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Have you sabotaged your own LLC? Always seek legal counsel to guide you through complex laws

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Limited liability companies have become the entity of choice for owning and managing real estate due in large part to the relative ease in forming the entity and the flexibility in its structure, while still sharing the most appealing characteristics of a corporation: limited liability. As with corporations, the liability protection provided by an LLC is not absolute. Under certain circumstances, creditors and those wronged by the LLC may "pierce the corporate veil," making the owner personally liable.

After the New Hampshire Supreme Court's *Mbahaba v. Morgan* decision in 2012, we discussed in this space the case of an LLC owner being held liable due to his own actions, which were deemed independent of those of the LLC. Another circumstance in which an owner of an LLC may be personally liable is when he or she treats the LLC as his or her "alter ego." Although the N.H. Supreme Court has not expressly addressed this situation, it is likely that a court would pierce the corporate veil of an LLC if evidence is introduced proving that the LLC was operated merely as an extension of the owner's personal affairs, rather than as a separate legal entity. In such instances, it is within the court's discretion to find that the LLC is a sham and, in fact, it is the owner who operated the business, as if the LLC didn't exist. Unfortunately, if they are not mindful of the rules, even LLC owners with the best intentions can run afoul of the law and unknowingly sabotage the liability protection afforded by an LLC.

A recent N.H. Superior Court decision in *PlasTech Machining & Fabrication, Inc. v. StemTech, Ltd.* is a good example (in the corporate context) of what not to do. In that case, a corporation's creditor sought to collect on a judgment lien against the corporation's shareholder. The corporation did not have bylaws, hold director's meetings or keep a corporate record book. Additionally, the corporation failed to keep financial records or file federal tax returns for an extended period. The most damning fact was that the corporation's funds were used for both the business and by the shareholder for his own individual purposes. Because the court found that the shareholder treated the corporation's bank account as his own property and used its assets for his personal expenses (purchases were made at various grocery stores, Starbucks and on iTunes), the plaintiff was allowed to collect its judgment against the shareholder personally.

For LLC owners, this decision is yet another reminder that merely forming an LLC is not sufficient to shield personal liability from potentially adverse parties, such as tenants and creditors. The challenge for most LLC owners, although not as burdensome as a corporation, is educating themselves on how the LLC must be operated and not deviating from those requirements. It is very important that an owner operates his or her LLC separately from the owner's personal affairs and other businesses in order to preserve the distinct legal identity of the LLC and the legal protection extended to it.

At a minimum, every LLC owner should: (1) Keep all bank accounts for the LLC separate from

personal accounts and from the accounts of any other businesses; (2) Make sure that all contracts, invoices and correspondence of the LLC are in the name of the LLC, and sign each contract and other obligation of the LLC as a member or manager of the LLC (as the case may be), not individually; (3) Maintain all insurance in the name of the LLC; (4) Keep and maintain records for the LLC, including making the necessary annual filings; and (5) Use a qualified accountant to assist with the tax reporting, financial operations and financial recordkeeping of the LLC, including keeping track of all capital contributions and distributions to and from the LLC.

For LLC owners, it pays to devote attention to the nuances of the laws governing LLC liability and to have an understanding of the limits of limited liability. Always seek legal counsel who can guide you through these complex laws.

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