

Developments

IN ASSET PROTECTION AND WEALTH PRESERVATION

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We are pleased to announce the publication of Adkisson & Riser's *Developments in Asset Protection and Wealth Preservation*. This publication represents a merger of the Adkisson Analysis and the Riser Report, two popular asset protection newsletters which were published several years ago but later discontinued when Jay and Chris started drafting their popular book, "Asset Protection: Concepts and Strategies" which was released last year by McGraw-Hill & Co.

Developments will focus on contemporary asset protection, risk management and wealth preservation topics. Each issue will include a feature article on asset protection planning or significant developments in debtor-creditor law, columns by Jay Adkisson or Chris Riser (or both), and reader-favorite Tony the Wonder Llama's "Report from Quatloosia." The newsletter will also feature occasional guest articles by other leading planners. We hope that you enjoy *Developments*, and we welcome your thoughts and comments.

Betty Nguyen, Editor

What's New:

- Jay and Chris announce the release of their new book, *Asset Protection: Concepts and Strategies* (McGraw-Hill, 2004), which is available at <http://assetprotectionbook.com> and Amazon.com
- Visit our new Daily Asset Protection Blog at <http://assetprotectionblog.com> for the latest news on asset protection and debtor-creditor issues.

AT A GLANCE

New Bankruptcy Act in Senate

The Senate is considering a new Bankruptcy Act, and our sources say that this time it is a "done deal". Highlights include a \$125,000 limitation on homestead, regardless of contrary state law (though there will be a 40-month grandfather provision), as well as an overall gutting of the creditor protections of pension and retirement plans.

Because of an article carried in the New York Times regarding domestic asset protection trusts, some proposed amendments would include the assets in self-settled

spendthrift trusts in the bankruptcy estate. But nobody knows how this Act will finally shake out, and the Act has made it to Joint Committee before, where it was tabled and died because of a provision relating to the abortion issue.

Charging Order in Bankruptcy

The recent opinion in *In re Ehmann*, 2005 WL 78921 (Bankr. D. Ariz., dec. Jan. 13, 2005), holds that where a membership interest in a Limited Liability Company is non-executory (the member has no duties to earn his share), then if the member goes into bankruptcy the trustee can take the

member's interest without first resorting to a charging order, and also potentially invade the LLC's assets to satisfy claims.

Although *Ehmann* dealt with an LLC interest, similar results have been reached in the context of limited partnerships. The effect of all these decisions is that unless the operating agreement for the LLC or LP is meticulously drafted to avoid the executory/non-executory issue, there might not be asset protection afforded against a creditor of a member or partner, if the member or partner chooses or is forced into bankruptcy.

What this means is that ALL operating agreements for LLCs and LPs must be re-

visited and updated to address this situation, and great care must be taken in future drafting. We'll note that while many clients and planners seem to obsess over finding the "perfect" jurisdiction, it is all for naught if the implementing documents are not well-drafted. We'd much rather defend well-drafted documents in a pro-creditor jurisdiction, than poorly-drafted documents in a pro-debtor jurisdiction. Sadly, too many planners are still churning out canned documents that do not address the realities of debtor-creditor law.

CIVIL CONSPIRACY ARISING FROM FRAUDULENT TRANSFERS

Alexandra Fugairon, J.D.

The creditors' bar has a new weapon in its arsenal: the civil conspiracy claim against an asset protection planner. While an advisor's conduct must be egregious for such a claim to advance, new conspiracy claims raise concerns about whether an attorney may be subject to civil or criminal liability for conspiracy to commit fraudulent transfers.

Creditors have brought civil conspiracy claims by using three theories. In the first type of claim, the creditor alleges civil conspiracy through an underlying tortious claim (such as a fraudulent transfer). The second type of claim is an intracorporate or institutional claim where there is fraud within a business entity. The third type of claim is made directly against attorneys and advisors. The following overview of recent civil conspiracy claims in the context of fraudulent transfers reveals that most courts faced with the issue at least have been willing to entertain the question of whether an attorney who advises or assists a client to transfer assets in order to avoid judgment creditors is liable for conspiracy.

CIVIL CONSPIRACY: UNDERLYING CAUSES OF ACTION AS BASIS FOR THE CLAIM

The majority of jurisdictions allow a claim for civil conspiracy if there is an independent underlying cause of action. That is, there can be no civil conspiracy if there is no underlying claim, such as a fraudulent transfer.

The typical elements of a civil conspiracy include: (1) an agreement (2) by two or more persons (3) to perform an overt act(s) (4) in furtherance of the agreement or conspiracy (5) to accomplish an unlawful purpose or a lawful purpose by unlawful means (6) causing injury to another. An essential element to a conspiracy is an "unlawful purpose," or an "unlawful means." Thus, even if there is an agreement to hide assets from a creditor, the creditor must show that the means to hide the assets was unlawful or served an unlawful purpose. Most courts require that "unlawfulness" be shown by proving every element of the underlying claim.

The most common underlying cause of action in a debtor-creditor case is based on a fraudulent transfer claim pursuant to the Uniform Fraudulent Transfers Act ("UFTA"). The following are recent civil conspiracy claims that have been filed based on alleged fraudulent transfers.

California

California does not recognize a separate tort for civil conspiracy or the civil action for conspiracy to commit a recognized tort, unless the wrongful act itself is committed and damage results from the wrongful act. In order to succeed on a claim of civil conspiracy, a plaintiff in California must prove that there is an underlying wrongful act.

The California Court of Appeals held that the trustee of an estate and the creditor's brother did not commit civil conspiracy by transferring decedent's assets into a family trust. *Keitel v. Huebel*, 2004 WL 853812 (Cal. App. 1 Dist 2004). In *Keitel*, the creditor tried to enforce a judgment that she obtained against her debtor

brother for expenses from their late mother's estate. The creditor claimed that her brother conspired with the trustees to transfer assets out of the estate. The creditor alleged that the day before the judgment was entered, the debtor attempted to transfer title of property to the family trust.

The creditor alleged that the transfers into their mother's revocable living trust violated the Uniform Fraudulent Transfer Act (UFTA) because they were (1) made without consideration; (2) rendered the debtors insolvent; and, (3) done with the specific intent to defraud. The court held that the transfers did not violate the UFTA because they were not "transfers" within the meaning of the UFTA. The court relied on *Gagan v. Gouyd*, 73 Cal.App.4th 835 (Cal. App. 4th 1999), which held that a transfer into a revocable trust is not a transfer within the meaning of the UFTA because the property is not disposed of and is still available to creditors.

Since the transfers did not violate the UFTA, the court held that the conspiracy claim failed as a matter of law because there is no independent cause of action for conspiracy.

On the other hand, the California Court of Appeals ruled that there was a civil conspiracy where a debtor transferred property in violation of the UTFA in order to hide them from judgment creditors. *Professional Collection Consultants Inc. v. Griffis*, 2004 WL 759302 (Cal.App. 2 Dist., 2004). In *Griffis*, the collection agency assigned to collect the debt contended that various transactions initiated by debtor were fraudulent transfers in violation of the California UFTA. The creditors claimed that the transactions were part of a conspiracy to take the property out of creditor's reach. The court found that the transfers were fraudulent, and that there was a conspiracy to hinder the creditor from collecting on the judgment.

However, in California, showing intent to defraud a creditor through a fraudulent creditor alone, without showing damages,

is not sufficient to win a fraudulent transfer claim. Thus, where the creditor fails to prove damages, the fraudulent transfer claim fails along with the civil conspiracy claim.

In *Mehrtash v. Mehrdash*, the California Court of Appeals held that where a judgment creditor does not prove damages in the underlying fraudulent transfer case, the civil conspiracy claim as well as the claim pursuant to the UFTA both fail. 93 Cal.App.4th 75 (Cal.App. Dist.2 2001). In *Mehrtash*, plaintiff, as creditor of her former husband, brought an action to set aside the husband's transfer of residence to plaintiff's stepsons as a fraudulent conveyance.

The court held that under the California Fraudulent Transfers Act, a creditor may sue to set aside a transfer of property by a debtor, where the transfer defrauds the and causes injury to the creditor. The court stated, "a transfer in fraud of creditors may be attacked only by one who is injured by the transfer; mere intent to delay or defraud is not sufficient."

The court ruled in favor of the debtor because the plaintiff-creditor failed to show that she was injured financially by the allegedly fraudulent conveyance. Without a successful underlying fraudulent transfer claim, plaintiff's civil conspiracy claim also failed. The court stated, "there is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results there from."

Missouri

Having held several years earlier, in *Mark VII v. Barthol*, 926 SW.2d 128 (Mo. App. 1996), that there is no separate tort for civil conspiracy against an attorney without an underlying unlawful action that supports the claim for civil conspiracy, the Missouri Court of Appeals recently sided with the minority view, finding that a case for civil conspiracy can exist even when there is no underlying fraudulent

transfer. *Fischer v. Brancato*, 147 S.W.3d 794 (Mo.App. E.D. 2004).

In *Fischer*, the Missouri Court of Appeals found that the creditor had a valid claim for civil conspiracy where a debtor physician attempted to avoid a judgment on a partnership agreement by earning professional fees through two companies owned by his wife.

The trial court held that the fees paid to the physician were not a "transfer of assets" per se. Since there was no fraudulent transfer, there could be no claim of civil conspiracy. The appellate court reversed and held that the defendant used the wife's corporation to fraudulently assign income attributable to his professional services. In other words, the "opportunity shift" of the physician's current income to his wife's corporation was sufficient to support a civil conspiracy claim beyond a motion to dismiss. The court did not answer whether the shift was technically a fraudulent transfer.

Other Jurisdictions

Georgia, Illinois, North Dakota, and Texas share the majority view that an unlawful tort must be proven in order for a civil conspiracy claim to succeed. Unlike California, these jurisdictions have not ruled on the issue of whether creditors in fraudulent transfer cases must show damages in order to recover for a fraudulent transfer civil conspiracy.

The Georgia Court of Appeals allowed a fraudulent transfer conspiracy case to survive summary judgment where the trustee of an estate and children of the decedent transferred assets out of the reach of the estate's beneficiaries. *Miller v. Lomax*, 596 S.E.2d 232 (Ga. App. 2004). In *Miller*, Estelle Miller and her children ("the Millers") sued the estate of her late ex-husband for fraud and breach of contract. The Millers, who were beneficiaries of the decedent's estate, claimed that defendant Lomax acted in concert with the decedent's children to transfer assets out of the estate in violation of a previous property settlement agreement

between Estelle Miller and her ex-husband.

The court stated that, in order to recover damages for a civil conspiracy claim, a plaintiff must show that two or more persons, acting in concert, engaged in conduct that constitutes a tort. The plaintiff also must prove all elements of the underlying tort. Absent a proven underlying tort, there can be no liability for civil conspiracy.

The court held that there was sufficient evidence to conclude that decedent's children participated in a scheme to fraudulently transfer assets, because the children transferred real property out of Miller's reach and violation of the property settlement agreement. Since there was an underlying fraudulent transfer claim, the court held that the civil conspiracy claim could survive.

Similarly, Illinois also requires proof of an underlying tort in order for a civil conspiracy claim to succeed. In *Bressner v. Ambroziak*, the court refused to allow a civil conspiracy claim to go forth where plaintiffs alleged a conspiracy without showing a violation under the Illinois UFTA. 2003 WL 21145699 (N.D.Ill. 2003). The creditor alleged that defendants conspired to defraud plaintiff by hiding assets and income in order to prevent plaintiff from collecting his judgment.

The court defined a civil conspiracy as (1) an agreement (2) by two or more persons (3) to perform an overt act(s) (4) in furtherance of the agreement or conspiracy (5) to accomplish an unlawful purpose or a lawful purpose by unlawful means (6) causing injury to another. The court reasoned that in order to state a cause of action for conspiracy, the creditor must allege not only that the conspirators committed the act, but also that the act was tortious in nature. The conspiracy alone is not enough to trigger a claim for civil conspiracy without the underlying tort.

The Texas Court of Appeals also held that where the defendant does not commit an unlawful tort, there is no valid claim for civil conspiracy. *Martinek v. Farmers & Merchants State Bank*, 2003 WL 2006607 (Tex.App. Dist.2 2003) In *Martinek*, the junior lien holder of two tracts of real property sued the bank that foreclosed on the property, alleging civil conspiracy to fraudulently transfer assets. The bank purchased the land at the foreclosure sale and resold it to the senior lien holder's family members. The defendant bank's actions extinguished plaintiff's junior liens because the lien amounts exceeded the prices paid for the properties.

The court held that the bank did not commit a fraudulent transfer by selling the property at the auction to the debtor's relatives, and that such a sale was done in the ordinary course of foreclosure of the senior liens. Thus, the conspiracy claim also failed.

CIVIL CONSPIRACY: INSTITUTIONAL AND INTRACORPORATE LIABILITY

Civil conspiracy claims may also be brought against business entities. Cases alleging intracorporate civil liability carry a tougher evidentiary burden than claims based on underlying fraudulent transfers against individuals. Many state and federal courts have adopted the "intracorporate conspiracy immunity doctrine," which states that intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim. In other words, because a corporation and its directors or a principal and his agent is viewed as one entity, a corporation and a director engaged in an agreement to commit unlawful acts cannot satisfy the "more than one party" element of a conspiracy.

The Tennessee Court of Appeals held that two or more persons or entities are required for a conspiracy to exist, so a civil conspiracy is not legally possible where a corporation and its alleged co-conspirators stand in a principal-agent

relationship. *Nelson v. Metric Realty*, 2002 WL 31126649 (Tenn.App. 2002). In *Nelson*, the defendant hired the plaintiff to oversee one of his businesses. Plaintiff began to have conflict with defendant's attorney, whom plaintiff worked with in the course of his business. Based on the advice of his attorney, defendant fired plaintiff when plaintiff complained about the conduct of the attorney. Plaintiff claimed that defendant and his attorney acted in concert to terminate plaintiff.

The issue is whether there can be a conspiracy where the agreement to act unlawfully is on an "intracorporate" level. Most courts have adopted the "intracorporate conspiracy immunity doctrine" to hold that wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim. A corporation can act only through the authorized acts of its corporate directors, officers, and other employees and agents, and the acts of the corporation's agents are attributed to the corporation itself. Because their identities are merged when the agent is acting on behalf of the corporation, the agent and the corporation cannot be accessories to one another.

The court adopted the intracorporate conspiracy immunity doctrine and held that a civil conspiracy claim may not go forth against a corporation and its officers, directors, or other agents, if the agent is acting in the scope of his or her employment. Because the attorney was acting in the scope of his employment, no conspiracy claim existed.

The Tennessee Court of Appeals held that no conspiracy existed between a creditor bank and the debtor against the plaintiff-creditor where the plaintiff entered into a subordination agreement with the bank, and the bank foreclosed on the debtor's property. *Burton v. Hardwood Pallets, Inc.*, 2001 Tenn. App. LEXIS 912. In *Burton*, Blake and Michael Burton sold their business to defendant Hardwood Pallet in exchange for a promissory note for \$1,000,000. Hardwood also paid the Burtons with an \$800,000 loan from the bank.

However, as a condition to the loan, the bank insisted that the Burtons enter into a subordination agreement. When Hardwood defaulted, the bank foreclosed on the business in a private sale. The Burtons sued Hardwood Pallets and the bank for conspiracy to defraud.

The court held that the plaintiffs did not show that the bank intended to defraud them or that the bank knew of any fraudulent intent on the part of the other defendants. The court explained that in order to be liable under a claim of civil conspiracy, each conspirator must have the intent to accomplish a common purpose and know of the other co-conspirators' intent. Further, the court noted, the Burtons voluntarily entered into a valid subordination agreement with the bank.

A corporation may be held liable for conspiracy when it engages in fraudulent acts with other corporations, as each corporation is an separate entity. The California Court of Appeals reversed the trial court's decision to grant summary judgment to the defendant corporations and ruled that two defendant corporations could be held liable for conspiracy to defraud a creditor in breach of the UFTA. *Monastra v. Konica Business Machines, U.S.A., Inc.*, 43 Cal.App. 4th 1628 (1996). In *Monastra*, plaintiff Nicholas Monastra had a \$400,000 judgment against Master Technology when Master transferred all of its assets to Konica Business Machines for \$600,000. Monastra alleged that the value of the assets was \$3 million, and that the transfer rendered Master insolvent, which demonstrated a fraudulent transfer. The court noted that a judge or jury could find a conspiracy based on such evidence.

CIVIL CONSPIRACY CLAIMS INVOLVING ATTORNEYS

Should an attorney engaged in asset protection planning for the defendant debtor also be subject to civil conspiracy violations? The primary issue in conspiracy cases where the attorney is a named defendant is whether the attorney is acting in

pursuit of his or her professional duties to the client or is acting in concert with the client to commit a wrong. Although most courts require proof of an underlying claim in order to hold the attorney liable for conspiracy, the Sixth Circuit Court of Appeals held, in *Morganroth v. Delorean*, that attorneys who assisted their clients in fraudulent transfers were liable for civil conspiracy, even without proving an underlying claim of fraud. 123 F.3d 374 (6th Cir. 1997). A review of conspiracy suits against attorneys reveals that *Morganroth* is somewhat of an anomaly. Despite the harsh ruling in *Morganroth*, most states have only been willing to charge attorneys with civil conspiracy or professional disciplinary violations if the plaintiff-creditors proved the underlying tortious claim.

JURISDICTIONS WHERE ATTORNEYS HAVE BEEN SUBJECT TO PROFESSIONAL DISCIPLINE FOR FRAUDULENT TRANSFERS

New Jersey

Although it did not find conspiracy, the New Jersey Supreme Court reprimanded an attorney for advising his clients to transfer title to their home to an uncle in order to avoid creditors. In *re DePamphilis* arose out of a disagreement over attorney's fees at which time the clients filed a bar complaint and revealed attorney's advice to the court. 30 N.J. 470, 153 A.2d 680 (1959). The attorney responded that he acted pursuant to the wishes of the clients. Nonetheless, the court recommended the attorney be reprimanded.

Oregon

Similarly, the Oregon Supreme Court found that an attorney violated the Oregon Code of Professional Responsibility by assisting his clients in transferring assets out of the reach of creditors. In *re Conduet of Hockett*, 734 P.2d 877 (1987). The attorney was suspended for two months.

JURISDICTIONS WHERE ATTORNEYS HAVE BEEN HELD LIABLE FOR CONSPIRACY TO DEFRAUD

Wisconsin

The Wisconsin Supreme Court held an attorney liable for conspiracy to transfer company assets out of the reach of a former employee. *Lane v. Sharp Packaging System, Inc.*, 640 NW.2d 788 (Wis. 2002). Lane, the executive vice president of Sharp Packaging Systems, was terminated. Prior to his termination, Lane used his authority as a member of the Board of Directors to replace Sharp's attorney. Sharp's attorney then advised Sharp to gradually transfer money out of the business to avoid making a stock option sale available to Lane. Lane claimed that the attorney aided the client in the transfer of assets in retaliation.

The issue in this case was whether a lawyer and a client can engage in a conspiracy, as a matter of law. The court listed the following elements that are required to prove civil conspiracy: (1) the formation and operation of the conspiracy; (2) wrongful act or acts done pursuant thereto; and, (3) damage resulting from such act or acts. To form a conspiracy there must be an actual agreement to violate or disregard the law, and the persons involved must knowingly be members of the conspiracy. The court held that Sharp's attorney was liable to Lane for fraudulent acts committed while acting in the scope of their attorney-client relationship.

Arizona

The Arizona Court of Appeals held that a "fraudulent transfer is a legal wrong which may be the subject of a complaint for damages arising out of a conspiracy to commit a fraudulent transfer." *McElhanon v. Hing* 728 P.2d 256 (Ariz. Ct. App. 1 1985). *McElhanon* was an inter-shareholder's suit where the defendant transferred stock with the aid of his attorney in order to keep the assets away from the plaintiff.

The court held the attorney liable for conspiracy to commit a fraudulent transfer, but noted that an action for damages arising out of a conspiracy to commit a fraudulent transfer is a remedy that should only be used where a remedy under the Uniform Fraudulent Conveyances Act is inadequate.

The Arizona Court of Appeals reiterated its holding in *McElhanon*, by holding that an attorney was liable for conspiracy to make a fraudulent transfer in *Pearce v. Stone*. 720 P.2d 542 (Ariz. Ct. App. 1986). The attorney in *Pearce* was held liable for setting up a spendthrift trust in order to hide assets for his client. The court held that the transfer was fraudulent and established an underlying tort to support a civil conspiracy claim.

New Jersey

Similarly, a New Jersey Court held that an attorney who advised his client that it was lawful if the client transferred his property to his wife prior to defaulting on a loan was subject to a civil conspiracy claim. *Banco Popular North America v. Gandi*, (N.J. Super. App. Div. 2003).

The issue was whether the attorney participated in the conspiracy by offering defendant legal advice. Generally, an attorney is not liable for a client's tort unless the he or she assisted the client through the conduct itself or gave substantial assistance to the client knowing the client's conduct was tortious. That is, an attorney may be charged with conspiracy if he or she is an active participant in the client's unlawful activity. The court grounded its decision to allow a claim against the attorney in Restatement Second, Torts § 876, which states:

In general, a lawyer is not liable for a client's tort unless the lawyer assisted the client through conduct itself tortious or gave substantial assistance to the client knowing the client's conduct to be tortious; whether a more onerous standard applies to a lawyer who assists a client's conduct depends on applicable law, which in general requires negligent or intentional

misconduct for civil liability to attach to a principal and often requires a higher level of awareness for a lawyer than for a principal.

JURISDICTIONS THAT HAVE REFUSED TO HOLD ATTORNEYS LIABLE FOR CONSPIRACY WITHOUT AN UNDERLYING CLAIM

Kansas

In Kansas, mere involvement in a fraud does not necessarily make one an active participant in a conspiracy to defraud. In *McKibben v. Chubb*, the Tenth Circuit Court of Appeals in held that an attorney who drafted and executed a will for a plaintiff's brother was not liable for civil conspiracy. 840 F.2d 1525 (10th Cir. 1988). The attorney brought a will to the brother's home, where it was executed and witnessed. Under the will, he left all of his assets to his roommate. The plaintiff claimed that, since the roommate asked the attorney to draft his brother's will, the attorney and the roommate conspired to leave all of the brother's assets to the roommate.

The court stated the necessary elements for a civil conspiracy claim in Kansas are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and, (5) damages as the proximate cause thereof. The court held there was no evidence in the record to suggest that the attorney was anything more than a casual acquaintance of the decedent and was merely retained to draft his will. The court found there was no cause for a finding of civil conspiracy. The attorney's mere involvement as an advisor did not rise to the level of a conspiracy.

THE WRATH OF MORGANROTH

Unlike most courts, the Sixth Circuit Court of Appeals did not hesitate in holding that, under New Jersey law, a law firm

conspired with its client to transfer assets in order to avoid a judgment creditor. *Morganroth & Morganroth v. DeLorean* shows that a court may be willing to subject attorneys engaged in asset protection planning to conspiracy claims, without underlying fraudulent transfer claims. Of course, this could result in substantial financial liability and dire professional consequences. 123 F.3d 374 (6th Cir. 1997). In *Morganroth*, the *Morganroth* law firm sued its former client, John DeLorean, and his attorneys for conspiring to transfer DeLorean's assets in order to avoid a \$6 million judgment for past due legal fees in favor of *Morganroth*. Further, *Morganroth* alleged that DeLorean and his law firm actively, knowingly, and intentionally participated in unlawful efforts to avoid execution on DeLorean's property. The court held that the behavior of defendant law firm was so egregious that it rose to the level of conspiracy, even without an underlying tort claim. The court held:

When a complaint alleges that an attorney has knowingly and intentionally participated in a client's unlawful conduct to hinder, delay, and/or fraudulently obstruct the enforcement of a judgment of a court, the plaintiff has stated a claim under New Jersey law for creditor fraud against the attorney. This is so even if the complaint does not allege any misrepresentation by the attorney to the judgment creditor and does not allege that the creditor detrimentally relied on such misrepresentation.

THE FLORIDA EXCEPTION (?)

The highest court of one jurisdiction in the United States expressly has so far declined to extend the UFTA to include civil conspiracy claims or aiding and abetting claims for fraudulent transfers: Florida.

The Florida Supreme Court was not willing to expand the Florida UFTA, reasoning that it was not intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee party monetary damages arising from the non-

transferee party's alleged aiding-abetting of a fraudulent money transfer. *Freeman v. First Union Bank*, 329 F.3d 1231 (Fla. 2004). In *Freeman*, the issue was whether Florida's UFTA Act creates a cause of action for damages in favor of a creditor against an aider or abettor to a fraudulent transaction. The plaintiff-creditors sought monetary damages for defendant-bank's role in an alleged fraudulent Ponzi scheme conducted by a company called Unique Gems. The plaintiffs alleged that defendants, as a banking institution servicing Unique Gems' financial transactions, aided and abetted in the fraudulent transfers of money by Unique Gems to the harm of Unique Gems' creditors.

Even though Florida courts will not expand the FUFTA to include conspiracy claims against attorneys or other advisors, attorneys still may be sanctioned for ethical violations for their participation in a fraudulent transfer.

For example, the Florida Supreme Court suspended an attorney for one year after the attorney advised his son to transfer real property in an effort to avoid creditors. *Florida Bar v. Rood*, 622 So.2d 974 (Fla. 1993). The court found that the attorney was in clear violation of the Code of Professional Conduct for his involvement with the fraudulent transfer.

SUMMARY

There is no clear answer as to what constitutes civil conspiracy arising from a fraudulent transfer. With the exception of Missouri, the majority of jurisdictions require an underlying claim of fraud to establish a claim of civil conspiracy.

Clearly, an attorney cannot assist a client when the client is seeking to hide assets via fraudulent transfer without risking some sort of liability or ethical sanctions. Whether a court is willing to enforce a civil conspiracy claim for a fraudulent transfer is uncertain and depends on the circumstances of the particular case. Nonetheless, *Morganroth* demonstrates that when an attorney's conduct is par-

ticularly egregious - which is an entirely subjective issue - courts are more willing to apply the civil conspiracy theory to fraudulent transfers.

FRAUDULENT TRANSFER OPINION SUMMARIES

The following cases are recent developments in fraudulent transfer law:

Han v. Davis, No. G031526 (Cal. App. 12/01/2004)

Ms. Davis transferred her interest in residential real property to her husband as his separate property. They later separated and began divorce proceedings. In the midst of those proceedings, the husband contracted to sell the property to Mr. and Mrs. Han. Before the sale was complete, the wife decided to try to block the sale. Ultimately, she obtained an interspousal transfer deed from her husband in the context of the marital settlement agreement with her ex-husband. She subsequently refused to complete the sale to the Hans.

The Hans filed an action for specific performance of the real estate contract to force the completion of the transfer, as well as for monetary damages. They based their argument for relief on the California UFTA, alleging that the transfer to Mrs. Davis was made with the intent to defraud the Hans. The lower court found that the transfer was fraudulent. Ms. Davis appealed, arguing that California family precludes the application of the UFTA when property is transferred pursuant to a marital settlement agreement.

The appeals court upheld the lower court's ruling, noting that the California Supreme Court had recently held that the UFTA may be applied to transfers pursuant to a marital settlement agreement in *Mejia v. Reed*, 31 Cal.4th 657, 74 P.3d 166 (Cal. 08/14/2003).

Lavetts v. Cutter, No. B172197 (Cal.App. 11/10/2004)

The California Court of Appeals held that a transfer of real property from defendant

Edward Cutter to his brother was not a fraudulent transfer because the transfer satisfied a debt, and adequate consideration was given. Cutter, individually, and as trustee of an irrevocable trust, transferred property to his brother in order to satisfy a debt to his brother. In an action by another of Cutter's creditors to set aside the transfer to Cutter's brother as a fraudulent transfer, the trial court held in favor of Cutter.

At issue in this case was whether Cutter met his burden of proof to show that the transfer was not fraudulent. It was undisputed that Cutter was insolvent at the time of the transfer of the property, or that the transfer of the property rendered Cutter insolvent. The court noted that once a debtor's insolvency has been proven by the creditor, it is the transferee's burden to prove that the debtor received adequate consideration for the transferred property.

The appellate court found there was substantial evidence that Cutter received a reasonably equivalent value in exchange for transferring the property. In so finding, the court noted that it appeared that the debtor had actually gotten more than equivalent consideration, extinguishing a \$40,000 debt for what appeared to be about \$20,000 in equity in the property.

EFFICACY OF FOREIGN ASSET PROTECTION TRUSTS

Jay D. Adkisson, JD

An asset protection trust is a form of trust that the settlor creates for himself as the beneficiary (a "self-settled" trust), and in which the settlor's beneficial interest is protected from his creditors by spendthrift provisions. In other words, an asset protection trust is a self-settled spendthrift trust (SSST). A foreign asset protection trust (FAPT) is a trust that is created in a jurisdiction outside the United States whose laws allow for self-settled spendthrift trusts.

The statutory laws of nearly all Anglo/American jurisdictions specifically allow for trusts with spendthrift provisions. The same laws allow for trusts to be self-settled. (i.e., one can create a trust for his or her own benefit). For example, the revocable grantor trust, popularly known as a "living trust", is fundamentally a self-settled trust. There are no illegalities in having spendthrift provisions in a trust or in having self-settled trust alone.

However, problems do arise when a self-settled trust contains spendthrift provisions protecting the trust assets from the creditors of the settlor/beneficiary. Most U.S. states forbid the use of spendthrift provision to protect the assets of self-settled trusts from the creditors of the settlor/beneficiary. Otherwise, a settlor would be able to protect himself from creditors by simply transferring assets into a trust for the settlor's own benefit.

In 1986, the Cook Islands attempted to attract trust formation work by adopting a radical new legislation that specifically allowed self-settled spendthrift trusts ("SSSTs") and a host of blatant anti-creditor provisions. Cook Islands' initiation of the self-settled spendthrift laws may have been the starting point of law relating to asset protection trusts, and, perhaps, even the entire concept of asset protection as a specialized practice area. Major offshore jurisdictions soon adopted similar laws, and by the late 1990s, the legislatures of Alaska, Delaware and Nevada had joined the movement.

How and Why FAPTs Fail

Although a few U.S. jurisdictions, such as Alaska, Delaware, and Nevada, allow the use of SSSTs, most jurisdictions do not allow SSSTs. Thus, when a settlor of a FAPT creates a SSST in a jurisdiction that allows SSSTs, but resides in a jurisdiction that does not allow the trusts, a conflict of laws arises. The issue is whether the laws of the jurisdiction in which the trust is formed controls or the laws of the jurisdiction where the settlor resides controls.

Courts have held and creditors have successfully argued that it is unfair to allow debtors to intentionally hide assets from creditors by forming trusts in distant jurisdictions. Further, courts have deemed the settlor the owner of trust assets, even where the settlor is the discretionary beneficiary of a FAPT.

In an FAPT case, the court is challenged by the fact that the settlor-debtor is often within the court's jurisdiction, but the settlor's assets that the creditor seeks are located in another jurisdiction. Thus, the court is deprived of the ability to dispose of the trust assets in order to satisfy the judgment. In the alternative, courts have ordered the settlor to repatriate the assets back to jurisdiction where the settlor resides. With the exception of the Reichers case, there are no cases where a court has refused a creditor's request for the repatriation remedy. If a court enters a repatriation order, the settlor has three alternatives: comply, flee, or refuse to comply.

Comply

If the settlor complies with the repatriation order, the settlor essentially negates his or her elaborate planning to avoid creditors and is forced to pay the creditors with the repatriated assets. See *FTC v. Fortuna Alliance* (unreported, 1997) (after issuance of arrest warrants, defendants immediately agreed to return \$5 million from their Antigua offshore trust accounts); *BankFirst v. Legendre* (unreported, 2002) (settlor agreed to repatriate assets after only five days in jail); *Bank of America v. Weese*, 277 B.R. 241 (D.Md. 2002) (debtor's father paid \$12 million settlement to keep settlors from being incarcerated). See also *J.W. v. Allvest, Inc.*, (Alaska Sup. 3rd Dist. No. 3AN-97-7192-CIV, 2002) (case settled favorably to plaintiffs after settlor, his FAPT, and his attorneys were sued for civil conspiracy arising from post-judgment attempt to defraud plaintiffs).

Flee

The settlor may escape the repatriation order by fleeing from the jurisdiction of

the court, subject to serious ramifications. If the settlor flees from the jurisdiction, the court will hold the settlor in contempt of court, and the settlor's return would result in incarceration until the assets are returned. In short, the settlor can only flee if he never intends to return.

Fleeing the country may also trigger the "fugitive disentitlement doctrine", which prevents the debtor from defending himself in litigation or appeals if he has intentionally fled the jurisdiction of the court. This may have dramatic consequences if the creditor is able to persuade the court to enter the repatriation order in the earlier stages of the litigation. (i.e., the settlor will not have an opportunity to present what otherwise might be a good defense).

Refuse to Comply or Feign Compliance

Finally, the settlor can refuse to return the assets, but such a refusal will likely result in incarceration until the assets are returned. Although there was a theory that a settlor could be incarcerated no more than six months because of Constitutional due process issues, this theory was dispelled in the Lawrence case, where the debtor settlor, who is currently incarcerated, had been in jail for more than four years.

A variation of refusing to comply is where the settlor requests a return of the assets, and the foreign trustee refuses to comply. Thereafter, the settlor would plead "impossibility." The "impossibility" approach has been regularly advocated by the proponents of foreign asset protection trusts since the mid-1990s, and numerous professional articles have been written about the viability of the "impossibility defense".

Courts have consistently refused to adopt the impossibility argument in the foreign asset protection trust context because the impossibility is deemed have been self-created. See, e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999) (a/k/a "Anderson case") (settlor who failed to honor repatriation order were

incarcerated for 6 months); *SEC v. Brennan*, 230 F.3d 65 (2nd Cir. 2000) (settlor ordered to repatriate assets under penalty of contempt, but defendant was convicted of securities fraud in advance of hearing on contempt issue); *SEC v. Bilzerian*, 131 F. Supp. 2d 10 (D.C. 2001) (settlor held in contempt and incarcerated after refusing to honor repatriation order); *In re Stephen J. Lawrence*, 279 F.3d 1294 (11th Cir. 2002) (settlor incarcerated for over four years after refusing to obey repatriation order; appeal to U.S. Supreme Court failed after 11th Circuit held that he could be jailed almost indefinitely until he complied with repatriation order).

In order to obtain a repatriation order against a debtor who pleads impossibility, the plaintiff must satisfy the burden of proof of showing that the contempt order should be issued. If the plaintiff satisfies his burden of proof, the burden shifts to the defendant, who may attempt to prove that it is actually impossible for the defendant to comply with the court's order. For example, impossibility can be proved where the assets were destroyed in a fire or embezzled by the trustee. However, the defendant may not offer evidence that the assets cannot be returned due to his own acts, such as the act of transferring assets to an offshore trust.

Many practitioners have offered well-researched theories on why a court must respect the impossibility defense in the foreign asset protection trust context. Nonetheless, along with a growing number of courts and legal scholars, I must respectfully disagree with their conclusions. Courts have consistently rejected the notion of the "self-created impossibility," in compliance with existing offshore trust law.

Bankruptcy

Bankruptcy has not proven to aid settlors of FAPTs and should probably be avoided where the debtor has settled an FAPT. Indeed, a smart creditor might attempt to force the debtor into bankruptcy for the reasons which follow.

Bankruptcy courts have refused to allow settlor-debtors to exclude their foreign trust assets from bankruptcy estates. Where settlors have attempted to avoid the inclusion of foreign trust assets in bankruptcy proceedings, courts have consistently ordered the settlors to repatriate the trust assets. Further, the bankruptcy court will usually deny the settlor a discharge of the debt, which makes the debt against settlor permanent until paid. See, e.g., *In re Colburn*, 145 B.R. 851 (Bkrpt E.D.Va. 1992) (discharge denied to settlor of FAPT); *Brown v. Higashi* (Bkrpt. Ak. 1995) (assets of Belize FAPT included in settlor's bankruptcy estate); *In re Portnoy*, 201 B.R. 685 (S.D.N.Y. Bkrpt. 1996) (discharge denied); *In re Brooks*, 217 B.R. 98 (D.Conn. Bkrpt. 1998) (stock shares held in FAPT included in settlor's bankruptcy estate); *In re Stephen J. Lawrence*, 279 F.3d 1294 (11th Cir. 2002) (discharge denied and settlor incarcerated).

A significant concern is that bankruptcy trustees may start to wield the sword of pressing criminal bankruptcy fraud charges against FAPT settlors. Proposed changes to the bankruptcy laws may make this more tempting to trustees.

The FAPT in the Divorce Setting

Where the settlor used an FAPT in order to hide assets from an ex-spouse, courts have deemed the FAPT's assets as part of the marital estate and allowed the aggrieved spouse to satisfy his or her judgment out of accessible domestic assets.

The New York state court held that the settlor's FAPT was part of the marital estate in a divorce proceeding, and the settlor's ex-wife could satisfy the divorce settlement with domestic assets. *Riechers v. Riechers*, 679 N.Y.S.2d 233 (1998). In *Riechers*, a physician attempted to hide a portion of his \$4 million estate from his wife forming a Colorado limited partnership that was owned by a Cook Islands trust. The state court ruled that, although it did not have jurisdiction over the Cook Islands trustee, the trust assets were part

of the marital estate, subject to inclusion in the calculation of the total marital assets. Thus, the court simply ordered the husband to pay the wife the \$2 million attributable to the wife's share of the Cook Islands trust assets from his other domestic assets.

The fact that the court acknowledged that it did not have jurisdiction over the trustee and that it did not incarcerate the settlor is a supposed "victory" of the FAPT against creditors. However, that victory was rather hollow considering that the wife received the same judgment and collected the same amount of assets as she would have if the FAPT assets instead had been stacked in neat piles of hundred-dollar bills on the judge's bench. \$2 million is \$2 million, whether it comes from a FAPT or a U.S. bank account.

Similarly, the Wyoming Supreme Court allowed a marital division based on assets in the offshore trust, commenting, "The use of such trusts to avoid alimony, child support, and a fair division of marital property upon divorce is reprehensible to us." *Breitenstine v. Breitenstine*, 2003 WY 16, 62 P.3d 587 (Wyo. 2003). In *Breitenstine*, the husband attempted to use a Bahamas FAPT to shield marital assets from his wife.

Even though no court has addressed whether an aggrieved spouse may obtain a repatriation order to satisfy his or her judgment where the remaining domestic property is insufficient, case law indicates that courts probably would be willing to order the repatriation of offshore assets to satisfy aggrieved spouses.

Impossibility Defense Rejected in Other Contexts

The Federal District Court for the Northern District of Texas rejected a settlor's impossibility defense, expanding such rejection into the realm of tax law. *Eulich v. U.S.*, (N.D.Tex. Case No. 99-CV-01842, August 18, 2004). *Eulich* did not involve a self-settled spendthrift trust, but involved a trust formed exclusively for

the settlor's beneficiaries. The settlor created a Bahamas offshore trust. Thereafter, the settlor came under investigation by the IRS. When the IRS served a formal request for documents from the trust, the settlor refused to provide the documents, claiming that he had no control over the trust. The district court disagreed and held that the settlor was able to get the documents from the trust by appointing new administrators and by filing a lawsuit in the Bahamas.

Further, the court stated it was not going to recognize the settlor's "impossibility defense" because the impossibility was self-created in that the settlor's own drafting and choice of jurisdiction created the impossibility. The Court held the settlor in contempt and imposed a fine of \$5,000 per day, to be increased to \$10,000 per day after 30 days. After 45 days of non-compliance, the Court would consider incarcerating the Settlor until the documents appeared. Thus, *Eulich* ordered the trust to comply with the document request and moved to purge the contempt order.

Using FAPTs Properly

Debtors' and creditors' attorneys alike argue that unreported cases support their position. Some asset protection planners claim that "hundreds" of unreported cases have come out favorably for the FAPT settlors. On the other hand, creditors' attorneys claim that they regularly leverage the threat of Anderson-like incarceration in order to extract settlements of 100 cents on the dollar.

However, the anecdotes about the successes or failures of FAPTs are worthless where the stories are not admissible as evidence in court. FAPTs are often used improperly, and have frequently failed to protect debtors. Cases where the settlor is protected from incarceration or repatriation, and the settlor's assets are protected, do not involve FAPTs.

The failures of FAPTs to protect debtors from incarceration or repatriation demonstrate that many planners mistakenly be-

lieved their own propaganda, and that the “impossibility defense” would be effective in a court of law in a FAPT case. Nonetheless, FAPTs, if used correctly, can be useful components of effective asset protection planning, so long they are not used as an all-purpose asset protection tool. Situations where FAPTs can be used safely and effectively are limited. The most common situations follow.

Non-U.S. Clients

U.S. cases do not have any impact upon persons not resident in the United States. In many other parts of the world, the use of offshore trusts is a form of planning that is respected by the local courts.

Immigration Planning

FAPTs can play a very important role in either inbound or outbound immigration planning. It is difficult for a creditor to attack an FAPT that was formed prior to the time that settlor migrated to the United States. Further, it is probably impossible for a creditor to successfully attack an FAPT where the settlor has migrated from the U.S. prior to or upon a repatriation order being entered. An example of inbound immigration is where a Chinese national moves to the U.S. to facilitate his import-export business from the United States. An example of an outbound immigrant is a foreign professional who earned his education in the U.S. eventually returns to his home country.

U.S. Persons with Substantial Preexisting International Interests

When used conservatively and subject to substantial limitations, FAPTs may be used to facilitate the interests of U.S. persons who have substantial preexisting international interests, such as businesses abroad, because the trust may be justified as offering legitimate tax or estate planning opportunities.

When used in this situation, no more than 20% of the client’s net worth should be transferred to the trust, and the assets held by the FAPT should be limited to assets

generating legitimately non-taxable or tax-deferred income.

U.S. Persons as Political Contingency Planning

FAPTs can be used for contingency planning, within certain limits. A contingency planning FAPT may allow the settlor to prepare for unforeseen circumstances that would cause him to flee from the U.S. Usually, a contingency FAPT may be formed but not funded, or funded it with a minimal amount.

However, the mere formation of the FAPT is likely to require certain IRS tax filings. Then, the existence of the FAPT is known to creditors who could use the FAPT’s existence in order to imply evidence of culpability against the settlor. If litigation arises, the settlor may have to decide whether to maintain the FAPT or voluntarily repatriate the assets. Consequently, a FAPT should be worth no more than 25% of the settlor’s total net worth. Further, the contingency FAPT should be the first asset protection structure to be funded in order to avoid questions about the settlor’s remaining liquidity and ability to meet obligations at the time of funding.

Why the Limitation on Funding?

A transfer of the bulk of the settlor’s assets to an FAPT will trigger a heightened scrutiny of the trust. The U.S. District Court’s opinion in *Lawrence* states “it defies reason--it tortures reason--to accept and believe that this Debtor transferred over \$7,000,000 in 1991, an amount then constituting over ninety percent of his liquid net worth, to a trust in a far away place administered by a stranger--pursuant to an Alleged Trust which purports to allow the trustee of the Alleged Trust total discretion over the administration and distribution of the trust res.” *In re Lawrence*, 227 B.R. 907 (S.D.Fla. 1998).

The old saying that “pigs get fat, hogs get slaughtered” apply to the funding of FAPTs. If the settlor transfers a relatively small portion of his assets to an FAPT, leaving assets available for creditors (even if he later takes steps to protect those

other exposed assets as well), the FAPT has a much better chance of withstanding scrutiny.

Merely creating an FAPT abroad does not guarantee the assets in the FAPT will be successfully protected. However, in a worst case scenario, the option of fleeing may still exist.

Despite these concerns, the funding of an FAPT with all or nearly all of the settlor’s wealth is a pro forma practice among many asset protection planners for lack of other tools. That is, if the only tool that you have is a hammer, everything looks like a nail.

Are Proper Disclosures Being Made to Clients?

Planners should disclose to prospective clients that many courts have not honored the protections of FAPTs. Unfortunately, I find that many FAPT planners are not disclosing any adverse authority to their clients and rationalize that the negative cases have been wrongly decided. A good FAPT planner should sit down with his or her client and discuss these cases with the client to allow the client to weigh the pros and cons of FAPTs in his or her decision-making process.

Summary

Settlors who used FAPTs in their asset protection plans often end in positions worse than if they had no asset protection plan at all. Nonetheless, FAPTs are not completely ineffective and should be noted as a possible strategy for some clients. FAPTs may be used for non-U.S. persons and those planning immigrations to and from the U.S. Further, FAPTs can be used for some U.S. persons to facilitate substantial and existing international business, so long as the trust assets are limited to non-U.S. source income and do not amount to the majority of the settlor’s net wealth. Finally, FAPTs may be used for U.S. persons for contingency planning

if the assets in the trusts are limited to 25% of the settlor's net worth.

The FAPT is a tool, and one that should neither be used indiscriminately nor completely discarded. FAPTs should not be used for U.S. persons who will not immigrate or who do not have substantial and existing international businesses, as there are safer and proven domestic alternatives available.

UPCOMING EVENTS

Jay Adkisson will be speaking at two California seminars sponsored by the National Business Institute on the topic of asset protection.

Anaheim – March 17

Pasadena – March 18

Current seminar updates and additional information available at assetprotectionbook.com

REPORT FROM QUATLOOSIA

Tony-the-Wonder-Llama

People are stupid. Well, not all people are stupid, but quite a few of them are! They must be when I see people fall for the same well-known scams over and over.

You don't think that anybody ever responds to those Nigerian scam letters? A typical letter reads, "Dear Sir, I need your assistance to consummate a glorious transaction to move \$30 million out of Nigeria, for which I will assure your participation of 30%."

In fact, people do reply to these letters. Every couple of weeks, someone sends us an e-mail asking, "They keep asking for money, but every time that I send them

money, another problem arises. What do I do?"

Quit sending them money, for starters.

* * *

The latest Nigerian scam is the so-called "Overpayment Scam," which is directed to those who try to sell stuff over the internet, such as on E-Bay, or electronic classified ads. Here's how it works:

Let's say that you finally want to sell your 1991 Toyota or your late uncle's gun cabinet, and you believe that you can get \$1,000 for it. So, you advertise it somewhere over the internet for \$1,000.

Eventually, you are contacted by a Nigerian who says that he has been looking for a red 1991 Toyota Corolla, and that he will immediately pay you \$1,000. You say, "Great! Send me a check."

In a few days, a cashier's check for \$3,000 arrives in the mail. The next day, the Nigerian calls you and says, "There has been a mistake. I misunderstood the currency conversion. However, let's just split the difference." The caller tells you to keep an extra \$1,000 and wire-transfer the other \$1,000 back to Nigeria.

You transfer \$1,000 to Nigeria. The buyer never sent instructions as to where you should send the Toyota. However, 30 days later your bank sends you a notice that the cashier's check has bounced. You go down to your bank, and demand that the bank reverse the wire-transfer. Unfortunately, your bank says that your wire-transfer and the bad cashier's check have nothing to do with each other. You have just been scammed for \$1,000.

You contact your local police station or the FBI. While they are sympathetic to your situation, they also make it clear that they have no jurisdiction over Nigerian residents and no power to reverse the bank transaction.

This scam happens EVERY DAY. We've seen people lose as much as \$20,000 to such schemes. Recently, here in the

United States, notes with Nigerian contact numbers have been found on cars that state, "I've been looking for a car just like your car. Will you sell it to me?"

* * *

When common sense is handed out, some people appear to prefer to wait in the "easy money" line instead. They're still in that line – now waiting for easy money to replace the hard-earned money stolen from them by scammers who told them the easy money was a mere investment decision away, in a High Yield Investment Program (HYIP).

Asset protection planners most often run across victims of HYIP scams before the victims know they are victims. Often these victims shop around for asset protection planning information for assets they are "receiving soon." The typical victim says he is about to receive a large amount of money from Europe or the Far East and needs an offshore corporation to protect the forthcoming multi-million dollar windfall from tax liability.

When asked about the source of the money, he starts hem-hawing around that his friend got him involved in a trading program in Europe, and he was lucky enough to get one of the only six top HYIP traders who is able to complete the transaction successfully.

In a nutshell, the victim states that he is able to deposit money in his own bank risk-free and leverage it a thousand times to make a princely profit and donate portions of the money to charity, too. In fact, the scam artist substitutes his cash for a worthless Korean bank bond or persuades the victim to pledge the cash against a letter of credit that the scam artist exercises immediately.

Many who fall for HYIP scams simply cannot be convinced that they have been scammed. Therefore, they often spend the next decade trying to figure out why the U.S. government is trying to keep them and their humanitarian programs from their assets.

* * *

Two of the most high-profile offshore planners are in jail, and a third one has entered into a plea bargain.

After being prosecuted for computer fraud in the early 1970s, Jerome Schneider launched himself as a top offshore planner and spent years setting up worthless shell banks in various island nations in the Pacific. For years, Schneider held expensive seminars and brought in a number of tax attorneys and other professionals to give a sheen of credibility to his strategies. Schneider charged exorbitant sums to put together various offshore tax evasion schemes.

Though having pleaded guilty to conspiracy to defraud the IRS, Schneider will spend only six months in prison, because he is actively cooperating with the U.S. Department of Justice in prosecuting his former clients. That is the problem with undisclosed offshore planning: someone always knows. Despite the promises of offshore promoters that you can live a secret life abroad, your planner, offshore banker, or offshore trust company knows what you are doing and a slight twist of the screw may be all it takes to put the authorities hot on your trail.

Marc Harris is another offshore trust guru, whose Harris Organization in Panama at one time boasted over two hundred employees. Harris provided “affordable” offshore planning, offering lower prices than other offshore promoters. Although he claimed that he was able to offer rock-bottom prices because of cheap labor costs in Panama, Harris was actually embezzling his clients’ funds.

Harris also told his clients that there was “no way” that anyone could identify them. Unfortunately, when Harris ran into financial trouble and terminated his staff without pay, one of his computer programmers downloaded Harris’ entire client list and e-mailed it to a reporter in Miami.

Agents of the U.S. Department of Justice snatched Harris from Nicaragua in the

middle of the night and put him on a Learjet to Miami. In Miami, Harris was tried, convicted, and sentenced to a 17-year vacation at Club Fed. Harris’ appeal is pending, and he has refused to testify against his clients. However, most inside observers believe that a deal is right around the corner. If so, Harris’ unhappy clients will join Schneider’s former clients in raking the leaves from the prison yard.

The third offshore promoter who was nabbed is Terry Neal, author of “The Offshore Advantage” and “The Nevada Advantage”. Neal also preached the virtues of secrecy and privacy and assisted his clients in tax evasive schemes. Unfortunately for his clients, Neal entered into a deal with prosecutors in which he agreed to testify against his former clients in exchange for a reduced sentence. While awaiting sentencing, a dispute arose between Neal and prosecutors as to whether he told the entire truth. The latest news is that Neal was trying to take back his plea bargain and get a jury trial.

For those of you seeking asset protection services, beware that the professionals you use are often as good as the service providers that they use. If the planner – even innocently - picks a bad egg such as Neal, you may get hassled, regardless of your intentions.

Offshore tax evasion does not work. Someone knows about your offshore trust or bank account, and that somebody is likely to sell you to the authorities in exchange for a reduced sentence.

Visit <http://quatloos.com> for more information about these and other scams.

SOME CHANGES

Chris Riser and Jay Adkisson are pleased to announce the formation of their new law firm, Riser Adkisson LLP, to be based in Atlanta, with plans for offices in Dallas, Houston, Raleigh, NC, and Short Hills, NJ. The firm will concentrate its

practice on asset protection, wealth preservation and tax planning, mergers & acquisitions, insurance and captives, and debtor-creditor litigation. Justin Schneider will also join the firm as partner of the firm’s Short Hills, New Jersey, office.

Jay Adkisson will continue to serve as the Director of Client Private Services for Select Portfolio Management, Inc., a Registered Investment Advisory Firm with its headquarter offices in Southern California.

AND DON’T FORGET . . .

Jay Adkisson and Chris Riser’s book, “Asset Protection: Concepts and Strategies” is available at Amazon.com, Borders, Barnes & Noble, and other major booksellers.

IN THE NEXT EDITION

Charging Orders: A Survey of Major Cases -- A feature article on charging order law, including foreclosure, related to partnerships and limited liability companies.

We’ll also talk more, about *In re Ehmman*, the recent opinion from a federal district court that highlights a very significant landmine for debtors in the area of charge order protection. We’ll also try to answer the question: *Just what the heck is a charging order anyhow?*

COMMENTS

Comments about this newsletter or the issues herein are always welcome, by e-mail to info05@apbook.com or by calling us toll-free at 888-359-8851.