Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #180

Date: 20-Jun-11
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **Steve Oshins: Nevada Passes New Charging Order Laws**

"With the passage of SB405, Nevada has enhanced its creditor protection laws for its LLCs, LPs and corporations. It has done so by expanding its laws to not only make the charging order the exclusive remedy, but to also remove all potential equitable remedies that might apply. The only exception is that the alter ego equitable remedy is still permitted to apply to Nevada corporations.

The new legislation also specifies that creditors of a member of a single member LLC and creditors of a shareholder of a single shareholder corporation are limited to the charging order remedy (other than the alter ego equitable remedy for corporations), thereby distancing itself from the laws of other states."

Now, **Steve Oshins** provides **LISI** members with an important and late-breaking report on the charging order language that he co-authored with Reno attorney **Mark Smallhouse** and Las Vegas attorney **Rob Kim** in SB405.

Steve is happy to report that SB405 passed through the 2011 Nevada legislative session by unanimous vote in both the Senate and the Assembly, and was approved by the Governor on June 16, 2011. Having also authored Nevada's charging order laws in both the 2001 and 2003 legislative sessions, Steve notes that the third time's a charm. Steve would like to thank **Rob Kim** and **Mark Smallhouse** for their work on the charging order portion of the legislative bill, and would like to thank Mr. Kim, Mr. Smallhouse and the rest of the **Executive Committee of the Business Law Section of the State Bar of Nevada** for sponsoring the bill and including the charging order language.

Steven J. Oshins is a member of the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who is listed in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. He was voted into the NAEPC Estate Planning Hall of Fame® and will be inducted in 2011. He is one of the most innovative attorneys in the country as demonstrated by how active he has been in writing some of Nevada's most important estate planning and creditor protection laws, including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP, the law changing the Nevada rule against perpetuities to 365 years and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP. He is also the author of the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is http://www.oshins.com.

Here is Steve's commentary:

EXECUTIVE SUMMARY:

The new charging order language in SB405 affects Nevada LLCs, LPs and corporations. The changes to the statutes will be effective on October 1, 2011. This commentary summarizes the key changes made to the statutes, and also reviews planning opportunities that advisors should consider.

FACTS:

Following are the key changes:

1. Single Member LLCs and Single Shareholder Corporations

The new language specifically makes the charging order the exclusive remedy of a judgment creditor for Nevada LLCs, corporations and LPs, specifically including both single member LLCs and single shareholder corporations. A charging order is essentially an order issued by the court granting the judgment creditor a lien over the judgment debtor's interest in the business entity. By specifically making the charging order the exclusive remedy for single member LLCs (and single shareholder corporations), the new Nevada law statutorily negates the problems that have occurred with single member LLCs in cases such as *Ashley Albright* (Colorado, 2003), *A-Z Electronics, LLC* (Idaho, 2006), *In re Modanlo* (Maryland 2006) and *Olmstead* (Florida, 2010).

Through appropriate forum shopping, the asset protection plan can be designed using business entities where the charging order is the exclusive remedy so that the client's potential creditors will typically be frustrated into settling for pennies on the dollar.

2. No Equitable Remedies

The legislation also adds language to the Nevada LLC, LP and corporation statutes specifying that no other remedies (i.e., no equitable remedies) can apply. This would include equitable remedies such as reverse veil piercing, alter ego, constructive trust and resulting trust theories that may have allowed a judge to circumvent the prior language that the charging order is the exclusive remedy. Note that most states that make the charging order the exclusive remedy of a judgment creditor do not also exclude equitable remedies from applying. Further note that during the legislative session, a negotiated exception was made only with respect to corporations (i.e., no effect on LLCs or LPs) allowing the alter ego theory to be the exclusive equitable remedy to apply to corporations.

3. NRS Chapter 87A Limited Partnership Charging Order Laws Fixed

Nevada has two different limited partnership Chapters - Chapters 87A and 88. Chapter 88 has existed for many years, whereas Chapter 87A was created much more recently in 2007. Asset Protection planners have traditionally used Chapter 88 to form Nevada limited partnerships since Chapter 87A limited partnership statutes did not make the charging order the exclusive remedy, probably as a result of its passage well after Nevada's charging order statutes were modified in 2001 and 2003. The language adopted in SB405 fixes this problem by adopting similar charging order language for both limited partnership Chapters.

COMMENT:

Planning Opportunities

The Nevada charging order laws create numerous planning opportunities. These opportunities assume that Nevada law is applied for charging order purposes.

1. Single Member LLCs: Given the recent case law in at least four jurisdictions, most planners have been reluctant to create single member LLCs since the judge may rule that a single member LLC doesn't get the charging order as the exclusive remedy. Despite this fairly recent drafting trend, a new option is to use a single member LLC, but domicile it in Nevada.

2. Any LLCs or LPs Established in other Jurisdictions: In order to obtain the advantages of Nevada law where the charging order is the exclusive remedy and no equitable remedies can be issued, consider any of the following strategies:

a. Dissolve the existing entity and start over with a Nevada entity. This is simple if the underlying assets are easy to transfer out of one entity and then into another entity. In most cases, this is the best option since it is so simple.

b. Change the existing entity to Nevada law using a statutory conversion (a.k.a., a domestication). For assets that are difficult to move out of one entity and then into another entity, this is a very simple way of switching state law for the entity since it's essentially just a change of state laws without any material disruptions.

c. Merge the existing entity into a new Nevada entity. This is more complex than a statutory conversion and requires a new tax identification number since it's a change in entity. The merger option will be selected if the initial entity's state law doesn't allow statutory conversions. Although a merger is more disruptive than a statutory conversion, the disruption is most likely very small in comparison to the asset protection advantages of merging the entities.

d. Form a Nevada entity as a holding company. This a great solution where there are multiple existing entities formed under the laws of a state which has lesser creditor protection laws. For example, many people have multiple LLCs, each owning one piece of real estate. Just forming one additional Nevada entity to hold the interests in the other entities puts a charging order-only wall around all of the other entities. This is also a solution if a merger is too complex. Instead of a merger, the Nevada entity can own 100% of the already-existing other entity.

3. Corporations: Because of the greater creditor protection traditionally given to LLCs and LPs through the charging order, the national trend has been to use less corporations and more of the other forms of business entity. Despite this trend, there are countless corporations that have already been formed and that are still being formed. Consider obtaining the charging order benefits of a Nevada corporation. Nevada is the only state that makes the charging order the exclusive remedy and thus provides this greater protection. In order to use this protection, one must do one of the following: form a new corporation in Nevada, domesticate (or convert) an existing corporation to Nevada, merge an existing entity into a Nevada corporation or use a Nevada corporation as a holding company. All of these concepts are explained above.

Conclusion:

With the passage of SB405, Nevada has enhanced its creditor protection laws for its LLCs, LPs and corporations. It has done so by expanding its laws to not only make the charging order the exclusive remedy, but to also remove all potential equitable remedies that might apply. The only exception is that the alter ego equitable remedy is still permitted to apply to Nevada corporations.

The new legislation also specifies that creditors of a member of a single member LLC and creditors of a shareholder of a single shareholder corporation are limited to the charging order remedy (other than the alter ego equitable remedy for corporations), thereby distancing itself from the laws of other states.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

DUNCAN OSBORNE - TECHNICAL EDITOR

CITE AS:

CITE:

SB405

Click here to comment on this newsletter.

Leimberg Services MEMBERS HOME PAGE