

Tuesday, January 25, 2011

Are Limited Liability Companies more vulnerable after Olmstead?

The Florida Supreme Court recently handed down its opinion in the *Olmstead et al. v. FTC*, 35 Fla. L. Weekly S357 (Fla. 2010) ("Olmstead"). The question considered in Olmstead was whether a single member limited liability company ("LLC") is subject to judicial foreclosure (sale) or attachment in Florida.

We have long advised our clients that single member LLC's are probably not an entity protected from creditor infiltration. The premise of Partnership law (from which LLC law is derived) is if there are two more partners in a venture and one partner has a creditor, that it would be inappropriate to make the non liable partner become partners with the creditor of partner against whom there is a judgment (the "Debtor Partner"). Thus, under LLC law, the creditor would be left generally with the right only to receive those distributable proceeds which the Debtor Partner would have gotten or would get if there was a distribution from the LLC. In a single member LLC, the argument is that there is no other "non-debtor" partner to protect. The Federal Bankruptcy Courts have already reached the conclusion in reported cases that there is no protection for single member LLC's. Our feeling and concern was that eventually the Florida courts would reach the same result, and in fact did so in Olmstead. In Olmstead the Court agreed that single member LLC's do not enjoy any real creditor protection. Since Olmstead, numerous committees of the Florida Bar have been working on a "patch" to clarify what protections LLC's companies have following Olmstead. Many of you have undoubtedly seen commentary pronouncing that all LLC's are in danger. However, it appears that multiple member LLC's will continue to enjoy the statutory "protections" described above, while there will be little or no protection for single member LLC's.

What if you have a single member LLC? Should you add a member and remain a multiple member LLC in Florida? Should you consider utilizing another, more favorable jurisdiction, such as Wyoming or Delaware? What are the tax implications of adding a member?

There is no "one size fits all" answer here and if you have questions regarding your LLC, we would invite you to contact us to discuss your options as personal strategies will likely depend on your specific facts and circumstances.