

Legislation Committee

EXHIBIT “2”

Minutes
January 7, 2011
Telephonic Meeting of the
Legislation Committee
(FAMILY LAW SECTION OF THE FLORIDA BAR)

MEMBERS IN ATTENDANCE:

Maria Gonzalez, Co-Chair
Thomas Duggar, Co-Chair
Ronald Bornstein, Co-Vice Chair
Susan Savard, Co-Secretary
Benjamin Hodas, Co-Secretary
Patricia Alexander
Hon. Barbara Beilly
Steven Berzner
Matthew Capstraw
Michael Gilden
Caryn Green
Amy Hamlin
David Hirschberg
Diane Kirigin, **SECTION CHAIR**
Hon. Norberto Katz
Robert Kohlman
Belinda B. Lazzara
David Manz
Hon. Raymond McNeal
Shannon Novey
Stephen Pennypacker
Monica Pigna
Carin Porras
David Riggs
Kim Rommel-Enright
Robin Scher
Laura Davis Smith
Robin Vines
C. Debra Wech
Adam Zborowski

Excused from meeting: Stan Jubran, Heather Apicella, Elisha Roy and Hon. Robert Jones

1. Welcome and call to Order– Thomas Duggar. Meeting called to Order at 12:10 p.m. The issue for the telephonic meeting is LLCs and ability/inability to obtain judgments against them. Lauren Detzel with RPPTL section will be presenting, as will Mr. Louis Conti and Mr. Gary Teblum of the Business Law and Tax Sections.

2. Mr. Conti advised that the Olmstead decision has created uncertainty and caused concern over how judges at the trial court level will interpret creditors rights, members and membership interests, in single member and multiple member LLC's. The Tax, RPPTL and Business law sections are concerned over impact of this decision and the confusion and unpredictability resulting from it, not only in Florida, but also in the context of single member LLC's in other jurisdictions operating in Florida.

The concern is a creditor seeking to step into shoes of member and take member's position as owner of LLC interest or creditor seeks to foreclose and obtain more than what is provided in statute; charging order to receive distributions from LLC. Mr. Conti advises that he is summarizing in interests of time and that there is much more to it.

How do we address it? Is a legislative fix the best avenue? Should we try to provide some statutory construct for judges to view claims of creditors. It is useful to put some legislative proposal on the table to give some direction to lawyers who are trying to advise clients, but also direction to judges.

There are just under 500,000 single member LLC's in Florida. The number cannot be identified absolutely. In addition, LLC's are the vehicle of choice for entity formation. There are more LLCs than partnerships and corporations in Florida. Many existing entities which will be impacted by the Olmstead decision. Not all LLC's are asset protection vehicles. No statistics on this. Very clear that as asset protection vehicle, LLC's are not all that favorable in Florida. He has been advised on interim basis that there are not a lot of LLC's formed as pure asset protection.

Legislative proposal – Tax and RPTL sections quickly came up with a proposal. The Business law section is comprised of creditors rights lawyers and litigators. They are an active group of bankruptcy lawyers and litigators. The legislative proposal was floated by the Tax and RPPTL sections as opposed to a committee in Business law section. Bs. law section to address issues significant to members in that section. The three sections met over several months in a collaborative effort to address concerns. Overall result of those meetings and goals established

- 1) Try to make it clear in the legislative proposal that multi-member LLCs are not subject to same result as in Olmstead opinion. Olmstead – bad actors and bad acts. May have been poorly argued and presented. Multiple member LLC's should not be subject to the Olmstead holding. RPPTL and business sections both acknowledge this.

- 2) Say nothing about single member LLCs and codify Olmstead in some way
- 3) address single member LLC's in limited context and only limited circumstances. If Olmstead is left in place, it would fail to address significant potential consequences. It would be unfair not to address single member LLC's. Leaving proposal silent as to single member LLC's while addressing multi member – saying that Olmstead is way should be treated.

Compromise to above positions – allow, under limited circumstances, the court to determine if creditor (unsecured) and no fraudulent conveyance or transfer not

satisfied under charging order – single member LLC context, a mechanism to reach through to force LLC distribution to the unsecured creditor or to reach LLC interest itself.

Gary Teblum added: Another option is to take position some other states have taken to completely override Olmstead – that the charging order is the only exclusive remedy. Delaware has this in place statutorily. Treat single and multi-member LLC's the same – charging order is sole and exclusive remedy. A proposal along this line was drafted and may or may not be filed. There is a group of legislators that may be supportive of Delaware position.

3. Lauren Detzel addressed the meeting as follows:

Ms. Detzel asked if there were any preliminary questions that she could answer before her presentation. No questions presented.

Ms. Detzel provided a history. Before 1998 – LLC's not used much due to corporate income tax issues. They were not the preferred mechanism – less than 10,000 total combined then. In 1998 there was a repeal of corporate tax – since then – there has been an explosion of LLC's – both multi and single member LLC's.

There has been little opportunity to redo all of the state law rules relating to LLC's as was done with limited partnerships and other entities. Multi sectional task force – Business Law, Tax Law and RPPTL Sections to do so, but not complete yet. Hopefully in next session there will be a re-write of this section. Olmstead came down before an opportunity to redo old LLC statute. The majority picked up on discrepancy between partnership and LLC law and made bad assumption that legislature must have meant something different for each type of entity. Single member LLC foreclosed upon by creditor. This left jeopardy for multi member LLC's. The statute is the same for both types (single and multi member) LLC's. Charging order not exclusive remedy – Tax and RPPTL sections very concerned over multi member LLC – drafted statute for only multi member LLC's. They looked at issue differently than the Business law section – concern that consistency on how entities are treated – look to justification behind charging order and what it is. The Olmstead reasoning might have been the correct one. Barry Nelson wrote very good article – “Olmstead, Right Result, Wrong Reason.”

A charging order is unique in the LLC setting. If you go into business and other partner has significant debts and creditor comes in and liquidates, etc., charging order is to protect innocent partner so partner's interest cannot be foreclosed upon – charging order stands in shoes of member and receives distributions until debt is satisfied, rather than assignment of LLC interest to creditor. Don't have that concern in single member LLC – owned only by one person and no innocent member concept exists in single member LLC. Bad public policy to allow individuals to create single member LLC and avoid creditors by standing behind charging lien. This is not significantly different than revocable trust. Need to protect innocent the partner. The Tax and RPPTL sections felt that they needed to come in and propose legislation to clarify that Olmstead does not apply to multi-member LLCs. In that case charging lien is exclusive remedy. This would put it on par with partnerships. Language in the proposed statute is from the partnership act. There are policy difference between

Business law section – they seek to protect single-member LLCs. Here, in dealing with fixing this problem, it is urgent to prevent exitus of LLC's from Florida. We must make it clear that multi member LLC's are treated like multi member partnerships.

Questions and Comments:

David Manz: Is crux of distinction that the business section proposal would protect single-member LLC such that creditor can't foreclose and force sale of LLC interest, and Tax and RPPTL sections would want to not allow protection for single-member LLC?

Exclusivity of charging order only with multiple member LLC – BS section is asking that it be extended to single-member LLC – except when proven that it won't satisfy creditor, then creditor can come in. May cause additional litigation and problems; not willing to go that far

Conti – That recap is a fair statement. There is no dispute on multi-member LLC's. Remaining silent as to single member LLC's is the issue. The proposal lets judges decide what they will in evaluating single-member LLC – specifically range of potential actions on claim by creditor against member. That's a mistake. Don't ignore single member LLC in charging orders. Was applicable (in our view)- just never said sole and exclusive remedy – opened door for Olmstead court to conclude that the charging order was not sole and exclusive remedy and other remedies may be available. Disservice to lawyers and others, including judges. The proposal tried to balance the ambiguity as to what the results could be, and how creditors could get to membership interests and assets of an LLC. Wanted to provide something in the statute for guidance. In context of an LLC, the charging order is first. Thereafter, seek to enforce against judgment debtor if it can be established to court that no distributions are being made and need something else; some other remedy. This is now built into proposed statute – want court to decide that there is mechanism that can take place in following through. They should be able to get distributions or LLC interests. There was much discussion about the language of the proposal. It is not perfect. There may be some ambiguity in dealing with foreclosures and executions. It does a better job than saying nothing.

Lauren Detzel– thinks mechanism to do what Conti says – suppose doctor is in practice and has committed malpractice – plaintiff spent 5 years litigating and has judgment for \$. The plaintiff is going to enforce the judgment. The doctor put all assets into single-member LLC. Under our statutory proposal there is no impediment to Plaintiff immediately going after assets in LLC to satisfy the judgment . This is just like if he put assets in a corporation. The plaintiff could get stock in the corporation and get assets. Under business law section's proposal, the plaintiff must spend more time, money, etc litigating and proving that plaintiff has not paid quick enough. Doctor puts assets in corporation – plaintiff can get it. If he holds assets in his own name – plaintiff can get it. As it is now – if assets are in LLC – can't get it?

Greater number of states do not provide that a charging order as exclusive remedy in single-member LLC.

Conti: A Number of states are silent as to this issue. Many states are reconsidering and drafting legislation so they can address Olmstead themselves.

David Manz: Asks Mr. Conti – does business law section proposal allow a foreclosure if creditor proves debtor is making fraudulent non-distributions?

Mr. Conti: Yes – The proposal makes it quite clear that law and equitable principles are not overridden. It was intended to include the fraudulent actions by debtor. This includes conveyances or other equitable arguments – dealt with concerns of creditors rights. Given this language, judges have voiced ability to make decisions and respond to provide monies out of an LLC . Judges had power to enforce and satisfy the judgment.

Lauren Detzel: If creditor is not paid within reasonable time, you don't have to wait for an indefinite term before moving forward.

Mat Capstraw: Is business section suggesting that a single owner LLC – ownership of that asset be treated differently than another asset? Would there be additional steps for single-member LLCs?

Lauren Detzel: Correct

Shannon Novey: Overriding Olmstead to some extent. We are trying to put structure around Olmstead decision – limit it's application. The proposal is meant to address decisions subsequently before courts and what rights a creditor has against all LLC members – exception for single member LLCs. See doctor discussion above.

A number of states have provided that charging orders applicable to LLC interests generally – i.e., the Delaware proposal discussed earlier. A lot of states feel that this is the right approach. Lauren feels differently – single member LLC should be treated differently - No state has currently seen fit to statutorily treat single-member LLC differently than multiple-member LLC within their statute. Some say "sole and exclusive" but none treat differently.

Thomas Duggar: Legislative proposals?

Attached to white papers.

Lauren Detzel: Proposes the family law section take no position and allow them to deal with legislature separately. If family law section wanted to take position in favor of one proposal or another – OK, but no position is better.

Conti: Would welcome endorsement from the section, but failing that – no opposition is perfectly fine. Conti will e-mail proposed statute to Thomas Duggar or Maria Gonzalez for distribution to all on the committee.

Thomas Duggar gives thanks to both speakers.

Lauren Detzel: Thanked us for our time in trying to sort through all of this and emphasize both sections believe that the legislature needs to move forward to protect multi-member LLC's. Want to present legislature with something – 3 sections have policy differences, but all believe it is essential that multi-member LLCs get protection.

Motion by Norbert Katz that the Legislation Committee take no position. Second: Carin Porras

Disapprovals: Mat Capstraw:

Motion: by Mr. Capstraw: If Motion to take no position fails – support RPPTLs version of the proposal, but not expending resources to do so.

Shannon Novey: – opposed to business section proposal – RPPTL position makes more sense

Dave Manz: It does a disservice to our clients to allow the doctor in the previous example can protect assets from ex spouse by constructing a single-member LLC.

Motion to adopt business section's proposal, made by David Manz. We may compromise our client's position.

Thomas Duggar: Philosophically agrees, but political concerns about what it means to take a position and potential consequences of doing so in this circumstance

Vote: On Motion above that no position be taken with respect to the proposed legislation:

17 in FAVOR of taking no position; 8 AGAINST. Motion carries.

1:10 p.m. Meeting adjourned.