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Cover Page Footnote

Professor of Law and Director of the Mitchell Fellows Program, William Mitchell College of Law; A.B. 1972, Harvard University; J.D. 1979, Yale Law School. This essay is based on a paper delivered by the author at the 21st Century Commercial Law Forum, Seventh International Symposium, School of Law, Tsinghua University, Beijing, People's Republic of China (Oct. 22, 2007). As always, Professor Kleinberger's work depends on the insights and support of Carolyn Sachs, Esq.

THE LLC AS RECOMBINANT ENTITY: REVISITING FUNDAMENTAL QUESTIONS THROUGH THE LLC LENS

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ABSTRACT

Rather than being a simple hybrid, the U.S. limited liability company is better described as a recombinant entity that combines attributes of four different types of business organizations. The LLC offers an almost ineffably flexible structure, but that flexibility does not place the LLC beyond the range of traditional, formalist analysis. To the contrary, parsing the LLC in pursuit of conventional forms may allow us “to know the place for the first time.” This essay uses conventional concepts to: (i) explore whether “labels matter” when LLC membership interests are described as Contract or as Property; and (ii) examine how the plight of the “bare naked assignee” relates to the LLC’s status as a legal person distinct from its members.

A. INTRODUCTION

It is conventional wisdom that within the United States, “limited liability companies are a conceptual hybrid, sharing some of the characteristics of partnerships and some of corporations.”¹³¹ A more accurate description is that an LLC combines attributes of four different types of business organizations: general partnerships, limited partnerships, corporations, and closely held corporations.

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131. *Lieberman v. Wyoming.com LLC*, 11 P.3d 353, 357 (Wyo. 2000).

The “pick your partner” principle and the bifurcation of ownership interests into financial and governance rights originates in partnership law,¹³² while corporate law provides the complete “liability shield” – i.e., the conceptual “non-conductor” that protects owners from automatic liability for the debts of the enterprise.¹³³ The notion of management by owners as owners – which has been the blueprint for the “member-managed” LLC – is derived from general partnership law,¹³⁴ and limited partnership law provides the centralized management structure that has been the blueprint for “manager-managed” LLCs.¹³⁵ The law of “close corporations” provides the perspective for understanding the “lock in” problem that exists when the “pick your partner” principle overlaps with perpetual duration.¹³⁶

Into this mixture, the “check the box” regulations have infused a flexibility and variability of structure unprecedented in the U.S. law of business entities.¹³⁷ Thus, by connotation at least, the word “hybrid” grossly understates the multifaceted and almost plastic nature of limited liability companies. Those who invented and developed LLC statutes have done more than graft the branch of one entity to the stalk of another; they have been gene splicing from among various business entities. The adjective “recombinant” is more apt than “hybrid” to describe the results.

The recombinant nature of LLCs occasions a reconsideration of fundamental questions in the law of closely held businesses, because recombination creates opportunities to view attributes in different contexts, revealing elements and consequences previously unseen or taken

132. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 8.06[1][a].

133. *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908).

134. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 7.02[2].

135. *Id.* ¶ 7.02[3]; *see also* Kleinberger, Agency, Partnership and LLCs, *supra* note 8, § 13.1.4 (explaining how IRS rulings preceding “check the box” were conducting toward a limited partnership management structure for LLCs).

136. Kleinberger, *Why Not Good Faith?*, *supra* note 68, at 1148; 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 7.03 (3d ed. 2002); *see, e.g.*, *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 513 (Mass. 1975) (discussing the lock-in problem); *Berremán v. West Publ’g Co.*, 615 N.W.2d 362, 367-68 (Minn. Ct. App. 2000) (discussing the common law fiduciary duty in close corporations due to their likeness of partnerships).

137. *See* Revised Uniform Limited Liability Company Act § 301(a) cmt. (2006) (“flexibility of management structure is a hallmark of the limited liability company”).

for granted. These opportunities in turn create an obligation to reconsider fundamental questions, because recombination necessarily transcends old forms that may have served some function.¹³⁸ Those pushing the statutory development of LLCs have been and are almost exclusively transactional lawyers, who naturally seek to mold the law to facilitate the interests of their clients and their own day-to-day tasks. Galvanized by Revenue Ruling 88-76¹³⁹ and then liberated and emboldened by “check the box” statutes, they may have acted radically without fully understanding the consequences.

So, perhaps “the forms must be observed.”¹⁴⁰ To that end, this essay considers two questions:¹⁴¹ (1) does it matter whether the law uses the label “property” or “contract” to understand the rights in the business; and (2) is the limited liability company the apotheosis of the “separate entity” concept, and, how does the separate entity concept relate to the problem of the “bare naked assignee?”

B. PROPERTY OR CONTRACT, AND DOES THE LABEL MATTER?

At first glance, the answer to the question “Does the label matter?” must be yes. These labels are fundamental in U.S. jurisprudence. The U.S. Constitution addresses separately the rights of property owners and the rights of parties to a contract,¹⁴² and for centuries American law students have been taught that the subjects of Contract and Property law are related, but separate, building blocks of the common law. In one famous and ironic example, the U.S. Supreme Court chose Contract rather than Property as the bulwark to protect capital from pro-labor regulation. In

138. See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (“This feature of property – that it comes in a fixed, mandatory menu of forms, in contrast to contracts that are far more customizable – constitutes a deep design principle of the law that is rarely articulated explicitly. The fact that the in rem aspect of property has largely disappeared from academic discourse has made this latent design principle all the easier to overlook.”).

139. Rev. Rul. 88-76, *supra* note 43.

140. Harold Speed, *The Practice and Science of Drawing* 93 (New York, Dover Publications 1972).

141. For the author’s earlier efforts in this regard, see Daniel S. Kleinberger, *The Closely Held Business*, *supra* note 66; Daniel S. Kleinberger, “Magnificent Circularity” and the Churkendoose: *LLC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477 (1997).

142. See U.S. Const. art. I, § 10, cl. 1 (constitutional rights of parties to a contract); U.S. Const. amend. V (constitutional rights of property owners).

Lochner v. New York, the Court stated: “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”¹⁴³

Both labels have played a role in the law of business organizations. The Property label has been fundamental. For example, the oldest uniform business organization act defines a general partnership as “an association of two or more persons to carry on as co-owners a business for profit”¹⁴⁴ and characterizes the partners’ relationship to the means of production as “tenancy in partnership.”¹⁴⁵

Corporate law refers to “stockholders” or “shareholders,” which bespeaks ownership,¹⁴⁶ and a leading close corporation case delineates the duties of controlling shareholders by stating: “The majority, concededly, have certain rights to what has been termed ‘selfish ownership’ in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.”¹⁴⁷

Partnership law has long recognized a central role for the Contract label, as well. Although the Uniform Partnership Act’s definition of a general partnership refers to an “association of two or more persons” rather than to a contract among two or more persons,¹⁴⁸ the official Comment explains away the omission:

143. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)), *rev’d West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

144. Uniform Partnership Act § 6(1) (1914). The Model Entity Transaction Act, which seeks to encompass all forms of organizations, uses “interest holder” as its all-encompassing term for those with a recognizable stake in an organization and defines that term with property-like fashion: “‘Interest holder’ means a direct holder of an interest.” Model Entity Transaction Act § 102(20) (2007).

145. Uniform Partnership Act § 25. One principal improvement made by the Revised Uniform Partnership Act was to replace the conceptually contorted concept of “tenancy in partnership” with straightforward rules delineating the rights of partners to possess and use partnership property. Revised Uniform Partnership Act § 401(g) (1997); KLEINBERGER, AGENCY, PARTNERSHIP AND LLCs, *supra* note 8, § 8.8.2.

146. *See* Model Business Corporation Act § 1.40(21) (2002); *see also id.* § 1.40(15C) (defining “owner liability”).

147. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (citation omitted).

148. Uniform Partnership Act § 6(1).

To say that the association must be created by contract, is not only unnecessary, but in view of the varied use of the word “contract” in our law, if the word is used an explanation would have to be made as to whether the contract could be implied, and if so, whether it could be implied in law or only implied as a fact. By merely saying that it is an association these difficulties are avoided.¹⁴⁹

Moreover, under all uniform partnership acts the partners’ agreement is the primary determinant of relations *inter se* the partners.¹⁵⁰

Contracts within close corporations have had a more troubled history. For some time “shareholder control agreements” were disallowed as an interference with the discretion and duties of those responsible for protecting the interests of those who had invested property in the corporation.¹⁵¹ Modern doctrine, however, recognizes the close corporation as an “incorporated partnership” and both statute and case law have legitimized the shareholders’ contract as a way of predetermining “the deal” and protecting against oppression.¹⁵²

Thus, upon reflection the better answer to the question “Does the label matter?” may seem to be that the question hardly arises. But from the vantage point of LLC law, a more complicated picture develops.

To begin with terminology, under LLC acts the term of art is “member,” which does not connote ownership.¹⁵³ The initial word choice by the Wyoming statute drafters may have reflected nothing more than a search for a new term for a new organization. Still, the term “member” facilitates efforts to characterize the LLC as merely a contract among its members, thereby divorcing LLC law from “status based” concepts of fiduciary duty. However, that divorce is possible only by ignoring the proprietary nature of membership. If members are under-

149. *Id.* § 6(1) cmt.

150. *Id.* §§ 18, 21, 27, 38, 40; Revised Uniform Partnership Act § 103; Uniform Limited Partnership Act § 110 (2001).

151. *See* McQuade v. Stoneham, 189 N.E. 234, 239 (N.Y. 1934) (declining to enforce a shareholder agreement and honoring instead the directors’ contrary action). *See generally* Kleinberger, *Why Not Good Faith?*, *supra* note 68, at 1144, 1147-48, 1149-50.

152. *E.g.* Model Corporation Business Act § 7.32. *See generally* Kleinberger, *Why Not Good Faith?*, *supra* note 68, at 1149.

153. Definitions in both Black’s Law Dictionary and the online version of Merriam-Webster Dictionary characterize a member as a part of an organization, without any reference to a member having a proprietary stake in the organization. BLACK’S LAW DICTIONARY 1005 (8th ed. 2004); Merriam-Webster, <http://mw1.merriam-webster.com/dictionary/member> (last visited Jan. 16, 2009).

stood to own property in the organization, it becomes difficult to ignore the notion that managerial power over a person's property traditionally carries with it some measure of non-waivable duty.¹⁵⁴

The Contract/Property distinction also matters fundamentally in the issue of the "shelf LLC" – i.e., "an LLC formed without having at least one member upon formation."¹⁵⁵ The need for "the shelf" is practical: "many attorneys (and their clients) wish to have a limited liability company formed and on the public record while the relevant deal coalesces – i.e., before the precise identity and relationship of the members has been finally determined."¹⁵⁶ The objections are theoretical and relate to the Contract construct. "In theory, according to some . . . a member-less LLC is an oxymoron and having an LLC waiting 'on the shelf' for the members to be identified is an example of the 'corpufuscation' of partnership law."¹⁵⁷ From the Property perspective, in contrast, a shelf LLC makes perfect sense. Members acquire (property) interests in the LLC by making contributions to the LLC.¹⁵⁸ Conceptually, therefore, the LLC's existence must precede any membership.¹⁵⁹

LLC law also teaches that the Contract/Property distinction can

154. See generally 2 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 13.07(c) (David A. Thomas ed., 2000); 8A AM. JUR. 2D *Bailments* § 90. See also, e.g., *Diaz v. Fernandez*, 910 P.2d 96, 97 (Colo. Ct. App. 1995) (holding that because "a member of a limited liability company [has by statute] a personal property interest in the company" the member may have grounds to obtain appointment of a receiver); *In re McCabe*, 345 B.R. 1, 8-9 (D. Mass. 2006) (stating that a claim for conversion arises where one member of an LLC purports to readjust ownership interests to the prejudice of another member). *But cf.* *Steele v. Rosenfeld, LLC*, 936 So. 2d 488, 493 (Ala. 2005) (holding that a membership interest's status as personal property precludes a claim for equitable conversion, which, under Alabama law, is limited to claims pertaining to real property). For further discussion of the impact of this point on the remedies available to transferees of membership interest, see Daniel S. Kleinberger, "The Plight of the Bare Naked Assignee," __ *Suffolk L. Rev.* __ (forthcoming 2009).

155. Revised Uniform Limited Liability Corporation Act § 201 cmt.

156. Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 *BUS. LAW.* 515, 528 (2007).

157. *Id.*

158. See MOYE, *supra* note 17, at 149.

159. Note, however, that the drafters of Re-ULLCA thought it prudent to compromise on the shelf issue. Revised Uniform Limited Liability Corporation Act § 201 cmt. A recent federal district court case holds that it is obvious that shelf LLCs are permitted under the Delaware LLC Act. *ConnectU LLC v. Zuckerberg*, 482 F. Supp. 2d 3, 21 (D. Mass. 2007).

matter critically in the regulatory context. Bankruptcy law provides an important and controversial example. When an LLC member becomes bankrupt, fellow members seek to restrict the power of the trustee in bankruptcy by characterizing the membership relationship as not merely contractual, but also as involving a “personal service contract” that the trustee may neither assume nor assign.¹⁶⁰ The trustee, in contrast, will characterize the member’s interest as property and therefore fully part of the bankruptcy estate.¹⁶¹

In provisional summation, one might say that, in the U.S. law of closely held businesses, the Contract/Property distinction remains in play and continues to matter – both for the theoretician trying to capture unincorporated law for the radical contractarian perspective and for the practitioner trying to determine how regulatory law will treat the LLC and other unincorporated business entities.

C. IS THE LLC THE APOTHEOSIS OF THE “SEPARATE ENTITY” CONCEPT,
AND HOW DOES THAT CONCEPT AFFECT THE STATUS
OF THE BARE NAKED ASSIGNEE?

1. The LLC as an Entity Separate from its Members

For decades the entity/aggregate distinction complicated the law of partnerships,¹⁶² but it is almost axiomatic that a limited liability company is an entity entirely separate from its members. LLC statutes give this juridical proposition a central place in the statutory scheme, and LLC cases often begin or turn on the recitation of this basic truth.

For example, Re-ULLCA § 201(a) states, “A limited liability company is an entity distinct from its members.”¹⁶³ The Official Comment further explains: “The ‘separate entity’ characteristic is funda-

160. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 1.04; *see also* Daniel S. Kleinberger, Live Lecture at the Cardozo Law School Heyman Center on Corporate Governance, New Issues with the Limited Liability Company: The ‘Pick Your Partner’ Principle Meets the Bankruptcy Code or *Götterdämmerung* When an LLC Member Becomes Bankrupt? (Apr. 15, 2007), *available at* http://www.sonnenschein.com/video/bamberger/pan_4.wmv [hereinafter Kleinberger, The ‘Pick Your Partner’ Principle] (last visited Jan. 16, 2009).

161. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 1.04; *see also* Kleinberger, The ‘Pick Your Partner’ Principle, *supra* note 160.

162. Kleinberger, *The Closely Held Business*, *supra* note 66, at 830-35.

163. Revised Uniform Limited Liability Corporation Act § 201(a).

mental to a limited liability company and is inextricably connected to both the liability shield . . . and the charging order provision”¹⁶⁴

A litany of case law pronouncements is also available. According to a Michigan state court citing New York law, for example, an LLC is “a ‘separate legal entity.’ Its members are afforded corporate-like limited liability protection, i.e., members do not have personal liability for the debts, obligation, or liabilities of the LLC. In addition, like a corporation, it has rights and obligations which are separate and distinct from those of its members.”¹⁶⁵ Similarly, under Maryland law, “an LLC is treated as a separate legal entity for purposes of liability and property ownership.”¹⁶⁶ Bankruptcy courts have held that a limited liability company, like a corporation, “is treated as a separate legal entity and its liabilities are not attributable to its owners and managing members.”¹⁶⁷ And like a corporation an LLC can “[s]ue, be sued, complain and defend in its name.”¹⁶⁸

To use the separate entity idea as a rule for producing outcomes is, of course, a type of legal formalism,¹⁶⁹ but LLC law has done just that. The separate entity characterization underpins the members’ liability shield,¹⁷⁰ requires and helps justify the distinction between direct and

164. *Id.* § 201(a) cmt.

165. *Trident-Allied Assoc., LLC v. Cypress Creek Assoc., LLC*, 317 F. Supp. 2d 752, 755 (E.D. Mich. 2004) (citing *Weber v. King*, 110 F. Supp. 2d 124 (E.D.N.Y. 2000) (referencing New York Limited Liability Company law).

166. *Kreiser v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) (applying Maryland law).

167. *In re Gilbert*, Bankr. No. 06-10119-JMD, 2007 WL 397018, at *3 (Bankr. D. N.H. Feb. 1, 2007).

168. *Trademark Retail, Inc. v. Apple Glen Investors, LP*, 196 F.R.D. 535, 541 (N.D. Ind. 2000) (internal quotations omitted).

169. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988).

170. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 6.01; *Conn. Light & Power Co. v. Westview Carlton Group, LLC*, No. CV020469715S, 2006 WL 3719484, at *2 (Conn. Super. Ct. Dec. 6, 2006).

The assets of a corporation or limited liability company, therefore, typically are not available to creditors seeking to recover amounts owed by a stockholder or member of that corporation or limited liability company. Nonetheless, “[c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed”

Id. (citing *Angelo Tomasso, Inc. v. Armor Constr. and Paving, Inc.*, 187 Conn. 544, 552 (1982)); *Gowin v. Granite Depot, LLC*, 634 S.E.2d 714, 719 (Va. 2006) (“A limited liability company is an entity that . . . shields its members from personal liability based

derivative claims,¹⁷¹ and produces myriad other consequences ranging from property rights to the mechanics of litigation.

For example, a member's contribution of property to an LLC constitutes "more than a change in the form of ownership; it is a transfer from one entity to another."¹⁷² A contribution of property to an LLC: (i) can trigger a deed tax, even if the contributor is the LLC's sole member, unless the tax statute provides otherwise; (ii) can entitle a real estate broker to commission for the "sale" from the member to the LLC; (iii) means that the former owner of property contributed to an LLC lacks standing to contest zoning activities pertaining to the property and that LLC members cannot sue to partition land contributed to (and therefore owned by) the LLC; (iv) puts the contributed property out of the reach of the contributor's creditors, unless a creditor can make a case of fraudulent transfer or persuade the court to do a reverse pierce, treating the LLC as if it were the member; (v) renders improper a lis pendens filed by a creditor of an LLC member against real property owned by the LLC; and (vi) renders inapplicable the statute of frauds to an agreement to sell an LLC membership interest, even when the LLC's only asset is land.¹⁷³

In litigation, as a separate legal entity, an LLC is authorized and required to sue and be sued in its own name.¹⁷⁴ An LLC is also subject to particular requirements relating to service of process, cannot be an agent for service of process on any of its members (including a sole member),¹⁷⁵ and cannot be represented by a non-attorney member.¹⁷⁶

2. Why Push the Metaphysical Envelope?

Precise attention to legal constructs is sometimes condemned as "metaphysical" and "similar to the medieval quest to determine how many angels can dance on the head of a pin."¹⁷⁷ Now that the practical

on actions of the entity.").

171. See Kleinberger, *Direct Versus Derivative*, *supra* note 69, at 68; Kleinberger, *The Closely Held Business*, *supra* note 66, at 852-54.

172. Hagan v. Adams Prop. Assoc., Inc., 482 S.E.2d 805, 807 (Va. 1997).

173. These examples come essentially verbatim from KLEINBERGER, AGENCY, PARTNERSHIP AND LLCs, *supra* note 8, § 14.4.2 at 491-92.

174. See BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 5.05[1][e].

175. *Id.*

176. *Id.*

177. Magana v. State, 230 S.W.3d 411, 415 (Tex. App. 2007) (Hilbig, J.,

consequences of LLC entity status are so well and so broadly established, it may seem like “empty formalism” to inquire whether the entity concept is fully realized in the LLC.

But formalism has its own generally applicable virtues.¹⁷⁸ Moreover, it is possible that cross-examining the LLC’s separate entity character may help illuminate one of the most difficult issues in LLC law – the plight of the “bare naked assignee.”

3. The Bare Naked Assignee

When an LLC member transfers economic rights to a non-member, absent approval of the other members, the transferee obtains no governance rights and virtually no information rights.¹⁷⁹ The same is true in a general or limited partnership.¹⁸⁰ The transferee can provide itself some protection, if: (i) the transfer is by agreement; (ii) the transferor retains its ownership status despite the transfer of economic rights; and (iii) the contract affecting the transfer obliges the transferor to exercise its governance and information rights to the benefit of the transferee.¹⁸¹ Even so, once the transferor “dissociates” – i.e., ceases to be an owner – even

dissenting); *see also*, Idaho State Homebuilders v. Wash. Water Power, 690 P.2d 350, 356 (Idaho 1984); Clark Equip. Co. v. Leoni Twp., Jackson County, 318 N.W.2d 586, 589 (Mich. Ct. App. 1982).

178. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988).

In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal. Rather than being an exclusively positivist transformation of the non-legal into the juridical, law can involve the recognition of that which already has an inchoate juridical significance. The paradigmatic legal function is not the manufacturing of legal norms but the understanding of what is intimated by juridical arrangements and relationships. Legal creativity here is essentially cognitive, and it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.

Id.

179. Revised Uniform Limited Liability Company Act § 502; DEL. CODE ANN. tit. 6, § 18-702.

180. Revised Uniform Partnership Act § 503 (2008); Uniform Limited Partnership Act § 702 (2001); Revised Uniform Limited Liability Company Act § 502; DEL. CODE ANN. tit. 6, § 18-702.

181. *See* Revised Uniform Limited Liability Company Act § 602[4][B] (internal citations omitted).

that second-hand protection disappears. Hence, the term – “bare naked assignee.”¹⁸²

The problem of the naked assignee is not one-sided. Efforts to protect the naked assignee inevitably impinge on the members’ right to run their own enterprise. The situation is well explained by a lengthy comment to the Revised Uniform Limited Liability Company Act:

The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization’s owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization’s economic interests. (Such transferees can include the heirs of business founders as well as former owners who are “locked in” as transferees of their own interests.

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can “freeze the deal” as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

Bauer v. Blomfield Co./Holden Joint Venture . . . illustrates this point nicely. The case arose after all the partners had approved a commission arrangement with a third party and the arrangement dried up all the partnership profits. When an assignee of a partnership interest objected, the court majority flatly rejected not only the claim but also the assignee’s right to assert the claim. A mere assignee “was not entitled to complain about a decision made with the consent of all the partners.” A footnote explained, “We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner’s interest.”

182. An early version of ULPA 2001 defined “bare transferable interest” as “a transferable interest whose original owner is dissociated.” Uniform Limited Partnership Act, Feb. 1998 Draft § 101(1), *available at* <http://www.law.upenn.edu/bll/archives/ulc/llp/lp298.htm>. For a case in which a controlling interest almost disappeared into bare naked status, see *Lusk v. Elliott*, No. Civ. A. 16326, 1999 WL 644739 (Del. Ch. Aug. 13, 1999). The case involved AMI, an LLC that originally had two members, Mr. Elliott (with a 99 percent interest) and CRT (with a one percent interest). “Before he conveyed his 99% AMI interest to the [Neal M. Elliott and Gail Williams Elliott] Trust, Mr. Elliott was the AMI’s sole managing member.” *Id.* at *1. CRT, which managed the LLC’s day-to-day operations, claimed that Mr. Elliott’s conveyance to the trust had shorn his interest of anything but economic rights. *Id.* at *3. The court sided with the trust, interpreting a consent to assignment as permitting the transfer of all rights. *Id.* at *5.

The dissent, invoking the law of contracts, asserted that the majority had turned the statutory protection of the partners' management prerogatives into an instrument for abuse of assignees:

It is a well-settled principle of contract law that an assignee steps into the shoes of an assignor as to the rights assigned. Today, the court summarily dismisses this principle in a footnote and leaves the assignee barefoot. . . .

As interpreted by the court, the [partnership] statute now allows partners to deprive an assignee of profits to which he is entitled by law for whatever outrageous motive or reason. The court's opinion essentially leaves the assignee of a partnership interest without remedy to enforce his right.

The *Bauer* majority is consistent with the limited but long-standing case law in this area (all of it pertaining to partnerships rather than LLCs).¹⁸³

The Re-ULLCA drafting committee struggled repeatedly with the naked assignee problem; several drafts of the Act allowed transferees to seek dissolution in cases of serious oppression.¹⁸⁴ Eventually, however, the drafting committee decided that such an approach would undermine the "pick your partner" principle, could often "freeze the deal" and, in the hands of a litigious transferee, might serve as a weapon for extorting preferential redemptions.

The final version of Re-ULLCA contains no provision protecting transferees from oppression. On the contrary, the Act expressly provides that "an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation, or other liability of the limited liability company

183. Revised Uniform Limited Liability Company Act § 112(b), cmt. (citing *Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365 (Alaska 1993)) (internal citations omitted).

184. See, e.g., Revised Uniform Limited Liability Company Act, Feb. 2006 Draft § 701(a)(5), available at <http://www.law.upenn.edu/bll/ulc/ullca/2006febmtg.htm> (providing that a court ordered dissolution "on application by a member, a dissociated member that has retained a transferable interest, or a transferee, . . . on the grounds that the managers or those members in control of the limited liability company: (A) have acted, are acting, or will act in a manner that is illegal or fraudulent; or (B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.") (emphasis added).

or its members to the person in the person's capacity as a transferee or dissociated member."¹⁸⁵ A comment explains that the new Act:

[F]ollows the *Bauer* majority and other cases by expressly subjecting transferees and dissociated members to operating agreement amendments made after the transfer or dissociation. . . . The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation, is a question for other law.¹⁸⁶

D. UNDERSTANDING THE NAKED ASSIGNEE: DISCOVERING THE FLAW IN THE LLC AS ENTITY

If “there is nothing new under the sun”¹⁸⁷ and the limited liability company is an amalgam of partnership and corporation, how is it possible for LLC law to be flailing about with such a troublesome issue?¹⁸⁸

185. Revised Uniform Limited Liability Company Act § 112(b).

186. *Id.*, cmt. The Uniform Law Commissioners first seriously considered the naked assignee issue several years before the Re-ULLCA drafting process, in the context of conversions and mergers involving limited partnerships. A reporter's “endnote” to an early draft of the “Re-RULPA” commented:

What protection exists for holders of such ‘bare’ interests? They have no right to vote and no right to seek appraisal. Contrast the situation for partners who lack enough votes to block a merger. Suppose, for example, that: (i) a limited partnership has two classes of limited partner interests, (ii) the partnership agreement allows a merger to occur if a majority of all interests, voting in the aggregate, concur, and (iii) a merger is proposed and approved with provisions that significantly prejudice one of the classes. At least the owners of interests of the disadvantaged class can claim breach of the duty of good faith and fair dealing. Transferees do not even have that recourse. One possible solution – extend the obligation of good faith and fair dealing to transferees, but only in the context of a merger.

Revision of Uniform Limited Partnership Act (1976), Oct. 1998 Draft, *available at* <http://www.law.upenn.edu/bll/archives/ulc/ulpa/rulp1098.pdf>, at 304. The official Comments to the final version of ULPA 2001 recognize but do not resolve the problem. Sections 1102 (Conversion) and 1106 (Merger) contain the following, essentially identical comment:

If the converting [merging] organization is a limited partnership, the plan of conversion will determine the fate of any interests held by mere transferees. This Act does not state any duty or obligation owed by a converting [merging] limited partnership or its partners to mere transferees. That issue is a matter for other law.

Uniform Limited Partnership Act (2001), *available at* <http://www.law.upenn.edu/bll/archives/ulc/ulpa/final2001.pdf>, at 159.

187. Ecclesiastes 1:9.

188. Admittedly, as *Bauer*, 849 P.2d at 1365, illustrates, the problem is not completely novel. However, as will be seen, the problem is more acute under LLC law than

One explanation is that the LLC is not the apotheosis of the business organization as separate entity. The formal disengagement between the entity and its owners is incomplete.

An entity and its owners might be engaged or distinct in several ways.¹⁸⁹ First, the entity might be distinct from or engaged in the identity of its owners. Specifically, where the addition of new owners has no effect on the identity of the entity, the identity of its owners is distinct; conversely, where the addition of new owners causes a new entity to replace the old entity, entity and owners are engaged. Similarly, dissociation of an owner can either: (i) have no effect on the identity of the entity (distinct identity of owners); (ii) cause the entity to end (engaged); or (iii) threaten to end the entity (semi-engaged). The same is true of transfer of ownership. A transfer may have no connection to the identity of its owners (distinct), or the entity's organic statute may provide constraints on transfer (engaged).

Second, the entity's property might be distinct from or engaged with the property of its owners. Where the property is distinct, judgment creditors of owners have no right to entity's property. In contrast, where the entity's property is engaged with the property of its owners, judgment creditors of owners have direct access to the entity's property.

Third, entity obligations might be distinct from or engaged with the obligations of its owners. Where obligations are distinct, obligations of the entity are not *ipso facto* obligations of the owners, and obligations of the owners (whether joint or individual) are not *ipso facto* the obligations of the entity. In contrast, where the obligations of the entity and owners are engaged, obligations of the entity are automatically the obligations of the owners and obligations of the owners are automatically the obligations of the entity.

The following table uses the attributes listed above to assess the entity character *vel non* of nine different types of business organizations. The table also considers perpetual duration, an attribute closely related to entity continuity.¹⁹⁰

under partnership law - at least partnership law prior to revisions made over the past decade.

189. This analysis is reminiscent of the method the Internal Revenue Service once used to determine whether to classify an unincorporated business organization as a corporation or partnership for federal income tax purposes. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 2.01 (discussing the Kintner Regulations).

190. If the statute governing a business organization requires each organization to be

Table 1

X = attribute is entity-like

x = attribute has some entity character

	pre-UPA gen. pshp.	UPA (1914)	RUPA (1992)	RUPA LLP (1997)	RULPA (1976/1985)	ULP A 2001	LLC pre check the box	Re-ULLCA (2006)	Corp.
new owner effect	X	X	X	X	X	X	X	X	X
dissociation effect			x	x	x	X	x	X	X
Perpetual duration						X		X	X
Entity stance re: transfer of ownership									X
access to entity property ¹⁹¹		X	X	X	X	X	X	X	X
Owner automatic liability for entity obligations ¹⁹²				X	x	X	X	X	X
Entity automatic liability for Owner obligations ¹⁹³	x	X	X	X	X	X	X	X	X

either “at will” [of its owners] or to have a stated term, the organization does not have perpetual duration. As explained in a comment to Re-ULLCA:

In this context, the word ‘perpetual’ is a misnomer, albeit one commonplace in LLC statutes. Like all current LLC statutes, this Act provides several consent-based avenues to override perpetuity: a term specified in the operating agreement; an event specified in the operating agreement; member consent. Section 701 (events causing dissolution). In this context, ‘perpetuity’ actually means that the Act does not require a definite term and creates no nexus between the dissociation of a member and the dissolution of the entity.

Revised Uniform Limited Liability Company Act, § 104(c), cmt. Although the Kintner Regulations did not address perpetual duration, before the “check the box” regulations, almost all LLC statutes required each LLC to have a stated term of existence. BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 9.02 [1][a] (“In its early days, the modern U.S. law of LLCs required every LLC to have a specified, lim-

As Table 1 reflects: (i) the U.S. law of unincorporated business organizations has been, in general, moving toward fully-separate entity status; and (ii) the LLC is the apotheosis of this development, with one notable exception. Even under the most modern LLC statute, the entity remains fundamentally engaged in the identity of its owners through built-in, statutory restrictions on the transfer of governance rights.¹⁹⁴

This anomaly helps explain the plight of the naked transferee. In the corporate context, aspects of ownership can be separately alienated but a naked transferee can never exist.¹⁹⁵ Economic rights are necessarily connected – even if transferred – to some underlying, existing stock. Even non-voting stock has some rights; stockholders have derivative standing to assert mismanagement claims and direct standing to assert expropriation or oppression claims.¹⁹⁶

The naked assignee has no such rights. Severing the nexus between dissociation and entity termination, retaining the entity's engagement in owner transfer (the “pick your partner” principal), and providing for perpetual duration have created a “lockin”/oppression danger inconceivable in the law of close corporations.

ited term of existence.”).

191. Carter G. Bishop, Thomas Earl Geu, & Daniel S. Kleinberger, *Charging Orders and the New Uniform Limited Partnership Act Dispelling Rumors of Disaster*, 18 PROB. & PROP. 30, 30-31 (2004) (explaining how, before the invention of the charging order, a judgment creditor of a partner could cause partnership property to be seized).

192. Subject to claims to “pierce the veil” – i.e., to conflate the owners with the entity to reach the owners for the benefit of the entity's creditors. See BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 6.03[4][a] (Traditional Piercing – Disregard the Entity to Reach the Member).

193. Subject to claims for a “reverse pierce” – i.e., to conflate the owners with the entity to reach the entity for the benefit of the owner's creditors. See BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 6.03[4][a] (Limits of the Shield: Piercing the Veil).

194. Revised Uniform Limited Liability Company Act § 502(a); see also BISHOP & KLEINBERGER, LIMITED LIABILITY COMPANIES, *supra* note 35, ¶ 8.06 n.434 (“Even after ‘check the box,’ LLC statutes have preserved the ‘pick-your-partner’ approach, obviously for reasons independent of tax classification.”).

195. See generally DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE, §§ 2:4 & 2:6 (West updated through 2007); Kleinberger, *Direct Versus Derivative*, *supra* note 69, at 89.

196. See generally *Id.* §§ 2:4 & 2:6 (West updated through 2007); Kleinberger, *Direct Versus Derivative*, *supra* note 69 at 89.

Perpetual duration, in particular, has removed a safety valve that formerly provided at least some recourse to assignees. Under UPA § 32(2), for example, an assignee had standing to seek judicial dissolution of an at-will general partnership at any time and of a partnership for a term or undertaking if the partnership continued in existence after the completion of the term or undertaking.¹⁹⁷ RUPA § 801(6) maintained the safety valve, while adding the requirement that the court determine that dissolution is equitable.¹⁹⁸ ULLCA § 801(5) followed RUPA.

In contrast, ULPA 2001 eliminated that remedy as moot, given the Act's provision for perpetual duration.¹⁹⁹ For the same reason, the remedy does not appear in Re-ULLCA.²⁰⁰ In fact, toward the end of the drafting process the Re-ULLCA drafting committee eliminated language that would have allowed a transferee to seek dissolution in egregious circumstances.²⁰¹ In sum, under most LLC acts, absent a contrary agreement:

- A person who ceases to be a member of an LLC, for any reason, has no “pay out” right and becomes solely a transferee of the person's own transferable interest;
- The transferee of a transferable interest does not become a member, has no governance rights and virtually no information rights, regardless of whether the transfer was voluntary, involuntary, gratuitous, or for consideration;

197. Uniform Partnership Act § 32(2).

198. Revised Uniform Partnership Act § 801(6).

199. An early version of what became ULPA 2001 proposed to preserve the remedy: On application by or for a transferee the [designate the appropriate court] court may decree dissolution of a limited partnership if:

- the limited partnership amended its certificate of limited partnership to extend the limited partnership's term after having notice of the transfer or entry of the charging order that gave rise to the transferee's interest;
- the limited partnership's term would have expired but for that amendment; and
- it is equitable to dissolve the limited partnership and wind up its business.

Revised Uniform Limited Partnership Act § 802(b), Feb. 1998 Draft, (footnotes omitted). At its March, 1999 meeting, the drafting committee eliminated this remedy. Revised Uniform Limited Partnership Act, July 1999 Draft, § 802 cmt. to former subsection (b). These drafts are available at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ullca>.

200. Revised Uniform Limited Liability Company Act § 701(a).

201. Revised Uniform Limited Liability Company Act, Feb. 2006 Draft, § 701(a)(5), available at <http://www.law.upenn.edu/bll/archives/ulc/ullca/2006febmtg.htm> (providing standing to seek dissolution on grounds of oppression to “a member, a dissociated member that has retained a transferable interest, or a transferee”).

- Members may alter the operating agreement and affect a transferee's rights, without the consent of the transferee; and
- The LLC's duration is perpetual and a transferee has no right to seek dissolution, which means that the transferee is "locked in" to its status in perpetuity, or until the members decide otherwise.²⁰²

Shareholders in control of a close corporation might desire a comparable situation, but they cannot have it. The *full* entity nature of the corporation stands in the way. Because corporation statutes do not engage the corporation in the identity of its owners, a corporation can have no "bare naked assignees."

In the corporate sphere, attempts to circumscribe transfer rights must be made through agreements among the shareholders. Corporate law views such agreements as restraints on alienation. As a result, corporate law disfavors such agreements, strictly interprets them, and invalidates them when they seek to impose unreasonable restrictions.²⁰³ Under corporate law, it would be unreasonable to freeze in a would-be transferor or to permit transfers only where the transferee lacks all rights to protect its investment.

Thus, the problem of the bare naked assignee exists because the LLC is not quite the separate entity as is the corporation.

CONCLUSION

The limited liability company offers an almost ineffably flexible structure for business organizations, but that flexibility does not place the LLC beyond the range of traditional, formalist analysis. To the contrary, parsing the LLC in pursuit of conventional forms may allow us "to know the place for the first time."²⁰⁴

202. Kleinberger & Bishop, *supra* note 157, at 543. The quoted passage refers to LLCs formed under Re-ULLCA but is also applicable to most current state LLC statutes.

203. Kleinberger, *The Closely Held Business*, *supra* note 66, at 866-67; *see also In re Trilling & Montague*, 140 F. Supp. 260, 261 (E.D. Pa. 1956); *Phillips v. Newland*, 166 So. 2d 357, 359 (La. Ct. App. 1964).

204. T.S. ELIOT, *FOUR QUARTETS* 39 (Harcourt, Brace and Co. 1943) ("We shall not cease from exploration and the end of all our exploring will be to arrive where we started and know the place for the first time.").