

# SUING THE MAN BEHIND THE CURTAIN: CAN NEVADA LLC MEMBERS BE LIABLE UNDER THE ALTER EGO DOCTRINE?

BY RYAN LOWER, ESQ.

## THE SITUATION

Without consulting a lawyer, your client, a Nevada resident, contracts to sell goods to a limited liability company (LLC), which two of his neighbors own and operate, along with one other person, who lives in New York but who does not participate in the company's operations. The client delivers the goods, but the LLC fails to pay for them and thereby breaches the contract. Your client wants to sue the LLC for damages, but informs you that it is insolvent. Because your client knows the owners, however, he tells you that the members of the LLC have significant assets. Can your client recover from the LLC's members for the LLC's breach? Not likely.

### **A Member of a Nevada LLC is Generally Not Liable for LLC's Debts**

As the name limited liability company implies, no owner or member of an LLC is "vicariously liable for the obligations of the LLC." (Larry E. Ribstein & Robert R. Keatinge, 1 Ribstein and Keatinge on Limited Liability Company, § 1:5 (2d ed. 2013)). Nevada law states that, "[u]nless otherwise provided in the articles of



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organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company.” (Nev. Rev. Stat. § 86.371). Moreover, a “limited liability company is an entity distinct from its managers and members.” (Nev. Rev. Stat. § 86.201(3)). For these reasons, “[a] member of a limited-liability company is not a proper party to proceedings by or against the company...” (Nev. Rev. Stat. § 86.381).

If the business entity is a Nevada corporation, the result is the same, with one exception: a stockholder, officer or director may be liable for the corporation’s obligations, if that person acts as the alter ego of the corporation. (Nev. Rev. Stat. § 78.747(1)).

## Does the Alter Ego Doctrine Apply to Nevada Limited Liability Companies?

Nevada has long recognized the equitable remedy of “piercing the corporate veil” when the corporation is acting as the alter ego of the controlling individual.<sup>1</sup> Courts use the doctrine to “do justice” when the corporate shield is abused to protect a corporate stockholder, director or officer from liability.<sup>2</sup> The Nevada legislature added the alter ego exception to Nevada’s private corporation statute in 2001. (Nev. Rev. Stat. § 78.747(1), added by ch. 601, § 1, 2001 Nev. Stat. 3170).

Unlike Nevada’s corporation statute, however, the alter ego doctrine is not included in Nevada’s LLC statute. (Nev. Rev. Stat. § 86.001 et seq). This omission creates a negative inference that the Nevada legislature did not intend for it to apply to LLCs.<sup>3</sup> Indeed, if the Nevada legislature had wanted the doctrine to apply to LLCs, it would have followed other states whose LLC statutes explicitly state that the alter ego doctrine applies to LLCs.<sup>4</sup> Although some courts have found the alter ego doctrine applies to LLCs without express statutory provisions,<sup>5</sup> it is for the Nevada legislature, not the courts, to rewrite Nevada’s LLC statute.<sup>6</sup>

This history notwithstanding, one federal bankruptcy court predicted that Nevada would apply the alter ego doctrine to LLCs.<sup>7</sup> The Nevada Supreme Court, however, has not done so, nor has it considered the question.<sup>8</sup> Therefore, until the Nevada legislature amends NRS Chapter 86 to address the application of the alter ego doctrine to Nevada LLCs or the Nevada Supreme Court addresses this issue, both lawyers and clients should be careful about relying on it to recover from a member of an LLC.

## Nevada Courts Do Not Automatically Have Jurisdiction Over Nevada LLC Members

Even if the alter ego doctrine does apply to Nevada LLCs, and that is still uncertain, there may be jurisdictional obstacles blocking your client’s attempt to sue the LLC members. Because an LLC is a distinct entity, separate from its managers and members, “[p]ersonal jurisdiction over a limited liability company does not automatically extend to its members.” (See *Mountain Funding, LLC v. Blackwater Crossing, LLC*, No. 3:05CV513–MU, 2006 WL 1582403, \*2 (W.D.N.C. June 5, 2006) (granting LLC member’s motion to dismiss for lack of personal jurisdiction); see also *Amerireach.com, LLC v. Walker*, 719 S.E.2d 489, 495-96 (Ga. 2011) (holding personal jurisdiction over a member of LLC does not automatically follow from personal jurisdiction over the LLC and that each member’s contacts with the forum state must be assessed individually to satisfy due process requirements); *Fisk Ventures, LLC v. Segal*, CIV.A. 3017–CC, 2008 WL 1961156, \*7 (Del. Ch. May 7, 2008) (“Mere ownership of a Delaware [LLC] does not constitute a sufficient basis for personal jurisdiction.”); *Graymore, LLC v. Gray*, No. 06–C–00638, 2007 WL 1059004, \*8 (D. Colo. April 6, 2007) (holding that because “LLCs expressly protect members from liability for company obligations,” it follows that personal jurisdiction over an LLC “does not automatically extend to its members.”)).

“Instead, **the members must** have the requisite minimum contacts with the forum state independently of the limited liability company.” (*Mountain Funding*, 2006 WL 1582403, at \*2 (emphasis added)). Therefore, a plaintiff must plead sufficient facts to show that a member’s own minimum contacts with Nevada are independent of the LLC’s contacts before a Nevada court can exercise personal jurisdiction over the member. (*Mountain Funding*, 2006 WL 1582403 at \*2). Here, it is clear that a Nevada court would have jurisdiction over your client’s two neighbors, but it may not have jurisdiction over the New York member of the LLC. Thus, you, on behalf of your client, must demonstrate that the New York member has the requisite minimum contacts with Nevada.

## Conclusion

Do not presume that a Nevada court will consider an LLC to be a corporation and pierce the corporate veil to find LLC members liable for the LLC’s debts under the alter ego doctrine, NRS § 86.371 notwithstanding. As Judge Frank Easterbrook and his co-author Daniel Fishel have noted, “[p]iercing seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”<sup>9</sup> Therefore, your clients should avoid trying to sue the man behind the curtain, who, like the great and powerful Oz, may be no more than an illusion for judgment purposes, providing no recovery. A writ of execution would not be returned as satisfied against an illusion. ■

1. See *McCleary Cattle Co. v. Seweel*, 73 Nev. 279, 317 P.2d 957 (1957); *LFCMktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 846 (2000).

2. *Polaris Indust. Corp. v. Kaplan*, 103 Nev. 598, 603, 747 P.2d 884, 888 (1987).

3. *Dep’t of Taxation v. DaimlerChrysler*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (“[O]missions of subject matters from statutory provisions are presumed to have been intentional.”); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967)

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("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.")

4. See, e.g., Cal. Corp. Code § 17703.04(b) (LLC is subject to liability under the common law governing alter ego liability); Colo. Rev. Stat. § 7-80-107(1) (applying the case law which interprets the circumstances under which the corporate veil of a corporation may be pierced under Colorado law to LLCs); Tex. Code Ann. § 101.002 (applying corporate alter ego statute to LLCs); Was. Rev. Code § 25.15.060 (LLC members are liable for any act, debt, obligation, or liability of the LLC to the extent that shareholders of a Washington business corporation would be).
5. See, e.g., *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 467–69 (Ky. Ct. App. 2012) (recognizing piercing of veil for an LLC in cases of fraud, illegality, or other unlawfulness); *Westmeyer v. Flynn*, 889

N.E.2d 671, 678 (Ill. Ct. App. 2008) (holding that Illinois LLC act "does not bar the other bases for corporate veil piercing, such as alter ego, fraud or undercapitalization").

6. *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.") (citation omitted).
7. *In re Giampietro*, 317 B.R. 841, 846 (D. Nev. 2004) ("If presented with the issue, this court believes it highly likely that Nevada courts would recognize the extension of the alter ego doctrine to members of limited liability companies.")
8. *Webb v. Shull*, 128 Nev. Adv. Op. 8, at 6 n.3, 270 P.3d 1266, 1272 n.3 (2012) ("The parties assume that NRS 78.747, which is part of the statutory chapter governing corporations, applies to the alter ego assertion against Shull and Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume, **without**

**deciding**, that the statute applies and analyze their alter ego arguments under that standard.") (emphasis added).

9. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89 (1985).



**RYAN LOWER** practices with the Morris Law Group. He concentrates his practice on commercial litigation, representing clients in contract disputes,

business torts, real estate and other commercial disputes. Lower received his J.D. from The Ohio State University Moritz College of Law. He can be reached at (702) 474-9400 or [rml@morrislawgroup.com](mailto:rml@morrislawgroup.com).

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