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State Law & State Taxation Corner

By Thomas E. Rutledge

I May Be Lost But I'm Making Great Time: The Failure of *Olmstead* to Correctly Recognize the *Sine Qua Non* of the Charging Order

The recent decision of the Florida Supreme Court in *Olmstead v. Federal Trade Commission*[1] has been widely discussed and oft condemned.[2] In that decision, the Court held that, under Florida law, a charging order issued against a member's interest in a limited liability company is not the exclusive remedy available to the member's judgment creditor. Unfortunately, the *Olmstead* Court then engaged in a discussion of the basis for the charging order, justifying its narrow holding on statutory construction with a normative analysis of the charging order in the context of LLCs in general and single-member LLCs in particular. Ultimately, the Court determined that not restricting the judgment creditor to the charging order was permissible because there was no violence done, in the context of a single-member LLC, to the *in delectus personae* rule embodied in the LLC Act, other members being a null set.[3]

The *Olmstead* Court's justification of its narrow holding is flawed. While it is true that in the context of a single-member LLC there are no other members and *in delectus personae*[4] is not an issue, that is the incorrect starting point for an analysis of the charging order. Rather, asset partitioning (and not *in delectus personae*) is the policy underlying the charging order. Having started at the wrong place, the *Olmstead* Court was and remained lost.

Asset Partitioning

The traditional understanding of "limited liability" is that an owner of a business organization, simply because she is an owner, is not liable, beyond the assets contributed to the venture, for its debts and

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obligations.[5] As the term is used herein, "asset partitioning" is the other side of the limited liability coin, namely that the assets of the venture are devoted to the activities (and the creditors) of the venture.[6] Even as creditor claims are satisfied from the business' assets, those assets will not be available to satisfy claims against the owners in their individual capacities.[7] Especially upon insolvency, the assets constitute a trust fund for the benefit of the business' creditors.[8]

In the Beginning

At common law, a partnership could not hold real property in the name of the partnership; rather, title was held by one or more partners on behalf of the partnership.[9] Still, irrespective of whether the property was personal (which pre-UPA could be held in the firm's name) or real, it was deemed held by the partners in a modified form of tenants in common.[10] The parameters of that relationship and the rights of individual partners *vis-à-vis* the partnership's assets were unclear.[11]

The Uniform Partnership Act (UPA) changed the first of these rules, providing that a partnership may take legal title to realty in its own name.[12] As to the second rule, it created the "self-contradictory"[13] "tenancy in partnership."[14] Even as each partner holds specific partnership property as a tenant in partnership with each other partner,[15] a partner may not possess that property other than for partnership purposes.[16] The interest in the property is not unilaterally assignable by an individual partner,[17] is not subject to attachment or execution to satisfy a partner's personal debt[18] and is not subject to homestead or exemption, dower, courtesy or allowance laws.[19] In addition, upon a partner's death, the interest in the property vests in the other partners.[20] Essentially, the partner is the owner of the assets, but the partner cannot directly utilize or convey that which he or she is identified as owning.[21] What the one hand giveth, the other taketh away.

The Uniform Partnership Act (UPA) changed the first of these rules, providing that a partnership may take legal title to realty in its own name.

UPA went on to define a new concept, a partner's "interest in the partnership," as being the partner's "share of the profits and surplus," identifying it as personal property.[22] This "interest in the partnership" is assignable, vesting in the assignee the assignor's rights to whatever profits would have been distributed to the assignor, but without conveying any right on the part of the assignee to participate in the management of the partnership.[23]

The Troubled Situation of the Pre-Charging Order Partnership

As observed by the leading commentator on the law of partnerships, "No partnership property question has been more confused by the decisions than the right of a partner's separate creditor to attach or levy execution on his share or interest in the firm's property."[24] 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 caused 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 due by the executor debtor. A more clumsy method of proceeding could hardly have grown up.[25]

Eventually, the common law came to recognize the inequity of applying partnership assets other than for partnership purposes and for the benefit of a partner's individual creditors and restricted the rights of the creditor to access those assets.[26] That policy was incorporated into UPA (just as it had been into the predecessor British Partnership Act[27]) in the form of the charging order.

The UPA Charging Order

The charging order exists to balance two valid and competing interests: that of the judgment creditor to collect on a judgment against a partner and that of the partnership (as well as the nondebtor partners) in applying its assets to its operations and obligations without interference from the individual partner's creditor.

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,[28] it follows that the creditor of a member or partner may look only to the partner's interest in the partnership[29] as an asset available to satisfy a debt;[30] it being expressly stated that the partnership's assets are not available to satisfy that debt.[31] A judgment creditor gains access to the distributions made with respect to the judgment debtor's transferable interest by means of a charging order.[32] The holder of the charging order has a lien on the distributions when made to the judgment debtor/partner[33] while not enjoying any right to participate in the venture's management.[34] It is this limitation on participation in management that precludes the judgment creditor from forcing an interim or liquidating distribution from the partnership.[35] The charging order does not effect a transfer of the partner's interest in the partnership to the judgment creditor (*i.e.*, the holder of the charging order is not an assignee),[36] and the right to participate in management stays with the judgment debtor/partner.[37] When the underlying judgment is satisfied, the charging order will be released, and the owner again receives distributions as they occur.[38]

Foreclosure of the charging order transfers to the purchaser the judgment debtor's interest in the partnership.[39] The rights of the foreclosure sale purchaser are those of a transferee of a transferable interest. They are passive in nature; all that is sold/purchased are the passive economic rights that 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.

Olmstead's Flawed Identification of *In Delectus Personae* as the Basis for the Charging Order

The recent decision of the Florida Supreme Court in *Olmstead*[40] determined that the charging order is not the exclusive remedy of a Florida LLC member's judgment creditor and that other remedies are available. On its most narrow basis, the ruling was the result of the absence in the LLC Act of a statement that the charging order is the judgment creditor's exclusive remedy[41]; the charging order provisions of the Florida adoptions of the Revised Uniform Partnership Act[42] and the Uniform Limited Partnership Act[43] both contain express declarations of exclusivity.[44] While this determination is subject to criticism,[45] it is not without basis.

Unfortunately, the *Olmstead* decision continued with a normative analysis of the charging order, assuming it to be based upon the *in delectus personae* principle of partnership law.[46] While normally this rule, sometimes recited as "pick your partner," would preclude a partnership or LLC from being forced to take on a stranger as a partner or member without the consent of the incumbent partners or members, the *Olmstead* Court reasoned that as the set of other partners is null, and as the charging order exists to implement *in delectus personae*, in the SMLLC the charging order serves no purpose as it has no function.[47] In doing so, the *Olmstead* Court followed in the footsteps of both other courts[48] and commentators,[49] who have made similar identifications of the basis of the charging order.

In fact, it is asset partitioning, not *in delectus personae*, that constitutes the basis for the charging order.

If *In Delectus Personae*, Why Not Assignee? The Need for a Nonassignee Status for a Partner's Judgment Creditor

The rights of the holder of a charging order and the rights of an assignee (including a purchaser of an interest in a partnership pursuant to the foreclosure of a charging order) are different. The rights of the former are entirely passive; they have no rights *vis-à-vis* the partnership beyond the receipt of the distributions that would have otherwise gone to the judgment debtor/partner. Conversely, an assignee has rights *vis-à-vis* the partnership including the right to apply for its judicial dissolution,[50] to apply that the partnership's winding up be accomplished by the court[51] and to an accounting from the last accounting agreed to by the partners.[52] *Ergo*, being the holder of a charging order is a status different from that of being an assignee.

Assume that *in delectus personae* is the justification for the charging order; it would then be appropriate that the holder of a charging order have the rights of an assignee.[53] The judgment creditor, for the period the charging order is in place, would properly enjoy all of the judgment debtor's rights *vis-à-vis* the partnership even as the principle of "pick your partner" is fully protected.

That is not, however, the statutory paradigm. Rather, assignees and holders of charging orders have different rights (in an alternative formula, their rights are not co-extensive). It follows that the charging order and the limited rights of an assignee must not directly support the same policy. The holder of a charging order may morph their position into that of an assignee, and in so doing come into the broader rights of that status, by the mechanism of a foreclosure,[54] but that transformation requires court approval and, in certain instances, the opportunity for the other partners and the partnership to object.[55] It is only after the transformation of the holder of the charging order into an assignee that the creditor of the partner may access the partnership's property in order to realize on any value in satisfaction of the judgment, thereby defeating the asset partitioning of UPA section 25(2).

This analytic path is supported by the comments to UPA section 25, which provides in part:

> [T]he net result of the remedial law, as worked out in law and at equity, is that a judgment creditor of a separate partner may attach and sell his debtor's interest in partnership property as that interest is defined in section 26 (see section 28); but he cannot sell so as to affect in any way the rights of the partnership specific partnership property.[56]

This comment links the charging order (UPA section 28) to the asset-partitioning effect of the partnership (UPA section 26) while making no mention of *in delectus personae* (UPA section 27(1)).

Were it the case that the purpose of the charging order is to restrict the holder thereof to the rights of an assignee, thereby preserving the "pick your partner" rule, the holder of a charging order would have the rights of an assignee. In fact, they do not. The holder does have, however, a body of rights that protects the asset partitioning effect of the partnership. Therefore, the charging order exists to protect asset partitioning, and not in the first order to protect *in delectus personae*.

SMLLCs and "Abusive" Asset Partitioning

That Shawn Olmstead was compelled to surrender the assets derived from his credit card scam[57] is undoubtedly the correct result; none of us benefits from the asset protection of manifestly ill-gotten gains. Still, cases such as *Olmstead* prove the adage that hard cases make bad law. In seeking to justify its determination that the turn-over of his entire interest in his single-member LLC (SMLLC) was permissible, a determination already justified on the basis of statutory construction, the *Olmstead* Court, as had the *Albright* Court before it, for inexplicable reasons decided it needed to engage in further justification of its determination. Sadly, that further justification was premised upon a faulty foundation, namely that the charging order is a component of *in delectus personae*. While the lack of other members in the context of a SMLLC may appear to justify not restricting the judgment creditor to the charging order remedy, that is the wrong analytic foundation.

> The recent decision of the Florida Supreme Court in *Olmstead* determined that the charging order is not the exclusive remedy of a Florida LLC member's judgment creditor, and that other remedies are available.

That is not to say that indiscriminate asset partitioning through a SMLLC should be permitted or that it is not subject to remedy. At least two approaches exist.[58] First, the courts may adopt lenient standards for the reverse piercing[59] of SMLLCs in order to make the LLC's assets available to satisfy claims against the single member, especially where the LLC is little more than a passive title-holding vehicle. Doing so would preclude efforts to equate the SMLLC with the self-settled spendthrift trust, especially in that significant majority of jurisdictions that do not permit that form.

Second, in the SMLLC the standard for foreclosure of the charging order should as well be lenient. While it is entirely true that the rights of the assignee of the purchaser at foreclosure are only those of an assignee, careful attention needs to be paid to the LLC act at issue to fully appreciate the implications of foreclosure on the interest of a single member. For example, under many LLC acts, upon the transfer of a member's entire interest that member is dissociated from the LLC.[60] Now lacking a member, under some statutes the LLC must proceed to dissolve in that the statutory requirement that the LLC have at least one member[61] will no longer be satisfied. Upon that dissolution, the assets of the SMLLC will be distributed to the assignee. In many instances the assignee will have been the holder of the charging order, so they will have ultimately succeeded in accessing the assets underlying the SMLLC in satisfaction of the single member's debt. In light of the eventuality of gaining control of the underlying assets, it is possible that others will bid on foreclosure of the charging order, thus rendering a higher value to be paid against the judgment. In other jurisdictions, the assignee of the sole member will be empowered to elect themselves into the position of member,[62] thereby achieving control of the underlying assets. Regardless, there will exist a path, conditioned upon the court permitting foreclosure, for reaching the SMLLC's assets to satisfy the judgment against the sole member. These mechanisms may not be ultimately effective in those states that both provide that the charging order is the exclusive remedy and which preclude foreclosure,[63] but in those instances we will expect that equity will be applied to craft, for that situation, an appropriate remedy.

Conclusion

The significant failure of the *Olmstead* decision is its incorrect reference to the principle of *in delectus personae* as the *sine qua non* of the charging order in justifying its determination that the charging order need not apply in the realm of the SMLLC. It should be expected that further "hard cases" will arise out of the efforts by individuals to achieve asset protection by means of SMLLCs; the law needs to have in place rational bases for determining whether and when the asset partition effects of an LLC[64] will be permitted to stand and when they will be set aside. Understanding the charging order as a component of asset partitioning, combined with a detailed understanding of the place of the charging order in the LLC act, hopefully will lead to a reasoned resolution of these disputes.

ENDNOTES

1 *Olmstead v. FTC*, Fla. SCt, 2010 Fla. LEXIS 990, 2010-1 TRADE CASES (CCH) ¶77,079 (Jun. 24, 2010). A comprehensive review of this decision appears in Professor Thomas Earl Geu, Thomas E. Rutledge and John DeBruyn, *To Be Or Not To Be Exclusive: Statutory Construction of the Charging Order In the Single Member LLC*, 9 DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL __ (Fall 2010) (*forthcoming*) (available on SSRN, abstract 1705567).

2 *See, e.g.*, Barry A. Nelson, *Olmstead: Right Result, Wrong Reason*, 51 TAX MGMT. MEMO. 1 (Sept. 13, 2010). *See also* Carter G. Bishop, *Desiderata: The Single Member Limited Liability Company Charging Order Statutory Lacuna*, Suffolk U. Law School Legal Studies Research Paper 10-59 (available on SSRN, abstract 1697621).

3 *See infra* notes 46 and 47, and accompanying text.

4 Literally "the choice of person," the term labels the partner's right to select those persons with whom they will be partners.

5 *See, e.g.*, Bayless Manning, A CONCISE TEXTBOOK ON LEGAL CAPITAL (2nd ed.), at 6:

> History aside, it is important to understand that modern corporation law does not "provide for" limited liability; what it does is provide that in the case of creditor claims against an enterprise in corporate form, *the corporation is the debtor* rather than those who hold claim to the proprietorship capital in the enterprise. Once that step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals.

(*Emphasis* in original.) *See also* 1 William Meade Fletcher, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §14 (perm. ed.) ("Unless the corporation and the individuals are the same entity, it is logical that its rights and liabilities are not primarily and essentially theirs. When it is an owner or a debtor, they are not, and vice versa.").

6 FLETCHER CYCLOPEDIA, §38 at n. 8. This aspect of limited liability has been labeled "affirmative asset partitioning" *see* Henry Hansmann & Reinier Krackman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394–95 (2000)) and "capital lock-in." *See* Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003); Lynn A. Stout, *On the Nature of Corporations*, 2005 ILLINOIS L. REV. 253. As to the development of asset protection planning through the utilization of LLCs and other forms premised upon partnership law, *see* Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Organizations*, 30 DEL. J. CORP. L. 199 (2005).

7 *See, e.g.*, Stout, *Nature of Corporations*, *id.*, at 255 ("A corporation's assets belong to the corporation, and not to its equity investors. As a result, those assets cannot be unilaterally withdrawn from the firm by either its shareholders, or the creditors of its shareholders.").

8 *See, e.g., Hollins v. Brierfield Coal & Iron Co.*, SCt, 150 US 371, 384 (1893) ("[A]ll its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders.").

9 Alan R. Bromberg, CRANE AND BROMBERG ON PARTNERSHIP, at 221 (1968) (hereinafter "BROMBERG ON PARTNERSHIP").

10 BROMBERG ON PARTNERSHIP at 228–29. *See also, id.*, at 229 ("The common law, then, was twisted up with the difficulty of trying to reconcile two essentially different types of ownership—organizational (or collective) and individual—in a single concept.").

11 *See* UNIFORM PARTNERSHIP ACT (UPA) §25, 6 (pt. II) U.L.A. 294 (2001), comment ("That the partners are co-owners of the partnership property is clear; but the legal incidents attached to the right of each partner as co-owner are not clear.").

12 *See* UPA §8(3), 6 (pt. I) U.L.A. 532 (2001); *see also, id.*, comment (noting that UPA changed from common law).

13 BROMBERG ON PARTNERSHIP at 230.

14 *See* UPA §25(1), 6 (pt. II) U.L.A. 294 (2001).

15 *Id. See also* UPA §24, 6 (pt. II) U.L.A. 291 (2001) ("The property rights of a partner are (i) his rights in specific partnership property ….").

16 *See* UPA §25(2)(a), 6 (pt. II) U.L.A. 294 (2001).

17 *See* UPA §25(2)(b), 6 (pt. II) U.L.A. 294 (2001).

18 *See* UPA §25(2)(c), 6 (pt. II) U.L.A. 294 (2001).

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[19] *See* UPA §§25(2)(c), (e), 6 (pt. II) U.L.A. 294 (2001).

[20] *See* UPA §25(2)(d), 6 (pt. II) U.L.A. 294 (2001).

[21] *See also* 1 Alan R. Bromberg and Larry E. Ribstein, Bromberg and Ribstein on Partnership at §3.04(b)(1) (hereinafter "Bromberg & Ribstein") (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.").

[22] *See* UPA §26, 6 (pt. II) U.L.A. 326 (2001). *See also* UPA §24, 6 (pt. II) U.L.A. 291 (2001) (describing one of a partner's property rights as "his interest in the partnership").

[23] *See* UPA §27(1), 6 (pt. II) U.L.A. 332 (2001). Under the prior common law, an assignment dissolved the partnership. *See id.*, comment; *Karrick v. Hannaman*, SCt, 168 US 328 (1897). Permitting assignment of the interest in the partnership without a consequent partnership dissolution was a change from the common law.

[24] Bromberg on Partnership §43(a) at 241.

[25] J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 Wash. L. Rev. 1 (1953), quoting *Brown, Janson & Co. v. Hutchinson & Co.*, 1 Q.B. 737 (1895). The reference to "fi. fa." is to the common law writ of execution *fieri facias*. *See also generally* F.F., *The Legal and Equitable Rights of Individual and Partnership Creditors; With Reference to the Taking in Execution of Partnership Property for the Debt of a Partner*, 26 Am. Jurist & L. Mag. 55 (1841–42).

[26] *See, e.g.*, *Johnson v. Wingfield*, 42 SW 203 (Tenn. Ch. App. 1897); *Pierce v. Jackson*, 6 Mass. 242 (1810) ("At common law, partnership stock belongs to the partnership, and one partner has no interest in it, but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe the firm. Consequently, all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made by the debtor, or on seizing of the goods on execution.").

[27] Bromberg on Partnership §43(b) at 246.

[28] *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."); *see also* James R. Richardson, *Creditors' Rights and the Partnership*, 40 Ky. L. J. 243 at 245 (1951-52) ("A stream can rise no higher than its source; a creditor can acquire no greater interest than his debtor.").

[29] *See* UPA §26, 6 (pt. II) U.L.A. 326 (2001); *id.,* §27(1), 6 (pt. II) U.L.A. 332 (2001).

[30] *See also* 1 Larry E. Ribstein and Robert R. Keatinge, Ribstein and Keatinge on Limited Liability Companies at §7.8 (2d ed. 2010) (hereinafter "Ribstein and Keatinge on LLCs") ("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.").

[31] *See* UPA §25(c), 6 (pt. II) U.L.A. 294 (2001).

[32] *See* UPA §28, 6 (pt. II) U.L.A. 341 (2001).

[33] While the charging order formula utilized in UPA does not characterize the holder's interest as a lien, that has been the accepted interpretation. *See, e.g.*, Bromberg on Partnership at 242, citing *Kerry v. Schneider*, CA-9, 239 F2d 896 (1956) and *Taylor v. S & M Lamp Co.*, 190 Cal. App.2d 700, 12 Cal. Rptr. 323 (1961). *See also* Bromberg & Ribstein at 3:99.

[34] The charging order is against the partner's UPA §26 interest in the partnership, it being distinct from the UPA §24(3) right to participate in management of the partnership.

[35] In so doing, 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).

[36] *See* Bromberg on Partnership at 248 ("the charging creditor is not the owner of the interest.") (citation omitted); J. William Callison and Maureen A. Sullivan, Partnership Law and Practice at 7-39 (hereinafter "Callison Partnership"). Consequently, it is the charged partner who retains the tax liability on the partnership's activities. *See* Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know (Part II)*, 9 J. Passthrough Entities 25, 25–26 (July–Aug. 2006).

[37] *See* Bromberg on Partnership at 248; Bromberg & Ribstein at 3:103; and Callison Partnership at p. 7-39.

[38] *See also* 1 Ribstein and Keatinge on LLCs, at §7.8, n. 3 (2d ed. 2010) ("A mere pledge or encumbrance, without more, should not be characterized as an assignment because the pledgee's or creditor's rights last only until the debt is discharged.").

[39] *See, e.g.*, Bromberg on Partnership at 248; Callison Partnership at 7-39 to 7-40.

[40] *See supra* note 1. Through Peoples Credit First, LLC, and Consumer Preferred, LLC, Shaun Olmstead and Julie Connell operated what was characterized as an "advance-fee credit card scam." *Fed. Trade Comm'n v. Olmstead*, CA-11, 528 F3d 1310, 1312 (2008). In response to numerous complaints, the FTC brought an action. The LLCs were placed in receivership and the assets of Olmstead and Connell were frozen. Ultimately, the FTC was awarded summary judgment on its claim for violation of section 5(a) of the Federal Trade Commission Act, and a restitution order of more than $10 million was ordered.

To satisfy the restitution the FTC sought an order requiring the surrender of all "right, title and interest" to certain single-member LLCs owned by Olmstead or Connell. They asserted the FTC was limited to a charging order against their interest in each LLC. The 11th Circuit certified to the Florida Supreme Court the question of whether the FTC was limited to the rights of a charging order.

[41] Fla. Stat. §608.433(4).

[42] Uniform Partnership Act, 6 (pt. I) U.L.A. 1 (2001) (typically referred to as RUPA in accordance with the practice though part of its drafting and as a necessary means of distinguishing it from the original 1914 Uniform Partnership Act; *see also* Allan W. Vestal and Thomas E. Rutledge, *Modern Partnership Law Comes to Kentucky: Comparing the Kentucky Revised Uniform Partnership Act and the Uniform Act From Which it was Derived*, 95 Ky. L. J. 715, n. 4 (2006-07)).

[43] Uniform Limited Partnership Act (2001), 6A U.L.A. 325 (2008).

[44] *See* Fla. Stat. §620.8504 (FlRUPA); *id.*, §620.1703 (FlULPA).

[45] 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 (even though the statutes at issue did not recite that the charging order is the exclusive remedy. *See Givens v. National Loan Investors, L.P.*, 724 So2d 610 Fl. App. 5th Dist 1998); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So2d 1002 (Fla. App. 4th Dist. 1986); and *In re Stocks*, 110 B.R. 65 (Bankr. N.D. Fla. 1989); *see also Myrick v. Second Nat'l Bank of Clearwater*, 335 So2d 343 (Fla. App. 2nd Dist. 1976).

[46] *See, e.g.*, UPA §18(g), 6 (pt. II) U.L.A. 101 (2001) ("No person can become a member of a partnership without the consent of all the partners."); *id.*, §27, 6 (pt. II) U.L.A. 332 (2001) (assignee of a partner's interest in the partnership has no right to participate in ongoing partnership management). These same principles have been carried forward into the law of LLCs. *See, e.g.*, Revised Uniform Limited Liability Company Act §401(d)(3), 6B U.L.A. 478 (2008); *id.*, §502(a)(3), 6B U.L.A. 496 (2008); Ky. Rev. Stat. Ann. §275.265(1); *id.*, §275.255(1)(c).

[47] *See Olmstead*, note 1, *supra* ("In particular, the transfer of management rights in an LLC generally is restricted. This particular characteristic of LLCs underlies the establishment of the LLC charging order remedy, a remedy derived from the charging order remedy created for the personal creditors of partners.").

[48] *See, e.g.*, *In re Albright*, 291 B.R. 538, 541 (Bankr. Colo. 2003) ("The Debtor argues

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that the Trustee acts merely for her creditors and is only entitled to a charging order against distributions made on account of her LLC member interest. However, the charging order, as set forth in Section 703 of the Colorado Limited Liability Company Act, exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager. A charging order protects the autonomy of the original members, and their ability to manage their own enterprise. In a single-member entity, there are no non-debtor members to protect. The charging order limitation serves no purpose in a single member limited liability company, because there are no other parties' interests affected.") (citations omitted). For a general review of the *Albright* decision, *see* 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).

49 *See, e.g.*, Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199 at 231–32 (2009):

> [In the context of an SMLLC] [t]here are no other remaining members to protect as in the case of a multi-member [LLC] . . . . Preferably, every state would amend its SMLLC legislation to provide that upon the voluntary or involuntary transfer of the only economic interest in the SMLLC, the transferee be admitted as a substitutional member, with or without the consent of the only member.

This author has also contributed to this confusion. *See* Rutledge and Geu, *The Albright Decision*, *id.,* at 18, text at n. 6.

50 *See* UPA §32(2), 6 (pt. II) U.L.A. 404 (2001).

51 *See* UPA §37, 6 (pt. II) U.L.A. 470 (2001).

52 *See* UPA §27(2), 6 (pt. II) U.L.A. 332 (2001).

53 See *supra* note 46.

54 It is here assumed that it is the judgment debtor who will be the purchaser at the foreclosure sale.

55 *See* UPA §28(2), 6 (pt. II) U.L.A. 341 (2001) (noting the possibility of foreclosure); BROMBERG & RIBSTEIN at §3.05(d)(3)(iv) (suggesting that the partnership and other partners are entitled to notice and to be heard). In addition, faced with the possibility of an assignee who may be able to move for the partnership's dissolution and in so doing directly access its assets in satisfaction of the debt of an individual partner, the charging order may be redeemed. *See* J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 PAC. L. J. 1, 14 (1993–94); *FDIC v. Birchwood Builders, Inc.*, 573 A2d 182, 186 (N.J. Super. Ct. App. Div. 1990).

56 UPA §25, 6 (pt. II) U.L.A. 298 (2001) comment to subdivision (2-c).

57 *See Federal Trade Commission v. Olmstead*, 528 F3d 1310, 1311–12 (11th Cir. 2008).

58 These two suggestions are intended as mechanisms through which to address abusive asset sheltering SMLLCs, and are in no manner intended to exclude other avenues such as the application of the laws of fraudulent conveyance.

59 *See, e.g., C.F. Trust, Inc. v. First Flight Partnership*, 580 SE2d 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).

60 *See, e.g.*, DEL. CODE ANN. tit. 6, §18-702(b)(3) ("A member ceases to be a member … upon assignment of all of the member's [LLC] interest."); FLA. STAT. §608.432(2)(c) ("A member ceases to be a member and to have the right to exercise any rights or powers of a member upon assignment of all the membership interest of such member."); OR. CODE §63.265(1). Statutes that require action by the incumbent members other than the member whose entire interest in the LLC has been transferred in order to expel that member (*e.g.*, KY. REV. STAT. ANN. §275.280(1)(c)(2)) should be updated to address the situation in which there are no other members and provide for automatic termination of member status. Another means of effecting the dissociation of the sole member, leaving the LLC memberless, would be an involuntary bankruptcy filing. *See, e.g.*, RULLCA §602(7)(A), 6B U.L.A. 503 (2008) (in a member-managed LLC, member dissociated upon becoming a debtor in bankruptcy); KY. REV. STAT. ANN. §275.280(1)(d)3. (member dissociated upon being adjudicated bankrupt or insolvent). As noted elsewhere, "the bankruptcy filing of the sole member functionally transfers all of the member's economic rights to the bankruptcy trustee. At that point the sole member has been dissociated from the LLC," and those assets are now available either to discharge the charging order lien (assuming bankruptcy precedes foreclosure) or distribution to the holder of the assignee interest in the SMLLC (where bankruptcy succeeds foreclosure. *See* Rutledge and Geu, *The Albright Decision*, *supra* note 48 at 20; *see also* Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199, 221–24 (2009).

61 *See, e.g.*, KY. REV. STAT. ANN. §275.015(11); KAN. STAT. ANN. §17-7663(f).

62 *See, e.g.*, DEL. CODE ANN. tit. 6, §18-801(4); KY. REV. STAT. ANN. §275.285(4); and OR. REV. STAT. §63.265(2)(b).

63 *See, e.g.*, ALASKA STAT. §10.50.380.

64 *See, e.g.*, PROTOTYPE LIMITED LIABILITY COMPANY ACT §701(A); 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."); ALASKA STAT. §10.50.350(a) (same); and CONN. GEN. STAT. ANN. §34-167(a) (same).