THE RIGHTS OF A JUDGMENT CREDITOR AGAINST AN LLC, UNDER VARIOUS STATES' CHARGING ORDER STATUTES

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I. Introduction

Most states' limited liability company (LLC) laws have an exclusive charging order statute, which means that a creditor who has a judgment against an LLC member can only collect from the LLC assets through the very narrow—and often meaningless—charging order procedure.[1] A minority of states have enacted a nonexclusive

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[1] *See, e.g.*, ALA. CODE § 10A-5A-5.03(f) (2019) ("This section provides the exclusive remedy by which a judgment creditor of a member or transferee may satisfy a judgment out of the judgment debtor's transferable interest and the judgment creditor shall have no right to foreclose, under this chapter or

charging order statute in their LLC laws, leaving open the possibility of other judicial remedies.[2] Some of those nonexclusive states, such as Florida, have concluded that a creditor may foreclose upon membership interests and obtain managerial control over a single-member LLC.[3] The availability of document discovery is also a question.[4] Courts in some states have recently concluded that LLC laws offer protection to judgment debtors from document discovery.[5] These courts have held that a judgment creditor who holds a claim against an LLC member cannot compel the member to produce LLC records.[6]

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any other law, upon the charging order, the charging order lien, or the judgment debtor's transferable interest."); TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2019) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest.").

[2] *See, e.g.*, N.H. REV. STAT. ANN. § 304-C:126(VI)(a) (2019) ("[A] charging order shall not be the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against the member.").

[3] *See* Alan S. Gassman et al., *After Olmstead Will A Multiple-Member LLC Continue to Have Charging Order Protection?*, 84 FLA. B.J. 9, at 9 (2010) (analyzing the effects of the Florida Supreme Court's decision in *Olmstead* where a "court may order a judgment debtor to surrender all right, title, and interest in a debtor's single-member Florida LLC to satisfy an outstanding judgment."); *see also* Olmstead v. F.T.C., 44 So. 3d 76, 78 (Fla. 2010) ("[W]e conclude that the statutory charging order provision does not preclude application of the creditor's remedy of execution on an interest in a single-member LLC.").

[4] *See, e.g.*, Wells Fargo Bank, Nat'l Assoc. v. Continuous Control Solutions, Inc., No. 11-1285, 2012 WL 3195759, at *3 (Iowa Ct. App. Aug. 8, 2012) (vacating disclosure provisions required by the district court and upholding the LLC challenge to said required disclosure on the grounds that there is no statutory authority); Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, pp. 19–20 (La. App. 4 Cir. 5/13/16) 194 So. 3d 751, 762 (reversing a lower court decision in a creditor's motion to compel action against an LLC for financial documents and tax returns).

[5] *Wells Fargo*, 2012 WL 3195759, at *3 (holding that the charging statute under Iowa law is an economic interest and does not entitle access to an LLC's records); *Channelside*, 194 So. 3d at 753, 757–58 (using applicable Louisiana LLC law to find that a creditor cannot compel documents during discovery).

[6] *Wells Fargo*, 2012 WL 3195759, at *3 (finding no statutory authority for a creditor to compel the production of a debtor LLC's documentation concerning their activities); *Channelside*, 194 So. 3d at 762 (denying the motion to compel after reviewing the applicable law).

Following these developments in case law, not only can the judgment creditor often not obtain meaningful relief against the LLC, but it cannot obtain information about whether the LLC has assets and access to streams of revenue.[7] Of course, many legitimate businesses operate through single-member LLCs.[8] But the increasingly favorable asset-protection attributes of LLC laws also give debtors opportunities to take unfair advantage of the law by placing their assets in wholly-owned LLCs to avoid personal liabilities.[9] LLCs have become the predominant vehicle for business structures in the United States.[10] If this problem at the intersection of corporate law and creditors' rights is not resolved, abuses will only increase.

When a creditor obtains a judgment against a debtor whose assets are held in membership interests in an LLC, its remedies are limited.[11] The Limited Liability Company Law provides for a charging

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[7] *See, e.g.*, ALA. CODE § 10A-5A-5.03(f) (2019) (limiting the right of a creditor to only that which the debtor would receive in a transferable interest, with no right to foreclose or to obtain possession, and denying "[c]ourt orders for actions or requests for accounts and inquiries"); TEX. BUS. ORGS. CODE ANN. § 101.112(b)–(f) (West 2009) (barring creditors from seeking foreclosure or any other interest apart from the membership interest, and from any right to obtain possession of or any other legal remedies with respect to the property of the LLC); *Channelside*, 194 So. 3d at 762 ("[Creditor] does not have the right to obtain or inspect any business or financial documents of the LLC.").

[8] *See generally* Rodney Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. OF CORP. & FIN. L. 459, 459–60, 483–87 (2010) (claiming that LLCs have become a popular form among business entities seen in the growth of the number of LLCs and LLC revenues, and including single-member LLCs in this analysis lending credence to their legitimacy).

[9] Elizabeth N. Kozlow, *A Charging Order Conundrum: Is It Really the Exclusive Remedy of an LLC Member Judgement Creditor*, 63 BAYLOR L. REV. 884, 886 (2011) (giving a hypothetical of a creditor, and not an LLC, of a doctor, who placed all of his or her assets in a single-member LLC, could not recover those assets or seek other remedies, such as piercing the LLC, under the protective Texas charging order).

[10] Chrisman, *supra* note 8, at 478 (inferring from the ratio between new LLCs to new corporations or limited partnerships as evidence of LLC surpassing other forms of business entities).

[11] *See, e.g.*, ALA. CODE § 10A-5A-5.03(f) (2019) (restricting creditors to only charging orders as remedies); TEX. BUS. ORGS. CODE ANN. § 101.112(d)

order in such instances, which is a narrow remedy that merely allows the creditor to receive cash distributions.[12] The managers of the LLC, who are often the same as the members, can manage the company's assets and revenue in such a way that there are no cash distributions due to the creditor.[13] In these instances, the charging order is a meaningless remedy.[14] Direct pursuit of the LLC's assets is not typically available, unless the creditor can meet the high burden of reverse veil-piercing.[15]

The focus of this article is the argument that when a charging order statute is nonexclusive, a creditor can pursue collection remedies against membership interests in the LLC by way of writs of execution, such as the writ of *fieri facias*.[16] Whether this remedy is available, however, is largely untested in many jurisdictions.[17] For example, in Louisiana there is nothing in the charging statute restricting the creditor from pursuing the tried and true remedy of the writ of *fieri facias* against the membership interest.[18] In the context of a single-

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(West 2009) (limiting judgement creditors to entries of charging orders as remedies); *see also* LA. STAT. ANN. § 12:1331 (2019) ("[T]he judgment creditor shall have only the rights of an assignee of the membership interest.").

[12] *See, e.g.*, LA. STAT. ANN. § 12:1331 (2019) (permitting courts to "charge membership interests of the member with payment of the unsatisfied amount of judgment with interest").

[13] Franklin A. Gevurtz, *Attacking Asset Protection LLCs, in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 129, 131 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (explaining limitations of charging orders stemming from the severance of economic interest and management rights).

[14] *Id.*

[15] *See* Michael Richardson, *The Helter Skelter Application of the Reverse Piercing Doctrine*, 79 U. CIN. L. REV. 1605, 1605–07 (2011) (examining the lack of uniformity in reverse piercing doctrine application and the inherent burdens in presenting a successful reverse piercing argument).

[16] *See infra* Part IV.B (discussing the process of seizing and selling assets during a Sheriff's Sale).

[17] *See Id.* (discussing the applicability of a writ of *fieri facias).*

[18] Although Louisiana's statute follows the nonexclusive rubric, a few courts have suggested that the charging order is the exclusive remedy of a creditor against a member's right in an LLC. *See, e.g.*, Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, pp. 15–16 (La. App. 4 Cir. 5/13/16) 194 So. 3d 751, 760 (suggesting a charging order provides the exclusive remedy for creditors); *see also infra* Part IV.B (discussing the process of seizing and selling assets during a Sheriff's Sale). *Compare* LA. STAT. ANN. § 12:1331

member LLC, this remedy could be critical. The focus of this article's analysis is the proposition that in a nonexclusive charging order jurisdiction, a creditor can obtain complete control of its debtor's wholly owned LLC when it proceeds through foreclosure and conducts a seizure and sale of the membership interest. This gives substantially greater leverage to a judgment creditor.[19] A few states, including Florida and New Hampshire, have adopted this view in their states' LLC laws with respect to single-member LLCs, either judicially or by legislation.[20] Rather than be forced to await nebulous payment on a charging order, judgment creditors in these states are able to take control of and liquidate the LLC assets for satisfaction of the debt.[21]

Absent these foreclosure remedies, and particularly in the multi-member LLC context, there is little the creditor can do to pursue recovery from an LLC.[22] Recent discovery rulings have made it more difficult to enforce judgments through a charging order.[23] These cases usually involve a creditor who obtains a charging order against an LLC, receives no payment, and then seeks documents to monitor the cash flow of the LLC.[24] The courts have almost uniformly upheld the

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(2019) (omitting language making a charging order the exclusive remedy for creditors), *with* TEX. BUS. ORGS. CODE ANN. § 101.112 (West 2009) (stating that a charging order provides the exclusive remedy for creditors), *and* ALA. CODE § 10A-5A-5.03 (2019) (stating that a charging order provides the exclusive remedy for creditors).

[19] *See* LA. STAT. ANN. § 12:1331 (2019) (omitting language making a charging order the exclusive remedy for creditors).

[20] *See* Olmstead v. F.T.C., 44 So. 3d 76, 78 (Fla. 2010) ("[W]e conclude that the statutory charging order provision does not preclude application of the creditor's remedy of execution on an interest in a single-member LLC."); *see also* N.H. REV. STAT. ANN. § 304-C:126 (2019) (codifying New Hampshire's non-exclusive charging order remedy). *See generally* Carter G. Bishop*, Fifty State Series: LLC Charging Order Case Table* 50–60, 128–29 (Suffolk U. L. Sch., Legal Stud. Res. Paper Series, Paper No. 10-15, 2019), http://ssrn.com/abstract=1565595 (reviewing charging statute exclusivity in all US jurisdictions).

[21] Gevurtz, *supra* note 13, at 133 (explaining creditors' increased power to acquire owed assets where entire membership interest, including management rights, is transferred).

[22] *Id.* (discussing creditors' limited ability to acquire owed assets where charging statutes are exclusive).

[23] *See, e.g.*, *Channelside*, 194 So. 3d at 760 (holding the "right to obtain and inspect the LLC's records is reserved to members").

[24] *Id*. at 753–54 (discussing creditor's claim for discovery as a result of a failed payment).

rights of LLCs to exempt internal information from disclosure to creditors of members, as well as other third parties.[25] As a result, for a creditor who has obtained a charging order, it will be difficult even to investigate and determine that its charging order is being followed.[26] These decisions further depreciate the utility of the charging order remedy, and make the impetus to seek alternative remedies, such as the writ of *fieri facias,* more compelling.[27]

The entire complexion of a creditor's rights against membership interests changes if the judgment debtor files a bankruptcy petition.[28] Bankruptcy courts have consistently found that when a debtor holding a one hundred percent membership interest in an LLC files bankruptcy, he or she subjects that LLC to the control of the trustee.[29] These decisions are distinguishable from an ordinary foreclosure scenario because the bankruptcy trustee is a fiduciary, acting in the best interest of creditors, and may elect either to exercise that control or to abandon the estate's interest in the LLC.[30] Nevertheless, these decisions at least conceptually support granting foreclosing creditors similar rights against membership interests in the non-bankruptcy context.[31]

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[25] *See, e.g.*, Khoobehi Properties, LLC v. Baronne Dev. No. 2, LLC, 16-354, 16-356, 16-506, p. 8 (La. App. 5 Cir. 3/29/17) 216 So. 3d 287, 296 (finding that the right to obtain and inspect records of an LLC is limited by statute to its members).

[26] *See id.* (asserting that third parties other than members of the LLC do not have the right to obtain and inspect LLC records).

[27] Chad J. Pomeroy, *Think Twice: Charging Orders and Creditors' Property Rights*, 102 KY. L.J. 705, 734 (2013) (describing how ineptness of charging orders against LLCs lead creditors to pursue more aggressive means of collection).

[28] *See infra* Part IV.D (observing that when a debtor is in bankruptcy, courts apply a combination of Section 541 of the Bankruptcy Code and applicable state LLC law).

[29] *See, e.g.*, *In re Albright*, 291 B.R. 538, 540 (Bankr. D. Colo. 2003) (finding Chapter 7 trustee had full right to control the LLC after debtor holding 100 percent interest in LLC filed for bankruptcy).

[30] *Compare In re Albright*, 291 B.R. at 540 (establishing the trustee's right of control) *with Olmstead*, 44 So. 3d 76, 82 (Fla. 2010) (finding that the Court could order a judgment debtor to surrender interest in LLC to satisfy an outstanding judgment).

[31] *See In re Albright*, 291 B.R. at 540 (finding that a non-debtor LLC effectively assigned her entire membership interest in LLC to the bankruptcy trustee upon filing a Chapter 7 petition).

Owing to the vulnerability of single-member LLCs discussed in this article, as well as other uncertainties in protection of assets in single-member LLCs, structured finance planners have devised various strategies to protect assets held by single-member LLCs from aggressive creditors. This article reviews the various strategies that have been employed, including "springing members," and considers whether those strategies would in fact maintain control in the event of a foreclosure sale or the filing of a bankruptcy petition by the sole member. Other circumstances, such as community property regimes, liens and security interests against the membership interests, and other restrictions contained in the LLC operating agreement, may affect a creditor's rights in membership interests.[32]

In sum, the current law on creditor's rights in LLC membership interests serves as a bulwark to judgment debtors, though it can be the bane of a collection lawyer's existence. But in those states where the language of the statute is nonexclusive, the writ of *fieri facias* may be a chink in the armor, at least as to single-member LLCs.[33] There are various strategies that businesses may use in structuring their LLCs to avoid these problems, but results will be difficult to predict as long as the law remains ambiguous. Even when aggressively pursued, the rights of a creditor to recover from a debtor's membership interests in an LLC are likely to yield mixed results.

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[32] *See* LA. STAT. ANN. § 10:9-102(42) (2019) ("'General intangible' means any personal property, including things in action, other than accounts, chattel paper, tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, life insurance policies, and money."); *see also* Malone v. Malone, 46-615, pp. 8–10 (La. App. 2 Cir. 11/2/11), 77 So. 3d 1040, 1044 (discussing whether corporate stock may be classified as investment property); *see also* Anthony J. Pagano, *Liability of Community and Separate Property for Debts*, *in* 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 20.07(i) (Matthew Bender ed., 2019) (explaining that, in a community property jurisdiction, community property generally may not be used to satisfy separate debts).

[33] *See* LA. CODE CIV. PROC. ANN. art. 2291 ("A judgement for the payment of money may be executed by a writ of *fieri facias* directing the seizure and sale of property of the judgment debtor."); *see also* Brennan v. Brennan, 945 F. Supp. 2d 704, 717 (E.D. La. 2013), *vacated*, 548 Fed. App'x. 264 (5th Cir. 2013) (explaining that stock had been seized by writ of *fieri facias*); *see also* Lisso v. Williams, 71 So. 365, 366 (La. 1916) (concluding the *fieri facias* "addresses itself to the debtor's property in general; and its mandate to the sheriff is to cause the amount of the debt to be made out of the property of the debtor indiscriminately").

II. Overview of the LLC Entity

The LLC form was created to provide business owners the tax benefits that were historically associated with a partnership, along with the limited liability enjoyed by a corporation.[34] That flexibility, as well as additional advantages over ordinary corporations, has driven popularity of LLCs nationwide since the 1980s.[35]

The LLC law allows an organizer to establish a new LLC to conduct any lawful business by filing articles of organization with the state's secretary of state.[36] The LLC is then owned by its members, who also direct the affairs of the LLC, unless they elect to establish managers to do so in their place, as agents of the LLC.[37] An operating agreement, establishing the rights of members between themselves and the authority of managers, among other things, is often advisable, but is not required.[38] The default rules for the internal affairs of an LLC, and the rules and procedures for its dissolution, are in many ways defined by the applicable LLC law of the jurisdiction in which the LLC is organized, but many of these default rules may be varied by the provisions of the operating agreement.[39]

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[34] *See* Elf Atochem North Am., Inc. v. Jaffari, 727 A.2d 286, 287 (Del. 1999) (determining that the purpose of the LLC Act is to allow "persons or entities ('members') to join together in an environment of private ordering to form and operate the enterprise under an LLC agreement with tax benefits akin to a partnership and limited liability akin to the corporate form.").

[35] *See* Chrisman, *supra* note 8, at 485 ("For instance, the enormous flexibility and contractual nature of the LLC may provide advantages such as clearly negotiated and defined fiduciary duties and only the desired formalities. Further, in many states, the LLC may provide asset protection that goes beyond even that provided by the corporation.").

[36] LA. STAT. ANN. § 12:1304(A) (2019) (explaining that filing must go through the secretary of state).

[37] LA. STAT. ANN. §§ 12:1311–1312 (2019) (explaining that an LLC is managed by its members but can be managed by non-member managers).

[38] *See* LA. STAT. ANN. § 12:1301(16) (2019) ("Operating agreement" means any agreement, written or oral, of the members as to, or in the case of a limited liability company having a single member, any written agreement between the member and the company memorializing the affairs of a limited liability company and the conduct of its business.").

[39] *See* LA. STAT. ANN. §§ 12:1334–1337 (2019) (providing for default rules of dissolution and winding up); *see also* Susan Kalinka, *Transferability of a Member's Interest—In General*, *in* 9 LA. CIV. L. TREATISE, LLC & PARTNERSHIP BUS. & TAX PLAN § 1:39 (4th ed.) ("The Louisiana LLC Law permits an LLC's articles of organization or a written operating agreement to alter the

In many ways, based upon the rules for formation and governance of corporations, an LLC's rules and regulations are generally more relaxed than those of corporations.[40] Of course, the nomenclature is also different: a corporation is owned by its shareholders, whereas an LLC is owned by its members[41]; a corporation is formed by incorporation, whereas an LLC is "organized"[42]; a corporation acts through its officers, whereas the LLC acts through its members or managers[43]; and the list goes on. These differences are in many instances purely semantic, but in a broader sense, they reflect a dispensation of the formalities of corporations in favor of a more flexible and accessible form.[44]

One of the hallmarks of LLCs is its additional flexibility, which provides greater potential for asset protection.[45] The LLC eschews many complications that arose from variations in partnerships and corporations.[46] The question of whether a partnership was a separate entity or simply an aggregate of its partners had placed uncertainty in the partnership form from a legal and civil procedure perspective for decades, notwithstanding its tax benefits.[47] Likewise, the C corporation form versus that of the S corporation, which allowed for pass through tax status for corporations long before the advent of

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default rule that prevents an assignee of a member's interest from becoming a member or participating in the management of the LLC without the unanimous written consent of the other members. The parties, however, may prefer to retain the default rules with respect to this issue.").

[40] *See, e.g.*, Elf Atochem North Am., Inc. v. Jaffari, 727 A.2d 286, 287 (Del. 1999) (highlighting the freedom to contract granted in the Delaware Limited Liability Company Act).

[41] *See* LA. STAT. ANN. § 12:1329 (2019) (describing membership interest).

[42] LA. STAT. ANN. § 12:1304(A) (2019) (describing formation and organization of an LLC).

[43] LA. STAT. ANN. §§ 12:1311–1312 (2019) (describing manager/member control).

[44] *See Elf*, 727 A.2d at 290 (noting that the LLC is more flexible than the corporate form).

[45] Chrisman, *supra* note 8, at 485 ("Further, in many states, the LLC may provide asset protection that goes beyond even that provided by the corporation.").

[46] *Id*. at 485, 488 (highlighting the tax and other benefits LLC provides compared to partnerships and corporations).

[47] WILLIAM S. MCKEE, WILLIAM F. NELSON & ROBERT L. WHITMIRE, FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS 1–5 (1978) (explaining aggregate and entity concepts of partnerships).

the LLC, created certain problem areas, such as qualifications for subchapter S eligibility and the franchise tax.[48] The LLC, first introduced in 1978, simplified many of these questions.[49]

The corporation and the partnership are the LLC's two main ancestors, and while the differences between the LLC and the corporation are discrete and statutory, the differences between the LLC and the partnership are in many ways broader and more conceptual.[50] The LLC differs from the partnership most notably in that its members are shielded from liability for the acts of the LLC entity.[51] The LLC is a separate juridical entity, whereas the partnership, under many states' laws, is simply an aggregate of the partners.[52] The partners are personally liable for the debts of a general partnership, whereas an LLC's members generally are not liable for the debts of the LLC.[53] The differences are substantial, and vary by jurisdiction.[54] But, a critical difference between LLCs and partnerships, particularly for this article, is the ability to form a single-member LLC, whereas the common law of partnership did not allow an individual to form a partnership by him or herself.[55] Initially, some states required LLCs to have more than one member, consistent with the qualifications of partnership.[56]

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[48] *See* Susan Kalinka, *The Limited Liability Company and Subchapter S: Classification Issues Revisited*, 60 U. CIN. L. REV. 1083, 1157 (1992) (describing problems in eligibility requirements for subchapter S).

[49] For a discussion of the history of limited liability companies' early development, from "*limitadas*" in South American jurisdictions to their introduction in Alaska and Wyoming, see Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. REV. 199, 203–04 (2009).

[50] *In re ICLNDS Notes Acquisition LLC*, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) ("[A]n LLC is neither a corporation nor a partnership, as those terms are commonly understood. Instead an LLC is a hybrid . . . that has attributes of both a corporation and a partnership.").

[51] *See* Bishop, *supra* note 49, at 200 ("The entity possessed a corporate styled limited liability shield where no member was personally liable for entity obligations but was nonetheless taxed like a partnership or sole proprietorship.").

[52] Of course, under Louisiana law, "[a] partnership is a juridical person, distinct from its partners[.]" LA. CIV. CODE ANN. art. 2801 (2019).

[53] *See* Chrisman, *supra* note 8, at 465–66 (explaining the advent of the LLC as an attempt to secure the limited liability familiar to corporations with the benefit of pass-through taxation of partnerships).

[54] *Id.* at 488 (acknowledging the variety of different ways LLCs are treated and taxed by states).

[55] REVISED UNIF. P'SHIP ACT, § 202(a) (2019) ("[T]he association of two or more persons to carry on as co-owners a business for profit forms a

Until 2003, Massachusetts was the lone holdout that still did not allow single-member LLCs.[57] In that year, its governor, Mitt Romney (who later famously said "corporations are people, my friend"[58]), signed a law permitting single-member LLCs in Massachusetts.[59] Since then, all states and the District of Columbia have permitted single-member LLCs.[60]

A. Limited Liability and Reverse Veil Piercing

Limited liability is a key element in an LLC, and in practice it not only protects the member from the LLC's liability, but also the reverse.[61] In the classic sense of the limitation from liability afforded by a corporation, the shareholders are shielded from liability for the acts taken on behalf of the corporation.[62] However, at times the opposite directional flow of liability, i.e. the liability of a corporate

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partnership, whether or not the persons intend to form a partnership."); Bishop *supra* note 49, at 209 ("A single member liability company cannot be classified as a partnership because it lacks associates in the sense of two or more owners.").

[56] Bishop *supra* note 49, at 209 ("Consequently, although most states authorized formation of multiple member limited liability companies prior to the 1997 CTB regulations, few states authorized the formation and use of a limited liability company with just one member.").

[57] *See Tax Treatment of LLCs and LLPs: Update for 2002*, St. & Loc. Taxes Wkly. Art. 13 (Apr. 1, 2002) ("Massachusetts is now the only state that expressly requires a domestic LLC to have two or more members to operate.").

[58] Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES, Aug. 11, 2011, at A16.

[59] *See* 2003 Mass. Acts c. 4, §§ 33–45 (describing changes to the Massachusetts LLC laws).

[60] *See Tax Treatment of LLCs and LLPs: Update for 2002*, *supra* note 57 (stating that Massachusetts was the only state prohibiting single-member LLCs).

[61] *See* Bishop, *supra* note 49, at 231. ("[C]harging order statutes make clear that creditors of the owner cannot reach the assets of the entity and are limited to reaching the distributions determined by the owner and otherwise available to that owner.").

[62] *Id.* at 200 ("The entity possessed a corporate styled limited liability shield where no member was personally liable for entity obligations but was nonetheless taxed like a partnership or sole proprietorship.").

entity for the debts of its shareholders or members, is the concern.[63] The typical situation to be considered is when a creditor obtains a judgment against an individual, and the creditor learns that the individual lacks liquid assets or other tangible executable assets to satisfy the judgment.[64] Suppose also that the creditor learns that the individual has membership interests in an LLC that has significant value, but the creditor has no direct claim against that LLC. Of course, the creditor will pursue the value in the LLC to satisfy its claim.[65]

Because an LLC is a separate juridical entity from its members, the member cannot be held liable for the debts of the LLC, and the LLC cannot be held liable for the debts of the member.[66] Of course, there are exceptions to this general rule.[67] Veil piercing generally refers to an attempt by a creditor to hold the member, or members, liable for the debts of the LLC.[68] Seeking to impose liability on the LLC for debts of the members, by contrast, is commonly referred to as reverse veil piercing.[69]

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[63] *See id.* at 230–31 (explaining the process by which courts may pierce an entity's veil in situations where a debtor has complete control over the entity and used that control to commit fraud or wrong).

[64] *See id.* (allowing a reverse pierce of an LLC where debtor created the LLC during litigation with creditor in an attempt to keep assets away from the creditor (citing Litchfield Asset Management Corp. v. Howell, 799 A.2d 298, 312 (Conn. App. Ct. 2002))).

[65] *See, e.g.*, Curci Inv., LLC v. Baldwin, 221 Cal. Rptr. 3d 847, 848 (Cal. Ct. App. 2017) (allowing reverse piercing to satisfy a creditor's claim against the member of an LCC using LLC assets).

[66] *See* UNIF. LTD. LIAB. CO. ACT § 304(a) (UNIF. LAW COMM'N 2013) ("A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company."); *see also* Postal Instant Press, Inc. v. Kaswa Corp., 77 Cal. Rptr. 3d 96, 97 (Cal. App. Ct. 2008) (acknowledging that "a third party creditor may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's personal liability").

[67] *See* Allen Sparkman, *Will Your Veil be Pierced? How Strong Is Your Entity's Liability Shield?—Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity*, 12 HASTINGS BUS. L.J., 349, 349–50 (2016) (describing corporate veil piercing and the alter ego doctrine as examples of exceptions to general limits on LLC liability).

[68] Bishop, *supra* note 49, at 229 (acknowledging that "generally, typical corporate veil piercing applied to a limited liability company permits and entity creditor to press its claims against the entity owner").

[69] *See id.* at 229–30 (defining reverse veil piercing as a "related but rarely used doctrine" that "reverses the process and seeks to impose the entity owner's obligations against its entity's assets").

A creditor faces a high burden of proof to pierce the corporate veil, in either direction.[70] Whether a corporate entity has disregarded the corporate formalities such that the corporate veil may be pierced is determined on the basis of a multi-factor test.[71] The factors are unweighted, and vary from case to case.[72] Generally, these factors include whether personal and corporate funds were commingled, the observance of statutory formalities, and undercapitalization.[73] Nevertheless, even considering these factors, courts generally require not only that the entity is shown to be an alter ego, but also that it has been used by the shareholder to carry out some sort of fraud.[74]

The same standards generally apply when trying to hold an LLC liable for its member's debts, i.e., the reverse veil piercing action.[75] Some courts have noted that reverse veil piercing may be easier to prove in cases involving single-member LLCs.[76] Just as in the

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[70] *See, e.g.*, Riggins v. Dixie Shoring Co., Inc., 590 So. 2d 1164, 1168 (La. 1991) (stating that plaintiffs "bear a heavy burden of proving that the shareholders disregarded the corporate entity to such an extent that it ceased to become distinguishable from themselves" in meeting the corporate veil standard).

[71] *See, e.g.*, *id.* at 1168 (listing five factors the court considers in determining whether to apply the alter ego doctrine).

[72] *See, e.g.*, *id.* at 1169 (acknowledging that no factor is dispositive, but rather "the totality of the circumstances is determinative").

[73] *See, e.g.*, *id.* at 1168 (listing factors the court considers in determining whether to apply the alter ego doctrine as "1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings").

[74] Kingsman Enters., Inc. v. Bakerfield Elect. Co., 339 So. 2d 1280, 1284 (La. App. 1 Cir. 1976) (declaring that when fraud or deceit is absent, the circumstances must be especially strong so as to "clearly indicate that the corporation and shareholder operated as one"); Thomas v. Bridges, 2013-1855, pp. 15–17 (La. 05/07/14), 144 So. 3d 1001, 1008 (requiring fraud to pierce single-member LLC veil).

[75] Litchfield Asset Mgmt. Corp. v. Howell, 799 A.2d 298, 312–13 (Conn. App. Ct. 2002) (emphasizing control exercised by the LLC's majority owner, unauthorized use of corporate funds to pay personal expenses, and commingling of business and personal affairs and funds in granting a reverse veil piercing remedy).

[76] Comm'r Envtl. Prot. v. State Five Indus. Park, Inc., 37 A.3d 724, 743 n.5 (Conn. 2012) (explaining that court reluctance to grant reverse veil piercing

conventional direction of veil piercing, the plaintiff must prove that the owner or member controlled the limited liability company, and that the control brought about fraud or a wrong that injured the plaintiff.[77] Ultimately, a plaintiff or creditor pursuing the reverse veil piercing remedy is entitled to the same relief as in ordinary veil piercing, i.e., the owner or member and the limited liability company are deemed to have merged into one for purposes of the creditor's recovery.[78] Given these standards, absent extraordinary circumstances, the reverse veil piercing remedy will not afford creditors an avenue to recovery from an LLC owned by the debtor.[79]

The case of *Thomas v. Bridges*, a tax matter before Louisiana's Supreme Court, provides an instructive decision on these issues.[80] The case involved a single-member LLC, organized under the laws of Montana, which had ostensibly been formed to avoid liability for sales tax for the purchase of a recreational vehicle in Louisiana.[81] The Louisiana Department of Revenue sought to impose personal liability on the sole member, and the Board of Tax Appeals had ordered piercing of the corporate veil of the Montana LLC.[82] The Supreme Court reversed the finding of personal liability, first, because the Board had pierced the veil of a Montana LLC without applying

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remedies is assuaged in the single member scenario because multiple shareholders are not implicated).

[77] *Litchfield*, 799 A.2d at 312 (stating that the "instrumentality rule" requires 1) control, 2) fraud, violation of a legal duty, or dishonest acts in contravention of a plaintiff's rights, and 3) proximate causation of plaintiff's injury).

[78] *See* Chao v. O.S.H. Review Comm'n, 401 F.3d 355, 364 (5th Cir. 2005) (explaining that both veil piercing and reverse veil piercing entail two separate entities merging into one for liability purposes).

[79] *State Five Indus. Park*, 37 A.3d at 732 (acknowledging that both veil piercing and reverse veil piercing are "not lightly imposed" and "should be pierced only reluctantly and cautiously").

[80] Thomas v. Bridges, 2013-1855, p. 1 (La. 05/07/14), 144 So. 3d 1001, 1003 (affirming the finding of the lower courts that "the Department failed to show the veil of the Montana LLC should be pierced and further failed to show Thomas should be held individually liable").

[81] *Id.* ("[A] Louisiana resident . . . admitted he formed a Montana LLC solely to avoid the Louisiana sales tax for the purchase of a recreational vehicle.").

[82] *Id.* ("The Court of Appeal upheld the reversal, finding Thomas's appeal met the Department's procedural requirements, and the Department failed to show the veil of the Montana LLC should be pierced and further failed to show Thomas should be held individually liable.").

Montana law—instead applying Louisiana law.[83] The Court further held that some type of fraud is required to justify piercing the corporate veil, but could find no basis for fraud.[84] The fact that the taxpayer had formed the single-member LLC for the sole purpose of avoiding sales taxes, the court concluded, was not sufficient to pierce the veil.[85] The Court voiced its policy concern that permitting the veil to be pierced under such circumstances could have a "destabilizing" effect in Louisiana.[86] As an example, the Court posited that duck hunters establish LLCs solely to avoid liability for their duck leases and could be exposed to fraud allegations.[87] While the Court acknowledged the risk of abuse, it held that the legislature would need to act to impose personal liability in such circumstances.[88] In a concurring opinion, Justice Clark wrote, "[t]he potential for abuse in allowing the creation of sham entities to avoid the payment of taxes has policy implications that are worthy of the legislature's attention."[89]

B. The Single-Member LLC's Unique Attributes

The single-member LLC inhabits a unique space in that it is its own juridical person but it is not treated as a separate person for various purposes, including taxation.[90] This uniqueness has led to

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[83] *Id.* (describing the procedural history of the case).

[84] *Id.* at 1008 ("[A]s the lower courts properly found, there is no evidence demonstrating Thomas committed fraud." (citing LA. STAT. ANN. § 12:1320(D) (2019)). It is noted that the Supreme Court's discussion of fraud as a basis for veil piercing was based upon the statutory provision for independent member liability contained in Section 1320, as opposed to the jurisprudential *alter ego* standard.

[85] *Id.* at 1009 ("A finding that the formation of an LLC solely for tax avoidance and not for any "legitimate" purpose constitutes fraud would have destabilizing implications for Louisiana law.").

[86] *Id.* at 1009 ("A finding that the formation of an LLC solely for tax avoidance and not for any "legitimate" purpose constitutes fraud would have destabilizing implications for Louisiana law.").

[87] *Id.* ("For example, duck hunters who incorporate solely in order to limit liability of individuals arising out of a duck lease could be said to be engaging in fraudulent activity by incorporating without any "legitimate" purpose.").

[88] *Id.* ("[W]e suggest pursuing legislation rather than allegations of fraud is the appropriate way to remedy these policy concerns.").

[89] *Id.* at 1011 (Clark, J., concurring).

[90] *Single Member Limited Liability Companies*, U.S. INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies (last updated May 20, 2019) [https://

various legal questions as to whether it should be accorded special treatment, each of which is informative to the central question of this article, i.e., whether a creditor can seize and take control of a single-member LLC. These questions include the question of pass-through taxation, the ability of the single member to appear in court *pro se*, and the ability of a single-member LLC to invoke Fifth Amendment protections so as not to offer testimony against the sole member in a criminal proceeding.[91]

1. Disregarded Entity for Tax Purposes

One of the driving purposes of the LLC has always been to optimize tax treatment and to avoid double taxation.[92] Prior to 1997, LLCs and their tax professionals faced puzzling questions to determine partnership or corporate treatment for the taxation of the entity.[93] Since the advent of Check-the-Box regulations in 1997, the single-member LLC has been given unique tax treatment that reflects the unique

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perma.cc/2QJ5-MLGQ] ("For income tax purposes, an LLC with only one member is treated as an entity disregarded as separate from its owner, unless it files Form 8832 and affirmatively elects to be treated as a corporation. However, for purposes of employment tax and certain excise taxes, an LLC with only one member is still considered a separate entity.").

[91] *See generally* Lila L. Inman, *Personal Enough for Protection: The Fifth Amendment and Single-Member LLCs*, 58 WM. & MARY L. REV. 1067, 1070 (2017) ("The LLC is a form of business organization that offers its members the pass-through federal income tax treatment of a partnership, while also shielding the owners from personal liability for the obligations of the business."); Daniel S. Kleinberger & Carter G. Bishop, *The Single-Member Limited Liability Company as a Disregarded Entity: Now You See It, Now You Don't* (Suffolk U. L. Sch., Working Paper No. 10-12, 2010), http://ssrn.com/abstract=1559401 ("The contradiction between tax and non-tax status can be confusing, as illustrated by a pair of recent Circuit Court decisions involving the right of a litigant to appear pro se in federal court.").

[92] *See* John O. Everett, Cherie J. Hennig & William A. Raabe, *Converting a C Corporation into an LLC: Quantifying the Tax Costs and Benefits*, 113 J. TAX'N 93, 94–95 (2010) ("Double taxation is avoided if the entity operates as an LLC, since this entity is generally taxed as a partnership.").

[93] *See* United States v. Kintner, 216 F.2d 418, 428 (9th Cir. 1954) (finding an "association" practicing medicine should be treated as a corporation for tax purposes); *see also* Michael Lux, *Check-The-Box Proposed Regulations: An Instant Hit*, 24 J. REAL EST. TAX'N 27, 32 (1996) (discussing the regulatory environment before the changes).

character of the entity.[94] The IRS devised an elective classification scheme whereby the LLC that does not elect corporate status is disregarded for taxation purposes.[95] While an LLC having two or more members is taxed either as a corporation or a partnership, an LLC with only one member is either taxed as a corporation or disregarded as a separate entity.[96] The IRS currently advises that when a single-member LLC elects not to be treated as a corporation, the LLC is a "disregarded entity."[97] In such an instance, the LLC's financial activities must be reflected on its owner's federal tax return.[98] Accordingly, because the single-member LLC has no tax identity when disregarded, no tax form is required to be completed on behalf of the single-member LLC.[99] This national policy of disregarding the entity is a rather startling inconsistency when considering the fact that, for purposes of liability in tort or contract law, the single-member LLC is simultaneously accorded the full protection of a corporate shield, as a separate juridical person.[100]

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[94] Treas. Reg. § 301.7701 (as amended in 2011) ("[A]n eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner.").

[95] *LLC Filing as a Corporation or Partnership*, U.S. INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership (last updated May 10, 2019) [https://perma.cc/H6H4-GMYW] ("Generally, LLCs are . . . not required to be treated as corporations. LLCs can . . . elect their business entity classification.").

[96] *See* Treas. Reg. § 301.7701–2(a), (c) ("A business entity with only one owner is classified as a corporation or is disregarded.").

[97] *Single Member Limited Liability Companies*, *supra* note 90 ("If a single-member LLC does not elect to be treated as a corporation, the LLC is a "disregarded entity," and the LLC's activities should be reflected on its owner's federal tax return.").

[98] *Id.* ("If a single-member LLC does not elect to be treated as a corporation . . . the LLC's activities should be reflected on its owner's federal tax return.").

[99] *See id.* ("For federal income tax purposes, a single-member LLC classified as a disregarded entity generally must use the owner's social security number (SSN) or employer identification number (EIN) for all information returns and reporting related to income tax.").

[100] *See* John A. Pearce II & Ilya A. Lipin, *The Uncertain Viability of a Single Member Limited Liability Company as a Choice of Entity*, 9 HASTINGS BUS. L.J. 423, 427 (2013) ("When a corporation owns an SMLLC, its activities are treated as if the SMLLC was a corporate branch or division.").

2. Ability to Appear in Court is Generally Denied

Corporate entities ordinarily cannot appear in court through a representative who is not a lawyer; nor can they submit pleadings unless signed by an attorney.[101] This principle has been equally applied to wholly-owned corporations.[102] Following the logic that the LLC is a "disregarded entity," one might reasonably question whether the general prohibition of a nonlawyer appearing in court on behalf of a corporate entity would apply to the single-member LLC.[103] An individual who runs his or her small business like a sole proprietorship through a single-member LLC may, in some instances, need to appear in court on behalf of the LLC without the expense of hiring a lawyer.[104] This type of nonlawyer representation is ordinarily not permitted.[105] Many states have provisions allowing nonlawyer individuals to appear on behalf of a corporate entity in a small claims court matter.[106] But those who have attempted to appear in courts of general jurisdiction or in federal district courts on behalf of a single-member LLC have generally been denied the opportunity to do so.[107]

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[101] *See e.g.*, K.M.A., Inc. v. Gen. Motors Acceptance Corp., 652 F.2d 398, 399 (5th Cir. 1981) (holding that the appeal was subject to dismissal when the notice of appeal was filed by the corporation's sole stockholder, who was not an attorney).

[102] *Id.* ("This is so even when the person seeking to represent the corporation is its president and major stockholder.").

[103] *See Could the Rule Against Pro Se Representation be a Problem for Single-Member LLCs?*, 3 ILL. BUS. L.J. 50, 50–51 (2006) ("[I]t may not be practicable to require all LLCs to be treated as corporate-like entities for the purpose of court representation.").

[104] *See* Kleinberger, *supra* note 91, at 1 (discussing two circuit court decisions involving "an LLC's sole owner attempt[ing] to appear pro se on behalf of the LLC").

[105] *See id.* ("Even when the entity is an LLC with only one member, for pro se purposes the entity may not be disregarded.").

[106] *See e.g.*, LA. STAT. ANN. § 37:212 (2019) ("Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction or on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.").

[107] *See* Smith v. Rustic Home Builders, LLC, 826 N.W.2d 357, 360 (S.D. 2013) ("A non-licensed attorney is not permitted to appear pro se to represent

3. Fifth Amendment Protection

Another contested issue of law in single-member LLCs is whether the entity may invoke the protections under the Fifth Amendment against self-incrimination of the sole member of the LLC.[108] The Supreme Court has issued a series of decisions discussing a principle referred to as the "collective entity doctrine" holding that corporations, partnerships and any other collective entities are not entitled to the protection of the self-incrimination clause.[109] It remains an open question whether the single-member LLC could protect information from disclosure on the basis that the information could incriminate the single member.[110] The U.S. Supreme Court has rejected the

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a limited liability company (LLC) in legal proceedings."); *see also* Sharp v. Bivona, 304 F. Supp. 2d 357, 364–65 (E.D.N.Y. 2004) (stating "[t]here exists a longstanding rule that a corporation may not proceed *pro se* in federal court, but must appear by an attorney " and that because plaintiff "is unrepresented by counsel, it may not proceed in this action").

[108] *See generally* Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 8, 77 (2005) (suggesting "formation of an LLC may have an unintended consequence that business owners (and even their counsel) do not foresee at the time of formation—loss of the sole proprietor's ability to assert a Fifth Amendment privilege against self-incrimination when responding to a grand jury subpoena or other compulsory process seeking his or her business records [citation omitted]" and urging "reexamination of the collective entity doctrine," which governs this principle); Inman, *supra* note 91, at 1074 ("[S]ingle-member LLCs should be permitted to independently invoke the Fifth Amendment because any holding to the contrary would jeopardize the single-member's constitutional right against self-incrimination."); Peter Thompson, *The Fifth Amendment's Act of Production Doctrine: An Overlooked Shield Against Grand Jury Subpoenas Duces Tecum*, 20 FEDERALIST SOC'Y REV. 4, 5 (2019) ("Except in some cases of sole proprietorships, which do not exist independently of the persons who comprise them, the right to resist compelled self-incrimination is a 'personal privilege,' which companies and other collective entities do not share [footnotes omitted]").

[109] *See* Braswell v. United States, 487 U.S. 99, 104–05 (1988) ("[W]e have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.").

[110] *See id.* at 118 n.11 ("We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably

applicability of Fifth Amendment protections for corporations[111], and has indicated that a member of a partnership is also not entitled to the constitutional protections except perhaps in the instance of a small family partnership.[112] Arguably, the rationale behind the small family partnership exception could extend to single-member LLCs as well.[113] Inman postulated that a single-member LLC may avoid the collective entity doctrine and therefore be able to take advantage of Fifth Amendment protections against incrimination.[114] Many of these issues, particularly constitutional criminal law, are beyond the scope of this article, but the courts' treatment of these questions reveals just how blurred the line is between the personality of an LLC and its member in the single-member LLC context.[115]

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conclude that he produced the records."); *see also* Cole, *supra* note 108, at 85 ("Whether or not *Braswell's* reasoning should be applied to single-member LLC is by no means and open-and-shut case.").

[111] *See Braswell*, 487 U.S. at 104 ("[W]e have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.").

[112] Bellis v. United States, 417 U.S. 85, 101, (1974) ("Whether corporation or partnership . . . the applicability of the privilege should not turn on an insubstantial difference in form of the business enterprise. This might be a different case if it involved a small family partnership." (citing United States v. Slutsky, 352 F. Supp. 1105 (S.D.N.Y. 1972) and In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948))).

[113] *See* Inman, *supra* note 91, at 1095 ("In *Braswell*, the Court explicitly left open the possibility that Fifth Amendment protection may be available to a business entity with a single custodian, '*employee and officer*' because in that scenario a jury [would] *inevitably conclude that [the sole owner] produced the records.'* The single-member LLC falls squarely within this exception.").

[114] *Id.* at 1099 ("Grouping single-member LLCs under the collective entity umbrella denies the sole owners the constitutional right against self-incrimination, and thus violates a well-established personal privilege.").

[115] *See* Cole, *supra* note 108, at 12 ("The exploding use of new forms of limited liability business entities, and the application of the collective entity doctrine to those new entities, necessitates a re-examination of the collective entity doctrine"); *see also* Inman, *supra* note 91, at 1080 ("[I]t is unclear whether the Supreme Court implicitly approved the extension of Fifth Amendment rights to a business entity intimate enough to embody the personal interests of its owners, and lower courts are divided on the issue.").

III. Protection of LLC Membership Interests from Creditors

Limited liability companies have two strong protections against answering for the liabilities of their members.[116] First, the charging order statute provides a veritable force field against collection activity, particularly in jurisdictions where it is deemed the exclusive remedy against LLC membership interests.[117] It requires only that the LLC pay to the creditor any distributions that otherwise would be due to the member.[118] Second, the LLC records statute, along with its interpretative case law, provides a parallel protection.[119] Although the provision facially addresses the rights of members to obtain records from the LLC, courts have interpreted it to also exclude nonmembers from obtaining the documents enumerated in the statute.[120] In tandem, the two provisions can be utilized to deny creditors of LLC members

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[116] *See generally* LA. STAT. ANN. §§ 12:1331, 12:1319 (2019) (outlining Louisiana's charging and records statute).

[117] *See* Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, BUS. ENTITIES, Sept.–Oct. 2006, at 28, 64 ("A charging order is not a very effective debt collection tool. A creditor may find itself holding a charging order, without any ability to determine when the judgment will be paid off."). *Contra* Pomeroy, *supra* note 27, at 707 ("Most lawyers' belief that a charging order effectively precludes creditor recovery is significantly overstated . . . .").

[118] *See, e.g.*, TEX. BUS. ORG. CODE. ANN §101.112(b) (West 2019) ("If a court charges a membership interest with payment of a judgment as provided by Subsection (a), the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest.").

[119] *See* LA. STAT. ANN. § 12:1319 (2019) (describing the records law in Louisiana); *see also* Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, p. 17 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 761, 763 (stating "the Louisiana LLC Act expressly restricts judgment creditors of members of LLCs to obtaining a charging order and being granted only the rights of an assignee of the membership interest unless and until the assignee becomes a member" and holding that appellant "as an assignee, is not entitled to inspect any of . . . [non-party appellee's] business and financial records because that right is reserved for members of the LLC.").

[120] *See, e.g.*, *Channelside*, 194 So. 3d at 760 (finding the "right to obtain and inspect the LLC's records is reserved to members").

from meaningful recourse against the members' economic interest held in the LLC.[121]

A. The Charging Order Statute

The concept of the charging order derives from partnership law.[122] Historically, its origins go back at least to the English Partnership Act of 1890.[123] Generally, a charging order gives the creditor a right to receive its debtor's economic interest in a business association.[124] In the context of LLC law, a charging order gives the creditor the right to receive payment from the LLC under limited circumstances.[125] As an example, Louisiana Revised Statutes, Section 12:1331 provides:

> On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest. To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest. This Chapter shall not deprive any member of the benefit of any exemption laws applicable to his membership interest.[126]

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[121] *See generally* LA. STAT. ANN. § 12:1319 (2019) (allowing only members to obtain the records); LA. STAT. ANN. § 12:1331 (2019) (limiting collection activity).

[122] *See* Daniel S. Kleinberger et al., *Charging Orders and the New Uniform Limited Partnership Act — Dispelling Rumors of Disaster*, 18 PROB. & PROP. 30, 31 (2004) (describing the history and origins of charging orders).

[123] *See* Partnership Act 1890, 53 & 54 Vict. c. 39, § 23 (Eng.) (stating the "procedure against partnership property for a partner's separate judgment debt"); Kleinberger et al., *supra* note 122, at 31 ("The remedy originated . . . in Section 23 of English Partnership Act of 1890.").

[124] *See* Kleinberger et al., *supra* note 122, at 30 (explaining that charging orders entitle "the judgment creditor to whatever distributions would otherwise be due to the debtor partner whose interest is subject to the order").

[125] *See* Kozlow, *supra* note 9, at 885 (explaining that "under a charging order, the creditor can receive distributions from the entity only to the extent of the debt").

[126] LA. STAT. ANN. § 12:1331 (2019).

The judgment creditor simply files a motion before the court and, absent some dispute as to the validity or finality of the judgment, or the legitimacy of the debtor's interest in the LLC, the judgment creditor will be entitled to entry of the charging order.[127] The charging order permits the creditor to have "only the rights of an assignee of the membership interest."[128] This means that the creditor is not entitled to exercise management authority or otherwise to direct the affairs of the LLC.[129] Section 1332 further defines this concept when it states "[a]n assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing."[130] The creditor is therefore not entitled to the ordinary rights of an LLC member, such as the right to manage the company, to vote the membership interests, or to withdraw from the LLC and demand payment.[131] The creditor is only entitled to receive distributions that would otherwise be paid to a holder of a membership interest.[132]

Just as many concepts in LLCs are based upon the prior laws governing partnerships and corporations, the charging order provision is based in part upon the charging order provision in the Uniform Partnership Act.[133] The provision in the Uniform Partnership Act, however, was somewhat more complicated.[134] It provided more remedies, although limited, to the judgment creditors of partners.[135] First, the law allowed the court to "appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the

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[127] *See id.* (describing the charging order procedure under Louisiana law).
[128] *Id.*
[129] *See id.* (describing the charging order procedure under Louisiana law); *see also* Kozlow, *supra* note 9, at 889 ("A creditor's inability to vote the charged interest or participate in the management of the entity is at the heart of the asset protection efficacy of the charging order.").
[130] LA. STAT. ANN. § 12:1332 (2019).
[131] *Id.* (describing the rights of and limitations of an assignee).
[132] LA. STAT. ANN. § 12:1331 (2019) (stating that a "judgment creditor shall have only the rights of an assignee of the membership interest").
[133] UNIF. P'SHIP ACT § 504 (2013) ("On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment.").
[134] *See id.* (defining the ability to enter a charging order in the interest of the judgment creditor).
[135] *Id.* (detailing remedies available to judgment creditors of partners.).

judgment debtor might have made . . . ."[136] Second, the partnership law expressly allowed the creditor to foreclose its lien and order the sale of the interest subject to the charging order.[137] Like the iteration of the charging order contained in the LLC Law, however, the Uniform Partnership Act charging order's foreclosure procedure did not permit the foreclosing creditor or the purchaser to obtain full partnership rights, but rather, was limited to the economic interests.[138]

Civil law jurisdictions' partnership law regarding seizure of a partner's interests differs greatly from the historical paradigm of the Uniform Partnership Act.[139] For example, Louisiana partnership law provided a much stronger remedy for creditors than the Uniform Partnership Act.[140] A creditor holding a judgment against a partner is permitted to seize the partner's interest in the partnership.[141] If such seizure continues unabated for 30 days, the partnership is dissolved and the creditor is entitled to be paid an amount equal to the value of the interest as of the time of seizure.[142] The Commonwealth of Puerto Rico, another civil law jurisdiction, incorporates similar remedies.[143] These types of remedies, however, are not incorporated into any states' iterations of the LLC Law.[144]

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[136] *Id.* at (b)(1).

[137] *Id.* at (c) ("Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest.").

[138] *Id.* ("The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner.").

[139] UNIF. P'SHIP ACT § 504(c) (2013) (describing the UPA's provision for seizure of partner interests as being "as much a remedy limitation as a remedy.").

[140] LA. CIV. CODE. ANN. art. 2817 (2019) (providing "that each partner is bound for his virile share of the debts of the partnership.").

[141] LA. CIV. CODE. ANN. art. 2819 (2019) ("[A] partner ceases to be a member of a partnership if his interest in the partnership is seized.").

[142] *See id.* (describing partnership interest seizure and dissolution, and also noting that under a newer version of the law, "seizure does not operate to dissolve the partnership but only terminates the partner's membership if the seized interest is not released within thirty days.").

[143] P.R. LAWS 31 § 4373 ("The private creditors of each partner may demand the attachment and sale at auction of the latter's share in the partnership capital.").

[144] *See* LexisNexis, *Business and Corporate Law: Limited Liability Companies, 50-State Survey* (Feb. 2019) (providing an overview of each state's LLC laws).

Corporate law has also long provided that a creditor may seize shares and exercise all rights of a shareholder. Considering the creditor's remedies under corporate law and partnership law, it is noteworthy that the LLC Law provides protections to owners of LLC interests that are vastly greater than that which is available to either corporate stockholders or holders of partnership interests.[145] If nothing else, attorneys and financial and tax advisors in business formation should consider the strong favorability of LLCs in asset protection.[146] Considering this vulnerability, among others, there are few instances in which an attorney could competently advise a client to form a general partnership.

The narrow right of a creditor to obtain a charging order allows the target LLC significant latitude to manage its business to prevent the creditor from receiving distributions.[147] Cash distributions are often discretionary under the governing rules and regulations of an LLC, and therefore, such distributions may be deferred indefinitely in many circumstances.[148] The other members of the LLC are ordinarily sympathetic to the plight of their co-member who is in conflict with a third party creditor, and they are often willing to take actions sufficient to deny recovery to the creditor. This may even include characterizing distributions as "salary" or other compensation to avoid having to

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[145] *Compare* LA. STAT. ANN. § 12:1331 (2019) ("To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest.") *with* UNIF. P'SHIP ACT § 504 (2013) ("On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment.").

[146] *Compare* LA. STAT. ANN. § 12:1331 (2019) ("To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest.") *with* UNIF. P'SHIP ACT § 504 (2013) ("On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment.").

[147] *See* LA. STAT. ANN. § 12:1331 (2019) (explaining that § 12:1331 only allows a creditor the narrow remedy of receiving cash distributions from an LLC).

[148] *See id*. (explaining that through statutory rules, such as § 12:1331, LLC members can disguise cash distributions in such a way as to circumvent payments to creditors).

distribute funds to the creditor.[149] Such manipulation of the LLC governance could arguably give rise to claims of breach of fiduciary duty against the other members of the LLC acting in concert with the debtor. Certain other remedies, such as garnishment, may be available to the creditor as well.[150] The creditor may also ask the court to sign a charging order that places additional restrictions on the debtor and the LLC, for example, by dictating that any salary paid to the debtor-member is deemed to be a distribution.[151] Ultimately, however, the creditor's rights will be difficult to vindicate.

B. The Judgment Creditor's Limited Right to Information

The difficulty in collecting from a charging order raises the next pivotal question: how can a creditor police the charging order and make sure that he is receiving the full "rights of an assignee of the membership interest"?[152] Recent case law has narrowed the ability of a creditor to monitor the activity of the LLC at issue.[153] The creditor

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[149] *See* LA. STAT. ANN. § 13:3881(A)(1)(a) (2019) (stating that under certain conditions, an individual's disposable incomes is exempt from seizure under any writ, mandate, or process).

[150] James L. Buchwalter et al., *Garnishment*, 38 CORPUS JURIS SECUNDUM § 229 (last updated Sept. 2019) ("In general, a garnishment creates a prior right as against general creditors of the defendant, and is superior to any lien or right subsequently acquired against the property or claim garnished, but inferior to prior liens and claims.").

[151] *See* UNIF. P'SHIP ACT § 504(b)(2) (2013) (stating that the court may "make all other orders necessary to give effect to the charging order"); *see also* Stephen Fishman, *LLC Asset Protection and Charging Orders: An Overview of State Laws*, NOLO, https://www.nolo.com/legal-encyclopedia/llc-asset-protection-charging-orders.html (last visited Oct. 20, 2019) [https://perma.cc/CWJ4-S7EE] ("However, in most states, creditors with a charging order only obtain the owner-debtor's financial rights and cannot participate in management of the LLC."); *see also* Jay Atkinson, *The Misunderstood Charging Order*, FORBES (Apr. 30, 2013), https://www.forbes.com/sites/jayadkisson/2013/04/30/the-misunderstood-charging-order/#ebf4dec1d418 [https://perma.cc/LM4U-4RN9] (discussing that when charging orders are issued by courts, provisions are placed that specifically prevent the making of loans or payment of salary to the debtor member, and if done so, those distributions must go to the creditor).

[152] LA. STAT. ANN. § 12:1331 (2019).

[153] Wells Fargo Bank, Nat'l Assoc. v. Continuous Control Solutions, Inc., No. 11–1285, 2012 WL 3195759, at *3 (Iowa Ct. App. Aug. 8, 2012) (holding

does not have much of a right to supervise the LLC after it has obtained a charging order.[154] Courts have not allowed creditors to obtain document discovery against an LLC in this context.[155]

The provision that courts have relied upon to determine a creditor's right to information in this context is contained in Section 1319 of the Louisiana LLC law.[156] That section provides that members of an LLC are entitled, by virtue of their membership interest, to review and inspect certain company documents upon reasonable request.[157] Specifically, the LLC Law provides that any member is entitled to view various types of company documents, including the following:

- any limited liability company record;
- information regarding the state of the business and financial condition of the limited liability company;
- limited liability company's federal and state income tax returns;
- information regarding the affairs of the limited liability company;
- formal accounting of the limited liability company's affairs.[158]

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that the charging statute under Iowa law is an economic interest and does not entitle access to an LLC's records); Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, pp. 1, 22 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 753, 763 (using applicable Louisiana LLC law to find that a creditor cannot compel documents during discovery).

[154] *Wells Fargo*, 2012 WL 3195759, at *3 (holding that the charging statute under Iowa law is an economic interest and does not entitle access to an LLC's records); *Channelside*, 194 So. 3d at 753, 757–58 (using applicable Louisiana LLC law to find that a creditor cannot compel documents during discovery).

[155] Khoobehi Properties, LLC v. Baronne Dev. No. 2, LLC, 16-354, 16-356, 16-506, p. 8 (La. App. 5 Cir. 3/29/17), 216 So. 3d 287, 296 (finding that the right to obtain and inspect records of an LLC is limited by statute to its members).

[156] LA. STAT. ANN. § 12:1319 (2019) (requiring record-keeping by LLCs for the benefit of its members).

[157] LA. STAT. ANN. § 12:1319(B)(2) (2019) (allowing LLC members to inspect certain LLC records and information).

[158] LA. STAT. ANN. § 12:1319(A) (2019) (enumerating the types of LLC records that members have the right to access).

Courts have interpreted the provisions of Section 1319(B) to mean not only that *members* are entitled to review these documents, but also the inverse proposition: that people who are *not* members are almost never entitled to review the LLC's records.[159] "There is nothing in this statute that suggests that the right to an accounting from the LLC is extended to nonmembers."[160] The courts have widely concluded that this right to information is exclusive to members.[161]

This issue has come up before courts of appeal in the judgment creditor context, with most decisions holding for protection of the LLC's documents from discovery.[162] An Iowa appellate court reached that conclusion in *Wells Fargo Bank, N.A. v. Continuous Control Solutions, Inc.*[163] In that case, the judgment creditor obtained a charging order and requested that the court also direct the target LLC to give periodic cash flow statements to the creditor.[164] The trial court entered an order with that requirement.[165] The LLC appealed, arguing that there was "no statutory authority for the disclosure orders issued by the district court."[166] The court of appeals agreed, concluding that because the statute did not specifically provide for any remedy

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[159] *Khoobehi*, 216 So. 3d at 296 ("There is nothing in this statute that suggests that the right to an accounting from the LLC is extended to nonmembers.").

[160] *Id.*

[161] *See, e.g.*, *id.* ("There is nothing in this statute that suggests that the right to an accounting from the LLC is extended to nonmembers."); *see also* Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, p. 15 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 760 ("According to the language of La. R.S. 12:1319, the right to obtain and inspect the LLC's records is reserved to members of the LLC."); *see also* Kinkle v. R.D.C., LLC, 2004-1092, p. 15 (La. App. 3 Cir. 12/8/04), 889 So. 2d 405, 413 (finding that the personal representative of a deceased member's estate was not entitled to inspect the records of an LLC).

[162] *See, e.g.*, Law v. Zemp, 362 Ore. 302, 332–33 (2018) (finding that a charging order provision that required disclosure of financial information to creditors was reversible error by the trial court).

[163] Wells Fargo Bank, Nat'l Assoc. v. Continuous Control Solutions, Inc., No. 11–1285, 2012 WL 3195759, at *3 (Iowa Ct. App. Aug. 8, 2012) ("We conclude there is no statutory authority for the disclosure orders the district court issued in this case.").

[164] *Id.* at *1 ("The judgment creditors also requested an order requiring the LLCs to disclose their cash flow statements or other documentation . . . .").

[165] *Id.* ("[T]he district court granted charging orders against each judgment debtor.").

[166] *Id.* ("On appeal, the LLCs argue there is no statutory authority for the disclosure orders issued by the district court.").

regarding disclosure of LLC information, it would not read that into the statute.[167] The court, therefore, vacated that portion of the charging orders requiring financial disclosure.[168]

Likewise, in *Channelside Services, LLC v. Chrysochoos Group*, a Louisiana court of appeal reached a similar conclusion.[169] The creditor in that case had obtained a judgment against a Florida corporation that had a membership interest in a Louisiana LLC.[170] The LLC was a non-party to the original suit.[171] The creditor obtained a charging order against the Florida corporation's membership interest in the LLC, and then sought document discovery as to the internal business of the LLC.[172] The trial court partially granted and partially denied opposing motions to quash and to compel a records deposition and subpoena *duces tecum* issued to the LLC, for the production of financial documents and tax returns.[173] The appellate court found the "specific provisions of the Louisiana LLC Act are controlling in this case over the more general statutory provisions governing discovery."[174] The court held that in accordance with the provisions of the LLC Law, an assignee of a membership interest in an LLC "is expressly restricted from inspecting the records" of the LLC.[175] As a

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[167] *Id.* at *3 ("[T]he provision relied upon by the judgment creditors does not specifically include a right to information as a remedy to effectuate the collection of distributions.").

[168] *Id.* ("We therefore vacate the parts of the order which require disclosure to the judgment creditors' counsel or to the court and affirm the remaining portions of the orders.").

[169] Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, p. 22 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 763 (holding that Channelside is an assignee, not a member, and only a member of the LLC may inspect the financial statements of the LLC under the Louisiana LLC Act).

[170] *Id.* at 753–54 (recognizing the Thirteenth Judicial Circuit Court granted Channelside, the creditor, a judgment of $352,325.81 with interest).

[171] *Id.* (describing the original suit between Channelside and Chysochoos Group ("CGI"), not JTMC (the LLC) in which CGI "owns a fifty percent membership interest.").

[172] *Id.* (describing the action Channelside took in 2014 whereby the trial court granted the charging order for Channelside to seek the unpaid judgement from JTMC).

[173] *Id.* at 754 ("The trial court's . . . judgment ordered JTMC to submit any evidence of indebtedness by JTMC to CGI.").

[174] *Id.* at 759.

[175] *Id.* at 773.

result, the creditor was denied the opportunity to see financial information of the company against which it held a charging order.[176]

The charging order was already a very limited remedy, and the recent decisions of the courts that have addressed this issue further limit a creditors' recourse to enforce that right.[177] If the LLC makes no distributions to the judgment creditor on account of a charging order (as will often be the case, for the reasons previously discussed) the creditor has very little ability to investigate whether the charging order is being followed, due to the limitations of the LLC Law on record access.[178] Given these developments in the law, the most effective way to discover this information in support of the charging order may be through aggressive questioning at one or more judgment debtor examinations of the debtor who holds the membership interest.[179] Furthermore, the creditor may request that the court include in the charging order provisions that require information regarding any funds paid to the debtor, whether as salary, or loans, as well as other provisions to ensure faithful adherence to the charging order.[180]

IV. Creditors' Rights Against Single-Member LLCs

While the charging order may be the only remedy against a membership interest provided in the LLC Act, there is a path to a more

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[176] *Id.* at 760 ("JTMC argues that Channelside's notice of records deposition and subpoena duces tecum must be quashed. Based upon the clear language of the applicable LLC statutes, we agree.").

[177] *See* Bishop, *supra* note 20, at 30–31 (summarizing the Connecticut case *Voll v. Dunn* and stating that the court was wrong in its determination that the creditor was entitled to judgment, presumably because the charging order is typically an exclusive, limited remedy).

[178] *See* Fishman, supra note 151 ("Frequently, creditors who obtain charging orders end up with nothing because they can't order the LLC to make any distributions.").

[179] *See* Stephanie Lane, *What Is a Debtor's Examination?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-debtor-examination.html (last visited Oct. 26, 2019) [https://perma.cc/4M2K-6NJK] (explaining debtor examinations as something the debtor "must do.").

[180] *See* Jay D. Adkisson, *Ancillary Provisions in Charging Orders Illuminated in Law v. Zemp*, ABA BUSINESS LAW TODAY (Mar. 13, 2018), https://businesslawtoday.org/2018/03/ancillary-provisions-in-charging-orders-illuminated-in-law-v-zemp/ [https://perma.cc/EFN5-A9T4] (highlighting that there are no standard ancillary provisions to add to charging orders and that they may be requested by the creditor but not necessarily upheld).

fulsome remedy under general collection law when the target is a single-member LLC. The argument rests upon both post judgment remedies like the writ of execution, and the language of Section 1332 of the LLC Law.[181] While some courts and state legislatures in other jurisdictions have approved or codified this interpretation, no consensus has been reached among the state supreme courts.[182]

The policy reason often given as to why a judgment creditor's rights against an LLC are limited to a charging order is that, in LLCs that have multiple members, it would be an imposition on the other members if a creditor could simply step in the shoes of an LLC member and exercise control over the business.[183] One Delaware court stated, "it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent."[184] Following this logic, such an intrusion into management of a business by a third-party stranger would only be permissible if the other members agree.[185] It makes sense then that Section 1332 of the LLC Law provides that a person holding the rights of an assignee can exercise full managerial rights if all of the other LLC members have consented to his admission.[186] Following this procedure, a judgment creditor who is granted a charging order could obtain full member

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[181] *See* LA. STAT. ANN. §12:1332(A)(1) (2019) ("An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.").

[182] Stephen Fishman, *LLCs and Limited Liability Protection*, NOLO (last visited Oct. 26, 2019), https://www.nolo.com/legal-encyclopedia/limited-liability-protection-llcs-a-50-state-guide.html [https://perma.cc/W6TK-S2JS] ("In some states, it's not clear whether single member LLCs will receive the same liability protection from personal creditors of the LLC owner as multi-member LLCs.").

[183] Fishman, *supra* note 151 ("The reason personal creditors of individual LLC owners are limited to a charging order or foreclosure is to protect the other members (owners) of the LLC.").

[184] Eureka VIII, LLC v. Niagara Falls Holdings, LLC, 899 A.2d 95, 115 (Del. Ch. 2006).

[185] *See id.* (discussing that closely held LLC members tend to prefer to select their own associates).

[186] *See* LA. STAT. ANN. §12:1332(A)(1) (2019) ("An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.").

rights if and when the other LLC members vote to admit him, although this, of course, rarely happens.[187]

This aspect of the assignee-member distinction makes for a compelling argument when it comes to single-member LLCs. If the debtor is the *sole member* of an LLC, then the creditor should arguably obtain all membership rights to the LLC either when it obtains a charging order, or when it obtains the interests at an execution sale, because there are no other members whose consent would be required for the creditor to be admitted as a full member.[188] This theory has been tested in courts with differing results.[189]

A. The Sometimes-Blurry Line between Exclusive and Non-Exclusive Charging Orders

Foreclosure is probably a moot point in states with exclusive charging order statutes. The precise distinction between exclusive and nonexclusive charging order statutes is important here. The charging order provision in exclusive states contains language clearly stating that the charging order remedy is exclusive.[190] Louisiana, for example, does not have that limitation and, therefore, the charging order is regarded as a nonexclusive remedy.[191] Compare the applicable Louisiana statute to those in place in Texas and Alabama and the distinction

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[187] Joseph Briggett, *Current Issues in Enforcing Judgments Against Limited Liability Companies*, LUGNEBUHL BLOG (Feb. 14, 2018), http://www.lawla.com/blog/current-issues-in-enforcing-judgments-against-limited-liability-companies/ [https://perma.cc/5376-GSBR] ("Following this procedure, a judgment creditor who is granted a charging order could obtain full member rights if and when the other LLC members vote to admit him. Although this, of course, rarely happens.").

[188] *See generally* LA. STAT. ANN. §12:1332(A)(1) (2019) ("An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.").

[189] Fishman, *supra* note 151 ("Because of this difference with SMLLCs, some courts have applied different rules for SMLLC protection from creditors and in many states it remains unclear what type of protection they would receive.").

[190] *See e.g.*, TEX. BUS. ORGS. CODE ANN. § 101.112 (West 2019) (indicating that a judgment creditor is entitled to no remedy apart from the charging order).

[191] *See* LA. STAT. ANN. § 12:1331 (2019) (lacking any provision limiting a judgment creditor's remedy to a charging order).

between non-exclusive and exclusive charging order remedies is clear[192]:

Texas

> (a) On application by a judgment creditor of a member of a limited liability company or of any other owner of a membership interest in a limited liability company, a court having jurisdiction may charge the membership interest of the judgment debtor to satisfy the judgment.[193]
>
> (d) *The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest*.[194]

Alabama

> (a) On application to a court of competent jurisdiction by any judgment creditor of a member or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest.[195] To the extent so charged and after the limited liability company has been served with the charging order, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the transferable interest. . . ."[196]

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[192] *Compare id.* (lacking any reference to the charging order as an exclusive remedy) *with* TEX. BUS. ORGS. CODE § 101.112 (West 2019) ("The entry of a charging order is the exclusive remedy . . . .") *and* ALA. CODE § 10A-5A-5.03(f) (2019) ("This section provides the exclusive remedy . . . .").
[193] TEX. BUS. ORGS. CODE ANN. § 101.112(a) (West 2019).
[194] TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2019) (*emphasis added*).
[195] ALA. CODE § 10A-5A-5.03(a) (2019).
[196] *Id.*

> (f) *This section provides the exclusive remedy by which a judgment creditor of a member or transferee may satisfy a judgment out of the judgment debtor's transferable interest and the judgment creditor shall have no right to foreclose, under this chapter or any other law, upon the charging order, the charging order lien, or the judgment debtor's transferable interest*.[197]

Louisiana

> On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest. To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest. This Chapter shall not deprive any member of the benefit of any exemption laws applicable to his membership interest.[198]

Not all states fall into these rigid categories. Florida is somewhat of an outlier, because its statute was once nonexclusive and, after some notable court decisions, the legislature amended the statute to make the remedy exclusive, with certain qualifications.[199] The issue arose in the *Olmstead* case, in which the Eleventh Circuit had certified the question to the Florida Supreme Court as to whether a creditor could seize full membership rights in a wholly owned LLC.[200] At the

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[197] ALA. CODE § 10A-5A-5.03(f) (2019).
[198] LA. STAT. ANN. § 12:1331 (2019).
[199] *See, e.g.*, Olmstead v. F.T.C., 44 So. 3d 76, 83 (Fla. 2010) (concluding that there is "no reasonable basis for inferring that the provision authorizing use of charging orders . . . establishes the sole remedy for a judgment creditor against a judgment debtor's interest in [sic] single-member LLC"). *Compare* FLA. STAT. ANN. § 608.433 (West 2010) (lacking any language that a charging order is an exclusive remedy) *with* FLA. STAT. ANN. § 605.0503(4) (West 2019) (introducing exclusivity provisions).
[200] *Olmstead*, 44 So. 3d at 77–78 ("Whether . . . a court may order a judgment-debtor to surrender 'all right, title, and interest' in the debtor's single-member limited liability company to satisfy an outstanding judgment.").

time, Florida had a nonexclusive charging order statute.[201] The facts before the court in *Olmstead v. Federal Trade Commission* lent themselves to a creditor-friendly decision, insofar as the plaintiff was the Federal Trade Commission enforcing judgments against individuals that had used the subject LLCs to perpetrate a scam.[202] Florida's high court answered the certified question in the affirmative, holding that in the context of single-member LLCs, a judgment creditor who has a charging order against a single-member LLC may take full membership rights in the LLC.[203] The court reasoned that there are no other members who could object to the judgment creditor taking a complete assignment of the membership interest.[204] The Court observed that in the context of a single-member LLC, the set of "all members other than the member assigning the interest" is empty.[205] "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."[206]

The effects of this interpretation of the LLC Law were profound.[207] In reviewing the plight of a debtor in bankruptcy court in Florida following the *Olmstead* decision, a Florida bankruptcy judge observed the effects of the ruling as follows:

> Before *Olmstead*, if a Florida judgment creditor levied on a debtor's ownership in a single-member LLC, the

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[201] *See id.* at 81 (explaining that the Florida statute did not expressly establish the charging order remedy as exclusive); *see also* FLA. § 608.433 (lacking any exclusivity provisions).

[202] *See Olmstead*, 44 So. 3d at 78 ("[T]he FTC sued the appellants and the corporate entities for unfair or deceptive trade practices.").

[203] *Id.* at 83 (finding that the lack of explicit exclusivity in the statute meant that the FTC had a remedy under a separate statute).

[204] *Id.* at 81 (stating that the provision that a judgment creditor only has the rights of an assignee of an LLC interest serves to recognize that a judgment creditor "cannot defeat the rights of nondebtor members," not to limit the freely-assignable rights of a sole owner).

[205] *Id.*

[206] *Id.*

[207] *See generally* William J. Callison, *Charging Order Exclusivity: A Pragmatic Approach to Olmstead v. Federal Trade Commission*, 66 THE BUS. LAW. 339, 358 (2011) ("Charging order exclusivity presents a very real problem that perplexed the Florida Supreme Court in *Olmstead* and will likely similarly perplex other courts in months and years to come.").

> most the judgment creditor could get was a statutory charging order . . . . In the instant case, that result would not have threatened the Debtor, because the Debtor did not receive any "profits or distributions" from the Middle Tier, single-member LLCs. Pursuant to the holding of *Olmstead*, after June 24, 2010, Inervest became entitled to cause the Debtor to surrender its "right, title and interest" in, and to, all of the Middle Tier LLCs. The Debtor would have lost control of the subsidiaries, and subsequently all the real property owned by the subsidiaries. In order to prevent that outcome, the Debtor filed the instant case.[208]

This interpretation of the law gave creditors extraordinarily greater leverage against a debtor's interest in wholly owned LLCs.[209] By the same token, as the bankruptcy court observed, it likely encouraged bankruptcy filings and also incentivized business owners to structure their LLC interests so as not to be wholly owned by one person.[210] Not long after the Florida Supreme Court's decision, the Florida legislature amended the applicable law to limit the rights of a judgment creditor to a charging order, or foreclosure.[211]

Prior to General Statute 57D-5-03, North Carolina was another nonexclusive state.[212] In the context of a multi-member LLC case, North Carolina's Court of Appeals viewed the question somewhat differently from Florida's, but applied reasoning that can still be

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[208] *In re Davis Heritage GP Holdings*, *LLC*, 443 B.R. 448, 458 (Bankr. N.D. Fla. 2011).

[209] *Id.* at 460 (granting creditor's motion to dismiss the debtor's Chapter 11 relief).

[210] *Id.* at 458 (stating after the *Olmstead* holding, debtor had to file this case to prevent the loss of control of subsidiaries).

[211] FLA. STAT. § 605.0503(6) (2019) (codifying the amended law related to judgment creditors in Florida).

[212] *See* Herring v. Keasler, 563 S.E.2d 614, 615 (N.C. App. 2002) ("North Carolina General Statutes § 57C-5-03, however, provides that with respect to a judgment debtor's membership interest in a limited liability company, a trial court "may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest." (citing N.C. GEN. STAT. § 57C-5-03 (1993), *repealed by* 2013 N.C. Sess. Laws 157)).

reconciled with *Olmstead*.[213] In *Herring v. Keasler*, a creditor moved for seizure and sale of a judgment debtor's 20% interest in a multi-member LLC, and simultaneously requested a charging order providing that it be paid any distributions in the interim period pending sale.[214] The court noted the general provisions for execution of judgments in North Carolina, and focused its inquiry on those provisions as read together with the charging order statute.[215] The court did not expressly acknowledge that North Carolina had enacted the non-exclusive version of the law, and ultimately did not make any determination of the exclusivity of the provision.[216] Ultimately, the court concluded that the general right to seizure and sale did not apply to the judgment debtor's fractional membership interests, due to the statutory non-assignability of LLC membership interests.[217] The court reasoned that a foreclosure sale is prohibited in such an instance "because the forced sale of a membership interest in a limited liability company to satisfy a debt would necessarily entail the transfer of a member's ownership interest to another, thus permitting the purchaser to become a member . . . ."[218] The holding of *Herring* could therefore be limited to multi-member LLCs and could be reconciled with *Olmstead*.[219]

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[213] *See id.* at 616 ("Accordingly, the trial court did not err in ordering that the judgment be satisfied through the application of the distributions and allocations of Defendant's membership interests in the LLCs and in denying Plaintiff's motion to have Defendant's membership interests seized and sold.").

[214] *Id.* at 615 ("In Defendant's affidavit, he stated he had a 20% membership interest in several limited liability companies . . . .").

[215] *Id*. at 615–16 (describing the application of North Carolina law to judgment debtor's membership interest in an LLC).

[216] *See id.* ("Accordingly, the trial court did not err in ordering that the judgment be satisfied through the application of the distributions and allocations of Defendant's membership interests in the LLCs and in denying Plaintiff's motion to have Defendant's membership interests seized and sold."); see also N.C. GEN. STAT. § 57C-5-03 (1993) *repealed by* 2013 N.C. Sess. Laws 157 (repealing the non-exclusivity of charging orders in North Carolina).

[217] *Id.* ("Accordingly, the trial court did not err in ordering that the judgment be satisfied through the application of the distributions and allocations of Defendant's membership interests in the LLCs and in denying Plaintiff's motion to have Defendant's membership interests seized and sold.")

[218] Herring v. Keasler, 563 S.E.2d 614, 616 (N.C. App. 2002).

[219] *Id.* (reasoning a forced sale in a multi-member LLC without the approval of all members would be prohibited, but not explicitly commenting on a forced sale of a single-member LLC membership interest).

Texas is an exclusive charging order state, and its courts have reviewed the *Olmstead* question unfavorably.[220] A Texas appellate court recently rejected the *Olmstead* argument in a somewhat similar fact pattern involving partnerships in *Pajooh v. Royal West Investments LLC, Series E*.[221] The Texas appellate court's decision in *Pajooh* did not involve a single-member LLC, but rather, involved a limited partnership with respect to which the creditor held judgments against each of the partners.[222] The creditor argued that because it held judgments against all of the partners, there was no partner who could object to the creditor's admission, just as in *Olmstead*.[223] The court expressly rejected the application of the reasoning employed by *Olmstead*, and determined that the creditor was entitled to a charging order only.[224]

In an act to protect business interests from the uncertainty surrounding single-member LLCs, some states have amended the provisions of the LLC Law to affirm that single-member LLCs are accorded the same protections that would be given to multi-member LLCs.[225] These states include Delaware, Wyoming, and Nevada.[226]

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[220] *See* TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2019) (laying out the charging order language); Pajooh v. Royal W. Invs. LLC, Series E, 518 S.W.3d 557, 563 (Tex. App. 2017) ("We decline to follow . . . *Olmstead*.").

[221] *Pajooh*, 518 S.W.3d at 563. *See Herring*, 563 S.E.2d at 615–16 (involving a creditor seeking to force a sale of a debtor's LLC membership interest).

[222] *Pajooh*, 518 S.W.3d at 559–60 (describing the structure of the partnership and providing a diagram).

[223] *Id.* at 564 (discussing the textual basis for the argument).

[224] *Id.* at 563, 565 (expressly declining to follow *Olmstead* and holding that the charging order is the creditor's exclusive remedy in this situation).

[225] DEL. CODE. ANN. tit. 6 § 18-703(d) (West 2019) (explaining the charging order to be the exclusive remedy "whether the limited liability company has 1 member or more than 1 member"); NEV. REV. STAT. ANN. § 86.401.2(a) (West 2019) (explaining the charging order to be the exclusive remedy "whether the limited-liability company has one member or more than one member"); WYO. STAT. ANN. § 17-29-503(g) (2019) (explaining the charging order to be the exclusive remedy against "any judgment debtor who may be the sole member" of an LLC).

[226] DEL. CODE. ANN. tit. 6 § 18-703(d) (West 2019) (explaining the charging order to be the exclusive remedy "whether the limited liability company has 1 member or more than 1 member"); NEV. REV. STAT. ANN. § 86.401.2(a) (West 2019) (explaining the charging order to be the exclusive remedy "whether the limited-liability company has one member or more than one member"); WYO. STAT. ANN. § 17-29-503(g) (2019) (explaining the charging order to be the exclusive remedy against "any judgment debtor who may be the sole member" of an LLC).

New Hampshire, by contrast, has gone in the opposite direction, enacting a provision that expressly allows a creditor to foreclose upon a single-member's membership interest in an execution sale.[227] While generally prohibiting such a remedy in multi-member LLCs, the New Hampshire law provides as follows as to single-member LLCs:

> VI. (a) If a judgment creditor shows to the satisfaction of a court of competent jurisdiction that distributions under a charging order in respect of the limited liability company interest of a debtor-member of a single-member limited liability company will not satisfy the judgment within a reasonable time, a charging order shall not be the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against the member.[228]
>
> (b) Upon such a showing, the court may order the sale of the debtor-member's membership rights under an execution sale.[229]
>
> (c) A judgment creditor may make a showing to the court under subparagraph (a) that distributions under a charging order will not satisfy a judgment either (1) when the judgment creditor applies for the entry of a charging order under a member of a single-member limited liability company or (2) at any time thereafter.[230]

The statute attempts to balance the interests of the LLC as against the rights of creditors by requiring the creditor to make a "showing" that the charging order distributions will not satisfy the judgment within a reasonable time.[231] It is unclear how this standard is applied in practice in the relatively short time since the law became effective in 2013. If

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[227] N.H. REV. STAT. ANN. § 304-C:126 (2019) (stipulating the conditions to foreclose on a single-member LLC membership interest).
[228] *Id.* at (VII.)(a).
[229] *Id.* at (VII.)(b).
[230] *Id.* at (VII.)(c).
[231] *Id.* (limiting the fact that a "charging order shall not be the sole and exclusive remedy" of a creditor by requiring that the creditor to show the judgment will not be fulfilled within a reasonable time).

the creditor passes this hurdle, they can then proceed to the *Olmstead*-style remedy of acquisition of control.[232]

While Louisiana's statute does not utilize the exclusive language, like North Carolina, courts in Louisiana have addressed the issue with some ambiguous language.[233] Some Louisiana courts seem to have inferred that exclusivity principle from the Louisiana statute.[234] These decisions have been limited to the aforementioned cases decided in the context of discovery disputes regarding subpoenas issued to target LLCs.[235] In *Channelside*, the court concluded that the Louisiana LLC Law "expressly restricts judgment creditors of members of LLCs to obtaining a charging order and being granted only the rights of an assignee of the membership interest unless and until the assignee becomes a member."[236] Nevertheless, these conclusions are likely limited by the discovery context in which they were decided.[237]

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[232] *See* Olmstead v. F.T.C., 44 So. 3d 76, 78 (Fla. 2010), *superseded by statute*, FLA. STAT. ANN. § 605.0503 (holding that a court can order the debtor to surrender all interests in the debtor's single-member LLC).

[233] *See* Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, pp. 12–14 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 758–59 (explaining that an LLC's property is not available to a member-debtor's creditors but that the Louisiana LLC Act allows creditors to apply for charging orders in limited circumstances). *See generally* LA. STAT. ANN. § 12:1331 (2019) (codifying Louisiana LLC law).

[234] S.E. Prop. Holdings, LLC v. Chunn, 2017-246, p. 9 (La. App. 2 Cir. 11/8/17), 231 So. 3d 89, 96 (construing the Louisiana LLC law as limiting a creditor's remedy to charging orders).

[235] *S.E. Prop. Holdings*, 231 So. 3d at 90 (explaining the facts of the case where the Plaintiff-creditor issues a subpoena for business records of an LLC of which the Defendant-debtor was a member); *Channelside*, 194 So. 3d at 754 (assessing the case where Plaintiff issued a subpoena for business records owned by an LLC in which the debtor maintained a 50% interest).

[236] *Channelside*, 194 So. 3d at 761 (contrasting the limit rights a creditor receives as an assignee of a membership interest in an LLC against the full rights they receive by seizing a shareholder's stock of a business corporation).

[237] *See S.E. Prop. Holdings*, 231 So. 3d at 95 ("While the general rules of discovery govern the examination of judgment debtors . . . , the Louisiana LLC Act is specifically directed to the matter at issue in this case, namely, the limitations on discovery of a judgment creditor, as assignee of a judgment debtor's membership interest in an LLC for payment of an unsatisfied judgment.").

B. Seizing and Selling LLC Membership Interests at a Sheriff Sale

If the charging order in the relevant jurisdiction is not exclusive, then there is an argument that the creditor can utilize its tried and true tool, the writ of *fieri facias* or writ of execution, to seize and sell the membership interests at a sheriff sale.[238] Generally speaking, the *fieri facias* writ allows a judgment creditor to seize and sell all of the judgment debtor's property that can be collected within the sheriff's jurisdiction.[239] Using the Louisiana Code of Civil Procedure as a paradigm example, the provisions on execution of judgments are broad and do not admit any exception for membership interests in LLCs.[240] Under the Louisiana Code of Civil Procedure's provisions for execution of judgments, after the delays for appeal have passed, a creditor has the right to obtain from the clerk a writ of *fieri facias* directing the sheriff to seize and sell property of the judgment debtor.[241] Article 2291 of the Louisiana Code of Civil Procedure states that "[a] judgment for the payment of money may be executed by a writ of *fieri facias* directing the seizure and sale of property of the judgment debtor."[242] The phrase "property of the judgment debtor" has been construed broadly to include all of the judgment debtor's property.[243] Moreover, the statutes governing seizure and sale provide that the creditor may direct the sheriff to seize and sell "any other property which the seizing creditor wants seized belonging to the debtor."[244] Of course, there are exemptions of property from execution that are

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[238] *See* 1 FRIEND'S VIRGINIA PLEADING AND PRACTICE § 22.04 (2018) ("The most common method of enforcing an unpaid law judgment is the writ of *fieri facias*, also known as a writ of execution.").

[239] *Id.* ("The writ is directed to the sheriff . . . who is commanded by the writ to 'make the money therein mentioned' out of the goods and chattels of the person against whom the judgment has been rendered.").

[240] *See* LA. CODE CIV. PROC. ANN. art. 2251 (2019) (explaining that a "judgment can be executed only by a trial court" but not providing any exception for LLC membership interests).

[241] La. Code Civ. Proc. Ann. art. 2291 (2019) (stating a judgment may be executed by a writ of *fieri facias*, but fails to list LLC exception).

[242] *Id.*

[243] Lisso v. Williams, 71 So. 365, 366 (La. 1916) (concluding the *fieri facias* "addresses itself to the debtor's property in general; and its mandate to the sheriff is to cause the amount of the debt to be made out of the property of the debtor indiscriminately.").

[244] LA. STAT. ANN. § 13:3884 (2019).

established by legislation.[245] These exemptions do not include membership interests in LLCs.[246]

Nor is there any distinction based upon the inherent intangible nature of membership interests that would remove them from the purview of a writ of *fieri facias*.[247] Under the civilian classifications of property, a membership interest in an LLC is an incorporeal movable.[248] Incorporeal movables are defined to include "interests or shares in entities possessing juridical personality."[249] And incorporeal movables have been held in numerous instances to be subject to the writ of *fieri facias*.[250] Corporate stocks, belonging to the same category of incorporeal movables, have routinely been seized and sold under this process.[251] No court appears to have specifically concluded that membership interests are subject to the same procedure, but there is also no reason to conclude otherwise.[252] In *Hibernia National Bank v. AeroMech, Inc.*, for example, the Second Circuit reviewed a case in

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[245] LA. STAT. ANN. § 13:3881 (2019) (codifying the list types of property exempt from execution).

[246] *See id.* (codifying the exemptions without naming membership interest in an LLC among those exemptions).

[247] LA. STAT. ANN. § 12:1329 (2019) (defining membership interests as incorporeal movables); LA. CIV. CODE ANN. art. 473 (2019) (defining incorporeal movables as "rights, obligations, and actions that apply to a movable thing"). *See, e.g.*, Sec. First Nat. Bank v. Tattersall, 311 So. 2d 218, 220 (La. 1975) (holding that certificate of right to ownership of horses can be seized under *fieri facias*); *see also* Gen. Elec. Co. v. Bd. of Assessors, 46 So. 122, 126 (La. 1908) (finding credit against a nonresident debtor to be "equally subject to seizure").

[248] LA. STAT. ANN. § 12:1329 (2019) (defining membership interests as incorporeal movables); LA. CIV. CODE ANN. art. 473 (2019) (defining incorporeal movables as "rights, obligations, and actions that apply to a movable thing").

[249] LA. CIV. CODE. ANN. art. 473 (2019). *See also Succession of McGuire*, 92 So. 40, 43 (La. 1922) (stating that shares of stock in corporations are classified as 'incorporeal things.').

[250] *Sec. First Nat. Bank,* 311 So. 2d at 220 (holding that ownership right of horse was subject to seizure under *fieri facias*); *Gen. Elec. Co.,* 46 So. at 126 (finding credit against a nonresident debtor to be "equally subject to seizure").

[251] *See, e.g.*, Brennan v. Brennan, 945 F. Supp. 2d 704, 711 (E.D. La. 2013), *vacated*, 548 Fed. App'x. 264 (5th Cir. 2013) (stating that judgment creditor, who was a non-party to the suit, had seized stock ownership via *fieri facias*).

[252] *See, e.g.*, Hibernia Nat. Bank v. AeroMech, Inc., 50-608, p. 2 (La. App. 2 Cir. 8/3/16), 215 So. 3d 350, 352 (acknowledging that holder of judgment had seized membership interest of an LLC via writ of *fieri facias*).

which a judgment creditor sought to seize and sell membership interests in an LLC under a writ of *fieri facias*.[253] The court did not question whether the membership interests could be seized as a fundamental matter, but rather, affirmed the dismissal of the case on other grounds.[254] Considering the governing provisions of the Louisiana Code of Civil Procedure and the applicable case law, and setting aside the dicta in *Channelside* and its progeny, the sound conclusion is that a creditor is permitted to foreclose on membership interests by way of the writ of *fieri facias*.[255]

Considering the procedural rules governing execution, along with the provisions of the LLC Law and the nature of that property interest, it follows that the writ of *fieri facias* is an available remedy for a creditor to foreclose upon the judgment debtor's membership interests.[256] More importantly, the applicable provisions lead to the conclusion that after following the procedure to a sheriff's sale and adjudication, the purchaser at the sheriff's sale (which could be the judgment creditor) obtains the membership interests as completely as if the judgment debtor had sold them, which would give the purchaser all rights and powers of a member.[257]

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[253] *Id.* at 352 (acknowledging that membership interest in the LLC had been seized by writ of *fieri facias*).

[254] *Id.* at 355 (affirming dismissal of appeal as abandonment of action statute did not apply).

[255] LA. CODE CIV. PROC. ANN. art. 2291 (2019) (establishing that "a judgment for the payment of money may be executed by a writ of fieri facias directing the seizure and sale of property of the judgment debtor"). *See, e.g.*, Channelside Servs., LLC v. Chrysochoos Grp., Inc., 2015-0064, p. 14 (La. App. 4 Cir. 5/13/16), 194 So. 3d 751, 759 (asserting that a judgment creditor becoming the assignee of a member's interest is entitled to share of profit but not any exercise of rights or powers).

[256] *See* LA. CODE CIV. PROC. ANN. art. 2291 (2019) (establishing that "a judgment for the payment of money may be executed by a writ of fieri facias directing the seizure and sale of property of the judgment debtor"); *see also Channelside*, 194 So. 3d at 759 (asserting that a judgment creditor becoming the assignee of a member's interest is entitled to share of profit but not any exercise of rights or powers).

[257] LA. STAT. ANN. §§ 12:1329–1331 (2019) (delineating rights of member and assignee when a member's interest in an LLC is assigned to a third party); LA. CODE CIV. PROC. ANN. arts. 2291, 2371 (2019) (detailing that a writ of *fieri facias* may transfer an interest in an LLC to a third party by judgment as if the member had sold the interest).

What does this remedy give the creditor beyond the charging order that is provided for in the LLC Law?[258] In the instance of a single-member LLC, the difference could be significant. The seizure and sale of the membership interest under this procedure is a method by which the judgment creditor may transfer possession of the membership interest to a purchaser at a sheriff's sale.[259] The Code of Civil Procedure addresses this in article 2371 as to the effect of adjudication following seizure and sale.[260] The Code states that "[t]he adjudication transfers to the purchaser all the rights and claims of the judgment debtor as completely as if the judgment debtor had sold the property."[261] While the charging order only entitles a judgment creditor to receive payment, the seizure and sale gives the judgment creditor, or more accurately, the purchaser at a sheriff's sale, the whole property interest that a judgment debtor could have sold.[262] After adjudication through the *fieri facias* process, the creditor obtains a significantly greater stake in the membership interests than he or she would have obtained through a charging order.[263]

While this difference between the two remedies may have little significance in multi-member LLCs, in the instance of a single-member LLC, the foreclosure process should grant the purchaser at the

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[258] *See* LA. STAT. ANN. § 12:1331 (2019) (stating that under a charging order, "the judgment creditor shall have only the rights of an assignee of the membership interest.").

[259] LA. CODE CIV. PROC. ANN. art. 2291 (2019) (stating that "a writ of fieri facias" may direct "the seizure and sale of property of the judgment debtor").

[260] LA. CODE CIV. PROC. ANN. art. 2371 (2019) (stating that "adjudication transfers to the purchaser all the rights and claims of the judgment debtor as completely as if the judgment debtor had sold the property").

[261] *Id.*

[262] *Compare id. with* LA. STAT. ANN. § 12:1331 (2019) ("The court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest. To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest.").

[263] *See* LA. STAT. ANN. § 12:1331 (2019) (stating that under a charging order, "the judgment creditor shall have only the rights of an assignee of the membership interest."); *see also* LA. CODE CIV. PROC. ANN. art. 2371 (2019) (stating that "adjudication transfers to the purchaser all the rights and claims of the judgment debtor as completely as if the judgment debtor had sold the property").

sheriff's sale full membership rights in the LLC.[264] Again, the legal effect of the adjudication of the foreclosure sale is that the purchaser is entitled to the whole property interest that a judgment debtor could have sold.[265] Clearly, the sole member of an LLC has the right to assign and transfer his 100% membership interest in an LLC to a third person and thereby grant the third person full membership rights.[266] There is a genuine question, however, as to whether a nonconsensual transfer confers the same rights and benefits on the transferee.

The Florida Supreme Court considered this question in *Olmstead*, however, it did not analyze the issue within the context of the foreclosure procedure.[267] It simply concluded that the issuance charging order would confer ownership rights upon the creditor, in the context of a single-member LLC.[268] Within the analytical and procedural framework of the foreclosure process, the court would make that determination at a different juncture, i.e., upon the adjudication of the sheriff's sale.[269] Superficially it would appear that for a court to reach that conclusion even in that context, it would have to create or infer a remedy, which courts are naturally reluctant to do.[270] In this context, however, that result does not require inference or creation of a remedy *per se*, but rather, a court may simply decide that the statutory condition contained in Section 1332 is moot when considering the judgment debtor's ability to transfer the 100% membership interest in

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[264] *See* LA. CODE CIV. PROC. ANN. art. 2371 (2019) (stating that an adjudication transfers a member's interest in an LLC to a purchaser as completely as if the member had sold the interest).

[265] *Id.* (stating that an adjudication transfers a member's interest in an LLC to a purchaser as completely as if the member had sold the interest).

[266] LA. STAT. ANN. § 12:1330 (2019) (stating that "a membership interest shall be assignable in whole or in part").

[267] Olmstead v. F.T.C., 44 So. 3d 76, 80–83 (Fla. 2010) (considering a creditor's remedies when a debtor has an interest in a single-member LLC).

[268] *Id.* at 83 (holding that a debtor with a single-member LLC can assign, or be ordered to assign, interests in the single-member LLC).

[269] *See In re McKenzie*, No. 08-16378, 2011 WL 6140516, at *19 (Bankr. E.D. Tenn. Dec. 9, 2011) (ruling that a debtor could convey single-member LLC interests to creditors).

[270] *See id.* (inferring a remedy from the Tennessee single-member LLC statute, which explicitly provided that the sole member of the LLC could confer rights or membership interests without restriction).

a single-member LLC.[271] Section 1332(A)(1) provides that "[a]n assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company *unless the other members unanimously consent in writing*."[272] A permissible interpretation of this provision would be that the clause "unless the other members unanimously consented in writing" is inapplicable and moot when no other members exist.[273] Therefore, the limitation is inapplicable in the instance of single-member LLCs.[274] This is further supported by the phrasing of the statute, because it is unequivocal that the only consent required is that of the other members—the member whose interest is being assigned lacks standing to consent or withhold consent.[275] Therefore, insofar as the condition for consent is moot or inapplicable, nothing prevents the seizing creditor, or the purchaser at a sheriff sale, from obtaining all the "rights or powers of a member" that are the predicate of Section 1332.[276]

The court in *Olmstead* did not address the issue of transfer in the narrow context of rights arising from a transfer at foreclosure sale, and indeed, this presents a somewhat more discrete question than that which the Florida court addressed.[277] The question boils down to

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[271] *See Olmstead*, 44 So. 3d at 81 (finding that the language in Florida's LLC statute, which required other members to approve an assignment, to be "empty" in the single-member LLC context).

[272] LA. STAT. ANN. § 12:1332(a) (2019) (*emphasis added*).

[273] *See Olmstead*, 44 So. 3d at 8 (interpreting a Florida single-member LLC law provision about LLC member sign off on assigning interests to be meaningless when membership interest is only in a single member).

[274] *See id.* (finding that the provision limiting assignee rights did not apply to the single-member LLC context).

[275] LA. STAT. ANN. § 12:1332(a)(1) (2019) ("An assignee of an interest in a [LLC] shall not become a member or participate in the [LLC's management] unless the other members unanimously consent in writing.").

[276] *See id.* ("An assignee of an interest in a [LLC] shall not become a member or participate in the [LLC's management] unless the other members unanimously consent in writing."); *see also Olmstead*, 44 So. 3d at 83 (holding that a court can order a debtor to surrender a single-member LLC to satisfy a creditor).

[277] *See Olmstead*, 44 So. 3d at 78 (phrasing the certified question in the case as "[w]hether Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member limited liability company to satisfy an outstanding judgment," and answering the question in the affirmative).

whether the single member has the power to transfer his membership interest without restriction.[278] And in that context, other courts have reached the same conclusion as did the court in *Olmstead*, as to the transferability of membership interests.[279] The U.S. Bankruptcy Court for the Eastern District of Tennessee dealt with this question in *In re McKenzie*, a case in which the debtor held membership interests in numerous LLCs from different states, which had been pledged to a law firm as security for payment.[280] The bankruptcy court considered the question of whether the debtor could fully transfer the membership interests in the LLCs, which he alone owned, to the creditor law firm.[281] The court divided its analysis as to the two states in which the LLCs in question were organized—Tennessee and Georgia.[282] Under Tennessee's laws, the question was more easily answered because Tennessee's LLC law provides that "[t]he sole member of an LLC may freely assign governance rights and/or membership interests in the LLC at any time."[283] Georgia's law presented a more difficult question, however, because its LLC law makes no distinction between assignment of multi-member and single-member LLCs, and contains

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[278] *See generally* Carter G. Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, 16 STAN. J.L. BUS. & FIN. 222, 238–43 (2011) (discussing the legal and analytical difficulties created by statutory transfer restrictions in all jurisdictions that provide that when a member of an LLC transfers all of her interest in the LLC, the transferee acquires only the economic rights, while the transferor retains all her original managerial rights).

[279] *See, e.g.*, *In re Davis Heritage GP Holdings, LLC*, 443 B.R. 448, 458, 462–63 (Bankr. N.D. Fla. 2011) (quoting *Olmstead* approvingly and applying its holding to dismiss a bankruptcy proceeding, allowing a creditor to seize a debtor's interest in an LLC); Voll v. Dunn, No. X10UWYCV126018520, 2014 WL 7461644, at *22–23 (Conn. Super. Ct. Nov. 10, 2014) (discussing *Olmstead* and concluding that "the court finds that the execution, levy and sale of the defendant's full membership interest in [the LLCs at issue] was valid under Connecticut law").

[280] *In re McKenzie*, No. 08-16378, 2011 WL 6140516, at *1 (Bankr. E.D. Tenn. Dec. 9, 2011) (discussing the court's factual findings regarding the LLC interests involved in the case).

[281] *Id.* at *19 ("With respect to entities where there is evidence that the debtor was the sole member, the court finds that the debtor could convey his interest in those entities based on a review of [the applicable statutes].").

[282] *Id.* (discussing the relevant provisions of the Tennessee LLC Act, the Revised Tennessee LLC Act, and the Georgia Code).

[283] *Id.* (quoting TENN. CODE ANN. § 48–232–102(a) (2019)).

statutory limits on assignment.[284] The court nevertheless concluded that even under Georgia law, the debtor had the authority to fully transfer his wholly owned membership interest.[285] Any restrictions on that transfer—for example, those imposed by the operating agreement—could be deemed waived by the debtor insofar as he was the only person who would need to consent to transfer or waive any applicable restrictions.[286]

The reasoning in *In re McKenzie* as to the transferability of membership interests in a Georgia LLC is analogous to that which would apply to the rights of a purchaser of membership interests at a sheriff sale.[287] Again, the central question is whether the debtor would have the power under corporate law to transfer his interest, and to what extent.[288] Setting aside any special restrictions contained in an operating agreement, such as springing members or other protections against transfer, the sole member of an LLC should be deemed to have the right to fully transfer his membership interests to a third person.[289] And again, the statutory restriction requiring that "the other members unanimously consented in writing" is inapplicable when no other members exist.[290] Because the sole member can unilaterally transfer his full membership interests to a third party in such circumstances, which is exactly what the purchaser at a sheriff sale should receive

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[284] *Id.* ("Georgia law allows for the assignability of a member interest unless otherwise provided in the operating agreement." (citing GA. CODE ANN. § 14–11–502 (2019)).

[285] *Id.* (stating that "[t]here is nothing prohibiting assignment or pledge [of a sole member's interest in an LLC] in Georgia's Limited Liability Company Act").

[286] *Id.* (concluding that "restrictions [on transferability] may be imposed but they are contractual provisions contained in the articles of organization or a written operating agreement," and these restrictions "may be waived by the sole member").

[287] LA. CODE CIV. PROC. ANN. art. 2371 (2018) (stating that when rights are assigned, they are assigned fully as if the property had been sold); *In re McKenzie*, 2011 WL 6140516, at *19 (stating that there is nothing that prohibits assignment or pledge in GA law).

[288] DEL. CODE ANN. tit. 6, § 18-702 (West 2019) (discussing when limited liability interests may be assigned).

[289] *Id*. (stating that a limited liability company interest is wholly assignable except as designated in the LLC agreement.).

[290] *In re McKenzie*, 2011 WL 6140516, at *19 ("As the sole member, the debtor would have been the only party who would have needed to consent even if consent were required in the Operating Agreement".).

after adjudication, analyzing the question here under article 2371 of the Louisiana Code of Civil Procedure.[291] Through the foreclosure process, the purchaser at the sheriff sale should be entitled to obtain full rights and control of a member in a wholly-owned LLC.[292]

Timing is also a key concern here. Following this procedure, the creditor would not obtain the rights associated with membership interest until adjudication, rather than upon seizure.[293] This principle has been fairly well developed through the process of seizure and sale of corporate stocks, which are probably the closest cousin to membership interests as incorporeal movables.[294] The controversy has arisen as to whether a seizing creditor has rights incident to ownership of stock, such as voting, in the twilight between the time when the creditor effectuates seizure of the stocks, and when the actual sale and adjudication occurs.[295] When the writ of *fieri facias* directs the seizure and sale of property, the seizing creditor obtains a privilege on any property seized, but does not become the owner of the property.[296] For example, in the struggle for control of the renowned Brennan's restaurant company, creditors seized stock of a shareholder under writ of *fieri facias*, and the seizing creditor asserted the ability to control the shares in the interim.[297] The court observed that "an owner of shares of stock retains his right to vote those shares of stock unless and until the

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[291] CIV. PROC. ANN. art. 2371 (stating that when rights are assigned, they are assigned fully as if the property had been sold).

[292] *Id*. (stating that when rights are assigned, they are assigned fully as if the property had been sold).

[293] *Id*. (stating that when rights are assigned, they are assigned fully as if the property had been sold).

[294] Brennan v. Brennan, 945 F. Supp. 2d 704, 717 (E.D. La. 2013), *vacated*, 548 Fed. App'x. 264 (describing the seizure and sale of corporate stocks and the rights that get attached to them); Missett v. Hub. Intern. Pennsylvania, LLC, 6 A.3d 530, 537 (Pa. Super. Ct. 2010) ("A 'membership interest' is an ownership interest in a limited liability company and is akin to an interest in stock of a corporation.")

[295] *Brennan*, 945 F. Supp. 2d at 717 (discussing how voting rights are effected by seizure of rights).

[296] *See* LA. CODE CIV. PROC. ANN. art. 2291 (2018) ("A judgement for the payment of money may be executed by a writ of fieri facias directing the seizure and sale of property of the judgment debtor.").

[297] *Brennan*, 945 F. Supp. 2d at 711 (ordering that "pursuant to the writ of *fieri facias*, Kenyon was entitled to take control of Ted's stock certificates in Brennan's, Inc., and on April 26, 2013, Kenyon took control of those certificates.").

ownership of those shares is formally transferred to another person or entity."[298] The court held that seizure under the writ did not equate ownership, particularly where the stock was still registered in the debtor-shareholder's name.[299]

Likewise, in the context of seizure of membership interests, the ability to control the LLC would not arise until adjudication of the sheriff's sale, i.e., entry of an order by the court.[300] Only then could the purchaser step into the shoes of the single member and control the LLC.[301]

C. Practical Effects of Deemed Assignment

Problems could arise from the theory that membership interests in a single-member LLC are assignable in a foreclosure sale.[302] Even from the creditor's perspective, there are inherent difficulties in stepping into the shoes of the sole member. Most often in this scenario, the sole member has not elected C corporation status prior to the seizure and sale, and the entity would therefore be a disregarded, pass-through entity for tax purposes.[303] Therefore, the purchaser at the sheriff sale could walk into the tax liabilities of the foreclosed LLC and become personally exposed for any such liabili-

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[298] *Id*. at 717 ("Under Louisiana law, an owner of shares of stock retains his right to vote those shares of stock unless and until the ownership of those shares is formally transferred to another person or entity.").

[299] *Id.* ("In this case, the stock is still registered in Ted's name and Ted has established from all the facts and circumstances of this case that he remains the owner of the shares, even if he does not have them in his possession.").

[300] Foreman v. Hines, 314 So. 2d 460, 464 (La. App. 4 Cir. 1975) (holding that, after a corporation seized an individual's shares for jurisdictional purposes, the shareholder was not precluded from voting).

[301] *Id*. (explaining that, given the fact that plaintiffs were still shareholders of records, defendants could not take control as directors of the company).

[302] DEL. CODE ANN. tit. 6, § 18-7029(a) (West 2016) ("A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement."); *In re McKenzie*, No. 08-16378, 2011 WL 6140516, at *19 (Bankr. E.D. Tenn. Dec. 9, 2011), *aff'd*, No. 1:11-CV-192, 2012 WL 4742708 (E.D. Tenn. Oct. 2, 2012), *aff'd*, 737 F.3d 1034 (6th Cir. 2013) ("[T]he Tenn. LLC Act provides that '[t]he sole member of an LLC may freely assign governance rights and/or membership interests in the LLC at any time.'").

[303] Gregory L. Prescott et al., *Forms of Business Ownership: A Primer for Commercial Lenders*, 25 COM. LENDING REV. 27, 28 (2010) (illustrating the taxation and legal statuses of various forms of business organizations).

ties.[304] Other liabilities may exist as well.[305] Any creditor pursuing this path would be well-advised to establish a special purpose entity to bid on and acquire the LLC membership interests at the foreclosure sale, so as to insulate itself from those liabilities.[306]

Acceptance of these principles could have practical benefits not only in the law of creditor's rights, but also in successions. Legal scholars have noted the problems associated with LLC Law as to successions.[307] This problem is particularly acute when the decedent held membership interests in an LLC, but no one can exercise managerial rights following his or her death.[308] Legal scholars have proposed repeal or amendment of Section 1333 of the LLC Law, in order to resolve the "inherently problematic result of the death of the sole

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[304] Martin J. McMahon Jr., *Now You See it, Now You Don't: The Comings and Goings of Disregarded Entities*, 65 TAX LAW 259, 264 (2012) ("For federal income tax purposes . . . the sole member of the LLC is treated as . . . directly owing all of the LLC's debts, with all of the tax consequences that flow from incurring, paying, and being relieved of debts.").

[305] United States *ex rel.* Geschrey v. Generations Healthcare, LLC, 922 F. Supp. 2d 695, 709 (N.D. Ill. 2012) (quoting Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995)) ("[Successor liability] 'allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was substantial continuity in the operation of the business before and after the sale.'").

[306] HDSA Westfield Lake, LLC v. Harris City Appraisal Dist., 490 S.W.3d 558, 559 (Tex. App. 2016) (illustrating the purpose of a special purpose entity in a foreclosure sale); Samantha J. Rothman, *Lessons from General Growth Properties: The Future of the Special Purpose Entity*, 17 FORDHAM J. CORP. & FIN. L. 227, 229–30 (2012) (defining a special purpose entity and explaining the purpose as "[s]eparat[ing] the credit quality of the assets being securitized from the credit risk of any other entity involved in the financing.'").

[307] William A. Neilson, *Uncertainty in Death and Taxes—The Need to Reform Louisiana's Limited Liability Company Laws*, 60 LOY. L. REV. 33, 34 (2014) (explaining that Louisiana LLC law has "[r]endered death and taxes entirely uncertain. This uncertainty can paralyze business, stall successions, and negatively impact tax consequences.").

[308] *See* LA. STAT. ANN. §12:1333 (2019) ("Except as otherwise provided in the articles of organization or a written operating agreement, if a member who is an individual dies . . . the member's membership ceases and the member's executor, administrator, guardian, conservator, or other legal representative shall be treated as an assignee of such member's interest in the limited liability company.").

member of a single-member LLC. . . ."[309] That proposal sought to address the recurring problem whereby an executor takes custody of a decedent's membership interest as an assignee and has only the financial benefit of the membership interest, rather than any managerial right.[310] This legislative solution would have permitted the executor to continue the managerial role of the deceased member, which would assist in the more efficient administration of estates.[311] If courts were to adopt the above-discussed approach as to single-member LLCs, no legislative change as to the LLC Law would be necessary to effectuate this same purpose in successions, at least as to single-member LLCs.[312] An executor who is charged with administering the estate of a decedent who held the sole membership interest in a single-member LLC would be entitled to take control of the LLC in the same manner that a purchaser of the sole membership interest at a sheriff's sale would take such control.[313]

This interpretation of the LLC Law would also harmonize the law with other business associations.[314] Neither holders of partnership interests nor holders of stock in corporations are entitled to protect their rights from the reach of creditors to such an extent as LLC members are, and it makes little sense from a policy perspective to give holders of LLC membership interests a *de facto* exemption from

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[309] Neilson, *supra* note 307, at 53 ("This proposed provision would eliminate the financial concern of a tax obligation being owed without distributions from the company to cover the tax. Finally, the proposed law would resolve the inherently problematic result of the death of the sole member of a single-member LLC because the executor would continue the role of the deceased member."). *See* Susan Kalinka, *Death of a Member of an LLC*, 57 LA. L. REV. 451, 451 (1997) ("It is uncertain whether a decedent member's heir has any rights with respect to the decedent's interest in the LLC unless the heir is also a legal representative of the decedent.").

[310] Neilson, *supra* note 307 at 51–53 (discussing proposal to treat an LLC membership interest as a heritable asset and allow for the transfer of the deceased member's rights and powers in the LLC).

[311] *Id*. at 52 ("Because the executor's rights would no longer be restricted, the executor would be in a substantially better position to protect and preserve the estate's share from the remaining member(s).").

[312] *Id*. at 52–53 (discussing a proposal that provides for the transfer of LLC membership interests at death).

[313] *Id*. at 53 (discussing the impact of the proposed legislation on powers granted to executors upon a member's death).

[314] *Id*. at 52 (comparing the proposed legislation to the treatment of corporate stock).

seizure.[315] Corporations and partnerships are the conceptual predecessors to the LLC, as well as the business forms most analogous to LLCs, and they point toward adopting the *Olmstead* approach. It seems inconsistent, to grant members of an LLC heightened protections not available to holders of interests in these other business associations.[316]

The principal policy consideration in favor of maintaining membership interests as exempt from seizure is the desire to allow LLCs to operate without disruption from disputes between their members and third-party creditors.[317] Granted, the prospect of fighting battles against any creditor who holds an unsatisfied claim against an LLC member could hinder the ability of any LLC to continue as a profitable going concern. On the other hand, lenders and other providers of goods and services who extend credit have reasonable expectations, and a right, to proceed against any property of their debtor, including membership interests.[318] Going back to the legislative purposes for creation of LLCs, one might question any extension of creditor rights beyond the simple charging order, by pointing out that LLCs were intended as a vehicle to limit liability.[319] By the same token, LLCs were certainly not intended as a vehicle in which insolvent debtors could place assets beyond the reach of their creditors.[320]

D. Treatment of Single-Member LLCs in Bankruptcy

The same conclusion that the court reached in *Olmstead* has been carried forward in numerous bankruptcy court decisions;

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[315] *See generally* Bishop, *supra* note 49, at 211–28 (discussing the hardships faced by LLC creditors seeking to collect payment relative to corporations).

[316] *See generally id.* at 217–20 (describing additional barriers to collection faced by LLC creditors).

[317] *See* Callison, *supra* note 207, at 347 (discussing the policy of "private ordering" which "protects the firm's and its members' autonomy by not forcing strangers into the firm's midst").

[318] *See id.* at 347 ("[T]here is a policy that considers creditors' interests and generally allows a judgment creditor to satisfy its claim by stepping into its debtor's shoes with respect to the debtor's assets.").

[319] *See* DEL. CODE ANN. tit. 6, § 18-1101(e) (2019) (stating an LLC agreement may limit or eliminate all liabilities for breach by a member).

[320] *See id.* at § 18-502(c) (stating that an actionable claim arises when a debtor fails to make required contributions to a creditor).

however, these decisions may be limited to the bankruptcy context.[321] Courts appear more receptive to this argument when the debtor is in bankruptcy, applying a combination of Section 541 of the Bankruptcy Code and applicable state LLC law.[322] It should suffice to say, for purposes of this discussion, that as a matter of bankruptcy law, Section 541 establishes the scope of property of the debtor's bankruptcy estate, and it is often construed broadly. [323] Applying this broad principal to the rights of a trustee vis-à-vis a debtor's 100% interest in an LLC, courts have often found that the trustee may simply step into the shoes of the debtor to manage the LLC.[324] In the Chapter 7 setting, the bankruptcy courts that have discussed the rights of a Chapter 7 Trustee flowing from a debtor's pre-petition membership interest have generally held that where the debtor held a 100% membership interest, the Chapter 7 Trustee obtains full management rights.[325]

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[321] *See, e.g.*, *In re Davis Heritage GP Holdings, LLC*, 443 B.R. 448, 458 (Bankr. N.D. Fla. 2011) (relying on the *Olmstead* holding in order to support a finding of bad faith dealing).

[322] *See id.* at 458–59 (applying Florida LLC law in conjunction with Section 541 of the U.S. Bankruptcy Code where the debtor is insolvent).

[323] 11 U.S.C. § 541 (2012) ("This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property. . . ."); *United States v. Whiting Pools, Inc*., 462 U.S. 198, 204–05 & n. 9 (1983) (noting that the scope of § 541(a)(1) is sufficiently broad to cover all kinds of property). ("The statutory language reflects this view of the scope of the estate. As noted above, §541(a)(1) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of commencement of the case. . . . The House and Senate Reports on the Bankruptcy Code indicate that §541(a)(1)'s scope is broad.").

[324] *See, e.g.*, *In re Albright*, 291 B.R. 538, 540 (Bankr. D. Colo. 2003) ("Consequently, the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC.")

[325] *In re Albright*, 291 B.R. at 540 ("Consequently, the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."); *In re A-Z Electronics, LLC*, 350 B.R. 886, 890 (Bankr. D. Idaho 2006) ("It found that where "there are no

In *In re Albright*, for example, Albright filed a Chapter 7 petition.[326] On the date of filing, she held a 100% membership interest in a Colorado limited liability company. [327] The court held the Chapter 7 Trustee had not only economic rights with respect to the LLC, but also full right to control the LLC to the same extent the debtor did pre-petition.[328] In reaching its decision, the court held that the requirement under Colorado law that an assignee does not obtain managerial rights unless and until other members consent was inapplicable in the instance of a sole member LLC.[329] The court stated:

> Because there are no other members in the LLC, no written unanimous approval of the transfer was necessary. Consequently, the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC.[330]

In fact, the decision in *Albright* suggests that in the bankruptcy context the courts will take the matter one step further and will grant the trustee such membership rights if the debtor held an overwhelming majority interest in the LLC. In addition, some third party has a

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other members in the LLC, . . . the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."'); *In re Garrison-Ashburn, LC*, 253 B.R. 700, 704 (Bankr. E.D. Va. 2000) ("The effect on a member of becoming dissociated from a limited liability company is to divest the member of all rights as a member to participate in the management or operation of the company."). *See generally In re Mohawk Traveler Transportation, LLC*, No. 2:11-bk-13269 (Bankr. E.D. La. docketed Oct. 4, 2011).

[326] *In re Albright,* 291 B.R. at 538 (discussing debtor filing Chapter Seven petition).

[327] *Id.* at 539 (indicating that debtor was the sole owner of the LLC at the time of the filing).

[328] *Id.* at 540 ("[T]he Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC.").

[329] *Id.* (stating that because there were no other members, written unanimous consent was not needed).

[330] *Id*.

"peppercorn" interest which may, presumably, be disregarded in order to better effectuate creditors' rights.[331] Notwithstanding the broad scope of Section 541, the rights of a trustee in property of the estate is defined by applicable non-bankruptcy law, i.e., state law, and therefore this suggestion may be difficult to reconcile with applicable state LLC provisions such as the Louisiana Statute (Annotated) § 12:1332, requiring the consent of other members to admit an assignee.[332] Neither Section 541 nor any other provisions of the bankruptcy code would appear to supersede that requirement.[333] Nonetheless the statement in *Albright* as to peppercorn interests is dicta, and its applicability may be limited to the realm of *alter ego* or fraud situations.[334]

These instances in the bankruptcy context are fundamentally different from the ordinary creditor-debtor disputes discussed above because the bankruptcy courts in those cases allowed the trustee, as a fiduciary, to step into the shoes of the debtor and exercise membership rights.[335] These cases involve a trustee acting for the benefit of

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[331] *Id*. at 541 n. 9 ("To the extent a debtor intends to hinder, delay or defraud creditors through a multi-member LLC with 'peppercorn' co-members, bankruptcy avoidance provisions and fraudulent transfer law would provide creditors or a bankruptcy trustee with re-course.").

[332] *See* LA. STAT. ANN. § 12:1332 (2019) ("An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing."); *see also United States v. Whiting Pools, Inc*., 462 U.S. 198, 204–05 (1983) (clarifying that the scope of Section 541 is broad enough to cover all kinds of property).

[333] *In re Blasingame*, 597 B.R. 614, 618 (B.A.P. 6th Cir. 2019) (*quoting* Butner v. United States, 440 U.S. 48, 55 (1979)) ("Section 541(a) of the Bankruptcy Code explains that, with few exceptions, the bankruptcy estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' It is axiomatic that '[p]roperty interests are created and defined by state law.'").

[334] *In re Albright*, 291 B.R. 538, 541 n. 9 (Bankr. D. Colo. 2003) (discussing peppercorn interests in the footnotes).

[335] *In re Albright*, 291 B.R. at 540 ("Consequently, the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."); *In re A-Z Electronics, LLC*, 350 B.R. 886, 890 (Bankr. D. Idaho 2006) ("It found that where "there are no other members in the LLC, . . . the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."'); *In re Garrison-Ashburn, LC*, 253 B.R. 700, 704

creditors, and they do generally support creditor's rights vis-à-vis LLC membership interests conceptually.[336] But they do not implicate the same creditor's rights discussed in *Olmstead* in the strict sense.[337]

V. Community Property, Noneconomic Membership Interests, and Other Variations in the Single-Member LLC Scenario

Whether a debtor's interest in an LLC subjects it to the foregoing analysis as a single-member LLC may not be altogether clear at times. For a financial institution that lends to the single-member LLC, it may be desirable to structure the transaction so as to protect against disruptions caused by the sole member's creditors.[338] From the perspective of the creditor pursuing the member, the debtor may appear to be the only member of the LLC, but other conditions exist in the LLC's rules and regulations or the debtor's financial

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(Bankr. E.D. Va. 2000) ("The effect on a member of becoming dissociated from a limited liability company is to divest the member of all rights as a member to participate in the management or operation of the company."). *See generally In re Mohawk Traveler Transportation, LLC*, No. 2:11-bk-13269 (Bankr. E.D. La. docketed Oct. 4, 2011).

[336] *See In re Albright*, 291 B.R. at 540 ("Consequently, the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."); *see also In re A-Z Electronics, LLC*, 350 B.R. 886, 890 (Bankr. D. Idaho 2006) ("It found that where "there are no other members in the LLC, . . . the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC."'); *see also In re Garrison-Ashburn, LC*, 253 B.R. 700, 704 (Bankr. E.D. Va. 2000) ("The effect on a member of becoming dissociated from a limited liability company is to divest the member of all rights as a member to participate in the management or operation of the company.").

[337] *See* Olmstead v. F.T.C., 44 So. 3d 76, 81 (Fla. 2010) ("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.").

[338] Matthew Olsen & Gregory Johnson, *Look Before You Lend: Creditors' Rights Against Single-Member LLC Owners*, N.Y.L.J., Mar. 9, 2015, at 4 ("[Commercial l]enders . . . need to consider how they will be able to enforce a prospective judgment, as applicable enforcement mechanisms may frustrate a creditor's efforts to collect against assets presumed to be available at the time a loan or other credit transaction is originated.").

condition that might call his or her exclusive control of the LLC into question. For example, some LLCs are structured specifically to avoid the single-member LLC problem by appointing noneconomic members or springing members to step into the place of a sole member who dies, becomes insolvent, or files bankruptcy.[339] Another method of protecting the LLC from third party creditors is to grant the lender a security interest in the membership interests as collateral.[340] If the debtor is married, his or her spouse may have a community property interest in the membership interest which could become an impediment.[341] Furthermore, the LLC's operating agreement may provide extrinsic obstacles to any attempt to foreclose upon and take control of the LLC.[342]

Firms frequently take advantage of the LLC form and use single-member LLCs in structured finance, particularly in real estate

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[339] Colleen DeVries, *The Role of a Springing Member in a Bankruptcy Remote Entity*, COGENCY GLOBAL INC., CORPORATE TRANSACTIONS AND COMPLIANCE BLOG (Jun. 21, 2018), https://www.cogencyglobal.com/blog/the-role-of-a-springing-member-in-a-bankruptcy-remote-entity [https://perma.cc/RW3J-CEJ5] ("In the event that the [Delaware LLC]'s single member is terminated (which would otherwise trigger dissolution of the [Delaware LLC]), the springing member—like the name implies—'springs' into the membership role and prevents the entity from dissolving . . . ."). *See* DEL. CODE ANN. tit. 6, § 18-301 ("Unless otherwise provided in a limited liability company agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company;"); *see also* LA. STAT. ANN. §1301(16) (2019) ("'Member' means a person with a membership interest in a limited liability company with the rights and obligations specified under this Chapter.").

[340] Tarik J. Haskins, *Using Limited Liability Company Interests and Limited Partnership Interests as Collateral*, AM. BAR ASS'N. (Jan. 31, 2013), https://www.americanbar.org/groups/business_law/publications/blt/2013/01/01_haskins/ (explaining the perfection of a security interest).

[341] David M. Steingold, *LLCs Co-Owned by Spouses in Community Property States*, NOLO, https://www.nolo.com/legal-encyclopedia/taxation-llcs-owned-spouses-community-property-states.html [https://perma.cc/6VXS-FT6M] (last visited Oct. 31, 2019) (illustrating the interest in a single-member LLC in community property states).

[342] *See Single-Member LLCs and Asset Protection: A 50-State Guide*, NOLO, https://www.nolo.com/legal-encyclopedia/single-member-llcs.html (last visited Oct. 31, 2019) (elaborating on the asset protection of a single-member LLC).

transactions.[343] The financial institutions that drive these transactions have been wary of decisions that would make single-member LLCs vulnerable to third party creditor rights, such as the decision in *Olmstead*.[344] Even in jurisdictions in which a charging order is the exclusive remedy against an LLC, borrowers have taken the prophylactic measure of establishing single-member LLCs that feature springing members or noneconomic members, to allow for continuity and to prevent the LLC's asset-protection features from being compromised.[345] These structures allow a third party to step into the position of the single member if, for example, the sole member dies or files bankruptcy.[346] Rather than subjecting the LLC to the control of a bankruptcy trustee or an aggressive creditor, the springing member is able to exercise the managerial rights of the original member following certain trigger events identified in the operating agreement or other governing documents.[347] Such a structure could likewise frustrate or defeat the aforementioned argument that the requirement for written consent of other members contained in Section 1332 is moot or made inapplicable by the absence of other members, provided, of course, that the triggering event has occurred at the time the creditor is proceeding to foreclosure.[348]

Springing member provisions are generally included in the LLC's Operating Agreement or as an addendum to the operating

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[343] Jeff Weaver, *Forming an LLC for Real Estate Investments: Pros & Cons*, LEGALZOOM (Jan. 2014), https://www.legalzoom.com/articles/forming-an-llc-for-real-estate-investments-pros-cons [https://perma.cc/V79B-WJC8] ("Over the last decade, limited liability companies (LLCs) have become one of the most preferred forms of business entities through which to hold title to investment real estate properties.").

[344] Olmstead v. F.T.C., 44 So. 3d 76, 76 (Fla. 2010) ("[W]e conclude that the statutory charging order provision does not preclude application of the creditor's remedy of execution on an interest in a single-member LLC.").

[345] John C. Murray, *Title Insurance Issues in Limited Liability Company Transactions*, 15 PROB. & PROP. 47, 51 (2001) (discussing how springing members have become more prevalent in single-member LLC).

[346] *Id.* (discussing the role "springing members" play when filing for bankruptcy).

[347] Alex R. Pederson, *The Rejuvenation of the Tenancy-In-Common for Like-Kind Exchanges and Its Impact on Lenders*, 24 ANN. REV. BANKING & FIN. L. 467, 482 (2005) (explaining the role of the "springing member" after certain trigger events, such as bankruptcy, occur).

[348] LA. STAT. ANN § 12:1332 (2019) (explaining the right of an assignee to become a member).

agreement.[349] A typical springing member provision states something to the effect of:

> Upon the occurrence of any event that causes the Original Member to cease to be a member of the Company . . . Springing Member 1 shall, without any action of any Person and simultaneously with the cessation of the Original Member's membership, automatically be admitted to the Company as a Special Member and shall continue the Company without dissolution.[350]

The springing member is given admission and control solely for continuity, and without necessarily obtaining any interest in the LLC or any requirement that it make a capital contribution.[351] Delaware law specifically provides that noneconomic members, such as springing members, are permissible.[352] The Uniform Limited Liability Company Act does not specifically permit or prohibit such interests,[353] although

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[349] Murray, *supra* note 345, at 51 (describing the places springing membership provisions are generally found).

[350] *See, e.g.*, *Limited Liability Company Agreement of Bref HR, LLC*, SEC. EXCH. COMM'N Section 5(b) (Oct. 26, 2019), https://www.sec.gov/Archives/edgar/data/1531537/000119312511278790/d235923dex32.htm.

[351] Norman M. Powell & James D. Prendergast, *Mezzanine Loans – The Vagaries of Membership Interest Collateral*, 24 PROB. & PROP. 20, 22–23 (2010) (explaining that springing members become members of the LLC for continuity purposes, without investing significant capital or having interest in the LLC).

[352] DEL. CODE ANN. tit. 6, § 18–301 (2019) ("Unless otherwise provided in a limited liability company agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company.").

[353] UNIF. LTD. LIAB. CO. ACT § 401 (UNIF. LAW COMM'N 2013) (providing that the persons founding a limited liability company shall agree among themselves who is to be a member of the LLC, and that, after formation, any person may become a member as provided by the operating agreement, and that a person may become a member without "acquiring a transferable interest" or "making or being obligated to make a contribution to the limited liability company").

some states' definition of member could be construed as too restrictive to allow noneconomic members.[354]

The question of a springing member's authority to control an LLC after the original, sole member files bankruptcy is a difficult one. No reported decisions have considered whether the springing member would be permitted to carry out the management of the company after the original member filed bankruptcy.[355] First and foremost, the springing member would likely need to be cautious because any actions taken with respect to the LLC that was owned by the debtor could constitute a violation of the automatic stay.[356] Theoretically, the springing member could avoid violating the automatic stay during a bankruptcy proceeding insofar as the springing member's management of the LLC would not constitute an exercise of control over the specific property that the debtor possessed—the membership interests.[357] Rather, it would be control over the LLC itself and the LLC's property through rights existing under the operating agreement.[358]

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[354] *See, e.g.*, LA. STAT. ANN. § 12:1301(13) (2019) ("'Member' means a person with a membership interest in a limited liability company with the rights and obligations specified under this Chapter.").

[355] *See, e.g.*, *In re Lake Michigan Beach Pottawattamie Resort LLC*, 547 B.R. 899, 913 (Bankr. N.D. Ill. 2016) (striking down as void against public policy an operating agreement whereby a creditor was installed as "special member,"—essentially a springing member—of a debtor LLC, and would have had the power to stop the debtor LLC from pursuing bankruptcy); *see also* Norman W. Powell, *Delaware Alternative Entities: The Benefits and Burdens of Contractual Flexibility*, PROB. & PROP., Jan./Feb. 2009, at 11, 12 (suggesting that a springing member or special member, "in its capacity as such," has "no power or authority to act for or bind the [LLC] and no right to vote on, approve, or otherwise consent to any action by, or matter relating to, the [LLC]").

[356] *See* 11 U.S.C. § 362(a)(3) (2018) (providing that a bankruptcy petition shall operate as a stay on "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate").

[357] *See* Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 266 (D. Del. 1989) (discussing, in the corporate context, the importance of treating the assets and liabilities of a subsidiary corporation as legally separate and distinct from those of its parent corporation, and vice versa); Am. B. Ass'n Bus. L. Section, *Single-Member LLC Entity Member Form*, 69 BUS. LAW. 745, 759 n.31 (2014) (applying the holding of *Mobil Oil Corp.* to the LLC context).

[358] *See, e.g.*, DEL. CODE ANN. tit. 6, § 18–402 (2019) (providing that, unless otherwise stated in the operating agreement, management of the company shall be vested in its members in proportion to the percentage of the LLC's

Assuming those automatic stay considerations were surpassed, there is also the question of whether the springing member's admission to the LLC would even be valid if it were triggered by the debtor's filing of bankruptcy.[359] The Bankruptcy Code does not recognize so-called *ipso facto* clauses that terminate or modify the debtor's rights due solely to the filing of bankruptcy.[360] If the sole basis of the springing member's qualification and admission as the substitute member were the debtor's filing of the petition, the springing member's admission could be deemed null and void.[361] Bankruptcy courts have applied this analysis to provisions of an LLC operating agreement dictating the disassociation of members upon bankruptcy filing.[362] Following this reasoning, springing members may provide an effective response to certain disassociation events in single-member LLCs, such as death, where they would likely not be able to take control in the bankruptcy context.

Besides springing members, an alternative protective measure that may be utilized by a party who lends to a single-member LLC to protect against any adverse effect from insolvency of the sole member is to take a security interest in the membership interests.[363] Security

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profits owned by each member, and that the manager shall have power to bind the LLC).

[359] Norman D. Powell & James D. Prendergast, Mezzanine Loans—The Vagaries of Membership Interest Collateral, 24 Prob. & Prop. 20, 24 (2010) (discussing the succession of rights in bankruptcy and foreclosure activities).

[360] 11 U.S.C. § 365(e) (2019) (providing that an executory contract of the debtor may not be terminated or modified at any time after the commencement of a bankruptcy proceeding solely because a provision in the contract is conditioned on the commencement of a bankruptcy proceeding).

[361] *In re LaHood*, 437 B.R. 330, 337 (C.D. Ill. 2010) ("Proceedings conducted in violation of the automatic stay are generally void and without legal effect.").

[362] *In re LaHood*, 437 B.R. at 336 ("[T]he Court concludes that the provisions of the Operating Agreement purporting to place limitations or restrictions on Michael's interest as a result of his bankruptcy filing are unenforceable in this proceeding. Richard and FLLZ therefore cannot use the alleged violation of §§ 6.01 and 6.05 of the Operating Agreement to establish that Michael's dissociation was wrongful . . . .").

[363] *See, e.g.*, *In re McKenzie*, No. 08-16378, 2011 WL 6140516, at *22 (Bankr. E.D. Tenn. Dec. 9, 2011) (explaining that "[b]y failing to produce the Operating Agreements, GKH has failed to show that the debtor's interest included the ability to transfer the debtor's member interest, and if so, under what conditions", and more generally, "[w]ith respect to entities where there is evidence that the debtor was the sole member, the court finds that the debtor could convey his interest in those entities . . . .").

rights in membership interests are governed by Article 9 of the Uniform Commercial Code (UCC).[364] Under the UCC, LLC membership interests are generally included within the definition of "general intangibles," which is a residual category embracing personal property that does not fall within the other defined types of collateral.[365] In some instances, membership interests could also be classified as investment property.[366] The method of attachment and perfection of a security interest in membership interests is usually the executing of a security agreement and filing of a financing statement in the appropriate public records.[367] If the lender properly perfected such a security interest in the membership interest, it would take priority over any lien the member's creditor might obtain against the membership interests either by way of a judgment lien or seizing creditor's privilege.[368] While it would not necessarily prevent the seizing creditor from subjecting the membership interests to a sheriff's sale, it would require any purchaser at the sheriff's sale to bid at least the amount of the indebtedness secured by the membership interests.[369] Otherwise, any foreclosure sale would not be approved.[370]

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[364] *See, e.g.*, LA. STAT. ANN. §§ 10:9-101 (2019).

[365] *See* LA. STAT. ANN. § 10:9-102(42) (2019) ("'General intangible' means any personal property, including things in action, other than accounts, chattel paper, tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, life insurance policies, and money.").

[366] *See* Malone v. Malone, 46-615, pp. 9–11 (La. App. 2 Cir. 11/2/11), 77 So. 3d 1040, 1044–45 (discussing whether corporate stock may be classified as investment property).

[367] *See* LA. STAT. ANN. § 10:9-312 (2019) ("A security interest in chattel paper, negotiable documents, instruments other than collateral mortgage notes, or investment property may be perfected by filing.").

[368] *See* LA. STAT. ANN. § 10:9-322 (2019) (describing the perfection of security interests in Louisiana law).

[369] LA. CODE CIV. PROC. ANN. arts. 2335, 2337 (2018) ("The sheriff shall announce that the property is to be sold for cash subject to any security interest, mortgage, lien, or privilege thereon superior to that of the seizing creditor," and "[i]f the price offered by the highest bidder at the first or subsequent offering is not sufficient to discharge the costs of the sale and the security interests, mortgages, liens, and privileges superior to that of the seizing creditor, the property shall not be sold.").

[370] LA. CODE CIV. PROC. ANN. art. 2337 ("If the price offered by the highest bidder at the first or subsequent offering is not sufficient to discharge the costs of the sale and the security interests, mortgages, liens, and privileges superior to that of the seizing creditor, the property shall not be sold.").

And this protection could also be helpful if the sole member filed bankruptcy. Unlike the problems raised by the springing member, having a perfected security interest would not run into the same automatic stay problems or *ipso facto* clause issues in bankruptcy.[371] Rather, the lender's security interest in the membership interests would provide it a direct stake in them as collateral.[372] The trustee could still arguably exercise the same control with respect to the LLC as discussed by the court in *Albright*.[373] In doing so, however, the trustee would have to act in the interest of the secured creditor.[374] Bankruptcy courts have held that a trustee owes a fiduciary duty to secured creditors to exercise reasonable care with respect to the secured creditor's collateral.[375] While the security interest is by no means a perfect solution for a lender extending credit to an LLC whose sole member poses an insolvency risk, it could protect the lender from uncertainty in this area.

Community property rights could also complicate things when, for example, a creditor has a claim against a married debtor who holds the sole membership interest in an LLC, and the debtor is subject to a community property regime.[376] The debtor's spouse's one-half property interest may not be subject to seizure by the creditor.[377] This

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[371] *See* 11 U.S.C. § 362 (codifying automatic stay provisions of bankruptcy law); *see also* 11 U.S.C. 365(e) (codifying executory contracts and unexpired leases in bankruptcy law).

[372] *See, e.g.*, *In re McKenzie*, No 08-16378, 2011 WL 6140516, at *19 (Bankr. E.D. Tenn. Dec. 9, 2011) (explaining that the sole member of an LLC may assign his or her membership interest in the company).

[373] *See In re Albright*, 291 B.R. 538, 540 (Bankr. D. Colo. 2003) (holding that, as the debtor was the sole member of the LLC, control of the LLC was assigned to the Trustee upon Debtor's bankruptcy filing).

[374] *See Comm. Fut. Trading Co. v. Weintraub*, 741 U.S. 343, 356 (1985) (explaining that a trustee has a fiduciary duty to "all interested parties").

[375] *In re Thu Viet Dinh*, 80 B.R. 819, 822 (Bankr. S.D. Miss. 1987) ("In addition to the statutory duties enumerated hereinabove, the trustee is considered to be a fiduciary of the secured creditors with the duty to exercise reasonable care as custodian of the properties which serve as collateral for the secured claims.").

[376] *See generally* Pagano, *supra* note 32, at 1 (explaining that, in a community property jurisdiction, community property generally may not be used to satisfy separate debts).

[377] *Id*. ("[T]he liability of community property for community property debts is related to the relevant state statutes that govern management and control over community property.").

circumstance, however, would likely not affect the analysis of a creditor's foreclosure rights against the single-member LLC in Louisiana. Like shares of stock, membership interests are incorporeal movables, and when they are issued in the name of one spouse, they are subject to management only by that spouse, even when they constitute community property.[378] Applying the same analysis regarding the statutory restrictions on the rights of nonmember assignees of membership interests that applies to creditors, the nonmember spouse's one-half community property interest in the membership interests would not entitle him or her to the status of a member.[379] Nevertheless, the fractional interest could certainly complicate any further steps to monetize the property.[380]

Many statutory provisions in the LLC Law are default rules that may be superseded by provisions of the operating agreement or other governing documents.[381] For example, the provision that defines the right of an assignee (or a judgment creditor) to become a member is couched in the clause "[e]xcept as otherwise provided in the articles of organization or a written operating agreement."[382] The analysis regarding third parties' rights is therefore subject to any countervailing provisions of the operating agreement that may limit the rights of

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[378] Schexnayder v. Yolande Schexnayder & Son, Inc., 12-855, p. 13 (La. App. 5 Cir. 05/23/13), 119 So. 3d 624, 630 (holding that shares of stock are subject to management exclusively by named spouse).

[379] *See* LA. STAT. ANN. §12:1332(A)91 (2019) ("An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.").

[380] Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. Q. 737, 781 (2000) (giving as example the issues arising from the sale of a fractional interest to an outside developer, who "obviously never intended to enjoy common ownership with the family. To the contrary, the developer had every intention, when it acquired the interest, to destroy the cotenancy in order to force a sale and purchase of the land").

[381] *See* Kalinka, *supra* note 309, at 455 ("Moreover, the default rules may be altered by a provision in the LLC's articles of organization or a written operating agreement that permits the LLC to continue after the death of a member without the consent of the remaining members.").

[382] *See* LA. STAT. ANN. §12:1332 (2019).

judgment creditors to become members.[383] This includes the aforementioned provisions regarding noneconomic or springing members.[384] Operating agreements could also theoretically be designed to pretermit the efforts of third party creditors to seize control of the LLC and its assets, although any such effort might be complicated by the arguments raised by the bankruptcy court in *McKenzie* that such provisions could be deemed waived by the sole member.[385]

VI. Conclusion

Given the protections afforded by the LLC law and uncertainty in the law as to single-member LLCs, debtors who hold membership interests, as well as their creditors, should proceed cautiously.[386] Creditors are generally entitled to a charging order, which in many instances is a meaningless remedy.[387] Any attempt to obtain more direct relief against the LLC, whether through veil-piercing or seizing membership interests, presents a significant challenge.[388] Lender who intend to rely upon assets held within a borrower's LLC might avoid this uncertain area by memorializing their expectations in advance through documentation like security interests in the LLC's property, or a guaranty directly from the LLC.[389] Absent such documentation, pursuit of the assets indirectly could be an exercise in

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[383] *See* Kalinka, *supra* note 309, at 454–55 (explaining that under the Louisiana statute, the default LLC rules may be altered by the provisions of the operating agreement itself).

[384] *See* DeVries, *supra* note 339 (explaining how springing members can be used in LLC agreements and can be relied on when the single-member LLC is terminated).

[385] *In re McKenzie*, No. 08–16378, 2011 WL 6140516, at *19 (Bankr. E.D. Tenn. Dec. 9, 2011) ("As such they may be waived by the sole member.").

[386] *See* Kozlow, *supra* note 9, at 884–85 ("Creditors of the entity. . . can absolutely reach the LLC's assets to satisfy a claim, but their claim may not generally be satisfied with assets owned by the entity's individual members.").

[387] *See* Bishop, *supra* note 49, at 231 ("Likewise, the charging order statutes make clear that creditors of the owner cannot reach the assets of the entity and are limited to reaching the distributions determined by the owner . . . .").

[388] *Id.* (discussing the challenges of applying veil-piercing, as it is only applicable to cases of "fraudulent conveyance").

[389] *See, e.g.*, *In re McKenzie*, 2011 WL 6140516, at *19 (discussing that if GHK could show that it had a valid security interest, the debtor would have rights in the member interests of the LLC).

futility.[390] The writ of *fieri facias* may provide the creditor an advantage against a single-member LLC, but that procedure poses some legal questions that have yet to be answered definitively.[391] By the same token, businesses and individuals concerned about asset protection should be cautious about assets held within single-member LLCs.[392] While there are some creative ways LLCs have been structured to avoid that exposure, it remains an open question whether a creditor may be able to bypass the ordinary charging order process when there is only one member of the LLC.

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[390] *See id.* at *20–22 (holding that GHK failed to meet its burden in establishing that the security interests were perfected, resulting in them being unable to obtain assignment of the debtor's member interests).

[391] *See* Hibernia Nat. Bank v. AeroMech, Inc., 50-608, p. 8 (La. App. 2 Cir. 8/3/16), 215 So. 3d 350, 355 (dismissing the case for other reasons without answering specifically whether membership interests can be seized through the writ of *fieri facias*).

[392] *See* Bishop, *supra* note 49, at 231–32 (concluding that the same mechanisms that apply to LLCs, when applied to SMLLCs creates a paradox where the debtor has control of the entity over the creditor).