

The following article has been accepted for publication in the DePaul Business & Commercial Law Journal and is scheduled for publication in Volume 9 thereof. This document constitutes the submission draft of the article and does not incorporate any edits or revisions by the DePaul Business & Commercial Law Journal.

**TO BE OR NOT TO BE EXCLUSIVE:
STATUTORY CONSTRUCTION OF
THE CHARGING ORDER
IN THE SINGLE MEMBER LLC**

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*'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'
'The question is,' said Alice, 'whether you can make words mean so many different things.'
'The question is,' said Humpty Dumpty, 'which is to be master - - that's all.'
- Lewis Carroll,
Through the Looking Glass¹*

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¹ LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS, p. 254 (David Campbell Pub. Lmt., 1992, orig. published 1871).

The charging order has long been a feature of partnership law. Like partnerships and other unincorporated entities, the charging order is an important statutory attribute of limited liability companies that, in the context of the single member LLC, has generated significant controversy.² Recently the Florida Supreme Court waded into this quagmire in deciding *Olmstead v. Federal Trade Commission*.³ Sadly, rather than broadly mapping the issues to help future travelers, *Olmstead* charted a unique course that will be difficult for others to follow.

The Olmstead Facts

The defendants, Shaun Olmstead and others, operated an “advance-fee credit card scam.”⁴ In order to fund restitution obligations that exceeded \$10 million, the defendants’ assets were placed in receivership; those assets included membership interests in several single-

² For example, upon the bankruptcy of the sole member of an LLC, does the right to manage the LLC transfer to the bankruptcy estate? In *In re Albright*, 291 B.R. 538 (Bankr. D. Co. 2003) and *In re Ehmann*, 334 B.R. 437 (Bankr. D. Ariz. 2005), withdrawn 337 B.R. 228 (Bankr. D. Ariz. 2006), the courts answered “yes.” See generally Thomas E. Rutledge and Thomas E. Geu, *The Albright Decision - Why a SMLLC is Not an Appropriate Asset Protection Vehicle*, 5 BUSINESS ENTITIES 16 (Sept./Oct., 2003); Thomas E. Rutledge and Thomas E. Geu, *Guess Who’s Coming to Dinner?: The Bankruptcy Trustee’s Ability to Become a Member and the Ehmann Decision*, 7 BUSINESS ENTITIES 32 (Mar./Apr. 2005); and Thomas E. Rutledge and Thomas E. Geu, *In re Ehmann II - Now You See It, Now You Don’t*, 8 BUSINESS ENTITIES 44 (May/June 2006).

³ _____ So.3d _____, 2010 WL 2518106 (Fla. June 24, 2010).

⁴ *Federal Trade Commission v. Olmstead*, 528 F.3d 1310, 1311-12 (11th Cir. 2008).

member limited liability companies (SMLLCs) organized under Florida law. Finally, the trial court directed the defendants to endorse and surrender to the receiver all “right, title and interest” in each SMLLC.⁵ The defendants asserted the order went too far because the only remedy against their SMLLC interests was under the Florida LLC Act charging order provision.⁶ The Eleventh Circuit Court of Appeals certified the following question to the Florida Supreme Court:

Whether, pursuant to [the charging order provision of the Florida LLC Act], a court may order a judgment-debtor to surrender all “right, title and interest” in the debtor’s . . . [SMLLC] to satisfy an outstanding judgment.⁷

In the course of its opinion the Florida Supreme Court rephrased (and expanded) the question as:

Whether Florida law permits a court to order a judgment debtor to surrender all right, title and interest in the debtor’s . . . [SMLLC] to satisfy an outstanding judgment.⁸

In turn, the Court answered *Yes* to the rephrased question. The most narrow[narrowest] interpretation of the holding was that the absence of the word “exclusive” in the LLC Act’s charging order provision means

⁵ 2010 WL 2518106, * [REDACTED].

⁶ FLA. STAT. § 608.433(4).

⁷ *Federal Trade Commission v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008).

⁸ 2010 WL 2518106, * [REDACTED].

that other collection remedies may be asserted against the member's interests in the SMLLC. More broadly, and more troubling, the Court engaged in a normative analysis about the place of the charging order in the context of a Florida SMLLC.

The Charging Order Generally

The charging order exists to balance two valid and competing interests: (1) those of the judgment creditor to collect on a judgment against an owner; and (2) the interest of the venture to apply its assets to its operations and obligations without interference from an owner's creditor.⁹ Corporate law contemplates the transfer of voting rights with the underlying shares. Indeed, even pure voting rights can be transferred in corporations through a rather detailed statutory proxy mechanism. In unincorporated law, however, the interests of an owner are divided into a "transferable interest," encompassing the economic rights of ownership, and management rights.¹⁰ Under the statutory default rules the

¹⁰ Collectively a partner's "interest in the partnership," or "partnership interest." UNIFORM PARTNERSHIP ACT ("RUPA") § 101(9), 6 (pt. 1) U.L.A. 61 (2001). *See also* UNIFORM LIMITED PARTNERSHIP ACT ("ULPA") § 701, cmt, 6A U.L.A. 461 (2008). In the context of the LLC the formulae vary, with some statutes defining a "transferable interest" (*see, e.g.*, REVISED UNIFORM LIMITED LIABILITY COMPANY ACT ("RULLCA") § 102(21), 6B U.L.A. 430 (2008); DEL. CODE. ANN. tit. 6, § 18-101(8); *see also* IND. CODE § 23-18-1-10 (defining the term interest)) as the right to receive distributions from the LLC with no term defining the management participatory rights. Other states define a

transferable interest is freely transferable to a third-party¹¹ fully vesting in the transferee the right to receive all distributions (periodic and liquidation) that would have otherwise been received by the transferor.¹² The management rights, however, are not unilaterally transferable.¹³ Rather, even a transferee of those management rights may not exercise them¹⁴ absent the consent of some portion of the incumbent members.¹⁵

“limited liability company interest” encompassing economic and management rights (*see, e.g.,* KY. REV. STAT. ANN. § 275.015(12)) with distinctions then drawn as to the transferability (or not) of the two components. *See, e.g.,* KY. REV. STAT. ANN. § 275.255.

¹¹ UPA § 27, 6 (pt. II) U.L.A. 332 (2001); RUPA § 503(a)(1), 6 (pt. 1) U.L.A. 156 (2001); ULPA § 702(a)(1), 6A U.L.A. 461 (2008); RULLCA § 502(a)(1), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 15-503(a)(1); KY. REV. STAT. ANN. § 275.255(1)(a); *id.* § 362.1-503(1)(a); *id.* § 362.2-702(1)(a); and IND. CODE § 23-18-6-3.1(b)(1).

¹² UPA § 27(1), 6 (pt. II) U.L.A. 332 (2001); RUPA § 503(b)(1), 6 (pt. 1) U.L.A. 157 (2001); ULPA § 702(b), 6A U.L.A. 462 (2008); RULLCA § 502(b), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 18-503(a)(1); KY. REV. STAT. ANN. § 275.255(1)(b); *id.* § 362.1-503(2)(a), (b); *id.* § 362.2-702(2); and IND. CODE § 23-18-6-3.1(b)(2).

¹³ Conversely, in corporate law, absent private ordering to the contrary, shares are freely transferable, and the transferee may exercise all rights of the transferor, including the right to vote. The exception to this statement is Nevada, which as to “closely held” corporations utilizes a charging order. *See* NRS § 78.746; *see also* Thomas E. Rutledge, *Nevada’s Corporate Charging Order: Less There Than Meets the Eye*, 11 J. PASSTHROUGH ENTITIES 21 (Mar./Apr. 2008); *Postscript*, 12 J. PASSTHROUGH ENTITIES 48 (Mar./Apr. 2010).

¹⁴ UPA § 27(1), 6 (pt. II) U.L.A. 332 (2001); RUPA § 503(a)(3), 6 (pt. 1) U.L.A. 156-57 (2001); ULPA § 702(a)(3), 6A U.L.A. 462 (2008); RULLCA § 502(3), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 15-503(a)(3); KY. REV. STAT. ANN. § 275.255(1)(c); *id.* § 362.1-501(i)(c); *id.* § 362.2-702(i)(c); and IND. CODE § 23-18-6-3.1(b)(3).

¹⁵ *See, e.g.,* UPA § 18(g), 6 (pt. II) U.L.A. 101 (2001) (transferee to be admitted as a partner only upon the approval of all incumbent partners); RUPA § 401(i), 6 (pt. 1) U.L.A. 133 (2001) (same); UNIFORM LIMITED LIABILITY COMPANY ACT (“ULLCA”) § 404(c)(7), 60 U.L.A. 591 (2008) (transferee to be admitted as a member only upon the approval of all of the incumbent members); RULLCA § 401(d)(3), 6B U.L.A. 478 (2008) (transferee to be admitted as a member only upon the approval of all of the incumbent

Starting from the proposition that the rights of the creditor in the debtor's property can be no greater than the rights enjoyed by the debtor,¹⁶ it follows that the creditor of a member or partner may look only to the transferable economic rights in the venture as an asset available to satisfy a debt.¹⁷ A judgment-creditor gains access to the distributions made with respect to the judgment-debtor's transferable interest by means of a charging order. The holder of the charging order has a lien on the

members); ULPA § 301(3), 6A U.L.A. 416 (2008), *id.* § 401(4), 6A U.L.A. 428 (2008) (transferee to be admitted as a partner only upon the approval of all of the incumbent partners); DEL. CODE ANN. tit. 6, § 18-704(a)(1) (transferee to be admitted as a member only upon the approval of all of the incumbent members); DEL. CODE ANN. tit. 6, § 18-702(b)(3) (transferee to be admitted as a member only upon the approval of all of the incumbent members); DEL. CODE ANN. tit. 6, § 15-401(i) (transferee to be admitted as a partner only upon the approval of all of the incumbent partners); SDCL § 48-7A-401(i) (transferee may become partner only with the consent of all the partners); SDCL § 47-34A-503 (transferee admitted as member only upon consent of all incumbent members); KY. REV. STAT. ANN. § 275.265(1) (transferee to be admitted as a member upon the approval of majority-in-interest of the incumbent members); *id.* § 362.1-401(9) (transferee to be admitted as a partner only upon the approval of all of the incumbent partners); *id.* § 362.2-301(3) (transferee to be admitted as a limited partner only upon the approval of all of the incumbent partners); and IND. CODE § 23-18-6-4.1(b) (transferee admitted as a member only upon the approval of all other members). *See generally* Thomas E. Rutledge, *Assigning Membership Interests: Consequences to the Assignor and Assignee*, 12 J. PASSTHROUGH ENTITIES 35 (July/Aug. 2009).

¹⁶ See UPA § 25, 6 (Pt. II) U.L.A. 294 (2001), comment to subdivision (2-c) ("The beneficial rights of the separate creditors of a partner in partnership property should be no greater than the beneficial rights of their debtor.").

¹⁷ *See also* 1 LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 7.8 (2nd Ed. 2010) ("Just as LLC members cannot individually assign the firm's specific property, it follows that they cannot make it individually available to their creditors in connection with individual debts."). The same statement is made in the official comment to section 705 of the Prototype LLC Act. *See* PROTOTYPE LIMITED LIABILITY COMPANY ACT, § 705, Commentary.

distributions when made to the judgment-debtor/partner¹⁸ but does not enjoy any right to participate in the venture's management.¹⁹ This limitation on participation in management precludes the judgment-creditor from forcing an interim or liquidating distribution from the LLC.²⁰ From the other side of the equation, the judgment-debtor remains an owner, and her management rights are not diminished.²¹ The charging order, however, does not affect a transfer of the partner's/member's transferable interest to the judgment-creditor²² and the right to participate in

¹⁸ RUPA § 504(b), 6 (pt. 1) U.L.A. 160 (2001); ULPA § 703(b), 6A U.L.A. 463 (2008); RULLCA § 503(a), 6B U.L.A. 498 (2008); KY. REV. STAT. ANN. § 275.260(3); *id.* § 362.1-504(3); *id.* § 362.2-703(3); UNIFORM STATUTORY TRUST ENTITY ACT ("USTA") § 606(c), 6B U.L.A. (2010 Supp.) 84.; UNIF. LTD. COOPERATIVE ASS'N ACT § 605(a), 6A U.L.A. 233 (2008). In contrast, certain statutes do not expressly describe those rights as being a lien. *See, e.g.*, IND. CODE. § 23-18-6-7.

¹⁹ *See, e.g.*, KY. REV. STAT. ANN. § 275.260(2) ("To the extent so charged, the judgment creditor has only the rights of an assignee and shall have no right to participate in the management or to cause the dissolution of the [LLC].")

²⁰ *I.e.*, asset partitioning is maintained. *See, e.g.*, UPA § 25(2)(a), 6 (pt. II) U.L.A. 294 (2001) (partner may utilize partnership property only for partnership purposes); *id.* § 25(c) (partnership property not subject to attachment to satisfy partner's personal debt).

²¹ *See* HILLMAN, VESTAL & WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT (West 2009 ed.), Authors' Comment 8 to RUPA § 503; J. WILLIAM CALLISON AND MAUREEN SULLIVAN, PARTNERSHIP LAW AND PRACTICE (West) § 7.20 at 7-39. By way of analogy, a mortgage does not transfer to the lender title to the collateral.

²² RUPA § 504(b), 6 (pt.1) U.L.A. 160 (2001); ULPA § 703, 6A U.L.A. 463 (2008). Certain state formulas are quite express on the point. *See, e.g.*, KY. REV. STAT. ANN. § 275.260(3) ("A charging order does not of itself constitute an assignment of the [LLC] interest."); *id.* § 362.1-504(4); and *id.* § 362.2-703(3). *See also* Thomas E. Rutledge, *The 2007 Amendments to Kentucky's Business Entity Statutes*, 97 KY. L. J. 229, 252-53 (2008-09).

management stays with the member.²³ When the underlying judgment is satisfied, the charging order is released and the owner again receives distributions.

Upon foreclosure the owner is either expelled, or is subject to being expelled, from the venture.²⁴ The rights of the purchaser at the foreclosure sale become, or has the rights of a transferee of a transferable interest. To repeat for emphasis, transferable rights are passive in nature; all that is sold/purchased at the sale are the passive economic rights that

²³ RUPA § 502, 6 U.L.A. 156 (2001) (“The only transferable interest of a partner in the partnership is the partner’s share of the profits and losses of the partnership and the partner’s right to receive distributions. The interest is personal property.”) *See also* ULPA § 701, 6A U.L.A. 461 (2008) (“The only interest of a partner which is transferable is the partner’s transferable interest. A transferable interest is personal property.”); RULLCA § 102(21), 6B U.L.A. 430 (2008) (a “transferable interest” as “the right, as originally associated with a person’s capacity as a member, to receive distributions from a [LLC] in accordance with the operating agreement, whether or not the person remains a member or continues to own any part of the right.”) *See also* RUPA § 101(9), 6 U.P.A. 61 (2001) (“‘Partnership interests’ or ‘Partner’s interest in the partnership’ means all of the partner’s interests in the partnership, including the partner’s transferrable interest and all management and other rights.”); DEL CODE ANN. tit. 6, § 15-101(15) (substituting “economic interest” for “transferable interest”); DEL. CODE ANN. tit. 6, § 18-101(8) (defining a “liability company interest” as “A member’s share of the profits and losses of a [LLC] and a member’s right to receive distributions of the [LLC]’s assets.”). *See also* GA. CODE § 14-11-101(13) (defining a “limited liability company interest” as referring to only the economic interest in the company); VA. CODE § 13.1-1002 (defining a “membership interest” as referring to only the economic interest in the company); and IND. CODE. § 23-18-1-10 (defining an “interest” in terms of the economic rights of a member).

²⁴ *Compare* RUPA § 601(4)(ii), 6 (pt. 1) U.L.A. 163 (2001); ULPA § 601(b)(4)(B), 6A U.L.A. 450 (2008) (upon transfer of all economic interests in the venture the partner is automatically expelled from status as a partner) *with* KY. REV. STAT ANN. § 275.280(a)(c)2 (upon the transfer of all of a member’s economic rights in a venture, the member may be expelled by a vote of a majority-in-interests of the other members). *See also* KY. REV. STAT. ANN. § 275.255(1)(d).

the debtor could otherwise unilaterally convey. The purchaser is a transferee/assignee and has the right to receive whatever distributions the transferor/assignor would receive but for the transfer/assignment.²⁵ The rights of a transferee are very limited when compared to those of a member. Unlike a member holding management rights, an assignee/transferee under most statutes does not have inspection rights or related information rights,²⁶ nor a right to participate in management²⁷

²⁵ See, e.g., RULLCA § 502, 6B U.L.A. 496 (2008) (“A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.”); ULPA § 702(b), 6A U.L.A. 462 (2008) (“A transferee has a right to receive, in accordance with the transfer: (1) Distributions to which the transferor would otherwise be entitled; and (2) Upon the dissolution and winding up of the limited partnership’s activities, the net amount otherwise distributable to the transferor.”); KY. REV. STAT. ANN. § 275.255(1)(b) (“An assignment shall entitle the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled.”); and DEL. CODE ANN. tit. 6, § 18-702(b)(2) (“An assignment of a [LLC] interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction or credit or similar item to which the assignor was entitled, to the extent assigned.”) RUPA § 503(b), 6 U.P.A. 157 (2001), provides:

A transferee of a partner’s transferable interest in the partnership has a right:

- (1) To receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
- (2) To receive upon the dissolution and winding up of a partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor; and
- (3) To seek under Section 801(6) a judicial determination that it is equitable to wind up the partnership business.

In certain instances an assignee/transferee has limited rights to move for judicial dissolution and receive an accounting at, or after, the dissolution of the business organization. See, e.g., RUPA §§ 503(b)(3), 801(6), 6 (pt. 1) U.L.A. 156, 189 (2001).

²⁶ See, e.g., RULLCA § 410(g), 6B U.L.A. 494 (2008).

even with respect to modification of the underlying operating agreement when the modifications have a negative effect on the assignee.²⁸ Finally, the assignee/transferee is typically owed neither fiduciary obligations nor obligations of good faith or fair dealing.²⁹

The Charging Order Formulae

The various state statutes use different formulae for calculating the charging order.³⁰ The statutory formulae provide different values for a

²⁷ See, e.g., RULLCA § 502(a)(3), 6B U.L.A. 496 (2008) (the assignee of an LLC interest is not entitled to “participate in the management or conduct of the activities of the [LLC] or to have access to its records and other information.”); KY. REV. STAT. ANN. § 275.255(1)(c) (providing in part “An assignment of a [LLC] interest shall not ... entitle the assignee to participate in the management and affairs of the [LLC] or to become or exercise any rights of a member other than the right to receive distributions pursuant to subsection (1)(b) of this section.”); RUPA § 502(a)(3), 6 (pt. 1) U.L.A. 156 (2001) (a transferee, during the “continuance of the partnership,” is not entitled to “participate in the management or conduct of the partnership business, to acquire access to information concerning partnership transactions, or to inspect or copy the partnership books or records.”)

²⁸ See, e.g., *Bauer v. The Blomfield Co.*, 849 P.2d 1365 (Alaska 1993) (assignee of partnership interest not owed obligations of good faith and fair dealing); *Bayside Petroleum, Inc. v. Whitmar Exploration Co.*, 1997 WL 34690262 (D. Okla. Aug. 13, 1997) (“no fiduciary duty” is owed the assignee of a partner); *Haynes v. B&B Realty Group, LLC*, 633 S.E.2d 691 (N.C. 2006) (no fiduciary duties owed to transferee of LLC interest); *Landskroner v. Landskroner*, 797 N.E.2d 1002, 1014 (Ohio App. 2003) (fiduciary duties are not owed to former member of LLC).

²⁹ See Thomas E. Rutledge, Carter G. Bishop and Thomas Earl Geu, *No Cause for Alarm: Foreclosure and Dissolution Rights of a Member's Creditor*, 21 PROBATE & PROPERTY 35 at 40 (May-June 2007).

³⁰ See Exhibit 1 for a side by side comparison of the charging order provisions of UPA, RUPA, ULPA, ULLCA, RULLCA and USTA. Professor Carter Bishop has published and from time to time updates a state-by-state comparison of the charging order provisions of the various LLC Acts. See Carter G. Bishop, *Fifty State Series: LLC Charging Order Statutes*, available at SSRN.com, abstract 1542244.

number of variables in their formulae including, but not necessarily limited to:

- an express statutory statement identifying the rights of the order's holder vis-à-vis the partnership/LLC;³¹
- the exclusivity of the charging-order remedy for the judgment-creditor of the judgment-debtor partner/member;³²
- the availability of foreclosure to the holder of a charging order against the underlying transferable interest;³³
- the standard for foreclosure;³⁴ and
- rights of the purchaser at the foreclosure sale.³⁵

The existence of different statutory provisions across state borders creates choice of law (and related) questions.³⁶

³¹ Compare RULPA § 703, 6A U.L.A. 463 (2008) (holder of charging order has rights of assignee) with ULLCA § 504, 6B U.L.A. 605 (2008) (silent as to holder's rights).

³² Compare UPA § 28, 6 (pt. 2) U.L.A. 341 (2001) (no statement as to exclusivity) with RUPA § 504(e), 6 (pt. 1) U.L.A. 160 (2001) (statement that charging order is exclusive remedy).

³³ Compare RULLCA § 503(c), 6B U.L.A. 498 (2008) (providing for foreclosure) with USTA § 606, 6B U.L.A. (2010 Supp.) (silent as to foreclosure) and IND. CODE § 23-18-6-7 (silent as to foreclosure).

³⁴ Compare UPA § 28, 6 (pt. II) U.L.A. 341 (2001) (while contemplating foreclosure, silent as to a standard for permitting same) with RULLCA § 503(c) (setting standard for foreclosure).

³⁵ See, e.g., RULLCA § 503(c), 6B U.L.A. 498 (2008); KY. REV. STAT. ANN. § 275.260(4); *id.* § 362.1-504(4).

³⁶ This raises issues concerning the scope of the “internal affairs” doctrine and conflict of laws or “choice of law” issues. That is: (1) Is the charging order provision a matter of internal affairs such that the law of the state of formation controls its application? and/or (2) How will a court of a forum state, *e.g.*, one in which a tort was committed, frame the conflict of laws or “choice of law” issue?

The first issue is simply whether charging orders so effect the rights of third parties as to be excluded from the internal parties as to be excluded from the internal affairs doctrine. Note this issue will even arise when there is a statutory choice of law provision because it addresses the scope of internal affairs not choice of law (directly). Background for both issues is given by the Restatement (Second) on Conflict of Laws provides:

[W]hen there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(2) (1971).

In corporate law most, but not all, courts apply the law of the state of formation for purposes of piercing the corporate veil of limited liability. *See* J. WILLIAM CALLISON, MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 11.3 (2010); Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 206 (2006); *Cf.* Matt Stevens, *Note, Internal Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047 (2007). The case for applying the law of formation for the liability of members via *piercing*, of course, presents slightly different policy issues than does the charging order. It would seem, however, that the status of the ultimate recipient of the interest *would* be an internal affair. Therefore, for example, the purchaser at a foreclosure sale of an interest has the status of a transferee and not a member. *See supra* note [redacted] (discussion of transferable interests). Professor Ribstein recently wrote that the internal affairs doctrine was a corporate doctrine that did not originally extend to unincorporated entities. And, further, that its extension to unincorporated entities was a key reason for the “vigorous competition” among states in unincorporated entity innovation and law. Ribstein, *supra* note [redacted], at 132 (stating it is a choice of law rule).

There are other related issues, for example, jurisdiction. The case of *Koh v. Inno Holdings Ltd.*, 114 Wash.App.268, 54 P.3d 1270 (2002), is a jurisdictional case concerning collection from a judgment debtor that was a member of an LLC. In that case the LLC was formed under the Washington LLC Act. The judgment debtor was a Singapore public corporation from a California court. The creditor filed a charging order in Washington because the LLC had a presence and property there. The Washington

As discussed in the next part of this article, the absence of exclusivity language in the Florida LLC Act's charging order provision was the door for the *Olmstead* decision.³⁷

The Analytic Quagmire of the Charging Order in the Context of a SMLLC

The charging order arose in the context of the general partnership, a structure that presupposes at least two partners.³⁸ It developed as a

court held that the charging order was valid against the LLC even though it had no personal jurisdiction of the judgment debtor whose membership interest was personal property.

Finally, a simple illustration of the concepts mentioned in this note as applied to fraudulent conveyance laws to domestic trusts follows:

An argument that the full faith and credit clause does not affect the ability of domestic asset protection trusts to protect assets contends that the trustee is not the same person as the settlor, and that therefore a judgment obtained against the settlor would not be enforceable against the trustee. However, if a judgment were obtained against a settlor in Florida who had created an Alaska trust and the claimant was unable to collect that judgment, he or she would bring a post-judgment fraudulent transfer action and join the trustee in Alaska as a transferee (as any transferee would be joined over whom jurisdiction could be obtained). Once that joinder is accomplished, the Florida court would have jurisdiction over that trustee, and an order issued by the Florida court determining that the transfer into the trust was a fraudulent transfer, would, as a result of the full faith and credit clause, be enforceable in Alaska.

Asset Protection Planning, EP/BP No. 810-2nd, BNA PORTFOLIO § VI (2010).

³⁷ One of us (Rutledge) has criticized the absence of exclusivity language in the charging order provision of the Uniform Statutory Trust Entity Act. *See* USTA § 606, 6B U.L.A. (2010 Supp.) 84; Thomas E. Rutledge and Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055 at n. 244 and accompanying text (Aug. 2010).

³⁸ *See* UPA § 6(1), 6 U.L.A. 393 (2001); *see also* RUPA § 101(6), 6 (pt. 1) U.P.A. 61 (2001).

means of protecting both the partnership as an entity and the individual partner(s) whose interests were not charged from interference by a partner's personal judgment-creditor. A second order implication, of the charging order (as well as the restriction upon foreclosure of a purchaser to these rights of an assignee) is that it protects the *in delectus personae* rule as embodied in the law of unincorporated business organizations.³⁹

³⁹ See *supra* note 15 and accompanying text. Partnership law, of course, existed before the express adoption of charging orders. An 1889 Partnership treatise, however, identifies the elemental attributes of partners (as opposed to *partnership* attributes) as turning on title and the relationship of the partnership to its property and those attributes are consistent with both the emergence and operation of the charging order. See JAMES PARSONS, PRINCIPLES OF PARTNERSHIP § 53, p. 131; § 55, p. 138; § 110, p. 366 (1889).

Piecing together those attributes in the treatise results in the following description of the rights of a members charging order. It starts with the *entity-aggregate* distinction and maybe reflecting the opinion of the treatise author given his protestations, the treatise states: "It is not necessary to declare land to be personalty in order to subject it to firm business. All that is necessary is to apply to land the principles which govern the partnership relation." *Id.* at § 110, p. 366 (There is a distinction in result between a partner holding legal title in partnership real estate in his own name who conveys legal title to his individual creditor and a partner who conveys personalty (his interest in the partnership as an entity) to his individual creditor: the first takes against the partnership, the second does not. *Id.* at 369). Importantly the land is *converted in equity* (or subject to the *doctrine of equitable lien*, see, *id.*, at 360): "The legal holder is merely converted into a trustee for the partnership." *Id.* at 367. Finally, no partner can withdraw his share from the firm or prevent the firm's use of the land until settlement." *Id.* (footnote omitted).

The treatise defines profits in relationship to the rights of partnership creditors (firm creditors) as follows: (1) "Profits result from the contribution."; (2) "[P]rofits have no independent status, but are merged in the contribution."; (3) "The word 'profits' is a relative term, and has a meaning only for the partners themselves."; (4) "The creditor may demand all property, or assets, of his *debtor-firm*, because they are devoted to the payment of his claim."; (5) "The so-called [sic] right [of a partner] to share the profits during the partnership is not a right at all, but a threat. It takes effect as a condition...to sever the relation altogether..."; and, here is where it gets interesting; (6) "Should the partners divide the joint fund among themselves, and convert the joint into several titles, the withdrawal would be a fraud upon the creditor [b]ut the...[partners] would not be

That is not, however, its primary focus. Rather, the charging order serves to protect the asset partitioning effect of holding assets in, and doing business through, a business venture. Even as both the common law and the Uniform Partnership Act significantly embodied the “aggregate” notion (as contrasted with the entity) of the partnership.⁴⁰ Nonetheless,

charged because they took it...as profits [rather, because that they withdrew it before the creditor was repaid his loan].” *Id.* at 132, 139-140.

Thus, the treatise is of the view that the partners have either an equitable lien or equitable title in “partnership” real estate; and, there is no transferable “profits” interest because any positive cash flow increases the original contributions of the partners but, by definition, is not *profit* until all the partnership creditors are paid in final settlement after dissolution. Any interim distribution, therefore, could be a fraudulent conveyance subject to clawback under that equitable doctrine as long as firm creditors exist.

If the summary is correct, the law circa 1889 did not anticipate regular interim distributions and, arguably, assumed the accounting period for determining profit was the life of the partnership. As a result, distributions or withdrawals to or by partners were subject to fraudulent conveyance law. Of course, this is logical and complete under general partnership law because the partners have unlimited liability for partnership debts and obligations. That is, the partners would be liable to the partnership creditors for distributions if the partnership was not able to pay them. As a general matter, therefore, there would be no need for resort to fraudulent conveyance law. Though not explicit in the treatise it seems that any of the withdrawal paid to a partner’s individual creditor would be subject to a constructive trust or an equitable lien for the benefit of the partnership creditor to the extent it could be traced.

⁴⁰ The question of aggregate versus entity treatment of partnership under UPA was explored in a series of articles, namely William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915); Judson A. Crane, *The Uniform Partnership Act--A Criticism*, 28 HARV. L. REV. 762 (1915); William Draper Lewis, *The Uniform Partnership Act--A Reply to Mr. Crane’s Criticism, Part I*, 29 HARV. L. REV. 158 (1915); and *Part II*, 29 HARV. L. REV. 291 (1916); Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916); Samuel Williston, *The Uniform Partnership Act, with Some Remarks on Other Commercial Laws*, 63 U. PA. L. REV. 196 (1914); and Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 MICH. L. REV. 609 (1917). See also EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION at 293-301 (Baker Voorhis 1929) (discussing various utilizations of entity and aggregate concepts in UPA, concluding that “Drafting the Uniform Partnership Act afforded a wonderful opportunity to give a clear

they both provided for asset partitioning. Even as the partnership's property was co-owned – by the partners held by means of a “tenancy in partnership.” Partners could not use partnership property other than for partnership purposes, and were expressly precluded from utilizing it for personal purposes.⁴¹ A partners using partnership property for personal gain would be in violation of their duty of loyalty.⁴² Under the common law, prior to the development of the charging order,

When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a fi. fa., and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and cause the execution creditor to bring an action in Chancery in order to get an injunction to take an account and pay over that which was

and ambiguous answer to that question. We think that no such answer is given by the Act, and that is a matter of profound regret.”) For more recent reviews of the issue, see Gary S. Rosin, *The Entity-Aggregate Disputes: Conceptualization and Functionalism in Partnership Law*, 42 ARK. L. REV. 395 (1989), and A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963). For further discussion, see *supra* note 39.

⁴¹ UPA § 25, 6 (pt. II), U.P.A. 294 (2001). See also 1 ALAN R. BROMBERG AND LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 3.04(b)(1) (UPA § 25 defined tenancy in partnership “so as to negate all of the incidents of individual ownership, Functionally, therefore, property is owned by the partnership.”)

⁴² See UPA § 21(1), 6 (pt. II), U.P.A. 194 (2001); see also Thomas E. Rutledge and Thomas E. Geu, *The Analytic Protocol of the Duty of Loyalty Under the Prototype LLC Act*, 43 ARK. L. REV. ____ (2011) (forthcoming), available on SSRN, abstract no. 1628715.

due by the executor debtor a more clumsy method of proceeding could hardly have grown up.⁴³

The reasons for this state of affairs were two-fold.⁴⁴ First, lawyers and courts had “difficulty ... in understanding the nature of a partner’s interest in a partnership.”⁴⁵ Second, “[t]he common law had no procedure for the seizure of the partner’s intangible interest in the business.”⁴⁶ The first reason still exists, although the modern statutes have provided greater definitional clarity on this point.⁴⁷ The second reason suggests part of the solution to the charging order problem is careful consideration of, and drafting for, the statutory nature of the abstract rights of a member in her membership interest.

The SMLLC, however, creates significant challenges to the underlying rationale for the charging order. Initially, and as other

⁴³ J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. 1 (1953) [redacted], quoting *Brown, Janson & Co. v. Hutchinson & Co.*, 1 Q.B. 737 (1895).

⁴⁴ See also JUDSON A. CRANE AND ALAN R. BROMBERG, *THE LAW OF PARTNERSHIP* § 43 at p. 241.

⁴⁵ See *supra* note 40 (discussing converting partnership realty into personally held by the separate partners).

⁴⁶ *Id.*

⁴⁷ See, e.g., RUPA § 201(a), 6 (pt. 1) U.L.A. 91 (2001) (a partnership is a legal entity); *id.* § 502, 6 (pt. 1) U.L.A. 155 (2001) (a partnership interest is personal property); *id.* § 203, 6 (pt. 1) U.L.A. 96 (2001) (partnership property is not the property of the partners individually); and *id.* § 501, 6 (pt. 1) U.L.A. 155 (2001) (a partner has no ownership interest in partnership property).

commentors have well identified,⁴⁸ the rule of *in delectus personae* cannot apply in the context of an SMLLC. Simply, no “other members” exist; “other members” is a null set.⁴⁹ Second, and returning to the *sine qua non* of the charging order, it is often difficult on both factual and analytic grounds to distinguish the single member from the SMLLC and; under those circumstances, to respect the asset partitioning element of the LLC structure.⁵⁰

The Narrow Reading of Olmstead – Statutory Exclusivity

One reading of *Olmstead* is that as the Florida LLC Act does not contain an express statement of exclusivity (*i.e.*, preemption) and, therefore, it is different than the charging order provisions under other of Florida’s unincorporated statutes.⁵¹ Not having been defined as exclusive,

⁴⁸ See, e.g., Larry Ribstein, *Reverse Limited Liability and the Design of Business Organizations*, 30 DEL. J. CORP. L. 199 (2005); Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199 (2009).

⁴⁹ See *infra* notes [redacted] - [redacted] and accompanying text (“A false category – there are no other members”).

⁵⁰ See, e.g., KY. REV. STAT. ANN. § 275.010(2) (“A [LLC] is a legal entity distinct from its members”); *id.* § 275.240(1) (“Property transferred to or otherwise acquired by a [LLC] shall be the property of the [LLC] and not of the members individually.”); and *id.* § 275.250 (“A [LLC] interest shall be personal property.”). It appears that only Wyoming expressly references the SMLLC in its charging order provision. See WYO. STAT. § 17-29-503(g) (charging order is the exclusive remedy of a member’s judgment creditor, including if the are the sole member).

⁵¹ The charging order provision of Florida’s adoptions of both RUPA and ULPA state that the charging order is the exclusive remedy of a partner’s judgment creditor. See FLA. STAT. § 620.8504 (FIRUPA); *id.* § 620.1703 (FIULPA).

the Florida LLC's Act's charging order provision is in parity with and supplements other available judgment-creditor statutes under Florida law.⁵² Other remedial judgment creditor Florida law provides a levy and execution remedy for property that is assignable by the judgment debtor.⁵³

⁵²

See *Olmstead* at * :

Since the charging order remedy clearly does not authorize the transfer to a judgment creditor of all of an LLC member's "right, title and interest" in an LLC, while section 56.061 clearly does authorize such a transfer, the answer to the question at issue in this case turns on whether the charging order provision in section 608.433(4) always displaces the remedy available under section 56.061.

⁵³

Olmstead at * . As a matter of background, but also of critical importance, the Court in *Olmstead* found Florida's general statutory execution scheme would apply to members of LLCs if the charging order was not the exclusive remedy for judgment creditors under the LLC Act. *Olmstead v. F.T.C.*, slip op. p. 7, citing Section 56.061 Florida Statutes (2008). A *critical determination* was that the LLC was to be treated as a corporation for purposes of that statute. Specifically it said, in part, "An LLC is a type of corporate entity. . .". *Id.* Shortly thereafter it added: "At no point have the appellants contended that section 56.061 does not by its own terms extend to an ownership interest [in an LLC]. . .". *Id.* at 8. Had the LLC charging order provision been interpreted as exclusive it would have been consistent with the general execution statute; *i.e.*, corporations means corporations and has one statutory provision and LLCs have another.

Two points are relevant for possible future reference. First, and as a general matter, "one of the characteristics that all LLCs share is that they are "unincorporated . . .". 1 LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 1:3, p. 1-11 (2009). Second, LLCs are flexible entities and not easily susceptible to a one size fits all analysis. Larry E. Ribstein, *The Uncorporation's Domain*, 55 VILL. L. REV. 125 at 125 (2010) (Ribstein used the term *uncorporation* rather than *unincorporated entities* or *alternative entities*. As Professor Miller concluded:

Where the issue is one that is not explicitly addressed within the parameters of the LLC statute, such as how an LLC or those associated with it are to be treated under another statutory or regulatory scheme, the tendency of courts to examine how other entities have been treated and to analogize to the LLC context is not surprising. Where a statute does not expressly refer to LLCs, as in the case of a statute enacted

As a result of Olmstead being the only member of the LLC, he had the practical capacity to assign his interest, vesting in the assignee all membership rights including management. Simply, there were no other members whose consent were required in order for him to assign all those rights.⁵⁴ The Court held that Olmstead could be compelled to make that

prior to the advent of LLCs, the question may arise whether other terminology used in the statute, such as “person,” “corporation,” or “association,” encompasses LLCs. Courts have reached various conclusions in such cases. Some courts have readily accepted the analogy between an LLC and a corporation, at times even interpreting the word “corporation” to include an LLC. In a number of contexts, however, courts have emphasized the unincorporated nature of an LLC and have concluded that an LLC is not the equivalent of a corporation. In some cases, it is entirely appropriate to approach an LLC as “like a corporation” or “like a partnership.” Here again, however, courts should be mindful (as they have been with respect to treatment of LLC interests under federal securities laws) that some contexts call for refinement or variation of the principles and analyses applied to other entities if the theory and policy underlying the LLC form, as well as the particular doctrine being applied to the LLC, are to be best effectuated.

Elizabeth S. Miller, *Are Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing From Other Forms*, Symposium: *Limited Liability Companies* at 20, 42 SUFFOLK U. L. REV. 617 at n. 151 (2009). Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, Symposium: *Limited Liability Companies* at 20, 42 SUFFOLK U. L. REV. 507 (2009); See Thomas E. Rutledge and Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 64 ARK. L. REV. ____ (2011) (forthcoming, available on SSRN, abstract: 1628715).

⁵⁴

See *Olmstead* at * ____:

The limitation on assignee rights in section 608.433(1) has no application to the transfer of rights in a single-member LLC. In such an entity, the set of “all members other than the members assigning the interest” is empty. Accordingly, an assignee of the membership interest of the sole member in a single-member LLC becomes a member and takes the full

alienation in satisfaction of the judgment against him because his membership rights were alienable entirely at his option and in his discretion.

The Court's reliance upon the absence of exclusivity language in the Florida LLC Act and the implied burden on drafters to amend all acts as the state-of-the-art in drafting moves forward in any of them is subject to challenge. For example, curiously not referenced by the *Olmstead* Court were prior lower court rulings in Florida to the effect that the charging order was the exclusive remedy of the judgment creditor and that other collection mechanisms were not available.⁵⁵ Further a fair

right, title, and interest of the transferor without the consent of anyone other than the transferor.

⁵⁵ See *Givens v. National Loan Investors, L.P.*, 724 So.2d 610 Fl. App. 5th Dist 1998) (Florida RULPA charging order is the exclusive remedy for the judgment-creditor of a limited partner); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So.2d 1002 (Fla. App. 4th Dist. 1986) (Under Florida UPA, "the charging order is the only means by which a judgment creditor can reach the debtor's partnership interest."); see also *Myrick v. Second Nat'l Bank of Clearwater*, 335 So.2d 343 (Fla. App. 2nd Dist. 1976) (under Florida UPA, a judgment creditor must bring with a charging order before other collection mechanisms may be employed); and *In re Stocks*, 110 B.R. 65 (Bankr. N.D. Fla. 1989) (the Florida adoptions of UPA and RULPA have modified the law as to levy and sale under execution to the effect that "the statutory charging order [is] the only means by which a judgment creditor can legally command payment from the debtor's partnership interest.") (citations omitted). As a general statement of "hornbook" law circa 1968 about the original UPA which did not contain any *exclusive* language:

Although the U.P.A. nowhere says that a charging order is the exclusive process for a partner's individual creditor, the courts have generally so interpreted it. This seems consistent with the Act, but (since the charge is wholly post-judgment) may not harmonize with the policy of allowing pre-judgment attachment in many states. Against a

assumption is that the drafters of the LLC Act were both aware of and intended to incorporate the common law as it existed at the time of adoption.⁵⁶

Nonetheless, as previously delineated, a reasoned analysis of the opinion must lead to the conclusion that the holding is supported by a sound technical and logical textual basis.

The Unfortunate Normative Discussion of the Charging Order Generally

The most unfortunate aspect of the *Olmstead* decision is its normative linkage of the charging order remedy and the *in delectus personae* rule concerning the admission of new or substitute member[s]. Further compounding the error of misidentifying the most important reason for the charging order,⁵⁷ the Court engaged in a normative analysis

limited partner's interest, the charging order is cumulative of other remedies which may exist apart from the partnership Acts.

ALAN. R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP LAW § 44, p. 249 (1968) (footnotes omitted, no Florida case cites, newest was 1959). Note the distinction in treatment between truly passive liability shielded limited partner and the general partner under UPA.

⁵⁶ An article on *Olmstead* written by a Florida lawyer provides further background. In deed, it states that there was a previous attempt to amend the Florida LLC Act to include the exclusive language but that attempt was abandoned before introduction in the Florida legislature. Barry A. Nelson, *Olmstead, Right Result, Wrong Reason*, 51 TAX MNGMT MEMO 315 at 319 (Issue 19 Sept. 13, 2010).

⁵⁷ A similar misidentification of *in personam delectus* as the basis for the charging order took place in the *Albright* decision. See *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003).

of how that (incorrect) basis should effect upon the statutory charging order remedy. The Court set forth an analytic framework in which the justification for the charging order is protection of the “pick your partner rule.”⁵⁸ Having defined that (in fact false) dependency, it was able to determine that in the absence of a member other than the judgment-debtor the charging order lacks purpose and justification.⁵⁹ At that point and in the opinion the case was already resolved as a matter of statutory construction; therefore, all of this analysis is likely dicta, but it is worth recognizing that the Court could/should have tacked slightly and adopted a theory of the charging order that protects the *in delectus personae* rule even in the SMLLC context except to the extent either other law, equity or the operating agreement of the LLC in question provides otherwise. Doing so however, would, have weakened its conclusion of non-exclusivity.

⁵⁸ See *supra* note [redacted].

⁵⁹ Drafters of statutes in response to *Olmstead* should be aware of a related unsolved question under many states’ LLC law, namely whether a person must have an “equity” (transferable) interest in the LLC to be a member. See, e.g., KY. REV. STAT. § 275.195(3) (permitting the admission of a member who does not acquire a limited liability company interest); DEL. CODE ANN. tit. 6, § 18-301(d).

Linkage to the *in delectus personae* of a second member is not theoretically necessary.⁶⁰ While the principle of *in delectus personae* and the procedure of the charging order have long existed in concert with one another in multiple member unincorporated organizations like partnerships; the charging order is not necessarily dependent upon the principle for its justification and vitality. In fact, the charging order serves to protect the venture itself, the venture's creditors, and the participants, including the judgment-debtor, from a judgment-creditor appropriating venture property in satisfaction of the judgment debt.⁶¹ Irrespective of whether it is an SMLLC, the LLC has a legally justifiable right to apply its property⁶² to its operations.⁶³ The foregoing is the second side of the limited liability coin called *asset partitioning*; that is, the assets of the business organization are dedicated to its purposes and are not generally

⁶⁰ See *infra* notes [redacted] - [redacted] and accompanying text ("A False Category – There Are No Other Members") and the charging order certainly furthers and protects that right. It does, however, raise other interesting issues beyond the scope of this article. See J. Callison, *supra* note [redacted] at.

⁶¹ See Gose, *UPA Charging Orders*, *supra* note [redacted], at [redacted]; BROMBERG ON PARTNERSHIP, *supra* note [redacted].

⁶² See, e.g., FLA. STAT. § 608.425(1) ("All property originally contributed to the [LLC] or subsequently acquired by a [LLC] by purchase or otherwise is [LLC] property."); KY. REV. STAT. ANN. § 275.240(1) ("Property transferred to or otherwise acquired by a [LLC] shall be the property of the [LLC] and not of the members individually.").

⁶³ See *infra* notes [redacted] - [redacted] and accompanying text ("A False Category – There Are No Other Members") and the charging order certainly furthers and protects that right.

available to satisfy the creditors of the individual owners.⁶⁴ This second side of limited liability exists for the benefit of the *business organization's creditors*, assisting them in credit pricing because absent distributions (which may be limited by contract or covenant),⁶⁵ company assets will be applied first to their claims and will not be diverted to satisfy the creditors of the individual owners (members, partners). One counterbalance to such a protective rule is the “reverse pierce” wherein, under certain compelling circumstances, the assets of the entity are made available to meet the personal debts of an owner.⁶⁶

A False Category – There Are No Other Members

The *Olmstead* decision; normative justification for not restricting *Olmstead's* judgment-creditor to the charging-order remedy was barred by the fact that there are no other members affected by the transfer of

⁶⁴ See generally Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253; Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 383 (2000).

⁶⁵ See, e.g., KY. REV. STAT. ANN. § 275.225(1)(c).

⁶⁶ See, e.g., *C.F. Trust, Inc. v. First Flight Partnership*, 580 S.E.2d 806, 810 (Va. 2003) (holding that reverse piercing is possible under Virginia law and listing similar determinations of other jurisdictions). See also Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1991) (Efforts to provide bulletproof asset protection may be frustrated through “reverse piercing,” especially if the asset transfer to the entity occurs after the judgment is secured and if the entity is a single-member LLC). See, e.g., *Litchfield Asset Management Corp. v. Howell*, 799 A.2d 298 (Conn. App. Ct. 2001). See *supra* notes [redacted] - [redacted] and accompanying text (for further discussion of, and citation for, “reverse piercing”).

Olmstead's interest in the SMLLC to the judgment-debtor. While that is the case, it should not be the entirety of the analysis. Rather, there may be third-parties who have legitimate claims to be considered.

Assume that an SMLLC, while holding significant assets in its own name, serves as the general partner of a number of real estate developments; each development is organized as a limited partnership. The sole member of the SMLLC is an experienced and accomplished development manager. Further, assume a judgment lien against the SMLLC's only member consequent to his unfortunate personal decision to guarantee a cousin's corporate business debt. Should a remedy beyond the charging order be permissible under these circumstances (including the lack of personal culpability)⁶⁷ given the possible significant negative consequences to the various real estate developments that would follow from a change in ownership of the SMLLC?⁶⁸ Thus illuminates the

⁶⁷ Contrast Olmstead's personal and ongoing operation of a financial scam. See *Olmstead*, *supra* note 4 ("scam").

⁶⁸ A 1976 California case illustrates this logic and rationale in the related context of a limited partnership that owned and operated a hotel. The individual judgment debtors were the only limited partners and owned all the stock in the corporate general partner. The personal judgment debt was for defaulting on the purchase price of the stock in the corporate general partner. The judgment debtor attempted to execute on the hotel owned by the limited partnership through California's general levy and execution statute asserting the charging order process was not appropriate because the judgment debtors owned all interests of the limited partnership and its corporate general (analogous to the

fallacy of the *in personam delectus* rule as the bases for the charging order and the failure of the no other member reasoning of the *Olmstead* case even as the asset partitioning effect of the SMLLC is highlighted.

The Dissent

Two justices filed a significant dissent. At its core, the dissent challenges the majority opinion's reliance on the absence of exclusivity

sole member of an SMLLC except for cross-consent requirements for accepting new partners). The Court's discussion and analysis are instructive:

Plaintiff would have us adopt an exception to this statutory prohibition against execution (§§ 15028, 15522) to cover those cases in which the partnership is owned entirely by the judgment debtors. He argues that the purpose underlying the enactment of these statutes is to protect innocent partners from the injustice and hardship they may suffer when partnership property is sold in execution of a judgment against an individual partner. (*Taylor v. S & M Lamp Co.*, *supra* 190 Cal. App.2d 700, 708, 12 Cal. Rptr. 323.) This purpose, so the argument goes, is not furthered by disallowing execution against specific partnership assets in cases when the judgment debtors won the entire proprietary interest in the business.

We decline plaintiff's invitation to recognize such an implied exception to the required use of the statutory charge procedure. Where, as in the instant case, the partnership is a viable business organization and plaintiff does not show that he will be unable to secure satisfaction of his judgment by use of a charging order or by levy of execution against the debtor's other personally owned property, there is no reason to permit deviation from the prescribed statutory process.

Evans v. Galardi, 16 Cal.3d 300 at 310-11 (Cal. S. Ct. 1976) (note the absence of "exclusive" statutory language). See CRANE, *supra* note [REDACTED] (the quoted material therein supports this case). For discussion and analysis of a line of cases in California that culminated, for a time, in an undue interference test for foreclosure of charging orders see, *infra* notes [REDACTED] - [REDACTED] and accompanying text.

language in the LLC Act's charging order provision.⁶⁹ The dissent argues the majority rewrote the charging order law not only for SMLLCs but for all LLCs.⁷⁰ The dissent suffers, however, from its suggestion that the majority ruling opens the door to creditor intervention in the context of a multiple-member LLC.

It would not be the case in the context of a multiple member LLC that a judgment-creditor would acquire all rights and title in the judgment-debtor's LLC interest and thereby involve themselves in the management and affairs of the LLC. Rather, the judgment-creditor holding either a charging order or a transferable interest after a foreclosure under the charging order statute or even under the state law⁷¹ has no affirmative rights vis-à-vis the company. Prior to foreclosure there is no mechanism vis-à-vis the charged interest to become a member, and after acquisition by foreclosure the judgment-creditor may become a member under LLC default rules only upon the consent of the incumbent members. Without

⁶⁹ Curiously, the dissent did not address the numerous earlier Florida decisions stating the charging order to be exclusive even though not expressly set forth in the statute. See *supra* note [redacted].

⁷⁰ A treatment of the *In re Albright* decision, *supra* note 2, written by two of the authors, Thomas E. Rutledge and Thomas Earl Geu, *The Albright Decision - Why a SMLLC is Not an Appropriate Asset Protection Vehicle*, 5 BUSINESS ENTITIES 16 (Sept./Oct., 2003), was cited in the dissent.

⁷¹ See *supra* note [redacted] and accompanying text.

that consent the creditor could become only a transferee and succeed to the right to participate in the LLCs management.⁷² Thus, only under unique circumstances consequent to private ordering in the controlling operating agreement would the judgment-creditor of a member in a multi-member LLC have more than only the (minimal) rights of an assignee/transferee.⁷³

Statutory Construction

Charting the course from Point A to Point B on the surface of the statute using tools of construction does not necessarily account for the jurisprudential ridges and tangled policy wrecks that lurk just below it. A general awareness of these features aids in understanding *Olmstead*; though, paradoxically, it does not necessarily explain it. The subsurface features result from tension between and among law and equity, on one hand, and, on the other, the separation of powers between the judiciary and the legislative branches of government. These tensions can quickly devolve into a theoretical morass beyond the scope of this article.

⁷² FL. STAT. § 608.432, cited *Olmstead*, at * . Accord KY. REV. STAT. ANN. §§ 275.275(1)(b); 275.265(1) (requiring a majority-in-interest of the members other than the assignee to approve the admission of the assignee as a replacement member). See also *supra* note and accompanying text.

⁷³ For example, an operating agreement could provide that a member's transferee is admitted to full membership in the LCC upon receipt of notice of the transfer.

Nonetheless, these hard issues are integral to a nuanced understanding of *Olmstead*.

The tensions, and the related issues analysis of those tensions uncover, are sometimes nested in statutory construction. Next, therefore, this article provides a selective and illustrative introduction to the application of canons of statutory construction and a court's use of equity as a part of those canons. It is by no means a comprehensive or deep analysis. The issues it uncovers but which this article does not attempt to resolve, however, are present just beneath the surface of many judicial opinions including *Olmstead*.

Karl Llewellyn took on the task of illuminating statutory construction in an article published in 1950.⁷⁴ Apparently Llewellyn did not hold to the convention that a statute had a single meaning because the article stated: "[t]he accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons [of statutory construction] on almost every point.... Every lawyer must be familiar with them all: they are still needed

⁷⁴ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1949-1950). See *infra* note [redacted] ("textualist").

tools of argument.”⁷⁵ How does one choose the correct canon to apply? Llewellyn posits the judge should select the canon that leads to a construction in harmony with the “good sense” of the situation and which uses as simple a construction as possible given that “good sense.” In Llewellyn’s own words:

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, by *tenable means, out of the statutory language*.⁷⁶

Llewellyn’s “situational sense” that would drive his recommended choice of canons probably places him in the “cooperative partner” (pragmatic) school of statutory construction. In the cooperative partner school of statutory construction, judges are partners with the legislature “in the enterprise of law elaboration.”⁷⁷ An opposing school of construction places the judge in the role of a “faithful agent” of the legislature⁷⁸ (sometimes referred to as the “textualist” or “formalist”⁷⁹

⁷⁵ *Id.* at 401.

⁷⁶ *Id.* (emphasis in original).

⁷⁷ William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation 1776-1806*, 101 COLUM. L. REV. 990, 991 (2001).

⁷⁸ *Id.* at 993. Statutory construction is not the same as philosophy of law but may reflect it. The *faithful servant* view of construction has much in common with the legal

school). Llewellyn's "situational sense" applies to broad *types of situations* rather than to narrow types of situations which apply "the sense of a particular controversy between particular litigants."⁸⁰

philosophy of *Positivism*. *Positivism* "became dominant in the nineteenth century as a rejection of natural law philosophy." Maureen E. Markey, *Natural Law, Positive Law, and Conflicting Social Norms in Harper Lee's To Kill A Mockingbird*, 32 N.C. CENT.L. REV. 162 at n. 14 (2010). Under the Positivist conception of the philosophy of law: "Law does not derive from religious beliefs or absolute moral values; rather, law is that which is promulgated by a legitimate authority and backed by sanction for failure to comply." *Id.*

⁷⁹ Eskridge, *supra* note [redacted], at 993. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (1993). For current examples of literature on the subject of equity, more generally, seek the work of T. Leigh Anenson and, in turn, the literature she cites therein. See, e.g., T. Leigh Anenson and Donald O. Mayer, "*Clean Hands*" and the CEO: *Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 101 (2010); T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L. J. [redacted] (forthcoming 2010).

⁸⁰ Llewellyn, *supra* note [redacted] at 398. In effect Llewellyn classified his situational sense into two categories and classification is an important and basic part of the law. Professor Weinrib indicates just how important by stating:

The understanding of law is a classificatory act. One cannot claim to understand law if one cannot differentiate legal instances, that is, those events or conditions to which the law assigns legal consequences, from all other events or conditions.

Jacob Weinrib, *What Can Kant Teach Us About Legal Classification*, available at <http://ssrn.com/abstract=1684344> (August 23, 2010). Somewhat paradoxically, scholars like Professors Weinrib and Waddams disagree about whether any *classificatory scheme* can yet explain the law. Stephen Waddams, for example, takes the position, "that the complexity of the law exceeds the explanatory power of any classificatory system so far," in part, because classification schemes (or *maps*) obscure the complexity of the instances in which it arises. *Id.* at pp. 1-4. This helps explain in a generalized theoretical way both the importance of classification *and* the reason it is difficult to apply even relatively narrow statutory classification provisions, (like charging order statutes), to real life situations.

Weinrib suggests that Waddams' bases his argument on history by "referring to a litany of judges who emphasize the tension between the untidiness of law and the orderliness of classification." *Id.* at 4. Illustratively:

Oliver Wendell Holmes claimed that "the life of the law has not been logic: it has been experience"; Lord Halsbury stated that "every lawyer

It is unclear with which *type* of *situational sense*, if any, the *Olmstead* court approached its task. The “type of situation” approach favored by Llewellyn would frame the issue in terms of “all SMLLCs,” “all LLCs” or even “all nonfraudulent LLCs.” In the alternative, the “controversy between particular litigants” approach would consider the particular unique facts of the case: that the sole member of the SMLLCs in question was engaged in a “scam”⁸¹ and, further, that the LLCs apparently held the fruitful proceeds from those scams. These senses, of course, are never stated in the *Olmstead* opinion. The mere fact that the court recites that the sole member of the LLCs was involved in a “scam”, however, seems to indicate that the court determined the “scam” important context for its decision. If so, Llewellyn’s analysis would suggest the court was likely using a narrower rather than a broader situational sense.

One of the dangers of using the narrower situational sense, according to Llewellyn, is,

[I]t leads readily to finding an out *for this case only*—and that leads to a complicating multiplicity of refinement and

must acknowledge that the law is not always logical at all”; and Lord Wilberforce suggested that “[t]here are many situations of daily life that do not fit neatly into conceptual analysis.”

Id. (footnotes omitted).

⁸¹ See *supra* note [redacted].

distinction, as to repeated resort to analogies unthought through and unfortunate of extension. This is what the proverb seeks to say “Hard cases make bad law.”⁸²

Alternatively, the *Olmstead* holding could be interpreted more broadly to apply to all *single member* LLCs because the phrase “with respect to a judgment debtor’s freely alienable membership interest in a single-member LLC....” was appended to its holding⁸³ The dissent, conversely, argued the majority’s holding included the *all LLC* situational sense, not just the *single member* situational sense. The dissent argued that because the majority’s reasoning hinged on the *absence* of the word “exclusive” in the statute without distinction it would necessarily apply to single- and multi-member LLCs alike.⁸⁴

The extent of the holding is in question because the majority opinion stated elsewhere:

The relevant question is not whether the purpose of the charging order provision—i.e., to authorize a special remedy designed to reach no further than the rights of nondebtor members of the LLC will permit—provides a basis for implying an exception from the operation of that provision for single member LLCs. Instead the question is

⁸² Llewellyn, *supra* note [redacted] at 398.

⁸³ Slip op at 14.

⁸⁴ Slip op at 16-17.

whether it is justified to infer that the LLC charging order mechanism is an *exclusive remedy*.⁸⁵

Recall that Llewellyn's broad *situational sense* framework seemed consistent with the cooperative-partner school of statutory construction.⁸⁶ Both the cooperative-partner and the faithfulagent schools of construction argue from history. A proponent of the faithfulagent school argues, for example, that the "cooperativepartner" approach is simply an extension of "the old English tradition of equitable interpretation."⁸⁷ Indeed, a treatise

⁸⁵ Slip op at 10-11. See *supra* note [redacted] (discussing lower court charging order decisions in Florida). In 1998, a Florida appeals court interpreted the limited partnership charging order provision (Florida's Act was a version of the Revised Uniform Limited Partnership Act). Like the LLC statute in *Olmstead*, the Florida limited partnership statute at the time did not contain any provision for foreclosure of the lien portion of a charging order. Therefore the Court held there was no foreclosure sale procedure available under the limited partnership statute. *Givens v. National Loan Investors L.P.*, 724 S.2d 610 (Fl. App. 5, 1998) (*rehearing denied*). On one hand, this approach seems consistent with the interpretive approach taken in *Olmstead* because it emphasizes that the *absence* of a phrase or word has independent negative significance. On the other hand, it can be seen as almost completely opposite to *Olmstead* because in *Givens*, the result of appellate court's holding was that a provision which looked like the LLC provision; was, in effect, exclusive because no other law was given effect to allow foreclosure (*e.g.*, execution sales) (though that was *not* an issue before the appellate court).

There is a possibility the result in *Givens* was wrong even assuming the interpretive approach (which was consistent with *Olmstead*) was appropriate. The court seemed a bit confused by an edit of a portion of an article it quoted at length and upon which it partially relied (or by which it was partially led astray). The edited and quoted part of the article can be interpreted to *imply*, and the Court clearly *inferred*, that a purchaser at the foreclosure sale under the general partnership charging order provision somehow becomes a partner (perhaps confusing *foreclosure* sales with *execution* sales, the latter of which correctly was *not* permitted by precedent).

⁸⁶ See *supra*, notes [redacted] - [redacted] and accompanying text.

⁸⁷ Eskridge, *All About Words*, *supra* note [redacted], at 993.

on statutory construction published in 1848 devotes an entire chapter to the use of equitable construction after the separation of the legislative and judicial powers in England.⁸⁸ The treatise bifurcates “equity” into two meanings.

The first meaning identifies equity as a source of law that is higher than legislation or, in constitutional systems, even higher than the constitution. It is “that natural justice which distributes right to all men indiscriminately.”⁸⁹ Thus, roughly one meaning of “equity” is the “natural law” which is a source of inalienable rights either contained in, or consistent with, the Constitution. These rights are an extra-constitutional basis for judicial review. Judicial review on extra-constitutional grounds, of course, raises separation-of-power issues between the legislature and the judiciary. Natural law arguments, sometimes disguised as an appeal to justice, are made even within the context of charging orders and SMLLCs,

⁸⁸ E. FITCH SMITH, SMITH’S COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION § 696, p. 815 (1848) (hereinafter “Smith’s Commentaries”).

⁸⁹ Natural law “has been a centerpiece of legal philosophy since the ancient Greeks and Romans” and the “belief in universal principles of right and wrong and the essential integration of law and morality are the central tenets of natural law.” Maureen E. Markey, *Natural Law, Positive Law, and Conflicting Social Norms in Harper Lee’s To Kill A Mockingbird* ____ (2010) (footnotes omitted but citing or naming Aristotle, Aquinas, Grotius, Rousseau, Locke, and Blackstone as adherents to one or another kind of natural law hanging from being based in religion to being based [in] rational philosophy).

in spite of the arrangements' flirtation with the separation of power issue. These arguments are sometimes embedded in the larger public-policy issues raised by asset-protection planning.⁶⁶ This rather raw, equitable

⁶⁶ More than five years ago, a book on asset protection questioned the pedigree of public policy concerning SMLLC charging orders as follows:

The original policy reason for the charging order, however, does not exist with a single-member LLC. There is no other LLC member who would be unfairly affected by the seizure of LLC assets or of the LLC interest itself in its entirety. [paragraph deleted] If asset protection via the charging order is a major concern, single member LLCs should be used with caution.

JAY D. ADKISSON, CHRISTOPHER M. RISER, *ASSET PROTECTION: CONCEPTS AND STRATEGIES FOR PROTECTING YOUR WEALTH* (2004) at 219 (*e.g.*, chapter 19 is entitled *Charging Order Protected Entities*). The book quoted sounds in both Llewellyn's *situational sense* of statutory construction and the narrower meaning of equity (to the particular parties at bar). It says, in part, "[v]ery simply, an asset protection structure that protects the assets of all persons, no matter how illegal or despicable their conduct, cannot be expected to last long before changes in the law defeat such structures." At the very least this complicates the drafting of charging order statutes that seek both universality and certainty. *Id.* at 35. Note that the quote sounds primarily in asset partition and this article argues that under most circumstances asset partition favours use of a charging order provision to protect the business of the entity. *See, e.g., supra* notes - and accompanying text.

Jay Adkisson, one of the authors of the cited book, *id.*, further stated in an email to John DeBruyn (one of the authors of this article):

American judges have never been nor were meant to be mere automatons who mindlessly apply statutes and interpret governing documents in a vacuum and without regard to the surrounding circumstances. Indeed, it could be argued that the very role of judges is to safeguard concepts of justice by not applying statutes in those situations where it would be unfair or inequitable for the statutes to be applied, or to interpret government documents in a way that would do an injustice. With this in mind, it is folly to believe that one can draft statutes or create operating agreements that will provide 100% bulletproof asset protection in all situations for the benefit of all debtors against all creditors. The judges can and will look for loopholes that lead to the most just result in cases involving egregious facts; indeed, that is their job. The desire of some practitioners to give complete comfort to their clients that their asset protection will stand up in all circumstances against all comers will never be anything more than a

version of construction, however, is only one of the tensions existing between law and equity that can be raised in the context of statutory construction.⁶⁷ Another tension is related to the second meaning of equity.

The second meaning of equity for purposes of equitable construction, is “justice which takes off from the rigor and severity of the written law [(hereinafter *equity softens the law*)].”⁶⁸ The same 1848 treatise quoted previously posits that the practice of equitable construction continues “in more modern times”⁶⁹ as an antidote to the universal application of a statute in circumstances contrary to “the intention of the law-giver, in matters which he was not able or willing to express, or in

false hope. This is particularly true in the circumstance of the single member LLC, where if such an entity were allowed to protect assets from the creditors of its single owner, it would have the effect of creating an unlimited exemption for such of the personal property that the single owner uses to fund the SMLLC in a way that would completely abrogate the normal statutory exemptions from collection of such assets.

Email from Jay Adkisson to John DeBruyn (8:59 pm, Aug. 26, 2010) (Email on file with John DeBruyn, quoted with permission).

The old-fashioned notion of morality and its necessary role in the economy, as well as its place in the evolution of humans and human societies, is the subject of serious study in the allied areas of brain science including neuro-economics and behavioral and evolutionary economics. See, e.g., Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007). For a bibliography of other such literature, see <http://law.vanderbilt.edu/seal/> (last visited August 30, 2010).

⁶⁷ Eskridge, *All About Words*, *supra* note 49 at 993.

⁶⁸ SMITH’S STATUTORY COMMENTARIES, *supra* note [redacted] at 814.

⁶⁹ *Id.* at 819.

restraining the words of the law, where it is clear that they were not intended to extend to a particular act or thing.”⁷⁰ This second meaning of equity selectively softens the law in application, echoing both types of Llewellyn’s situational senses in statutory construction.

Rather obviously, the difference between the two meanings of *equity* parsed by the old statutory-construction treatise is both of degree and kind. It is a difference in degree because in the most powerful natural-law sense, the judiciary can, and arguably should, override the meaning *and even intent*, of the law, if necessary, in *all cases* representing Llewellyn’s broad interpretive sense. Under the other meaning of equity, the court interpolates a meaning from the statute that is “equitable” between the parties at bar in a given case, even though the result may not be expressly provided by the statutory language. In the latter instance equity is used as a necessary antidote to universal statements of law where it is clear the law-giver (legislature) did not mean the law to extend to a particular circumstance or set of circumstances. The use of equity as an antidote to law in individual cases comes dangerously close to equity as between the two parties, which violates Llewellyn’s warning that the

⁷⁰*Id.* at 814.

“narrower situational sense” of construction raises both certainty and jurisprudential issues. Llewellyn suggests using this narrower sense can lead to “multiplicity of refinement and distinction.”⁹¹ In application, to repeat Llewellyn, it embodies the proverb: “Hard cases make bad law.”⁹² It is inelegant.⁹³

In June 2010, the United States Supreme Court decided a case that directly addressed the equitable powers of the federal courts in relation to the one-year statute of limitations on *habeas corpus* petitions.⁹⁴ The opinion, among other things specifically discussed jurisdiction,⁹⁵ statutory

⁹¹ LLEWELLYN, *supra* note [redacted] at [redacted].

⁹² LLEWELLYN, *supra* note [redacted] at [redacted].

⁹³ *Elegant* as used here means “neatness” and “simplicity.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 402 (1991). It is used in the sense of *Occam’s razor*. See *id.* at 816. See *supra* note [redacted]. (Llewellyn suggests using the simplest construction to achieve the necessary sense of the law).

⁹⁴ *Holland v. Florida*, [redacted] U.S. [redacted], 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

⁹⁵ Jurisdiction is a particularly confusing term when applied to equity. See, *infra* note [redacted] - [redacted] and accompanying text. It’s complexity, if not confusion, is also reflected in constitutional law. For example, the *Holland* opinion stated:

First, the AEDPA “statute of limitations defense . . . [ellipses in original] is not “jurisdictional.” [citations omitted] It does not set forth “an inflexible rule requiring dismissal whenever” its “clock has run” [citations omitted]

* * *

We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a “rebuttable presumption” in *favor* “of equitable tolling.” [citations omitted]

Holland v. Florida, *supra* note [redacted] at [headnotes 2 & 3].

construction,⁹⁶ the role of equity in a statute of limitation scheme,⁹⁷ and the importance of whether the statutory provision in question originally sounded in equity or law.⁹⁸ Each of those topics is addressed in the

⁹⁶ *Holland, supra* note [redacted], at [redacted] [headnote 5]. The opinion discussed the majority's decision not to follow a linguistic canon this way:

Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive *maxim inclusion unius est exclusion alterius* (to include one item (*i.e.*, suspension during state-court collateral review) is to exclude other similar items (*i.e.*, equitable tolling)).

Id. (citations omitted, emphasis in original) (for a general discussion of linguistic canons of construction); *see, supra*, notes [redacted] - [redacted] and accompanying text (for an application of statutory construction in *Olmstead*).

Unlike the *Olmstead* opinion, however, the Supreme Court engaged in an extended discussion about the purpose of the statute and its one-year statute of limitations. *Holland, supra*, at [redacted] [headnotes 6&7] (majority) and at [redacted] [p.21] (Scalia, *dissent*). For the purpose of a charging order (not discussed by *Olmstead*) *see, supra* notes [redacted] - [redacted] and accompanying text.

⁹⁷ First, there is a rebuttable presumption that equitable tolling is available against nonjurisdictional statute of limitation provisions. *Holland, supra* at [redacted] [headnote 3]. Second, "we 'will not construe a statute to displace courts' traditional equitable authority absent the 'clearest command'" *Id.* (citations omitted). The Court reiterated several factors that weighed in favor of displacing equitable tolling under a different statute of limitations. These included that "it set forth its time limitations in unusually emphatic form"; "used highly detailed and technical language that, linguistically speaking cannot be read as containing implicit exceptions" and; "related to an underlying subject matter . . . with respect to which the practical consequences of permitting tolling would have been substantial." *Id.* at [redacted] [headnote 4] (internal quotation punctuation removed)

⁹⁸ *See, Holland, supra* note [redacted] at [redacted] [headnote 6,7] ("But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petitioner's timeliness was always determined under equitable principles."); *see, id.* at [redacted] [headnote 4] ("In the case of the AEDPA, the presumptions strength is reinforced by the fact that "equitable principles" have traditionally "'governed' the substantive law of habeas corpus. . . ." [citations omitted])

context of *Olmstead* later in this article.⁹⁹ The importance of the *habeas* case here is that it illustrates the interspace between the two meanings of *equity*.

First, concerning the *softens the law* equity type, the Court stated:

In emphasizing the need for flexibility for avoiding mechanical rules . . . we have followed a tradition in which courts of equity have sought to relieve hardships which from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.¹⁰⁰

Second, although the Supreme Court does not directly address any sort of natural law whatsoever, it hints at the “natural law” meaning of equity when it observes that, in part, because the writ of *habeas corpus* is the only writ mentioned by the Constitution, the Court should “be hesitant” to find “a congressional intent to close courthouse doors that a strong equitable claim would normally keep open.”¹⁰¹ Thus, the importance of equity within constitutional and common-law jurisprudence is underscored by *Holland*; and, therefore, equity’s role in cases like

⁹⁹ See *infra* notes [] - [] and accompanying text (equitable jurisdiction); notes [] - [] and accompanying text (statutory construction); notes [] - [] and accompanying text (role of equity in a statutory scheme); notes [] - [] and accompanying text (effect of codifying former equity)

¹⁰⁰ *Holland*, *supra* note [], at [headnote 9, 10, 11] (internal quotation marks omitted).

¹⁰¹ *Id.* at [] [immediately above III of the top]

Olmstead, even if inchoate and not concisely recognized, should not be underestimated going forward.

The *Olmstead* opinion seems to successfully navigate through the disadvantages posed by both meanings of equity: (1) *the natural law meaning* threatening separation of power; and (2) the *equity softens the law meaning* suggesting that the judiciary has the power to expressly and selectively bend the law to fit the parties before it. It does so by using a different kind of interpretation altogether. It is an interpretation that purports to focus on the actual language of the statute to find the intent of the legislature as expressed in the statute. In *Olmstead*, the Court determined the intent is based on the absence of the word “exclusive” or any other express statement of exclusivity.

Thus *Olmstead* uses the textualist approach to construction; and, because the approach is ultimately based on legislative intent as expressed by the words of the statute alone, it would seem to posture the court in the faithful-agent school of statutory construction. Textualists “maintain that the statutory text is the only reliable indication of . . . intent,” they use linguistic but not substantive canons of construction. Linguistic canons include canons of construction like “inclusion of the one is exclusion of

the other.”¹⁰² As a general matter, “[l]inguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature’s intent.”¹⁰³ The “cooperative partner,” to the contrary, uses other canons of construction in addition to linguistic canons “to adjust statutory language to protect public values.”¹⁰⁴

As a result, the “safest” canons of construction for purposes of avoiding separation-of-power issues inherent in *equitable* kinds of interpretation are, almost by syllogism, linguistic canons. Linguistic canons, however, can be used to accomplish a substantive purpose.¹⁰⁵ Thus, linguistic canons can be used to obfuscate the actual use of other approaches to construction; for example, Llewellyn’s situational senses. Guido Calabresi warns, therefore, that linguistic construction can be used “to hide a fundamental value conflict, recognition of which would be too

¹⁰² Textualists “tend to be originalists in constitutional interpretation” and emphasize linguistic canons of construction. *Barrett, infra* note [redacted] at [redacted].

¹⁰³ Amy Conen Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010).

¹⁰⁴ *Id.* Barrett uses the modern term “dynamic statutory drafters” rather than Llewellyn’s “cooperative partners,” but for purposes of this article they can be used synonymously.

¹⁰⁵ *Id.* (“The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic.”)

destructive for the particular society to accept”¹⁰⁶ and he describes this type of construction a “tragic choice.”¹⁰⁷ These tragic choices are inconsistent with both the faithful-servant and cooperative-partner schools of interpretation.

The purpose of discussing advantages and pitfalls of various methods and approaches to statutory construction and selective rationale is not meant to suggest the method or approach adopted by *Olmstead* was inappropriate. Neither is the discussion meant to imply a nefarious purpose for its use of linguistic canons within the textual approach. The purpose of the discussion, simply, is that courts have a variety of tools to use to construct statutes. Therefore, different courts may be expected to construct the same language under similar factual circumstances differently. Moreover, it suggests that there are jurisprudential and constitutional dimensions to issues of construction, and it is possible to pick and choose tools of construction to avoid those issues while reaching a desired result.

¹⁰⁶ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 173 (1982). This book, though not necessarily the quote used in the text, has been called “[t]he most provocative challenge to originalism as a method of statutory construction” and “a radical solution.” Nicholas Zeppos, *Judicial Cardor in Statutory Interpretation*, 78 GEO. L. J. 353 at 357 (1989).

¹⁰⁷ CALABRESI, *supra* note 84 at .

Maxims: The Law-Equity Boundary

The *Olmstead* Court charted its course based on linguistic canons of construction which avoided the issues related to either the *natural law meaning* or the *equity softens the law meaning* of equity. In doing so it necessarily, if intuitively, acknowledged the existence of two maxims that help demarcate the boundary between law and the *equity softens the law meaning* of equity.¹⁰⁸ They are: (1) “Equity follows the law,”¹⁰⁹ and; (2) “Equity has no jurisdiction where there is an adequate, complete, and certain, remedy at law [(hereinafter, *adequate remedy at law*)].”¹¹⁰ These two maxims are related, but can be in conflict at the outer reaches of their respective applications.

The first maxim has a narrow scope because, according to hundred-year-old hornbook law, “[t]he great mass of equity jurisprudence has been created by open disregard of the [common] law.”¹¹¹ Nonetheless,

¹⁰⁸ Another treatise suggests the following regarding the use of maxims:

The maxims of equity are short statements of principles that guide courts of equity in the exercise of their discretion. Their brevity and generality prevent them from having much utility in determining how the court will act in a given situation, but they possess some utility as memory aids, after the principles they represent have been mastered.

HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* (2d ed.) (1948) at 52.

¹⁰⁹ JAMES W. EATON, *EATON ON EQUITY* 47 (1901).

¹¹⁰ *Id.* at 31.

¹¹¹ *Id.* at 48.

one of the classes of cases to which the maxim applies, according to the same old hornbook, is “[w]here *legal rights* are considered in a court of equity, the general rules and policy of the law must be obeyed.”¹¹² Conversely but not inconsistently, the United States Supreme Court has said that a statute should not be construed to displace a court’s “traditional *equity authority* absent the ‘clearest command’ or an ‘inescapable inference’ to the contrary.”¹¹³

The relationship between statutory law and equity is relevant to *Olmstead* because the original articulation of the charging order in English courts was equitable (in chancery).¹¹⁴ It is arguable, therefore, that codification of the charging order simply acknowledged and recognized what was already being done by courts in equity; and, as a result, that charging-order statutes were not intended to cabin the courts’ broader use of equity.¹¹⁵ In *Olmstead*, however, the court did not need to resort to the

¹¹² *Id.* at 47.

¹¹³ *Miller v. French*, 530 U.S. 327, ___, 120 S.Ct. 2246, ___, 147 L.Ed.2d 326, ___ (2000) (emphasis added). See the discussion of *Holland v. Florida*, *supra* notes ___ - ___ and accompanying text.

¹¹⁴ See *Brown, Janson & Co. v. A. Hutchinson & Co.*, 895 Q.B. 737 (Eng. C.A.) (Lindley, J.) quoted in Daniel S. Kleinberger, Carter G. Bishop and Thomas Earl Geu, *Dispelling Rumors of Disaster*, PROB. & PROP. (July/Aug) 30, 31 (2004).

¹¹⁵ See, *infra* notes [around 125]. Professor McClintock’s treatise states as a general rule:

use of its equity power; instead, it selected a textual approach which gave deference to the explicit words used by the legislature regardless of the equitable roots of those words in the charging order statute. Therefore, the Court's opinion is not so much consistent with the maxim that equity follow the law; as much as it stands for the proposition that there is no need for the Court to address the maxim because its rationale stays within the waters of law and well away from the boundary of law and equity. That is not to say, however, that the Court was necessarily even aware of the boundary or maxim.

The second maxim, that equity has no jurisdiction where there is an adequate remedy at law, has been translated more broadly by some authorities as follows: "[U]nless the legal remedy is as plain, adequate and complete, and as practical in its results, and as efficient in the administration of justice, as the equitable remedy, the *jurisdiction* in

Where equitable jurisdiction over a particular class of suits has been established because of the inadequacy of the remedy at law, and the remedy at law has since become adequate because of extension by judicial decision or statute, it is often said that the jurisdiction of equity is not thereby diminished, but the principle is not uniformly recognized, and is disregarded in many cases.

MCCLINTOCK ON EQUITY, *supra* note 108 at 115. Unlike Professor McClintock's treatise, the older treatise by Professor Eaton expresses no doubt about the matter quoted: "Nor will courts of equity be ousted of their original jurisdiction because courts of law have adopted equitable principles." EATON ON EQUITY, *supra* note 109 at 34. Statutes, of course, add to the decisional mix the dimension of separation of power. *See supra* notes [redacted] - [redacted] and accompanying text (separation of powers).

equity will attach.”¹¹⁶ Again, *Olmstead’s* interpretation of the law obviates any need for the analysis of this maxim in the opinion. Indeed, *Olmstead’s* statutory construction reaches the same result in this case as a determination that the charging order provisions were exclusive coupled with a further determination that the exclusive remedy provided by the statute was *law* and was *inadequate*.

The maxim raises questions of meaning even without reference to law. One question is the definition of a complete *legal* remedy. This definitional question again raises the relationship of equity to separation of powers; this time under the guise of a kind of statutory preemption under some theory of legislative supremacy. The key to part of this question is determining the comprehensiveness and scope of the charging order statute as intended by the legislature. Answering part of that question, in turn, implicates the legislature’s intended policy balance between the aggregate rights of debtors and creditors and the place of SMLLCs in that balance. Professor Loewenstein addresses both of these issues in the context of the equitable theory of piercing the liability shield of corporations. He argues that non-statutory remedies (*i.e.*, equitable)

¹¹⁶ EATON ON EQUITY, *supra* note 109 at 34-35.

should be further narrowed because the business entity statutes have consciously and carefully balanced the rights, duties and obligations consistent with legislatively articulated public policy.¹¹⁷ Moreover, he suggests that the application of equity to statutory charging orders *is* narrowed in application because a “business association statute serves no other purpose [other than determining the appropriate policy balance] and arguably ‘preempts’ the field on the issues it resolves.”¹¹⁸

There is raised as well the question of how to define or describe *adequate remedy*. This question is related to the comprehensiveness of the statute; but, nonetheless, may be independent from the issue of comprehensiveness. One illustrative issue nested within the definitional question of *adequate remedy* is whether mere inability to collect from a debtor or a debtor’s insolvency renders the legal remedy inadequate. A Florida pleading and practice guide suggests one fence to the use of equitable remedies under those circumstances:

The complaint must show that there are obstacles which prevent the full enforcement of the judgment in law and the execution and return *nulla bona* by the proper officer will suffice in this regard, but more general allegations that

¹¹⁷ Loewenstein, *supra* note [redacted] at 15.

¹¹⁸ *Id.*

there is no remedy or adequate remedy at law are insufficient.¹¹⁹

Another boundary is suggested in a Florida appellate court case seeking an injunction to freeze an account before payment of a disputed commission to a real estate broker it stated in 1984:

The order is plainly wrong. This was an action to recover money damages upon a claim of breach of an oral contract to pay money; that is, a commission. Such a cause of action does not entitle the claimant to equitable relief simply because the complaint alleges uncertainty of collectability of the judgment if a fund of money is to be disbursed. The test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether once obtained it will be collectible.¹²⁰

At a minimum these quotes suggest the appropriate time to seek equitable remedies is when a judgment at law is returned uncollectible. This article necessarily returns to the issue of *adequate remedy of law* later because there exist other questions concerning the phrase; first, however, it turns to the more general distinction between equity and law.

Equity & Interpretation

“Equity” is neither synonymous with “common law” nor necessarily separate from statutory law; indeed, “our substantive law is

¹¹⁹ John J. Dvorske, *Creditors Rights and Remedies*, FLORIDA JURIS.2d, § 288 (2010) (citations omitted).

¹²⁰ *St. Lawrence Co., N.V. v. Alkow Realty, Inc.*, 453 So. 2d 514, 514 (Fla. App. 4 Dist. 1984).

derived from common law, from equity, and from statute.”¹²¹ Thus, many statutory laws are based on recognized equity principles.¹²² For example, equity first governed the entire substantive areas of trusts and mortgages which are now largely statutory.¹²³ Moreover, and as a further illustration, “the concept of fiduciary duty has spread from express trusts to a whole range of principal-agent relationships.”¹²⁴ Arguably therefore, courts are using equitable principles and remedies more broadly than ever before. Professor Laycock, for example, posits the maxim that “a court will not grant an equitable remedy if a legal remedy would be adequate...is

¹²¹ Laycock, *The Triumph of Equity*, *supra* note 79 at 67. See generally *supra* note ____ (discussing similar topic). Perhaps Professor Laycock’s most famous article, based on response in the literature, is entitled “The Death of the Irreparable Injury Rule.” Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

¹²² Equity uses principles. Leonard I. Rotman, *Is Fiduciary Law Efficient? A Preliminary Analysis*, at 24. Law uses rules. *Id.* Thus it creates a kind of tension. It echoes recent debates about rule-based and principle-based accounting. See Rebecca Toppe Shortridge and Mark Myring, *Defining Principle-Based Accounting Standards*, THE CPA JOURNAL ONLINE (N. Y. Society for CPAs) (Aug. 2004), http://www.nysscpa.org/cpajournal/Augustcover_large.jpg;PicWin'400,560 (last visited Sept. 28, 2010).

¹²³ See generally JAMES W. EATON, EATON ON EQUITY pp. x-xviii (1901) (table of contents); John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007).

¹²⁴ Laycock, *The Triumph of Equity*, *supra* note 6, at 67. For a brief discussion of fiduciary duty as equity see *infra* notes ____ - ____ and accompanying text (used as an example of the ambiguity of equity).

dead...”; meaning the maxim “never constrains a court’s decision in any case where the choice of remedy matters.”¹²⁵

Whether insolvency or uncollectability are themselves enough to make a remedy at law inadequate (part of the distinction above) may be too theoretically pure to be of practical application in factual situations similar to *Olmstead* or in most other real-life situations. Simply, the pure issue assumes no independent facts from which an “*equitable right*, estate, or interest” could be derived.¹²⁶ After noting that many such rights are generally termed “a trust estate,” the previously cited “old treatise” observed there are “many other” equitable rights and interests that (at the turn of the century when the treatise was written) were not recognized “in law courts.”¹²⁷ These *interests* included, among others “the mortgagor’s equity of redemption” and “equitable lienors.”¹²⁸

¹²⁵ *Id.* at 54-5.

¹²⁶ EATON ON EQUITY, *supra* note 109 at 30.

¹²⁷ *Id.*

¹²⁸ Mortgage law was at one time entirely equitable but, even after codification, equitable mortgages still exist. For example, a South Dakota case decided in 2006 recharacterized a purported real property sale as an equitable mortgage where a transfer by a warranty deed was followed immediately by a contract for deed. *Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76 (2006). This decision illustrates, in a general way, how equity “thinks” and how courts apply it. In other words it conveys a *sense* of equity.

Illustratively, the opinion states: (1) “the recharacterization of a document is an equitable remedy” (at 9); (2) the trial court has discretion to grant or deny equitable remedies (*id.*); (3) the standard of review is abuse of discretion (*id.*); (4) “Equity requires

Equitable rights and interests can be viewed as merely component parts of equitable remedies, but historically they were independent from remedies because they provided the separate equity courts concurrent jurisdiction with the law courts.¹²⁹ “Concurrent jurisdiction will not be exercised unless there is some equitable circumstance to give jurisdiction; such as fraud, irreparable injury, trust, accident, or the like.”¹³⁰ Where equity has an independent source of “jurisdiction” it is arguably not necessary for courts to determine no adequate remedy at law is available.¹³¹ At least one influential court, however, and by way of

that the transaction be treated according to its substance and effect, not its form.” *Id.* quoting *Star Enterprise v. Thomas*, 783 F.Supp. 1564, 1568 (D. RI 1992) (other citations omitted); (5) “A purported absolute conveyance may be recharacterized as a mortgage, depending on the parties’ intent.” (*Myers, supra* at 11); and, (6) The most important time for determining the intent of the parties is “at the inception of their relationship.” (*Id.* at 12). Finally the opinion describes the appropriate attitude of a court when using its discretion to exercise its equitable powers: “If facts plainly exist to warrant equitable relief and no facts exist to disentitle a party to such relief, then a court is not free simply to ignore the remedy in the name of discretion. Consistency and fairness require courts to decide similar cases similarly.” *Id.* at 9-10 quoting, *Adrian v. McKinnie*, 2002 SD 10 ¶ 9, 639 N.W.2d 529, 533.

¹²⁹ EATON ON EQUITY, *supra* note [redacted] at 34.

¹³⁰ *Id.* at 34. “Accident,” as used in the quote, has a meaning to somewhat related to both “mistake” and “impossibility.” *Cf. Id.* at 247 (e.g., failure of technical signing requirements).

¹³¹ Professor McClintock’s treatise states as a general rule: “Many courts have held that fraud is itself a basis for the exercise of equity jurisdiction, even though the remedy at law may be adequate.” MCCLINTOCK ON EQUITY, *supra* note 108 at 117 (The treatise suggests this is the English rule but that it does not appear to be the majority rule in the United States. *Id.* at 118.)

example only, held both an independent source of jurisdiction and no adequate remedy[ies] at law are required.¹³²

Fraud is one illustration of an “equitable circumstance” that gives a court equity jurisdiction: “As a general rule, courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with and sometimes exclusive of other courts.”¹³³ Historically “fraud” included

¹³² A frequently cited Delaware Supreme Court case, *DuPont v. DuPont*, 32 Del.Ch. 413, 85 A.2d 724 (1951), discussed the constitutionally determined jurisdiction of the Delaware Chancery Court. It touches on both *meanings* of jurisdiction and describes the importance of the phrase “an adequate remedy at law.” At issue was whether the court had equitable power to award separate maintenance of a spouse due to abandonment. The answer required determining, first, whether the legislature had constitutional authority to vest jurisdiction of all matrimonial matters in a separate Family Court apart from Chancery, and; second, whether an adequate remedy of law was available and that the Court of Chancery could not exercise such jurisdiction if it had it.

The Court analyzed the first question by determining whether the British Court of Chancery would have had jurisdiction of such matters when the state constitution was ratified followed by vetting several amendments to the state’s (Delaware) constitutional provision. The Court held that the Delaware Constitution guaranteed the equitable jurisdiction of the Chancery Court to be at least that of the British Chancery Court in the late eighteenth century and, therefore, that the legislature could not strip it of its jurisdiction over certain matters that it had by statute transferred to Family Court.

The constitutional provision cited by the Court as establishing carry-over jurisdiction, however, also contained a provision modifying it. The provision “is to the effect that the Chancellor shall not hear and determine any cause where a sufficient remedy exists at law.” *Id.* at [headnote 8]. Thus, the Chancery Court could not *exercise its jurisdiction* if the statute establishing the Family Court also provided an *adequate remedy at law*. The latter was the second question in the case.

Regarding the second question in the case, the Delaware Supreme Court found that there was no adequate remedy at law. Therefore, *circa* 1951, Chancery Court had both jurisdiction over the subject matter and the authority to exercise it to provide equitable relief for maintenance to an abandoned spouse.

¹³³ *Id.* at 283.

both *actual* and *constructive* fraud,¹³⁴ and equitable remedies for fraud include constructive trusts, equitable liens, setting aside fraudulent conveyances,¹³⁵ and appointing receivers.¹³⁶ Other equity-based remedies

¹³⁴ *Id.* There are two classes of fraud in equity. They are actual and constructive fraud.

Actual Fraud

Actual fraud arises from facts and circumstances of imposition, and may be described as something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud.

EATON ON EQUITY, *supra* note 109, at § 122, p. 287.

Constructive Fraud

Constructive fraud may be described as an act done or omitted, not with actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence.

Id. at § 123, p. 287.

Relief from and, Remedies for, Fraud

A treatise published nearly 50 years after EATON said:

Equity can declare a person who has been guilty of fraud to be a constructive trustee of the property he has received in the transaction, and to account for it as trustee; or it can impose an equitable lien to secure return of the consideration; or it can compel him to make good on the representations on which the other party has acted.

MCCLINTOCK ON EQUITY, *supra* note 108, § 85, at 229. *See* EATON ON EQUITY, *supra* note 109, § 194, at 411 (Eaton seems to go further than the quoted language from McClintock stating that a constructive trust may be impressed, “on the grounds of justice and good conscience, without reference to the intention of the parties.”)

¹³⁵ Fraudulent conveyance law is another example, like charging order law, of a notion that started as equity but became statutory. Therefore it raises similar issues as those previously noted; like the effect the adoption of a statute has on equity, equity jurisdiction, and the availability of equitable remedies. *See, e.g., supra* notes [redacted] - [redacted].

Florida has a statutory fraudulent transfers act entitled the “Florida Uniform Fraudulent Transfers Act” (FUFTA), 726 [redacted] §§ 222.29-222.30. Like similar statutes, FUFTA has an exception for transfers where reasonable value is received by the debtor in exchange for the transfer. Whether the exchange of individually owned property for LLC interests is equivalent seems to be one of the pressure points in the application of the

include pre-judgment asset freezing injunctions (“Mareva Injunctions”)¹³⁷ and the disregard of the *veil* of limited liability provided by an entity

statutes. The latter issue is similar, to some degree, to the “vanishing value” issue in the law of wealth transfer taxation. *See generally*, [need cite from E.G. Pennell treatise]

Based on the authors’ conversations with other lawyers, it seems that the power of the constructive fraud provision of UFTA (Uniform Fraudulent Transfer Act) is underestimated. Section 4 of UFTA provides in part a transfer is fraudulent as to both present and future creditors if the debtor:

(2) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they came due.

UFTA § 4(a)(2) (1984), 7A Uniform Laws Annotated 58 (2006) (the quoted paragraph is constructive fraud and does not require proof of intent; the traditional badges of fraud can be used to prove actual fraud.

¹³⁶ *See e.g.*, MCCLINTOCK ON EQUITY, *supra* note 108 at 229, 553, 557.

¹³⁷ Injunctions are equity. *See generally*, EATON, *supra* note 109 at 563-606 (Ch. 22). Contempt is a possible sanction for violation of an injunction. The use of foreign asset protection trusts (APTs) has sometimes, but rarely, drawn contempt sanctions including incarceration. *See, e.g.*, *F.T.C. v. Affordable Media*, 179 F.3d 1228 (9th Cir. 1999) (more commonly referred to as “the Anderson case”). *See generally*, Duncan E. Osborne, Elizabeth Shurig, *A Comparison of Foreign and Delaware APTs – Advantages of Delaware APTs*, 2 ASSET PROTECTION: DOM. AND INT’L L. & TACTICS § 14A:146 (2009).

According to a Uniform Laws Commission (ULC) Memorandum there is a great deal of inconsistency between and among the various states and the United States concerning freezing orders since *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999) (no equity jurisdiction for Fed. Courts for prejudgment asset freezing order where only money damages sought unless otherwise provided by Congress). ULC has a drafting project for a uniform state act. Michael Getty, Chair, Study Committee on Minerva Injunctions to ULC Committee on Scope and Programs, May 27, 2010 at 2, available at <http://www.nccusl.org/update/docs/mareva%20injunctions/MarevaInjunctions-Getty%20memo%20Oct%2014%2009.pdf> (last visited Sept. 10, 2010).

(“piercing the veil” or as applied in circumstances similar to *Olmstead* “reverse piercing”).¹³⁸

¹³⁸ A classic corporate case concerning the liability of owners for corporate debts stated: “Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, ‘pierce the corporate veil,’ whenever necessary ‘to prevent fraud or achieve equity.’” *Walkovsky v. Carlton*, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585, 223 N.E.2d 6 at [redacted] (Ct. of App. 1966). A “reverse pierce” occurs where a judgment creditor of an owner is allowed to “pierce” to the assets owned by an entity. The suggestion that even complete unity ownership not justify making the assets of the venture available to satisfy the judgment-creditor was made where none of the elements necessary for piercing was present (other than perhaps the conclusory statement that it would be unjust to the judgment-creditor). See *Evans v. Galardi*, 128 Cal.Rptr. 25, 15 Cal.3d 300, 546 P.2d 313 (Cal. 1976), reversing 119 Cal.Rptr. 889, 46 Cal.App.3d 84 (Cal.App.2nd Dist. 1975). Piercing, forward or reverse, is an equitable remedy that calls for setting aside the asset partitioning that is otherwise provided for by statute. See, e.g., KY. REV. STAT. ANN. § 271B.6-220(2) (shareholder not liable for debts and obligations of a business corporation); *id.* § 275.150(1) (member of LLC not liable for debts and obligations of an LLC); *id.* § 275.240 (property of LLC is that of the LLC as a legal entity (see KRS § 275.010(2)) in which the members have no interest). The mere fact there is complete unity of ownership by an individual has been held inadequate to pierce; in that case, however, no other factors or elements for piercing were present (except perhaps, the conclusory statement that it would be unjust to the judgment-creditor). See *Evans v. Galardi*, 128 Cal.Rptr. 25, 15 Cal.3d 300, 546 P.2d 313 (Cal. 1976), reversing 119 Cal.Rptr. 889, 46 Cal.App.3d 84 (Cal. App. 2nd Dist. 1975) (corporate law). Piercing, forward or reverse, is an equitable remedy that calls for setting aside the asset partitioning that is otherwise provided for by statute. See, e.g., KY. REV. STAT. ANN. 2§ 71B.6-220(2) (shareholder not liable for debts and obligations of a business corporation); *id.* § 275.150(1) (member of LLC not liable for debts and obligations of a LLC); *id.* § 275.240 (property of LLC is that of the LLC as a legal entity (see KRS § 275.010(2)) in which the members have no interest).

In circumstances in which piercing is appropriate, there is no policy basis for permitting an exclusivity provision to preclude that result. Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199 (2009) quoting REVISED UNIF. LTD. LIAB. CO. ACT § 503(g) cmt. Subsection g (2006) 6B U.L.A. 498-501 (2008). For another excellent treatment of the issues raised by the asset protection features of LLCs, see Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations*, 30 DEL. J. CORP. L. 199 (2005). The Revised Limited Liability Company Act commentary expressly notes that the exclusivity of the charging order remedy is not designed to override reverse piercing: ‘This subsection is not intended to prevent a court from effecting a “reverse pierce” where appropriate.’” For further discussion of piercing see *infra* note [redacted].

An important point of this discussion of equity for purposes of this article is simply that none of these equitable principles were discussed by *Olmstead*, though it appears the court could have done so.¹³⁹ Another point is that the principles are not necessarily modified or modifiable by the addition of a simple statutory exclusivity phrase. As a result, the existence of equitable *actions* is a confounding variable for statutory drafters in determining the scope of “exclusive” and, in turn, how to draft it. For example, assuming that reverse piercing is available, there is the question as to whether, in the context of an LLC, reverse piercing would

¹³⁹ Arguably the Florida Supreme Court *could* have addressed the equitable issues even under the certified question. *First*, the question was modified by the Court from one that expressly referenced the charging order provision to a broader one referencing generic “Florida law.” “Florida law” seems to include all law in the unified court system to include common law, equity, and statutes.

Further but, still arguably, the Court could have addressed equity under the question as originally certified for one or a combination of the following reasons:

- (1) The unpublished opinion certifying the question to the Florida Supreme Court expressly stated “Under Rule 69 of the Federal Rules of Civil Procedure, proceedings in aid of judgment or execution are to be conducted in accordance ‘with the procedure of the state where the court is located’.”
- (2) The same opinion expressly stated: “In certifying this question, we do not intend to restrict the issues considered by the state court [citations omitted]” and “we ask for guidance.”
- (3) The authority for the Federal District Court entering the original injunction in this case was, in part, derived from equity because it entered a freezing order (a type of injunction) *See generally, supra* note [redacted] (discussing Mareva orders).

be precluded by the addition of a simple “exclusivity” phrase to the charging order provision.¹⁴⁰

Indeed, the use of a separate and freestanding equitable cause of action seems to raise fewer difficult jurisprudential and separation-of-powers questions than an *equitable interpretation* of the statute because it is a distinct action independent from the statute based on special and identifiable circumstances (like fraud).¹⁴¹ Stated another way for emphasis, an equitable remedy can be a remedy for a separate equitable *action* for fraud and not as merely an extraordinary remedy auxiliary to the charging order statute.

¹⁴⁰ See, e.g., KY. REV. STAT. ANN. 275.260(1). See *supra* note [redacted] and accompanying text (“choice of law” and a brief reference to selected jurisdictional issues which is a confounding variable for application of statutes). A good example of the normative interrelationship between statutes and equity (as well as other law) is the debate around Article 2 of the UCC. The debate concerned a statute, the relationship between equity and the common law, on the other. Specifically, it concerned the standard for displacing other law under Uniform Commercial Code Section 1-103. The discussion was whether displacement should be broadened “either by deleting references to explicit displacement, thus permitting displacement by implication, or by redrafting the comments to permit broader preemption.” Robyn L. Meadows, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code*, Symposium on Revised Article 1 . . . , 54 S.M.U. L. REV. 535, [redacted] [at end of Part I of her art.] (2001). (“The purpose of this article is to argue that broadening the preemptive scope of the code is not only unnecessary, but ill advised.”). See generally Mark D. Rosen, *What Has Happened to the Common Law? - - Recent American Codifications and Their Impact on Judicial Practices and The Law’s Subsequent Development*, 1994 WIS. L. REV. 1119.

¹⁴¹ See 15 U.S.C.A. § 53(b) (“Upon a proper showing that, weighing the equities and considering...”). See *supra* note [redacted] (discussing Mareva orders).

As previously discussed, a relatively well-known example of a separate action that provides an equitable remedy is *piercing* the liability protection afforded by (and to) an entity.¹⁴² Indeed, it is convenient that fraud occurs frequently enough and over a large enough range of circumstances to be a significant category while at the same time sharing a compositional core across that broad range of situations. It is conceptually identifiable even if not factually certain. This frequency of occurrence and identifiable composition make fraud an independent equitable action apart from law and, therefore, almost by definition not in conflict with law.

Conversely, and for interpretive purposes, the credible classification of situations covered by equitable *fraud* hold true even if fraud's independence from law is ignored. That is: (1) fraud is a credible situational classification satisfying Llewellyn's conditions for appropriate "cooperative-partner" statutory interpretation; and, (2) it identifies those situations as a class not intended by the legislature to be governed by the charging order provision¹⁴³ further, recognition of a class of equitable fraud situations creates two distinct classes for purposes of the charging

¹⁴² One of the elements under some formulations of the test for piercing is "fraud on the public." See *infra* note [redacted]. For further discussion of piercing the veil of limited liability, see, *supra* note [redacted] and *infra* note [redacted].

¹⁴³ And, therefore, also complies with Llewellyn's *situational sense* requirement for proper interpretation. See *supra* note [redacted].

order statute: (1) judgment debtors and (2) judgment debtors who perpetrated some sort of fraud upon the judgment creditor.¹⁴⁴ The *charging order* is available against both classes of judgment debtors. Equitable actions or additional equitable remedies beyond those provided at law (or statutorily) are available only against judgment debtors of the second class; those who perpetrated some sort of fraud.

Arguably, a court's express recognition of equitable *fraud* as a separate equitable cause of action or as a distinguishable class of situations not intended the benefit of the express statutory charging order provides a break from the myopic analytic focus on the word *exclusive* in the Florida LLC charging order provision. Equitable fraud applies across all statutes and would invite the reasoned and deliberative policy analysis contemplated by Professor Lowenstein (though by courts not legislators) even in states whose statutes include the "exclusive" language.

Finally, in addition to the other ways a court might avoid the strict application of the charging order statute, the class distinction concept might suggest a way to work equitable remedies as *supplementary* to the *statutory remedy* of the charging order (rather than as a remedy for an

¹⁴⁴ Needless to say all of the latter category fall within the former, but not vice-versa.

independent wrong, or as a class of situations not intended to be subjected to the statute), while remaining true to the maxim “equity follows the law.” That *way* brings the introductory analysis of equity in this article, as previously promised, back full circle to the maxim:

[U]nless the legal remedy is plain, adequate and complete, and as practical in its results, and as efficient in the administration of justice as the equitable remedy, the jurisdiction in equity will attach.¹⁴⁵

The maxim was previously discussed as part of the role statutory interpretation plays in the larger context of judicial equitable powers and the separation of powers.¹⁴⁶ The specific question, raised but not previously answered, was whether the charging order represented such a comprehensive scheme as to preempt the field of judgment creditor protection from judicial exercise of equity.¹⁴⁷ The current discussion focuses on a different but related question, the question whether equity can supplement an inadequate remedy at law for a *legal* cause of action where

¹⁴⁵ EATON ON EQUITY *supra* note 109 at ____.

¹⁴⁶ See *supra* notes ____-____ and accompanying text.

¹⁴⁷ Equity as used here is used in its *softens the law* meaning; not its *natural law* meaning. See *supra* notes ____-____ and accompanying text.

there is no concurrent equity jurisdiction based on a separate equitable right or cause of action, for example, where there is no fraud.¹⁴⁸

The two “old” equity treatises that have served as the foundation to frame the equitable issues for this article are not in complete accord as to whether equity jurisdiction may attach *only* for an inadequate remedy at law. The older of the two treatises ambiguously indicates that an equitable remedy may require independent equitable jurisdiction not acquired simply because of an inadequate remedy at law.¹⁴⁹ The “newer” treatise

¹⁴⁸ A notion that seems to support the independent existence of equitable causes of action, perhaps in addition to *no adequate remedy at law*, is to the effect of, “[t]his court is committed to the doctrine that no person has the right to maintain a bill in equity unless the suit brought falls within some acknowledged head of equity jurisprudence. . . .” *B.L.E. Realty Corp. v. Mary Williams Co.*, 134 So. 47, at [redacted] [headnote 12] (Fla. 1931).

An old Florida Supreme Court case defines “bill of equity” as follows:

A creditor’s bill is one brought by a creditor who has secured judgment at law, and has in vain attempted at law to obtain satisfaction, and who sues in equity for the purpose of reaching property which cannot be reached by execution of law. The nature, purpose, and scope of such bill is to bring into exercise the equitable power of the court to enforce satisfaction of a judgment by means of equitable power of the court to enforce satisfaction of a judgment by means of an equitable execution at law cannot be had.

B.L.E. Realty Corp., at [redacted] [headnote 1,2] (Fla. 1931)

¹⁴⁹

It states:

The inadequacy of the legal remedy may be said to be the foundation of the concurrent jurisdiction of courts of equity. The concurrent jurisdiction covers all cases in which no adequate remedy can be obtained at law except by circuity of action or by multiplicity of suits, and adequate and complete relief can be given in equity in one and the same action: as in the cases of accident, mistake, and fraud.

hedges its statement. Illustratively, in the particular case of insolvency, it says:

Though there are not a great many cases holding that insolvency alone makes the remedy at law inadequate so that equity may give relief in a proper case because ordinarily plaintiff is able to find some other basis for applying to equity, there are a few well reasoned cases to that effect, and the great weight of judicial opinion is in accord.¹⁵⁰

The quoted material illustrates the level of confusion caused by the phrase *equity jurisdiction*. All courts, be they law courts, equitable chancery courts, or unified courts, must meet subject-matter and personal jurisdiction requirements in order to exercise power. Unless specifically limited by the state constitution or a constitutionally valid statute thereunder, however, a court of general jurisdiction in a unified court system has power to adjudicate using both law and equity if it has both subject-matter and personal jurisdiction. *Equity jurisdiction*, before the merger of law and equity, did not mean jurisdiction in the subject matter or personal jurisdictional sense. Rather:

[I]t was traditionally used to refer to the body of equitable precedents, practices, and attitudes. . . . Sometimes courts

EATON ON EQUITY, *supra* note 109 at 32 (The listed examples are all equitable causes; therefore, it seems jurisdiction must be based on something in addition to inadequate remedy at law.)

¹⁵⁰

MCCLINTOCK ON EQUITY, *supra* note 108 at § 47 p. 112.

would say that if the plaintiff had an adequate remedy at law, they would dismiss the claim “for want of equity jurisdiction”. . . . But the phrase means no such thing For clarity, the term equity jurisdiction might well be avoided.¹⁵¹

The phrase was and is still used in the context of whether there is a right to a jury (law);¹⁵² but, usually the right to a jury trial can be framed as a distinct question from jurisdiction. In any event, if there is an *inadequate remedy at law*, and there is no constitutionally valid limitation on the

¹⁵¹ DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES: DAMAGES — EQUITY — RESTITUTION § 2.7 at 180 (Second Ed., 1993).

¹⁵² “If the contract is not in writing, the jury finds what the contract was, and the court decides the legal effect of it.” *Id.* at § 21, p. 44. For modern partnership case, that turns on the law-equity distinction see, *Mundhenke v. Holm*, 2010 SD 67, 388 N.W.2d 848 (2010) (note the analysis did not discuss the effect of RUPA on whether an accounting is required under certain circumstances. The South Dakota case addressed the pendent *incidental* jurisdiction doctrine wherein a court acting in equity, under former law, could decide *incidental* matters of law that would ordinarily require a jury. Whether a partnership exists is a question of law requiring jury determination if the contract was oral; but, “[i]f it is in writing, the court interprets the meaning of the parties and determines the legal effect of the articles. (The court expressly stated that the parties both agreed with this point and the case was tried on that basis suggesting the court had second thoughts about whether the existence of a partnership is law or equity).). See also *Holcomb v. Davis*, 431 S.W.2d 881, 883 (Ky. 1968) (applying equitable laches rather than a legal statute of limitations to the question of the timeliness of a petition for an accounting); *Conley v. Hall*, 395 S.W.2d 2 575, 578 (Ky. 1965); *Doyle v. Miller*, No. 95-CA-00223-MR (Ky. App. Dec. 13, 1996). For discussion concerning recent examples of merger between law and equity courts and some of the issues that cause in addition to the right to a jury trial, see W. Hamilton Bryson, *The Merger of Common Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77 (2006); Charles D. McDaniel, Jr., Note, *First National Bank of Dewitt v. Cruthers: An Analysis of the Right to A Jury Trial in Arkansas After the Merger of Law and Equity*, 60 ARK. L. REV. 563 (2007) (identifying five states that recently merged their law courts and equity courts as West Virginia, Rhode Island, Florida, Alabama and Maryland). See Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 OX. J. LEG. STUD. 1 (2002).

A *general partnership* is based on contract. JAMES PARSONS, PRINCIPLES OF PARTNERSHIP § 22, p. 45 (1889) (“As the partnership results from a contract....”).

range of remedies, a court has equitable *jurisdiction* to provide *equitable* remedies beyond statutory remedies as a supplemental aid to the statute. Of course, the court would need to heed the maxim, equity follows the law.¹⁵³ This conclusion is consistent with an article quoting a Delaware Chancery opinion that stated: “[t]his court will use its ‘broad discretion’ to tailor [a remedy] to suit the situation as it exists. As Delaware has long recognized, ‘the Court of Chancery [has] the inherent power to adapt its relief to the particular rights and liabilities of each party.’”¹⁵⁴

In summary, even this limited “hornbook” overview of equity suggests courts have a great deal of flexibility either in fashioning equitable remedies consistent with statutory remedies, or in aid of extending equity in statutes sounding in equitable principles. The most powerful exercise of equitable jurisdiction, however, in the appropriate case, might be for a court to avoid addressing the statutory remedies. For example, in the charging order statute a court might identify a separate and

¹⁵³ See *supra* notes [redacted] - [redacted] and accompanying text (discussing the equity maxims: “equity follows the law” and “inadequate remedy at law”).

¹⁵⁴ Mary Siegel, *The Dangers of Equitable Remedies*, 15 STAN. J. L. BUS. & FIN. 86 (2009) quoting *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del.Ch. 2005) (quoting *Cantor Fitzgerald, L.P. v. Cantor, C.A.*, No. 16297, 2001 Del.Ch.Lexis 70, at *9 (May 11, 2001). *Hamldy v. Wereschak*, 207 A.2d 369, 370 (Del. 1965)).

distinct equitable wrong like fraud.¹⁵⁵ The court may then, again in appropriate circumstances, unleash the full panoply of equitable remedies including remedies like constructive trusts and reverse piercing.

Unfortunately unleashing equity is not a panacea (or for that matter it is not even all sweetness and light). Even the equitable power yielded in Delaware over corporate matters has not been immune from criticism. One author, for example, begins an article by stating: “While Delaware jurisprudence is renowned for its clarity and sophistication, one area of its corporate law is, by design, uncharacteristically ambiguous: equitable remedies.”¹⁵⁶ The author concludes the article with the observation that while “equitable doctrines play an important role in providing justice to an aggrieved party. . . .”; they are, “potent, amorphous, and ambiguous. . . . Unless courts keep a laser-sharp focus on the purpose of these remedies, they threaten to unravel much of the fabric of our law.”¹⁵⁷ It is remarkable that the ambiguousness of equity, according to the same article, is by *design*. The designed ambiguousness may be because equity’s ambiguity

¹⁵⁵ As a very general matter, “equity has the authority to relieve against fraud....” John Bourdeau, Rachel M. Kane, 27A AM.JUR.2d EQUITY § 5, 552 (2008). Further: “[F]raud in equity has a much broader connotation than at law and includes acts inconsistent with fair dealing and good conscience....” *Id.* See *supra* notes [redacted] - [redacted].

¹⁵⁶ Siegel, *supra* note [redacted] - [redacted]. [Rotman, cited immediately below]

¹⁵⁷ *Id.* at [last page of article]

provides the flexibility in application that, in fact, makes equity efficient. For example, the equitable notion of fiduciary duty has been called the “most doctrinally pure expression of equity.”¹⁵⁸ Yet fiduciary duty is famously ambiguous for the same reason that all of equity is ambiguous because “the fiduciary concept is potentially applicable to an infinite variety of actors involved in an infinite number of circumstances.”¹⁵⁹ Equitable fiduciary duty may be efficient because it creates a necessary

¹⁵⁸ Fiduciary duty has been called the “most doctrinally pure expression of Equity.” Leonard I. Rotman, *Is Fiduciary Law Efficient? A Preliminary Analysis* [SSRN, Professor of Law, University of Windsor, CA, paper presented at the Remedies Discussion Forum held in Aix-en-Provence, France, June 5-6, 2009] at 4. It is over 300 years old in English common law and similar principles were in Roman civil law. *Id.* at 8.

¹⁵⁹ Fiduciary duty is equitable in nature and, therefore, representative of it. *See infra* note [redacted]. A recent Canadian commenter explained why the definition of the fiduciary concept is so “amorphous,” “elusive,” and “indefinite.” Leonard I. Rotman, *Is Fiduciary Law Efficient? A Preliminary Analysis*, *supra* note [redacted] at 1 (footnotes omitted). He explained:

It is admittedly, difficult to pin down the fiduciary concept with the type of definition that usually accompanies the various bases of civil obligation. One reason for this is the broad spectrum of interactions to which the fiduciary concept may apply. Since the fiduciary concept is potentially applicable to an infinite variety of actors involved in an indefinite number of circumstances; it cannot be defined with the explicitness that is generally demanded by law. In fact, the fiduciary duties’ protean quality makes even meaningful generalization difficult. This does not entail, however, that the fiduciary concept is not efficient.

Id. at 3.

systemic counterweight, at least in select circumstances, to the “efficient contract breach” at law.¹⁶⁰

The “tension” between law and equity was addressed explicitly in a 2005 article written by Justice Jacobs of the Delaware Supreme Court, and much of the discussion in the past few paragraphs of this article is consistent with Justice Jacobs’ earlier article.¹⁶¹ Importantly, Justice Jacobs’ article said:

[T]he dispute [between law and equity in corporate law] created and continues to create tension between the need for a flexible set of rules that promote fair treatment of investors, and the policy, endorsed by transactional

¹⁶⁰ As stated in the text, fiduciary duty is used herein as representative of all equity. It may be efficient because it acts as the opposite pole to efficient breach under the rubric of law and economics:

It may be plausibly suggested that the fiduciary concept’s focus on the preservation of important relationships is “efficient,” even in contrast to the notion of efficient breach, insofar as it maintains the viability of necessary relations in interdependent societies by preserving the trust of those who engage in them. The fiduciary concept instills a greater degree of predictability in these interactions...

Leonard I. Rotman, *Is Fiduciary Law Efficient?*, *supra* note [redacted] at 20 (footnotes omitted). The tension created between (and because of) the poles of efficient breach and fiduciary duty may be a necessary for law’s stability and flexibility. There is growing literature on law as a complex adaptive system (CAS) exploring CAS and the law. *See, e.g.*, J. B. Ruhl, *Regulation y Adaptive Management - Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21 (2005) (and citations therein); Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933, 955-75 (1994); <http://jurisdynamics.blogspot.com/2006/07/complexity-theory-in-legalscholarship.html> (last visited June 9, 2010) (bibliography).

¹⁶¹ Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1 (2005) (at (between fn1 and fn2 of that article)).

planners, that favors a set of bright-line rules that promote clarity and predictability.¹⁶²

After analyzing the “law model,” the “equity model,” and setting forth a brief history of equity in Delaware corporate law, Judge Jacobs observed (as of 2005) that he:

[V]iew[s] the [Delaware] Supreme Court’s apparent movement away from equity not as an attempt to get rid of equity, but as a mid-course adjustment develop[ing] a bright line rule that would make the application of equity more predictable [and that] the concept of wrapping law around equity is a great idea, if it can be carried off.¹⁶³

¹⁶²

Id.

¹⁶³

Id. at [in conclusion]. See generally, Grace Murphy Long, Comment, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875 (2006). (“Although Alabama courts place clear limitations on equitable relief, making the remedy appear more legal, constructive trusts still retain some of their equitable attributes.”) (In conclusion of that article).

It is possible that the entire subject of equity is slowly disappearing from our system because of lack of familiarity and attention. Professor McClinton, in the 1948 edition of his treatise on equity, warned:

A problem with more practical aspects is the problem of the classification of equity in our legal system, and in law school curricula. It has been earnestly advocated that we should no longer regard equity as a separate system, but as merely a part of each branch of the law with which it deals, remedies and procedure, property, contracts, torts and so on. Whatever may be thought of the logic of that practice, it is apparent that it will be difficult to preserve the characteristic features of equity, its discretion and adaptability, if it is nowhere considered as a whole. If it is not, as some contend, inevitable that those characteristics will be lost anyway under the combined system, it is highly probable that they cannot survive when the various aspects of the system are separately treated and often taught and applied by men who have no adequate foundation themselves on which to base an exposition of the characters. The only hope for the preservation of equity lies in a continuous study of it as a system based on fundamental conceptions, but applied in all of the various fields of law.

The tension between, and the design of, law and equity, therefore, seems to be creative and evolutionary.¹⁶⁴

Again, and for the third time in this article, another well-worn example of ambiguity as a design feature of equity is piercing the liability veil of an entity.¹⁶⁵ Indeed, Professor Loewenstein, as previously

HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY, 18-19 (1948) (footnotes omitted).

¹⁶⁴ Justice Jacobs, for example, observed that federal securities law has, at a couple times in history, evolved to fill niches or gaps in state law. Jacobs, *supra* note [redacted]. Therefore the federal securities law could be said to “co-evolve” with state enterprise law.

¹⁶⁵ See *supra* notes [redacted] - [redacted] (discussing piercing the veil in greater detail). Loewenstein quotes and cites two of the leading scholars in corporate law in veil piercing as follows:

- Robert Clark: “[C]ases attempting to pierce...are unified more by the remedy sought—subjecting to corporate liabilities the personal assets directly held by shareholders—than by repeated and consistent application of the same criteria for the remedy.” (*Id.* at n.8, citation omitted);
- Stephen M. Bainbridge: “The present state of veil piercing doctrine allows judges to impose their own brand of rough justice without being overly concerned with precedent or appellate review.” (*Id.* at n.12, citation omitted).
- Robert Clark: “[A]rguing that veil piercing is employed by the courts when other doctrines, principally, fraudulent conveyance, are found lacking and moral precepts support denying limited liability for an entities owner.” (*Id.* at n.55).

LLCs are subject to *veil piercing* (disregard of the limited liability protection) under similar circumstances as corporations. See Mark J. Loewenstein, *Veil Piercing to Non-owners: A Practical and Theoretical Inquiry* __ SETON HALL L. REV. (2011), available on SSRN, Abstract 1660576) at 3-4, 7. Professor Loewenstein discusses the “privilege theory” of corporations as the traditional policy reason for limited liability; *i.e.*, limited liability relies on the *personality* of the entity which is granted by law. *Id.* at 5. Another possible policy reason would sound as a tragedy of the commons market related hypothesis. See *supra* note [redacted] (*fiduciary law* as polar opposite to efficient breach). This article, however, adds and emphasizes that simple asset partitioning may be a primary

discussed, argues that business entity statutes should be interpreted as preempting much piercing and other equitable doctrine because those statutes have already balanced the rights, obligations and risks as a matter of public policy.¹⁶⁶ He further warns of legislative *push-back* if and when judicial decisions alter that balance because of, increased transactions costs.¹⁶⁷

reason for the demarcation between owners' personal creditors and the creditors of the entity. *See supra* notes [] - [] and accompanying text.

Discussion of the various tests for piercing is beyond the scope of this article. Nonetheless, a common element in the cases is that failure to pierce would result in "fraud or injustice." Loewenstein, *Veil Piercing*, *supra* note [] at 7. Another doctrine closely related to, and sometimes subsumed by, veil piercing is through the use of agency law to find the dominant owner liable for the obligations of the entity. That is, the owner(s) so control and dominate the entity as to become its principal in the principal agency relationship. *Id.* at 8 (stating the use of the agency theory is largely confined to parent subsidiary relationships). Additionally, this theory, it seems, might be used to find dominant *non*-owners liable. Another theory, the instrumentality theory is relatively close, but distinct from, agency theory. A corporation, for example, may be found to be a *mere instrumentality* where the "controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." ARTHUR R. PINTO, DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* (3rd Ed.) 49 (2009) quoting 1 FLETCHER'S ENCYCLOPEDIA OF CORPORATIONS 205.

¹⁶⁶ Professor Loewenstein's article argues that the use of piercing and, more generally, equity, should be narrowed because the business entity statutes have balanced the rights, duties and obligations of the constituents and society. *Id.* at 15. Moreover, he suggests that it *is* narrowed because a "business association statute serves no other purpose and arguably 'preempts' the field on the issues it resolves." *Id.* at 15. *See supra* notes [] - [] and accompanying text.

¹⁶⁷ He warns of "legislative push-back" if and when judicial decisions alter the statutory balance of liability and risk as follows:

"Judicial decisions that alter this balance and allow a creditor to pierce the veil of an entity and hold an owner liable, result in legislative push-back, add transaction costs as parties seek to contract around the judicial incursion, or create uncertainty and additional litigation."

Loewenstein, *supra* note [], at 15 (footnote omitted).

Nonetheless, different kinds of equitable tools and machinery have evolved historically in response to factual environments similar to *Olmstead*. The California limited partnership law (then in effect), for example, spawned an instructive line of cases which culminated in the fashioning of an *undueinterference standard* for ordering the foreclosure of a charging order. The California charging order provision that was interpreted did not address foreclosure. In his analysis of this line of cases, Professor Hynes quotes *Hellman v. Anderson* for the Court's expression of the *original* policy behind the charging order and why that policy required flexibility in application of remedies:

[T]he policy underlying the Uniform Partnership Act [is] avoiding undue interference with partnership business.... In some cases, foreclosure might cause a partner with essential managerial skills to abandon the partnership. In other cases, foreclosure would appear to have no appreciable effect on the conduct of partnership business. Thus, the effect of foreclosure on the partnership should be evaluated on a case-by-case basis by the trial court in connection with its equitable power to order a foreclosure.¹⁶⁸

¹⁶⁸ J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 PAC. L.J. 1 (1993) quoting *Hellman v. Anderson*, 233 Cal. App. 3d 840, 852; 284 Cal. Rptr. 830, 838 (3d Dist. 1991).

Neither California's limited partnership nor general partnership charging order statutes applicable to this line of cases provided for foreclosure of a partnership interest and all the cases involved determining under what circumstances a court could order such a sale.

According to Professor Hynes one of the first cases “stated that the charging order provision was ‘not intended to protect a debtor partner against claims of his judgment creditors where no legitimate interest of the partnership, or of the remaining partners is to be served.’” *Hynes, supra*, at [FN54], quoting *Taylor v. S&M Lamp Company*, 190 Cal. App. 2d 700, at 708, 12 Cal. Rptr. 323, at 328 (1961). This is very close to one of the basic arguments in the *Olmstead* court. See *supra* note ____ and accompanying text. In addition, it is in accord with a statement by Jay Addikson. See, *supra* note ____.

Approximately thirty years later, in *Centurion Corp. v. Crocker National Bank*, the general partner in a limited partnership had consented to the foreclosure sale but the sole limited partner objected because his interest was not assignable under the limited partnership agreement. *Hynes, supra*, at [FN 51] citing 208 Cal. App. 3d 1, at 9, 255 Cal. Rptr. 794, 798 (1st Dist. 1989). According to Hynes the court expanded the *S&M Lamp Co.* language and,

[C]oncluded that California law “seems to contemplate” sale of a partnership interest “where three conditions are met: first, the creditor has previously obtained a charging order; second, the judgment nevertheless remains unsatisfied; and third, all partners other than the debtor have consented to the sale of the interest.

Id.

The general partnership case quoted in the text of this article captioned *Hellman v. Anderson, supra* came shortly after *Crocker*. It analyzed *Crocker*’s partner consent requirement modifying the three conditions test with an *undue interference test* as quoted in the text. Professor Hynes strongly disagreed with strengthening the charging orders’ prophylactic effect even for the sake of the partnership and the partnership business (as opposed to the debtor-partner which is the case in *Olmstead*).

Professor Hynes, too, identifies Georgia as the first state to modify its partnership act to exclude foreclosure from the charging order process. *Hynes, supra*, at [FN 106] citing Larry E. Ribstein, *An Analysis of Georgia’s New Partnership Law*, 36 MERCER L. REV. 443 (1985) (whom helped draft the Georgia provision). See Henry Hansmann, Reinier Kraakman, Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1388-1994 (2006) (for the historical and global context for “asset shielding”). Charging orders and attendant auxiliary proceedings began in equity. See *supra* note _____. Now such provisions are statutory. This migration is not completely unique in the law because the *law* of wills, too, migrated into statutory law (but from law not from equity). See, generally, John H. Langbein, Lawrence W. Waggoner, *Curing Execution Errors and Mistaken Terms in Wills*, Working Paper No. 207, PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES, UNIV. MICH. L. SCHOOL avail. at <http://ssrn.com/abstract=1653438> (last visited August 31, 2010). The paper states that,

Courts of equity have for centuries exercised the power to reform mistakes in trusts, deeds of gift, and beneficiary obligations.” *Id.* at 6. Only now, however, have “[l]eading modern authority in a number of American states...reversed the strict-compliance and no-reformation rules [of the interpretation of wills]. Both by judicial decision and

Hynes argues strongly against the imposition of the standard. He first states that the standard is vague and, further, that “uncertainty comes at a cost.”¹⁶⁹ Beyond uncertainty, however, he argues against the necessity of the rule because more traditional notions of the charging order and its foreclosure provide balanced protection for the partnership and the nondebtor partners. This balance, again according to Hynes, includes “nonpartner debtor redemption” and “carefully crafted limitations placed

legislation, the courts have been empowered to excuse harmless execution errors and to reform mistaken terms.

Id. at 1. The emphasis on *intent*, and the expressed confidence that courts can determine intent even in cases where the person whose intent matters is dead, would seem to encourage the use of *intent* elsewhere; like in actual fraud. See *supra* note [redacted].

The other reason the relaxation of strict-compliance and no-reformation for wills might be instructive in the context of charging orders is that some *courts* have taken the action even though there was no statutory authority to do so and no change in the statute on which to imply such a legislative intent. According to Langbein and Waggoner, the Ontario Court of Justice stated, “the...absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does not exist here [one of the witnesses failed to sign the will].” *Id.* at 7 quoting *Sisson v. Park Street Baptist Church*, 24 E.T.R. 2d 18 (Ont. Gen. Div. 1988) (note this was law *not* equity). This seems to represent the “cooperative partners” school of statutory construction; perhaps with just a hint of natural law. See *supra* notes [redacted] - [redacted] and accompanying text (statutory construction). It is consistent with the charging order foreclosure cases that resulted in the *undue interference* test in California. See *supra* note [redacted] and accompanying text.

An author of the present article, Geu, echoed earlier warnings including the one quoted in the text early in 2005. He feared an explosion of the use of unpredictable equitable remedies and the increase of more “control-person” or “responsible party” models of statutory liability if charging order provisions were restricted too tightly. Thomas Earl Geu, *Letter to the Editor*, 19 PROBATE & PROPERTY (Issue No. 1) at 4 (March/April 2005). See ADKISSON, *supra* note [redacted].

¹⁶⁹ Hynes, *Charging Order*, *supra* note [redacted], at [fn79] (Continuing, “[t]hat alone does not make a rule wrong.”)

on the nature of the interest bought at the sale.”¹⁷⁰ Further, he observes: “The...protections loom particularly large when one considers that the charging order displaces remedies at common law.”¹⁷¹

Professors Loewenstein and Hynes indirectly emphasize the importance of reasoned and measured public policy as embodied and expressed by public statutes that balance the rights, duties, and liabilities of constituents of business entities. But, this article also suggested that the best statutory defense against the uncertainty of court-ordered equitable remedies (as well as possible legislative push-back in the context of a member’s judgment creditor) may be a clearly drafted provision that provides prophylactically a limited but arguably *adequate remedy at law*.

Issue Cascade and A Legislative Agenda

There existed no articulated policy basis for different charging order formulas between the charging order provisions of the various Florida unincorporated acts. Therefore, *Olmstead* calls out for a legislative response. The relatively simple change of adding the

¹⁷⁰ *Id.* at [FN80-86].

¹⁷¹ *Id.* at [FN 90]. If the *undue interference* standard were applied to *Olmstead*; the first issue might be whether the SMLLCs’ had a “business” with which to be interfered. Obviously, the single-member nature of the LLCs in *Olmstead* makes it possible to distinguish it from *Hellman* on the facts.

exclusivity language to the statute will calm the waves that *Olmstead* caused.

Even with the additional exclusivity language; it would be possible for *Olmstead* (or cases like it) to reach the same conclusion. The same result may be reached by at least two different ways. First, a court could use different canons of statutory construction to chart a different course to the same destination. Second a court could, in many cases, go straight to equity to supplement the statute. While adequately solving the dispute of the parties at bar, however, ad hoc judicial responses do not answer the normative policy question of whether all charging order provisions *should* provide the charging order the exclusive remedy.

The addition of these few words to the statute probably should apply equally to all unincorporated entities and to all owners of those entities (be they an LLC member or manager, a general or limited partner, or a partner in a limited liability partnership). Moreover, the addition of the “exclusive” words across all statutes solve the issue in *Olmstead*. Such a solution, however, ignores plausible distinguishing features across and within each entity. The distinguishing characteristic of the LLC that was the gravamen of the certified question in *Olmstead* was the capacity

for LLCs to have a single member.¹⁷² Based on that distinguishing characteristic, a state could legitimately determine that the charging order should apply differently to multiple member LLCs and SMLLCs. The charging order, therefore, could be the exclusive remedy in the case of a multiple member LLCs but not the exclusive remedy in the case of SMLLCs.¹⁷³

Similar character differences between types of entities might lead to different treatment of those types for purposes of *foreclosure* against charged transferable interests;¹⁷⁴ or apply differently if the entire membership interest of any type of entity were freely transferable by

¹⁷² But see notes [redacted] through [redacted] and accompanying text.

¹⁷³ While doing so would no doubt lower a state's ranking as to the vitality of its asset protection law, a state could decide that a high ranking on that index is not desirable. A state that has rejected (or not embraced) the self-settled spendthrift trust might decide that the SMLLC should not be available for asset protection purposes. *Cf. infra* note [redacted].

¹⁷⁴ Some have asserted that the ability to foreclose upon the charging order lien is a significant weakness in the asset protection provided in even multiple member LLC, see Elizabeth M. Schurig and Amy P. Jetel, *The Alarming Potential for Foreclosure and Dissolution by an LLC Member's Personal Creditors*, PROB. & PROP. 42 (May/June 2006). Others think any weakness is outweighed by possible benefits. See Thomas E. Rutledge, Thomas E. Geu and Carger G. Bishop, *Foreclosure and Dissolution Rights of a Member's Creditors: No Cause for Alarm*, 21 PROBATE & PROPERTY 35 (May/June 2007). For a discussion of the perhaps unintended consequences of precluding foreclosure, see Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, 8 BUS. ENTITIES 28 (Sept/Oct. 2006).

agreement.¹⁷⁵ Moreover, it is conceivable that a state might make distinctions *between* the types of entities in order to fine-tune specific entity types for particular uses; for example, the LLC for use in real estate development and syndication and the limited partnership for estate and asset protection planning.

On the other hand, the number of existing entities and the dense web of interstate commerce provide a good argument that charging order provisions should be consistent not only across all unincorporated entity types in a single state, but uniform across the states.¹⁷⁶ Such uniformity would avoid the very type of interpretive issue that confronted the Court in *Olmstead* and would reduce possible conflicts and unintended consequences concerning multi-state entity operation.¹⁷⁷ In any event, once the several policy questions are answered, the answers should be articulated by setting forth particular and distinguishing language against

¹⁷⁵ Where the parties themselves have given a partner/member the authority to freely transfer the interest (consider the example of the publicly traded master limited partnership), there seems to exist a significant policy question as to whether the judgment-creditor should be restricted to the rights afforded the holder of a charging order.

¹⁷⁶ Callison, *supra* note [redacted] at [redacted].

¹⁷⁷ See *supra* note [redacted] (briefly discussing choice of law issues).

the backdrop of a basic formula used by all the unincorporated entities in order to make as clear as possible the intent of the legislature.¹⁷⁸

In summary, states need to consider carefully the range of inter-relationships under their remedy statutes vis-à-vis the charging order caused by factual permutations. For example, an express determination that the charging order is the exclusive remedy, post-*Olmstead*, might contain language like “including against an interest in an LLC with a single member” if that is the intent. Of course, a state can make the opposite policy decision meaning that asset partitioning through use of an SMLLC¹⁷⁹ *against* a judgment creditor of its member will not be permitted.¹⁸⁰ But that decision too should be reflected in the statutory language. Statutory language is particularly important as a mechanism of bringing clarity and certainty to the law in states with absence of legislative histories or “weak” reliance upon legislative history.

¹⁷⁸ Such effort for example was recently completed in Kentucky when the five charging order provisions were all revised as necessary to set forth a consistent formula. See KY. REV. STAT. ANN. §§ 275.260; 362.285; 362.481; 362.1-504 and 362.2-703 as amended by 2010 Acts, ch. 133, §§ 35, 49, 50, 56 and 63. Charging order provisions are also a topic of discussion by The Harmonization of Business Organizations Drafting Committee of the Uniform Law Commission.

¹⁷⁹ See generally Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253; Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 383 (2000).

¹⁸⁰ See also RESTATEMENT (THIRD) OF TRUSTS §§ 57, 58(2).

And finally: states should consider whether exclusivity extends to equitable remedies in aid of statutory collection process and to separate and traditional equitable causes of action whether or not codified. The latter, obviously, implicates the equity power of the courts under the constitutions of the various states.

Conclusion

Olmstead is an important decision not so much for what it holds but for the instruction provided by the holding. Initially it is a call for an informed policy decision concerning negative asset partitioning through the use of an SMLLC. Perhaps more broadly, it asks whether the LLC charging order provision *should* be the “exclusive means for a member’s judgment creditor [to] obtain value from the ownership interest in the LLC.” It is a clarion call to state drafting committees to undertake a review and reconciliation of statutory language in order to avoid the pregnant affirmative between charging order provisions in separate unincorporated entity statutes which was relied upon in *Olmstead*. After there has been a policy determination, the specific source of the narrow SMLLC issue presented in *Olmstead* can be statutorily solved by making the charging order provisions consistent across all entities or more clearly stating any intended distinctions between the provisions.

Unfortunately, the narrow statutory construction issue under which *Olmstead* was decided is the only issue that can be charted and avoided with a modicum of certainty. The policy and jurisprudence concerning the *application* and *construction* of the exclusiveness of the charging order are the harder issues, and their answers lie just beneath the surface of the statute.

The review of the charging order provision once undertaken can likely avoid all but glancing blows to the most fundamental issues even assuming they exist just beneath the surface. Even so, any such review will meet difficult comparative policy issues between different unincorporated entity statutes in a single state. It will also risk unintended consequences including, *inter alia*, conflict of law issues if many states choose different charging order policies for the same type of entity.

Moreover, and paradoxically, it is possible that increasing the restrictiveness of charging order remedies may have the unintended consequence of narrowing their coverage and increasing uncertainty as the statute provides an *adequate remedy at law* in fewer and fewer cases. Thus, the greater the restrictions; the bigger the invitation to the courts to exercise their equity jurisdiction or to use different canons of statutory construction to avoid unacceptable results. In addition, greater restrictions

might encourage interest groups and the legislature to push-back against the provisions thereby actually reducing the current protection afforded by the charging order. The push-back could ultimately place a venture's operational assets at such risk to the creditors of individual members that entity choice for refuge from liability will shift back to the corporation.

No matter the policies chosen, however, the lessons from *Olmstead* includes: (1) it is necessary to consider factual permutations when making policy decisions about charging orders; (2) there is a premium on clear and consistent statutory drafting; and, (3) there will remain a modicum of jurisprudential tension caused by judicial construction of statutes because that tension reflects the constitutional design of separation of powers. In those general matters the result of[in] *Olmstead* is unremarkable.

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Exhibit 1
The Charging Order Provisions of the Various Uniform Acts

<i>UPA § 28</i>	<i>RUPA § 504</i>	<i>RULPA § 703</i>	<i>ULPA § 703</i>	<i>ULLCA § 504</i>	<i>RULLCA § 50.</i>
<p>(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.</p> <p>(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court</p>	<p>(a) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.</p> <p>(b) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a</p>	<p>On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. The [Act] does not deprive any partner of the benefit of any exemption laws applicable to his [or her] partnership interest.</p>	<p>(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.</p> <p>(b) A charging order constitutes a lien on the judgment</p>	<p>(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries, the judgment debtor might have made or which the circumstances may require to give effect to the charging order.</p> <p>(b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of alien on a distributional interest subject to the charging order</p>	<p>(a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.</p> <p>(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:</p> <p>(1) appoint a receiver of the distributions subject to the charging</p>

<p>may be purchased without thereby causing a dissolution:</p> <p>(a) With separate property, by any one or more of the partners, or</p> <p>(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.</p> <p>(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.</p>	<p>transferee.</p> <p>(c) At any time before foreclosure, an interest charged may be redeemed:</p> <p>(1) by the judgment debtor;</p> <p>(2) with property other than partnership property, by one or more of the other partners; or</p> <p>(3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.</p> <p>(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.</p> <p>(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.</p>		<p>debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.</p> <p>(c) At any time before foreclosure, an interest charged may be redeemed:</p> <p>(1) by the judgment debtor;</p> <p>(2) with property other than limited partnership property, by one or more of the other partners; or</p> <p>(3) With limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged.</p> <p>(d) This [Act] does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest.</p> <p>(e) This section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment</p>	<p>at any time. A purchaser at the foreclosure sale has the right of a transferee.</p> <p>(c) At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed:</p> <p>(1) by the judgment debtor;</p> <p>(2) with property other than the company's property, by one or more of the other members; or</p> <p>(3) With the company's property, but only if permitted by the operating agreement.</p> <p>(d) This [Act] does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.</p> <p>(e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.</p>	<p>order, with the power to make all inquiries the judgment debtor might have made; and</p> <p>(2) Make all other orders necessary to give effect to the charging order.</p> <p>(c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest; does not thereby become a member and is subject to Section 502.</p> <p>(d) At any time before foreclosure under subsection (c), the member or transferee whose transferable interest is subject to a charging order under subsection (c) may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order</p> <p>(e) At any time before foreclosure</p>
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