

THE UNIVERSITY OF TEXAS SCHOOL OF LAW  
CONTINUING LEGAL EDUCATIONS  
LLCS, LPS, AND PARTNERSHIPS CONFERENCE 2014  
JULY 10-11, 2014

# Charging Orders

The Misunderstood Theory -vs- The Trenches of Litigation

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<sup>1</sup> The author thanks San Francisco attorney Gerald V. Niesar of NIESAR & VESTAL LLP for his very valuable contributions to this paper.

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### CHRONOLOGY OF THE ACTS

<u>Acronym</u>	<u>Title</u>	<u>Ch.Ord.§</u>
UKPA 1890	Partnership Act of 1890 (U.K.)	§ 23
UPA 1914	Uniform Partnership Act of 1914	§ 28
RUPA 1997	Uniform Partnership Act (Revised) of 1994 (amended 1997)	§ 504
ULPA 1916	Uniform Limited Partnership Act of 1916	§ 22
RULPA 1976	Uniform Limited Partnership Act (Revised) of 1976	§ 703
ULPA 2001	Uniform Limited Partnership Act of 2001	§ 703
ULLCA 1996	Uniform Limited Liability Company Act of 1996	§ 504
RULLCA 2006	Uniform Limited Liability Company Act (Revised) of 2006	§ 503

## HISTORY OF THE "PECULIAR MECHANISM"<sup>2</sup>

The Charging Order is an oddity of American law, sometimes rarely appearing in old opinions pre-dating World War I to address odd situations in garnishment law, but now almost exclusively found in the law of partnerships, and more recently LLCs. Yet, in that area, the Charging Order has taken on a life and aurora of its own, with some states racing each other to have the "best" Charging Order provisions, so as to foster the entity formation and registered agents businesses within those states. Creditors meanwhile, while of course describing the "race" in less than flattering terms, have been developing their own strategies for defeating or circumventing the much-ballyhooed "exclusivity" of the Charging Order remedy.

To understand why this unique remedy even exists, and why it has graced or cursed the area of partnership and LLC law, we must retrace the history of Anglo-American law to where a fork in the road developed in how each country would handle security interests that were created by creditor claims.

The Lien was not a part of the English Common Law. Instead, it was first suggested in 1791 as a "Mechanic's Lien" by Thomas Jefferson as a means to further the construction of the District of Columbia. After adoption by the Maryland legislature that same year, thereafter the concept quickly spread to other states.<sup>3</sup> The concept was not a particularly new one; the Romans had centuries before developed the concept of the *obligare rem*, by which a creditor took an interest in a *pignus* (the object of a security interest) to secure a debt. The Roman security interest had survived into the Civil Law of the continental European states,

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<sup>2</sup> *91st Street Joint Venture v. Goldstein*, 691 A.2d 272, 114 Md.App. 561 (1997) (contrasting "standard execution procedures rather than the peculiar mechanism of the charging order which is subject both to the broad discretion of the trial court and to redemption by the debtor").

<sup>3</sup> See generally Charles Emmett Davison, *THE MECHANICS LIEN LAW OF ILLINOIS: A LAWYER'S BRIEF UPON THE TOPIC* (1922).

of which the francophile attorney Jefferson was likely aware.

Now we have materialman's liens, tax liens, mortgage liens, attorney's liens, mineral liens, maritime liens, warehouse's liens, HOA liens, municipal liens, UCC liens, judgment liens (of which the Charging Order Lien is but one), the list goes on and on. Thanks to our Third President, America has become the land of the Free and the Brave, and the Lien.

While America went the way of the Lien, the United Kingdom instead adopted the notion of the Charging Order to the same effect. That a debtor's interest in shares of stock could be "charged" was formalized in the first two Acts of Queen Victoria.

#### **JUDGMENTS ACT 1838 C. 110 (REGNAL. 1 & 2 VICTORIA)**

XIV Stock and Shares in Public Funds and Public Companies belonging to the Debtor, and standing in his own Name, to be charged by Order of a Judge.

And be it enacted, That if any Person against whom any Judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any Government Stock, Funds, or Annuities, or any Stock or Shares of or in any Public Company in England (whether incorporated or not), standing in his Name in his own Right, or in the Name of any Person in Trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the Application of any Judgment Creditor, to order that such Stock, Funds, Annuities, or Shares, or such of them or such Part thereof respectively as he shall think fit, shall stand charged with the Payment of the Amount for which Judgment shall have been so recovered, and Interest thereon, and such Order shall entitle the Judgment Creditor to all such Remedies as he would have been entitled to if such Charge had been made in his Favour by the Judgment Debtor, provided that no Proceedings shall be taken to have the Benefit of such Charge until after the Expiration of Six Calendar Months from the Date of such Order.

Thus, under U.K. law, the method for a judgment creditor to create and maintain a legal interest on the debtor's property was through the vehicle of the Charging Order. When the U.K. codified its partnership law in 1890, the Charging Order was thus the natural and accepted method of achieving that end.

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First appeared as part of the conference materials for the  
2014 LLCs, LPs and Partnerships session

"Charging Orders: The Misunderstood Theory vs. The Trenches of Litigation"