

**THE “*OLMSTEAD* FIX”:
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**New Florida Legislation Clarifies Charging Order Protection
for Membership Interests in Limited Liability Companies**

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On June 24, 2010, the Florida Supreme Court held in *Olmstead v. Federal Trade Commission*¹ that a charging order was not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single-member limited liability company. Although the Court limited its holding specifically to single-member Florida LLCs, significant concern arose, including among the dissenting members of the Court, that the majority’s reasoning could also extend to prevent the charging order from being the exclusive remedy available to a judgment creditor of a member in a multi-member Florida LLC. The *Olmstead* decision was significant for many reasons, but primarily because it was the first Florida Supreme Court opinion defining the scope of the charging order protection (or lack thereof) for LLCs organized under Florida law. Further, many practitioners may have anticipated the holding in *Olmstead*, but the reasoning applied by the Court to get there was surprising.

Within weeks of *Olmstead*, members of the Florida Bar Tax Section and RPPTL Sections formed a joint task force to create a legislative solution and correction to the breadth of the Court’s holding. Despite significant headwinds from other interested parties in Florida, the task force (later joined by The Florida Bar Business Law Section) reached a compromise in House Bill 253 (“HB 253”), which was subsequently enacted into law on May 31, 2011. The purpose of this outline is to explain how HB 253 has changed the charging order protection for single-member and multi-member LLCs in Florida, describe the bifurcated approach taken in HB 253, list certain issues intentionally omitted from the final legislation and help practitioners determine if it is now “safe” to utilize LLCs in Florida.

I. The law before *Olmstead*.

A. Florida Statutes § 608.433 (initially enacted in 1993) provided, in part, as follows:

(1) Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

* * *

¹ 44 So. 3d 76 (Fla. 2010).

(4) On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member 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 such interest. This chapter does not deprive any member of the benefit of exemption laws applicable to the member's interest.

B. There were no reported court decisions addressing the scope of the charging order protection for a membership interest in a Florida single-member or multi-member LLC. However, at least a few cases analyzed the charging order protection afforded to interests in Florida partnerships.

1. In *Givens v. National Loan Investors L.P.*, 724 So.2d 610 (Fla. 5th DCA 1999), the court concluded that the plain language of the charging order statute under the Florida Revised Uniform Limited Partnership Act in effect at that time, which was essentially identical to Florida Statutes § 608.433(4), provided that the charging order was the sole remedy available to a judgment creditor of a limited partner. The court interpreted the statutory language providing “the judgment creditor has *only* the rights of an assignee of the partnership interest” to clearly prohibit judicial foreclosure of the partnership interest.

2. See also *Myrick v. Second National Bank*, 335 So.2d 343 (Fla. 2d DCA 1976) (concluding that a charging order was the sole remedy available to a judgment creditor under Florida's version of the Uniform Partnership Act because, in part, the purpose of the charging order statute under the UPA was to protect non-debtor partners by preventing “disruption of the partnership business and consequent injustice to other partners.”) and *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So.2d 1002 (Fla. 4th DCA 1986). These decisions are consistent with the historic justification of the charging order concept, first espoused in the Uniform Partnership Act in 1916, which adopted the concept from the English Partnership Act of 1890, that the presence of the charging lien mechanism is not so much to protect the debtor-partner, but rather to insulate the operations of the partnership and the other partners from the economic and business effects of a foreclosure upon the debtor-partner's interest. Of course, under Florida's Uniform Partnership Act, the Court may order a foreclosure of the judgment creditor's charging lien which has the effect of an assignment. F.S. 620.8504(2).

C. Some bankruptcy court decisions from jurisdictions outside Florida recently held that the charging order was not the sole remedy available to a judgment creditor of a member's interest in a *single-member LLC*.

1. In *Albright*, 291 B.R. 538 (Bankr. D. Colorado, 2003), the debtor was the sole member and manager of a Colorado LLC. The court held that the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate and, thus, the trustee obtained all of the debtor's rights in the LLC, including the right to control management. The court stated:

[T]he charging order . . . exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or 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, however, "there are no non-debtors to protect. The charging order limitation serves no purposes in a single member limited liability company, because there are no other parties' interests affected."

2. See also *Modanlo*, 412 B.R. 715 (Bankr. D. Maryland, 2006) and *A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho, 2006).

II. **Olmstead v. Federal Trade Commission, 44 So. 3d 76 (Fla. 2010).**

- A. The Federal Trade Commission sued Mr. Olmstead and others in federal court for unfair and deceptive trade practices. Assets of the defendants, including interests in single-member LLCs, were frozen and placed in receivership. As the U.S. 11th Circuit Court of Appeals considered the matter, it sought the opinion of the Florida Supreme Court on this peculiarity of Florida law. *Fed. Trade Comm'n v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008).
- B. The Florida Supreme Court concluded that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's membership interest in a single-member LLC to satisfy an outstanding judgment. The Court stated that it based its conclusion on (i) the uncontested right of the owner of the single-member LLC to transfer the owner's full interest in the LLC, and (ii) the absence of any basis in the Florida LLC Act for not allowing the long-standing creditor's remedy of levy and sale under execution pursuant to Florida Statutes § 56.061.
- C. The Court reasoned that (i) the limitation on assignee rights set forth in Florida Statutes § 608.433(1) has no application to the transfer of rights in a single-member LLC, (ii) an assignee of the membership interest of the sole member becomes a member and takes the full right, title, and interest of the transferor without the consent of anyone other than the transferor, and (iii) the charging order provision of the Florida LLC Act does not give a judgment creditor of the

sole owner less extensive rights than the rights that are freely assignable by the judgment debtor.

- D. The Court stated that “[t]he 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 the 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 whether it is justified to infer that the LLC charging order mechanism is an exclusive remedy.”
1. The Court found that the plain language of Florida Statutes § 608.433(4) established a nonexclusive remedy and did not “in any way” suggest that the charging order was the exclusive remedy.
 2. The Court noted that the charging order statute under each of the Florida Revised Uniform Partnership Act and the Florida Revised Uniform Limited Partnership Act had been recently revised to provide that the charging order was the “exclusive remedy” by which a judgment creditor may satisfy a judgment out of a debtor’s interest in the partnership. The Court observed that the legislature’s omission of such explicit exclusivity language from Florida Statutes § 608.433 and its failure to amend such statute to include exclusivity language prevented the Court from inferring that the charging order was the sole and exclusive remedy when such statute was not otherwise clear on its face. In fact, at that moment a Florida Bar legislative task force was re-writing Chapter 608 for the Legislature’s consideration and would have included such language within the new Florida LLC Act. Thus, this apparent divergence in statutory language was somewhat an issue of timing.
- E. The dissent strongly criticized the majority opinion, claiming that the majority was “judicially rewriting” the Florida LLC Act.
1. Although the majority specifically limited its holding to single-member LLCs, the dissent argued that there was no basis to create an exception for single-member LLCs because the plain language of Florida Statutes § 608.433 did not distinguish between single-member and multi-member LLCs. Further, the dissent asserted that the Legislature’s decision not to amend Florida Statutes § 608.433 to make a distinction between single-member and multi-member LLCs when it revised the Florida LLC Act to specifically permit single-member LLCs indicated that the legislature intended for the charging order provision to apply uniformly to all LLCs.
 2. The dissent stated that “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.” Accordingly, the dissent concluded that “[t]he majority opinion now eliminates the charging order remedy for multi-member LLCs under its theory of ‘nonexclusivity’ which is a disaster for those entities.”

3. The dissent noted that “the appropriate remedy in this circumstance is not for this Court to impose its speculative interpretation, but for the Legislature to amend the statute to reflect its specific intention, if necessary.”

III. Florida Statute § 608.433 as revised by HB 253.

- A. The revisions to Florida Statutes § 608.433 are intended to be clarifying and remedial in nature and apply retroactively.
- B. Subsections (1), (2) and (3) of Florida Statutes 608.433 were not substantively changed by HB 253.
- C. Florida Statutes § 608.433(4) has been amended to clarify that a court may enter a charging order against the LLC interest of the judgment debtor or the judgment debtor’s assignee rights for the unsatisfied amount of the judgment plus interest. Subsection (b) provides that a charging order constitutes a lien on the judgment debtor’s LLC interest or assignee rights and that, under a charging order, the judgment creditor has only the rights of an assignee to receive any distribution(s) to which the judgment debtor would otherwise have been entitled from the LLC, to the extent of the judgment plus interest. Subsection (c) clarifies that nothing in Chapter 608 is intended to deprive any member or member’s assignee of the benefit of any exemption law otherwise applicable to the member’s LLC interest or the assignee’s rights to distributions.
- D. Florida Statutes § 608.433(5) has been added to explicitly provide that “[e]xcept as otherwise provided in subsections (6) and (7), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member’s assignee may satisfy a judgment from the judgment debtor’s LLC interest or rights to distributions from the LLC.”
 1. As described below, the exceptions described in subsections (6) and (7) apply solely to single-member LLCs. Accordingly, subsection (5) clearly establishes that a charging order is the sole and exclusive remedy for a judgment creditor to reach a member or assignee’s interest in a multi-member LLC. Additionally, subsection (5) clearly establishes that a charging order is the sole and exclusive remedy for a judgment creditor to reach a member or assignee’s interest in a single-member LLC which does not fall within subsection (6) or (7).
- E. Florida Statutes § 608.433(6) has been added to create an exception to the general rule for interests in single-member LLCs that are not either (i) currently making

distributions which can be applied towards satisfaction of the charging order within a reasonable time, or (ii) projected to produce sufficient income which can be applied towards satisfaction of the charging order within a reasonable time. Specifically, a charging order will not be the sole and exclusive remedy by which a judgment creditor may satisfy a judgment if the judgment creditor “establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time.” Upon such showing, the court may order the sale of the judgment debtor’s interest pursuant to a foreclosure sale.

1. The judgment creditor may make this showing to the court at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.
 2. This exception prevents a debtor from utilizing a single-member LLC as a depository for non-income producing assets, such as raw land, in order to shield such assets from legitimate creditor claims.
 3. Notwithstanding subsection (6), the charging order should be the exclusive remedy for a single-member LLC operating a business or holding income-producing assets as long as distributions are anticipated.
- F. Florida Statutes § 608.433(7) has been added to describe the rules for foreclosing on a membership interest in a single-member LLC if so ordered. Specifically, if the court orders a foreclosure sale of a judgment debtor’s LLC interest or of a charging order lien pursuant to subsection (6), then (i) the purchaser obtains the judgment debtor’s entire interest (not merely an assignee interest), (ii) the purchaser becomes the sole member, and (iii) the judgment debtor ceases to be a member of the LLC.
- G. Florida Statutes § 608.433(8) has been added to expressly provide that the remedy of foreclosure of a judgment debtor’s LLC interest or against assignee rights to distributions in the LLC is not available with respect to interests in a multi-member LLC. This reaffirms the position in Fla. Stat. § 608.433(5) that the charging order is the sole and exclusive remedy with respect to multi-member LLCs.
- H. Florida Statutes § 608.433(9) is added to clarify that nothing in Florida Statute § 608.433 shall be applied to limit:
1. The remedies otherwise available to secured creditors under applicable law;
 2. the principles of law and equity which affect fraudulent transfers;
 3. the availability of equitable principles of alter ego, equitable lien, or constructive trust, or other equitable principles not inconsistent with Florida Statutes § 608.433; or

4. the continuing jurisdiction of the court to enforce a charging order in a manner consistent with Florida Statutes § 608.433.
- I. Subsection (9) is not intended to grant any additional rights to a judgment creditor that it would not already possess if subsection (9) was not enacted. Instead, subsection (9) was added as a compromise to clarify that certain remedies continue to exist for a judgment creditor under appropriate circumstances.
 1. Secured creditors retain the right to seek redress pursuant to the terms of the security instrument or other law applicable to secured creditors.
 2. Creditors may continue to seek to set aside the fraudulent transfer of assets to an LLC by a debtor pursuant to the Florida Uniform Fraudulent Transfer Act under Chapter 726.
 3. Remedies based on equitable principles, such as alter ego, are not prohibited. This is intended to prevent abuse of the enhanced charging order protection granted under Florida Statutes § 608.433. It is important to note that the remedy of foreclosure would not be permitted as an equitable remedy against interests in a multi-member LLC under the language of subsection (9)(c) because such remedy would be inconsistent with the explicit language of subsection (8).

IV. **Comments about HB 253.**

- A. Important omissions.
 1. HB 253 did not address minimum requirements, conditions or safe-harbors for creating a multi-member LLC for purposes of Florida Statutes § 608.433 despite vigorous attempts by opponents of this remedial legislation to insert provisions that would have disregarded “nominal” interests of multi-member LLCs.
 - a. Any attempt to codify constructive ownership concepts would likely result in arbitrary and inconsistent results.
 - b. The reclassification of a multi-member LLC to a single-member LLC would permit a judgment creditor to seek, pursuant to Florida Statutes § 608.433(6), remedies other than a charging order (such as foreclosure) upon a showing that distributions under a charging order will not satisfy the judgment within a reasonable time. Judgment creditors are not prohibited under Florida Statutes § 608.433 from seeking reclassification of a multi-member LLC by raising equitable arguments to disregard member interests; however, courts retain the discretion to make such determination on a case-by-case basis.

B. Policy justifications.

1. This statute was an attempt to balance competing public policy concerns. On one hand, it is important to protect the “innocent partner” in a multi-member LLC and provide certainty that the interest of an owner of an LLC is as protected and on par with a partner in a Florida limited partnership. On the other hand, it is not intended to provide protection for an owner using an LLC solely to shield assets from legitimate creditors. If protection from outside creditors (not inside liabilities of the LLC) is the motivation for the creation of a single-member LLC, creation of the entity using the LLC laws of a state other than Florida may be appropriate.

“Olmstead” LLC Fix

CHAPTER 2011-77

Committee Substitute for House Bill No. 253

An act relating to limited liability companies; amending s. 608.433, F.S.; providing that a charging order against a member's limited liability company interest is the sole and exclusive remedy available to enforce a judgment creditor's unsatisfied judgment against a member or member's assignee; providing an exception for enforcing a judgment creditor's unsatisfied judgment against a judgment debtor or assignee of the judgment debtor of a single-member limited liability company under certain circumstances; providing that, in the case of a multimember limited liability company, certain remedies are unavailable to a judgment creditor attempting to satisfy a judgment; prohibiting a court from ordering such remedies; providing construction relating to secured creditor rights, specified principles of law and equity, and continuing enforcement jurisdiction of the court; providing legislative intent; providing for retroactive application; providing an effective date.

WHEREAS, on June 24, 2010, the Florida Supreme Court held in *Olmstead v. Federal Trade Commission* (No. SC08-1009), reported at 44 So.3d 76, 2010-1 Trade Cases P 77,079, 35 Fla. L. Weekly S357, that a charging order is not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single-member limited liability company (LLC), and

WHEREAS, a charging order represents a lien entitling a judgment creditor to receive distributions from the LLC or the partnership that otherwise would be payable to the member or partner who is the judgment debtor, and

WHEREAS, the dissenting members of the Court in *Olmstead* expressed a concern that the majority's holding is not limited to a single-member LLC and a desire that the Legislature clarify the law in this area, and

WHEREAS, the Legislature finds that the uncertainty of the breadth of the Court's holding in *Olmstead* may persuade businesses and investors located in Florida to organize LLCs under the law in other jurisdictions where a charging order is the exclusive remedy available to a judgment creditor of a member of a multimember LLC, and

WHEREAS, the Legislature further finds it necessary to amend s. 608.433, Florida Statutes, to remediate the potential effect of the holding in *Olmstead* and to clarify that the current law does not extend to a member of a multimember LLC organized under Florida law and to provide procedures for application of the holding in *Olmstead* to a member of a single-member LLC organized under Florida law, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Section 1. Section 608.433, Florida Statutes, is amended to read:

608.433 Right of assignee to become member.—

(1) Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

(2) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of the assigning member under the articles of organization, the operating agreement, and this chapter. An assignee who becomes a member also is liable for the obligations of the assignee's assignor to make and return contributions as provided in s. 608.4211 and wrongful distributions as provided in s. 608.428. However, the assignee is not obligated for liabilities which are unknown to the assignee at the time the assignee became a member and which could not be ascertained from the articles of organization or the operating agreement.

(3) If an assignee of a limited liability company interest becomes a member, the assignor is not released from liability to the limited liability company under ~~s. ss.~~ 608.4211, s. 608.4228, ~~or s. and~~ 608.426.

(4)(a) On application to a court of competent jurisdiction by any judgment creditor of a member or a member's assignee, the court may enter a charging order against the limited liability company interest of the judgment debtor or assignee rights for charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment plus with interest.

(b) A charging order constitutes a lien on the judgment debtor's limited liability company interest or assignee rights. Under a charging order To the extent so charged, the judgment creditor has only the rights of an assignee of a limited liability company interest to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled from the limited liability company, to the extent of the judgment, including such interest.

(c) This chapter does not deprive any member or member's assignee of the benefit of any exemption law laws applicable to the member's limited liability company interest or the assignee's rights to distributions from the limited liability company.

(5) Except as provided in subsections (6) and (7), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's assignee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.

(6) In the case of a limited liability company having only one member, if a judgment creditor of a member or member's assignee establishes to the

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satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the assignee of the sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

(7) In the case of a limited liability company having only one member, if the court orders foreclosure sale of a judgment debtor's interest in the limited liability company or of a charging order lien against the sole member of the limited liability company pursuant to subsection (6):

(a) The purchaser at the court-ordered foreclosure sale obtains the member's entire limited liability company interest, not merely the rights of an assignee;

(b) The purchaser at the sale becomes the member of the limited liability company; and

(c) The person whose limited liability company interest is sold pursuant to the foreclosure sale or is the subject of the foreclosed charging order ceases to be a member of the limited liability company.

(8) In the case of a limited liability company having more than one member, the remedy of foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.

(9) Nothing in this section shall limit:

(a) The rights of a creditor that has been granted a consensual security interest in a limited liability company interest to pursue the remedies available to such secured creditor under other law applicable to secured creditors;

(b) The principles of law and equity which affect fraudulent transfers;

(c) The availability of the equitable principles of alter ego, equitable lien, or constructive trust, or other equitable principles not inconsistent with this section; or

(d) The continuing jurisdiction of the court to enforce its charging order in a manner consistent with this section.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Section 2. The amendment to s. 608.433, Florida Statutes, made by this act is intended by the Legislature to be clarifying and remedial in nature and shall apply retroactively.

Section 3. This act shall take effect upon becoming a law.

Approved by the Governor May 31, 2011.

Filed in Office Secretary of State May 31, 2011.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Enactment of Revisions to Section 608.433, Florida Statutes

I. SUMMARY

The proposal, if adopted, will restore certainty to an important aspect of the law of limited liability companies, ensuring that Florida LLCs will again be a viable business choice. Uncertainty exists because of the reasoning of the Supreme Court of Florida's decision in *Olmstead v. Federal Trade Comm.*, Case No. SC08-1009 (June 24, 2010), holding that the remedy of a judgment creditor of an owner of an interest in a single-member LLC is not limited to a charging order and that, instead, a court may enter an order directing the judgment debtor to surrender all right, title and interest in the debtor's membership interest to satisfy an outstanding judgment. The proposal to amend the Florida Limited Liability Company Act, F. S. §§608.401 – 608.705, confirms that a charging order lien is the exclusive remedy available to a judgment creditor seeking to attach the membership interest of a member in a multiple-member LLC.

II. CURRENT SITUATION

A. Background: Creditors' Rights in LLC Membership Interests in General.

(1) Increasingly Widespread Use of LLCs.

LLCs first became available in Florida in 1982, but were rarely used primarily because LLCs were subject to Florida corporate income tax. By contrast, partnerships and S corporations were not subject to Florida corporate income tax.

In 1999 LLCs were exempted from the Florida corporate income tax. This change in the law caused LLCs to become popular and, according to statistics published by the Secretary of State on Sunbiz.org, by 2007 there were more LLCs created than any other form of business organization, including corporations. Although the number of new corporations created in Florida has declined slightly since 2000 (from 119,282 in 2000 to 103,113 in 2009, a decrease of 16,169), the number of new LLCs has exploded (from 19,186 in 2000 to 128,548 in 2009, an increase of 109,362).

(2) Assignee of Membership Interest Must Receive Consent of Other Members to Become Member.

Florida Statutes Section 608.433(1) provides as follows:

Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

Accordingly, at least in the context of a multiple-member LLC, an assignee of a membership

interest would not become a member of the LLC without the consent of the other members. This concept is derived from partnership law, where it is often referred to as the “know your partner” rule.

(3) Charging Order Remedy for LLCs.

Florida Statutes Section 608.433(4) (which has essentially been unchanged since its enactment in 1993) provides as follows:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member 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 such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

Florida Statutes Section 608.433(4) provides that a court may grant a judgment creditor of an LLC member a charging order. If a judgment creditor of an LLC member does obtain a charging order, then to the extent that distributions are made from the LLC, the creditor would be entitled to distributions allocable to the membership interest in which it has obtained the charging order. However, a charging order does not grant management rights to the creditor or cause the creditor to be admitted as a member.

(4) Florida Cases Interpreting Partnership Charging Order Remedy Prior to *Olmstead*.

In *Myrick v. Second National Bank*, 335 So.2d 343 (Fla. 2d DCA 1976), a creditor attempted to levy upon the debtor's interest in a partnership. The court considered whether the charging order statute in effect at that time, which was substantially similar to current Florida Statutes Section Florida 608.433(4), merely furnished the creditor with an additional remedy or whether it limited the remedy to a charging order. The court concluded that the judgment debtor's rights in the partnership were not subject to levy but could only be reached by the judgment creditor through a charging order.

The courts in *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So.2d 1002 (Fla 4th DCA 1986) and *Givens v. National Loan Investors L.P.*, 724 So.2d 610 (Fla 5th DCA 1999) reached similar results, concluding that the charging order remedy was the sole remedy available to a judgment creditor.

(5) Statutory Charging Order Provision for Limited Partnerships Revised in 2005: Florida Makes a Charging Order the Exclusive Remedy.

In 2005, Florida Statutes Section 620.1703, which provides for a charging order remedy in connection with partnership interests of a limited partnership, was revised to indicate that the charging order remedy "was the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest." The statutory change codified the results of the decisions discussed in the preceding subsection (4).

(6) Other States Make the Charging Order the Exclusive Remedy Available to Judgment Creditors of LLC Members.

A number of states prohibit foreclosure of LLC interests, including Alabama, Alaska, Arizona (but see *Ehmann*, discussed below), Delaware, Minnesota, Mississippi, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Virginia and Wyoming.

(7) Bankruptcy Cases Addressing Charging Orders are Instructive

Florida is a so-called “opt out” state, meaning that a Florida debtor in bankruptcy can only use state law exemptions. For bankruptcies in other states, depending on applicable state and federal law, a debtor might be able to choose between state and federal exemptions, or might be required to use the federal exemptions. Regardless of what law the Bankruptcy Courts apply in a particular case, the analysis of the exclusivity of the charging order remedy by those Courts is instructive to state legislatures and courts addressing the question.

In *Albright*, 291 B.R. 538 (Bankr. D. Colorado, 2003), the debtor was the sole member and manager of a Colorado LLC. The bankruptcy trustee argued that because the debtor was the sole member and manager of the LLC at the time she filed bankruptcy, the trustee controlled the LLC and could cause the LLC to sell the assets owned by the LLC and distribute the sale proceeds to the bankruptcy estate. The debtor argued that the bankruptcy trustee was only entitled to a charging order and could not assume management of the LLC or cause the LLC to sell the assets of the LLC. The court concluded that, where the debtor, on the date her Chapter 7 petition was filed, was the only member of the LLC, the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the trustee obtained all of her rights, including the right to control management of the LLC.

On the other hand, the court in *Albright* stated that if the debtor's interest were in a multiple-member LLC, and if other members had not consented to substitute member status for the Chapter 7 trustee, the bankruptcy estate would have been entitled only to receive a share of the profits or other compensation from the LLC, and would not have had the right to participate in the management of the LLC.

In *Ehmann*, 319 B.R. 200 (Bankr. D. Arizona, 2005), the debtor owned an interest in an Arizona multiple-member LLC that held two investments, one of which was converted to cash shortly after the bankruptcy case was filed. Distributions were made from the LLC to other members but not to the bankruptcy trustee. The court concluded that the operating agreement was not an “executory contract” because the members had no material obligations. The court held that where the operating agreement of the LLC was not an “executory contract,” the bankrupt member's interest in the LLC became property of the bankruptcy estate, notwithstanding any language in the operating agreement otherwise restricting or conditioning the transfer of the bankrupt member's interest. Accordingly, the bankruptcy trustee had all the rights and powers with respect to the LLC that the debtor held as of the commencement of the bankruptcy.

In *Modano*, 412 B.R. 715 (Bankr. D. Maryland, 2006), the bankruptcy trustee moved for leave to cause the debtor's single-member LLC to call a meeting of the shareholders of a corporation in which it was the largest shareholder and held control. The court held that the trustee was authorized to exercise management and governance rights in the LLC.

In *A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho, 2006), the court held that the bankruptcy trustee exercised the sole and exclusive management of the debtor's single-member LLC.

B. The Olmstead Case.

(1) Facts.

The Federal Trade Commission sued Mr. Olmstead and others for unfair and deceptive trade practices. Assets of the defendants were frozen and placed in receivership. Among the assets were several single-member LLCs.

The United States Court of Appeals for the Eleventh Circuit certified the following question to the Florida Supreme Court: "Whether, pursuant to Fla. Stat. Section 608.433(4), a court may order a judgment-debtor to surrender all 'right, title, and interest' in the debtor's single-member limited liability company to satisfy an outstanding judgment." *Fed. Trade Comm'n v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008).

(2) Majority Opinion.

The Florida Supreme Court, in an opinion written by Justice Canady, concluded that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's membership interest in a single-member LLC to satisfy an outstanding judgment. The Court stated that it based its conclusion on (i) the uncontested right of the owner of the single-member LLC to transfer the owner's full interest in the LLC; and (ii) the absence of any basis in the Florida LLC Act for not allowing the long-standing creditor's remedy of levy and sale under execution.

The Court reasoned that (i) the limitation on assignee rights set forth in Florida Statutes Section 608.433(1) has no application to the transfer of rights in a single-member LLC; (ii) an assignee of the membership interest of the sole member in a single-member LLC becomes a member and takes the full right, title, and interest of the transferor without the consent of anyone other than the transferor; and (iii) the charging order provision of the Florida LLC Act does not give a judgment creditor of the sole owner of an LLC less extensive rights than the rights that are freely assignable by the judgment debtor.

The Court noted that the statutory charging order provision applicable to limited partnerships is explicitly stated to be a creditor's "exclusive remedy," and that such a provision is absent from the Florida Limited Liability Company Act. Thus, the Court reasoned that the Florida legislature must have intended to not make the charging order remedy the exclusive remedy for LLCs when it failed to amend the Florida Limited Liability Company Act when changes to the Florida Revised Uniform Limited Partnership Act of 2005 were made.

(3) Dissenting Opinion.

The dissenting opinion in *Olmstead* was written by Justice Lewis, who was joined by Justice Polston.

Justice Lewis concluded Florida law does not permit a court to order a judicial foreclosure of an LLC membership interest without first proceeding through the statutory requirements created by the Florida Limited Liability Company Act. Justice Lewis pointed out that, based on *Givens* and *Myrick*, Florida courts have determined in the partnership context that a charging order is the exclusive remedy for judgment creditors based on the "straightforward language of the statute."

Justice Lewis also observed that the Court's rationale applies equally to multiple-member LLCs.

He argued that “the actual language of the statute does not distinguish between the number of members in the LLC” and that the holding of the Court” is premised on a limited application of a charging order without express language in the statutory scheme to support this assertion.”

Justice Lewis concluded that the restraint on transferability provided for in Florida Statutes Section 608.433(1) has applicability to single-member LLCs, and that a member of a single-member LLC continues to be a member unless all of the member's economic interest is transferred to the judgment creditor by the charging order. He continued by noting that alternative remedies are available to judgment creditors of an LLC member, including (i) dissolution of the LLC if the charging order requires the surrender of all of the member's economic interest; (ii) an order of insolvency against the judgment debtor, in which case that member's interest would become part of judgment debtor's bankruptcy estate; or (iii) “reverse piercing” of the LLC veil by a court to allow a judgment creditor to reach the assets of the LLC.

C. The Practical Consequences of *Olmstead*: Prompt Action is Required.

The rationale for the result reached by the Florida Supreme Court in *Olmstead* – that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment against the member – could apply with equal force to membership interests in multiple-member LLCs. Although *Olmstead* dealt only with a single-member LLC, the Court's reasoning will create substantial uncertainty as to the remedies available to a judgment creditor of a member of a multi-member LLC.

The continued general use of LLCs organized in Florida will decline if the uncertainty created by *Olmstead* is allowed to continue. Businesses will have an incentive to create an LLC in another jurisdiction where certainty exists, such as Delaware, or to re-locate existing Florida LLCs to those jurisdictions.

The Florida Limited Liability Company Act should be amended as soon as possible to provide that, consistent with the law applicable to limited partnerships, as to multiple-member LLCs, a charging order is the exclusive remedy which a judgment creditor of a member may use to satisfy a judgment out of the judgment debtor's membership interest in the multiple-member LLC.

III. EFFECT OF PROPOSED CHANGES

Through a modification of Section 608.433, Florida Statutes, the proposed legislative changes will make clear that the sole remedy of a creditor seeking to enforce a judgment against the interest owned by a member of a multiple-member LLC is a charging order against the member's transferable interest in the LLC. Foreclosure on the judgment debtor's interest and all other remedies a creditor could have are not available and may not be ordered by a court.

The proposed statute is intended to clarify existing law. The Court's decision in *Olmstead* applies only to single-member LLCs. The proposed legislative changes do not attempt to supersede *Olmstead* and will not apply to single-member LLCs. Instead, these changes are only to make clear that the law in Florida is now and continues to be that a charging order is the exclusive remedy of a judgment creditor as against a member's transferable interest in a multiple-member LLC.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal, if adopted, should increase revenue because existing LLCs will continue to pay fees to the State in order to remain in good standing in Florida, and additional LLCs will pay the fees required by the State for the LLC to be validly formed here.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposed statute will benefit the private sector by providing certainty and predictability to those establishing and maintaining multiple-member LLCs under Florida law. Without the proposed statutory revision, LLCs will no longer be a viable option for doing business in Florida and business formation and operation will be removed to other states that provide the protection that the revision is designed to achieve.

VI. CONSTITUTIONAL ISSUES

No constitutional issues are anticipated.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax and Business Law Sections of The Florida Bar, and the Florida Bankers Association. The Tax Section is a co-sponsor of this proposal.