

A CHARGING ORDER CONUNDRUM: IS IT REALLY THE “EXCLUSIVE REMEDY” OF AN LLC MEMBER JUDGMENT CREDITOR?

Elizabeth N. Kozlow*

I. INTRODUCTION

The limited liability company (LLC) is the current entity of choice because of its pass-through partnership tax treatment¹ and for its limited liability for its managers and members.² The LLC is a more attractive alternative than both other unincorporated and incorporated business models because an LLC is an entity whose owners are not personally liable for the LLC’s obligations and liabilities, resembling a corporate model, but which in many respects mirrors a partnership in flexibility and tax treatment.³

Furthermore, there are relatively few types of assets that are statutorily protected from claims of creditors, and the Texas LLC⁴ provides such protection.⁵ “Creditors *of the entity* . . . can absolutely reach the LLC’s assets to satisfy a claim, but their claim may not generally be satisfied with

*J.D., cum laude, Baylor University School of Law, July 2011; B.A. University of Notre Dame, 2007. Elizabeth Kozlow is currently serving as a Law Clerk to Justice Dale Wainwright of the Supreme Court of Texas. This article solely reflects the author’s views, not those of the Justice Dale Wainwright or the Supreme Court of Texas. The author would like to thank Professor Elizabeth Miller for her advice, assistance and inspiration as a leading scholar on business organizations. She would also like to thank her family for their unconditional love and support.

¹See 19 ROBERT W. HAMILTON ET AL., TEXAS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 18.7, at 681 (2d ed. 2004).

²TEX. BUS. ORGS. CODE ANN. § 101.114 (West 2010).

³See 19 HAMILTON ET AL., *supra* note 1, § 18.3, at 671.

⁴Texas was one of the first states to enact legislation authorizing the formation of LLCs with the passage of the Texas Limited Liability Company Act (TLLCA) in 1991. The provisions of the TLLCA were included, with some modification, in the Texas Business Organizations Code (BOC). An LLC formed on or after January 1, 2006, has been governed by the BOC since the date of its formation. The BOC governs all LLCs in Texas as of January 1, 2010, regardless of the time of their formation or governing code election. See 19 HAMILTON ET AL., *supra* note 1, § 18.4, at 674, 676.

⁵See TEX. BUS. ORGS. CODE ANN. § 101.112.

assets owned by the entity's individual members".⁶ However, "[a]s a member has no interest in specific LLC property,⁷ a creditor of a member may not proceed directly against LLC property."⁸ Each member's ownership is based on rights of distribution, either during the operation of the company or on its winding up.⁹ However, judgment creditors of a member may proceed against a membership interest to satisfy the judgment.¹⁰ A judgment creditor of a member may go to court and have the membership interest "charge[d]" with the payment to satisfy the judgment¹¹ but will only have "the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest."¹² "Under a charging order, the creditor can receive distributions from the entity only to the extent of the debt. The debtor keeps [the] membership interest, is taxable on [the] pro rata share of LLC income, and once the debt is paid, the debtor is freed from the order"¹³

"In the past, a judgment creditor [of a member or partner] could disrupt the business of [the] entire partnership [or LLC] by forcing an execution sale of the partner's interest to satisfy a nonpartnership debt."¹⁴ The charging order developed as a way to prevent interference by a judgment creditor of a partner or member with the business of the partnership or LLC.¹⁵ "The charging order derives from partnership law, is analogous to a lien on the economic part of the member's membership interest, and entitles the charging party only to whatever distributions the member would otherwise be entitled to receive."¹⁶ "A charging order constitutes a lien on

⁶2 DUNCAN E. OSBORNE & ELIZABETH MORGAN SCHURIG, *ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS* § 18.4, at 18-5 (2010).

⁷TEX. BUS. ORGS. CODE ANN. § 101.106(b).

⁸20 HAMILTON ET AL., *supra* note 1, § 20.20, at 180.

⁹*See* 12 WILLIAM V. DORSANEO III & PETER WINSHIP, *TEXAS LITIGATION GUIDE* § 183.04[3][b] (2010).

¹⁰TEX. BUS. ORGS. CODE ANN. § 101.112(a).

¹¹*Id.*

¹²*Id.* § 101.112(b).

¹³*See* 2 OSBORNE & SCHURIG, *supra* note 6, § 18.4, at 18-6.

¹⁴*See* Stanley v. Reef Sec., Inc., 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.) (citing Alan M. Weinberger, *Making Partners Pay Child Support: The Charging Order at 100*, 27 HOUS. L. REV. 297, 301 (1990)).

¹⁵*Id.* (citing Michael C. Riddle et al., *Choice of Business Entity in Texas*, 4 HOUS. BUS. & TAX L.J. 292, 318–19 (2004); Weinberger, *supra* note 14, at 302).

¹⁶1 CARTER G. BISHOP & DANIEL S. KLEINBERGER, *LIMITED LIABILITY COMPANIES: TAX & BUSINESS LAW* § 5.04[2][c], at S5-23–24 (Supp. 2011).

the judgment debtor's membership interest" but may not be foreclosed on under the Business Organizations Code or any other law.¹⁷ "The entry of a charging order is the *exclusive remedy* by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest."¹⁸

Hypothetically, a doctor could form a single-member LLC and place all of his assets into the LLC for protection. Under Texas law, if a judgment creditor of the doctor—assuming the creditor was not also a creditor of the LLC—attempted to recover the doctor's membership interest in the LLC, that judgment creditor would be restricted to a charging order.¹⁹ Under the literal statutory language—which trumps other legal and equitable remedies²⁰—the judgment creditor arguably could not reverse pierce the veil of the LLC,²¹ could not attempt an action based on fraudulent transfer,²² and could not pursue any other remedies beyond the charging order.²³ As a judgment creditor of the member, that creditor is limited solely to the statutory charging order.²⁴

This comment seeks to clarify the current state of the charging order in Texas by looking back at the history of the remedy and predicting the future application in recognition of other jurisdictions' treatment of the charging order. Part II details the legislative history of the charging order remedy, Part III considers the treatment in Texas for a judgment creditor's attempt to reach an LLC membership interest, Part IV considers fellow jurisdictions' decisions regarding the charging order, and Part V speculates the future treatment of the charging order by Texas courts.

As the exclusive remedy, a charging order may be a "rather unsatisfactory remedy for the judgment creditor"²⁵ of a member in that a

¹⁷ TEX. BUS. ORGS. CODE ANN. § 101.112(c).

¹⁸ *Id.* § 101.112(d) (emphasis added).

¹⁹ *See id.*

²⁰ *See id.* § 101.112(f).

²¹ *See* 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

²² *See id.* § 20.20, at 175 n.21.

²³ *See* TEX. BUS. ORGS. CODE ANN. § 101.112(f).

²⁴ *See id.* § 101.112(d).

²⁵ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 172 (Supp. 2010); *see also* Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, BUS. ENTITIES, Sept.–Oct. 2006, at 28, 64 ("A charging order is not a very effective debt collection tool. A creditor may find itself holding a charging order, without any ability to determine when the judgment will be paid off.").

“judgment creditor with a charging order may be in a position of waiting indefinitely for any payments. If an LLC is not making distributions and there is no prospect of liquidation in the foreseeable future, a charging order on a member’s interest may be of little value to the judgment creditor.”²⁶ Furthermore, “[a] creditor of a member or of any other owner of a membership interest does not have the right to obtain possession of, or otherwise exercise *legal or equitable remedies* with respect to, the property of the limited liability company.”²⁷ The charging order is, therefore, a narrow yet expressly exclusive remedy for a judgment creditor of an LLC membership interest.²⁸

Recently, however, courts in other jurisdictions have neglected to support the exclusivity of the charging order provisions in favor of allowing a judgment creditor to reach the assets of a single-member LLC.²⁹ Because the statute limits a judgment creditor’s remedy to the charging order, an owner of a single-member LLC could shield all assets from the claims of any creditor of the member.³⁰ These cases have highlighted this policy rationale in allowing judgment creditors of a member to seek other remedies against a single-member LLC,³¹ but it is unclear to what extent this will apply in Texas with the explicit statutory language of the exclusivity of the charging order.³² Will the charging order trump a judgment creditor’s attempt to reach a single-member LLC’s assets, will this charging order trump other remedies such as fraudulent transfer and reverse veil piercing, and will this charging order remedy be applied by the courts uniformly given this statutory language?

II. HISTORY AND PURPOSE OF LLC CHARGING ORDER PROVISIONS IN TEXAS

In 1991, the Texas Limited Liability Company Act conferred the right of a charging order to a judgment creditor of a member or any other owner

²⁶ 20 HAMILTON ET AL., *supra* note 1, § 20.20 at 172 n.11 (Supp. 2010).

²⁷ TEX. BUS. ORGS. CODE ANN. § 101.112(f) (emphasis added).

²⁸ *See id.* § 101.112(d).

²⁹ *See, e.g.,* Fed. Trade Comm’n v. Peoples Credit First, LLC, No. 8:03-CV-2353-T-TBM, 2006 WL 1169677, at *2 (M.D. Fla. May 3, 2006) (unreported opinion); *In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003); *In re Modanlo*, 412 B.R. 715 (Bankr. D. Md. 2006); *Olmstead v. Fed. Trade Comm’n*, 44 So. 3d 76 (Fla. 2010).

³⁰ *See* TEX. BUS. ORGS. CODE ANN. § 101.112(d), (f).

³¹ *See* cases cited *supra* note 29.

³² TEX. BUS. ORGS. CODE ANN. § 101.112(d).

of a membership interest, but limited the rights of the judgment creditor under the charging order to the rights of an assignee of the interest.³³ The original charging order provisions in the BOC and TLLCA also stated that the charging order conferred the creditor with the rights of an assignee of the membership interest.³⁴

The rights of an assignee include reasonable inspections of the LLC's books and records,³⁵ a right to reasonable information or a reasonable account of the transactions of the company,³⁶ as well as the right to receive distributions.³⁷ However, an assignor of a membership interest in a limited liability company continues to be a member of the company³⁸ while the assignee is entitled to become a member on the approval of all of the company's members.³⁹ An assignment of a membership interest in an LLC does not entitle the assignee to participate in the management and affairs of

³³ The Act stated:

On application to a court of competent jurisdiction by a judgment creditor of a member or any other owner of a membership interest, the court may charge the membership interest of the member or other owner with payment of the unsatisfied amount of the judgment. Except as otherwise provided in the regulations to the extent that the membership interest is charged in this manner, the judgment creditor has only the rights of an assignee of the interest. This Section does not deprive any member of the benefit of any exemption laws applicable to that member's membership interest.

Act of May 23, 2007, 80th Leg., R.S., ch. 688, § 142, 2007 Tex. Gen. Laws 1267, 1309 (expired Jan. 1, 2010).

³⁴ The statute stated as follows:

On application by a judgment creditor of a member of a limited liability company or any other owner of a membership interest in a limited liability company, a court may charge the membership interest of the member or owner, as appropriate, with payment of the unsatisfied amount of the judgment; (b) If a court charges a membership interest with payment of a judgment as provided by Subsection (a), the judgment creditor has only the rights of an assignee of the membership interest; (c) This section may not be construed to deprive a member of a limited liability company or any other owner of a membership interest in a limited liability company of the benefit of any exemption laws applicable to the membership interest of the member or owner.

Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 1, sec. 101.112, 2003 Tex. Gen. Laws 267, 497–98 (amended 2009) (current version at TEX. BUS. ORGS. CODE ANN. § 101.112).

³⁵ TEX. BUS. ORGS. CODE ANN. §§ 101.109(a)(4), 101.502.

³⁶ *Id.* § 101.109(a)(3).

³⁷ *Id.* § 101.109(a)(2).

³⁸ *Id.* § 101.111(a).

³⁹ *Id.* § 101.109(b).

the company, become a member of the company, or exercise any rights of a member of the company.⁴⁰

Furthermore, members have specific statutory remedies to enforce their distribution rights⁴¹; for example, when a member is entitled to receive a distribution from the company, the member, with respect to the distribution, has the same status as a creditor of the company and is entitled to any remedy available to a creditor of the company.⁴² There is no doubt that the TLLCA and the BOC limited the judgment creditor's ability to manage and direct the voting based on the membership interest charged.⁴³ "A creditor's inability to vote the charged interest or participate in the management of the entity is at the heart of the asset protection efficacy of the charging order."⁴⁴

The statute did not mention the exclusivity of the remedy⁴⁵ nor did it preclude the creditor from exercising any other legal or equitable remedies.⁴⁶ Additionally, "there is no longer a statutory basis for a judgment creditor who has obtained a charging order to demand such information" as the previous statute conferred.⁴⁷ Furthermore, these provisions "were silent as to the court's power to issue ancillary orders and inquiries, as well as with regard to the availability of foreclosure and redemption."⁴⁸

The 2007 amendments of the charging order provisions amended the remedy to make it even more restrictive as a remedy and to narrow the rights of the judgment creditor.⁴⁹ The legislature amended the provisions by adopting the Delaware approach to the use of charging orders in connection with limited partnerships and LLCs.⁵⁰ The language of the 2007 amendments is virtually identical to the current Delaware charging order

⁴⁰ *Id.* § 101.108(b)(2).

⁴¹ 12 DORSANEO & WINSHIP, *supra* note 99, § 183.04[3][a], at 183-17.

⁴² TEX. BUS. ORGS. CODE ANN. § 101.207.

⁴³ *See id.* § 101.112 (b), (f).

⁴⁴ *See* Stein, *supra* note 25, at 31.

⁴⁵ *See* 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

⁴⁶ *See id.* § 20.20, at 172-73 (Supp. 2010).

⁴⁷ *Id.* § 20.20, at 172 (Supp. 2010).

⁴⁸ *Id.*

⁴⁹ TEX. BUS. ORGS. CODE ANN. § 101.112; Act of May 23, 2007, 80th Leg., R.S., ch. 688, § 98, sec. 101.112, 2007 Tex. Gen. Laws 1267, 1293-94; Act of May 20, 1991, 72d Leg., R.S., ch. 901, § 46, 1991 Tex. Gen. Laws 3161, 3192-216 (expired Jan. 1, 2010). The legislature amended the exclusivity language found in the BOC in the TLLCA as well.

⁵⁰ House Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 1737, 80th Leg. R.S. (2007).

provisions.⁵¹ Finally, the legislature amended the statute to include provisions that the “charging order lien may not be foreclosed on under this code or any other law.”⁵²

III. PREDICAMENT OF EXCLUSIVE REMEDY

The current provisions state that the charging order is the exclusive remedy for a judgment creditor of a member.⁵³ Although this language seems to certify that a judgment creditor of a member is limited to this remedy alone,⁵⁴ the lack of case law and the emergence of policy decisions based on the charging order may question the exclusivity.⁵⁵ In construing the LLC charging order,⁵⁶ it is important to additionally consider the limited partnership charging order as it contains the same exclusivity of the remedy.⁵⁷ “A charging order is the sole means by which a judgment

⁵¹ The statute reads as follows:

(a) On application by a judgment creditor of a member or a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest. (b) A charging order constitutes a lien on the judgment debtor's limited liability company interest. (c) This chapter does not deprive a member or member's assignee of a right under exemption laws with respect to the judgment debtor's limited liability company interest. . . . (e) No creditor of a member or a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company. (f) The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such charging order.

DEL. CODE ANN. tit. 6, § 18-703 (2005).

⁵² Act of May 4, 2009, 81st Leg., R.S., ch. 84, § 40, sec. 101.112, 2009 Tex. Gen. Laws 128, 140 (current version at TEX. BUS. ORGS. CODE ANN. § 101.112(c)).

⁵³ TEX. BUS. ORGS. CODE ANN. § 101.112(d).

⁵⁴ See TEX. BUS. ORGS. CODE ANN. § 101.112(d).

⁵⁵ See 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010); Stein, *supra* note 25, at 33.

⁵⁶ See TEX. BUS. ORGS. CODE ANN. § 101.112(d).

⁵⁷ The statute provides:

(a) On application by a judgment creditor of a partner or of any other owner of a partnership interest, a court having jurisdiction may charge the partnership interest of the judgment debtor to satisfy the judgment. (b) To the extent that the partnership interest is charged in the manner provided in Subsection (a), the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise

creditor can reach an individual debtor's partnership interest"⁵⁸ in a limited partnership.⁵⁹

A. Stanley v. Reef Securities: *Insight from the LP Statute*

Although there is sparse case law on the statutory language,⁶⁰ recently, the Dallas Court of Appeals considered the exclusivity language of the charging order of a limited partnership interest.⁶¹ After obtaining a judgment against Stanley,⁶² Reef Securities filed a post judgment application for turnover relief and appointment of a receiver to collect their \$526,186 judgment.⁶³ The application alleged that Stanley owned numerous investment properties and received nonexempt payments of \$20,000 per month from one of the companies.⁶⁴ Stanley instead "argued that Reef Securities sought the wrong relief; he alleged that turnover relief was not proper in this case and that Reef Securities" was "limited to a charging order."⁶⁵ Although Stanley argued that the monthly payments were for services as the president of the LLC⁶⁶ (which was the general

be entitled in respect of that partnership interest. (c) A charging order constitutes a lien on the judgment debtor's partnership interest. The charging order lien may not be foreclosed on under this code or any other law. (d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest. (e) This section does not deprive a partner or other owner of a partnership interest of a right under exemption laws with respect to the judgment debtor's partnership interest. (f) A creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership.

Id. § 153.256.

⁵⁸ *Dispensa v. Univ. State Bank*, 951 S.W.2d 797, 800 (Tex. App.—Texarkana 1997, pet. denied) (construing TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 25(2)(c), 28 (West 1997)).

⁵⁹ *See id.*

⁶⁰ *See id.* at 800 n.6; Stein, *supra* note 25, at 33.

⁶¹ *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 663 (Tex. App.—Dallas 2010, no pet.).

⁶² *Id.* at 662.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 662–63.

partner of the limited partnership),⁶⁷ the trial court ruled that the monthly payments were not current wages but distributions from the partnership.⁶⁸

Although the court did agree that the charging order is the exclusive remedy by which a judgment creditor of a partner may satisfy a judgment out of the judgment debtor's partnership interest,⁶⁹ the court disagreed that the creditor sought the partnership interest in this case.⁷⁰ Once a partnership distribution has been made to a partner, it ceases to be the partner's "partnership interest" and becomes that partner's personal property.⁷¹ In this case, the creditor sought Stanley's proceeds of a partnership distribution through a turnover order.⁷² The court held that nothing in the plain language of the statute precluded a judgment creditor from seeking the turnover of proceeds from a partnership distribution after that distribution has been made and is in the partner's possession.⁷³ While the court admitted that the charging order is the exclusive remedy for a judgment creditor seeking satisfaction of a judgment out of the partnership interest,⁷⁴ the judgment creditor could instead seek a turnover order to turn over the proceeds of a partnership distribution after the debtor has received those proceeds.⁷⁵

While the court did not find that the charging order was the appropriate remedy in this case,⁷⁶ the court utilizes language that may question whether the charging order is the exclusive remedy in all scenarios.⁷⁷ Reef Securities argued by way of cross-appeal that the trial court "abused its discretion by refusing to appoint a receiver over Stanley's interests in the [LLC] and the partnership and by not ignoring Stanley's transfer of 10% ownership in Stanley Interests to his brother."⁷⁸ The appellate court held that the statute "gives the trial court discretion to appoint a receiver when it

⁶⁷ *Id.* at 662.

⁶⁸ *Id.* at 663.

⁶⁹ *Id.* at 664.

⁷⁰ *See id.* at 665.

⁷¹ *Id.* (citing *Marshall v. Marshall*, 735 S.W.2d 587, 593–94 (Tex. App.—Dallas 1987, writ *ref'd n.r.e.*)).

⁷² *Id.* at 662.

⁷³ *Id.* at 665.

⁷⁴ *Id.* at 664.

⁷⁵ *Id.* at 665.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *Id.* at 670.

deems it appropriate and to not appoint a receiver when it deems it is not appropriate.”⁷⁹ On this record, the court held that the trial court did not abuse its discretion in not appointing a receiver.⁸⁰

The court alludes to circumstances in which a trial court could grant a receiver based on its discretionary authority to do so.⁸¹ However, the exclusivity of the language in the statute appears to preclude these ancillary orders and limit the court solely to the charging order.⁸² Reconciling the exclusive charging order and this court’s allowance of a court’s discretionary power to appoint a receivership in the appropriate circumstances may be impossible and may show that the courts will not treat this remedy as exclusive.⁸³

B. Exclusive to All Legal and Equitable Remedies?

The *Stanley* case begs the question of whether, in the appropriate circumstances, the court will utilize alternative remedies to the charging order.⁸⁴ Since *Stanley* alludes to a receivership,⁸⁵ it logically follows that courts can and will apply other remedies at least in the most egregious circumstances.⁸⁶ If the doctor fraudulently transferred all of his assets into a single-member LLC with the intent to hinder his malpractice creditors, will the court still limit that creditor to a charging order of his LLC interest?⁸⁷ Although the statute “literally appears to shield the assets of a single

⁷⁹ *Id.* at 671.

⁸⁰ *Id.*

⁸¹ *See id.* at 670–71.

⁸² *See* 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 172–73 (Supp. 2010) (“In contrast to the prior charging order provisions of the limited partnership statutes, the charging order provisions originally adopted in the Texas Limited Liability Company Act (and carried forward in the Business Organizations Code) were silent as to the court’s power to issue ancillary orders and inquiries, as well as with regard to the availability of foreclosure and redemption. For that matter, the LLC statute did not explicitly preclude a judgment creditor from utilizing remedies completely apart from the charging order provisions, such as a turnover order” (citations omitted)).

⁸³ *See* 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010) (“Presumably, the [LLC] judgment creditor’s rights were limited to obtaining a charging order as described in the statute, but the statute’s lack of an explicit statement in this respect left room for argument.” (citations omitted)).

⁸⁴ *See Stanley*, 314 S.W.3d at 665.

⁸⁵ *Id.* at 671.

⁸⁶ *See id.* at 665 (“We conclude that a charging order . . . was not the exclusive remedy in this case.”).

⁸⁷ *See supra* Part I.

member LLC from the claims of a creditor of the sole member . . . the policy behind such a result may be questioned.”⁸⁸

1. Fraudulent Transfer

Recall the doctor single-member LLC hypothetical.⁸⁹ If the doctor siphoned all of his assets into a single-member LLC to shield himself from an expectant malpractice judgment, the LLC statute “literally appears to shield”⁹⁰ him from that judgment.⁹¹ Although the claimant could argue that his single-member LLC exists as a fraudulent transfer,⁹² the doctor will defensively argue that a creditor of a member may not exercise any other legal or equitable remedies with respect to the property of the LLC.⁹³

Under the Uniform Fraudulent Transfer Act,

[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.⁹⁴

Although “[p]resumably, the provision does not trump fraudulent transfer laws,”⁹⁵ the scope of the exclusivity is not altogether clear.⁹⁶ The question will be whether the court will allow for such an equitable remedy with extraordinary circumstances, such as actual fraud to hinder a creditor, or if the court will enforce the exclusivity of the charging order.⁹⁷

Furthermore, the court could find that if the assets were fraudulently transferred, then conceptually those assets are not property of the LLC.⁹⁸ A claimant could argue that if the debtor transfers property without receiving

⁸⁸ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

⁸⁹ *See supra* Part I.

⁹⁰ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

⁹¹ *See* TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2010).

⁹² *See* TEX. BUS. & COM. CODE ANN. § 24.005(a) (West 2009).

⁹³ *See* TEX. BUS. ORGS. CODE ANN. § 101.112(f).

⁹⁴ TEX. BUS. & COM. CODE ANN. § 24.005(a)–(a)(1).

⁹⁵ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 175 n.21 (Supp. 2010) (citation omitted).

⁹⁶ *Id.*

⁹⁷ *See id.* § 20.20, at 173 (Supp. 2010).

⁹⁸ *See* TEX. BUS. & COM. CODE ANN. § 24.008.

value and is insolvent,⁹⁹ that is a fraudulent transfer and no intent is necessary.¹⁰⁰ But, theoretically, if you have transferred property into an LLC, you have received value in the form of the interest in the LLC.¹⁰¹ The debtor will argue that he has contributed property to the LLC, received a membership interest and has therefore received value.¹⁰² Therefore, without intent,¹⁰³ fraudulent transfer may not work as a remedy since the value element¹⁰⁴ could be satisfied by the membership interest¹⁰⁵ as consideration. Even with actual fraud and intent,¹⁰⁶ however, the availability of fraudulent transfer is still unknown when up against the exclusivity of the charging order.¹⁰⁷

2. Reverse Veil Piercing

A creditor could also attempt to reverse pierce the veil of the LLC in order to hold the LLC liable for the controlling member's debt, but may still be defeated by the exclusivity of the charging order.¹⁰⁸ If the member and the LLC are really just alter egos, then the creditor is simply attempting to reach the property of the member.¹⁰⁹ While Texas case law is sparse,¹¹⁰ reverse veil piercing has been acknowledged as a remedy.¹¹¹

Whether an entity "is an LLC or a corporation is a distinction without a difference"¹¹² for purposes of applying veil piercing principles, and therefore a claimant may attempt to reverse pierce an LLC by utilizing

⁹⁹ See *id.* § 24.005(a)(2) ("[I]f the debtor made the transfer or incurred the obligation . . . without receiving a reasonably equivalent value in exchange for the transfer or obligation . . .").

¹⁰⁰ See *id.* § 24.005(a).

¹⁰¹ See TEX. BUS. ORGS. CODE ANN. § 101.106(a) (West 2010) ("A membership interest in a limited liability company is personal property.").

¹⁰² See *id.*

¹⁰³ See TEX. BUS. & COM. CODE ANN. § 24.005(a)(1).

¹⁰⁴ See *id.* § 24.005(a)(2).

¹⁰⁵ See TEX. BUS. ORGS. CODE ANN. § 101.106(a).

¹⁰⁶ See TEX. BUS. & COM. CODE ANN. § 24.005(a)(1).

¹⁰⁷ See 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

¹⁰⁸ *Id.*

¹⁰⁹ TEX. BUS. ORGS. CODE ANN. § 101.106(a); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 244 (5th Cir. 1990).

¹¹⁰ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

¹¹¹ See *Zahara*, 910 F.2d at 243–44; *Bramante v. McClain*, No. SA-06-CA-0010, 2007 WL 4555943, at *1–2 (W.D. Tex. Dec. 18, 2007) (unreported).

¹¹² *In re Moore*, 379 B.R. 284, 289 n.4 (Bankr. N.D. Tex. 2007).

corporate case law.¹¹³ In a recent bankruptcy case, the court held that reverse veil piercing “should only be applied when it is clear that it will not prejudice non-culpable shareholders or other stakeholders . . . of a corporation.”¹¹⁴ However, the corporate statutes do not consider the charging order as a remedy¹¹⁵ and the case was decided before the amendments to the LLC statutes.¹¹⁶ Therefore, although it seems that in a single-member LLC context reverse piercing could be applied,¹¹⁷ the difference in the corporate and LLC statutes creates tension.

Even if a creditor of a member attempts to reverse veil pierce an LLC, the member could argue that the creditor is precluded from using any remedies other than the charging order.¹¹⁸ However,

[i]t might be argued that disregard of the LLC’s separate existence under reverse piercing principles is not precluded by this provision just as the literal reach of the provision presumably does not preclude a partner’s creditor from resorting to the fraudulent transfer statutes to recover property fraudulently transferred to an LLC.¹¹⁹

With an egregious case, the court will have a difficult decision in enforcing the exclusivity of the charging order against both fraudulent transfer and reverse veil piercing.

IV. A LOOK AT OTHER COURTS’ TREATMENT OF THE CHARGING ORDER REMEDY

Texas has yet to establish a clear treatment of the charging order remedy for a judgment creditor of an LLC membership interest.¹²⁰ While the statute expressly states that the remedy is exclusive¹²¹—even exclusive of all equitable and legal remedies¹²²—there is virtually no case law to support

¹¹³ See TEX. BUS. ORGS. CODE ANN. § 101.002(a) (incorporating corporate veil piercing statutes into LLC statutes); 20 HAMILTON, ET AL., *supra* note 1, § 20.20, at 176 n.23.

¹¹⁴ *Moore*, 379 B.R. at 295.

¹¹⁵ See TEX. BUS. ORGS. CODE ANN. §§ 21.223–25.

¹¹⁶ *Moore*, 379 B.R. at 284.

¹¹⁷ *Id.* at 295.

¹¹⁸ TEX. BUS. ORGS. CODE ANN. § 101.112(d).

¹¹⁹ 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 173 (Supp. 2010).

¹²⁰ See *id.*

¹²¹ TEX. BUS. ORGS. CODE ANN. § 101.112(d).

¹²² *Id.* § 101.112(f).

this statutory language.¹²³ Since there is scant case law on the topic regarding charging orders in attempting to reach LLC membership interests,¹²⁴ a look at other courts' treatment in neighboring jurisdictions can provide helpful insight in looking to the future treatment under Texas law. In other jurisdictions, courts seem to balance stringent statutory language of the charging order remedy with the equitable result based on egregious facts.¹²⁵ Although the statutes may confer a stringent and, perhaps, an exclusive remedy,¹²⁶ "[c]harging orders 'are not intended to protect a debtor partner against claims of his judgment creditors where no legitimate interest of the partnership, or of the remaining or former partners is to be served.'"¹²⁷

A. Olmstead v. FTC: *Florida's Groundbreaking Decision*

In a much-anticipated decision, the Florida Supreme Court recently answered the question of whether the charging order provision in the Florida Limited Liability Company Act always displaces another remedy and establishes the exclusivity of the judgment creditor's remedy in a single-member LLC.¹²⁸ The Federal Trade Commission (FTC) sued Olmstead, Connell, and the corporate entities for unfair and deceptive trade practices in operating an "advance-fee credit card scam."¹²⁹ The assets of the defendants, including several single-member Florida LLCs in which either Olmstead or Connell was the sole member, were frozen and placed in receivership.¹³⁰ The District Court for the Middle District of Florida

¹²³ 20 HAMILTON, ET AL., *supra* note 1, § 20.20, at 174 n.19 (Supp. 2010).

¹²⁴ See Stein, *supra* note 25, at 33 ("There are few cases dealing with charging orders First, many creditors fail to find the charging order to be a useful remedy, and seek to settle with the debtor rather than hope to get a distribution from the entity. Second, . . . the charging order is granted by a trial court and is rarely appealed, resulting in few published opinions.").

¹²⁵ See Gardner F. Davis & Mary F. Kendrick, *Single-Member LLC Will Not Shield Debtor's Assets from Judgment Creditor*, AM. BANKR. INST. J., Oct. 2010, at 52.

¹²⁶ See FLA. STAT. ANN. § 608.433(4) (West 2007).

¹²⁷ Carter G. Bishop, *LLC Charging Orders: A Jurisdictional & Governing Law Quagmire*, BUS. ENTITIES, May–June 2010, at 14, 17–18 (quoting *Taylor v. S & M Lamp Co.*, 12 Cal. Rptr. 323, 328 (Cal. Ct. App. 1961)).

¹²⁸ *Olmstead v. Fed. Trade Comm'n*, 44 So. 3d 76, 80 (Fla. 2010).

¹²⁹ *Fed. Trade Comm'n v. Olmstead*, 528 F.3d 1310, 1312 (11th Cir. 2008).

¹³⁰ *Olmstead*, 44 So. 3d at 78.

entered a judgment against defendants Olmstead and Connell for more than \$10 million in restitution as a result of the credit card scheme.¹³¹

But, the FTC was unable to collect its judgment because the defendants held their assets in the single-member LLCs and the defendants chose not to pay distributions.¹³² The FTC obtained, over the objections of Olmstead and Connell, an order compelling them to endorse and surrender to the receiver all right, title, and interest in their LLCs.¹³³ That order was the subject of the appeal in the Eleventh Circuit that precipitated the certified question for the Supreme Court of Florida.¹³⁴

The Supreme Court ruled that the provision of the Florida LLC Act¹³⁵ providing a judgment creditor with the right to a charging order against the judgment debtor's ownership interest in a single-member LLC was not intended to be an exclusive remedy.¹³⁶ The court ruled that "there is no showing of an irreconcilable conflict between the charging order remedy and the previously existing judgment creditor's remedy and therefore no basis for overcoming the presumption against the implied abrogation of a statutory remedy."¹³⁷

In reaching this decision, the court relied on the language of the LLC Act¹³⁸ in "stark contrast"¹³⁹ to the charging order provisions found in the Florida Partnership Act¹⁴⁰ and the Florida Limited Partnership Act.¹⁴¹

¹³¹ *Fed Trade Comm'n*, 528 F.3d at 1312.

¹³² *See id.*

¹³³ *Fed. Trade Comm'n v. Peoples Credit First, LLC*, No. 8:03-CV-2353-T-TBM, 2006 WL 1169677, at *2 (M.D. Fla. May 3, 2006) (unreported).

¹³⁴ *Fed. Trade Comm'n*, 528 F.3d at 1311.

¹³⁵ The Florida Limited Liability Company Act provides:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member 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 such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

FLA. STAT. ANN. § 608.433(4) (West 2007).

¹³⁶ *Olmstead v. Fed. Trade Comm'n*, 44 So. 3d 76, 83 (Fla. 2010).

¹³⁷ *Id.*

¹³⁸ FLA. STAT. ANN. § 608.433(4).

¹³⁹ *Olmstead*, 44 So. 3d at 82.

¹⁴⁰ The charging order remedy states that it "provides the *exclusive remedy* by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment

Although the “core language of the charging order provisions in each of the three statutes is strikingly similar, the absence of an exclusive remedy provision sets the LLC Act apart from the other two statutes.”¹⁴² The court recognized that “[t]he Legislature has shown—in both the partnership statute and limited partnership statute—that it knows how to make clear that a charging order remedy is an exclusive remedy.”¹⁴³ The existence of this exclusivity undermines the argument “that the charging order provision in the LLC Act—which does not contain such an exclusive remedy provision—should be read to displace”¹⁴⁴ the statutory remedy¹⁴⁵ of levying the interest and obtaining full title to it.¹⁴⁶

The court reasoned its holding through the policy of a single-member LLC and asset protection,¹⁴⁷ but the statutory language at that time made no such distinction between single-member or multi-member LLCs.¹⁴⁸ “While it is not a surprise that the Florida Supreme Court concluded that a charging order is not the sole and exclusive remedy for a creditor with respect to a debtor’s membership interest in a single-member LLC, it is surprising that the court’s analysis was based on the conclusion that the charging order is not the exclusive remedy for a creditor in the context of a multi-member Florida L.L.C.”¹⁴⁹ The *Olmstead* decision could apply equally to multi-member LLCs since there is no distinction made in neither the majority opinion nor the statutory language at the time of the LLC Act.¹⁵⁰ This

debtor’s transferable interest in the partnership.” FLA. STAT. ANN. § 620.8504(5) (emphasis added).

¹⁴¹ The charging order remedy states that it “provides the *exclusive remedy* which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor’s interest in the limited partnership or transferable interest.” FLA. STAT. ANN. § 620.1703(3) (emphasis added).

¹⁴² *Olmstead*, 44 So. 3d at 82.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing FLA. STAT. ANN. § 56.061 (West 2006) (providing that various categories of “real and personal property . . . [including] stock in corporations, shall be subject to levy and sale under execution”)).

¹⁴⁵ FLA. STAT. ANN. § 56.061 (providing that various categories of real and personal property, including “stock in corporations, shall be subject to levy and sale under execution”).

¹⁴⁶ *Olmstead*, 44 So. 3d at 82.

¹⁴⁷ *See id.* at 83.

¹⁴⁸ FLA. STAT. ANN. § 608.433(4) (West 2007).

¹⁴⁹ Steven I. Klein & Stephen R. Looney, *Florida Supreme Court Holds that Charging Order Is Not Exclusive Remedy*, BUS. ENTITIES, Sept.–Oct. 2010 at 39, 41.

¹⁵⁰ *See generally* FLA. STAT. ANN. § 608.433(4); *Olmstead*, 44 So. 3d at 82–83.

decision certainly throws into question whether the charging order is the exclusive remedy for multi-member Florida LLCs, as well as LLCs in other states having statutes similar to the Florida statutes.¹⁵¹

The Florida Legislature responded to *Olmstead* and amended its LLC charging order provisions.¹⁵² The Legislature distinguished between single-member LLCs and multi-member LLCs by granting a judgment creditor of a member or a member's assignee a procedure for application of foreclosure of the interest in the limited liability company.¹⁵³ Now, a judgment creditor of a single-member LLC can establish to the court that distributions under a charging order will not satisfy the judgment in a reasonable time.¹⁵⁴ The bill clarifies that the general application of the *Olmstead* decision to single-member LLCs does not apply to multi-member LLCs.¹⁵⁵ Therefore, the Florida Legislature answered the question and distinction between single-member LLCs and multi-member LLCs by allowing a judgment creditor of a single-member LLC another potential remedy if the charging order is not satisfactory.¹⁵⁶

B. Adjudicating Based on Policy: Colorado and the Single-Member LLC

In another decision on charging orders and LLCs, a Colorado bankruptcy court rejected the argument that the bankruptcy trustee was only entitled to a charging order with respect to the debtor's ownership interest in a single-member LLC.¹⁵⁷ The court held that the charging order¹⁵⁸ exists

¹⁵¹ Klein & Looney, *supra* note 149, at 41.

¹⁵² See FLA. STAT. ANN. § 608.433(5)–(7) (West 2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Fla. S. Judiciary Comm., S.B. 1152 (2011) Staff Analysis 6 (March 25, 2011), available at <http://www.flsenate.gov/Session/Bill/2011/1152/Analyses/MFgnU=PL=w4G6nW8ZIn2FYqknwzJjw=%7C7C/Public/Bills/1100-1199/1152/Analysis/2011s1152.ju.PDF>.

¹⁵⁶ *Id.*

¹⁵⁷ See *In re Albright*, 291 B.R. 538, 538–40 (Bankr. D. Colo. 2003).

¹⁵⁸ The Colorado Limited Liability Company Act provides:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest thereon and may then or later appoint a receiver of the member's share of the profits and of any other money due or to become due to the member in respect of the limited liability company and make all other orders, directions, accounts, and inquiries that the debtor member might have

to protect members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager.¹⁵⁹ In a single-member LLC, however, there are no non-debtor members to protect and the “charging order limitation serves no purpose in a single member limited liability company, because there are no other parties’ interests affected.”¹⁶⁰

The trustee argued that because the debtor was the sole member and manager of the LLC at the time she filed bankruptcy, the trustee now controls the LLC and may cause the LLC to sell real property and distribute proceeds.¹⁶¹ The debtor, on the other hand, maintained that the trustee was only entitled to a charging order and cannot assume management of the LLC or cause the LLC to sell real property.¹⁶² According to Colorado law, however, “because there are no other members in the LLC, the entire membership interest passed to the bankruptcy estate, and the trustee became a ‘substituted member’.”¹⁶³ Therefore, the court held that because the trustee became the sole member of the LLC upon the debtor’s bankruptcy filing, the trustee controls all governance of the entity, including decisions regarding the liquidation of the assets.¹⁶⁴

made, or that the circumstances of the case may require.

COLO. REV. STAT. ANN. § 7-80-703 (West 2006).

¹⁵⁹ *Albright*, 291 B.R. at 541.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 539.

¹⁶² *Id.*

¹⁶³ *Id.* at 540; *See also* COLO. REV. STAT. ANN. § 7-80-702(1) (1994) (amended 2006), which provides:

The interest of each member in a limited liability company constitutes the personal property of the member and may be transferred or assigned. However, if all of the other members of the limited liability company other than the member proposing to dispose of the member’s interest do not approve of the proposed transfer or assignment by consent of all members, the transferee of the member’s interest shall have no right to participate in the management of the business and affairs of the limited liability company or to become a member. The transferee shall only be entitled to receive the share of profits or other compensation by way of income and the return of contributions to which that member would otherwise be entitled.

¹⁶⁴ *Albright*, 291 B.R. at 541.

The Colorado statutes are distinguishable from Texas. In Colorado, the charging order is not the exclusive remedy available to creditors.¹⁶⁵ Unlike Colorado, the Texas statute does not expressly grant a court's discretion in forming the order to the circumstances of the case.¹⁶⁶ Additionally, the admission of a member and assignment of a membership interest is treated differently,¹⁶⁷ which is important in construing *Albright*. As the court emphasized in *Albright*, the Colorado LLC Act requires the unanimous consent of other members in order to allow a transferee to participate in the management of the LLC.¹⁶⁸ "Because there were no other members in the LLC, no written unanimous approval of the transfer was necessary."¹⁶⁹ Consequently, the debtor's bankruptcy filing effectively assigned her entire membership interest to the bankruptcy estate, and the trustee obtained all of the rights.¹⁷⁰

In Texas, an assignment of a membership interest in an LLC does not entitle the assignee "to (A) participate in the management and affairs of the company; (B) become a member of the company; or (C) exercise any rights of a member of a company".¹⁷¹ An assignor of a membership interest continues to be a member of the company,¹⁷² while an assignee receives the economic benefits of the membership interest.¹⁷³ Texas law does not create the implication that the sole member's consent is unnecessary, as the court stressed in *Albright* under the Colorado statute.¹⁷⁴

The court admitted that a harder question would "involve an LLC where one member effectively controls and dominates the membership and management of an LLC that also involves a passive member with a minimal

¹⁶⁵ COLO. REV. STAT. ANN. § 7-80-703 (West 2006). ("[T]he court *may* charge the membership interest of the member with payment . . . or later appoint a receiver of the member's share of the profits and of any other money due . . . and make all other orders, directions, accounts, and inquiries that the debtor member might have made, or that the circumstances of the case may require." (emphasis added)).

¹⁶⁶ TEX. BUS. ORGS. CODE ANN. § 101.112 (West 2010).

¹⁶⁷ See COLO. REV. STAT. § 7-80-702(1); TEX. BUS. ORGS. CODE ANN. § 101.108(b).

¹⁶⁸ *Albright*, 291 B.R. at 540.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ TEX. BUS. ORGS. CODE ANN. § 101.108.

¹⁷² TEX. BUS. ORGS. CODE ANN. § 101.111.

¹⁷³ See TEX. BUS. ORGS. CODE ANN. § 101.109.

¹⁷⁴ *In re Albright*, 291 B.R. 538, 540 (Bankr. D. Colo. 2003).

interest.”¹⁷⁵ If the non-debtor member did not consent, the trustee would only be entitled to a share of distributions and would have no role in the voting or governance of the company.¹⁷⁶ The court makes an important distinction between the policy of protecting the “autonomy of the original members, and their ability to manage their own enterprise”¹⁷⁷ and single-member LLCs in only protecting the single debtor. The result would be different if there were other legitimate nondebtor members in the LLC.¹⁷⁸

In addition to Texas, other states such as Delaware, Illinois, and California retain statutory language that makes clear that a charging order is the only remedy.¹⁷⁹ However, the rationale of *Olmstead* that the charging order is not necessary in the single-member context because no other members need protection may be persuasive.¹⁸⁰ However, as commentators have mentioned:

[T]he rationale of *Olmstead* that the charging order is not necessary in the single-member context because no other members need protection may be persuasive. . . . The Florida Supreme Court’s majority decision in *Olmstead* . . . will presumably lead to similar rulings in other courts. . . . [T]he message is clear that the technical statutory requirement for a charging order is not going to stand in the way of a judgment creditor seeking to collect from the debtor’s assets held in a single-member LLC.¹⁸¹

C. Conclusion: The Future of the LLC Judgment Creditor Charging Order

The statutory language in the BOC makes it clear that the charging order is the exclusive remedy for a judgment creditor of an LLC membership interest.¹⁸² Although this statute is unambiguous and should be construed as it is written, the treatment of the statute by the courts is still

¹⁷⁵ *Id.* at 541 n.9.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 541.

¹⁷⁸ Klein & Looney, *supra* note 149, at 41.

¹⁷⁹ See DEL. CODE ANN. tit. 6, § 18-703(d) (2005); 805 ILL. COMP. STAT. ANN. 180/30-20(e) (West 2010); CAL. CORP. CODE § 17302(e) (West 2006).

¹⁸⁰ Davis & Kendrick, *supra* note 125, at 99.

¹⁸¹ *Id.*

¹⁸² TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2010).

unknown.¹⁸³ Whether the courts will uphold this remedy as exclusive in egregious cases is yet to be seen, but the language in the statute is certainly distinguishable from that of Colorado and Florida.¹⁸⁴

Because there is virtually no Texas case law regarding a court's treatment on the charging order in the LLC context, one might infer that courts are in fact not treating the remedy as exclusive. Courts will likely have a difficult time in enforcing the exclusive charging order with extraordinary and egregious cases. The creditor of the member will argue that the exclusivity is against policy in denying equitable remedies, while the member will point to the statute as it is written. The court will be faced with how to justify the charging order when the member has clearly abused the entity and the understanding that he may be shielded completely by this charging order.

In the meantime, a solution should be proposed that can ease this tension between policy and purpose. The policy rationale behind barring a single-member LLC from protecting assets without nondebtor members does balance the scale of the original purpose in passing the charging order statute:

The sensible statutory restrictions applicable to transfers of a membership in a multiple member limited liability company are justified and intuitive. Specifically, the rules that permit a member to freely transfer economic rights to future distributions while at the same time requiring the consent of the remaining members to admit the transferee as a member are appropriate to balance the reasonable expectations of members of a close business association. However, when applied to a SM-LLC ["single-member LLC"], the same rules create a perverse and unexpected result Preferably, every state could amend its legislation to provide that upon the voluntary or involuntary transfer of the only economic interest in the SMLLC, the transferee will be admitted as a substituted member, with or without the consent of the only member.¹⁸⁵

¹⁸³ *Id.*

¹⁸⁴ COLO. REV. STAT. ANN. § 7-80-703 (West 2006); FLA. STAT. ANN. § 608.433(4) (West 2007).

¹⁸⁵ Barry A. Nelson, *Olmstead: Right Result, Wrong Reason*, TAX MGMT MEM., Sept. 13, 2010, at 315, 321 (2010) (citing Carter G. Bishop, *Reverse Piercing: A Single Member LLC*

A solution to the problem could be to distinguish the exclusivity of the charging order between a single-member LLC from a multi-member LLC. Currently, only Wyoming specifically provides exclusive remedy protection to a judgment debtor who is the sole LLC member by stating that its protection includes “any judgment debtor who may be the sole member” of an LLC.¹⁸⁶ Texas is silent on the distinction between single-member and multi-member LLCs¹⁸⁷. This silence leaves the question open as to whether the courts will make a policy decision in favor of judgment creditors attempting to reach a single-member LLC in egregious cases or will strictly construe the statutory language.

As we have seen from the other equitable remedies utilized, fraudulent transfer and reverse veil piercing,¹⁸⁸ the policy arguments for allowing these remedies is much stronger with a single-member LLC than in a multi-member LLC. In balancing the policy and the purpose of the charging order, the legislature could amend the statute and distinguish these LLCs, thereby reconciling the current tension.

Paradox, 54 S.D. L. REV. 199, 231–32 (2009)).

¹⁸⁶ WYO. STAT. ANN. § 17-29-503(g) (2011).

¹⁸⁷ See TEX. BUS. ORGS. CODE ANN. § 101.112(d).

¹⁸⁸ See generally TEX. BUS. ORGS. CODE ANN. § 101.112(f); *Zahra Spiritual Trust v. United States*, 910 F.2d 240 (5th Cir. 1990); *Bramante v. McClain*, No. SA-06-CA-0010, 2007 WL 4555943, (W.D. Tex. Dec. 18, 2007) (unreported); 20 HAMILTON ET AL., *supra* note 1, § 20.20, at 175 n.21.