

# THE BENEFITS AND BURDENS OF LIMITED LIABILITY

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Law students in business associations and people starting businesses often think the only choice for forming a business entity is a limited liability entity like a corporation or a limited liability company (LLC).<sup>1</sup> Although seeking a limited liability entity is usually justifiable, and usually wise, this Article addresses some of the burdens that come from making that decision. We often focus only on the benefits.

Choosing an entity type is a personal decision that is as significant as deciding whether to form an entity at all.<sup>2</sup> Without expressly forming an entity, the default rule for a single-person business is a sole proprietorship.<sup>3</sup> If two or more persons join as co-owners to start a business seeking profit, we call that a partnership.<sup>4</sup> But to get the protection of limited liability, a business must file with the state and follow certain formalities to get that statutorily created protection.<sup>5</sup> Limited liability does not automatically attach.<sup>6</sup>

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<sup>1</sup> An LLC—a limited liability *company*—is an entity distinct from a corporation, but both provide owner certain limited liability protections. See Stephen M. Brainbridge, *LLCs Are Not Corporations and Professor Fershee Wants to Make Sure You Know That*, PROFESSORBAINBRIDGE.COM (Mar. 30, 2016, 8:20 PM), <https://www.professorbainbridge.com/professorbainbridgecom/2016/03/llcs-are-not-corporations-and-professor-fershee-wants-to-make-sure-you-know-that.html>.

<sup>2</sup> LARRY E. RIBSTEIN ET AL., UNINCORPORATED BUSINESS ENTITIES ch. 12 (5th ed. 2013) (discussing new frontiers in limited liability, including why limited liability is often seen as the default rule).

<sup>3</sup> *Sole Proprietorship*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/sole-proprietorship> (last visited Mar. 11, 2021).

<sup>4</sup> REVISED UNIF. P'SHIP ACT § 102(11) (NAT'L CONF. COMM'RS UNIF. STATE L. 1997).

<sup>5</sup> See, e.g., DEL. CODE ANN. tit. 6, § 18-201 (2017).

<sup>6</sup> Bethany K. Laurence, *LLC (Limited Liability Company) Basics*, NOLO, <https://www.nolo.com/legal-encyclopedia/llc-basics-30163.html> (last visited Mar. 4, 2021).

It would not have to be that way, of course. A state could decide that limited liability should be the default rule between parties, via contract, as long as it is properly agreed upon. This is not substantially different from the current position, but the decision starts with an entity, not between parties. A business must have properly formed a limited liability entity (with rare exception), and once they do, limited liability protection attaches, by default, to most subsequent business dealings.<sup>7</sup>

But it is not beyond comprehension that all contracts with a named business could go straight to limited liability as the default rule. This rule would obviously mean a shift in the order of operations (as noted above). Such a shift would make limited liability the presumption as long as a creditor does not seek personal liability from individuals or parent companies. While this concept is unlikely to gain traction given how well-settled the law is, it reveals that the current mechanism for entity formation is not inherently correct. Changing the current system would, admittedly, be a significant disruption.

There are cases where a default to limited liability might make sense.<sup>8</sup> In *Progress Printing Corp. v. Jane Byrne Pol. Comm.*,<sup>9</sup> Jane Byrne ran for re-election as the mayor of Chicago in both 1992 and 1993.<sup>10</sup> As part of her re-election effort, an official with her political action committee contracted with a printing shop for \$91,000 worth of services.<sup>11</sup> When the printing corporation came to collect, the political action committee was out of money and Byrne refused to pay, arguing that the official that placed the order was not their agent.<sup>12</sup> After a decade of legal wrangling, the court ultimately found that her political action committee, which was an unincorporated association (that did not have limited liability) was liable.<sup>13</sup> Unsurprisingly, the court went on to hold that the candidate was directly liable or jointly and severally liable (as part of an unincorporated

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<sup>7</sup> See generally CORPORATION TRUST CO., THE LIMITED LIABILITY COMPANY HANDBOOK (2012) (available at [https://foleypearson.com/global\\_pictures/CT\\_Corp\\_LLC\\_Handbook\\_2012.pdf](https://foleypearson.com/global_pictures/CT_Corp_LLC_Handbook_2012.pdf)).

<sup>8</sup> See *Progress Printing Corp. v. Jane Byrne Pol. Comm.*, 601 N.E.2d 1055 (Ill. App. Ct. 1992).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1058.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1070 (finding the defendant liable, but reducing the amount to the extent of the evidence).

association) for the debts of the campaign.<sup>14</sup> Had Byrne formed an LLC or corporation for the campaign committee, there is a good chance she would have been protected from liability.

Why not establish a default rule of limited liability? In today's world, Byrne's issue is largely avoided by practice and contract, not through entity formation. Because of the risk that a campaign will overspend, it is generally understood in the campaign world that if the money is not upfront, a bill may not get paid.<sup>15</sup> Because of this, radio and television advertising cannot be bought on credit.<sup>16</sup> Advertising, printing, consultants, and financial people require campaigns to prepay for services (for consultants, this is often because of the compliance filings scheduled after the election when the money might be gone).<sup>17</sup> Therefore, with things like a political action committee, it may not do much good to have an entity, if the candidate is liable regardless. (It may have value for certain tort suits, though.)

Why not form an entity in the campaign context? First, creating an entity can be time consuming and it can be complicated to add an entity to filings once a candidate has begun the process.<sup>18</sup> Second, because election campaigns (formal entity or not) have a reputation for stiffing creditors, the lack of an entity can promote a candidate as an upstanding citizen who intends to pay promptly.<sup>19</sup>

Beyond the campaign world, a large entity might decide not to make any sub-entities. Sub-entities with unclear assets could signal to creditors and other business partners an effort to escape payments.<sup>20</sup> Thus,

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<sup>14</sup> *Id.*

<sup>15</sup> See Dave Levinthal, *Police to Trump, Clinton, and Sanders: 'Pay Your Bills Already'*, THEWORLD (Jan. 11, 2017, 12:45 AM), <https://www.pri.org/stories/2017-01-10/police-trump-clinton-and-sanders-pay-your-bills-already>.

<sup>16</sup> See, e.g., Application for Advertising Credit, Bellingham Herald ("Political advertising must be prepaid in all cases.") (available at [http://media.bellinghamherald.com/static/pdf/pay-your-invoice/CreditApplication\\_13.pdf](http://media.bellinghamherald.com/static/pdf/pay-your-invoice/CreditApplication_13.pdf)).

<sup>17</sup> See Ethics in Government Act of 1978, 5 U.S.C. app. § 101(c); see also United States v. Tarver, 642 F. Supp. 1109 (D. Wyo. 1986) (finding that campaign disclosures must be filed post-election even if they were due before end of election).

<sup>18</sup> 5 U.S.C. app. § 102.

<sup>19</sup> See, e.g., Murray v. Haggerty, 2 Pa. D. & C.5th 338, 340–42 (2006); Vitale & Assocs., LLC v. Lowden, No. 212-cv-1400-JAD-VCF, 2015 U.S. Dist. LEXIS 100511, at \*1-2 (D. Nev. July 29, 2015).

<sup>20</sup> See generally BEST PRACTICES IN CORPORATE SUBSIDIARY MANAGEMENT (2021), Westlaw Practice Note 5-521-9294 (discussing the tasks of subsidiary management and importance of maintaining separate corporate identities in sub-entities).

sometimes the decision on forming an entity is based not solely on the function of the entity, but also on the message communicated by the existence of an entity.<sup>21</sup> A limited liability entity, just by being present, may signal a message about the people involved, and that message could end up being a burden.

In *Stone St. Partners, LLC v. City of Chicago*,<sup>22</sup> we see another burden of forming a limited liability entity (in this case, an LLC). In that decision, the court found that Chicago's administrative hearings—which involved the admission of evidence, examinations, and cross examinations of sworn witnesses—are just like judicial proceedings and, therefore, appearing at a hearing constitutes the practice of law.<sup>23</sup> The court held that the representation of corporations at administrative hearings—particularly those which involve testimony from sworn witnesses, interpretation of laws and ordinances, and that can result in fines—must be made by a licensed attorney.<sup>24</sup> The court extended this reasoning to an LLC, finding that an owner of a single member LLC could not represent the entity in those administrative hearings.<sup>25</sup> Because an LLC is, by statute,<sup>26</sup> a person separate from the owner, the person arguing on behalf of the LLC is acting as a lawyer for the interests of the LLC.<sup>27</sup> Only the LLC itself could be *pro se*, but as a non-natural person, it could not.<sup>28</sup>

This can seem like an unnatural conclusion. To some, it seems that because the LLC and the owner are really one and the same, the person should be able to act not as representation for the LLC in court but as the LLC itself. But this would be having it both ways and consequently improper. If the LLC is an independent person for purposes of limited liability to protect the owner, that owner should not be able to decide when to merge with the LLC for purposes of convenience without also risking personal liability. For consistency, the LLC should always be treated as a

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<sup>21</sup> See Press Release, SEC, SEC Charges Shell Factory Operators with Fraud (May 12, 2016), <https://www.sec.gov/news/pressrelease/2016-86.html>.

<sup>22</sup> *Stone St. Partners, LLC v. City of Chicago*, 12 N.E.3d 691 (Ill. 2014).

<sup>23</sup> *Id.* (Connors, J., concurring in part, dissenting in part).

<sup>24</sup> *Id.* at 698–99. *But see id.* at 706–07 (Connors, J., dissenting in part).

<sup>25</sup> *Id.* at 698.

<sup>26</sup> Limited Liability Company (LLC), IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc> (“A Limited Liability Company (LLC) is a business structure allowed by state statute.”) (last updated Sept. 19, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

person independent of the owner. Thus, an LLC is a person that is incapable of defending itself in court and therefore it requires counsel.

Kent Professor Harold J. Krent noted the burden the *Stone* decision put on all businesses when he was interviewed for a report by WMAQ-TV NBC 5 Chicago.<sup>29</sup> Professor Krent was discussing the impact of *Stone* on business owners who had received parking tickets on vehicles registered to their wholly owned companies. Because of the *Stone* decision, those business owners, if they were not licensed attorneys, could not challenge a \$100 parking ticket without hiring a lawyer. Krent argued that the *Stone* decision should be re-evaluated:

[W]hen the rule is applied to a very small corporation—particularly if the corporation is one person—the rule doesn't make any sense. . . . I think that if it's asked, the court itself would carve out an exception for a simple category of traffic tickets. It does make sense if the corporation is an individual. The individual should be able to represent him or herself just like they can in any other case.<sup>30</sup>

The flaw in this argument is that it allows the courts to be inconsistent when it comes to treating the owner and the entity as separate. If the state (or city) were so inclined, it could write a statute to allow a non-lawyer representative of an entity to engage in certain administrative court hearings without a license to practice law.<sup>31</sup> But without that law, it is more sensible to treat limited liability entities as separate from their owners to maintain the personhood concept of the entity.

If Chicago had wanted to come after the owner of the entity personally to recover the debt of the parking ticket, the owner could argue it was improper as the debt is held by the entity and not the owner. (However, because the entity has the vehicle as an asset, the owner of the entity would be wise to pay the ticket, anyway, or risk losing their property.)

This could be a different matter if the owner had gotten a speeding ticket—then the owner could not argue that the “debt” was the LLC's

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<sup>29</sup> Lisa Parker, *Why Fighting Tickets in Illinois Just Got Harder, Costlier for Some Drivers*, NBC 5 CHI. (Oct. 6, 2015), <http://www.nbcchicago.com/news/local/fighting-tickets-illinois-harder-costlier-drivers/91895/> (last updated Oct. 7, 2015, 7:05 AM).

<sup>30</sup> *Id.*

<sup>31</sup> For example, those arguing before the U.S. Tax Courts are not required to be licensed attorneys. *See* 26 U.S.C. § 7452 (“No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.”).

alone because agents are responsible for their own crimes, too.<sup>32</sup> The owner would be directly liable, but the LLC could be additionally liable if an ordinance permitted the court to reach the entity.

Regarding agent liability, the most frequently cited case is *A. Gay Jenson Farms Co. v. Cargill, Inc.*<sup>33</sup> In *Cargill*, the court considered whether Cargill, the creditor of a grain mill who owned and managed the grain before the mill's folding, should be required to make the mill's customers whole.<sup>34</sup> Under the agency theory, the court held that Cargill should be liable.<sup>35</sup> However, the enduring question from this opinion is, how would it have worked in reverse? If the grain had not been delivered, would the court have allowed Cargill to seek compensation from its customers? The answer would seem to be a clear "No." But that inconsistency forces the court to consider the lack of a traditional agency and third-party relationship. Without an estoppel situation, any contract would be binding in both directions. This obligation gives rise to what makes limited liability so beneficial despite its burdens.

In some cases, the burden of choosing a limited liability entity (or at least the wrong one) can be very expensive. A regular reader of *Business Law Prof Blog*, Scott Bonacker, brought attention to the Michigan tax case of *Rochlani v. Commissioner* in a comment.<sup>36</sup> In *Rochlani*, a ticket purchase-and-resell business run by a married couple—a sort of early StubHub—was found to be a corporation despite the fact that the Rochlanis' son formed and registered the corporation without his parents' knowledge or permission.<sup>37</sup> The court found that because the entity had taken a corporate form, it was subject to corporate taxes, regardless of whether they knew they were registered.<sup>38</sup> In short, the benefits of limited liability always come with the burden. The court clearly understood that the son was not authorized to register the entity, but upon learning that it had

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<sup>32</sup> RESTATEMENT (THIRD) OF AGENCY § 7 (AM. L. INST. 2006).

<sup>33</sup> *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981).

<sup>34</sup> *Id.* at 287–90.

<sup>35</sup> *Id.* at 290.

<sup>36</sup> *Rochlani v. Comm'r*, No. 5383-11, T.C. Memo. 2015-174, at \*2 (U.S.T.C. Sept. 8, 2015); Bonacker, Comment to *Respect Limited Liability Rules, Respect the Entity*, BUS. L. PROF BLOG, [https://lawprofessors.typepad.com/business\\_law/2015/10/respect-limited-liability-rules-respect-the-entity.html](https://lawprofessors.typepad.com/business_law/2015/10/respect-limited-liability-rules-respect-the-entity.html) (last visited Apr. 14, 2021).

<sup>37</sup> *Rochlani*, No. 5383-11, 2015 T.C. Memo. 2015-174, at \*2.

<sup>38</sup> *Id.* at \*9.

happened, Mr. Rochlani did not act to undo the registration.<sup>39</sup> Under Michigan law, as in many jurisdictions, unauthorized acts may be ratified explicitly or implicitly, so the failure to act in contravention to the discovered registration was an implicit ratification of the registration.<sup>40</sup> The court wrote that “the unauthorized acts of an agent are ratified if the principal accepts those acts with knowledge of the material facts.”<sup>41</sup> That forces consideration of what constitutes the “material facts” of entity law. Did Mr. Rochlani know that his son had formed a corporation? Yes. Did Mr. Rochlani know the tax implications of ratifying that decision? Maybe, but a lack of knowledge could limit the scope of any ratification.

For example, a five-year fulfillment contract is not ratified by accepting one delivery.<sup>42</sup> While there is liability for any delivery that is accepted, that liability does not extend to the full course of the contract without a previously arranged shared agreement between the parties.<sup>43</sup> Could that shared agreement, however, be imputed by the understanding of the existence of a corporation? In *Rochlani*, the court acknowledged that Mr. Rochlani had no idea of the tax implications of being a corporation.<sup>44</sup> But if it is maintained that the benefits and the burdens of being a limited liability must be accepted together, the benefits of being a corporation must come with the burden of accepting the tax consequences.

That then compels the question of whether the court would have provided limited liability benefits to Mr. Rochlani if he were sued individually and had not held his business out as a corporation. In determining personal liability, the court would likely base its decision on whether to ignore the registration of a corporation either because the creditor did not know of the entity or because it failed to act like one. Suppose the corporation did not keep separate books and records,<sup>45</sup> did not track tax records,<sup>46</sup> and did not have separate bank accounts.<sup>47</sup> It makes sense that if a corporation is going to get the burden of being an entity, it should receive the benefit as well. This makes the court’s hardline

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<sup>39</sup> *Id.* at \*8 (“[U]pon learning that it had been registered, Mr. Rochlani did nothing to undo what his son had done.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See RESTATEMENT (THIRD) OF AGENCY § 4.01 (AM. L. INST. 2006).

<sup>43</sup> *Id.* § 4.04.

<sup>44</sup> T.C. Memo. 2015-174 at \*2.

<sup>45</sup> *Id.* at \*4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

approach potentially problematic when, in a case like this, it is possible the owners never were entitled to any benefit from the corporate entity. (It is, though, fair to note there are at least some scenarios where limited liability protections may have attached.)

Another potential benefit or burden can attach to the choice of entity. Jurisdiction issues for entities and their owners can bring their own potential challenges. A corporation, in federal court, is deemed to be a citizen of both the state of incorporation as well as the location of the principal place of business.<sup>48</sup> This means that a corporation can easily be the citizen of two states. Because of this, courts have the unfortunate habit of always drawing attention to where a business is formed and where the business's principal place of business is even though this is irrelevant to determining jurisdiction for an LLC.

In *Kendle v. Whig Enters., LLC*,<sup>49</sup> plaintiff John Kendle was an Ohio citizen while defendant Wig Enterprises, LLC, was a Florida corporation with a principal place of business in Mississippi.<sup>50</sup> Because the amount in controversy was in excess of \$75,000, diversity jurisdiction attached as to the amount in controversy.<sup>51</sup> However, if either of the two owners of the LLC, Mr. Barrett and Mr. Rutland, were a citizen of Ohio, diversity jurisdiction could not attach.<sup>52</sup> Again, a court's jurisdictional analysis depends in part on the type of entity chosen. Here, the case does not include any evidence of the citizenship of the LLC members, but the court found diversity jurisdiction, meaning Rutland and Barrett may have improperly received the benefit of the *corporate* form when they should have had the burden of the *LLC* form.<sup>53</sup>

In discussing the benefits and burdens of limited liability, it is also worth considering the risks to those protections when it comes to single-owner entities. Some recent cases indicate a potential eroding of the benefits of a limited liability entity. The concept of veil piercing is an equitable remedy that is unlikely to vanish, but especially troubling language was written into a Supreme Court of Hawai'i opinion regarding

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<sup>48</sup> 28 U.S.C. § 1332(c)(1).

<sup>49</sup> *Kendle v. Whig Enters., LLC*, 760 F. App'x 371, 373 (6th Cir. 2019).

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

<sup>51</sup> *Id.* at 375; 28 U.S.C. § 1332(a).

<sup>52</sup> 28 U.S.C. § 1332(a).

<sup>53</sup> *Kendle*, 760 F. App'x at 375 (listing citizenship of defendants without exploring the members of the LLC).



veil piercing. In *Calipjo v. Purdy*,<sup>54</sup> the court discussed the plaintiff's allegations that sole ownership and control is one of the many factors that can establish alter ego.<sup>55</sup> This, therefore, made previous ownership and control pertinent to the claim. This is true in most alter ego and veil piercing instances, but in *Calipjo*, the court gave jury instructions that suggested sole ownership and control might be a factor in determining whether veil piercing was proper, along with other factors from a list.<sup>56</sup> The jury was instructed that to determine whether they should disregard the legal entity of an LLC and return a verdict in favor of plaintiff against the defendant as an individual, several factors had to be considered:

One, whether or not defendant Jack Prudy owned all or substantially all the stock in Regal Capital Corporation; two, whether or not Jack Prudy exercised discretion and control over the management of Defendant Regal Capital Corporation; three, whether or not the Defendant Jack Prudy directly or indirectly furnished all or substantially all of the financial investment in Defendant Regal Capital Corporation; four, whether or not Regal Capital Corporation was adequately financed either originally or subsequently for the business in which it was to engage.<sup>57</sup>

All of these factors go to every single-member LLC, or every single-shareholder or solely owned corporation. So, the factors are meaningless with anything that is not a single-member LLC. Any time an organization does not pay its bills, it is not subsequently “adequately financed” (i.e., undercapitalized) by definition. This makes the factor list problematic.

Item five in the list requires the court to consider “whether or not there was actual participation in the affairs of Regal Capital Corporation by its stockholders and whether stock was issued to them.”<sup>58</sup> So, if there must be actual participation in the affairs of Regal Capital Corporation by the stockholders for there to be recognition of the entity, what do shareholders have to do to participate? Annual meetings would be an obvious start. But this is another implication that without at least one

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<sup>54</sup> *Calipjo v. Purdy*, 439 P.2d 218 (Haw. 2019).

<sup>55</sup> *Id.* at 229.

<sup>56</sup> *Id.* at 224–25.

<sup>57</sup> *Id.* at 225.

<sup>58</sup> *Id.*

additional shareholder, the owners are presumptively personally liable. The court put more on its list of factors:

Six, whether or not Regal Capital Corporation observed the [formalities] of doing businesses as a corporation such as the holding of regular meetings, the issuance of stock, the filing of necessary reports and similar matters. Seven, whether or not Defendant Regal Capital Corporation [dealt] exclusively with Defendant Jack Purdy, directly or indirectly in the real estate sales development activities in this case. Eight, whether or not Defendant Regal Capital Corporation existed merely to do a part of business of Defendant Jack Purdy.<sup>59</sup>

Notice the lack of any mention of fraud. Every factor on this list is something related to how one might operate a business. Anyone in real estate sales setting up an entity would do all of those things except perhaps not be undercapitalized, which would be inherent to a failing business. The upshot is that being a single operating owner in and of itself might make one personally liable. A glance toward agency law might resolve some of the issues. Disregarding the entity may make sense where there is fraud or deception, but not when there is an unfortunate yet honest inability to pay. The presumption is moving in the wrong direction. Curiously, when it comes to very large businesses, courts are less likely to hold the parent entity liable. This should be the other way around, with individuals bearing less liability than large corporations.

Finally, it should be recognized that there must be an entity if there is to be a successor entity. *Consolmagno v. Hosp. of St. Raphael Sch. of Nurse Anesthesia*<sup>60</sup> involved an equal employment opportunity claim against a hospital in New Haven, Connecticut.<sup>61</sup> Alleging gender discrimination and retaliation, the plaintiff sought to join what they called a successor entity—a Yale New Haven Hospital and subsequent school.<sup>62</sup> Despite never claiming that the hospital was an LLC, the facts make it clear that it was.<sup>63</sup> Based on Connecticut law, the court concluded that while the predecessor school went under and the Yale New Haven Hospital picked up a similar

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<sup>59</sup> *Id.*

<sup>60</sup> *Consolmagno v. Hosp. of St. Raphael Sch. of Nurse Anesthesia*, No. 3:11CV109 (DJS), 2017 U.S. Dist. LEXIS 227515 (D. Conn. Mar. 27, 2017).

<sup>61</sup> *Id.* at \*1.

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> *See id.* at \*15; *see also id.* at \*25–26.

program with similar people and location, it was not a successor entity and could not be joined.<sup>64</sup>

If this had been an assets-only transition, this would make sense, as only assets would transfer and not liabilities.<sup>65</sup> The lack of facts in the opinion makes it difficult to figure out the nature of the transaction. But the opinion does claim that there was no evidence that the HSR school had an existence independent of its initial owner.<sup>66</sup> The school went under when its parent entity went under, and then another corporation reconstituted the entity in an asset sale.<sup>67</sup>

Still, it is challenging to figure out if there is a legitimate successor or not because no evidence is provided about which entity is which. The opinion states that the Yale New Haven Hospital and Yale University cannot take on each other's liabilities.<sup>68</sup> The court wrote that the potential successor entities, the hospital and Yale University, "are two separate corporate entities with separate governance structures."<sup>69</sup> Because those are both separate, they cannot be held liable. They could be partners, but evidence of two separate governance structures suggests they were two individual people, both of whom might be operating a school as co-owners seeking profit. That might be problematic, but possible.

When thinking about limited liability entities, the questions are clear: "Why do you not just get a limited liability entity?"; "Why do we not form a corporation?"; "Why do we not form an LLC?"; "They are magic—your liability goes away!" Jesse Richardson of West Virginia University even called it "the magical entity."<sup>70</sup> The conversations he would have with farmers were instructive.

They would start with, "I would like to form an LLC because I am tired of being liable for all of these deaths and accidents."

And then he would ask, "Okay, what is your LLC going to be?"

The farmer would respond, "Well, it is going to be my farm."

"Okay, what are you going to put into the LLC?"

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<sup>64</sup> *Id.* at \*29.

<sup>65</sup> Matthew P. Polesetsky, *What is Successor Liability and How Can You Avoid It?*, FOUNDATION L. (Jan. 6, 2020, 2:40 PM), <https://www.foundationlaw.com/successor-liability-1/> (stating that "The general rule is that an asset acquisition cuts off successor liability").

<sup>66</sup> *Consolmagno*, *supra* note 60, at \*4.

<sup>67</sup> *Id.* at \*6.

<sup>68</sup> *Id.* at \*6 n.3.

<sup>69</sup> *Id.* at \*7.

<sup>70</sup> Source on file with the author.

“Well, my farm.”

“What's the only asset you have to lose?”

“My farm.”

This “magical entity” will not protect anyone from losing their farm if the farm is operated through the entity. There is no magic cleansing of all liability. But questions are left behind, some of these policy questions, some of them moral questions, all geared toward answering who should be liable. It would be inconceivable for every unpaid debt to be paid by an individual. And every individual, just like every entity, cannot be held liable for every action. So, in a way, veil piercing really just becomes Potter Stewart's obscenity test: “I know it when I see it.”<sup>71</sup>

If this is the test for determining liability, the courts would be marching into uncharted territories with much potential danger from lack of certainty. Creditors often get harmed by limited liability. But they also get protected. If one puts assets into a single member entity, a creditor has rights to those that other individuals do not. Other personal creditors do not have access to the assets that one put into a corporation or an LLC to satisfy those debts. To disregard that—to make those assets available to personal creditors—is to the detriment of those business creditors. And so there are benefits and burdens to limited liability, and both must be considered every time the courts look to pierce the veil or otherwise uphold or disregard an entity.

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<sup>71</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).