



ST. MARY'S  
UNIVERSITY

Digital Commons at St. Mary's University

---

Faculty Articles

School of Law Faculty Scholarship

---

2014

# Think Twice: Charging Orders and Creditor Property Rights

Chad J. Pomeroy

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Property Law and Real Estate Commons](#)

---

## Recommended Citation

Chad J. Pomeroy, Think Twice: Charging Orders and Creditor Property Rights, 102 Ky. L.J. 705 (2014).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact [jllloyd@stmarytx.edu](mailto:jllloyd@stmarytx.edu).

# Think Twice: Charging Orders and Creditor Property Rights

*Chad J. Pomeroy*<sup>1</sup>

## INTRODUCTION

WHAT do you do? As a lawyer (or prospective lawyer), I mean—what do you do (or what will you do) in exchange for a salary or hourly fee? You will probably be expecting a lot of money for your services; so what, exactly, is it that you will do to justify that payment?

The answer, of course, is varied because lawyers do lots of different things. And, among these activities, there are some things that *only* lawyers can do. Chief among those is suing people. Suing people is something that only lawyers do because states do not generally permit non-lawyers to appear in court or file pleadings.<sup>2</sup> Accordingly, doing so—whether in pursuit of injunctive relief, declaratory relief, or a monetary remedy—is a significant part of the current legal market.<sup>3</sup> Indeed, it is the professional focus of the many lawyers who practice commercial litigation or who perform collections work. In these areas of the law, lawyers sue people in an attempt to validate their clients' rights and causes of actions with a money judgment.

So what you do very likely comes down to getting money. This is not novel, of course: many people spend their time arguing about, dealing with, or negotiating over money. What is somewhat unique, however, is just how clean and abrupt a lawyer's role is in this context: your job is (or will be) to take property belonging to someone else and convert it into property belonging to your client—in other words, to create a property interest for your client.

Creditors have a unique ability in our legal system to acquire property rights in assets belonging to debtors. This Article examines these “creditor property rights,” in general, and those granted to creditors of debtors that

---

<sup>1</sup> Assistant Professor of Law, St. Mary's University School of Law, J.D., Brigham Young University; B.A., Brigham Young University.

<sup>2</sup> This prohibition does not, of course, apply to permitted *pro se* claimants.

<sup>3</sup> Compare *Occupational Outlook Handbook, 2012–13 Edition: What Lawyers Do*, BUREAU LAB. STAT. <http://www.bls.gov/ooh/legal/lawyers.htm#tab-2> (last visited Feb. 8, 2014) (stating that lawyers' responsibilities include conducting legal research, preparing legal documents, and representing parties at trial), with *Occupational Outlook Handbook, 2012–13 Edition: What Paralegals and Legal Assistants Do*, BUREAU LAB. STAT. <http://www.bls.gov/ooh/legal/paralegals-and-legal-assistants.htm#tab-2> (last visited Feb. 8, 2014) (describing paralegals' and legal assistants' responsibilities, including fact investigation, drafting legal documents, and assisting lawyers at trial).

own interests in partnerships, limited partnerships, and limited liability companies, in particular.<sup>4</sup> More specifically, this Article examines charging orders—the redress granted to a creditor vis-à-vis a debtor’s interest in a partnership entity—and argues that this remedy is a much more significant, useful, and choate right than is generally acknowledged by either the academy or the bar.

Part I begins this examination by looking at the history of creditor property rights and the manner in which they have developed over the years, culminating in our current system, which allows creditors to “convert” debtor property to creditor property via execution. This redress represents the ultimate creditor right, but it does not stand alone. Rather, the courts have fashioned a number of remedies that grant creditors a “partial” property right. Of chief interest here is the charging order, which is reviewed in detail in Part II. This Part explains the function, history, and evolution of this remedy from its inception. The charging order initially developed in the partnership context, in response to a perceived unfairness existing when a creditor gained unfettered rights in the partnership interest of a debtor-partner and the partnership’s underlying assets. Based on this inequity, the courts granted creditors a provisional right in partnership property (a “quasi” property right) by permitting the creditor to intercept certain distributions that would otherwise flow from the partnership to the partner but prohibiting any interference with the partnership itself. The remedy quickly spread to limited partnerships and was incorporated into LLC law from its inception. This is particularly important given the explosive popularity of the LLC over the last thirty-five years<sup>5</sup> and the fact that the charging order—and its attendant limitation on creditors (whether real or perceived)—has had an enormous effect on planning, on transactional work, and on litigation in general.

Part III expands upon Part II’s examination of the charging order remedy and argues that creditors of partnership entity owners are not as limited as is widely believed and that the perception of the charging order as an effective barrier to collection is exaggerated. Part III focuses on the underlying purpose of creditor property rights and charging orders and analyzes the language of some of the statutes that create the charging order remedy. By placing charging orders in their proper context (as a type of

---

4 Hereafter, limited liability companies are referred to as LLCs, and all three of these entities are collectively referred to as “partnership entities.”

5 See, e.g., JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING § 11.1, at 11-5 (2011 ed. 2010) (“[T]he LLC has become the vehicle of choice.”); David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 447 & n.108 (1998) (“The LLC has spread like wildfire throughout the country.”); Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 35 (2004) (“The [LLC] has become the dominant form for newly-created small businesses in a clear majority of the states . . .”).

creditor property interest) and by focusing on actual statutory language, this Part highlights the options available to holders charging orders. These options are substantial and should be more aggressively utilized by courts and lawyers. If that occurs, the charging order will assume a more rightful place in the hierarchy of creditor rights and afford much greater creditor protection than it presently does.

The Article concludes, then, that most lawyers' belief that a charging order effectively precludes creditor recovery is significantly overstated and that, given the extraordinary prevalence of partnership entities today, this is an important point that lawyers, teachers, and students overlook at their own peril.

## I. CREDITOR PROPERTY RIGHTS

As indicated above, creditor property rights constitute a large part of our legal system. They do so substantively, in that property is a significant part of the legal world and property rights arising from creditors' claims are a significant subset of property. And they do so practically, in that much of our legal system and the current practice of law focus on creditor rights and on creditors' attempts to gain rights to debtor property. The award of a charging order as a remedy constitutes a small, but significant, element of this story. As such, in order to fully analyze charging orders, it is necessary to first focus more broadly on creditor property rights generally. Looking at the history and evolution of this area of the law—with a particular focus on execution, the ultimate remedy available to a creditor seeking to lay claim to debtor property—lays the foundation for understanding charging orders and the relief creditors should achieve thereunder.

### *A. Historical Development of Creditor Property Rights*

Modern creditor rights vary from jurisdiction to jurisdiction, but the early history and nature of credit arose in the same way throughout human societies.<sup>6</sup> Early on, when trade was primarily an individual matter without a strong underlying sense of custom or propriety, there was no real concern about creating creditor property rights (or about doing anything else to protect creditors) because there simply was no credit.<sup>7</sup> There was no real trust among people, and there was no large commercial class, so payment was contemporaneous with the delivery of goods or services and no one worried about how to collect on their debts.<sup>8</sup>

---

6 See generally Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 228–31 (1918) (examining how societies developed their understanding of credit).

7 *Id.* at 228.

8 *Id.*; see also Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 3 (1919) (quoting Sir Frederick Pollock, *English Law Before the Norman Conquest*, in 1 SELECT

At some point, however, this changed. Due to the increasingly complex nature of society, and to the commercialization and specialization of trade, suspension of payment was gradually introduced.<sup>9</sup> At first, the willingness of one party to a transaction to permit the other party to borrow (that is, to extend credit to a borrower) was viewed as an exception, to be extended only rarely or only to a privileged few.<sup>10</sup> Soon, however, economic necessity intruded, and credit became a commonplace element of commercial exchange.<sup>11</sup> However, creditors did not fear default because of sanctions that developed and built up alongside the creation and normalization of commercial debt.<sup>12</sup>

The first such sanction was generally religious in nature and was meant to bring public approbation and spiritual pressure to bear.<sup>13</sup> One illustration is the method of "sitting d'harna," traditionally utilized in India.<sup>14</sup> Thereunder, a creditor who was owed money simply sat on the debtor's doorway, for all of the debtor's family and neighbors to see, until the debt was paid.<sup>15</sup> Another example comes from Egypt. There, a debtor traditionally "pledged" the mummified body of a near, deceased relative, especially one's father.<sup>16</sup> If the debtor defaulted, the creditor removed the mummy and closed the family tomb against the debtor's own burial.<sup>17</sup> The second sanction related to execution, though not the sort we traditionally think of. Here, non-paying debtors were subject to severe, physical mistreatment, often culminating in explicit violence.<sup>18</sup> Under Hindu law, for example, a creditor could maim or kill a debtor, enslave the debtor, or harm the debtor's family.<sup>19</sup> Under the Code of Hammurabi, the debtor or the debtor's family were regularly sold into slavery,<sup>20</sup> and, in Rome, the debtor was said to have pledged his own body against repayment, with failure to honor the debt often resulting in the execution of the person.<sup>21</sup>

---

ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88, 104 (Ass'n of Am. Law Sch. ed., 1907)) ("Prior to the Norman Conquest, 'business had hardly got beyond ready money between parties both present,' and there was not much room for trade confidences.").

9 See Levinthal, *The Early History of Bankruptcy Law*, *supra* note 6, at 229.

10 *See id.*

11 *See id.*

12 *See id.*

13 *See id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 229-30.

19 *Id.* at 230.

20 *Id.*

21 *Id.* at 231.

Credit in its early forms, then, was either non-existent or strenuously enforced. It was not until later, as custom mellowed and formal law supplanted tradition, that creditor protection solidified into a regulated whole. In the English and American system, contingent creditor property rights were created in debtor property. This was accomplished by turning execution away from the person and toward their property, thereby protecting debtors' freedom and physical safety but not their estate.<sup>22</sup> Debtor protection was not the sole basis for this change, however. Instead, this was "an instance of the general evolution of legal process from the stage where [sic] retaliation is the end in view to the stage where compensation is the chief desideratum."<sup>23</sup>

So execution against property came to be the ultimate creditor remedy in our system of laws—the option to which a creditor can turn when faced with a non-paying debtor and when in need of recompense. This right to reach out and convert another's property to one's own property is powerful in its own right and is particularly interesting as it relates to charging orders, a lesser (but related) remedy. Because of this relevance, it is worth examining execution at greater length.

### B. Execution, the Ultimate Creditor Remedy

The transition from personal execution to property-based (or proprietary) execution was a relatively natural one, given the competing concerns regarding the debtor's safety and the creditor's need for compensation and the historical basis of execution existing in most systems of jurisprudence.<sup>24</sup> These systems, as indicated above, often viewed the debtor's body as a direct pledge on the debt.<sup>25</sup> From there, it was a relatively natural transition to viewing the debtor's property as also serving as security.<sup>26</sup> This leap, from person to property, created

---

<sup>22</sup> It is important, here, to distinguish the remedy of execution from that of foreclosure. Foreclosure is similar to execution in that it permits creditors to convert debtor property to their own and in that it is a result of "the power struggle between borrowers and lenders." Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV., Fall 1996, at 77, 89 (citing 4 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 427-579 (A. James Casner ed., 1952)). The two are dissimilar, however, in that foreclosure is the result of an express contractual agreement between the parties that a particular piece of property (or multiple pieces of defined property) should be subject to the creditor's potential property rights, whereas execution is the result of a statutorily granted right to generally seize property that arises without the debtor's consent or cooperation. This lack of debtor cooperation parallels the granting of a charging order and draws the two together such that charging orders can only be truly understood as part of the same spectrum of rights to which execution belongs.

<sup>23</sup> Levinthal, *The Early History of Bankruptcy Law*, *supra* note 6, at 232.

<sup>24</sup> *See id.* at 232-33.

<sup>25</sup> *See id.* This view may well have arisen from a more explicit pledge of flesh in the context of secured transactions. *See, e.g.*, George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363, 365 (1999) ("Primitive Roman law required human hostages providing slave labor to the secured party.").

<sup>26</sup> *See Levinthal, The Early History of Bankruptcy Law, supra* note 6, at 232.

a new set of creditor rights, ranging from the right of an individual creditor to execute against specific property (individual proprietary execution) to the right of one or more creditors to seize the entire debtor's estate and liquidate it for the benefit of all creditors (general proprietary execution).<sup>27</sup>

Tracing these twin developments, individual proprietary execution goes back at least as far as the Statute of Acton–Brunell, passed in 1283.<sup>28</sup> In response to merchant complaints regarding commercial losses, and a concomitant refusal to come to England to trade, Edward I passed this law, intending to create a speedy method for debt recovery.<sup>29</sup> Thereunder, merchants in certain cities gained the power to summon debtors before the Mayor and establish the debt and default.<sup>30</sup> Once done, if the debts were not then paid, the Mayor had the right to order the debtor's assets sold for the benefit of the creditor.<sup>31</sup> This process has evolved significantly over the last 720 years, of course, but the underlying premise remains. Creditors still have the right to summon debtors<sup>32</sup> and to seize their assets to pay proven debts.<sup>33</sup>

General proprietary execution merely broadened and extended that right. The general right of execution developed alongside individual proprietary execution as a complementary element of the same basic scheme intended to compensate creditors. Here, rather than permitting a single creditor to seize a single item of property, the law provided that all of the debtor's assets (or its "estate") should be seized, sold, and divided up amongst all creditors.<sup>34</sup> This protects creditors from debtor fraud<sup>35</sup> and from each other<sup>36</sup> and ultimately

---

<sup>27</sup> See *id.* at 232–35.

<sup>28</sup> See Levinthal, *The Early History of English Bankruptcy*, *supra* note 8, at 7.

<sup>29</sup> *Id.* at 7–8.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.*

<sup>32</sup> Rather than prove the debt before the Mayor, creditors now prove the debt before a court. Doing so results in a judgment against the debtor, in favor of the creditor.

<sup>33</sup> See, e.g., CAL. CIV. PROC. CODE §§ 699.010–.090 (West 2009 & Supp. 2013); CONN. GEN. STAT. ANN. §§ 52–367a to –367b (West 2005); DEL. CODE ANN. tit. 10, §§ 4901–4987 (West 1999 & Supp. 2012); N.Y. C.P.L.R. 5230 (McKinney 2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 34.001–.076 (West 2008 & Supp. 2013).

<sup>34</sup> See Levinthal, *The Early History of Bankruptcy Law*, *supra* note 6, at 235–37.

<sup>35</sup> This occurs, where, for example, a debtor wrongfully favors one creditor over another. See, e.g., W.T. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, 69 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY, No. 3, New Series, 1, 30 & n.108 (1979) (discussing P.R.O., C.39/24, *Muschamp v. Stoakes* (1598), an early case wherein the executrix of a debtor confessed judgment in favor of a select number of creditors, thereby entirely frustrating all other creditors).

<sup>36</sup> This occurs where, for example, the creditors have to "race to the courthouse" to establish their rights. See, e.g., Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543, 2548 (1996) (citing Joint Project of UNCITRAL and INSOL International on Cross–Border Insolvencies: Expert Committee's Report on Cross–Border Insolvency Access and Recognition, 5 INSOL INT'L INSOLVENCY REV. 140, 143–44 (1996)) ("Unsecured creditors seek to maximize return by preventing exclusion of secured interests, and by

served as the basis for modern bankruptcy law, which is essentially a full-scale execution of all of a debtor's (non-exempt) assets.<sup>37</sup>

What our system has ultimately settled on, then, is a spectrum of creditor rights, transferring debtor property to creditors to varying degrees depending on a host of factors and circumstances. The charging order is part of this spectrum. Though not as powerful as individual proprietary execution (and certainly not as broad as general proprietary execution), the charging order is part of a long tradition that transfers real and actual rights in debtor property directly to creditors. Its rightful place in the panoply of creditor property rights<sup>38</sup> speaks volumes and is relevant in analyzing the true depth and worth of this remedy. Before considering that at length, however, it is useful to examine in detail the nature and development of the charging order.

## II. PROPERTY FORM AND THE NUMERUS CLAUSUS

So creditor property rights have developed over time, attempting to grant creditors property rights as necessary to effect legitimate claims but also balancing this creation (or conversion) of property with the legitimate concerns and needs of the debtor.<sup>39</sup> The charging order is part of this development,<sup>40</sup> and

---

beating other unsecured creditors in the race to the court house, before a stay may be imposed.”)

37 See Levinthal, *The Early History of Bankruptcy Law*, *supra* note 6, at 225–27.

38 This spectrum should be seen as a whole series of rights and interests developed by the law in order to compensate creditors with debtor property but to do so in a reasonable fashion that balances the competing concerns of the opposing parties. Another right that exists along this spectrum, for example, is the claim of fraudulent transfer, originating in the Statute of 13 Elizabeth and invalidating “covinous and fraudulent” transfers meant “to delay, hinder or defraud creditors and others.” Fraudulent Conveyances Act, 1571, 13 Eliz., c. 5 (1570) (U.K.). Again, this permits creditors to exercise control over a debtor's property in order to ensure creditor payment.

39 And, as discussed below, the interests of third parties doing business with the debtor. *See infra* text accompanying notes 51–63.

40 This development has lately culminated in a charging order that applies to debtor interests in LLCs. *See* UNIF. LTD. LIAB. CO. ACT § 504 (1996), 6B U.L.A. 605 (2008). This section of the Uniform Limited Liability Company Act (ULLCA) addresses the creation and awarding of a charging order. *Id.* ULLCA is a uniform act, adopted by the National Conference of Commissioners on Uniform State Laws in 1996. *See, e.g.*, J. William Callison, *Charging Order Exclusivity: A Pragmatic Approach to Olmstead v. Federal Trade Commission*, 66 BUS. LAW. 339, 345 (2011). The Revised Uniform Limited Liability Company Act (RULLCA) followed in 2006. *Id.*; REV. UNIF. LTD. LIAB. CO. ACT (2006), 6B U.L.A. 407 (2008). Though neither statute has been systematically adopted by the various states, they both serve as reasonable and useful guidance as to how state LLC statutes generally function and so are referred to throughout this Article. *See* Callison, *supra*, at 345–46. Though LLCs, general partnerships, and limited partnerships are all distinct types of business entities with distinct rules, LLC charging orders have evolved directly from the general partnership and limited partnership charging order concepts and all charging orders function in roughly the same manner. *See id.* at 341–45. Accordingly, this Article frequently cites to the Uniform Partnership Act (UPA), the Revised Uniform Partnership Act (RUPA), the Uniform Limited Partnership Act (ULPA), and the Revised Uniform Limited Partnership Act (RULPA), and all of these acts may be relied on herein to the extent relevant.



the nature of the charging order is relevant because of what it tells us about the placement and purpose of charging orders within the general penumbra of creditor property rights, how that function has changed over time, and how charging orders ought to be perceived and utilized by the bar and judiciary.

### A. Description and Initial History

The charging order constitutes a distinctive part of the general suite of creditor property rights. It arises only in the context of partnership entities and effectively prevents creditors from directly seizing debtor interests in these businesses.<sup>41</sup> Instead of direct execution, a judgment creditor may use a charging order to “reach only the debtor–member’s interest in the firm’s distributions, somewhat like garnishment.”<sup>42</sup> This means that the creditor is able to gain a property interest in *something* (the right to distributions) but not the actual interest in the entity itself.<sup>43</sup> The charging order, then, constitutes a lien on the debtor’s right to distributions,<sup>44</sup> and it stays attached thereto until the judgment is satisfied,<sup>45</sup> but it does not affect any other rights the partner had before the execution of the order (including managerial rights).<sup>46</sup> If the judgment will not be satisfied, or if the creditor can demonstrate a need, the relevant court may ultimately appoint a receiver, order foreclosure, or make other orders, but these remedies are rarely utilized.<sup>47</sup>

In this fashion, the law has effectively fashioned an “in between” remedy—greater than a naked, unsecured claim but less than the right to foreclose or otherwise seize an asset.<sup>48</sup> Indeed, “[c]harging orders have been

---

<sup>41</sup> See *infra* Part II.B.

<sup>42</sup> Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations*, 30 DEL. J. CORP. L. 199, 203 (2005); see also Carter G. Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, 16 STAN. J.L. BUS. & FIN. 222, 225 (2011) (referring to a charging order as “a perpetual garnishment order”).

<sup>43</sup> This “bundle of rights” then, is considerably less than what one would have if one owned the interest in the entity outright. The actual logistics of getting this lesser bundle of rights probably varies from jurisdiction to jurisdiction. In general, the judgment creditor probably needs to obtain and serve an order to show cause or some other sort of order from the court directing the partners to either oppose the charging order or to consent to its direction that future profits be directed to the creditor. See J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. 1, 19 (1953).

<sup>44</sup> UNIF. LTD. LIAB. CO. ACT § 504(b), 6B U.L.A. 605.

<sup>45</sup> See Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 225.

<sup>46</sup> See, e.g., *Weddell v. HzO, Inc.*, 271 P.3d 743, 750 (Nev. 2012) (“[T]he debtor member no longer has the right to future LLC distributions to the extent of the charging order, but retains all other rights . . . including managerial interests.”).

<sup>47</sup> But see *infra* Part III.B. These additional rights are at the heart of what this Article is about and are discussed at length below.

<sup>48</sup> See, e.g., *First Mid-Illinois Bank & Trust, N.A. v. Parker*, 933 N.E.2d 1215, 1222 (Ill. App. Ct. 2010) (internal quotation marks omitted) (“[T]he Illinois LLC Act Statute regarding charging

described as ‘nothing more than a legislative means of providing a creditor some means of getting at a debtor’s ill-defined interest in a statutory bastard, surnamed ‘partnership,’ but corporately protecting participants by limiting their liability as [ ] corporate shareholders.’<sup>49</sup> The charging order, then, is distinctive and is not a full property right, but it still fits comfortably within the larger galaxy of creditor property rights intended to aid creditors in their quest for compensation. Just how this kind of remedy came about is both interesting and relevant to this Article’s discussion regarding the legitimate scope and application of the LLC charging order.

As with so many things, the charging order came from England, having been incorporated into the English Partnership Act.<sup>50</sup> The reason for this half-step toward creditor ownership arises from the law’s struggle to define and properly treat a partnership vis-à-vis its constituent partners. By its very nature, a partnership requires more than one person.<sup>51</sup> So who owns what? Does each partner own a pro rata share of all property “belonging to the partnership”? Or does each partner merely own its particular share of the partnership, which in turn directly owns the property titled to the entity? This question reflects a long-standing divergence in the treatment of partnerships wherein a partnership is treated as either an entity or an aggregate of the partners.<sup>52</sup>

Early law, as embodied in the Uniform Partnership Act of 1914<sup>53</sup> (UPA), adopted the aggregate view, rejecting the idea that the partnership was a separate legal entity and dictating that partnership assets were therefore owned by the partners collectively.<sup>54</sup> This led to significant confusion, wherein courts and lawyers mistakenly believed that a partner’s interest was a direct interest in the property of the firm, rather than an intangible share

---

orders] creates a special remedy that enables the creditor to realize the value of the judgment debtor’s distributional interest, while at the same time protecting both the limited liability company’s ability to continue to operate and the interests of the other members.”).

49 *Weddell*, 271 P.3d at 750 (quoting *Bank of Bethesda v. Koch*, 408 A.2d 767, 770 (Md. Ct. Spec. App. 1979)).

50 Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 231; Gose, *supra* note 43, at 3; *see also* REV. UNIF. P’SHP ACT § 301 cmt. 2 (1997), 6 pt. I U.L.A. 101–02 (2001).

51 This is the case in the vast majority of situations. There is, however, an exception to virtually everything, and, technically, there may be a situation where a partnership continues on with a single owner. *See generally* Robert W. Hillman & Donald J. Weidner, *Partners Without Partners: The Legal Status of Single Person Partnerships*, 17 *FORDHAM J. CORP. & FIN. L.* 449 (2012). This minor anomaly is not directly relevant here. For our purposes (and in the vast majority of situations), “[a] partnership is formed whenever *two or more* persons voluntarily associate in the carrying on of a business without forming some other business organization.” *Id.* at 471 (emphasis added).

52 *See, e.g.*, ROBERT W. HAMILTON ET AL., *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 46–49 (11th ed. 2010).

53 UNIF. P’SHP ACT (1914), 6 pt. I U.L.A. 275 (2001).

54 *See, e.g.*, HAMILTON ET AL., *supra* note 52, at 103 (discussing the “tenancy in partnership” form of ownership effectively established by the UPA).

in the business operations of the entity.<sup>55</sup> Moreover, even when this concept was properly understood, there simply was no procedure by which a creditor could seize the debtor–partner’s intangible interest in the business.<sup>56</sup> The only available remedy was the writ of *fieri facias*, which only addressed the seizure of physical property.<sup>57</sup> As such, “[s]ince it was practically inconceivable that valuable partnership interests should be exempt from creditors’ claims,” creditors were systematically permitted to seize assets directly owned by the partnership.<sup>58</sup>

This meant that a debtor’s partners had a very direct, and very practical, stake in the debtor’s affairs. Effectively, foreclosure of a partner’s interest was a foreclosure of the partnership’s assets, and such a foreclosure often resulted in a termination of the partnership’s business.<sup>59</sup> An early English case makes the point well:

When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a [writ of execution], and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in Chancery in order to get an injunction to take an account and pay over that which was due by the execution debtor. A more clumsy method of proceeding could hardly have grown up.<sup>60</sup>

This result was not optimal for anyone. It was unfair to the non–debtor partners, for obvious reasons.<sup>61</sup> It was a loss to society, insofar as profitable and contributing companies were put out of business due to non–market externalities.<sup>62</sup> And it was often harmful even to the “recovering” creditor

---

<sup>55</sup> Gose, *supra* note 43, at 2.

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* (citing *Nixon & Chatfield v. Nash*, 12 Ohio St. 647, 648 (1861)).

<sup>59</sup> *See* Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 231.

<sup>60</sup> *Id.* (quoting *Brown, Janson & Co. v. A. Hutchinson & Co.*, [1895] 1 Q.B. 737 (Eng. C.A.)); *see also* Gose, *supra* note 43, at 1 (“Substantially the same procedure prevailed throughout the United States.”).

<sup>61</sup> *See* Gose, *supra* note 43, at 2 (listing reasons as disruption of the business and dissolution of the partnership).

<sup>62</sup> *See, e.g.*, Kenneth S. Klein, *When Enough Is Not Enough: Correcting Market Inefficiencies in the Purchase and Sale of Residential Property Insurance*, 18 VA. J. SOC. POL’Y & L. 345, 346 n.2 (2011) (“Inefficient markets are ones unnecessarily burdened with external costs or risks, such as a cost or risk that could be eliminated with a solution costing less than the cost or risk itself, or a transactional cost or risk allocated to a party inadequately apprised of the allocation and thus without a reasonable opportunity to account for the cost or risk when negotiating the transaction price.”); *cf.* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 533 (8th ed. 2011) (discussing the negative economic consequences associated with the impermanence of partnerships).

because any cessation of business reduced the value of the partnership interest the creditor had hoped to retrieve.<sup>63</sup>

In the United States, numerous reforms were instituted in an attempt to address these difficulties. Texas, for example, passed a statute that permitted a “symbolic seizure” of a partner’s business interest by physically exhibiting the writ at the partnership place of business.<sup>64</sup> In other jurisdictions, statutes permitted the constructive seizure of partnership assets but forbade any actual interference.<sup>65</sup> But these new laws did not address the core problem—distinguishing between a partner’s ownership in the business entity itself and that entity’s ownership of property. This state of affairs gave rise to the charging order.

The charging order was meant to directly address this problem, which arose from the aggregate nature of the partnership, and to “protect the *partnership* business from disruption at the hands of the creditors of an *individual partner*.”<sup>66</sup> As discussed above, it did so by permitting creditors to theoretically salvage the worth of a partnership interest (i.e., the profit arising therefrom) without directly seizing any assets.<sup>67</sup> This intermediate right seemed a reasonable attempt to balance competing interests by providing aid to creditors and simultaneously preventing the harm traditionally suffered by innocent third party partners.

Additionally, the charging order served a number of salutary purposes, despite the difficulties arising from an aggregate view of partnerships.<sup>68</sup> This is because of the relatively small scale of most unincorporated entities and what that implies for the owners thereof. Many, if not most, partnerships are relatively small and do not involve significant professional management.<sup>69</sup> Contrast this with some larger corporations wherein a large number of owners—who do not necessarily know anything about each other—come

---

63 Gose, *supra* note 43, at 2 (“[G]ood will and going concern value might be impaired or destroyed.”).

64 *Id.*

65 In Washington, for example, state law allowed the partnership to retain possession if the non-debtor partners posted a bond. *See id.* at 3.

66 Daniel S. Kleinberger, Carter G. Bishop & Thomas Earl Geu, *Charging Orders and the New Uniform Limited Partnership Act: Dispelling Rumors of Disaster*, PROB. & PROP., July–Aug. 2004, at 30, 31; *see also* Gose, *supra* note 43, at 1.

67 *See supra* note 43 and accompanying text.

68 RUPA has adopted the entity view of partnerships but has nevertheless retained the charging order as a remedy available to creditors of individual partners. *See* HAMILTON ET AL., *supra* note 52, at 48; *see also* REV. UNIF. P’SHIP ACT § 201 (1997), 6 pt. I U.L.A. 91 (2001). Similarly, LLC law and limited partnership law both provide for charging orders, even though both sets of doctrine clearly honor and accept the entity view. *See* REV. UNIF. LTD. LIAB. CO. ACT § 503 (2006), 6B U.L.A. 498–99 (2008); REV. UNIF. LTD. P’SHIP ACT § 703 (2001), 6A U.L.A. 463 (2008).

69 *See* Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 828 (2012).

together as investors in an entity run by highly compensated professionals.<sup>70</sup> This generally means that the few owners in a given unincorporated entity know each other and consciously choose to do business together. Permitting a stranger to intrude into the partnership, then, would work a hardship on all parties.<sup>71</sup>

The law recognizes this hardship and so has established the “pick your partner principle,” which essentially dictates that no new partners can be admitted into a partnership without the unanimous approval of all other partners.<sup>72</sup> The charging order effectively backstops this rule against assignment,<sup>73</sup> ensuring that involuntary assignees play by the same rules

---

<sup>70</sup> See Kelli A. Alces, *Strengthening Investment in Public Corporations Through the Unincorporation*, 35 SEATTLE U.L. REV. 1009, 1027 (2012) (“[T]he numerous, widely dispersed shareholders who also invest in public corporations.”). *But see infra* note 76.

<sup>71</sup> This is particularly so in a general partnership setting, wherein all partners have equal management rights, all partners have apparent authority, all partners have personal liability, and any partner can cause dissolution. See Steven O. Weise, *PEB Commentary No. \_\_\_\_ Application of UCC Sections 9-406 and 9-408 to Transfers of Interests in Unincorporated Business Organizations*, ST044 A.L.I.-ABA 377, 380 (2012). Of course, this desire to be able to determine one’s own partners also arises from simple human nature: people enter into business arrangements with specific individuals based on trust and a belief that those individuals will make “good” partners. Permitting a debtor-partner’s creditor to unilaterally interject forces a stranger into the mix, something people generally, and understandably, do not want. See J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 PAC. L.J. 1, 12 (1993) (“The nondebtor partners in a charging order setting have had a situation thrust upon them which occurred outside of the course of partnership business and over which they had no control.”). Closely related to this generic desire, however, is a specific concern about liability. See generally HAMILTON ET AL., *supra* note 52, at 104–09. Partners have the ability to bind the partnership. UNIF. P’SHP ACT § 9 (1914), 6 pt. I U.L.A. 553 (2001); REV. UNIF. P’SHP ACT § 301 (1997), 6 pt. I U.L.A. 101 (2001). And partners are, in turn, liable for partnership liabilities. See also UNIF. P’SHP ACT § 15, 6 pt. I U.L.A. 613 (2001); REV. UNIF. P’SHP ACT § 306, 6 pt. I U.L.A. 117 (2001). Accordingly, every partner is potentially liable for the acts of every other partner, and the law generally holds that this potentially unlimited liability should only be incurred voluntarily.

<sup>72</sup> This “pick your partner” principle is considered “a fundamental characteristic of the law and practice related to unincorporated business organizations . . . by which an owner can decide who the owner’s business partner or partners may be through the use of those very transfer restrictions.” Weise, *supra* note 71, at 380. This principle is notably expressed in UPA sections 18, 27 and RUPA section 401. See Callison, *supra* note 40, at 343 (“By preventing assignees (both voluntary and involuntary) from participating in partnership business, the pick-your-partner principle avoids undue and unbargained-for risk to the partnership business and the other partners posed by the admission of a stranger to the partnership.”). This principle is also at the “core” of LLC law. Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515, 544 (2007); see also REV. UNIF. LTD. LIAB. CO. ACT § 502 cmt. (2006), 6B U.L.A. 497 (2008) (“One of the most fundamental characteristics of LLC law is its fidelity to the ‘pick your partner’ principle. This section is the core of the Act’s provisions reflecting and protecting that principle.”). And limited partnerships also reflect this principle. See Daniel S. Kleinberger, *A User’s Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK U. L. REV. 583, 597 (2004) (“Article 7 . . . reflect[s] the ‘pick your partner’ approach that is characteristic of partnership law.”); see also REV. UNIF. LTD. P’SHP ACT § 703 cmt. (2001), 6A U.L.A. 464 (2008).

<sup>73</sup> The law is actually a little more nuanced than this statement implies. A partner can transfer its “interest in the partnership.” See, e.g., UNIF. P’SHP ACT § 26 (1914), 6 pt. II U.L.A. 349 (2001);

such that both voluntary and involuntary assignees end up honoring the “pick your partner” principle.<sup>74</sup>

The importance of this principle is further emphasized by contrasting the charging order remedy with the remedy available to creditors of debtors that own shares in a corporation. In that situation, if a debtor defaults, the creditor can foreclose and obtain full and unfettered ownership of the shareholders’ stock in the corporation.<sup>75</sup> This right exists regardless of the size or complexity of the corporation<sup>76</sup> and gives the foreclosing party all of the rights and elements of ownership associated with the foreclosed shares,

---

REV. UNIF. P’SHIP ACT § 502 (1997), 6 pt. I U.L.A. 156 (2001). But this “interest in the partnership” is not what we generally think of as a “partnership interest.” It is, instead, merely a share of profits, losses, and rights to distributions. *See id.* It is only this “bare economic interest” (or “distributional interest”) that is freely transferable as personal property—a “full partnership interest” (with its attendant right to management, information, etc.) is not transferable without unanimous partner approval. *See, e.g.*, UNIF. P’SHIP ACT § 18, 6 pt. II U.L.A. 101 (2001); REV. UNIF. P’SHIP ACT §§ 401, 501, 503, 6 pt. I U.L.A. 133, 155, 156–57 (2001).

<sup>74</sup> *See* REV. UNIF. P’SHIP ACT §§ 501, 504 (1997), 6 pt. I U.L.A. 133, 160 (2001); REV. UNIF. LTD. P’SHIP ACT (2001) §§ 702, 703, 6A U.L.A. 461–62, 463 (2008); REV. UNIF. LTD. LIAB. CO. ACT §§ 502, 503 (2006), 6B U.L.A. 496–99 (2008); *see also In re Lucas*, 107 B.R. 332, 336 (Bankr. D.N.M. 1989) (“Any assignee of the partnership interest merely entitles the assignee to receive the profits to which the partner would otherwise be entitled.”); *Kellis v. Ring*, 155 Cal. Rptr. 297, 299 (Ct. App. 1979) (internal quotation marks omitted) (“While [the creditor] has a right to receive the share of the profits or other compensation by way of income, or the return of his contributions to which his assignor would otherwise be entitled, he has no right to interfere in the management of the limited partnership.”); *Madison Hills Ltd. P’ship II v. Madison Hills, Inc.*, 644 A.2d 363, 367 (Conn. App. Ct. 1994) (“[A] charging creditor does not become a full partner [and] is not entitled to manage the partnership . . . .”); *Brant v. Krilich*, 835 N.E.2d 582, 592 n.20 (Ind. Ct. App. 2005) (“There is no reason why our courts should disregard the intent of the General Assembly to protect the close-knit structure of a LLC and violate the other members’ interests and rights by declaring that they must accept a judgment creditor of a member into full membership with all the rights appurtenant thereto when the judgment debtor could not transfer those rights himself.”); *Green v. Bellerive Condominiums Ltd. P’ship*, 763 A.2d 252, 261–62 (Md. Ct. Spec. App. 2000) (holding that the fundamental management rights of a partner are not transferred to a judgment creditor by a charging order); *Zokaites v. Pittsburgh Irish Pubs, LLC*, 962 A.2d 1220, 1226 n.4 (Pa. Super. Ct. 2008) (“There is no justification for this Court to ignore the intent of our Legislature to protect the close-knit structure of a limited liability company and violate the other members’ interests and rights by declaring that they must accept a judgment creditor of a member into full membership with all the rights appurtenant thereto when the judgment debtor could not transfer those rights himself.”). *But see* Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 235 (“[T]he charging order never truly had anything to do with the pick-your-partner principle and the anti-transfer restrictions.”).

<sup>75</sup> *See, e.g.*, Stephen R. Looney & Ronald A. Levin, *Limited Liability Companies Classified as S Corporations – Part II*, SN067 A.L.I.–ABA 961, 971 (2008).

<sup>76</sup> *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 354 (2010). In this case the Court supported its reasoning with evidence that that “96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees” and “more than 75% of corporations whose income is taxed under federal law have less than \$1 million in receipts per year.” *Id.* (citations omitted).

including the right to vote, to participate in management, and to request information.<sup>77</sup>

The rights of a creditor who lends to a shareholder, then, are significantly greater than the rights of a creditor who lends to a partnership. Given that there is no reason to believe that creditors of partners would differ from creditors of shareholders, the difference must lie within the nature of the entity, so we come again to the pick your partner principle: because of the structure of corporations and the manner in which they are governed,<sup>78</sup> it is simply more important to be able to pick your partner (for the reasons discussed above) than it is to be able to pick your fellow shareholder.<sup>79</sup> Charging orders, then, are only necessary to weight the scales in favor of business-owner debtors when the nature of the business entity exposes other owners to unfair liability or liquidation.

These concerns and historical circumstances all work together to explain the circumstances and legal issues that gave rise to the charging order and its unique balancing of debtor and creditor interests. The law is not stagnant, though, and the charging order has evolved significantly over time, contracting in some ways and expanding in others. This evolution is important to examine, as it lends additional insight into the current nature and scope of the charging order.

---

<sup>77</sup> See MODEL BUS. CORP. ACT §§ 7,8 (4th ed. 2008). Corporations can issue many different classes of shares with many different characteristics. See, e.g., MODEL BUS. CORP. ACT § 6.01 (4th ed. 2008). So it is conceivable that a given class of shares may not have some or any of the rights we generally associate with traditional common stock (i.e., voting rights, profit participation, etc.). And, of course, the foreclosing party only inherits the rights actually inherent in the foreclosed stock.

<sup>78</sup> An explanation of corporate governance is beyond the scope of this Article. Suffice it to say that: (a) corporations are limited liability entities such that shareholders are not subject to liability for the actions of their fellow shareholders in the same way that partners are, and (b) shareholders have a less direct role in the management and control of a corporation, given that corporations are generally controlled by officers and directors. Cf. David G. Yosifon, *Consumer Lock-in and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429, 1442 n.58 (2012) (“[A]ll partners have a right to control the partnership and can, unlike shareholders, attend directly to the value of their own investment.”). See generally Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991) (discussing corporate shareholder limited liability).

<sup>79</sup> This is particularly true in the case of *minority* partners. That is because minority partners do not have the level of organizational control necessary to deflect the potential predations of a creditor that steps into a position of control. As an example, assume that three partners—X, Y, and Z—each own 1/3 of XYZ Partnership. If A gets a judgment against X and thereafter takes X’s interest in XYZ Partnership, neither Y nor Z is at an extreme disadvantage. While it is true that both Y and Z likely still have a number of objections to A’s involvement (they may not know A, they are potentially subject to liability, etc.), Y and Z continue to control the partnership, through their 2/3 ownership. As a counter-example, assume the same arrangement, except that X owns 60%, and Y and Z each own 20%. Now, if A gets a judgment against X and thereafter takes X’s interest in XYZ Partnership, both Y and Z are at an extreme disadvantage. A, a stranger to the partnership, now has the ability to control, and even terminate, the business entity.

*B. Early Adoption, Evolution, and Perception of the Charging Order*

Gaining traction for all of the reasons set forth herein, the charging order made its first appearance in an American uniform statute in the Uniform Partnership Act of 1914 (UPA).<sup>80</sup> This iteration codified the charging order, limited its effect, and strongly protected the pick your partner principle:

[The] statute made clear that a judgment creditor of any partner could seek a court order charging the interest of the partner with the amount of the unsatisfied judgment. The statute granted the court the power to appoint a receiver to receive the profit distributions and to make all other orders, directions, accounts, and inquiries which the debtor partner might have made. The same statute also contemplated the creditor could foreclose on its charging order lien and the partnership interest could be redeemed at any time before the foreclosure sale. However, the purchaser–assignee could only become a partner with the consent of all the remaining partners. While the original charging order statute was silent regarding “other” rights acquired by the purchaser at a foreclosure sale, other provisions made clear that the purchase did not dissolve the partnership or entitle the assignee to (i) interfere in management or administration of the partnership business or affairs, (ii) require any information or account of partnership transactions, or (iii) inspect partnership books. The foreclosure sale only entitled the purchaser–assignee to receive the profits to which the assigning–selling partner would otherwise have been entitled. Moreover to make matters even more clear, a separate statute indicated that a partner’s right in specific partnership property was not subject to attachment or execution except on a claim against the partnership itself.<sup>81</sup>

This language was picked up in 1916 by the Limited Partnership Act,<sup>82</sup> and, from there, the concept was statutorily cemented into American jurisprudence. The Revised Uniform Limited Partnership Act of 1976 with the 1985 amendments,<sup>83</sup> the Revised Uniform Limited Partnership Act of 2001,<sup>84</sup> and the Revised Uniform Partnership Act of 1997<sup>85</sup> (RUPA) all adopted similar language.<sup>86</sup> And the charging order made its way into LLC law when it was adopted by the Uniform Limited Liability Company Act of 1996<sup>87</sup> and the Revised Uniform Limited Liability Company Act of 2006.<sup>88</sup>

As the various charging order statutes filtered through the various uniform acts and throughout all fifty states, the manner in which legislatures, courts, and lawyers viewed and utilized this remedy evolved.

---

<sup>80</sup> UNIF. P’SHP ACT § 28 (1914), 6 pt. II U.L.A. 341 (2001); Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 231.

<sup>81</sup> *Id.* at 231–32 (footnotes omitted).

<sup>82</sup> Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 232.

<sup>83</sup> REV. UNIF. LTD. P’SHP ACT § 703 (amended 1985), 6B U.L.A. 313 (2008).

<sup>84</sup> REV. UNIF. LTD. P’SHP ACT § 703 (2001), 6A U.L.A. 463 (2008).

<sup>85</sup> REV. UNIF. P’SHP ACT § 504 (1997), 6 pt. I U.L.A. 160 (2001).

<sup>86</sup> There have been, however, a number of changes in that language as the charging order and its underlying concepts evolved over time. *See generally infra* Part II.

<sup>87</sup> UNIF. LTD. LIAB. CO. ACT § 504 (1996), 6B U.L.A. 605 (2008).

<sup>88</sup> REV. UNIF. LTD. LIAB. CO. ACT § 503 (2006), 6B U.L.A. 498–99 (2008); *see supra* note 40.



Though it is outside the scope of this Article to trace this process precisely,<sup>89</sup> it is possible to generally describe that evolution in the broader context of how the perception and utilization of the remedy has changed over time. In particular, it is possible to describe this development in the context of two early philosophies of charging order interpretation.<sup>90</sup> The divergence of these two philosophies, one that viewed the charging order as a self-contained remedy and one that viewed it as part of a broader package of creditor rights, reflects (and ultimately explains) both the early lack of certainty surrounding charging orders and the more recent, perceived impotence of the remedy.

The view of the charging order as part of a broader range of remedies was articulated by Lord Lindley in applying the charging order statute under the English Partnership Act.<sup>91</sup> This philosophy dictated that the charging order, in and of itself, "simply encumbers the interest [and] does not compel the firm to do anything about paying the creditor."<sup>92</sup> A charging order was merely a first step that imposed no obligation on the partnership or on anyone else and that required any creditor desiring real compensation to go back to the court for further help.<sup>93</sup> The charging order alone, then, was essentially worthless.<sup>94</sup> This early, or English, view contrasts with a broader view articulated by Professor William Lewis, the principal architect of the UPA.<sup>95</sup> This alternative, or American, view perceived the charging order as a more useful remedy in that it affirmatively directed a debtor-partner's share of profits to the creditor.<sup>96</sup> The other avenues of recourse described by the charging order statutes were available, but primarily as a way to enforce the primary charging order itself.<sup>97</sup>

These two lines of thought regarding the charging order predictably filtered into state law, though not in the manner generally perceived. It is commonly believed that the broader view of charging orders has been adopted and that this view gives the remedy more substance.<sup>98</sup> While the American view has predominated legislatively, the English view has done so in the courts;

---

89 Various charging orders have been adopted in the various states hundreds of times over the last 100 years.

90 See, e.g., Gose, *supra* note 43, at 7-11.

91 Lord Lindley was the author of the opinion in the *Brown, Janson & Co.* case, cited above. See *supra* note 60 and accompanying text.

92 Gose, *supra* note 43, at 8.

93 This help could take the form of ordering a receiver, of ordering an accounting, or even of selling the debtor's interest in the partnership. *Id.* at 8-9.

94 See *id.* at 8.

95 *Id.* at 10.

96 See *id.* at 11.

97 See *id.* at 10.

98 See *id.* at 11 ("Generally the cases appear to proceed on the liberal philosophy of interpretation indicated by Professor Lewis rather than by the apparently narrower views suggested by Lord Lindley.")

this mismatch of perception goes a long way toward explaining the weak development and utilization of the charging order.

The American view is manifest in the statutes in a number of different ways.<sup>99</sup> In particular, modern statutes generally differ in two large and relevant ways, and these differences seem to indicate that the statutes presume that the charging order stands alone, in line with the philosophy of Professor Lewis. These differences relate to exclusivity and the ultimate remedy of foreclosure.<sup>100</sup>

As to exclusivity in the context of LLCs, approximately thirty-four states have indicated that the charging order is exclusive, while the other sixteen have remained silent.<sup>101</sup> Similarly, some jurisdictions have explicitly addressed foreclosure, with twelve states<sup>102</sup> (Alaska, Delaware, Florida, Georgia, Maine, Michigan, New Hampshire, New Jersey, Oklahoma, South Dakota, Texas, and Wyoming) specifically precluding it, and two others<sup>103</sup> (Nevada, and Virginia)

---

99 See Carter G. Bishop, *Fifty State Series: LLC Charging Order Statute Table 5–51* (Suffolk Univ. Law Sch. Research, Working Paper No. 10–03, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542244). As a matter of pure historical adoption, it appears that the following jurisdictions base their statute on the ULLCA: California, Colorado, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and West Virginia. The rest of the jurisdictions (Alabama, Alaska, Arizona, Arkansas, Connecticut, Georgia, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Washington, Wisconsin, and Wyoming) appear to have based their statutes on RULPA. See *id.* There are numerous differences laced throughout the various state statutes, and a review of these differences is outside the scope of this Article. See *id.*; see also Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 236 (“While it is clear that every state partnership and LLC charging order statute was patterned after one of the uniform law versions, the patchwork differences in language are difficult to explain.”).

100 Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 236–37. Therein, Professor Bishop identifies “three areas of comparative importance.” In addition to the two discussed herein, he also discusses the fact that some statutes make a distinction between a multi-member LLC and a single member LLC. *Id.*

101 See Bishop, *Fifty State Series: LLC Charging Order Statute Table*, *supra* note 99. These statutes specify that the charging order is 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.” See *id.* (quoting REV. UNIF. P’SHP ACT § 504(e) (1997), 6 pt. I U.L.A. 160 (2001)).

102 ALASKA STAT. § 10.50.380(c) (2008); FLA. STAT. ANN. § 608.433(8) (West Supp. 2013) (expressly precluding foreclosure for non-single member LLCs); GA. CODE ANN. § 14-11-504(b) (2003 & Supp. 2009) (prohibiting foreclosure “except as otherwise provided in the articles of organization or a written operating agreement”); ME. REV. STAT. ANN. tit. 31, § 1573(3) (2011); MICH. COMP. LAWS ANN. § 450.4507(5) (West 2010); N.H. REV. STAT. ANN. § 304-C:126 (LexisNexis 2012) (expressly precluding foreclosure for non-single member LLCs); N.J. STAT. ANN. § 42:2B-45 (West 2004); OKLA. STAT. tit. 18, § 2034 (West 1999 & Supp. 2010); S.D. CODIFIED LAWS § 47-34A-504(e) (2007 & Supp. 2009); TEX. BUS. ORGS. CODE ANN. § 101.112(c) (West 2010); WYO. STAT. ANN. § 17-29-503(g) (2011).

103 See DEL. CODE ANN. tit. 6, § 18-703 (2005); NEV. REV. STAT. § 86.401(2)(a) (2011); VA. CODE ANN. § 13.1-1041.1 (2006).

eliminating foreclosure language with the intent of prohibiting it.<sup>104</sup> The importance of these limitations is subject to some doubt,<sup>105</sup> but the implication and intent are not. This cabining of remedies demonstrates an ongoing hostility to creditors of members and a further willingness to reallocate rights from owners of creditor property rights to non-debtor members. Importantly, it also indicates that legislatures perceive the charging order as so broad and potentially useful a tool that no other remedy is needed and that, in fact, it needs explicit limitation.

That view, however, is not held by lawyers and courts. These participants, instead, view the charging order in the context of the English view—as a weak, unhelpful remedy that does little to nothing on its own. There exists in the bar a general perception that people can place their assets into an LLC and effectively put them beyond the reach of potential creditors because charging orders provide so little satisfaction.<sup>106</sup> In general, the thinking goes, charging orders only allow creditors to claim certain, limited distributions, and the debtor can avoid even that by ensuring that there are no distributions.

These two contradictory philosophies applied in tandem have led to a toxic situation in which charging orders are viewed as virtually impotent. On the one hand, the operative statutes are drafted narrowly, reflecting the legislature's belief that the charging order is a broadly operative statute that needs to be carefully restrained so that third party business owners are properly protected. On the other hand, judges (and, concomitantly, lawyers) view the charging order as weak and so view statutory restraints and claw-backs as even further evidence of the relative uselessness of the remedy. This state of affairs has led to a clear deterioration of the usefulness and legitimacy of the charging order as a property right of any significant worth or value.

---

104 See Bishop, *Fifty State Series: LLC Charging Order Statute Table*, *supra* note 99. The remaining states either expressly permit foreclosure or are silent without any intent to eliminate foreclosure as a possibility. See *id.*

105 See *infra* note 107 and accompanying text. But see *infra* Part III.B (discussing the utility of various avenues available to the holder of a charging order, including foreclosure).

106 See, e.g., Susan Kalinka, *Assignment of an Interest in a Limited Liability Company and the Assignment of Income*, 64 U. CIN. L. REV. 443, 483 (1996) (“[A] judgment creditor who obtains a charging order against a member’s interest in an LLC obtains only the right to receive the distributions to which the member was entitled. If neither the LLC’s operating agreement nor its members authorize nonliquidating distributions from the LLC, the charging order may be worthless to the judgment creditor.”); see also Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, BUS. ENTITIES, Sept.–Oct. 2006, at 28, 64 (footnote omitted) (“As a practical matter, creditors rarely choose to pursue charging orders. A charging order is not a very effective debt collection tool. A creditor may find itself holding a charging order, without any ability to determine when the judgment will be paid off. Practitioners should remember that any uncertainty surrounding charging orders is uncertainty for both the debtor and the creditor. This uncertainty forces most creditors to settle the judgment with the debtor, on terms more acceptable to the debtor, rather than pursue the charging order remedy.”). In the end, then, the view is that charging orders provide protection to debtors, not compensation to creditors.

Moreover, this view of impotence has considerable academic support. In fact, some scholars claim that these variations and different schools of thought are not important because the very foundation of charging order simply is not particularly meaningful.<sup>107</sup> In particular, the first round of revised uniform statutes that incorporated language limiting foreclosure rights and providing for exclusivity can be read as merely underscoring then-existing law.<sup>108</sup> This is so for a couple of reasons.

First, partnerships (as well as limited partnerships, limited liability partnerships, and LLCs) are, and were, treated as separate entities.<sup>109</sup> This is clear under RUPA,<sup>110</sup> the limited partnership statutes,<sup>111</sup> and the LLC statutes.<sup>112</sup> Interestingly, it was also true under UPA, the first iteration of partnership law and the first American incorporation of the charging order. As discussed above, UPA did not treat a partnership as a separate entity for most purposes,<sup>113</sup> which meant that partnership property was effectively owned by the partners individually.<sup>114</sup> Aggregate treatment of partnership property did not, however, carry through to creditors of individual partners in that those creditors were not permitted to attach or execute thereon.<sup>115</sup> This prohibition on creditor interference arguably obviates at least some of the need for the charging order remedy.

Similarly, to the extent the charging order was intended to protect the pick your partner principle, pre-existing law may have already provided sufficient protection. Recall that only “part” of a partnership interest is transferable.<sup>116</sup> Under American law, partners have long had the right to transfer an economic interest in their entity.<sup>117</sup> This transferable interest, however, is distinctly limited.

---

107 See Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 233–35, 237–40 (arguing that the charging order simply displaces other collection procedures and does not accomplish anything significantly novel or important). *But see infra* note 159 and accompanying text (discussing the extent to which foreclosure of a charging order is, in fact, a true danger).

108 See Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 233–34.

109 *Id.* at 235 (“American law . . . regards a partnership or LLC as an entity separate from its owners . . .”).

110 REV. UNIF. P’SHP ACT § 201 (1997), 6 pt. I U.L.A. 91 (2001).

111 UNIF. LTD. P’SHP ACT § 104 (2001), 6A U.L.A. 366 (2008) (“A limited partnership is an entity distinct from its partners.”).

112 UNIF. LTD. LIAB. CO. ACT § 201 (1996), 6B U.L.A. 574 (2008); REV. UNIF. LTD. LIAB. CO. ACT § 104 (2006), 6B U.L.A. 437 (2008) (“A limited liability company is an entity distinct from its members.”).

113 *Supra* note 54 and accompanying text.

114 UNIF. P’SHP ACT § 25(t) (1914), 6 pt. II U.L.A. 294 (2001) (“A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.”).

115 *Id.* § 25(2)(c), 6 pt. II U.L.A. 294 (2001) (“A partner’s right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership.”).

116 *Supra* notes 73–74 and accompanying text.

117 Referred to as a “bare economic interest” above, this is referred to as a “transferable inter-

In particular, it does not pass to the recipient the right to participate in the management or conduct of the company.<sup>118</sup> And this is the only interest that an owner can pass to a third party without unanimous approval of all other owners.<sup>119</sup> As such, no one can enter into a partnership entity (in a full sense, as a full member or partner, with the right to participate in—i.e., disrupt—the conduct of the entity) without the non-transferring partners' approval. Accordingly, the argument goes, the charging order is not really needed to protect the integrity of the pick your partner principle. Nobody, not even involuntary assignees, can succeed to an owner's interest, so there is no need for a charging order to serve an intermediate role to prevent creditors from intruding.

But this general view of impotence is incorrect. It is not that the charging order is not needed or is not of independent value. Instead, the true nature of the charging order has been forgotten as the entire system of partnership law<sup>120</sup> has grown over time in an organic, holistic sense, as opposed to a linear, or direct, sense. What started out as an attempt to address serious concerns with respect to partnerships, as utilized in early commercial settings, grew in tandem with other elements of partnership law. These elements—viewing the partnership as a separate entity and requiring unanimity for the admission of additional partners—may ultimately affect the need for charging orders, but all of these developed together.

Similarly, the other areas of law specifically concerned with business associations other than general partnerships also developed alongside the growth of the charging order, all the while borrowing from earlier concepts of partnership law. For instance, the limited partnership and the LLC were created with the specific intent to address a number of perceived weaknesses inherent in general partnership and corporation law.<sup>121</sup> They did this by strengthening

---

est" under both partnership law and LLC law. REV. UNIF. P'SHIP ACT § 502 (1997), 6 pt. I U.L.A. 156 (2001); REV. UNIF. LTD. P'SHIP ACT § 701 (2001), 6A U.L.A. 461 (2008); REV. UNIF. LTD. LIAB. CO. ACT § 501 (2006), 6B U.L.A. 496 (2008).

<sup>118</sup> See, e.g., REV. UNIF. LTD. LIAB. CO. ACT § 502(a)(3)(A) (2006), 6B U.L.A. 496 (2008).

<sup>119</sup> See, e.g., *id.* at § 401(d)(3), 6B U.L.A. 478 (2008) (stating the default rule that a third party cannot become a member without approval of all members).

<sup>120</sup> "Partnership law," as used herein, refers generically to that body of law that has developed with respect to non-corporate business entities. See, e.g., Saul Levmore, *Uncorporations and the Delaware Strategy*, 2005 U. ILL. L. REV. 195, 196 n.4 ("[T]he terms uncorporations and unincorporate law interchangeably with expressions such as noncorporate forms, or partnership law and limited liability company law, meaning always to refer to the law enabling and regulating noncorporate forms of business activity."). To the extent that it is important or relevant to focus on general partnerships (as opposed to limited partnerships or LLCs), this Article specifically states that "general partnerships" are at issue.

<sup>121</sup> See, e.g., William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 874-75 (1995) (footnotes omitted) ("Once the United States entered the era of general corporation laws, demand for a noncorporate alternative did not disappear. Beginning in 1874, Pennsylvania, Michigan, New Jersey, and Ohio adopted statutes authorizing 'limited partnership associations' or 'partnership associations,' which gave members limited liability. These statutes

the entity concept, restricting liability for limited partners and members, and by mimicking general partnership law regarding admission of new owners.<sup>122</sup> These new concepts were not created out of whole cloth, however, and consistently drew from UPA and/or RUPA as they were fashioned.<sup>123</sup> This meant that, even as the underlying law of partnership was changing, and even as the specifics of the charging order concept were changing simultaneously, both were being sampled and utilized in substantial measure for new entities with differing concepts.

The result is a remedy well-grounded in real world concerns that has been made practically moot by other areas of partnership law and laws applicable to other business associations. The charging order began as a compromise intended to protect uniquely vulnerable persons associated with general partnerships (non-debtor partners) from the forced intrusions of third party creditors, but it has ended up as a forgotten and nearly vestigial element of partnership law.

Of course, this circuitous, non-linear evolution is not new or novel.<sup>124</sup> Indeed, it does not change the basic state of the law or the fact that we now have the charging order, a distinct remedy unique to non-corporate business associations, which grants a suite of privileges to creditors that effectively constitute a choate property right. This is particularly so when the charging order is viewed as what it truly is—a choate property right intended to balance the rights of creditors, debtors, and third parties.<sup>125</sup>

---

were apparently adopted to relieve entrepreneurs of some of the burdens of the corporate form . . . Finally, the limited partnership appeared in its modern incarnation in 1916, with promulgation of the Uniform Limited Partnership Act. While the limited partnership has enjoyed considerable popularity, it has not become a viable substitute for the corporation . . .”).

122 See, e.g., REV. UNIF. LTD. P'SHIP ACT § 301 (2001), 6A U.L.A. 416 (2008); REV. UNIF. LTD. LIAB. CO. ACT § 401 (2006), 6B U.L.A. 478 (2008).

123 See, e.g., Robert R. Keatinge, *The Partnership Agreement and Third Parties: ReRULPA § 110(b)(13) v. RUPA § 103(b)(10)*, 37 SUFFOLK U. L. REV. 873, 873–74 (2004) (footnote omitted) (“Unincorporated business organizations organized under [these] uniform acts . . . have several common characteristics.”).

124 See ALLAN C. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* 17–18 (2005) (arguing that law develops from an amalgam of different means, as opposed to an organic, linear process).

125 The National Conference on Commissioners on Uniform State Laws's (NCCUSL) explanation of the role of the charging order supports this view:

This section balances the needs of a judgment creditor of a partner or transferee with the needs of the limited partnership and non-debtor partners and transferees. The section achieves that balance by allowing the judgment creditor to collect on the judgment through the transferable interest of the judgment debtor while prohibiting interference in the management and activities of the limited partnership.

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the order. The creditor has no say in the timing or amount of those distributions. The charging order does not entitle the creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited partnership.

REV. UNIF. LTD. P'SHIP ACT § 703 cmt. (2001), 6A U.L.A. 464 (2008).

### III. THE CHARGING ORDER AS A CHOATE CREDITOR PROPERTY RIGHT

As we can see, charging orders have changed over time. They came into existence in the long tradition of creditor property rights, that area of law that seeks to grant to creditors ownership of debtor property. Their very creation, though, constitutes a compromise, an attempt to accommodate unique partnership issues and to balance creditor needs with those of debtors and innocent third parties. But this initial balancing has come to favor debtor rights too heavily in the context of LLC charging orders, at least in practice, and the charging order remedy has become increasingly unmoored from its historical roots as a creditor remedy. Indeed, rather than being viewed as a limited deviation from the larger suite of creditor rights, too often the charging order is viewed as a throw-away remedy, a non-right that effectively offers no real solace or value to a creditor.

This is neither appropriate nor inevitable. Emphasizing the nature of the charging order, as part of the broader galaxy of creditor property rights, refocuses our analysis on the purpose of those rights and stresses the principle underlying charging orders. Re-casting of the nature and aim of the remedy is significant because, once one accepts charging orders as a choate creditor property right, they gain substance, possessing the various attributes that generally flow from property ownership and vastly increasing in both scope and reach.

#### *A. Purpose of Charging Orders and Creditor Property Rights*

Property has been famously described as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>126</sup> It is that individualized right of exploitation that creates value, and the creation and recognition of creditor property rights takes that value from the debtor and takes it for the benefit of the creditor. As discussed above, this institutionalized expropriation (or “execution”) arose directly in response to the need to protect creditors by granting them a useful remedy and thereby stimulating commercially beneficial economic activity.<sup>127</sup> In other words, the creation of creditor property rights is meant to make creditors whole, and its focus is quite rightly not on debtors, third parties, or society. Instead, its focus is on creditors and on how the law can effectively guard their interests by ensuring that they get as close as possible to the position they would have occupied had the debtor fully performed all of its obligations.<sup>128</sup>

---

<sup>126</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>127</sup> See *supra* Part I.B.

<sup>128</sup> See, e.g., 3 DEBTOR-CREDITOR LAW § 27.03 (Matthew Bender 2010) (explaining that creditors can pursue execution and so reach debtor assets in order to satisfy properly effected judgments).

Recognizing that the charging order is a type of creditor property right is a useful insight because it brings the focus back to the real purpose behind charging orders: taking property from debtors and transferring it to creditors. Now, it is of course true that charging orders represent a compromise, as discussed above, and that partnership law and charging orders developed such that debtor and third party interests receive more consideration in this context than they do in the context of other creditor property rights. But that re-balancing of competing interests does not change the fundamental nature of the charging order as a creditor property right.

One can see this by again contrasting the charging order with execution on a debtor's ownership in a corporation. Both a charging order that affects a partner's interest in a partnership, and a writ of execution that affects a shareholder's interest in a corporation, create creditor property rights by transferring the ownership of a business entity from the debtor to the creditor. Both also expose third parties (third party partners and shareholders) to the potential risks associated with being forced to do business with the creditor, a stranger to the business venture.<sup>129</sup> The law has given additional protection to partners due to the unique nature of that entity, but the underlying circumstances are effectively identical: valuable assets owned by defaulting debtors should be seized and liquidated so that the value thereof can be transferred to deserving creditors. The fact that a quirk of partnership law has resulted in a lessening of the harsh manner in which the creditor achieves recompense should not distract from the underlying goal of creating creditor property rights.

Unfortunately, that is precisely what has happened in this area of the law. Instead of recognizing that the charging order is meant to compensate creditors by creating property rights in debtor business interests, judges, lawyers, and even academics have instead focused on debtor rights and the actual and perceived weaknesses associated with the remedy.<sup>130</sup> From a practical standpoint, most parties simply believe that they can avoid the effects of a pure charging order simply by stopping distributions or recharacterizing them as salary or something else.<sup>131</sup> If, instead, these parties would focus on the underlying nature of the charging order as a creditor property right, they would perceive just how concrete this remedy is and how significantly it can advance creditors' positions (and, conversely, hurt debtors' positions).<sup>132</sup> The next section develops this in

---

129 See *supra* note 71–72 and accompanying text.

130 See *supra* note 106.

131 *Id.* Indeed, this is a significant part of the reason that LLCs have become so important in modern planning and commercial contexts. See, e.g., John T. Mulligan, *Asset-Protection Strategies for Physicians*, AM. BANKR. INST. J., Oct. 2003, at 22, 50 (emphasis added) ("Family limited partnerships or limited-liability companies can offer significant asset protection in that, if properly structured, on an ongoing basis the creditor of a partner or member could *only* receive a charging order against the individual's interest in the partnership or LLC.").

132 See Carter G. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, BUS. ENTITIES, May–June 2010, at 14, 17–18 (quoting *Taylor v. S & M Lamp Co.*, 12 Cal. Rptr. 323, 328 (Dist. Ct. App. 1961) ("Charging orders 'are not intended to protect a debtor partner against



greater detail, focusing on the nature of the charging order as a property interest and analyzing the sorts of concrete rights and remedies that traditionally flow out of such rights.

### B. Giving Charging Orders the Weight of "Real" Property

Recognizing charging orders for what they are should reverse the existing view of their impotence. Instead of viewing them as a way of preventing creditors from interrupting partnerships, courts should seek to uphold them in the same way that they do numerous other types of property interests. Of course, they do not constitute a full and unfettered property interest, but that does not matter. In this sense, they are analogous to other "compromised" property interests, which are generally zealously protected by our legal system.

One example is property with an attached restraint on alienation. This can arise in connection with real or personal property, and, just like the charging order, this specific sort of ownership constitutes a compromised set of rights creating a need to balance rights of competing parties.<sup>133</sup> On the one hand, the party who owns the property seeks full and free alienability, and, on the other hand, the party who imposed the restraint seeks its enforcement. And courts will generally enforce the restriction.<sup>134</sup> But they do so hesitantly.<sup>135</sup> The law

---

claims of his judgment creditors where no legitimate interest of the partnership, or of the remaining or former partners is to be served.")).

<sup>133</sup> See, e.g., Linda L. Kreicher, Note, *Much Ado About Due-on-Sale: Avoiding the Tempest in New York*, 10 HOFSTRA L. REV. 1229, 1235 (1982). Therein, Ms. Kreicher notes that the due-on-sale clause is a reasonable restraint on alienation, which balances the competing interests of lenders and borrowers.

The criticism that the clause is an unreasonable restraint on alienation likewise fails to distinguish reasonable restraints that can be removed by private agreement from those that cannot. The due-on-sale clause only "shifts to the lender the advantage from the increase in interest rates which would otherwise belong to the seller."

*Id.* at 1260 (footnotes omitted) (quoting Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 312 (1975)).

<sup>134</sup> 12 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5455 (2011) (footnote omitted) ("Courts applying common law principles have held that transfer restrictions constitute restraints on alienation and should be strictly construed. Under the rule of strict construction, the transfer restriction generally will be upheld if it is reasonable and lawful.")

<sup>135</sup> See RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 3.4 (2000) ("A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable."); 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 90 (2002); see also *First Bank & Trust v. Novak*, 747 P.2d 850, 855 (Kan. Ct. App. 1987) ("A restriction against assignment is a restraint on alienation, and as such it is strictly construed against the party urging the restriction."); *Wright v. Rub-a-Dub Car Wash, Inc.*, 740 So. 2d 891, 903 n.2 (Miss. 1999) ("[A] restriction against assignments in that it acts as a restraint on alienation is not favored by the law and should be strictly construed against the lessor."); *Johnson v. Yousoofian*, 930 P.2d 921, 924 (Wash. Ct. App. 1996) ("[L]ease covenants requiring the landlord's consent to assignment are restraints on alienation and should be strictly construed.")

favors full and unfettered ownership and the rights that accompany it<sup>136</sup> and so seeks to find and encourage that wherever possible.

There are many examples in property law, situations where courts or legislatures have crafted a property interest that marks a middle course between or among competing interests by giving an owner something less than full and unfettered rights to property.<sup>137</sup> And, time and again, the courts reflexively favor the holder of the property.<sup>138</sup> They recognize that these are property interests and seek to honor them, attempting to magnify owner rights, simplify ownership, and therefore permit market forces to take effect. Even with a restraint on alienation, or subject to a covenant or restriction, property is still property. It is still a valuable right, hard fought over and jealously guarded once obtained, and the law seeks to maximize it by construing it, to the extent possible, as a limited departure from its roots.

When it comes to charging orders, however, this independent regard and fealty to property rights (along with the judicial desire to adhere to the roots of ownership) vanishes.<sup>139</sup> Rather than focusing on the creditor's ownership interest in the debtor's business entity, the law focuses on all the ways in which creditors have no effective recourse and all the ways that debtors can escape paying what they owe.<sup>140</sup> This odd fixation on debtor rights, arising as it does

---

136 See William A. Dreier, *The Restatement (Third) of Torts: Products Liability and New Jersey Law—Not Quite Perfect Together*, 50 *RUTGERS L. REV.* 2059, 2124 n.402 (1998) (quoting *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 12 cmt. a (1998)) (“[C]orporate law ‘favors the free alienability of corporate assets and limits shareholders’ exposures to liability in order to facilitate the formation and investment of capital.”); John P. Strohm, Comment, *Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law*, 34 *CUMB. L. REV.* 127, 135 (2003) (“In essence, as with property in general, the law favors free alienability of copyright ownership . . .”).

137 One such additional example is property fettered by real covenants and restrictions. As with property subject to restraints on alienation, the law reflexively favors the unconstrained use of law, not subject to these sorts of restrictions. See Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 *ST. JOHN'S L. REV.* 3, 11 (1999) (“[Covenants and restrictions] continue to be regarded with disfavor as isolated attempts by inept or mean-spirited grantors to interfere with the right of every person to enjoy their property to the absolute fullest.”).

138 See, e.g., 9 *RICHARD R. POWELL, POWELL ON REAL PROPERTY* § 67.03[3] (Michael Allan Wolf ed., 2000) (discussing the law's policy favoring unfettered use of land).

139 Part of this unique resistance to acknowledging the nature of charging orders perhaps arises from the long-standing confusion surrounding charging orders. See, e.g., Gose, *supra* note 43, at 5 (“Casual conversations with American judges and lawyers reveal not only a general unfamiliarity with the statute but also a lack of familiarity with its theory and its meaning on the part of those who try to apply it. Such confusion is wholly understandable.”). And part of it perhaps arises because charging orders tend to arise in a limited set of circumstances that usually involve egregious acts of debtors. See, e.g., Elizabeth N. Kozlow, Comment, *A Charging Order Conundrum: Is It Really the “Exclusive Remedy” of an LLC Member Judgment Creditor?*, 63 *BAYLOR L. REV.* 884, 897 (2011) (“[C]ourts seem to balance stringent statutory language of the charging order remedy with the equitable result based on egregious facts.”). Whatever the cause, it is clear that charging orders are given significantly less respect than most other types of property interests.

140 See Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging*

from a failure to view the charging order as an actual property right, results in a hodge-podge of rules created to address this unique situation, creating substantial uncertainty and inefficiency.<sup>141</sup> But this state of affairs is neither appropriate nor necessary. If courts and practitioners more clearly understood the underlying nature of charging orders and focused on enlarging those rights rather than minimizing them, then the use and scope of these rights would solidify and begin to serve the purpose of creditor protection, for which they were created.

This can be done in a number of ways. Initially, courts and practitioners can simply begin to give full effect to the clear statutory language associated with most charging orders. Charging order statutes generally provide that a judgment creditor can charge the debtor's transferable interest and that the court itself can (1) appoint a receiver of the distributions due or to become due, (2) make "all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances . . . may require," and (3) order a foreclosure of the interest subject to the charging order.<sup>142</sup> This language is not all-encompassing, but it does afford a number of potential remedies for which lawyers can advocate, and that courts can countenance, in seeking to establish and protect creditor interests.<sup>143</sup>

For instance, charging order recipients can seek to protect the underlying value of the partnership by setting aside mortgages and liens that insiders have placed on partnership property.<sup>144</sup> This can substantially increase the value and worth of a charging order, as it may effectively terminate a prior claimant to

---

*Order Statutory Lacuna*, *supra* note 42, at 222 ("Since the member alone retains discretionary control over when and if such distributions will be made, the charging order is usually ineffective because the member simply accumulates distributions.").

141 See Alan M. Weinberger, *Making Partners Pay Child Support: The Charging Order at 100*, 27 HOUS. L. REV. 297, 306 (1990) (footnotes omitted) (discussing the charging order in the context of "the considerable confusion surrounding th[e] procedure, its circuitous nature, and the uncertainty of recovery in the end").

142 See, e.g., REV. UNIF. P'SHIP ACT § 504 (1997), 6 pt. I U.L.A. 160 (2001); REV. UNIF. LTD. P'SHIP ACT § 703 (2001), 6A U.L.A. 463 (2008); UNIF. LTD. LIAB. CO. ACT § 504 (1996), 6B U.L.A. 605 (2008); REV. UNIF. LTD. LIAB. CO. ACT § 503 (2006), 6B U.L.A. 498-99 (2008). Of course, not every state has statutes matching these, but these serve as useful models.

143 Note that, here, there is no necessary distinction among LLCs, partnerships, and limited partnerships—lawyers and courts can give weight to enabling statutes regardless of the underlying entity, and many of the relevant statutes are similar among the various types of entities. This is not necessarily true of all of the arguments made in this section. See *infra* note 164 and accompanying text.

144 Gose, *supra* note 43, at 12-13 (citing *Windom Nat'l Bank v. Klein*, 254 N.W. 602 (Minn. 1934)) (discussing the right of an appointed receiver to set aside insider security interests). *Windom National Bank* specifically states:

[A] receiver . . . has the right in a proper action to have adjudicated the nullity of any mortgage or other assignment by some but not all of the partners of their interest in specific property of the partnership less than the whole. Such a receiver is entitled to any relief under the language of the statute "which the circumstances of the case may require" to accomplish justice under the law. Obviously, a part of such relief is the avoidance of any unauthorized attempt to dispose of partnership property.

the funds that would otherwise be distributed to the debtor partner. Similarly, a debtor can protect its relative rights to partnership profits by blocking an attempted dissolution of the partnership in order to defeat the creditor's claim.<sup>145</sup> This could frustrate attempts by the debtor, and the debtor's partners, to avoid a direct distribution subject to the charging order, but they would nevertheless receive funds associated with a termination of the partnership entity. Moreover, if such an attempt to block dissolution fails, then the creditor can attempt to dictate the manner in which a sale of the partnership interest is to be made.<sup>146</sup> Again, this power gives the creditor the ability to frustrate debtor attempts to somehow extract value out of the entity (by colluding to sell assets for less than fair market value or by transferring the assets to a controlled person or entity or in some other creative way) without creating a distribution available to the holder of the charging order. These individual remedies fall within the general ambit of a court's power to make "orders, directions, accounts [sic] and inquiries . . . which the circumstances . . . may require" and may or may not involve the appointment of a receiver.<sup>147</sup> That right—the ability to appoint an independent party with its own powers, prerogatives, and the capacity to review and monitor business activities—is an extremely powerful remedy because it will significantly frustrate and inhibit the normal operations of an entity.

Indeed, even more than the fact that these various sorts of actions give creditors specific tools to block specific misdeeds and avoidance strategies, the general right of a creditor to intrude into a business entity's affairs and affect its course of operations will affect the balance of power between debtors and creditors holding a charging order. This ability to interject is anathema to business. It exposes private business activity to scrutiny, prevents speedy deliberation, and ultimately harms an entity's ability to conduct business. In fact, it effectively creates the very sort of situation that the charging order was meant to prevent: one wherein the creditor interrupts the entity and the solvent partners.<sup>148</sup> Of course, exposing partners to scrutiny is not the same as taking away their property, but it still upsets non-debtors and the entity at large. This creates leverage because creditors who can affect partnership operations should be able to pressure the entity, the non-debtor partners, and the debtor partner to make chargeable distributions and thereby satisfy the creditor's claims.

And creditors have this power even without considering their statutory right to foreclose. This right creates additional leverage, involving the creditor even more intimately in the affairs of the business entity and the non-debtor partners. However, foreclosure in this context is not as straightforward as in most other circumstances, and it is important here to understand precisely what rights the creditor possesses. Notably, foreclosure

---

Windom Nat'l Bank v. Klein, 254 N.W. 602, 605 (Minn. 1934).

<sup>145</sup> Gose, *supra* note 43, at 15.

<sup>146</sup> See *id.* at 17.

<sup>147</sup> See *id.* at 16 (internal quotation marks omitted).

<sup>148</sup> See *supra* note 58 and accompanying text.

does not constitute a wholesale transfer of ownership to a judgment creditor (or to a purchaser at a foreclosure sale). This is because, in line with the discussion above regarding a “bare economic interest,” the creditor (or purchaser at the foreclosure sale) does not receive what we commonly think of as a “full membership interest.”<sup>149</sup> Instead, the creditor receives what is known as a distributional interest.<sup>150</sup> This interest is something less than a full membership interest in that it does not entitle the holder thereof to participate in the management of the LLC, demand information, or inspect company records.<sup>151</sup> So the creditor receives all economic rights of the LLC (rather than just the temporary right to receive distributions until the underlying judgment is satisfied), but it cannot dissolve the company to gain access to the underlying assets or otherwise control the entity.<sup>152</sup>

Additionally, even if one could put aside the underlying nature of what a foreclosure sale yields, gaining ownership in a debtor’s interest in a partnership entity is likely to be compromised due to transferability and liquidity issues. For example, the interest is likely to be worth less than fair market value in the creditor’s hands because most LLCs are not publicly traded.<sup>153</sup> The vast majority of foreclosed LLC interests involve small,

---

149 See UNIF. LTD. LIAB. CO. ACT §§ 503(d)–(e), 601 (1996), 6B U.L.A. 604, 607–08 (2008).

150 See *id.* § 503(a), 6B U.L.A. 603 (2008).

151 *Id.* § 503(d), 6B U.L.A. 604 (2008). This holds under the current, strict view of charging orders. If courts were to more creatively utilize the discretion granted to them in most charging order statutes by ordering a transfer of management *and* economic rights, as is advocated above, then many of these arguments would be entirely moot.

152 Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 226. Professor Bishop discusses this difficulty in the context of a single member LLC, specifically, though he likely exaggerates its significance. Still, there is no getting around the fact that the creditor essentially becomes a “naked assignee” instead of a member and so is not protected by fiduciary duties or entitled to “meddle” with the management of the company. See Kleinberger, Bishop & Geu, *supra* note 66, at 32 (analyzing charging orders in the substantially similar realm of limited partnerships). Additionally, a number of commentators believe that receiving a charging order exposes the creditor to adverse tax consequences insofar as the creditor may be taxed for entity-level profits notwithstanding its failure to receive any distributions. *Id.* at 32–33 (citing Rev. Rul. 77–137, 1977–1 C.B. 178); Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 226–27 (same). Again, though, this concern seems exaggerated. While it is true that any potential of adverse tax consequences is likely to trouble creditors, it appears that Revenue Ruling 77–137 is being interpreted too broadly. That Ruling (which addresses limited partnerships and limited partners) indicates that assignees can be held as tax partners under federal income tax law, even if they are not full partners, under state law. See Rev. Rul. 77–137, 1977–1 C.B. 178. However, this only occurs if the assignee acquires “substantially all of the dominion and control over the limited partnership.” *Id.* That does not occur in connection with a foreclosure, for all of the reasons addressed above. The creditor does not become a “full member,” with all the attendant rights, so the level of dominion and control necessary to create tax partner status simply does not exist. See ARTHUR B. WILLIS ET AL., *PARTNERSHIP TAXATION* ¶ 1.03[7] (7th ed. 2011) (citing I.R.S. Gen. Couns. Mem. 36,960 (Dec. 20, 1976)). Nevertheless, the fear of adverse tax consequences persists and is often promulgated as a reason why foreclosure is not useful and so not likely to be widely utilized.

153 Indeed, it is very rare for an LLC to ever be publicly traded. The vast majority of publicly

relatively closely held LLCs such that there is no way to establish, much less receive, fair value.<sup>154</sup>

Additionally, even if there were a market for the interest, many closely held partnerships and LLCs are laced with contractual provisions that restrict the manner in which partners or members can sell or transfer their interests.<sup>155</sup> These restrictions mean that even if a creditor could find a willing buyer, the creditor would not be able to freely transfer the interest to that buyer. Such restrictions chill the market and restrict liquidity, thereby diminishing value. As such, even after gaining ownership of a partnership interest, a creditor will be unlikely to sell the LLC interest at anything approaching fair market value.<sup>156</sup>

So foreclosure is not perfect and does not completely transfer power from the debtor to the creditor. But it does not need to. Many commentators who examined charging order foreclosure have more or less scorned the danger of foreclosure by pointing out the imperfections inherent therein,<sup>157</sup> but these arguments are only partially correct. The ULLCA, which provides for foreclosure, also gives a significant bite to that remedy, despite the “bare economic” nature of a member’s transferable interest, by specifically providing that “[a] transferee who does not become a member is entitled to . . . seek . . . a judicial determination that it is equitable to dissolve and wind up the company’s business.”<sup>158</sup> This right, when coupled with the power to

---

traded companies are corporations, not LLCs or any other type of entity. See Robert C. Micheletto, Comment, *The Poison Pill: A Panacea for the Hostile Corporate Takeover*, 21 J. MARSHALL L. REV. 107, 119 (1987) (citing Leo Herzel & Laura D. Richman, *Delaware’s Preeminence by Design—Foreword to R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS*, at ix (1986)).

154 See, e.g., *Eyler v. Comm’r*, 69 T.C.M. (CCH) 2200, 2207 (1995) (“[I]n determining the value of unlisted stocks, actual sales made in reasonable amounts at arm’s length, in the normal course of business, within a reasonable time before or after the valuation date, are the best criteria of market value.”).

155 See, e.g., *Weise*, *supra* note 71, at 382 (“Many partnership agreements and operating agreements also contain contractual transfer restrictions. Sometimes these transfer restrictions merely repeat the statutory restrictions on the transfer of governance rights, but many agreements go further. For example, a partnership or operating agreement might provide a ‘first refusal’ or other ‘buy-sell’ mechanism or otherwise limit or even prohibit the assignment of economic rights even though under the relevant statutory provisions the economic rights are otherwise freely transferable.”).

156 See Bishop, *Desiderata: The Single Member Limited Liability Company Olmstead Charging Order Statutory Lacuna*, *supra* note 42, at 225 (focusing on “the lack of liquidity, marketability, and transferability” of single member LLCs). Contrast this with foreclosure of real property and tangible personal property. While foreclosure in those circumstances is often costly and time-consuming, those types of property are relatively easy to seize, value, and sell. If nothing else, the foreclosing creditor can generally bid some or all of the obligation owing to it, thereby exchanging debt for an asset. This is generally called a “credit bid” and results in the creditor possessing an actual, tangible asset that can be sold or otherwise utilized.

157 See, e.g., *id.*

158 See UNIF. LTD. LIAB. CO. ACT § 503(e)(3) (1996), 6B U.L.A. 604 (2008). Hawaii, Montana, South Carolina, Vermont, and West Virginia have adopted this provision.

foreclose, means that recipients of a charging order can, in fact, terminate the business operations of an LLC.<sup>159</sup>

Moreover, even in jurisdictions that do not permit a foreclosing creditor to seek dissolution, the imperfect practicalities of foreclosure simply do not change the basic structure of the law, which transfers some right or ownership of the debtor to the creditor.<sup>160</sup> Pointing out that the process is not ideal does not diminish the legal reality that foreclosure permits creditors to gain a foothold in the business entity and its operations in that they now have a specific ownership right to *something*, whatever it is. Third party partners must know, and account for, the fact that after a foreclosure, there is now a stranger to the original partnership that owns some explicit part of the partnership and to whom some duties or obligations are owed.

Foreclosure, then, introduces uncertainty. Again, it is this sort of involvement and uncertainty that entities and third party partners want to avoid. When the possibility of foreclosure is present, no one can count on an assured barrier to protect LLC assets from creditors. Instead, everyone must anticipate that creditors might foreclose, thrusting all parties into an area of ambiguity and indecision, wherein neither the debtor nor the creditor seems to have a full ownership interest in anything. This lack of certainty is a powerful element that should be explicitly recognized by those utilizing LLCs<sup>161</sup> and gives creditors significant leverage, going far beyond the toothless remedy many describe.

Thus, there are a number of mainstream remedies contained within charging order statutes that permit lawyers and judges to give charging orders their due weight as real property and thereby shift their focus to maximizing the utility and scope of this unique creditor property right. There is, in addition, a significantly more aggressive argument available to holders of charging orders in the context of LLCs, wherein creditors can seek to push beyond the type of foreclosure typically available in the LLC context and therefore expand their rights to true ownership status.

Initially, it is important to note that this argument to expand foreclosure rights may not work in those states that have adopted exclusivity language

---

159 See *In re Canney*, 284 F.3d 362, 369 (2d Cir. 2002); *Provident Bank v. Lewitt*, 852 A.2d 852, 855-56 (Conn. App. Ct. 2004). Under Connecticut law, a court can order a strict foreclosure rather than a standard sale. Upon doing so, the court will normally give the debtor a set period of time in which to pay off or redeem the debt. If the debtor fails to do so in the allotted time, the creditor is granted immediate ownership and possession of the property. *Provident Bank*, 852 A.2d at 855-56. Vermont law is similar, also permitting strict foreclosure. See, e.g., *In re Canney*, 284 F.3d at 369.

160 For instance, it is clear that the purchaser at a foreclosure sale has inspection rights. See Kozlow, *supra* note 139, at 888 (footnotes omitted) ("The rights of an assignee include reasonable inspections of the LLC's books and records, a right to reasonable information or a reasonable account of the transactions of the company, as well as the right to receive distributions.").

161 See Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 893 (1988) (discussing the "importance of legal certainty *ex ante* to . . . private planning").

in their charging order statutes.<sup>162</sup> To the extent that there is no exclusivity rule that preempts the field, however, holders of charging orders should consider arguing that foreclosure entitles them to more than a mere transferable interest. As discussed above, partnership law has long protected the business entity and non-debtor partners by limiting the nature of a partnership interest that is foreclosed upon. And there is no question that this approach has traditionally applied to LLCs as well.<sup>163</sup> However, it is conceivable that shifting the perception of the charging order to a property-based remedy, which should be construed broadly, will entice the courts to expand upon this concept, as well.

Courts could utilize the concept of a property-based remedy by ordering foreclosure and dictating that such process transfer full and complete ownership (instead of a mere transferable interest). Conceptually, this makes sense in the context of LLCs.<sup>164</sup> LLCs are, in relevant ways, much more like corporations than like partnerships. In particular, a member of an LLC enjoys limited liability and is not liable for the acts of its co-members beyond its initial investment.<sup>165</sup> Additionally, LLCs can be managed by a non-member manager, who functions like an officer of a corporation and controls the company on behalf of its constituent owners.<sup>166</sup> These similarities to corporations are important because they

---

162 See *supra* note 101 and accompanying text. A number of LLC charging order statutes explicitly provide that the rights contained therein constitute “the exclusive remedy by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor’s transferable interest.” REV. UNIF. LTD. LIAB. CO. ACT § 503(g) (2006), 6B U.L.A. 499 (2008). As discussed above, there is some question about the nature of this exclusivity. See Callison, *supra* note 40, at 343 n.22 (“Although courts have implied that charging orders are the exclusive remedy under the UPA, the various rationales for that conclusion are unclear.”); see also Kleinberger, Bishop & Geu, *supra* note 66, at 33. Determining the true impact of this language is beyond the scope of this Article, however. The remedy described in the remainder of this Article is likely only available in those states with statutes that do not truly exclude other remedies.

163 See *supra* note 118–119 and accompanying text. It is clear that the transferable interest referred to in RULLCA section 502 comes from partnership law. See Carol R. Goforth, *Why Arkansas Should Adopt the Revised Uniform Limited Liability Company Act*, 30 U. ARK. LITTLE ROCK L. REV. 31, 68 (2007) (following “the lead of traditional partnership law in specifying that an owner’s transferable interest in an LLC is personal property”).

164 This wide view of charging order foreclosure may make sense in the context of limited partnerships, as well, though these entities combine the corporate and partnership elements at play in this analysis.

165 See Jonathan R. Macey, *The Limited Liability Company: Lessons for Corporate Law*, 73 WASH. U. L.Q. 433, 434 (1995) (“[T]he purpose of forming a limited liability company is to create an entity that offers investors the protections of limited liability and the flow-through tax status of partnerships.”).

166 See William H. Clark, Jr., *The Relationship of the Model Business Corporation Act to Other Entity Laws*, LAW & CONTEMP. PROBS., Winter 2011, at 57, 71 (“A manager of an LLC has a position that can combine elements of the functions of directors and officers in a corporation.”). Not all LLCs are run by managers, and managers are often also members. Nonetheless, it is accurate to



are what gave rise to the charging order in the partnership context. Recall from above that charging orders were created to honor the pick your partner principle and to ensure that partnerships, as relatively small and personally managed enterprises, were not disrupted by the intrusion of an unwanted third party.<sup>167</sup> These concerns, however, are largely absent in the context of LLCs. It is true that most LLCs are relatively small entities<sup>168</sup> and that it is unlikely that any member wants to be forced to do business with an unknown, third-party creditor. However, the direct need to avoid this—the danger to a partnership arising from every partner’s ability to create entity-wide liability and to routinely participate in management—simply is not present.

Again, return to creditor property rights in the context of corporations.<sup>169</sup> There, as in all business settings, the entity owners (the shareholders) have chosen their compatriots carefully and likely do not welcome outside intrusion. Nevertheless, the law permits it, applying execution concepts as a matter of course,<sup>170</sup> because there are no partnership-centric issues that precipitate against doing so. And the same should apply here, where there is no explicit statutory prohibition: acknowledging the property nature of the charging order, judges should construe it broadly and permit it to foreclose an entire LLC interest, analogous to corporate law.<sup>171</sup>

Moreover, this extension is not so bold. Some courts have already begun to move along this path in certain circumstances. Florida, in particular, started down this route in *Olmstead v. Federal Trade Commission*.<sup>172</sup> There, the state supreme court held that a court of competent jurisdiction could “order a judgment debtor to surrender all right, title, and interest in the debtor’s single-member LLC to satisfy an outstanding judgment.”<sup>173</sup> Now, it is true that

---

characterize LLCs as being designed with a more professional, detached leadership style than that associated with partnerships.

<sup>167</sup> See *supra* Part II.A.

<sup>168</sup> See Michael McCord, *LCC Changes Coming Jan. 1: Act’s Author Says New Law Has Wide Range of Benefits*, SEACOASTONLINE (Dec. 10, 2012, 2:00 AM), <http://www.seacoastonline.com/articles/20121210-BIZ-212100303> (stating that the average size of an LLC is three members, but that around half of all LLCs are single member entities).

<sup>169</sup> See *supra* note 75 and accompanying text.

<sup>170</sup> See *id.*

<sup>171</sup> Courts could also chart numerous middle courses, expanding current foreclosure powers but stopping short of doing so uniformly in all LLC contexts. One of many potential examples would be to permit a foreclosing charging order holder to gain complete ownership if the charging order attached to a majority interest (or, perhaps a “quasi majority interest” in the case of a family or sham entity) in the LLC. This would only expose minority interest holders to a third party participant, something that they were potentially exposed to, in any event, given their exposure to the vagaries of minority ownership. Or, perhaps, courts could only permit a foreclosing charging order holder to gain complete ownership if the charging order attached to a single member LLC. See *infra* note 177.

<sup>172</sup> See *Olmstead v. FTC*, 44 So. 3d 76, 78 (Fla. 2010).

<sup>173</sup> See *id.* at 78. The case law from *Olmstead* is actually derived from three related cases. In

the holding was limited to single member LLCs<sup>174</sup> and that Florida legislature has since cemented this distinction.<sup>175</sup> However, some of the reasoning underlying this conclusion applies just as forcefully to multi-member LLCs. *Olmstead*, for instance, focused on a single member's right to transfer assets and the fact that an interest in an LLC is similar to "corporate stock."<sup>176</sup> These characteristics do not necessarily change just because additional members have ownership in the entity.<sup>177</sup> Regardless of how many members there are, an LLC interest is very much like a corporate interest, and there are many circumstances under which the two should be treated similarly. As such, it is within a court's power, and within an established conceptual framework, to broadly construe the foreclosure power afforded a charging order holder and so give concrete effect to the property nature of the charging order remedy.<sup>178</sup>

---

the first case, the trade commission sued operators of an alleged credit card scam, resulting in a federal judgment. See *FTC v. Peoples Credit First, LLC*, No. 8:03-CV-2353-T-TBM, 2006 WL 1169677, at \*1 (M.D. Fla. May 3, 2006); see also Louis T.M. Conti, *The New Olmstead Patch Legislation: A Case Study in the Art of Compromise for Florida LLC Law*, FLA. B.J., Dec. 2011, at 49, 49. In attempting to effect the judgment ultimately granted to the FTC, the federal court went beyond a traditional charging order and required defendants to surrender assets held by non-party, single member LLCs. See *Peoples Credit First*, 2006 WL 1169677, at \*2 & n.5. Upon appeal, the 11th Circuit certified to the Florida Supreme Court whether such an order was permissible under Florida law. See *FTC v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008). The Florida Supreme Court responded, ruling that "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." See *Olmstead*, 44 So. 3d at 78 (internal quotation mark omitted).

174 See *Olmstead*, 44 So. 3d at 81 ("The limitation on assignee rights in section 608.433(1) [of Fla. Stat. (2008)] 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.").

175 See FLA. STAT. ANN. § 608.433(5)–(7) (West Supp. 2013). Other states have similarly made this distinction, with some reaching the same conclusion and others, the opposite. Compare UTAH CODE ANN. § 48-2C-1103(2)(d) (LexisNexis 2010) ("Notwithstanding Subsection (2)(c), if the member whose interest is charged under this section is the sole member of the company when the charging order was entered: (i) the purchaser at a foreclosure sale acquires all rights of the member, including voting rights; and (ii) the member is considered to have consented to the admission of the purchaser as a member of the company."), with WYO. STAT. ANN. § 17-29-503(g) (2011) ("This section provides the exclusive remedy by which a person seeking to enforce a judgment against a judgment debtor, including any judgment debtor who may be the sole member, dissociated member or transferee, may, in the capacity of the judgment creditor, satisfy the judgment from the judgment debtor's transferable interest or from the assets of the limited liability company.").

176 See *Olmstead*, 44 So. 3d at 80.

177 It is likely that most LLCs with multiple members would have some sort of transfer restriction. However, this only holds for non-controlling interests in a truly arm's-length entity. To the extent that the debtor retains actual or constructive control, this element is just as applicable, regardless of the number of members.

178 See *In re Albright*, 291 B.R. 538, 541 (Bankr. D. Colo. 2003) ("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

## CONCLUSION

This Article seeks to untangle and lay bare the true nature of charging orders. Long viewed as a toothless remedy, hopelessly transferring the balance of power from debtors to creditors, a charging order is much more than that. It is property, and understanding and focusing on that basic fact is important. Its underlying intent is to transfer ownership from a debtor to a creditor. While it is true that a charging order is not a wholesale transfer of rights and was, in fact, created in the context of partnership law as a compromise interest, that does not change its fundamental nature. Recognizing the charging order's genesis within the greater constellation of creditor property rights and its inherent nature as a true and legitimate property interest means that the focus should be upon maximizing the value of this remedy, not minimizing it.

And there are many ways in which this could be done. In particular, a renewed focus on the powers granted to courts and charging order holders and a more aggressive attempt to utilize foreclosure in certain circumstances both seem conceptually and philosophically legitimate. The result of this shift in perception and execution will, of course, re-shift the current balance of power between debtors and creditors and could permanently alter the manner in which partnerships, limited partnerships, and LLCs are utilized. Courts, practitioners, and academics should all take note, as this would constitute a significant and important change affecting many areas of the law and practice.

---

no purpose in a single member limited liability company, because there are no other parties' interests affected." ). Again, there is a conceptual basis to expand this beyond mere single member LLCs, given that the "autonomy of the original [owners] and their ability to manage their own enterprise" in multi-member LLCs is no less exposed than in corporations. *But see id.* at 541 n.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." ).