

Akerman Practice Update

CORPORATE

June 6, 2011

Florida Legislature Adopts the Olmstead “Patch” Clarifying the Rights of Judgment Creditors of Members of Florida Limited Liability Companies

Philip B. Schwartz
philip.schwartz@akerman.com

Andrew E. Schwartz
andrew.schwartz@akerman.com

The Florida Legislature recently passed legislation designed to resolve the uncertainties created with respect to Florida limited liability companies (“LLCs”) by the Florida Supreme Court’s holding in Olmstead v. Federal Trade Commission, 44 So. 3d 76 (Florida 2010). The legislation, which became effective on May 31, 2011, modifies Section 608.433, Florida Statutes (dealing with the rights of an assignee to become a member of a limited liability company) and is commonly called the “Olmstead Patch.” The Olmstead Patch clarifies that the holding in the Olmstead case does not apply to multi-member limited liability companies (“MMLLCs”), and that the sole and exclusive remedy for a judgment creditor of a member of a MMLLC is a charging order on the member’s transferable interest. The Olmstead Patch also provides clarity as to the “rules of the road” for judgment creditors who, in appropriate circumstances, will now have the right to foreclose on the



Akerman Senterfitt • Akerman Senterfitt LLP • Attorneys at Law

BOCA RATON DALLAS DENVER FORT LAUDERDALE JACKSONVILLE LAS VEGAS LOS ANGELES MADISON MIAMI NAPLES NEW YORK ORLANDO
PALM BEACH TALLAHASSEE TAMPA TYSONS CORNER WASHINGTON, D.C. WEST PALM BEACH

akerman.com

“The Legislature, in adopting the Olmstead Patch, concluded that the uncertainty created by the Olmstead decision might persuade businesses and investors located in Florida to organize their LLCs under the laws of other jurisdictions pursuant to which a charging order is the exclusive remedy available to a judgment creditor of the member..”

akerman.com

membership interest of a judgment debtor’s single member LLC (“SMLLC”). A copy of the Olmstead Patch legislation can be found [here](#).

Why was passage of the Olmstead Patch important

LLCs are useful because of the flexibility that is afforded by their use, with pass through taxation, limited liability for the members of an LLC for the debts of the LLC, and the flexibility to contract among members regarding the manner in which the LLC will be operated. According to information posted on the website of the Florida Department of State, as of January 2011, there were almost 550,000 LLCs organized in Florida (compared to approximately 743,000 Florida corporations), and during 2010 alone, more than 138,000 LLCs were organized in Florida (compared to approximately 104,000 Florida corporations). Further, while the exact number of Florida LLCs that are SMLLCs cannot be determined with accuracy, anecdotally it appears that approximately 60% of Florida LLCs are SMLLCs. All of this evidences that the LLC structure has become an important option for businesses organizing in Florida.

The Legislature, in adopting the Olmstead Patch, concluded that the uncertainty created by the Olmstead decision might persuade businesses and investors located in Florida to organize their LLCs under the laws of other jurisdictions pursuant to which a charging order is the exclusive remedy available to a judgment creditor of the member. The Olmstead Patch expressly solves this issue for members of Florida MMLLCs. Further, while the substantive holding in the Olmstead case continues to apply with respect to Florida SMLLCs, the new legislation provides for an orderly process and protection for all parties by providing a clear path whereby a judgment creditor of the member of a SMLLC can foreclose on the membership interest held by that member under appropriate circumstances and following appropriate court review.

The Olmstead Patch – How it Works

The Olmstead Patch amends Section 608.433, Florida Statutes, to provide:

- With respect to Florida MMLLCs, the amendment provides that: (i) 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 a judgment debtor’s interest in an LLC or rights to distributions from a members interest in the LLC,” and (ii) that the remedy of foreclosure on a judgment debtor’s interest in the LLC is not available.

“The Olmstead Patch clarifies that the holding in the Olmstead case does not apply to multi-member limited liability companies, and that the sole and exclusive remedy for a judgment creditor of a member of a MMLLC is a charging order on the member’s transferable interest. ”

- With respect to a Florida SMLLC, while a charging order is expressed to be the sole and exclusive remedy of the judgment creditor, where the judgment creditor can show a court that, under a charging order, distributions will not satisfy the judgment in a reasonable period of time, the court may order a foreclosure sale of the LLC interest pursuant to which the purchaser in such a sale becomes the member of the LLC and the debtor member’s ownership interest ceases.
- The legislation expressly states that it does not apply to consensual grants of security interests in an LLC member’s interest, to principles of law or equity that affect fraudulent transfers or to the availability of equitable principles of alter ego, equitable lien, constructive trust or other equitable principles not inconsistent with this statute. The legislation also states that courts have the continuing jurisdiction to enforce their charging orders in a manner consistent with amended Section 608.433, Florida Statutes.
- The amendment expressly states that it is intended by the Legislature to be clarifying and remedial in nature and to have retroactive effect. However, whether and how that intent will be fulfilled will be determined in the future by courts that address that issue.

Planning Following the Adoption of the Olmstead Patch

For members of Florida MMLLCs, the Olmstead Patch should ease concerns that a judgment creditor of a member of a Florida MMLLC can obtain foreclosure or another remedy with respect to a member’s interest in the LLC. However, the Olmstead Patch does not remedy concerns that some commentators have expressed that for a MMLLC to be treated as a MMLLC for purposes of charging order exclusivity, it must have two or more real members. This issue will be left to the courts to sort out in the future. However, this issue is no different under Florida’s LLC statute than it is under the laws of other states.

Further, some may argue that those who wish to use a SMLLC in their business should organize their SMLLC in a state where the law expressly limits the rights of a judgment creditor of a member of a SMLLC to a charging order against the member’s transferable interest and does not allow foreclosure of the membership interest in the LLC. However we believe that the clarity provided by the amended statute may well be better than the protections arguably available if the member organizes his or her SMLLC in another jurisdiction. First, there is a reasonable possibility, in light of and following the holding in the Olmstead decision, that other state legislatures will consider changing their laws in the context of SMLLCs to more closely follow what the Florida Legislature passed, or some other proposed solution that allows a judgment creditor to foreclose on a judgment debtor’s

“The Olmstead Patch also provides clarity as to the “rules of the road” for judgment creditors who, in appropriate circumstances, will now have the right to foreclose on the membership interest of a judgment debtor’s single member LLC.”

membership interest in a SMLLC. Further, the jury is still out on how Florida courts will treat foreign LLCs where the protections afforded to the members of those LLCs under the laws of their jurisdiction of organization are being used (like in the Olmstead case) to arguably thwart the interests of creditors.

Contact

For further information or for help in assessing how the Olmstead case and the recently passed Olmstead Patch may affect your business, please contact your principal lawyer at the firm or one of the authors of this client alert.

For more information, please contact a member of our Corporate practice.

This practice update was prepared by Philip B. Schwartz, a partner in Akerman Senterfitt’s Miami office, and Andrew E. Schwartz, an associate in Akerman Senterfitt’s Miami office. Both Philip B. Schwartz and Andrew Schwartz are members of the LLC Drafting Committee which was organized by three sections of The Florida Bar to consider proposed revisions to Florida’s limited liability company statute and to present those revisions to the Florida legislature. The Olmstead Patch legislation discussed in this client alert was drafted by a special committee of the LLC Drafting Committee on which Philip B. Schwartz served.

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2011) in number of lawyers and is the leading Florida firm. With 500 lawyers and government affairs professionals, Akerman serves clients throughout the U.S. and overseas from Florida, New York, Washington, D.C., California, Virginia, Colorado, Nevada, and Texas.

