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ATTORNEYS

SEILLER WATERMAN LLC

derbycitylaw.com™

Meidinger Tower
22nd Floor
Louisville, KY 40202
502.584.7400

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SEILLER WATERMAN CORPORATE & BUSINESS PRACTICE LAW UPDATE

SINGLE-MEMBER LLC NOT ALWAYS A PANACEA FOR ASSET PROTECTION *By Michael Hymson*



Limited liability companies are very useful in many ways in the areas of business, taxation, and estate planning. They are also great tools for asset protection planning. However, one should pay careful attention when considering a single-member limited liability company for asset protection against creditors of the member.

In the recent Florida case, *Olmstead, et al. v. Federal Trade Commission*, 2010 WL 2518106 (June 24, 2010), the Florida Supreme Court held that a creditor could attach a debtor's entire membership interest in a single-member limited liability company organized under the Florida Limited Liability Company Act ("Florida LLC Act"). The creditor was not limited to a charging order, which gives a creditor only the right to receive distributions that would otherwise be paid to the debtor. The Court gave two reasons for its decision. First, that with respect to single-member LLCs, the member can freely assign all the member's rights associated with the member's interest in the LLC without the consent of anyone else. These rights include, among others, the right to participate in the business and affairs of the LLC. Second, the charging order remedy was not the exclusive remedy of the member's creditors. The Florida charging order provisions for general partnerships and limited partnerships expressly state that they are the exclusive remedy by which a judgment creditor of the judgment debtor may satisfy a judgment out of the judgment debtor's interest in the general partnership or limited partnership. The Florida charging order provision in the Florida LLC Act is silent on the exclusivity point.

The Kentucky Limited Liability Company Act ("Kentucky LLC Act") is similar to the Florida LLC Act in many respects. However, there are important differences. The Kentucky charging order statute provides that it is the exclusive remedy by which the judgment creditor of a member or the assignee of a member may satisfy a judgment out of the judgment debtor's limited liability company interest. KRS 275.260(1).

The LLC Acts of twenty-nine states contain exclusivity language, while the LLC Acts of twenty-two states do not contain such language. (Christopher M. Riser and T. Scott Tufts, *Are Single-Member LLCs A Ticking Time-Bomb For Asset Protection?* ABA Section of Real Property, Trust and Estate Law, Course Material for Audio Program on August 24, 2010, at pages 21 and 32.)

A judgment creditor who obtains a charging order with respect to a judgment debtor's membership in a Kentucky LLC has only the rights of an assignee and has no rights to participate in the management of the LLC or cause the dissolution of the LLC.



KRS 275.260(2). A Kentucky charging order gives the judgment creditor the right to receive, and a lien on, distributions the LLC would otherwise pay to the judgment debtor/member. KRS 275.260(3). The judgment debtor/member, the other members, or the LLC with the consent of the members other than the judgment debtor, may redeem the charged limited liability company interest, or a third party may purchase the charged limited liability company interest at a foreclosure sale and become an assignee with the same rights as the original judgment creditor. KRS 275.260(4). Thus, under the Kentucky LLC Act, as in most other LLC Acts, a judgment creditor cannot become a member of the LLC in which the judgment debtor is a member without the consent of a majority-in-interest of the members.

In the context of a single-member LLC, even with the exclusivity provision in the Kentucky LLC Act, it remains to be seen whether or not a Kentucky court would take the same position as the Florida court since there would be no other members to give consent. Until that question is resolved, it will be especially important to consider the composition of a limited liability company when it is initially organized, whether in Kentucky or in another state.

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Seiller Waterman LLC, 462 S. Fourth Street, 22nd Floor, Meidinger Tower, Louisville, Kentucky 40202; (502) 584-7400
www.DerbyCityLaw.com

Contact: info@DerbyCityLaw.com