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CASE NOTE

**BUSINESS LAW—What Does It Really Take to Pierce the Veil of an LLC in Wyoming?; *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.*, 2014 WY 144, 337 P.3d 454 (Wyo. 2014)**

*Al Walsh\**

I. INTRODUCTION

Piercing the veil of a Limited Liability Company (LLC) is something that can only be done under exceptional circumstances.<sup>1</sup> Courts have historically applied piercing remedies inconsistently.<sup>2</sup> The innovation of new types of business entities has in many ways compounded that inconsistency.<sup>3</sup> However, two elements that have remained consistent across all types of veil-piercing, including LLCs, are whether there has been some misuse of the organizational form and whether piercing the veil is required to prevent some kind of injustice.<sup>4</sup>

On November 7, 2014, in *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.*, the Wyoming Supreme Court upheld a district court decision to pierce the veil of an LLC.<sup>5</sup> This case presented the Wyoming Supreme Court the first opportunity to address LLC veil-piercing since the passage of the new Wyoming Limited Liability Company Act (WLLCA) in 2010.<sup>6</sup>

This case note begins with a review of the history and development of LLC veil-piercing tests in Wyoming.<sup>7</sup> Next, this case note outlines the facts and the opinion of the *GreenHunter* case.<sup>8</sup> Then, it explains the two-prong test for veil-piercing, and sets forth how specific factors may or may not be used to meet the test.<sup>9</sup> In *GreenHunter*, the court articulated a revised test for piercing the veil of an LLC which emphasized the intensive fact specific nature of the analysis, focused

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<sup>1</sup> *GreenHunter Energy, Inc. v. W. Ecosystems Tech. Inc.*, 2014 WY 144, ¶ 27, 337 P.3d 454, 462 (Wyo. 2014).

<sup>2</sup> *Id.* ¶ 13–14, 337 P.3d at 460.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ¶ 12, 337 P.3d at 459.

<sup>5</sup> *Id.* ¶ 58, 337 P.3d at 470.

<sup>6</sup> See WYO. STAT. ANN. §§ 17-29-101 to -1105 (2015); see also *infra* note 65 and accompanying text.

<sup>7</sup> See *infra* notes 11–62 and accompanying text.

<sup>8</sup> See *infra* notes 65–90 and accompanying text.

<sup>9</sup> See *infra* notes 103–51 and accompanying text.

the analysis on whether the facts indicated a lack of separation due to misuse of the LLC, and whether leaving the LLC veil intact would result in some form of injustice.<sup>10</sup>

## II. BACKGROUND

### A. *Limited Liability Companies in General*

Prior to the creation of an LLC as a business organization under the first WLLCA in 1977, any person who wanted to start a company had a variety of options; although for a small business, each carried certain disadvantages.<sup>11</sup> For example, partnerships and S Corporations allow pass-through taxation in which business income passes through to the owner and is taxed once as personal income.<sup>12</sup> However, most partnerships require owners or partners to be personally liable for the debts of the business, while S Corporations place restrictions on the ownership and management of a business.<sup>13</sup>

A C Corporation and its shareholders, on the other hand, are subject to double taxation in which the corporation's income is taxed and any dividends owners receive from the business are taxed again as personal income.<sup>14</sup> However, corporations provide the advantage of limited liability to owners for debts and obligations of the business.<sup>15</sup> Creating an LLC structure allows business owners to retain the benefits of pass-through taxation and limited liability for its members while shedding many of the restrictions placed upon ownership and management.<sup>16</sup>

### B. *Limitations*

The limited liability protection provided to members of an LLC is not absolute.<sup>17</sup> In 2002, the Wyoming Supreme Court addressed the question of whether the veil of an LLC may be pierced in the absence of fraud in *Kaycee Land & Livestock v. Flahive*.<sup>18</sup> Mr. Flahive was the sole member of Flahive Oil

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<sup>10</sup> *GreenHunter Energy*, ¶ 27, 337 P.3d at 462.

<sup>11</sup> See Karin Schwindt, *Limited Liability Companies: Issues in Member Liability*, 44 UCLA L. REV. 1541, 1543–44 (1997); see also WYO. STAT. ANN. §§ 17-15-101 to -147 (repealed 2010).

<sup>12</sup> See Schwindt, *supra* note 11, at 1544.

<sup>13</sup> See Schwindt, *supra* note 11, at 1544–55.

<sup>14</sup> See Schwindt, *supra* note 11, at 1544.

<sup>15</sup> See Schwindt, *supra* note 11, at 1544.

<sup>16</sup> See Schwindt, *supra* note 11, at 1545.

<sup>17</sup> Harvey Gelb, *Limited Liability Policy and Veil Piercing*, 9 WYO. L. REV. 551, 573 (2009).

<sup>18</sup> See *Kaycee Land & Livestock v. Flahive*, 2002 WY 73, ¶ 2, 46 P.3d 323, 324 (Wyo. 2002).

and Gas LLC.<sup>19</sup> The LLC entered into a contract for surface rights to land owned by Kaycee Land and Livestock for oil and gas development.<sup>20</sup> Kaycee Land and Livestock alleged environmental damage to its property and sued Mr. Flahive personally because his company had no assets.<sup>21</sup> Mr. Flahive argued that piercing the veil of an LLC was precluded by law and quoted the statute:

Neither the member of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company.<sup>22</sup>

Mr. Flahive contrasted this language with Wyoming's corporation statutes which provide that liability can be placed on members and managers in some circumstances.<sup>23</sup>

The court held that the corporate veil of an LLC may be pierced because there was no reason to allow veil-piercing of a corporation and not of an LLC.<sup>24</sup> Nothing in *Kaycee* indicates that piercing the veil of an LLC should be either easier or more difficult than a corporation.<sup>25</sup> Although the court stated that the factors to consider are different, it held that the two types of entities should be treated equally.<sup>26</sup> The court did not articulate the test for LLC veil-piercing in *Kaycee* because the only issue presented was whether LLC veil-piercing was possible.<sup>27</sup> However, the court stated: "For guidance, we direct attention to commentators who have opined on the appropriate factors to be applied in the LLC context."<sup>28</sup>

### *C. The First Test to Pierce the Veil of an LLC*

After *Kaycee*, the Wyoming Supreme Court took the opportunity to articulate the test for piercing the veil of an LLC in *Gasstop Two, LLC v. Seatwo, LLC*.<sup>29</sup> In *Gasstop*, the owners of Seatwo leased space from Gasstop to operate a Burger

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<sup>19</sup> *Id.* ¶ 3, 46 P.3d at 324.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 6, 46 P.3d at 326 (citing WYO. STAT. ANN. § 17-15-113 (repealed 2010)).

<sup>23</sup> *Kaycee Land & Livestock*, ¶ 6, 46 P.3d at 326.

<sup>24</sup> *Id.* ¶¶ 11, 15, 46 P.3d at 327, 329.

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

<sup>26</sup> *Id.* ¶¶ 12, 15, 46 P.3d at 328–29.

<sup>27</sup> *Id.* ¶ 12, 46 P.3d at 328.

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

<sup>29</sup> *Gasstop Two, LLC v. Seatwo, LLC*, 2010 WY 24, ¶ 9, 225 P.2d 1072, 1077 (Wyo. 2010).

King franchise.<sup>30</sup> The franchise never turned a profit and closed after three years.<sup>31</sup> Gasstop then sued Seatwo for unpaid rent.<sup>32</sup> The district court found that Seatwo breached the lease agreement and owed Gasstop \$236,672.12 in damages.<sup>33</sup> Seatwo could not satisfy this judgment so Gasstop argued that Seatwo's LLC veil should be pierced, forcing its members to pay the judgment.<sup>34</sup>

The district court turned to *Kaycee* when deciding whether to pierce Seatwo's LLC veil.<sup>35</sup> First, the court examined whether the LLC was undercapitalized.<sup>36</sup> The court found that the members of Seatwo had operated several other Burger King franchises successfully with similar capitalization, and that this franchise failed because it was in a poor location and attracted few customers.<sup>37</sup> Therefore, the court concluded that Seatwo ran out of money for market-related reasons, not because of undercapitalization.<sup>38</sup> The court also concluded that undercapitalization alone was not enough to justify piercing the veil of the LLC.<sup>39</sup>

Next, the court examined whether the members impermissibly mixed personal and business funds or otherwise abused the LLC.<sup>40</sup> The court concluded that Seatwo's members did not commingle funds or misuse the Burger King franchise.<sup>41</sup> Then, the court concluded that Seatwo was not an alter ego of its owners because it maintained separate bank accounts, tax returns, and all appropriate paperwork was filed with the Secretary of State.<sup>42</sup> Finally, the court concluded that the owners of Seatwo did not operate the LLC in such a way as to defraud Gasstop.<sup>43</sup> Based on these conclusions, the district court did not allow the Seatwo's veil to be pierced, and Gasstop appealed to the Wyoming Supreme Court.<sup>44</sup>

Because the Wyoming Supreme Court only stated that piercing the veil of an LLC was possible and did not articulate a test in *Kaycee*, the district court in

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<sup>30</sup> *Id.* ¶¶ 4–5, 225 P.3d at 1075.

<sup>31</sup> *Id.* ¶ 5, 225 P.3d at 1075.

<sup>32</sup> *Id.* ¶ 10, 225 P.3d at 1077.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* ¶ 1, 225 P.3d at 1074.

<sup>35</sup> *Id.* ¶ 9, 225 P.3d at 1077.

<sup>36</sup> *Id.* ¶ 11, 225 P.3d at 1077.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* ¶ 11, 225 P.3d at 1077–78.

<sup>40</sup> *Id.* ¶ 11, 225 P.3d at 1078.

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

<sup>42</sup> *Id.* ¶ 11, 225 P.3d at 1078–79.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* ¶ 1, 225 P.3d at 1074.

*Gasstop* created a test.<sup>45</sup> On appeal, the Wyoming Supreme Court determined that the test was acceptable.<sup>46</sup> The court clarified the LLC veil-piercing test and listed four factors to consider: “(1) Fraud; (2) Inadequate capitalization; (3) Failure to observe company formalities; and (4) Intermingling of business and finances of the company and the member to such an extent that there [was] no distinction between them.”<sup>47</sup>

Next, the court affirmed the district court’s conclusion that undercapitalization alone could not justify piercing the veil of an LLC.<sup>48</sup> The court, however, did not prioritize any of the factors.<sup>49</sup> Instead, it held that courts should make a veil-piercing decision after weighing all of the factors presented by a given set of facts.<sup>50</sup> Finally, the court affirmed that there was no misuse of the LLC and therefore, no reason to pierce the veil.<sup>51</sup>

#### *D. The 2010 Wyoming Limited Liability Act*

Five days after *Gasstop*, the Wyoming Legislature passed the 2010 WLLCA,<sup>52</sup> which replaced the former WLLCA and, among many other changes, allowed for LLCs to be managed with more flexibility.<sup>53</sup> The new WLLCA brought the law in-line with modern business practices.<sup>54</sup> This new flexibility meant that certain actions by the members of an LLC could no longer be used to support some of the *Gasstop* factors when performing an LLC veil-piercing analysis.<sup>55</sup> As a result, the *Gasstop* test required an update almost immediately.<sup>56</sup>

Under the 2010 WLLCA, “[t]he failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members

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<sup>45</sup> Compare *Kaycee Land & Livestock v. Flahive*, 2002 WY 73, 46 P.3d 323 (Wyo. 2002), with *Gasstop Two*, 2010 WY 24, 225 P.2d 1072.

<sup>46</sup> See *Gasstop Two*, ¶ 12, 225 P.3d at 1079.

<sup>47</sup> *Id.* ¶ 9, 225 P.3d at 1077 (citing Phillip L. Jelsma & Pamela Everett Nollkamper, THE LIMITED LIABILITY COMPANY § 11:130 (Adam Pringle ed., 2012), <http://www.jamespublishing.com/wp-content/uploads/toc/llc-contents.pdf>).

<sup>48</sup> *Gasstop Two*, ¶ 11, 225 P.3d at 1078.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* ¶¶ 9–10, 225 P.3d at 1077.

<sup>51</sup> See *id.* ¶ 11, 225 P.3d at 1079.

<sup>52</sup> *GreenHunter Energy, Inc. v. W. Ecosystems Tech. Inc.*, 2014 WY 144, ¶ 22, 337 P.3d 454, 461 (Wyo. 2014).

<sup>53</sup> *Id.* ¶ 23, 337 P.3d at 462.

<sup>54</sup> *Id.* ¶ 22, 337 P.3d at 461–62 (citing Dale W. Cottam et al., *The 2010 Wyoming Limited Liability Act: A Uniform Recipe with Wyoming “Home Cooking”*, 11 WYO. L. REV 49, 52 (2011)).

<sup>55</sup> See WYO. STAT. ANN. § 17-29-304(b) (2015).

<sup>56</sup> *GreenHunter Energy*, ¶ 27, 337 P.3d at 462.

or managers for the debts, obligations or other liabilities of the company.”<sup>57</sup> This language acknowledges that many LLCs operate informally and makes it easier for LLCs to operate informally within the law.<sup>58</sup> Regarding LLC veil-piercing, this provision negates the portion of the *Gasstop* test which required courts to consider the “[f]ailure to observe company formalities” as a factor in piercing the veil of an LLC.<sup>59</sup>

The second change under the 2010 WLLCA reduced a hurdle for single member LLCs by allowing an LLC to be formed by only one member.<sup>60</sup> In the prior WLLCA, an LLC had to be formed by at least two members and then it could elect “to be a flexible LLC . . . owned by one member.”<sup>61</sup> These changes make an intermingling analysis more difficult because many actions performed by a single member LLC, which is not required to follow any corporate formalities, could be within the letter and intent of the law, yet could look very similar to intermingling.<sup>62</sup>

A classic Wyoming example would be a rancher, the sole member of an LLC for his ranch, who drives his only truck an hour to town for both work and personal errands and pays for ranch supplies with his personal checkbook because he forgot to bring the LLC checkbook. Under the *Gasstop* test, this scenario presents credible arguments for failure to follow formalities and intermingling.<sup>63</sup> However, because the 2010 WLLCA specifically excludes failing to follow formalities from the analysis, facts which formerly fell into the formalities category may have to be considered differently.<sup>64</sup>

### III. PRINCIPAL CASE

*GreenHunter Energy, Inc., v. Western Ecosystems Technology, Inc.* provided the Wyoming Supreme Court with the opportunity to clarify the LLC veil-piercing test in light of the changes from the 2010 WLLCA.<sup>65</sup> In 2009, Western Ecosystems Technology, Inc. (Western) entered into a contract to provide services to GreenHunter Wind Energy LLC (GreenHunter), the sole member of which

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<sup>57</sup> WYO. STAT. ANN. § 17-29-304(b).

<sup>58</sup> Cottam et al., *supra* note 54, at 63–64.

<sup>59</sup> *Gasstop Two, LLC v. Seatwo, LLC*, 2010 WY 24, ¶ 9, 225 P.3d 1072, 1077 (Wyo. 2010).

<sup>60</sup> *See* WYO. STAT. ANN. § 17-29-401(a).

<sup>61</sup> Cottam et al., *supra* note 54, at 64 n.99.

<sup>62</sup> *GreenHunter Energy, Inc. v. W. Ecosystems Tech. Inc.*, 2014 WY 114, ¶ 35, 337 P.3d 454, 464 (Wyo. 2014).

<sup>63</sup> *Gasstop Two*, ¶ 9, 225 P.3d at 1077.

<sup>64</sup> *See* WYO. STAT. ANN. § 17-29-304(b).

<sup>65</sup> *GreenHunter Engery*, ¶ 27, 337 P.3d at 462.

was Appellant, GreenHunter Energy (the Member).<sup>66</sup> Western won a judgment for breach of contract against GreenHunter, but the judgment could not be satisfied because GreenHunter had no assets.<sup>67</sup> Western then successfully brought a suit against the Member seeking to pierce the LLC veil.<sup>68</sup>

The district court found that GreenHunter was undercapitalized because, among other things, it often maintained a zero balance in its accounts and the Member would transfer exact amounts of money to pay specific bills.<sup>69</sup> Unlike in *Gasstop*, GreenHunter was undercapitalized by choice, and the Member's actions amounted to a misuse of GreenHunter by choosing which bills would be paid and when.<sup>70</sup> The district court also found that the business and finances of the Member and GreenHunter were intermingled for the following reasons.<sup>71</sup> First, GreenHunter had no money of its own.<sup>72</sup> Second, GreenHunter had no employees of its own.<sup>73</sup> Third, the Member manipulated assets and liabilities so that the Member would have all of the assets and GreenHunter the liabilities.<sup>74</sup> As a result, there was no separation between the Member and GreenHunter.<sup>75</sup> Finally, the district court found the Member committed fraud by entering into a contract with Western knowing that it either could not or would not pay for the services Western provided.<sup>76</sup> Based on the application of these factors, the district court held that the Member and GreenHunter were no longer separate entities and to maintain the legal fiction that they were, would amount to an injustice.<sup>77</sup> The Member appealed.<sup>78</sup>

The Wyoming Supreme Court extensively reviewed case law, statutes, and commentary that followed the development of veil-piercing generally, and of the Wyoming law around piercing the veil of an LLC more specifically.<sup>79</sup> This review highlighted several principles that formed the *GreenHunter* decision.<sup>80</sup>

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<sup>66</sup> *Id.* ¶ 3, 337 P.3d at 458.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 4, 337 P.3d at 458.

<sup>69</sup> *Id.* ¶ 40, 337 P.3d at 465.

<sup>70</sup> *Id.* ¶ 43, 337 P.3d at 466.

<sup>71</sup> *Id.* ¶ 45, 337 P.3d at 467.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶ 52, 337 P.3d at 469.

<sup>77</sup> *Id.* ¶ 46, 337 P.3d at 467.

<sup>78</sup> *See id.* ¶¶ 1–2, 337 P.3d at 458.

<sup>79</sup> *GreenHunter Energy*, ¶¶ 12–25, 337 P.3d at 459–62.

<sup>80</sup> *Id.*



One principle is that an LLC's veil may only be pierced when the organizational form has been misused, and by not allowing it to be pierced an injustice would result.<sup>81</sup> Another principle is that LLCs, by design, are "intended to be much more flexible" than C Corporations in their business practices.<sup>82</sup>

After this review, the court turned to its prior decisions.<sup>83</sup> First, the court affirmed its holding from *Kaycee* that the veil of an LLC may be pierced.<sup>84</sup> Second, the court refined and clarified its holding from *Gasstop* by articulating a two-prong test in compliance with the 2010 WLLCA.<sup>85</sup> According to the court the "test is fact-driven and flexible, and it focuses on whether the limited liability company has been operated as a separate entity as contemplated by statute, or whether the member has instead misused the entity in an inequitable manner to injure the plaintiff."<sup>86</sup>

Ultimately, the Wyoming Supreme Court held that the district court appropriately followed *Gasstop* and conformed its analysis to the 2010 WLLCA.<sup>87</sup> It also affirmed the district court's findings that GreenHunter was undercapitalized due to manipulation, and that the required separateness between GreenHunter and the Member ceased to exist.<sup>88</sup> However, the court reversed the district court with regard to fraud, citing the lack of false statements by the Member.<sup>89</sup> Finally, the court affirmed the conclusion that the Member's actions amounted to a misuse of GreenHunter and decided that by not piercing the LLC's veil an injustice would result.<sup>90</sup>

#### IV. ANALYSIS

In *GreenHunter*, the court articulated a revised test for piercing the veil of an LLC which emphasized a fact specific analysis, focused on whether the facts indicated a lack of separation due to a misuse of the LLC and whether leaving the LLC's veil intact would result in some form of injustice.<sup>91</sup> On its face, the *GreenHunter* test does not retain any of the factors from the *Gasstop* test.<sup>92</sup>

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<sup>81</sup> *Id.* ¶ 17, 337 P.3d at 460.

<sup>82</sup> *Id.* ¶ 19, 337 P.3d at 461.

<sup>83</sup> *Id.* ¶ 26, 337 P.3d at 462.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ¶ 27, 337 P.3d at 462.

<sup>86</sup> *Id.* ¶ 28, 337 P.3d at 463.

<sup>87</sup> *Id.* ¶ 38, 337 P.3d at 465.

<sup>88</sup> *Id.* ¶¶ 43, 46, 337 P.3d at 466–67.

<sup>89</sup> *Id.* ¶ 56, 337 P.3d at 470.

<sup>90</sup> *Id.* ¶ 58, 337 P.3d at 470.

<sup>91</sup> *See id.*

<sup>92</sup> *Id.* ¶ 27, 337 P.3d at 462.

However, a district court may still use factors to aid in the analysis.<sup>93</sup> Fraud is the only factor which can justify piercing the veil of an LLC alone.<sup>94</sup> Regarding undercapitalization, courts should consider whether the LLC has adequate capital for its business and, if not, whether this is due to market factors or manipulation.<sup>95</sup> Concerning intermingling, courts should look for signs of separation and manipulation by the member while keeping in mind that LLCs are not required to follow any particular formalities.<sup>96</sup> Finally, courts are free to consider any additional factors which are called for by the specific facts of the case.<sup>97</sup>

#### *A. An Exceptional Remedy Guarded by a Two-Prong Test*

The Wyoming Supreme Court's first holding in *GreenHunter* was to affirm the decision in *Kaycee* which held that the veil of an LLC may be pierced "under certain extraordinary circumstances."<sup>98</sup> Next, the court stated the revised test for when the veil of an LLC may be pierced:

The veil of a limited liability company may be pierced under exceptional circumstances when: (1) the limited liability company is not only owned, influenced and governed by its members, but the required separateness has ceased to exist due to misuse of the limited liability company; and (2) the facts are such that an adherence to the fiction of its separate existence would, under the particular circumstances, lead to injustice, fundamental unfairness, or inequity.<sup>99</sup>

This test is an improvement over the *Gasstop* test because it focuses the analysis on whether a lack of separation exists due to misuse and whether leaving the LLC in place would result in an injustice.<sup>100</sup> However, the *Gasstop* factors—except for fraud—are still relevant to the analysis.<sup>101</sup> Additionally, the *GreenHunter* test allows for other factors to be considered if necessary.<sup>102</sup>

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<sup>93</sup> *Id.* ¶ 29, 337 P.3d at 463.

<sup>94</sup> *Id.* ¶ 34, 337 P.3d at 464.

<sup>95</sup> *Id.* ¶ 32, 337 P.3d at 463.

<sup>96</sup> *Id.* ¶¶ 33, 35, 337 P.3d at 464.

<sup>97</sup> *Id.* ¶ 34, 337 P.3d at 464.

<sup>98</sup> *Id.* ¶ 26, 337 P.3d at 462.

<sup>99</sup> *Id.* ¶ 27, 337 P.3d at 462.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶¶ 29–33, 337 P.3d at 463–64.

<sup>102</sup> *Id.* ¶ 34, 337 P.3d at 464.

### 1. *Fraud*

Fraud remains the only factor that can single-handedly lead to the piercing of an LLC's veil.<sup>103</sup> An act of fraud impacts both prongs of the *GreenHunter* test because using an LLC to commit fraud is a misuse of the LLC, which creates an injustice.<sup>104</sup> In *GreenHunter*, the district court found fraud because GreenHunter entered into the contract with Western knowing that it either could not or would not pay for the services Western provided.<sup>105</sup> However, the Wyoming Supreme Court reversed because "Western failed to present any evidence of fraud, or the intention by Appellant to commit any fraud."<sup>106</sup> The court explained:

[A] claim for relief for fraud [is] a false representation made by the defendant which is relied upon by the plaintiff to his damage, the asserted false representation must be made to induce action, and the plaintiff must reasonably believe the representation to be true. A plaintiff who alleges fraud must do so clearly and distinctly, and fraud will not be imputed to any party when the facts and circumstances out of which it is alleged to arise are consistent with honesty and purity of intention. Fraud must be established by clear, unequivocal and convincing evidence, and will never be presumed.<sup>107</sup>

Western's allegation of fraud relied entirely on the Member's conduct in relation to Western.<sup>108</sup> The court found that there were no false statements made to Western, nor were there any partially truthful statements or evidence of fraudulent intent.<sup>109</sup> Rather, GreenHunter merely breached its contract and a breach of contract alone did not support a finding of fraud.<sup>110</sup> As a result, the court held it was an error to find fraud on behalf of the Member.<sup>111</sup> However, the court also stated that a finding of fraud was not required to pierce the veil of the LLC.<sup>112</sup> Thus, the absence of fraud was not dispositive.<sup>113</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ¶ 53, 337 P.3d at 469.

<sup>105</sup> *Id.* ¶ 52, 337 P.3d at 469.

<sup>106</sup> *Id.* ¶ 54, 337 P.3d at 470.

<sup>107</sup> *Id.* ¶ 55, 337 P.3d at 470 (quoting *White v. Shane Edeburn Const., LLC*, 2012 WY 118, ¶ 26, 285 P.3d 949, 957 (Wyo. 2012)).

<sup>108</sup> *GreenHunter Energy*, ¶ 52, 337 P.3d at 469.

<sup>109</sup> *Id.* ¶ 56, 337 P.3d at 470.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* ¶ 52, 337 P.3d at 469.

<sup>113</sup> *Id.*

## 2. *Undercapitalization*

The court stated that an LLC is undercapitalized when it lacks the resources to continue its operations and is unable to arrange for other financing on its own, resulting in a situation where the LLC must rely on its members to pay its bills.<sup>114</sup> The court also stated that undercapitalization lends strong support for the first prong of the veil-piercing test because it may indicate a lack of separation between the LLC and its members, demonstrating a misuse of the LLC structure.<sup>115</sup> However, an attempt to pierce the veil of an LLC will be unsuccessful if the only supporting factor is undercapitalization.<sup>116</sup>

There are two main reasons why undercapitalization alone is insufficient.<sup>117</sup> First, businesses vary greatly in the extent to which they require capital.<sup>118</sup> As a result, courts should look at each business's particular circumstances because businesses that only require small amounts of capital should not be penalized.<sup>119</sup> Second, because there are many reasons why a business might become undercapitalized, courts should analyze whether a business was undercapitalized by choice or by external market forces.<sup>120</sup> In the context of veil-piercing, courts should only be concerned with undercapitalization when it indicates a purposeful manipulation of the LLC.<sup>121</sup> Courts should not be concerned if the undercapitalization indicates an unsuccessful business.<sup>122</sup> Thus, a business that is unable to pay its bills because it is hiding assets from creditors is a candidate for veil-piercing, whereas a business that is unable to pay its bills due to an unexpected change in the marketplace is not.<sup>123</sup>

Regarding *GreenHunter*, the district court made several factual findings which indicated undercapitalization due to manipulation.<sup>124</sup> Often, *GreenHunter* maintained a zero balance in its operating account.<sup>125</sup> When an invoice would come in, the Member would transfer the exact amount of money *GreenHunter* needed to pay the invoice, immediately returning the account balance back to zero.<sup>126</sup>

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<sup>114</sup> *Id.* ¶ 31, 337 P.3d at 463.

<sup>115</sup> *Id.* ¶ 27, 337 P.3d at 462.

<sup>116</sup> *Id.* ¶ 31, 337 P.3d at 463.

<sup>117</sup> See *supra* notes 119–24 and accompanying text.

<sup>118</sup> *GreenHunter Energy*, ¶ 32, 337 P.3d at 463.

<sup>119</sup> *Id.* ¶ 32, 337 P.3d at 463.

<sup>120</sup> *Id.* ¶ 43, 337 P.3d at 466.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* ¶ 41, 337 P.3d at 465–66.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

The Member argued against this finding by properly pointing out that start-up ventures often need capital infusions from their owners.<sup>127</sup> The implication was that GreenHunter was a start-up venture and required regular transfers from the Member.<sup>128</sup> Based on this argument, there was no violation because the Member only transferred money to GreenHunter for specific bills.<sup>129</sup> Although the Wyoming Supreme Court acknowledged the validity of the Member's points, the court agreed with the district court that the method of infusing enough money to pay each individual bill indicated that GreenHunter was undercapitalized by choice, amounting to a misuse of the LLC structure.<sup>130</sup>

### 3. *Intermingling*

*GreenHunter* indicates that intermingling occurs when “the required separateness has ceased to exist.”<sup>131</sup> To make this determination, courts should consider whether the member and the LLC have maintained an arms-length distance from each other by keeping separate accounting records, treating property as separate, and considering whether assets and liabilities are manipulated for the benefit of the member.<sup>132</sup> Like undercapitalization, evidence of intermingling by itself will not justify veil-piercing because courts are more concerned with the possibility of LLC misuse or injustice.<sup>133</sup> Moreover, LLCs are intended to have a flexible and decentralized management structure.<sup>134</sup> An LLC's flexible management structure creates situations where actions by a member, which may indicate intermingling, are acceptable management practices for the LLC.<sup>135</sup> However, courts must weigh these actions to determine whether there is a misuse of the LLC structure.<sup>136</sup>

Regarding *GreenHunter*, the district court found that the LLC had no employees of its own and that all of its functions were carried out by employees of the Member.<sup>137</sup> The Member pointed out that, by default, single-member companies are managed by the member.<sup>138</sup> Therefore, employees of the member

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<sup>127</sup> *Id.* ¶ 43, 337 P.3d at 466.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 27, 337 P.3d at 462.

<sup>132</sup> *Id.* ¶ 33, 337 P.3d at 464.

<sup>133</sup> *See id.* ¶¶ 12, 33–34, 337 P.3d at 459, 464.

<sup>134</sup> *Id.* ¶ 35, 337 P.3d at 464.

<sup>135</sup> *See id.* ¶ 46, 337 P.3d at 467.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* ¶ 45, 337 P.3d at 467.

<sup>138</sup> *Id.* ¶ 49, 337 P.3d at 468.

performing the functions of the LLC are not only allowed, but specifically contemplated by the law.<sup>139</sup> The Wyoming Supreme Court acknowledged the validity of the Member's argument, but stated that intermingling of the business activities is still a factor to consider.<sup>140</sup>

The Member also pointed out that it had, at all times, maintained separate bank accounts with the LLC and that no LLC expenses were paid from the Member's account, nor were any of the Member's expenses paid from the LLC's account.<sup>141</sup> Therefore, the Member argued that the district court erred in finding financial intermingling.<sup>142</sup> However, the Wyoming Supreme Court concluded that the reality of the financial transactions showed that, for each invoice, the money merely passed through GreenHunter's account to a specific vendor.<sup>143</sup> Thus, the court agreed with the district court that GreenHunter never had any money of its own, and that the finances of GreenHunter and the Member were intermingled.<sup>144</sup> Based on these conclusions, the court also agreed that the intermingling indicated a misuse of the LLC structure which required GreenHunter's veil to be pierced to avoid an inequitable result.<sup>145</sup>

### *B. LLCs Do Not Need to Follow Corporate Formalities*

The *Gasstop* test specifically included “[f]ailure to observe company formalities” as one of the factors used in an LLC veil-piercing analysis.<sup>146</sup> However, this factor was superseded by the 2010 WLLCA.<sup>147</sup> In *GreenHunter*, the court acknowledged that the LCC structure was intended to give a business great flexibility in how it manages its affairs.<sup>148</sup> Therefore, the court held that company formalities should no longer be considered in an LLC veil-piercing analysis.<sup>149</sup>

This change eliminated an objective measuring tool.<sup>150</sup> Previously, the question of whether an LLC followed a specific formality could have been answered with a

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<sup>139</sup> See WYO. STAT. ANN. § 17-29-407 (2015).

<sup>140</sup> *GreenHunter Energy*, ¶ 49, 337 P.3d at 468–69.

<sup>141</sup> *Id.* ¶ 44, 337 P.3d at 466.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* ¶ 45, 337 P.3d at 467.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶ 46, 337 P.3d at 467.

<sup>146</sup> *Gasstop Two, LLC v. Seatwo, LLC*, 2010 WY 24, ¶ 9, 225 P.2d 1072, 1077 (Wyo. 2010).

<sup>147</sup> See WYO. STAT. ANN. § 17-29-304(b) (2015).

<sup>148</sup> *GreenHunter Energy*, ¶ 35, 337 P.3d at 464.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* ¶ 45, 337 P.3d at 467.

simple yes or no.<sup>151</sup> For example, it was easy to determine if an LLC kept minutes of its required annual meetings. However, the failure to follow formalities can still be used in an LLC veil-piercing analysis.<sup>152</sup> Many of the same facts could also indicate intermingling, undercapitalization, or fraud, provided that the court gives the facts appropriate weight.<sup>153</sup>

### C. *Other Factors Give Courts Greater Flexibility*

In addition to intermingling, undercapitalization, and fraud, *GreenHunter* allows district courts to consider other factors if doing so is necessary for the specific case.<sup>154</sup> The purpose is to incorporate factors traditionally used in piercing the veil of a C Corporation and use them in an analysis for piercing the veil of an LLC.<sup>155</sup> *GreenHunter* explained that “the test and the factors considered must be attuned to the facts of a given case.”<sup>156</sup> In *GreenHunter*, the Member argued that the district court erred by looking to factors from a case involving piercing the veil of a corporation.<sup>157</sup> The court rejected the Member’s argument and stated that it was not important where the factors came from, but that the factors complied with the 2010 WLLCA.<sup>158</sup>

## V. CONCLUSION

The *GreenHunter* test emphasizes the intensive, fact specific analysis required to pierce the veil of an LLC. The analysis focuses on whether the facts indicate a lack of separation due to misuse of the LLC and whether leaving the LLC’s veil intact would result in injustice.<sup>159</sup> The court in *GreenHunter* established that fraud alone would suffice to pierce the veil of an LLC but declined to allow fraud to be implied by a course of conduct.<sup>160</sup> The court also explained that undercapitalization must cause purposeful manipulation to indicate a misuse of an LLC and that financial intermingling can occur when a member and an LLC maintain separate bank accounts.<sup>161</sup> District courts can no longer look to whether

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* ¶ 49, 337 P.3d at 469.

<sup>154</sup> *Id.* ¶ 34, 337 P.3d at 464.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* ¶ 35, 337 P.3d at 464.

<sup>157</sup> *Id.* ¶ 36, 337 P.3d at 464.

<sup>158</sup> *Id.* ¶ 37, 337 P.3d at 464.

<sup>159</sup> *Id.* ¶ 27, 337 P.3d at 462.

<sup>160</sup> See *supra* notes 103–13 and accompanying text.

<sup>161</sup> See *supra* notes 117–47 and accompanying text.

an LLC failed to follow formalities; however, the facts that tend to indicate a failure to follow formalities may still be included in an analysis as long as they are given appropriate weight.<sup>162</sup> Finally, district courts now have greater flexibility in determining whether to pierce the veil of an LLC because of the *Gasstop* factors and the ability to consider other relevant factors.<sup>163</sup>

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<sup>162</sup> See *supra* notes 148–55 and accompanying text.

<sup>163</sup> See *supra* notes 92–97 and accompanying text.