

Client Alert

Current Issues Relevant to Our Clients

May 8, 2014

Dass v. Yale: Illinois Allows LLC Members to Avoid Liability for Personal Torts

While the common law has long held that an individual is liable for those tortious acts he or she personally commits, the Illinois Appellate Court's decision in *Dass v. Yale*, 2013 IL App. (1st) 122520 (December 20, 2013), appears to insulate limited liability company ("LLC") members from liability for torts personally committed while acting within their role for the LLC, unless the articles of the organization contain a contrary provision and the member has consented in writing to adoption of the provision or to be bound to the provision. In light of the ruling in *Dass*, entities doing business with LLCs in Illinois may be well advised to require the inclusion of such provisions. A petition for leave to appeal to the Illinois Supreme Court was recently denied, so, for the time being, this appears to be the law of Illinois.

In *Dass*, the plaintiffs purchased a condominium unit from Wolcott LLC ("*Wolcott*"), where Defendant Yale served as managing member. The plaintiffs later experienced significant flood damage in their unit, and brought suit against Wolcott after discovering that the quality of the sewer line was not as previously reported to them during the closing on their property. The plaintiffs eventually asserted two counts of fraud against Yale, individually, based on various misrepresentations made, personally, in the course of the purchase and construction of their unit.

Yale moved to dismiss the claim against him personally, relying on Section 10-10 of the Illinois Limited Liability Company Act (the "*LLC Act*" or the "*Act*"), which provides:

[T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company [solely by reason of being or acting as a member or manager. 805 ILCS § 180/10-10.

In response, the plaintiffs argued that the above-referenced provision did not intend to shield LLC members from liability for those torts personally committed by a

member. Ultimately, the Appellate Court found in favor of Yale, determining that he was shielded from personal liability under the plain language of Section 10-10 of the Act.

Dass is confusing for a number of reasons. First, the plain language of Section 10-10 provides that a member is not personally liable for an obligation or liability of the company. It seems a stretch to read the section to insulate a member from tortious liability for his own acts, as an obligation or liability of the company. The LLC's liability for fraud would usually only be derivative of the manager's conduct. Second, the court's opinion ignores the qualifier "solely" in the second sentence of Section 10-10. The only reasonable explanation of the inclusion of "solely" in that sentence is that certain other facts may, in fact, result in member or manager liability. Otherwise, its inclusion is meaningless. *Dass* did not address these problems in its statutory construction.

Finally, Section 10-10 was amended in 1997 when Illinois adopted the Uniform Limited Liability Company Act (the "ULLCA"), and a comment to the ULLCA plainly states that LLC members are not insulated from liability for personal torts:

A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity. ULLCA § 303, Comment (1996).

The court expressly rejected this comment as "not part of the Act," and ultimately reached the opposite conclusion to the ULLCA Comment.

Importantly, however, Section 10-10(d) allows an exception to the court's analysis, in that, pursuant to

subsection (d), an LLC may adopt a provision allowing for personal liability:

All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

While the Act is traditionally relied upon to reinforce the concept that torts committed by an LLC do not impose personal liability upon its members, this appears to be the first case in Illinois to take the position that only the LLC faces responsibility for torts committed personally by its members. The court's holding also means that, for an action to impose liability on an individual member of an LLC in tort, a plaintiff must pierce the corporate veil and successfully argue that the LLC member was acting solely in his/her individual capacity -- a questionable undertaking under current law. A business or person doing business with an LLC in Illinois may be well served to require a provision under subsection (d)(2), consented to by relevant managers, allowing for personal liability for tortious conduct. Otherwise, as *Dass* makes clear, in Illinois, the LLC is the only one who will pay for the torts committed by its members.

For More Information

For more information, please contact Joseph Lombardo (312.845.3428), Jeffrey Close (312.845.2984), Mia D'Andrea (312.845.3766) or your primary Chapman attorney, or visit us online at chapman.com.

This document has been prepared by Chapman and Cutler LLP attorneys for informational purposes only. It is general in nature and based on authorities that are subject to change. It is not intended as legal advice. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this document, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material.

To the extent that any part of this summary is interpreted to provide tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

© 2014 Chapman and Cutler LLP. All rights reserved.

Attorney Advertising Material.