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# Mirror, Mirror: Amending Louisiana's LLC Statutes Related to Personal Liability of Members to Reflect Corporate Counterparts After *Ogea v. Merritt*

Thomas Bourgeois

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# **Mirror, Mirror: Amending Louisiana’s LLC Statutes Related to Personal Liability of Members to Reflect Corporate Counterparts After *Ogea v. Merritt***

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## INTRODUCTION

One of the most important and risky investments a person can make is deciding to start a business. With so much potentially at risk, knowledge of exactly what features each type of business entity provides to owners—including liability, taxation, and management flexibility—is essential to prospective business owners. Unfortunately, after the Louisiana Supreme Court's decision in *Ogea v. Merritt*,<sup>1</sup> the issue of personal liability for limited liability company (“LLC”) members is anything but clear.

For instance, consider the following example involving two new Louisiana business owners—Lucky and Savvy. Lucky chooses to form an LLC and believes that the entity will provide the benefits of flow-through taxation,<sup>2</sup> flexible management requirements, and limited liability<sup>3</sup> for the debts of his business.<sup>4</sup> Savvy chooses to form a corporation, which he elects to be taxed as an “S Corporation,” so he also expects to receive flow-through taxation and limited liability.<sup>5</sup> Both operate construction-

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1. *Ogea v. Merritt*, 130 So. 3d 888 (La. 2013).

2. Flow-through taxation allows the income of the partnership to be taxed only once. The individual partners report the income of the partnership on their personal income tax returns, and the partnership itself does not pay income taxes on its income. 1 ARTHUR B. WILLIS & PHILIP F. POSTLEWAITE, PARTNERSHIP TAX ¶ 9.01[2] (7th ed. 2013). This avoids the problem that corporate shareholders have with double taxation—taxation of the income and taxation of the distributions to shareholders. *Id.* at ¶ 3.01[1].

3. The phrase “limited liability” is a bit misleading. Although the phrase seems to imply that a business owner will have limited personal liability for the debts of the business, the shield actually provides limited *risk* to business owners. The owner is not personally liable for *any* amount of the debts of a business—save a veil-piercing exception—and the owner's *risk* is limited to his or her capital investment in the business. *See infra* Part I.B.

4. *See infra* Part I.A.

5. GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 41.01, in 8 LOUISIANA CIVIL LAW TREATISE 405–07 (1999).

contracting businesses and enter into contracts on behalf of their respective companies to build new homes for two individuals. Lucky and Savvy both forget to pay their renewal fees for their state contractor's licenses and therefore are not properly licensed, constituting a misdemeanor criminal offense.<sup>6</sup> During construction, both Lucky and Savvy—sole owners and employees of their respective businesses—personally perform work that results in cracked foundations for each of the homes they contracted to build.

Both homeowners sue, and Lucky and Savvy's businesses become liable for damages under claims of breach of contract. Both companies have few assets, so the plaintiffs seek to recover against Lucky and Savvy personally for the damages. Louisiana Revised Statutes section 12:1-622(B) makes clear that corporate shareholders in Louisiana are protected against personal liability for the debts of the corporation.<sup>7</sup> Thus, absent a theory of recovery rendering him personally liable, such as a tort or the use of a veil-piercing theory, Savvy himself will not be liable for any of the damages.<sup>8</sup> The contract was an obligation of Savvy's business, not one he owed personally.<sup>9</sup>

Lucky is, well, not so lucky. Although the LLC statute was intended to provide the same—if not stronger—protections to LLC members that its corporate counterpart provides to shareholders, the Louisiana Supreme Court interpreted and applied Revised Statutes section 12:1320 by creating a different and potentially weaker test for determining personal liability in *Ogea*. A lower court applying the test from *Ogea* could find Lucky *personally* liable under an “exception” to the limited liability shield provided to LLC members. One of the “factors” used to determine if one of the exceptions is met is “criminal conduct.”<sup>10</sup> Therefore, a court could use Lucky's misdemeanor improper licensing offense to find him personally liable for the damages resulting from his work on the home. Further, because Lucky personally performed the poor work, a court could find that his actions were tortious in nature even though the homeowner would likely not be capable of establishing a prima facie case under tort law.<sup>11</sup> Thus, although Lucky's facts are similar to those in *Ogea*, a lower

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6. LA. REV. STAT. ANN. § 37:2160(B), (C) (2007 & Supp. 2015).

7. LA. REV. STAT. ANN. § 12:1-622(B) (2015).

8. See *infra* Part I.B (discussing the limited liability shield afforded to corporate shareholders and LLC members).

9. See *Donnelly v. Handy*, 415 So. 2d 478 (La. Ct. App. 1982); see also *infra* Part I.B (explaining the concept of limited liability, which provides protections to corporate shareholders as well as LLC members in most states).

10. *Ogea v. Merritt*, 130 So. 3d 888, 902–04 (La. 2013).

11. See *infra* Part IV.A.3.a.

court could weigh the factors differently than the Supreme Court, imposing personal liability on Lucky despite the plaintiff's failure to prove all required elements of a cause of action. The reason for this discrepancy is because the *Ogea* Court's test employs a case-by-case inquiry and, instead of using true causes of action, looks at "crime" and "tort" factors that are potentially present.<sup>12</sup>

Although no justification exists for the contrasting theories of personal liability,<sup>13</sup> this example illustrates what is now true in Louisiana: LLC members are treated differently from corporate shareholders for purposes of personal liability.<sup>14</sup> This contradictory treatment creates a cloud of uncertainty for LLC owners and threatens to undermine the limited liability shield—one of the major advantages the LLC was created to provide.<sup>15</sup> Thus, to supply clarity and certainty to current and prospective business owners, the Louisiana Legislature should amend Revised Statutes section 12:1320—which provides for the personal liability of LLC members—so that it mirrors Revised Statutes section 12:1-622 and the rules on personal liability of corporate shareholders.

This Comment will explain the problems with Revised Statutes section 12:1320 and how the statute led to the Court's unfortunate decision in *Ogea*. Part I will provide a brief history of LLCs and explain the advantages they provide to members. This Part will illustrate how the limited liability shield typically protects members in certain scenarios. Part II describes the Louisiana LLC and corporate statutes that determine personal liability of owners of those respective business entities. Part III will first explain how Louisiana courts wrestled with the language in Revised Statutes section 12:1320 before the Supreme Court's first examination of limited liability in relation to LLCs in *Ogea v. Merritt*. This Part will then analyze the Court's landmark holding in *Ogea*. Part IV provides an in-depth analysis of how Revised Statutes section 12:1320 led to the Supreme Court's ambiguous and "all-encompassing" test, including potential ramifications of the decision. Part V argues that, to cure the

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12. *See id.* at 905.

13. *See* Petch v. Humble, 939 So. 2d 499, 505 (La. Ct. App. 2006) (applying principles from a case analyzing personal liability of corporate shareholders to a case involving personal liability of LLC members); *see also* 1 CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 6.01[4] (2012); MORRIS & HOLMES, *supra* note 5, § 44.06, at 495 ("LLCs are not different from corporations in any sense that would justify a different approach to such questions of personal liability.").

14. *Compare* Donnelly v. Handy, 415 So. 2d 478 (La. Ct. App. 1982) (addressing personal liability of corporate shareholders), *with* *Ogea*, 130 So. 3d 888 (addressing personal liability of LLC members).

15. *See infra* Part I.A.

uncertainty that the Louisiana Legislature and the Louisiana Supreme Court in *Ogea* created, the legislature should amend Revised Statutes section 12:1320 to mirror its corporate counterpart.

## I. THE HISTORY OF LLCs AND THE PROTECTIONS OF THE LIMITED LIABILITY SHIELD

LLCs filled an important void for small businesses left open by corporations and partnerships by providing the limited liability traditionally associated with corporations in addition to the tax advantages and flexible managerial provisions of partnerships. These three appealing advantages create an enticing business entity for businesses large and small and have led to the LLC quickly becoming a prominent business organization despite being a relatively new entity type.<sup>16</sup>

### A. *The Need for LLCs*

Prior to 1977 and the creation of LLCs, new business owners essentially chose between two types of businesses: partnerships and corporations.<sup>17</sup> General and limited partnerships offered the advantages of flow-through taxation and flexible management but had no mechanism to limit the personal liability of general partners for debts of the business.<sup>18</sup> Corporations, on the other hand, did not provide shareholders with the same tax advantages and were subject to rigorous management requirements and formalities.<sup>19</sup> They did, however, protect shareholders from personal liability for the debts of the corporation.<sup>20</sup>

With the entities available to a business owner at the time, the best an owner could hope for was to obtain two out of the three desired advantages. To avoid the problems that each of these entity types presented, business owners began forming limited partnerships and naming a corporation as the

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16. See Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 475–76 (2009) (noting that 82% of new domestic business filings in Louisiana and 58% nationwide were for LLCs between 2004 and 2007); Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 37 (2004) (noting that 45% of business filings nationwide and 72% of business filings in Louisiana were for LLCs in 2003).

17. Friedman, *supra* note 16, at 40.

18. *Id.* at 40–44 (stating these reasons but acknowledging that they are a bit exaggerated).

19. *Id.*

20. *Id.*

sole general partner.<sup>21</sup> The partnership protected the individual limited partners from being personally liable for the debts of the business.<sup>22</sup> The only general partner—who alone was personally liable for all debts of the partnership<sup>23</sup>—was a minimally capitalized corporation that was often owned and managed by the limited partners.<sup>24</sup> Under this model, no individual would be personally liable for debts of the business and the partners received flow-through taxation.<sup>25</sup> This method, however, created extreme organizational complications and inserted rigorous corporate governance rules into partnerships. Thus, the strategy essentially provided limited liability and flow-through taxation but not flexible management. Business owners sought a simpler method that would provide all three advantages.

Accordingly, in 1977, Wyoming became the first state to enact a statute allowing for the creation of LLCs.<sup>26</sup> Due to uncertainty surrounding the tax implications of this new business entity, the LLC received little attention until 1988.<sup>27</sup> That year, the Internal Revenue Service (“IRS”) issued a Revenue Ruling stating that an LLC could be taxed as a partnership—with flow-through taxation—if the entity met certain conditions.<sup>28</sup> After the IRS settled the tax implications, the popularity of LLCs spread quickly. By 1997, all 50 states had passed statutes providing for the creation of LLCs.<sup>29</sup> LLCs have since become the “dominant form

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21. Robert W. Hamilton, *Corporate General Partners of Limited Partnerships*, 1 J. SMALL & EMERGING BUS. L. 73, 77–86 (1997).

22. Limited partnerships are called “partnerships in commendam” in Louisiana. See LA. CIV. CODE art. 2844 (2014); see also GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS, § 5.01, in 7 LOUISIANA CIVIL LAW TREATISE 176–80 (1999).

23. See LA. CIV. CODE art. 2844 (2015) (stating that provisions of general partnership rules apply to partnerships in commendam); *id.* art. 2817 (stating that general partners are liable for their “virile share” of the debts of the partnership).

24. See Hamilton, *supra* note 21, at 79.

25. *Id.* at 79–80.

26. MORRIS & HOLMES, *supra* note 5, § 44.06, at 483.

27. William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 858–59 (1995).

28. Rev. Rul. 88-76, 1988-2 C.B. 360. The IRS originally established the tax status of a given LLC by determining whether the entity’s characteristics were more similar to a corporation or to a partnership. See *id.* The distinctions, however, became so blurred that this test was replaced with “check-the-box” regulations, which allow LLCs to choose their own tax status. 2 LARRY R. RIBSTEIN & ROBERT R. KEATINGE, LIMITED LIABILITY COMPANIES § 16:4 (2003).

29. Richard M. Lipton & John T. Thomas, *Impact of Final Check-the-Box Regulations Awaits Further IRS Guidance and States’ Input*, 14 J. PARTNERSHIP TAX’N 91, 99 (1997).

of business organization in the United States”<sup>30</sup> for closely held firms and have grown significantly faster than any other business type that provides limited liability to owners.<sup>31</sup> LLCs are advantageous to members in many respects, particularly to owners of small businesses. They provide the flow-through taxation of a partnership, along with limited liability for members, and flexible management options that are well-suited to small businesses.<sup>32</sup>

### *B. The Limited Liability Shield*<sup>33</sup>

Properly understood, “no member . . . of a limited liability company is liable in such capacity for a debt, obligation, or liability of the . . . company”<sup>34</sup> unless a claimant establishes liability under a “veil-piercing” theory.<sup>35</sup> The limited liability shield protects members from personal liability resulting *solely* from the member’s status as owner of the LLC.<sup>36</sup> LLC members, however, are generally not protected from any personal

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30. NICHOLAS KARAMBELAS, LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS § 6.2 (2d ed., Supp. 2013).

31. Chrisman, *supra* note 16, at 475–76; Friedman, *supra* note 16, at 37.

32. Friedman, *supra* note 16, at 43–44; *see also id.* at 49–55; MORRIS & HOLMES, *supra* note 5, § 44.01, at 483 (“[LLC] statutes are designed to achieve the basic objective of a partnership-like entity that confers corporate-like limited liability.”); Ann K. Wooster, *Annotation, Construction and Application of Limited Liability Company Acts—Issues Relating to Personal Liability of Members*, 47 A.L.R.6TH 1, 1 (West, Westlaw through 2009).

33. This Comment refers to a “correct” determination of personal liability several times. A “correct” determination of personal liability for members follows the process outlined in this part of the Comment. The limited liability shield described here is the proper and generally accepted theory of the protections provided to shareholders and members.

34. LA. REV. STAT. ANN. § 12:1320(B) (2010).

35. Wooster, *supra* note 32, § 16 (“Only in narrowly defined circumstances can an individual member of a limited liability company (LLC) be subject to personal liability for obligations for which the LLC would be solely liable; similar to the concept of ‘piercing the corporate veil,’ these exceptions may be characterized as ‘piercing the company veil.’”). Generally, corporations and LLCs are treated as separate legal entities, hence the theory behind the limited liability shield. *See* MORRIS & HOLMES, *supra* note 5, § 32.01, at 50–52. Courts use “veil-piercing” theories to disregard the separate personality of the owners and treat the two as one “person” to impose liability on an owner for a debt that would normally only be a liability of the business. *See id.*

36. BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.01[1] (comparing the personal liability of sole proprietors and partners to that of members to which no personal liability attaches “merely from the status as ‘owner’”).

obligations that may arise from conduct they undertake in connection with the LLC's business.<sup>37</sup> Members can become personally liable for these types of actions under several bodies of law including, but not limited to, contract, tort, and agency.<sup>38</sup> The relevant inquiry for a court in determining a member's personal liability is whether the member would be liable for the actions in question if he were not an owner of the business but rather a non-member employee or agent.<sup>39</sup> In contrast, sole proprietors and general partners *are* personally liable for the debts of their businesses simply because of their status as owners.<sup>40</sup>

A common and easily understood hypothetical for demonstrating the protections of the limited liability shield involves an employee of a business delivering a package for his or her employer. While driving a car to make the delivery, the employee carelessly hits a pedestrian crossing the street. The employee is obviously liable to the pedestrian for his negligence under a tort theory, assuming the other tort elements are present, because the employee has a personal duty not to hit the pedestrian.<sup>41</sup> The business will also likely face liability under a theory of vicarious liability because the employee was in the course and scope of his employment when the accident occurred.<sup>42</sup> The business will be vicariously liable regardless of the entity type. If the business were a sole

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37. *Id.* at ¶ 6.04 (“[T]he shield provides no protection when a member engages in actionable conduct. Liability in those circumstances can arise under both common law and statutory rule, and the fact that a member’s conduct is in connection with, or even in the service of, an LLC will not negate liability.”).

38. *See id.* (providing an explanation of the numerous ways in which a member can be liable); *see also* Wooster, *supra* note 32, §§ 10–16; RIBSTEIN & KEATINGE, *supra* note 28, § 12:4 (providing general rules and examples).

39. This concept will be explained further in the example below.

40. *See* LA. CIV. CODE art. 2817 (2015); *see also* BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.01[1] (comparing the personal liability of sole proprietors and partners to that of members to which no personal liability attaches “merely from the status as ‘owner’”); MORRIS & HOLMES, *supra* note 22, § 6.06, at 246.

41. More generally, it could be said that the employee has a duty to operate the vehicle in a responsible manner or simply with due care. Whatever formulation of the duty is used, the result is the same—the driver owed a tort duty to the pedestrian.

42. *See* LA. CIV. CODE art. 2320; *Timmons v. Silman*, 761 So. 2d 507, 510 (La. 2000); *see also* WILLIAM E. CRAWFORD, TORT LAW § 9:11, *in* 12 LOUISIANA CIVIL LAW TREATISE 145–47 (2000). Additionally, the business’s vicarious liability does not affect the employee’s personal liability for the tort. The two become solidary obligors to the victim and both remain liable despite having different legal sources of liability. *Narcise v. Ill. Cent. Gulf R.R. Co.*, 427 So. 2d 1192, 1194 (La. 1983); *see also* CRAWFORD, *supra*, § 8:2, at 134–35.

proprietorship or a general partnership, the owner or owners of the business would be personally liable for the business's debt—a tort judgment—just as they would be for any of its other debts because those entities do not provide limited liability for their owners.<sup>43</sup>

If the business were an LLC or a corporation, however, the members or shareholders would not be personally liable to the pedestrian.<sup>44</sup> This is within the scope of the limited liability shield—protecting owners from liability arising solely from their status as owners. But if the driver were also an owner of the LLC or corporation, he or she would be liable to the pedestrian.<sup>45</sup> The fact that an employee is also an owner of the business does not absolve the employee of liability for his or her own tortious conduct; this liability does not result from the member's ownership of the business, but rather because he committed a tort.<sup>46</sup> The limited liability shield does not provide any form of immunity to owners for their personal obligations, but merely protects owners from the entity's liabilities.<sup>47</sup> Even if the member acted in his or her capacity as a member or in fulfillment of an employment duty owed to the LLC, the limited liability shield would not protect the member from liability because the obligation resulting from the member's careless driving is personal and belongs to the member.<sup>48</sup>

LLCs are an extremely important new form of business. They provide their members with an entity type better suited for small businesses than

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43. Owners of those types of businesses are liable for the debt and obligations of the business simply because of their status as owner. *See* LA. CIV. CODE art. 2817; *see also* BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.01[1] (comparing the personal liability of sole proprietors and partners to that of members to which no personal liability attaches “merely from the status as ‘owner’”); MORRIS & HOLMES, *supra* note 22, § 6.06, at 246.

44. BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.01[1] (comparing the personal liability of sole proprietors and partners to that of members to which no personal liability attaches “merely from the status as ‘owner’”).

45. *Id.* at ¶ 6.04 (“The shield provides no protection when a member engages in actionable conduct. Liability in those circumstances can arise under both common law and statutory rule, and the fact that a member’s conduct is in connection with, or even in the service of, an LLC will not negate liability.”).

46. The owner’s personal liability is not affected by the fact that the business may be vicariously liable for his tortious conduct because he is an employee, just as a non-owner employee would remain liable in the same scenario. *See Narcise*, 427 So. 2d at 1194; *see also* CRAWFORD, *supra* note 42, § 8:2, at 134–35.

47. BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.04 (“The LLC liability shield relates only to liability arising from a member’s status as member.”).

48. *Id.* (“The shield provides no protection when a member engages in actionable conduct. Liability in those circumstances can arise under both common law and statutory rule, and the fact that a member’s conduct is in connection with, or even in the service of, an LLC will not negate liability.”).

the traditional business organizations.<sup>49</sup> One of the main advantages of the entity is to provide corporate-like limited liability to owners.<sup>50</sup> Unfortunately, in Louisiana, the legislature chose language in the statute pertaining to member liability that leads to a large disconnect between personal liability for owners of LLCs and that of shareholders of a corporation.

## II. LOUISIANA'S CONTRASTING LIMITED LIABILITY STATUTES FOR CORPORATE SHAREHOLDERS AND LLC MEMBERS

The Louisiana Legislature joined the national LLC trend by enacting legislation permitting the formation of these important new entities in 1992.<sup>51</sup> Unfortunately, the provision in the statute that addresses the personal liability of members, Revised Statutes section 12:1320, contains overly broad language. That language eventually led to the Supreme Court's misguided test for determining a member's personal liability. The legislature's choice of language also created unnecessary, superficial differences between the LLC statute and its corporate counterparts.

Because one of the intentions behind the creation of LLCs was to provide members with the same limited liability associated with corporations,<sup>52</sup> the corporate statutes relating to limited liability in force at the time the LLC statutes were enacted are a useful starting place. The corporate statute in effect at the time was relatively simple, stating, "[a] shareholder of a corporation . . . shall not be liable personally for any debt or liability of the corporation."<sup>53</sup> The only other relevant provision in the corporate chapter preserved liability for shareholders who committed fraud on a third party.<sup>54</sup> This was a narrow no-derogation provision, only

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49. See *supra* Part I.A.

50. Friedman, *supra* note 16, at 44 ("The limited liability company offers the default rules of partnership along with limited liability."); MORRIS & HOLMES, *supra* note 5, § 44.01, at 483 ("[LLC] statutes are designed to achieve the basic objective of a partnership-like entity that confers corporate-like limited liability.").

51. Act No. 780, 1993 La. Acts 2031, 2083–153; see also MORRIS & HOLMES, *supra* note 5, § 44.01, at 482–83.

52. Friedman, *supra* note 16, at 44; MORRIS & HOLMES, *supra* note 5, § 44.01, at 483.

53. LA. REV. STAT. ANN. § 12:93(B) (2010) (repealed 2014).

54. *Id.* § 12:95 (repealed 2014). Importantly, the no-derogation provision was not necessary to impose liability on shareholders who committed fraud. These shareholders would be liable for any fraud they personally committed because they owe a personal duty not to act in this manner such that the limited liability shield would not protect them from liability. See *supra* Part I.B (explaining that the limited liability shield does not protect LLC members from liability for their own tortious conduct).

applying to fraud. Courts rarely used this provision and never considered the statute to be the sole source of liability for corporate shareholders. In fact, courts routinely ignored this provision and held members liable under the traditional limited liability shield doctrine.<sup>55</sup> In contrast, the language of Revised Statutes section 12:1320 appears to provide a more “bulletproof” protection for LLC members than the then-current corporate statute.<sup>56</sup>

The LLC statute contains three relevant provisions—an exclusivity provision, a no-liability provision, and a no-derogation provision. The exclusivity provision, Subsection A, provides that “[t]he liability of members, managers, employees, or agents, as such, of a limited liability company organized and existing under this Chapter shall at all times be determined solely and exclusively by the provisions of this Chapter.”<sup>57</sup> Subsection B states the no-liability rule, providing: “[e]xcept as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.”<sup>58</sup> In addition, Subsection C makes LLC participants improper parties to litigation involving the LLC, save internal disputes.<sup>59</sup> The statute then continues with the no-derogation provision, Subsection D, stating:

Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited

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55. *See, e.g.*, *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9, 12 (La. 1975); *Donnelly v. Handy*, 415 So. 2d 478, 479–80 (La. Ct. App. 1982).

56. LA. REV. STAT. ANN. § 12:93(B) (repealed 2014) (stating simply that “[a] shareholder of a corporation organized after January 1, 1929, shall not be liable personally for any debt or liability of the corporation”); *see also* MORRIS & HOLMES, *supra* note 5, § 44.06, at 493–96.

57. LA. REV. STAT. ANN. § 12:1320(A).

58. *Id.* § 12:1320(B).

59. *Id.* § 12:1320(C) (“A member, manager, employee, or agent of a limited liability company is not a proper party to a proceeding by or against a limited liability company, except when the object is to enforce such a person’s rights against or liability to the limited liability company.”). This provision appears to severely limit a LLC member’s exposure to liability, but is rarely invoked as the jurisprudence in the area rarely, if ever, discusses it.

liability company may have against any such person because of any fraud practiced upon it by him.<sup>60</sup>

Subsections A and B illustrate that the legislature clearly intended for Revised Statutes section 12:1320 to be a “one-stop shop” for determining a member’s liability. This intent is evident from the use of language such as “solely and exclusively” and “[e]xcept as otherwise specifically set forth in this Chapter.”<sup>61</sup> When the statute was originally enacted, its effects were potentially even more far reaching because it did not contain the scope-limiting words “as such” in Subsection A or “in such capacity” in Subsection B.<sup>62</sup>

The no-derogation rule in Subsection D does not explicitly create or limit any causes of action that a claimant may have against a member.<sup>63</sup> Seemingly, the legislature added Subsection D to avoid a scenario in which the professional corporation statutes would expressly preserve liability for professional misconduct while the parallel LLC statute remained silent. Because the legislature intended for professionals to have the ability to form LLCs, the legislature simply copied the language from the existing professional corporation statutes<sup>64</sup> into the new LLC statute to avoid the risk that the omission would lead a court to interpret the statute as protecting professional LLC members from malpractice claims.<sup>65</sup> The

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60. *Id.* § 12:1320(D).

61. *Id.* § 12:1320(A), (B). This language will be referred to in this Comment as the “exclusivity language.”

62. Act No. 475, 1993 La. Acts 1177, 1183.

63. LA. REV. STAT. ANN. § 12:1320(D) (“Nothing in this Chapter shall be construed *as being in derogation of* any rights . . .” (emphasis added)).

64. The state’s corporate law is divided into several chapters. The discussion of the repealed shareholder liability statute earlier in this Part is in reference to the business corporation statutes found in Louisiana Revised Statutes Title 12, Chapter 1. The Revised Statutes set out a separate set of rules for each “professional” corporation type—such as professional law or medical corporations—found in Title 12, Chapters 8 through 12, 14 through 21, and 23.

65. *See, e.g.*, LA. REV. STAT. ANN. § 12:807 (“Nothing in this Chapter shall be construed as in derogation of any rights which any person may by law have against an incorporator, subscriber, shareholder, director, officer or agent of the corporation, because of any fraud practiced upon him, or because of any breach of professional duty or other negligent or wrongful act, by such person . . .”). Although only a subsidiary issue in this Comment, Subsection D’s language creates a large problem in the LLC context. In the professional corporation statutes, the subsection’s source, each statute clearly preserves liability for a particular “professional duty” because each professional corporation chapter pertains to only one identified profession. But in the LLC context, the “professional duties” that the statute refers to and the types of “professions” that

exclusivity language in the statute, however, has led to an interpretation that this language is an attempt to list the exclusive causes of actions for which members may become personally liable for a business debt.<sup>66</sup> The professional corporation statutes do not contain exclusivity provisions,<sup>67</sup> so courts have never interpreted these statutes as providing the only available source of liability for professional shareholders.

In contrast, the recently enacted corporate statute governing the personal liability of shareholders for debts of corporations is more straightforward than both the parallel LLC statute and the prior corporate statute. The new statute simply states, “[a] shareholder of a corporation is not personally liable for the acts or debts of the corporation.”<sup>68</sup> When adopting the statute from the Model Business Corporation Act section 6.22, the legislature chose to delete the phrase “except that [the shareholder] may become personally liable by reason of his own acts or conduct” from the end of the sentence.<sup>69</sup> The reason for the deletion, as stated in a comment to the statute, was that the phrase “could have been interpreted to provide an independent basis for personal liability based simply on a corporate actor’s having engaged in some kind of personal conduct in connection with the corporation’s operations.”<sup>70</sup> The comment acknowledges that a shareholder could still be held liable for personal conduct if, for example, the acts amount to a tort.<sup>71</sup> The comment clarifies that bodies of law other than corporate law—including tort law, contract law, and agency law—should determine liability.<sup>72</sup> The comment further states that if a court holds a shareholder personally liable for “personal acts

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are included in the definition of “business” are not clear because there is no list of those professions anywhere in the LLC chapter. Although a very important issue, whether any type of tradesman that is not included in one of the professional corporation chapters is or should be considered a professional under the LLC chapter is outside the scope of this article. For two cases looking at this issue, see *Szygy Construction, L.L.C. v. McKey*, 156 So. 3d 763, 768–69 (La. Ct. App. 2014), and *Nunez v. Pinnacle Homes, L.L.C.*, 158 So. 3d 71, 75–76 (La. Ct. App. 2014).

66. *See, e.g.*, *Ogea v. Merritt*, 130 So. 3d 888, 896 (La. 2013); *Hooper v. Wisteria Lakes Subdivision*, 135 So. 3d 9, 20 (La. Ct. App. 2013); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734, 740 (La. Ct. App. 2008); *Petch v. Humble*, 939 So. 2d 499, 503–05 (La. Ct. App. 2006); *see also infra* Part III.A.2.

67. *See, e.g.*, LA. REV. STAT. ANN. § 12:807.

68. LA. REV. STAT. ANN. § 12:1-622(B) (2015).

69. *Id.* at cmt. a.

70. *Id.* at cmt. c.

71. *Id.*

72. *Id.*

or conduct in connection with the operation of the corporation, the [shareholder] is being held liable for his own acts or debts, not those of the corporation, so no need exists to state the exception.”<sup>73</sup>

A comparison of the corporate and LLC owner liability statute reveals several major differences. For example, Revised Statutes section 12:1320 provides that personal liability of members should be found only by reference to the LLC chapter; the corporate statute contains no parallel limitation. Further, the LLC statute also purports to determine liability for managers, employees, and agents of the business, yet the corporate statute merely limits liability for shareholders. Additionally, Revised Statutes section 12:1320(D) attempts to preserve liability for members under certain theories, while the analogous general business corporation statute contains no such preservations.<sup>74</sup> Unfortunately, the differing language contained in Revised Statutes section 12:1320 serves as the basis for numerous misapplications of the limited liability shield to LLC members.

### III. JURISPRUDENCE ON PERSONAL LIABILITY OF LLC MEMBERS

The many Louisiana appellate court decisions interpreting the far-reaching language of Revised Statutes section 12:1320 highlight the uncertainty the statute has created. Even with a large body of corporate jurisprudence to borrow from, the courts continuously come up short in determining a member’s liability due to the differences in the statute’s language. Despite this jurisprudential confusion, the Louisiana Supreme Court did not address personal liability of LLC members until 2013 in *Ogea v. Merritt*.<sup>75</sup>

#### A. Comparing Pre-Ogea LLC Cases with Corporate Cases

No Louisiana court has been able to properly articulate the circumstances under which an LLC member should be held personally liable, largely due to the deficiencies of Revised Statutes section

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73. *Id.*

74. The corporation chapters of the Louisiana Revised Statutes are split into several major types. The important distinctions for this Comment are between the general business corporation chapter and the professional corporation chapters. The general business corporation statute—Louisiana Revised Statutes section 12:1-622—does not contain this preservation language. The professional corporation statutes do contain this language. *See, e.g.*, LA. REV. STAT. ANN. § 12:807 (2010).

75. *Ogea v. Merritt*, 130 So. 3d 888 (La. 2013).

12:1320.<sup>76</sup> However, because there is no justification to treat LLC members and corporate shareholders differently in terms of personal liability, jurisprudence interpreting the liability of corporate shareholders is helpful in providing a model analysis for how the limited liability shield should apply to LLC members in Louisiana.<sup>77</sup>

### *1. Traditional Corporate Analysis of Shareholder Liability*

*Donnelly v. Handy* is an enlightening corporate liability case, addressing whether the sole shareholder of a small construction corporation could be liable for negligent supervision and defective construction.<sup>78</sup> Handy, the defendant, signed a contract on behalf of his corporation to build a home for Donnelly, the plaintiff.<sup>79</sup> Donnelly filed suit after disputes arose between the parties about the quality of the work.<sup>80</sup> After acknowledging that shareholders cannot be liable for debts of the business, the court looked for distinct theories under which Handy could be personally liable outside of corporate law.<sup>81</sup>

Initially, the court stated that Handy could not be liable for breach of contract because the contract was between the corporation and the plaintiff, and Handy signed only in his capacity as president.<sup>82</sup> The court then looked at whether Handy could be held liable for negligence<sup>83</sup> and held that a shareholder could only be personally liable to a third party for a tort if the shareholder owed a personal tort duty to the third party.<sup>84</sup> The

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76. See *infra* Part IV (discussing these deficiencies and how they led to the *Ogea* holding).

77. See *supra* Part I.A (discussing the advantages of LLCs, including “corporate-like” limited liability); see also *Ogea*, 130 So. 3d at 901 (“LLCs are not different from corporations in any sense that would justify a different approach to such questions of personal liability.” (quoting *MORRIS & HOLMES*, *supra* note 5, § 44.06, at 495)); *Petch v. Humble*, 939 So. 2d 499, 505 (La. Ct. App. 2006) (applying principles from a case analyzing personal liability of corporate shareholders to determine personal liability of LLC members).

78. *Donnelly v. Handy*, 415 So. 2d 478, 479–80 (La. Ct. App. 1982).

79. *Id.* at 479.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 479–80.

84. *Id.* at 480. This is known as the “personal duty” theory. See H. B. “Buster” Hughes, Inc. v. Bernard, 318 So. 2d 9, 12 (La. 1975); *Canter v. Koehring Co.*, 283 So. 2d 716, 720 (La. 1973); *Manning v. United Med. Corp. of New Orleans*, 902 So. 2d 406, 410–11 (La. Ct. App. 2005); 13 WILLIAM MEADE FLETCHER,

court further explained that if a shareholder injures a third party through a breach of that duty, the shareholder is personally liable “whether or not the act culminating in the injury is committed by or for the corporation . . . and it does not matter that liability might also attach to the corporation.”<sup>85</sup> The court found that Handy did not owe a personal duty to the plaintiff to provide quality construction work or to properly supervise the corporation’s employees.<sup>86</sup> Instead, Handy merely owed a duty to the corporation that he worked for, not to its customer.<sup>87</sup> Conversely, the corporation owed a contractual duty to the plaintiff to provide quality work and to supervise its employees.<sup>88</sup> Therefore, the court found the corporation—but not Handy—liable.<sup>89</sup> The analysis in *Donnelly* is well-reasoned and follows the typical framework used in cases adjudicating a corporate shareholder’s personal liability.

## 2. Lower Courts’ Attempts at Analyzing LLC Member Liability

When adjudicating the personal liability of LLC members, however, courts have not provided such a technically sound analysis. Many appellate courts have interpreted Revised Statutes section 12:1320(D) as providing an exclusive list of the causes of actions under which a court may hold a member personally liable.<sup>90</sup> This interpretation of the statute differs from the corporate jurisprudence where courts simply look to standalone theories of liability that exist outside of corporate law rather than a list of exceptions.<sup>91</sup> Perhaps this is because the shareholder liability

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FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6214, at 441–42 (2004 & Supp. 2008).

85. *Donnelly*, 415 So. 2d at 481 (quoting *H. B. “Buster” Hughes, Inc.*, 318 So. 2d at 12).

86. *Id.*

87. *Id.* The duty was to properly “supervise, inspect, govern, control and manage the construction” and resulted from being an employee of the corporation. *Id.*

88. *Id.* at 481–82.

89. *Id.* at 482.

90. *See, e.g.*, *Hooper v. Wisteria Lakes Subdivision*, 135 So. 3d 9, 20 (La. Ct. App. 2013); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734, 740 (La. Ct. App. 2008); *Petch v. Humble*, 939 So. 2d 499, 503–05 (La. Ct. App. 2006).

91. *See, e.g.*, *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9, 12 (La. 1975) (analyzing tort liability of a corporate shareholder); *Chaney v. Godfrey*, 535 So. 2d 918, 921–23 (La. Ct. App. 1988) (analyzing liability of corporate shareholders under agency theories); *Donnelly*, 415 So. 2d at 481.

statute provides no similar list and no exclusivity provision.<sup>92</sup> Although one old corporate statute did contain a narrow no-derogation provision for fraud,<sup>93</sup> the courts never viewed this as the sole potential source of liability<sup>94</sup>—likely because of the lack of an exclusivity provision.<sup>95</sup> Additionally, many appellate courts have also interpreted the exclusivity language and the words “in such capacity” to mean that a member cannot be held personally liable for any of the “exceptions” in Subsection D unless the member was acting “outside” of his or her capacity as member.<sup>96</sup> This too diverges from the corporate jurisprudence where a shareholder’s “capacity” does not affect a court’s determination of personal liability.<sup>97</sup>

Further problems have arisen when courts interpret the “breach of professional duty” language in Subsection D. In several cases, plaintiffs sued members of construction LLCs alleging personal liability for faulty

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92. See LA. REV. STAT. ANN. § 12:1-622(B) (2015).

93. LA. REV. STAT. ANN. § 12:95 (2010) (repealed 2014). The new corporate shareholder liability statute does not contain any no-derogation provisions. LA. REV. STAT. ANN. § 1-622 (2015).

94. See, e.g., *Donnelly*, 415 So. 2d at 479–82 (addressing potential personal liability of a corporate shareholder under contract and tort theories).

95. See LA. REV. STAT. ANN. § 12:93(B) (2010) (repealed 2014).

96. See, e.g., *Hooper v. Wisteria Lakes Subdivision*, 135 So. 3d 9, 20 (La. Ct. App. 2013) (“The evidence in the record revealed that all actions taken by [the members] with regard to the [plaintiff’s] property . . . were in their capacities as members or agents of [the LLC]. Hence, they are not personally liable for any debt, obligation or liability of [the LLC].”); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734, 740 (La. Ct. App. 2008) (finding liability where the member “was not acting solely in his capacity as a member of the limited liability company”); *Petch v. Humble*, 939 So. 2d 499, 504 (La. Ct. App. 2006) (“To have meaning within the statute, the phrase ‘or other negligent or wrongful act by such person’ must refer to acts that are either done outside one’s capacity as a member . . . of a limited liability company or which while done in one’s capacity as a member . . . of a limited liability company also violate some personal duty owed by the individual to the injured party.”); *Curole v. Ochsner Clinic, L.L.C.*, 811 So. 2d 92, 97 (La. Ct. App. 2002) (“To have meaning within the entire statute, the phrase ‘or other negligent or wrongful act by such person’ must refer to acts done outside one’s capacity as a member, manager, employee, or agent of the limited liability company.”).

97. See, e.g., *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9 (La. 1975) (analyzing tort liability of a corporate shareholder); *Chaney v. Godfrey*, 535 So. 2d 918 (La. Ct. App. 1988) (analyzing liability of corporate shareholders under agency theories); *Donnelly*, 415 So. 2d at 481.

or poor workmanship on work the member actually completed.<sup>98</sup> In those cases, the courts strongly implied that they were holding the members liable under the “breach of professional duty exception” but did not expressly do so.<sup>99</sup> Rather, these courts held the members personally liable by stating that they were “negligent”—violating the standard of care<sup>100</sup>—in performing the work without establishing any specific duty owed to the claimants.<sup>101</sup> In corporate cases with similar facts, courts focused on whether the shareholder who performed the faulty work owed a tort duty to the plaintiff, not solely on whether their acts violated the standard of care or whether the members were acting as professionals.<sup>102</sup> In the corporate context, contractors are not professionals, and therefore, the shareholders in construction liability cases will not be liable to their customers for poor work absent a veil-piercing theory because they owe no personal duty.

The tension between traditional applications of the limited liability shield and the language in Revised Statutes section 12:1320 has long been

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98. See, e.g., *Matherne v. Barnum*, 94 So. 3d 782, 785–86 (La. Ct. App. 2012); *Regions Bank*, 997 So. 2d 734, 736; *W.J. Spano Co. v. Mitchell*, 943 So. 2d 1131, 1131–32 (La. Ct. App. 2006).

99. See *Matherne*, 94 So. 3d at 788–90; *Regions Bank*, 997 So. 2d at 740–41; *W.J. Spano Co.*, 943 So. 2d at 1133.

100. In a typical negligence tort case in Louisiana, the plaintiff must prove the following elements: (1) a duty, (2) a breach of that duty (negligence), (3) that the breach was the cause in fact of the harm, and (4) the actual injury. See CRAWFORD, *supra* note 42, § 4:2, at 76–78. In these cases, the courts did not address the presence of all of these elements. They held the member–contractor liable because the member breached—was negligent and violated the standard of care—but skipped the question of whether there was a duty owed that could be breached in the first place. This may not have changed the result of the cases because the courts could have found that the contractors were professionals and therefore owed a tort duty to the plaintiffs. By not expressly holding so, however, the courts left gaping holes in their analyses.

101. See *Matherne*, 94 So. 3d at 788–90; *Regions Bank*, 997 So. 2d at 740–41; *W.J. Spano Co.*, 943 So. 2d at 1133.

102. See, e.g., *Donnelly*, 415 So. 2d at 479–80; see also *H. B. “Buster” Hughes, Inc.*, 318 So. 2d at 10–12. In *Nunez v. Pinnacle Homes, L.L.C.*, the Supreme Court held that licensed contractors were not professionals as contemplated by the LLC chapter. No. 2015-C-0087, 2015 WL 5972529 (La. Oct. 14, 2015). This Comment does not seek to address the merits of either side of that debate. For the purposes of this Comment, the important issue is not whether a contractor is a “professional” as contemplated by the LLC chapter, but the manner in which the courts used the professional liability preservation in Louisiana Revised Statutes section 12:1320(D) to hold members liable without establishing a personal tort duty.

apparent. The above cases demonstrate how the lower courts attempted to solve the mysteries created by the statutory language, although almost all attempts have resulted in legally unsound analyses. The lower courts acted with no guidance from the Supreme Court until *Ogea*, which unfortunately did little to clear the ambiguities surrounding the statute.

*B. The Breaking Point: Ogea v. Merritt*

*Ogea* involved a contract between the plaintiff, Ogea, and a construction contracting business, Merritt LLC.<sup>103</sup> The latter agreed to build a new home for Ogea.<sup>104</sup> Travis Merritt, the sole member of the LLC, personally prepared the dirt “pad” over which the concrete slab for the home would be poured.<sup>105</sup> Upon realizing that the completed slab contained significant defects, Ogea sued both Merritt LLC and Merritt personally for violations of the New Home Warranty Act<sup>106</sup> and Civil Code articles related to construction defects.<sup>107</sup> The trial court held that “[u]nder one or more of the [legal] theories,’ the damages . . . were caused either by Merritt LLC or Mr. Merritt or both.”<sup>108</sup> Specifically as to Merritt, the trial court held that he was personally liable because he performed the negligent work on the pad himself and that his failure to produce an insurance policy upon Ogea’s request constituted fraud.<sup>109</sup>

The Louisiana Third Circuit Court of Appeal affirmed the trial court’s decision to hold Merritt personally liable for the construction defects.<sup>110</sup> Merritt argued that because the contract was between the LLC and Ogea, he should not be personally liable for the LLC’s breach.<sup>111</sup> Conversely, Ogea argued that because Merritt personally completed or supervised all of the work on the pad, he should be personally liable for the poor workmanship.<sup>112</sup>

Relying on language in the LLC chapter, the court reasoned that “the legislature intended for the personal liability of LLC members to be

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103. *Ogea v. Merritt*, 130 So. 3d 888, 892 (La. 2013).

104. *Id.*

105. *Id.*

106. LA. REV. STAT. ANN. §§ 9:3141 to :3150 (2009).

107. *Ogea v. Merritt*, 109 So. 3d 516, 518 (La. Ct. App. 2013).

108. *Id.* at 519.

109. *Id.*

110. *Id.* at 523, 528.

111. *Id.* at 521.

112. *Id.*

different from the personal liability of corporate shareholders.”<sup>113</sup> According to the court, under Revised Statutes section 12:1320, members received limited liability for the debts of the LLC as long as the debt or liability at issue was not caused by the member’s own actions that would constitute an “exception” under Subsection D.<sup>114</sup> The court then determined that Merritt was negligent in preparing the dirt for the home and therefore was personally liable to Ogea for the damages even though they were a result of the LLC’s breach of contract.<sup>115</sup> Under this analysis, a member of an LLC could be held liable for the business’s debt if his or her conduct was the source of the defective performance regardless of whether the member owed a personal duty to the injured party. This analysis differs significantly from the typical inquiry to determine the liability of corporate shareholders—whether the person owed a personal duty to the claimant.<sup>116</sup>

The Louisiana Supreme Court subsequently granted writs and reversed the portion of the Third Circuit’s decision holding Merritt personally liable.<sup>117</sup> In its first interpretation of Revised Statutes section 12:1320, however, the Court implicitly agreed with the Third Circuit that the legislature intended to provide a different and weaker form of protection against personal liability to the members of an LLC than that provided to the shareholders of a corporation.<sup>118</sup>

The Court began its analysis by recognizing that LLCs are juridical persons and are legally distinct from their owners.<sup>119</sup> The Court then

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113. *Id.* at 522. Specifically, the Third Circuit stated that it was precluded from looking at the law pertaining to corporate shareholders because the LLC chapter explicitly stated that LLCs were unincorporated associations and because the exclusivity language in Louisiana Revised Statutes section 12:1320(D) prevented it from looking anywhere outside of LLC law. *Id.*

114. *Id.*

115. *Id.* at 523–24.

116. *See, e.g.*, *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9, 12 (La. 1975); *Canter v. Koehring Co.*, 283 So. 2d 716, 720 (La. 1973); *Manning v. United Med. Corp. of New Orleans*, 902 So. 2d 406, 410–11 (La. Ct. App. 2005); *Donnelly v. Handy*, 415 So. 2d 478, 480 (La. Ct. App. 1982); *see also* FLETCHER, *supra* note 84, § 6214, at 441–42; *supra* Part I.B.

117. *Ogea v. Merritt*, 130 So. 3d 888, 907 (La. 2013).

118. *Compare Donnelly*, 415 So. 2d at 479–80 (acknowledging that corporations and shareholders are distinct from one another and inquiring as to whether the shareholder owed a personal duty to the plaintiff to determine tortious personal fault), *with Ogea*, 130 So. 3d at 895–907 (creating a test and factors to be used in analyzing Louisiana Revised Statutes section 12:1320).

119. *Ogea*, 130 So. 3d at 894–95 (citing LA. CIV. CODE art. 24 (2013)). The Court acknowledged that members can be held liable for debts of the business if

recited the statutory interpretation guidelines to set up the framework for its purportedly conservative statutory interpretation,<sup>120</sup> stating that Subsection A provides for the LLC chapter to exclusively govern the personal liability of members.<sup>121</sup> According to the Court, the statute creates a “general rule” of limited liability for members for the debts, obligations, and liabilities of the LLC in Subsection B, with exceptions to that shield listed in Subsection D.<sup>122</sup> To find a member personally liable for the debts of an LLC, according to the Court, the claimant must (1) be “a person who ‘by law’ has a cause of action against [the member] individually” and (2) have obtained that cause of action as a result of “‘any fraud practiced upon [him or her]’ or ‘any breach of professional duty or other negligent or wrongful act.’”<sup>123</sup>

### 1. *The Fraud Exception*

The analysis then turned to the first “exception” to a member’s limited liability—fraud. The Court used a definition of fraud from the obligations section of the Civil Code, but found that the record lacked any evidence showing that Merritt committed fraud because Ogea did not enter into evidence the insurance policy at issue.<sup>124</sup>

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a claimant proves a “veil-piercing” theory; however, the Court quickly dismissed this discussion because neither party nor the lower courts discussed this issue. *Id.* at 895.

120. *See id.* at 896 (“Within our civil law system, the starting point in the interpretation of any statute is the language of the statute itself. Words and phrases shall be read in context and shall be construed according to the common and approved usage of the language.” (citations omitted)). The word “conservative” as used in this sentence means “traditional” in the sense that the Court stated it should look only to the text of the statute to provide an interpretation.

121. *Id.*

122. *Id.* at 896–97. Although there may be other exceptions to personal liability elsewhere in the LLC chapter, the Court limited this opinion to the “exceptions” listed in Section D, just as the trial court and Third Circuit had done in the case. *Id.* at 897. Other exceptions may include, for example, liability for unlawful distributions, LA. REV. STAT. ANN. § 12:1328 (2010), and failure to make required contributions, *id.* § 12:1322.

123. *Ogea*, 130 So. 3d at 897 (citing LA. REV. STAT. ANN. § 12:1320(D)).

124. *Id.* at 897–98. The Court additionally implied that the insurance policy probably would not have provided coverage for the damage anyway, so Ogea suffered no harm. *See id.* at 898.

## 2. *The Breach of Professional Duty Exception*

The next exception the Court analyzed was whether Merritt breached a professional duty.<sup>125</sup> The key question was whether contractors are considered “professionals” within the LLC chapter.<sup>126</sup> Despite the question’s importance,<sup>127</sup> the Court chose not to provide an answer.<sup>128</sup> Instead, the Court illustrated how the word “professional” had a clearly defined meaning in business entity law, listing the professions for which professional corporation statutes have been enacted.<sup>129</sup> Although Ogea argued that contractors should be equated to the other traditional professions and subjected to the professional duty standards, the Court avoided the question by noting that the LLC held the contractor’s license, not Merritt personally.<sup>130</sup> The Court again found the record void of any evidence showing that Merritt himself was a professional.<sup>131</sup>

## 3. *The “Negligent or Wrongful Act” Exception*

The Court then moved to its final exception to limited liability—a “negligent or wrongful act.”<sup>132</sup> This portion of its analysis began by rejecting Merritt’s argument that the words “negligent or wrongful act” as

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125. *Id.*

126. The question of whether a certain occupation should be considered a profession has never been an issue in corporate law because each chapter of the professional corporation statutes pertains to only one specifically named profession. *See, e.g.*, LA. REV. STAT. ANN. § 12:807(D) (found in the professional law corporation chapter); *id.* § 12:907(C) (same language in the professional medical corporation statute).

127. *See, e.g.*, *Matherne v. Barnum*, 94 So. 3d 782, 788 (La. Ct. App. 2012); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734, 740 (La. Ct. App. 2008); *W.J. Spano Co. v. Mitchell*, 943 So. 2d 1131, 1132 (La. Ct. App. 2006). For more recent cases directly addressing this issue, see *Szygy Construction, L.L.C. v. McKey*, 156 So. 3d 763, 768–69 (La. Ct. App. 2014), and *Nunez v. Pinnacle Homes, L.L.C.*, 158 So. 3d 71, 75–77 (La. Ct. App. 2014).

128. The Court later answered the question by stating that contractors are not professionals in the LLC context. *See Nunez v. Pinnacle Homes, L.L.C.*, No. 2015-C-0087, 2015 WL 5972529 (La. Oct. 14, 2015).

129. *Ogea*, 130 So. 3d at 898–99. The “traditional” professions contemplated by the professional corporation chapters are: lawyers, medical doctors, dentists, accountants, chiropractors, nurses, architects, optometrists, psychologists, veterinarians, and architectural engineers. *See id.*

130. *Ogea*, 130 So. 3d at 899.

131. *Id.*

132. *Id.*

used in Revised Statutes section 12:1320(D) mean simply a tort.<sup>133</sup> The Court stated that although the terms are commonly used in tort law, they are also used in criminal law, mineral law, and court reporter bond laws.<sup>134</sup> The Court pronounced four factors to guide lower courts in analyzing the “negligent or wrongful act” exception:

1) [W]hether a member’s conduct could be fairly characterized as a traditionally recognized tort [the tort factor]; 2) whether a member’s conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable [the criminal conduct factor]; 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC [the contract factor]; and 4) whether the conduct at issue was done outside the member’s capacity as a member [the capacity factor].<sup>135</sup>

Favoring a fact-intensive inquiry, the Court required each case to be decided on its specific facts and for courts to analyze *all* of the factors in their decisions.<sup>136</sup> Thus, one factor may be dispositive of personal liability in one case but not in others. A court is not bound to base its decision on whether a member should be personally liable on the existence of any one of the enumerated factors in every case.<sup>137</sup>

*a. The Tort Factor*

The Court first turned to the “tort factor.” Under this factor, the commission of a tort by an LLC member “weighs in favor of” the “negligent or wrongful act” exception.<sup>138</sup> Although explaining that the tort factor could weigh in favor of personal liability for a member, the Court quoted a case assessing personal tort liability for a corporate shareholder and acknowledged that shareholders are liable for any personal torts they commit if they owe a personal duty to the victim.<sup>139</sup> The Court then inexplicably stated that LLC members should not be treated differently

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133. *Id.* at 900.

134. *Id.*

135. *Id.* at 900–01.

136. *Id.* at 905; *but see* *Hodge v. Strong Built Int’l, LLC*, 159 So. 3d 1159 (La. Ct. App. 2015) (ignoring the criminal conduct and contract factors).

137. *Ogea*, 130 So. 3d at 114.

138. *Id.* at 901.

139. *Id.* (quoting *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9, 12 (La. 1975)).

than corporate shareholders when determining personal liability after overtly doing exactly that.<sup>140</sup>

The opinion next held that, when analyzing the tort factor, courts should focus on whether the member owes a personal tort duty to the alleged victim.<sup>141</sup> The duty cannot be merely a contractual duty to do quality work, however, otherwise the general rule for limited liability would be negated in many cases.<sup>142</sup> The Court was unclear whether a person must prove all of the elements of a traditional tort or simply establish a personal tort duty for this factor to be present.<sup>143</sup> Finally, despite saying that no factors were always dispositive, the Court also stated that the tort factor may be dispositive because finding that a member breached a personal tort duty owed to the claimant could be enough to “pave the way to a member’s personal liability for the tort.”<sup>144</sup>

Under the facts of this case, however, the Court found no evidence that Merritt owed any personal tort duty to Ogea.<sup>145</sup> According to the Court, holding a member liable for poor workmanship arising out of the LLC’s contract does not alone establish a negligent or wrongful act because doing so would “negate the general rule of limited liability.”<sup>146</sup> The Court held that the tort factor was not present because Ogea proved only poor workmanship.<sup>147</sup>

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140. *Id.* (quoting MORRIS & HOLMES, *supra* note 5, § 44.06, at 495). This particular portion of the Court’s analysis is ironic. It cites a corporate case that *commands* shareholders be held liable for their torts for the proposition that an LLC member’s tort should merely *weigh in favor* of personal liability. Additionally, the Court’s statement that members and shareholders should have the same personal liability is extremely ironic considering the test the Court is creating is substantially different from the analysis used in corporate cases.

141. *Id.* at 901–02.

142. *Id.* at 902.

143. *Id.* at 901. (“Of course, a claimant must prove all elements of a claim to succeed *in a tort action*. Applying . . . tort law, when examining whether a member of an LLC can be personally liable in tort, the threshold question to be asked regarding the member is therefore: ‘Was any duty of care owed to plaintiff (was it a foreseeable risk)?’” (emphasis added)). This point will be examined further *infra* Part IV.A.3.a.

144. *Ogea*, 130 So. 3d at 905. The Court also recognizes that an order of restitution by a criminal court after a conviction may also make the criminal factor dispositive. *Id.* at 905 n.14.

145. *Id.* at 905.

146. *Id.* at 905–06.

147. *Id.* at 906.

*b. The Criminal Conduct Factor*

The Court went on to explain the “criminal conduct factor.” According to the Court, if the member’s conduct “constitutes a crime, that fact weighs in favor of the ‘negligent or wrongful act’ exception,” which in turn favors a finding of personal liability.<sup>148</sup> *Ogea* limited the crimes to which a court may look at to those that a natural person, rather than solely a juridical person, could commit.<sup>149</sup> Considering crimes for which only juridical persons could be guilty would thwart the general rule of shielding an LLC member from the business’s debts.<sup>150</sup>

As its first justification for why criminal conduct should favor personal liability, the Court said that a victim of a crime may be granted restitution and that shielding a criminal from that liability simply because he was a member of an LLC would be inequitable.<sup>151</sup> As an example, the Court demonstrated how licensing requirements could weigh in favor of personal liability for members.<sup>152</sup> Under the Court’s test, an LLC member who acts as a contractor without a proper license would be more likely to be personally liable for debts of the business.<sup>153</sup>

As the second justification for the factor, the Court stated that criminal statutes sometimes provide the basis for tort duties.<sup>154</sup> The explanation began with odd language stating that when a *civil* claimant proves that a member’s *criminal* conduct creates a “right of recovery,” the situation “weighs in favor of” finding personal liability.<sup>155</sup> Even so, the Court explained that the member does not have to have been actually convicted of the crime to establish the factor.<sup>156</sup> According to the Court, Subsection D does not require a claimant to have already obtained a legal remedy, but rather only requires a claimant to prove by a preponderance of the evidence the existence of a right—not a remedy—that he or she may have against the member.<sup>157</sup> The Court clarified this ambiguous language by stating that its true intent was to allow courts to use a criminal statute as a

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148. *Id.* at 902.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 902–03. “Engaging in the business of contracting without authority” is a misdemeanor crime. LA. REV. STAT. ANN. § 37:2160 (2010).

153. *Ogea*, 130 So. 3d at 902–03.

154. *Id.* at 903–04 (quoting *Gugliuzza v. K.C.M.C., Inc.*, 606 So. 2d 790, 793 (La. 1992)).

155. *Id.* at 903.

156. *Id.*

157. *Id.*

“civil duty” in a tort analysis to determine personal liability.<sup>158</sup> The Court did not require that the crime be the cause of any damage but did state that the crime must be “related” to the damage.<sup>159</sup> The Court quickly dismissed the presence of the crime factor in this case because Ogea made no allegations that Merritt engaged in any criminal conduct.<sup>160</sup>

*c. The Contract Factor*

Under the Court’s “contract factor,” a member is less likely to be found personally liable for a debt or obligation of the business if his or her conduct “was required by, or was in furtherance of, a contract between the claimant and the LLC.”<sup>161</sup> The rationale for this factor is that, under Subsection B, members should not be liable for an obligation of the LLC.<sup>162</sup> Thus, according to the Court, if the member acts to satisfy one of these obligations, he or she should be more likely to qualify for limited liability.<sup>163</sup> Here, the Court found that Merritt’s actions in preparing the dirt and supervising the construction were taken in furtherance of the contract between Merritt LLC and Ogea.<sup>164</sup> The contract factor, therefore, weighed against personal liability for Merritt.

*d. The Capacity Factor*

The final of the Court’s four factors under the “negligent or wrongful act” exception is the “factor of acting inside or outside the LLC.”<sup>165</sup> Under this factor, actions taken “outside” of an LLC owner’s capacity as a member weigh in favor of personal liability.<sup>166</sup> To illustrate this factor, the

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158. *Id.* at 903–04 (quoting *Gugliuzza*, 606 So. 2d at 793).

159. *Id.* at 903 n.13 (“Unrelated criminal conduct is simply irrelevant and cannot advance a claimant’s burden of proving that an exception to limited liability applies. Drawing as an example a variant from the facts of this case, we would be hard pressed to see how a member receiving a traffic citation one day on the way to the job site would breach a duty owed to a landowner who contracted with the member’s LLC for construction of a home.”).

160. *Id.* at 906.

161. *Id.* at 904.

162. *Id.*

163. *Id.*

164. *Id.* at 906.

165. This factor will be referred to as the “capacity factor” throughout this Comment.

166. *Id.* at 904 (quoting *Petch v. Humble*, 939 So. 2d 499, 504 (La. Ct. App. 2006)).

Court chose to use the “principal-mandatory” relationship.<sup>167</sup> *Ogea* stated that if a member becomes a mandatory for the claimant and breaches any of its duties owed to the claimant as principal, the member could become personally liable for the breach because he was acting as a mandatory for the claimant, not as a member of the LLC.<sup>168</sup>

The Court’s second example considers a scenario where a member acts as an undisclosed agent for the LLC. The opinion states that when a member–agent fails to disclose that he is acting on behalf of the LLC, the member can become “personally liable for the contracts that he negotiates on his principal’s behalf”<sup>169</sup> because he or she is “acting ‘outside’ the structure of an LLC.”<sup>170</sup> Both of these examples tip the scales toward a finding of personal liability for the member, but only after weighing the other three factors as well.<sup>171</sup>

As to this factor, the Court found that Merritt was acting in his capacity as a member at all relevant times, which weighed against finding him personally liable for the damage to the home.<sup>172</sup> *Ogea* knew that the contract was between herself and Merritt LLC, not Merritt personally; therefore, no issue existed as to whether Merritt was acting as an undisclosed mandatory or outside of his capacity as a member.<sup>173</sup>

#### 4. *Limitations and Holding*

In concluding its opinion, the Court was careful to limit its application. *Ogea* stated that members can still personally obligate themselves to a contract, which would always result in personal liability if the member breached that contract.<sup>174</sup> The Court also stated that parties to construction contracts may still secure performance bonds to protect the client if the contract is not completed satisfactorily.<sup>175</sup> The Court then reversed the portion of the appellate court decision holding Merritt personally liable for the damage to the home and affirmed the remainder of the issues on appeal.<sup>176</sup>

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167. *Id.* at 904–05.

168. *Id.* at 904.

169. *Id.* at 905 (quoting *MORRIS & HOLMES*, *supra* note 5, § 33.04, at 105–06).

170. *Id.*

171. *Id.*

172. *Id.* at 906.

173. *Id.*

174. *Id.* at 907.

175. *Id.*

176. *Id.*

The Court's opinion interprets Revised Statutes section 12:1320 as providing both a general rule of limited liability in Subsection B and exceptions to that rule for the theories listed in Subsection D.<sup>177</sup> *Ogea* creates four factors for determining whether particular actions of a member constitute one of the exceptions to limited liability.<sup>178</sup> Despite its best efforts to clear up this area of law, the Court created immense uncertainty and confusion for LLC members trying to anticipate the circumstances under which they may be held personally liable when acting in connection with the LLC.

#### IV. MISGUIDED STATUTORY DRAFTING LEADS TO MISGUIDED INTERPRETATION

The legislature's attempt at an overly protective statute led the Louisiana Supreme Court to create an ambiguous and uncertain test for determining the personal liability of LLC members. The Court attempted to perform a restrained statutory analysis only to misinterpret the statute and to insert in its place the Court's own "four factor" test, which calls for lower courts to combine the policies of numerous distinct bodies of law in an indeterminate manner. This misinterpretation partially is due to the overly broad and ambiguous scope of Revised Statutes section 12:1320. Applying the Supreme Court's exceptions and factors may lead to situations in which a court may impose personal liability when it otherwise should not or, conversely, situations in which a court may not impose personal liability when it otherwise should. In addition, *Ogea* created numerous policy issues needing resolution. Regardless of its genesis, the *Ogea* decision clearly creates a myriad of problems for LLC owners, most importantly uncertainty as to their exposure of personal liability in conducting business.

##### *A. How the Problems with Revised Statutes Section 12:1320 Led to Ogea*

The Supreme Court's *Ogea* decision has led to a huge disparity between the state's LLC law and traditional limited liability law. The legislature's drafting of Revised Statutes section 12:1320 led to the problems with the Supreme Court's overall general rule–exception framework, and the Court's exceptions and factors have created specific issues that the legislature did not anticipate.

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177. *Id.* at 896–97.

178. *Id.* at 900–01.

*1. The Overreaching Drafting of Revised Statutes Section 12:1320*

The drafters of Revised Statutes section 12:1320 attempted to make the statute more inclusive than necessary from the start. Subsections A and B state that the LLC chapter of the Revised Statutes exclusively governs the personal liability of “members, managers, employees, [and] agents” of LLCs.<sup>179</sup> The legislature’s attempt, however, to determine the liability of managers, employees, and agents is unnecessary. A correct application of the traditional limited liability shield only protects *members* from personal liability for debts or obligations of the business that arise solely because they are owners.<sup>180</sup> Applying the shield to non-owners of the business is unnecessary because no “tenet of law” exists to extend liability to those categories of people for debts of the business in the first place.<sup>181</sup> In contrast, both the old and new versions of the corporate statute purport to determine the liability only of corporate shareholders, not anyone else associated with the corporation.<sup>182</sup> The original language of the statute shows how protective the drafters intended the statute to be. Although the legislature may have fixed one problem with its language, the remaining concerns surrounding the statute not nearly resolved.

Another example of the legislature’s overreaching attempt to cover all possible personal liability theories can be seen in Revised Statutes section 12:1320’s original language. Without the scope-limiting language “as such” and “in such capacity” in Subsections A and B, the first version of the statute provided only that LLC law exclusively determines the liability of LLC members at all times.<sup>183</sup> Under this language, whether a member,

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179. LA. REV. STAT. ANN. § 12:1320 (2010).

180. *See supra* Part I.B.

181. BISHOP & KLEINBERGER, *supra* note 13, ¶ 6.01[4]; *see also* LA. REV. STAT. ANN. § 12:1-140(15C)(a) (2015) (defining “owner liability” as “personal liability for a debt, obligation, or liability of a domestic or foreign business or nonprofit corporation or unincorporated entity that is imposed . . . [s]olely by reason of the person’s status as a shareholder, partner, member, or interest holder”).

182. LA. REV. STAT. ANN. § 12:1-622(B); LA. REV. STAT. ANN. § 12:93 (2010) (repealed 2014).

183. Act No. 475, 1993 La. Acts 1177, 1183. The original language of the statute is reproduced below with the amended portions in brackets:

A. The liability of members, managers, employees, or agents[, as such,] of a limited liability company . . . shall at all times be determined solely and exclusively by the provisions of this Chapter.

B. Except as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable [in

employee, manager, or agent of an LLC could be liable for personal obligations, such as a home mortgage was unclear, because nothing in the LLC provisions created liability for these categories of people for any personal contracts.<sup>184</sup> To quell these concerns, the legislature added the words “as such” and “in such capacity” so that now the statute “governs exclusively unless it doesn’t.”<sup>185</sup>

The exclusivity provision of Revised Statutes section 12:1320 is also responsible for many of the statute’s shortcomings.<sup>186</sup> The language is unnecessary because the legislature had no reason to attempt to place all possible theories of personal liability into a single statutory provision. Corporate law makes no attempt to do so, and courts consistently find shareholders personally liable for their own liabilities and debts without even referring to the corporate limited liability provision.<sup>187</sup> The courts reach this result by leaving the determination of personal liability—outside of piercing the corporate veil—to other bodies of law that give rise to personal liability for shareholders.<sup>188</sup>

Despite the legislature’s apparent best efforts to create a pro-business statute that limits the liability of those associated with LLCs to the furthest extent possible, the superfluous language has actually backfired and created much uncertainty for LLC members. The unnecessary language forced the Supreme Court to generate a new test in *Ogea* that potentially destroys one of the most important advantages the entity is designed to offer.

## 2. *The Overreaching Language Leads to Ogea’s General Rule-Exception Framework*

In *Ogea*, the Court’s general rule of no liability and three exceptions—fraud, breach of professional duty, and negligent or wrongful acts—derive

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such capacity] for a debt, obligation, or liability of the limited liability company.

*Id.*; see also *supra* Part II.

184. See MORRIS & HOLMES, *supra* note 5, § 44.06, at 495.

185. See *id.*

186. See *infra* Part IV.A.2.

187. Courts consistently find liability for personal contractual obligations, under agency principles, see, e.g., *C.T. Traina Plumbing & Heating Contractors, Inc. v. Palmer*, 580 So. 2d 525 (La. Ct. App. 1991), and for tort liability, *U.S. Fid. & Guar. Co. v. Ledford*, 244 So. 2d 252 (La. Ct. App. 1971); see also MORRIS & HOLMES, *supra* note 5, §§ 33.01 to 33.13.

188. See *supra* Part I.B (providing an application of the limited liability shield).

from language found in Revised Statutes section 12:1320.<sup>189</sup> Ideally, the Court would not have viewed the no-derogation provision in Subsection D as creating exceptions but instead would have treated that provision as referring to separate and distinct legal theories. The reason for the Court's use of these separate causes of action as exceptions and its creation of factors, however, is readily apparent. Because the statute commanded the Court not to look outside of LLC laws when determining personal liability, the Court sought to ensure that members and others associated with an LLC could not escape personal liability simply because the statute did not expressly provide for liability under a particular theory. In an attempt to preserve liability for members, employees, managers, and agents under all of the traditional theories of recovery, the Court combined several bodies of law into one indeterminate and confusing test. In actuality, each of the "exceptions" and the four "negligent or wrongful act" factors are standalone legal theories that should result in personal liability for an LLC member without reference to a framework or test, as they would under corporate law.<sup>190</sup>

The source of the Court's "exceptions"—Subsection D—is completely unnecessary, making the Court's erroneous interpretation even more frustrating. The legislature simply copied the no-derogation provision from the professional corporations statutes to avoid an apparent disconnect.<sup>191</sup> The provision was only placed in the professional corporation statutes to ensure that liability for professionals would not change simply because they were providing services through a corporate, limited liability entity.<sup>192</sup> Essentially, the legislature wanted to assure the public that professionals, such as doctors and lawyers, would still be liable for malpractice despite performing their services through a corporation—which would have been true even without this language.<sup>193</sup> The statutory

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189. See *Ogea v. Merritt*, 130 So. 3d 888, 896–97 (La. 2013).

190. See RIBSTEIN & KEATINGE, *supra* note 28, § 12:4; *supra* Part IV.A.3; *supra* Part I.B (explaining that the limited liability shield does not protect owners from personal liability from their own personal conduct).

191. See *supra* Part II.

192. See MORRIS & HOLMES, *supra* note 5, § 42.06, at 454–55. The no-derogation provision does not tempt courts to treat the theories of recovery as "exceptions" in the professional corporation context because those statutes do not contain an exclusivity provision. See, e.g., LA. REV. STAT. ANN. § 12:807 (2010).

193. Just as non-professional corporate shareholders remain liable for the torts they commit in connection with their businesses, professionals remain liable for malpractice despite performing their services through a corporation. See, e.g., LA. REV. STAT. ANN. § 12:807(C); see also MORRIS & HOLMES, *supra* note 5, § 42.06, at 454–55.

preservation is superfluous because the limited liability shield does not protect from this type of personal obligation in the first place.<sup>194</sup>

Similarly, the duplication of this language in the LLC statute is not necessary because Subsection B purports to shield members only from liability for debts or obligations of the LLC.<sup>195</sup> On the other hand, Subsection D and the professional corporations statutes attempt to do nothing more than preserve a member or shareholder's personal liability for their own debts and obligations. The provisions preserve rights that a claimant may have "against a member" and are silent as to any rights that the person may have against the LLC.<sup>196</sup> Clearly, this subsection is excessive because no statute attempts to limit the liability that it preserves in the first place.

Further, the theories of liability the Court used to formulate its exceptions and factors are, in fact, not exceptions to the limited liability shield at all. They are completely separate and distinct theories of recovery that create personal liability for the member because of his or her own actions, not liability for a debt of the entity.<sup>197</sup> The key inquiry is whether the member would be liable if he or she were simply an employee or agent of the LLC and not an owner.<sup>198</sup> This inquiry is much clearer as articulated in corporate law, where Revised Statutes section 12:1-622 simply states that shareholders are not liable for the debts of the corporation.<sup>199</sup> No interpretation problems exist there because the statute does not contain a no-derogation provision preserving liability for any theory or limiting a shareholder's personal liability to a particular chapter of the Revised Statutes.<sup>200</sup>

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194. *See supra* Part I.B.

195. LA. REV. STAT. ANN. § 12:1320(B) ("Except as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.").

196. *Id.* § 12:1320(D) (emphasis added).

197. These theories include torts, contracts, agency, and other traditional theories of recovery. *See supra* Part I.B.

198. *See supra* Part I.B.

199. *See* LA. REV. STAT. ANN. § 12:1-622(B) (2015).

200. In cases adjudicating the personal liability of corporate shareholders, courts proceed directly to these traditional theories of recovery without having to analyze a statute or navigate any test. *See, e.g.,* H. B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9 (La. 1975) (analyzing tort liability of a corporate shareholder); Chaney v. Godfrey, 535 So. 2d 918 (La. Ct. App. 1988) (analyzing liability of corporate shareholders under agency theories); Donnelly v. Handy, 415 So. 2d 478 (La. Ct. App. 1982).

Take, for example, the breach of professional duty exception. A member is liable for his or her own torts regardless of whether the actions are committed in connection with the business.<sup>201</sup> A breach of a professional duty should result in a malpractice claim against the member, and he or she should be held personally liable to the third party as a tortfeasor regardless of the member's status as owner.<sup>202</sup> The limited liability protections merely shield a member from liability for debts of the business and so are not implicated because the professional is personally liable for his own misconduct.

Based on the language of the statute, the idea that the legislature intended for courts to use the reservations in Subsection D as an exclusive list of exceptions to the limited liability shield seems plausible. What seems more likely is that the statute was simply an overreaching attempt to protect members from personal liability in situations to which the limited liability shield would normally not apply. The legislature likely—and unwisely—was attempting to make holding a person connected with an LLC personally liable for any act taken in connection with the business impossible.<sup>203</sup> But the legislature, feeling compelled to include Subsection D's no-derogation provision, created another possible interpretation. Interpreting Subsection D as providing a list of exceptions to a general rule rather than separate theories of liability results in an analysis out of touch with the plain meaning of the statute and traditional limited liability law.

In that sense, almost all of the Court's interpretation misconstrues the plain language of Revised Statutes section 12:1320, although the language itself does not conform to the traditional scope of the limited liability shield. The no-liability provision—Subsection B—does not create a “general” or absolute rule against members for personal liability for actions taken in connection with the business; rather, that provision merely protects them from personal liability for debts of the business. The no-derogation provision, instead of providing exceptions to the no-liability provision, merely states that the statute should not affect a member's liability for his personal actions, seemingly clarifying the scope of Subsection B. When the exclusivity provision is added to the equation, however, the reason why the Court chose to create the *Ogea* test becomes obvious—to preserve the typical theories under which owners of limited liability entities can become personally liable for actions taken in connection with the business.

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201. See *supra* Part I.B.

202. See RIBSTEIN & KEATINGE, *supra* note 28, § 12:4; see also *supra* Part I.B.

203. Of course, this cannot be true as these people can clearly be held personally liable under other bodies of law—for instance, tort. See *supra* Part I.B.

In essence, the Court had two evils to evaluate: (1) interpret the plain language of the statute correctly and (2) leave gaps in personal liability from the statute's poor drafting or misinterpret the language in an attempt to cover all theories of personal liability. Had the Court interpreted the plain language of the statute correctly, a member would not become liable for, say, acting as an undisclosed agent because nothing in the LLC chapter of the Revised Statutes imposes liability on a member for that type of action. Therefore, the Court was essentially forced to house all of these theories in one test under the statute. Although the Court may have acted with the best of intentions, the new analysis is legally unsound and creates numerous potentially incorrect applications.

### *3. The Negligent or Wrongful Act Factors*

In addition to the issues with the overall framework, many problems are specifically presented within the negligent or wrongful act exception. The Court's use of separate forms of liability as mere factors weakens the legal effects of those theories. For instance, if a claimant can prove all elements of a tort or has a restitution claim against a member of an LLC, the claimant should be able to bring the claim and succeed in recovery. Under *Ogea*, however, the tort or crime is now just one part of a four-factor test, so proof of the theory of recovery will not automatically result in liability for the member. Other than the general problems that result from using standalone legal theories as "factors," each of the "factors" present unique complications.

#### *a. The Tort Factor*

Much of what the Court says about the tort factor is correct under the traditional limited liability shield—specifically the focus on the presence of a personal tort duty. Besides a tort actually being a separate legal theory, two problems with this factor persist. First, the Court is unclear as to whether a claimant must prove all elements of tort or only a duty and breach. Making the tort analysis merely a "factor" implies that a claimant should not have to prove all elements of a tort to find the factor present. If the Court intended to require claimants to establish all elements of a tort, no justification would exist to make torts a "factor" and not deem them standalone theories of recovery. If proof of only a duty and a breach of that duty is necessary, however, a court could hold a member personally

liable without the claimant having to prove an entire legal theory upon which to impose the liability.<sup>204</sup>

Second, the Court should have been more careful when discussing the legal ramifications of Merritt's poor workmanship. The Court did not find the tort factor present because Ogea only proved poor workmanship arising out of a contract, which amounts to a breach of contract, not a tort.<sup>205</sup> Poor workmanship may, however, constitute a tort if the actor is a professional; in those situations, poor workmanship becomes malpractice because professionals owe a special tort duty to their hirers.<sup>206</sup> For example, if a doctor or lawyer performs his or her work poorly, that doctor may become liable for malpractice as a tort, even though the doctor is actually acting in furtherance of a contract with a client or patient.<sup>207</sup> This tort is a result of the professional duty, and without that professional duty in *Ogea*, the Court correctly determined that no tort had occurred.

*b. The Criminal Conduct Factor*

The criminal conduct factor is equally perplexing. The Court uses two misguided justifications for the factor and does not require the crime to be the cause of the claimant's damages. First, the Court was unclear what legal theory creates the basis for finding liability under this factor. Using a criminal statute as a standard for determining a duty as part of a tort analysis does not justify another "factor." Instead, a court could simply fit the criminal statute into its tort analysis and hold the defendant personally liable under tort law or find the tort factor present. Further, if the criminal statute at issue in a given case expressly provides for restitution, then a court should use that statute rather than Revised Statutes section 12:1320 to provide a basis for the member's personal liability because the statute

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204. Additionally, the Court used unfortunate language in its first listing of the negligent or wrongful act factors when it stated that one of the factors is whether the conduct "could be fairly characterized as a traditionally recognized tort." *Ogea v. Merritt*, 130 So. 3d 888, 900 (La. 2013). This language seems to suggest that the Court requires only proof of "tort-like" conduct, without proof of an actual tort duty, or other elements of a prima facie case, to find the tort factor present. This may seem like a trivial point because the Court clarified that at least a tort duty and breach were required. Subsequent decisions, however, have quoted only this "tort-like" language when analyzing the negligent or wrongful act exception and stated nothing about a tort duty. *See, e.g., Nunez v. Pinnacle Homes, L.L.C.*, 158 So. 3d 71, 77 (La. Ct. App. 2014) (Amy, J., dissenting).

205. *Ogea*, 130 So. 3d at 905–06.

206. 65 C.J.S. *Negligence* § 160 (2010).

207. *See, e.g., LA. REV. STAT. ANN.* § 12:807(C) (2010); *see also* MORRIS & HOLMES, *supra* note 5, § 42.06, at 454–55.

in no way limits the member's liability for personal debts and obligations.<sup>208</sup> Using a restitution provision in a criminal statute or using a statute as a "duty" in a tort analysis are completely separate theories of recovery housed outside of business entity law, not "exceptions" to the limited liability shield or "factors" in any analysis. These theories should have no place in an analysis under Revised Statutes section 12:1320. In addition, the Court only stated that the case and crime should be "related" but did not require the crime to be the *cause* of the harm.<sup>209</sup> This ambiguity could result in crimes only tangentially related to the harm serving as the basis of personal liability for an LLC member.

*c. The Contract and Capacity Factors*

Like the tort and criminal conduct factors, the Court's contract and capacity factors should not be conceptualized as factors because they are standalone theories of recovery. The contract factor represents the Court's attempt to prevent a member from being liable for breaches of duties that the LLC owes to the claimant pursuant to a contract to which it alone is a party.<sup>210</sup> The capacity factor is simply an attempt by the Court to ensure that its new framework covers agency theories—such as undisclosed mandate—and obligations that a member personally guarantees or those for which he or she personally contracts. A court's focus, however, should not be on what "capacity" the member was acting in, but whether the member or other affiliated person owed any personal duties to the claimant.<sup>211</sup> The language of Revised Statutes section 12:1320 again led the Court to include these theories as mere factors in what it views as a universal scheme of personal liability for members.

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208. The Court's decision to use the contractor's licensing statute to illustrate the "criminal conduct" factor is also troubling. The relevant statute does not itself provide for restitution, LA. REV. STAT. ANN. § 37:2160 (2007 & Supp. 2015), and the Court does not state that the statute would be used as a tort "duty." *Ogea*, 130 So. 3d at 902–03. The Court essentially created a new theory of liability based on an ill-defined way on the premise that an LLC member violated a criminal statute.

209. *Ogea*, 130 So. 3d at 903 n.13.

210. *See, e.g.,* *Donnelly v. Handy*, 415 So. 2d 478, 482 (La. Ct. App. 1982) (holding that a corporate shareholder was not personally liable for the poor work he completed in furtherance of his corporation's contract because the corporation had the contractual duty, not the shareholder); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734, 742 (La. Ct. App. 2008) (Caraway, J., concurring in part and dissenting in part).

211. *See supra* Part I.B; *supra* Part III.A.2 (discussing cases using the "capacity" factor).

Further, the Court's undisclosed agency example is troublesome.<sup>212</sup> A traditional analysis would simply show that under the law of mandate, the member is personally liable for the contractual duty because the member acted as an undisclosed agent.<sup>213</sup> Failure to disclose his or her status as an agent is the cause of liability, not the capacity in which the person was acting.<sup>214</sup> Revised Statutes section 12:1320 is not implicated in these situations because the member is being held liable for a personal debt, not one belonging to the business. The problems with these two factors, along with the other factors and exceptions, create immense uncertainty and potentially lead to extreme misapplications of the traditional limited liability shield.

### *B. Potential Applications of the Court's Ruling*

The problems with the statute and opinion become even more apparent when analyzing potential applications of the Court's test. Under certain circumstances, a court may find no personal liability for a member under *Ogea* when that member normally would become liable under traditional legal theories. For example, consider a situation where a member making a delivery for his LLC strikes a pedestrian with his automobile.<sup>215</sup> The member owes a personal duty to the pedestrian not to hit her. If the pedestrian can prove the remaining elements of a tort, then under traditional limited liability law, the member will be personally liable to the pedestrian for the damages he causes in the accident, regardless of his ownership interest.<sup>216</sup> Limited liability under Revised Statutes section 12:1320(B) is not implicated because the liability is personal and not a liability of the business.

But, under the *Ogea* analysis, a court would have to determine whether an "exception" to limited liability was met. Analyzing the "negligent or wrongful act" exception, the "tort" factor would be present. The member, however, did not commit any crime, was acting in furtherance of the

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212. *Ogea*, 130 So. 3d at 905.

213. See LA. CIV. CODE art. 2320 (2015); see also MORRIS & HOLMES, *supra* note 5, § 33.04, at 105–07.

214. An undisclosed agent may in fact be acting in his capacity as an agent of the LLC, but the third party has no knowledge of that, hence the resulting personal liability. Further, a tortfeasor employee may be acting in his capacity as an employee, but should still be liable in an automobile accident that his negligence caused. See *Narcise v. Ill. Cent. Gulf R.R. Co.*, 427 So. 2d 1192, 1194 (La. 1983); see also CRAWFORD, *supra* note 42, § 8:2, at 134–35.

215. See *supra* Part I.B.

216. See *supra* Part I.B.

LLC's contract to deliver the package, and was acting in his capacity as member and employee of the LLC. Three factors would weigh against holding the member personally liable, and one factor would weigh in favor of liability. Because, as the Court stated, no single factor is automatically dispositive, a court could easily find no personal liability existed in this situation even though the member should clearly be personally liable under traditional tort law.<sup>217</sup>

Conversely, a court applying *Ogea* may find a member personally liable when that member would not be under traditional legal theories. For example, consider a member, whose driver's license expired the previous day, striking a pedestrian with his car after driving through a malfunctioning stop light on his way home from work. Imagine that in a suit against the member, the claimant cannot prove causation—a required element in negligence tort cases<sup>218</sup>—because the city's broken traffic light caused the accident. Under a proper analysis, the member would not be liable to the claimant because the claimant cannot prove a legal theory upon which to base a recovery.

But under *Ogea*, a court could determine that the member's actions were criminal because he was driving with an expired license, were not in furtherance of an LLC contract because he was going home, and were not taken in his capacity as a member of the LLC because he was not working. A court could hold a member liable for the damages by finding three out of four factors under the "negligent or wrongful act" exception even though no traditional legal theory exists under which to hold the member liable. Although a court may be unlikely to do this, but given that the claimant would have been one element short of proving a tort, this result is certainly possible under *Ogea*. Courts have the ability to weigh the individual factors in any way they see fit, which, as these examples illustrate, makes the test inherently subjective and unpredictable. However unlikely these potential applications may be, the uncertainty of how the cases would be decided is the true problem with *Ogea*.

### C. Policy Problems Created by *Ogea*

Aside from the specific problems with the framework and factors, the *Ogea* decision creates some broader policy concerns. First and most

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217. Although *Ogea* stated that the tort factor may be dispositive, a court is not required to find liability automatically if all of the elements of a tort are proven. *Ogea*, 130 So. 3d at 905.

218. See *Morris v. Orleans Parish Sch. Bd.*, 553 So. 2d 427, 429 (La. 1989) (“[T]he elements of a [tort] cause of action are fault, causation, and damage.”); see also CRAWFORD, *supra* note 42, § 4:6, at 82–84.

importantly, the decision creates large amounts of uncertainty for LLC owners, who are now unsure under what circumstances a court may hold them personally liable for the debts of the business. Ideally, courts would provide LLC members with the same certainty that they give to corporate shareholders—no personal liability for debts of the business unless the corporate veil is pierced.<sup>219</sup> The Louisiana Supreme Court’s interpretation of Revised Statutes section 12:1320 casts doubt on one of the major advantages LLCs were intended to provide to their owners.<sup>220</sup>

The Court’s “factor” test, which determines whether a member’s actions meet the “negligent or wrongful act” exception, is too ambiguous. This test allows courts to hold LLC members personally liable without fully proving any one theory of recovery.<sup>221</sup> The test incorrectly introduces several completely distinct bodies of law into business entity law. When a court is deciding whether a member should be personally liable for his or her actions, that court should use the policies of that particular body of law, such as contracts, torts, or agency. *Ogea* combines all of these policies and doctrines into one “test.” This improper merger of unique bodies of law appears ill advised; in theory, a judge should have tort policies in mind when deciding whether a member owes a personal tort duty to a claimant, not contract or agency policies. The “factor” test bleeds these areas of law together and makes unclear under which theory a court is holding a member liable or if the court is finding liability without proof of all elements of any theory.<sup>222</sup>

The Court’s framework of using the no-derogation provision in Subsection D as exceptions to a general rule of limited liability creates numerous problems. That framework misinterprets the plain language of Revised Statutes section 12:1320 and in doing so transforms numerous standalone theories of recovery into either an exception or one of four factors in a test. The language in the poorly written LLC statute is the most prominent cause, however, because that language led the Court to believe that its opinion had to encapsulate all possible theories of recovery for actions taken in connection with an LLC in one all-encompassing test. The problems with the statute, along with the *Ogea* decision and its potential applications, make changes to LLC law absolutely necessary.

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219. *Smith v. Cotton’s Fleet Serv., Inc.*, 500 So. 2d 759, 761–63 (1987); *see also* MORRIS & HOLMES, *supra* note 5, § 33.01, at 50–52.

220. *See supra* Part I.A.

221. *See supra* Part IV.B (providing examples of potential problems with the factor test).

222. *See supra* Part IV.B (providing an example of how a court could find personal liability without proof of an entire legal theory of recovery).

## V. WHY THE LEGISLATURE MUST MIRROR THE LLC AND CORPORATE STATUTES

To alleviate the errors and concerns arising from the Supreme Court's *Ogea* decision, the Louisiana Legislature should amend Revised Statutes section 12:1320 to mirror Revised Statutes section 12:1-622(B), the parallel corporate statute. The legislature could not have intended for courts to treat LLC members and shareholders differently, but the Court's *Ogea* decision yields exactly that result. Leaving the lower courts to trudge through the Supreme Court's extremely amorphous decision threatens the financial stability of LLC owners because of the extreme uncertainty surrounding the potential outcomes under the test in any number of scenarios.

If the legislature were to mirror the corporate statute, lower courts could easily analogize to liability decisions involving corporate shareholders. No justification exists to treat the two entities differently with respect to owner liability,<sup>223</sup> and the only reason that courts have done so is because of the language of Revised Statutes section 12:1320.<sup>224</sup> LLCs pose the same risks to persons affected by the limited liability rule as corporations. A third party is not concerned with whether the business with which the third party is interacting with is an LLC or a corporation because the third party likely believes its rights against the owners of each are the same.

Mirroring the corporate and LLC statutes would clarify to courts that the owners of the two business entities should be equally protected and would allow courts determining the personal liability of LLC owners to more easily use corporate cases as a guide. Because LLCs are the fastest growing type of entity in the state,<sup>225</sup> this analogy would allow limited

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223. *See Ogea v. Merritt*, 130 So. 3d 888, 901 (La. 2013) ("LLCs are not different from corporations in any sense that would justify a different approach to such questions of personal liability." (quoting *MORRIS & HOLMES*, *supra* note 5, § 44.06, at 495)); *Petch v. Humble*, 939 So. 2d 499, 505 (La. Ct. App. 2006) (applying principles from a case analyzing personal liability of corporate shareholders to determine personal liability of LLC members).

224. *See Ogea v. Merritt*, 109 So. 3d 516, 522 (La. Ct. App. 2013) (holding that the legislature intended the two types of owners to be treated differently based on language in the LLC chapter); *see generally Ogea*, 130 So. 3d 888 (creating a test for member personal liability based on the language on Revised Statutes section 12:1320).

225. *Chrisman*, *supra* note 16, at 475–76 (noting that 82% of new domestic business filings in Louisiana were for LLCs between 2004 and 2007); *Friedman*, *supra* note 16, at 37 (noting that 72% of business filings in Louisiana were for LLCs in 2003).

liability shield law<sup>226</sup> to develop even more quickly, as many more LLC cases are bound to appear on dockets. Mirroring the statutes would render most of the current jurisprudence interpreting Revised Statutes section 12:1320 useless, providing the advantage of ridding the law of these incorrect applications of the limited liability shield.<sup>227</sup> The portions of those decisions that were correct would still be applicable, and the portions that were not—such as the “general rule-exception” framework and the “capacity” factor—would be eliminated completely. Courts should instead apply the mass of prior corporate shareholder liability jurisprudence in the LLC context because cases have correctly determined the liability of corporate shareholders for years.<sup>228</sup>

Although the intent of this amendment would be to mirror the corporate liability rules, removing only Subsection D—the no-derogation provision—could cause courts to believe that the legislature intended to protect LLC members from tort claims for breaches of professional duties. In some ways, this assumption would be reasonable because the preservation language would be present in the professional corporation statutes but removed from the LLC statutes, creating an obvious difference between the two. To dispel this concern, the legislature should simply add a reference to the professional corporation statutes in the new version of Revised Statutes section 12:1320.<sup>229</sup> The ideal statute should read:

A member of an LLC is not personally liable for the acts or debts of the LLC. This section does not affect the personal liability of any member for a breach of a professional duty if the member meets the qualifications for exercising share voting power in, or participating in the earnings of, any form of professional corporation authorized in Title 12.<sup>230</sup>

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226. By providing identical statutes for both corporations and LLCs, the courts could easily analogize between cases involving different entity types. The result would be one collection of jurisprudence that applies equally to both corporate shareholders and LLC members, hence the designation “limited liability shield law.”

227. See *supra* Part III.A.2 (discussing the Louisiana jurisprudence pertaining to personal liability of LLC owners before *Ogea*).

228. See, e.g., *H. B. “Buster” Hughes, Inc. v. Bernard*, 318 So. 2d 9, 12 (La. 1975); *Donnelly v. Handy*, 415 So. 2d 478, 482 (La. Ct. App. 1982).

229. This reference would also provide guidance on the question of which occupations are considered “professions” in the LLC chapter.

230. Only licensed members of the designated profession may exercise voting rights and share in the earnings of a professional corporation. See, e.g., LA. REV. STAT. ANN. §§ 12:805(B)(1), :801(A)(2)(a) (2010). The incorporation of this rule

Additionally, comments to the statute explaining the reasons for the change would be helpful to alleviate any concerns that a court may hold an LLC member liable for an obligation of the LLC if the member commits malpractice. Courts would not interpret the second sentence as creating “exceptions” to limited liability—as in *Ogea*—because the exclusivity language from the current statute would be completely eliminated.

There would also be no concern that courts would not be able to “pierce the company veil” despite the fact that veil piercing would not be expressly provided for in the statute. Neither the current LLC nor the corporate statute contains any mention of piercing the corporate veil,<sup>231</sup> yet courts have regularly employed the doctrine as a theory to create personal liability for both shareholders and members.<sup>232</sup> Courts have no reason to disregard this theory simply because it would not be in the revised version of Revised Statutes section 12:1320. In fact, there would be more justification for courts to use veil-piercing theories in LLC cases because the legislature would have clearly showed its intention for courts to place LLC members and corporate shareholders on equal footing with respect to liability.

#### CONCLUSION

One of the main purposes behind limited liability companies is to provide limited liability to members for the debts of the business. The Louisiana Supreme Court’s *Ogea v. Merritt* decision thwarts this advantage by circumventing the traditional method of determining personal liability of business owners protected by the limited liability shield. The decision is a direct result of the Court’s attempt to fit all possible theories of recovery into one test because of the legislature’s use of unnecessary language in Revised Statutes section 12:1320. The decision creates a vague and indeterminate test that combines, in undetermined portions, the policies of several bodies of law that should be kept separate from one another. Further, *Ogea* threatens the protections the legislature intended to provide LLC members

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into the LLC statute would ensure that the second sentence of the statute related to professional duties would only apply to professional LLC members.

231. See *id.* § 12:1320; *id.* § 12:93 (2010) (repealed 2014) (old corporate statute); LA. REV. STAT. ANN. § 12:1-622 (2015) (current corporate statute).

232. See, e.g., *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164 (La. 1991) (corporate case acknowledging the ability of claimants to “pierce the corporate veil” and citing only case law for authority); *Charming Charlie, Inc. v. Perkins Rowe Assocs., L.L.C.*, 97 So. 3d 595 (La. Ct. App. 2012) (LLC case acknowledging the possibility of piercing the veil of an LLC and citing only case law as authority).

and creates a mass of uncertainty for the fastest growing entity type in the state.

Therefore, the Louisiana Legislature should amend Revised Statutes section 12:1320 to mirror its corporate counterpart, Revised Statutes section 12:1-622(B). This amendment would abrogate the Supreme Court's *Ogea* decision and clarify that LLC members should be treated the same as corporate shareholders for purposes of personal liability. Louisiana courts have properly adjudicated personal liability for corporate shareholders previously, and analogizing LLCs to corporations would clear the uncertainty currently surrounding member liability. Louisiana has an important interest in protecting LLC members, and they should not be forced to put the fate of their financial livelihoods in the hands of a court applying a confusing and legally unsound test.

*Thomas Bourgeois\**

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