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GENERAL NEWS

Decision from Florida Supreme Court Creates Questions Regarding the Asset Protection Benefits of Florida LLCs

Olmstead v. FTC: June 24 Decision from Florida Supreme Court Creates Questions Regarding the Asset Protection Benefits of Florida LLCs

In *Shaun Olmstead, et. al., v. The Federal Trade Commission* [Supreme Court of Florida. Case No. SC08-1009. (June 24, 2010)], the Florida Supreme Court ruled that a creditor of an owner of a single-member Limited Liability Company (“LLC”) may take possession and control of the single-member LLC to satisfy the claim. For many, this aspect of the ruling is not surprising, even though it is the first decision in Florida indicating that single-member LLCs offer little creditor protection.

What’s perhaps more disturbing about *Olmstead* is the Supreme Court’s decision also threw open the question as to whether owners of interests in multi-member LLCs will have the charging order protection of the statute.

In summary, the FTC won a judgment against Olmstead for unfair and deceptive trade practices, and the FTC obtained an order compelling him to endorse and surrender to a receiver all right title and interest in single member LLCs that Olmstead owned.

Olmstead argued that the FTC should only have a “charging lien” (a right to receive distributions only when and if such are made from the LLC in Olmstead’s discretion) on his LLC interest. To support his argument, Olmstead pointed to the Florida statutes Chapter 608 regarding LLC interests which generally provide that a creditor of a member in an LLC only receives a charging lien. The statute does distinguish single-member LLCs vs. multi-member LLCs.

However, as became central to the decision, the FTC pointed to the fact that the LLC statute does not say a charging lien is the “exclusive remedy.” Relying on the lack of an “exclusive remedy” clause in the statute, the court held the FTC can take possession of the single-member LLC interest since the single member had total control and the ability to transfer the interest.

While the FL Supreme Court went to lengths to note this decision was focused on this one case and this single-member LLC, the central argument in the decision was not specifically about single-member LLCs vs. multi-member LLCs; instead, the Florida Supreme Court’s opinion relied heavily on the fact that the Florida General Partnership (“GP”) statute and the Florida Limited Partnership (“LP”) statute provide that a charging lien is the sole remedy, while 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 statute 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 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].

However, the Florida Supreme Court’s conclusion regarding the legislative intent may have given credit where credit was not due. The organized bar with the help of creditor protection savvy lawyers promoted the adoption of the updated partnership and limited partnership statutes with the 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 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 dissenting opinion in the case, it is possible that the opinion in *Olmstead* opens the door to allow creditors to attack all LLC interests (including multi-member LLCs) citing to the same lack of an “exclusive remedy” clause in the LLC statute. As evidence that this concern is not totally far-fetched the following discussion was in the dissenting opinion filed in the case:

“[T]he 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 concern about a future creditor attack on even a multi-member Florida LLC.

There is still some good news, however. First, there is time for clients to plan. There may be situations where clients will prefer to convert LLCs to Florida Limited Liability Limited Partnerships ("LLLPs"), as the Florida LP statute (including its very progressive rules for LLLPs) is on the cutting edge, has the "exclusive remedy" provisions and is very protective from creditors' claims. Those considering asset protection planning in Florida might prefer the LLLP structure for that reason. Second, for those who cannot plan with LLLPs (clients with LLCs taxed as S-Corporations, for example), there may be ways to divide up the management and control functions in an operating agreement so as to better protect the integrity of the multi-member LLC even in case of a creditor attack on a member.

In the end, we hope there will be a statutory reform to confirm the exclusive remedy of a creditor of a member of a Florida LLC is the charging lien. We believe such a statute may well be passed as early as next year. However, for those with LLCs or those planning to create them, the *Olmstead* decision is a reminder that particularly if you have concerns about creditor protection, it may be appropriate to discuss the potential impact of this new case.