

FLORIDA ACTS TO RESOLVE OLMSTEAD ISSUES [FLORIDA]

MONDAY, MAY 02, 2011

I previously discussed the Olmstead case – that discussion can be read [here](#). This case created a stir both inside and outside of Florida, when it provided that at least in the situation of a single member LLC, a creditor's rights are not limited to a charging order but could include a right to foreclose on the debtor's LLC interest. The potential application of the decision to multimember LLC's became a much-discussed issue. My partner, Jordan Klingsberg, has written the following summary relating to new LLC legislation that seeks to resolve these issues:

On Friday April 29, 2010 the Florida Senate passed CS/HB 253, Limited Liability Companies, to address some of the uncertainty surrounding Florida LLCs created by the recent Florida Supreme Court case, Olmstead v. Federal Trade Commission, 44 So.3d 76 (Fla. 2010). The bill provides that, except in one situation, a charging order is the "sole and exclusive remedy" to satisfy a judgment from a judgment debtor's interest in an LLC. The exception concerns an LLC with one member where distributions under a charging order will not satisfy the judgment in a reasonable time. In such a situation, a court may order the sale of the single member's interest in the LLC. CS/HB 253 passed both the Florida House and Senate and has been sent to the Governor to be signed into law.

In June of 2010, the Florida Supreme Court in Olmstead held that a charging order is not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single member LLC. The court ruled that the judgment debtor had to surrender all right, title, and interest in the member's single member LLC interest in order to satisfy the outstanding judgment. The dissent in Olmstead, however, stated that the majority's holding was not limited to single member LLCs and expressed a desire that the Florida legislature clarify the law in this area.

Many practitioners believed that the Supreme Court's reasoning in Olmstead would apply to all limited liability companies. This led many businesses to change their situs and organize in states other than Florida where a charging order is the exclusive remedy available to judgment creditors of multimember LLCs. This bill amends Fla. Stat. §608.433 to clarify that the Olmstead decision does not extend to multimember LLCs and provides procedures for applying the Olmstead decision to single member Florida LLCs.

The bill specifically states that a judgment creditor has only the rights of an assignee of the LLC interest to receive distributions to which the judgment debtor would have otherwise been entitled from the LLC. The only situation in which a court may order the sale of a member's interest is where the judgment creditor of a member's interest in a single member LLC establishes "that distributions under a charging order will not satisfy the judgment within a reasonable time." Upon such a showing, the court may order the sale of the single member's interest pursuant to a foreclosure sale and the purchaser becomes a member of the LLC and obtains the prior member's entire interest in the LLC. The foreclosure remedy is not available to a judgment creditor of a multimember LLC and cannot be ordered by a court.

Section 9 of the Bill does provide that nothing in the statute shall (i) limit the rights of a secured creditor, (ii) change the impact of a fraudulent conveyance; or (iii) change the court's right to use equitable principals such as ruling that an LLC was sham or using equitable liens or constructive trusts. These provisions, however, were likely already law in Florida.

The Bill does not contain any provisions for treating a multi-member LLC as a single member LLC and disregarding nominal interests held by minority members such as family members and grantor trusts.

This Act and the amendment to Fla. Stat. §608.433 will hopefully clarify the judgment remedies available against Florida LLCs and remove some of the ambiguity surrounding the treatment and operations of LLCs in Florida.

Special thanks to Richard Josepher of Gutter Chaves Josepher Rubin Forman Fleisher PA and other members of the special committee of the Florida Bar Tax Section who worked extremely hard and supported this legislation.

Authored by Charles Rubin, Esq. Mr. Rubin is a Florida Bar Board Certified tax attorney with the firm of Gutter Chaves Josepher Rubin Forman Fleisher P.A. (www.floridatdex.com) His practice focuses on protecting & enhancing individual, family & business wealth through: Planning to Minimize Taxes (U.S. & International) • Estate Planning, Charitable, Marital & Succession Planning • Business Structuring & Transactions • Trusts & Estates (Administration-Disputes-Drafting) • Creditor Protection. He can be reached at 561-998-7847 or at crubin@floridatdex.com. This article was previously published at <http://www.rubinontax.blogspot.com>.