

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #190

Date: 23-Jan-12

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: [Merric, Comer & Monasky: Updated LLC Asset Protection Planning Table](#)

In August 2007, [LISI](#) published the first table regarding sole remedy and judicial foreclosure by **Mark Merric** and **William 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 four years, states have continued to change their laws regarding charging orders, and **Marc Merric, William Comer** and **Mark Monasky** have joined together to provide members with their latest updated “**LLC Asset Protection Planning Table.**” [LISI](#) would like to thank **Steve Oshins** for his help on and insight into recent changes in Nevada law.

Mark Merric is special counsel working with **Holme, Roberts, and Owen** in the areas of estate planning, international tax and business transactions, and asset protection planning. Mark is also co-author of CCH's treatise on asset protection –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 has been quoted in the Wall Street Journal, Forbes, Investor’s News, Oil and Gas Investor, The Street, and several other publications. His articles have been feature in Trusts and Estates, Estate Planning Magazine, Journal of Practical Estate Planning, Lawyer’s Weekly – Heckerling Edition, Journal of Taxation as well as Leimberg LISI’s. Many of these articles have been multi-part series on discretionary dynasty trusts, Who Can Be a Trustee Without an Estate Inclusion Issue, Reciprocal Trusts, Spousal Access Trusts, and this series on Charging Order Protection.

William Comer is a long-time paralegal 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.

Before we get to their commentary, members should note that two **60 Second Planners** were recently posted to the **LISI** homepage. In his latest 60 Second Planner, **Bob Keebler** discusses how to preserve portability with a “timely filed” 706 estate tax return. Members may click this link to access Bob’s latest podcast: [Bob Keebler](#). The most recent **60 Second Planner** discusses a new IRS Exempt Organizations search tool called “Select Check” that can help you find information on tax-exempt organizations. Members may click this link to access this podcast: [SelectCheck](#). Now, here is the commentary by Marc Merric, William Comer and Mark Monasky:

EXECUTIVE SUMMARY:

The LLC charging order table has also been updated. Similar to the FLP charging order table, the most significant change from 2010 is several states adopting the ULLC (2006). This uniform act specifically provides that a court may order the judicial foreclosure sale of the member’s interest, a broad charging order, as well as apply equitable remedies to the limited liability company.

With this in mind, 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.

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 LISI #1637, Adams and the Porcupine, the authors generally find the judicial foreclosure sale of a member’s interest to be an effective creditor remedy.

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.^[1] 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^[2];
- Making distributions (for example, non-pro rata distributions);
- Selling any membership interest; and
- Providing a full accounting of the membership 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 limited liability company itself and seek to reach the underlying assets of the limited liability company such as a constructive trust, resulting trust, alter ego, and reverse veil pierce.^[3] 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.

STATE	Creditor May	Judicial Foreclosure = JF;	Broad Charging	Equitable Remedies
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	Petition Court Judicial Dissolution	Simple Sole Remedy = SR; or Silent	Order Permits Prohibits	Permits Prohibits
Alabama	No	SR ^[4]	Silent	Permits
Alaska	No	SR ^[5]	Prohibits ^[6]	Permits
Arizona	No	SR ^[7]	Silent	Permits
Arkansas	No	Silent ^[8]	Silent	Permits
California	No	JF ^[9]	Permits ^[10]	Permits
Colorado	No	JF ^[11]	Silent	Permits
Connecticut	No	Implied JF ^[12]	Silent	Permits
Delaware	No	SR ^[13]	Silent	Prohibits ^[14]
District of Columbia	No	JF ^[15]	Permits	Permits
Florida	No	SR ^[16]	Permits	Permits
Georgia	No	SR ^[17]	Prohibits ^[18]	Permits
Hawaii	Yes ^[19]	JF ^[20]	Permits ^[21]	Permits
Idaho	No	JF ^[22]	Permits ^[23]	Permits
Illinois	Yes ^[24]	JF ^[25]	Silent	Permits
Indiana	No	Probably SR ^[26]	Silent	Permits
Iowa	No	JF ^[27]	Permits ^[28]	Permits
Kansas	No	SR ^[29]	Silent	Permits
Kentucky	No	JF ^[30]	JF ^[31]	Permits
Louisiana	No	Silent ^[32]	Silent	Permits
Maine	No	JF ^[33]	Permits	Permits
Maryland	No	JF ^[34]	Silent	Permits
Massachusetts	No	Silent ^[35]	Silent	Permits
Michigan	No	Silent ^[36]	Silent	Permits
Minnesota	No	SR ^[37]	Silent	Permits
Mississippi	No	SR ^[38]	Silent	Prohibits
Missouri	No	Silent ^[39]	Silent	Permits
Montana	Yes ^[40]	JF ^[41]	JF ^[42]	Permits
Nebraska	No	JF ^[43]	Permits ^[44]	Permits
Nevada	No	SR ^[45]	Prohibits	Prohibits
New Hampshire	No	Silent ^[46]	Silent	Permits
New Jersey	No	SR ^[47]	Prohibits ^[48]	Permits
New Mexico	No	Silent ^[49]	Silent	Permits
New York	No	Silent ^[50]	Silent	Prohibits ^[51]
North Carolina	No	SR by Case Law ^[52]	Silent	Permits
North Dakota	No	SR ^[53]	Silent	Permits
Ohio	No	Silent ^[54]	Silent	Permits
Oklahoma	No	SR ^[55]	Silent	Permits
Oregon	No	Silent ^[56]	Silent	Permits

Pennsylvania	No	No charging order language ^[57]	Silent	Permits
Rhode Island	No	Silent ^[58]	Silent	Permits
South Carolina	Yes ^[59]	JF ^[60]	Permits ^[61]	Permits
South Dakota	No	SR ^[62]	Prohibits ^[63]	Prohibits ^[64]
Tennessee	No	SR ^[65]	Silent	Permits
Texas	No	Statute ^[66]	Silent	Prohibits ^[67]
Utah	No	JF ^[68]	Permits ^[69]	Permits ^[70]
Vermont	Yes ^[71]	JF ^[72]	Permits ^[73]	Permits
Virginia	No	SR ^[74]	Silent	Prohibits ^[75]
Washington	No	Silent ^[76]	Silent	Permits
West Virginia	No	JF ^[77]	Permits ^[78]	Permits
Wisconsin	No	Silent ^[79]	Silent	Permits
Wyoming	No	SR ^[80]	Prohibits ^[81]	Permits

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

Mark Merric

William Comer

Mark Monasky

DUNCAN OSBORNE - TECHNICAL EDITOR

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CITATIONS:

^[1] 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.

^[2] 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.

- [3] A reverse veil pierce is a new cause of action, and states are divided regarding whether they allow a reverse veil pierce action.
- [4] Ala. Code § 10A-5-05
- [5] Alaska Stat. § 10.50.380
- [6] Alaska Stat. § 10.50.380
- [7] Ariz. Rev. Stat. § 29-655
- [8] Ark. Code § 4-32-705
- [9] Cal. Corp. Code § 17302. *Severson v. Superior Ct.* 2006 WL 1495309 unreported.
- [10] Cal. Corp. Code § 17302.
- [11] Colo. Rev. Stat. § 7-80-703, specifically permitting other remedies.
- [12] 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.
- [13] Del. Code 6 § 18-703
- [14] Del. Code 6 § 18-703
- [15] D.C. Code § 29-805.03, adopting ULLC (2006)
- [16] Fla. Stat. ch.608.433
- [17] Ga. Code Ann. §14-11-504(b) passed 2009 reversing a statute that previously stated that a charging order is not a creditor’s exclusive remedy. Also reversing *Hopson v. Bank of North Georgia*, 574 S.E. 2d 411 (Ga. App. 2001).
- [18] Ga. Code Ann. §14-11-504(b).
- [19] Haw. Rev. Stat. § 428-503(e)(3), adopting ULLC (2006)
- [20] Haw. Rev. Stat. § 428-504, adopting ULLC (2006)
- [21] Haw. Rev. Stat. § 428-504
- [22] Idaho Code § 30-6-503, which adopted the ULLC (2006)
- [23] Idaho Code § 30-6-503, which adopted the ULLC (2006)
- [24] 805 Ill. Comp. Stat. 180/35-1
- [25] 805 Ill. Comp. Stat. 180/30-20; *In re Lahood*, 2009 WL 2169879 (Bkrtcy 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.

- ^[26] 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.
- ^[27] Iowa Code 489.503, adopting the ULLC (2006).
- ^[28] Iowa Code 489.503, adopting the ULLC (2006).
- ^[29] Kan. Stat. §17-76, 113
- ^[30] Ky. Rev. Stat. §275-260, which adopted the ULLC (2006). KY SB 210 adds sub-section 6 stating that the LLC is not a necessary party to issue a charging order.
- ^[31] Ky. Rev. Stat. §275-260, which adopted the ULLC (2006).
- ^[32] La. Rev. Stat. § 12:1331
- ^[33] 31 Me. Rev. Stat. §1573, adopting ULLC (2006)
- ^[34] Md. Code § 4A-607
- ^[35] Mass. Gen. Laws ch. 156C § 40
- ^[36] Mich. Comp. Laws § 450.4507
- ^[37] Minn. Stat. Ann. §322B.32
- ^[38] Miss. Code § 79-29-705
- ^[39] Mo. Rev. Stat. § 347.199
- ^[40] Mont. Code Ann. § 35-8-707(6)(c), adopting ULLC (2006)
- ^[41] Mont. Code Ann. § 35-8-705
- ^[42] Mont. Code Ann. § 35-8-902(2)(b)
- ^[43] Neb. Rev. Stat. § 21-2654, adopting ULLC (2006)
- ^[44] Neb. Rev. Stat. § 21-2654, adopting ULLC (2006)
- ^[45] Nev. Rev. Stat. § 86.401. Note that recent legislation in 2011 prohibits all equitable remedies in Nevada. See Steve Oshins' commentary in Asset Protection Planning Newsletter #180.
- ^[46] N.H. Rev. Stat. § 304-C:47
- ^[47] N.J. Stat. § 42:2B-45
- ^[48] N.J. Stat. § 42:2B-45
- ^[49] N.M. Stat. § 53-19-35
- ^[50] N.Y. Ltd. Liab.Co. Law § 607.
- ^[51] N.Y. Ltd. Liab. Co. Law § 607(b)

- ^[52] N.C. Gen. Stat. § 57C-5-03. *Herring v. Keasler*, 563 S.E.2d 614 (N.C. App. 2002)
- ^[53] N.D. Cent. Code § 10-32-34
- ^[54] Ohio Rev. Code § 1705.19
- ^[55] Okla. Stat. tit. 18 § 2034
- ^[56] Or. Rev. Stat. § 63.259
- ^[57] *Zokaites 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.
- ^[58] R.I. Gen. Laws § 7-16-37.
- ^[59] S.C. Code § 33-44-503
- ^[60] S.C. Code § 33-44-504
- ^[61] S.C. Code § 33-44-504
- ^[62] S.D. Codified Laws §47-34A-504
- ^[63] S.D. Codified Laws §47-34A-504
- ^[64] S.D. Codified Laws §47-34A-504
- ^[65] Tenn. Code § 48-218-105
- ^[66] Tex. Bus. Orgs. Code § 101.112
- ^[67] Texas Bus.Orgs. Code § 101.112
- ^[68] Utah Code § 48-2c-1103. Please note that this section also provides no charging order protection for a single member LLC.
- ^[69] Utah Code § 48-2c-1103, adopting ULLC (2006) after July 1, 2012.
- ^[70] Utah Code § 48-2c-1103
- ^[71] Vt Stat. Title 11 § 3073(e)(4)
- ^[72] Vt Stat. Title 11 § 3074
- ^[73] Vt. Stat. Title 11 § 3074
- ^[74] 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 member's interest, but there was no discussion of a judicial foreclosure sale.
- ^[75] Va. Code § 13.1-1041.1
- ^[76] Wash. Rev. Code § 25.15.255
- ^[77] W. Va. Code § 31B-5-504, adopting ULLC (2006).

[\[78\]](#) W. Va. Code § 31B-5-504

[\[79\]](#) Wis. Stat. § 183.0705

[\[80\]](#) Wyo. Stat. § 17-29-503(g).

[\[81\]](#) Wyo. Stat. § 17-29-503(g).