

Introduction

If one looks at the totality of statutory partnership and LLC law as a radar screen, the charging order is barely a blip, mentioned with any gravity only in section 504 of the Uniform Partnership Act, section 703 of the Uniform Limited Partnership Act, and section 503 of the Uniform Limited Liability Company Act (collectively as the “Uniform Acts”). Even those sections do little more than describe the ultimate effect of a charging order, without illuminating the slightest on seemingly basic issues such as how an order might be obtained or what it should look like.

Every day, hundreds of thousands of partnerships and LLCs conduct business without the slightest regard to charging orders. The managers and owners of these entities are much more concerned with issues of immediate importance, such as distributions, fiduciary duties, associating and disassociating members, tax issues, and the like, all in addition to actually operating the business. Day to day, the very concept of a charging order for those involved with such businesses seem about as relevant as the current temperature on the dark side of the moon.

Nonetheless, when business planners discuss choice of entity with their clients, the charging order seems to invariably become an important piece of the conversation, if not to dominate it entirely. The reason for this is that the charging order, or, more accurately, the *exclusivity* of a creditor’s remedy to a charging order, offers the prospect for some degree of asset protection for the value of the owner’s investment therein. This sort of protection is not found for other forms of investments, whether stock investments into a corporation or buying a bond—those things are immediately and easily available to creditors of the owner.

Thus, the charging order has become extremely useful in the marketing of partnerships and LLCs. Some states have modified their own charging order laws in an attempt to make those laws even more creditor-unfriendly than the Uniform Acts, and entity formation promoters in those states will often discuss charging order first, and everything else as if almost an afterthought. All of this creates a situation where the charging order has an outsized prominence in the discussion of partnership and LLC law relative to the many other issues of arguably much greater importance; I liken it to somebody going to the Super Bowl and focusing on the quality of the hot dogs.

The problem is, as mentioned, the Uniform Acts tell us about the effects of a charging order but little else. When creditor-debtor litigation arises that involves charging orders, the litigants and the courts must fill in the rest of the procedure *ad hoc* based on such legal precedent as may exist in a given jurisdiction. Only

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California has adopted anything like a procedural statute to give guidance to that which is substantively mandated by the Uniform Acts, and even California's guidance is little more than a few dozen (though extremely helpful) words. It is as if the Uniform Acts painted a small red dot in the middle of a large canvass, and litigants and judges have start with that dot and paint something akin to da Vinci's *The Last Supper*; that the final product often ends up looking like some tortured combination of a Rothko and a Pollock should be of little surprise.

Even in California, the state which has more statutory and opinion law guidance than any other, the remedy of a charging order is little known and less understood. As late as 2010, I appeared at oral argument on a motion for charging order in a substantial case, *Bay Guardian Company vs. New Times LLC*, the latter being the then-owner of the \$200 million Village Voice chain of newspapers. The judgment of my client (Bay Guardian) at that time exceeded \$20 million, and the parties had filed extensive briefs prior to the hearing. Nonetheless, the hearing began with the judge's words uttered in the utmost seriousness: "*Mr. Adkisson, what is a charging order?*"

Ultimately, the court granted the charging order, but to add context, this took place in the Remedies Department of the San Francisco Superior Court, being a court that routinely hears judgment enforcement matters, i.e., if any court should know something about charging orders, this would be the one. But this very competent and respected judge, who had been on the bench for many years, had simply never come across a charging order before. His response was anything but atypical; rare is the bench officer to whom I have not had to explain the rudiments of what a charging order is and what it does.

That there is *de minimis* statutory guidance on charging orders has similarly lead to a recent avalanche of appellate litigation and opinions about charging orders, meaning that at least one party in the case believed that the trial court got the issue egregiously wrong. Here also, charging order litigation has consumed a quantity of judicial resources grossly disproportional to the charging order's relative importance to other partnership and LLC issues, although mitigated somewhat by the fact that many ordinary partnership and LLC disputes are between members and thus likely to end up in unreported arbitration proceedings, whereas charging order disputes are solely about the use of a judicial remedy and thus all of them end before somebody in a black robe.

The absence of any meaningful statutory guidance about charging orders, and the struggles of the courts to fill in the gaps as best they can, provided the impetus for this book. Whether it gets close to that mark is a question that only readers will be able to answer.

This project is the result of the very substantial assistance given by more than 65 persons, nearly all of whom are members of the LLCs, Partnerships and Unincorporated Entities Committee (LPUE) of the Business Law Section of the American Bar Association, who volunteered their valuable professional time to

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assist with every aspect. It would thus be an error to say that this is “my” book, but rather it was intended to be, and is, the end result of literally years of labor by the LPUE Committee members and a few others regarding the topic of charging orders generally, as embodied in numerous programs and articles on the subject, and more specifically those persons’ direct assistance with this work.

Special thanks go to Professors Carter Bishop and Dan Kleinberger for their initial conceptualizing about this project, and more specifically to Carter Bishop for literally years of intense discussions about the bankruptcy issues and to Dan Kleinberger for similar discussions on just about everything.

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The credit for this work that I absolutely refuse to share with others are for any errors and omissions found herein, which are mine and mine alone.

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