

2010

To Be Or Not to Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC

Thomas E Geu, *University of South Dakota School of Law*

John W DeBruyn

Thomas E Rutledge

To Be or Not to Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC

Thomas Earl Geu,
Thomas E. Rutledge and
John W. DeBruyn*

*'When I use a word,' Humpty Dumpty said in rather a scornful
tone, 'it means just what I choose it to mean –
neither more nor less.'
'The question is,' said Alice, 'whether you can make words
mean so many different things.'
'The question is,' said Humpty Dumpty, 'which is
to be master – that's all.'*

—Lewis Carroll,
*Through the Looking Glass*¹

INTRODUCTION

The charging order, long a feature of the law of partnerships and other unincorporated entities, has, in the context of the single-member LLC, generated significant controversy.² Recently, the Florida

* Geu is professor of law at the South Dakota School of Law in Vermillion, South Dakota. Rutledge is a member of Stoll Keenon Ogden PLLC resident in its Louisville, Kentucky office. DeBruyn is principal of DeBruyn Law Office in Denver, Colorado, where he practices with his son. All three authors are frequent commentators on the law of unincorporated business organizations. They thank T. Leigh Anenson, Associate Professor University of Maryland Robert H. Smith School of Business and of counsel, Reminger Co., L.P.A., for her orientation and assistance concerning the topic of equity, and Norma A. Lockhart for her patience in typing the manuscript and deciphering the authors' various questionable handwritten notes. Of course, any errors are those of the authors alone.

1. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 132 (Thomas Y. Crowell & Co. 1893) (1871).

2. The charging order is the remedy of a judgment-creditor against the interest in an unincorporated entity (e.g., membership) owned by its debtor. See *infra* notes 9-37 and accompanying text. In the context of the single member LLC it has generated significant controversy. For example, upon the bankruptcy of the sole member of an LLC, does the right to manage the LLC transfer to the bankruptcy estate? In *In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003) and *In re Ehmann*, 334 B.R. 437 (Bankr. D. Ariz. 2005), *withdrawn* 337 B.R. 228 (Bankr. D. Ariz. 2006), the courts answered "yes." See generally Thomas E. Rutledge & Thomas E. Geu, *The Albright Decision – Why a SMLLC is Not an Appropriate Asset Protection Vehicle*, 5 BUS. ENTITIES, Sept.-Oct. 2003, at 16; Thomas E. Rutledge & Thomas E. Geu, *Guess Who's Coming to Dinner?: The Bankruptcy Trustee's Ability to Become a Member and the Ehmann Decision*, 7 BUS. ENTITIES No. 2, Mar.-Apr. 2005, at 32; Thomas E. Rutledge & Thomas E. Geu, *In re Ehmann II – Now You See It, Now You Don't*, 8 BUS. ENTITIES No. 3, May-June 2006, at 44.

Supreme Court waded into this quagmire in deciding *Olmstead v. Federal Trade Commission*.³ Sadly, rather than mapping the issues to help future travelers, *Olmstead* charted a unique and difficult course for others to follow.

This article first analyzes the *Olmstead* facts and describes the charging order remedy in the context of the single-member LLC. As a matter of policy it suggests that there exist reasons beyond *in personam delectus* for applying charging order provisions *in toto* to single-member LLCs. It then critically examines the Court's method of statutory construction against the backdrop of real constitutional separation of power issues. Finally, the article discusses the role of equity in the contexts of separation of power and charging order statutes. It suggests an equitable alternative to reach the same right result in *Olmstead*. The article concludes with the warning that even the potentially best legislative "fixes" to *Olmstead* are probably doomed to be either over-inclusive or under-inclusive.

THE *OLMSTEAD* FACTS

The defendants, Shaun Olmstead and others, operated an "advance-fee credit card scam."⁴ In order to fund restitution obligations that exceeded \$10 million, the defendants' assets were placed in receivership; those assets included membership interests in several single-member limited liability companies ("SMLLCs") organized under Florida law. Further, the trial court directed the defendants to endorse and surrender to the receiver all "right, title and interest" in each SMLLC.⁵ The defendants asserted the order went too far because the only remedy against their SMLLC interests was under the Florida LLC Act's charging order provision.⁶ The Eleventh Circuit Court of Appeals certified the following question to the Florida Supreme Court:

Whether, pursuant to [the charging order provision of the Florida LLC Act], a court may order a judgment-debtor to surrender all "right, title and interest" in the debtor's . . . [SMLLC] to satisfy an outstanding judgment.⁷

In the course of its opinion the Florida Supreme Court rephrased – and expanded – the question as follows:

3. 44 So. 3d 76 (Fla. 2010).

4. *FTC v. Olmstead*, 528 F.3d 1310, 1311-12 (11th Cir. 2008).

5. *Olmstead*, 44 So. 3d at 77.

6. FLA. STAT. ANN. § 608.433(4) (West 2010).

7. *Olmstead*, 528 F.3d at 1314.

Whether Florida law permits a court to order a judgment debtor to surrender all right, title and interest in the debtor's . . . [SMLLC] to satisfy an outstanding judgment.⁸

In turn, the Court answered *Yes* to the rephrased question. The narrowest interpretation of the holding was that the absence of the word “exclusive” in the LLC Act’s charging order provision means that other collection remedies may be asserted against the member’s interests in the SMLLC. More troubling, however, was that the Court, in justification of its narrow holding, engaged in a (flawed) normative analysis about the place of the charging order in the context of a Florida LLC.

THE CHARGING ORDER GENERALLY

The charging order exists to balance two valid and competing interests: (1) those of the judgment-creditor to collect on a judgment against an owner; and (2) the interest of the venture to use its assets to its operations and obligations without interference from an owner’s creditor.⁹ Corporate law contemplates the transfer of voting rights with its underlying ownership shares. Even pure voting rights can be transferred in corporations through a rather detailed statutory proxy mechanism. In unincorporated law, however, the interests of an owner are divided into a “transferable interest,” encompassing the economic rights of ownership, and management rights.¹⁰ Under the statutory default rules the transferable interest is freely transferable to a third-party,¹¹ fully vesting in the transferee the right to receive all

8. *Olmstead*, 44 So. 3d at 77.

9. A significant failure of the *Olmstead* court was its assumption that the charging order exists to support the rule of *in delectus personae* (pick your partner) otherwise embodied in partnership and LLC law. In fact, the basis of the charging order is asset segregation, the rule that company assets will be applied to the satisfaction of venture obligations rather than the personal obligations of the owner. See *infra* notes 57-66 and accompanying text (“The Unfortunate Normative Discussion of the Charging Order Generally”). Thomas E. Rutledge, *I May Be Lost But I’m Making Great Time: The Failure of Olmstead to Correctly Recognize the Sine Qua Non of the Charging Order*, 13 J. PASSTHROUGH ENTITIES, NOV.-DEC. 2010, at 49.

10. Collectively a partner’s “interest in the partnership,” or “partnership interest.” UNIF. P’SHIP ACT 1997 § 101(9), 6(I) U.L.A. 61 (2001). See also UNIF. LTD. P’SHIP ACT § 701, 6A U.L.A. 461 (2008). In the context of the LLC the formulae vary, with some statutes defining a “transferable interest” (see, e.g., REVISED UNIF. LTD. LIAB. CO. ACT § 102(21), 6B U.L.A. 430 (2008); DEL. CODE. ANN. tit. 6, § 18-101(8) (2010); see also IND. CODE § 23-18-1-10 (2010) (defining the term “interest” as the right to receive distributions from the LLC with no term defining the management participatory rights). Other states define a “limited liability company interest” encompassing economic and management rights (see, e.g., KY. REV. STAT. ANN. § 275.015(12) (West 2010)) with distinctions then drawn as to the transferability (or not) of the two components. See, e.g., KY. REV. STAT. ANN. § 275.255 (West 2010).

11. UNIF. P’SHIP ACT 1914 § 27, 6(II) U.L.A. 332 (2001); UNIF. P’SHIP ACT 1997 § 503(a)(1), 6(I) U.L.A. 156 (2001); UNIF. LTD. P’SHIP § 702(a)(1), 6A U.L.A. 461 (2008); UNIF. LTD. LIAB.

distributions (periodic and liquidation) that would have otherwise been received by the transferor.¹² The management rights, however, are not unilaterally transferable.¹³ Even a transferee of those management rights may not exercise them¹⁴ absent the consent of some portion of the incumbent members.¹⁵

Starting from the proposition that the rights of the creditor in the debtor's property can be no greater than the rights enjoyed by the

Co. § 502(a)(1), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 15-503(a)(1) (2010); KY. REV. STAT. ANN. § 275.255(1)(a) (2010), § 362.1-503(1)(a), § 362.2-702(1)(a); and IND. CODE § 23-18-6-3.1(b)(1) (West 2010).

12. UNIF. P'SHIP ACT 1914 § 27(1), 6(II) U.L.A.332 (2001); UNIF. P'SHIP ACT 1997 § 503(b)(1), 6(I) U.L.A. 157 (2001); UNIF. LTD. P'SHIP ACT § 702(b), 6A U.L.A. 462 (2008); REVISED UNIF. LTD. LIAB. CO. ACT § 502(b), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 15-503(a)(1) (2010); KY. REV. STAT. ANN. § 275.255(1)(b) (2010), § 362.1-503(2)(a), (b), § 362.2-702(2); and IND. CODE § 23-18-6-3.1(b)(2) (West 2010).

13. Conversely, in corporate law, absent private ordering to the contrary, shares are freely transferable, and the transferee may exercise all rights of the transferor, including the right to vote. The exception to this statement is Nevada, which as to "closely held" corporations utilizes a charging order. See NEV. REV. STAT. § 78.746 (2010); see also Thomas E. Rutledge, *Nevada's Corporate Charging Order: Less There Than Meets the Eye*, 11 J. PASSTHROUGH ENTITIES, Mar.-Apr. 2008, at 21; Thomas E. Rutledge, *The Nevada Restricted LLC/LP: Damned If You Do and Damned If You Do*, 12 J. PASSTHROUGH ENTITIES, Mar.-Apr. 2010, at 48.

14. UNIF. P'SHIP ACT 1914 § 27(1), 6(II) U.L.A. 332 (2001); UNIF. P'SHIP ACT 1997 § 503(a)(3), 6(I) U.L.A. 156-57 (2001); UNIF. LTD. P'SHIP ACT § 702(a)(3), 6A U.L.A. 462 (2008); REVISED UNIF. LTD. LIAB. CO. ACT § 502(3), 6B U.L.A. 496 (2008); DEL. CODE ANN. tit. 6, § 15-503(a)(3) (2010); KY. REV. STAT. ANN. § 275.255(1)(c) (2010), § 362.1-501(1)(c), § 362.2-702(1)(c); and IND. CODE § 23-18-6-3.1(b)(3) (West 2010).

15. See, e.g., UNIF. P'SHIP ACT 1914 § 18(g), 6(II) U.L.A. 101 (2001) (stating transferee to be admitted as a partner only upon the approval of all incumbent partners); UNIF. P'SHIP ACT 1997 § 401(i), 6(I) U.L.A. 133 (2001) (same); UNIF. LTD. LIAB. CO. ACT § 404(c)(7), 60 U.L.A. 591 (2008) (stating transferee to be admitted as a member only upon the approval of all of the incumbent members); REVISED UNIF. LTD. LIAB. CO. ACT § 401(d)(3), 6B U.L.A. 478 (2008) (stating transferee to be admitted as a member only upon the approval of all of the incumbent members); UNIF. LTD. P'SHIP ACT § 301(3), 6A U.L.A. 416 (2008), § 401(4), 6A U.L.A. 428 (stating transferee to be admitted as a partner only upon the approval of all of the incumbent partners); DEL. CODE ANN. tit. 6, § 18-704(a)(1) (2010) (stating transferee to be admitted as a member only upon the approval of all of the incumbent members), § 18-702(b)(3) (stating transferee to be admitted as a member only upon the approval of all of the incumbent members), § 15-401(i) (stating transferee to be admitted as a partner only upon the approval of all of the incumbent partners); S.D. CODIFIED LAWS § 48-7A-401(i) (2010) (stating transferee may become partner only with the consent of all partners), § 47-34A-503 (stating transferee admitted as member only upon consent of all incumbent members); KY. REV. STAT. ANN. § 275.265(1) (2010) (stating transferee to be admitted as a member upon the approval of majority-in-interest of the incumbent members), § 362.1-401(9) (stating transferee to be admitted as a partner only upon the approval of all of the incumbent partners), § 362.2-301(3) (stating transferee to be admitted as a limited partner only upon the approval of all of the incumbent partners); and IND. CODE § 23-18-6-4.1(b) (West 2010) (stating transferee admitted as a member only upon the approval of all other members). See generally Thomas E. Rutledge, *Assigning Membership Interests: Consequences to the Assignor and Assignee*, 12 J. PASSTHROUGH ENTITIES, July-Aug. 2009, at 35, 35 (2009).

debtor,¹⁶ it follows that the creditor of a member or partner may look only to the transferable economic rights in the venture as an asset available to satisfy a debt.¹⁷ A judgment-creditor gains access to the distributions made with respect to the judgment-debtor's transferable interest by means of a charging order. The holder of the charging order has a lien on the distributions when made by the partnership or LLC to the judgment-debtor,¹⁸ but does not enjoy any right to participate in the venture's management.¹⁹ This limitation on participation in management precludes the judgment-creditor from forcing an interim or liquidating distribution from the partnership or LLC.²⁰ From the other side of the equation, the judgment-debtor remains an owner, and her management rights are not diminished.²¹ The charging order does not transfer the partner or member's transferable interest to the judgment-creditor,²² and the right to participate in management stays

16. See UNIF. P'SHIP ACT 1914 § 25, 6(II) U.L.A. 294 (2001), cmt. to subdivision (2-c) ("The beneficial rights of the separate creditors of a partner in partnership property should be no greater than the beneficial rights of their debtor."); see also James R. Richardson, *Creditors' Rights and the Partnership*, 40 Ky. L.J. 243, 245 (1952) ("A stream can rise no higher than its source; a creditor can acquire no greater interest than his debtor.").

17. See also 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 7:8 (2d ed. 2010) ("Just as LLC members cannot individually assign the firm's specific property, it follows that they cannot make it individually available to their creditors in connection with individual debts.") [hereinafter RIBSTEIN & KEATINGE ON LLCs]. The same statement is made in the official comment to section 705 of the Prototype LLC Act. See PROTOTYPE LIMITED LIABILITY COMPANY ACT, § 705, Commentary.

18. UNIF. P'SHIP ACT 1997 § 504(b), 6(I) U.L.A. 160 (2001); UNIF. LTD. P'SHIP ACT § 703(b), 6A U.L.A. 463 (2008); REVISED UNIF. LTD. LIAB. CO. ACT § 503(a), 6B U.L.A. 498 (2008); KY. REV. STAT. ANN. § 275.260(3) (2010), § 362.1-504(3), § 362.2-703(3); UNIF. STATUTORY TRUST ENTITY ACT § 606(c), 6B U.L.A. (2010 Supp.) 84; UNIF. LTD. COOP. ASS'N ACT § 605(a), 6A U.L.A. 233 (2008). In contrast, certain statutes do not expressly describe those rights as being a lien. See, e.g., IND. CODE. § 23-18-6-7 (West 2010).

19. See, e.g., KY. REV. STAT. ANN. § 275.260(2) (West 2010) ("To the extent so charged, the judgment creditor has only the rights of an assignee and shall have no right to participate in the management or to cause the dissolution of the [LLC].").

20. Asset partitioning is maintained. See, e.g., UNIF. P'SHIP ACT 1914 § 25(2)(a), 6(II) U.L.A. 294 (2001) (partner may utilize partnership property only for partnership purposes), § 25(c) (partnership property not subject to attachment to satisfy partner's personal debt).

21. See HILLMAN, VESTAL & WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT (2010-11), REVISED UNIF. P'SHIP ACT § 503, Authors' Comment 8; J. WILLIAM CALLISON & MAUREEN SULLIVAN, PARTNERSHIP LAW AND PRACTICE (2010) § 7:20. By way of analogy, a mortgage does not transfer to the lender title to the collateral under the lien theory of mortgages in property law and under most "sale of asset" provisions in entity law statutes.

22. UNIF. P'SHIP ACT 1997 § 504(b), 6(I) U.L.A. 160 (2001); UNIF. LTD. P'SHIP ACT § 703, 6A U.L.A. 463 (2008). Certain state formulas are quite express on the point. See, e.g., KY. REV. STAT. ANN. § 275.260(3) (West 2010) ("A charging order does not of itself constitute an assignment of the [LLC] interest."), § 362.1-504(4), and § 362.2-703(3). See also Thomas E. Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 Ky. L.J. 229, 252-53 (2008-09).

with the member.²³ When the underlying judgment is satisfied, the charging order is released and the owner again receives distributions.

Upon foreclosure the owner is either expelled or is subject to being expelled from the venture.²⁴ The purchaser at the foreclosure sale has the rights of a transferee of a transferable interest. To repeat for emphasis, transferable rights are passive in nature; all that is sold or purchased at the sale are the passive economic rights that the judgment-debtor could otherwise unilaterally convey. The purchaser is a transferee/assignee and has the right to receive whatever distributions the transferor/assignor would receive but for the transfer or assignment.²⁵

23. UNIF. P'SHIP ACT 1997 § 502, 6(I) U.L.A. 156 (2001) ("The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property."). *See also* UNIF. LTD. P'SHIP ACT § 701, 6A U.L.A. 461 (2008) ("The only interest of a partner which is transferable is the partner's transferable interest. A transferable interest is personal property."); REVISED UNIF. LTD. LIAB. CO. ACT § 102(21), 6B U.L.A. 430 (2008) (defining a "transferable interest" as "the right, as originally associated with a person's capacity as a member, to receive distributions from [an LLC] in accordance with the operating agreement, whether or not the person remains a member or continues to own any part of the right."). *See also* UNIF. P'SHIP ACT 1997 § 101(9), 6(I) U.P.A. 61 (2001) ("Partnership interests' or 'Partner's interest in the partnership' means all of the partner's interests in the partnership, including the partner's transferable interest and all management and other rights."); DEL CODE ANN. tit. 6, § 15-101(15) (2010) (substituting "economic interest" for "transferable interest"), § 18-101(8) (defining a "liability company interest" as "[a] member's share of the profits and losses of [an LLC] and a member's right to receive distributions of the [LLC]'s assets."). *See also* GA. CODE ANN. § 14-11-101(13) (West 2010) (defining a "limited liability company interest" as referring to only the economic interest in the company); VA. CODE ANN. § 13.1-1002 (West 2010) (defining a "membership interest" as referring to only the economic interest in the company); IND. CODE. § 23-18-1-10 (2010) (defining an "interest" in terms of the economic rights of a member).

24. *Compare* UNIF. P'SHIP ACT 1997 § 601(4)(ii), 6(I) U.L.A. 163 (2001); UNIF. LTD. P'SHIP ACT § 601(b)(4)(B), 6A U.L.A. 450 (2008) (stating upon transfer of all economic interests in the venture the partner is automatically expelled from status as a partner), *with* KY. REV. STAT. ANN. § 275.280(1)(c)2 (West 2010) (stating upon the transfer of all of a member's economic rights in a venture, the member may be expelled by a vote of a majority-in-interests of the other members). *See also* KY. REV. STAT. ANN. § 275.255(1)(d) (West 2010).

25. *See, e.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 502(b), 6B U.L.A. 496 (2008) ("A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled."); UNIF. LTD. P'SHIP ACT § 702(b), 6A U.L.A. 462 (2008) ("A transferee has a right to receive, in accordance with the transfer: (1) Distributions to which the transferor would otherwise be entitled; and (2) Upon the dissolution and winding up of the limited partnership's activities, the net amount otherwise distributable to the transferor."); KY. REV. STAT. ANN. § 275.255(1)(b) (West 2010) ("An assignment shall entitle the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled."); and DEL. CODE ANN. tit. 6, § 18-702(b)(2) (2010) ("An assignment of [an LLC] interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction or credit or similar item to which the assignor was entitled, to the extent assigned."). UNIF. P'SHIP ACT 1997 § 503(b), 6(I) U.P.A. 157 (2001), provides:

A transferee of a partner's transferable interest in the partnership has a right:

(1) To receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

The rights of a transferee are very limited when compared to those of a member. Unlike members, who typically hold management rights, an assignee or transferee under most statutes do not have inspection rights or other related information rights,²⁶ nor a right to participate in management²⁷ even with respect to modification of the underlying operating agreement when the modifications have a negative effect on the assignee.²⁸ Finally, the assignee or transferee is typically owed neither fiduciary obligations nor obligations of good faith or fair dealing.²⁹

THE CHARGING ORDER FORMULAE

The various state statutes use different formulae for the charging order,³⁰ typically including:

-
- (2) To receive upon the dissolution and winding up of a partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor; and
 - (3) To seek under Section 801(6) a judicial determination that it is equitable to wind up the partnership business.

In certain instances, an assignee/transferee has limited rights to move for judicial dissolution and receive an accounting at, or after, the dissolution of the business organization. *See, e.g.*, UNIF. P'SHIP ACT 1997 §§ 503(b)(3), 801(6), 6(I) U.L.A. 156, 189 (2001).

26. *See, e.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 410(g), 6B U.L.A. 494 (2008).

27. *See, e.g.*, REVISED UNIF. LTD. LIAB. CO. ACT § 502(a)(3), 6B U.L.A. 496 (2008) (stating the assignee of an LLC interest is not entitled to "participate in the management or conduct of the activities of the [LLC] or to have access to its records and other information."); KY. REV. STAT. ANN. § 275.255(1)(c) (West 2010) (providing in part "An assignment of [an LLC] interest shall not . . . entitle the assignee to participate in the management and affairs of the [LLC] or to become or exercise any rights of a member other than the right to receive distributions pursuant to subsection (1)(b) of this section."); UNIF. P'SHIP ACT 1997 § 503(a)(3), 6(I) U.L.A. 156 (2001) (stating a transferee, during the "continuance of the partnership," is not entitled to "participate in the management or conduct of the partnership business, to acquire access to information concerning partnership transactions, or to inspect or copy the partnership books or records.").

28. *See, e.g.*, *Bauer v. The Blomfield Co.*, 849 P.2d 1365 (Alaska 1993) (stating assignee of partnership interest not owed obligations of good faith and fair dealing); *Bayside Petroleum, Inc. v. Whitmar Exploration Co.*, 1997 WL 34690262 (D. Okla. 1997) (stating "no fiduciary duty" is owed the assignee of a partner); *Haynes v. B&B Realty Group, LLC*, 633 S.E.2d 691 (N.C. 2006) (stating no fiduciary duties owed to transferee of LLC interest); *Landskroner v. Landskroner*, 797 N.E.2d 1002, 1014 (Ohio Ct. App. 2003) (stating fiduciary duties are not owed to former member of LLC).

29. *See* Thomas E. Rutledge, Carter G. Bishop & Thomas Earl Geu, *No Cause for Alarm: Foreclosure and Dissolution Rights of a Member's Creditor*, 21 PROBATE & PROPERTY, May-June 2007, at 35, 40.

30. *See infra* Exhibit 1 for a side-by-side comparison of the charging order provisions of UPA, RULPA, RUPA, ULPA, ULLCA, RULLCA and USTA. Professor Carter Bishop has published 'and from time to time updates' a state-by-state comparison of the charging order provisions of the various LLC Acts. *See* Carter G. Bishop, *Fifty State Series: LLC Charging Order Statutes* (Suffolk Univ. Law Sch. Legal Studies Research Paper Series, Paper No. 10-03), available at <http://ssrn.com/abstract=1542244>.

- an express statutory statement identifying the rights of the order's holder vis-à-vis the partnership/LLC;³¹
- the exclusivity of the charging-order remedy for the judgment-creditor of the judgment-debtor partner/member;³²
- the availability of foreclosure to the holder of a charging order against the underlying transferable interest;³³
- the standard for foreclosure;³⁴ and
- the rights of the purchaser at the foreclosure sale.³⁵

The existence of different statutory provisions across state borders creates choice of law (and related) questions.³⁶

31. Compare REVISED UNIF. LTD. P'SHIP ACT § 703, 6A U.L.A. 463 (2008) (stating holder of charging order has rights of assignee), with REVISED UNIF. LTD. LIAB. CO. ACT § 504, 6B U.L.A. 605 (2008) (silent as to holder's rights).

32. Compare UNIF. P'SHIP ACT 1914 § 28, 6(II) U.L.A. 341 (2001) (making no statement as to exclusivity), with UNIF. P'SHIP ACT 1997 § 504(e), 6(I) U.L.A. 160 (2001) (stating charging order is exclusive remedy).

33. Compare REVISED UNIF. LTD. LIAB. CO. ACT § 503(c), 6B U.L.A. 498 (2008) (providing for foreclosure), with UNIF. STATUTORY TRUST ENTITY ACT § 606, 6B U.L.A. 84 (Supp. 2010) (silent as to foreclosure) and IND. CODE § 23-18-6-7 (West 2010) (silent as to foreclosure).

34. Compare UNIF. P'SHIP ACT 1914 § 28, 6(II) U.L.A. 341 (2001) (silent as to a standard for while permitting foreclosure), with REVISED UNIF. LTD. LIAB. CO. ACT § 503(c), 6B U.L.A. 498 (2008) (setting standard for foreclosure).

35. See, e.g., REVISED UNIF. LTD. LIAB. CO. ACT § 503(c), 6B U.L.A. 498 (2008); KY. REV. STAT. ANN. § 275.260(4) (2010), § 362.1-504(4).

36. This raises issues concerning the scope of the "internal affairs" doctrine and conflict of laws or "choice of law" issues. That is: (1) Is the charging order provision a matter of internal affairs such that the law of the state of formation controls its application? and/or (2) How will a court of a forum state, e.g., one in which a tort was committed, frame the conflict of laws or "choice of law" issue? See also Carter G. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, 12 J. BUS. ENTITIES, May-June 2010, at 14.

The first issue is simply whether charging orders so affect the rights of third parties as to be excluded from the internal affairs doctrine. Note this issue even arises when there is a statutory choice of law provision because it addresses the scope of internal affairs, not choice of law (directly). Background for both issues is given by the Restatement (Second) on Conflict of Laws provides:

[W]hen there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

In corporate law, most, but not all, courts apply the law of the state of formation for purposes of piercing the corporate veil of limited liability. See J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, *LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE* § 11.3 (2010); Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 206 (2006); cf. Matt Stevens, Note, *Internal Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047 (2007). The case for applying the law of formation for the liability of members via *piercing*, of course, presents slightly different policy issues than does the charging order. It would seem, however, that the status of the ultimate

As discussed in the next part of this article, the absence of exclusivity language in the Florida LLC Act's charging order provision was the door for the *Olmstead* decision.³⁷

THE ANALYTIC QUAGMIRE OF THE CHARGING ORDER IN THE CONTEXT OF A SMLLC

The charging order arose in the context of the general partnership and partnerships require at least two partners.³⁸ It developed as a means of protecting both the partnership as an entity and the individual partner(s) whose interests were not charged from interference by a partner's personal judgment-creditor. A second order implication of the charging order (as well as the restriction upon foreclosure of a purchaser to the rights of an assignee) is that it protects the *in delectus*

recipient of the interest *would* be an internal affair. Therefore, for example, the purchaser at a foreclosure sale of an interest has the status of a transferee and not a member. See *supra* note 23. Professor Ribstein recently wrote that the internal affairs doctrine was a corporate doctrine that did not originally extend to unincorporated entities and further that its extension to unincorporated entities was a key reason for the "vigorous competition" among states in unincorporated entity innovation and law. Larry E. Ribstein, *The Uncorporation's Domain*, 55 VILL. L. REV. 125, 132 (2010) (stating it is a choice of law rule).

There are other related issues, for example jurisdiction. The case of *Koh v. Inno Holdings Ltd.*, 54 P.3d 1270 (2002), is a jurisdictional case concerning collection from a judgment debtor that was a member of an LLC. In that case, the LLC was formed under the Washington LLC Act. The judgment-debtor was a Singapore public corporation. The creditor held a judgment issued by a California court and filed a charging order in Washington because the LLC had a presence and property there. The Washington court held that the charging order was valid against the LLC even though it had no personal jurisdiction over the judgment-debtor whose membership interest was personal property.

Finally, a simple illustration of the concepts mentioned in this note as applying to fraudulent conveyance laws to domestic trusts follows:

An argument that the full faith and credit clause does not affect the ability of domestic asset protections trusts to protect assets contends that the trustee is not the same person as the settlor, and that therefore a judgment obtained against the settlor would not be enforceable against the trustee. However, if a judgment were obtained against a settlor in Florida who had created an Alaska trust and the claimant was unable to collect that judgment, he or she would bring a post-judgment fraudulent transfer action and join the trustee in Alaska as a transferee (as any transferee would be joined over whom jurisdiction could be obtained). Once that joinder is accomplished, the Florida court would have jurisdiction over that trustee, and an order issued by the Florida court determining that the transfer into the trust was a fraudulent transfer, would, as a result of the full faith and credit clause, be enforceable in Alaska.

Portfolio 810-2nd: Asset Protection Planning, BNA ESTATES, GIFTS AND TRUSTS PORTFOLIOS: ESTATE PLANNING/BUSINESS PLANNING § VI (2010).

37. One of us (Rutledge) has criticized the absence of exclusivity language in the charging order provision of the Uniform Statutory Trust Entity Act. See Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, n.244 and accompanying text (2010).

38. See UNIF. P'SHIP ACT 1914 § 6(1), 6(II) U.L.A. 393 (2001); see also UNIF. P'SHIP ACT 1997 § 101(6), 6(1) U.P.A. 61 (2001).

personae rule embodied in the law of unincorporated business organizations.³⁹ However, that is not its primary focus. Rather, the charging order serves to protect the asset partitioning effect of holding assets in, and doing business through, a business venture. Even as both common law and the Uniform Partnership Act significantly embodied the

39. See *supra* note 15 and accompanying text; see also Rutledge, *supra* note 9. Partnership law, of course, existed before the express adoption of charging orders. An 1889 partnership treatise, however, identifies the elemental attributes of partners (as opposed to *partnership* attributes) as turning on title and the relationship of the partnership to its property. See JAMES PARSONS, AN EXPOSITION OF THE PRINCIPLES OF PARTNERSHIP § 53, p. 131, § 55, p. 138, § 110, p. 366 (1889). Those attributes are consistent with both the emergence and operation of the charging order.

Piecing together those attributes in the treatise results in the following description of the rights of one holding a charging order. It starts with the *entity-aggregate* distinction and may be reflecting the opinion of the treatise author given his protestations, the treatise states: "It is not necessary to declare land to be personalty in order to subject it to firm business. All that is necessary is to apply to land the principles which govern the partnership relation." *Id.* at § 110, p. 366 (There is a distinction in results between a partner holding legal title in partnership real estate in his own name who conveys legal title to his individual creditor and a partner who conveys personalty (his interest in the partnership as an entity) to his individual creditor: the first takes against the partnership, the second does not. *Id.* at 369). Importantly the land is *converted in equity* (or subject to the *doctrine of equitable lien*, see *id.* at 360): "The legal holder is merely converted into a trustee for the partnership." *Id.* at 367. Finally, no partner can withdraw his share from the firm or prevent the firm's use of the land until settlement." PARSONS, § 110, p. 367 (footnote omitted).

The treatise defines profits in relationship to the rights of partnership creditors (firm creditors) as follows: (1) "Profits result from the use of the contribution."; (2) "[P]rofits have no independent status, but are merged in the contribution."; (3) "The word 'profits' is a relative term, and has a meaning only for the partners themselves."; (4) "The creditor may demand all property, or assets, of his *debtor-firm*, because they are devoted to the payment of his claim."; (5) "The co-called [sic] right [of a partner] to share the profits during the partnership is not a right at all, but a threat. It takes effect as a condition . . . to sever the relation altogether . . ."; and, here is where it gets interesting; (6) "Should the partners divide the joint fund among themselves, and convert the joint into several titles, the withdrawal would be a fraud upon the creditor [b]ut the . . . [partners] would not be charged because they took it . . . as profits [rather, because that they withdrew it before the creditor was repaid his loan]." *Id.* at 132, 138-140.

Thus, the treatise is of the view that the partners have either an equitable lien or equitable title in "partnership" real estate; and, there is no transferable "profits" interest because any positive cash flow increases the original contributions of the partners but, by definition, is not *profit* until all the partnership creditors are paid in final settlement after dissolution. Any interim distribution, therefore, could be a fraudulent conveyance subject to clawback under that equitable doctrine as long as firm creditors exist.

If the summary is correct, the law circa 1889 did not anticipate regular interim distributions and, arguably, assumed the accounting period for determining profit was the life of the partnership. As a result, distributions or withdrawals to or by partners were subject to fraudulent conveyance law. Of course, this is logical and complete under general partnership law, because the partners have unlimited liability for partnership debts and obligations. That is, the partners would be liable to the partnership creditors for distributions if the partnership was not able to pay them. As a general matter, therefore, there would be no need for resort to fraudulent conveyance law. Though not explicit in the treatise, it seems that any of the withdrawal paid to a partner's individual creditor would be subject to a constructive trust or an equitable lien for the benefit of the partnership creditor to the extent it could be traced.

“aggregate” (as contrasted with the “entity”) notion of the partnership,⁴⁰ they provided for asset partitioning. Even as the partnership’s property was co-owned by the partners as a “tenancy in partnership,” partners could not use partnership property for anything other than partnership purposes and were expressly precluded from using it for personal purposes.⁴¹ A partner using partnership property for personal gain would be in violation of their duty of loyalty.⁴² Under the common law, prior to the development of the charging order:

When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a *fi. fa.*, and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in Chancery in order to get an injunction to take an account and pay over that which was due by the executor debtor. A more clumsy method of proceeding could hardly have grown up.⁴³

The reasons for this state of affairs were two-fold.⁴⁴ First, lawyers and courts had “difficulty . . . in understanding the nature of a part-

40. The question of aggregate versus entity treatment of partnership under UPA was explored in a series of articles, which included William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915); Judson A. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762 (1915); William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane’s Criticism, Part I & Part II*, 29 HARV. L. REV. 158, 291 (1915-1916); Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916); Samuel Williston, *The Uniform Partnership Act, with Some Remarks on Other Commercial Laws*, 63 U. PA. L. REV. 196 (1914); Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 MICH. L. REV. 609 (1917). See also EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 293-301 (Baker Voorhis 1929) (discussing various utilizations of entity and aggregate concepts in UPA, concluding that “Drafting the Uniform Partnership Act afforded a wonderful opportunity to give a clear and ambiguous answer to that question. We think that no such answer is given by the Act, and that is a matter of profound regret.”) For more recent reviews of the issue, see Gary S. Rosin, *Functionalism in Partnership Law*, 42 ARK. L. REV. 395 (1989), and A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963).

41. UNIF. P’SHP ACT 1914 § 25, 6(II) U.L.A. 294 (2001). See also ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 3.04(b)(1) (2010) (UPA § 25(2) defined tenancy in partnership “so as to negate all of the incidents of individual ownership Functionally, therefore, property is owned by the partnership.”). Modern partnership law has abandoned the notion of tenancy in partnership, providing rather that the partnership’s property will be held by it as an entity. See UNIF. P’SHP ACT 1997 § 203, 6(I) U.L.A. 96 (2001); see also § 201(a), 6(I) U.L.A. 91 (2001).

42. See UNIF. P’SHP ACT 1914 § 21(1), 6(II) U.P.A. 194 (2001); see also Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol of the Duty of Loyalty Under the Prototype LLC Act*, 63 ARK. L. REV. 473 (2010).

43. J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. 1 (1953) (quoting *Brown, Janson & Co. v. Hutchinson & Co.*, [1895] 1 Q.B. 737).

44. See also JUDSON A. CRANE & ALAN R. BROMBERG, THE LAW OF PARTNERSHIP § 43, p. 241 (1968) [hereinafter CRANE & BROMBERG ON PARTNERSHIP].

ner's interest in a partnership."⁴⁵ Second, "[t]he common law had no procedure for the seizure of the partner's intangible interest in the business."⁴⁶ The first reason still exists, although the modern statutes have provided greater definitional clarity on this point.⁴⁷ The second reason suggests part of the solution to the charging order problem is careful consideration of, and drafting for, the statutory nature of the abstract rights of a member in her membership interest.

The SMLLC, however, creates significant challenges to the underlying rationale for the charging order. Initially, and as other commentators have well identified,⁴⁸ the rule of *in delectus personae* cannot apply in the context of an SMLLC. Simply put, no "other members" exist as "other members" is a null set.⁴⁹ Second, and returning to the *sine qua non* of the charging order, it is often difficult on both factual and analytic grounds to distinguish the single member from the SMLLC and, under those circumstances, to respect the asset-partitioning element of the LLC structure.⁵⁰

THE NARROW READING OF *OLMSTEAD* – STATUTORY EXCLUSIVITY

One reading of *Olmstead* is that as the Florida LLC Act does not contain an express statement of exclusivity (*i.e.*, preemption), it is different than the charging order provisions under other of Florida's other unincorporated statutes.⁵¹ Not having been defined as exclusive, the Florida LLC's Act's charging order provision is in parity with and supplements other available judgment-creditor statutes under

45. See *supra* note 39.

46. See *supra* note 39.

47. See, e.g., REVISED UNIF. LTD. P'SHIP ACT § 201(a), 6 U.L.A. 91 (2001) (a partnership is a legal entity); § 502, 6 U.L.A. 155 (2001) (a partnership interest is personal property); § 203, 6 U.L.A. 96 (2001) (partnership property is not the property of the partners individually); § 501, 6 U.L.A. 155 (2001) (a partner has no ownership interest in partnership property).

48. See, e.g., Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Organizations*, 30 DEL. J. CORP. L. 199 (2005); Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199 (2009).

49. See *infra* notes 67-68 and accompanying text.

50. See, e.g., KY. REV. STAT. ANN. § 275.010(2) (West 2010) ("[An LLC] is a legal entity distinct from its members"), § 275.240(1) ("Property transferred to or otherwise acquired by [an LLC] shall be the property of the [LLC] and not of the members individually."), § 275.250 ("[An LLC] interest shall be personal property."). See also Rutledge, *supra* note 9. It appears that only Wyoming expressly references the SMLLC in its charging order provision. See WYO. STAT. § 17-29-503(g) (2010) (charging order is the exclusive remedy of a member's judgment creditor, including if they are the sole member).

51. The charging order provision of Florida's adoptions of both RUPA and ULPA state that the charging order is the exclusive remedy of a partner's judgment creditor. See FLA. STAT. ANN. § 620.8504 (West 2010) (FIRUPA); § 620.1703 (FIULPA).

Florida law.⁵² Florida law provides a levy and execution remedy for property that is assignable by the judgment-debtor.⁵³ As a result of Olmstead being the only member of the LLC, he had the practical capacity to assign his interest, vesting in the assignee all membership rights—including management. In *Olmstead*, there were no other members whose consent was required in order for him to assign all those rights.⁵⁴ The Court held that Olmstead could be compelled to

52. See *Olmstead v. FTC*, 44 So. 3d 76, 80 (Fla. 2010) (“Since the charging order remedy clearly does not authorize the transfer to a judgment creditor of all of an LLC member’s “right, title and interest” in an LLC, while section 56.061 clearly does authorize such a transfer, the answer to the question at issue in this case turns on whether the charging order provision in section 608.433(4) always displaces the remedy available under section 56.061.”).

53. *Olmstead*, 44 So. 3d at 80. As a matter of background, but also of critical importance, the Court in *Olmstead* found Florida’s general statutory execution scheme would apply to members of LLCs if the charging order was not the exclusive remedy for judgment creditors under the LLC Act. The Court cites Section 56.061 Florida Statutes (2008). A critical determination was that the LLC was to be treated as a corporation for purposes of that statute. Specifically, it said, in part, “An LLC is a type of corporate entity” *Id.* Shortly thereafter it added: “At no point have the appellants contended that section 56.061 does not by its own terms extend to an ownership interest [in an LLC]” *Id.* at 81. Had the LLC charging order provision been interpreted as exclusive, it would have been consistent with the general execution statute; *i.e.*, corporation means corporation and has one statutory provision and LLCs have another.

Two points are relevant for possible future reference. First, and as a general matter, “one of the characteristics that all LLCs share is that they are “unincorporated” RIBSTEIN & KEATINGE ON LLCs, *supra* note 17, at 1-11. Second, LLCs are flexible entities and not easily susceptible to a one size fits all analysis. Ribstein, *supra* note 36 (Ribstein used the term *unincorporation* rather than *unincorporated entities* or *alternative entities*). As Professor Miller concluded:

Where the issue is one that is not explicitly addressed within the parameters of the LLC statute, such as how an LLC or those associated with it are to be treated under another statutory or regulatory scheme, the tendency of courts to examine how other entities have been treated and to analogize to the LLC context is not surprising. Where a statute does not expressly refer to LLCs, as in the case of a statute enacted prior to the advent of LLCs, the question may arise whether other terminology used in the statute, such as “person,” “corporation,” or “association,” encompasses LLCs. Courts have reached various conclusions in such cases. Some courts have readily accepted the analogy between an LLC and a corporation, at times even interpreting the word “corporation” to include an LLC. In a number of contexts, however, courts have emphasized the unincorporated nature of an LLC and have concluded that an LLC is not the equivalent of a corporation. In some cases, it is entirely appropriate to approach an LLC as “like a corporation” or “like a partnership.” Here again, however, courts should be mindful (as they have been with respect to treatment of LLC interests under federal securities laws) that some contexts call for refinement or variation of the principles and analyses applied to other entities if the theory and policy underlying the LLC form, as well as the particular doctrine being applied to the LLC, are to be best effectuated.

Elizabeth S. Miller, *Are Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing From Other Forms*, Symposium: *Limited Liability Companies*, 42 SUFFOLK U. L. REV. 617, n.151 (2009); Thomas E. Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, Symposium: *Limited Liability Companies*, 42 SUFFOLK U. L. REV. 507 (2009); see also Rutledge & Geu, *supra* note 42.

54. See *Olmstead*, 44 So. 3d at 81 (“The limitation on assignee rights in section 608.433(1) has no application to the transfer of rights in a single-member LLC. In such an entity, the set of “all

make that alienation in satisfaction of the judgment against him because his membership rights were alienable entirely at his option and in his discretion.

The implied burden on drafters to amend all acts as the state-of-the-art in drafting moves forward in any of them implicit in the Court's reliance upon the absence of exclusivity language in the Florida LLC Act is subject to challenge. For example, it is curious that the *Olmstead* Court did not reference prior lower court rulings in Florida to the effect that the charging order was the exclusive remedy of the judgment-creditor and that other collection mechanisms were not available.⁵⁵ Further, it is a fair assumption that the drafters of the Florida LLC Act were both aware of and intended to incorporate the common law as it existed at the time of adoption.⁵⁶

Nonetheless, as previously mentioned, a reasoned analysis of the opinion leads one to the conclusion that the holding is supported by a sound technical and logical textual basis.

members other than the members assigning the interest" is empty. Accordingly, an assignee of the membership interest of the sole member in a single-member LLC becomes a member and takes the full right, title, and interest of the transferor without the consent of anyone other than the transferor.").

55. See *Givens v. Nat'l Loan Investors, L.P.*, 724 So. 2d 610 (Fla. Dist. Ct. App. 1998) (Florida RULPA charging order is the exclusive remedy for the judgment-creditor of a limited partner); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So. 2d 1002 (Fla. Dist. Ct. App. 1986) (under Florida UPA, "the charging order is the only means by which a judgment creditor can reach the debtor's partnership interest"); see also *Myrick v. Second Nat'l Bank of Clearwater*, 335 So. 2d 343 (Fla. Dist. Ct. App. 1976) (under Florida UPA, a judgment creditor must bring with a charging order before other collection mechanisms may be employed); and *In re Stocks*, 110 B.R. 65 (Bankr. N.D. Fla. 1989) (citations omitted) (the Florida adoptions of UPA and RULPA have modified the law as to levy and sale under execution to the effect that "the statutory charging order [is] the only means by which a judgment creditor can legally command payment from the debtor's partnership interest"). As a general statement of "hornbook" law circa 1968 about the original UPA:

Although the U.P.A. nowhere says that a charging order is the exclusive process for a partner's individual creditor, the courts have generally so interpreted it. This seems consistent with the Act, but (since the charge is wholly post-judgment) may not harmonize with the policy of allowing pre-judgment attachment in many states. Against a limited partner's interest, the charging order is cumulative of other remedies which may exist apart from the partnership Acts.

CRANE & BROMBERG ON PARTNERSHIP *supra* note 44, at § 43(b), p. 249 (footnotes omitted). Note the distinction in treatment between truly passive liability shielded limited partner and the general partner under UPA.

56. An article on *Olmstead* written by a Florida lawyer provides further background. Indeed, it states that there was a previous attempt to amend the Florida LLC Act to include the exclusive language, but that attempt was abandoned before introduction in the Florida legislature. Barry A. Nelson, *Olmstead, Right Result, Wrong Reason*, 51 TAX MGMT. MEMO 315, 319 (2010).

THE UNFORTUNATE NORMATIVE DISCUSSION OF THE CHARGING
ORDER GENERALLY

The most unfortunate aspect of the *Olmstead* decision is the Court's normative linkage of the charging order remedy and the *in delectus personae* rule concerning the admission of new or substitute member[s]. Further compounding the Court's initial error of misidentifying the most important reason for the charging order,⁵⁷ the Court engaged in a normative analysis of how that—incorrect—basis should affect the statutory charging order remedy. The Court set forth an analytic framework in which the justification for the charging order is protection of the “pick your partner rule.”⁵⁸ Having defined that—in fact false—dependency, the Court was able to determine that in the absence of a member other than the judgment-debtor the charging order lacks purpose and justification.⁵⁹ At this point in the opinion the case was already resolved as a matter of statutory construction; therefore, all of this analysis is likely dicta, but it is worth recognizing that the Court could have, and arguably should have, taken a slightly different tack and adopted a theory of charging orders that protect the *in delectus personae* rule even in the SMLLC context except to the extent that either law, equity, or the operating agreement of the LLC in question provides otherwise. Doing so, however, would, have weakened the Court's conclusion of non-exclusivity.

Linkage to the *in delectus personae* of a second member is not theoretically necessary.⁶⁰ While the principle of *in delectus personae* and the procedure of charging orders have long existed in concert with one another in multiple-member unincorporated organizations like partnerships, the charging order is not necessarily dependent upon that principle for its justification and vitality. In fact, the charging order serves to protect the venture itself, the venture's creditors, and the participants in the venture (including the judgment-debtor), from a judgment-creditor that is attempting to appropriate venture property

57. A similar misidentification of *in personam delectus* as the basis for the charging order took place in the *Albright* decision. See *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003). See generally Rutledge, *supra* note 9.

58. See generally Rutledge, *supra* note 9.

59. Drafters of statutes in response to *Olmstead* should be aware of a related unsolved question under many states' LLC law, namely whether a person must have an “equity” (transferable) interest in the LLC to be a member. See, e.g., KY. REV. STAT. ANN. § 275.195(3) (West 2010) (permitting the admission of a member who does not acquire a limited liability company interest); DEL. CODE ANN. tit. 6, § 18-301(d) (2010) (same).

60. See *infra* notes 67-68 and accompanying text and the charging order certainly furthers and protects that right. It does, however, raise other interesting issues beyond the scope of this article. See generally CALLISON & SULLIVAN, *supra* note 21.

in satisfaction of an owner's judgment-debt.⁶¹ Irrespective of whether it is an SMLLC, the LLC has a legally justifiable right to apply its property⁶² to its operations.⁶³ This principle is the second side of the limited liability coin called *asset partitioning*; the assets of the business organization are dedicated to its purposes and are not generally available to satisfy the creditors of the individual owners.⁶⁴ This second side of limited liability exists for the benefit of the *business organization's creditors* and assists them in credit pricing, because absent distributions (which may be limited by contract or covenant),⁶⁵ company assets will be applied first to their creditor claims and will not be diverted to satisfy the creditors of individual owners (members, partners). The only counterbalance to this extremely protective rule is the "reverse pierce" wherein, only under certain compelling circumstances, the assets of the entity are made available to meet the personal debts of an owner.⁶⁶

A FALSE CATEGORY – THERE ARE NO OTHER MEMBERS

The *Olmstead* decision's normative justification for not restricting Olmstead's judgment-creditor to the charging-order remedy was based upon the fact that there are no other members affected by the transfer of Olmstead's interest in the SMLLC to the judgment-debtor. While that is the case, it should not be the entirety of the analysis. Rather, there may have been third parties with legitimate claims to be considered.

Assuming that an SMLLC, while holding significant assets in its own name, serves as the general partner of a number of real estate developments; each development is organized as a limited partnership. The sole member of the SMLLC is an experienced and accom-

61. See Gose, *supra* note 43; CRANE & BROMBERG ON PARTNERSHIP, *supra* note 44.

62. See, e.g., FLA. STAT. ANN. § 608.425(1) (2010) ("All property originally contributed to the [LLC] or subsequently acquired by [an LLC] by purchase or otherwise is [LLC] property."); KY. REV. STAT. ANN. § 275.240(1) (West 2010) ("Property transferred to or otherwise acquired by a [LLC] shall be the property of the [LLC] and not of the members individually.").

63. See also *infra* notes 67-68 and accompanying text.

64. See generally Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253 (2005); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

65. See, e.g., KY. REV. STAT. ANN. § 275.225(1)(c) (West 2010).

66. See, e.g., C.F. Trust, Inc. v. First Flight P'ship, 580 S.E.2d 806, 810 (Va. 2003) (holding that reverse piercing is possible under Virginia law and listing similar determinations of other jurisdictions). See also Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1991) (efforts to provide bulletproof asset protection may be frustrated through "reverse piercing," especially if the asset transfer to the entity occurs after the judgment is secured and if the entity is a single-member LLC). See, e.g., Litchfield Asset Mgmt. Corp. v. Howell, 799 A.2d 298 (Conn. App. Ct. 2001).

plished development manager. Furthermore, assume a judgment lien against the SMLLC's only member consequent to his unfortunate personal decision to guarantee a cousin's corporate business debt. Should a remedy beyond the charging order be permissible under these circumstances (including the lack of personal culpability)⁶⁷ given the possible significant negative consequences to the various real estate developments that would follow from a change in ownership of the SMLLC?⁶⁸ There is thus illuminated the fallacy of the *in personam delectus* rule as the basis for the charging order and the failure of the "no other member" reasoning in the *Olmstead* case even though the asset partitioning effect of the SMLLC is highlighted.

THE DISSENT

Two justices in the *Olmstead* case filed a significant dissent. At its core, the dissent challenges the majority opinion's reliance on the absence of exclusivity language in the Florida LLC Act's charging order provision.⁶⁹ The dissent argues the majority rewrote the charging or-

67. Contrast *Olmstead*'s personal and ongoing operation of a financial scam. See *FTC v. Olmstead*, 528 F.3d 1310, 1311-12 (11th Cir. 2008).

68. A 1976 California case illustrates this logic and rationale in the related context of a limited partnership that owned and operated a hotel. The individual judgment debtors were the only limited partners and owned all of the stock in the corporate general partner. The personal judgment debt was for defaulting on the purchase price of the stock in the corporate general partner. The judgment debtor attempted to execute on the hotel owned by the limited partnership through California's general levy and execution statute asserting the charging order process was not appropriate because the judgment debtors owned all interests of the limited partnership and its corporate general (analogous to the sole member of an SMLLC except for cross-consent requirements for accepting new partners). The Court's discussion and analysis are instructive:

Plaintiff would have us adopt an exception to this statutory prohibition against execution (§§ 15028, 15522) to cover those cases in which the partnership is owned entirely by the judgment debtors. He argues that the purpose underlying the enactment of these statutes is to protect innocent partners from the injustice and hardship they may suffer when partnership property is sold in execution of a judgment against an individual partner. (*Taylor v. S & M Lamp Co.*, 12 Cal. Rptr. 323, (1961)). This purpose, so the argument goes, is not furthered by disallowing execution against specific partnership assets in cases when the judgment debtors won the entire proprietary interest in the business.

We decline plaintiff's invitation to recognize such an implied exception to the required use of the statutory charge procedure. Where, as in the instant case, the partnership is a viable business organization and plaintiff does not show that he will be unable to secure satisfaction of his judgment by use of a charging order or by levy of execution against the debtor's other personally owned property, there is no reason to permit deviation from the prescribed statutory process.

Evans v. Galardi, 546 P.2d 313, 321 (Cal. 1976). See also CRANE & BROMBERG ON PARTNERSHIP *supra* note 44, at § 43.

69. *Olmstead v. FTC*, 44 So. 3d 76, 83 (Fla. 2010) (Lewis, J., dissenting). Curiously, the dissent did not address the numerous earlier Florida decisions stating the charging order to be exclusive even though not expressly set forth in the statute. See *supra* note 55.

der law not only for SMLLCs, but for all LLCs.⁷⁰ The dissent's counter-argument suffers, however, from its suggestion that the majority's holding opens the door to creditor intervention in the context of multiple-member LLCs.

In the context of a multiple member LLC, it would not be the case that a judgment-creditor would acquire all rights and title in the judgment-debtor's LLC interest and thereby be able to involve themselves in the management and affairs of the LLC. Rather, the judgment-creditor would hold either a charging order or, consequent to a foreclosure sale, a transferable interest after a foreclosure under the under state law, neither of which will afford the holder affirmative rights to participate in company management.⁷¹ Prior to foreclosure, there is no mechanism to become a member; however, after acquisition by foreclosure, the judgment-creditor may become a member but only upon the consent of the incumbent members. Without that consent, the creditor becomes only a transferee and does not succeed to the right to participate in the LLCs management.⁷² Thus, only under unique circumstances consequent to private ordering in the LLC's controlling operating agreement would the judgment-creditor of an individual member in a multi-member LLC have more than the (minimal) rights of an assignee or transferee.⁷³

STATUTORY CONSTRUCTION

Moving from point A to point B on the surface of the statute using tools of construction does not account for the jurisprudential ridges and tangled policy wrecks that lurk just below. A general awareness of these features aids in understanding *Olmstead* though, paradoxically, it does not explain it. The subsurface features are a result of tension between law and equity on one side of the coin, and the separation of powers between the judiciary and the legislative branches of government on the other side of the coin. These tensions can quickly devolve into a theoretical morass that are beyond the scope of this

70. *Olmstead*, 44 So. 3d 76, 83 (Fla. 2010) (Lewis, J., dissenting) (citing Thomas E. Rutledge & Thomas E. Geu, *The Albright Decision – Why a SMLLC is Not an Appropriate Asset Protection Vehicle*, 5 BUS. ENTITIES, Sept.-Oct. 2003, at 16).

71. See *supra* notes 27-29 and accompanying text.

72. *Olmstead*, 44 So. 3d 76, 79 (citing FL. STAT. § 608.432 (2010)); accord KY. REV. STAT. ANN. §§ 275.275(1)(b), 275.265(1) (2010) (requiring a majority-in-interest of the members other than the assignee to approve the admission of the assignee as a replacement member). See also *supra* note 15.

73. For example, an operating agreement could provide that a member's transferee is admitted to full membership in the LCC upon receipt of notice of the transfer.

article. Nonetheless, an awareness these hard issues are integral to a nuanced understanding of *Olmstead*.

The tensions, and the related issues analysis those tensions uncover, are sometimes nested in statutory construction. Therefore, this article provides a selective and illustrative introduction to the application of canons of statutory construction and the use of equity as a part of those canons. This is by no means a comprehensive or deep analysis. Nonetheless, the issues that are uncovered but not resolved are present just beneath the surface of many judicial opinions, including *Olmstead*.

Karl Llewellyn took on the task of illuminating statutory construction in an article published in 1950.⁷⁴ Apparently, Llewellyn did not hold to the convention that a statute had a single meaning since the article clearly stated: “[t]he accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons [of statutory construction] on almost every point Every lawyer must be familiar with them all: they are still needed tools of argument.”⁷⁵ How does one choose the correct canon to apply? Llewellyn posits that the judge should select the canon that leads to a construction in harmony with the “good sense” of the situation and use as simple a construction as possible given that “good sense.” In Llewellyn’s own words:

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, by *tenable means, out of the statutory language*.⁷⁶

Llewellyn’s “situational sense” that drives his recommended choice of canons probably places him in the “cooperative partner” (pragmatic) school of statutory construction. In the cooperative partner school of statutory construction, judges are partners with the legislature “in the enterprise of law elaboration.”⁷⁷ An opposing school of construction places the judge in the role of a “faithful agent” of the legislature⁷⁸ (sometimes referred to as the “textualist” or “formalist”⁷⁹

74. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1949-50).

75. *Id.* at 401.

76. *Id.* (emphasis in original).

77. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation 1776-1806*, 101 COLUM. L. REV. 990, 991 (2001).

78. *Id.* at 993. Statutory construction is not the same as philosophy of law but may reflect it. The *faithful servant* view of construction has much in common with the legal philosophy of *Positivism*. *Positivism* “became dominant in the nineteenth century as a rejection of natural law philosophy.” Maureen E. Markey, *Natural Law, Positive Law, and Conflicting Social Norms in*

school). Moreover, Llewellyn's "situational sense" applies to *broad* types of situations rather than to *narrow* types of situations which apply "the sense of a particular controversy between particular litigants."⁸⁰

It is unclear with which type of *situational sense*, if any, the *Olmstead* court approached its task. The "type of situation" approach favored by Llewellyn would frame the issue in terms of "all SMLLCs," "all LLCs" or even "all nonfraudulent LLCs." In the alternative, the "controversy between particular litigants" approach would consider the particular unique facts of the case: that the sole member of the SMLLCs in question was engaged in a "scam"⁸¹ and, furthermore, that the LLCs apparently held the proceeds from those scams. These analyses, of course, are never stated outright in the *Olmstead* opinion. The fact that the court recites that the sole member of the LLCs was involved in a "scam", however, seems to indicate that the court determined the "scam" to be important context for its decision. If so, Llew-

Harper Lee's To Kill A Mockingbird, 32 N.C. CENT. L. REV. 162, n.14 (2010). Under the Positivist conception of the philosophy of law: "Law does not derive from religious beliefs or absolute moral values; rather, law is that which is promulgated by a legitimate authority and backed by sanction for failure to comply." *Id.*

79. Eskridge, *supra* note 77, at 993. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (1993). For current examples of literature on the subject of equity, more generally, seek the work of T. Leigh Anenson and, in turn, the literature she cites therein. See, e.g., T. Leigh Anenson & Donald O. Mayer, "Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation, 12 U. PA. J. BUS. L. 101 (2010); T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509 (2010).

80. Llewellyn, *supra* note 74, at 398. In effect, Llewellyn classified his situational sense into two categories and classification is an important and basic part of the law. Professor Weinrib indicates just how important by stating: "[t]he understanding of law is a classificatory act. One cannot claim to understand law if one cannot differentiate legal instances, that is, those events or conditions to which the law assigns legal consequences, from all other events or conditions." Jacob Weinrib, *What Can Kant Teach Us About Legal Classification*, (August 23, 2010), available at <http://ssrn.com/abstract=1684344>. Somewhat paradoxically, scholars like Professors Weinrib and Waddams disagree about whether any *classificatory scheme* can yet explain the law. Stephen Waddams, for example, takes the position, "that the complexity of the law exceeds the explanatory power of any classificatory system so far," in part, because classification schemes (or *maps*) obscure the complexity of the instances in which it arises. *Id.* at 1-4. This helps explain in a generalized theoretical way both the importance of classification *and* the reason it is difficult to apply even relatively narrow statutory classification provisions, (like charging order statutes), to real life situations.

Weinrib suggests that Waddams' bases his argument on history by "referring to a litany of judges who emphasize the tension between the untidiness of law and the orderliness of classification." *Id.* at 4. Illustratively:

Oliver Wendell Holmes claimed that "the life of the law has not been logic: it has been experience"; Lord Halsbury stated that "every lawyer must acknowledge that the law is not always logical at all"; and Lord Wilberforce suggested that "[t]here are many situations of daily life that do not fit neatly into conceptual analysis."

Id. (footnotes omitted).

81. See *supra* note 4.

ellyn's analysis would suggest the court was likely using a *narrower* rather than a *broad*er situational sense.

One of the dangers of using the narrower situational sense, according to Llewellyn, is:

[I]t leads readily to finding an out *for this case only*—and that leads to a complicating multiplicity of refinement and distinction, as to repeated resort to analogies unthought through and unfortunate of extension. This is what the proverb seeks to say “Hard cases make bad law.”⁸²

Alternatively, the *Olmstead* holding could be interpreted broadly to apply to all *single member* LLCs, because the phrase “with respect to a judgment debtor’s freely alienable membership interest in a single-member LLC . . .” was expressly appended to its holding.⁸³ The dissent, conversely, argued that the majority’s holding included *all LLCs* in its situational sense, not just the *single member LLCs* situational sense. The dissent argued that because the majority’s reasoning hinged on the *absence* of the word “exclusive” in the statute without distinction, it would necessarily apply to single- and multi-member LLCs alike.⁸⁴

The extent of the holding is in question because the majority opinion stated elsewhere:

The relevant question is not whether the purpose of the charging order provision—i.e., to authorize a special remedy designed to reach no further than the rights of nondebtor members of the LLC will permit—provides a basis for implying an exception from the operation of that provision for single member LLCs. Instead the question is whether it is justified to infer that the LLC charging order mechanism is an *exclusive remedy*.⁸⁵

82. Llewellyn, *supra* note 74, at 398.

83. *Olmstead v. FTC*, 44 So. 3d 76, 82 (Fla. 2010).

84. *Id.* at 84.

85. *Id.* at 82. In 1998, a Florida appeals court interpreted the limited partnership charging order provision (Florida’s Act was a version of the Revised Uniform Limited Partnership Act). Like the LLC statute in *Olmstead*, the Florida limited partnership statute at the time did not contain any provision for foreclosure of the lien portion of a charging order. Therefore, the Court held there was no foreclosure sale procedure available under the limited partnership statute. *Givens v. Nat’l Loan Investors L.P.*, 724 So. 2d 610 (Fl. App. Ct. 1998) (*reh’g denied*). On one hand, this approach seems consistent with the interpretive approach taken in *Olmstead*, because it emphasizes that the *absence* of a phrase or word has independent negative significance. On the other hand, it can be seen as almost completely opposite to *Olmstead*, because in *Givens*, the result of appellate court’s holding was that a provision which looked like the LLC provision was, in effect, exclusive because no other law was given effect to allow foreclosure (e.g., execution sales); (though that was *not* an issue before the appellate court).

There is a possibility that the result in *Givens* was wrong, even assuming the interpretive approach (which was consistent with *Olmstead*) was appropriate. The court seemed a bit confused by an edit of a portion of an article it quoted at length and upon which it partially relied (or by which it was partially led astray). The edited and quoted part of the article can be interpreted to

Recall that Llewellyn's broad *situational sense* framework seemed consistent with the cooperative-partner school of statutory construction.⁸⁶ Both the cooperative-partner and the faithful-agent schools of construction argue from history. A proponent of the faithful-agent school argues, for example, that the "cooperative-partner" approach is simply an extension of "the old English tradition of equitable interpretation."⁸⁷ Indeed, a treatise on statutory construction published in 1848 devotes an entire chapter to the use of equitable construction after the separation of the legislative and judicial powers in England.⁸⁸ This treatise bifurcated "equity" into two meanings.

The first meaning identifies equity as a source of law that is higher than legislation or, in constitutional systems, even higher than the constitution. It is "that natural justice which distributes right to all men indiscriminately."⁸⁹ Thus, one rough meaning of "equity" is the "nat-

imply, and the Court clearly *inferred*, that a purchaser at the foreclosure sale under the general partnership charging order provision somehow becomes a partner (perhaps confusing *foreclosure* sales with *execution* sales, the latter of which correctly was *not* permitted by precedent).

86. See *supra* notes 74-79 and accompanying text.

87. Eskridge, *supra* note 77, at 993.

88. E. FITCH SMITH, SMITH'S COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION 815 (1848) [hereinafter SMITH'S COMMENTARIES].

89. "Natural Law" as a current source of judicial empowerment over legislation in a constitutional sense is out of favor and swept up in the historical morass of "due process." By way of summary, overview laws that "[do] not substantially impair a fundamental constitutional right, or employ a constitutionally suspect classification . . . enjoy a presumption of constitutionality." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (6th ed.) §11.5, p. 425 (2000). See generally, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW AND POLICY (2d ed.) §§ 8.1-8.2, pp. 584-605 (economic substantive due process). Under the rubric of substantive due process, very few "fundamental rights" have been identified. In describing these fundamental rights, a treatise states:

These are rights which the Court recognizes as having a value so essential to individual liberty in our society that they justify the Justices reviewing the acts of other branches of government in a manner quite similar to substantive due process approach of the pre-1937 period. Little more can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in *Calder v. Bull*.

NOWAK, *supra*, at § 11.7, p. 433 (footnote omitted). Of course, it is perhaps conceivable that a charging order statute could run aground of federal constitutional provisions specifically based on equal protection or procedural due process. Those topics are well beyond the scope of this article. See T. Leigh Anenson, *Process*, *supra* note 79, at 533, n.91 (process jurisdiction).

State courts, on the other hand, "may have an advantage over federal courts in the scope of their powers vis-a-vis the legislative branch." T. Leigh Anenson, *Process*, *supra* note 79, at 532 (footnote omitted). See also Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. (forthcoming 2011) (arguing that the Delaware General Assembly is constitutionally prohibited from preventing its judiciary from applying fiduciary duties).

More generally, and constitutional issues aside, "natural law" "has been a centerpiece of legal philosophy since the ancient Greeks and Romans[.]" and the "belief in universal principles of

ural law” which is a source of inalienable rights either contained in, or consistent with, the Constitution. These rights are an extra-constitutional basis for judicial review. Judicial review on extra-constitutional grounds, of course, raises separation-of-power issues between the legislature and the judiciary. Natural law arguments, sometimes disguised as an appeal to justice, are made even within the context of charging orders and SMLLCs, in spite of the arrangements’ flirtation with the separation of power issue. These arguments are sometimes embedded in the larger public-policy issues raised by asset-protection planning.⁹⁰ This rather raw, equitable version of construction, how-

right and wrong and the essential integration of law and morality are the central tenets of natural law.” Maureen E. Markey, *supra* note 78, at 163 (footnotes omitted but citing or naming Aristotle, Aquinas, Grotius, Rousseau, Locke, and Blackstone as adherents to one or another kind of natural law hanging from being based in religion to being based [in] rational philosophy).

90. More than five years ago, a book on asset protection questioned the pedigree of public policy concerning SMLLC charging orders as follows:

The original policy reason for the charging order, however, does not exist with a single-member LLC. There is no other LLC member who would be unfairly affected by the seizure of LLC assets or of the LLC interest itself in its entirety. [paragraph deleted] If asset protection via the charging order is a major concern, single member LLCs should be used with caution.

JAY D. ADKISSON & CHRISTOPHER M. RISER, *ASSET PROTECTION: CONCEPTS AND STRATEGIES FOR PROTECTING YOUR WEALTH* 219 (2004) (e.g., chapter 19 is entitled *Charging Order Protected Entities*). The book quoted sounds in both Llewellyn’s *situational sense* of statutory construction and the narrower meaning of equity (to the particular parties at bar). It says, in part, “[v]ery simply, an asset protection structure that protects the assets of all persons, no matter how illegal or despicable their conduct, cannot be expected to last long before changes in the law defeat such structures.” At the very least this complicates the drafting of charging order statutes that seek both universality and certainty. ADKISSON, at 35. Note that the quote sounds primarily in asset partition and this article argues that under most circumstances asset partition *favours* use of a charging order provision to protect the business of the entity. See also *supra* notes 37-50, 60-70, *infra* notes 179-183.

Jay Adkisson, one of the authors of the cited book, *supra*, further stated in an email to John DeBruyn (one of the authors of this article):

American judges have never been nor were meant to be mere automatons who mindlessly apply statutes and interpret governing documents in a vacuum and without regard to the surrounding circumstances. Indeed, it could be argued that the very role of judges is to safeguard concepts of justice by not applying statutes in those situations where it would be unfair or inequitable for the statutes to be applied, or to interpret government documents in a way that would do an injustice. With this in mind, it is folly to believe that one can draft statutes or create operating agreements that will provide 100% bulletproof asset protection in all situations for the benefit of all debtors against all creditors. The judges can and will look for loopholes that lead to the most just result in cases involving egregious facts; indeed, that is their job. The desire of some practitioners to give complete comfort to their clients that their asset protection will stand up in all circumstances against all comers will never be anything more than a false hope. This is particularly true in the circumstance of the single member LLC, where if such an entity were allowed to protect assets from the creditors of its single owner, it would have the effect of creating an unlimited exemption for such of the personal property that the single owner uses to fund the SMLLC in a way that would completely abrogate the normal statutory exemptions from collection of such assets.

ever, is only one of the tensions existing between law and equity that can be raised in the context of statutory construction.⁹¹ Another tension is related to the second meaning of equity.

The second meaning of equity for purposes of equitable construction is “justice which takes off from the rigor and severity of the written law [(hereinafter *equity softens the law*)].”⁹² The same 1848 treatise quoted above posits that the practice of equitable construction continues “in more modern times”⁹³ as an antidote to the universal application of a statute in circumstances contrary to “the intention of the law-giver, in matters which he was not able to or willing to express, or in restraining the words of the law, where it is clear that they were not intended to extend to a particular act or thing.”⁹⁴ This second meaning of equity selectively softens the law in application, echoing both of Llewellyn’s situational senses in statutory construction.

Rather obviously, the difference between the two meanings of *equity* parsed by the old statutory-construction treatise is both of degree and kind. It is a difference in degree because in the most powerful natural-law sense, the judiciary can, and arguably should, override the meaning, *and even the intent*, of the law if necessary, which in *all cases* represents Llewellyn’s broad interpretive sense. Under the other meaning of equity, the court interpolates a meaning from the statute that is “equitable” between the parties at bar in a given case, even though the result may not be expressly provided by the statutory language. In the latter instance, equity is used as a necessary antidote to universal statements of law where it is clear the law-giver (legislature) did not mean the law to extend to a particular circumstance or set of circumstances. The use of equity as an antidote to law in individual cases comes dangerously close to equity as between the two parties, which violates Llewellyn’s warning that the “narrower situational sense” of construction raises both certainty and jurisprudential issues. Llewellyn suggests that using this narrower sense can lead to “multiplicity of refinement and distinction.”⁹⁵ In application, to repeat

E-mail from Jay Adkisson, to John DeBruyn (Aug. 26, 2010, 20:59 MST) (on file with author).

The old-fashioned notion of morality and its necessary role in the economy, as well as its place in the evolution of humans and human societies, is the subject of serious study in the allied areas of brain science including neuro-economics and behavioral and evolutionary economics. *See, e.g.,* Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007). For a bibliography of other such literature, *see* <http://law.vanderbilt.edu/seal/> (last visited August 30, 2010).

91. *See* Eskridge, *supra* note 77, at 993.

92. SMITH’S COMMENTARIES, *supra* note 88, at 814.

93. SMITH’S COMMENTARIES, *supra* note 88, at 819.

94. SMITH’S COMMENTARIES, *supra* note 88, at 814.

95. Llewellyn, *supra* note 74, at 398.

Llewellyn, it embodies the proverb: “Hard cases make bad law.”⁹⁶ It is inelegant.⁹⁷

In June 2010, the United States Supreme Court decided a case that directly addressed the equitable powers of the federal courts in relation to the one-year statute of limitations on *habeas corpus* petitions.⁹⁸ The opinion, among other things, specifically discussed jurisdiction,⁹⁹ statutory construction,¹⁰⁰ the role of equity in a statute of limitation scheme,¹⁰¹ and the importance of whether the statutory provision in question originally sounded in equity or law.¹⁰² Each of these topics is

96. *Id.*

97. *Elegant* as used here means “neatness” and “simplicity.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 402 (11th ed. 2003). It is used in the sense of *Occam’s razor*. See *id.* at 816. Llewellyn suggests using the simplest construction to achieve the necessary sense of the law is usually the right construction. See Llewellyn, *supra* note 74.

98. *Holland v. Florida*, 130 S.Ct. 2549 (2010).

99. Jurisdiction is a particularly confusing term when applied to equity. See *infra* note 134-60 and accompanying text. Its complexity, if not confusion, is also reflected in constitutional law. For example, the *Holland* opinion stated:

First, the AEDPA “statute of limitations defense . . . is not “jurisdictional.” It does not set forth “an inflexible rule requiring dismissal whenever” its “clock has run.” . . . We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a “rebuttable presumption” in favor “of equitable tolling.”

Holland, 130 S.Ct. at 2560 (citations omitted).

100. *Id.* at 2561-62. The opinion discussed the majority’s decision not to follow a linguistic canon this way:

Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive maxim *inclusio unius est exclusio alterius* (to include one item (*i.e.*, suspension during state-court collateral review) is to exclude other similar items (*i.e.*, equitable tolling)).

Id. (citations omitted, emphasis in original).

Unlike the *Olmstead* opinion, however, the Supreme Court engaged in an extended discussion about the purpose of the statute and its one-year statute of limitations. Compare *Holland*, 130 S.Ct. at 2562 (Breyer, J.), with *Holland*, 130 S.Ct. at 2571 (Scalia, *dissent*). For the purpose of a charging order (not discussed by *Olmstead*), see *supra* notes 9-29 and accompanying text.

101. First, there is a rebuttable presumption that equitable tolling is available against nonjurisdictional statute of limitation provisions. *Holland*, 130 S.Ct. at 2560 (Breyer, J.). Second, the court “will ‘not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command’” *Id.* The Court reiterated several factors that weighed in favor of displacing equitable tolling under a different statute of limitations. *Id.* at 2561. These included that “it set forth its time limitations in unusually emphatic form”; “used highly detailed and technical language that, linguistically speaking cannot be read as containing implicit exceptions” and; “related to an underlying subject matter, . . . with respect to which the practical consequences of permitting tolling would have been substantial.” *Id.* (internal quotation marks removed).

102. See *Holland*, 130 S.Ct. at 2562 (“But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition’s timeliness was always determined under equitable principles.”); *id.* at 2560 (“In the case of the AEDPA, the presumption’s strength is reinforced by the fact that equitable principles have traditionally governed the substantive law of habeas corpus” (citations omitted) (internal quotation marks omitted)).

addressed in the context of *Olmstead* later in this article.¹⁰³ The importance of the *habeas* petition here is that it illustrates the interplay between the two meanings of *equity*.

First, concerning the *softens the law* equity type, the Court stated: In emphasizing the need for flexibility for avoiding mechanical rules . . . we have followed a tradition in which courts of equity have sought to relieve hardships which from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.¹⁰⁴

Second, although the Supreme Court does not directly address any sort of natural law whatsoever, it hints at the “natural law” meaning of equity when it observes that, in part, because the writ of *habeas corpus* is the only writ mentioned by the Constitution, the Court should “be hesitant” to find “a congressional intent to close courthouse doors that a strong equitable claim would normally keep open.”¹⁰⁵ Thus, the importance of equity within constitutional and common law jurisprudence is underscored by *Holland*; and, therefore, equity’s role in cases like *Olmstead*, even if inchoate and not concisely recognized, it should not be underestimated going forward.

The *Olmstead* opinion seems to successfully navigate through the disadvantages posed by both meanings of equity: (1) *the natural law meaning* threatening separation of power; and (2) *the equity softens the law meaning* suggesting that the judiciary has the power to expressly and selectively bend the law to fit the parties before it. It does so by using a different kind of interpretation altogether, one that purports to focus on the actual language of the statute to find the intent of the legislature as expressed in the statute. In *Olmstead*, the Court determined that the intent is based on the absence of the word “exclusive” or any other express statement of exclusivity.¹⁰⁶

Thus, *Olmstead* uses the textualist approach to construction; and, because the approach is ultimately based on legislative intent as expressed by the words of the statute alone, it would seem to posture that the Court is in the faithful-agent school of statutory construction. Textualists “maintain that the statutory text is the only reliable indication of . . . intent,” they use linguistic but not substantive canons of construction. Linguistic canons include canons of construction like

103. See *infra* notes 134-60 and accompanying text (equitable jurisdiction); *supra* notes 88-102 and accompanying text (statutory construction); *infra* notes 104-12 and accompanying text (statutory construction); *infra* notes 116-20 and accompanying text (role of equity in a statutory scheme); *infra* notes 121-30 and accompanying text (effect of codifying former equity).

104. *Holland*, 130 S.Ct. at 2563 (citations omitted) (internal quotation marks omitted).

105. *Id.* at 2562.

106. *Olmstead v. FTC*, 44 So. 3d 76, 81-82 (Fla. 2010).

“‘inclusion of the one is exclusion of the other.’”¹⁰⁷ As a general matter, “[l]inguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature’s intent.”¹⁰⁸ In contrast, the “cooperative partner” uses other canons of construction, in addition to linguistic canons, “to adjust statutory language to protect public values.”¹⁰⁹

As a result, the “safest” canons of construction for purposes of avoiding separation-of-power issues inherent in *equitable* kinds of interpretation are, almost by syllogism, linguistic canons. Linguistic canons, however, can be used to accomplish a substantive purpose.¹¹⁰ Thus, linguistic canons can be used to obfuscate the actual use of other approaches to construction; for example, Llewellyn’s situational sense. Guido Calabresi warns that linguistic construction can be used “to hide a fundamental value conflict, recognition of which would be too destructive for the particular society to accept[.]”¹¹¹ and he describes this type of construction as a “tragic choice.”¹¹² These tragic choices are inconsistent with both the faithful-servant and cooperative-partner schools of interpretation.

The purpose of discussing advantages and pitfalls of various methods and approaches to statutory construction and selective rationale is not meant to suggest the method or approach adopted by *Olmstead* was inappropriate. Neither is the discussion meant to imply a nefarious purpose for its use of linguistic canons within the textual approach. The purpose of the discussion, simply, is that courts have a variety of tools to use to construct statutes. Therefore, different courts may be expected to construct the same language under similar factual circumstances differently. Moreover, it suggests that there are jurisprudential and constitutional dimensions to issues of construction, and it is possible to pick and choose tools of construction to avoid those issues while reaching a desired result.

107. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 114, 117 (2010) (“[t]extualists ‘tend to be originalists in constitutional interpretation’ and emphasize linguistic canons of construction.”).

108. *Id.* at 117.

109. *Id.* at 116 (Barrett uses the modern term “dynamic statutory drafters” rather than Llewellyn’s “cooperative partners,” but for purposes of this article they can be used synonymously.).

110. *Id.* at 119 (“[t]he distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic.”).

111. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172 (1982). This book, though not necessarily the quote used in the text, has been called “[t]he most provocative challenge to originalism as a method of statutory construction” and “a radical solution.” Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 357 (1989).

112. CALABRESI, *supra* note 111, at 173.

MAXIMS: THE LAW-EQUITY BOUNDARY

The *Olmstead* Court charted its course based on linguistic canons of construction which avoided the issues related to either the *natural law meaning* or the *equity softens the law meaning* of equity. In doing so, it necessarily, if not intuitively, acknowledged the existence of two maxims that help demarcate the boundary between law and the *equity softens the law meaning* of equity.¹¹³ They are: (1) "Equity follows the law,"¹¹⁴ and; (2) "Equity has no jurisdiction where there is an adequate, complete, and certain, remedy at law [(hereinafter, *adequate remedy at law*)]."¹¹⁵ These two maxims are related, but can be in conflict at the outer reaches of their respective applications.

The first maxim has a narrow scope because, according to ancient hornbook law, "[t]he great mass of equity jurisprudence has been created by open disregard of the [common] law."¹¹⁶ Nonetheless, one of the classes of cases to which the maxim applies, according to the same old hornbook, is "[w]here *legal rights* are considered in a court of equity, the general rules and policy of the law must be obeyed."¹¹⁷ Conversely, but not inconsistently, the United States Supreme Court has said that a statute should not be construed to displace a court's "traditional *equity authority* absent the 'clearest command' or an 'inescapable inference' to the contrary."¹¹⁸

The relationship between statutory law and equity is relevant to *Olmstead* because the original articulation of the charging order in English courts was equitable (in chancery).¹¹⁹ It is arguable, therefore, that codification of the charging order simply acknowledged and recognized what was already being done by courts in equity; and, as a result, that charging-order statutes were not intended to cabin the

113. Another treatise suggests the following regarding the use of maxims:

The maxims of equity are short statements of principles that guide courts of equity in the exercise of their discretion. Their brevity and generality prevent them from having much utility in determining how the court will act in a given situation, but they possess some utility as memory aids, after the principles they represent have been mastered.

HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 52 (2d ed. 1948).

114. JAMES W. EATON, EATON ON EQUITY 42 (2d ed. 1923).

115. *Id.* at 28.

116. *Id.* at 42.

117. *Id.*

118. *Miller v. French*, 530 U.S. 327, 340 (2000) (emphasis added) (citing *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). See the discussion of *Holland*, *supra* notes 99-105 and accompanying text.

119. See *Brown Janson & Co. v. A. Hutchinson & Co.*, [1895] Q.B. 737 (Eng. C.A.) (Lindley, J.), quoted in Daniel S. Kleinberger, Carter G. Bishop & Thomas Earl Geu, *Charging Orders and the New Uniform Limited Partnership Act Dispelling Rumors of Disaster*, PROB. & PROP., July-Aug. 2004, at 30, 31.

courts' broader use of equity.¹²⁰ However, in *Olmstead*, the court did not need to resort to the use of its equity power; instead, it selected a textual approach which gave deference to the explicit words used by the legislature regardless of the equitable roots of those words in the charging order statute. Therefore, the Court's opinion is not consistent with the maxim that equity follow the law; as much as it stands for the proposition that there is no need for the Court to address the maxim because its rationale stays within the law and well away from the boundary of law and equity. That is not to say, however, that the Court was necessarily even aware of the boundary or maxim.

The second maxim—that equity has no jurisdiction where there is an adequate remedy at law—has been translated more broadly by some authorities as follows: “[U]nless the legal remedy is as plain, adequate and complete, and as practical in its results, and as efficient in the administration of justice, as the equitable remedy, the *jurisdiction* in equity will attach.”¹²¹ Again, *Olmstead*'s interpretation of the law obviates any need for the analysis of this maxim in the opinion. Indeed, *Olmstead*'s statutory construction reaches the same result in this case as a determination that the charging order provisions were exclusively coupled with a further determination that the exclusive remedy provided by the statute was *law* and was *inadequate*.

The maxim raises questions of meaning even without reference to law. One question being what is the definition of a complete *legal* remedy. This definitional question again raises the relationship of equity to separation of powers; this time under the guise of a kind of statutory preemption under some theory of legislative supremacy. The key to part of this question is determining the comprehensiveness and scope of the charging order statute as intended by the legislature. Answering part of that question, in turn, implicates the legislature's intended policy balance between the aggregate rights of debtors and creditors and the place of SMLLCs in that context. Professor Loew-

120. See MCCLINTOCK, *supra* note 113. Professor McClintock's treatise states as a general rule:

Where equitable jurisdiction over a particular class of suits has been established because of the inadequacy of the remedy at law, and the remedy at law has since become adequate because of extension by judicial decision or statute, it is often said that the jurisdiction of equity is not thereby diminished, but the principle is not uniformly recognized, and is disregarded in many cases.

MCCLINTOCK, *supra* note 113, at 115. Unlike Professor McClintock's treatise, the older treatise by Professor Eaton expresses no doubt about the matter quoted: “Nor will courts of equity be ousted of their original jurisdiction because courts of law have adopted equitable principles.” EATON, *supra* note 114, at 30. Statutes, of course, add to the decisional mix the dimension of separation of power.

121. EATON, *supra* note 114, at 30-31 (emphasis added).

enstein addresses both of these issues in the context of the equitable theory of piercing the liability shield of corporations. He argues that non-statutory remedies (*i.e.*, equitable) should be further narrowed because the business entity statutes have consciously and carefully balanced the rights, duties and obligations consistent with legislatively articulated public policy.¹²² Moreover, he suggests that the application of equity to statutory charging orders is narrowed in application because a “business association statute serves no other purpose [other than determining the appropriate policy balance] and arguably ‘preempts’ the field on the issues it resolves.”¹²³

The question of how to define or describe *adequate remedy* is also raised. This definitional question is related to, but independent from, the comprehensiveness of the statute; but, nonetheless, it may be independent from the issue of comprehensiveness. One illustrative issue nestled within *adequate remedy* is whether mere inability to collect from a debtor or a debtor’s insolvency renders the legal remedy inadequate. A Florida pleading and practice guide suggests one defense to the use of equitable remedies under those circumstances:

The complaint must show that there are obstacles which prevent the full enforcement of the judgment in law and the execution and return *nulla bona* by the proper officer will suffice in this regard, but more general allegations that there is no remedy or adequate remedy at law are insufficient.¹²⁴

Another boundary is suggested in a Florida appellate court case where the claimants sought an injunction to freeze an account before payment of a disputed commission to a real estate broker. It stated in 1984:

The order is plainly wrong. This was an action to recover money damages upon a claim of breach of an oral contract to pay money; that is, a commission. Such a cause of action does not entitle the claimant to equitable relief simply because the complaint alleges uncertainty of collectability of the judgment if a fund of money is to be disbursed. The test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether once obtained it will be collectible.¹²⁵

122. Mark J. Loewenstein, *Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry*, 15 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 10-23, 2010), available at <http://ssrn.com/abstract=1660576>.

123. *Id.*

124. 13 JOHN J. DVORSKE, FLA. JUR. CREDITORS’ RIGHTS AND REMEDIES § 288 (2d ed. 2010) (citations omitted).

125. *St. Lawrence Co., N.V. v. Alkow Realty, Inc.*, 453 So. 2d 514, 514 (Fla. Dist. Ct. App. 1984).

At a minimum these quotes suggest that the most appropriate time to seek equitable remedies, absent truly extraordinary circumstances, is when a judgment at law is returned as uncollectible. This article necessarily returns to the issue of *adequate remedy of law* later because there exist other questions concerning the phrase; first, however, the article turns to the more general distinction between equity and law.

EQUITY & INTERPRETATION

“Equity” is neither synonymous with common law nor necessarily separate from statutory law; indeed, “our substantive law is derived from common law, from equity, and from statute.”¹²⁶ Thus, many statutory laws are based on recognized equity principles.¹²⁷ For example, equity first governed the entire substantive areas of trusts and mortgages, which are now largely statutory.¹²⁸ Moreover, and as a further illustration, “the concept of fiduciary duty has spread from express trusts to a whole range of principal-agent relationships.”¹²⁹ Arguably, courts are using equitable principles and remedies more broadly than ever before. Professor Laycock, for example, suggests the maxim that “a court will not grant an equitable remedy if a legal remedy would be adequate . . . is dead . . .”; meaning the maxim “never constrains a court’s decision in any case where the choice of remedy matters.”¹³⁰

Whether insolvency or uncollectability is enough to make a remedy at law inadequate (which is part of the distinction above) may be too theoretically pure to be of practical application in factual situations similar to *Olmstead* or in most other real-life situations for that matter. Simply, the pure issue assumes no independent facts from which an “equitable right, estate, or interest” could be derived.¹³¹ After not-

126. Laycock, *supra* note 79, at 67. Perhaps Professor Laycock’s most famous article, based on response in the literature, is entitled “The Death of the Irreparable Injury Rule.” Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

127. Equity uses principles. Leonard I. Rotman, *Is Fiduciary Law Efficient? A Preliminary Analysis*, 24 (Oct. 8, 2009) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=1485853>. Law uses rules. *Id.* Thus it creates a kind of tension. It echoes recent debates about rule-based and principle-based accounting. See Rebecca Toppe Shortridge & Mark Myring, *Defining Principle-Based Accounting Standards*, THE CPA JOURNAL ONLINE (Aug. 2004), <http://www.nysscpa.org/cpajournal/2004/804/essentials/p34.htm>.

128. See generally EATON, *supra* note 114 (explanation of areas covered by equity in the early Twentieth Century); John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007) (explanation of areas covered by equity today).

129. Laycock, *supra* note 79, at 68.

130. Laycock, *supra* note 79, at 54-55.

131. EATON, *supra* note 114, at 26 (emphasis added).

ing that many such rights are generally termed “a trust estate,” the previously cited “old treatise” observed there are “many other” equitable rights and interests that (at the turn of the century when the treatise was written) were not recognized “in law courts.”¹³² These *interests* included, among others “the mortgagor’s equity of redemption” and “equitable lienors.”¹³³

Equitable rights and interests can be viewed as merely component parts of equitable remedies, but historically they were independent from remedies because they provided the separate equity courts concurrent jurisdiction with the law courts.¹³⁴ “Concurrent jurisdiction will not be exercised unless there is some equitable circumstance to give jurisdiction; such as fraud, irreparable injury, trust, accident, or the like.”¹³⁵ Where equity has an independent source of “jurisdiction”, it is arguably not necessary for courts to determine no adequate remedy at law is available.¹³⁶ At least one influential court, however,

132. EATON, *supra* note 114, at 27.

133. Mortgage law was at one time entirely equitable but, even after codification, equitable mortgages still exist. For example, a South Dakota case decided in 2006 recharacterized a purported real property sale as an equitable mortgage where a transfer by a warranty deed was followed immediately by a contract for deed. *Myers v. Eich*, 720 N.W.2d 76 (S.D. 2006). This decision illustrates, in a general way, how equity “thinks” and how courts apply it. In other words it conveys a *sense* of equity.

Illustratively, the opinion states: (1) “the recharacterization of a document is an equitable remedy,” *id.* at 82 (citing *Englehart v. Larson*, 566 N.W.2d 152, 155 (S.D. 1997)); (2) the trial court has discretion to grant or deny equitable remedies, *id.*; (3) the standard of review is abuse of discretion, *id.* (citing *Adrian v. McKinnie*, 639 N.W.2d 529, 533 (S.D. 2002)); (4) “‘Equity requires that the transaction be treated according to its substance and effect, not its form[.]’” *id.* (quoting *Star Enterprise v. Thomas*, 783 F. Supp. 1564, 1568 (D.R.I. 1992)); (5) “A purported absolute conveyance may be recharacterized as a mortgage, depending on the . . . parties’ intent,” *Myers*, 720 N.W.2d at 83 (citing *Adrian*, 639 N.W.2d at 533); and, (6) The most important time for determining the intent of the parties is “at the inception of their relationship.” *Id.* (citing *Abberton v. Stephens*, 747 S.W.2d 334, 336 (Mo. Ct. App. 1988)). Finally, the opinion describes the appropriate attitude of a court when using its discretion to exercise its equitable powers: “if facts plainly exist to warrant equitable relief and no facts exist to disentitle a party to such relief, then a court is not free simply to ignore the remedy in the name of discretion. Consistency and fairness require courts to decide similar cases similarly.” *Id.* at 82 (quoting *Adrian*, 639 N.W.2d at 533).

134. EATON, *supra* note 114, at 30.

135. EATON, *supra* note 114, at 30. “Accident,” as used in the quote, has a meaning to somewhat related to both “mistake” and “impossibility.” *Cf.* EATON, *supra* note 114, at 223 (failure of technical signing requirements).

136. Professor McClintock’s treatise states as a general rule: “Many courts have held that fraud is itself a basis for the exercise of equity jurisdiction, even though the remedy at law may be adequate.” MCCLINTOCK, *supra* note 113, at 117 (the treatise suggests this is the English rule but that it does not appear to be the majority rule in the United States. MCCLINTOCK, *supra* note 113, at 118.).

held both an independent source of jurisdiction and no adequate remedy[ies] at law are required.¹³⁷

Fraud is one illustration of an “equitable circumstance” that gives a court equity jurisdiction: “As a general rule, courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with and sometimes exclusive of other courts.”¹³⁸ Historically, “fraud” included both *actual* and *constructive* fraud,¹³⁹ and equitable remedies

137. A frequently cited Delaware Supreme Court case, *DuPont v. DuPont*, 85 A.2d 724 (Del. 1951), discussed the constitutionally determined jurisdiction of the Delaware Chancery Court. It touches on both *meanings* of jurisdiction and describes the importance of the phrase “an adequate remedy at law.” At issue was whether the court had equitable power to award separate maintenance of a spouse due to abandonment. *Id.* at 730. The answer required determining, first, whether the legislature had constitutional authority to vest jurisdiction of all matrimonial matters in a separate Family Court apart from Chancery. *Id.* at 726. Second, whether an adequate remedy of law was available and that the Court of Chancery could not exercise such jurisdiction if it had it. *Id.* at 729.

The Court analyzed the first question by determining whether the British Court of Chancery would have had jurisdiction of such matters when the state constitution was ratified followed by vetting several amendments to the state’s (Delaware) constitutional provision. *Id.* at 729. The Court held that the Delaware Constitution guaranteed the equitable jurisdiction of the Chancery Court to be at least that of the British Chancery Court in the late eighteenth century and, therefore, that the legislature could not strip it of its jurisdiction over certain matters that it had by statute transferred to Family Court. *DuPont*, 85 A.2d at 730.

The constitutional provision cited by the Court as establishing carry-over jurisdiction, however, also contained a provision modifying it. The provision “is to the effect that the Chancellor shall not hear and determine any cause where a sufficient remedy exists at law.” *Id.* at 729. Thus, the Chancery Court could not *exercise its jurisdiction* if the statute establishing the Family Court also provided an *adequate remedy at law*. The latter was the second question in the case.

Regarding the second question in the case, the Delaware Supreme Court found that there was no adequate remedy at law. *Id.* at 734. Therefore, *circa* 1951, Chancery Court had both jurisdiction over the subject matter and the authority to exercise it to provide equitable relief for maintenance to an abandoned spouse. *See*, Johnson, *supra*, note 89 (footnote omitted) (containing an excellent discussion of *DuPont* and of the equity powers of Delaware Courts over business organizations, generally, arguing the Delaware Constitution makes fiduciary duties unavailable in its unincorporated entity, a.k.a. “alternative entity,” law).

138. EATON, *supra* note 114, at 283.

139. EATON, *supra* note 114, at 283. There are two classes of fraud in equity: actual and constructive fraud.

Actual Fraud

Actual fraud arises from facts and circumstances of imposition, and may be described as something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud.

EATON, *supra* note 114, at 287.

Constructive Fraud

Constructive fraud may be described as an act done or omitted, not with actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence.

EATON, *supra* note 114, at 287.

Relief from and, Remedies for, Fraud

A treatise published nearly 50 years after Eaton said:

for fraud included constructive trusts, equitable liens, setting aside fraudulent conveyances,¹⁴⁰ and appointing receivers.¹⁴¹ Other equity-based remedies include pre-judgment asset freezing injunctions (“Mareva Injunctions”)¹⁴² and the removal of the *veil* of limited liabil-

Equity can declare a person who has been guilty of fraud to be a constructive trustee of the property he has received in the transaction, and to account for it as trustee; or it can impose an equitable lien to secure return of the consideration; or it can compel him to make good on the representations on which the other party has acted.

McCLINTOCK, *supra* note 113, at 229. See EATON, *supra* note 114, at 411 (Eaton seems to go further than the quoted language from McClintock stating that a constructive trust may be impressed, “on the grounds of justice and good conscience, without reference to the intention of the parties.”).

140. Fraudulent conveyance law is another example, like charging order law, of a notion that started as equity but became statutory. Therefore, it raises similar issues as those previously noted; like the effect the adoption of a statute has on equity, equity jurisdiction, and the availability of equitable remedies.

Florida has a statutory fraudulent transfers act entitled the “Florida Uniform Fraudulent Transfers Act” (FUFTA), FLA. STAT. ANN. §§ 222.29-222.30, 726.101 (West 2010). Like similar statutes, FUFTA has an exception for transfers where reasonable value is received by the debtor in exchange for the transfer. *Id.* § 726.109(1). Whether the exchange of individually owned property for LLC interests is equivalent seems to be one of the pressure points in the application of the statutes. The latter issue is similar, to some degree, to the “vanishing value” issue in the law of wealth transfer taxation. See generally JEFFREY N. PENNELL & ALAN NEWMAN, ESTATE AND TRUST PLANNING 419 (2005). Nonetheless, based on the authors’ conversations with other lawyers, it seems that the power of the constructive fraud provision of UFTA (Uniform Fraudulent Transfer Act) is underestimated. Section 4 of UFTA provides in part a transfer is fraudulent as to both present and future creditors if the debtor:

(2) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- (i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they came due.

UNIF. FRAUDULENT TRANSFERS ACT, § 4(a)(2), 7A U.L.A. 58 (2006) (the quoted paragraph concerns constructive fraud and does not require proof of intent; the traditional badges of fraud are codified to prove actual fraud).

141. See, e.g., McCLINTOCK, *supra* note 113, at 229, 553, 557.

142. Injunctions are equity. See generally chapter 22 of EATON, *supra* note 114, at 563-605. Contempt is a possible sanction for violation of an injunction. The use of foreign asset protection trusts (APTs) has sometimes, but rarely, drawn contempt sanctions including incarceration. See, e.g., FTC v. Affordable Media, 179 F.3d 1228, 1244 (9th Cir. 1999) (more commonly referred to as “the Anderson case”). See also generally Duncan E. Osborne & Elizabeth Schurig, *A Comparison of Foreign and Delaware APTs – Advantages of Delaware APTs*, 2 ASSET PROTECTION: DOM. & INT’L L. & TACTICS § 14A:146 (2010).

According to a Uniform Laws Commission (ULC) Memorandum, there is a great deal of inconsistency between and among the various states and the United States concerning freezing orders since *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999) (no equity jurisdiction for Federal Courts for prejudgment asset freezing order where only money damages sought unless otherwise provided by Congress). ULC has a drafting project for a uniform state act. Memorandum from Michael Getty, Chair, Study Comm. on Mareva Injunctions to ULC Comm. on Scope and Programs 1 (Oct. 14, 2009), available at <http://www.>

ity provided by an entity (“piercing the veil” or as applied in circumstances similar to *Olmstead* “reverse piercing”).¹⁴³

An important point of the discussion of equity for purposes of this article is simply that none of these equitable principles were discussed by *Olmstead*, though it appears the Court could have done so.¹⁴⁴ Another point is that the principles are not necessarily modified or modifiable by the addition of a simple statutory exclusivity clause. As a result, the existence of equitable actions is a confounding variable for statutory drafters in determining the scope of “exclusive” and how to draft it. For example, assuming that reverse piercing is available,

nccusl.org/Update/Docs/Mareva%20Injunctions/MarevaInjunctions_Getty%20memo_%20Oct%2014%2009.pdf.

143. A classic corporate case concerning the liability of owners for corporate debts stated: “Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, ‘pierce the corporate veil,’ whenever necessary ‘to prevent fraud or achieve equity.’” *Walkovsky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966) (quoting *Int’l Aircraft Trading Co. v. Mfrs. Trust*, 79 N.E.2d 249, 252 (N.Y. 1948)). A “reverse pierce” occurs where a judgment creditor of an owner is allowed to “pierce” to the assets owned by an entity. For the suggestion that even complete unity ownership should not justify making the assets of the venture available to satisfy the judgment-creditor was made where none of the elements necessary for piercing was present (other than perhaps the conclusory statement that it would be unjust to the judgment-creditor), see *Evans v. Galardi*, 546 P.2d 313, 317 (Cal. 1976). Piercing, forward or reverse, is an equitable remedy that calls for setting aside the asset partitioning that is otherwise provided for by statute. See, e.g., KY. REV. STAT. ANN. § 271B.6-220(2) (West 2010) (shareholder not liable for debts and obligations of a business corporation); *id.* § 275.150(1) (member of LLC not liable for debts and obligations of an LLC); *id.* § 275.240 (property of LLC is that of the LLC as a legal entity in which the members have no interest).

In circumstances in which piercing is appropriate, there is no policy basis for permitting an exclusivity provision to preclude that result. See Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199, 214, 231-32 (2009). Bishop quotes REVISED UNIF. LTD. LIAB. CO. ACT § 503(g) cmt. Subsection g, 6B U.L.A. 498-501 (2008), which notes that the exclusivity of the charging order remedy is not designed to override reverse piercing: “This subsection is not intended to prevent a court from effecting a ‘reverse pierce’ where appropriate.” *Id.* For another excellent treatment of the issues raised by the asset protection features of LLCs, see Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations*, 30 DEL. J. CORP. L. 199 (2005). For further discussion of piercing, see *infra* note 170.

144. Arguably, the Florida Supreme Court could have addressed the equitable issues even under the certified question. First, the question was modified by the Court from one that expressly referenced the charging order provision to a broader one referencing generic “Florida law.” *FTC v. Olmstead*, 528 F.3d 1310, 1311 (11th Cir. 2008). “Florida law” seems to include all law in the unified court system to include common law, equity, and statutes.

Further, but still arguably, the Court could have addressed equity under the question as originally certified for one or a combination of the following three reasons: First, the Court stated “Under Rule 69 of the Federal Rules of Civil Procedure, proceedings in aid of judgment or execution are to be conducted in accordance ‘with the procedure of the state where the court is located’.” *Id.* at 1313. Second, the same opinion stated: “In certifying this question, we do not intend to restrict the issues considered by the state court [citations omitted]” and “we ask for guidance.” *Id.* at 1314. Third, the authority for the Federal District Court entering the original injunction in this case was, in part, derived from equity because it entered a freezing order (a type of injunction). See generally *supra* note 142 (discussing Mareva orders).

there is the question to whether, in the context of an LLC, reverse piercing would be precluded by the addition of a simple “exclusivity” phrase to the charging order provision.¹⁴⁵

Indeed, the use of a separate and freestanding equitable cause of action seems to raise fewer difficult jurisprudence and separation-of-powers questions than an *equitable interpretation* of the statute because it is a distinct action independent from the statute based on special and identifiable circumstances (such as fraud).¹⁴⁶ Stated another way for emphasis, an equitable remedy can be a remedy for a separate equitable action for fraud and is neither necessarily nor solely an extraordinary remedy auxiliary to the charging order statute.

As previously discussed, a relatively well-known example of a separate action that provides an equitable remedy is *piercing* the liability protection afforded by (and to) an entity.¹⁴⁷ Fraud is conceptually identifiable, even if not factually certain. That is, occurs frequently enough and over a large enough range of circumstances to be a significant category, while at the same time sharing a compositional core across that broad range of situations. This frequency of occurrence and identifiable composition makes fraud an independent equitable action apart from law and; therefore, almost by definition, not in conflict with law.

Conversely, and for interpretive purposes, the credible classification of situations covered by equitable *fraud* hold true even if fraud’s independence from law is ignored. That is: (1) fraud is a credible situational classification satisfying Llewellyn’s conditions for appropriate

145. See, e.g., KY. REV. STAT. ANN. 275.260(1) (West 2010). See *supra* note 36 and accompanying text (“choice of law” and a brief reference to selected jurisdictional issues which is a confounding variable for application of statutes). A good illustration of the normative interrelationship between statutes and equity (as well as other law) is the discussion in the Southern Methodist University Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code. Robyn L. Meadows discusses the standard for displacing other law under Uniform Commercial Code Section 1-103, specifically, whether displacement should be broadened “either by deleting references to explicit displacement, thus permitting displacement by implication, or by redrafting the comments to permit broader preemption.” Robyn L. Meadows, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code*, 54 SMU L. REV. 535, 537 (2001). She argues “that broadening the preemptive scope of the code is not only unnecessary, but ill advised.” *Id.* See also generally Mark D. Rosen, *What Has Happened to the Common Law? – Recent American Codifications and Their Impact on Judicial Practices and The Law’s Subsequent Development*, 1994 WIS. L. REV. 1119 (1994).

146. See 15 U.S.C.A. § 53(b)(2) (West 2010) (“Upon a proper showing that, weighing the equities and considering the [Federal Trade] Commission’s likelihood of success, such action would be in the public interest[.]”). See *supra* note 142 (discussing Mareva orders).

147. One of the elements under some formulations of the test for piercing is “fraud on the public.” See *supra* note 139. For further discussion of piercing the veil of limited liability, see *supra* note 143 and *infra* note 170.

“cooperative-partner” statutory interpretation, and (2) fraud identifies those situations as a class not intended by the legislature to be governed by the charging order provision.¹⁴⁸ Further, recognition of a class of equitable fraud situations creates two distinct classes for purposes of the charging order statute: (1) judgment debtors and (2) judgment debtors who perpetrated some sort of fraud upon the judgment creditor.¹⁴⁹ The *charging order* is available against both classes of judgment debtors. Equitable actions or additional equitable remedies beyond those provided at law (or statutorily) are available only against judgment debtors of the second class: those who perpetrated some sort of fraud.

Recognition of equitable *fraud* either as (i) a separate equitable cause of action, or (2) as a distinguishable class of situations not intended to have the benefit of the express statutory charging order; provides a break from the focus on *exclusive* in the Florida LLC Act. Equitable fraud applies across all statutes and would invite the reasoned and deliberative policy analysis contemplated by Professor Lowenstein (though by courts not legislators) even in states whose statutes include the “exclusive” language.

Finally, in addition to the other ways a court might avoid the strict application of the charging order statute, the class distinction concept might suggest a way to work equitable remedies as *supplementary* to the *statutory remedy* of the charging order (rather than as a remedy for an independent wrong, or as a class of situations not intended to be subjected to the statute), while remaining true to the maxim “equity follows the law.” That *way* brings the introductory analysis of equity in this article, as previously promised, back full circle to the maxim, “unless the legal remedy is plain, adequate and complete, and as practical in its results, and as efficient in the administration of justice as the equitable remedy, the jurisdiction in equity will attach.”¹⁵⁰

The maxim was previously discussed as part of the role statutory interpretation plays in the larger context of judicial equitable powers and the separation of powers.¹⁵¹ The specific question raised, but not previously answered, was whether the charging order represented such a comprehensive scheme as to preempt the field of judgment-creditor protection from judicial exercise of equity.¹⁵² The current

148. And, therefore, also complies with Llewellyn’s situational sense requirement for proper interpretation. *See supra* note 76.

149. Needless to say all of the latter categories fall within the former, but not vice-versa.

150. EATON, *supra* note 114, at 34-35.

151. *See supra* notes 88-110 and accompanying text.

152. Equity as used here is used in its *softens the law* meaning; not its *natural law* meaning. *See supra* notes 89-98 and accompanying text.

discussion focuses on a different but related question: Whether equity can supplement an inadequate remedy at law for a *legal* cause of action where there is no concurrent equity jurisdiction based on a separate equitable right or cause of action, for example, where there is no fraud.¹⁵³

The two “old” equity treatises that have served as the foundation with which to frame the equitable issues for this article are not in complete accord as to whether equity jurisdiction may attach *only* for an inadequate remedy at law. The older of the two treatises ambiguously indicates that an equitable remedy may require independent equitable jurisdiction not acquired simply because of an inadequate remedy at law.¹⁵⁴ The “newer” treatise hedges its statement. Illustratively, in the case of insolvency, it says:

Though there are not a great many cases holding that insolvency alone makes the remedy at law inadequate so that equity may give relief in a proper case because ordinarily plaintiff is able to find some other basis for applying to equity, there are a few well reasoned cases to that effect, and the great weight of judicial opinion is in accord.¹⁵⁵

The quoted material illustrates the level of confusion caused by the phrase *equity jurisdiction*. All courts, be they law courts, equitable chancery courts, or unified courts, must meet subject-matter and personal jurisdiction requirements in order to exercise power. Unless specifically limited by the state constitution or a constitutionally valid statute thereunder; however, a court of general jurisdiction in a uni-

153. A notion that seems to support the independent existence of equitable causes of action, perhaps in addition to *no adequate remedy at law*, is to the effect of, “[t]his court is committed to the doctrine that no person has the right to maintain a bill in equity unless the suit brought falls within some acknowledged head of equity jurisprudence[.]” *B.L.E. Realty Corp. v. Mary Williams Co.*, 134 So. 47, 50 (Fla. 1931). A “bill of equity” is

brought by a creditor who has secured judgment at law, and has in vain attempted at law to obtain satisfaction, and who sues in equity for the purpose of reaching property which cannot be reached by execution at law. The nature, purpose, and scope of such bill is to bring into exercise the equitable power of the court to enforce satisfaction of a judgment by means of an equitable execution because equitable execution at law cannot be had.

Id. at 49.

154. It states:

The inadequacy of the legal remedy may be said to be the foundation of the concurrent jurisdiction of courts of equity. The concurrent jurisdiction covers all cases in which no adequate remedy can be obtained at law except by circuity of action or by multiplicity of suits, and adequate and complete relief can be given in equity in one and the same action; as in the cases of accident, mistake, and fraud.

EATON, *supra* note 114, at 32 (the listed examples are all equitable causes; therefore, it seems jurisdiction must be based on something in addition to inadequate remedy at law).

155. McCLINTOCK, *supra* note 113, at 113.

fied court system has power to adjudicate using both law and equity if it has both subject-matter and personal jurisdiction. *Equity jurisdiction*, before the merger of law and equity, did not mean jurisdiction in the subject matter or personal jurisdictional sense. Rather:

[I]t was traditionally used to refer to the body of equitable precedents, practices, and attitudes Sometimes courts would say that if the plaintiff had an adequate remedy at law, they would dismiss the claim “for want of equity jurisdiction”. . . . But the phrase means no such thing For clarity, the term equity jurisdiction might well be avoided.¹⁵⁶

The phrase was and is still used in the context of whether there is a right to a jury (law);¹⁵⁷ but, usually the right to a jury trial can be framed as a distinct question from jurisdiction. In any event, if there is an *inadequate remedy at law*, and there is no constitutionally valid limitation on the range of remedies, a court has equitable *jurisdiction* to provide *equitable* remedies beyond statutory remedies as a supplemental aid to the statute. Of course, the court would need to heed the maxim, *equity follows the law*.¹⁵⁸ This conclusion is consistent with an article quoting a Delaware Chancery opinion: “[t]his court will use its ‘broad discretion’ to tailor [a remedy] to suit the situation as it exists.

156. DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION § 2.7, at 180 (2d ed. 1993).

157. James Parsons’ treatise states:

The Court determines the legal effect of the contract, but its terms, if oral, are found by jury If it is in writing, the court interprets the meaning of the parties and determines the legal effect of the parties. If the contract is not in writing, the jury finds what the contract was, and the court decides the legal effect of it.

JAMES PARSONS, PRINCIPLES OF PARTNERSHIP § 21, at 44 (1889). For a modern partnership case that turns on the law-equity distinction, see *Mundhenke v. Holm*, 787 N.W.2d 302 (S.D. 2010). The court addressed the pendent *incidental* jurisdiction doctrine wherein a court acting in equity, under former law, could decide *incidental* matters of law that would ordinarily require a jury. *Id.* at 306. The court stated that the parties agreed that the question of the partnership’s existence was a question of law, and the case was tried on that basis. *Id.* at 307. This suggests the court had second thoughts about whether the existence of a partnership is law or equity. See also *Holcomb v. Davis*, 431 S.W.2d 881, 883 (Ky. 1968) (applying quantum meruit); *Doyle v. Miller*, No. 95-CA-00223-MR, slip op. at 1-2 (Ky. Ct. App. Dec. 13, 1996) (applying equitable laches rather than a legal statute of limitations to the question of the timeliness of a petition for an accounting). For a discussion of the issues arising from the merger of law courts and equity courts, such as the right to a jury trial, see generally W. Hamilton Bryson, *The Merger of Common Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77 (2006); see also Charles D. McDaniel, Jr., Note, *First National Bank of Dewitt v. Cruthis: An Analysis of the Right to a Jury Trial in Arkansas After the Merger of Law and Equity*, 60 ARK. L. REV. 563, 568 (2007) (identifying five states that recently merged their law courts and equity courts as West Virginia, Rhode Island, Florida, Alabama and Maryland). For an analysis of the law-equity distinction in English law, see Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002).

158. See *supra* notes 113-125 and accompanying text (discussing the equity maxims: “equity follows the law” and “inadequate remedy at law”).

As Delaware has long recognized, ‘the Court of Chancery [has] the inherent power to adapt its relief to the particular rights and liabilities of each party.’”¹⁵⁹

In summary, even this limited “hornbook” overview of equity suggests that courts have a great deal of flexibility either in fashioning equitable remedies consistent with statutory remedies, or in the aid of extending equity in statutes sounding in equitable principles. The most powerful exercise of equitable jurisdiction, in the appropriate case, might be for a court to avoid addressing the statutory remedies. For example, in a case involving a charging order statute, a court might identify a separate and distinct equitable wrong like fraud.¹⁶⁰ The court may then unleash the full panoply of equitable remedies, including remedies like constructive trusts and reverse piercing.

Unfortunately unleashing equity is not a panacea. Even the equitable power yielded in Delaware over corporate matters has not been immune from criticism. One author, for example, begins an article by stating: “[w]hile Delaware jurisprudence is renowned for its clarity and sophistication, one area of its corporate law is, by design, uncharacteristically ambiguous: equitable remedies.”¹⁶¹ The author concludes the article with the observation that, while “equitable doctrines play an important role in providing justice to an aggrieved party . . .”; they are, “potent, amorphous, and ambiguous Unless courts keep a laser-sharp focus on the purpose of these remedies, they threaten to unravel much of the fabric of our law.”¹⁶² It is remarkable that the ambiguousness of equity, according to the same article, is by *design*. The designed ambiguity may be the source of equity’s flexibility that, in fact, makes it efficient. For example, the equitable notion of fiduciary duty has been called the “most doctrinally pure expression of equity.”¹⁶³ Yet fiduciary duty is famously ambiguous for the same reason that all of equity is ambiguous; because “the fiduciary

159. Mary Siegel, *The Dangers of Equitable Remedies*, 15 STAN. J.L. BUS. & FIN. 86 (2009) (quoting *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005), *Cantor Fitzgerald, L.P. v. Cantor*, No. 16297, 2001 Del. Ch. LEXIS 70, at *9 (May 11, 2001), *Hanby v. Wereschak*, 207 A.2d 369, 370 (Del. 1965)).

160. As a very general matter, “equity has the authority to relieve against fraud[.]” 27A AM. JUR. 2D *Equity* § 5 (2010). Further: “[F]raud in equity has a much broader connotation than at law and includes acts inconsistent with fair dealing and good conscience[.]” *Id.* See also *supra* notes 136-140.

161. Siegel, *supra* note 159, at 86.

162. Siegel, *supra* note 159, at 126.

163. Leonard I. Rotman, *Is Fiduciary Law Efficient? A Preliminary Analysis*, 4 (SSRN Working Paper Series, presented at the Remedies Discussion Forum held in Aix-en-Provence, Fr., June 5-6, 2009), available at <http://ssrn.com/abstract=1485853>. Fiduciary duty is over 300 years old in English common law and similar principles were in Roman civil law. *Id.* at 8.

concept is potentially applicable to an infinite variety of actors involved in an infinite number of circumstances.”¹⁶⁴ Equitable fiduciary duty may be efficient—at least in select circumstances—because it is a necessary systemic counterweight to the “efficient contract breach” at law.¹⁶⁵

The “tension” between law and equity was addressed explicitly in a 2005 article written by Justice Jacobs of the Delaware Supreme Court.¹⁶⁶ Justice Jacobs’ article said:

[T]he dispute [between law and equity in corporate law] created and continues to create tension between the need for a flexible set of rules that promote fair treatment of investors, and the policy, endorsed by transactional planners, that favors a set of bright-line rules that promote clarity and predictability.¹⁶⁷

After analyzing the “law model,” the “equity model,” and setting forth a brief history of equity in Delaware corporate law, Judge Jacobs observed (as of 2005) that he:

[V]iew[s] the [Delaware] Supreme Court’s apparent movement away from equity not as an attempt to get rid of equity, but as a mid-course adjustment . . . develop[ing] a bright line rule that would make the application of equity more predictable . . . [and that] the concept of wrapping law around equity is a great idea, if it can be carried off.¹⁶⁸

164. *Id.* at 3.

165. Rotman summarized as follows:

It may be plausibly suggested that the fiduciary concept’s focus on the preservation of important relationships is “efficient,” even in contrast to the notion of efficient breach, insofar as it maintains the viability of necessary relations in interdependent societies by preserving the trust of those who engage in them. The fiduciary concept instills a greater degree of predictability in these interactions[.]

Id. at 20 (footnotes omitted). The tension created between (and because of) the poles of efficient breach and fiduciary duty may be a necessary for law’s stability and flexibility. There is growing literature on law as a complex adaptive system. See, e.g., J. B. Ruhl, *Regulation by Adaptive Management – Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21 (2005) (and citations therein); Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933, 955-75 (1994); *Complexity Theory in Legal Scholarship*, JURIS-DYNAMICS.BLOGSPOT.COM, <http://jurisdynamics.blogspot.com/2006/07/complexity-theory-in-legal-scholarship.html> (bibliography).

166. Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1 (2005).

167. *Id.* at 2.

168. *Id.* at 15. Professor Johnson argues that under the Delaware Constitution, at least, the legal wrapper cannot mandatorily constrain the equitable power of the courts and, therefore, staying within the wrapper is voluntary by the courts. See Johnson, *supra* note 89. See also Grace Murphy Long, Comment, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875, 906 (2006) (“Although Alabama courts place clear limitations on equitable relief, making the remedy appear more legal, constructive trusts still retain some of their equitable attributes.”). It is possible that the entire subject of equity is slowly disappearing

The tension between, and the design of, law and equity, therefore, seems to be creative and evolutionary.¹⁶⁹

Again, and for the third time in this article, another well-worn example of ambiguity as a design feature of equity is piercing the liability veil of an entity.¹⁷⁰ Indeed, Professor Loewenstein, as previously

from our system because of lack of familiarity and attention. Professor McClintock, in the 1948 edition of his treatise on equity, warned:

A problem with more practical aspects is the problem of the classification of equity in our legal system, and in law school curricula. It has been earnestly advocated that we should no longer regard equity as a separate system, but as merely a part of each branch of the law with which it deals, remedies and procedure, property, contracts, torts and so on. Whatever may be thought of the logic of that practice, it is apparent that it will be difficult to preserve the characteristic features of equity, its discretion and adaptability, if it is nowhere considered as a whole. If it is not, as some contend, inevitable that those characteristics will be lost anyway under the combined system, it is highly probable that they cannot survive when the various aspects of the system are separately treated and often taught and applied by men who have no adequate foundation themselves on which to base an exposition of the characters. The only hope for the preservation of equity lies in a continuous study of it as a system based on fundamental conceptions, but applied in all of the various fields of law.

McCLINTOCK, *supra* note 113, § 7, at 18-19 (footnotes omitted).

169. Justice Jacobs, for example, observed that federal securities law has, at a couple times in history, evolved to fill niches or gaps in state law. Jacobs, *supra* note 166, at 1. Therefore the federal securities law could be said to “co-evolve” with state enterprise law.

170. See *supra* note 143 (discussing piercing the veil in greater detail). Professor Mark J. Loewenstein quotes two of the leading scholars in corporate law in veil piercing in his article, *Veil Piercing to Non-owners: A Practical and Theoretical Inquiry*, *supra* note 122. First, he quotes Robert Clark: “[C]ases attempting to pierce the corporate veil are unified more by the remedy sought – subjecting to corporate liabilities the personal assets directly held by shareholders – than by repeated and consistent application of the same criteria for the remedy.” Loewenstein, *supra* note 122, at 2 n.8, (citation omitted). He then quotes Stephen M. Bainbridge: “The present state of veil piercing doctrine allows judges to impose their own brand of rough justice without being overly concerned with precedent or appellate review.” Loewenstein, *supra* note 122, at 3 n.12 (citation omitted). He then summarizes another argument by Robert Clark: “[Clark argues] that veil piercing is employed by the courts when other doctrines, principally, fraudulent conveyance, are found lacking and moral precepts support denying limited liability for an entity’s owner.” Loewenstein, *supra* note 122, at 8 n.55.

In addition, Professor Loewenstein discusses the “privilege theory” of corporations as the traditional policy reason for limited liability; *i.e.*, limited liability relies on the *personality* of the entity which is granted by law. Loewenstein, *supra* note 122, at 5. Another possible policy reason would sound as a tragedy of the commons market related hypothesis. See *supra* note 165 (*fiduciary law* as polar opposite to efficient breach). This article, however, adds and emphasizes that simple asset partitioning may be a primary reason for the demarcation between owners’ personal creditors and the creditors of the entity. See *supra* notes 90 and 143 and accompanying text.

Discussion of the various tests for piercing is beyond the scope of this article. Nonetheless, a common element in the cases is that failure to pierce would result in “fraud or injustice.” Loewenstein, *supra* note 122, at 7. Another doctrine closely related to, and sometimes subsumed by, veil piercing is the use of agency law to find the dominant owner liable for the obligations of the entity. That is, the owner(s) so control and dominate the entity as to become its principal in the principal-agency relationship. Loewenstein, *supra* note 122, at 8 (stating the use of the agency theory is largely confined to parent subsidiary relationships). Moreover, this theory, it seems,

discussed, argues that business entity statutes should be interpreted as preempting piercing and other equitable doctrine because those statutes have already balanced the rights, obligations and risks as a matter of public policy.¹⁷¹ Loewenstein further warns of legislative *push-back* if and when judicial decisions alter that balance because of increased transactions costs.¹⁷²

Nonetheless, different kinds of equitable tools and machinery have evolved historically in response to factual environments similar to those in *Olmstead*. The California limited partnership law (then in effect) for example, spawned an instructive line of cases which culminated in the fashioning of an *undue-interference standard* for ordering the foreclosure of a charging order. The California charging order provision that was interpreted did not address foreclosure. In his analysis of this line of cases, Professor Hynes quotes *Hellman v. Anderson* for the Court's expression of the *original* policy behind the charging order and why that policy required flexibility in application of remedies:

[T]he policy underlying the Uniform Partnership Act [is] avoiding undue interference with partnership business In some cases, foreclosure might cause a partner with essential managerial skills to abandon the partnership. In other cases, foreclosure would appear to have no appreciable effect on the conduct of partnership business. Thus, the effect of foreclosure on the partnership should be evaluated on a case-by-case basis by the trial court in connection with its equitable power to order a foreclosure.¹⁷³

might be used to find dominant *non*-owners liable. Loewenstein, *supra* note 122, at 11. Another theory, the instrumentality theory, is relatively close to, but distinct from, agency theory. A corporation, for example, may be found to be a *mere instrumentality* where the "controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 43, at 303 (West 2006).

171. Loewenstein, *supra* note 122, at 15 ("The statutes are crafted to balance the interests of the various constituencies of the entity – owners, managers and third parties dealing with the entity – regarding the rights and obligations of the owners and managers."). Moreover, he suggests that it is narrowed because a "business association statute serves no other purpose and arguably 'preempts' the field on the issues it resolves." Loewenstein, *supra* note 122, at 15. See also *supra* note 145 and accompanying text.

172. Loewenstein, *supra* note 122, at 15 ("Judicial decisions that alter this balance and allow a creditor to pierce the veil of an entity and hold an owner liable, result in legislative push-back, add transaction costs as parties seek to contract around the judicial incursion, or create uncertainty and additional litigation.") (footnotes omitted). Unpopular decisions in "bad cases," however, may create legislative push-back against impregnable statutory charging order provision. See *supra* note 171.

173. J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 PAC. L.J. 1, 12 (1993) (quoting *Hellman v. Anderson*, 284 Cal. Rptr. 830, 837-38 (Ct. App. 1991)). Neither California's limited partnership nor general partnership charging order statutes applica-

ble to this line of cases provided for foreclosure of a partnership interest. All the cases involved determining the circumstances under which a court could order such a sale.

According to Professor Hynes, one of the first charging order cases “stated that the charging order provision was ‘not intended to protect a debtor partner against claims of his judgment creditors where no legitimate interest of the partnership, or of the remaining partners is to be served.’” Hynes, *supra* note 173, at 8 (quoting *Taylor v. S&M Lamp Company*, 12 Cal. Rptr. 323, 328 (Ct. App. 1961)). This is very close to one of the basic arguments in the *Olmstead* decision. See *supra* notes 57-66 and accompanying text. In addition, it is in accord with a statement by Jay Adkisson. See *supra* note 90.

Approximately thirty years later, in *Centurion Corporation v. Crocker National Bank*, the general partner in a limited partnership had consented to the foreclosure sale but the sole limited partner objected because his interest was not assignable under the limited partnership agreement. See Hynes, *supra* note 173, at 7-8. According to Hynes, the court expanded the *S&M Lamp Company* language and, “concluded that California law ‘seems to contemplate’ sale of a partnership interest ‘where three conditions are met: first, the creditor has previously obtained a charging order; second, the judgment nevertheless remains unsatisfied; and third, all partners other than the debtor have consented to the sale of the interest.’” Hynes, *supra* note 173, at 8 (quoting *Centurion Corp. v. Crocker Nat’l Bank*, 255 Cal. Rptr. 794, 798 (Ct. App. 1989)).

The general partnership case quoted in the text of this article, *Hellman v. Anderson*, came shortly after *Crocker*. It analyzed *Crocker*’s partner consent requirement modifying the three conditions test with an *undue interference test* as quoted in the text. *Hellman*, 284 Cal. Rptr. at 837. Professor Hynes strongly disagreed with strengthening the charging orders’ prophylactic effect even for the sake of the partnership and the partnership business (even as opposed to the upside-down protection which primarily serves to benefit the debtor-partner which is the case in *Olmstead*). Hynes, *supra* note 173, at 13-15.

Professor Hynes also identifies Georgia as the first state to modify its partnership act to exclude foreclosure from the charging order process. Hynes, *supra* note 173, at 18 (citing Larry E. Ribstein, *An Analysis of Georgia’s New Partnership Law*, 36 MERCER L. REV. 443 (1985) (Ribstein helped draft the Georgia provision)). For the historical and global context for “asset shielding,” see Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1388-1394 (2006). Charging orders and attendant auxiliary proceedings began in equity. See *supra* note 119. Now such provisions are statutory.

This migration is not completely unique in the law because the law of wills, too, migrated into statutory law (but from law not from equity). See generally John H. Langbein & Lawrence W. Waggoner, *Curing Execution Errors and Mistaken Terms in Wills* 1 (Univ. Mich. Pub. Law & Legal Theory Working Paper Series, Paper No. 207), available at <http://ssrn.com/abstract=1653438>. The paper states that “[c]ourts of equity have for centuries exercised the power to reform mistakes in trusts, deeds of gift, and beneficiary designations.” *Id.* at 6. Only now, however, have “[l]eading modern authority in a number of American states . . . reversed the strict-compliance and no-reformation rules [of the interpretation of wills]. Both by judicial decision and legislation, the courts have been empowered to excuse harmless execution errors and to reform mistaken terms.” *Id.* at 1. The emphasis on *intent*, and the expressed confidence that courts can determine intent even in cases where the person whose intent matters is dead, would seem to encourage the use of *intent* elsewhere, like in actual fraud. See *supra* note 140.

The other reason the relaxation of strict-compliance and no-reformation for wills might be instructive in the context of charging orders is that some courts have taken the action even though there was no statutory authority to do so and no change in the statute on which to imply such a legislative intent. According to Langbein and Waggoner, the Ontario Court of Justice stated, “the . . . absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does [sic] not exist here [one of the witnesses failed to sign the will].” Langbein & Waggoner, *supra*, at 7 (quoting *Sisson v. Park St. Baptist Church* (1998), 24 E.T.R. 2d 18, para. 40 (Can. Ont. Gen. Div.)). Note that this was law, not equity. This seems to represent the “cooperative partners” school of statutory construction;

Hynes argues strongly against the imposition of the standard. He first states that the standard is vague and further states that “uncertainty comes at a cost.”¹⁷⁴ Beyond uncertainty, however, he argues against the necessity of the rule because more traditional notions of the charging order and its foreclosure provide balanced protection for the partnership and the non-debtor partners.¹⁷⁵ This balance, again according to Hynes, includes “nonpartner debtor redemption” and “carefully crafted limitations placed on the nature of the interest bought at the sale.”¹⁷⁶ Further, he observes: “The . . . protections loom particularly large when one considers that the charging order displaces remedies at common law.”¹⁷⁷

Professors Loewenstein and Hynes indirectly emphasize the importance of reasoned and measured public policy as embodied and expressed by public statutes that balance the rights, duties, and liabilities of constituents of business entities. But, this article also suggested that the best statutory defense against the uncertainty of court-ordered equitable remedies (as well as possible legislative push-back in the context of a member’s judgment-creditor) may be a clearly drafted provision that provides a limited but arguably *adequate remedy at law* as a prophylactic.

ISSUE CASCADE AND A LEGISLATIVE AGENDA

There existed no articulated policy basis for different charging order formulas between the charging order provisions of the various unincorporated Florida acts. Therefore, *Olmstead* calls out for a legislative

perhaps with just a hint of natural law. See *supra* notes 74-91 and accompanying text (statutory construction). It is consistent with the charging order foreclosure cases that resulted in the undue interference test in California.

An author of the present article, Geu, echoed earlier warnings, including the one quoted in the text early in 2005. He feared an explosion of the use of unpredictable equitable remedies and the increase of more “control-person” or “responsible party” models of statutory liability if charging order provisions remedies too tightly to provide reasonable recourse in the *bad facts* case. Thomas Earl Geu, *Letter to the Editor*, 19 PROB. & PROP., Mar.-Apr. 2005, at 4. See also ADKISSON, *supra* note 90.

174. Hynes, *supra* note 173, at 13. Hynes qualifies that statement by saying, “[t]hat alone does not make a rule wrong.” Hynes, *supra* note 173, at 13.

175. Hynes, *supra* note 173, at 12-17.

176. Hynes, *supra* note 173, at 13-14. Some state statutes do not allow foreclosure sales of the transferable interest. See, e.g., S.D. CODIFIED. L. § 47-34A-504(e)(2010) (“No other remedy, including foreclosure on a members distributional interest . . .”). It would be interesting to ask Professor Hynes whether he would consider such a statute a carefully balanced policy based statute.

177. Hynes, *supra* note 173, at 15. If the *undue interference* standard were applied to *Olmstead*, the first issue might be whether the SMLLCs had a “business” with which to be interfered. Obviously, the single-member nature of the LLCs in *Olmstead* makes it possible to distinguish it from *Hellman* on the facts.

response. The relatively simple change of adding the exclusivity language to the statute will calm the waves that *Olmstead* caused.

Even with the additional exclusivity language it would be possible for *Olmstead* (or cases like it) to reach the same conclusion. The same result may be reached by at least two different ways. First, a court could use different canons of statutory construction to chart a different course to the same destination. Second a court could, in many cases, go straight to equity to supplement the statute. While adequately solving the dispute of the parties at bar, ad hoc judicial responses do not answer the normative policy question of whether all charging order provisions *should* provide the charging order as the exclusive remedy.

The addition of these few words to the statute probably should apply equally to all unincorporated entities and to all owners of those entities (be they an LLC member or manager, a general or limited partner, or a partner in a limited liability partnership). Moreover, the addition of the “exclusive” words across all statutes solves the issue in *Olmstead*. Such a solution, however, ignores plausible distinguishing features across and within each entity. The distinguishing characteristic of the LLC that was the gravamen of the certified question in *Olmstead* was the capacity for LLCs to have a single member.¹⁷⁸ Based on that distinguishing characteristic, a state could legitimately determine that the charging order should apply differently to multiple member LLCs and SMLLCs. The charging order, therefore, could be the exclusive remedy in the case of a multiple member LLCs but not the exclusive remedy in the case of SMLLCs.¹⁷⁹

Similar differences between types of entities might lead to different treatment for purposes of *foreclosure* against charged transferable interests;¹⁸⁰ or apply differently if the entire membership interest of any

178. *But see supra* notes 67-68 and accompanying text.

179. While doing so would no doubt lower a state’s ranking as to the vitality of its asset protection law, a state could decide that a high ranking on that index is not desirable. A state that has rejected (or not embraced) the self-settled spendthrift trust might decide that the SMLLC should not be available for asset protection purposes. *Cf. infra* note 184. There are other articles discussing legislative responses to *Olmstead*. See, e.g., Carter G. Bishop, *Desiderata: The Single Member Limited Liability Charging Order Statutory Lacuna*, STAN. J.L. BUS. & FIN. (forthcoming 2010) (SUFFOLK UNIV. L. SCH. RESEARCH PAPER NO. 10-59), available at <http://ssrn.com/abstract=1697621>.

180. Some have asserted that the ability to foreclose upon the charging order lien is a significant weakness in the asset protection provided in even multiple member LLCs. See generally Elizabeth M. Schurig & Amy P. Jetel, *The Alarming Potential for Foreclosure and Dissolution by an LLC Member’s Personal Creditors*, 20 PROB. & PROP., May-June 2006, at 42. Others think any weakness is outweighed by possible benefits. See generally Thomas E. Rutledge, Carter G. Bishop & Thomas E. Geu, *Foreclosure and Dissolution Rights of a Member’s Creditors: No Cause for Alarm*, 21 PROB. & PROP., May-June 2007, at 35. For a discussion of the perhaps

type of entity were freely transferable by agreement.¹⁸¹ Moreover, it is conceivable that a state might make distinctions *between* the types of entities in order to fine-tune specific entity types for particular uses; for example, the LLC for use in real estate development and syndication versus the limited partnership for estate and asset protection planning.

On the other hand, the number of existing entities and the dense web of interstate commerce provide a good argument that charging order provisions should be consistent not only across all unincorporated entity types in a single state, but uniform across the several states.¹⁸² Such uniformity would avoid the very type of interpretive issue that confronted the Court in *Olmstead* and would reduce possible conflicts and unintended consequences concerning multi-state entity operation.¹⁸³ In any event, once the several policy questions are answered, the answers should be articulated by setting forth particular and distinguishing language against the backdrop of a basic formula used by all the unincorporated entities in order to make as clear as possible the intent of the legislature.¹⁸⁴

In summary, states need to consider carefully, under a range of factual permutations, the range of interrelationships under their remedy statutes vis-à-vis the charging order. For example, an express determination that the charging order is the exclusive remedy, post-*Olmstead*, might contain language like “including against an interest in an LLC with a single member” if that is the intent. Of course, a state can make the opposite policy decision, meaning that asset partitioning through use of an SMLLC¹⁸⁵ *against* a judgment-creditor of a member will not be permitted.¹⁸⁶ But that decision too should be reflected in the statutory language. Statutory language is particularly important as a mechanism of bringing clarity and certainty to the law in states with

unintended consequences of precluding foreclosure, see Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, 8 BUS. ENTITIES, Sept.-Oct. 2006, at 28.

181. Where the parties themselves have given a partner/member the authority to freely transfer the interest (consider the example of the publicly traded master limited partnership), there seems to be a significant policy question as to whether the judgment-creditor should be restricted to the rights afforded the holder of a charging order.

182. See CALLISON & SULLIVAN, *supra* note 36 § 1:5.

183. See CALLISON & SULLIVAN, *supra* note 36 (briefly discussing choice of law issues).

184. Such effort for example was recently completed in Kentucky when the five charging order provisions were all revised as necessary to set forth a consistent formula. See 2010 KY. ACTS 1885, 1895, 1896, 1900, 1904 (amending KY. REV. STAT. ANN. §§ 275.260, 362.285, 362.481, 362.1-504, 362.2-703 (West 2010)). Charging order provisions are also a topic of discussion by The Harmonization of Business Organizations Drafting Committee of the Uniform Law Commission.

185. See generally Stout, *supra* note 64; Hansmann & Kraakman, *supra* note 64.

186. See also RESTATEMENT (THIRD) OF TRUSTS §§ 57, 58(2) (2003).

absence of legislative histories or “weak” reliance upon legislative history.

And finally: states should consider whether exclusivity extends to equitable remedies in aid of their statutory collection process and whether it extends to separate and traditional equitable causes of action whether or not codified. The latter, obviously, implicates the equity power of the courts under the constitutions of the various states.

CONCLUSION

Olmstead is an important decision not so much for what it holds, but for the instruction provided by the holding. Initially, it is a call for an informed policy decision concerning negative asset partitioning through the use of an SMLLC. Perhaps more broadly, it asks whether the LLC charging order provision *should* be the “the exclusive remedy by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor’s transferable interest.”¹⁸⁷ It is a clarion call to state drafting committees to undertake a review and reconciliation of statutory language in order to avoid the pregnant affirmative between charging order provisions in separate unincorporated entity statutes upon which *Olmstead* relied. After there has been a policy determination, the specific source of the narrow SMLLC issue presented in *Olmstead* can be statutorily solved by making the charging order provisions consistent across all entities or more clearly stating any intended distinctions between the provisions.

Unfortunately, the narrow statutory construction issue under which *Olmstead* was decided is the only issue that can be re-charted and avoided with a modicum of certainty. The policy and jurisprudence concerning the *application* and *construction* of the exclusiveness of the charging order remedy are the harder issues, and their answers are shaped by jurisprudence that is just beneath the surface of the statute.

The review of the charging order provision, once undertaken, can likely avoid all but glancing blows to the most fundamental issues, even assuming they exist just beneath the surface. Even so, any such review will meet difficult comparative policy issues between different unincorporated entity statutes in a single state. It will also risk unintended consequences including, *inter alia*, conflict of law issues if many states choose different charging order policies for the same type of entity.

187. REVISED UNIF. LTD. LIAB. CO. ACT § 503(g), 6B U.L.A. 498-501 (2008).

Moreover, and paradoxically, it is possible that increasing the restrictiveness of charging order remedies may have the unintended consequence of narrowing their coverage and increasing uncertainty as the statute provides an *adequate remedy at law* in fewer and fewer cases. Thus, the greater the restrictions, the bigger the invitation to the courts to exercise their equity jurisdiction, or to use different canons of statutory construction to avoid unacceptable results. In addition, greater restrictions *might* encourage interest groups and the legislature to push back against the provisions, thereby actually reducing the protection afforded by the current statutory charging order. The push-back could ultimately place a venture's operational assets at such risk to the creditors of individual members that the choice for refuge from liability could shift back to the corporation.

No matter the policies chosen, however, the lessons from *Olmstead* include: (1) it is necessary to consider factual permutations when making policy decisions about charging orders; (2) there is a premium on clear and consistent statutory drafting; and, (3) there will remain a modicum of jurisprudential tension caused by judicial construction of statutes because that tension reflects the constitutional design of separation of powers. In those general matters, *Olmstead* is unremarkable.

EXHIBIT 1

THE CHARGING ORDER PROVISIONS OF THE VARIOUS UNIFORM ACTS

UPA § 28	RUPA § 504	RULPA § 703	ULPA § 703	ULLCA § 504	RULLCA § 503	USTA § 606
(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, inquiries the judgment debtor might have made or which the circumstances of the case may require.	(a) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, inquiries the judgment debtor might have made or which the circumstances of the case may require.	On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The [Act] does not deprive any partner of the benefit of any exemption laws applicable to his [or her] partnership interest.	(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or of a partner's transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, inquiries, accounts, and inquires, the judgment debtor might have made or which the circumstances may require to give effect to the	(a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.	(a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.	(a) If a beneficial interest is not freely transferable by a beneficial owner so that the transferee has all rights of the transferor, a judgment creditor of a beneficial owner may satisfy the judgment against the beneficial owner's beneficial interest only as provided in this section. (b) On application by a judgment creditor of a beneficial owner, the [appropriate court] may issue a charging order against the beneficial owner's right to distributions from the trust for the unsatisfied part of the judgment and: (1) appoint a

UPA § 28	RUPA § 504	RULPA § 703	ULPA § 703	ULLCA § 504	RULLCA § 503	USTA § 606
or which the circumstances of the case may require. (2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution: (a) With separate property, by any one or more of the partners, or (b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold. (3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.	lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee. (c) At any time before foreclosure, an interest charged may be redeemed: (1) by the judgment debtor; (2) with property other than partnership property, by one or more of the other partners; or (3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.	inquires the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order. (b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee. (c) At any time before foreclosure, an interest charged may be redeemed: (1) by the judgment debtor; (2) with property other than partnership property, by one or more of the other partners; or (3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.	inquires the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order. (b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee. (c) At any time before foreclosure, an interest charged may be redeemed: (1) by the judgment debtor; (2) with property other than partnership property, by one or more of the other partners; or (3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.	charging order. (b) A charging order constitutes a lien on the judgment debtor's interest. The court may order a foreclosure of alien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the right of a transferee. (c) At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed: (1) by the judgment debtor; (2) with property other than the company's property, by one or more of the other members; or (3) With the company's property, but only if	collection of distributions pursuant to a charging order in effect under subsection (a), the court may: (1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and (2) Make all other orders necessary to give effect to the charging order. (c) A charging order issued under subsection (b) is a lien on the beneficial owner's right to distributions and requires the statutory trust to pay over to the judgment creditor any distribution that would otherwise be paid to the beneficial owner until the judgment has been satisfied. (d) A statutory trust or beneficial owner that is not subject to a charging order issued under	receiver of the distributions subject to the charging order, with the power to enforce the beneficial owner's right to a distribution; and (2) Make other orders necessary to give effect to the charging order. (c) A charging order issued under subsection (b) is a lien on the beneficial owner's right to distributions and requires the statutory trust to pay over to the judgment creditor any distribution that would otherwise be paid to the beneficial owner until the judgment has been satisfied. (d) A statutory trust or beneficial owner that is not subject to a charging order issued under

UPA § 28	RUPA § 504	RULPA § 703	ULPA § 703	ULLCA § 504	RULLCA § 503	USTA § 606
	(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership. (e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.		(3) With limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged. (d) This [Act] does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest. (e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.	permitted by the operating agreement. (d) This [Act] does not affect a member's right under exemption laws with respect to the member's distributational interest in a limited liability company. (e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributational interest in a limited liability company.	transferable interest, does not thereby become a member, and is subject to Section 502. (d) At any time before foreclosure under subsection (c), the member or transferee whose interest is subject to a charging order under subsection (a) may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order. (e) At any time before foreclosure under subsection (c), a limited liability company or one or more members whose transferable interests are not subject to the charging order may	subsection (b) may pay to the judgment creditor the full amount due under the judgment lien and thereby succeed to the rights of the judgment creditor, including the charging order. (c) This [act] does not deprive a beneficial owner or a transferee of the beneficial interest of any exemption applicable to the beneficial interest

<i>UPA § 28</i>	<i>RUPA § 504</i>	<i>RULPA § 703</i>	<i>ULPA § 703</i>	<i>ULLCA § 504</i>	<i>RULICA § 503</i>	<i>USTA § 606</i>
					pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.	
					(f) This [act] does not deprive any member or transferee of the benefit of any exemption laws applicable to the member's or transferee's transferable interest.	
					(g) This section provides the exclusive remedy by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor's transferable interest.	

