

LITIGATION ALERT

AUGUST 20, 2019

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Re-thinking the use of single-member LLCs for companies in Florida

If you are just beginning to form a company or have an existing company, think twice about using a Florida single-member limited liability company (LLC). An LLC has two types of creditors: inside creditors and outside creditors.

Inside creditor claims arise from alleged actions or omissions of the LLC. For example, if someone were to fall or get injured on property owned by the LLC (creditor), you hope to minimize and even eliminate the ability of such creditor from being able to execute his or her judgment against your other personal assets. Thus, this type of creditor protection is referred to as “inside creditor protection.”

Outside creditor claims arise from alleged actions or omissions by a debtor member of the LLC. If you are at fault in an accident or otherwise liable to creditors, your hope is to protect the LLC assets from your personal creditors. Thus, this type of creditor protection is referred to as “outside creditor protection.”

Limited liability of all members is the most attractive reason for creating LLCs. For LLC members in some states, it is beneficial that a charging order is the sole and exclusive remedy for a member’s creditor. A charging order differs from other remedies such as judicial foreclosure. Judicial foreclosure enables the creditor to become an assignee of the LLC, converting a “lien interest” to a “title interest” where a membership interest may be sold by the court. Multiple-member LLCs in most states, including Florida, afford its members that a charging order is the sole and exclusive remedy for the members’ creditors.

The issue in Florida is that LLCs do not afford charging order protection as the sole and exclusive remedy to single-member LLCs. If you are forming an LLC as the sole member or already have a single-member interest in an

LLC individually with no other members, you run into creditor problems where a creditor could potentially execute his or her judgment against your other personal assets. This may not be the result you ultimately desire. You thought an LLC protected you, but in this case it does not.

One possible solution would be to create the single-member LLC in another state, such as South Dakota, Delaware or Wyoming, that arguably affords single-member LLC charging order protection. The drawback of course is that such states charge fees for:

- The creation of the LLC (you would have this fee in Florida, too)
- LLC annual registered agent fee (if you are a Florida resident, you would not have this fee if you created a Florida LLC because you could be the registered agent)
- LLC registration to do business in Florida fee (again, an additional fee that you would avoid if this were a Florida LLC)
- Florida annual filing fee (you would have to pay an annual filing fee in the state of South Dakota, Delaware or Wyoming, as the case may be, too)

Another possible solution would be to add another member and turn what would be a "single-member LLC" into a "multiple-member LLC." The drawback is that you would be giving someone an interest in an entity that you might otherwise not have desired to align yourself with (whether that be a spouse, child, friend or other relative). What if you and your spouse get divorced? What if your child, friend or relative turns out to be a spendthrift?

As a client, you have a choice: do you want to save money and risk creditor protection by using a Florida single-member LLC, or might it be better to spend extra money for greater asset protection and form your company in another state, such as Delaware, Wyoming or South Dakota? No one choice is bulletproof, but if asset protection is the chief concern (and/or you have a reputable business partner(s)), a multiple-member LLC formed in Florida, or single-member LLC formed in another state, would be the best choice.

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