

The New Nevis LLC

By Gary A. Forster

The Nevis Limited Liability Company (Amendment) Ordinance (NLLCAO), 2015 (the “New Ordinance”) strengthens and clarifies the prior Nevis Limited Liability Company Ordinance (NLLCO) of 1995 (“Prior Ordinance”). Among the improvements made by the New Ordinance are the addition of (1) fraudulent transfer provisions governing assets contributed to a Nevis LLC, (2) language prohibiting enforcement of foreign judgments against member equity, and (3) enhanced limitations on creditor remedies. This article explores several significant aspects of the New Ordinance.

Introduction

Nevis is a small island located in the West Indies of the Eastern Caribbean. Nevis is primarily known in the United

States for being the birthplace of founding father Alexander Hamilton. Other historical significance includes a period during which Nevis was home to substantial sugar plantations and the hub of the English slave trade. Nevis is one of the two islands that constitute the Federation of St. Kitts and Nevis.

The first ordinance adopted in Nevis establishing a beneficial planning entity, the Nevis asset protection trust, was the Nevis International Exempt Trust Ordinance. See Nevis International Exempt Trust Ordinance (1994, as amended). The trust ordinance was modeled on the Cook Islands International Trust Act, passed in 1984. The Nevis International Exempt Trust Ordinance offers several protective features, including prohibitions against the enforcement of foreign judgments against trust assets, limited fraudulent transfer remedies, and binding choice of law provisions. To complement the trust, Nevis adopted a limited liability company ordinance in 1995.

Two Significant Prior Deficiencies

The Prior Ordinance contained significant omissions (Deficiencies). The Deficiencies included (1) a lack of prohibitions on registration (or domestication) of foreign judgments (to attach Nevis LLC equity) and (2) a lack of a fraudulent transfer law.

As discussed below, it is nearly impossible to determine the actual common law of Nevis from public research. Other than the statutes associated with protective entities and foreign investment, Nevis law is not available to the public. Nevis court opinions are unpublished. Thus, one is often left making inferences from the few available sources.

The First Deficiency: No Protection from Foreign Judgments

Under the Prior Ordinance, equity in a Nevis LLC was vulnerable to a foreign money or collection judgment in the creditor’s home jurisdiction and

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registration or domestication by court order in Nevis. Because of the lack of statutory protection from registration of foreign judgments, a creditor with a foreign ruling could seek to have the ruling enforced through a Nevis court. The lack of statutory authority to deny registration or domestication made possible the successful attachment of an interest in a Nevis LLC through a foreign ruling.

The ability to domesticate a foreign judgment in Nevis left the Nevis LLC particularly exposed because of the intangible nature of the LLC interest. Most U.S. jurisdictions consider intangible property located wherever the owner is physically located. This leaves the LLC interest subject to the in rem jurisdiction of a court where a member-debtor is physically present. See *Wells Fargo Bank, N.A. v. Barber*, 85 F. Supp. 3d 1308 (M.D. Fla. 2015). The LLC interest therefore becomes subject to the jurisdiction of the local court, with power over property located within its physical jurisdiction. A local court with such jurisdiction could then apply its own local law, presumably under a choice-of-law analysis, to order a local collection remedy not available in Nevis. The judgment allowing for collection of Nevis LLC equity could then potentially be registered, or domesticated, in Nevis. Registration in Nevis could permit the foreign creditor to reach LLC equity and the foreign assets held in the Nevis LLC. Nevis courts, under the Prior Ordinance, had neither the express authority to deny registration, or enforcement of the judgment, nor the authority to prohibit collection on LLC membership interests. A statutory prohibition on registration and domestication was needed to force the creditor to again litigate the claim for damages in the LLC's home jurisdiction.

The Second Deficiency: Unbounded Fraudulent Transfer Law

The Prior Ordinance contained no fraudulent transfer provisions governing contributions to a Nevis LLC. Without statutory law governing a fraudulent transfer action, common law controls. See Bureau of Economic and Business Affairs, 2012 *Investment Climate Statement*, U.S. Department of

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State, <http://www.state.gov/e/eb/rls/othr/ics/2012/191225.htm> (June 2012) ("St. Kitts and Nevis bases its legal system on the British common law system"). Determining Nevis common law is difficult, however, because the St. Christopher and Nevis's constitution is not clear on governing legal principles when there is no legislative or constitutional authority. Most Nevis court opinions are sealed and therefore inaccessible. The only Nevis-related opinions available to the public have come from the Privy Council or the Eastern Caribbean Courts, and neither has addressed the fraudulent transfer law in Nevis. Presumably, like many of Nevis's common law brethren, it would look to the laws of England to form the basis of its common law until such time as the legislature sought to abrogate the common law through enactment of legislation.

One case suggests that, because Nevis became independent from England, it was not bound by English common law. See *Conway v. Queensway Trustees Ltd.*, [1999] ECSCJ No. 130. The *Conway* court relied on the manner by which Nevis gained independence from Great Britain to conclude that Nevis is no longer bound by British traditions (including the English common law of fraudulent transfers, found in the Statute 13 of Elizabeth).

The Statute 13 of Elizabeth (the Fraudulent Conveyances Act 1571) is particularly problematic for a transferor. A fraudulent transfer under the statute encompasses transfers colloquially

referred to as "actual fraud" in U.S. jurisprudence, an often highly subjective determination. See Uniform Fraudulent Transfer Act § 4 (transfer made with "actual intent to hinder, delay, or defraud"). See also Uniform Voidable Transactions Act § 4. In addition, an action for avoidance under the Statute 13 of Elizabeth is not subject to a statute of limitations.

There are suggestions that importation of English common law is what occurred in Nevis. For example, in *Huggins v. Commissioner of Police*, [2013] ECSCJ No. 0239, it is suggested that St. Kitts and Nevis would have had to turn to the uncertain English common law to determine their rules for bail if it had not been for the adoption of the Bail Act 2012.

For fraudulent transfers, the law applicable to a Nevis LLC before the New Ordinance is unclear. Before the 2015 amendments, the use of a Nevis LLC could therefore actually increase the exposure of LLC assets to avoidance as a fraudulent transfer.

The Deficiencies came to the forefront as other jurisdictions adopted modern LLC and trust laws. See International Limited Liability Companies Act, 2011 (Belize). The New Ordinance eliminates these major deficiencies. The remainder of the article discusses the significant changes made to the Nevis ordinance.

The New Ordinance: Innovations and Remedying the Deficiencies

The New Ordinance prohibits enforcement of foreign remedies, adds fraudulent transfer law, and generally modernizes the Nevis LLC.

Preventing Domestication of Foreign Judgments

The New Ordinance makes strides to both prohibit domestication of foreign judgments and eliminate the threat of a foreign court awarding a remedy not recognized under Nevis law. The New Ordinance does not generally prohibit recognition of foreign judgments but bans enforcement of certain foreign remedies. The New Ordinance prohibits enforcement of any foreign judgment that grants a remedy not available under Nevis law. NLLCAO § 43(3). This

eliminates remedies of particular concern, including access by a creditor to LLC property, foreclosure of a member's interest, and certain avoidance of fraudulently transferred property.

The New Ordinance prohibits enforcement of foreign remedies against LLC equity by adopting multiple nonrecognition provisions that prevent the application of foreign law. The first of the nonrecognition provisions provides that a judgment from a foreign court will not be enforced against a member's interest "to the extent the judgement purports to charge, mortgage, levy, attach, assign, or in any other way to affect the member's interest." NLLCAO § 43(3)(b). This language precludes a judgment creditor from obtaining a collection remedy in a foreign jurisdiction to collect on LLC equity and domesticating the judgment to enforce the remedy. A judgment creditor is now forced to relitigate the remedial portion of the claim in a Nevis court. Further, the creditor is limited to a severely restricted charging order under Nevis law.

The second nonrecognition provision overlaps with section 43(3)(b). Section 43(8) provides that "no court order in any jurisdiction that purports to provide the redress or remedy set forth in subsection (7) shall be enforceable or enforced." Section 43(7) prohibits a creditor with a charging order from directly affecting the property or management of an LLC. Section 43(8) therefore prevents a Nevis court from recognizing a judgment that awards a remedy that "liquidates or seizes the assets" of the LLC. Specifically, a creditor cannot

- become an assignee of the member's interest,
- hold or be entitled to a member's rights in relation to that interest,
- interfere with the management of the LLC,
- liquidate or seize assets,
- restrict the business of the LLC, or
- dissolve or cause the dissolution of the LLC.

NLLCAO § 43(7).

On its own, section 43(7) serves little purpose because a charging order is the only remedy permitted under Nevis

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law. The charging order itself is narrowly defined in the Act and prevents a creditor from acting directly on LLC assets or management. Section 43(7) is apparently intended to override any conflict of law issues that may arise in other jurisdictions applying local law in resolving a collection dispute.

Note that property located in the creditor's home jurisdiction may not be protected by this section. Section 43(8) could be ignored by a foreign court enforcing its order under local law, by applying the local LLC statute and collection law against LLC equity or property located in its in rem jurisdiction. A Florida district court ruled that the law of the court with jurisdiction over the interest or property controls, and not the law of country of formation. See *Wells Fargo Bank, N.A.*, 85 F. Supp. 3d at 1316. The district court analyzed the choice of law analysis under Nevis's prior statute and held that Florida law was applicable. The opinion indicates that the language added to the current Nevis statute would have been inconsequential to the analysis. See id.; but cf. *Arayos, LLC v. Jimmie Ellis*, No. 15-0027-WS-M, 2016 U.S. Dist. LEXIS 54685 (S.D. Ala. Apr. 25, 2016) (holding that the Alabama LLC statute did not give authority to issue a charging order on an LLC formed in a state other than Alabama).

Sections 43(3)(b) and 43(8) prohibit enforcement of a foreign collection

order against a Nevis LLC or membership equity but do not address a fraudulent transfer judgment obtained in a foreign jurisdiction. A fraudulent transfer claim is not a creditor right, but a remedy available to a creditor to avoid or unwind a transaction, making assets available for seizure or liquidation. Section 43A covers the avoidance of transferred property and monetary liability of the LLC for the value of fraudulently transferred property. Section 43A(9)(b) states that "[n]o judgment obtained in a foreign jurisdiction in respect of any remedy described in section 43A(1) shall be recognized or enforced by the Court." Thus, Nevis courts may not enforce any foreign judgment ordering an avoidance of property or holding a LLC liable for the value of property fraudulently transferred to a Nevis LLC.

The nonrecognition provisions, taken together, require the relitigation in Nevis of any creditor remedy attaching a membership interest or granting access to LLC property, either directly or indirectly. The nonrecognition provisions insulate property held by a Nevis LLC in Nevis and in any other jurisdiction respecting foreign LLC law from foreign courts. These limitations create some certainty as to the maximum exposure a member faces in a Nevis court from a foreign creditor. That exposure is the Nevis charging order or a Nevis fraudulent transfer claim, both of which are very limited in scope.

Note that new section 43(3) does not prevent the creditor from domesticating a monetary judgment. A creditor effectively faces no barrier to obtaining a charging order under Nevis law, so long as the creditor domesticates the foreign money judgment before the expiration of the statute of limitations.

Protecting Against the Fraudulent Transfer

Fraudulent transfer is likely the greatest vulnerability a Nevis LLC faced under the Prior Ordinance. Fraudulent transfers to a Nevis LLC were likely subject to the creditor-friendly Statute 13 of Elizabeth. Consequently, fraudulent transfer actions in Nevis by a creditor of a member for assets in a Nevis LLC were likely not subject to a statute of

limitations. Fraudulent transfers were also likely avoidable under a somewhat subjective standard, similar to what is commonly referred to in the United States as “actual fraud.” Consequently, the new fraudulent transfer law is much more protective of LLC assets, especially if held in Nevis or a different jurisdiction respecting foreign LLC law.

The Standard of Proof. To establish a transfer as “fraudulent” under the New Ordinance, the creditor must prove all elements beyond a reasonable doubt, the highest evidentiary burden in law. NLLCAO § 43A(1). This evidentiary standard is particularly burdensome in light of the New Ordinance requiring proof of debtor insolvency and the associated valuation of the transferor’s assets. Ascertaining the value of a particular property is an inexact science, and the failure to establish property value beyond a reasonable doubt may make proof of insolvency practically impossible.

The Elements of a Fraudulent Transfer Under the New Ordinance. To successfully execute a fraudulent transfer claim, a creditor must prove beyond a reasonable doubt that

1. the claimant is a creditor of the member,
2. the transfer was made by or for the benefit of the member,
3. the transfer was made with the “principal intent” to defraud the creditor, and
4. the transfer rendered the member “insolvent or without property.”

NLLCAO § 43A(1).

Establishing the claimant as a creditor and that the transfer was made by the member or for the benefit of the member are generally simple background facts. “Creditor” is broadly defined to include anyone with a cause of action against the debtor, and the beneficiary of a transfer is usually obvious. NLLCAO § 43A(11).

Third, a creditor must prove that the transfer is made with the principal intent to defraud the creditor. The use of the word “principal” means that it is not sufficient for the creditor to prove that the debtor intended to defraud the creditor. The creditor must prove that

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it is the primary intent of the debtor to defraud the creditor bringing the claim, that is, avoidance was the debtor’s main reason for transferring the asset. A myriad of other reasons may exist for the transfer, such as a business purpose, estate planning, or *even potentially the intent to defraud a different creditor.*

Fourth, a creditor must prove that the transfer renders the member-debtor insolvent or without property to satisfy the debt. The fourth element is effectively a valuation exercise. As noted above, the validity of asset valuations is difficult to prove, especially under a reasonable doubt standard. If a member is borderline insolvent, even slight variations in property value could create doubt.

To prove insolvency, the creditor must demonstrate that the value of the member’s property, which includes the value of the LLC interest received, is not more than the member-debtor’s total debts or that the debtor is otherwise without property to satisfy the creditor’s claim. If the creditor is unable to prove either that the value of the member’s property has decreased to the point of insolvency or that the debtor is otherwise without property to satisfy the claim, then the fraudulent transfer remedy is unavailable.

The fourth solvency element can render transfers by a member to a single-member LLC practically immune

from a fraudulent transfer claim. Section 43A(2) provides that, in determining insolvency, the fair market value of the member’s interest immediately after the transfer should be taken into account. NLLCAO § 43A(2). Such language was submitted to address the propensity of U.S. courts to exclude protected assets from the solvency calculation.

When an asset is transferred to an LLC, especially a single-member LLC, there is likely little or no decline in the relative value, which is the value of the asset transferred versus the value of the membership interest received. A member’s total property value, including LLC equity received, before and after transfer to a single-member LLC is therefore practically identical. A member-debtor of a single-member LLC and potentially multi-member LLC will likely have a similar net worth after the transfer and therefore will not be “rendered . . . insolvent or without property.” *Id.* The decline in relative value may be greater when an asset is transferred to a multi-member LLC in exchange for a membership interest, because of factors such as combined asset values and loss of control.

The heightened standard to prove fraudulent transfer presents an additional and substantial creditor burden. If the elements and standard of proof fail to dissuade a creditor from bringing a fraudulent transfer action, the other provisions in section 43A may.

Dissuading the Creditor. Several additional provisions of the New Ordinance impede creditors from bringing a fraudulent transfer action in Nevis.

A creditor initially faces not only the general financial burden of bringing a fraudulent transfer action (to pursue LLC assets) but can also be liable for the litigation costs of the debtor. The costs are not limited to attorney’s fees, but include the total costs incurred in defending the claim. A Nevis court has discretion to order payment of costs and expenses incurred by the opposing party (directly or incidentally) in relation to a fraudulent transfer claim. The court has the power to award costs and expenses to either side, regardless of the outcome. See NLLCAO § 43A(15). This differs from traditional fee shifting

provisions that award attorney's fees only to the prevailing party.

The creditor suing for fraudulent transfer under the New Ordinance also must obtain a bond in the amount of \$100,000 from a Nevis financial institution. NLLCAO § 43A(16). The bond must be posted with the Nevis Permanent Secretary in the Ministry of Finance. *Id.* The bond secures the payment of all creditor costs resulting from the fraudulent transfer action.

Furthermore, even if a creditor prevails, the creditor remains responsible for the total costs incurred by the LLC and any other members in defending the action if the LLC or member are found not to have acted in bad faith. The creditor's property avoided will be encumbered by the LLC's or member's "first and paramount" charge over the property, securing reimbursement, subject to the fraudulent transfer action. NLLCAO § 43A(12).

The charge against the asset can be a substantial obstacle to collection. Take for example, an LLC with two members, A and B. A fraudulently transfers property X to the LLC. B, as part of his ordinary distributions, is distributed property X. Creditor C sues the LLC and B to recover the value of the asset. Assuming that the transfer of X from the LLC to B is voidable, the LLC is treated as owning the asset avoided, or the value of the asset may directly be recoverable from B, if the asset itself cannot be recovered or the transaction is not feasible to unwind. C can recover only the value of the asset equal to A's interest in the asset at the time of transfer. Assuming that the asset transfer can be unwound to satisfy C's claim, the LLC must either transfer the now avoided asset to C or sell the asset. Before the sale or transfer, B and the LLC, if not acting in bad faith, can obtain a "charge" on the asset for the entire cost of their expense in defending the claim. C is left with any funds remaining.

The incidental costs of suing abroad, the litigation costs of the debtor, the cost of posting bond to secure litigation costs, collateral LLC and member costs, and the LLC's right to charge the property avoided, coupled with the requirement that a creditor must prove

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its case beyond a reasonable doubt, will likely dissuade all but the largest and most well-funded creditors.

Obstacles to Proving a Fraudulent Transfer. As noted, the creditor must establish the elements of fraudulent transfer beyond a reasonable doubt. The New Ordinance limits the evidence a creditor may use to establish a fraudulent transfer, making it more difficult to meet the already high burden of proof. The New Ordinance prohibits proof of fraudulent transfer by means of a single piece of evidence to establish a *prima facie* case of fraudulent transfer. This prohibition means that certain facts, in a vacuum, are insufficient to establish a fraudulent transfer. NLLCAO § 43A(5).

Two different factual scenarios are provided as examples in the New Ordinance. Neither may independently serve as the sole reason for a court to conclude that the transferor had intent to defraud a creditor.

First, a court cannot conclude that a member-debtor had the intent to defraud a creditor because a transfer was made to the LLC within two years of the creditor's cause of action accruing. *Id.* A creditor must present more evidence than simply that a transfer occurred after the claim accrued. The restriction seems reasonable because the mere fact that a transfer was made after an event of liability is likely insufficient to demonstrate beyond a reasonable doubt that the member-debtor's "primary intent" was to defraud the creditor.

Second, the fact that a member-debtor enjoys the powers or benefits of a member or a manager is not a sufficient basis to conclude that the member-debtor had the intent to defraud a creditor. *Id.* This prevents a court from concluding that, because the member-debtor retains a beneficial interest or control over the property, the intent was to defraud a creditor.

It is unclear whether section 43A(5) allows a court to consider both factual settings to conclude that there was sufficient intent to defraud. The use of "solely" and "or" can be read to mean that either factual scenario on its own is an insufficient basis for fraudulent intent while not prohibiting the conclusion that the transferor had the intent to defraud when both facts are present. The intent of the section suggests that neither, nor both together, is a sufficient base for concluding that the member-debtor had intent to defraud.

The amendments limit any presumption of intent by placing the onus of proof on the creditor to show that the member acted with the specific intent to defraud the creditor (through acts beyond the timing of the transfer and control of the LLC). NLLCAO § 43A(7). These provisions eliminate two "badges" of intent to avoid a creditor—(1) action taken to secure exposed assets by transfer made after the creditor's cause of action accrued and (2) the retention of control over the property transferred. Without more, the creditor legally cannot prove intent to defraud the creditor. No set of facts will shift the burden to the member.

Statute of Limitations. A Nevis LLC and its members no longer face a potentially eternal claims period for a fraudulent transfer action under Nevis law. It is likely that under the common law the equitable doctrine of laches could be invoked as a defense to a fraudulent transfer action brought after a significant time after transfer. Absent court intervention and no statutory expression of limitation, however, the possibility existed that a fraudulent transfer action could have been brought at any time in Nevis.

The new statute of limitations begins running early and expires quickly. To bring a cause of action to recover

a transferred asset, the transfer must have occurred after the claim "accrued or had arisen." NLLCAO § 43A(4). A claim accrues on "the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action . . ." NLLCAO § 43A(8). A cause of action is defined as the "earliest cause of action capable of assertion by a creditor against the member or, as the case may be, against the member of property upon a limited liability company, by which that creditor has established (or may establish) an enforceable claim against that initial member." NLLCAO § 43A(8)(a). If more than one act or omission is ongoing, then the claim accrues on the date of the earliest act or omission that would have given rise to the cause of action. NLLCAO § 43A(8). It is also important to note that an entry of a judgment does not constitute a separate cause of action. NLLCAO § 43A(8)(b).

The statute of limitations begins to run at the time the claim accrues, without regard to the creditor's knowledge of any transfer of assets. This eliminates the standard U.S. "knowledge exception," leaving the limitations period open indefinitely.

A fraudulent transfer action is barred by the statute of limitations under either of two conditions. If the transfer occurs more than two years "from the date of [the] creditor's cause of action accruing," then the fraudulent transfer claim cannot be brought by a creditor of the member. NLLCAO § 43A(3). If the transfer occurs within the two-year period from the date of accrual (whether the transfer is made by establishment of the LLC or disposition to the LLC), the creditor has only one year from the date of the transfer to bring the cause of action. *Id.*

The statute of limitations gives the creditor very little time. The creditor that suffers a contract breach or a loan default is likely not contemplating a fraudulent transfer or the titling of offshore assets. By the time a creditor realizes that it must avail itself of a Nevis court (to seek a fraudulent transfer remedy), the creditor may be time barred. This can occur even before starting the judicial process in the creditor's home jurisdiction.

Recovering the Property. There also are limitations on the recovery of Nevis LLC assets subject to a fraudulent transfer action. A creditor may not reverse a fraudulent transfer of property to the LLC. The LLC is instead liable only for an amount equal to the value of the member's interest in the property at the time of transfer. NLLCAO § 43A(1).

To satisfy the claim, the LLC can transfer the asset to the creditor or conduct a sale of the asset and distribute the proceeds to the creditor. A creditor's recovery is limited to recovering from the asset. The creditor has no right to recover value transferred from any other member, manager, or property of the LLC. Limiting recovery to the asset shifts the risk from the LLC transferee to the creditor for any depreciation in value between the time of the transfer and the filing of the "fraudulent" transfer action. NLLCAO § 43A(6).

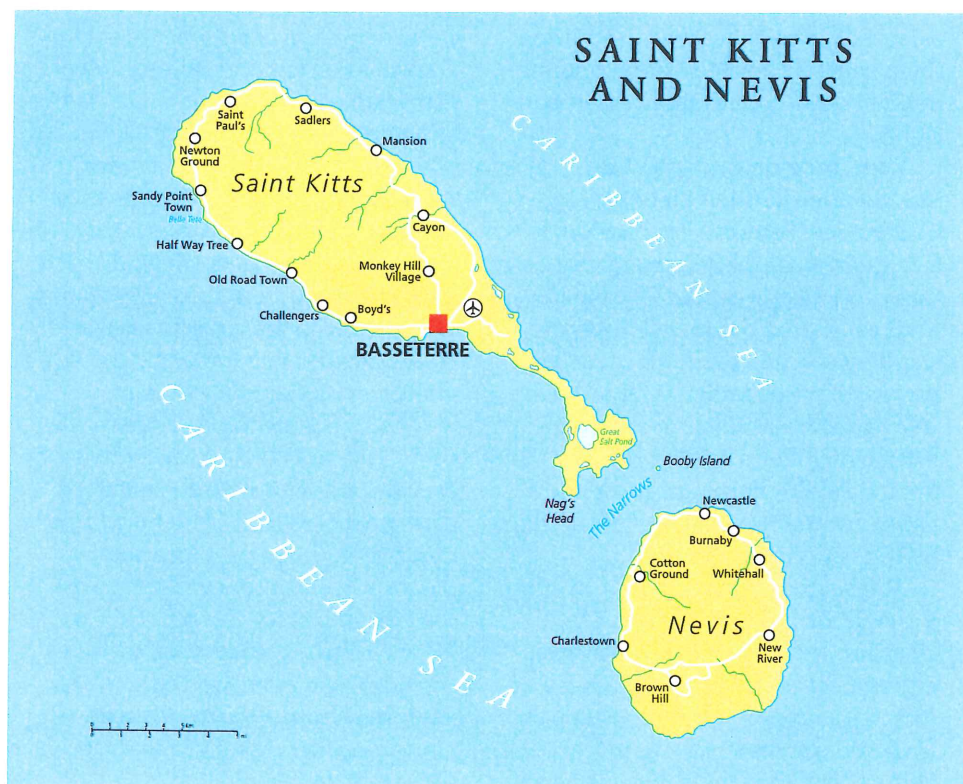
A creditor is provided some limited protections to recover. The amendments prevent the disposal of the asset subject to the fraudulent transfer action in a transfer that is not a bona fide sale made for "full and adequate" value. Sales of assets transferred to

the LLC by the LLC for less than reasonable value are therefore void. NLLCAO § 43A(6)(a).

Eliminating the Danger of Judicial Activism

The New Ordinance provides that a creditor of a member may not be awarded any remedy "of any type, legal or equitable" against a member's interest. NLLCAO § 43(3)(a). This limitation includes, but is not limited to, "foreclosure, seizure, levy, or attachment of the member's interest or . . . an accounting." *Id.* Such language prohibits equitable rulings by a Nevis court or foreign court respecting Nevis law to force the member to do or refrain from doing something, such as turn over property.

The New Ordinance further prohibits direct access to assets of the LLC. NLLCAO § 43(5). The New Ordinance states: "No judgment creditor of a member or a member's assignee has any rights to obtain possession of, or otherwise exercise legal or equitable remedies . . ." against the property of the LLC. *Id.* The language precludes the court from empowering the creditor to



reach LLC property as a basis for satisfying a judgment.

New Section 43: Updated Charging Order Provisions

The charging order provisions in the Prior Ordinance were eliminated and rewritten in the New Ordinance. The New Ordinance adopts portions of the Prior Ordinance, but, for the most part, it is an entirely new provision. It separately defines the rights of a creditor, a member, and the LLC when a collection action is brought against a member's interest.

As a matter of background, general confusion exists among state legislatures and practitioners regarding the difference between the foreclosure of a membership interest and issuing a charging order. Foreclosure of a membership interest allows for transfer of the entire ownership interest, or all a member's rights. In contrast, a charging order generally entitles the holder solely to the economic benefits of the membership interest. The other rights, such as participation and managerial rights, are left undisturbed. Foreclosing a charging order, when permitted, is only a foreclosure of the economic interest. In most cases, this creates little practical creditor advantage or interest in LLC assets because permitting foreclosure and sale of the economic interest does not augment collection rights.

The Charging Order on Single-Member Limited Liability Companies. Section 43(1) provides a single remedy to a member's creditors—the charging order. The New Ordinance provides that “[n]otwithstanding any other law, the remedies provided by subsection (1) shall be the sole remedies available to any creditor of a member's interest whether the limited liability company has a *single member or multiple members*.” NLLCAO § 43(3) (emphasis added).

The language is apparently an effort to avoid the U.S. trend to reject the charging order as the exclusive remedy against equity in a single-member LLC. The “exclusive remedy” language in the Prior Ordinance was more conclusory than the U.S. statutes at issue.

The New Ordinance also defines the rights a charging order provides a judgment creditor and the rights a member retains in his interest.

It, nevertheless, remained exposed to the argument, made with success in the United States, that the charging order is intended to protect other members and that such purpose is not fulfilled in a single-member scenario. See Gary Forster, *Asset Protection for Professionals, Entrepreneurs & Investors* 167–71 (2013), for a discussion of the cases that lead some jurisdictions to reject the charging order as the exclusive remedy regarding equity in a single-member LLC.

The Applicability of the Charging Order. The New Ordinance clarifies who may obtain a charging order. In the Prior Ordinance, a bankruptcy trustee was not specifically included in the definition of judgment creditor. The omission left open the argument that a bankruptcy trustee could claim a different remedy. NLLCO § 43(1). This is because a debtor does not “owe” something to the bankruptcy trustee (afforded onerous collection rights). Bankruptcy trustees are not judgment creditors. They are a statutory creation endowed with the power to seek equitable remedies that transcend the rights of ordinary judgment creditors.

Absent the inclusion of such a statutory provision, a bankruptcy trustee may not fall within the definition of a judgment creditor. Under the Prior Ordinance, it was therefore possible for a bankruptcy trustee to avoid the charging order restrictions. The New Ordinance specifically includes bankruptcy trustees as creditors of a member, limiting the trustee to the charging order rights afforded a private judgment creditor. *Id.*

Defining Creditor Rights. The New Ordinance also defines the rights a charging order provides a judgment creditor and the rights a member retains in his interest. Under the Prior Ordinance, a judgment creditor was entitled to the “rights of an assignee of a member's interest.” NLLCO § 43(1). The “rights of an assignee of a member's interest” is both ambiguous and susceptible to various interpretations—including the interpretation that equity in a single-member LLC may be subject to foreclosure. The New Ordinance replaces such language and limits a creditor with a charging order to distributions made to the member from the LLC. NLLCAO § 43(1)(a) (“A charging order shall entitle the judgment creditor to receive any distributions, in relation to that member's interest, . . . whether of income or capital, but only as and when made by the limited liability company”).

The creditor receives only distributions and only when and if made. The judgment creditor has no power to compel distributions or manage LLC operations. Creditor rights are affirmatively limited by section 43(7) of the New Ordinance, which prohibits interference with the assets or business of the LLC.

The New Ordinance also defines the rights of a member whose interest is subject to a charging order. In the Prior Ordinance, the rights of the debtor member were undefined. See NLLCO § 43. The debtor member's rights could be inferred as whatever LLC rights an assignee did not obtain. The history of the charging order suggests that a creditor with a charge should be limited to distributions but (without any confirming case law) a court could reach a different conclusion.

The New Ordinance eliminates the ambiguity by providing that the rights of a member whose interest is subject to a charging order retains all “his membership rights and obligations . . . as if the charging order had not been issued.” NLLCAO § 43(9). The debtor-member will therefore suffer no change in managerial capacity. The creditor is limited to the distributions a member would be entitled to receive, but management continues to reside in the members.

The New Ordinance also defines the rights of the LLC regarding the member whose interest is charged. A charging order does not affect the LLC's ability to make calls on its members. NLLCAO § 43(13). A distribution made (but retained) to satisfy a call is not subject to a charging order. *Id.* The call may be satisfied by a distribution otherwise payable to the debtor-member.

Sheltering distributions through capital calls potentially allows for continued investment by the LLC. An LLC could therefore order a call before making a distribution. This would likely preserve the value of any otherwise charged distribution by means of a mandatory reinvestment of the called distribution. Distribution by a single-member LLC called for reinvestment could even potentially avoid exposure to a fraudulent transfer claim, as the call and reinvestment likely effect no change in the economic position of the member.

Curbing the Charge. The New Ordinance limits any charging order of a Nevis LLC interest to the amount of the judgment. NLLCAO § 43(1). The charging order cannot be used to collect beyond the amount of the judgment for either actual or consequential damages. The creditor also may not collect punitive or treble damages. *Id.*

The charging order under the New Ordinance differs from the traditional charging order that persists indefinitely until the judgment is satisfied. Under the New Ordinance, three years after the charging order is issued, it terminates and is not renewable. NLLCAO § 43(11). A creditor is limited to a single, one-time charging order against a member's interest. *Id.* That charging order remains in effect for three years, leaving the member and LLC assets undisturbed. The time limitation affords the debtor-member leverage to wait out the creditor or force the creditor into settlement if the member's other assets are protected.

The charging order is further curbed by language allowing a member to petition for discharge of a charging order. The petition is available to any member of the LLC, including a member whose interest is subject to a charging order. See NLLCAO § 43(12) ("Any member

may apply for the discharge of a charging order"). The amendment provides two bases for discharge.

The first basis for a petition of discharge *requires* the court to discharge the charging order when the creditor has been "paid all sums payable under the charging order." NLLCAO § 43(12). Before these amendments, the charging order apparently expired naturally once the debt was satisfied. See NLLCO § 43. The new requirement that a member go to court to have the charging order lifted forces the creditor and member-debtor into a proper forum for any payment dispute. The resulting court order also creates closure.

The second basis for a petition for discharge gives the court the discretion to discharge the charging order on its conclusion that "the circumstances giving rise to the charging order have changed such that it is just and proper to discharge the charging order." NLLCAO § 43(12)(b). Any change in the relationship between the creditor and the debtor can be a basis to support a petition for discharge. This language potentially allows the member to seek discharge of the charging order whenever circumstances change. The scope of the right to discharge based on a change in circumstances is unclear.

Charging Order Not a Lien. New section 43(6) provides that a charging order "shall not be construed to constitute a lien on a member's interest. . . ." NLLCAO § 43(6). The language was likely intended to prevent the encumbrance and foreclosure of a member's interest. This section seems to have limited purpose, because other sections of the Ordinance prevent foreclosure.

Section 43(6) seems targeted particularly at American law and more specifically at the Revised Uniform Limited Liability Act, which states that a charging order "constitutes a lien" on the interest. Rev. Unif. LLC Act § 503(a). As a matter of background, the lien is a device that originated in civil law adopted into American law by Thomas Jefferson. See Charles Davidson, *The Mechanic's Lien Law of Illinois: A Lawyer's Brief upon the Topic* 6 (1922). A lien is the primary method by which a creditor denotes interest in a debtor's property

(garnishment and attachment being the others). Under American law, the charging order gives rise to a lien that attaches to a member's interest. *Arkansas City v. Anderson*, 752 P.2d 673, 684 (Kan. 1988). Practically, however, U.S. lien law would likely be given little effect in a Nevis court.

As Nevis law is likely derived from English common law, a charging order would likely be treated as a remedy distinct from a lien. See Fredrick Walton Atickson, *The Law and Practice Relating to Solicitor's Liens and Charging Orders* 1, 9 (1905). The charging order is the remedy by which a judgment creditor took an interest in the judgment debtor's property, but a lien under English common law is a possessory interest in property. Judgments Act 1838, 1 & 2 Vict., c. 110, § XIV (Eng.). See also generally Lancelot Hall, *Possessory Liens in English Law* (1917). Of course, a foreign court, particularly a U.S. court, may ignore Nevis law and its origins on the issue of remedies affecting a member's interest. See *Wells Fargo Bank, N.A.*, 85 F. Supp. 3d at 1308.

Conclusion

The New Nevis LLC Ordinance clarifies and enhances the Prior Ordinance. Foreign judgments against a member are no longer a threat to assets held in a Nevis LLC if the assets are held in Nevis or in another jurisdiction respecting the New Ordinance. The Nevis Ordinance specifically applies to the single-member LLC. A creditor attempting to collect in Nevis must now relitigate the remedial portion of a foreign judgment in Nevis. The sole remedy against Nevis LLC equity, the charging order, is limited to the amount of the judgment, if it can be collected within three years. Lastly, fraudulent transfers to a Nevis LLC are no longer the major vulnerability they once were. A creditor seeking assets in Nevis or in other jurisdictions respecting the New Ordinance must relitigate a fraudulent transfer claim by proving his case "beyond a reasonable doubt." The creditor is left with a limited and unattractive remedy. For practitioners and their clients, these are welcome additions that strengthen and update the Nevis limited liability company. ■