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Report From Counsel

Insights and Developments in the Law **Summer 2011**

New Legislative Developments Affecting Florida Limited Liability Companies as an Asset Protection Planning Vehicle for Florida Residents

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It was just last summer on June 24, 2010, that the Florida Supreme Court issued an opinion in the case styled *Olmstead v. FTC*, 44 So.2d 67 (Fla. 2010) that dealt the use of single member limited liability companies in Florida as an asset protection planning strategy a seemingly fatal blow. This decision also put into question whether the same fate would befall multi-member limited liability companies in Florida thus making multi-member limited liability companies an ineffective asset protection planning tool as well.

The facts in the *Olmstead* case involved two individual defendants who became the subject judgment debtors of a $10,000,000 judgment obtained against them by the FTC due to liability arising from the defendants' participation in a credit card scheme. The FTC procured a post-judgment order from the trial court that mandated the judgment debtors to surrender all right, title and interest in various single member limited liability companies that the judgment debtors owned for purposes of satisfying the FTC judgment entered in the case. The judgment debtors argued to the Florida Supreme Court that their respective interests in their single member limited liability companies could not be taken by legal judgment collection remedies and liquidated since the sole and exclusive judgment collection remedy afforded to the FTC under Florida law in the case was a "charging order" as provided for in §608.433(4), *Florida Statutes*. Is a judgment creditor of a judgment debtor who happens to be a member of a single member limited liability company in Florida a matter of law limited to a charging order as the sole and exclusive collection remedy for the judgment as against the member's interest in the limited liability company? This was the legal issue presented in the *Olmstead* case as to the Florida Supreme Court's interpretation of §608.433(4), *Florida Statutes*, which statute states as follows:

> *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.*

The Florida Supreme Court interpreted the above statutory language to mean that a charging order was *not* the exclusive remedy available to a judgment creditor who holds an unsatisfied judgment against the sole member of a single member limited liability company. The Court stated in its opinion in the *Olmstead* case that the above statute did not expressly provide that the charging order was to be the sole and exclusive judgment collection remedy that a judgment creditor could exercise against the judgment debtor's membership interest in a single member limited liability company in Florida and contrasted the text of §608.433, *Florida Statutes*, with the language of both the Florida Revised Uniform Partnership Act ("FRUPA"), Chapter 620, Part II, Florida Statutes, and the Florida Revised Uniform Limited Partnership Act ("FRULPA"), Chapter 620, Part 1, Florida Statutes, wherein a charging order is expressly made the exclusive judgment collection remedy against certain defined "partners" in said statutes. The Court in *Olmstead* accordingly sided with the judgment creditor, i.e. the FTC, and ordered the judgment debtors in the case to surrender all of their right, title and interest in their single member limited liability companies to the FTC.

The Florida Supreme Court in the *Olmstead* case glaringly did not ad-

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Social Media in the Workplace

The prevalence of social media, including postings that are meant for employment-related topics in particular, has led to an increase in litigation on the subject between employees and their employers. The scenarios leading the parties to the courtroom are as varied as one might imagine. A company fires a worker over her criticisms of the boss that she posted on Facebook. Repeated attempts by a manager to "friend" a female employee on Facebook eventually leads to allegations of sexual harassment. A disappointed job applicant sues when a job offer is retracted after a hiring manager turns up something about the applicant on Twitter that the manager finds disturbing.

From an employer's standpoint, the best protection against potential liability stemming from social media may be to establish a policy that clearly spells out the ground rules for the use of social media.

In addition to scenarios in which a worker loses his or her job because of something appearing in social media, litigation may ensue against an employer if its supervisory officials go too far in digging for dirt by this means. For example, two restaurant workers won a monetary settlement after having sued their former employer for gaining access to postings on a password-protected Myspace page set up as a chat group for employees only. What was found on the page eventually led to the workers' termination. The case was settled after a jury found that the employer had violated the federal Stored Communications Act (SCA).

The employees' managers had violated the SCA by knowingly accessing the chat group on Myspace without authorization. Although a fellow employee had provided her log-in information to one of the company's managers, she had not authorized access to the chat group by any of the company's managers. She also felt that she had been coerced into giving her password to her manager, as she felt that she would have been in trouble if she had not done so.

Using the employee's password, the company's managers accessed the chat group on several occasions, although it was clear on the website that the chat group was intended to be private and accessible only to invited members. Finally, the managers continued to access the chat group even after realizing that the employee had reservations about having provided her log-in information.

Since e-mail first came on the scene, similar cases have arisen over what was or was not appropriate when employees used their company-provided computers for sending e-mails. One preventative measure for employers has been to create a clear written policy on the subject, followed up by informing and training the employees. Likewise, an employer's best protection against potential liability stemming from social media may be to establish a policy that clearly spells out the ground rules for the use of social media.

Borrowers, Lenders, and Processing Payments

The Real Estate Settlement Procedures Act (RESPA) is a federal consumer protection law that regulates the real estate settlement process, including the servicing of loans and the assignment of those loans. RESPA places a number of duties on lenders and loan servicers, including requirements that borrowers be given notice by both a transferor and a transferee when their loan is transferred to a new lender or servicer, and that loan servicers respond promptly to borrowers' written requests for information.

It takes a qualified written request to trigger the loan servicer's duties under RESPA to acknowledge and respond. RESPA defines a "qualified written request" as written correspondence from the borrower or his or her agent that requests information or states reasons for the borrower's belief that the account is in error. To qualify, the written request must also include the name and account number of the borrower or must enable the servicer to identify the borrower.

Within 60 days after receiving a qualified written request, the servicer must take one of three actions: (1) make appropriate corrections to the borrower's account and notify the borrower in writing of the corrections; (2) investigate the borrower's account and provide the borrower with a written clarification as to why the servicer believes the borrower's account to be correct; or (3) investigate the borrower's account and provide either the requested information or an explanation as to why the requested information is unavailable.

In any event, the servicer must provide a name and telephone number of

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New Gift Tax Break

Having a net worth of $1 million, or maybe even $2 million, does not give you entry into such a small exceptional group as used to be the case. By some estimates, between 5 and 6 million American households have a net worth of at least $2 million. This means that currently there are considerably more people who should consider how best to shield their money from the IRS and pass it on to their heirs, assuming that is their wish. One such strategy that just became more attractive, due to new federal legislation, is the making of gifts during one's lifetime.

Taken together, the new federal estate and gift tax rates are more favorable for taxpayers than they have been for approximately 80 years.

Among the significant pieces of the new federal tax law that was passed in December 2010 were very substantial, albeit temporary, increases in the lifetime gift tax exemptions for individuals and couples. For 2011 and 2012, these exemptions have increased five-fold, from $1 million to $5 million for individuals, and from $2 million to $10 million for couples. There will be no gift tax imposed on gifts that do not exceed those totals. The same law reduces the tax rate for gifts above the exemptions to 35% from a scheduled rate of 55%, thus benefiting individuals wealthy enough to make gifts that exceed the exemption levels.

Last year, Congress also raised the exemption for federal estate taxes to $5 million, and lowered the estate tax rate to 35%, also for a two-year period, so that, taken together, the new federal estate and gift tax rates are more favorable for taxpayers than they have been for approximately 80 years.

This is an area of the law for which sophisticated professional help is especially appropriate, but there are some general considerations to bear in mind when devising a plan for gift-giving. For example, making a gift now, tax-free, makes good sense, especially for assets that are appreciating rapidly, so that future appreciation can be shielded from taxes. It is conceivable that Congress in the future could "claw back" gifts that are greater than the exemption at the time the donor dies, but, even in that event, any income or appreciation occurring after the gift date should be tax-exempt.

Other considerations for giving are more emotional than legal. Financial considerations aside, it may be a high priority for you to make sure that assets with sentimental value are preserved for future descendants, such as by putting them into a trust. Or gift-giving decisions may entail weighing some remorse over parting with assets that took so long to acquire against the desire to improve the lot of those receiving the gifts. Of course, a contrarian view might see large gifts as mainly abdicating control and risking having everything squandered. In any case, if these considerations are all reconciled in favor of making major gifts, now may well be the time to take the plunge.

Processing Payments

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a representative of the servicer who can assist the borrower. During the 60-day period, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency.

In the culmination of what the court described as "maddening troubles" that two borrowers, a husband and wife, encountered with two mortgage companies, a federal appellate court ruled that the borrowers' claims under RESPA for damages could proceed to a trial on the merits. Two of the five different letters sent by the borrowers were ruled to be qualified written requests. As to both letters, the borrowers contended that one of the mortgage servicers violated RESPA by reporting their account as delinquent to credit bureaus within the 60-day window after the letters were received. As to one of the letters, the servicer also was alleged to have failed to investigate properly or to take corrective action.

The borrowers withstood an argument by the mortgage servicers that the borrowers had not done enough to raise triable issues on actual damages allegedly sustained as a result of the RESPA violations. It was for a jury to decide if they had, in fact, suffered the compensable losses they claimed, stemming from being denied home equity lines of credit and a small business loan, and from suffering emotional distress from the whole affair.

Asset Protection Update

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dress whether the judgment debtor members of multi-member limited liability companies would also be subject to the same rule that would allow judgment creditors of such members to also be exposed to judgment collection remedies that would not be limited to a charging order. The *Olmstead* case therefore created an unacceptable asset protection planning ambiguity that caused many attorneys to advise their clients with Florida limited liability companies to either migrate their entity business to another jurisdiction where the charging order issue is not a problem, transfer limited liability company membership interests to a more protected entity form or convert the limited liability company to a Florida partnership that has the charging order limitation legislatively in place regardless of the type of limited liability company at hand.

The Florida legislature has heard a sufficient outcry from the public so as to motivate the recent passage of HB 253 that amends §608.433, *Florida Statutes*, in some significant ways in order to address the above interpretational difficulties regarding said statute and bring some clarity to the judgment creditor collection remedies issues regarding both single member and multi-member limited liability companies in Florida. HB 253 is awaiting Governor Scott's signature to become law.

HB 253 amends §608.433, *Florida Statutes*, to specifically state that a charging order is the sole and exclusive remedy by which a judgment creditor of a limited liability company member may satisfy a judgment from the judgment debtor's interest, i.e. the member's interest, in a limited liability company or in the rights to distributions therefrom. However, there are two exceptions to this statutory rule that applies to single member limited liability companies *only*, to-wit: (1) A charging order is not an exclusive and sole remedy for a judgment creditor of a member of a single member limited liability company if the judgment creditor can prove to the satisfaction of the court that distributions under a charging order will not satisfy the judgment within a reasonable time. (2) If a court orders a foreclosure sale of a member's interest in a single member limited liability company or of a charging order lien then the purchaser of the member interest at the foreclosure sale obtains the entire member interest and becomes a limited liability company member and the judgment debtor ceases to be a member thereof. The remedy of foreclosure by a judgment creditor of a member's interest in a multi-member limited liability company is expressly prohibited by the amended statute. The amended statute further provides that nothing contained in the statute shall limit the rights of a secured creditor, the principles of law and equity regarding fraudulent transfers, the availability of equitable principles including, but not limited to, alter ego, equitable lien or constructive trust.

The planning impact of the amended §608.433, *Florida Statutes*, once signed into law, is very significant since the statute clarifies the applicability of the limitation of judgment creditor collection remedies as against judgment debtors who are members of either single member or multi-member limited liability companies in Florida. The amended statute creates two different sets of rules for the application and limitation of judgment creditor collection remedies against limited liability company members who are judgment debtors. The planning implications are complex regarding possible asset protection planning considerations for limited liability companies operating in Florida; therefore, competent legal advice and counsel should be obtained by members of limited liability companies that are organized in Florida or registered to do business in Florida in order to evaluate specific planning implications.

FDIC Insurance Update

Last summer, a law was enacted that raised the standard maximum deposit insurance amount (SMDIA) to $250,000. The law made permanent a previous temporary increase to $250,000 from the former maximum limit of $100,000. The new permanent maximum limit should especially benefit consumers who figure to have more than $100,000—such as in multi-year certificates of deposit—in their bank beginning in 2014, when the temporary hike in the maximum limit had been scheduled to expire.

It is important to bear in mind that the SMDIA does not mean that under no circumstances may a single individual have insurance on more than $250,000 in a single institution. The SMDIA applies per depositor, per insured depository institution, for each account ownership category. A person's single account will be insured up to the new permanent maximum amount, but so will his or her share of all joint accounts, as well as any other of his or her accounts in other ownership categories.

Another legislative change, which went into effect on the last day of 2010, creates a new temporary insurance category that will fully insure all funds, regardless of the dollar amount, but only in checking accounts that pay no interest to the account holder. An example of a possible application of this new insurance is an account in which an individual who has just sold a home temporarily parks the large proceeds from the sale in that account, understanding that no interest will be earned. As the law now stands, this change is temporary, in that the new insurance account category is set to expire at the end of 2012.