

2024

An LLC by Any Other Name Is Still Not a Corporation

Samantha J. Prince

Penn State Dickinson Law, sjp15@psu.edu

Joshua P. Fershee

Creighton University School of Law, joshuafershee@creighton.edu

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/fac-works>

 Part of the [Business Organizations Law Commons](#)

Recommended Citation

Samantha J. Prince and Joshua P. Fershee, *An LLC by Any Other Name Is Still Not a Corporation*, 54 *Seton Hall L. Rev.* 1105 (2024).

This Article is brought to you for free and open access by the Faculty Scholarship at Dickinson Law IDEAS. It has been accepted for inclusion in Faculty Scholarly Works by an authorized administrator of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

An LLC by Any Other Name Is Still Not a Corporation

Samantha J. Prince & Joshua P. Fershée*

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

It is critically important that people, especially lawyers, recognize the difference between entities such as corporations and limited liability companies (LLCs). It is an egregious, nearly unforgivable, error to call an LLC a "limited liability corporation." This is not only because lawyers should try to get things right but also because conflating the two entity types can lead to unpredictable outcomes. Perhaps more important, it could lead to incorrect and unjust results. A prime example lies within the veil piercing context.

There are nearly nine thousand references to the phrase "limited liability corporation" in court cases. Practicing attorneys are not the only people messing this up. Judges, legislators, federal and state agency officials, and media pundits are also getting it wrong. Most recently, Justice Samuel Alito scribed

* Samantha J. Prince is an Assistant Professor of Law at Penn State Dickinson Law. She earned her LL.M. in Tax from Georgetown University Law Center; J.D. from Widener Commonwealth Law; and B.S. in Chemistry from Muhlenberg College. Joshua P. Fershée is Dean and Professor of Law at Creighton University School of Law. He earned his J.D. from Tulane Law School and his B.A. in Social Science from Michigan State University. Many of his contributions to this Article are based on his writing for the Business Law Prof Blog. BUS. L. PROF BLOG, https://lawprofessors.typepad.com/business_law. On behalf of both authors, we thank Alexis Pinzon, Faith Scrivo, and other members of the *Seton Hall Law Review* for their excellent assistance with this Article. We also thank Tim Azizkhan, Brandon Beck, Nikolajs Gaikis, Taylor Haberle, Kaci McNeave, and Jeannie Perez for research assistance. In addition, we would also like to thank Professors Ann Lipton and Sam Brunson for alerting us to some of the examples we used herein. Thank you to Dean Fershée's co-bloggers and countless readers for their insights, critiques, and suggestions. Particular thanks to Joan Heminway, Steve Bainbridge, Jeff Lipshaw, Tom Rutledge, Keith Bishop, and Elaine Waterhouse Wilson for helping the cause (and asking good questions). The authors are both music fans and do not apologize for the smattering of lyrical references throughout this Article.

an op-ed that was published in The Wall Street Journal where he misused the term. Even the TV show Jeopardy! allowed “What is a limited liability corporation?” as the correct answer during one episode.

Enter artificial intelligence (AI). AI relies on information it can find, and therefore text generators, like ChatGPT, replicate the incorrect term. With a proliferation of users and programs using ChatGPT and other AI resources, the use of incorrect terminology will balloon and exacerbate the problem. Perhaps one day, AI can be used to correct this problem, but that cannot happen until there is widespread understanding of the distinct nature of LLCs and a commitment to using precise language.

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

I. INTRODUCTION	1107
II. EVOLUTION OF THE LIMITED LIABILITY COMPANY.....	1110
III. SOURCES OF CONFLATION	1113
A. Lawyers and the Judiciary	1114
1. Lawyers	1114
i. Blogs.....	1114
ii. Transactional Documents.....	1116
iii. Court Documents.....	1118
2. The Judiciary.....	1120
i. Misnaming	1121
ii. Jurisdiction	1123
iii. Veil Piercing	1125
B. Legislators.....	1132
C. Government Administrative Agencies	1134
1. PTO	1135
2. FTC.....	1136
3. SEC.....	1137
4. DoL.....	1139
5. IRS1140	
6. State and Local Governments.....	1141
D. Media and Non-lawyer Service Providers.....	1144
E. Artificial Intelligence	1148
IV. LOOMING HARMS OF MISIDENTIFYING OR CONFLATING ENTITIES	
.....	1151
V. SOLUTIONS	1156
VI. CONCLUSION.....	1164

I. INTRODUCTION

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

The United States (U.S.) Supreme Court Justice Samuel Alito wrote an op-ed entitled “ProPublica Misleads Its Readers,” defending his connection to cases involving Paul Singer in which he did not recuse himself. Justice Alito stated, “The entities that ProPublica claims are connected to Mr. Singer all appear to be either limited liability corporations or limited liability partnerships.”³ The authors of this Article each thought: *I lost a vital part of me.*⁴

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

¹ The ChatGPT screenshot is on file with the authors. AI and ChatGPT are hot topics in the news for getting things wrong and right. This Article does not endeavor to dig into the ways that such text generators are used, nor take a stance on whether it is useful or not for various tasks. This Article’s focus is on the use of AI as it pertains to the misuse and replication of limited liability “corporation” rather than “company,” and any adjacent misuses such as the use of the terms incorporation, shareholder, etc. This Article emphasizes that references to LLCs are “limited liability *companies*.”

² HOT MULLIGAN, **Equip Sunglasses**, on YOU’LL BE FINE, at 00:20 (Hot Mulligan & Many Hats Distrib. 2020). See *Psalms* 120:5 for the original reference to the concept of “woe is me.” This Article italicizes song lyrics throughout.

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

⁴ HOLDING ABSENCE, *Afterlife*, on THE GREATEST MISTAKE OF MY LIFE, at 02:14 (SharpTone Recs. 2021).

⁵ WEHOIT, LLC describes itself as a “licensed [l]imited [l]iability [c]orporation” on its website. *About Wehoit*, WEHOIT, LLC, <https://www.wehoit.com> (last visited Feb. 23, 2024).

ChatGPT did not get this erroneous information out of thin air, and Justice Alito is not the only member of the judiciary to have gotten it wrong. There are now 8,919 references to the phrase “limited liability corporation” across all fifty state court systems; federal courts; courts of the District of Columbia, Puerto Rico, and U.S. Virgin Islands; the Eastern Cherokee Trial Court; and the Navajo Supreme Court.⁶ All thirteen circuits and the Supreme Court are represented.⁷ When removing federal courts, this number drops to 2,519,⁸ though that may be inaccurate given the variations in state-level reporting. Despite best efforts, there are ninety-eight new examples across state courts in the past twelve months.⁹

It is not solely judges who are mislabeling LLCs. There is a litany of other guilty parties as well. Practicing attorneys, legislators, federal and state agency officials, and media pundits have all mislabeled LLCs. One would think that the Federal Trade Commission (FTC) and the U.S. Securities and Exchange Commission (SEC)—two agencies that deal with businesses of all sizes and types—would get it right, but both of those agencies have referred to LLCs erroneously using the dreaded “corporation” word a copious number of times.

Why does this happen? This Article does not assert that people are unintelligent or incompetent. But this distinction is clearly not a priority for many people, so this Article tries to point out how important it is. Once people see the problem, they cannot unsee it. This Article aims to shine a light on this problem.

For example, in the high-profile case brought by the FTC and several state attorneys general against “pharma bro” Martin Shkreli, Vyera Pharmaceuticals, LLC, Phoenixus AG, and Kevin Mulleady, the complaint identified Vyera as a “privately-held, for-profit limited liability corporation that is wholly owned by Phoenixus AG.”¹⁰ It

⁶ WESTLAW [hereinafter WESTLAW, Limited Liability Corp.], <https://1.next.westlaw.com> (search in search bar for “limited liability corporation”; then choose “all states” and “all federal”; then click “search”) (last visited Feb. 18, 2024).

⁷ *See, e.g., Daimler AG v. Bauman*, 571 U.S. 117, 123 (2014).

⁸ WESTLAW, <https://1.next.westlaw.com> (search in search bar for “limited liability corporation”; then choose “all states”; then click “search”) (last visited Feb. 18, 2024).

⁹ WESTLAW, <https://1.next.westlaw.com> (search in search bar for “limited liability corporation”; then choose “all states”; then click “search”; then choose “date”; then choose “last 12 months” from dropdown) (last visited Feb. 18, 2024).

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

continued on to say that Vyera is *incorporated* in Delaware.¹¹ But LLCs are *organized*, not *incorporated*, because they are not corporations. And when the FTC reported the matter on its website, it listed Vyera as a Delaware limited liability “corporation.”¹²

Such errors are seemingly pervasive.¹³ And there are other adjacent errors like those shown above including coupling the term “incorporate” with the formation of an LLC, rather than using more precise terms, such as “organize” or “form.” Another flagrant mistake is applying the term “pierce the corporate veil” to LLCs. Since LLCs are not corporations, they have no *corporate* veil to pierce. Rather, to be accurate, one should use the term “pierce the liability veil,” “pierce the entity veil,” or simply “pierce the veil.”¹⁴

This Article in Part II discusses the evolution of LLCs. Part III reports myriad sources of the use of the erroneous term, limited liability “corporation,” including numerous examples. Part IV discusses the harms of misidentifying LLCs or conflating LLCs with

¹¹ *Id.*

¹² *Vyera Pharmaceuticals, LLC*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/161-0001-vyera-pharmaceuticals-llc> (Jan. 23, 2024). While the state websites did not replicate this error, two of them referred to Vyera as a “corporate defendant,” which it is not; it is an LLC. Press Release, Commonwealth of Va. Off. of the Att’y Gen., Att’y Gen. Herring Helps Secure \$40 Million from Vyera Pharms., Bans Corp. Exec. from Pharm. Indus. for Seven Years (Dec. 7, 2021), <https://www.oag.state.va.us/consumer-protection/index.php/news/507-december-7-2021-herring-helps-secure-40-million-from-vyera-pharmaceuticals-bans-corporate-executive-from-pharmaceutical-industry-for-seven-years>.

¹³ In fact, less than twenty-four hours after the authors posted the first draft of this Article on SSRN, a prominent business law attorney and blogger noted another recent opinion making a related error. Keith Paul Bishop, *The Too Too Unpardonable Fault of Conflating LLCs and Corporations*, ALLEN MATKINS: CAL. CORP. & SEC. L. (Aug. 10, 2023), <https://www.calcorporatelaw.com/the-almost-unpardonable-sin-of-conflating-llcs-and-corporations>.

¹⁴ Not to be conflated with the rock band Pierce the Veil from San Diego whose name sadly did not come from the business entity piercing context but rather from the sociology context. The band’s founder and lead singer, Vincent Fuentes, learned about the term while at San Diego State University.

The name comes from a phrase that I learned during a sociology class in college. To Pierce the Veil means to go directly to the source of a problem and completely cut it out. This idea has helped me through a lot of problems in my life that I may have otherwise never gotten over. If something is truly bothering you or causing you pain, just go to the heart of the problem and get rid of it at the root. It can be a breath of fresh air.

FAQ, TUMBLR: PIERCE THE VEIL KNOWLEDGE, <https://ptv-knowledge.tumblr.com/FAQ> (last visited Feb. 4, 2024).

corporations. Part V of this Article proposes solutions on how to fix this issue before it becomes even more rampant through the replication of the term by AI processing tools such as ChatGPT. The Article then briefly concludes.

II. EVOLUTION OF THE LIMITED LIABILITY COMPANY

The LLC has evolved from a rarely used entity choice to become the leading business entity of choice.¹⁵ Back in 1988, the Internal Revenue Service (IRS) determined that LLCs could have pass-through tax status.¹⁶ The IRS later created the check-the-box regime in 1997, which allowed LLCs (and other entities) to be taxed under what was traditionally tax treatment available only for partnerships.¹⁷

The appeal of the LLC is multifaceted. The option of having pass-through tax status for the entity is one significant part of the appeal. An LLC is not technically required to obtain pass-through tax status for all of an entity's "owners," but the LLC provides a streamlined option like nothing before it.¹⁸ Beyond that, the LLC provides its members limited liability protection.

Prior to the IRS's 1997 ruling, for all "owners" of an entity to have limited liability and pass-through tax treatment, there were two primary choices.¹⁹ One was an S corporation, which came with the required corporate formalities (because it is a corporation) plus additional limitations.²⁰ The other was a limited partnership with a corporation as the general partner.²¹ The LLC provided a fluid, informal entity structure that more accurately represented the needs and desires of the members.²²

¹⁵ Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK U. L. REV. 459, 460 (2009) ("Until [1997], the corporation was unquestionably the dominant entity of choice for an operating business.").

¹⁶ Rev. Rul. 88-76, 1988-2 C.B. 360, *repealed by* Rev. Rul. 98-37, 1998-2 C.B. 133.

¹⁷ T.D. 8697, 1997-1 C.B. 215; Bishop, *supra* note 15, at 460.

¹⁸ See Joshua P. Fershée, *LLCs and Corporations: A Fork in the Road in Delaware?*, 1 HARV. BUS. L. REV. ONLINE 82, 82 (2011) [hereinafter Fershée, *Fork in the Road*].

¹⁹ See Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, in BUSINESS TAX STORIES 295, 295-96 (Steven A. Bank & Kirk J. Stark eds. 2005).

²⁰ *Id.* at 295.

²¹ *Id.* at 298.

²² See *id.* at 302.

Because of this tax treatment, LLCs have often been viewed as “hybrid” entities,²³ which is accurate in the sense that some LLCs have similarities to partnerships and corporations. Even though thinking about LLCs as hybrids is correct, this framing is potentially misleading because the LLC is its own entity rather than a combination of two other types. Too often, courts (and practitioners and laypeople) treat LLCs as corporations with pass-through tax status. That is not quite right.

As the Delaware Court of Chancery has observed, “[T]here is nothing absurd about different legal principles applying to corporations and LLCs.”²⁴ Nonetheless, LLCs are far too often conflated with corporations. But why?

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

Going back to a time well before LLCs, corporations existed only by grant of government charter.²⁵ In England, there had been a history of granting limited liability only to entities engaging in a business that had some connection to providing a public good, such as a railroad or a bridge.²⁶ There were many corporations with unlimited liability at that time, including those within the United States.²⁷ Early entity law,

²³ See, e.g., *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at *4 (Tenn. Ct. App. Nov. 21, 2003) (“The LLC is a relatively new form of business entity, a hybrid [that] ‘incorporates certain beneficial aspects of a partnership with certain beneficial aspects of a corporation.’” (citation omitted)); Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 248 (2005) (citing *Anderson*, 2003 WL 22768666, at *4).

²⁴ *CML V, LLC v. Bax*, 6 A.3d 238, 249 (Del. Ch. 2010).

²⁵ See Hamill, *supra* note 19, at 303–04.

²⁶ E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1351 (1948), <https://doi.org/10.2307/1335933>; Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 29, 2019), <https://corp.gov.law.harvard.edu/2019/08/29/a-new-understanding-of-the-history-of-limited-liability-an-invitation-for-theoretical-reframing> (“Notable contemporary observers, including the [p]residents of Columbia and Harvard, viewed limited liability corporation as the greatest single discovery of modern times, surpassing steam and electricity.”).

²⁷ See Dodd, *supra* note 26, at 1352 (“All of the New England states at one time or another adopted a policy of granting manufacturing corporation charters in large

therefore, had distinctions between limited liability corporations and unlimited liability corporations—both of which were corporate entities.

By the mid-1800s, though, the term “corporation” signaled to the world that the business/entity had limited liability.²⁸ This distinction contrasted with general partnerships, which retained the concept of personal liability for the partners.²⁹ Quite possibly, the “limited liability corporation” error, when used in reference to LLCs, is loosely connected to the limited/unlimited liability corporation distinction from the early 1800s, but this is not an especially compelling theory.

In 2011, Dean (then-Professor) Fershée observed:

Many courts . . . seem to view LLCs as close cousins to corporations, and many even appear to view LLCs as subset or specialized types of corporations. A May 2011 search of Westlaw’s “ALLCASES” database provides 2,773 documents with the phrase “limited liability corporation,” yet most (if not all) such cases were actually referring to LLCs—limited liability *companies*. As such, it is not surprising that courts have often failed to treat LLCs as alternative entities unto themselves. It may be that some courts didn’t even appreciate that fact.³⁰

By 2015, that number had increased to 4,575 cases.³¹ As of February 2024, that number is 8,919.³² Thus, more than four thousand new cases have made this error in the past eight years.

Perhaps the most egregious of those cases—because it is a Supreme Court case—is *Daimler AG v. Bauman*.³³ Justice Ginsberg authored this opinion, joined by Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan.³⁴ Justice

numbers, while coupling the grants with provisions for unlimited shareholder liability.”).

²⁸ See Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS’N BULL. 11, 11 (1960).

²⁹ See Hamill, *supra* note 19, at 298.

³⁰ Fershée, *Fork in the Road*, *supra* note 18, at 86 (footnotes omitted).

³¹ Joshua Fershée, *Wrong: U.S. Supreme Court & 4575 Other Cases Say an LLC Is a Corporation*, BUS. L. PROF. BLOG (Sept. 8, 2015) [hereinafter Fershée, *Wrong*], https://lawprofessors.typepad.com/business_law/2015/09/the-us-supreme-court-doesnt-know-an-llc-is-a-limited-liability-company.html.

³² WESTLAW, *Limited Liability Corp.*, *supra* note 6.

³³ 571 U.S. 117 (2014).

³⁴ *Id.* at 120.

Sotomayor filed a concurring opinion.³⁵ The entire Court either embraced or acquiesced to an incorrect characterization of the LLC.

For example, the opinion stated, “MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.”³⁶ The Court continued, “Jurisdiction over the lawsuit was predicated on the California contacts of *Mercedes-Benz USA, LLC (MBUSA)*, a subsidiary of *Daimler incorporated in Delaware* with its principal place of business in New Jersey.”³⁷ An LLC is, of course, not a corporation, and thus cannot be incorporated. The entity would have been “formed” or “organized” in Delaware.

As mentioned, the entire Court at least acquiesced to the use of this incorrect terminology. And, as shown above, Justice Alito is *still* mislabeling an LLC as a “limited liability corporation.” Hopefully, the three most recently appointed Justices will help change course. *Daimler AG* is, thankfully, the only U.S. Supreme Court case that refers to a “limited liability corporation.”³⁸

Misnaming errors like those mentioned above occur in multiple ways, but there are a few that occur more often than others. For example, case captions frequently mislabel LLCs, which are mostly an aesthetic, harmless mistake. Similarly, some cases incorrectly refer to the LLC as a corporation in the opinion, but the reference is merely for identification purposes. These errors, too, are largely harmless (though still wrong).

Other circumstances, however, increase the risk of harm. In cases in which a court’s jurisdiction is an issue, corporations and LLCs have different tests that can lead to very different outcomes. Similarly, in veil piercing cases, courts apply separate tests for corporations and LLCs; some distinctions are subtle, some major, and all significant. Before exploring the risks and harms that loom, it is important to survey the sources of conflation.

III. SOURCES OF CONFLATION

Erroneous labeling of LLCs typically arises when conflating them with corporations. Such conflation emanates from a variety of sources extending beyond lawyers and government. No particular group appears to be immune to the fallacy of the limited liability corporation.

³⁵ *Id.* at 142 (Sotomayor, J., concurring)

³⁶ *Id.* at 123 (majority opinion).

³⁷ *Id.* at 121 (emphasis added).

³⁸ *Id.* at 123.

In the past, legislators have incorrectly labeled LLCs, but thankfully, the more current trend is for legislators to fix erroneous court case results by enacting statutes. There is still much work to be done. This Part covers the ways that lawyers and the judiciary, legislators, governmental agencies, media, and AI misuse terminology surrounding LLCs.

A. *Lawyers and the Judiciary*

1. Lawyers

When lawyers mislabel LLCs, the error proliferates because lawyers interact with laypeople, other lawyers, governmental officials, and members of the judiciary. Lawyers communicate with other clients and potential clients through blogs and newsletters. They also draft contracts that are seen by other lawyers, clients, and managers of clients, which could be seen by judges and clerks.³⁹ Additionally, litigators file pleadings, including briefs, which are read by judges, clerks, the media, and other individuals in society. When lawyers do not use the proper terminology—or are imprecise—bad things can happen. This Part covers myriad examples of lawyers getting it wrong and it does not matter the size or prestige of the firm. *Rich or poor, large or small, [t]he undertaker takes them all.*⁴⁰

i. Blogs

Blogs and firm newsletters are purportedly excellent ways to gain new clients or provide existing clients with ideas for new services. Lawyers show they are experts in certain areas when seeking to help clients. While some get it right, it is particularly disconcerting to see incorrect terminology use by lawyers who are purporting to be experts.

Take, for example, a firm that lists its areas of expertise as: Business Consulting, Corporate and Business Law, Tax Services, and Accounting Services.⁴¹ These are all highly technical areas where precision matters. And this particular firm also blogs on its website. Unfortunately, these experts titled a blog post, “Starting a New Limited

³⁹ If the company is publicly traded, all documents are available in the SEC’s EDGAR database for anyone who has internet access to see. *EDGAR—Search and Access*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/edgar/search-and-access> (Jan. 18 2024).

⁴⁰ ACCEPT, *The Undertaker*, on TOO MEAN TO DIE, at 01:40 (Nuclear Blast Recs. 2021).

⁴¹ Janathan Allen, *Starting a New Limited Liability Corporation in San Diego*, ALLEN BARRON, INC. (July 30, 2021), <https://allenbarron.com/starting-a-new-limited-liability-corporation-in-san-diego>.

Liability Corporation in San Diego.”⁴² The first line reads that “[t]here is a lot for a new business person to learn when starting a new [l]imited [l]iability [c]orporation in San Diego or Southern California.”⁴³

As if that was not enough to give one consternation, the blog continued, “Starting a new [l]imited [l]iability [c]orporation in San Diego is much more than just downloading some inexpensive forms and contracts from some website and launching into business. The [l]imited [l]iability [c]orporation or LLC corporate documents should include an ‘operating agreement.’”⁴⁴ An LLC does in fact need an operating agreement, but the operating agreement is *not* a “corporate” document.

Another example comes from a named shareholder at a different firm from a blog post titled “Limited Liability Corporation Versus a Sole Proprietorship.”⁴⁵ The author explains that the “[l]imited [l]iability [c]orporation” is the most common form used to structure a new business:

“[N]ew businesses are started without proper understanding of the financial and legal ramifications of their entity choice. There are many legal ways to structure a new business, such as partnerships, S [c]orporations and regular corporations. [But] the most common forms are the [l]imited [l]iability [c]orporation (LLC) and the [s]ole [p]roprietorship.”⁴⁶

Some additional winning content appears in a separate firm page: “Every state in the U.S. allows limited liability corporation establishment.”⁴⁷ This page uses the erroneous term seven times.⁴⁸

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Kenneth J. Bloom, *Limited Liability Corporation Versus a Sole Proprietorship*, BLOOM, BLOOM & ASSOCS., P.C., <http://bloomlawfirm.com/articles/31/limited-liability-corporation-versus-sole-proprietorship> (last visited Feb. 23, 2024).

⁴⁶ *Id.*

⁴⁷ *Corporate Law*, FULLER, CHLOUBER & FRIZZELL, LLP, <https://www.legalok.com/corporate> (last visited Feb. 23, 2024).

⁴⁸ *See id.*

Sadly, the examples seem endless.⁴⁹ Incorrect linking of the term “incorporation” with LLC formation is also rampant.⁵⁰ Although it is possible that the firm’s attorneys are not writing these posts themselves, as some firms outsource these tasks, the firm nevertheless endorses the content by virtue of publishing the posts as an expert on the subject.

ii. Transactional Documents

Lawyers draft copious amounts of transactional documents, such as LLC operating agreements, that frequently contain erroneous terminology and are not publicly available. And there are likely even more that are not posted on the internet and thus unrecorded.⁵¹

In two distinct companies’ operating agreements—Interactive One, LLC and Atlas Growth Partners GP, LLC—the entities are properly labeled as limited liability companies throughout, until the

⁴⁹ See, e.g., Maurice R. Johnson, *S-Corporation vs. Limited Liability Corporation: What’s the Difference?*, GOOSMANN L. FIRM (Nov. 17, 2022), <https://www.goosmannlaw.com/blog/2022/november/s-corporation-vs-limited-liability-corporation-w>; *Limited Liability Corporations*, FRASER L. FIRM LLC, <https://hiltonheadislandlaw.com/service/limited-liability-corporations> (last visited Feb. 23, 2024); *What Is Limited Liability Corporation (LLC)?*, GULOTTA & GULOTTA, PLLC, <https://gulottagulotta.com/what-is-a-limited-liability-corporation> (last visited Feb. 23, 2024); Sanjeev Kumar, *Key Terms for Your LLC Operating Agreement*, KUMAR L. FIRM PLLC: BLOG (Mar. 28, 2023), <https://thekumarlawfirm.com/key-terms-for-your-llc-operating-agreement>; *Is an LLC Arrangement Right for You?*, BRENT BLACKSTOCK PLC (May 6, 2022), <https://www.brentblackstock.com/blog/2022/05/is-an-llc-arrangement-right-for-you>; *Business Law*, BHATTA L. & ASSOCS., PLLC, <https://bhattalaw.com/practice-area/business-law> (last visited Feb. 23, 2024); Steven Lowe, *What Can the Right Operating Agreement Do for Your LLC?*, LOWE & ASSOCS. (June 4, 2019), <https://lowelaw.com/what-can-the-right-operating-agreement-do-for-your-llc>; *LLP vs LLC*, THE BERGLUND GRP. (Mar. 18, 2023), <https://www.berglundgroup.com/insights/llp-vs-llc>.

⁵⁰ See, e.g., *Incorporating a Business as an LLC: All You Need to Know as a Business Owner*, THE DOYLE L. OFFS., <https://thedoylelawoffices.com/blog/incorporating-a-business-as-llc> (last visited Feb. 23, 2024); *Limited Liability Companies*, BERKMAN SOLS.: LEXTREE, <https://www.berkmansolutions.com/articles/entities/llc> (last visited Feb. 23, 2024); *What Is a Limited Liability Company (LLC), How Can Business Owners Incorporate One (or Do I Need a Lawyer) and Can Foreign Investors Own a LLC in Florida?*, TREMBLY L. FIRM, <https://tremblylaw.com/what-is-a-limited-liability-company-llc-and-how-can-business-owners-form-one> (last visited Feb. 23, 2024).

⁵¹ A great place to find and search out legal documents is on the SEC’s EDGAR database. This, of course, only contains disclosures from public companies. *EDGAR—Search and Access*, *supra* note 39.

included joinder agreement, which uses the erroneous term.⁵² In addition, several operating agreements contain correct labeling up until the *signature* line.⁵³ Of course, some examples remain where the term is misused right in the preamble.⁵⁴

Mergers-and-acquisitions lawyers are getting it wrong too.⁵⁵ In an Agreement and Plan of Merger between General Electric Company, National Broadcasting Company, and others, one of the recitals defines Telemundo Network Group, LLC as “a Delaware limited liability corporation.”⁵⁶ All of these companies have highly paid attorneys and in-house counsel. Counsel at other big companies have used incorrect terminology as well. Take Google: as per its Managed Google Play Agreement for Android users, Google LLC is characterized as a “Delaware limited liability corporation”—except it is not.⁵⁷ And how about Blackrock? Blackrock’s sample form Distribution Agreement’s preamble defines Blackrock Investments, LLC as a “Delaware limited liability corporation.”⁵⁸

⁵² Radio One, Inc., Amendment No.1 to Amended and Restated Limited Liability Company Operating Agreement of Interactive One, LLC (Form S-4 Ex. 3.22) (Feb. 9, 2011); Atlas Growth Partners, L.P., Amended and Restated Limited Liability Company Agreement of Atlas Growth Partners GP, LLC (Form S-1 Ex. 3.6) (Oct. 21, 2015).

⁵³ See, e.g., CityCenter Holdings, LLC, Amended and Restated Limited Liability Company Agreement of CityCenter Holdings, LLC (Form S-4 Ex. 3.2) (Sept. 29, 2011); Wells Operating P’ship II, L.P., Operating Agreement of Wells Reit II – University Circle, LLC (Form S-4 Ex. 3.74) (July 18, 2011).

⁵⁴ See, e.g., Black Rock City LLC, LLC Agreement (May 19, 2000), https://burningman.org/about/history/brc-history/afterburn/02-2/org/llc_agreement; Warner Music Grp. Corp., Limited Liability Company Agreement of Artist Arena International, LLC (Form S-4 Ex. 3.206) (Jan. 25, 2012); Galaxy Nutritional Foods, Inc., Amended and Restated Limited Liability Company Agreement of MW1 LLC (Schedule 13D/A Ex. 99.K) (May 8, 2009).

⁵⁵ See, e.g., Colombier Acquisition Corp., Sponsor Support Agreement (Form 8-K Ex. 10.2) (Feb. 28, 2023).

⁵⁶ Telemundo Holdings, Inc., Agreement and Plan of Merger (Form S-4 Ex. 2.3) (Nov. 1, 2011).

⁵⁷ *Managed Google Play Agreement*, ANDROID (Mar. 23, 2021), <https://www.android.com/enterprise/terms>.

⁵⁸ BlackRock ETF Tr., Registration Statement (Form N-1A Ex. 99.5(A)) (Mar. 4, 2019); see also *Terms and Conditions*, HEMP BENCHMARKS, <https://www.hempbenchmarks.com/terms> (last visited Feb. 23, 2024) (identifying itself, an LLC, as a “Connecticut limited liability corporation”); *Distribution*, CONNECT CHARLIE, <https://connectcharlie.com/pages/distribution-or-wholesale> (last visited Feb. 23, 2024) (defining its parent company, an LLC, as a “California [l]imited [l]iability [c]orporation”); *Non-Disclosure Agreement*, TERADEK, <https://teradek.com/pages/reseller-nda> (last visited Feb. 23, 2024) (identifying itself, an LLC, as a “California [l]imited [l]iability [c]orporation”).

And more examples exist. Aspirational Consumer Lifestyle Corp. and Wheels Up Partners Holdings LLC executed an Agreement and Plan of Merger.⁵⁹ Aspirational Consumer Lifestyle Corp. also issued an accompanying SEC Form 8-K Current Report, which listed all of the entities involved in said merger, including more than one Delaware LLC.⁶⁰ The Form 8-K properly defined some entities but erroneously listed one LLC as a “corporation.”⁶¹ The agreement itself, however, contained the correct language.⁶²

iii. Court Documents

Having discussed transactional documents,⁶³ this Article now turns to court-filed documents. Litigators draft pleadings that identify the parties as well as the applicable law. Other lawyers, such as opposing counsel and members of the judiciary, rely on these pleadings. The following Part provides multiple examples of the judiciary getting it wrong. Sometimes the errors start with the lawyers who prepared the pleadings or transactional documents.

All too often, complaints will improperly identify a party in the caption as a limited liability “corporation.”⁶⁴ This problem is pervasive and ongoing. And some lawyers are models of consistency and replicate the error in the body of the complaint itself.⁶⁵

As discussed below,⁶⁶ the Supreme Court of Pennsylvania opinion in *Mortimer v. McCool* conflated LLCs with corporations from beginning to end.⁶⁷ While the court is responsible for its opinion, the conflating language began with the lawyers. In the appellant’s brief in the Superior Court of Pennsylvania, the statement of the questions involved began with numerous references to LLCs having their

⁵⁹ Aspirational Consumer Lifestyle Corp., Amendment No.1 to Agreement and Plan of Merger (Form 8-K/A Ex. 2.1) (May 6, 2021).

⁶⁰ Aspirational Consumer Lifestyle Corp., Current Report (Form 8-K) (May 6, 2021).

⁶¹ *Id.*

⁶² Aspirational Consumer Lifestyle Corp., Amendment No.1 to Agreement and Plan of Merger (Form 8-K/A Ex. 2.1) (May 6, 2021).

⁶³ See discussion *supra* Part III.A.1.ii.

⁶⁴ See, e.g., Complaint at 1, *Granum v. Granum*, No. 20CV374820 (Cal. Super. Ct. Dec. 16, 2020).

⁶⁵ *Id.*

⁶⁶ See discussion *infra* Part III.A.2.iii.

⁶⁷ *Mortimer v. McCool*, 255 A.3d 261 (Pa. 2021).

“corporate veils” pierced and being “corporate forms.”⁶⁸ And the incorrect labeling continued from there. Sometimes proper usage occurred, and other times erroneous terminology and conflation arose.

A layperson also misused the terminology, and a court-filed document quoted them without correcting or noting the mislabeling. An owner testified that one of the LLCs was a “shell *corporation*,” which was created for the purpose of holding a liquor license, as the appellant noted in their brief.⁶⁹ Later, the brief indicated that the appellees “abused their privileges of incorporation by using their corporate forms to perpetrate fraud, defeat public convenience, and circumvent the law requiring their corporate veils to be pierced pursuant to the alter ego theory or on equitable principals.”⁷⁰ The appellees could not have abused their privileges of incorporation because an LLC is neither “incorporated” nor a “shell corporation.” Further, an LLC cannot be subject to a law requiring “corporate veils to be pierced” because an LLC is not a corporation.⁷¹

Unfortunately, the appellant’s brief is not the only faulty one in this case. The appellees’ brief made the following statement: “Limited liability companies are treated in the same manner as corporations.”⁷² No, they are not. As the Supreme Court of Pennsylvania noted, the “governing statute at all relevant times was the Limited Liability Company Law of 1994.”⁷³ To be fair, *Mortimer* was a case of first

⁶⁸ Brief for Appellant at 2–3, *Mortimer v. McCool*, No. 3585 EDA 2018 (Pa. Super. Ct. May 15, 2019).

⁶⁹ *Id.* at 54.

⁷⁰ *Id.* at 72. The appellant’s reply brief elaborated on this assertion:

A thorough review of Pennsylvania jurisprudence fails to reveal any corporate liquor licensee quite like 340 Associates, LLC: a company created by its officers/members for the admitted purpose of being a ‘shell corporation designed just to own the license;’ a company that never intended to operate or supervise its licensed establishment; and, a company that never intended to earn a profit. Appellant submits that Appellees’ use of this ‘shell corporation,’ under these special and limited circumstances, is not lawful and must not be condoned by our courts.

Reply Brief for Appellant at 3, *Mortimer v. McCool*, No. 3585 EDA 2018 (Pa. Super. Ct. July 29, 2019).

⁷¹ See discussion *infra* Part II.A.2.iii.

⁷² Brief of Appellees at 10, *Mortimer v. McCool*, No. 3585 EDA 2018 (Pa. Super. Ct. July 15, 2019).

⁷³ *Mortimer v. McCool*, 255 A.3d 261, 266 n.6 (Pa. 2021). Due to the formation dates of the LLCs at issue in this case, the 1994 law applied. But it should be noted that in 2016, Pennsylvania repealed that law and enacted the Pennsylvania Uniform Limited Liability Company Act. 15 PA. STAT. AND CONS. STAT. ANN. § 8811 (West 2024).

impression; still, no need to conflate here. And to continue referencing “piercing the corporate veil” when discussing LLCs is wrong.

The amicus brief continued the mislabeling, citing the case *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, but erroneously labeling the case in its table of citations as “*Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, Limited Liability Corporation*,” instead of properly leaving the LLC designator at the end of the company name.⁷⁴ A deeper look into the brief reveals some further errors, stating that one of the appellees “qualifies as a ‘corporation’ with the accompanying immunity of its owners from liability for the negligence of its ‘operator.’”⁷⁵ And worse, the brief continued, “A corporation or limited liability company is an entity existing only when created *and functioning* in accordance with the Pennsylvania corporation statutes contained in Title 15 of Purdon’s [Pennsylvania] Statutes and the myriad of judicial decisions interpreting these statutes.”⁷⁶ Again, the Pennsylvania Uniform Limited Liability Company Act, not the corporation statute, governs LLCs.

2. The Judiciary

To reiterate, LLCs are not a type of modified corporation.⁷⁷ LLCs are unique and distinct entities.⁷⁸ Unfortunately, courts, including our nation’s highest Court, continue to conflate LLCs and corporations.⁷⁹

⁷⁴ Amicus Curiae Brief of Pennsylvania Ass’n for Just. Supporting the Appellant at Table of Citations, *Mortimer v. McCool*, No. 3585 EDA 2018 (Pa. Super. Ct. May 7, 2019).

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 8.

⁷⁷ Joshua Fershée, *You Can’t Pierce the Corporate Veil of an LLC Because It Doesn’t Have One*, BUS. L. PROF. BLOG (Oct. 15, 2013), https://lawprofessors.typepad.com/business_law/2013/10/you-cant-pierce-the-corporate-veil-of-an-llc-because-it-doesnt-have-one-1.html.

⁷⁸ Larry Ribstein, *An Academic’s Day in Court*, TRUTH ON THE MKT. (Dec. 20, 2011), <http://truthonthemarket.com/2011/12/20/an-academics-day-in-court>.

⁷⁹ Fershée, *Wrong*, *supra* note 31.

i. Misnaming

As noted,⁸⁰ there are nearly nine thousand court cases that misname LLCs as corporations, including the previously mentioned U.S. Supreme Court case *Daimler AG*.⁸¹ This misnaming can create a host of problems as shown in Part IV.

This Part starts with California because that state and its courts have been known to misname frequently.⁸² As an example, a California court order granting a motion for final settlement in an antitrust class action suit omitted (at least arguably) LLCs as “person(s)” in the settlement’s definitions. The following clause appeared multiple times in the settlement agreement:

“Person(s)” means an individual, corporation, *limited liability corporation*, professional corporation, limited liability partnership, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and any spouses, heirs, predecessors, successors, representatives[,] or assignees of any of the foregoing.⁸³

A reference to a “limited liability corporation” equates to referencing a “corporation,” not an LLC. Granted, the “limited liability corporation” language almost certainly *intended* to cover

⁸⁰ See *supra* notes 6–9, 32 and accompanying text.

⁸¹ *Daimler AG v. Bauman*, 571 U.S. 117, 123 (2014); see, e.g., *Drummond v. Alsalousi*, No. 23-cv-21379, 2023 WL 4882692, at *3 (S.D. Fla. Aug. 1, 2023) (order remanding case); *Holland v. Khedr Props., LLC*, No. CV 23-05741, 2023 WL 4873624, at *3 (C.D. Cal. July 27, 2023) (order to show cause); *Cauley v. Ruane*, No. CV 23-05968, 2023 WL 4873621, at *3 (C.D. Cal. July 27, 2023) (order to show cause); *State v. Morello*, 547 S.W.3d 881, 884 (Tex. 2018); *Jones v. Marquis Props., LLC*, 212 F. Supp. 3d 1010, 1020–21 (D. Colo. 2016); *Richardson v. UN Empress Props., LLC*, No. L-3297-07, 2010 WL 1426495, at *4 (N.J. Super. Ct. App. Div. Apr. 7, 2010); *Purchase Partners II, LLC v. Max Cap. Mgmt. Corp.*, No. 604218-2004, 2008 WL 1821878, at *3 (N.Y. Sup. Ct. Apr. 22, 2008); *Conn. Light & Power Co. v. Westview Carlton Grp., LLC*, 950 A.2d 522, 524 (Conn. App. Ct. 2008).

⁸² Joshua Fershée, *Bang Head Here: California and the LLC as a “Corporation,”* BUS. L. PROF BLOG (Oct. 9, 2018), https://lawprofessors.typepad.com/business_law/2018/10/bang-head-here-california-and-the-llc-as-a-corporation.html; Joshua Fershée, *Dear California: LLCs Are Not Corporations. Or Are They?*, BUS. L. PROF BLOG (May 18, 2016) [hereinafter *Dear California*], https://lawprofessors.typepad.com/business_law/2016/05/dear-california-llcs-are-not-corporations-or-are-they-.html.

⁸³ *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-02420, 2019 WL 3856413, at *12, *29, *44, *59, *74, *91, *108, *125 (N.D. Cal. Aug. 16, 2019) (emphasis added) (order granting final approval of settlement).

“limited liability *companies*” or LLCs, but the phrase likely does not. The fact that the definition includes all “unincorporated associations” may mean it includes LLCs, but that is neither clear nor definitive. For example, the U.S. Court of Appeals for the Fourth Circuit found that a limited liability company is an “unincorporated association” for purposes of 28 U.S.C. § 1332(d)(10), which concerns jurisdictional determinations related to subject-matter jurisdiction.⁸⁴ But in other contexts, an “unincorporated association” is an organization that is “not a legal entity separate from the persons who compose it.”⁸⁵ At a minimum, the use of such language creates unnecessary, and unwanted, room for confusion and argument.

Courts reviewing settlements should correct such an error. Also, there is great risk this mistake is more rampant than known because clauses like the one above are often pulled from prior settlements.

Adding insult to injury, a recent court actively decided to use corporate language to describe an LLC’s members.⁸⁶ The court stated, “Although CVH is a limited liability company, we refer to holders of equity interests in the company as ‘shareholders’ for ease of reference.”⁸⁷ As attorney Peter A. Mahler asked, “What’s easier about ‘shareholders’ than ‘members’?”⁸⁸ One thing is for certain: “shareholders” is a less accurate characterization than “members.”

Precedent matters. Wording matters. Precision matters. The *Mortimer* court, discussed above, stated, “[I]t remains for the lower courts in future cases to consider [the law’s] application consistently with the approach described above, in harmony with prior case law, mindful of the salutary public benefits of limited liability, and with an eye always toward the interests of justice.”⁸⁹ Poor, inaccurate phrasing in opinions cannot lead to “harmony.” Incorrect verbiage instead creates murky situations that become vaguer as each case interprets and applies flawed language, creating imprecise law.

⁸⁴ *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010) (“Accordingly, we agree with the district court that, under § 1332(d)(10), Express Check’s citizenship for purposes of CAFA is that of the [s]tate under whose laws it is organized and the State where it has its principal place of business.”).

⁸⁵ *Unincorporated Association*, BLACK’S LAW DICTIONARY (7th ed. 1999).

⁸⁶ *S. Advanced Materials, LLC v. Abrams*, 220 A.D.3d 74, 76 n.2 (N.Y. App. Div. 2023).

⁸⁷ *Id.*

⁸⁸ E-mail from Peter A. Mahler, Partner, Farrell Fritz, P.C., to Joshua P. Fershée, Dean, Creighton Univ. Sch. of L. (Oct. 1, 2023, 7:39 AM) (on file with author).

⁸⁹ *Mortimer v. McCool*, 255 A.3d 261, 288 (Pa. 2021); *see also* discussion *supra* Part III.A.1.iii.

ii. Jurisdiction

No courts are immune from conflating entities. Delaware is a leader in business law, and many entities choose to originate there. Accordingly, such a place should be better than most at understanding, distinguishing, and describing entities. Delaware often is not.

Take, for example, a federal diversity jurisdiction case that started out on track, explaining that under 28 U.S.C. § 1332(a)(1), “no plaintiff can be a citizen of the same state as any of the defendants.”⁹⁰ But the court continued:

A natural person is a citizen of “the state where he is domiciled,” and a corporation is a citizen of the state where it maintains its principal place of business, as well as the state where it is incorporated. For purposes of § 1332, the citizenship of a limited liability corporation (“LLC”) is determined “by the citizenship of each of its members.” Plaintiff Cliffs Natural Resources Inc. is incorporated in Ohio, and [p]laintiff CLF Pinnoak LLC is incorporated in Delaware and maintains its principal place of business in Ohio. In moving to dismiss this action for lack of jurisdiction, [the] [d]efendants assert that Seneca Coal Resources, LLC, a Delaware corporation, includes members who are Ohio citizens, thus destroying complete diversity as required for § 1332.⁹¹

The court made multiple errors here.⁹² For example, the citizenship of an LLC’s members determines the citizenship for an LLC.⁹³ Corporations have other rules. Also, an LLC is formed, not incorporated. And the plaintiff is a Delaware LLC. Like most states, Delaware has an entire act just for LLCs.⁹⁴

The above is another example of a rather run-of-the-mill error that started with the complaint and carried through into the court’s analysis. Ultimately, the court got back on track, even referring to

⁹⁰ *Cliffs Nat. Res. Inc. v. Seneca Coal Res., LLC*, No. 17-567, 2018 WL 2012900, at *1 (D. Del. Apr. 30, 2018) (quoting *Midlantic Nat’l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995)).

⁹¹ *Id.* (emphasis added) (citations omitted).

⁹² In addition to the errors in the text, the court should have noted that the statute applies regardless of gender. And notably, this error clearly emanated from the complaint, but the court should have fixed it in its opinion.

⁹³ *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004).

⁹⁴ DEL. CODE ANN. tit. 6, § 18-101 (2023).

LLCs correctly later in the opinion.⁹⁵ Still, it is fair to expect more from Delaware and hold the state's courts to a standard of precision because of the immense number of LLCs forming there.

In addition, there are instances where misnaming LLCs produces jurisdictional-analysis errors. For example, the U.S. Court of Appeals for the Sixth Circuit got it quite wrong in at least one case, *Kendle v. Whig Enterprises, LLC*:

John Kendle is a citizen of Ohio; defendant *WHIG Enterprises, LLC* is a Florida corporation with its principal place of business in Mississippi; defendant Rx Pro Mississippi is a Mississippi corporation with its principal place of business in Mississippi; defendant Mitchell Chad Barrett is a citizen of Mississippi; defendant Jason Rutland is a citizen of Mississippi.⁹⁶

Again, an LLC is not a corporation. And for purposes of diversity jurisdiction, “a limited liability company is a citizen of any state of which a member of the company is a citizen.”⁹⁷ Thus, the LLC's place of formation and principal place of business do not matter. All that matters is the citizenship of each LLC member.

In *Kendle*, the court suggested that there may be additional owners (i.e., members).⁹⁸ The opinion referred to the plaintiff suing “WHIG Enterprises, LLC, two of its co-owners, and another affiliated entity.”⁹⁹ If the court wants to know whether diversity jurisdiction is proper, though, the court needs to know *all* of WHIG Enterprises' members and their citizenships.

Now in *Kendle*, there could be diversity among the parties, but readers do not know, and neither, apparently, did the court. Diversity jurisdiction may not be an issue in this case, but if people start modeling their bases for jurisdiction on the *Kendle* description, things could get ugly. Fortunately, some cases remind us to check diversity for all members in an LLC.¹⁰⁰

⁹⁵ *Cliffs Nat. Res. Inc.*, 2018 WL 2012900, at *2, *4.

⁹⁶ *Kendle v. Whig Enters., LLC*, 760 F. App'x 371, 375 (6th Cir. 2019) (emphasis added) (citations omitted). This is another case where the complaint initially used erroneous terminology, and the court did not fix it in the opinion.

⁹⁷ *Rolling Greens*, 374 F.3d at 1022.

⁹⁸ *Kendle*, 760 F. App'x at 373.

⁹⁹ *Id.*

¹⁰⁰ *Thermoset Corp. v. Bldg. Materials Corp of Am.*, 849 F.3d 1313, 1316 (11th Cir. 2017).

iii. Veil Piercing

How judges discuss LLCs is important in the veil piercing context, and judicial opinions can provide some learning opportunities.¹⁰¹ Take, for example, the case of *McKee v. Whitman & Meyers, LLC*.¹⁰² In *McKee*, the plaintiff filed a complaint claiming several violations of the Fair Debt Collection Practices Act against defendants Whitman & Meyers, LLC and Joseph M. Goho.¹⁰³ Those defendants failed to appear and defend the action, which resulted in a default judgment.¹⁰⁴ Defense counsel then finally responded.¹⁰⁵

This case provides multiple challenges. To start, the court insisted on referring to the LLC as “corporate.” “Defense counsel admits that he was under the mistaken assumption that default was to be taken against the *corporate* entity only. [But], default was entered as to both the *corporate* and individual defendants on July 3, 2014.”¹⁰⁶ Once again, an LLC is neither corporate nor a corporation.

Sometimes the parties set up judges for such errors. Here, the plaintiff argued that “the court should pierce the corporate veil and hold defendant Goho personally liable.”¹⁰⁷ The court responded, “[T]here is nothing on the face of the complaint or in the record that would support individual liability for defendant Goho on the basis of corporate veil-piercing.”¹⁰⁸

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

¹⁰¹ See Joshua Fershée, *Courts and the LLC, End of the Year Edition*, BUS. L. PROF BLOG (Dec. 30, 2014), https://lawprofessors.typepad.com/business_law/2014/12/courts-and-the-llc-end-of-the-year-edition.html.

¹⁰² *McKee v. Whitman & Meyers, LLC*, No. 13-CV-793, 2014 WL 7272748, at *2 (W.D.N.Y. Dec. 18, 2014).

¹⁰³ *Id.* at *1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added) (citation omitted) (“[T]he court . . . accept[ed] the explanation of defense counsel as evidence of a careless lack of attention to procedural detail rather than an egregious and willful default on the part of defendant Goho [the individual and apparent owner of the LLC].”).

¹⁰⁷ *Id.* at *2.

¹⁰⁸ *Id.*

Similarly, high-level state courts are not immune from conflating LLCs.¹⁰⁹ The Supreme Court of Wyoming, for example, affirmed the lower court's decision to pierce the limited liability veil of a single-member LLC where GreenHunter Wind Energy, LLC ("GreenHunter LLC"), had a single member: GreenHunter Energy, Inc. ("GreenHunter Corp").¹¹⁰ In that case, GreenHunter LLC had entered a services contract with Western Ecosystems Technology, Inc. ("Western").¹¹¹ The court determined that veil piercing—which allowed Western to recover GreenHunter LLC's debts from the corporate member—was proper for several reasons.¹¹² It is unclear whether the court was correct.

The court began accurately, as it often does. It explained that the rule for piercing the veil of a limited liability company is comprised of three basic factors: (1) fraud; (2) undercapitalization; and (3) "intermingling the business and finances of the company and the member to such an extent that there is no distinction between them."¹¹³ The court noted correctly that a failure to follow company formalities was no longer a factor because the state's LLC statute changed.¹¹⁴

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

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

¹⁰⁹ Joshua Fershée, *Wyoming S.C. Makes LLC Veil Piercing Easier, Says LLCs Can Have "Corporate Assets,"* BUS. L. PROF. BLOG (Nov. 14, 2014), https://lawprofessors.typepad.com/business_law/2014/11/wyoming-sc-makes-llc-veil-piercing-easier-says-llcs-can-have-corporate-assets.html.

¹¹⁰ *Greenhunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 337 P.3d 454, 458 (Wyo. 2014).

¹¹¹ *Id.* at 458.

¹¹² *Id.* at 465–67.

¹¹³ *Id.* at 461.

¹¹⁴ *Id.* at 461–62. A factor for corporate veil piercing is the failure to follow corporate formalities requirements, such as holding regular meetings and taking minutes at those meetings, etc. LLCs, however, are not required to have such formalities. Thus, using the failure to follow them as a factor in deciding whether GreenHunter LLC should/can be pierced is illogical.

[GreenHunter] LLC by attempting to obtain a guarantee or other form of security. To do so would invite abuse of entities, as is the case here.¹¹⁵

The court also stated that “the district court correctly concluded that [GreenHunter Corp] ‘failed to adequately capitalize [GreenHunter] LLC, that [GreenHunter] LLC was undercapitalized at all times relevant to this suit[,] and that [GreenHunter] LLC lacks corporate assets.’”¹¹⁶ This does not make sense. Again, if Western knew the finances of GreenHunter LLC at the time of contracting (as it could and should have), then Western accepted the risk that GreenHunter LLC was undercapitalized. GreenHunter LLC simply existed, and Western did not seek to avoid the risk of dealing with such an entity. More importantly, LLCs cannot have “corporate assets.” A limited liability company can have “LLC assets” or “entity assets,” but not corporate ones.

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

Plaintiff . . . failed to provide any case law supporting his theory of attributing liability to Aegis LLC because of the existence of a pass-through tax structure of a disregarded entity. Between 2006 and 2008, when 100% of Aegis LLC’s shares were owned by Aegis UK, Aegis LLC was treated as a disregarded entity by the IRS and the taxable income earned by Aegis LLC was reflected in federal and District of Columbia tax returns filed by Aegis UK. In the case of a limited liability corporation with only one owner, the limited liability corporation must be classified as a disregarded entity. Instead of filing a separate tax return for the limited liability corporation, the owner would report the income of the disregarded entity directly on the owner’s tax return. Moreover, determining whether corporate formalities have been disregarded requires more than just recognizing the tax arrangements between a corporation and its shareholders. Given the above analysis, the undersigned finds that there is no unity of ownership and interest between Aegis UK and Aegis LLC.¹¹⁷

The case correctly explained that it is not appropriate to use pass-through tax status to find a unity of interest and ownership in a way

¹¹⁵ *Id.* at 469.

¹¹⁶ *Greenhunter Energy, Inc.*, 337 P.3d at 466.

¹¹⁷ *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 1, 9–10 (D.D.C. 2013) (emphasis added) (citations omitted).

that will support veil piercing. But the court then misses the very nature of LLCs by calling the LLC a “limited liability corporation.” The entity is a limited liability company, which is not a corporation.

Moreover, to use the court’s language, while it is true that “determining whether corporate formalities have been disregarded requires more than just recognizing the tax arrangements between a corporation and its shareholders,”¹¹⁸ the case premised on an LLC’s status. A judge should know the difference and make that clear in their language. A more accurate statement would read: “Determining whether LLC formalities have been disregarded requires more than just recognizing the tax arrangements between an LLC and its members.”

In the context of state high courts and erroneous use of critical terminology in the veil piercing context, a 2021 Supreme Court of Pennsylvania case, *Mortimer* as discussed earlier,¹¹⁹ is also a big reminder of this Article’s necessity.¹²⁰ The opinion began, “In this case, we examine the doctrine of ‘piercing the corporate veil,’ an area ‘among the most confusing in corporate law.’”¹²¹ Naturally, this case surrounds veil piercing an LLC.

The opinion then proceeded to define the relevant companies as corporations, which include TA Properties and 340 Associates, despite the court noting both entities as limited liability companies.¹²² In a footnote, the court (incorrectly) referred to “[t]he corporate parties,” but correctly noted that the applicable law is the “Limited Liability Company Law of 1994.”¹²³ The opinion recurrently used the term “piercing the corporate veil” and called the LLCs “corporations” or “corporate.” Repeatedly mentioning corporations sends the court down the wrong path in applying veil piercing doctrine.

The *Mortimer* court correctly identified many of the business law concepts before it, with imprecise references to corporations and corporate law sprinkled in. For example, the court explained:

Appellees turn next to corporate formalities. Although Pennsylvania law imposes very few requirements upon limited liability companies, the record established that 340 Associates and McCool Properties had separate operating

¹¹⁸ *Id.* at 9–10.

¹¹⁹ See discussion *supra* Parts III.A.1.iii, III.A.2.ii.

¹²⁰ *Mortimer v. McCool*, 255 A.3d 261, 265 (Pa. 2021).

¹²¹ *Id.*

¹²² *Id.* at 267.

¹²³ *Id.* at 266 n.6.

agreements; maintained separate books and bank accounts; filed taxes separately; and had distinct revenue streams. Moreover, corporate formalities are relevant only where the lack of observance is associated with abuse of the corporate form. Indeed, the Corporations Code itself provides that “[t]he failure of a . . . limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a partner, member or manager of the entity for a debt, obligation or other liability of the entity.”¹²⁴

Except, LLCs do not and *cannot* have “corporate” formalities, and although the code citation was correct in the opinion, it was not the “Corporations Code,” it was the “Associations Code.” Ironically, the opinion expressed frustration with veil piercing law, which is reasonable. The court stated, “And so, too, we encounter (and sometimes experience) frustration with the imprecision of the law of piercing.”¹²⁵ This very opinion unintentionally, and unfortunately, adds to the imprecision.

Similarly, the Supreme Court of Appeals of West Virginia had the opportunity in 2014 “to address the role (if any) of veil piercing of West Virginia LLCs.”¹²⁶ The state statute was silent on the subject. The West Virginia circuit court took on the following question with the corresponding answer:

Does West Virginia’s version of the Uniform Limited Liability Company Act afford complete protection to members of a limited liability company against a plaintiff seeking to pierce the corporate veil?

ANSWER: YES¹²⁷

Under West Virginia LLC law:

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

¹²⁴ *Id.* at 276 (alteration in original) (emphasis added) (footnote omitted).

¹²⁵ *Id.* at 286.

¹²⁶ See Joshua Fershée, *More LLC Veil Piercing Forced into State Statutes*, BUS. L. PROF BLOG (May 13, 2014), https://lawprofessors.typepad.com/business_law/2014/05/more-llc-veil-piercing-forced-into-state-statutes.html.

¹²⁷ *Kubican v. The Tavern, LLC*, No. 11-C-231-2, 2012 WL 8523515, at *2 (W. Va. Cir. Ct. Apr. 16, 2012), *rev’d*, 752 S.E.2d 299 (W. Va. 2013) (emphasis added) (citation omitted).

acting as a member or manager. . . . The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.¹²⁸

Just over a year later, the Supreme Court of Appeals of West Virginia took the certified question and confirmed that veil piercing was, in fact, allowed for West Virginia LLCs.¹²⁹ The court needed to answer the question, but the rationale was not very satisfying. The court explained, in the syllabus, the law on veil piercing for corporations, as follows:

[T]o “pierce the corporate veil” in order to hold the shareholder(s) actively participating in the operation of the business personally liable . . . , there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement).¹³⁰

As explained in more detail in Part IV, West Virginia’s conflation of corporate veil piercing and LLC veil piercing remains a looming issue that is bound to continue creating uncertainty.

LLC veil piercing confusion is an ongoing problem for Minnesota as well.¹³¹ For example, in *Guava LLC v. Merkel*, a Minnesota court upheld a decision to pierce the limited liability veil of Alpha Law Firm, LLC.¹³² The appellate court found “the district court did not abuse its discretion by piercing Alpha’s corporate veil.”¹³³ Again though, the LLC did not have such a veil because it was not a corporation.

Veil piercing should be easier to keep straight in Minnesota than most places. Minnesota law expressly allows for LLC veil piercing and

¹²⁸ W. VA. CODE § 31B-3-303 (1996).

¹²⁹ *Kubican v. The Tavern, LLC*, 752 S.E.2d 299, 313 (W. Va. 2013).

¹³⁰ *Id.* at 311 (quoting *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 94 (W. Va. 1986)).

¹³¹ Joshua Fershée, *LLCs Still Don’t Have Corporate Veils. Really.*, BUSINESS L. PROF. BLOG (Aug. 25, 2015), https://lawprofessors.typepad.com/business_law/2015/08/llcs-still-dont-have-corporate-veils-really-.html.

¹³² *Guava LLC v. Merkel*, No. A15-0254, 2015 WL 4877851, at *8 (Minn. Ct. App. Aug. 17, 2015).

¹³³ *Id.*

states that the corporate law concept applies to the LLC. And the Minnesota statute also says “piercing the veil” in the LLC statute,¹³⁴ which makes clear the veil is an LLC veil, and not a corporate one.

Understanding and applying veil piercing to LLCs is admittedly challenging. As *Guava* demonstrates, when a statute brings corporate veil piercing into the LLC world, it can be awkward. Another excerpt from *Guava* elucidated:

Hansmeier next challenges the district court’s decision to pierce on the merits. “In certain circumstances, it is possible to ‘pierce the corporate veil’ and hold a shareholder personally liable.” Veil piercing applies to LLCs as well as corporations. A court may pierce a corporate veil when there is fraud or when the shareholder is the “alter ego” of the corporation.¹³⁵

Because LLCs do not have shareholders (they have members), the opinion is misleading. The court vacillates between corporate and LLC concepts, which causes even more confusion. The court should have taken the time to set the LLC standard and separate the concepts between the entities, so that future courts do not continue this cycle.

A 2011 Minnesota case provided an even bigger and more dangerous misapplication of veil piercing rules to an LLC.¹³⁶ The case set up the facts as follows:

Center Pointe Apartments (the property) is owned by Brooklyn Center Leased Housing Associates Limited Partnership. The partnership includes one general partner and two limited partners, each of which is a limited liability corporation. The general partner is Brooklyn Center Housing, LLC (BCH) in which appellant Hyder Jaweed is the sole member. His brother, appellant Asgher Ali, has no legal interest in BCH, the partnership, or the property.¹³⁷

The court then went down that path of corporate veil piercing law for LLCs. The court cited to the statute: “The shareholders of a corporation ordinarily are not personally liable for the corporation’s

¹³⁴ MINN. STAT. § 322B.303(2) (2014) (“Subd. 2. Piercing the veil. The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.”).

¹³⁵ *Guava*, 2015 WL 4877851, at *6 (citations omitted).

¹³⁶ See *Kromrey v. Ali*, No. A10-785, 2011 WL 500025, at *1 (Minn. Ct. App. Feb. 15, 2011).

¹³⁷ *Id.* (emphasis added). Once again, the court misnamed the LLC as a corporation.

debts.”¹³⁸ Using corporate law, the court provided the following determination:

Although the record does not support the district court’s finding that five of the eight Victoria Elevator factors are present in this case, the presence of several critical factors supports the district court’s exercise of its equitable powers to pierce the corporate veil. For example, corporate formalities have not been observed, there were no functioning officers and directors, and the corporation was a mere façade for individual dealings.¹³⁹

The problem, of course, was that an LLC is not required to follow corporate formalities. Minnesota law, at the time, did not account for this inconsistency.¹⁴⁰ Minnesota law has, thankfully, changed,¹⁴¹ but these and similar cases continue to provide faulty guidance, dissonance, and confusion.

B. Legislators

Likely one of the problems for lawyers and judges is that some statutes have it wrong. For example, several Washington state statutes use the term “limited liability corporation.”¹⁴² One does so in the context of entity conversion.¹⁴³ That Washington statute outlines reporting requirements when significant events occur and uses the example: “[I]f your business is changing . . . from a corporation to a limited liability corporation, you must notify the department and may be required to file a new escrow agent application.”¹⁴⁴

It certainly does not help when the country’s most populated state conflates LLCs with corporations. For example, the California Revised Uniform Limited Liability Company Act falls within the California

¹³⁸ *Id.* at *2 (citing MINN. STAT. § 302A.425 (2010)).

¹³⁹ *Id.*

¹⁴⁰ See MINN. STAT. § 322B.303(2) (2014) (“The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.”), *repealed by* 2014 Minn. Laws ch. 157, art. 1, § 91 (effective Jan. 1, 2018).

¹⁴¹ MINN. STAT. ANN. § 322C.0304(3) (2023); see also *infra* note 299 and accompanying text.

¹⁴² WASH. REV. CODE § 19.160.010(3) (2015); WASH. REV. CODE § 19.355.010(4) (2015); WASH. REV. CODE § 61.24.010(1)(a) (2012); WASH. REV. CODE § 70.44.315(4)(a) (2006); WASH. REV. CODE § 23B.11.110(2) (2016); WASH. REV. CODE § 30A.04.010(12) (2015).

¹⁴³ WASH. ADMIN. CODE § 208-680-265(1)(b) (2023).

¹⁴⁴ *Id.*

Corporations Code.¹⁴⁵ One can easily see how the California Corporations Code creates a mess regarding all entities:

- Title 1. Corporations¹⁴⁶
- Title 2. Partnerships¹⁴⁷
- Title 2.6. California Revised Uniform Limited Liability Company Act¹⁴⁸
- Title 3. Unincorporated Associations¹⁴⁹

Partnerships and LLCs are not corporations and are “unincorporated.” It is misleading to have this section of the code called “Corporations” and then house unincorporated entities within it. And lawyers know the canon of construction, *expression unius est exclusio alterius*, which means that the expression of one thing is the exclusion of another. If legislators list “unincorporated” separate from partnerships and LLCs, legislators are signaling that LLCs are not unincorporated—what a mess.

This concern becomes clear in an unpublished decision, *City of Fontana v. Bani, LLC*. The opinion stated that “[a] corporation—including a limited liability corporation—may be served by effecting service on its agent for service of process. One of the ways a limited liability corporation can be served is by substituted service.”¹⁵⁰ First, even in California, an LLC is a “limited liability company.” It says so right in the act.¹⁵¹ In California, the LLC act, as noted above, is part of the California Corporations Code.¹⁵² For that matter, so are partnerships.¹⁵³

There has been some, but not enough, movement in state legislatures to fix statutory errors. Scott Brinkman, former Kentucky house member, helped the cause. He successfully sponsored a bill amending Kentucky’s LLC act to change some terminology including

¹⁴⁵ California is not the only state to house its LLC act within its Corporations Code. Fortunately, most states do not do this. Other states making this mistake include Idaho, Kansas, Michigan, New Mexico, North Dakota, Oklahoma, South Dakota, and Virginia.

¹⁴⁶ CAL. CORP. CODE tit. 1 (West 1977).

¹⁴⁷ CAL. CORP. CODE tit. 2 (West 1949).

¹⁴⁸ CAL. CORP. CODE tit. 2.6 (West 2012).

¹⁴⁹ CAL. CORP. CODE tit. 3 (West 1947).

¹⁵⁰ *City of Fontana v. Bani, LLC*, No. E062018, E063549, 2016 WL 2864971, at *11–12 (Cal. Ct. App. May 12, 2016) (citations omitted).

¹⁵¹ “This title may be cited as the California Revised Uniform Limited Liability Company Act.” CAL. CORP. CODE § 17701.01 (West 2014).

¹⁵² CAL. CORP. CODE tit. 2.6 (West 2012).

¹⁵³ CAL. CORP. CODE tit. 2 (West 1949).

to change the phrase “limited liability corporation” to “limited liability company” in the definition of “business.”¹⁵⁴ Hopefully, things improve similarly moving forward.

Sadly, a new era of potential confusion began at the start of 2024. The Corporate Transparency Act, passed by the U.S. Congress in 2021, took effect January 1, 2024.¹⁵⁵ The law requires beneficial owners of entities to report who they are.¹⁵⁶ Counterintuitively, the “Corporate” Transparency Act applies to more than corporations. The law requires beneficial owners of companies to report if the entity is:

1. A corporation, a limited liability company (LLC), or was otherwise created in the United States by filing a document with a secretary of state or any similar office under the law of a state or Indian tribe; or
2. A foreign company and was registered to do business in any U.S. state or Indian tribe by such a filing.¹⁵⁷

Anyone who reads the explanations should be able to figure out rather quickly that any limited liability entity will need to file under the act. But people, as a general matter, are not known for reading the fine print. Maybe it would not help very much to call the act the “Business (or Company or Entity) Transparency Act,” but it would have the advantage of being accurate.

C. *Government Administrative Agencies*

Government administrative agencies interact with businesses of all sizes and entity types. They are responsible for enforcing laws against such businesses. Large federal agencies such as the Patent and Trademark Office (PTO), FTC, SEC, Department of Labor (DoL), and IRS have all used the term “limited liability corporation” in myriad ways.¹⁵⁸ State agencies are also not immune to the problem. But before

¹⁵⁴ KY. REV. STAT. ANN. § 11A.010 (West 2021).

¹⁵⁵ 31 U.S.C. § 5336 (adding and amending Pub. L. No. 116-283, div. F, tit. LXIV, § 6403(a), tit. LXV, § 6509(b), 134 Stat. 4605, 4633 (2021)).

¹⁵⁶ *Id.*

¹⁵⁷ U.S. DEP’T OF THE TREASURY: FIN. CRIMES ENF’T NETWORK, AN INTRODUCTION TO BENEFICIAL OWNERSHIP INFORMATION REPORTING (2024), <https://www.fincen.gov/sites/default/files/shared/BOI%20Informational%20Brochure%20508C.pdf>; § 5336(a)(2).

¹⁵⁸ Additionally, the U.S. Environmental Protection Agency (EPA) in a complaint against Norlite, LLC described Norlite as “a foreign limited liability corporation incorporated in the [s]tate of Delaware” Letter from Dore LaPosta, Dir., Enf’t & Compliance Assurance Div., U.S. Env’t Prot. Agency, to Darrell Monk, Plant Manager, Norlite, LLC (Jan. 30, 2020), <https://yosemite.epa.gov/oarm/alj/>

heading down the path of despair, this Part starts on a positive note by discussing the PTO.

1. PTO

The PTO provides a unique example of handling this issue—labeling LLCs—correctly. It stated the following in its July 2022 Trademark Manual of Examining Procedure:

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

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

Limited Liability Corporation. A business organization known as a “limited liability corporation” is currently not recognized in any jurisdiction. If an applicant’s entity type is identified as a limited liability corporation, the examining attorney must inquire as to whether the applicant is a limited liability company or a corporation. If the applicant believes that it is a limited liability corporation, then the applicant must provide proof that such a legal entity exists under the appropriate state statute.¹⁵⁹

ALJ_Web_Docket.nsf/Filings-and-Attachments/50969515CB6A4C31852585280067FAF4/\$File/Norlite201004Complaint.pdf. The U.S. Department of Housing and Urban Development (HUD) in its Regulatory Agreement for Multifamily Projects lists actions requiring prior HUD written approval, one of which provides:

Except from permissible withdrawals of [s]urplus [c]ash, pay any compensation, including wages or salaries, or incur any obligation to do so, to any officer, director, stockholder, trustee, beneficiary, partner, member, manager (in the case of a [b]orrower formed as a [l]imited [l]iability [c]ompany or [l]imited [l]iability [c]orporation), or [p]rincipal of [b]orrower, or to any nominee thereof.

U.S. DEP’T OF HOUS. & URB. DEV., REGULATORY AGREEMENT FOR MULTIFAMILY PROJECTS (2017).

¹⁵⁹ TMEP § 803.03(h) (July 2022).

Preach! As discussed below,¹⁶⁰ change will not happen if people are not held accountable. This is the kind of accountability the authors of this Article ask from judges and are over the moon to see it here from a federal agency.

But the above-referenced messaging did not filter through and reach other attorneys at the PTO. *It is so sad to say.*¹⁶¹ The deputy general counsel for the Office of General Law at the PTO executed an order on April 30, 2019 to suspend a former registered patent agent.¹⁶² The order's stipulated facts section misnames both of the LLCs it lists.¹⁶³ As part of the agreed upon sanctions, the director of the Office of Enrollment and Discipline was to publish a notice in the *Official Gazette*, part of which states: "Respondent founded Sinorica, a Maryland [l]imited [l]iability [c]orporation ('Sinorica'), in 2006. Respondent's son founded another Maryland [l]imited [l]iability [c]orporation."¹⁶⁴ So, despite the PTO refusing to acknowledge "limited liability corporations," the deputy general counsel allowed the misnaming to occur in two sections of the order and for it to permeate into the *Official Gazette*.

2. FTC

As early as 1998, the FTC has filed complaints against LLCs and referred to at least one of them as "a joint venture limited liability corporation."¹⁶⁵ A search as of March 7, 2024, revealed ninety-five examples of erroneous use, many emanating from FTC staff attorneys. One example noted above, the FTC's complaint referred to Shkreli's company, Vyera Pharmaceuticals, LLC as a "limited liability corporation" that was "incorporated" in Delaware.¹⁶⁶

¹⁶⁰ See discussion *infra* Part V.

¹⁶¹ THE MIGHTY MIGHTY BOSS TONES, *So Sad to Say, on PAY ATTENTION* (Island Recs. 2000).

¹⁶² *In re* Ming Chow, No. D2018-27 (USPTO Dir. Apr. 30, 2019), https://foiadocuments.uspto.gov/oed/0996_dis_2019-04-30.pdf.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ FED. TRADE COMM'N, 21ST REPORT (FY 1998) (1999), <https://www.ftc.gov/reports/21st-report-fy-1998>.

¹⁶⁶ See *supra* note 10 and accompanying text.

In the FTC’s suit against Safariland, LLC, the complaint named this particular defendant as a “corporation.”¹⁶⁷ In the complaint against Flagship Resort Development Corporation and Atlantic Palace Development, LLC, the FTC’s caption stated that Atlantic Palace is a “New Jersey limited liability corporation.”¹⁶⁸ Interestingly, the body of the complaint listed Atlantic Palace as a “limited liability company” not a “corporation.”¹⁶⁹ Summaries of these cases on the FTC website replicate the erroneous term, however.¹⁷⁰

Another example lies within the complaint that the FTC brought against Myfreemedicine.com, LLC, a “California limited liability corporation,” and Geoffrey J. Hasler, individually as a “member of Myfreemedicine.com, LLC.”¹⁷¹ Here the incorrect term is used to describe the entity, but the correct term describes the individual owner.¹⁷² Both the caption and body of the complaint used the incorrect term.¹⁷³

3. SEC

“The SEC has a three-part mission: [p]rotect [i]nvestors, [m]aintain fair, orderly, and efficient markets, [and] facilitate capital formation. [I]t needs to add: ‘[e]nsure proper entity identification.’”¹⁷⁴

Searches through the SEC website performed on March 7, 2024 indicate 440 misuses of the term. These misapplications appear in SEC

¹⁶⁷ Complaint, Axon Enters., Inc., F.T.C. Docket No. D9389, at 1 (Jan. 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf.

¹⁶⁸ Complaint for Civil Penalties, Permanent Injunction, & Other Relief at 2, United States v. Flagship Resort Dev. Corp., No. 05-CV-00981 (D.N.J. Feb. 16, 2005).

¹⁶⁹ *Id.*

¹⁷⁰ There are more—sometimes the complaint uses the correct terminology, but the case summary does not. For example, the FTC labeled the tech support scam “Trothsolutions LLC” as “a Nevada limited liability corporation” in the drafted case summary on its website. *Troth Solutions*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3018-x170034-troth-solutions> (Feb. 11, 2019).

¹⁷¹ Complaint for Injunctive & Other Equitable Relief at 1, FTC v. Myfreemedicine.com, LLC, No. CV05-1607 (W.D. Wash. Sept. 20, 2005).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Joshua Fershée, *The SEC Needs to Crack Down on Incorrect Entity Types*, BUS. L. PROF BLOG (Aug. 14, 2018), https://lawprofessors.typepad.com/business_law/2018/08/the-sec-needs-to-crack-down-on-incorrect-entity-types-.html.

complaints/actions, SEC officials' speeches, and in documents that practitioners filed with the SEC. Lawyers need to exercise care when drafting these documents, particularly because the documents are electronically filed and are available for all eyes and AI to read.¹⁷⁵

Numerous complaints containing the SEC's use of faulty terminology exist. One complaint described an individual as the "owner or partial owner of several limited liability corporations ostensibly involved in the construction business."¹⁷⁶ The same complaint listed one entity defendant as a "limited liability corporation."¹⁷⁷ A litany of complaints and actions named defendant LLCs with the same erroneous terminology.¹⁷⁸

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

[F]ailed to file with the Commission certain required forms ("Forms 13F") that would have disclosed the size of the Church's equity portfolio to the Commission and the public. Instead, the Church and Ensign Peak created thirteen limited liability corporations ("LLCs"), including twelve similar LLCs (the "Clone LLCs") with addresses located throughout the U.S., for the sole purpose of filing Forms 13F and preventing public disclosure by Ensign Peak of the Church's equity securities holdings.¹⁷⁹

Here, the SEC referred to the thirteen LLCs as "corporations."

In 2020, Jeffrey Nick, a professional accounting fellow in the Office of the Chief Accountant (OCA), in a presentation to OCA staff, spoke of a fact pattern relating to the consolidation analysis for a voting interest entity: "This legal entity, a limited liability corporation with governing provisions that are the functional equivalent of a regular corporation, had its equity ownership divided between two investors,

¹⁷⁵ For examples of practitioner errors, see discussion *supra* Part III.A.1.

¹⁷⁶ Complaint for Violations of the Federal Securities Laws at 9, SEC v. Dubovoy, No. 15-6076 (D.N.J. Aug. 10, 2015).

¹⁷⁷ *Id.* at 13.

¹⁷⁸ AST Inv. Servs., Inc., Exchange Act Release No. 5346, 2019 WL 4447396 (Sept. 16, 2019); Putnam Inv. Mgmt., LLC, Exchange Act Release No. 5050, 2018 WL 4630657 (Sept. 27, 2018); Performance Cap. Mgmt., LLC, Exchange Act Release No. 90972, 2021 WL 241878 (Jan. 22, 2021); Complaint at 4, SEC v. Cimino, No. 7:21-cv-01375 (S.D.N.Y. Feb. 17, 2021).

¹⁷⁹ Ensign Peak Advisors, Inc., Exchange Act Release No. 96951, 2023 WL 2160756 (Feb. 21, 2023).

of which the reporting entity was one.”¹⁸⁰ This highlights not only the misuse of the LLC term but also the comment that LLCs are the “functional equivalent of a regular corporation.”¹⁸¹ If these provisions were not part of an operating agreement, then the statement is misstating the law.

Earlier, in 1999, the deputy chief accountant, Jane B. Adams, in a list of problem areas regarding generally accepted accounting principles, discussed the “[a]pplication of the equity method of accounting to limited liability corporations.”¹⁸² This mislabeling is quite frustrating, but the errors continue.

4. DoL

The DoL adds to the pile of government agencies who misname LLCs. On March 7, 2024, there were thirty-six examples in enforcement actions—fewer than the FTC and SEC—but still egregious. One noteworthy example is in a 2006 advisory opinion written by Louis J. Campagna, chief of the Division of Fiduciary Interpretations.¹⁸³ Chief Campagna used the term “limited liability corporation” when referring to an LLC.¹⁸⁴

You represent that Salon Services and Supplies, Inc. is a Washington state ‘S’ Corporation (“S Company”) which is 68% owned by Miles and Sydney Berry, a marital community (M). The other 32% is owned by a third-party, George Learned (“G”). Miles Berry (Berry) proposes to create a limited liability corporation (“LLC”) that will purchase land, build a warehouse and lease the property to S Company.¹⁸⁵

Additionally, dol.gov includes a page called “Myths About Misclassification,”¹⁸⁶ which intends to clarify complicated legal issues

¹⁸⁰ Jeffrey Nick, Pro. Acct. Fellow, U.S. Sec. & Exch. Comm’n, Remarks Before the 2020 AICPA Conference on Current SEC and PCAOB Developments (Dec. 7, 2020).

¹⁸¹ *Id.*

¹⁸² Jane B. Adams, Deputy Chief Acct., U.S. Sec. & Exch. Comm’n, Remarks Before the 27th Annual National AICPA Conference on Current SEC Developments (Dec. 8, 1999).

¹⁸³ U.S. Dep’t of Labor, Emp. Benefits Sec. Admin., Advisory Opinion 2006-01A (Jan. 6, 2006).

¹⁸⁴ *Id.* Chief Campagna also used an odd abbreviation for an S corporation referring to it as an “S Company.” *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Myths About Misclassification*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail> (last visited July 13, 2023).

surrounding worker classification. Ironically, this page replicates the erroneous term “limited liability corporation” twice.¹⁸⁷ The frequently asked question (FAQ) or “myth” is “I have my own employer identification number (EIN) or paperwork stating that I am performing services as a [l]imited [l]iability [c]orporation (LLC) or other business entity. This means that I am an independent contractor.”¹⁸⁸ The DoL responds but fails to correct the terminology within the question. Although the DoL was more concerned with the misclassification issue, precision still counts.

5. IRS

Credit must be given to the IRS for not mislabeling LLCs with any prevalence. The IRS only misnamed LLCs once, and the misnaming appeared in a December 2021 press release regarding the sentencing of a former Netflix executive.¹⁸⁹ The entity structure truly matters to the IRS for taxation purposes, and therefore it follows that this agency would be more accurate.

But the IRS does not get off scot-free, as it plays a unique role in all this confusion. Dean Fershée has argued that the IRS should “stop using state-law designations”¹⁹⁰ because entities are creatures of state law. How the federal or state government taxes such entities does not change that fact. It is time to start using more precise language that makes that clear.

State law is the origin of all entity types (barring a few minor exceptions), and references to “C corporations” and “S corporations” are not really on target, though such references are reasonably clear when only talking about tax issues. Labeling entity type is unnecessary under today’s tax code, where entities have check-the-box options allowing most entity types to choose whatever tax treatment they wish. As discussed in Part IV, an LLC can elect to be taxed under subchapter

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ Press Release, IRS, Former Netflix Executive Sentenced to 30 Months for Bribes and Kickbacks from Netflix Vendors (Dec. 14, 2021), <https://www.irs.gov/compliance/criminal-investigation/former-netflix-executive-sentenced-to-30-months-for-bribes-and-kickbacks-from-netflix-vendors>.

¹⁹⁰ Joshua Fershée, *Let Corps Be Corps: Follow-Up on Entity Tax Status*, BUS. L. PROF. BLOG (July. 13, 2016), https://lawprofessors.typepad.com/business_law/2016/07/let-corps-be-corps-follow-up-on-entity-tax-status.html; Joshua Fershée, *I Don’t Care What the IRS Says, There Are No Federal Entities*, BUS. L. PROF. BLOG (Jan. 8, 2019), https://lawprofessors.typepad.com/business_law/2019/01/i-dont-care-what-the-irs-says-there-are-no-federal-entities.html.

S—make an S election—by filing Form 2553.¹⁹¹ The IRS should be able to keep its role clear, without including entity in the type of taxation.¹⁹²

6. State and Local Governments

Et tu Delaware? A quick Google search landed on the term “foreign limited liability corporation”—which is *not a thing*—on Delaware.gov’s “Business First Steps” page.¹⁹³ Delaware, the state in which more than a million business entities have their “legal home,” really needs to fix this error. Thankfully, the proper terminology appears on the “Delaware Division of Corporations” links, such as the “New Entities” page that contains form links, including one for “foreign limited liability *company*.”¹⁹⁴

The problem is that there are attorneys using the phrase “foreign limited liability corporation incorporated in Delaware” now.¹⁹⁵ While it is unknown why these attorneys are getting this wrong, having seen the phrase on Delaware’s own websites could explain why it is happening.

Another error on Delaware.gov appears in the sample corporate files for a certificate of merger, which erroneously refers to the “Limited Liability Corporation Act of the State of Delaware”—which does not exist.¹⁹⁶ The Michigan.gov site contains a similar mistake; on

¹⁹¹ *Form 2553*, IRS, <https://www.irs.gov/pub/irs-pdf/f2553.pdf> (last visited Feb. 20, 2024); see discussion *supra* Part IV. Note that an LLC that elects to be taxed under subchapter S must meet the requirements therein.

¹⁹² See discussion *infra* Part V.

¹⁹³ *Corporations—Legal Entity Formation*, DELAWARE.GOV, <https://firststeps.delaware.gov/corporations/> (last visited Feb. 24, 2024).

¹⁹⁴ *New Entities*, DELAWARE.GOV, <https://corp.delaware.gov/newentit09> (last visited Feb. 24, 2024); ILLINOIS.GOV, <https://www.illinois.gov/business.html> (last visited Feb. 24, 2024). The Illinois.gov “Business” page (provided by the Office of the Secretary of State) has a large block called “Corporation & Limited Liability Corporation Online Filings” that links to a page with that title.

¹⁹⁵ As recently as June 16, 2023, the Commonwealth of Kentucky Public Protection Cabinet Department of Financial Institutions filed an Administrative Action against several defendants, naming Plutus Lending LLC as “a foreign limited liability corporation organized in Delaware.” Administrative Complaint at 1, *Dep’t of Fin. Insts. v. Plutus Fin. Inc.*, No. 2023-AH-0012 (June 16, 2023), <https://kfi.ky.gov/Documents/Plutus%20Financial%20INC.%20dba%20Abra%20and%20William%20John%20Barhydt%202023-AH-00012.pdf>.

¹⁹⁶ DEL. DIV. OF CORPS., CERTIFICATE OF MERGER (2004), <https://corpfiles.delaware.gov/Cert%20-%20DE%20LLC09.pdf>.

its “Corporate Officer Liability” FAQ page, question and answer number five really is a head-spinner:

5. My divorce decree states that I am not liable. Why am I being billed/assessed? [Answer:] Based on a review of the corporation’s account, the [d]epartment will attempt to collect the debt from all officers, managers, members and/or partners of a corporation, limited liability *corporation*, partnership, limited partnership or limited liability partnership responsible for the filing or payment of Michigan taxes during the period(s) in question.¹⁹⁷

The application for the Maryland Department of Transportation’s Small Business Enterprise (SBE) Program has a check box for the type of entity/business structure applying, and the LLC is listed as limited liability corporation.¹⁹⁸ The same is true for the Texas Department of Transportation’s Business Opportunity Programs,¹⁹⁹ and several other states.²⁰⁰ The authors of this Article are happy to reside in jurisdictions on the correct side of this. The Pennsylvania Department of Transportation, for example, has it right.²⁰¹ And so does the city of Omaha, which uses LLC and does not write out what it could stand for.²⁰² This would seemingly be more user-friendly for small business owners to understand and complete.

Like many cities, the city of Milwaukee’s Office of Equity & Inclusion requires small businesses to complete an application if they

¹⁹⁷ *Corporate Officer Liability Frequently Asked Questions*, MICH. DEP’T OF TREASURY (emphasis added), <https://www.michigan.gov/taxes/collections/corporate-officer-liability-frequently-asked-questions> (last visited Feb. 24, 2024).

¹⁹⁸ MD. DEP’T OF TRANSP., SMALL BUSINESS ENTERPRISE (SBE) PROGRAM CERTIFICATION (2022), https://www.mdot.maryland.gov/MBE_DOCS/SBE_APPLICATION_2023_March%202023.pdf.

¹⁹⁹ TEX. DEP’T OF TRANSP. BUS. OPPORTUNITY PROGRAMS SECTION, SMALL BUSINESS ENTERPRISE (SBE) CERTIFICATION APPLICATION (2001), <https://ftp.dot.state.tx.us/pub/txdot-info/cmd/bop/certifap.pdf>.

²⁰⁰ *See, e.g.*, MO. REG’L CERTIFICATION COMM., SMALL BUSINESS ENTERPRISE (SBE) PROGRAM “DECLARATION OF CERTIFICATION” (2022), <https://www.modot.org/sites/default/files/documents/SBE%2520Declaration%2520of%2520Certification-Final%5B1%5D.pdf>.

²⁰¹ PA. DEP’T OF TRANSP., SMALL BUSINESS ENTERPRISE (SBE) CERTIFICATION APPLICATION (2020), <https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/SBE%20Certification%20Application.pdf>.

²⁰² CITY OF OMAHA, NEB., AUTHORIZATION FOR TIER I/II EMERGING SMALL BUSINESS (ESB) OR SMALL BUSINESS (SB) (2020), https://humanrights.cityofomaha.org/images/SEB/Tier_I-II_Application_2023.pdf.

wish to be certified as an SBE.²⁰³ The city created a handy checklist that one can use depending on the type of entity. Sadly, the checklist provides “limited liability corporation” as the LLC option.²⁰⁴ In a draft, the District of Columbia’s District Department of Transportation lays out goal setting methods that discuss its SBE program. Problematically it states that a “small business may be a . . . [l]imited [l]iability [c]orporation, or any other legally formed entity.”²⁰⁵ A limited liability corporation is not a “legally formed entity.” Nashville’s Metropolitan Development Housing Agency has a diversity business enterprise directory, and every LLC is listed as a “limited liability corporation.”²⁰⁶

Other municipalities have errors as well. In a contract between the city of Tamarac, Florida, and Lhoist North America of Alabama, LLC, the agreement described the company as an “Alabama [l]imited [l]iability corporation duly registered as a Florida [f]oreign [l]imited [l]iability corporation.”²⁰⁷ Yet another municipality had it right and then gave in to the error near the end of the page.²⁰⁸

²⁰³ *Small Business Development*, CITY OF MILWAUKEE, <https://city.milwaukee.gov/Equity-and-Inclusion/Certification> (last visited Feb. 24, 2024); *see also* CITY OF HOUS., SMALL BUSINESS ENTERPRISE (SBE) CERTIFICATION APPLICATION (2017), <https://www.houstontx.gov/obo/docsandforms/sbeapplication.pdf>; MIAMI-DADE CNTY., INTERNAL SERVICES DEPARTMENT (ISD) SMALL BUSINESS DEVELOPMENT (2014), <http://www.miamidadade.gov/smallbusiness/library/forms/sbe-certification-application-personal-financial-statement-forms.pdf>; CITY OF PHX., CERTIFICATION APPLICATION (2012), <https://www.phoenix.gov/eodsite/documents/certapppdf1012.pdf>.

²⁰⁴ *SBE New Certification Document Checklist*, MILWAUKEE OFF. OF SMALL BUS. DEVELOP., <https://city.milwaukee.gov/ImageLibrary/Groups/daEBEP/certApps/SBECertificationDocumentChecklist.pdf> (last visited Feb. 24, 2024).

²⁰⁵ *Goal Setting Methodology*, GOV’T OF THE D.C., https://ddot.dc.gov/sites/default/files/dc/sites/ddot/publication/attachments/FY_2016-2018_FHWA_Goal_Methodology_11-19-15vs.pdf (last visited Feb. 24, 2024).

²⁰⁶ METRO. DEV. HOUS. AGENCY, DIVERSITY BUSINESS ENTERPRISE DIRECTORY (2022), <https://www.nashville-mdha.org/wp-content/uploads/2022/11/MDHA-DBE-Website-Directory10272022.pdf>.

²⁰⁷ CITY OF TAMARAC, FLA., RESOLUTION NO. R-2020-095 (Sept. 3, 2020) (on file with the authors).

²⁰⁸ *What Is the Difference Between a Business Being Sole Proprietor and a Limited Liability Company (LLC)?*, FALMOUTH ME., <https://www.falmouthme.org/town-clerk/faq/what-is-the-difference-between-a-business-being-sole-proprietor-and-a-limited> (last visited Feb. 24, 2024).

D. *Media and Non-lawyer Service Providers*

Various media outlets have mislabeled LLCs. For instance, the long-standing popular game show *Jeopardy!* heralded the prompt: “Per the National Small Business Association, more than 30% of U.S. small businesses operate as these, LLCs.”²⁰⁹ The contestant received credit for the wrong answer: “What is a limited liability corporation?”²¹⁰

Similarly, the *Wall Street Journal*’s Saturday Crossword, September 2, 2023, titled, “Just Sayin’,” followed suit, using “Partnership letters” as the clue for eighty-six down, with the answer being “LLC.”²¹¹ “Just Sayin’,” indeed.

On one episode of the HBO crime drama, *The Wire*, there is a conversation between characters Detective Freamon and Detective Roland Pryzbylewski (Prez) where Freamon tells Prez “the first thing is we need the name of all front companies, limited partnerships and LLCs.”²¹² Prez responds with “LLCs?” and Freamon explains, “limited liability corporations.”²¹³ The entirety of the conversation uses corporate terminology and then ultimately shows a paper with a big red circle around the words “Triple B-LLC.”²¹⁴

The trend continued with a once-popular sitcom: *The Big Bang Theory*.²¹⁵ The story line of one episode related to the creation of a

²⁰⁹ *Jeopardy!* (Sony Pictures Television Nov. 27, 2020); Joshua Fershée, *Jeopardy Doesn’t Know LLCs Are Not Corporations, but Courts Are Improving*, BUS. L. PROF BLOG (Dec. 1, 2020) (quoting Samantha Prince (@ProfSJPrince), TWITTER (Nov. 28, 2020) (archived tweet, screenshot on file with authors)), https://lawprofessors.typepad.com/business_law/2020/12/jeopardy-doesnt-know-llcs-are-not-corporations-but-courts-are-improving.html.

²¹⁰ Fershée, *supra* note 209 (quoting Samantha Prince (@ProfSJPrince), TWITTER (Nov. 28, 2020) (archived tweet, video on file with authors)).

²¹¹ *Just Sayin’ (Saturday Crossword)*, WALL ST. J. (Sept. 2, 2023), <https://www.wsj.com/articles/just-sayin-saturday-crossword-september-2-388cf186>. Notably, the *New York Times* mini crossword provided an accurate clue and answer. *The Mini Crossword*, N.Y. TIMES (Aug. 25, 2023), <https://www.nytimes.com/crosswords/game/mini/2023/08/25> (using “business name ender” as the clue for nine across with the answer being “LLC”). This is a good clue because there are multiple options that could have been correct, such as “inc,” “llp,” or “ltd.”

²¹² *The Wire: Cleaning Up* (Home Box Office Sept. 1, 2002).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Dean Fershée noted this episode in 2016. Joshua Fershée, *Top Five Mistakes of March*, BUS. L. PROF BLOG (Mar. 22, 2016) [hereinafter Fershée, *Top Five Mistakes of March*], https://lawprofessors.typepad.com/business_law/2016/03/top-five-llc-mistakes-of-march.html.

partnership agreement for some of the characters.²¹⁶ Of course, one should avoid forming an entity and drafting contract language without the help of a lawyer, but this bit of fiction is art imitating life. In the show, one character says he has some concerns about the partnership, and another replies with this joke: “Are you suggesting a limited liability corporation, because I did not LLC that coming.”²¹⁷ It is easy to see how this happens, though. Relatedly, a student reported to Professor Prince that a Quimbee study guide for Secured Transactions asked a question that listed a “repair company” as registered in the state as a “limited liability corporation.”²¹⁸

Even business-savvy people are not immune. ZenBusiness blog quoted Mark Cuban, a noted entrepreneur and television personality from Shark Tank, as stating, “The best form of incorporation is what they call an LLC. It limits your liability when you do business. With an LLC, you are protecting your personal assets, like your own car, house, and savings.”²¹⁹ Maybe, but as established, an LLC is not incorporated, it is formed.

Sites like ContractsCounsel.com, LawInsider.com,²²⁰ UpCounsel.com,²²¹ and PandaDoc.com²²² are proliferators of erroneous language. These sites provide real life examples of various documents so people can use them to create their own documentation. ContractsCounsel.com offers a sample “limited liability agreement,” which by law in most states is an operating agreement, so why not just call it that? But more egregious is the agreement description:

The limited liability agreement is not the same as the form one files to create a limited liability corporation—this

²¹⁶ *The Big Bang Theory: The Application Deterioration* (Warner Bros. Television Mar. 10, 2016).

²¹⁷ *Id.*

²¹⁸ E-mail from student to Samantha J. Prince, Assistant Prof. of L., Pa. State Dickinson L. (Dec. 8, 2023) (on file with author).

²¹⁹ Interview with Mark Cuban in Austin, Texas (Dec. 1, 2023), <https://www.zenbusiness.com/blog/mark-cuban-tips-for-entrepreneurs>.

²²⁰ *Corporate Formation Sample Clauses*, LAWINSIDER, <https://www.lawinsider.com/clause/corporate-formation> (last visited Feb. 20, 2024).

²²¹ *LLC Bylaws Sample: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/llc-bylaws-sample> (last visited July 13, 2023).

²²² A quick find of the operating agreement templates on PandaDoc shows a Real Estate LLC Operating Agreement using the wrong language. *Operating Agreement Templates*, PANDADOC, <https://www.pandadoc.com/operating-agreement-templates> (last visited Feb. 24, 2024).

agreement dictates how a limited liability company will be operated.

The purpose of a limited liability agreement is to set clear expectations between the participating parties of how a limited liability corporation will be run. This agreement may include terms guidance on how management is hired, bookkeeping and records responsibilities, and what to do in the event of a bankruptcy or dissolution.²²³

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

Ebizfiling.com has a blog post entitled “8 Stupid Errors in an LLC Operating Agreement.”²²⁴ The blog makes several errors including referring to members as partners. “An operating agreement is the foundation of every limited liability corporation (LLC), and it guarantees that partners are treated equitably.”²²⁵ One suspects that there are more errors within this post than the authors realize.

A plethora of websites seeking to help entrepreneurs are mislabeling LLCs with regularity.²²⁶ For instance, John Boitnott authored an article for *Inc.* entitled “5 Reasons Why an LLC Is the Right Structure for Your Startup.”²²⁷ The first line reads “Limited [l]iability [c]orporations (or LLCs) are very attractive to the early stage startup.”²²⁸ Conversely, the staff at Shopify scribed an article explaining how to form a limited liability company.²²⁹ They get the term right in the title but then use the wrong term in the first line of

²²³ *Limited Liability Agreement*, CONTRACTSCOUNSEL, <https://www.contractsounsel.com/t/us/limited-liability-agreement> (last visited Feb. 24, 2024).

²²⁴ Pallavi Dadhich, *8 Stupid Errors in an LLC Operating Agreement*, EBIZFILING (Mar. 10, 2023), <https://ebizfiling.com/blog/errors-in-an-operating-agreement>.

²²⁵ *Id.*

²²⁶ Ophthalmic Mutual Insurance Company helps its clients by sharing some FAQs on its website. The question “Do I need entity coverage for my limited liability corporation or partnership?” stands out. *Do I Need Entity Coverage for My Limited Liability Corporation or Partnerships?*, OPHTHALMIC MUTUAL INS. CO., <https://www.omic.com/policyholder/do-i-need-entity-coverage-for-my-limited-liability-corporation-or-partnership/> (last visited Feb. 24, 2024).

²²⁷ John Boitnott, *5 Reasons Why an LLC Is the Right Structure for Your Startup*, INC. (Feb. 20, 2015), <https://www.inc.com/john-boitnott/5-reasons-why-an-llc-is-the-right-structure-for-your-startup.html>.

²²⁸ *Id.*

²²⁹ *What Is an LLC? How to Form a Limited Liability Company*, SHOPIFY: STARTING UP (Aug. 29, 2023), <https://www.shopify.com/ph/blog/what-is-an-llc>.

the article.²³⁰ Even the Small Business Development Center (SBDC) is not immune. The Roanoke Regional SBDC provides an operating agreement template for Virginia LLCs.²³¹ While the document itself does not use the wrong term, the launch page does.²³²

A self-help article published by the *Fort Worth Star-Telegram*, entitled, “What Is an LLC—Ultimate Guide to Limited Liability Companies,” uses the proper and erroneous terms interchangeably.²³³ Reading the article makes one feel like they are watching a tennis match. This could be because a marketing person at Paradise Media wrote the piece, who perhaps thinks that varying vocabulary—using company and corporation interchangeably—is a good idea to avoid repetition, rather than a lawyer who knows consistent and precise use of terms is important. Even more imperative is how many local news venues published this article²³⁴ due to their relationship with McClatchy Media Network—a company that states it has “30 growing markets” and “over 65 million monthly readers.”²³⁵ Another favorite is this advice: “For LLCs, Louisiana has certain name guidelines. Your

²³⁰ *Id.*

²³¹ *Virginia Operating Agreement Template*, AM.’S SBDC VA., <https://www.roanokesmallbusiness.org/resources/operating-agreement> (last visited July 13, 2023).

²³² *Virginia Operating Agreement Template*, AM.’S SBDC VA., <https://static1.squarespace.com/static/6101721496754b2bc82e9fe8/t/61420ee34e0da257c5c4df33/1631735808181VA+Operating+Agreement.pdf> (last visited Jan. 20, 2024).

²³³ Anna Miller, *What Is an LLC—Ultimate Guide to Limited Liability Companies*, FORT WORTH STAR-TEL. (May 17, 2023), <https://www.star-telegram.com/news/business/article275506841.html>.

²³⁴ Paradise Media authors wrote several virtually identical pieces, published by various McClatchy Media Network sites. Anna Miller, *7 Easy Steps to Start an LLC—Start Your Business Today*, THE STATE (May 11, 2023), <https://www.thestate.com/news/business/article275303726.html>; Anna Miller, *What Is an LLC—A Complete Guide [2023]*, NEWS & OBSERVER (May 17, 2023), <https://www.newsobserver.com/news/business/article275506631.html>; Anna Miller, *How to Start an LLC in 2023—A Comprehensive Overview*, KAN. CITY STAR (May 11, 2023), <https://www.kansascity.com/news/business/article275304276.html>; Anna Miller, *How to Start an LLC in 7 Steps—2023 Complete Guide*, FRESNO BEE (May 22, 2023), <https://www.fresnobee.com/news/business/article275660506.html>; Anna Miller, *How to Register a Business: A Full-Fledged Guide (2023)*, CHARLOTTE OBSERVER (May 11, 2023), <https://www.charlotteobserver.com/news/business/article275301871.html>; Anna Miller, *Ultimate Guide to What Is an LLC—2023*, LEXINGTON HERALD LEADER (May 23, 2023), <https://www.kentucky.com/news/business/article275686361.html>.

²³⁵ *Our Impact*, MCCLATCHY, <https://www.mcclatchy.com/our-impact> (last visited Feb. 24, 2024). Talk about replicating the error and producing more faulty fodder for AI.

[l]imited [l]iability [c]orporation's name must contain the words 'limited liability company' or an acronym like 'LLC' or 'L.L.C.'"²³⁶

The type of articles that mislabel LLCs transcend business-related self-help advice posts.²³⁷ For instance, the *Washington Post* published an article about Justice Clarence Thomas's wife's prior real estate firm, Ginger, Ltd., which later became Ginger Holdings, LLC, outlining concerns about the Justice's errors in reporting financial disclosures.²³⁸ The article did not err in misnaming the LLC. Instead, Justice Thomas continued to report the *corporate* entity no longer existed while referring to the LLC. The real issue as pertains to this Article, it appears, is in the journalism, which talks about "state incorporation records" when referring to both a corporation and an LLC:

That year, the family real estate company was shut down and a separate firm was created, state incorporation records show. The similarly named firm assumed control of the shuttered company's land leasing business, according to property records. Since that time, however, Thomas has continued to report income from the defunct company—between \$50,000 and \$100,000 annually in recent years—and there is no mention of the newer firm, Ginger Holdings, LLC, on the forms.²³⁹

The errors in this Part cause confusion for various readers and were a primary reason the authors decided to write this Article.

E. *Artificial Intelligence*

When asked what a "limited liability corporation" is, ChatGPT responded, "A limited liability corporation (LLC) is a type of business structure that combines the flexibility and tax benefits of a partnership or sole proprietorship with the limited liability protection of a

²³⁶ *How to Start LLC in Louisiana 7 Steps Guide 2023*, MGMT. LIBR. (Apr. 27, 2023), <https://management.org/how-to-start-llc-in-louisiana>.

²³⁷ See *Federal Street Building Sells for \$4.7M*, THE BUS. J. (June 2020), <https://businessjournaldaily.com/article/federal-street-building-sells-for-4-7m> (using the term "foreign limited liability corporation" for an LLC organized in Delaware); Laura Newpoff, *A Guide to Ohio's New Limited Liability Corporation Rules*, COLUMBUSCEO (May 24, 2022), <https://www.columbusceo.com/story/business/briefs/2022/05/24/how-ohios-new-llc-rules-affect-businesses/9613505002>.

²³⁸ Shawn Boburg & Emma Brown, *Clarence Thomas Has for Years Claimed Income from a Defunct Real Estate Firm*, WASH. POST (Apr. 16, 2023), <https://www.washingtonpost.com/investigations/2023/04/16/clarence-thomas-ginger-financial-disclosure>.

²³⁹ *Id.*

corporation.”²⁴⁰ It then proceeded to accurately list some key features of LLCs, including proper use of LLC-related terms like “members” and “organized.”²⁴¹

Interestingly, when asked during the same session what the difference is between a limited liability company and a limited liability corporation, ChatGPT came through with a *mea culpa*: “I apologize for the confusion in my previous response. The correct term is ‘limited liability company’ (LLC), not ‘limited liability corporation.’ ‘Limited liability company’ is the correct and commonly used terminology. I apologize for any misunderstanding caused.”²⁴²

AI text generators like ChatGPT have become *en vogue* of late.²⁴³ Claude.ai, another text generator, did slightly better than ChatGPT when posed the same questions. When asked what LLC stands for, Claude.ai said the correct term but then defined it as a “corporate structure.”²⁴⁴ The text generator then listed, mostly correct, key features. Claude.ai did not bite when asked what a “limited liability corporation” is; instead it answered what a limited liability company is by listing all the same features as with the prior question with the addition of “perpetual existence.”²⁴⁵ When asked what the difference is between a limited liability company and a limited liability corporation, Claude.ai responded:

There is no difference between a limited liability company (LLC) and a limited liability corporation (LLC). They are the same type of business structure. The term “limited liability corporation” is technically incorrect – the proper term is just “limited liability company.” But the two terms are sometimes used interchangeably, incorrectly referring to an LLC as a corporation.”²⁴⁶

²⁴⁰ The ChatGPT screenshot is on file with the authors.

²⁴¹ The ChatGPT screenshot is on file with the authors.

²⁴² The ChatGPT screenshot is on file with the authors.

²⁴³ ChatGPT launched on March 14, 2023. See Roman Yankovskiy, *Sposoben li iskusstvennyj intellekt napisat' stat'yu v yuridicheskij zhurnal?* [Is Artificial Intelligence Capable of Writing a Law Journal Article?], ZAKON [THE STATUTE], March 2023, at 126, 126–33, <https://doi.org/10.37239/0869-4400-2023-20-3-126-133>.

²⁴⁴ The Claude.ai screenshot is on file with the authors.

²⁴⁵ The Claude.ai screenshot is on file with the authors. Notably, the list of key features indicates pass through taxation even though an LLC can elect out of this type of taxation.

²⁴⁶ The Claude.ai screenshot is on file with the authors.

Claude.ai then proceeded to provide where the “confusion stems from.”²⁴⁷

It is important to note how text generators like Claude.ai and ChatGPT work and where they get their information from. As described by Professor Roman Yankovskiy, ChatGPT’s task is to:

process input text data through transformers. These transformers rely on self-attention mechanisms, that allow the model to analyze word relationships in sentences and access their importance. This optimizes the handling and understanding of extended sequences and dependencies. *The model is trained on large amounts of text data, such as online articles, books, and other sources.*²⁴⁸

ChatGPT “cannot independently evaluate the accuracy of the data on which it has been trained,”²⁴⁹ therefore it is unlikely AI will always fix or avoid mislabeling LLCs. Had one not asked the difference between the correct and incorrect LLC terms above, ChatGPT would have failed to fix the misnaming.

Another problem is the currency of the data it is pulling from. At the time of the search, ChatGPT 3.5 used data collected in June 2021, whereas ChatGPT 4.0 operates on data gathered in September 2021 (both now use September 2021 data).²⁵⁰ Claude.ai uses a dataset as of December 2022. Either way, it may be some time before this Article and others like it can influence the AI-generated responses to help stop the mischaracterization of LLCs.²⁵¹

²⁴⁷ The Claude.ai screenshot is on file with the authors.

²⁴⁸ Yankovskiy, *supra* note 243, at 128 (emphasis added).

²⁴⁹ Yankovskiy, *supra* note 243, at 128.

²⁵⁰ *Models*, OPENAI API, <https://platform.openai.com/docs/models/gpt-4> (last visited July 13, 2023).

²⁵¹ See, e.g., Fershée, *Top Five Mistakes of March*, *supra* note 215; Joshua Fershée, *Embracing Freedom of Contract in the LLC: Linking the Lack of Duty of Loyalty to a Duty of Disclosure*, L. BUS. L. PROF. BLOG (Feb. 2, 2016), https://lawprofessors.typepad.com/business_law/2016/02/i-have-been-giving-a-lot-of-thought-to-the-idea-of-waiving-the-duty-of-loyalty-in-llcs-in-delaware-the-more-i-think-about-it.html; Joshua Fershée, *An LLC Checklist Proposal*, BUS. L. PROF. BLOG (May 30, 2018) [hereinafter *Fershée, LLC Checklist*], https://lawprofessors.typepad.com/business_law/2018/05/an-llc-checklist-proposal.html (providing a checklist to help courts stop misidentifying LLCs as “limited liability corporations”); Stephen M. Bainbridge, *LLCs Are Not Corporations and Professor Fershée Wants to Make Sure You Know That*, PROFESSORBAINBRIDGE.COM (Mar. 30, 2016), <https://www.professorbainbridge.com/professorbainbridge.com/2016/03/llcs-are-not-corporations-and-professor-fershee-wants-to-make-sure-you-know-that.html>.

There are other ways AI impacts word usage. For example, think about autofill on products such as Microsoft Word or Outlook. All Microsoft products allow a user to type the wrong term, and there is no autofill after typing in “limited liability co.” Similarly, Grammarly allows the erroneous term to make it past its grammar check. But Apple messenger correctly names LLCs with its iPhone prompts. When one types in “limited liability co,” it prompts to choose “companies” or “company” to complete the last word.

Mislabeled LLCs comes from a wide variety of constituencies, many of whom should know better and others who need to be educated. Although some errors are newly created, many mistakes replicate prior errors. From previous court opinions to legislation and agency action to media and AI, the mistakes explained above are readily and easily accessible and follow what are often trusted sources. The hope is that as lawyers and judges clean up their language, legislators, government agencies, and the broader public will follow suit. That starts with recognizing the potential harms.

IV. LOOMING HARMS OF MISIDENTIFYING OR CONFLATING ENTITIES

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

For example, when one hears about “renewable energy,” what constitutes as renewable is not an especially challenging concept in the most basic sense. Most people would agree that wind, solar, and hydropower are renewable sources. Certainly, in seeking a comprehensive definition, it gets more challenging, but the basic concept is likely easy for most folks to grasp. In the legal sense, though, colloquial or conversational definitions are irrelevant. All that matters is what the statute says. If the statute says certain types of coal are renewable, they are.²⁵² By even the most generous of traditional definitions, coal is not renewable.²⁵³ But for purposes of the statute, it

²⁵² See James M. Van Nostrand, *An Energy and Sustainability Roadmap for West Virginia*, 115 W. VA. L. REV. 879, 916 (2013).

²⁵³ *Coal Explained*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/coal> (Oct. 24, 2023) (“Coal is classified as a nonrenewable energy source because it takes millions of years to form.”).

was. In the legal world, words often have specific meanings, and those meanings matter.

Consider, for example, a 2023 California case, *CSHV 1999 Harrison, LLC v. County of Alameda*:

The tax advantages of “the LLC form of business is the ability, assuming proper organization, to avoid the double taxation of corporate income and shareholder dividends by having an eligible LLC elect to be treated as a partnership for federal tax purposes without being subject to as many restrictions as ‘subchapter S corporations.’ Moreover, a ‘single-member’ LLC . . . has the option of electing either to be taxed as an association (i.e., a corporation) or, like a sole proprietorship, to be disregarded as an entity separate from its owner. If the single-member LLC elects to be taxed as a sole proprietorship, the LLC itself does not pay taxes and does not have to file a separate tax return. Rather, the single member reports all LLC profits or losses on a personal tax return as if the business was a sole proprietorship.”²⁵⁴

This description is not as precise as it should be. Here, it may not matter that the word “elect” is being used as a synonym for “choose.” But in tax law, especially in this context, “elect” means that a choice has been made.²⁵⁵ To clarify, a single-member LLC is, by default, taxed as an entity not considered separate from its owner (a sole proprietorship).²⁵⁶ Therefore, an individual reports their LLC income and expenses on their IRS Form 1040 Schedule C.²⁵⁷ Similarly, by default, LLCs with more than one member are taxed pursuant to subchapter K as a partnership.²⁵⁸ Thus, under the default rules, two LLCs may pay income tax differently based on the ownership structure, even though for state law purposes, each LLC is the same entity type.

Furthermore, despite the default rules, an LLC can (is allowed, but not required, to) affirmatively elect to be taxed as an S corporation, pursuant to subchapter S, or a C corporation, pursuant to subchapter

²⁵⁴ *CSHV 1999 Harrison, LLC v. County of Alameda*, 309 Cal. Rptr. 3d 322, 327 (Cal. Ct. App. 2023) (citations omitted) (quoting *In re KRSM Properties, LLC*, 318 B.R. 712, 718–19 (B.A.P. 9th Cir. 2004)).

²⁵⁵ Note, *The Election Concept in Tax Law*, 47 VA. L. REV. 72, 72–73 (1961).

²⁵⁶ See *Single Member Limited Liability Companies*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies> (Aug. 2, 2023).

²⁵⁷ See *id.*

²⁵⁸ See *LLC Filing as a Corporation or a Partnership*, INTERNAL REVENUE SERV. [hereinafter *LLC Filing*], <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership> (Oct. 11, 2023); I.R.C. § 701.

C, rather than accept the default taxation position of being taxed pursuant to subchapter K.²⁵⁹ To elect to be taxed under subchapter S, the LLC must file IRS Form 2553.²⁶⁰ To elect to be taxed under subchapter C, the LLC must complete IRS Form 8832.²⁶¹ Note that the IRS uses state entity types to describe federal tax classifications, which is insufficient because as shown state entities, such as an LLC, can elect to be taxed as an S corporation.²⁶² Thus, for federal tax purposes, an LLC that makes such an election is also an S corporation, which is unnecessarily confusing.

In the *Greenhunter* case, discussed above, the Supreme Court of Wyoming outrageously and incorrectly suggested that the tax filings of the parent corporation and a subsidiary LLC can be a factor in a veil piercing analysis.²⁶³ For a single-member LLC, for federal tax purposes, an LLC will, at least typically, be a disregarded entity. Thus, an LLC will usually (if not always) look like part of the parent corporation. To even consider an entity's tax filing necessarily makes one factor automatically weigh in favor of piercing.

The Wyoming court provided additional examples of imprecision and arbitrariness creating further uncertainty, and potential inequity. The court seems to be saying that an LLC and a corporation cannot be distinct. This is beyond mere misidentifying an entity. *The court completely ignored one.* The court chose to disregard the LLC as an entity, even though the moving party signed a contract with the LLC. If a party is unable to “competitively or economically” secure a guarantee, the party should not enter the contract. If the legislature wants to create guarantees or minimum capitalization requirements for any or all entities, it can do so. If a state does not want to allow single-member LLCs, that is a legislative decision, too (though it would likely be

²⁵⁹ See *LLC Filing*, *supra* note 258.

²⁶⁰ *About Form 2553, Election by a Small Business Corporation*, INTERNAL REVENUE SERV., https://www.irs.gov/publications/p3402#en_US_201907_publink1000244352 (Feb. 1, 2024).

²⁶¹ See *LLC Filing*, *supra* note 258.

²⁶² See Nikki Nelson, *LLC Electing S Corporation Status: An Option You May Not Know You Have*, WOLTERS KLUWER (Feb. 12, 2023), <https://www.wolterskluwer.com/en/expert-insights/llc-electing-s-corp-tax-status-an-option-you-may-not-know-you-have> (“First, an LLC would need to elect to be taxed as a corporation by filing Form 8832, Entity Classification Election. After that, an LLC can then file a Form 2553, Election by a Small Business Corporation, to elect tax treatment as an S corporation.”).

²⁶³ *Greenhunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 337 P.3d 454, 458 (Wyo. 2014).

wrong). Absent a change in state law, however, courts should respect the entity.

Additionally, early in the opinion, the court said, “Piercing seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”²⁶⁴ The court seems to attempt making veil piercing law in LLCs more predictable. If the case is followed, the court would be, in a potentially dangerous way, making veil piercing of a single-member LLC the norm. Liability protection for single-member LLCs would be lacking. When the legislature allowed for single-member LLCs, one can safely assume that it did so to provide liability protection equal to that of other LLCs. Therefore, when the court extends into a position where it disregards any liability protection for the single member, it is rewriting the law in the state—which is the job of the legislature, not the court.

Another concerning development is that courts often apply the corporate veil piercing test without expressly stating how LLC veil piercing is distinct or different. One court, for example, eliminated the “disregard of formalities requirement” for LLCs but kept the rest of the corporate veil piercing test the same. The court provided:

[T]o pierce the veil of a limited liability company in order to impose personal liability on its member(s) or manager(s), it must be established that (1) there exists such unity of interest and ownership that the separate personalities of the business and of the individual member(s) or managers(s) no longer exist and (2) fraud, injustice, or an inequitable result would occur if the veil is not pierced.²⁶⁵

The problem is that part one of the LLC test is the same as that of the corporate veil piercing test, minus the explanation that the first step of corporate veiling includes “the disregard of formalities requirement.” The court comfortably said:

[The veil piercing test] is a fact driven analysis that must be applied on a case-by-case basis, and . . . the failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business may not be a ground for imposing personal liability on the member(s) or manager(s) of the company.²⁶⁶

²⁶⁴ *Id.* at 460 (quoting Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985)).

²⁶⁵ *Kubican v. The Tavern, LLC*, 752 S.E.2d 299, 313 (W. Va. 2013).

²⁶⁶ *Id.* (citing W. VA. CODE § 31B-3-303(b)).

So now the “unity of interest and ownership” test for LLCs no longer looks at corporate formalities and looks simply to other factors to make the determination. The court noted nineteen factors that can be used in corporate veil piercing cases, like undercapitalization, commingling of funds, etc., and explained that similar considerations may apply for LLCs.²⁶⁷ The court is right to point out that other states have made the same determination on similar statutes, but that does not make those decisions correct.²⁶⁸ The problem is, as explained in West Virginia’s veil piercing test from *Laya v. Erin Homes, Inc.*,²⁶⁹ corporate formalities are the main issue for the unity of interest test. This is true in many jurisdictions, but West Virginia stated it more clearly than other state courts.

Courts continue to look to veil piercing to rectify harms such as commingling of funds or using entity funds for personal endeavors, but such activity does not inherently warrant veil piercing. For example, if members use entity credit cards for personal expenses like visits to medical doctors, dinners, and even “a trip to Myrtle Beach” as the plaintiff in *Kubican* alleged, the funds should be returned to the entity to pay any claims the court awards the plaintiff from the LLC.²⁷⁰ Such conduct could be deemed a fraudulent transfer or improper use of entity funds that the member owes back to the entity. That is not veil piercing; it is simply requiring the member to return what was wrongfully withdrawn.

Another looming harm comes from the expanding use of AI. ChatGPT, for example, scours the internet for sources, keywords, etc. to generate what the user is asking it to create. This process, in the context of this Article, causes an obvious problem: the more AI finds “limited liability corporation,” the more it will replicate that erroneous terminology found in blog posts, operating agreements, contracts, pleadings, etc.²⁷¹ This may end up being the biggest challenge of them all.

²⁶⁷ *Id.*

²⁶⁸ See, e.g., Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 77 (2005); Stephen M. Bainbridge, *Why Not Just Abolish LLC Veil Piercing?*, PROFESSORBAINBRIDGE.COM (Mar. 17, 2017) <https://www.professorbainbridge.com/professorbainbridgecom/2017/03/why-not-just-abolish-llc-veil-piercing.html>.

²⁶⁹ *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 98–99 (W. Va. 1986).

²⁷⁰ *Kubican*, 752 S.E.2d at 303.

²⁷¹ Lawyers are exploring the best ways to use AI. See, e.g., Zach Warren, *Generative AI in Law Firms: For Many, Such Technologies Are Still a Great Unknown*, REUTERS (May 23, 2023), <https://www.reuters.com/legal/transactional/generative-ai-law-firms->

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

V. SOLUTIONS

As shown,²⁷² sometimes the judiciary mislabels LLCs, while other times courts point out how a statute's current language is erroneous. When this situation occurs, one hopes that the state legislature acts. Quite often this scenario arises in the veil piercing context. For instance, recall *Kubican v. The Tavern* where the Supreme Court of Appeals of West Virginia used corporate veil piercing criteria in making its decision.²⁷³ This ruling provided the impetus for the West Virginia legislature to enact a new law clarifying the liability of LLC members and managers:

A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager nor for fines, fees or penalties individually assessed against another member or manager for acts unrelated to the business of the limited liability company. It is the intent and policy of the [l]egislature to modify the applicability of the "corporate veil piercing" analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013) with respect to any claim against a limited liability company arising after the effective

many-such-technologies-are-still-great-unknown-2023-05-23; Ilona Logvinova, *Legal Innovation and Generative AI: Lawyers Emerging as 'Pilots,' Content Creators, and Legal Designers*, MCKINSEY & CO. (May 11, 2023), <https://www.mckinsey.com/featured-insights/in-the-balance/legal-innovation-and-generative-ai-lawyers-emerging-as-pilots-content-creators-and-legal-designers>. But caution is to be had. See articles regarding Steven A. Schwartz, a lawyer who let AI do his legal research and the cases it provided—which he used in his filed brief—were nonexistent. And note that a Texas judge has banned legal filings that are drafted mostly by AI unless it has been checked for accuracy. *Judge Brantley Starr*, U.S. DIST. CT. N. DIST. OF TEX., <https://www.txnd.uscourts.gov/judge/judge-brantley-starr> (last visited Feb. 24, 2024); Sara Merken, *Another US Judge Says Lawyers Must Disclose AI Use*, REUTERS (June 8, 2023), <https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08>.

²⁷² See discussion *supra* Part III.A.2.

²⁷³ *Kubican*, 752 S.E.2d at 313.

date of the reenactment of this section during the regular session of the [l]egislature, 2022.²⁷⁴

This law clarifies that a lack of following operational formalities will not be grounds for imposing personal liability. Additionally, it outlines what will create liability for LLC members or managers.²⁷⁵

Moreover, the judiciary can assist with correcting errors. Judges have the power to tell plaintiffs that a request to “pierce the corporate veil” of an LLC is a failure to state a redressable claim. Additionally, judges could require plaintiffs and defendants to properly identify (i.e., not permit an LLC to be called a “limited liability corporation”). In these cases, the courts could, and probably should, allow counsel to amend the complaint to get the language right. The more judges that push back on erroneous language, the greater the chance that lawyers will stop making the error. But until there is a consequence for conflating LLCs and corporations (like going to the trouble to amend a complaint, refile, and re-serving it), attorneys and courts will continue to incorrectly label LLCs. The PTO requiring explanatory filings when one erroneously lists their entity type demonstrates that the PTO recognizes the importance of this concept.

²⁷⁴ W. VA. CODE § 31B-3-303(a) (1996).

²⁷⁵ The West Virginia statute provides:

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) A provision to that effect is contained in the articles of organization, and a member so liable has consented in writing to the adoption of the provision or to be bound by the provision;

(2) The member against whom liability is asserted has personally guaranteed the liability or obligation of the limited liability company in writing;

(3) There is any tax liability of the limited liability company, which the law of the state or of the United States imposes liability upon the member;

(4) The member commits actual or constructive fraud which causes injury to an individual or entity.

(d) The “corporate veil piercing” analysis adopted in *Joseph Kubican v. The Tavern, LLC*, 232 W.Va. 268, 752 S.E.2d 299 (2013) shall apply to a claim asserted against a limited liability company for the purpose of determining personal liability of all or specified members or managers only if (1) the company is not adequately capitalized for the reasonable risks of the corporate undertaking and (2) the company does not carry liability insurance coverage for the primary risks of the business, with minimum limits of \$100,000 liability insurance, or such higher amount as may be specifically required by law.

W. VA. CODE § 31B-3-303(c)–(d) (1996).

Thankfully, some judges are helping the cause. The Honorable Aida M. Delgado-Colón, for example, has stressed that LLCs are not corporations and even required a party to refer to their legal entity correctly.²⁷⁶ Judge Delgado-Colón stated: “Pursuant to this [c]ourt’s *sua sponte* obligation to inquire into its own subject matter jurisdiction and noticing the unprecedented increase in foreclosure litigation in this [d]istrict, the [c]ourt ordered plaintiff to clarify whether it is a corporation or a limited liability company (“LLC”).”²⁷⁷

The opinion continued:

Here, the [c]ourt cannot ascertain that diversity exists among the parties. Rule 11(b) of the Federal Rules of Civil Procedure holds attorneys responsible for “assur[ing] that all pleadings, motions and papers filed with the court are factually well-grounded, legally tenable and not interposed for any improper purpose.” Despite Rule 11’s mandate, the [c]ourt finds significant inconsistencies among plaintiff’s representations, which to this date remain unclear. As noted at ECF No. 53, plaintiff has repeatedly failed to explain why its alleged principal place of business is in New Jersey instead of Michigan. *To make matters worse, plaintiff now claims to be a “limited liability corporation” under Delaware law.*²⁷⁸

Because the court was “unable to determine that complete diversity exist[ed] between the parties,” the court dismissed “without prejudice the amended complaint for lack of subject matter jurisdiction.”²⁷⁹

Mistakes as to diversity jurisdiction are not nearly as rare as one would hope, and sometimes lawyers might try to use the potentially confusing nature of different entities to gain an improper advantage. A 2023 case provides another good example of a court addressing the issue directly.²⁸⁰ Back in 2020, “Ben E. Keith Company, a Texas citizen, brought state-law claims against [Dining Alliance Inc.] in federal court.”²⁸¹ At some point before that, “Dining Alliance Inc. had converted into Dining Alliance LLC,” an entity that may have had citizenship in both Texas and Delaware because of its members.²⁸² The court stated, “It is therefore possible that from the outset of the case,

²⁷⁶ Reverse Mortg. Funding, LLC v. Estate of Antonini-Nazario, No. 16-3092, 2020 WL 881019, at *1 (D.P.R. Feb. 20, 2020).

²⁷⁷ *Id.*

²⁷⁸ *Id.* (emphasis added) (citations omitted).

²⁷⁹ *Id.*

²⁸⁰ See Ben E. Keith Co. v. Dining Alliance, Inc., 80 F.4th 695, 697 (5th Cir. 2023).

²⁸¹ *Id.*

²⁸² *Id.*

the parties were not diverse and jurisdiction was lacking. This potential jurisdictional defect was not recognized because Dining Alliance originally answered under the name Dining Alliance Inc. and represented itself as a Massachusetts citizen.”²⁸³

Fortunately, the district court and court of appeals saw the risk and addressed it directly. The Fifth Circuit held:

Although modern business entities may organize in complex ways unknown in the past, the criteria for diversity of citizenship jurisdiction as to LLCs has been firmly established in this circuit since 2008. Dining Alliance unacceptably hid the ball with respect to elementary jurisdictional facts during the entire course of this litigation, including on appeal. The district court dismissed its third-party claims with prejudice as a sanction for that willful abuse of the judicial process. Finding no abuse of discretion, we AFFIRM.²⁸⁴

There are not nearly enough cases holding attorneys and parties accountable for LLC accuracy, but these cases are a nice start.

It would also be extremely helpful if a court extended this kind of rationale to the differences in veil piercing law between LLCs and corporations. An opinion could explain that in certain circumstances, it is possible to “pierce the corporate veil” to hold a shareholder personally liable for a corporation’s debt. A court is allowed to pierce a corporate veil when there is fraud or when the shareholder is deemed the “alter ego” of the corporation. Veil piercing applies to LLCs as well as corporations. Therefore, a court can pierce the veil of an LLC when there is fraud or when the member is the “alter ego” of the LLC. But the evidence of what constitutes alter ego in the LLC setting will be different because LLCs and corporations are different entities with different obligations and procedures.

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

²⁸³ *Id.*

²⁸⁴ *Id.*

“powered by Grammarly.”²⁸⁵ This statement signals that if Grammarly would flag this as incorrect or fix it, less erroneous term usage would exist.

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

Here are some concrete and easily implemented suggestions for those working with and writing about LLCs.²⁸⁶ Think of the recommendations as an LLC checklist designed to help fix the use of erroneous terminology. *We could be heroes.*²⁸⁷

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

²⁸⁵ See, e.g., Howard Jaros, *Full Time RV Living: Making Money While Enjoying the Lifestyle*, YOUR FULL TIME RV LIVING (Nov. 23, 2022), <https://yourfulltimervliving.com/full-time-rv-living-making-money-while-enjoying-the-lifestyle>; *How to Determine the Legal Structure of Your Business*, GRIND SUCCESS (July 2, 2023), <https://grindsuccess.com/business-legal-structure>.

²⁸⁶ Dean Fershée’s blog post in 2018 provides the basis for this list. Fershée, *LLC Checklist*, *supra* note 251.

²⁸⁷ DAVID BOWIE, *Heroes*, on HEROES (RCA Recs. 1977).

goes more to substance than mechanics, but it is worth checking whether an argument is being accepted that need not be, or should not apply.

Ultimately, the internet needs to be fixed too.²⁸⁸ Data that feeds processing tools like ChatGPT and others that entrepreneurs and attorneys may rely upon for document generation has to start using the correct terminology. Governmental agency websites need to purge places where mislabeling occurs and start using the proper term.

The IRS can help here as well. Federal code provisions are not, at least in most cases, linked to any particular state law entity (under the check-the-box regime), so state entities should be recognized as state entities, and federal tax status should be noted with regard to federal tax status. If the IRS did so, it would be easier for people to understand the concept behind state entity status.²⁸⁹ Thus, it would be more accurate to have, for example, C tax corporations, S tax LLCs, and K tax LLCs. Using such language would indicate federal tax status, as well as the state entity type, separating the tax and entity concepts. There would likely be doctrinal improvements if the language makes clear that tax treatment and entity type are separate issues in today's federal tax world too. Tax status and entity type are separate and distinct, and the references should reflect that reality.

The goal is not to abolish corporate tax. Rather, the proposal is to have entities choose from options that are linked to the Internal Revenue Code, and not to a particular entity. Thus, this Article proposes (1) entity taxation, called "C Tax," where an entity chooses to pay tax at the entity level, which would be subchapter C taxation; (2) pass-through taxation, called "K Tax," which is usually thought of as partnership tax, but is simply taxation pursuant to subchapter K; and (3) removing S corporations, which can now be LLCs, allowing an entity to choose to be taxed pursuant to subchapter S.

Furthermore, states should ensure that their LLC statutes either stand alone or are embodied within a "Corporations and Unincorporated Associations Code"²⁹⁰ or a "Corporations and Other

²⁸⁸ The authors acknowledge that although this is a tall order, it is only a small part of what must be fixed on the internet.

²⁸⁹ Public company space often exacerbates this problem. Far too often, people think a C corporation always means a publicly traded corporation, but that is incorrect. In most instances, a publicly traded corporation is a C corporation, but not all C corporations are publicly traded.

²⁹⁰ Numerous states title their business codes more accurately and responsibly. *See e.g.*, tit. 15 PA. CONS. STAT. (1972) (Corporations and Unincorporated Associations Code); tit. 15 PA. CONS. STAT. ch. 88 (2016) (Limited Liability Companies); ALA. CODE

Companies Code”²⁹¹ and not within a “Corporations Code.” As mentioned,²⁹² California is one of the many violators here and should correct the title of its code to be more general or inclusive of both corporations *and* unincorporated business entities. The less that people see the word “corporations” around LLCs, the better.

It would make a lot more sense if legislators called the California Corporations Code for what it is: the “Business Entities Code.” As currently structured, LLCs and partnerships are arguably types of corporations under California law. One could argue that the headings do not change the meaning or intent of the laws.²⁹³ But the code text says otherwise: “This act shall be known as the Corporations Code.”²⁹⁴

“To reinforce that notion, the [c]ode [c]ommission’s notes from the 2014 main volume explain”:

This code was listed in the appendices of [c]ode [c]ommission reports showing code classification as the “Corporations, Partnerships, and Associations Code.” The 14 syllables of that title appear to make it impractical, but no shorter phrase indicative of the full subject-scope has been found. Therefore, resort has been had to the rhetorical device of synecdoche, and the entire code designated by the name of longest part.²⁹⁵

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

tit. 10A (2009) (Alabama Business and Nonprofit Entity Code); ALA. CODE tit. 10A, ch. 2A (2019) (Alabama Business Corporation Law); ALA. CODE tit. 10A, ch. 5A (2014) (Alabama Limited Liability Company Law); D.C. CODE, div. V, tit. 29 (2010) (Business Organizations); D.C. CODE, div. V, tit. 29, ch. 3 (2010) (Business Corporations); D.C. CODE, div. V, tit. 29, ch. 8 (2010) (Limited Liability Companies).

²⁹¹ See, e.g., NEB. REV. STAT. ch. 21 (2021) (Corporations and Other Companies); Nebraska Uniform Limited Liability Company Act, NEB. REV. STAT. § 21-101 (2021).

²⁹² See *supra* note 145 and accompanying text.

²⁹³ See CAL. CORP. CODE § 6 (West 2014) (“Title, division, part, chapter, article, and section headings contained herein do not in any manner affect the scope, meaning, or intent of the provisions of this code.”).

²⁹⁴ CAL. CORP. CODE § 1 (West 2014).

²⁹⁵ *Dear California*, *supra* note 82.

Additionally, Arizona, New Hampshire, and Washington should fix the way their business codes are structured. In these three states, the LLC act is within the partnerships title.²⁹⁶ Similarly, New Jersey's Revised Uniform Limited Liability Company Act is housed within Title 42—Partnership and Partnership Associations.²⁹⁷ LLCs are not partnerships or partnership associations!

Finally, states can fix problems by updating their statutes to make their standards clear. As discussed, Minnesota law at one time used a corporate veil piercing standard for LLCs that used a lack of corporate formalities as one factor that would support piercing.²⁹⁸ The state LLC statute, however, did not require LLCs to follow the same formalities as corporations. The legislature fixed that problem by expressly excluding corporate formalities as a reason for LLC veil piercing. Minnesota law now provides:

Subd. 2. Effect of lack of formalities. The failure of a limited liability company to observe formalities relating exclusively to the management of its internal affairs is not a ground for imposing liability on the members, managers, or governors for the debts, obligations, or other liabilities of the company.

Subd. 3. Piercing the veil. Except as relates to the failure of a limited liability company to observe any formalities relating exclusively to the management of its internal affairs, the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.²⁹⁹

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

²⁹⁶ See, e.g., Arizona Limited Liability Company Act, ARIZ. REV. STAT. § 29-3101 (2019); New Hampshire Revised Limited Liability Company Act, N.H. REV. STAT. ANN. § 304-C:1 (2013); Washington Limited Liability Company Act, WASH. REV. CODE § 25.15.904 (2019).

²⁹⁷ Revised Uniform Limited Liability Company Act, N.J. STAT. ANN. § 42:2C-1 (West 2013).

²⁹⁸ See *supra* note 140 and accompanying text.

²⁹⁹ Minnesota Revised Uniform Limited Liability Company Act, MINN. STAT. § 322C.0304 (2015).

VI. CONCLUSION

People who train lawyers and professionals who work with LLCs, such as law and business professors, really need to get this right.³⁰⁰ Precision is imperative for lawyers. Lawyers have an ethical responsibility in serving clients, and this includes duties of competence³⁰¹ and diligence.³⁰² Being accurate often touches both obligations, and lawyers can be precise without being rigid.

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

No matter who you are—a practicing lawyer, judge, clerk, law student, law professor, legislator, administrative agency employee, media, or a member of another profession that touches the legal field—this Article has given readers a roadmap for fixing this issue—mislabeling LLCs. Business law is complex, so correctly utilizing labels is especially important. A little vigilance will go a long way. And as the S.O.S. Band said in the 1980s, *[t]ake your time do it right*.³⁰³ That is all this Article asks.

³⁰⁰ The authors of this Article are doing their part but need help emphasizing the error and importance in the classroom. And it works! For example, one of Professor Prince's (now former) students reported that during his internship he noted that all of the firm templates for LLC documents used the wrong term. He took the initiative to alert the firm partner and fixed every one of the templates. He ended up being hired by the firm after graduation.

³⁰¹ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

³⁰² MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2024) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

³⁰³ THE S.O.S. BAND, TAKE YOUR TIME (DO IT RIGHT) (Tabu Recs. 1980).