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Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #157

Date: 29-Jun-10
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: FLASH - Olmstead - Part II - Asset Protection Planning Case.

EXECUTIVE SUMMARY:

Yesterday, **Alan Gassman** and **Christopher Denicolo** reported in Asset Protection Planning Newsletter # 156 that the Supreme Court of Florida in [i] Olmstead v. Federal Trade Commission held that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member limited liability company to satisfy an outstanding [ii] judgment. Florida law does not displace the creditor's remedy available with respect to a debtor's ownership interest in a single-member LLC. A "charging order" is not the sole remedy authorized by law.

Here are some *additional* thoughts on this very important case from **Chris Riser, Jeff Baskies**, and **Mark Merric**.

We've posted the Olmstead case in our ActualText Section.

Please note that this case may have implications far beyond Florida and its citizens.

FACTS:

This case involved individuals who, through certain corporate entities, [iii] perpetrated an advance-fee credit card scam.

In response to this scam, the FTC sued them and the corporate entities for unfair or deceptive trade practices.

Assets of these defendants were frozen and placed in receivership. Among the assets placed in receivership were several single-member Florida LLCs in which either Olmstead or Connell was the sole member.

Ultimately, the FTC obtained judgment for injunctive relief and for more than $10 million in restitution.

To partially satisfy that judgment, the FTC obtained an order compelling appellants to endorse and surrender to the receiver all of their right, title, and interest in their LLCs.

This precipitated the question the Supreme Court considered.

COMMENT:

Chris Riser of Riser **Adkisson LLP** in Athens Georgia notes that

"The court's reasoning is that, because the Florida LLC charging order statute does not expressly provide that the charging order remedy is exclusive (whereas the Florida GP and LP statutes do), the LLC charging order is *not* exclusive and thus levy and execution is available."

According to Chris,

"It appears that the court was looking for a way to give the FTC the win, while strongly implying that the legislature clarify its intentions. I'm fairly certain that this case will be overturned by the Florida legislature in the sense that it is likely to amend the LLC charging order statute to provide that the charging order remedy is exclusive. I hope the legislature also explicitly deals with SMLLCs and makes it clear that the charging order provisions do or don't apply to single member LLCs."

There is an strong dissent by Justice Lewis (twice as long as the majority opinion) that notes that the statute is clear on its face in not differentiating between SMLLCs and multi-member LLCs, and that "the plain language of the statute provides additional remedies to the charging order provision for judgment creditors seeking satisfaction on a judgment that is equal to or greater than the economic distributions available under a charging order—(1) dissolution of the LLC, (2) an order of insolvency against the judgment debtor, or (3) an order conflating the LLC and the member to allow a court to reach the property assets of the LLC."

The dissent also (correctly, I believe) distinguishes Albright and the other SMLLC member bankruptcy cases.

Riser suggests that Olmstead might encourage state legislatures to clarify charging order statutes in general, and in particular, as they are intended to apply (or not) to SMLLCs.

Jeff Baskies of **Katz Baskies LLC** in Boca Raton, Florida adds the following:

As Chris noted, the Florida Supreme Court's opinion relied heavily on the fact that the Florida GP and LP statutes provide that the charging lien is the sole remedy and the LLC statute does not provide the same. The Court said:

> *"The Legislature has shown – in both the partnership statute and the limited partnership statute – that it knows how to make clear that a charging order remedy is an exclusive remedy. The existence of the express exclusive-remedy provisions in the partnership and limited partnership statutes therefore decisively undermines the appellants' argument that the charging order provision of the LLC Act – which does not contain such an exclusive remedy provision – should be read to displace the remedy available under section 56.061 (the statute which authorizes a creditor with a judgment to levy on and obtain full title to intangibles, like shares of stock and now apparently membership interests in single-member LLCs).*"

Further the Court noted:

> *[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent…. In the past, we have pointed to language in other statutes to show that the legislature knows how to accomplish what it has omitted in the statute [we were interpreting]. citations omitted.*

However, the Florida Supreme Court's conclusion regarding the legislative

intent may have given credit where credit was not quite due. The fact is the organized bar with the help of creditor protection savvy lawyers promoted the adoption of the updated partnership and limited partnership statutes with the charging order as exclusive remedy clauses. The organized bar has been promoting similar changes to the LLC statute, but such a reform just has not made its way out of the bar and to the legislature yet. Thus, it may well be somewhat inaccurate to say that the legislature intended that there be an exclusive remedy clause in the GP and LP statutes but not in the LLC statutes; instead, it may be more accurate to say, the Legislature just has not gotten around to thinking about it yet.

Also, as highlighted in the dissent, does the opinion in Olmstead – which itself works very hard to limit its scope to single-member LLCs – open the door to allow creditors to attack all LLC interests (including in multi-member LLCs) citing to the same lack of an "exclusive remedy" clause in the LLC statute? Indeed, there is a very chilling note in the dissent for anyone planning with a Florida LLC (multi-member included):

> *"An adequate remedy is available without the extreme step taken by the majority in rewriting the plain and unambiguous language of a statute. This is extremely important and has far-reaching impact because the principles used to ignore the LLC statutory language under the current factual circumstances apply with equal force to multimember LLC entities and, in essence, today's decision crushes a very important element for all LLCs in Florida. If the remedies available under the LLC Act do not apply here because the phrase "exclusive remedy" is not present, the same theories apply to multimember LLCs and render the assets of all LLCs vulnerable.*

If the dissent's interpretation is accurate, then at least until a statutory fix can be adopted, there is reason for some concern about a future creditor attack on even a multi-member Florida LLC.

The good news is Florida's LP statute (including its very progressive rules for LLPs) is on the cutting edge, has the "exclusive remedy" provisions and is very protective from creditors claims. (See for example **Mark Merric** and **Bill Comer's** "Forum Shopping for Favorable FLP and LLC Law: 2010 Asset Protection Planning Table," (Asset Protection Planning Newsletter # 154)

In the end, as Chris notes, a statutory reform to confirm the exclusive remedy of an LLC is likely to be passed – and perhaps as early as next year. I guess the question would then be: if there is an exclusive remedy clause in the LLC law, do we still need additional directions regarding single-member LLCs? Or would such a reform protect all LLCs including single-member entities?

The answer seems to be that a reform to the statute (making a charging lien the exclusive remedy) should protect all LLCs. While talking a bit about the alienation rights of a single-member in an LLC, the Court's opinion is so steeped in the discussion of the exclusive remedy language, that once exclusive remedy language is adopted in the statute, it would appear the outcome would be different. Nevertheless, as Chris noted, for those who are working on a proposed statutory "fix" perhaps a specific statutory direction on single member LLCs would be a welcome addition to any new law.

Mark Merric, of the **Merric Lawfirm LLC** in Denver Colorado comments that
"Florida is one of the few states that case law consistently held that the RULPA 1976 language was sole remedy. The Supreme Court reversed this.
…

As noted in the Adams and the Porcupine article, the ULPA 2001 and ULLC 2006 acts provide very poor asset protection. My concern is not so much Florida, but the affect nationwide. The long term significance of Olmstead is that it is possible that sixteen states, maybe more, and including Florida's LPA

(not the LLC act the court ruled on) most likely need to be modified.

In other words, my guess is that all sixteen states with simple sole remedy charging orders will need to be modified to follow the South Dakota or Alaska prototypes. Delaware will also need to modify a bit toward the South Dakota or Alaska prototypes, or possibly the latest Texas modification. This could evolve into a major rewrite of what everyone thinks sole remedy charging order means.

Much thanks to **Chris Riser, Jay Adkisson**, **Lauren Detzell, David Pratt, Mark Merric,** and **Jeff Baskies** for bringing this case to our attention and for their helpful advice.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE DIFFERENCE!*

Steve Leimberg

Technical Editor – Duncan Osborne

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[i] Shaun Olmstead vs. Federal Trade Commission, No. SC08-1009, June 24, 2010.

[ii] Section 608.433(4).

[iii] Olmstead, 528 F.3d at 1311-12.