

**Steve Leimberg's Asset Protection Planning Newsletter- Archive Message # 154**

**Date:** 25-May-10  
**From:** Steve Leimberg's Asset Protection Planning Newsletter  
**Subject:** [Forum Shopping For Favorable FLP and LLC Law: 2010 LLC Asset Protection Planning Table - Part VI](#)

In August 2007, **LISI** published the first table regarding sole remedy and judicial foreclosure by **Mark Merric** and **Bill Comer**. See [LISI Asset Protection Planning Newsletter #112](#). This turned into a series on “Forum Shopping For Favorable FLP and LLC Legislation,” see [LISI Asset Protection Planning Newsletters #114, #117, #127](#).

Over the past three years, states have continued to change their laws regarding charging orders, and **Marc Merric, Bill Comer** and **Mark Monasky** have joined together to provide members with their latest table updating the status of each state.

**Merric Law Firm** is a boutique practice emphasizing activity in the areas of estate planning, international tax, and asset protection planning. Mark is co-author of CCH's treatise on asset protection – first edition, The Asset Protection Planning Guide (first edition), and the ABA's treatises on asset protection, Asset Protection Strategies Volume I, and Asset Protection Strategies Volume II. Mark's articles have been published in Trusts & Estates, Estate Planning Magazine, Journal of Practical Estate Planning, Lawyers Weekly – Heckerling Edition, Journal of Taxation, and the Asset Protection Journal. Mark speaks nationally on estate planning and asset protection.

**William Comer** is a financial consultant specializing in estate preservation, asset protection and privacy. He is a certified senior advisor, a long-time member of the Offshore Institute and has spoken on these issues throughout the U.S., Costa Rica and the Bahamas. He is the author of Freedom, Asset Protection & You <http://www.offshorepress.com/fapy.htm>, a complete encyclopedia of asset protection and estate preservation.

**Mark Monasky** is a board certified neurosurgeon and attorney with a legal practice limited to estate planning and asset protection. Mark graduated from Columbia University College of Physicians & Surgeons, trained at Mayo Clinic, and is a graduate of University of North Dakota School of Law. Mark is a member of Wealth Counsel, a fellow of the

American College of Surgeons and American College of Legal Medicine, and belongs to the American Association of Neurological Surgeons, Congress of Neurological Surgeons, Christian Medical & Dental Society, and American Medical and Bar Associations. Mark is a past recipient of the Best Doctors Award, America Central Region.

Now, here is their commentary:

## **EXECUTIVE SUMMARY:**

The following table depicts the following four key areas regarding charging order protection:

1. Whether a creditor may petition the court for a judicial dissolution of an LLC;
2. Whether state law allows for the judicial foreclosure sale of the member's interest;
3. Whether a state law allows or prohibits a broad charging order; and
4. Whether a state law permits or prevents equitable remedies.

## **FACTS:**

A few states that adopted the Uniform Limited Liability Company Act of 1996 ("ULLC 1996") allow a creditor with a charging order to petition for the judicial dissolution of a limited liability company if it is impractical to carry on the business of the company. While the authors have concerns regarding this asset protection weakness, the authors are unaware of any reported case where a creditor has utilized this unusual remedy.

Further, this remedy is not part of the Uniform Limited Liability Act of 2006 ("ULLC 2006"). Conversely, both the ULLC 2006 as well as the Uniform Limited Partnership Act of 2001 ("ULPA 2001") allow for the judicial foreclosure sale of a member's interest. As discussed in LSI XXXX, Adams and the Porcupine, the authors generally find the judicial foreclosure sale of a member's interest to be an effective creditor remedy.

## COMMENT:

Many states seek to prevent the judicial foreclosure sale of a member's interest by providing that a charging order is the sole and exclusive remedy. Unfortunately, there is a division regarding what sole remedy means.<sup>[i]</sup> For purposes of this article, if a statute states something similar to the following language the authors considered this a sole remedy ("SR") that prevents the judicial foreclosure sale of the member's interest:

On application to a court of competent jurisdiction by any judgment creditor of a member or assignee, the court may charge the interest of the member or assignee 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 financial rights. This section shall be the sole and exclusive remedy of a judgment creditor with respect to the judgment debtor's membership interest."

In addition to whether a membership interest may be sold at a judicial foreclosure sale, there is the further issue of whether a judge may issue a broad charging order that would restrict the activities of an LLC from engaging in the following actions without court and/or creditor approval:

- Making loans;
- Making capital acquisitions<sup>[ii]</sup>;
- Making distributions (for example, non-pro rata distributions);
- Selling any partnership interest; and
- Providing a full accounting of the partnership activities.
- This commentary takes the position that absent specific statutory language that prevents a court from issuing a broad charging order, then such action by a court is permitted.

Finally, there is the issue of equitable remedies that are directed at the partnership itself and seek to reach the underlying assets of the partnership such as a constructive trust, resulting trust, alter ego, and reverse veil pierce.<sup>[iii]</sup> A limited number of states have passed statutes that prevent all equitable and legal remedies other than the sole remedy of a charging order. For purposes of this article, unless a state specifically has statutory language that prevents equitable remedies, it is deemed to permit them.

<b>STATE</b>	<b>Creditor May Petition Court Judicial Dissolution</b>	<b>Judicial Foreclosure = JF; Simple Sole Remedy = SR; or Silent</b>	<b>Broad Charging Order Permits Prohibits</b>	<b>Equitable Remedies Permits Prohibits</b>
Alabama	No	SR[iv]	Silent	Permits
Alaska	No	SR[v]	Prohibits[vi]	Permits
Arizona	No	SR[vii]	Silent	Permits
Arkansas	No	Silent[viii]	Silent	Permits
California	No	JF[ix]	Permits[x]	Permits
Colorado	No	JF[xi]	Silent	Permits
Connecticut	No	Implied JF[xii]	Silent	Permits
Delaware	No	SR[x]	Silent	Prohibits[xiv]
District of Columbia	No	Silent[xv]	Silent	Permits
Florida	No	Silent[xvi]	Silent	Permits
Georgia	No	SR[xiv]	Prohibits[xv]	Permits
Hawaii	Yes[xviii]	JF[xix]	Permits[xx]	Permits
Idaho	No	JF[xxi]	Permits[xxii]	Permits
Illinois	Yes[xxiii]	JF[xxiv]	Silent	Permits
Indiana	No	Probably SR[xxv]	Silent	Permits
Iowa	No	JF[xxvi]	Permits[xxvii]	Permits
Kansas	No	JF[xxviii]	Silent	Permits
Kentucky	No	JF[xxix]	JF[xxx]	Permits
Louisiana	No	Silent[xxxii]	Silent	Permits
Maine	No	Silent[xxxiii]	Silent	Permits
Maryland	No	Silent[xxxiiii]	Silent	Permits
Massachusetts	No	Silent[xxxv]	Silent	Permits
Michigan	No	Silent[xxxvi]	Silent	Permits
Minnesota	No	SR[xxxvii]	Silent	Permits
Mississippi	No	Silent[xxxviii]	Silent	Permits
Missouri	No	Silent[xxxix]	Silent	Permits
Montana	Yes[xxxix]	JF[xl]	JF[xli]	Permits
Nebraska	No	Statute[xlii]	Statute[xliii]	Prohibits[xliv]
Nevada	No	SR[xlv]	Silent	Permits
New Hampshire	No	Silent[xlvi]	Silent	Permits

New Jersey	No	SR <a href="#">[xlvii]</a>	Prohibits <a href="#">[xlviii]</a>	Permits
New Mexico	No	Silent <a href="#">[xlix]</a>	Silent	Permits
New York	No	Silent <a href="#">[l]</a>	Silent	Prohibits <a href="#">[li]</a>
North Carolina	No	SR by Case Law <a href="#">[lii]</a>	Silent	Permits
North Dakota	No	SR <a href="#">[liii]</a>	Silent	Permits
Ohio	No	Silent <a href="#">[liv]</a>	Silent	Permits
Oklahoma	No	SR <a href="#">[lv]</a>	Silent	Permits
Oregon	No	Silent <a href="#">[lvi]</a>	Silent	Permits
Pennsylvania	No	No charging order language <a href="#">[lvii]</a>	Silent	Permits
Rhode Island	No	Silent <a href="#">[lviii]</a>	Silent	Permits
South Carolina	Yes <a href="#">[lix]</a>	JF <a href="#">[lx]</a>	Permits <a href="#">[lxi]</a>	Permits
South Dakota	No	SR <a href="#">[lxii]</a>	Prohibits <a href="#">[lxiii]</a>	Prohibits <a href="#">[lxiv]</a>
Tennessee	No	SR <a href="#">[lxv]</a>	Silent	Permits
Texas	No	Statute <a href="#">[lxvi]</a>	Silent	Prohibits <a href="#">[lxvii]</a>
Utah	No	JF <a href="#">[lxviii]</a>	Permits <a href="#">[lxix]</a>	Prohibits <a href="#">[lxx]</a>
Vermont	Yes <a href="#">[lxxi]</a>	JF <a href="#">[lxxii]</a>	Permits <a href="#">[lxxiii]</a>	Permits
Virginia	No	SR <a href="#">[lxxiv]</a>	Silent	Prohibits <a href="#">[lxxv]</a>
Washington	No	Silent <a href="#">[lxxvi]</a>	Silent	Permits
West Virginia	No	JF <a href="#">[lxxvii]</a>	Permits <a href="#">[lxxviii]</a>	Permits
Wisconsin	No	Silent <a href="#">[lxxix]</a>	Silent	Permits
Wyoming	No	SR <a href="#">[lxxx]</a>	Prohibits <a href="#">[lxxx]</a>	Permits

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

*Mark Merric*

*Bill Comer*

# Mark Monasky

**TECHNICAL EDITOR: Duncan Osborne**

## **CITE AS:**

Steve Leimberg's Asset Protection Planning Newsletter #154 (May 25, 2010) at <http://www.leimbergservices.com> Reproduction in Any Form or Forwarding to Any Person Prohibited - Without Express Permission.

© Copyright Mark Merric, Bill Comer, and Mark Monasky

All rights reserved.

## **CITATIONS:**

---

[i] For a detailed discussion regarding various interpretations of the term “sole and exclusive remedy” see Merric, Comer, Worthington, *Charging Order – What Does Sole and Exclusive Remedy Mean?*, Trust and Estates, April 2010. This article may be downloaded at [www.internationalcounselor.com](http://www.internationalcounselor.com).

[ii] Comments to both the ULPA (2001) and ULLC (2006) state that a court should not issue a charging order that would restrict capital acquisitions. As the comments are not the statute passed by the legislature, there is always the question of whether a court is required to follow the comments.

[iii] A reverse veil pierce is a new cause of action, and states are divided regarding whether they allow a reverse veil pierce action.

[iv] Ala. Code § 10-12-35

[v] Alaska Stat. § 10.50.380

[vi] Alaska Stat. § 10.50.380

[\[vii\]](#) Ariz. Rev. Stat. § 29-655

[\[viii\]](#) Ark. Code § 4-32-705

[\[ix\]](#) Cal. Corp. Code § 17302. *Severson v. Superior Ct.* 2006 WL 1495309 unreported.

[\[x\]](#) Cal. Corp. Code § 17302.

[\[xi\]](#) Colo. Rev. Stat. § 7-80-703.

[\[xii\]](#) Conn. Gen. Stat. § 34-171. *PB Real Estate, Inc. v. Dem II Properties*, 1997 WL 625465 – dictum regarding that an LLC statute should also be able to import the remedies of the UPA, including the judicial foreclosure sale of the LLC interest.

[\[xiii\]](#) Del. Code 6 § 18-703

[\[xiv\]](#) Del. Code 6 § 18-703

[\[xv\]](#) D.C. Code § 29-1038

[\[xvi\]](#) Fla. Stat. ch. 608.433(4)

[\[xvii\]](#) Ga. Code Ann. §14-11-504(b), similar to the limited partnership statute above states that a charging order is not a creditor’s exclusive remedy. *Hopson v. Bank of North Georgia*, 574 S.E. 2d 411 (Ga. App. 2001).

[\[xviii\]](#) Haw. Rev. Stat. § 428-503(e)(3)

[\[xix\]](#) Haw. Rev. Stat. § 428-504

[\[xx\]](#) Haw. Rev. Stat. § 428-504

[\[xxi\]](#) Idaho Code § 53-2-703, which adopted the ULLC (2006)

[\[xxii\]](#) Idaho Code § 53-2-703, which adopted the ULLC (2006)

[\[xxiii\]](#) 805 Ill. Comp. Stat. 180/35-1

[\[xxiv\]](#) 805 Ill. Comp. Stat. 180/30-20; *In re Lahood*, 2009 WL 2169879 (Bkrcty C.D. Ill. 2009). *But See, Bobak Sausage Co. v. Bobak Orland Park, Inc.*, 2008 WL 4814693 (N.D. Ill. 2008) where the court notes that there was considerable risk in acquiring an interest at judicial foreclosure sale and that there was no ready market value for such an interest. The court seems to imply that due to this lack of a market value (i.e. a very low sales value) a sheriff judicial foreclosure sale may not be the appropriate remedy.

[\[xxv\]](#) Ind. Code § 23-18-6-7; *Brant v. Krilich*, 835 N.E. 2d 582 (Ind. App. Ct. 2005) when discussing whether a debtor could use a garnishment statute and execute against the member's interest, the Indiana Appellate Court held that the charging order was the sole remedy. In other words, it denied the execution. However, the court did not discuss whether a judicial foreclosure sale would be allowed under the statute. In this respect, at first blush it appears that Indiana is sole remedy. However, further case law may develop to the contrary if a court is properly briefed on judicial foreclosure sale as applied to Indiana's statute that is silent on the issue.

[\[xxvi\]](#) Iowa Code passed the ULLC (2006) at this point the statutory section is unknown.

[\[xxvii\]](#) Iowa Code passed the ULLC (2006) at this point the statutory section is unknown.

[\[xxviii\]](#) Kan. Stat. §17-76, 113

[\[xxix\]](#) Ky. Rev. Stat. §275-260, which adopted the ULLC (2006). KY SB 210 adds subsection 6 stating that the partnership is not a necessary party to issue a charging order.

[\[xxx\]](#) Ky. Rev. Stat. §275-260, which adopted the ULLC (2006).

[\[xxxi\]](#) La. Rev. Stat. § 12:1331

[\[xxxii\]](#) 31 Me. Rev. Stat. §686

[\[xxxiii\]](#) Md. Code § 4A-607

[\[xxxiv\]](#) Mass. Gen. Laws ch. 156 § 40

[\[xxxv\]](#) Mich. Comp. Laws § 450.4507

[\[xxxvi\]](#) Minn. Stat. Ann. §322B.32

[\[xxxvii\]](#) Miss. Code § 79-29-703

[\[xxxviii\]](#) Mo. Rev. Stat. § 347.199

[\[xxxix\]](#) Mont. Code Ann. § 35-8-707(6)(c)

[\[xl\]](#) Mont. Code Ann. § 35-8-705

[\[xli\]](#) Mont. Code Ann. § 35-8-902(2)(b)

[\[xlii\]](#) Neb. Rev. Stat. § 21-2654 adopting ULLC (2006)

[\[xliii\]](#) Neb. Rev. Stat. § 21-2654 adopting ULLC (2006)

[\[xliv\]](#) Neb. Rev. Stat. § 21-2654(5)

[\[xliv\]](#) Nev. Rev. Stat. § 86.401.

[\[xlvi\]](#) N.H. Rev. Stat. § 304-C:47

[\[xlvii\]](#) N.J. Stat. § 42:2B-45

[\[xlviii\]](#) N.J. Stat. § 42:2B-45

[\[xlix\]](#) N.M. Stat. § 53-19-35

[\[l\]](#) N.Y. Ltd. Liab. Co. Law § 607.

[\[li\]](#) N.Y. Ltd. Liab. Co. Law § 607(b)

[\[lii\]](#) N.C. Gen. Stat. § 57C-5-03. *Herring v. Keasler*, 563 S.E.2d 614 (N.C. App. 2002)

[\[liii\]](#) N.D. Cent. Code § 10-32-34

[\[liv\]](#) Ohio Rev. Code § 1705.19

[\[lv\]](#) Okla. Stat. tit. 18 § 2034

[\[lvi\]](#) Or. Rev. Stat. § 63.259

[\[lvii\]](#) *Zokaïtes v. Pittsburgh Irish Pubs, LLC*, 962 A.2d 1220 (PA Super. 2008). While the Pennsylvania statute does not specifically mention the charging order remedy, the appellate court imported the concept based on an economic right and management right theory based on the comment to 15 Pa.C.S.A. § 8924. Originally, the creditor was granted a right to sell the membership interest including all of the managerial rights. The appellate court reversed this decision, holding that only economic rights could be transferred. However, it did not discuss whether the economic rights were subject to judicial foreclosure.

[\[lviii\]](#) R.I. Gen. Laws § 7-16-37.

[\[lix\]](#) S.C. Code § 33-44-503

[\[lx\]](#) S.C. Code § 33-44-504

[\[lxi\]](#) S.C. Code § 33-44-504

[\[lxii\]](#) S.D. Codified Laws §47-34A-504

[\[lxiii\]](#) S.D. Codified Laws §47-34A-504

[\[lxiv\]](#) S.D. Codified Laws §47-34A-504

[\[lxv\]](#) Tenn. Code § 48-218-105

[\[lxvi\]](#) Tex. Bus. Orgs. Code § 101.112

[\[lxvii\]](#) Texas Bus. Orgs. Code § 101.112

[\[lxviii\]](#) Utah Code § 48-2c-1103. Please note that this section also provides no charging order protection for a single member LLC.

[\[lxix\]](#) Utah Code § 48-2c-1103

[\[lxx\]](#) Utah Code § 48-2c-1103

[\[lxxi\]](#) Vt Stat. Title 11 § 3073(e)(4)

[\[lxxii\]](#) Vt Stat. Title 11 § 3074

[\[lxxiii\]](#) Vt. Stat. Title 11 § 3074

[\[lxxiv\]](#) Va. Code § 13.1-1041.1 ; *Wooten v. Lightburn*, 2009 WL 2424686 (W.D. Va. 2009) where the appellate court allowed the debtor to lien the partner's interest, but there was no discussion of a judicial foreclosure sale.

[\[lxxv\]](#) Va. Code § 13.1-1041.1 where

[\[lxxvi\]](#) Wash. Rev. Code § 25.15.255

[\[lxxvii\]](#) W. Va. Code § 31B-5-504

[\[lxxviii\]](#) W. Va. Code § 31B-5-504

[\[lxxix\]](#) Wis. Stat. § 183.0705

[\[lxxx\]](#) Wyo. Stat. § 17-29-503(g) effective July 1, 2010.

[\[lxxxii\]](#) Wyo. Stat. § 17-29-503(g) effective July 1, 2010.