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CS/HB 253, Engrossed 1

2011 Legislature

1 A bill to be entitled

2 An act relating to limited liability companies; amending
3 s. 608.433, F.S.; providing that a charging order against
4 a member's limited liability company interest is the sole
5 and exclusive remedy available to enforce a judgment
6 creditor's unsatisfied judgment against a member or
7 member's assignee; providing an exception for enforcing a
8 judgment creditor's unsatisfied judgment against a
9 judgment debtor or assignee of the judgment debtor of a
10 single-member limited liability company under certain
11 circumstances; providing that, in the case of a
12 multimember limited liability company, certain remedies
13 are unavailable to a judgment creditor attempting to
14 satisfy a judgment; prohibiting a court from ordering such
15 remedies; providing construction relating to secured
16 creditor rights, specified principles of law and equity,
17 and continuing enforcement jurisdiction of the court;
18 providing legislative intent; providing for retroactive
19 application; providing an effective date.

20
21 WHEREAS, on June 24, 2010, the Florida Supreme Court held
22 in *Olmstead v. Federal Trade Commission* (No. SC08-1009),
23 reported at 44 So.3d 76, 2010-1 Trade Cases P 77,079, 35 Fla. L.
24 Weekly S357, that a charging order is not the exclusive remedy
25 available to a creditor holding a judgment against the sole
26 member of a Florida single-member limited liability company
27 (LLC), and

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28 WHEREAS, a charging order represents a lien entitling a
 29 judgment creditor to receive distributions from the LLC or the
 30 partnership that otherwise would be payable to the member or
 31 partner who is the judgment debtor, and

32 WHEREAS, the dissenting members of the Court in Olmstead
 33 expressed a concern that the majority's holding is not limited
 34 to a single-member LLC and a desire that the Legislature clarify
 35 the law in this area, and

36 WHEREAS, the Legislature finds that the uncertainty of the
 37 breadth of the Court's holding in Olmstead may persuade
 38 businesses and investors located in Florida to organize LLCs
 39 under the law in other jurisdictions where a charging order is
 40 the exclusive remedy available to a judgment creditor of a
 41 member of a multimember LLC, and

42 WHEREAS, the Legislature further finds it necessary to
 43 amend s. 608.433, Florida Statutes, to remediate the potential
 44 effect of the holding in Olmstead and to clarify that the
 45 current law does not extend to a member of a multimember LLC
 46 organized under Florida law and to provide procedures for
 47 application of the holding in Olmstead to a member of a single-
 48 member LLC organized under Florida law, NOW, THEREFORE,

49
 50 Be It Enacted by the Legislature of the State of Florida:

51
 52 Section 1. Section 608.433, Florida Statutes, is amended
 53 to read:

54 608.433 Right of assignee to become member.—

55 (1) Unless otherwise provided in the articles of

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56 organization or operating agreement, an assignee of a limited
57 liability company interest may become a member only if all
58 members other than the member assigning the interest consent.

59 (2) An assignee who has become a member has, to the extent
60 assigned, the rights and powers, and is subject to the
61 restrictions and liabilities, of the assigning member under the
62 articles of organization, the operating agreement, and this
63 chapter. An assignee who becomes a member also is liable for the
64 obligations of the assignee's assignor to make and return
65 contributions as provided in s. 608.4211 and wrongful
66 distributions as provided in s. 608.428. However, the assignee
67 is not obligated for liabilities which are unknown to the
68 assignee at the time the assignee became a member and which
69 could not be ascertained from the articles of organization or
70 the operating agreement.

71 (3) If an assignee of a limited liability company interest
72 becomes a member, the assignor is not released from liability to
73 the limited liability company under s. ~~ss.~~ 608.4211, s.
74 608.4228, or s. ~~and~~ 608.426.

75 (4) (a) On application to a court of competent jurisdiction
76 by any judgment creditor of a member or a member's assignee, the
77 court may enter a charging order against the limited liability
78 company interest of the judgment debtor or assignee rights for
79 ~~charge the limited liability company membership interest of the~~
80 ~~member with payment of the unsatisfied amount of the judgment~~
81 plus with interest.

82 (b) A charging order constitutes a lien on the judgment
83 debtor's limited liability company interest or assignee rights.

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84 Under a charging order ~~To the extent so charged,~~ the judgment
 85 creditor has only the rights of an assignee of a limited
 86 liability company interest to receive any distribution or
 87 distributions to which the judgment debtor would otherwise have
 88 been entitled from the limited liability company, to the extent
 89 of the judgment, including ~~such~~ interest.

90 (c) This chapter does not deprive any member or member's
 91 assignee of the benefit of any exemption law ~~laws~~ applicable to
 92 the member's limited liability company interest or the
 93 assignee's rights to distributions from the limited liability
 94 company.

95 (5) Except as provided in subsections (6) and (7), a
 96 charging order is the sole and exclusive remedy by which a
 97 judgment creditor of a member or member's assignee may satisfy a
 98 judgment from the judgment debtor's interest in a limited
 99 liability company or rights to distributions from the limited
 100 liability company.

101 (6) In the case of a limited liability company having only
 102 one member, if a judgment creditor of a member or member's
 103 assignee establishes to the satisfaction of a court of competent
 104 jurisdiction that distributions under a charging order will not
 105 satisfy the judgment within a reasonable time, a charging order
 106 is not the sole and exclusive remedy by which the judgment
 107 creditor may satisfy the judgment against a judgment debtor who
 108 is the sole member of a limited liability company or the
 109 assignee of the sole member, and upon such showing, the court
 110 may order the sale of that interest in the limited liability
 111 company pursuant to a foreclosure sale. A judgment creditor may

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112 make a showing to the court that distributions under a charging
 113 order will not satisfy the judgment within a reasonable time at
 114 any time after the entry of the judgment and may do so at the
 115 same time that the judgment creditor applies for the entry of a
 116 charging order.

117 (7) In the case of a limited liability company having only
 118 one member, if the court orders foreclosure sale of a judgment
 119 debtor's interest in the limited liability company or of a
 120 charging order lien against the sole member of the limited
 121 liability company pursuant to subsection (6):

122 (a) The purchaser at the court-ordered foreclosure sale
 123 obtains the member's entire limited liability company interest,
 124 not merely the rights of an assignee;

125 (b) The purchaser at the sale becomes the member of the
 126 limited liability company; and

127 (c) The person whose limited liability company interest is
 128 sold pursuant to the foreclosure sale or is the subject of the
 129 foreclosed charging order ceases to be a member of the limited
 130 liability company.

131 (8) In the case of a limited liability company having more
 132 than one member, the remedy of foreclosure on a judgment
 133 debtor's interest in such limited liability company or against
 134 rights to distribution from such limited liability company is
 135 not available to a judgment creditor attempting to satisfy the
 136 judgment and may not be ordered by a court.

137 (9) Nothing in this section shall limit:

138 (a) The rights of a creditor that has been granted a
 139 consensual security interest in a limited liability company

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140 interest to pursue the remedies available to such secured
 141 creditor under other law applicable to secured creditors;
 142 (b) The principles of law and equity which affect
 143 fraudulent transfers;
 144 (c) The availability of the equitable principles of alter
 145 ego, equitable lien, or constructive trust, or other equitable
 146 principles not inconsistent with this section; or
 147 (d) The continuing jurisdiction of the court to enforce
 148 its charging order in a manner consistent with this section.
 149 Section 2. The amendment to s. 608.433, Florida Statutes,
 150 made by this act is intended by the Legislature to be clarifying
 151 and remedial in nature and shall apply retroactively.
 152 Section 3. This act shall take effect upon becoming a law.