

From the desk of Jeanne M. Kerkstra, Esq., CPA

Viewpoint

Cloudy Days in the Sunshine State

A disturbing trend has evolved concerning single member limited liability companies (LLC's).

In 2003, there was a Colorado bankruptcy case, *In Re Albright*, 291 B.R. 538 (D.Colo. 2003), in which the Court held that a creditor could attach a debtor's single member LLC even though the LLC was not in bankruptcy and there had been no allegations of comingling of assets such that you would think that there was legitimate cause of action for piercing the corporate veil. In that case, the judge held that the bankruptcy proceedings were there to protect the non-judgment creditors. Had there been a second member who held even an "infinitesimal interest", then protection would have been afforded to the entire LLC. However, because it was a single member LLC, the judge allowed the creditor to not only step into the shoes of the debtor but into the LLC as well. The LLC had contained a significant asset, of course.

Flash forward seven years and now we have the Florida Supreme Court case of *Shaun Olmstead, et al. v. The Federal Trade Commission*, Supreme Court of Florida Case No. SC08-1009, (June 24, 2010). This case is even more disturbing than *In Re Albright*, hi *Shaun Olmstead, et ah*, not only did the Florida Supreme Court allow a creditor to take over the assets of a single member LLC, but it also cast doubt as to whether a multi-member LLC would have any creditor protection.

Up until now, the belief was that a creditor would simply be able to obtain what is known as a charging order. This would get the creditor a Schedule K-1 which would allocate to the creditor all the tax attributes but would not allow the creditor to force a distribution. The Florida Supreme Court has created an upheaval here. I don't think any of my clients are going to want to wait to see how this is decided on appeal.

My recommendation would be to merge any Florida single member LLC's or Florida multi-member LLC's into LLC's situated in States that offer greater protection, such as Delaware. Further, I would minimize the Floridian connections - making sure the LLC contains some non-Floridian assets as well as have management and ownership divided up between a mix of Floridians and non-Floridians.

Certainly, Florida derives significant revenue from filing fees for business entities. It will not be surprising to see an exodus of business entities out of Florida due to this ruling.

In these uncertain times, it is now more important than ever to have the right trusted advisors in your corner. Give me a call today so that we can take all the necessary steps to protect your business interests and personal livelihood.

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