

**COMPARISON  
OF  
LIMITED LIABILITY COMPANY LAWS  
OF  
TEXAS AND DELAWARE**

**By: Daryl B. Robertson**

**Presentation at 25<sup>th</sup> Annual LLCs, LPs and Partnerships Conference**

**Sponsor: UT Law CLE**

**Austin, Texas  
July 15, 2016**

*2016 Copyright Reserved by:*  
Daryl B. Robertson  
Hunton & Williams LLP  
1445 Ross Avenue, Suite 3700  
Dallas, Texas 75202  
(214) 468-3371  
(214) 468-3599 (fax)  
drobertson@hunton.com

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. LIMITATIONS ON LIABILITY .....	1
A. Piercing Company Liability Shield.....	1
B. Liability for Unlawful Distributions .....	4
C. Reliance on Reports and Opinions.....	5
D. Claims by Judgment Creditors.....	6
III. FORMATION REQUIREMENTS .....	7
A. Filing of Certificate of Formation; Existence .....	7
B. Company Agreement .....	8
IV. VARIANCE OF STATUTORY PROVISIONS .....	10
V. DUTIES AND LIABILITIES OF MANAGERS AND MEMBERS.....	10
VI. INDEMNIFICATION.....	12
VII. INSPECTION OF RECORDS.....	13
VIII. CONTRIBUTIONS AND DISTRIBUTIONS .....	16
A. Contributions.....	16
B. Distributions.....	18
IX. MEMBERS AND MEMBERSHIP INTERESTS .....	19
A. Requirement, Qualification and Admission of Members .....	19
B. Assignments of Membership Interests.....	20
C. Series LLC Structures .....	22
X. MANAGEMENT.....	24
XI. MEETINGS AND VOTING .....	26
XII. FUNDAMENTAL BUSINESS TRANSACTIONS.....	30
A. Mergers .....	30
B. Conversions.....	35
C. Interest Exchange.....	38
D. Sale of Assets.....	39
E. Dissenters' Appraisal Remedy.....	40
F. Domestication of Non-United States Entities .....	40

G.    Transfer or Continuance Transactions .....	40
XIII.  WINDING UP AND TERMINATION .....	41
XIV.   CONCLUSION .....	45

**COMPARISON OF  
LIMITED LIABILITY COMPANY LAWS OF  
TEXAS AND DELAWARE**

*(2016 Copyright reserved by Daryl B. Robertson\*)*

I. INTRODUCTION

Choosing the applicable law under which to form the modern day limited liability company can be a crucial decision in the life of the company. Many lawyers and business people fail to appreciate the impact that the choice of law can have on future operations and transactions involving the limited liability company. Incorporating under the Delaware General Corporation Law has long been the dominant choice for public corporations. With the relative newness of the limited liability company structure, it is wise to examine the differences between Delaware and Texas law applicable to limited liability companies before automatically deferring to the choice of Delaware law for formation.

The statutory provisions governing limited liability companies in Texas are located in the Texas Business Organizations Code (the “TBOC”). Title 1 of the TBOC contains 12 Chapters that are generally applicable to all types of domestic entities formed under Texas law, including limited liability companies. The provisions of Chapter 101 of the TBOC are applicable solely to limited liability companies. The provisions of Chapter 101 and the provisions of Title 1 to the extent applicable to limited liability companies may be cited as the “Texas Limited Liability Company Law.”

The statutory provisions governing a Delaware limited liability company are found in the Delaware Limited Liability Company Act (the “DLLCA”). The DLLCA constitutes Chapter 18 of Subtitle II of Title 6 of the Delaware Laws.

While I have attempted to prepare a fairly comprehensive comparison of what I view as the more important aspects of these LLC laws, the comparison is not complete. There are other provisions in each of the statutes that I have not attempted to address and compare. Any reader, of course, should review the statutory provisions himself or herself in order to make his or her own analysis and to compare other provisions that I have not addressed.

II. LIMITATIONS ON LIABILITY

A. Piercing Company Liability Shield.

Texas. One of the primary considerations in choosing applicable law is the shield provided by the limited liability company for its members with respect to obligations and liabilities of the company. The TBOC specifically provides in Section 101.114 that, except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation or liability of the company, including a debt, obligation or

---

\* Daryl B. Robertson is a partner in the law firm of Hunton & Williams LLP, Dallas, Texas.

liability under a judgment, decree or court order.<sup>1</sup> This unequivocal statement has a legislative history evidencing an intent by the Texas Legislature to provide an absolute shield for members and managers from liability for a debt, obligation or liability of the company. However, prior to 2011, many court cases in Texas followed a trend in other states toward application of corporate “piercing the veil” theory in analyzing circumstances in which claims are made against members or managers for company liabilities.<sup>2</sup> When applying corporate veil piercing standards to limited liability companies, these courts have generally recognized that the provisions of Texas Business Corporation Act Article 2.21, which were carried over in Sections 21.223 through 21.226 of the TBOC, were controlling with respect to such standards. For an excellent discussion of most of the Texas court cases addressing, and other relevant background information concerning, the topic of piercing the LLC veil, one should refer to Professor Elizabeth Miller’s excellent CLE paper titled “*Governing Persons and Owners in Action: Liability Protection and Piercing the Veil of Texas Business Entities.*”<sup>3</sup>

In 2011, the Texas Legislature clarified the standards for the piercing of the liability shield for limited liability companies by adopting the standards set forth in the for-profit corporation statutory provisions, but made these new provisions subject to the continued application of Section 101.114.<sup>4</sup> Section 101.002 of the TBOC provides that Sections 21.223, 21.224, 21.225 and 21.226 apply to a limited liability company and its members, owners, assignees and subscribers, subject to the limitations contained in Section 101.114. The prior case law and the provisions of Section 101.002 were analyzed in detail in the appeal court’s opinion in *Shook v. Walden*, 368 S.W.3d 604 (Tex. App. – Austin 2012, pet. denied).

Except to the extent Section 101.114 provides an absolute prohibition, the new TBOC provisions provide protection to managers and members from company contractual liabilities, as opposed to tort liabilities, against piercing claims of alter ego, constructive fraud or the like under Section 21.223 of the TBOC. Nevertheless, there is nothing in the Texas legislative history that implies Section 101.114 should not provide full protection from tort liability for members and managers.

While the Texas statute specifically allows for the manager or member to agree in the company agreement to be liable for a debt, obligation or liability of the company, it does not address personal liability under other agreements. Nevertheless, it is difficult to believe that a

---

<sup>1</sup>TBOC §101.114.

<sup>2</sup>See, e.g., *Pinebrook Properties, Ltd. v. Brookhaven Lake Prop. Owners Association*, 77 S.W.3<sup>rd</sup> 487, 500 (Tex. App. - Texarkana 2002, pet. denied) (court assumed without analysis that corporate veil piercing should apply to a Texas limited liability company); *In re JNS Aviation, LLC (Nick Corp. v. JNS Aviation, Inc.)*, 376 B.R. 500 (Bankr. N.D. Tex. 2007) (bankruptcy court rejected argument that the statutory liability protection under the TLLCA precluded veil piercing and followed Texas cases that have applied corporate veil piercing principles to limited liability companies); *DDH Aviation, L.L.C. v. Holly*, 205 WL 770595 (N.D. Tex. March 31, 2005) (relied upon Texas corporate veil piercing analysis to pierce liability shield of a Texas limited liability company).

<sup>3</sup> Presented at *Essentials of Business Law* conference sponsored by the State Bar of Texas CLE on March 6-7, 2014 in Houston, Texas. The article can also be found on the Baylor Law School website on the webpage for Professor Miller at <http://www.baylor.edu/law>.

<sup>4</sup> TBOC § 101.002.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Comparison of Limited Liability Company Laws of Texas and Delaware

First appeared as part of the conference materials for the  
25<sup>th</sup> Annual LLCs, LPs and Partnerships session

"Choosing a Jurisdiction: Key Differences Between Texas and Delaware"