

# AN EXAMINATION OF THE BUSINESS FORM DECISION FOR PROFESSIONAL SERVICE FIRMS

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## ***I. Introduction***

The choice of business form has become complicated for professional service firms. Whether the firm organizes as a general partnership, a limited liability partnership ("LLP"), a limited liability company ("LLC"), or a professional corporation ("PC") depends significantly on the participants' concerns regarding liability. In the last decade, the LLC and LLP business forms have generated a great deal of attention, especially for professionals who want to limit their exposure to personal liability. However, limited liability for LLC and LLP owners is not absolute. For professionals who may practice in firms with relatively few members, the firm's liability exposure remains a particularly significant concern. This paper examines the liability issue for professionals practicing in various business forms. Part II provides an introduction to the basic structure of each of the organizational forms. Part III analyzes the provisions of the respective model acts that govern professional corporations, limited liability partnerships, and limited liability companies. Part IV focuses on the liability of the firm itself, including the liability of the firm for debts and obligations arising in tort and contract. Part V examines the issue of personal liability exposure. Part VI reviews examples of the relevant law governing organizational entities formed in South Carolina, North Carolina, and Georgia. Part VII concludes the investigation, and the Appendix presents tables summarizing the findings.

## ***II. Introduction to the Entities***

### ***A. Review of the Law Governing Business Entities***

A professional occupation may be defined as one that requires licensure to participate in that trade or occupation.<sup>1</sup> Professional occupations have traditionally been singled out for special treatment under the laws governing organizational entities.<sup>2</sup> For example, certain professionals, such as accountants, architects, dentists, lawyers, and

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<sup>1</sup> See generally Robert W. Hamilton, *Unincorporated Business Entities: Professional Partnerships in the United States*, 26 J. CORP. L. 1045 (2001).

<sup>2</sup> See, e.g., MODEL PROF. CORP. SUPP. (1997).

physicians, are prohibited under state law from doing business as a corporation.<sup>3</sup> Each state defines the term “professional” in its respective body of law governing organizational entities. Professionals, particularly accountants, doctors, and lawyers, have historically chosen to operate as sole proprietorships or general partnerships.<sup>4</sup> In a sole proprietorship, the owner assumes all debts and obligations of the enterprise.<sup>5</sup> A general partnership, on the other hand, is distinguished by the participation of two or more people who agree to do business together for a profit.<sup>6</sup> Each general partner assumes all debts and obligations for himself or herself, as well as for debts and obligations of fellow partners in the business.<sup>7</sup> In a general partnership, the client hires one professional, but essentially retains all members of the firm because all partners are directly liable for their own malpractice and vicariously liable for the tortious acts of fellow partners.<sup>8</sup>

Concerns over both the tax treatment and liability exposure of unincorporated business, such as sole proprietorships and general partnerships, gave rise to professional corporations (PCs) in the 1950s and 1960s.<sup>9</sup> Changes in tax law, however, have diminished tax treatment as a motivating factor for choice of entity. Today, the tax effects of forming any type of business entity are neutral. Furthermore, a common unincorporated business form, the general partnership, is not taxed under the federal tax law; its owners only pay federal income tax on their own share of partnership income.<sup>10</sup> The issue of liability, though, remains relevant to professionals who want to avoid the vicarious liability associated with the actions of their fellow

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<sup>3</sup> *Id.*; M. Shaun McGaughey, *Limited Liability Partnerships: Need Only Professionals Apply?*, 30 CREIGHTON L. REV. 105, 108 (1996).

<sup>4</sup> See, e.g., Teresa Stanton Collett, Symposium: Ethical Obligations and Liabilities Arising from Lawyers' Professional Associations, 39 S. TEX. L. REV. 205, 205 (1998). While states also provided for the creation of limited partnerships (LPs), the law generally required limited partners to be inactive partners, thus preventing limited partners from serving LPs as active professionals. See generally UNIF. LTD. P'SHIP. ACT (2001).

<sup>5</sup> 18A AM. JUR. 2D *Corporations* § 154 (2004).

<sup>6</sup> J. WILLIAM CALLISON AND MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE BY STATE GUIDE TO LAW AND PRACTICE 1 (1994).

<sup>7</sup> UNIF. P'SHIP. ACT § 306(a) (1997).

<sup>8</sup> David M. Pato, *Legal Malpractice-Membership in the Professional Corporation Does not Confer Upon an Attorney-Shareholder a Limitation on Personal Liability for Attorney's Breach of Duty*: Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corporation, 31 N.M. L. REV. 637 (2001).

<sup>9</sup> Hamilton, *supra* note 1, at 1048-51.

<sup>10</sup> *Id.*

practitioners, associates, and employees. Even after legislation created PCs, a practitioner's vicarious liability often continued to be a problem.<sup>11</sup> Today, practitioners benefit from legislation that allows them to choose to practice in either an LLP or an LLC.

Forming a PC to provide a shield from liability for its owners and participants proved to be inadequate, particularly in light of several cases that dealt with liability in the PC form.<sup>12</sup> For example, the Georgia Supreme Court held that non-complicit lawyers practicing in a PC remained liable for the malpractice of their fellow attorneys.<sup>13</sup> According to the Georgia court, this liability derived from the professional nature of practicing law, where clients could expect the fidelity of other members of the firm.<sup>14</sup> Ohio's Supreme Court reached a similar result, holding that each member of a PC is liable for the misconduct of another member.<sup>15</sup>

More recently, state law has addressed the limited liability issue for two other organizational entities: the LLP and the LLC.<sup>16</sup> Both forms share the same goal in seeking to limit practitioners' liability to clients.<sup>17</sup>

The LLP was designed to specifically address vicarious liability. LLPs developed in Texas in response to litigation following the savings and loan crisis in the 1980s.<sup>18</sup> Each LLP partner is directly liable for his

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<sup>11</sup> MODEL PROF. CORP. SUPP. § 34 (1997).

<sup>12</sup> See, e.g., *First Bank & Trust Co. v. Zagoria*, 302 S.E.2d 674 (Ga. 1983); *Reiner v. Kelley*, 457 N.E.2d 946 (Ohio Ct. App. 1983).

<sup>13</sup> *First Bank & Trust Co.*, 302 S.E.2d at 676. In a more recent case, the Georgia Supreme Court overruled its prior decision in *First Bank & Trust Co.* and permitted limited liability. *Henderson v. HIS Fin. Services, Inc.*, 471 S.E.2d 885, 886 (Ga. 1996).

<sup>14</sup> *First Bank & Trust Co.*, 302 S.E.2d at 675.

<sup>15</sup> *Reiner*, 457 N.E.2d at 951.

<sup>16</sup> See generally John H. Matheson and Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited Liability Protection*, 75 WASH. L. REV. 147 (2000). For laws of the various states that have enacted LLP and LLC statutes, see STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS (E. S. Miller & A. J. Howe eds.); MICHAEL D. JENKINS, *STARTING AND OPERATING A BUSINESS IN THE U.S.* (1999) (noting that all 50 states have enacted LLP and LLC statutes).

<sup>17</sup> Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. REV. 359, 359-73 (1998).

<sup>18</sup> Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 364 (1998). Parties involved in the Enron case, accountants and lawyers; may be arguing the limits of liability that the LLP attempts to provide. Under the current law in Texas, partners in an LLP continue to be liable for their own misconduct and for the misconduct of others that they supervise or direct; vicarious liability for other misconduct of fellow partners is, however, eliminated

or her own misconduct and actions when supervising or controlling the tortious acts of others.<sup>19</sup> The LLP attempts to eliminate the vicarious liability of partners for firm misconduct perpetrated by other partners.<sup>20</sup> LLP statutes throughout the United States vary in terms of whether the protection offered by an LLP is a complete shield against liability, guarding against lawsuits in both contract and in tort, or whether the LLP provides a shield against only tort actions.<sup>21</sup>

Most LLP statutes are the product of amendments to existing partnership law and are considered changes to the partnership form rather than an entirely new organizational entity.<sup>22</sup> State courts have the benefit, therefore, of being able to rely on existing common law when addressing LLP issues.

Another form that limits liability for practioners is the LLC. The LLC is the most ambitious of the organizational forms because it is a novel entity form and contemplates full shield protection against both contract and tort liabilities for all members of the organization.<sup>23</sup> While LLCs usually provide full shield protection, professionals practicing in an LLC generally remain personally liable for their own acts or omissions.<sup>24</sup> Professionals are not, however, subject to vicarious liability for the acts of their fellow professionals.<sup>25</sup> Furthermore, the LLC is different from other organizational forms in that there is no extensive body of common law for courts to base their decisions on when addressing LLC matters.<sup>26</sup>

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under the LLP form. Texas Revised Partnership Act, § 3.08, TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08 (2004).

<sup>19</sup> UNIF. P'SHIP. ACT § 306 (1997). See, e.g., S.C. CODE ANN. §§ 33-41-10 to 1220 (Law Co-op. 1990 & Supp. 1997).

<sup>20</sup> McWilliams, *supra* note 17, at 367-70.

<sup>21</sup> *Id.*

<sup>22</sup> Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 86-87 (2002).

<sup>23</sup> Warren H. Johnson, *Limited Liability Companies (LLC): Is LLC Liability Shield Holding Up Under Judicial Scrutiny?*, 35 NEW ENG. L. REV. 177, 214-15 (2000).

<sup>24</sup> UNIF. LTD. LIAB. CO. ACT (1996), art. 3, § 303, cmt.

<sup>25</sup> Elizabeth C. Woodford, *The Ethical Implications of the Limited Liability Status in the Practice of Law*, 87 KY. L. J. 489, 497-98 (1999); McWilliams, *supra* note 17.

<sup>26</sup> See generally William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855 (1995). The first LLC statute was passed in 1977. *Id.*

### B. *The Liability Shield*

Certainly, the statutes covering the various business forms differ in the amount of protection each provides to the practitioner. Participation in a limited liability entity does not guarantee limited liability.<sup>27</sup> Partners and members of professional entities are always liable for their own tortious conduct.<sup>28</sup> Professionals also generally remain liable for the misconduct of others that they control or supervise.<sup>29</sup> LLP and LLC statutes attempt to address and limit vicarious liability only.<sup>30</sup> Decisions by state courts have apparently extended this limitation on vicarious liability to the PC as well.<sup>31</sup> Other bases for vicarious liability, however, may remain at issue, including a duty to supervise. It is currently unclear under what circumstances professionals are obliged to supervise the work done by the firm.<sup>32</sup> A wrong committed by a firm member may result in no liability for another firm member, where the latter firm member has no supervisory responsibility for the perpetrator.

## III. *Model Acts*

A set of model acts governing PCs, LLPs, and LLCs have been sent to the states for adoption. When the model acts were created, PCs already provided a shield protecting the personal assets of professionals.<sup>33</sup> It was not, therefore, a great leap to create other organizational forms that provided similar protection. The model codes that currently govern PCs, LLPs, and LLCs provide similar levels of protection against the personal liability of their owners.

### A. *Professional Corporation Supplement*

The Model Professional Corporation Supplement provides that each individual performing professional services, as an employee of a PC, is liable for the negligence or wrongful acts of omission (in which he or she personally participates) as if he or she were a sole

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<sup>27</sup> See generally Pato, *supra* note 8.

<sup>28</sup> See, e.g., Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399 (1998).

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Fortney, *supra* note 28.

<sup>31</sup> See, e.g., Henderson, 471 S.E.2d at 887.

<sup>32</sup> See, e.g., Fortney, *supra* note 28; Wolfram, *supra* note 18.

<sup>33</sup> See MODEL PROF. CORP. SUPP. (1997).

practitioner.<sup>34</sup> Employees are not liable for acts of other employees of the PC unless they are at fault in appointing, supervising, or cooperating with them.<sup>35</sup> Furthermore, the PC is liable to the same extent as its employees when the employees are acting within the scope of their authority.<sup>36</sup>

The PC model statute also provides three alternatives, in lieu of the default provision described above, that govern issues of liability under the act.<sup>37</sup> States have the option of choosing the alternative that would most appropriately suit both state law and standards set by state professional organizations (for example, state bar associations).<sup>38</sup> The first alternative provides that the liability of shareholders who perform acts within the scope of their employment is no greater than that of a shareholder of a regular corporation formed under the Model Business Corporation Act.<sup>39</sup> The second alternative states that employees are liable to the same extent as partners in a partnership, as if the services were rendered on behalf of the partnership.<sup>40</sup> The third alternative maintains that if the PC is liable for acts of its employees, then every shareholder is liable as if they were partners in a partnership, except as otherwise provided by statute.<sup>41</sup> Under this last alternative, if the PC covers liability risk through insurance or a surety bond, then liability risk is satisfied to the extent covered by the insurance or bond.<sup>42</sup>

### B. *The Uniform Partnership Act*

LLPs are governed by modifications made to the Uniform Partnership Act (the "Act"), drafted in 1997 by The National Conference of Commissioners on Uniform State Laws.<sup>43</sup> The Act provides full shield protection, which protects practitioners from tort and contract liability associated with the misdeeds of others for all partners in the LLP.<sup>44</sup> As stated in the comments to section 306 of the

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<sup>34</sup> *Id.* § 34.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 34(b).

<sup>37</sup> *Id.* § 34(c).

<sup>38</sup> *Id.* § 34(d).

<sup>39</sup> MODEL PROF. CORP. ACT SUPP. § 34, altern. 1 (1997).

<sup>40</sup> *Id.* § 34, altern. 2.

<sup>41</sup> *Id.* § 34, altern. 3.

<sup>42</sup> *Id.*

<sup>43</sup> UNIF. P'SHIP. ACT (1997).

<sup>44</sup> *Id.* § 306; The National Conference of Commissioners on Uniform State Laws, *at*

Act:

Like shareholders of a corporation and members of a limited liability company, partners of a limited liability partnership are not personally liable for partnership obligations incurred while the partnership liability shield is in place solely because they are partners. As with shareholders of a corporation and members of a limited liability company, partners remain personally liable for their personal misconduct.<sup>45</sup>

It makes no mention of liability associated with a partner's control or supervision of another partner.<sup>46</sup>

The Act allows for modification of full shield protection permitting states to choose to extend protection to practitioners only for tort but not for contractual liability.<sup>47</sup> Although each state has the autonomy to choose whether to offer full shield or limited protection, an LLP will be governed by the version of the statute passed in the state in which the partnership applies for LLP status.<sup>48</sup>

### C. *Limited Liability Companies*

The liability of owners in an LLC is indeed limited – limited, that

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<http://www.nccusl.org/Update/> (last accessed Jan. 6, 2005).

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., South Carolina Uniform Partnership Act, S.C. CODE ANN. § 33-41-370 (Law. Co-op. 2003).

<sup>47</sup> UNIF. P'SHIP. ACT, prefatory note (1997). This note states in part:

The amendments to add LLP provisions to RUPA include a new § 306(c) providing for a corporate-styled liability shield which protects partners from vicarious personal liability for all partnership obligations incurred while a partnership is a limited liability partnership. The complete liability shield comports with the modern trend among the states. Most states, however, have adopted a partial liability shield protecting the partners only from vicarious personal liability for all partnership obligations arising from negligence, wrongful acts or misconduct, whether characterized as tort, contract or otherwise, committed while the partnership is an LLP. The Act does not alter a partner's liability for personal misconduct and does not alter the normal partnership rules regarding a partner's right to indemnification from the partnership (§ 401(c)). Therefore, the primary effect of the new liability shield is to sever a partner's personal liability to make contributions to the partnership when partnership assets are insufficient to cover its indemnification obligation to a partner who incurs a partnership obligation in the ordinary course of the partnership's business.

*Id.*

<sup>48</sup> *Id.* art.1, § 101 (1997).



is, to their respective investment in the organization.<sup>49</sup> The LLC offers full shield protection against liability from either tort or contract, placing responsibility for these obligations on the firm itself.<sup>50</sup> In this respect, the liability protection afforded under an LLC is similar to the protection originally offered by a professional corporation.<sup>51</sup> The Uniform Limited Liability Company Act, the model act regarding LLCs, does not provide the potential for alternative forms of liability, as does the PC statute. Instead, the liability shield provided by the LLC model act is more encompassing than the liability shield provided by the PC model act.<sup>52</sup>

#### IV. *The Liability of the Firm*

The following discussion presents an analysis of liability exposure to the firm, supplemented by instances in which professionals are singled out for special treatment. The discussion distinguishes the liability of professionals and professional firms from organizations that do not provide professional services.

##### A. *Firm Liability - Torts*

###### 1. Corporations

Corporations are directly liable for their own tortious conduct.<sup>53</sup> While the corporation's agents may be liable for their own torts, the firm is also jointly liable with the agent.<sup>54</sup> Succinctly stated, this proposition means: "If an individual is hit by a negligently operated

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<sup>49</sup> UNIF. LTD. LIAB. CO. ACT, art.3 (1996). § 303 which deals with the liability of members and managers reads:

(a) Except as otherwise provided in subsection (c), the 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 acting as a member or manager.

*Id.*

<sup>50</sup> *Id.*

<sup>51</sup> REVISED MODEL BUS. CORP. ACT § 6.22(b) (1984); UNIF. LTD. LIAB. CO. ACT, art.2 § 303(a) (1996).

<sup>52</sup> MODEL PROF. CORP. SUPP. § 34 (1997).

<sup>53</sup> REVISED MODEL BUS. CORP. ACT § 3.02 (detailing the right of the corporation to "sue and be sued").

<sup>54</sup> See, e.g., RESTATEMENT (SECOND) OF AGENCY § 229 (1958).

train, the railroad is liable . . . [H]ad the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad.”<sup>55</sup>

Corporations can also be liable under the theory of negligent supervision.<sup>56</sup> Cases here include those involving both economic and personal injuries as noted by the court in *Twin Fires Investment v. Morgan Stanley Dean Witter & Co.*<sup>57</sup> In *Twin Fires Investment*, an incorporated brokerage firm was considered directly liable under the theory of negligent supervision when a broker-employee of the firm failed to carry out a client’s directions concerning a stock trade.<sup>58</sup> The broker, relatively inexperienced and facing the prospect of a volatile initial public offering of which the firm was aware, was given no guidance from the firm.<sup>59</sup> The client subsequently sued the firm, claiming the loss of millions of dollars.<sup>60</sup> The firm admitted vicarious liability for the broker’s actions, but the court, in dicta, also noted that the firm was directly liable for the client’s economic loss.<sup>61</sup>

Corporate liability for personal injuries is illustrated in the case *Smith v. Orkin Exterminating Co., Inc.*<sup>62</sup> *Smith* involved a corporation that was held directly liable when it failed to exercise reasonable care in hiring and retaining an employee who entered a customer’s home and raped her.<sup>63</sup> Orkin was hired by its customer Smith.<sup>64</sup> Orkin sent an employee, Johnson, to Smith’s home to provide extermination services.<sup>65</sup> While Orkin had screened Johnson’s background, including administering several polygraph examinations, unbeknownst to Orkin, Johnson had been arrested for the burglary and rape of another Orkin customer at another location.<sup>66</sup> While performing the extermination at

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<sup>55</sup> *Browning-Ferris Indus. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1999).

<sup>56</sup> See, e.g., *Twin Fires Inv., v. Morgan Stanley Dean Witter & Co.*, 2002 WL 31875204, at \*1 (Mass. Super.).

<sup>57</sup> *Twin Fires Inv.*, 2002 WL 318752204, at \*33-35.

<sup>58</sup> *Id.* at \*33.

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*1.

<sup>61</sup> *Id.* at \*33.

<sup>62</sup> *Smith v. Orkin Exterminating Co.*, 540 So. 2d 363 (1989).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 365.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 367.

Smith's home, Johnson arranged access to the home subsequently utilizing that access to enter the house and rape Smith.<sup>67</sup> The court held that but for Orkin's failure to effectively investigate Johnson, the plaintiff would not have been harmed.<sup>68</sup> In this respect, the court stated:

[W]hen an employer hires an employee who in the performance of his duties will have a unique opportunity to commit a crime against a third party, he has a duty to exercise reasonable care in the selection of that employee . . . . Under the circumstances of Orkin's business, we also believe that there is a continuing duty to exercise reasonable care in the retention of employees.<sup>69</sup>

The court held that while employers that maintain their own premises might have a lower duty to customers than employers who send employees into private homes, Orkin was negligent in performing its duty to customers.<sup>70</sup> Because its breach resulted in harm to the plaintiff, Orkin was liable to its client.<sup>71</sup>

Under agency law, the corporation is also vicariously liable for the negligent actions of its employees when these actions are performed within the scope of the employee's work.<sup>72</sup> The corporation may not directly participate in the tort, but is nonetheless liable for actions that occur while the employee works under the control of the firm.<sup>73</sup> However, corporations are not liable for the acts of agents when the agents either act in pursuit of purely personal interests, or are engaged in acts that are so outrageous as to place them outside the scope of employment.<sup>74</sup> For example, in *Bates v. United States*, the employer was not liable for the actions of a military police officer, working on a military base for the United States, when the military police officer pulled over a car carrying four teenagers who he then shot and killed.<sup>75</sup>

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<sup>67</sup> *Id.* at 365.

<sup>68</sup> *Smith*, 540 So. 2d at 366.

<sup>69</sup> *Id.* at 365.

<sup>70</sup> *Id.* at 367.

<sup>71</sup> *Id.* at 365.

<sup>72</sup> See RESTATEMENT (SECOND) OF AGENCY §§ 228, 243 (2004).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Bates v. United States*, 701 F.2d 737, 742 (8th Cir. 1983).

The military police offer's conduct was so outrageous that the employer was not considered responsible for the employee's actions.<sup>76</sup>

## 2. Partnerships, LLCs, & LLPs

The tort liability of a corporation stands in contrast to the unlimited liability of both the firm and its partners in a general partnership. According to the Uniform Partnership Act that governs general partnerships, "partners are jointly and severally liable for all obligations of the partnership."<sup>77</sup> For the more recently developed organizational forms, the LLC and LLP, the firm itself remains both directly and vicariously liable for firm debts and obligations arising in tort.<sup>78</sup> While some LLP and LLC participants have adopted the limited liability form in the belief that the form is a panacea for liability generally, the firm's liability remains, regardless of the new forms' ability to shield individual participants from personal liability.<sup>79</sup> Whether organized as a corporation, partnership, LLC, or LLP, the firm remains liable for its own debts and obligations arising in tort.<sup>80</sup> For example, the Uniform Limited Liability Company Act states that "the 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."<sup>81</sup>

Illustrative of this proposition is *Southland Construction, Inc. v. The Richeson Corp.*<sup>82</sup> In this case, individual engineer-employees and an LLC engineering firm were being sued for the professional malpractice of the engineers.<sup>83</sup> The court stated that while the individuals were potentially liable for their own misconduct, the company remained vicariously liable for the actions of its agent-engineers.<sup>84</sup> In the case, the company hired Richeson to design a retaining wall, which subsequently cracked, bulged, and would have collapsed owing to Richeson's inappropriate design that failed to comport with professional

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<sup>76</sup> *Id.*

<sup>77</sup> UNIF. P'SHIP. ACT § 306(a) (1997).

<sup>78</sup> UNIF. P'SHIP. ACT § 305-306 (1997); UNIF. LTD. LIAB. CO. ACT § 302 (1996).

<sup>79</sup> *See, e.g.*, UNIF. LTD. LIAB. CO. ACT (1996); UNIF. P'SHIP. ACT (1997).

<sup>80</sup> *Id.*

<sup>81</sup> UNIF. LTD. LIAB. CO. ACT § 303 (1996).

<sup>82</sup> *Southland Construction, Inc. v. The Richeson Corp.*, 642 So.2d 5 (1994).

<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.* at 8-9.

engineering standards.<sup>85</sup> Southland successfully sued Richeson for negligently performing its duties.<sup>86</sup>

For an LLP, the liability concerns are similar. The firm is directly and vicariously liable for its responsibilities sounding in contract and tort. The Uniform Partnership Act states: "An obligation of the partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the responsibility of the partnership."<sup>87</sup> For example, *Pytko v. Hannah* involved a legal malpractice claim against an LLP.<sup>88</sup> The court held that the firm can be vicariously liable for the actions of a tortious attorney under the principle of respondeat superior.<sup>89</sup> Thus, the LLP form will not shield the firm from liability for the actions of employees that arise

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<sup>85</sup> *Id.* at 7.

<sup>86</sup> *Id.* at 9, n.6 (quoting the Florida statute governing professional corporations). Section 471.023(3) of the Florida statute reads:

The fact that a registered engineer practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by him. Partnerships and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. Any officer, agent, or employee of a corporation shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or committed by any person under his direct supervision and control, while rendering professional services on behalf of the corporation. The personal liability of a shareholder of a corporation, in his capacity as shareholder, shall be no greater than that of a shareholder-employee of a corporation incorporated under chapter 607. The corporation shall be liable up to the full value of its property for any negligent acts, wrongful acts, or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services.

*Id.*

The court also noted in *Southland* that while there was no direct privity of contract between the negligent engineer and the land owner who suffered damages due to the engineer's improper designs, the engineer nevertheless owed a duty to the company that used his designs (to professionally perform his job), and that a failure to meet professional standards would foreseeably cause harm to the land owner whose property was damaged. *Id.* at 8. The company itself did not directly suffer damages. *Id.* at 7. Rather, Southland suffered a \$188,000 loss and was required to provide additional repairs to the landowner's property as a result of the failures caused by Richeson's design. *Id.* Richeson was, under the court's analysis, liable to Southland. *Id.* at 9.

<sup>87</sup> UNIF. P'SHIP. ACT § 306(c) (1997).

<sup>88</sup> *Pytko v. Hannah LLP*, 2002 WL31677458, at \*1 (Mass. Super.).

<sup>89</sup> *Id.* at \*3-4.

from the performance of legal services.<sup>90</sup> Since the defendant attorney committed malpractice while working for the LLP, the LLP was automatically liable because the acts occurred within the scope of employment.<sup>91</sup> Even if, individually, the participants in the firm were not liable, the firm was.<sup>92</sup>

A California court addressed the issue of liability for professionals in *Armato v. Baden*.<sup>93</sup> In *Armato*, a patient was negligently treated for a broken wrist by a physician's assistant.<sup>94</sup> While the physician's assistant was the cause of the harm, the patient nonetheless sued the doctors, who worked as independent contractors for a medical corporation, which also employed the physician's assistant.<sup>95</sup> The plaintiff argued that, while the doctors did not treat her, the doctors were individually liable.<sup>96</sup> The court held, however, that the doctors had no personal liability for the corporation's torts if the doctors did not participate in the conduct.<sup>97</sup> The court noted that under the doctrine of respondeat superior, liability is imposed on the corporation for the torts of its employees.<sup>98</sup> The court ultimately held there was no basis for liability of the doctors.<sup>99</sup> The doctors did not participate in the negligent treatment, did not negligently supervise the physician's assistant, and did not have a duty to supervise him.<sup>100</sup> The corporation may have been liable, but the doctors were immune.<sup>101</sup>

### B. *Firm Liability - Contracts*

Regarding a firm's debts and obligations arising in contract, scholars state that:

"[a] partnership is fundamentally a contractual entity . . . . [It proceeds] from contract, and [arises] from the interests of the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Armato v. Baden*, 84 Cal. Rptr. 2d 294 (1999).

<sup>94</sup> *Id.* at 296.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 297.

<sup>97</sup> *Id.* at 300.

<sup>98</sup> *Id.*

<sup>99</sup> *Armato*, 84 Cal. Rptr. 2d at 294.

<sup>100</sup> *Id.* at 299.

<sup>101</sup> *Id.* at 299, 301.

purported partners. In contrast, the corporation is often described as a state-created legal 'person' . . . [I]ncorporated firms exchanged their autonomy as contractual entities for favors accorded state-created entities."<sup>102</sup>

As a legal entity, liability for debts and obligations of the corporation are personal to the corporation.<sup>103</sup> As noted previously, state statutes prescribe similar liability exposure for LLPs and LLCs, while in a general partnership, the partners remain personally liable.<sup>104</sup>

Table I, which appears in the Appendix, summarizes not only the liability of the firm, but also the personal liability of the firms' participants. Information in the tables is useful in analyzing the relative personal liability exposure examined in the next section.

### V. *The Liability of Individuals*

Agents are liable for their own acts, regardless of whether the principal is liable; an individual employee is liable for his or her own conduct that causes injury.<sup>105</sup> To trigger personal liability for a corporation's torts, a director or officer must participate in, authorize, or direct the tort.<sup>106</sup> For example, a corporate CEO was found criminally liable for a subcontractor's violation of Minnesota's building code when the CEO supervised the subcontractor's actions.<sup>107</sup>

In LLCs, on the other hand, "(a) member or manager is responsible for acts or omissions to the extent these acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity."<sup>108</sup> For LLPs, the uniform

<sup>102</sup> Larry E. Ribstein, *The Evolving Partnership*, 26 IOWA J. CORP. L. 819, 822-23 (2001).

<sup>103</sup> JOHN C. MOYE, *THE LAW OF BUSINESS ORGANIZATIONS* (International Thomson Publishing Company 5th ed. 1998).

<sup>104</sup> UNIF. P'SHIP. ACT § 306 (a) (1997); UNIF. LTD. LIAB. CO. ACT § 303 (1996).

<sup>105</sup> See, e.g., RESTATEMENT (SECOND) OF AGENCY § 354 (1958). This section establishes liability even for the failure of an agent to act. *Id.* The comments note that, "The liability of the agent is based upon the entire course of conduct, which includes the assumption of the duty to act and the subsequent failure to act." *Id.* § 354 cmt. a.

<sup>106</sup> See, e.g., *Armato*, 84 Cal. Rptr. 2d at 294; *Schuman v. Gallet, Dreyer, and Berkley*, 719 N.Y.S.2d 864 (N.Y. App. Div. 2001).

<sup>107</sup> *State v. Arkell*, 657 N.W.2d 883, 889 (Minn. 2003). In Minnesota, the state building code is considered a public welfare statute that regulates conduct which is potentially harmful or injurious, violation of which may result in criminal sanctions. *Id.* at 888-89.

<sup>108</sup> UNIF. LTD. LIAB. CO. ACT § 303 cmt. (1996).

act provides that "[a] partner (in an LLP) is not personally liable, directly or indirectly . . . solely by reason of being or so acting as a partner."<sup>109</sup> Furthermore, "as with shareholders of a corporation and members of a limited liability company, partners remain personally liable for their personal misconduct."<sup>110</sup> In the context of an LLP, a court noted that while a contractual release may eliminate a law firm's liability, it does not discharge individual defendants.<sup>111</sup>

The liability shield adopted by the LLP uniform act protects partners from vicarious liability arising in tort or contract.<sup>112</sup> Many states have adopted a partial shield, protecting partners only from the vicarious liability of a fellow partner's malpractice, but not for the debts and obligations arising in contract.<sup>113</sup> Some state LLP statutes provide that a supervising LLP member is liable for the torts of another LLP member whom he or she supervises.<sup>114</sup> Also, several states have similarly placed responsibility on individual members of LLCs when they control or supervise the work of a tortious fellow member.<sup>115</sup> Furthermore, courts have specifically held that professionals practicing in a professional corporation will also be held to standards requiring responsibility for their own misconduct.<sup>116</sup> Indeed, professionals practicing in any organizational form, including an LLP or LLC, must comport with the professional standards established by their respective governing boards.<sup>117</sup> This was true, for example, in *Winsted Land Development v. Design Collaborative Architects PC*, in which a corporation employed engineers.<sup>118</sup> In *Winsted Land Development*, the plaintiffs sued the individuals and both an LLC and an LLP for the

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<sup>109</sup> UNIF. P'SHIP ACT § 306 (c) (1997).

<sup>110</sup> UNIF. P'SHIP ACT § 306 (c) cmt. 3 (1997).

<sup>111</sup> *Schuman*, 719 N.Y.S.2d at 864.

<sup>112</sup> UNIF. P'SHIP. ACT § 306(c) (1997).

<sup>113</sup> See, e.g., S.C. CODE ANN. §§ 33-41-10 to 1220 (Law Co-op. 1990 & Supp. 1997); George M. Cohen, *Legal Malpractice and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997); Cindy A. Schipani, *Taking It Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 IOWA J. CORP. L. 29 (2001).

<sup>114</sup> See, e.g., S.C. CODE ANN. § 33-41-370(b) (Law Co-op. 1976).

<sup>115</sup> See, e.g., *Anthony v. Blum*, 1999 WL 259726, at \*2 (Conn. Super. 1999).

<sup>116</sup> See, e.g., *Armato*, 84 Cal. Rptr. 2d 294 (1999).

<sup>117</sup> But see David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203 (2004); MODEL RULES OF PROF'L CONDUCT R. 5.1 (2004).

<sup>118</sup> *Winsted Land Development Co. v. Design Collaborative Architects*, 1999 WL 997880, at \*1 (Conn. Super.).



malpractice of architects, engineers, and other site professionals hired by the LLC and LLP.<sup>119</sup> The individual defendants were held directly liable for their own misconduct when they breached the duty of care expected of such professionals.<sup>120</sup> In *Moransais v. Heathman*, the Supreme Court of Florida dealt with a negligence action brought against engineers who participated in a negligent home inspection.<sup>121</sup> Suits were filed against the engineering corporation and two engineers individually.<sup>122</sup> The court considered whether the plaintiff could sue individual engineers employed by the company.<sup>123</sup> The individual defendants owed a duty of care, and the fact that they were in a corporation did not shield them.<sup>124</sup> The professionals were liable for their own torts committed while rendering professional services.<sup>125</sup>

## VI. Representative State Statutes

Each model act has undergone some transformation when enacted in particular states. The following section reviews the law for various organizational entities formed in South Carolina, North Carolina, and Georgia.<sup>126</sup> These state statutes are representative of the differences that can occur in state law generally.

### A. South Carolina

#### 1. LLC

According to the LLC statute's language, liability for members of an LLC is limited: responsibility for debts, obligations, and liabilities in both tort and contract, arising from the acts of members of the LLC, rests with the company.<sup>127</sup> The liability exposure for professionals in an LLC appears to be that of a general partner in terms of their

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<sup>119</sup> *Id.* at \*1.

<sup>120</sup> *Id.* at \*17.

<sup>121</sup> *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

<sup>122</sup> *Id.* at 975.

<sup>123</sup> *Id.* at 975-78.

<sup>124</sup> *Id.* at 979.

<sup>125</sup> *Id.*

<sup>126</sup> See The Legal Information Institute, at <http://www.law.cornell.edu/statutes.html#state> (last visited Jan. 6, 2005) for the state statutes.

<sup>127</sup> S.C. CODE ANN. § 33-44-303(a) (Law. Co-op. 1996).

responsibility for malpractice: this is also the malpractice liability exposure faced by professionals practicing in a professional corporation or a limited liability partnership.<sup>128</sup>

## 2. PC & LLP

The PC statute states:

[An] individual who renders services as an employee of a . . . [PC] is liable for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner. An employee of a . . . [PC] is not liable, however, for the conduct of other employees of the corporation unless he is at fault in appointing, supervising, or cooperating with them.<sup>129</sup>

Notably, the last sentence quoted from the PC statute limits employee liability in a PC similar to that of a partner practicing in an LLP.

As an alternative to the PC form, South Carolina provides a partial liability shield for partners who organize as an LLP.<sup>130</sup> Tort liability is limited to misconduct in which either the individual directly participates or in which the individual becomes involved by virtue of his or her direct supervision or control over the guilty party.<sup>131</sup> Therefore, in order to obtain full shield protection in South Carolina, a professional organization would have to form as an LLC or PC, rather than an LLP.<sup>132</sup>

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<sup>128</sup> *Id.* South Carolina failed to include a provision dealing specifically with professionals in its first LLC statute. S.C. CODE ANN. § 33-44. The South Carolina Bar also prohibits lawyers from limiting their malpractice liability exposure as members of a profession with responsibilities to the public. *See, e.g.*, S.C. RULES OF CONDUCT § 1.8 (h). *See also*, MODEL RULES OF PROF'L CONDUCT R. 5.1, which imposes a further liability for lawyers either with direct supervisory control over a fellow lawyer, who violates the Rules of Professional Conduct, or with knowledge of the violation, fails to take action. MODEL RULES OF PROF'L CONDUCT R. 5.1 available at [http://abanet.org/cpr/mrpc/rule\\_5\\_1.html](http://abanet.org/cpr/mrpc/rule_5_1.html) (last visited Jan. 6, 2005.). The responsibility for the conduct of fellows is consistent with the PC and LLP statutes, discussed *infra* Part VI.A.2.

<sup>129</sup> *Id.* § 33-19-340(a). The LLC amendments introduced in 2002 used similar language as that found in the PC statute: § 33-19-340(b) states that the PC "whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation is liable to the same extent as its employees." *Id.*

<sup>130</sup> S.C. CODE ANN. §§ 33-41-10 to 1220 (Law Co-op. 1990 & Supp. 1997).

<sup>131</sup> *Id.* § 33-41-370(b). Section 33-41-370(d) deals specifically with professionals stating that the professional has a responsibility for his or her own misconduct. *Id.* Professionals may also be responsible for the activities of those they appoint, supervise, or with whom they cooperate. *Id.*

<sup>132</sup> *See, e.g., id.* § 33-44-303 (limiting liability arising in both tort and contract in an

## B. North Carolina

### 1. PLLCs

The North Carolina Limited Liability Company Act allows individuals performing professional services to form an LLC.<sup>133</sup> However, professional service firms must use the designation PLLC or P.L.L.C. to distinguish themselves from a regular LLC.<sup>134</sup>

In North Carolina, the difference between a regular LLC and a PLLC relates primarily to liabilities.<sup>135</sup> Ordinarily, members of an LLC are immune to the debts and obligations of the LLC.<sup>136</sup> For members and managers of a PLLC, the situation is not as clear. The act provides that they will be treated in the same manner as members and managers of a North Carolina Professional Corporation.<sup>137</sup>

Thus, members and managers of the PLLC are not personally liable for general debt obligations of the company, nor are they liable for liabilities arising because of acts, errors, or negligence of another member, manager, employee, or other representative of the PLLC.<sup>138</sup> However, they are still liable for their own acts of omission and negligence as under prior law.<sup>139</sup> The statute specifically provides that nothing in the Limited Liability Company Act affects the liabilities of a member of a PLLC for his or her own acts, errors, and negligence committed in rendering professional services.<sup>140</sup> Thus, this liability is presumably pursuant to North Carolina common law and relevant North Carolina statutes.<sup>141</sup> There is no specific provision in the act for liability

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LLC); § 33-19-340 (limiting liability in the context of a PC).

<sup>133</sup> N.C. GEN. STAT. § 57C-2-01(c) (2004).

<sup>134</sup> *Id.*

<sup>135</sup> N.C. GEN. STAT. § 57C-2-01 (2004).

<sup>136</sup> *Id.*; N.C. GEN. STAT. § 57C-2-01(c) (2004).

<sup>137</sup> See The Professional Corporation Act, N.C. GEN. STAT. §§ 55B-1 to 55B-16 (2004). Chapter 55B-9 of this Act provides that a shareholder, director, and officer of a Professional Corporation (PC) is not liable for the debts, obligations and liabilities of the PC arising from the acts, errors and negligence of other shareholders, directors, officers and representatives of the PC. N.C. GEN. STAT. § 55B-9(b) (2004). However, nothing in the act affects the liability of a shareholder, officer or director for his or her own acts, errors and negligence in performing professional services. *Id.*

<sup>138</sup> N.C. GEN. STAT. § 57C-2-01(c) (2004).

<sup>139</sup> N.C. GEN. STAT. § 55B-9 (2004).

<sup>140</sup> N.C. GEN. STAT. § 57C-2-01 (2004).

<sup>141</sup> *Id.*

incurred while supervising others.<sup>142</sup>

## 2. LLP & PC

Similar provisions apply to members of a North Carolina Limited Liability Partnership. These LLPs are provided for in the more general North Carolina Uniform Limited Partnership Act.<sup>143</sup> They must be designated as either LLPs or Registered Limited Liability Partnerships ("RLLP").<sup>144</sup> A partner in an LLP is not individually liable for the debts and obligations of the partnership simply by being a partner in the partnership or by participating in the activities of the LLP.<sup>145</sup>

Also, a partner in an LLP is not responsible for debts, obligations, and liabilities of the LLP arising from acts, errors, and negligence of other partners, employees, agents, or other representatives of the LLP.<sup>146</sup> However, the act specifically provides that nothing in the act affects the liabilities of a partner for his or her own acts of error or omission in performing professional services.<sup>147</sup> The act does not limit or alter the laws of North Carolina applicable to the professional relationship, and liabilities based on the performance of professional services.<sup>148</sup> Notably, there is no specific provision in the act relating to liability incurred while supervising others.<sup>149</sup>

The North Carolina Professional Corporation Act provides that a shareholder, director, and officer of a PC is not liable for the debts, obligations and liabilities of the PC arising from the acts, errors, and negligence of other shareholders, directors, officers and representatives of the PC.<sup>150</sup> However, nothing in the act affects the liability of a shareholder, officer or director for his or her own acts, errors and negligence in performing professional services.<sup>151</sup>

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<sup>142</sup> The Professional Corporation Act, N.C. GEN. STAT. §§ 55B-1 to 55B-16 (2004).

<sup>143</sup> N.C. GEN. STAT. §§ 59-1 to 59-1107 (2004). LLPs are provided for in Article 3B of Chapter 59. N.C. GEN. STAT. § 59-30.1 (2004). The LLP provisions are, thus, part of the Uniform Limited Partnership Act, which in turn is a part the North Carolina Uniform Partnership Act. N.C. GEN. STAT. § 59-31 (2004).

<sup>144</sup> N.C. GEN. STAT. § 59-35.1 (2004).

<sup>145</sup> N.C. GEN. STAT. § 59-45(2004).

<sup>146</sup> *Id.*

<sup>147</sup> N.C. GEN. STAT. § 59-45(b) (2004).

<sup>148</sup> *Id.*

<sup>149</sup> North Carolina Uniform Partnership Act, N.C. GEN. STAT. § 59-1 to -1107.

<sup>150</sup> N.C. GEN. STAT. § 55B-9(b) (2004).

<sup>151</sup> The Professional Corporation Act, N.C. GEN. STAT. §§ 55B-1 to 55B-16 (2004).

### C. Georgia

#### 1. LLC

Under the Georgia LLC statutes, professionals in an LLC enjoy protection from vicarious liability associated with the misconduct of their fellow practitioners, but remain liable for their own misconduct.<sup>152</sup> Practitioners in an LLC are also protected from the general debts and obligations of the firm.<sup>153</sup> Nothing in the Georgia LLC statute requires special designation as, for example, a "Professional Limited Liability Company."

The Georgia statute holds that a professional, licensed by a licensing board, will remain subject to regulation by that board, whether that professional practices in a proprietorship, partnership, professional corporation, an LLC, or any other business form.<sup>154</sup> Furthermore, the state supreme courts have traditionally regulated the admission and practice of one type of professionals, lawyers.<sup>155</sup> The Georgia Supreme Court announced in *Henderson*, however, that it would, nevertheless, defer to the judgment of the legislature when considering limits on the liability of attorneys through statutory limited liability entities.<sup>156</sup>

#### 2. PC & LLP

In a 1983 decision, *First Bank & Trust Co. v. Zagoria*, the Supreme Court of Georgia held that while shareholders in a corporation generally limit their liability to their own misconduct, innocent lawyers in a PC remained liable for the misconduct of their fellow professionals.<sup>157</sup> The *Zagoria* decision was partially overturned in 1996 by the Georgia Supreme Court in *Henderson v. HIS Financial Services*, which held that the limits to liability afforded by the state legislature (in the form of various organizational entities), including limits on the vicarious liability of attorneys, would be enforced.<sup>158</sup>

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<sup>152</sup> GA. CODE ANN. §§ 14-11-100 to 1109 (1993).

<sup>153</sup> *Id.* § 14-11-303.

<sup>154</sup> GA. CODE ANN. § 43-1-24 (1993).

<sup>155</sup> Mary R. Hawk, *Liability Limbo: Are Unincorporated Lawyers in Georgia Really Free from Personal Liability When Their Fellow Shareholders Misbehave?*, 15 GA. ST. U. L. REV. 1047 (1999).

<sup>156</sup> *Henderson*, 266 Ga. at 846.

<sup>157</sup> *First Bank & Trust Co.*, 250 Ga. at 847.

<sup>158</sup> *Henderson*, 266 Ga. at 846; see also Hawk, *supra* note 155.

Similarly, the LLP protects a practitioner from vicarious liability stemming from the misconduct of his or her fellow professionals.<sup>159</sup> The LLP provides full-shield protection, guarding against liability that arises in tort or in contract.<sup>160</sup> The LLP statute is silent regarding liability for the supervision or control of tortious colleagues, but it imposes liability for one's own misconduct.<sup>161</sup>

## VII. Conclusion

Another issue still remains for professionals practicing in a limited liability entity: whether or not a court is willing to pierce the veil of that limited liability entity and reach the personal assets of the professional. Traditionally associated with the liability of shareholders, and historically only successful for closely-held corporations, veil piercing is nevertheless an issue that participants in newer entities must also consider.<sup>162</sup> For all business entities, including corporations, LLCs, and LLPs, the courts have not established the liability of an entity's actors merely by reason of the actors' status as participants in the firm.<sup>163</sup> Rather, courts have pierced the corporate veil when corporate actors have disregarded the corporate entity, or when the corporation was used by corporate actors to sanction fraud or to promote an injustice.<sup>164</sup> Application of veil piecing in the corporate context has been inconsistent, although courts have been more willing to pierce the veil in tort, rather than contract cases.<sup>165</sup> Disregarding the corporate entity has been reserved for extraordinary circumstances where doing otherwise would "subvert the ends of justice."<sup>166</sup> So far, veil piercing has been applied in only a few cases involving LLCs, and has yet to be applied to an LLP.<sup>167</sup> Furthermore, some states, such as Minnesota and Colorado, have specifically provided for veil piercing of LLCs in their

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<sup>159</sup> GA. CODE ANN. §§ 14-9-100 to 1204 (2004).

<sup>160</sup> *Id.*

<sup>161</sup> GA. CODE ANN. § 14-11-303(a) (2004).

<sup>162</sup> The Committee on Corporate Laws, ABA Section of Business Law, *Managing Closely Held Corporations: A Legal Guidebook*, 58 BUS. LAW. 1073 (2003).

<sup>163</sup> Rebecca J. Huss, *Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine Into the Statutory Age*, 70 U. CIN. L. REV. 95 (2001).

<sup>164</sup> *Carter-Jones Co. v. LTV Steel Co.*, 237 F.3d 745, 748 (6th Cir. 2001).

<sup>165</sup> *Id.*

<sup>166</sup> *Johnson & Higgins of Miss., Inc. v. Comm'r of Ins.*, 321 So. 2d 281, 284 (1975).

<sup>167</sup> *Id.*; see generally Emily A. Lackey, *Piercing the Veil of Limited Liability in the Non-Corporate Setting*, 55 ARK. L. REV. 553 (2002); Huss, *supra* note 163.

LLC statutes.<sup>168</sup>

Professionals are forming and converting their firms to take advantage of the limited liability protection offered by new organizational forms. While the new forms do provide the benefit of limited liability, particularly in comparison to a general partnership, some liability still remains. Issues concerning the courts' treatment of these new forms continue as case law develops. Issues concerning the participants' operation of these new forms is also a matter of ongoing analysis. For example, is it likely that limited liability partners will supervise their fellow partners when their own liability depends, at least in some states, on the control or supervision of their fellow partners' work?<sup>169</sup> The answer to this question depends on how the firm balances the competing considerations confronted by it. On the one hand, when a member's principal concern is for the firm's reputation and its assets, the member will likely choose involvement in his or her own work and the work of fellow members. On the other hand, a member's decision to involve himself or herself in supervising or controlling another member's work subjects that member to liability for wrongdoing committed by a tortious other. The firm and its members must be watchful as to the unique liability issues that confront the business form and its members.<sup>170</sup>

Table II provides a summary of LLCs, LLPs, and PCs according to the provisions of their respective model codes, as well as the representative state laws of South Carolina, North Carolina, and Georgia. These organizational forms are creatures of statute, granted their existence at the sufferance of the state. The choice of business entity is complicated by the variety of forms allowed under various state statutes, as well as the regulation of professionals by state governing boards, for example, state bar associations, and the interpretation of these forms by the courts. The law in this regard is not yet settled, since the organizational forms for LLPs and LLCs are relatively new. The choice of business form will continue to evolve as firms organize under the new forms and courts interpret the statutes governing their organization.

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<sup>168</sup> COLO. REV. STAT. ANN. § 7-80-107(1); MINN. STAT. ANN. §§ 322B.303(2) to 323.14(3) (West 2004); Lackey, *supra* note 167.

<sup>169</sup> See, e.g., Jennifer T. Nijman, *New Limited Liability Rules Good for Lawyers and Their Clients*, 17-APR Chicago Bar Association Rec. 12 (Apr., 2003).

<sup>170</sup> See, e.g., Poonam Puri, *Judgment Proofing the Profession*, 15 GEO. J. LEGAL ETHICS 1 (2001).

## Appendix

*Table I<sup>171</sup>*  
***Exposure to Liability: Firms & Individuals***

Negligence			Contracts
	Direct Liability	Indirect Liability	
<b><u>Liability of the Firm</u></b>			
<b>For All Business Entities</b>	liability for corporation's own tortious conduct liability for negligent supervision	liability for tortious acts of agents within the scope of the agents' employment	liability for firm debts and obligations that arise in contract
<b><u>Personal Liability</u></b>			
<b>Corporations</b>	liability for individual's own tortious conduct	not applicable	not applicable
<b>General Partnership</b>	unlimited personal liability	unlimited personal liability	unlimited personal liability
<b>LLP &amp; LLC</b>	<b>malpractice:</b> personal liability for own tortious conduct in some states, personal liability for the misconduct of others who are supervised or controlled	<b>malpractice:</b> personal liability eliminated for malpractice if the malpractice was committed by fellow partner or member	only states that have adopted full shield protection eliminate personal liability for firm debts and obligations that arise in contract

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<sup>171</sup> See UNIF. LTD. LIAB. CO. ACT (1996); UNIF. P'SHIP ACT (1997); MODEL PROF. CORP. SUPP. (1997). Table I summaries of business forms under the Model Acts are based on these statutes.



**Table II<sup>172</sup>**  
**Properties of LLCs, LLPs & PCs**

	Liability Based on One's Own Misconduct	Tort Shield	Contract Shield	Required Designation if Practicing as Professionals	Liability Based on the Appointment or Supervision of Others
<b>LLC</b>					
Model Act	Yes	Yes	Yes	No	No
SC	Yes	Yes	Yes	No	No
NC	Yes	Yes	Yes	Yes	No
GA	Yes	Yes	Yes	No	No
<b>LLP</b>					
Model Act	Yes	Yes	Yes	No	No
SC	Yes	Yes	No	No	Yes
NC	Yes	Yes	Yes	No	No
GA	Yes	Yes	Yes	No	No
<b>PC</b>					
Model Act*	Yes	Yes	Yes	No	Yes
SC	Yes	Yes	Yes	No	Yes
NC	Yes	Yes	Yes	Yes	No
GA	Yes	Yes	Yes	No	No

\*Table I summaries for the PC under the Model Act are based on the Model Professional Corporation Supplement (1984) to the Revised Business Corporation Act (RMBCA) and do not include the three alternatives available under the Supplement.

<sup>172</sup> See S.C. CODE ANN. tit. 33 (2003); N.C. GEN. STAT. § 59 (2004); GA. CODE ANN. 14. Table II summaries for business forms in South Carolina, North Carolina and Georgia are based on these state laws.