IN THE FLORIDA SUPREME COURT

SHAUN OLMSTEAD et al,	*	
	*	
Movants-Defendants-Appellants, and	*	
	*	
v.	*	No. SC08-1009
	*	
FEDERAL TRADE COMMISSION,	*	
	*	
Respondent-Plaintiff-Appellee.	*	

On Certification from the United States Court of Appeals
for the Eleventh Circuit, No. 06-13254-DD

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:03 CV-2353-T17-TBM

INITIAL BRIEF OF APPELLANT SHAUN OLMSTEAD ET AL

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TABLE OF CONTENTS

Table of Contents i

Table of Citations iii

Preface and Note Re Record Reference v

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 3

IV. STATEMENT OF FACTS 7

V. SUMMARY OF ARGUMENT 9

VI. ARGUMENT 12

1. THE PLAIN LANGUAGE OF FLORIDA STATUTE § 608.433(4) STATES THAT A JUDGMENT CREDITOR MAY NOT FORECLOSE ON A JUDGMENT DEBTOR'S INTEREST IN A LIMITED LIABILITY COMPANY 12

2. THE LEGISLATURE HAS MANIFESTED AN INTENT THAT SINGLE MEMBER LLCs BE AFFORDED THE SAME ASSET PROTECTIONS OF MULITIPLE MEMBER LLCs 15

3. FLORIDA STATUTE § 608.443(4) SHOULD BE INTERPRETED IN THE SAME MANNER AS FLORIDA STATUTE § 620.153 17

4. THE AUTHORITY RELIED ON BY THE FTC AND RELIED UPON BY THE DISTRICT COURT IS INAPPLICABLE TO THE INSTANT CASE 20

5. THE FTC HAS CONCEDED THAT IT IS PROHIBITED FROM FORECLOSING ON MEMBER INTERESTS IN MULTIPLE-MEMBER LIMITED LIABILITY COMPANIES 25

VII. CONCLUSION 26

VIII. CERTIFICATE OF SERVICE 27

TABLE OF CITATIONS

Cases:

City of Miami Beach v. Galbut,
626 So.2d 192, 193 (Fla., 1993) 13

Cosgrove v. Bartolotta,
150 F.3d 729 (7th Cir.1998) 19

Deutsch v. Wolff,
7 S.W.3d 460 (Mo. App. E.D., 1999) 22

Exchange Point LLC v. U.S. S.E.C.,
100 F.Supp.2d 172, 174 (S.D.N.Y., 1999 18

FirstMerit Bank N.A. v. Washington Square Enterprises,
2007 WL 2206545 (Ohio App. Dist.) 23

Gillis v. State of California,
293 U.S. 62, 55 S.Ct. 4, 79 L.Ed. 199 (1934) 19

Givens v. National Loan Investors, L.P.,
724 So.2d 610 (Fla. 5th DCA 1998) 18

In re Ashley Albright,
291 B.R. 538 (D.Colo. 2003) 20-21

In re McCollam,
612 So.2d 572, 573 (Fla. 1993) 17

World Fuel Services Corp. v. Moorehead,
229 F.Supp.2d 584 (N.D. Tex., 2002) 22-23

Rules:

Fla. R. App. P. 9.150(a) 1, 5

Statutes:

Iowa House File 2633 21

C.R.S. § 7-80-703..21

Section 608.405, Florida Statutes 15-17

Section 608.433(4), Florida Statutes.................................... 2, 6-19, 21, 23-25

Section 608.4227(1), Florida Statutes..9, 15

Section 620.153, Florida Statutes 10, 17

Tex. Civ. Prac & Rem.Code Ann. §31.002 22

PREFACE AND NOTE RE RECORD REFERENCES

The Record on Appeal shall be referenced by "R" with applicable page numbers, and the Docket of the District Court shall be referenced by Docket (DKT) and number.

Also, as required by the rules of this Honorable Court, Appellants will be referred to as "Appellant," and Appellee will be referred to as "Appellee."

I. STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Fla. R. App. P. 9.150(a) on a Certified Question from the United States Court of Appeals for the Eleventh Circuit to the Supreme Court of the State of Florida.

II. STATEMENT OF THE ISSUES

The issues raised in this Initial Brief are as follows: WHETHER, PURSUANT TO FLA. STAT. § 608.433(4), A COURT MAY ORDER A JUDGMENT-DEBTOR TO SURRENDER ALL "RIGHT, TITLE, AND INTEREST" IN THE DEBTOR'S SINGLE-MEMBER LIABILITY COMPANY TO SATISFY AN OUTSTANDING JUDGMENT.

III. STATEMENT OF THE CASE

On November 10, 2003, The Federal Trade Commission ("FTC") filed an action against the Appellants alleging that they engaged in false and misleading business practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a). (Dkt 1) The complaint consists of only a one count complaint that Appellants' direct mail piece represents that by paying a fee, consumers would, or were likely to, receive a major credit card. That same day, within two hours, the lower court entered a Temporary Restraining Order "TRO" with asset freeze and other equitable relief, and appointed Mark J. Bernet, Esq. ("Receiver"), as Receiver for Peoples Credit First, LLC, and Consumer Preferred, LLC "Primary Companies." (Dkt 9) On November 12, 2003, the Receiver took physical possession of the business premises of the corporate Appellants. On December 17, 2003, the Appellants and FTC entered into a Stipulated Order of Preliminary Injunction Without Prejudice, which the court approved on December 23, 2003. (Dkt 26) On January 14, 2004, the court extended the Receivership to include Dynamic Fulfillment & Services, LLC. (Dkt 37) On October 27, 2004, Appellee filed its Motion for Summary Judgment. (Dkt 261) On November 12, 2004, the lower court extended the Receivership to include Foundation Commercial Properties, LLC; Product Dynamics, LLC; SoHo Holdings, LLC; and Generation Housing, LLC. (Dkt 283, 286) On November 15, 2004, Appellant Olmstead filed his

Motion for Summary Judgment. (Dkt 288) On November 18, 2004, Appellants' Primary Companies filed their Motion for Summary Judgment. (Dkt 296) On December 1, 2004 Appellant Connell filed a Joinder in Response to Primary Companies Motion for Summary Judgment. (Dkt 308) On November 24, 2004, the court extended the Receivership to include Nu Products, LLC d/b/a Royal Pineapple. (Dkt 304) In June, 2005, the District court ruled that the consumer declarations, complaint summaries and consumer complaints relied upon by the Appellee in obtaining the TRO and Preliminary Injunction were admissible evidence for the purposes of Summary Judgment and at trial. The court held a hearing for Motions of Summary Judgment on September, 14, 2005. (Dkt 409) On December 18, 2005, the lower court granted Appellee's Motion for Summary Judgment and denied the Appellants' Motions for Summary Judgment (Dkt 466) and awarded a Judgment in favor of the Appellee. (Dkt 467) An Amended Judgment was entered on February 15, 2006. (Dkt 501) The Appellant filed Notice of Appeal to the Eleventh Circuit Court of Appeals on March 13, 2006, (Dkt 513) and amended the Notice of Appeal for convenience of the clerk on March 17, 2006. (Dkt 516) On March 3, 2006, the District court held a Motion Hearing in part to address the application of Florida Statute §608 to single member limited liability companies. (Dkt 509, Transcript Dkt 566) The lower court withheld ruling and requested cross-pleadings be submitted regarding the implications of

Florida Statute §608. On March 16, 2006, Defendant Shaun Olmstead ("Olmstead" or "Appellant") filed a Memorandum of Law in Opposition to the Proposed Liquidation of Appellant, Olmstead's, Interest in the Limited Liability Companies. (Dkt 514) On March 17, 2006, Appellant Julie Connell ("Connell" or "Appellant") filed her Objections to FTC's Amended Motion to Compel the Surrender of Assets and Memorandum of Law Opposing the Liquidation of Limited Liability Companies. (Dkt 518) On March 20, 2006, Appellant Olmstead filed his Response to Plaintiff, Federal Trade Commission's Amended Motion to Compel the Surrender of Assets. On, March 29, 2006, Plaintiff Federal Trade Commission filed its Response to Defendants' Opposition to the Turn Over of Assets. (Dkt 527) Defendant Connell filed a Motion for Clarification stating that she no longer owned Peoples Credit First, LLC, and was unable to surrender its units to the Receiver. (Dkt 540) This motion was denied. (Dkt 541, R 5) On May 3, 2006, the District court issued its Order compelling Appellants to endorse and surrender to the Receiver all of Appellants' right, title, and interest in Appellants' ownership/equity unit certificates of the Florida limited liability companies. (Dkt 535, R 4) On June 22, 2006, Appellants filed a Notice of Appeal of that Order. (Dkt 554) On May 29, 2008, the United States Court of Appeals for the Eleventh Circuit certified to this Court, pursuant to *Fla. R. App. P.* 9.150(a), the following question:

"Whether, pursuant to Fla. Stat. § 608.433(4), 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."

IV. STATEMENTS OF THE FACTS

Appellee FTC asked the District court to enter an order directing the Receiver to liquidate assets and transfer the proceeds to the FTC in partial satisfaction of its judgment obtained against Appellants. (Dkt 511) Many of these assets are owned by single member Florida limited liability companies. Specifically, Appellant Olmstead owns a membership interest in the following single member Florida limited liability companies: Foundation Commercial Properties, LLC; Product Dynamics, LLC; SoHo Holdings, LLC; and Generation Housing, LLC. Appellant Connell owns a membership interest in the following Florida limited liability companies: NuProducts, LLC, d/b/a Royal Pineapple; and Dynamic Fulfillment and Services, LLC. The aforementioned limited liability companies have been under the control of the Receiver since his appointment by the District court at various times since the case was filed. In an attempt to partially satisfy its judgment against Appellants, the FTC sought by Motion to have the Receiver liquidate and transfer the assets of the limited liability companies to the FTC. The Appellants objected to that request, asserting that the FTC, as a judgment creditor, is limited by Florida Statute §608.433(4) only to a charging order as a remedy for collecting its judgment. Subsequently, the District court issued its Order requiring that Appellants surrender to the Receiver all of Appellants' right, title, and interest in Appellants' ownership/equity unit

certificates of the aforementioned Florida limited liability companies. (Dkt 535) An Appeal was taken of that Order to the United States Court of Appeals for the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit certified the following question to this Court:

> "Whether, pursuant to Fla. Stat. § 608.433(4), 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."

V. SUMMARY OF ARGUMENT

Appellants Olmstead and Connell own membership interests in several Florida limited liability companies. Appellants appeal from the lower court's ruling that the Appellee/FTC, as a judgment creditor of Olmstead and Connell, and not the non-party limited liability companies, can foreclose on Appellants' interests in the limited liability companies. According to the plain language of Florida Statute §608.433(4), a judgment creditor may not foreclose on a judgment debtor's interest in a Florida limited liability company. When a statute is clear and unambiguous, a court should not look beyond the statute's plain language to find legislative intent.

The Appellee/FTC asserts that the charging order provision in Florida Statute §608.433(4) should be inapplicable, as the charging order process was created to protect members of a limited liability company from having a new member thrust upon them. However, Florida statutory and jurisprudential law have drawn no distinction between single-member and multiple-member limited liability companies regarding the applicability of a charging order.

An important function of a limited liability company is the limitation of liability for its members. This limitation of liability is guaranteed by Florida law. Fla. Stat. §608.4227(1). To hold that the assets of a limited liability company can be foreclosed upon to satisfy a member's private debt, obligation, or liability

would be to substantially alter this important aspect of limited liability company law.

As there are no Florida cases interpreting §608.433(4), Appellants submit that the statute should be construed in the same manner as Florida Statute §620.153, which governs the rights of a judgment creditor of a partner in a limited partnership. Under such an interpretation, a judgment creditor should have only the rights of an assignee of a member's interest in a limited liability company. Therefore, the District court's Order allowing the Appellee/FTC, as a judgment creditor, to require a transfer of the Appellants' membership interests to the Receiver is contrary to Florida law.

The case law relied on by the Appellee/FTC in its Opposition and relied upon by the District court is inapplicable to the instant case. Since there are no Florida cases interpreting Florida Statute §608.433(4), all cases cited by the Appellee/FTC are out-of-state cases interpreting distinguishable state statutes. Therefore, the analyses of those dissimilar statutes are not germane to the construal of Florida Statute §608.433(4).

Finally, the Appellee/FTC has conceded that it is prohibited from foreclosing on a member interest in a multiple-member limited liability company. The Appellee/FTC has also agreed that a judgment creditor may obtain a charging order against a member's interest in a limited liability company. Because Florida

Statute §608.433(4) clearly applies to all limited liability companies, Appellants respectfully submit that the FTC, as a judgment creditor, should only be permitted to obtain a charging order against Appellants' interests in the aforementioned limited liability companies.

For the foregoing reasons, Appellants respectfully request that this Honorable Court answer the certified question from the United States Court of Appeals for the Eleventh Circuit with the declaration that a court may not order a judgment debtor to surrender all "right, title and interest" in the Appellants' single-member limited liability companies to satisfy an outstanding judgment.

VI. ARGUMENT

1. THE PLAIN LANGUAGE OF FLORIDA STATUTE §608.433(4) STATES THAT A JUDGMENT CREDITOR MAY NOT FORECLOSE ON A JUDGMENT DEBTOR'S INTEREST IN A LIMITED LIABILITY COMPANY.

Appellant Olmstead owns a membership interest in Soho Holdings, LLC; Generation Housing, LLC; Dynamic Fulfillment & Services, LLC; and Foundation Commercial Properties, LLC; hereinafter referred to as the "LLCs." Appellant Connell owns a membership interest Dynamic Fulfillment and Services, LLC; NuProducts, LLC d/b/a Royal Pineapple. Appellants appeal from the District court's ruling that the Federal Trade Commission, as a judgment creditor, can foreclose on Appellants' interests in the aforementioned limited liability companies.

Rule 69 of the Federal Rules of Civil Procedure states that proceedings in aid of execution of a judgment are to be conducted in accordance with the practice and procedure of the state in which the district court is seated. Fed. R. Civ. P. 69. Florida's Limited Liability Company Act ("LLC Act"), Florida Statute §608, addresses the ability of a judgment creditor to reach a debtor-member's interest in a limited liability company. Specifically, Florida Statute §608.433(4) provides:

> (4) On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of

such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

It is well settled that where a statute is clear and unambiguous a court will not look beyond the statute's plain language for legislative intent. City of Miami Beach v. Galbut, 626 So.2d 192, 193 (Fla., 1993) A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or absurd result. Id. Florida Statute §608.433(4) clearly draws no distinction between a single-member limited liability company and a multiple-member limited liability company. Therefore, the FTC's assertion that different rules should apply to a membership interest in a single-member limited liability company is simply not supported by the language of the statute. It would be absurd to suggest that an important limitation on the application of Florida Statutue §608.433(4) to some, but not all, limited liability companies would not be *expressly* provided by the statutory framework. In fact, neither the LLC Act (Chapter 608, Florida Statutes), nor interpreting jurisprudence, state that a charging order should not apply to single-member limited liability companies. Therefore, it is entirely unreasonable for the FTC to argue that §608.433(4) is inapplicable to single-member limited liability companies merely "because the Receivership LLCs have no other members whose interests may be affected or who want for protection."[1] (Dkt 527,

[1] The applicability and pertinence of the FTC's case law and jurisprudence from other jurisdictions will be discussed in greater detail below.

pg. 4) No statutory or jurisprudential law exists to support such a position and, indeed, the FTC cites none.

The FTC asserts that the charging order process was created to protect members of a limited liability company from having a new member thrust upon them. The FTC's position is that, absent other members, the need for a charging order does not exist, as there are no other members' interests to protect. However, as stated above, Florida statutory and jurisprudential law have drawn no distinction between single-member and multiple-member limited liability companies in this regard. Florida Statutes §608.433(4) merely states that the court "may charge the limited liability company membership interest with payment of the unsatisfied amount of the judgment with interest." Florida Statutes Chapter 608.433(4) (2005). Again, no distinction is made between single-member and multiple-member limited liability companies.

While the FTC relies on case law on the "general purpose" of charging orders under the laws of other states, or in bankruptcy law applications, no such purpose is set forth within Chapter § 608, its statutory comments, or interpreting state jurisprudence. While protecting other members' interests could be one reason for a charging order requirement, there are other important concerns behind the enactment of §608.433(4). For instance, one purpose for forming a limited liability company is to limit personal exposure. This limitation of liability is currently

guaranteed by Florida law. Fla. Stat. §608.4227(1). When a person forms a limited liability company, he is guaranteed by Florida Statute §608.4227(1) that the limited liability company's debts, obligations, and liabilities cannot be collected from his own personal assets. Likewise, the limited liability company should be shielded from liability from the personal debts of its members. For a court to hold otherwise—that the assets of a limited liability company can be foreclosed upon to satisfy a member's private debt, obligation, or liability—would be to substantially alter and threaten the financial stability of the thousands of single-member limited liability companies in the state of Florida.

Therefore, to hold that the charging order requirement does **not** apply to a single-member limited liability company would defeat that purpose of forming a limited liability company. Thus, while protection of other members' interests is not an issue with a single-member limited liability company, Florida Statute §608.433(4) is still needed to afford the single-member limited liability company with the limitation of liability guaranteed by Florida law.

2. THE LEGISLATURE HAS MANIFESTED AN INTENT THAT SINGLE MEMBER LLC's BE AFFORDED THE SAME ASSET PROTECTIONS A MULTIPLE MEMBER LLCs.

Prior to 1998, Florida law did not provide for the creation of a single member limited liability company ("LLC"). Specifically, Florida Statute, §608.405 (1997), read: "Formation—*Two* or more persons may form a limited

liability company." (emphasis added) At that time, Florida statutes limited creditor collection actions against an LLC interest to charging liens. Fla. Stat. §608.433(4) (1997). The following year, the Florida legislature amended §608.405 in the following manner: "Formation—*One* or more persons may form a limited liability company." Fla. Stat. §608.405 (1998) (emphasis added). By this act, the Florida legislature changed the law to specifically permit a single member LLC.

However, it is critical to note that the legislature did **not** change the law that limited creditors to obtaining charging liens as a remedy for actions against LLC interests. Fla. Stat. §608.433(4) (1998). If the Florida legislature's intent was that charging lien procedures and protections not be applicable to single member LLCs, it would have made the appropriate amendment when it authorized the creation of the single member LLC. However, as noted above, the Florida legislature made no such amendment distinguishing between the protections afforded a single member LLC and those afforded multiple member LLCs. Therefore, by leaving a creditor's remedy unaltered, it follows that the legislature manifested the intent that the single member LLC was the beneficiary of the same protections afforded to all LLCs.

Thus, Appellee's argument that the entirety of the Florida LLC Act somehow manifests the legislature's intent to create different protections and

procedures for dealing with single member LLCs is not supported by the history of the Act and is in fact rejected by that history.

Moreover, it is well settled that where a statute is clear and unambiguous a court will not look behind the statute's plain language for legislative intent. In Re McCollam, 612 So.2d 572, 573 (Fla.1993). Appellants submit that Florida Statutes §608.433 (2006) and §608.405 (2006) are in no way ambiguous. Rather, the statutes plainly allow for the creation of single and multiple member LLCs and provide remedies for creditors of said LLCs. There are simply no distinctions drawn between single and multiple member LLCs. Therefore, it is Appellants' position that since the statutes are clear and unambiguous, there is no need to determine the legislature's intent. Id.

3. FLORIDA STATUTE §608.433(4) SHOULD BE INTERPRETED IN THE SAME MANNER AS FLORIDA STATUTE §620.153.

Because there is no Florida case interpreting §608.433(4), Appellants submit that the statute should be construed in the same manner as Florida Statute §620.153. Florida Statute §620.153 governs the rights of a judgment creditor of a partner in a limited partnership, and provides:

> On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This act does not deprive any partner of the benefit of any exemption laws applicable to his or her partnership interest.

In Givens v. National Loan Investors, L.P., 724 So.2d 610 (Fla. 5th DCA 1998), the Fifth District Court of Appeals interpreted Florida Statute §620.153 as follows:

> The straightforward language of the statute confers upon a judgment creditor the right to charge the limited partner's interest with payment of the unsatisfied amount of the judgment. The statute further provides that to the extent so charged the judgment creditor has 'only the rights of an assignee of the partnership interest.' Because the statute says that a judgment creditor has only the rights of an assignee of the partnership interest, it necessarily follows that the creditor may not resort to judicial foreclosure of the partnership interest. Nothing in the Revised Uniform Limited Partnership Act authorizes foreclosure of the charged interest and foreclosure is inconsistent with the statute's interest and foreclosure is inconsistent with the statute's limitations upon the creditor's remedies.

Appellant respectfully requests that this Honorable Court use the same reasoning in interpreting the similar language in Florida Statute §608.433(4) and hold that a judgment creditor may not resort to judicial foreclosure of a membership interest in a limited liability company. Under such an interpretation, the FTC, as a judgment creditor, should have only the rights of an assignee of a member's interest in a limited liability company.

Additionally, Federal Courts have recognized that members of limited liability companies generally have more extensive limitations in liability than do members of limited partnerships. See Exchange Point LLC v. U.S. S.E.C., 100 F.Supp.2d 172, 174 (S.D.N.Y., 1999). Unlike a limited partnership, the limited liability company "need have no equivalent to a general partner, that is, an owner

who has unlimited personal liability for the debts of the firm." Id, at 174 (citing Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir.1998).

In the instant case, the lower court erred by overruling Appellants' objections to the surrendering of the membership interests in the non-party limited liability companies. Allowing the FTC, as a judgment creditor, to require a transfer of the Appellants' membership interests to the Receiver is contrary to Florida law. Pursuant to Florida Statute §608.433(4), the sole remedy of the FTC, as to the interests of the Appellants as members in limited liability companies, is to have those interests charged with payment of the judgment. Accordingly, the lower court's Order requiring that Appellants surrender to the Receiver all of Appellants' rights, title, and interest in Appellants' ownership/equity unit certificates of the aforementioned Florida limited liability companies improperly authorized the Receiver to conduct the affairs of the companies in a manner contrary to state law. See Gillis v. State of California, 293 U.S. 62, 55 S.Ct. 4, 79 L.Ed. 199 (1934). Appellants would urge this Court to answer the certified question from the United States Court of Appeals for the Eleventh Circuit with the declaration that a court may not 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.

4. THE AUTHORITY RELIED ON BY THE FTC AND RELIED UPON BY THE DISTRICT COURT IS INAPPLICABLE TO THE INSTANT CASE.

The FTC cited in its Response to Defendants' Opposition to the Turn Over of Assets in the District Court the out of state case of In re Ashley Albright, 291 B.R. 538 (D.Colo. 2003), to espouse their position that requiring a charging order limitation regarding a single-member LLC serves no purpose. (Dkt 527) However, the situation in the Albright case is not analogous to the situation in the instant case. Albright is a Chapter 7 Bankruptcy case and interprets the limited liability company law of Colorado, not Florida. In that case, the debtor was the sole member and manager of a Colorado limited liability company. Id, at 539. The bankruptcy court found that pursuant to the Colorado limited liability statute, the debtor's Chapter 7 bankruptcy filing transferred the membership interest to the bankruptcy estate, and, ultimately, allowed the Trustee to manage the company.[2]

The instant case involves neither a current bankruptcy nor a Trustee. Furthermore, the Colorado statute interpreted in Albright 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 the judgment with interest thereon ***and may then or later appoint a receiver*** of the member's share of the profits and of any other money due or to become due to the member in respect of the limited liability company and make all other orders, directions, accounts, and inquiries which

[2] The District Court's Order (Dkt 535) provided in paragraph 10 that the Receiver shall hold such interests pending further Order of the Court. There was no permanent transfer of the membership interest as would be the case with a Bankruptcy Trustee.

> the debtor member might have made, or which the circumstances of the case may require. To the extent so charged, except as provided in this section, the judgment creditor has only the rights of an assignee of the membership interest. ***The membership interest charged may be redeemed at any time before foreclosure.*** If the sale is directed by the court, the membership may be purchased without causing a dissolution with separate property by any one or more of the members. With the consent of all members whose membership interests are not being charged or sold, the membership may be purchased without causing a dissolution with property of the limited liability company. This article shall not deprive any member of the benefit of any exemption laws applicable to the member's membership interest. C.R.S. § 7-80-703 (emphasis supplied)

The Colorado limited liability statute interpreted by the bankruptcy court in Albright specifically states that a receiver may be appointed and that a judgment creditor may foreclose upon a membership interest. As neither of these provisions are present in Florida Statute §608.433(4). Appellants respectfully submit that the Albright bankruptcy court's interpretation of *Colorado* limited liability law is inapplicable to the instant case, as the respective state statutes are dissimilar.[3]

[3] The Iowa legislature has recently amended its limited liability statutory provisions to provide for a remedy similar to Colorado. In fact, if such a remedy is to exist under the Florida law regarding limited liability companies, then the legislature would need to specifically provide for it in an amended statute. House File 2633: An Act Relating to Business Associations, by Providing For Limited Liability Companies and Conversion Involving Corporations, Providing Fees and Penalties, and Providing an Effective Date. "Section 43. NEW SECTION. 489.503 CHARGING ORDER. 1. On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor. 2. To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection 1, the court may do all of the following: a. Appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made. b. Make all other orders necessary to give effect to the charging order. 3. 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. The purchaser at the foreclosure sale only obtains the transferable interest, does not thereby become a member, and is subject to section 489.502.

The FTC also cites as authority in its Opposition, the Missouri Court of Appeals case of Deutsch v. Wolff, 7 S.W.3d 460 (Mo. App. E.D., 1999). The FTC notes that the state appellate court in Deutsch granted a receiver broad powers so that the plaintiffs had a chance to collect on a judgment obtained against their former partner to the fullest extent of the law. Deutsch involved a Missouri appellate court's determination of Missouri *partnership* law and is, therefore, not analogous to the instant matter involving Florida limited liability companies and Florida statutory interpretation. Moreover, the charging order in that case was entered for the purpose of satisfying a judgment obtained by Wolff's *partners*. In addition, the partners in the Deutsch case were parties inside the company, not outside plaintiffs, as is the case in the instant matter. Therefore, the issues dealt with in Deutsch are not analogous to the issues on appeal in the instant case.

Also relied on by the FTC in its Opposition is the Northern District of Texas case of World Fuel Services Corp. v. Moorehead, 229 F.Supp.2d 584 (N.D. Tex., 2002). The FTC cites World Fuel Services to show that the court appointed a receiver with the authority to take possession of the defendant debtor's nonexempt property, sell it, and pay the proceeds to a creditor to satisfy the judgment. However, the district court in the case was not considering a statute specifically regarding limited liability companies. Rather, the district court interpreted the Texas Turnover Statute, Tex. Civ. Prac & Rem.Code Ann. §31.002, involving the

rights of judgment creditors in general and how it applied to a debtor's nonexempt property. Id. As the issue in the instant matter pertains to the interpretation of Florida Statute §608.433(4), which applies to limited liability companies, World Fuel Services, a Northern District of Texas case interpreting the Texas Turnover Statute, is inapplicable herein.

Furthermore, the language of the Texas Turnover Statute specifically allows for the appointment of a receiver with "the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." Tex. Civ. Prac & Rem.Code Ann. §31.002(3). As stated above, there is no such provision specifically allowing for the appointment of a receiver in Florida Statute §608.433(4). Therefore, the statute dealt with in World Fuel Services contains additional and different provisions than the statute at issue in the instant case, and the district court's interpretation of that statute is inapplicable to the analysis of Florida Statute §608.433(4).

In addition, in FirstMerit Bank, N.A. v. Washington Square Enterprises, 2007 WL 2206545 (Ohio App. 8 Dist.), the Ohio Court of Appeals for the Eighth District stated:

> "We cannot agree with Interim Holdings that the limited liability company and all of its assets could be used to satisfy the judgment debt. Limited liability companies are entities separate and distinct from their owners. While Clair Gruttadauria's membership interest in Claire Gruttadauria, L.L.C. was certainly as asset of hers which could be charged under R.C. 1705.19 to satisfy her judgment debt, this

> membership interest did not include any direct interest in the assets of the company which could be used by her creditors to satisfy her debts. Rather, a member's judgment creditors have only the rights of assignees of a membership interest. R.C. 1705.19. Assignees of membership interests do not become members themselves, but only have the right to receive distributions that would have been paid to the member-assignor. R.C. 1705.18. [FN4]

By analogy, this Court should not pursue the Appellee/FTC to satisfy its judgment from the assets of the nonparty single-member limited liability companies owned by Appellants.

The FTC focuses much of its argument on the rule that a receiver is entitled to assume control over and liquidate the assets of a non-party company as ordered by a court. However, the real issue is the FTC's erroneous and ill supported assertion that a receiver has the authority to stand in the shoes of a member of a Florida limited liability company and distribute the assets of that non-party company to a judgment creditor. As outlined above, to allow a receiver this authority would be clearly contrary to Florida Statute §608.433(4).

Undeniably, the plain language of Florida Statute §608.433(4) does not differentiate between a single-member and multi-member limited liability company. This Court should answer the certified question in favor of Appellant, and recognize the statutory protection for single-member limited liability companies.

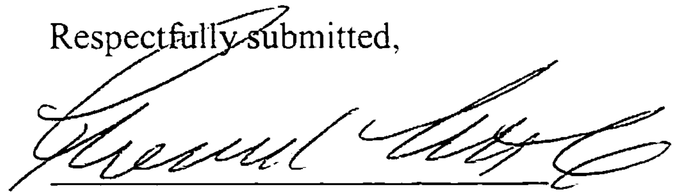
5. THE FTC HAS CONCEDED THAT IT IS PROHIBITED FROM FORECLOSING ON MEMBER INTERESTS IN MULTIPLE-MEMBER LIMITED LIABILITY COMPANIES.

The FTC has conceded that it is prohibited from foreclosing its judgment on a member interest in a multiple-member limited liability company and that a judgment creditor may obtain a charging order against that member's interest. Because Florida Statute §608.433(4) clearly applies to all limited liability companies, Appellants respectfully submit that the FTC, as a judgment creditor, should only be permitted to obtain a charging order against Appellants' interests in the limited liability companies.

VII. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court answer the certified question from the United States Court of Appeals for the Eleventh Circuit with a finding that a court may not order a judgment debtor to surrender all "right, title and interest" in the Appellants' single-member limited liability companies to satisfy an outstanding judgment.

Respectfully submitted,



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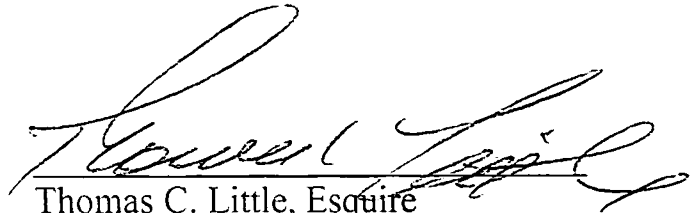
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2008, I sent a copy of the foregoing Appellant's Initial Brief by U.S. MAIL to: John Gotto and Richard Oliver, Esquire, 401 E. Jackson Street. Suite 2500, Tampa, FL 33602, and John Andrew Singer, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Room H-582, Washington, D.C. 20580.



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