LIST OF EXHIBITS

Exhibit 1	**Olmstead v. FTC,** 44 So. 3d 76 (Fla. 2010), 528 F.3d 1310 (11th Cir. 2008)
Exhibit 2	**Ashley Albright,** No. 01-11367 (Bankr. D. Colo. Apr. 4, 2003)
Exhibit 3	IRS Form 8832 – Entity Classification Election
Exhibit 4	Rev. Proc. 2002-69
Exhibit 5	**Watson, P.C. v. United States,** 714 F. Supp 2d 954 (S.D. Iowa 2010); 757 F. Supp 2d 877 (S.D. Iowa 2010)
Exhibit 6	**JD & Associates, Ltd. v. United States,** No. 3:04-CV-59 (D.N.D. May 19, 2006)
Exhibit 7	Comparison of Limited Liability Structures

EXHIBIT 1

H

Supreme Court of Florida.
Shaun OLMSTEAD, et al., Appellants,
v.
FEDERAL TRADE COMMISSION, Appellee.

No. SC08–1009.
June 24, 2010.
Rehearing Denied Aug. 31, 2010.

Background: The United States Court of Appeals for the Eleventh Circuit, 528 F.3d 1310, certified a question concerning the rights of a judgment creditor regarding the respective ownership interests of judgment debtors in certain single-member limited liability companies (LLCs).

Holding: The Supreme Court, Canady, J., held that court could order judgment debtor to surrender all right, title, and interest in debtor's single-member LLC.

Question answered.

Lewis, J., dissented and filed opinion in which Polston, J., joined.

West Headnotes

[1] Corporations and Business Organizations 101 ⚿3610

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3610 k. In general; nature and status. Most Cited Cases
(Formerly 241Ek6 Limited Liability Companies)

A "limited liability company (LLC)" is a business entity originally created to provide tax benefits akin to a partnership and limited liability akin to the corporate form.

[2] Corporations and Business Organizations 101 ⚿3630

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3627 Capital and Stock; Contributions
101k3630 k. Transfer, pledge, or assignment of interest. Most Cited Cases
(Formerly 241Ek30 Limited Liability Companies)

Corporations and Business Organizations 101 ⚿3638

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3632 Members, Owners, and Shareholders
101k3638 k. Management of company affairs in general. Most Cited Cases
(Formerly 241Ek30 Limited Liability Companies)

In addition to eligibility for tax treatment like that afforded partnerships, "limited liability companies (LLCs)" are characterized by restrictions on the transfer of ownership rights that are related to the restrictions applicable in the partnership context; in particular, the transfer of management rights in an LLC generally is restricted.

[3] Corporations and Business Organizations 101 ⚿3631

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3627 Capital and Stock; Contributions
101k3631 k. Rights of creditors; charging orders. Most Cited Cases
(Formerly 241Ek31 Limited Liability Companies)

The "limited liability company (LLC) charging order remedy" is a remedy derived from the charging order remedy created for the personal creditors of partners and affords a judgment creditor access to a judgment debtor's rights to profits and distributions from the business entity in which the debtor has an ownership interest.

[4] Corporations and Business Organizations 101 ⚿3610

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3610 k. In general; nature and status. Most Cited Cases
(Formerly 241Ek25 Limited Liability Companies)

Corporations and Business Organizations 101 ⚿3633

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3632 Members, Owners, and Shareholders
101k3633 k. In general; rights and liabilities. Most Cited Cases
(Formerly 241Ek25 Limited Liability Companies)

A "limited liability company (LLC)" is a type of corporate entity, and an ownership interest in an LLC is personal property that is reasonably understood to fall within the scope of corporate stock.

[5] Debtor and Creditor 117T ⚿11

117T Debtor and Creditor
117Tk11 k. Creditors' suit. Most Cited Cases
The general rule is that where one has any interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.

[6] Corporations and Business Organizations 101 ⚿3630

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3627 Capital and Stock; Contributions
101k3630 k. Transfer, pledge, or assignment of interest. Most Cited Cases
(Formerly 241Ek30 Limited Liability Companies)

The sole member in a single-member limited liability company (LLC) may freely transfer the owner's entire interest in the LLC.

[7] Corporations and Business Organizations 101 ⚿3631

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3627 Capital and Stock; Contributions
101k3631 k. Rights of creditors; charging orders. Most Cited Cases
(Formerly 241Ek30 Limited Liability Companies)

Court could order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment; provision authorizing the use of charging orders under the Limited Liability Company (LLC) Act was not the sole remedy for a judgment creditor against a judgment debtor's interest in a single-member LLC and did not displace the creditor's remedy under statute governing property subject to execution. West's F.S.A. § 608.433(4).

[8] Statutes 361 ⚿1499

361 Statutes
361VII Repeal
361k1498 Implied Repeal
361k1499 k. In general. Most Cited Cases
(Formerly 361k158)

Statutes 361 ⚿1500

361 Statutes
361VII Repeal
361k1498 Implied Repeal
361k1500 k. By inconsistent or repugnant statute. Most Cited Cases
(Formerly 361k159)
Repeal of a statute by implication is not favored and will be upheld only where irreconcilable conflict between the later statute and earlier statute shows legislative intent to repeal.

*77 Thomas C. Little, Clearwater, FL, for Appellant.

William Blumenthal, General Counsel, John F. Daly, Deputy General Counsel and John Andrew Singer, Attorney, Federal Trade Commission, Washington, D.C., for Appellee.

Daniel S. Kleinberger, Professor, William Mitchell College of Law, St. Paul, MN, as Amicus Curiae.

CANADY, J.

In this case we consider a question of law certified by the United States Court of Appeals for the Eleventh Circuit concerning the rights of a judgment creditor, the appellee Federal Trade Commission (FTC), regarding the respective ownership interests of appellants Shaun Olmstead and Julie Connell in certain Florida single-member limited liability companies (LLCs). Specifically, the Eleventh Circuit certified 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 ***78** single-member limited liability company to satisfy an outstanding judgment." *Fed. Trade Comm'n v. Olmstead,* 528 F.3d 1310, 1314 (11th Cir.2008). We have discretionary jurisdiction under article V, section 3(b)(6), Florida Constitution.

The appellants contend that the certified question should be answered in the negative because the only remedy available against their ownership interests in the single-member LLCs is a charging order, the sole remedy authorized by the statutory provision referred to in the certified question. The FTC argues that the certified question should be answered in the affirmative because the statutory charging order remedy is not the sole remedy available to the judgment creditor of the owner of a single-member limited liability company.

For the reasons we explain, we 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. In line with our analysis, we rephrase the certified question as follows: "Whether 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." We answer the rephrased question in the affirmative.

I. BACKGROUND

The appellants, through certain corporate entities, "operated an advance-fee credit card scam." *Olmstead,* 528 F.3d at 1311–12. In response to this scam, the FTC sued the appellants and the corporate entities for unfair or deceptive trade practices. Assets of these defendants were frozen and placed in receivership. Among the assets placed in receivership were several single-member Florida LLCs in which either appellant Olmstead or appellant Connell was the sole member. Ultimately, the FTC obtained judgment for injunctive relief and for more than $10 million in restitution. To partially satisfy that judgment, the FTC obtained—over the appellants' objection—an order compelling appellants to endorse and surrender to the receiver all of their right, title, and interest in their LLCs. This order is the subject of the appeal in the Eleventh Circuit that precipitated the certified question we now consider.

II. ANALYSIS

In our analysis, we first review the general nature of LLCs and of the charging order remedy. We then outline the specific relevant provisions of the Florida Limited Liability Company Act (LLC Act), chapter 608, Florida Statutes (2008). Next, we

discuss the generally available creditor's remedy of levy and execution under sale. Finally, we explain the basis for our conclusion that Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment. In brief, this conclusion rests on the uncontested right of the owner of the single-member LLC to transfer the owner's full interest in the LLC and the absence of any basis in the LLC Act for abrogating in this context the long-standing creditor's remedy of levy and sale under execution.

A. Nature of LLCs and Charging Orders

[1][2][3] The LLC is a business entity originally created to provide "tax benefits akin to a partnership and limited liability akin to the corporate form." *Elf Atochem North Am., Inc. v. Jaffari,* 727 A.2d 286, 287 (Del.1999). In addition to eligibility for tax treatment like that afforded partnerships, LLCs are characterized by restrictions on the transfer of ownership ***79** rights that are related to the restrictions applicable in the partnership context. In particular, the transfer of management rights in an LLC generally is restricted. This particular characteristic of LLCs underlies the establishment of the LLC charging order remedy, a remedy derived from the charging order remedy created for the personal creditors of partners. *See City of Arkansas City v. Anderson,* 242 Kan. 875, 752 P.2d 673, 681–683 (1988) (discussing history of partnership charging order remedy). The charging order affords a judgment creditor access to a judgment debtor's rights to profits and distributions from the business entity in which the debtor has an ownership interest.

B. Statutory Framework for Florida LLCs

The rules governing the formation and operation of Florida LLCs are set forth in Florida's LLC Act. In considering the question at issue, we focus on the provisions of the LLC Act that set forth the authorization for single-member LLCs, the characteristics of ownership interests, the limitations on the transfer of ownership interests, and the authorization of a charging order remedy for personal creditors of LLC members.

Section 608.405, Florida Statutes (2008), provides that "[o]ne or more persons may form a limited liability company." A person with an ownership interest in an LLC is described as a "member," which is defined in section 608.402(21) as "any person who has been admitted to a limited liability company as a member in accordance with this chapter and has an economic interest in a limited liability company which may, but need not, be represented by a capital account." The terms "membership interest," "member's interest," and "interest" are defined as "a member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company's assets, voting rights, management rights, or any other rights under this chapter or the articles of organization or operating agreement." § 608.402(23), Fla. Stat. (2008). Section 608.431 provides that "[a]n interest of a member in a limited liability company is personal property."

Section 608.432 contains provisions governing the "[a]ssignment of member's interest." Under section 608.432(1), "[a] limited liability company interest is assignable in whole or in part except as provided in the articles of organization or operating agreement." An assignee, however, has "no right to participate in the management of the business and affairs" of the LLC "except as provided in the articles of organization or operating agreement" and upon obtaining "approval of all of the members of the limited liability company other than the member assigning a limited liability company interest" or upon "[c]ompliance with any procedure provided for in the articles of organization or operating agreement." *Id.* Accordingly, an assignment of a membership interest will not necessarily transfer the associated right to participate in the LLC's management. Such an assignment which does not transfer management rights only "entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or

similar item to which the assignor was entitled, to the extent assigned." § 608.432(2)(b), Fla. Stat. (2008).

Section 608.433 —which is headed "Right of assignee to become member"—reiterates that an assignee does not necessarily obtain the status of member. Section 608.433(1) states: "Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited*80 liability company interest may become a member only if all members other than the member assigning the interest consent." Section 608.433(4) sets forth the provision—mentioned in the certified question—which authorizes the charging order remedy for a judgment creditor of a member:

> 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.

C. Generally Available Creditor's Remedy of Levy and Sale under Execution

[4][5] Section 56.061, Florida Statutes (2008), provides that various categories of real and personal property, including "stock in corporations," "shall be subject to levy and sale under execution." A similar provision giving judgment creditors a remedy against a judgment debtor's ownership interest in a corporation has been a part of the law of Florida since 1889. *See* ch. 3917, Laws of Fla. (1889) ("That shares of stock in any corporation incorporated by the laws of this State shall be subject to levy of attachments and executions, and to sale under executions on judgments or decrees of any court in this State."). An LLC is a type of corporate entity, and an ownership interest in an LLC is personal property that is reasonably understood to fall within the scope of "corporate stock." "The general rule is that where one has any 'interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.' " *Bradshaw v. Am. Advent Christian Home & Orphanage,* 145 Fla. 270, 199 So. 329, 332 (1940) (quoting *Croom v. Ocala Plumbing & Electric Co.,* 62 Fla. 460, 57 So. 243, 245 (1911)).

At no point have the appellants contended that section 56.061 does not by its own terms extend to an ownership interest in an LLC or that the order challenged in the Eleventh Circuit did not comport with the requirements of section 56.061. Instead, they rely solely on the contention that the Legislature adopted the charging order remedy as an exclusive remedy, supplanting section 56.061.

D. Creditor's Remedies Against the Ownership Interest in a Single–Member LLC

Since the charging order remedy clearly does not authorize the transfer to a judgment creditor of all an LLC member's "right, title and interest" in an LLC, while section 56.061 clearly does authorize such a transfer, the answer to the question at issue in this case turns on whether the charging order provision in section 608.433(4) always displaces the remedy available under section 56.061. Specifically, we must decide whether section 608.433(4) establishes the exclusive judgment creditor's remedy—and thus displaces section 56.061 —with respect to a judgment debtor's ownership interest in a single-member LLC.

[6] As a preliminary matter, we recognize the uncontested point that the sole member in a single-member LLC may freely transfer the owner's entire interest in the LLC. This is accomplished through a simple assignment of the sole member's membership interest to the transferee. Since such an interest is freely and fully alienable by its owner, section 56.061 authorizes a judgment creditor with a judgment for an amount equaling or exceeding *81 the value of the membership interest to levy on that interest and to obtain full title to it, including all the rights of membership—that is, unless the operation of section 56.061 has been limited by section

608.433(4).

Section 608.433 deals with the right of assignees or transferees to become members of an LLC. Section 608.433(1) states the basic rule that absent a contrary provision in the articles or operating agreement, "an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent." *See also* § 608.432(1)(a), Fla. Stat. (2008). The provision in section 608.433(4) with respect to charging orders must be understood in the context of this basic rule.

The limitation on assignee rights in section 608.433(1) has no application to the transfer of rights in a single-member LLC. In such an entity, the set of "all members other than the member assigning the interest" is empty. 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.

Section 608.433(4) recognizes the application of the rule regarding assignee rights stated in section 608.433(1) in the context of creditor rights. It provides a special means—i.e., a charging order—for a creditor to seek satisfaction when a debtor's membership interest is not freely transferable but is subject to the right of other LLC members to object to a transferee becoming a member and exercising the management rights attendant to membership status. *See* § 608.432(1), Fla. Stat. (2008) (setting forth general rule that an assignee "shall have no right to participate in the management of the business affairs of [an LLC]").

Section 608.433(4)'s provision that a "judgment creditor has only the rights of an assignee of [an LLC] interest" simply acknowledges that a judgment creditor cannot defeat the rights of nondebtor members of an LLC to withhold consent to the transfer of management rights. The provision does not, however, support an interpretation which gives a judgment creditor of the sole owner of an LLC less extensive rights than the rights that are freely assignable by the judgment debtor. *See In re Albright,* 291 B.R. 538, 540 (D.Colo.2003) (rejecting argument that bankruptcy trustee was only entitled to a charging order with respect to debtor's ownership interest in single-member LLC and holding that "[b]ecause there are no other members in the LLC, the entire membership interest passed to the bankruptcy estate"); *In re Modanlo,* 412 B.R. 715, 727–31 (D.Md.2006) (following reasoning of *Albright*).

Our understanding of section 608.433(4) flows from the language of the subsection which limits the rights of a judgment creditor to the rights of an assignee but which does not expressly establish the charging order remedy as an exclusive remedy. The relevant question is not whether the purpose of the charging order provision—i.e., to authorize a special remedy designed to reach no further than the rights of the nondebtor members of the LLC will permit—provides a basis for implying an exception from the operation of that provision for single-member LLCs. Instead, the question is whether it is justified to infer that the LLC charging order mechanism is an *exclusive remedy.*

On its face, the charging order provision establishes a *nonexclusive* remedial mechanism. There is no express provision in the statutory text providing that the ***82** charging order remedy is the *only* remedy that can be utilized with respect to a judgment debtor's membership interest in an LLC. The operative language of section 608.433(4)—"the court may charge the [LLC] membership interest of the member with payment of the unsatisfied amount of the judgment with interest"—does not in any way suggest that the charging order is an exclusive remedy.

In this regard, the charging order provision in the LLC Act stands in stark contrast to the charging order provisions in both the Florida Revised Uniform Partnership Act, §§ 620.81001–.9902, Fla. Stat. (2008), and the Florida Revised Uniform Lim-

ited Partnership Act, §§ 620.1101–.2205, Fla. Stat. (2008). Although the core language of the charging order provisions in each of the three statutes is strikingly similar, the absence of an exclusive remedy provision sets the LLC Act apart from the other two statutes. With respect to partnership interests, the charging order remedy is established in section 620.8504, which states that it "provides the *exclusive remedy* by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership." § 620.8504(5), Fla. Stat. (2008) (emphasis added). With respect to limited partnership interests, the charging order remedy is established in section 620.1703, which states that it "provides the *exclusive remedy* which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest." § 620.1703(3), Fla. Stat. (2008) (emphasis added).

"[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent." 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:2 (7th ed.2008). "In the past, we have pointed to language in other statutes to show that the legislature 'knows how to' accomplish what it has omitted in the statute [we were interpreting]." *Cason v. Fla. Dep't of Mgmt. Services,* 944 So.2d 306, 315 (Fla.2006); *see also Horowitz v. Plantation Gen. Hosp. Ltd. P'ship.* 959 So.2d 176, 185 (Fla.2007); *Rollins v. Pizzarelli,* 761 So.2d 294, 298 (Fla.2000).

[7] The same reasoning applies here. The Legislature has shown—in both the partnership statute and the limited partnership statute—that it knows how to make clear that a charging order remedy is an exclusive remedy. The existence of the express exclusive-remedy provisions in the partnership and limited partnership statutes therefore decisively undermines the appellants' argument that the charging order provision of the LLC Act—which does not contain such an exclusive remedy provision—should be read to displace the remedy available under section 56.061.

[8] The appellants' position is further undermined by the general rule that "repeal of a statute by implication is not favored and will be upheld only where irreconcilable conflict between the later statute and earlier statute shows legislative intent to repeal." *Town of Indian River Shores v. Richey,* 348 So.2d 1, 2 (Fla.1977). We also have previously recognized the existence of a specific presumption against the "[s]tatutory abrogation by implication of an existing common law remedy, particularly if the remedy is long established." *Thornber v. City of Fort Walton Beach,* 568 So.2d 914, 918 (Fla.1990). The rationale for that presumption with respect to common law remedies is equally applicable to the "abrogation by implication" of a long-established ***83** statutory remedy. *See Schlesinger v. Councilman,* 420 U.S. 738, 752, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975) (" '[R]epeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available.") (quoting *Reg'l Rail Reorganization Act Cases,* 419 U.S. 102, 133, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). Here, there is no showing of an irreconcilable conflict between the charging order remedy and the previously existing judgment creditor's remedy and therefore no basis for overcoming the presumption against the implied abrogation of a statutory remedy.

Given the absence of any textual or contextual support for the appellants' position, for them to prevail it would be necessary for us to rely on a presumption contrary to the presumption against implied repeal—that is, a presumption that the legislative adoption of one remedy with respect to a particular subject abrogates by implication all existing statutory remedies with respect to the same subject. Our law, however, is antithetical to such a presumption of implied abrogation of remedies. *See*

Richey; Thornber; Tamiami Trail Tours, Inc. v. City of Tampa, 159 Fla. 287, 31 So.2d 468, 471 (Fla.1947).

In sum, we reject the appellants' argument because it is predicated on an unwarranted interpretive inference which transforms a remedy that is nonexclusive on its face into an exclusive remedy. Specifically, we conclude that there is no reasonable basis for inferring that the provision authorizing the use of charging orders under section 608.433(4) establishes the sole remedy for a judgment creditor against a judgment debtor's interest in single-member LLC. Contrary to the appellants' argument, recognition of the full scope of a judgment creditor's rights with respect to a judgment debtor's freely alienable membership interest in a single-member LLC does not involve the denial of the plain meaning of the statute. Nothing in the text or context of the LLC Act supports the appellants' position.

III. CONCLUSION

Section 608.433(4) does not displace the creditor's remedy available under section 56.061 with respect to a debtor's ownership interest in a single-member LLC. Answering the rephrased certified question in the affirmative, we hold that a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment.

It is so ordered.

QUINCE, C.J., and PARIENTE, LABARGA, and PERRY, JJ., concur.
LEWIS, J., dissents with an opinion, in which POLSTON, J., concurs.

LEWIS, J., dissenting.

I cannot join my colleagues in the judicial rewriting of Florida's LLC Act. Make no mistake, the majority today steps across the line of statutory interpretation and reaches far into the realm of rewriting this legislative act. The academic community has clearly recognized that to reach the result of today's majority requires a judicial rewriting of this legislative act. *See, e.g.,* Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax and Business Law,* ¶ 1.04[3][d] (2008) (discussing fact that statutes which do not contemplate issues with judgment creditors of single-member LLCs "invite *Albright-style judicial invention* "); Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox,* 54 S.D. L.Rev. 199, 202 (2009); Larry E. Ribstein, ***84***Reverse Limited Liability and the Design of Business Associations,* 30 Del. J. Corp. L. 199, 221–25 (2005) ("The situation in *Albright* theoretically might seem to be better redressed through explicit application of traditional state remedies than by a federal court trying to *shoehorn its preferred result into the state LLC statute.* The problem ... is that no state remedy is appropriate because the asset protection was explicitly permitted by the applicable statute. The appropriate solution, therefore, lies in *fixing the statute.*" (emphasis supplied)); Thomas E. Rutledge & Thomas Earl Geu, *The Albright Decision—Why an SMLLC Is Not an Appropriate Asset Protection Vehicle,* Bus. Entities, Sept.-Oct.2003, at 16; Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders,* Bus. Entities, Sept.-Oct.2006, at 29. (stating that the *Albright* court "ignored Colorado law with respect to the applicability of a charging order" where the "statute does not exempt single-member LLCs from the charging order limitation"). An adequate remedy is available without the extreme step taken by the majority in rewriting the plain and unambiguous language of a statute. This is extremely important and has far-reaching impact because the principles used to ignore the LLC statutory language under the current factual circumstances apply with equal force to multimember LLC entities and, in essence, today's decision crushes a very important element for all LLCs in Florida. If the remedies available under the LLC Act do not apply here because the phrase "exclusive remedy" is not present, the same theories apply to multimember LLCs and render the assets of all LLCs vulnerable.

I would answer the certified question in the negative based on the plain language of the statute and an *in pari materia* reading of chapter 608 in its entirety. At the outset, the majority signals its departure from the LLC Act as it rephrases the certified question to frame the result. The question certified by the Eleventh Circuit requested this Court to address whether, *pursuant to section 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. The majority modifies the certified question and fails to directly address the critical issue of whether the charging order provision applies uniformly to all limited liability companies regardless of membership composition. In addition, the majority advances a position with regard to chapter 56 of the Florida Statutes that was neither asserted by the parties nor discussed in the opinion of the federal court.

Despite the majority's claim that it is not creating an exception to the charging order provision of the statute for single-member LLCs, its analysis necessarily does so in contravention of the plain statutory language and general principles of Florida law. The LLC Act inherently displaces the availability of the execution provisions in chapter 56 of the Florida Statutes by providing a remedy that is intended to prevent judgment creditors from seizing ownership of the membership interests in an LLC and from liquidating the separate assets of the LLC. In doing so, the LLC Act applies uniformly to single-and multimember limited liability companies, and does *not* provide either an implicit or express exception that permits the *involuntary* transfer of all right, title, and interest in a single-member LLC to a judgment creditor. The statute also does not permit a judgment creditor to liquidate the assets of a non-debtor LLC in the manner allowed by the majority today. Therefore, under the current statutory scheme, a judgment creditor seeking satisfaction must follow the statutory remedies specifically afforded under chapter 608, which include but are not limited to a ***85** charging order, regardless of the membership composition of the LLC.

Although this plain reading may require additional steps for judgment creditors to satisfy, an LLC is a purely statutory entity that is created, authorized, and operated under the terms required by the Legislature. This Court does *not* possess the authority to judicially rewrite those operative statutes through a speculative inference not reflected in the legislation. The Legislature has the authority to amend chapter 608 to provide any additional remedies or exceptions for judgment creditors, such as an exception to the application of the charging order provision to single-member LLCs, if that is the desired result. However, by basing its premise on principles of law with regard to *voluntary* transfers, the majority suggests a result that can only be achieved by rewriting the clear statutory provisions. In effect, the majority accomplishes its result by judicially legislating section 608.433(4) out of Florida law.

For instance, the majority disregards the principle that in general, an LLC exists separate from its owners, who are defined as members under the LLC Act. *See* §§ 608.402(21) (defining "member"), 608.404, Fla. Stat. (2008) ("[E]ach limited liability company organized and existing under this chapter shall have the same powers as an individual to do all things necessary to carry out its business and affairs...."). In other words, an LLC is a distinct entity that operates independently from its individual members. This characteristic directly distinguishes it from partnerships. Specifically, an LLC is not immediately responsible for the personal liabilities of its members. *See Litchfield Asset Mgmt. Corp. v. Howell,* 70 Conn.App. 133, 799 A.2d 298, 312 (2002), *overruled on other grounds by Robinson v. Coughlin,* 266 Conn. 1, 830 A.2d 1114 (2003). The majority obliterates the clearly defined lines between the LLC as an entity and the owners as members.

Further, when the Legislature amended the LLC requirements for formation to allow single-member LLCs, it did *not* enact other changes to the

provisions in the LLC Act relating to an involuntary assignment or transfer of a membership interest to a judgment creditor of a member or to the remedies afforded to a judgment creditor. Moreover, no other amendments were made to the statute to demonstrate any different application of the provisions of the LLC Act to single-member and multimember LLCs. For example, the LLC Act generally does not refer to the number of members in an LLC within the separate statutory provisions. The Legislature is presumed to have known of the charging order statute and other remedies when it introduced the single-member LLC statute. Accordingly, by choosing not to make any further changes to the statute in response to this addition, the Legislature indicated its intent for the charging order provision and other statutory remedies to apply uniformly to all LLCs. This Court should not disregard the clear and plain language of the statute.

In addition, the majority fails to correctly set forth the status of a member in an LLC and the associated rights and interests that such membership entails. An owner of a Florida LLC is classified as a "member," which is defined as

> any person who has been *admitted to a limited liability company as a member* in accordance with this chapter *and* has an *economic interest* in a limited liability company which may, but need not, be represented by a capital account.

§ 608.402(21), Fla. Stat. (2008) ("Definitions") (emphasis supplied). Therefore, to be a member of a Florida LLC it is now necessary to be admitted as such under ***86** chapter 608 *and* to also maintain an economic interest in the LLC. Moreover, a member of an LLC holds and carries a "membership interest" that encompasses both governance and economic rights:

> "Membership interest," "member's interest," or "interest" means a member's *share of the profits and the losses* of the limited liability company, the *right to receive distributions* of the limited liability company's assets, *voting rights, management rights,* or *any other rights* under this chapter or the articles of organization or operating agreement.

§ 608.402(23), Fla. Stat. (2008) (emphasis supplied). This provision was adopted during the 1999 amendments, which was after the modification to allow single-member LLCs. *See* ch. 99–315, § 1, at 4, Laws of Fla. In stripping the statutory protections designed to protect an LLC as an entity distinct from its owners, the majority obliterates the distinction between economic and governance rights by allowing a judgment creditor to seize both from the member and to liquidate the separate assets of the entity.

Consideration of an involuntary lien against a membership interest must address what interests of the member may be involuntarily transferred. Contrary to the view expressed by the majority, a member of an LLC is restricted from freely transferring interests in the entity. For instance, because an LLC is a legal entity that is separate and distinct from its members, the specific LLC property is not transferable by an individual member. In other words, possession of an economic and governance interest does not also create an interest in specific LLC property or the right or ability to transfer that LLC property. *See* § 608.425, Fla. Stat. (2008) (stating that all property originally contributed to the LLC or subsequently acquired is LLC property); *see also* Bishop, *supra,* 54 S.D. L.Rev. at 226 (discussing in context of federal tax liens the fact that "[t]ypically, a member is not a co-owner and has no transferable interest in limited liability company property") (citing Unif. Ltd. Liab. Co. Act § 501 (1996), 6A U.L.A. 604 (2003)). The specific property of an LLC is not subject to attachment or execution except on an express claim against the LLC itself. *See* Bishop & Kleinberger, *supra,* ¶ 1.04[3][d].

The interpretation of the statute advanced by the majority simply ignores the separation between the particular separate assets of an LLC and a member's specific membership interest in the LLC. The ability of a member to *voluntarily* assign his, her, or its interest does not subject the property of an LLC

to execution on the judgment. Under the factual circumstances of the present case, the trial court forced the judgment debtors to *involuntarily* surrender their membership interests in the LLCs and then authorized a receiver to liquidate the specific LLC assets to satisfy the judgment. In doing so, the trial court ignored the clearly recognized legal separation between the specific assets of an LLC and a member's interest in profits or distributions from those assets. *See F.T.C. v. Peoples Credit First, LLC,* No. 8:03–CV–2353–T–TBM, 2006 WL 1169677, *2 (M.D.Fla. May 3, 2006) (ordering the appellants to "endorse and surrender to the Receiver, all of their right, title and interest in their ownership/equity unit certificates" of the LLCs for the receiver to liquidate the assets of these companies). The majority approves of this disregard by improperly applying principles of voluntary transfers to allow creditors of an LLC member to attack and liquidate the separate LLC assets.

Additionally, the transfer of a membership interest is restricted by law and by the internal operating documents of the ***87** LLC. Although a member may freely transfer an economic interest, a member may not voluntarily transfer a management interest without the consent of the other LLC members. *See* § 608.432(1), Fla. Stat. (2008). Contrary to the view of the majority, in the context of a single-member LLC, the restraint on transferability expressly provided for in the statute does not disappear. Unless admitted as a member to the LLC, the transferee of the economic interest *only* receives the LLC's financial distributions that the transferring member would have received absent the transfer. *See* § 608.432(2), Fla. Stat. (2008); *see also* Bishop & Kleinberger, *supra,* ¶ 1.01[3][c]. Consequently, a member may cease to be a member upon the assignment of the *entire* membership interest (i.e., transferring all of the following: (1) share of the profits and losses of the LLC, (2) right to receive distributions of LLC assets; (3) voting rights, (4) management rights, and (5) any other rights). *See* §§ 608.402(23), 608.432(2)(c), Fla. Stat. (2008). Furthermore, a transferring member no longer qualifies under the statutory definition of "member" upon a transfer of the *entire* economic interest. *See* § 608.402(21), Fla. Stat. (2008) (defining "member" as a person who has an *economic* interest in an LLC). However, unless otherwise provided in the governing documents of the entity (i.e., the articles of incorporation and the operating agreement), the pledge or granting of "a security interest, lien, or other encumbrance in or against, any or all of the membership interest of a member *shall not cause the member to cease to be a member* or to have the power to exercise any rights or powers of a member." § 608.432(2)(c), Fla. Stat. (2008) (emphasis supplied). Accordingly, a judgment or a charging order does *not* divest the member of a membership interest in the LLC as the member retains governance rights. It only provides the judgment creditor the economic interest until the judgment is satisfied.

Whether the LLC Act allows a judgment creditor of an individual member to obtain this entire membership interest to exert full control over the assets of the LLC is the heart of the underlying dispute. Neither the Uniform Limited Liability Company Act nor the Florida LLC Act contemplates the present situation in providing for single-member LLCs but restricting the transferability of interests. This problematic issue is not one solely limited to our state, though our decision must be based solely on the language and purpose of the Florida LLC Act. Thus, in my view, this Court must apply the plain meaning of the statute unless doing so would render an absurd result. In contrast, the majority simply rewrites the statute by ignoring those inconvenient provisions that preclude its result.

Legislative Intent With Regard to the Rights of a Judgment Creditor of a Member

I understand the policy concerns of the FTC and the majority with the inherent problems in the transferability of both governance and economic interests under the LLC Act because the plain language does not contemplate the impact of a judgment creditor seeking to obtain the entire member-

ship interest of a single-member LLC and to obtain the ability to liquidate the assets of the LLC. The Florida statute simply does not create a different mechanism for obtaining the assets of a single-member LLC as opposed to a multimember LLC and, therefore, there is no room in the statutory language for different rules.

However, I decline to join in rewriting the statute with inferences and implications, which is the approach adopted by the majority. This Court generally avoids ***88** "judicial invention," as accomplished by the majority, when the statute may be construed under the plain language of the relevant legislative act. *See* Bishop & Kleinberger, *supra,* ¶ 1.04[3][d]. In construing a statute, we strive to effectuate the Legislature's intent by considering first the statute's plain language. *See Kasischke v. State,* 991 So.2d 803, 807 (Fla.2008) (citing *Borden v. East–European Ins. Co.,* 921 So.2d 587, 595 (Fla.2006)). When, as it is here, the statute is clear and unambiguous, we do *not* "look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels v. Fla. Dep't of Health,* 898 So.2d 61, 64 (Fla.2005). This is especially applicable in the instance of a business entity created solely by state statute.

If the statute had been written as the majority suggests here, I would agree with the result requested by the FTC. However, the underlying conclusion lacks statutory support. By reading only self-selected provisions of the statute to support this result, the majority disregards the remainder of the LLC Act, which destroys the isolated premise that the charging order provision only applies to multimember LLCs and that other statutory restrictions do not exist.

Additionally, exceptions not found within the statute cannot simply be read into the statute, as the majority does by holding that single-member LLCs are an *implicit* exception to the charging order provision. The remedy provided to the FTC by the federal district court and approved by the majority in this instance—that a judgment creditor of a single-member LLC is entitled to receive a surrender and transfer of the full right, title, and interest of the judgment debtor and to liquidate the LLC assets—is *not* provided for under the plain language of the LLC Act without judicially writing an exception into the statute.

Judgment Creditor Can Charge the Debtor Member's Interest in the LLC With Payment of the Unsatisfied Judgment

As a construct of statutory creation, an LLC is an entity separate and distinct from its members, and thus the liability of the LLC is not directly imputed to its members. In a similar manner, the liability of individual members is not directly imposed separately upon the LLC.

Although a member's interest in an LLC is considered to be personal property, *see* § 608.431, Fla. Stat. (2008), and personal property is generally an asset that may be levied upon by a judgment creditor under Florida law, *see* § 56.061, Fla. Stat. (2008) , there are statutory restrictions in the LLC context. Any rights that a judgment creditor has to the personal property of a judgment debtor are limited to those provided by the applicable creating statute.

The appellants contend that if a judgment creditor may seek satisfaction of a member's personal debt from a non-party LLC, the plain language of the LLC Act limits the judgment creditor to a charging order. *See* § 608.433(4), Fla. Stat. (2008). A charging order is a statutory procedure whereby a creditor of an individual member can satisfy its claim from the member's interest in the limited liability company. *See Black's Law Dictionary* 266 (9th ed.2009) (defining term in the context of partnership law). It is understandable that the FTC challenges the charging order concept being deemed a remedy for a judgment creditor because, from the creditor's perspective, a charging order may not be as attractive as just seizing the LLC assets. For example, a creditor may not receive *any* satisfaction of the judgment if there are no actual distributions from the LLC to the judgment creditor through the

debtor-member's economic interest. *See* Elizabeth M. Schurig & Amy P. Jetel, *A *89 Shocking Revelation! Fact or Fiction? A Charging Order is the Exclusive Remedy Against a Partnership Interest,* Probate & Property, Nov.-Dec.2003, at 57, 58. The preferred creditor's remedy would be a transfer and surrender of the membership interest that is subject to the charging order, which is a more permanent remedy and may increase the creditor's chances of having the debt satisfied. *See id.*

The application of the charging order provision, including its consequences and implications, has been hotly debated in the context of both partnership and LLC law because of the similarities of these entities. The language of the charging order provision in the Revised Uniform Limited Partnership Act (1976), as amended in 1985, is virtually identical to that used in the Uniform Limited Liability Company Act, as well as in the Florida LLC Act. *See* §§ 608.433(4), 620.153, Fla. Stat. (2008). The Uniform Limited Partnership Act of 2001 significantly changed this provision by explicitly allowing execution upon a judgment debtor's partnership interest. *See Schurig & Jetel, supra,* at 58. However, the Florida Partnership Act provides that a charging order is the exclusive remedy for judgment creditors. *See* § 620.8504(5), Fla. Stat. (2008) (stating the charging order provision provides the "exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership"). In the context of partnership interests, Florida courts have also determined that a charging order is the *exclusive* remedy for judgment creditors based on the straightforward language of the statute. *See Givens v. Nat'l Loan Investors L.P.,* 724 So.2d 610, 612 (Fla. 5th DCA 1998) (holding that charging order is the exclusive remedy for a judgment creditor of a partner); *Myrick v. Second Nat'l Bank of Clearwater,* 335 So.2d 343, 345 (Fla. 2d DCA 1976) (substantially similar). The Florida LLC Act has neither adopted an explicit surrender-and-transfer remedy nor does it include a provision explicitly stating that the charging order is the exclusive remedy of the judgment creditor. The plain language of the charging order provision only provides one remedy that a judgment creditor may choose to request from a court and that the court may, in its discretion, choose to impose. *See* § 608.433(4), Fla. Stat. (2008).

To support its conclusion that charging orders are inapplicable to single-member LLCs, the majority compares the provision in the partnership statute that mandates a charging order as an exclusive remedy to the non-exclusive provision in the LLC Act. The exclusivity of the remedy is irrelevant to this analysis. By relying on an inapplicable statute, the majority ignores the plain language of the LLC Act and the other restrictions of the statute, which universally apply the use of a charging order to judgment creditors of all LLCs, regardless of the composition of the membership. The majority opinion now eliminates the charging order remedy for multimember LLCs under its theory of "nonexclusivity" which is a disaster for those entities.

Plain Meaning of the Statute's Actual Language

The charging order provision does not act as a reverse-asset shield against the creditors of a member. Instead, the LLC Act implements statutory restrictions on the transfer and assignment of membership interests in an LLC. These restrictions limit the mechanisms available to a judgment creditor of a member of any type of LLC to obtain satisfaction of a judgment against the membership interest. Specifically, section 608.433(4) grants a court of competent jurisdiction the discretion***90** to enter a charging order against a member's interest in the LLC in favor of the judgment creditor:

> 608.433. Right of assignee to become member.—
>
> (1) Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent.

(2) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of the assigning member under the articles of organization, the operating agreement, and this chapter. An assignee who becomes a member also is liable for the obligations of the assignee's assignor to make and return contributions as provided in s. 608.4211 and wrongful distributions as provided in s. 608.428. However, the assignee is not obligated for liabilities which are unknown to the assignee at the time the assignee became a member and which could not be ascertained from the articles of organization or the operating agreement.

(3) If an assignee of a limited liability company interest becomes a member, the assignor is not released from liability to the limited liability company under ss. 608.4211, 608.4228, and 608.426.

(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....

§ 608.433, Fla. Stat. (2008) (emphasis supplied).

The majority asserts that the placement of the charging order provision within the section titled "Right of assignee to become member" mandates that the provision only applies to circumstances where the interest of the member is subject to the rights of other LLC members. There is absolutely nothing to support the notion that the Legislature's placement of the charging order provision as a subsection of section 608.433, instead of as a separately titled section elsewhere in the statute, was intended to unilaterally link its application only to the multimember context. For instance, the Revised Uniform Limited Liability Company Act, unlike the Florida statute, places the charging order provision as a separately titled section within the article that discusses transferable interests and rights of transferees *and* creditors. *See* Unif. Ltd. Liab. Co. Act § 503 (revised 2006), 6B U.L.A. 498 (2008). Other states have also adopted a statutory scheme that places the charging order remedy within a separate provision specifically dealing with the rights of a judgment creditor. *See* Conn. Gen.Stat. § 34–171 (2007). Thus, the majority's interpretation would again fail by a mere movement of the charging order provision to a separately titled section within the Act.

In contrast to the majority, my review of this provision begins with the actual language of the statute. In construing a statute, it is our purpose to effectuate legislative intent because "legislative intent is the polestar that guides a court's statutory construction analysis." *See Polite v. State,* 973 So.2d 1107, 1111 (Fla.2007) (citing *Bautista v. State,* 863 So.2d 1180, 1185 (Fla.2003)) (quoting *State v. J.M.,* 824 So.2d 105, 109 (Fla.2002)). A statute's ***91** plain and ordinary meaning must be given effect unless doing so would lead to an unreasonable or absurd result. *See City of Miami Beach v. Galbut,* 626 So.2d 192, 193 (Fla.1993). Here, the plain language establishes a charging order remedy for a judgment creditor that the court *may* impose. This section provides the only mechanism in the *entire* statute specifically allocating a remedy for a judgment creditor to attach the membership interest of a judgment debtor. In the multimember context, the uncontested, general rule is that a charging order is the appropriate remedy, even if the language indicates that such a decision is within the court's discretion. *See Myrick,* 335 So.2d at 344. As the Second District explained:

Rather, the charging order is the essential first step, and all further proceedings must occur under the supervision of the court, which may take all appropriate actions, including the appointment

of a receiver if necessary, to protect the interests of the various parties.

Id. at 345. Without express language to the contrary, the discretionary nature of this remedy applies with equal force to single-and multimember LLCs, which the majority erases from the statute.

Nevertheless, the certified question before us is not the discretionary nature of this remedy but whether a court should even apply the charging order remedy to single-member LLCs. The majority rephrases the question certified to this Court as not considering whether an exception to the charging order provision should be implied for single-member LLCs. In doing so, the majority unjustifiably alters and recasts the question posited by the federal appellate court to fit the majority's result. The convoluted alternative presented by the majority is premised on a limited application of a charging order without express language in the statutory scheme to support this assertion.

Here, the plain language crafted by the Legislature does *not* limit this remedy to the multimember circumstance, as the majority holds. Further, exceptions not made in a statute generally cannot be read into the statute, unless the exception is within the reason of the law. *See Cont'l Assurance Co. v. Carroll,* 485 So.2d 406, 409 (Fla.1986) ("This Court cannot grant an exception to a statute nor can we construe an unambiguous statute different from its plain meaning."); *Dobbs v. Sea Isle Hotel,* 56 So.2d 341, 342 (Fla.1952) ("We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally.... We cannot write into the law any other exception...."). Thus, without going behind the plain language of the statute, at first blush, the statute applies equally to all LLCs, regardless of membership composition.

The distinction asserted by the FTC is clearly inconsistent with the plain language of section 608.434 with regard to the proper method for a judgment creditor to reach the interest of a member in a LLC in that a complete surrender of the membership interest and the subsequent liquidation of the LLC assets are *not* contemplated by the LLC Act. The majority's interpretation that the charging order remedy only applies to multimember LLCs can only be given effect if the plain language of this provision renders an absurd result, which it does not.

The purpose of creating the charging order provision was never limited to the protection of "innocent" members of an LLC. Moreover, when amending the LLC Act to permit single-member LLCs, the Legislature did not also amend the assignment of interest and charging order provisions to create different procedures for ***92** single-and multimember LLCs. The appellants argue that this indicates a manifestation of legislative intent; however, it appears more likely that our Legislature, as with many other states, had not yet contemplated the situation before us. Even so, the appropriate remedy in this circumstance is not for this Court to impose its speculative interpretation, but for the Legislature to amend the statute to reflect its specific intention, if necessary. When interpreting a statute that is unambiguous and clear, this Court defers to the Legislature's authority to create a new limitation and right of action. Here, the actual language of the statute does not distinguish between the number of members in an LLC. Thus, the charging order applies with equal force to both single-member and multimember LLCs, and the assignment provision of section 608.433 does not render an absurd result.

The majority purports to base its analysis on the plain language of the statute. However, the FTC and a multitude of legal theorists agree that the plain language of the statute does not support this result. *See e.g.,* Bishop & Kleinberger, *supra,* ¶ 1.04[3][d]; Bishop, *supra,* 54 S.D. L.Rev. at 202; Ribstein, *supra,* 30 Del. J. Corp. L. at 221–25; Rutledge & Geu, *supra,* Bus. Entities, Sept.-Oct.2003 at 16; Stein, *supra,* Bus. Entities, Sept.-Oct.2006 at 28. All authorities recognize that the sole way to

achieve the result desired by the FTC and the majority is to ignore the plain language of the statute. No external support exists for the majority's bare assertions.

Rights of an Assignee

The plain language of section 608.433(4) applies the charging provision to the judgment creditor of both a single-member and multimember LLC. The next analytical step is to determine what rights that charging order provision grants the judgment creditor. To the extent that a membership interest is charged with a judgment, the plain text of the statute specifically provides that the judgment creditor only possesses the rights of an assignee of such interest. *See* § 608.433(4), Fla. Stat. (2008) ("To the extent so charged, the judgment creditor has only the rights of an assignee of such interest.").

To determine the rights of an assignee of such an interest, we look to section 608.432, which defines these rights. To divine the intent of the Legislature, we construe related statutory provisions together, or *in pari materia,* to achieve a consistent whole that gives full, harmonious effect to all related statutory provisions. *See Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 199 (Fla.2007) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla.1992)). The FTC asserts that the rights delineated in this section render an absurd result when applied to single-member LLCs; however, the FTC ignores that the same rule applies even if only a *part* of a member's interest is needed to satisfy a debt amount. Further, an assignee is entitled solely to an economic interest and is not entitled to governance rights without the unanimous approval of the other members or as otherwise provided in the articles of incorporation or the operating agreement.

The plain reading of this provision does not establish the judgment creditor as an assignee of such interest, only that to the extent of the judgment amount charged to the economic interest, the judgment creditor has the same rights as an assignee. Though section 608.433(4) directs that the judgment creditor has only the rights of an assignee of such interest, as provided in section 608.432, it is important to clarify that the judgment creditor does not become***93** an assignee; the language merely indicates that the judgment creditor's rights do not *exceed* those of an assignee.

This clear distinction can be seen when considering the voluntary and involuntary nature of these different interests—an assignment is generally a voluntary action made by an assignor, whereas a charging order is clearly an involuntary assignment by a judgment debtor. For that reason, the majority formulates a false conclusion that section 608.433(1) provides a foundation for the bare assertion that a charging order is inapplicable in the context of a single-member LLC. Exploiting this false foundation, the majority asserts a result that is unsupportable when considered *in pari materia* with the entirety of the statutory scheme.

The question before this Court requires articulation of a general principle of law that applies to all types of judgments, whether less than, equal to, or greater than the value of a membership interest, and to all types of LLCs. Reading section 608.433(4) and 608.432 together, a judgment creditor may be assigned a portion of the economic interest, depending on the amount of the judgment. This provision contemplates that a charging order may not encompass a member's entire membership interest if the judgment is for less than the available economic distributions of an LLC. For instance, if the LLC membership interest here were worth more than the $10 million judgment, it would be unnecessary under this provision to transfer the full economic interest in the LLC to satisfy the judgment. Further, a member does not lose the economic interest *and* membership status unless *all* of the economic interest is charged to the judgment creditor. *See* § 608.432(2)(c), Fla. Stat. (2008). Thus, if the judgment were for less than the value of either the membership interest or the assets in the LLC, the members could transfer a *portion* of their economic interest and still retain their membership interest, in

that they would still hold an economic and governance interest in the LLC. The FTC would then only have the right to receive distributions or allocations of income in an amount corresponding to satisfaction of a partial economic interest. Regardless of the amount of the interest assigned, the judgment creditor does not immediately receive a governance interest. *See* § 608.432(1), (2), Fla. Stat. (2008).

In such a circumstance, the result contemplated by the FTC does not come to pass—the single member maintains his, her, or its membership rights because a member only ceases to be a member and to have the power to exercise any governance rights upon assignment of *all* of the economic interest of such member. *See id.* The majority disregards this factual possibility and considers only the application of the statutory scheme in the context of a judgment that is equal to or greater than the value of the membership interest. Under the majority's interpretation of the statute, a judgment creditor could force a single-member LLC to surrender all of its interest and liquidate the assets specifically owned by the LLC, even if the judgment were for less than the assets' worth.

Alternative Remedies

Currently, the plain language of the statute provides additional remedies to the charging order provision for judgment creditors seeking satisfaction on a judgment that is equal to or greater than the economic distributions available under a charging order—(1) dissolution of the LLC, (2) an order of insolvency against the judgment debtor, or (3) an order conflating the LLC and the member to allow a court to reach the property assets of the LLC. First, upon the issuance of a charging order that exceeds a member's economic ***94** interest in an LLC for satisfaction of the judgment, dissolution may be achieved because the remaining member ceases to possess an economic interest and governance rights in the LLC following the assignment of *all* of its membership interest. *See* § 608.432(2)(c), Fla. Stat. (2008) ("Assignment of member's interest"). The statutory provision with regard to the assignment of a member's interest provides, in relevant part:

> (2) Unless otherwise provided in the articles of organization or operating agreement:
>
> ....
>
> (c) A *member ceases to be a member* and *to have the power to exercise any rights or powers of a member upon assignment* of *all* of the membership interest of such member. Unless otherwise provided in the articles of organization or operating agreement, the pledge of, or *granting of* a security interest, lien, or *other encumbrance in or against, any or all of the membership interest of a member shall not cause the member to cease to be a member* or to have the power to exercise any rights or powers of a member.

Id. (emphasis supplied). This demonstrates a clear and unambiguous distinction between a voluntary assignment of *all* the interest and the granting of an encumbrance against *any or all* of the membership interest. Because a "member" is defined as an actual or legal person admitted as such under chapter 608, who also has an *economic interest* in the LLC, it is the assignment of *all* of that economic interest that divests the member of his, her, or its status and power. Thus, if the charging order is only for a part of the economic interest held by the judgment debtor, the statute does not require that the member cease to be a member. *See* §§ 608.402(21), 608.432(2)(c), Fla. Stat. (2008). If, on the other hand, the charging order is to the extent that it requires a surrender of *all* of the member's economic interest, in that circumstance, the member ceases to be a member under section 608.432(2)(c). In the case of a *member*-managed LLC, this would leave the LLC without anyone to govern its affairs. However, within the *manager*-managed LLC context, the manager would remain in a position to direct the LLC and distribute any profits according to any governing documents.

This provision need not be limited to single-member LLCs. For example, if the appellants had

entered into a multimember LLC, that entity would be subject to the same statutory construction issues as a single-member LLC. Once the FTC obtained a judgment against a member of the multimember LLC, a charging order would be lodged against that member's interest. In that circumstance, though there may be charging orders against separate membership interests, in essence the same divestiture of the membership interest would occur if the judgment was for *all* of each member's economic interest.

It is important to note, however, if an LLC becomes a shell or legal fiction with no actual governing members, the LLC shall be dissolved under section 608.441. The dissolution statute provides:

> (1) A limited liability company organized under this chapter shall be dissolved, and the limited liability company's affairs shall be concluded, upon the first to occur of any of the following events:
>
> ....
>
> (d) *At any time there are no members;* however, unless otherwise provided in the articles of organization or operating agreement, the limited liability company is not dissolved and is not required to be wound up if, within 90 days, or such other period as provided in the ***95** articles of organization or operating agreement, after the occurrence of the event that terminated the continued membership of the last remaining member, the personal or other legal representative of the last remaining member agrees in writing to continue the limited liability company and agrees to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member; or
>
> ....
>
> (4) Following the occurrence of any of the events specified in this section which cause the dissolution of the limited liability company, the limited liability company shall deliver articles of dissolution to the Department of State for filing.

§ 608.441(1)(d), (4), Fla. Stat. (2008) (emphasis supplied). A dissolved LLC continues its existence but does not carry on any business except that which is appropriate to wind up and liquidate its business and affairs under section 608.4431. Once dissolved, the liquidated assets may then be distributed to a judgment creditor holding a charging order. *See* § 608.444(1), Fla. Stat. (2008).

The judgment creditor may also seek an order of insolvency against the individual member, in which instance that member ceases to be a member of the single-member LLC, and the member's interest becomes part of the bankruptcy estate. In Florida, the commencement of a bankruptcy proceeding also terminates membership within an LLC. *See* §§ 608.402(4), 608.4237, Fla. Stat (2008) . The decisions advanced by the FTC involved bankruptcies of the judgment debtor, and the rights of a judgment creditor in a bankruptcy are substantially different than the rights of a judgment creditor generally. *See In re Modanlo,* 412 B.R. 715 (Bankr.D.Md.2006), *aff'd,* No. 06–2213, 266 Fed.Appx. 272, 2008 WL 481957 (4th Cir.2008); *In re Albright,* 291 B.R. 538, 539 (Bankr.D.Colo.2003). Upon commencement of a bankruptcy proceeding, a bankruptcy estate includes all legal or equitable property interests of the debtor. An LLC membership interest is the personal property of the member. Therefore, when a judgment debtor files for bankruptcy, or is subject to an order of insolvency, the judgment debtor effectively transfers any membership interest in an LLC to the bankruptcy estate. In this context, it is reasonable for the bankruptcy courts to construe the LLC Act to no longer require a charging order because the judgment debtor has passed the entire membership interest to the bankruptcy estate, and the trustee stands in the shoes of the judgment debtor, who is

now seeking reorganization of its assets. *See, e.g., In re Albright,* 291 B.R. at 541. The majority refuses to even acknowledge any of these approaches.

This bankruptcy context is distinguishable from the general case of a judgment creditor seeking to execute upon the assets of an LLC because the judgment may not meet or exceed the economic interest remaining in the LLC. Thus, the *Albright* bankruptcy situation should not alter our determination that the plain language of the statute applies the charging order provision to both single-and multimember LLCs. This may be a more complicated procedure than to allow a court to simply "shortcut" and rewrite the law and enter a surrender-and-transfer order of a member's entire right, title, and interest in an LLC as the majority accomplishes today. However, it is the *method prescribed by the statute.* Although the procedures created by the statute may involve multiple steps and legal proceedings, they are not ***96** absurd or irreconcilable with chapter 608 as a whole.

A Charging Order, in and of Itself, Does Not Entitle a Judgment Creditor to Seize and Dissolve a Florida LLC

Based on the plain language of the statute and the construction of chapter 608 *in pari materia,* I would answer the certified question in the negative: A court may *not* order a judgment debtor to surrender and transfer outright all "right, title, and interest" in the debtor's single-member LLC to satisfy an outstanding judgment. If a judgment creditor wishes to proceed against a single-member LLC, it may first request a court of competent jurisdiction to impose a charging order on the member's interest. If the judgment creditor is concerned that the member is constraining distribution of assets and incomes, the creditor may seek judicial remedies to enforce proper distribution. In addition, if the economic interest so charged is insufficient to satisfy the judgment, the judgment creditor may move through additional proceedings: (1) seek to dissolve the LLC and to have its assets liquidated and subsequently distributed to the judgment creditor; (2) seek an order of insolvency against the judgment debtor, in which case the trustee of the bankruptcy estate will control the assets of the LLC, or (3) request a court to pierce the liability shield to make available the personal assets of the company to satisfy the personal debts of its member. This plain reading of chapter 608 may create additional steps for judgment creditors and judgment debtors to satisfy, as characterized by the federal district court in this case. However, only the Legislature, as the architects of this statutorily created entity, has the authority to provide a more streamlined surrender of these rights, not the judicial branch through selective reading and rewriting of the statute. As enacted, the plain meaning of the statute is unambiguous and does not require "judicial invention" of exceptions that are clearly not provided in the LLC Act. If the Legislature wishes to make either an exception to the charging order provision for single-member LLCs or to provide additional remedies to judgment creditors, it may do so through an amendment of chapter 608.

Accordingly, I would answer the certified question in the negative. Under Florida law, a court does not have the authority to order an LLC member to surrender and transfer all right, title, and interest in an LLC and have LLC assets liquidated without first going through the statutory requirements created by the Legislature.

POLSTON, J., concurs.

Fla.,2010.
Olmstead v. F.T.C.
44 So.3d 76, 2010-1 Trade Cases P 77,079, 35 Fla. L. Weekly S357

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United States Court of Appeals,
Eleventh Circuit.
FEDERAL TRADE COMMISSION,
Plaintiff–Appellee,
v.
Shaun OLMSTEAD, Julie Connell, Defendants–Appellants,
v.
Mark Bernet, Receiver–Appellee.

No. 06–13254.
May 29, 2008.

Background: Federal Trade Commission (FTC), as judgment creditor, filed motion to compel judgment debtors' surrender of assets to receiver, including the assets in their non-party, single-member limited liability companies (LLCs), in partial satisfaction of the amended judgment entered against judgment debtors in this case. Judgment debtors objected. The United States District Court for the Middle District of Florida, No. 03-02353-CV-T-17-TBM, Thomas B. McCoun, III, United States Magistrate Judge, 2006 WL 1169677, granted the motion, and judgment debtors appealed.

Holding: The Court of Appeals held that question would be certified to the Supreme Court of Florida, as to whether, under Florida's Limited Liability Company Act, a court may order a judgment debtor to surrender all "right, title, and interest" in the judgment debtor's single-member limited liability company (LLC) to satisfy an outstanding judgment.

Question certified.

West Headnotes

[1] Federal Courts 170B 3045(7)

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3022 Procedural Matters
170Bk3045 Judgment; Orders
170Bk3045(7) k. Execution and enforcement. Most Cited Cases
(Formerly 170Bk420, 170Ak2692.1)

Proceedings in aid of judgment or execution are to be conducted in accordance with the procedure of the state where the court is located. Fed.Rules Civ.Proc.Rule 69(a)(1), 28 U.S.C.A.

[2] Federal Courts 170B 3107

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(C) Unsettled or Undecided Questions
170Bk3105 Withholding Decision; Certifying Questions
170Bk3107 k. Particular questions. Most Cited Cases
(Formerly 170Bk392)

Court of Appeals would certify to the Supreme Court of Florida question as to whether, under Florida's Limited Liability Company Act, a court may order a judgment debtor to surrender all "right, title, and interest" in the judgment debtor's single-member limited liability company (LLC) to satisfy an outstanding judgment, in action brought by the Federal Trade Commission (FTC), as judgment creditor, seeking to compel judgment debtors' surrender of assets in their non-party, single-member LLCs to receiver in partial satisfaction of amended judgment entered against them; Florida law was not sufficiently well-established for the Court of Appeals to determine with confidence whether the district court's surrender order was permissible under the Act. West's F.S.A. § 608.433(4).

[3] Federal Courts 170B 3108

170B Federal Courts

170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(C) Unsettled or Undecided Questions
170Bk3105 Withholding Decision; Certifying Questions
170Bk3108 k. Proceedings following certification. Most Cited Cases
(Formerly 170Bk392)
In certifying question to state supreme court, the Court of Appeals did not intend to restrict the issues considered by the state court.

[4] Federal Courts 170B 3108

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(C) Unsettled or Undecided Questions
170Bk3105 Withholding Decision; Certifying Questions
170Bk3108 k. Proceedings following certification. Most Cited Cases
(Formerly 170Bk392)
Latitude extends to state supreme court's restatement of issue or issues and the manner in which answers to certified question are given.

***1311** Thomas C. Little, Clearwater, FL, for Defendants–Appellants.

Michael D. Bergman, John F. Daly, John Andrew Singer, FTC, Washington, DC, Richard Oliver, Buchanan Ingersoll, PC, Tampa, FL, for Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Chief Judge, and KRAVITCH and ALARCÓN,[FN*] Circuit Judges.

FN* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO FLA. R. APP. P. 9.150(a). TO THE SUPREME COURT OF FLORIDA AND ITS HONORABLE JUSTICES:

In this case, we must decide whether, at the request of a judgment-creditor, a court may order a judgment-debtor to surrender all "right, title, and interest" in the debtor's single-member limited liability company ("LLC"), even though that LLC is not a party to the garnishment action. Because this question is a matter of Florida law, we certify the question to the Florida Supreme Court.

I. Background

Shaun Olmstead, with the assistance of Julie Connell (together, "Defendants"), operated***1312** an advance-fee credit card scam. Through the corporate defendants, Peoples Credit First, LLC ("PCF") and Consumer Preferred, LLC ("CP"), Defendants mailed consumers over ten million solicitations. These solicitations created the impression that, in exchange for a payment of $45 or $49, a consumer would receive a "platinum" credit card like a VISA or MasterCard with a $5,000 credit line. More than 200,000 consumers purchased the credit cards; but the cards they received were not major credit cards like VISA or MasterCard. Instead, the cards were merely platinum-colored cards usable only for purchasing products from Defendants' merchandise catalog or website. Although some consumers used the cards to make purchases, a significant number of consumers claimed to have been misled and complained to PCF and CP as well as to local better business bureaus and state agencies.

The Federal Trade Commission ("FTC") filed this action, alleging that Defendants, including PCF and CP, violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive trade practices. The district court immediately issued an *ex parte* temporary re-

straining order ("TRO") freezing Defendants' assets and appointing a receiver over PCF and CP. Later, with the parties' consent, the district court approved a stipulated preliminary injunction extending the asset freeze and receivership provisions of the TRO.[FN1] At the receiver's request, the district court also entered a series of orders extending the receivership to include several non-party LLCs in which either Olmstead or Connell was the sole member.[FN2] The court placed these single-member LLCs into receivership because Defendants' management of them violated the terms of the asset freeze.

> FN1. Among other things, the stipulated preliminary injunction directed the receiver to "[c]onserve, hold, and manage," "preserve the value of," and prevent the "unauthorized transfer, withdrawal, or misapplication" of the receivership assets.

> FN2. These non-party, single-member LLCs are Dynamic Fulfillment & Services, LLC; Foundation Commercial Properties, LLC; Product Dynamics, LLC; SoHo Holdings, LLC; Generation Housing, LLC; and Nu Products, LLC. Each was organized under Florida law.

The FTC then moved for summary judgment, which the district court granted, entering a judgment for injunctive relief and for more than $10 million in restitution against Defendants. The district court also entered an amended judgment, which included additional equitable relief. Defendants appealed the district court's grant of summary judgment to the FTC.[FN3]

> FN3. A panel of this Court filed an unpublished opinion in No. 06–11827 on 19 July 2007, affirming the district court's judgment.

Defendants did not seek a stay of execution; so, to satisfy the judgment partially, the FTC moved to compel Defendants to surrender their membership interests in their LLCs to the receiver. Defendants objected, asserting that the FTC only has the rights of an assignee under Florida law. The district court nevertheless granted the FTC's motion and compelled Defendants to "endorse and surrender to the Receiver, all of their right, title and interest" in their LLCs. A later order issued by the district court authorized the receiver to liquidate the assets in Defendants' LLCs, which the receiver did through public auctions, and to pay the proceeds to the FTC.[FN4] In this appeal, ***1313** Defendants only challenge the district court's order requiring them to surrender the assets in their non-party, single-member LLCs to the receiver.

> FN4. According to the FTC, the proceeds from the auctions are being held in an interest-bearing account until the resolution of both this appeal and Defendants' appeal of the underlying summary judgment order, No. 06–11827, which this Court has already decided.

II. Discussion[FN5]

> FN5. We must first address the jurisdictional question that we earlier presented to the parties:
>
> Whether this Court has appellate jurisdiction given that, after the named defendants filed their June 2, 2006, notice of appeal, the district court granted, in part, the interested party's tolling motion for reconsideration of a related order.
>
> Because the order issued after the notice of appeal involved completely different assets and different parties, the 3 May surrender order—which Defendants sought to appeal in their 2 June notice of appeal—is appealable according to the doctrine of practical finality. *See Atl. Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir.1989) (treating orders as

> final that decide the right to contested property and that direct the property to be sold or delivered). Accordingly, we conclude that this Court has appellate jurisdiction to consider the district court's 3 May surrender order.

[1] Under Rule 69 of the Federal Rules of Civil Procedure, proceedings in aid of judgment or execution are to be conducted in accordance "with the procedure of the state where the court is located." Fed.R.Civ.P. 69(a)(1). Defendants argue that the surrender order is in error because it is contrary to Florida's Limited Liability Company Act ("LLC Act"), particularly Fla. Stat. § 608.433(4). Section 608.433(4) provides:

> 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.

Because the plain language of this provision draws no distinction between single-member and multiple-member LLCs, Defendants contend that a charging order is the only remedy that a judgment-creditor may obtain against the membership interest of an LLC member, even if that member is the sole member of the LLC. Therefore, according to Defendants, the district court erred by ordering Defendants to surrender "all of their right, title and interest" in their single-member LLCs.

Although acknowledging that the plain text of the LLC Act does not distinguish between single-member and multiple-member LLCs, the FTC argues nevertheless that the overall statutory context "leads to the inevitable conclusion that a charging order is a senseless (and certainly not exclusive) remedy for a judgment-creditor against the membership interest in a single member LLC." The FTC points out that the charging order remedy originated in common law to protect nondebtor partners from being forced unwillingly into partnership with a creditor. This rationale is lost in the context of single-member LLCs where, as here, no nondebtor members exist whose interests need protection.

In addition, the FTC argues that closely related provisions of the LLC Act demonstrate how Defendants' contended-for application of the charging order remedy to single-member LLCs would produce absurd results. For instance, the LLC Act provides that an assignee can become an LLC member with the consent of members other than the judgment-debtor. *See* Fla. Stat. §§ 608.432(1)(a), 608.433(1). ***1314** The FTC contends that this provision, which allows assignees to become LLC members, is rendered purposeless for single-member LLCs unless they are treated differently than multiple-member LLCs: Treating single-member and multiple-member LLCs alike would produce the absurd result that assignees could become members in multiple-member LLCs but not in single-member LLCs.

Also, according to the FTC, the LLC Act directs that an LLC member ceases to be a member upon the assignment of that member's interest. *See id.* § 608.432(2)(c). But, if a single-member LLC were subject only to a charging order remedy, then the single-member LLC would be left without any members to manage it. Because an LLC must be dissolved "[a]t any time there are no members," *id.* § 608.441(1)(d), the FTC contends that no member would remain with the authority to take the steps prescribed in Section 608.4431 to wind down the dissolved LLC. Given the foregoing, the FTC concludes that the "only way to harmonize these provisions into a coherent whole is to recognize that where, as here, an LLC has only one member, the assignment of that member's interest to a judgment-creditor necessarily enables the creditor to step in and liquidate the LLC's assets."

Neither party cites to Florida case law that dir-

ectly addresses the application of Section 608.433(4) to single-member LLCs. Instead, both parties rely on well-established canons of statutory construction. Defendants contend, for instance, that "where a statute is clear and unambiguous a court will not look beyond the statute's plain language for legislative intent." Appellant Br. 12 (citing *City of Miami Beach v. Galbut,* 626 So.2d 192, 193 (Fla.1993)). The FTC, on the other hand, cites the "cardinal rule of statutory construction, that a legislature does not intend to create statutes that lead 'to an unreasonable or ridiculous result.' " Appellee Br. 13 (citing *Galbut,* 626 So.2d at 193).

[2] After considering the parties' arguments and given the absence of controlling case law on point, we conclude that Florida law is not sufficiently well-established for us to determine with confidence whether the district court's surrender order is permissible under Section 608.433(4). The Florida Constitution authorizes this Court to certify a question about state law to the Florida Supreme Court if it "is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." Fla. Const. art. V, § 3(b)(6). Because we have found no such controlling precedent, we certify the following question to the Florida Supreme 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.

[3][4] In certifying this question, "we do not intend to restrict the issues considered by the state court." *Stevens v. Battelle Mem'l Inst.,* 488 F.3d 896, 904 (11th Cir.2007); *see also Miller v. Scottsdale Ins. Co.,* 410 F.3d 678, 682 (11th Cir.2005) ("Our phrasing of the certified question is merely suggestive and does not in any way restrict the scope of the inquiry by the Supreme Court of Florida."). We are indeed mindful that "latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." *Stevens,* 488 F.3d at 904 (internal quotation marks omitted). We ask for guidance.

QUESTION CERTIFIED.

C.A.11 (Fla.),2008.
F.T.C. v. Olmstead
528 F.3d 1310, 2008-1 Trade Cases P 76,171, 22 Fla. L. Weekly Fed. C 756

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EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: ASHLEY ALBRIGHT,

SSN 358-56-9118, Debtor, Case No. 01-11367
ABC, Chapter No. 7, 2003 Bankr. LEXIS 291

April 4, 2003, Decided

For Ashley Albright, Debtor: James H. Hahn, Greenwood Village, CO.

Harvey Sender, Trustee: Charles F. McVay, Denver, CO.

DISPOSITION:

Trustee's Motion to appoint Bob Karls as real estate broker for the Trustee granted.

OPINION BY:

A. Bruce Campbell, U.S. Bankruptcy Judge.

OPINION AND ORDER ON MOTION TO ALLOW TRUSTEE TO TAKE ANY AND ALL NECESSARY ACTIONS TO LIQUIDATE PROPERTY OWNED BY WESTERN BLUE SKY LLC

THIS MATTER is before the Court on the (1) Motion to Allow Trustee to Take Any and All Necessary Actions to Liquidate Property Owned by Western Blue Sky LLC ("Motion to Liquidate"); (2) Motion to Appoint and Compensate Bob Karls as Real Estate Broker to the Trustee; and (3) Debtor's Response to Trustee's Motion to Retain Realtor and Liquidate LLC Property. Following a hearing on February 4, 2003, the parties agreed to submit the matter on briefs.

Ashley Albright, the debtor in this Chapter 7 case ("Debtor"), is the sole member and manager of a Colorado limited liability company named Western Blue Sky LLC.[1] The LLC owns certain real property located in Saguache County, Colorado (the "Real Property"). The LLC is not a debtor in bankruptcy.

The Chapter 7 Trustee contends that because the Debtor was the sole member and manager of the LLC at the time she filed bankruptcy, he now controls the LLC and he may cause the LLC to sell the Real Property and distribute the net sales proceeds to his bankruptcy estate.[2] The Debtor maintains that, at best, the Trustee is entitled to a charging order[3] and cannot assume management of the LLC or cause the LLC to sell the Real Property.

Pursuant to the Colorado limited liability company statute, the Debtor's membership interest constitutes the personal property of the member. Upon the Debtor's bankruptcy filing, she effectively transferred her membership interest to the estate. See 11 U.S.C. § 541(a).[4] Because there are no other members in the LLC, the entire membership interest passed to the bankruptcy estate, and the Trustee has become a "substituted member."[5]

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[1] The Debtor initiated this case on February 9, 2001, under Chapter 13. It was converted to Chapter 7 by the Debtor on July 19, 2001.

[2] If the Trustee is entitled to control of the LLC, he could, presumably, as an alternative, dissolve the LLC, distribute its property to his bankruptcy estate, and then sell the property himself. The Trustee has not asserted any alter ego theory and has not attempted to pierce the veil of the LLC.

[3] The Debtor further asserts that because the LLC is "non-profit" pursuant to its operating agreement, no distribution of "profit" will ever be made and thus the value of this interest is zero. This argument erroneously assumes that a member of a Colorado limited liability company's distribution rights are limited only to "profits." They are not. Colo. Rev. Stat. § 7-80-102(10)("Membership interest means a member's share of the profits and losses of a limited liability company and the right to receive distributions of such company's assets.") See also Colo. Rev. Stat. § 7-80-702(1).

[4] 11 U.S.C. § 541(a)(1) provides, in relevant part: "The commencement of a case ... creates an estate. Such estate is comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case."

[5] Colo. Rev. Stat. § 7-80-702 provides (emphasis added):

> (1) The interest of each member in a limited liability company constitutes the personal property of the

Section 7-80-702 of the Limited Liability Company Act requires the unanimous consent of "other members" in order to allow a transferee to participate in the management of the LLC.[6] 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.[7]

The Debtor argues that the Trustee acts merely for her creditors and is only entitled to a charging order against distributions made on account of her LLC member interest.[8] However, the charging order, as set forth in Section 703 of the Colorado Limited Liability Company Act, exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager. A charging order protects the autonomy of the original members, and their ability to manage their own enterprise. In a single-member entity, there are no non-debtor members to protect. The charging order limitation serves no purpose in a single member limited liability

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member and may be transferred or assigned. However, if all of the other members of the limited liability company other than the member proposing to dispose of his or its interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member's interest shall have no right to participate in the management of the business and affairs of the limited liability company or to become a member. The transferee shall only be entitled to receive the share of profits or other compensation by way of income and the return of contributions to which that member would otherwise be entitled.

(2) A substituted member is a person admitted to all the rights of a member who has died or has assigned his interest in a limited liability company with the approval of all the members of the limited liability company by unanimous written consent. The substituted member has all the rights and powers and is subject to all the restrictions and liabilities of his assignor; except that the substitution of the assignee does not release the assignor from liability to the limited liability company under section 7-80-502.

[6] This reading of § 7-80-702 is reinforced in Colo. Rev. Stat. § 7-80-108(3)(a). Section 108 sets forth the effect of an operating agreement and what provisions are non-waivable. Section 108(3) states that "unless contained in a written operating agreement or other writing approved in accordance with a written operating agreement, no operating agreement may [...] vary the requirement under section 7-80-702(1) that, if all of the other members of the limited liability company other than the member proposing to dispose of the member's interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member's interest shall have no right to participate in the management of the business and affairs of the limited liability company or to become a member." Colo. Rev. Stat. § 7-80-108(3)(a). The clause "other than the member proposing to dispose of the member's interest" confirms that the "other members" identified in § 7-80-702 does not include the transferee.

[7] Under Colo. Rev. Stat. § 7-80-702, supra, the result would be different if there were other non-debtor members in the LLC. Where a single member files bankruptcy while the other members of a multi-member LLC do not, and where the non-debtor members do not consent to a substitute member status for a member interest transferee, the bankruptcy estate is only entitled to receive the share of profits or other compensation by way of income and the return of the contributions to which that member would otherwise be entitled. Thus, Mountain States Bank v. Irwin, 809 P.2d 1113 (Colo. App. 1991); Union Colony Bank v. United Bank of Greeley National Association, 832 P.2d 1112 (Colo. App. 1992) and Prefer v. Pharmnetrx LLC, 18 P.3d 844 (Colo.. App. 2000), cited by the parties, are distinguishable as they relate to multi-partner or member entities.

[8] Colo. Rev. Stat. § 7-80-703 provides:

Rights of creditor against a member. 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 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.

company, because there are no other parties' interests affected.[9]

The Colorado limited liability company statute provides that the members, including the sole member of a single member limited liability company, have the power to elect and change managers.[10] Because the Trustee became the sole member of Western Blue Sky LLC upon the Debtor's bankruptcy filing, the Trustee now controls, directly or indirectly, all governance of that entity, including decisions regarding liquidation of the entity's assets.

Because of the Court's ruling herein, the Debtor may be entitled to a claim for her contributions made to preserve an asset of this bankruptcy estate based on post-petition mortgage payments on the Real Property. The parties were asked to brief the issue, but the Debtor has not formally asserted such a claim. Therefore, the Court does not rule on the issue at this time.

Based on the foregoing, it is hereby:

ORDERED that the Trustee, as sole member, controls the Western Blue Sky LLC and may cause the LLC to sell its property and distribute net proceeds to his estate. Alternatively, the Trustee may elect to distribute the LLC's property to [*9] the bankruptcy estate, and, in turn, liquidate that property himself; and it is

FURTHER ORDERED that the Trustee's Motion to appoint Bob Karls as real estate broker for the Trustee is hereby granted; and it is

FURTHER ORDERED that the Debtor may file a claim, subject to objection in the regular course of this case, for her expenditures made to preserve an asset of this estate based on post-petition mortgage or other payments made by the Debtor.

DATED: 4-4-03

BY THE COURT:

/s/

A. Bruce Campbell
U.S. Bankruptcy Judge

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[9] The harder question would involve an LLC where one member effectively controls and dominates the membership and management of an LLC that also involves a passive member with a minimal interest. If the dominant member files bankruptcy, would a trustee obtain the right to govern the LLC? Pursuant to Colo. Rev. Stat. § 7-80-702, if the non-debtor member did not consent, even if she held only an infinitesimal interest, the answer would be no. The Trustee would only be entitled to a share of distributions, and would have no role in the voting or governance of the company. Notwithstanding this limitation, 7-80-702 does not create an asset shelter for clever debtors. 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 recourse. 11 U.S.C. § § 544(b)(1) and 548(a).

[10] See Colo. Rev. Stat. § 7-80-402 and § 7-80-405.

EXHIBIT 3

Form **8832**

(Rev. December 2013)

Department of the Treasury
Internal Revenue Service

Entity Classification Election

▶ **Information about Form 8832 and its instructions is at *www.irs.gov/form8832.***

OMB No. 1545-1516

Type or Print	Name of eligible entity making election	**Employer identification number**
	Number, street, and room or suite no. If a P.O. box, see instructions.	
	City or town, state, and ZIP code. If a foreign address, enter city, province or state, postal code and country. Follow the country's practice for entering the postal code.	

▶ Check if: ☐ Address change ☐ Late classification relief sought under Revenue Procedure 2009-41
☐ Relief for a late change of entity classification election sought under Revenue Procedure 2010-32

Part I Election Information

1 Type of election (see instructions):

a ☐ Initial classification by a newly-formed entity. Skip lines 2a and 2b and go to line 3.
b ☐ Change in current classification. Go to line 2a.

2a Has the eligible entity previously filed an entity election that had an effective date within the last 60 months?

☐ **Yes.** Go to line 2b.
☐ **No.** Skip line 2b and go to line 3.

2b Was the eligible entity's prior election an initial classification election by a newly formed entity that was effective on the date of formation?

☐ **Yes.** Go to line 3.
☐ **No.** Stop here. You generally are not currently eligible to make the election (see instructions).

3 Does the eligible entity have more than one owner?

☐ **Yes.** You can elect to be classified as a partnership or an association taxable as a corporation. Skip line 4 and go to line 5.
☐ **No.** You can elect to be classified as an association taxable as a corporation or to be disregarded as a separate entity. Go to line 4.

4 If the eligible entity has only one owner, provide the following information:

a Name of owner ▶ _____
b Identifying number of owner ▶ _____

5 If the eligible entity is owned by one or more affiliated corporations that file a consolidated return, provide the name and employer identification number of the parent corporation:

a Name of parent corporation ▶ _____
b Employer identification number ▶ _____

Part I **Election Information** (Continued)

6 **Type of entity** (see instructions):

a ☐ A domestic eligible entity electing to be classified as an association taxable as a corporation.
b ☐ A domestic eligible entity electing to be classified as a partnership.
c ☐ A domestic eligible entity with a single owner electing to be disregarded as a separate entity.
d ☐ A foreign eligible entity electing to be classified as an association taxable as a corporation.
e ☐ A foreign eligible entity electing to be classified as a partnership.
f ☐ A foreign eligible entity with a single owner electing to be disregarded as a separate entity.

7 If the eligible entity is created or organized in a foreign jurisdiction, provide the foreign country of organization ▶ _____

8 Election is to be effective beginning (month, day, year) (see instructions) . . . . . ▶ _____

9 Name and title of contact person whom the IRS may call for more information	10 Contact person's telephone number

Consent Statement and Signature(s) (see instructions)

Under penalties of perjury, I (we) declare that I (we) consent to the election of the above-named entity to be classified as indicated above, and that I (we) have examined this election and consent statement, and to the best of my (our) knowledge and belief, this election and consent statement are true, correct, and complete. If I am an officer, manager, or member signing for the entity, I further declare under penalties of perjury that I am authorized to make the election on its behalf.

Signature(s)	Date	Title

Part II Late Election Relief

11 Provide the explanation as to why the entity classification election was not filed on time (see instructions).

Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete. I (we) further declare that I (we) have personal knowledge of the facts and circumstances related to the election. I (we) further declare that the elements required for relief in Section 4.01 of Revenue Procedure 2009-41 have been satisfied.

Signature(s)	Date	Title

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8832 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form8832*.

What's New

For entities formed on or after July 1, 2013, the Croatian Dionicko Drustvo will always be treated as a corporation. See Notice 2013-44, 2013-29, I.R.B. 62 for more information.

Purpose of Form

An eligible entity uses Form 8832 to elect how it will be classified for federal tax purposes, as a corporation, a partnership, or an entity disregarded as separate from its owner. An eligible entity is classified for federal tax purposes under the default rules described below unless it files Form 8832 or Form 2553, Election by a Small Business Corporation. See *Who Must File* below.

The IRS will use the information entered on this form to establish the entity's filing and reporting requirements for federal tax purposes.

Note. An entity must file Form 2553 if making an election under section 1362(a) to be an S corporation

A new eligible entity should not file Form 8832 if it will be using its default classification (see Default Rules *below).*

Eligible entity. An eligible entity is a business entity that is not included in items 1, or 3 through 9, under the definition of **corporation** provided under *Definitions*. Eligible entities include limited liability companies (LLCs) and partnerships.

Generally, corporations are not eligible entities. However, the following types of corporations are treated as eligible entities:

1. An eligible entity that previously elected to be an association taxable as a corporation by filing Form 8832. An entity that elects to be classified as a corporation by filing Form 8832 can make another election to change its classification (see the *60-month limitation rule* discussed below in the instructions for lines 2a and 2b).

2. A foreign eligible entity that became an association taxable as a corporation under the foreign default rule described below.

Default Rules

Existing entity default rule. Certain domestic and foreign entities that were in existence before January 1, 1997, and have an established federal tax classification generally do not need to make an election to continue that classification. If an existing entity decides to change its classification, it may do so subject to the 60-month limitation rule. See the instructions for lines 2a and 2b. See Regulations sections 301.7701-3(b)(3) and 301.7701-3(h)(2) for more details.

Domestic default rule. Unless an election is made on Form 8832, a domestic eligible entity is:

1. A partnership if it has two or more members.

2. Disregarded as an entity separate from its owner if it has a single owner.

A change in the number of members of an eligible entity classified as an **association** (defined below) does not affect the entity's classification. However, an eligible entity classified as a partnership will become a disregarded entity when the entity's membership is reduced to one member and a disregarded entity will be classified as a partnership when the entity has more than one member.

Foreign default rule. Unless an election is made on Form 8832, a foreign eligible entity is:

1. A partnership if it has two or more members and at least one member does not have limited liability.

2. An association taxable as a corporation if all members have limited liability.

3. Disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

However, if a qualified foreign entity (as defined in section 3.02 of Rev. Proc. 2010-32) files a valid election to be classified as a partnership based on the reasonable assumption that it had two or more owners as of the effective date of the election, and the qualified entity is later determined to have a single owner, the IRS will deem the election to be an election to be classified as a disregarded entity provided:

1. The qualified entity's owner and purported owners file amended returns that are consistent with the treatment of the entity as a disregarded entity;

2. The amended returns are filed before the close of the period of limitations on assessments under section 6501(a) for the relevant tax year; and

3. The corrected Form 8832, with the box checked entitled: Relief for a late change of entity classification election sought under Revenue Procedure 2010-32, is filed and attached to the amended tax return.

Also, if the qualified foreign entity (as defined in section 3.02 of Rev. Proc. 2010-32) files a valid election to be classified as a disregarded entity based on the reasonable assumption that it had a single owner as of the effective date of the election, and the qualified entity is later determined to have two or more owners, the IRS will deem the election to be an election to be classified as a partnership provided:

1. The qualified entity files information returns and the actual owners file original or amended returns consistent with the treatment of the entity as a partnership;

2. The amended returns are filed before the close of the period of limitations on assessments under section 6501(a) for the relevant tax year; and

3. The corrected Form 8832, with the box checked entitled: Relief for a late change of entity classification election sought under Revenue Procedure 2010-32, is filed and attached to the amended tax returns. See Rev. Proc. 2010-32, 2010-36 I.R.B. 320 for details.

Definitions

Association. For purposes of this form, an association is an eligible entity taxable as a corporation by election or, for foreign eligible entities, under the default rules (see Regulations section 301.7701-3).

Business entity. A business entity is any entity recognized for federal tax purposes that is not properly classified as a trust under Regulations section 301.7701-4 or otherwise subject to special treatment under the Code regarding the entity's classification. See Regulations section 301.7701-2(a).

Corporation. For federal tax purposes, a corporation is any of the following:

1. A business entity organized under a federal or state statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic.

2. An association (as determined under Regulations section 301.7701-3).

3. A business entity organized under a state statute, if the statute describes or refers to the entity as a joint-stock company or joint-stock association.

4. An insurance company.

5. A state-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act, as amended, 12 U.S. C. 1811 et seq., or a similar federal statute.

6. A business entity wholly owned by a state or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in Regulations section 1.892-2T.

7. A business entity that is taxable as a corporation under a provision of the Code other than section 7701(a)(3).

8. A foreign business entity listed on page 7. See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.

9. An entity created or organized under the laws of more than one jurisdiction (business entities with multiple charters) if the entity is treated as a corporation with respect to any one of the jurisdictions. See Regulations section 301.7701-2(b)(9) for examples.

Disregarded entity. A disregarded entity is an eligible entity that is treated as an entity not separate from its single owner for income tax purposes. A "disregarded entity" is treated as separate from its owner for:

- Employment tax purposes, effective for wages paid on or after January 1, 2009; and
- Excise taxes reported on Forms 720, 730, 2290, 11-C, or 8849, effective for excise taxes reported and paid after December 31, 2007.

See the employment tax and excise tax return instructions for more information.

Limited liability. A member of a foreign eligible entity has limited liability if the member has no personal liability for any debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law under which the entity is organized (and, if relevant, the entity's organizational documents). A member has personal liability if the creditors of the entity may seek satisfaction of all or any part of the debts or claims against the entity from the member as such. A member has personal liability even if the member makes an agreement under which another person (whether or not a member of the entity) assumes that liability or agrees to indemnify that member for that liability.

Partnership. A partnership is a business entity that has at least two members and is not a corporation as defined above under *Corporation.*

Who Must File

File this form for an eligible entity that is one of the following:

- A domestic entity electing to be classified as an association taxable as a corporation.
- A domestic entity electing to change its current classification (even if it is currently classified under the default rule).
- A foreign entity that has more than one owner, all owners having limited liability, electing to be classified as a partnership.
- A foreign entity that has at least one owner that does not have limited liability, electing to be classified as an association taxable as a corporation.
- A foreign entity with a single owner having limited liability, electing to be an entity disregarded as an entity separate from its owner.
- A foreign entity electing to change its current classification (even if it is currently classified under the default rule).

Do not file this form for an eligible entity that is:

- Tax-exempt under section 501(a);
- A real estate investment trust (REIT), as defined in section 856; or
- Electing to be classified as an S corporation. An eligible entity that timely files Form 2553 to elect classification as an S corporation and meets all other requirements to qualify as an S corporation is deemed to have made an election under Regulations section 301.7701-3(c)(v) to be classified as an association taxable as a corporation.

All three of these entities are deemed to have made an election to be classified as an association.

Effect of Election

The federal tax treatment of elective changes in classification as described in Regulations section 301.7701-3(g)(1) is summarized as follows:

- If an eligible entity classified as a partnership elects to be classified as an association, it is deemed that the partnership contributes all of its assets and liabilities to the association in exchange for stock in the association, and immediately thereafter, the partnership liquidates by distributing the stock of the association to its partners.
- If an eligible entity classified as an association elects to be classified as a partnership, it is deemed that the association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership.
- If an eligible entity classified as an association elects to be disregarded as an entity separate from its owner, it is deemed that the association distributes all of its assets and liabilities to its single owner in liquidation of the association.
- If an eligible entity that is disregarded as an entity separate from its owner elects to be classified as an association, the owner of the eligible entity is deemed to have contributed all of the assets and liabilities of the entity to the association in exchange for the stock of the association.

Note. For information on the federal tax consequences of elective changes in classification, see Regulations section 301.7701-3(g).

When To File

Generally, an election specifying an eligible entity's classification cannot take effect more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date the election is filed. An eligible entity may be eligible for late election relief in certain circumstances. For more information, see *Late Election Relief*, later.

Where To File

File Form 8832 with the Internal Revenue Service Center for your state listed later.

In addition, attach a copy of Form 8832 to the entity's federal tax or information return for the tax year of the election. If the entity is not required to file a return for that year, a copy of its Form 8832 must be attached to the federal tax returns of all direct or indirect owners of the entity for the tax year of the owner that includes the date on which the election took effect. An indirect owner of the electing entity does not have to attach a copy of the Form 8832 to its tax return if an entity in which it has an interest is already filing a copy of the Form 8832 with its return. Failure to attach a copy of Form 8832 will not invalidate an otherwise valid election, but penalties may be assessed against persons who are required to, but do not, attach Form 8832.

Each member of the entity is required to file the member's return consistent with the entity election. Penalties apply to returns filed inconsistent with the entity's election.

If the entity's principal business, office, or agency is located in:	Use the following Internal Revenue Service Center address:
Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wisconsin	Cincinnati, OH 45999
If the entity's principal business, office, or agency is located in:	**Use the following Internal Revenue Service Center address:**
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wyoming	Ogden, UT 84201
A foreign country or U.S. possession	Ogden, UT 84201-0023

Note. Also attach a copy to the entity's federal income tax return for the tax year of the election.

Acceptance or Nonacceptance of Election

The service center will notify the eligible entity at the address listed on Form 8832 if its election is accepted or not accepted. The entity should generally receive a determination on its election within 60 days after it has filed Form 8832.

Care should be exercised to ensure that the IRS receives the election. If the entity is not notified of acceptance or nonacceptance of its election within 60 days of the date of filing, take follow-up action by calling 1-800-829-0115, or by sending a letter to the service center to inquire about its status. Send any such letter by certified or registered mail via the U.S. Postal Service, or equivalent type of delivery by a designated private delivery service (see Notice 2004-83, 2004-52 I.R.B. 1030 (or its successor)).

If the IRS questions whether Form 8832 was filed, an acceptable proof of filing is:

- A certified or registered mail receipt (timely postmarked) from the U.S. Postal Service, or its equivalent from a designated private delivery service;
- Form 8832 with an accepted stamp;
- Form 8832 with a stamped IRS received date; or
- An IRS letter stating that Form 8832 has been accepted.

Specific Instructions

Name. Enter the name of the eligible entity electing to be classified.

Employer identification number (EIN). Show the EIN of the eligible entity electing to be classified.

Do not put "Applied For" on this line.

Note. Any entity that has an EIN will retain that EIN even if its federal tax classification changes under Regulations section 301.7701-3.

If a disregarded entity's classification changes so that it becomes recognized as a partnership or association for federal tax purposes, and that entity had an EIN, then the entity must continue to use that EIN. If the entity did not already have its own EIN, then the entity must apply for an EIN and not use the identifying number of the single owner.

A foreign entity that makes an election under Regulations section 301.7701-3(c) and (d) must also use its own taxpayer identifying number. See sections 6721 through 6724 for penalties that may apply for failure to supply taxpayer identifying numbers.

If the entity electing to be classified using Form 8832 does not have an EIN, it must apply for one on Form SS-4, Application for Employer Identification Number. The entity must have received an EIN by the time Form 8832 is filed in order for the form to be processed. An election will not be accepted if the eligible entity does not provide an EIN.

Do not apply for a new EIN for an existing entity that is changing its classification if the entity already has an EIN.

Address. Enter the address of the entity electing a classification. All correspondence regarding the acceptance or nonacceptance of the election will be sent to this address. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the entity has a P.O. box, show the box number instead of the street address. If the electing entity receives its mail in care of a third party (such as an accountant or an attorney), enter on the street address line "C/O" followed by the third party's name and street address or P.O. box.

Address change. If the eligible entity has changed its address since filing Form SS-4 or the entity's most recently-filed return (including a change to an "in care of" address), check the box for an address change.

Late-classification relief sought under Revenue Procedure 2009-41. Check the box if the entity is seeking relief under Rev. Proc. 2009-41, 2009-39 I.R.B. 439, for a late classification election. For more information, see *Late Election Relief*, later.

Relief for a late change of entity classification election sought under Revenue Procedure 2010-32. Check the box if the entity is seeking relief under Rev. Proc. 2010-32, 2010-36 I.R.B. 320. For more information, see *Foreign default rule*, earlier.

Part I. Election Information

Complete Part I whether or not the entity is seeking relief under Rev. Proc. 2009-41 or Rev. Proc. 2010-32.

Line 1. Check box 1a if the entity is choosing a classification for the first time (i.e., the entity does not want to be classified under the applicable default classification). Do not file this form if the entity wants to be classified under the default rules.

Check box 1b if the entity is changing its current classification.

Lines 2a and 2b. 60-month limitation rule. Once an eligible entity makes an election to *change* its classification, the entity generally cannot change its classification by election again during the 60 months after the effective date of the election. However, the IRS may (by private letter ruling) permit the entity to change its classification by election within the 60-month period if more than 50% of the ownership interests in the entity, as of the effective date of the election, are owned by persons that did not own any interests in the entity on the effective date or the filing date of the entity's prior election.

Note. The 60-month limitation does not apply if the previous election was made by a newly formed eligible entity and was effective on the date of formation.

Line 4. If an eligible entity has only one owner, provide the name of its owner on line 4a and the owner's identifying number (social security number, or individual taxpayer identification number, or EIN) on line 4b. If the electing eligible entity is owned by an entity that is a disregarded entity or by an entity that is a member of a series of tiered disregarded entities, identify the first entity (the entity closest to the electing eligible entity) that is not a disregarded entity. For example, if the electing eligible entity is owned by disregarded entity A, which is owned by another disregarded entity B, and disregarded entity B is owned by partnership C, provide the name and EIN of partnership C as the owner of the electing eligible entity. If the owner is a foreign person or entity and does not have a U.S. identifying number, enter "none" on line 4b.

Line 5. If the eligible entity is owned by one or more members of an affiliated group of corporations that file a consolidated return, provide the name and EIN of the parent corporation.

Line 6. Check the appropriate box if you are changing a current classification (no matter how achieved), or are electing out of a default classification. Do not file this form if you fall within a default classification that is the desired classification for the new entity.

Line 7. If the entity making the election is created or organized in a foreign jurisdiction, enter the name of the foreign country in which it is organized. This information must be provided even if the entity is also organized under domestic law.

Line 8. Generally, the election will take effect on the date you enter on line 8 of this form, or on the date filed if no date is entered on line 8. An election specifying an entity's classification for federal tax purposes can take effect no more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date on which the election is filed. If line 8 shows a date more than 75 days prior to the date on which the election is filed, the election will default to 75 days before the date it is filed. If line 8 shows an effective date more than 12 months from the filing date, the election will take effect 12 months after the date the election is filed.

Consent statement and signature(s). Form 8832 must be signed by:

1. Each member of the electing entity who is an owner at the time the election is filed; or

2. Any officer, manager, or member of the electing entity who is authorized (under local law or the organizational documents) to make the election. The elector represents to having such authorization under penalties of perjury.

If an election is to be effective for any period prior to the time it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must sign.

If you need a continuation sheet or use a separate consent statement, attach it to Form 8832. The separate consent statement must contain the same information as shown on Form 8832.

Note. Do not sign the copy that is attached to your tax return.

Part II. Late Election Relief

Complete Part II only if the entity is requesting late election relief under Rev. Proc. 2009-41.

An eligible entity may be eligible for late election relief under Rev. Proc. 2009-41, 2009-39 I.R.B. 439, if **each** of the following requirements is met.

1. The entity failed to obtain its requested classification as of the date of its formation (or upon the entity's classification becoming relevant) or failed to obtain its requested change in classification solely because Form 8832 was not filed timely.

2. Either:

a. The entity has not filed a federal tax or information return for the first year in which the election was intended because the due date has not passed for that year's federal tax or information return; or

b. The entity has timely filed all required federal tax returns and information returns (or if not timely, within 6 months after its due date, excluding extensions) consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the tax years. If the eligible entity is not required to file a federal tax return or information return, each affected person who is required to file a federal tax return or information return must have timely filed all such returns (or if not timely, within 6 months after its due date, excluding extensions) consistent with the

entity's requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed during any of the tax years.

3. The entity has reasonable cause for its failure to timely make the entity classification election.

4. Three years and 75 days from the requested effective date of the eligible entity's classification election have not passed.

Affected person. An affected person is either:

- with respect to the effective date of the eligible entity's classification election, a person who would have been required to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the tax year of the person which includes that date; or
- with respect to any subsequent date after the entity's requested effective date of the classification election, a person who would have been required to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the person's tax year that includes that subsequent date had the election first become effective on that subsequent date.

For details on the requirement to attach a copy of Form 8832, see Rev. Proc. 2009-41 and the instructions under *Where To File*.

To obtain relief, file Form 8832 with the applicable IRS service center listed in *Where To File*, earlier, within 3 years and 75 days from the requested effective date of the eligible entity's classification election.

If Rev. Proc. 2009-41 does not apply, an entity may seek relief for a late entity election by requesting a private letter ruling and paying a user fee in accordance with Rev. Proc. 2013-1, 2013-1 I.R.B. 1 (or its successor).

Line 11. Explain the reason for the failure to file a timely entity classification election.

Signatures. Part II of Form 8832 must be signed by an authorized representative of the eligible entity and each affected person. See *Affected Persons*, earlier. The individual or individuals who sign the declaration must have personal knowledge of the facts and circumstances related to the election.

Foreign Entities Classified as Corporations for Federal Tax Purposes:

American Samoa—Corporation
Argentina—Sociedad Anonima
Australia—Public Limited Company
Austria—Aktiengesellschaft
Barbados—Limited Company
Belgium—Societe Anonyme
Belize—Public Limited Company
Bolivia—Sociedad Anonima
Brazil—Sociedade Anonima
Bulgaria—Aktsionerno Druzhestvo
Canada—Corporation and Company
Chile—Sociedad Anonima
People's Republic of China—Gufen Youxian Gongsi
Republic of China (Taiwan)—Ku-fen Yu-hsien Kung-szu
Colombia—Sociedad Anonima
Costa Rica—Sociedad Anonima
Croatia—Dionicko Drustvo
Cyprus—Public Limited Company
Czech Republic—Akciova Spolecnost
Denmark—Aktieselskab
Ecuador—Sociedad Anonima or Compania Anonima
Egypt—Sharikat Al-Mossahamah
El Salvador—Sociedad Anonima
Estonia—Aktsiaselts
European Economic Area/European Union—Societas Europaea
Finland—Julkinen Osakeyhtio/Publikt Aktiebolag
France—Societe Anonyme
Germany—Aktiengesellschaft
Greece—Anonymos Etairia
Guam—Corporation
Guatemala—Sociedad Anonima
Guyana—Public Limited Company
Honduras—Sociedad Anonima
Hong Kong—Public Limited Company
Hungary—Reszvenytarsasag
Iceland—Hlutafelag
India—Public Limited Company
Indonesia—Perseroan Terbuka
Ireland—Public Limited Company
Israel—Public Limited Company
Italy—Societa per Azioni
Jamaica—Public Limited Company
Japan—Kabushiki Kaisha
Kazakstan—Ashyk Aktsionerlik Kogham
Republic of Korea—Chusik Hoesa
Latvia—Akciju Sabiedriba
Liberia—Corporation
Liechtenstein—Aktiengesellschaft
Lithuania—Akcine Bendroves
Luxembourg—Societe Anonyme
Malaysia—Berhad
Malta—Public Limited Company
Mexico—Sociedad Anonima
Morocco—Societe Anonyme
Netherlands—Naamloze Vennootschap
New Zealand—Limited Company
Nicaragua—Compania Anonima
Nigeria—Public Limited Company
Northern Mariana Islands—Corporation
Norway—Allment Aksjeselskap
Pakistan—Public Limited Company
Panama—Sociedad Anonima
Paraguay—Sociedad Anonima
Peru—Sociedad Anonima
Philippines—Stock Corporation
Poland—Spolka Akcyjna
Portugal—Sociedade Anonima
Puerto Rico—Corporation
Romania—Societe pe Actiuni
Russia—Otkrytoye Aktsionernoy Obshchestvo
Saudi Arabia—Sharikat Al-Mossahamah
Singapore—Public Limited Company
Slovak Republic—Akciova Spolocnost
Slovenia—Delniska Druzba
South Africa—Public Limited Company
Spain—Sociedad Anonima
Surinam—Naamloze Vennootschap
Sweden—Publika Aktiebolag
Switzerland— Aktiengesellschaft
Thailand—Borisat Chamkad (Mahachon)
Trinidad and Tobago—Limited Company
Tunisia—Societe Anonyme
Turkey—Anonim Sirket
Ukraine—Aktsionerne Tovaristvo Vidkritogo Tipu
United Kingdom—Public Limited Company
United States Virgin Islands—Corporation
Uruguay—Sociedad Anonima
Venezuela—Sociedad Anonima or Compania Anonima

See Regulations section 301.7701-2(b)(8) for any exceptions and inclusions to items on this list and for any revisions made to this list since these instructions were printed.

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	2 hr., 46 min.
Learning about the law or the form	3 hr., 48 min.
Preparing and sending the form to the IRS	36 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File* above.

EXHIBIT 4

26 CFR 301.7701–3: Classification of certain business entities.
(Also § 301.7701–2.)

Rev. Proc. 2002–69

SECTION 1. PURPOSE

The Treasury Department and the Internal Revenue Service have become aware that taxpayers are unsure of the classification for an entity that is owned solely by a husband and wife as community property under the laws of a state, a foreign country, or a possession of the United States. To alleviate this uncertainty and in the interest of administrative simplicity, this revenue procedure provides that the Internal Revenue Service will respect a taxpayer's treatment of these entities as either disregarded entities or partnerships.

This revenue procedure provides guidance on the classification for federal tax purposes of a qualified entity (described in section 3.02 of this revenue procedure) that is owned solely by a husband and wife as community property under the laws of a state, a foreign country, or a possession of the United States.

SECTION 2. BACKGROUND

Section 301.7701–1(a)(1) states that the Code prescribes the classification of various organizations for federal tax purposes. Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law.

Section 301.7701–1(b) provides that the classification of organizations that are recognized as separate entities is determined under §§ 301.7701–2, 301.7701–3, and 301.7701–4 unless a provision of the Code provides for special treatment of that organization.

Section 301.7701–2(a) defines the term "business entity" as any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under § 301.7701–3) that is not properly classified as a trust under § 301.7701–4 or otherwise subject to special treatment under the Code. A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership. A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

SECTION 3. SCOPE

.01 *In General.* This revenue procedure provides guidance on the classification for federal tax purposes of a qualified entity (described in section 3.02 of this revenue procedure).

.02 *Qualified Entity.* A business entity is a qualified entity if:

(1) The business entity is wholly owned by a husband and wife as community property under the laws of a state, a foreign country, or a possession of the United States;

(2) No person other than one or both spouses would be considered an owner for federal tax purposes; and

(3) The business entity is not treated as a corporation under § 301.7701–2.

SECTION 4. APPLICATION

.01 If a qualified entity (as described in section 3.02 of this revenue procedure), and the husband and wife as community property owners, treat the entity as a disregarded entity for federal tax purposes, the Internal Revenue Service will accept the position that the entity is a disregarded entity for federal tax purposes.

.02 If a qualified entity (as described in section 3.02 of this revenue procedure), and the husband and wife as community property owners, treat the entity as a partnership for federal tax purposes and file the appropriate partnership returns, the Internal Revenue Service will accept the position that the entity is a partnership for federal tax purposes.

.03 A change in reporting position will be treated for federal tax purposes as a conversion of the entity.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective on the date published in the Internal Revenue Bulletin.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Laura Nash of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Ms. Nash or Ms. Rebekah Myers at (202) 622–3050 (not a toll-free call).