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SINGLE-MEMBER LLCS THREATENED BY RECENT FLORIDA SUPREME COURT RULING

David A. Holmes
Forrest J. Bass
October 2010

Introduction

Holding assets inside a limited liability company (LLC) traditionally carries a number of benefits, including the potential protection of the LLC assets from the creditors of the LLC member(s). Under a recent Florida Supreme Court decision, assets held inside of a single-member LLC are no longer protected from creditors of the member unrelated to the LLC, and serious questions are raised about the asset protection benefits of multiple-member LLCs.

Charging Orders and Asset Protection

The charging order is a remedy available to a judgment creditor of a debtor holding an interest in a business entity such as an LLC. The charging order requires that distributions to the debtor from the business entity be directed to the judgment creditor. The charging order does not compel distributions; rather, it merely provides that if distributions are made, they must be paid to the creditor. Charging orders were generally considered to be the only remedy available to creditors with respect to LLC interests. Therefore, a debtor could force a stalemate with creditors by refusing to make distributions from the LLC. With the debtor-member refusing to make distributions and the creditor not able to otherwise reach the LLC assets, the assets were effectively protected—affording the debtor-member significant leverage in negotiating a favorable settlement of the claim.

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The Olmstead Surprise

In *Olmstead v. Federal Trade Commission* the Florida Supreme Court recently held that the charging order is not the exclusive remedy available to a creditor of a debtor owning 100% of a single-member LLC. As a result, judgment creditors may now seize a debtor's membership interest in a single-member LLC and thereby access the LLC assets. While the *Olmstead* decision is limited to single-member LLCs, the court's reasoning has cast significant uncertainty over the asset protection benefits of multiple-member LLCs as well. The *Olmstead* case does not affect the limitation on liability that members receive for debts or other obligations of the LLC which they have not personally guarantied.

What to do

Fortunately, there are well-established planning options for LLC owners concerned about maintaining asset protection benefits, including the use of Florida limited partnerships. Under Florida's fraudulent transfers statute, the ability to take advantage of these options can be greatly limited once claims arise. Therefore, if you hold an interest in an LLC and are concerned about maintaining protection for the LLC assets, you should consult with qualified legal counsel right away.

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