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1.1 - LLC Basics

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Jon Whitehead

June 20, 2014

LLCs per Missouri Revised Statute, Chapter 347

- ❖ An LLC may conduct or promote any lawful businesses or purposes within this state or any other jurisdiction



LLCs per Missouri Revised Statute, Chapter 347

- ❖ Statutory Requirements
 - ❖ Registered Agent / Registered Office
 - ❖ Articles of Organization
 - ❖ Operating Agreement

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1.2 — LLC Basics: From the Litigator's Perspective

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Jon Whitehead

June 20, 2014

The Civil Justice System exist to allocate money to unforeseen risks, when the parties did not anticipate it to be worthwhile to reach an agreement earlier.

— *Jon Whitehead's Sr. Partner*



LLC Basics: the Litigator's Perspective

Takeaway Points:

- From a liability standpoint, entities enable cooperation, by limiting certain kinds of liability.
- LLCs are modern, extremely flexible vehicles for businesses — compared to predecessors.



CAN BE DIFFICULT
FOR LAWYERS TO DESCRIBE



LLC vs.

- ❖ ... Nothing (Sole Proprietorship).
- ❖ Easy.
- ❖ Saved a few hundred dollars.
- ❖ Unlimited risk for personal assets caused by business mistakes.



LLC vs.

- ❖ ... Partnership.
 - ❖ Also easy — *verbal* agreement is sufficient.
 - ❖ Cooperating with others.
 - ❖ Saved a few hundred dollars in legal fees.
 - ❖ *Unlimited* risk for personal assets — for actions by you *and all of the partners*.



LLC vs.

- ❖ ... Corporations.
 - ❖ Pro
 - ❖ Cooperating with others.
 - ❖ Minimal risk for investors and coworkers.
 - ❖ Long history of predictable case law.
 - ❖ Con
 - ❖ Significant paperwork and registration burden.
 - ❖ Ongoing legal fees and annual meetings.
 - ❖ Inflexible structure.
 - ❖ Relatively limited tax options.



LLC Basics: the Litigator's perspective

Legal Magic

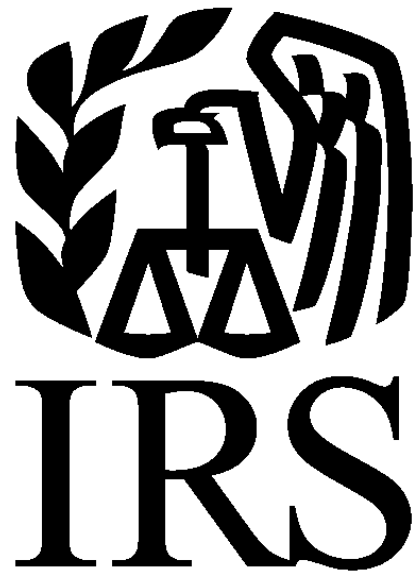
At relatively low cost, you can tell the Judge how to treat you and your money — if you do it far enough in advance.



1.3 – LLC Basics Taxation

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June 20, 2014



Taxation of an LLC

- Kintner Regulations
- Check the Box
- Partnership
- S Corp
- C Corp



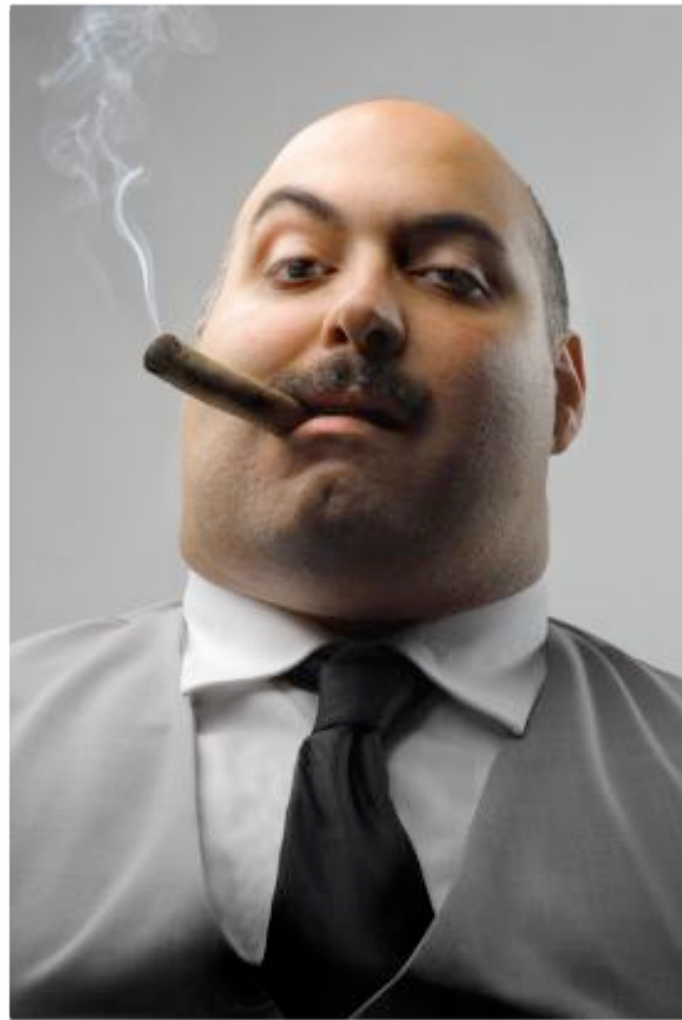
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1.4 — LLC Basics

Members vs. Managers

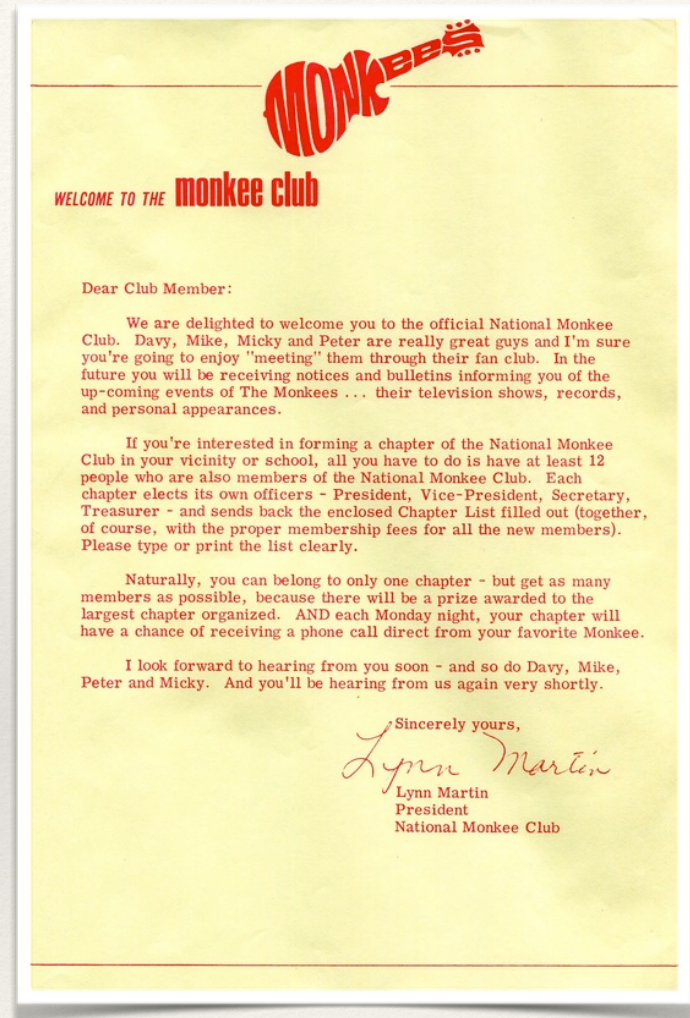
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“Manager”

VS.



“Member”

Member :

“... a party to the operating agreement at the time the limited liability company is formed and is identified as a member in that operating agreement...”

–*R.S.Mo. 347.015*

Manager:

“[if the] articles of organization state that management of the limited liability company is vested in one or more managers, the person or persons designated, appointed or elected as such...”

–*R.S.Mo. 347.015*

Those individuals or entities that hold an ownership interest in a limited liability company are designated as “members.”

“Managers,” on the other hand, are those individuals who may or may not be members of the LLC, but manage the LLC's operations.

– *Hibbs v. Berger*, ED100114, 2014 WL 1796755 (Mo. Ct. App. May 6, 2014)



https://www.legalzoom.com/assets/modals/modal-operating-agreements-sample-documents.html

Sample Documents

Select your state below for a representative sample document(s). Click on the link to view and/or download the document. Your final forms, documents and filings may differ depending on your state. NOTE: You will need Adobe® Acrobat Reader to view the document. Download the latest version [here](#).

Select state



Just a simple form



https://www.legalzoom.com/assets/modals/modal-operating-agreements-sample-documents.html

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Select state



Just a simple form

ARTICLE 4: MANAGEMENT

4.1 Management.

A. **Generally.** Subject to the terms of this Agreement and the [State] Limited Liability Company Act, the business and affairs of the Company will be managed by the Members.

Just a simple
form

4.2 Officers. The Company must have individuals exercising the functions of the offices, however designated, of chief manager and secretary. The Members are authorized to appoint one or more officers from time to time. The officers will have the titles, the authority, exercise the powers, and perform the duties that the Members determine from time to time. Each officer will continue to perform and hold office until such time as (a) the officer's successor is chosen and appointed by the Members; or (b) the officer is dismissed or terminated by the Members, which termination will be subject to applicable law and, if an effective employment agreement exists between the officer and the Company, the employment agreement. Subject to applicable law and the employment agreement (if any), each officer will serve at the direction of Members, and may be terminated, at any time and for any reason, by the Members. In the absence of an appointed chief manager or secretary, the person or persons exercising the principal functions of the chief manager or the secretary are considered to have been elected to those offices.

Just a simple
form

A danger of “Member” management:
liability as a participant

liability as a participant

A danger of “Manager” management: Securities Law

Howey Test

4-part test to determine an “investment contract” for 1933 Securities Act:

- investment of money due to
 - an expectation of profits arising from
 - a common enterprise
- which depends solely on the efforts of a promoter or third party

Unauthorized Practice of Law

- ❖ Practice of the law and law business defined.
- ❖ 484.010. 1. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.
- ❖ 2. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

1.4 - LLC Basics: Members vs. Managers

Takeaway Point:

- “Members” loosely are like shareholders.
- “Managers” loosely like Executives
- LLC flexibility can mean fact-specific determination of liability.
- Operating Agreement should clarify, not muddy, liability.
- Because of flexibility, almost impossible to avoid legal advice in choosing an LLC structure.



2.1 - Series LLCs

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June 20, 2014

Series LLCs

- ❖ Series LLCs were officially adopted in Missouri in 2013, so NO CASE LAW
- ❖ Requirements
 - ❖ Operating Agreement creates one or more series
 - ❖ Separate and distinct records are maintained
 - ❖ Assets accounted for separately from other series
 - ❖ Operating Agreement provides for limited liability
 - ❖ Notice of a series is included in the Articles of Organization
 - ❖ Articles of Organization separately identifies each series

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graph TD; A[Denker Law Firm LLC] --- B[Lex Launch, Series LLC]; A --- C[Legal Center for New Families, Series LLC]; A --- D[Criminal Law, Series LLC]; A --- E[Traffic Law, Series LLC]; A --- F[Bankruptcy Law, Series LLC]; A --- G[Real Estate Law, Series LLC];
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Lex Launch,
Series LLC

Legal Center for
New Families,
Series LLC

Criminal Law,
Series LLC

Traffic Law, Series
LLC

Bankruptcy Law,
Series LLC

Real Estate Law, S
eries LLC

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2.2 - Piercing the Veil & Litigation

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Jon Whitehead

June 20, 2014



"Shield"

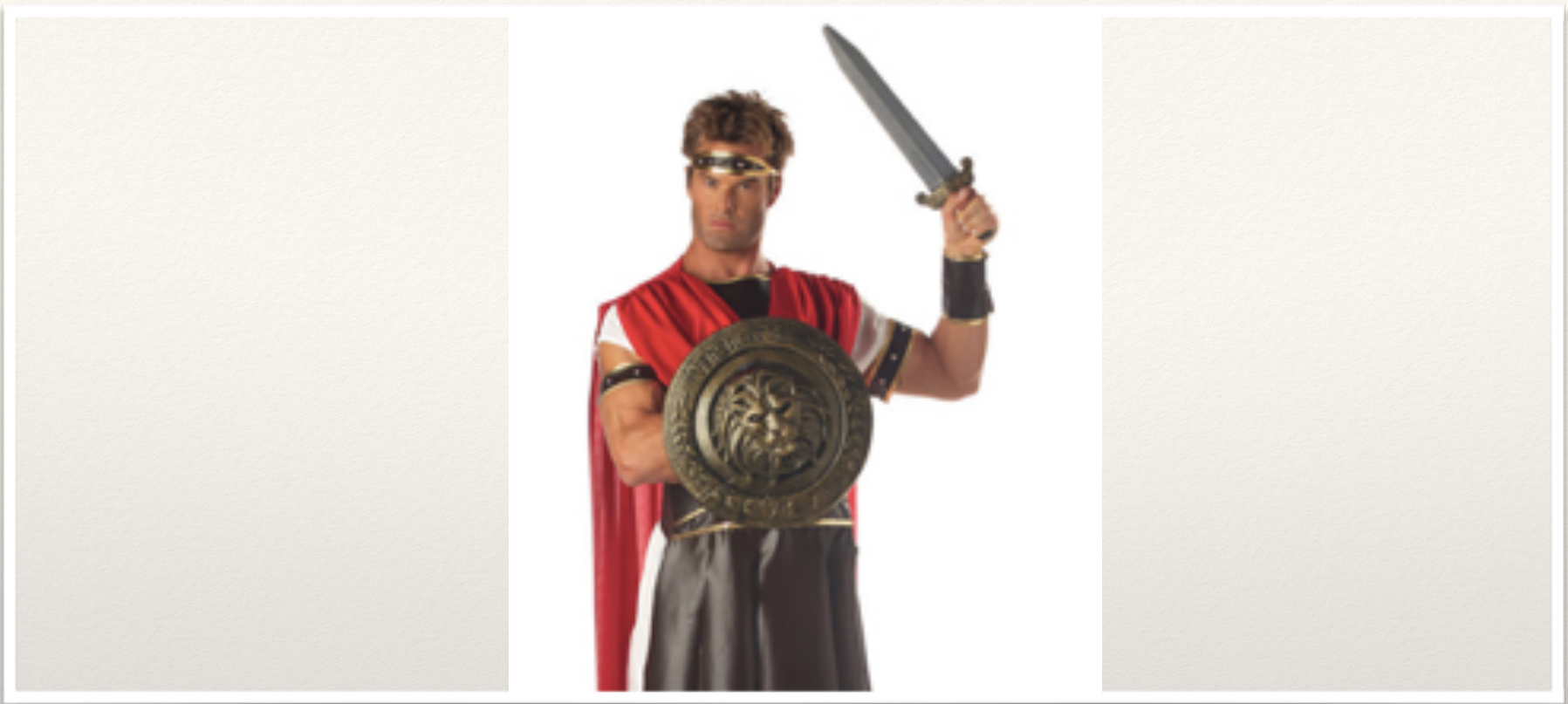
What Clients Think



at&t

Formerly Cingular Wireless LLC

What Clients Think



“Shield”

The legal protection
of a poor fit.



"Shield"

What Lawyers Think



"Shield"

Well trained users.
Correctly deployed in combat.
One of several tools in the
arsenal.



"Shield"

Correctly
deployed



"Shield"

Insurance

How to Defeat the LLC Shield

A Missouri court will disregard the entity and hold the owners liable if the following can be shown:

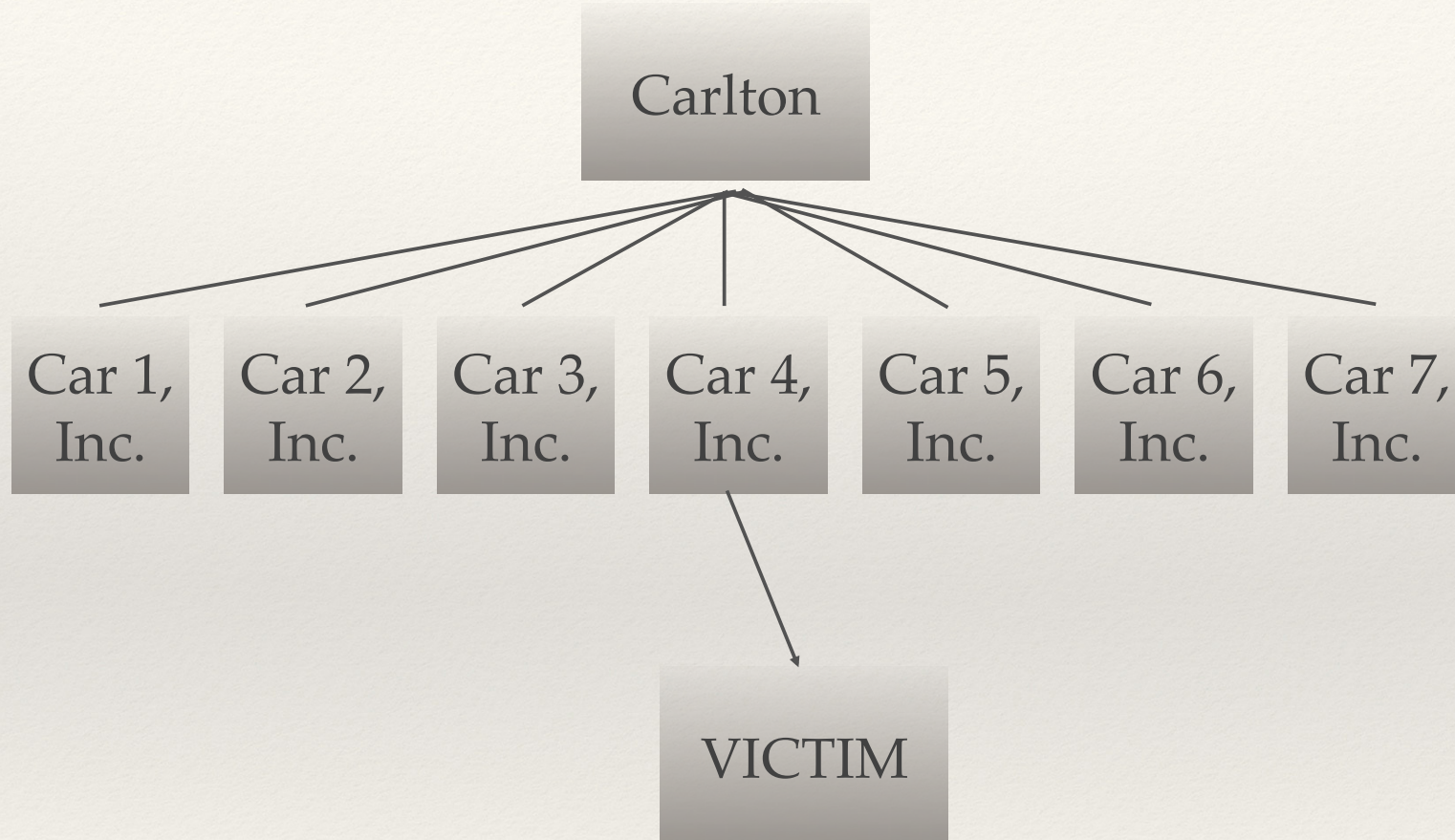
- 1) Control
- 2) A wrong
- 3) Causation

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.
2d 32, 40 (Mo. 1999)

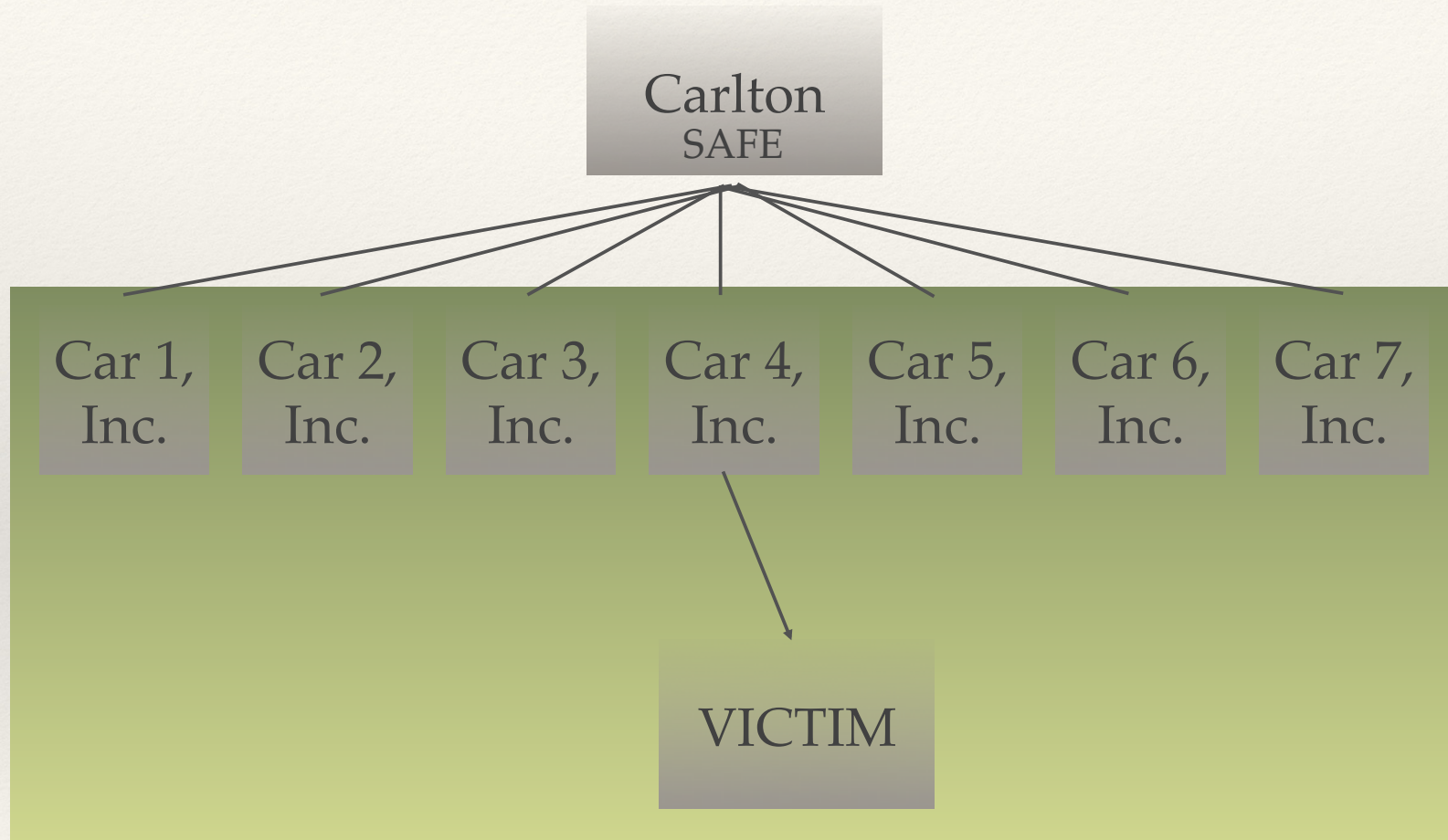
How to Defeat the LLC Shield

- ❖ Intentional misconduct
- ❖ Contract
- ❖ Taxes
- ❖ Co-mingling of funds
- ❖ Misrepresentation
- ❖ Personal Guarantee
- ❖ Domination
- ❖ Failure to observe formalities
- ❖ Tort vs. Contract
- ❖ Corporation vs. Individual

Walkovzky v. Carlton, 18 NY2d 414 (1966)



Walkovzky v. Carlton, 18 NY2d 414 (1966)



How to Defeat the LLC Shield

- ❖ *Mobius v. West*
 - ❖ 2001: Sublease, signed by West, for West Physician Search LLC (WPSLLC)
 - ❖ 2002: WPSLLC stops paying rent.
 - ❖ 2003: Consent Judgment: \$175,000 against WPSLLC, signed by West
 - ❖ 2004: Mobius sues West, personally.
 - ❖ Circuit Court rejects suit.

How to Defeat the LLC Shield

- ❖ Mobius v. West
 - ❖ 2005: Appeals Court reinstates suit, sends back for trial.
 - ❖ Notes:
 - ❖ West owned 80%
 - ❖ Paid employees with personal funds.
 - ❖ Two other members of West ran the company (Managers?) but they left before the consent judgment.
 - ❖ No corporate resolution authorizing the judgment — he did it on his own.
 - ❖ No corporate resolution authorizing the lease — he did it on his own.
 - ❖ inadequate capitalization (worse when assets are stripped)
 - ❖ No ledgers.
 - ❖ No more bank accounts.
 - ❖ The only reason Mobius has not been paid the money it is legally owed is because West lacks the necessary capital to satisfy this judgment.

2.2 - Piercing the Corporate Veil and Litigation

Takeaway Points:

- “Members” loosely are like shareholders.
- “Managers” loosely like Executives
- LLC flexibility can mean fact-specific determination of liability.
- Operating Agreement should clarify, not muddy, liability.



2.3 – Succession Planning

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Jon Whitehead

June 20, 2014

Planning for the Inevitable

- ❖ Goals
 - ❖ Ensure the business continues to run without you
 - ❖ Protect you and your family
 - ❖ Get value for your hard work



Eventually son, you'll be in charge of all this - assuming of course that I can't come up with any better alternative.

Planning for the Inevitable

- ❖ Buy-Sell Agreements
 - ❖ The purchase of a member's interest upon a qualifying event
 - ❖ 2 types
 - ❖ Cross-Purchase – Member buys out Member
 - ❖ Stock Redemption – Company buys out Member
- ❖ Individual Estate Planning

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2.4 - Dissolution & Sale to Others

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Jon Whitehead

June 20, 2014

Sales by Professionals

- ❖ Using LLC structure to provide stable income and increasing total sale price of the business.
- ❖ Use of LLCs where real estate is “stuck” in a C-Corp.



Regular Sales to Outsiders

- ❖ Mergers vs. Asset sales vs. Membership Sale



Forced Sale or Dissolution

- ❖ More common than many realize



Reasons for Small Company Litigation

- ❖ Greed
- ❖ Unanimous vote requirements
- ❖ Personality conflicts
- ❖ Marital and family discord
- ❖ Passive Members.
- ❖ Meddlesome members
- ❖ Death of the key member or manager
- ❖ Old age
- ❖ Need for promotion
- ❖ The Iron Fist
- ❖ "The Employees own it"
- ❖ It's a "family business."
- ❖ Majority rules!
- ❖ "Incentive" or "gift" shares.



2.4 - Dissolution and Sale to Others

Takeaway Points:

- LLCs can provide creative solutions to passing on real estate and other assets.
- Dispute and litigation is common, but seldom talked about.
- Operating Agreements should include provisions to reduce cost and harm of litigation.

