unreasonably believes that an agent is authorized, thus rewarding ignorance. Whatever reasons may support its existence for partners, or perhaps for LLC managers and officers, it should not be allowed to displace the common law of agency that the courts, quite rightly as a matter of policy, believe apply to LLCs.

\(^{102}\) Id. at 132-34. In Burns, a partnership had signed a contract conveying a right to a third party to broadcast time on a radio station. The partnership's sole business was selling broadcast time on that single radio station. Id. at 129. When the station went off the air for several months, the partners tried to settle with disgruntled advertisers. Id. at 130. Burns was a disgruntled advertiser. One of the partners, Bosquez, signed a note to Burns for $20,000 to compensate Burns for the deprivation of broadcast time. Id. Settling with disgruntled advertisers seems like just the thing a partnership devoted to selling advertising on a radio station would do if the station went off the air. But the court never asked whether Burns reasonably thought Bosquez by virtue of his position as a partner was apparently authorized to sign the note. Id. at 132-34. Instead, it asked whether partnerships generally engaged in selling ad time on the radio regularly signed notes, like "trading partnerships." Id. Of course, they did not, and Burns was unable to recover. I am indebted to Professor Gary Rosin for calling Burns to my attention.

\(^{103}\) The Texas Supreme Court looked at this provision later, in Cook v. Brundidge, Fountain, Elliott and Churchill, 533 S.W.2d 751, 758 (Tex. 1976), and said, after citing Burns, "The extent of authority of a partner is determined essentially by the same principles as those measuring the scope of the authority of an agent." Id. at 758 (reciting section 9 of the Uniform Partnership Act (1914), which was Texas law at the time and was the pattern for TBOC § 152.302(a)). The court never noted the illogic of that statement as a construction of the statute, which it had just cited. To make matters worse, the Cook court found that the partner at issue had no authority under either theory, id. at 758-59, so the statement is essentially dicta. This area of the law is not fully consistent with applicable statutes.
3. Subsection (c): The End of the Common Law of Agency for LLCs

Whereas (b) attempts to promulgate an additional theory of liability for businesses, in addition to the common law of agency, subsection (c) attempts to limit the law of agency to only two theories: that found in (b) and a theory of actual authority named in the statute. Subsection (c) states:

(c) An act committed by an agent of a limited liability company described by Subsection (a) that is not apparently for carrying out the ordinary course of business of the company binds the company only if the act is authorized in accordance with this title.\(^{104}\)

The obvious effect of this section is to limit liability to subsection (b) and the theory of actual authority set out in (c). The language "that is not apparently for carrying out the ordinary course of business of the company" is an obvious reference to subsection (b). The section sets out only two alternatives. An act not binding under (b) is binding "only if" it is authorized in accordance with Title 3, which contains provisions addressing only limited liability companies. Thus, subsection (c) limits liability to two theories: that in (b) and actual authority. Because the theory set forth in (b) is not apparent authority, (c) requires that the theory of apparent authority be abandoned in the LLC context. LLCs are not bound by apparent authority.

This seems at first a very odd result, especially since subsection (a) refers to agents "vested with ... apparent authority."\(^{105}\) But at least the statute is consistent. Subsection (a) in fact says of agents vested with apparent authority that each is in fact "an agent of the company for purposes of carrying out

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\(^{104}\) TBOC § 101.254(c).  
\(^{105}\) TBOC § 101.254(a).
the company's business." Subsection (a) thus also discards the doctrine of apparent authority, with its limitations, and instead empowers "apparent agents" with actual authority broadly to carry out the company's business, as discussed previously. Since subsection (a) replaces the apparent authority of "apparent agents" with a broader grant of actual authority, the doctrine of apparent authority is unnecessary to bind a LLC.

Subsection (c) on its face has other, broader consequences, however. As discussed previously, servants are agents. If subsection (c) limits the liability of the LLC to the theory in subsection (b) and actual authority, liability under respondeat superior is also abrogated. I think that would be a ludicrous result, and I seriously doubt any Texas court would reach that conclusion, but when the language of the statute plainly reaches it, and a court in order to reach a sensible result has to depart from the statute's plain language, it is evidence that the statute needs to be reworked.

C. If Agents Were Omitted

To resolve the foregoing difficulties, I recommend omitting agents from section 101.254. Merely removing the phrase "or agent" from section 101.254(a) would have the desired effect. The statute would no longer displace agency law, and agents of LLCs would go back to being treated like agents of other business entities.

The section would still not be perfect. One would have to explain why managers and officers of LLCs could not be liable under apparent authority, but the statute would cause no more potential confusion in that regard than the statute applicable to partners, section 152.302, as explained above, which also adopts liability for "apparently ... carrying on," a theory that appears to depart from the

106 [Id.]
107 See supra Part II.A.
108 See supra note 70.
common law's doctrine of apparent authority. Resolving that confusion further in the LLC and partnership codes might require more amending. But at least agents should be cut out and sent back to the common law of agency.

III. Veil Piercing

The LLC code seems quite clear on the issue of members' liability for the obligations of the LLC:

Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company ....

This section does not protect individuals acting within or for a LLC from their own individual liability. Rather, this sentence holds merely that the liability of the LLC will not be placed on a member or manager. This seemingly simple sentence does not tell the whole story, though. The corporate code has long provided that shareholders also are not liable for the debts and obligations of corporations, and that has not stopped courts from "piercing the corporate veil" and imposing corporate liability on shareholders notwithstanding. Courts have held that an LLC's veil can also be pierced.

A variety of rationales support imposing, in appropriate circumstances, entity liability on those who control the entity. I have two favorite rationales, for which I have never heard good counter-
arguments. First of all, a rule should not be construed to reach absurd results. When a person controlling a limited liability entity places liability exclusively in the entity in order to enable the controller to commit a fraud, the rule shielding the controller from that liability is absurd and should be discarded. The Texas Supreme Court recently affirmed this rationale for veil piercing when it listed the "kinds of abuse ... that the corporate structure should not shield." The first item on the list was "fraud."

Second, business entities may convey away assets in exchange for less than reasonably equivalent value. This is the kind of activity that fraudulent transfer laws are supposed to stop, but those laws may not work very well against certain business entities. These entities cannot be put on the stand and cross-examined. They are only what their controllers make of them. Their controllers keep records, or they do not. If no or inadequate records exist, then proving that a conveyance occurred at all could be difficult, and the details of numerous fraudulent conveyances may be lost. Assets may be moved, business opportunities shifted to new entities with the same or similar owners, taxes paid or not, costs and employees paid by one entity or the other, and so on—and all potential evidence of wrongdoing is in the hands of the person controlling the entity and that person has caused no documentation to be made. At some point, it is fair to hold that person liable for the entity's liability because the alternative would be that the person's sloppiness and negligence (or perhaps intent to hide wrongdoing) would place the

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114 See Witherspoon v. Jernigan, 76 S.W. 445, 447 (Tex. 1903) ("When a literal interpretation of the language used would produce an absurdity, the court will restrict or enlarge the text so as to conform to the general purposes and intent of the Legislature."); Korndorff v. Baker, 976 S.W.2d 696, 700 (Tex. App. 1997) ("[W]here the application of the statute's plain language would lead to absurd consequences that the legislature could not have possibly intended, we will not apply the statutory language literally."); see also, e.g., Sharp v. House of Lloyd, Inc., 815 S.W.2d 245, 249 (Tex. 1991); see also, e.g., V.T.C.A., Government Code § 311.021 (2010) ("In enacting a statute, it is presumed that ... a just and reasonable result is intended.").


116 Id. at 455; id. at 451 ("Examples are when the corporate structure has been abused to perpetrate a fraud ....").

entities themselves entirely beyond the law. Small wonder that the Texas Supreme Court listed next after fraud, in its list of abuses that the corporate veil should not shield, "evasion of existing obligations."\(^{118}\)

The chapter of the TBOC that contains provisions that apply to LLCs does not itself mention veil piercing doctrines, or anything other than the shield law cited at the beginning of this section. However, Texas courts have agreed that veil piercing doctrine applies against LLC members.\(^{119}\) Inasmuch as any rule could have absurd applications and actually shield fraudulent conduct, and inasmuch as the LLC form could be abused as much as the corporate form, application of some veil piercing doctrine against certain LLC members and managers makes sense.

Just what veil piercing doctrine to apply is another matter.\(^{120}\) Thus far, courts have imposed on LLC managers and members the same doctrines applicable to corporations.\(^{121}\) This is somewhat problematic in Texas, however. In Texas, the legislature in response to some loose language in a decision

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\(^{118}\) SSP Partners, 275 S.W. 3d at 455; id. at 451 (“Examples are when the corporate structure has been abused to ... evade an existing obligation ....”). Potential other abuses that the Texas Supreme Court cited to justify imposing liability on shareholders involve shareholders more directly: “circumvention of statutes, monopolization, criminal conduct.” Id. at 455; id. at 451 (“achieve or perpetrate a monopoly, circumvent a statute, protect a crime, or justify wrong”).
\(^{121}\) See supra cases cited note 119.
by the Texas Supreme Court in 1986, *Castleberry v. Branscum*,\(^\text{122}\) changed the common law's doctrine of veil piercing.\(^\text{123}\) The statute passed in 1989 and amended in 1993 has a long and well-told history.\(^\text{124}\) The statute was in fact poorly drafted and has been the source of controversy in judicial decisions since its passage,\(^\text{125}\) as I discuss *infra*. My purpose is not to ask that it be re-drafted (though that is surely a good idea), but to ask whether it should be imposed on LLCs, too.

The answer to that question, thus far, appears to have been ... why not? The law has not progressed beyond asking that question. One thing the statute requires, in order to impose a contractual liability on shareholders, is a finding of actual fraud.\(^\text{126}\) In the leading case, *McCarth v. Wani Venture, A.S.*,\(^\text{127}\) the trial court assumed the statute applied and presented the case to the jury on that assumption.\(^\text{128}\) The jury found what the statute requires—actual fraud—and this was supported by the evidence.\(^\text{129}\) The existence of actual fraud obviated the need to say whether application of the statute was really necessary. In *Sanchez v. Mulvaney*,\(^\text{130}\) the court turned liability aside for failure to prove actual fraud, but this is because the entity was, the court said, a "limited liability corporation to which state law principles for piercing the corporate veil apply."\(^\text{131}\) The court failed to explain why a limited liability company is a corporation.

The courts are not alone. Professor Miller claims, speaking of the developments in *McCarth* and *Sanchez*, "there is nothing to preclude a court from defining the standards in the LLC context consistently with the corporate statutes in Texas when defining how veil piercing should apply to LLCs as a matter of

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\(^\text{124}\) See *id.* at § 26.11 et seq.

\(^\text{125}\) See, e.g., *id.* at § 26.16 to 26.23.

\(^\text{126}\) TBOC § 21.223(a)(2) & (b).

\(^\text{127}\) 251 S.W.3d 573 (Tex. App. 2007).

\(^\text{128}\) 251 S.W.2d at 591.

\(^\text{129}\) *Id.*

\(^\text{130}\) 274 S.W.3d 708 (Tex. App. 2008).

\(^\text{131}\) *Id.* at 712.
Texas common law." On policy, she reaches the same conclusion: "there does not appear to be any reason for the courts, when developing the Texas common law of LLC veil piercing, to adopt standards that explicitly provide less liability protection for an LLC member than that available to a corporate shareholder." But she provides no reasons why the statute should be imposed on LLCs and their members. For my part, I wish to suggest three reasons why not to impose this statute outside of its stated boundaries. These seem sufficient to me, and it is difficult to explain to students why no one has taken account of them.

A. *The Code Says So.*

First, the Texas Business Organizations Code itself says that the statute's reach is limited. The reorganization of business entity statutes that became the Texas Business Organizations Code was conducted on a well-known principle: Those statutes that apply to all "domestic entities" (defined to include any entity "formed under" the code or "the internal affairs of which are governed by" the code) and foreign entities (formed under or governed in their internal affairs by the laws of other states) are included under the General Provisions, comprising Title 1. Those provisions governing only specific kinds of domestic entities are set forth in other titles, one title each for each kind of entity. So Title 2 governs corporations. Title 3 governs LLCs. Lest there be any confusion, the TBOC specifically authorizes the citation of Title 2 and those provisions of Title 1 applicable to corporations as "the Texas

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132 Miller, supra note 120, at 417; see also Hamilton, Miller & Ragazzo, supra note 112, at § 20.7 ("there is no apparent policy reason not to apply consistent standards"; "the standard set by [the corporate provision] ... would be appropriate in the context of LLCs").
133 Miller, supra note 120, at 418.
134 TBOC § 1.001(17) & (18).
135 TBOC § 1.001(27).
136 TBOC § 1.106(a).
The provisions of Title 3 and the provisions of Title 1 applicable to LLCs may be cited as "the Texas Limited Liability Company Law." 138

The code really does assert that its organization means something. Thus, it provides, "Each title of this code, other than this title [Title 1], applies to a different type of entity to the extent provided by that title." Thus, when Title 2's Chapter 21, which contains the limitation on veil piercing, provides, "This chapter applies only to: (1) domestic for-profit corporation formed under this code, and (2) foreign for-profit corporation that is transacting business in this state," we should take that at face value. Title 2 thus applies only to for-profit corporations.

What does this provision of the statute mean if courts can, as Professor Miller says, develop the common law by applying statutes wherever they see no reason not to? To say, as Professor Miller does, that in applying the corporate veil-piercing limitation to LLCs the courts are only developing the common law reads these limiting provisions right out of the code. When the courts want to apply the Texas Limited Liability Company Law to a Texas LLC, they are applying the statute; when they want to apply the Texas Corporation Law to a Texas LLC, they are simply developing the common law? It's all too convenient, and it ignores the plain language of the code.

In fact, it also ignores changes to the Texas limited liability company law that have occurred over time. A provision of the Texas Limited Liability Company Act as passed in 1991 provided,

To the extent this Act contains no provision with respect to one of the matters provided for in the TBCA or the Texas Miscellaneous Corporation Laws Act as such acts shall be amended from time to time, the provisions of the TBCA and the Texas Miscellaneous Corporation Laws Act

137 TBOC § 1.008(b).
138 TBOC § 1.008(e).
shall supplement the provisions of this Act to the extent they are not inconsistent with the provisions of this Act.\textsuperscript{139}

This statute might well have mandated that the Texas Business Corporation Act's veil-piercing statute\textsuperscript{140} be applied to LLCs. However, two years later, this provision of the Texas LLC Act was amended to name specifically only certain provisions of the TBCA that would apply to LLCs.\textsuperscript{141} The corporate veil-piercing statute, which was amended in the same bill,\textsuperscript{142} was omitted from the list.\textsuperscript{143} This legislative move is a clear rejection of the general application of corporate statutes to LLCs, and a specific rejection of the application of the corporate veil-piercing statute to LLCs. Later, when the TBOC was passed, the legislature again omitted the veil-piercing statute from the Texas Limited Liability Company Law.\textsuperscript{144}

Not only is the export of corporate provisions to other entities forbidden by the code, it not a good idea, generally. Each entity is designed specifically by the legislature with attributes that enhance its function and value. For example, it is not uncommon to set up an LLC with something like a corporate structure. The managers or members who are to manage might in the company agreement be called a board. Under the LLC statutes, if the LLC has managers, those managers—the board—are the LLC's governing authority.\textsuperscript{145} The code directs that the governing authority "shall manage the business and


\textsuperscript{140} The provision was then codified at Texas Business Corporation Act Art. 2.21 (1990); Acts 1989, 71st Leg., ch. 801, § 7, eff. Aug. 28, 1989.


\textsuperscript{142} See Acts 1993, 73rd Leg., ch. 215, § 2.05, eff. Sept. 1, 1993.

\textsuperscript{143} See id. The Bill Analysis for Acts 1993, 73rd Leg., ch. 215, § 1.25, states that the amendment "[p]rovides specificity as to the incorporation of certain provisions of the TBCA and Texas Miscellaneous Corporation Laws Act." Bill Analysis, HB 1239, codified at Acts 1993, 73rd Leg., ch. 215, available at http://www.lrl.state.tx.us/legis/billsearch/text.cfm?legSession=73-0&billTypeDetail=HB&billNumberDetail=1239&billSuffix=&startRow=1&IDList=&uniClicklist=&number=100. This change was noted at Hamilton, Mill, & Ragazzo, supra note 112, at § 20.7 n.4.

\textsuperscript{144} The TBOC drafters omitted from the Texas Limited Liability Company Law a provision similar to TLLCA § 8.04, which incorporated explicitly named provisions of the TBCA. Instead, the TBOC made those provisions of the TBCA applicable to LLCs by placing the substantive elements of those TBCA provisions in Title 1 of the TBCA. See, e.g., Texas Corporation and Partnership Laws XXXIX (West 2010) (a disposition table showing where the substantive provisions former located in 8.04 can now be located: all but those pertaining to derivative actions can be found in Title 1).

\textsuperscript{145} TBOC § 101.251.
affairs of the company.” A majority of this board constitute a quorum. The affirmative vote of a majority of the board present at a meeting at which a quorum is present constitutes an act of the governing authority. These provisions all have corporate analogs. The board is the corporation's governing authority. A majority of the board constitutes a quorum. The affirmative vote of a majority of the board present at a meeting at which a quorum is present constitutes an act of the board.

To some extent, both LLC provisions and corporate provisions are variable by contract. The corporate code provisions allowing different percentages of attending board members to form a quorum is limited, however; it may be no less than one-third of the number of board members. Likewise, the minimum number of directors of a quorum who must vote for something may also be varied, but only by increasing it. The number cannot be lowered. Surely these are wise limitations. Requiring that at least a third of board members meet in order to do business ensures that some deliberation takes place. Requiring at least a majority of a quorum to sign onto decisions makes it more probable that decisions are rational. But the LLC code contains no such limitations. No statute I have found limits the percentage of governing persons that can make up a quorum. It could be a single manager. And aside from some particular instances named by the code, the number of votes necessary for an action to take place appears to be equally malleable. It apparently could be less than a majority: perhaps a plurality, or perhaps a single manager.

146 TBOC § 101.252.
147 TBOC § 101.353.
148 TBOC § 101.355.
149 TBOC § 21.401.
150 TBOC § 21.413(a).
151 TBOC § 21.415(a).
152 TBOC §§ 21.101, 21.106, 21.109, 21.413(a) (allowing different quorum requirements in the bylaws or certificate of formation); 21.415(a) (allowing different voting percentages in the bylaws of the certificate of formation); 101.054.
153 TBOC § 21.413(b).
154 21.415(a).
Should the common law of LLCs be developed by adopting in the limitations of the corporate code, in order to protect the non-managing members? Why not? It seems to me the best reason why not is that, if the code wanted LLCs to be governed like corporations, it would have said so. Instead, it appears to say differently. Surely this reason is applicable to the veil piercing "common law," too. Business entities are fictions, or, alternately, are perhaps better thought of as a shorthand reference to a number of legal conclusions that are always or usually true of an entity of a certain type. Legislatures define business entities deliberately, or at least that is what a court is supposed to assume. The Texas legislature has defined corporations and LLCs the way it wants them, and it has directed that the veil piercing statute should apply to corporations, not to LLCs. Allowing common law development of entity law would turn the design of entities over to the courts, who can change the attributes of entities at best in piecemeal fashion over many years, and never with complete coherence over the short term. Business needs more certainty than that.

This last September, the First District Court of Appeals in Houston decided a case involving whether to pierce the veil of an LLC. In the trial court, no one, it appears, knew that they were to apply corporate law to LLCs. Neither party argued that section 21.223 of the Texas Corporation Law or its predecessor should apply. The trial court issued the jury charge without mentioning it. Perhaps the lawyers and the court should have noticed the case law in this area, but there is no evidence that they did not look in the right place in the code, is there? Please, let us have some guidance, here.

B. Clarity

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158 Id. at *7 n.6.
159 Id.
A second reason not to apply the statute to LLCs is that its meaning is uncertain. Applying this poorly drafted statute to a new set of entities would only magnify the interpretive problems created by the statute.

The language of the 1989 statute, at first and as amended in 1993, is unclear for two reasons. First, in order that a shareholder be held liable for a contractual obligation of the corporation, the court must find "actual fraud" by the shareholder.

The statute specifies this in a convoluted manner. It first provides that no shareholder will be liable for any contractual obligation of the corporation on the basis that the shareholder "is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory."\(^{161}\) Whence this long list? It is evidence of the legislature's antipathy to the loose language of the 1986 Supreme Court decision, *Castleberry*.\(^{162}\) *Castleberry* went out of its way to state its own long list of general categories of conduct that would justify veil-piercing. The breadth of the categories appeared to leave courts a great deal of discretion: fraud, sham to perpetrate a fraud, alter ego, means of evading an existing legal obligation, mere tool or business conduit of another corporation, inadequate capitalization—in short, whenever "the corporate form has been used as part of a basically unfair device to achieve an inequitable result."\(^{163}\) Lest "sham to perpetrate a fraud" be confused with mere fraud, the *Castleberry* court distinguished the two:

To prove there has been a sham to perpetrate a fraud, tort claimants and contract creditors must show only constructive fraud. We distinguished constructive from actual fraud in *Archer v. Griffith*:

*Griffith*:

Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of

\(^{161}\) TBOC § 2.21(a)(2).
\(^{162}\) 721 S.W.2d 270 (Tex. 1986).
\(^{163}\) Id. at 271-72.
moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.\textsuperscript{164}

The statute's purpose in naming the theories appears to be to oppose \textit{Castleberry}'s long list. Note that \textit{Castleberry} included actual fraud in its long list, and so does the statute include actual fraud in the list of prohibited theories.

But, after taking away liability based on actual fraud with one hand, the code provides it with the other: That provision "does not ... limit the liability of a [share]holder ... if ... the [share]holder ... caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the [share]holder."\textsuperscript{165} That take-and-give-back drafting method combined with the natural ambiguity of the phrase "actual fraud" leave us wondering what "actual fraud" is supposed to mean. The phrase was used in \textit{Castleberry} itself, in the passage quoted above. It might mean nothing more than conduct "involv[ing] dishonesty of purpose or intent to deceive."

Or, on the other hand, it might mean something else, like the tort of fraud. One might quite logically assume that, the legislature having said "actual fraud," the tort of actual fraud was what was wanted. That is the way my students sometimes read it.

The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.\textsuperscript{166}

\textsuperscript{164} \textit{Castleberry}, 721 S.W.2d at 273, quoting \textit{Archer v. Griffith}, 390 S.W.2d 735, 740 (Tex. 1964).
\textsuperscript{165} TBOC § 2.21(b).
\textsuperscript{166} \textit{Aquaplex, Inc. v. Rancho La Valencia, Inc.}, 297 S.W.3d 768, 774 (Tex. 2009).
The statute appears to demand that this be the new test for imposing corporate liability on a shareholder. The irony of that construction of the statute would be that if these elements are proved, the shareholder committed a tort and is liable in tort. No veil piercing is necessary to hold a defrauder liable for fraud, as the courts have recognized.\textsuperscript{167} And the damage rule for the tort of fraud is in fact broad enough itself to cover the corporate liability. Damages from fraud include either money paid out of pocket in reliance on the fraud, or the benefit of the promised, fraudulent bargain.\textsuperscript{168} "When properly pleaded and proved, consequential damages that are foreseeable and directly traceable to the fraud and result from it might be recoverable."\textsuperscript{169} If the fraud consisted in tricking the obligee into accepting an obligation of the corporation (as most often would be true for a case involving contractual liability of a corporation), then that obligation would be the benefit of the bargain, and money paid out by the plaintiff for it would be out of pocket. These would be the contract damages due from the corporation, and these would also be the damages due the plaintiff under the common law tort of fraud in an action against the defrauding shareholder. But, of course, we did not need a statute for that. We had the common law tort of fraud already. It appears that the statute reserves liability that defendants already had under the common law, making a reservation of liability for actual fraud pointless.

There is another possibility. It is possible that the statute means to require that the tort of fraud be proved in order to make the shareholder liable for some corporate liability \textit{even if unrelated to the fraud}. Perhaps the tort resulted in no or little damages, or some measure of damages not coinciding with the damages owed by the corporation in contract. The statute does not require that the "actual fraud" result in the corporate liability. In fact, it does not require any relation between the fraud and the contractual obligation at all: "Subsection (a)(2) does not prevent or limit the liability of a [share]holder ... if ... the holder ... did perpetrated an actual fraud," but not necessarily a fraud related to the corporate contractual

\textsuperscript{168} Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 636 (Tex.2007); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 49 (Tex.1998); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 817 (Tex.1997).
\textsuperscript{169} Formosa Plastics Corp. USA, 960 S.W.2d at 49.
liability. The statute does not require that the shareholder be liable "to the extent" of the fraud, for
instance. This would be a remarkable statute if it actually means fraud whether or not related to the
corporate liability, but it would not be without precedent.\(^\text{170}\) However, the use of the phrase "actual
fraud" in both (a)(2) and (b) suggests that the corporate debt should be related in some way to the fraud,
as if that debt is the actual fraud for which the shareholder would be liable. Moreover, the suggestion that
committing the tort of fraud should subject a person under this section of the Texas Corporation Laws to
greater or different damages than could be had under the common law for the tort of fraud would be an
enlargement of tort law that one should expect to be announced more clearly than this, if, that is, the
statute by naming "actual fraud" means to refer to the tort of fraud.

Yet, the statute's language does not clearly call for this interpretation. The statute describes
"actual fraud" without any limitations, and without clearly referring to the tort. Moreover, it uses the term
"actual fraud" rather than "the tort of fraud" or merely "fraud." The phrase "actual fraud" comes
(apparently) from Castleberry itself (it being the closest relevant authority), and it is doubtful, given
Castleberry's broad dicta, whether it meant the tort. It defined "actual fraud" as including a mental state:
"usually involves dishonesty of purpose or intent to deceive."\(^\text{171}\) Beyond that, the case distinguished a
sham to perpetrate a fraud from "common-law fraud or deceit," as if the tort were required.\(^\text{172}\) But the
court also distinguished a sham to perpetrate a fraud, or constructive fraud, from "intentional fraud" by
saying that “[n]either fraud nor an intent to defraud" was required, and this language suggests that an
intent to defraud could have been the "something more than constructive fraud" that the court was
considering. That the statute's phrase "actual fraud" appears to be lifted from this confusing Castleberry
dicta leaves the phrase open to interpretation as a mental state, or the tort of fraud, or perhaps something
else.

\(^{170}\) For a similar move under Rule 10b-5 of the federal securities law, see O'Hagan v. SEC, 521 U.S. 642 (1997).
\(^{171}\) Castleberry, 721 S.W.2d at 273, quoting Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964).
\(^{172}\) 721 S.W.2d at 273.
Perhaps because of this ambiguity and because the statute's reservation clause, read to refer to the tort, might well be superfluous, courts have generally not taken it literally. Sorting this out has taken some time. The statute was passed in 1989 and the courts of appeals are only now clarifying what "actual fraud" means.\textsuperscript{173} Rather than require that the tort of fraud be proved, courts, especially lately, have required merely that the shareholder have had some dishonesty of purpose or intent to deceive, which of course is something less than the tort of actual fraud.\textsuperscript{174} This comes with controversy, as commentators now assert that the tort was what was intended.\textsuperscript{175} The commentators do not address the ambiguity in the phrase "actual fraud," however, or what the point of the statute was if the tort is required, since shareholders who commit fraud were already liable in tort to corporate obligees.

As if the phrase "actual fraud" were not uncertainty enough, an equally ambiguous clause is the statute's list of theories. The statute prohibits veil piercing for contractual liabilities "on the basis that the [share]holder ... is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory."\textsuperscript{176} Commentators have been clocking the evolution of the "other similar theory" clause over the years.\textsuperscript{177} Only repeated visits to the courts of appeals have

\textsuperscript{173}See Latham v. Burgher, — S.W.3d —, 2010 WL 3369812 (Tex. App., August 27, 2010) (discussing the issue at length and resolving it); Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd., 273 S.W.3d 905, 908-09 (Tex. App. 2008) (discussing the issue at length and resolving it); Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd., 237 S.W.3d 379, 387-89 (Tex. App. 2007) (referring to a brief passage in \textit{Castleberry v. Branscum} that "usually involves dishonesty of purpose or intent to deceive" in order to define the meaning of the statute meant to supersede the language of \textit{Castleberry}).


\textsuperscript{176}TBOC § 21.223(a)(2) (italics added). The phrase in italics was added to the statute in 1993.

begun to settle its meaning. The "ratification" theory was included as an "other similar theory" only in 2006.\textsuperscript{178} The single business enterprise theory was classed as one in 2003.\textsuperscript{179} Will other theories arise to test the clause? Surely, and surely given the differences in form between a corporation and a LLC, litigants will seek a hearing on each theory for each entity, especially if development of LLC veil-piercing law is considered to be only common law development, as Professor Miller suggests.\textsuperscript{180}

But why should the law multiply this ambiguity by applying the statute to an additional entity? In light of such ambiguity, LLCs would be better served if the legislature were to take another try at drafting something clearer. Or perhaps the Texas Supreme Court, which seems itself to favor common law more friendly to businesses on this issue,\textsuperscript{181} should develop the law in this area. I for one believe they would do a better job than the drafters of this statute.

C. The Party Ends with the Corporation

Finally, another statute that is part of the Texas Limited Liability Company Law weighs in on the propriety of collecting a LLC debt from a member: "A member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company."\textsuperscript{182} This provision, which appears only in the Texas Limited Liability Company Law and not in the Texas Corporation Law, has not been construed interpret this statute for the courts, and criticize at length every court decision on this issue with which he disagrees, is itself evidence of the statute's lack of clarity.

\textsuperscript{178} Willis v. Donnelly, 199 S.W.3d 262, 273 (Tex. 2006).
\textsuperscript{179} Southern Union Co. v. City of Edinburg, 129 S.W.3d 74, 85-90 (Tex. 2003).
\textsuperscript{180} See supra notes 132 & 133 and accompanying text.
\textsuperscript{181} SSP Partners v. Gladstrong Inv. (USA) Corp., 275 S.W.3d 444, 450-56 (Tex. 2008).
\textsuperscript{182} TBOC § 101.113.
by the state's courts. The provision's plain language throws a wrench in a veil-piercing claim involving a LLC, however.

Veil-piercing is itself not an independent claim. "An attempt to pierce the corporate veil, in and of itself, is not a cause of action but rather is a means of imposing liability on an underlying cause of action such as a tort or breach of contract." Veil-piercing "is merely a ground upon which the individual may be held liable upon a cause of action which otherwise would have existed only against the corporation." Commonly, shareholders are named party defendants in actions seeking veil-piercing as a remedy for corporate liability. Once the corporation is held liable, and veil-piercing prerequisites met, shareholders are adjudged liable for the corporate liability.

This would not be possible in a suit against an LLC. A suit seeking veil-piercing must allege some cause of action against the LLC other than veil-piercing, such as tort (through the agency doctrine of respondeat superior) or contract. If the suit is successful on such a cause of action against the LLC, then under veil-piercing law a member might be held liable. But in order for the member to be held liable, the member must be a party to the suit, the very thing prohibited by the statute. The exceptions to the statute, for member derivative suits and suits brought by the company against the member, obviously do not apply.

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183 Harris v. Guetersloh, 2000 WL 12523 (Tex.App.-Amarillo, Jan. 6, 2000), suggested that, under the statute's predecessor, the defense provided by the statute must be raised by a defendant affirmatively or was waived. Other than this case, I have found no mention of the provision.


186 See, e.g., Seidler v. Morgan, 277 S.W.3d 549, 557 (Tex.App. 2009) ("Seidler also argues that there is some evidence to suggest that it would be appropriate to pierce the corporate veil, and thereby show that Morgan[, a shareholder,] was a proper party.").

187 See TBOC § 101.451 et seq.
Could a second, separate suit be brought against the member? That would seem an odd result. Most likely the member would not be bound by the earlier suit, to which it was not a party.\textsuperscript{188} The underlying LLC liability would have to be litigated a second time. Moreover, one would have to ask whether, in the second suit against the member for veil-piercing liability, the complaint would withstanding a motion to dismiss for failure to state a claim. Veil-piercing is not a cause of action, and the claim in the veil-piercing suit would be a claim only against the LLC, not a member. For this last reason, third party claimants would also not be able to bring a claim against a LLC member without first suing the entity.

The no-member-party rule is not hindered by Rule 39(a)(1) of the Texas Rules of Civil Procedure. That rule provides, "A person who is subject to service of process shall be joined as a party in the action if ... in his absence complete relief cannot be accorded among those already parties."\textsuperscript{189} First of all, if a rule of civil procedure conflicts with a statute, the statute controls unless the rule is passed last.\textsuperscript{190} Rule 39 was last amended in 1971, however.\textsuperscript{191} The no-member-party rule first came into being in 1991\textsuperscript{192} and was placed in its present form by legislative act in 2003.\textsuperscript{193} Second, the no-member-party

\textsuperscript{188} Generally, a person is not bound by a judgment in a suit to which she was not a party. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996). An exception exists for those "in privity with the parties to the original suit." \textit{Id.} at 652-53. "People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action." \textit{Id.} at 653. However, "a party's mere status as shareholder does not create privity [with the corporation] absent further evidence." Texas Capital Securities Management, Inc. v. Sandefer, 80 S.W.3d 260, 265-67 (Tex. App. 2002); \textit{see also} Dudley v. Smith, 504 F.2d 979, 982 (5th Cir.1974); Am. Range Lines, Inc. v. Comm'r of Internal Revenue, 200 F.2d 844, 845 (2d Cir.1952). In \textit{Sandefer}, the court held that not even the shareholders' additional status as officers of the corporation conferred privity. \textit{Sandefer}, 80 S.W.3d at 266 ("This status alone, without more evidence, does not, as a matter of law, establish privity."); \textit{accord} T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins. T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins. Agency, 2008 WL 7627806, *6, Memorandum and Order (S.D.Tex., Dec. 22, 2008); Brown v. Zimmerman, 160 S.W.3d 695, 703 (Tex. App. 2005). Moreover, "mere participation in a prior trial does not suffice to bar the participant on principles of res judicata, nor does knowledge of an ongoing trial." \textit{Brown v. Zimmerman}, 160 S.W.2d at 703. The upshot is that well-counseled shareholders or LLC members will not participate in the corporate or LLC litigation, nor control it, and hence will be less likely to be bound.

\textsuperscript{189} Texas Rule of Civil Procedure 39(a)(1).
\textsuperscript{190} V.T.C.A., Government Code § 22.004(c); Johnstone v. State, 22 S.W.3d 408, 409 (Tex. 2000); Villasan v. O'Rourke, 166 S.W.3d 752, 762 (Tex. App. 2005).
\textsuperscript{191} V.T.R.Ann. Rule 39 Credits.
\textsuperscript{193} Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.
rule is also far more specific than Rule 39, and therefore should control if a conflict exists. Finally, no conflict exists. Rule 39(a)(1) is satisfied even without the LLC member's participation in a suit because the LLC is a party; a judgment for the full amount of damages can be rendered against the LLC. Rule 39's purpose is to allow complete adjudication of disputes, not ensure the existence of a defendant with the means to pay a judgment.

Whatever the statute's purposes and effects are, it is not friendly to veil-piercing suits. The application of the corporate veil-piercing statute to LLCs assumes that the law of veil piercing applies to LLCs just as it does to corporations. But the no-member-party statute prohibits the normal corporate veil-piercing suit against an LLC member and raises questions as to whether such a suit could proceed at all. The result is that the analogy is dissimilar, and the "why not?" attitude of courts and commentators unjustified.

Incidentally, every Texas case in which LLC veil-piercing succeeded or was approved as a theory appears to have violated this statute. The lawyers appear to have had no idea of the violation. Clearly it is time to begin paying attention to the language of the code. Pretending that an LLC is just like a corporation is not the way to encourage the bar to follow the TBOC.

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194 TBOC § 1.051 (mandating that Chapter 311 of the Government Code apply to construction of each provision of the TBOC); V.T.C.A., Government Code § 311.026(b) ("If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.")

195 Hall v. Dorsey, 596 S.W.2d 565, 570 (Tex. App. 1980) ("Rule 39(a) is designed to avoid subjecting a person to the risk of paying the same claim more than once. ")

Because the code expressly indicates that the corporate veil-piercing statute, TBOC section 21.223, should apply only to corporations; because the provision is awkwardly drafted and not one wisely adopted elsewhere by the common law; and because LLC members cannot be party defendants in actions against LLCs, anyway, I conclude that TBOC section 21.223 would best not be applied to LLCs. The legislature should, if it wishes such a thing to occur, write a statute for LLCs and place it in the Texas Limited Liability Company Law. That would resolve the first and third objections named here, and it would clarify that the legislature really did want such a poorly drafted statute to apply to LLCs as well as corporations. Better yet, the legislature should re-draft the statute and place a much clearer one in the Texas Limited Liability Company Law. I will leave its contents to them and hope they avoid the clear inadequacies of the corporate rule.