Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #255
Date: 05-Aug-14
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Jay Adkisson, David Slenn and Philip Martino on In re Icenhower

"In re Icenhower illustrates the broad powers of the bankruptcy courts to fashion orders so as to bring the property of debtors and transferees back into the bankruptcy estate, and to satisfy creditors. This case also illustrates a serious shortcoming of offshore planning, which is that while the asset may be offshore, if the debtor or transferee is within the power of the Court, the chances are that the Court will be able to fashion some remedy to force the repatriation or change in possession of the asset.

Once again we see the weakness of attorney-client privilege in the creditor-debtor context. As the Ninth Circuit stated, if the creditor can show that a fraud is being perpetrated on the Court, then the creditor may get access to communications between the debtor and her attorneys. But a debtor can also inadvertently waive attorney-client privilege, as here, by having their attorneys testify about a subject, which causes the privilege to dissipate.

Which brings us back to the Impossibility Defense, which is what this case is really about. Because the burden of proof is on the debtor to prove up the defense, and the call whether the defense has been established is a discretionary one by the Court, it is very difficult for a debtor to win on the Impossibility Defense. Sometimes in rare cases, debtors are successful in asserting the Impossibility Defense, but most of the time they are not."

Jay Adkisson, **David Slenn** and **Philip Martino** provide members with their analysis of In re Icenhower.

Jay Adkisson is a partner of **Riser Adkisson LLP**, with his offices in Henderson, Nevada, and Newport Beach, California. Jay practices in the area of creditor-debtor law, was the collection counsel for the $20 million judgment in Bay Guardian LLC v. New Times Media LLC (the Village Voice companies), and has been appointed by courts to act as a receiver in cases involving allegations of debtor misconduct. With **Chris Riser**, Jay was the author of the book "Asset Protection: Concepts & Strategies" (McGraw-Hill 2004).

David Slenn is a senior associate of **Quarles & Brady LLP**, practicing in its Naples office, and practices in the areas of estate, business and tax planning. He is a past Chair for the Asset Protection Planning Committee of the American Bar Association. Jay and David were both ABA Advisors to the Uniform Law

Commission's Drafting Committee for the Uniform Voidable Transactions Act (formerly, the Uniform Fraudulent Transfer Act), which was unanimously approved by the Commission on July 16, 2014.

Philip Martino is a partner at **Quarles & Brady LLP**, practicing in its Chicago and Tampa offices. He concentrates his practice in Commercial Bankruptcy and Commercial Litigation. He was bankruptcy counsel for the court appointed receiver seeking to locate and liquidate the assets of Paul Bilzerian. He has been a Chapter 11 and Chapter 7 trustee in the Northern District of Illinois for almost 25 years, and as trustee he has been involved in high profile cases ranging from failed land developers, to overburdened franchisors, to cornered Ponzi scheme perpetrators.

Here is their commentary:

EXECUTIVE SUMMARY:

Transferee-recipients of a Mexican villa held in a Mexican trust were severely sanctioned for feigning compliance with a U.S. Bankruptcy Court's orders to cooperate in turning over the ownership of the Mexican villa to a creditor, while actually thwarting the Court's orders at every turn, and were eventually done in by their own statements when the Court held that attorney-client privilege had dissolved when they attempted to rely upon declarations given by their attorneys to show that it was impossible for them to comply with the Court's orders.

FACTS:

The Debtors, Jerry and Donna Icenhower, were sued on March 24, 2000. The litigation percolated for a few years, until finally a Judgment was entered against the Debtors, on November 24, 2003, in San Diego federal court, for close to $1.4 million. The next month, on December 15, the couple voluntarily filed for Chapter 7 bankruptcy relief.

Prior to the judgment and bankruptcy filing, the Debtors owned an interest in Villa Vista Hermosa, which is a coastal villa near Puerto Vallarta, Mexico. The Debtors' interest was not in the Villa itself -- Mexican law prohibits foreigners such as the Debtors from owning land within 50 kilometers of the coast -- but rather the Debtors' interest was in an arrangement known as a Fideicomiso Trust, where a Mexican national owned the land, but the Debtors had the rights to its beneficial use.

Importantly for our purposes, a Fideicomiso Trust cannot just be created by agreement as with most common law trusts, but instead requires a permit issued by the Mexican Ministry of Foreign Affairs.

While the litigation against them was percolating, but before it was reduced to Judgment, the Debtors started taking steps to protect their interest in the Villa. On March 4, 2002, the Debtors purchased Howell & Gardner Investors, Inc. (“H&G”), which was a shell company formed in Nevada, and transferred their interest in the Villa to H&G.

But this case isn't about the Debtors. Instead, it is about the folks to whom the Debtors ultimately transferred the Villa. The tale of the Bankruptcy Trustee's pursuit of the transferees gives us very important lessons about the fragile limits of attorney-client privilege and the tremendous powers of a bankruptcy court to marshal assets for the benefit of creditors.

And so down the rabbit hole we go!

About six months after the Judgment, on June 7, 2004, the Debtors caused H&G to sell the Villa to another couple, Alejandro Diaz–Barba; Martha Margarita Barba De La Torre (collectively, "the Diazes"), for $1.5 million.[i] Very importantly, the Diazes were U.S. residents, and so were directly subject to the orders of the Bankruptcy Court.

That same summer, on August 23, 2004, the Bankruptcy Trustee brought an adversary action to avoid the Debtor's 2002 transfer of the Villa to H&G as a fraudulent transfer, and the litigation started to inch forward.

Two years later, on August 3, 2006, the Bankruptcy Trustee brought a second adversary action, this time to set aside the transfer from H&G to the Diazes as an unauthorized post-petition transfer.

Then, on November 30, 2006, another creditor of the Diazes, Kismet Acquisition LLC, purchased all the assets of the Debtors' bankruptcy estate, and was substituted for the Trustee in the two adversary actions.

The two adversary cases, now effectively consolidated into a single action, finally went to trial in 2008, and on June 2 of that year, the Bankruptcy Court found in favor of Kismet and against the Debtors, H&G and the Diazes, ordering the latter transferees to convey the Villa to a new Fideicomiso Trust -- this one naming Kismet as the sole beneficiary “for the benefit of the bankruptcy estate.”

Alternatively, the Diazes could choose to pay to make Kismet whole.

The Diazes had until September 13, 2008, to comply.

Eager to assist the Diazes in complying, Kismet first drafted a power-of-attorney for the Diazes to sign that would allow Kismet to itself perform the transfer of the Villa to the new Fideicomiso Trust. The Diazes objected to the power-of-attorney on the basis that it would effectively make Kismet's attorneys the owners of the property, and thus violate Mexican law.

Next, on September 4, Kismet suggested to the Diazes that instead of the power-of-attorney, that they could instead appear before a Notary Public in Mexico to execute the transfer documents, and a few days later Kismet sent along the appropriate documents which would have named Kismet's Mexican subsidiary, Axolotl Immobiliari, as the beneficiary of the new Fideicomiso Trust.

On September 11, now just two days before the deadline, the Diazes objected to these new documents on the basis that they did not name Kismet as the beneficiary "for the benefit of the bankruptcy estate" as the Bankruptcy Court's order had required. On September 26, thirteen days past the deadline for compliance, Kismet again tried to get the Diazes to comply, and this time the Diazes objected to the naming of Axolotl Immobiliari as the beneficiary.

If it wasn't clear already that the Diazes were not going to comply, the Diazes' counsel then wrote to Kismet:

> [M]y client is advised by Mexican counsel that the specific performance portion of the Bankruptcy Court judgment (i.e. undoing of the avoided transaction) cannot at least at this stage of these proceedings, be accomplished under Mexican law.

On September 29, Kismet sought emergency relief, and the Bankruptcy Court entered an order to the Diazes to show cause why they should not be held in contempt. The next day, the Bankruptcy Court additionally ordered Mr. Diaz to submit to a deposition and produce documents relating to his and his wife's attempts to comply with the Court's earlier Order.

For his part, Mr. Diaz did show up at the deposition, and testified that his counsel had advised him that signing the documents would violate Mexican law. But even beyond that, Mr. Diaz further testified that he had brought an Amparo, which is a Mexican legal proceeding to ensure that his Mexican constitutional rights were not

being violated by a Mexican official (just which Mexican official is unclear). After the deposition, the Diazes submitted declaration from two of their attorneys which affirmed that the Diazes would violate Mexican law if they complied with the Bankruptcy Court's Order to transfer the Villa to the new Fideicomiso Trust -- in other words, the Diazes claimed that it was impossible for them to comply with the Court's Order.

Kismet compared the "Impossibility Defense" situation to some famous offshore asset protection trust cases such as *SEC v. Solow*, *In re Lawrence* and *SEC v. Bilzerian*. The Diazes claimed that all of those cases were not analogous, since in each of the cases, the defendants created the inability to comply, whereas in the Diazes' case, it was Mexican law that prevented the Diazes from complying.[ii]

The Bankruptcy Court was not moved by this argument, as it found the Diazes engaged in conduct that did not amount to taking "reasonable steps" to comply with the court's order. With respect to what Mexican law provides, the Bankruptcy Court, after very careful consideration, remarked "I don't really care about Mexico's law."[iii]

The two Declarations submitted by the Diazes' attorneys had another unforeseen effect than advising the Court about Mexican law -- it also constituted a waiver of attorney-client privilege between the Diazes and the two attorneys as to this topic. Kismet moved, and was granted, an Order that the Diazes' attorneys produce their communications with Mexican officials regarding the Fideicomiso Trust, and also between those attorneys and the Diazes relating to the "impossibility" issue.

Complicated litigation usually requires counsel to think three or four steps ahead, and not (to borrow a chess analogy) carelessly get caught in a Knight's fork resulting in the loss of an important piece. But as so frequently happens in creditor-debtor litigation, the Diazes here were simply responding to every move of the creditor instead of thinking ahead (*i.e.*, "prison chess"), and the documents that they had to disclose as a result of their two attorney's Declarations killed their defense.

Thus, it was seen that earlier in the month before the Court entered its September 29th Order to the Diazes to show cause why they should not be held in contempt, Mr. Diaz wrote to his counsel:

> I will not sign anything that executes a trust agreement.... I will not cooperate with these brigands, making a mockery of [M]exican law and attempting to

> circumvent it.

To which the Diazes' attorney responded:

> I understand that but we don't need to reveal it to [Kismet's counsel] yet. Better to let him think we are preparing to cooperate while we get our ducks in a row in Mexico. Therefore, [to] the extent [we] can point to defects, we can send back the draft document and make them change it again causing delay.

Later, that same attorney told Mr. Diaz that one of her objections "should throw a wrench in the works."

But the Diazes' attempt to circumvent the Court's Order went far beyond the dishonesty of the Diazes and their attorneys by feigning compliance. The Diazes in fact lobbied Ambassador Joel Hernandez Garcia of the Mexican Ministry of Foreign Affairs to sign a document stating that the Diazes' compliance with the Court's Order would be impossible under Mexican law and would subject them to penalties. Eventually, Ambassador Garcia signed a much watered-down Declaration, but striking the language that the Diazes would be subject to Mexican penalties.

The Diazes further lobbied the Ministry not to issue the Fideicomiso Trust permit to Kismet or its Mexican subsidiary. When this failed, the Diazes filed their Amparo -- the Mexican constitutional rights lawsuit -- and then tried to keep that proceeding a secret until it was recorded. But their Amparo was quickly dismissed.

Failing at all that, the Diazes were still not out of bullets -- even if they were aimed at their own feet. The Diazes circulated a press release that was highly critical of the U.S. Bankruptcy Judge who had issued the Order, rarely a good litigation tactic, and also bought radio advertising time to run commercials that denounced Kismet.

Probably to nobody's surprise, when the Court re-convened on November 13, 2008, the Diazes were held in contempt. The Court did find that, as a result of the Diazes' machinations, Kismet was unlikely to be approved for the Fideicomiso Trust permit. The Court therefore ordered the Diazes to sign a document transferring the Villa interest to Axolotl, which was Kismet's Mexican subsidiary, or to any other designee of Kismet that the latter desired.

The Diazes were given one week to comply with this new Order, after which compulsory sanctions would kick in at the rate of $25,000 per day. The Court also ordered compensatory sanctions against the Diazes, measured from the September 9

date of the original Order, in the amounts of $4,150 per day for the lost rental value, and $205 per day in the lost use of the property. Finally, the Diazes were also tagged with paying Kismet's attorney's fees and costs in preparing the earlier, abortive transfer documents.

If you think this latest Order and severe penalties finally ended the case, you would have reached a logical conclusion. You would also be quite wrong.

The one week given the Diazes on November 13 expired on November 19, and the Diazes again played along like they were going to close on that date. But the day before the closing, November 18, the Mexican Notary Public who was handling the transaction suddenly withdrew from the transaction. Kismet immediately found another Notary Public to step in, but that Notary Public immediately withdrew as well. Something fishy was obviously going on.

It was, and it stank. The Diazes' attorney had allegedly hired an agent in Mexico to go to the designated Notary Public and, well:

> The notary was thus concerned about the risk to herself if she proceeded with the transaction. Further, she allegedly believed that every notary in the area had been contacted that day to ensure that no notary would participate in the transaction.

If the local Notario Publicos had been intimidated, the U.S. Bankruptcy Judge was not. The next day, November 20, the Court entered yet another Order for the Diazes to close the transaction by November 25, and this time Kismet didn't have to name the Notary Public to close until the date of the closing.

Again, if you think that this Order finally ends the case, you'd have reached another logical conclusion. And you would again be quite wrong.

Just before the November 25 final, final, final closing date, a relative of the Diazes attempted to identify and intimidate the new Notary Public, although the Diazes of course denied any involvement. But this was small potatoes as to what would come next.

On the date of the closing, a close friend of Mr. Diaz, Mr. Guillermo Rivera and several of his buddies, crashed his truck through the gate of the Villa and took the property "hostage." While this drama was playing out, the transfer to Kismet was finally consummated and Kismet became the legal beneficiary of the Villa. So,

Kismet now owned a Villa that was illegally occupied by Rivera.

Rivera refused to vacate the Villa on Kismet's demand, claiming that he would only do so upon the express instructions of Mrs. Dias, which of course she refused to give. So, back to the U.S. bankruptcy judge everybody went.

The Court had already scheduled a hearing for December 4 to consider whether the Diazes were responsible for intimidating the previous Notary Publics and thus defeating the November 19 closing, which of course was a foregone conclusion under these facts. But the Court now also took the opportunity to further sanction the Diazes for Rivera's invasion, since it violated the Court's previous Order that the Diazes were not to make "unavailable . . . any part of the Villa property." The Court entered new compulsory sanctions (finally totaling $225,000) against the Diazes until possession of the Villa was restored to Kismet.

Finally checkmated, the Diazes vacated the Villa on December 5. On December 11, the Court heard testimony that Rivera had acted in concert with the Diazes in the Villa invasion, and thus further held the Diazes in contempt, issued more sanctions, and granted Kismet's application for attorney's fees from November 25 to December 11.

The Diazes appealed the Court's contempt orders and sanctions to the U.S. District Court for San Diego, which did not find any "clear error" in the finding of the Bankruptcy Court. However, the District Court did hold that the Bankruptcy Court should not have entered the $225,000 in compulsory sanctions from November 26 to December 25, nor the previous sanctions for $4,150 per day for the lost rental value, and $205 per day in the lost use of the property.

The Diazes now appealed to the U.S. Court of Appeals for the Ninth Circuit, which finally brings us to the Opinion that is the subject of this commentary.

First, the Diazes argued that it was wrong for the Bankruptcy Court to order the property to be conveyed to Axolotl, Kismet's Mexican subsidiary, arguing that to do so was to the effect of "amending the judgment" to add a party that had never been part of the proceedings. The Ninth Circuit held, however, that the Bankruptcy Court had the jurisdiction to craft necessary orders while supervising a bankruptcy case, and under the facts here -- with the Diazes actively working to defeat the transfer of the Fideicomiso Trust interest in the Villa -- ordering the interest transferred to Axolotl was proper.

Second, the Diazes argued that it violated their Due Process rights under the U.S. Constitution for the Bankruptcy Court to enter contempt and sanction orders based solely on affidavits, as opposed to requiring the live in-court testimony of witnesses. But that, the Ninth Circuit stated, ignored the practicalities of asserting the Impossibility Defense:

> Ordinarily, courts "should not impose contempt sanctions solely on the basis of affidavits." *Peterson v. Highland Music, Inc., 140 F.3d 1313, 1324 (9th Cir.1998)*. However, once an alleged contemnor's noncompliance with a court order is established, the burden shifts to the alleged contemnor to "produce [ ] sufficient evidence of [its] inability to comply to raise a question of fact." *United States v. Rylander, 656 F.2d 1313, 1318 (9th Cir.1981)*, rev'd on other grounds, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). If the alleged contemnor does not raise a question of fact through affidavits, and does not seek the opportunity to present its defense through live testimony, a court does not violate that party's due process rights by holding it in contempt solely based on affidavits. *See Thomas, Head*, 95 F.3d at 1458 (holding that contempt order did not violate due process where, although district court did not hold evidentiary hearing, contemnors "had ample notice and an opportunity to respond to the possibility that the court would find them in contempt" and did not request an evidentiary hearing); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir.1983) (affirming contempt order issued after show cause hearing in which contemnors could have, but did not, present testimony regarding their inability to comply with order).

Thus, the Diazes' Impossibility Defense failed because it was they, and not Kismet, who had the burden of proving the defense, and the Diazes themselves attempted to do so based only on the affidavits they submitted -- and so it was wholly proper for Kismet to counter with its own affidavits, and fight off the defense.

Third, the Diazes argued that the original Order of the Bankruptcy Court was vague, because it left to the parties to figure out how to comply with the Mexican Fideicomiso Trust issue, and did not require a specific course for the Diazes to follow. This defense flopped because Kismet had assigned its interest in the Judgment to Axolotl, its Mexican subsidiary, and the Diazes knew this, and thus knew that the transfer to Axolotl was legally proper.

Fourth, the Diazes argued that they couldn't be held in contempt where foreign law rendered impossible their compliance with the Bankruptcy Court's orders. The problem with this argument was that it was not impossible for the Diazes to comply

with it -- as ultimately they did.

Fifth, the Diazes argued that the Bankruptcy Court seriously erred when it held that the attorney-client privilege had been waived when their attorneys presented their Declarations about the Diazes' non-compliance. But the Ninth Circuit said:

> This order was not error. The crime-fraud exception to attorney-client privilege applies when "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme," and where "the attorney-client communications for which production is sought are 'sufficiently related to' and were made 'in furtherance of [the] intended, or present, continuing illegality.' "*In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir.2007), abrogated on other grounds by *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381–83 (9th Cir.1996)).

Here, the Diazes had consulted with their counsel for the purpose of obstructing compliance with the Bankruptcy Court's Order, and this conduct dissipated their attorney-client privilege.

But even beyond that, Mr. Diaz testified that he had relied upon the advice of counsel in not complying with the Bankruptcy Court's Order, and this was of course a waiver of the attorney-client privilege as to that advice and related facts.

The Ninth Circuit likewise dismissed Kismet's cross-appeal to try to reinstate the monetary sanctions that the District Court had kicked out, and then affirmed in full the decision of the District Court, which had substantially affirmed the decision of the Bankruptcy Court, except as to some of the monetary sanctions.

COMMENT:

This case illustrates the broad powers of the bankruptcy courts to fashion orders so as to bring the property of debtors and transferees back into the bankruptcy estate, and to satisfy creditors.

Contrast the result in *Kismet* with a recent non-bankruptcy case out of Florida, *Sargeant v. Al-Saleh*. In *Sargeant*, the Florida District Court of Appeals (Fourth District) ruled that, even though the debtor stood before it, the court had no power over the debtor’s property located offshore. The *Sargeant* court reasoned that the

exercise of contempt power would undermine the purpose of the Foreign Judgments Act.[iv]

Kismet, on the other hand, illustrates the true firepower and expansive reach of the Bankruptcy Code as it applies to property. Not only does the bankruptcy estate include "all legal or equitable interest of the debtor in property as of the commencement of the case," "wherever located and whomever held,"[v] but the bankruptcy court has exclusive jurisdiction of all the debtor's property and property of the estate, wherever located.[vi] It should be noted that there was a separate appeal pertaining to the Bankruptcy Court's ability to adjudicate a matter affecting Mexican realty.[vii]

This case also illustrates a serious shortcoming of offshore planning, which is that while the asset may be offshore, if the debtor or transferee is within the power of the Court, the chances are that the Court will be able to fashion some remedy to force the repatriation or change in possession of the asset.

But what this case really shows is that debtors and their counsel shouldn't play games with the Court, by feigning compliance while actually obstructing collection. If you get caught, contempt and sanctions will quickly follow.

While the names of the attorneys who were involved in the obstruction were not mentioned by the Ninth Circuit, suffice it to say that their State Bar of California cards may not be long for this world -- their conduct in telling their clients to feign compliance with the Court's Order could be deemed an "act of dishonesty" meriting ethical sanction, if not outright disbarment. If they are proven to have been behind the intimidation of the Notary Publics in Mexico, they might even face criminal penalties.

Once again we see the weakness of attorney-client privilege in the creditor-debtor context. As the Ninth Circuit stated, if the creditor can show that a fraud is being perpetrated on the Court, then the creditor may get access to communications between the debtor and her attorneys. But a debtor can also inadvertently waive attorney-client privilege, as here, by having their attorneys testify about a subject, which causes the privilege to dissipate.

Which brings us back to the Impossibility Defense, which is what this case is really about. Because the burden of proof is on the debtor to prove up the defense, and the call whether the defense has been established is a discretionary one by the Court, it is very difficult for a debtor to win on the Impossibility Defense. Sometimes in rare

cases, debtors are successful in asserting the Impossibility Defense, but most of the time they are not. Thus, because the trial court's decision is reviewed under an "abuse of discretion" standard, it almost invariably stands up on appeal.

This puts debtors in a difficult place, which is that they may require their attorney's testimony to establish the Impossibility Defense, but to use that testimony may, as here, result in a waiver of attorney-client privilege as to that attorney.

Query, what does this rationale mean for a debtor who merely communicates creditor problems (*i.e.*, "duress") to an offshore trustee (or other person who then communicates with the trustee) and how does this mesh with engaging in "reasonable efforts" to comply with a court order?

Also, if the legal obstacle allegedly creating the impossibility was due to another state's (versus another country's) laws, would the court avoid the threat of incarceration and let the controversy run its course within the U.S. legal system? [viii]

Here, it is important to remember that the Diazes were not the original Debtors (those were the Icenhowers), but rather were transferees of preferential and/or fraudulent transfers. This case thus again illustrates that transferees in such a case are immediately in a bad situation, and can end up both regurgitating the asset to the creditor and paying much more in attorney defense fees, costs, and (as here) even sanctions. The Diazes would have been much, much better off had they simply complied with the Court's Order immediately, and then asserted their own claims against the bankruptcy estate for the amount of moneys they had paid the Icenhowers.

Instead, the Diazes fought, lost, and ended up paying a great deal more than if they had just complied in the first place. It's an old story, oft-repeated in creditor-debtor law.

The financially-distressed debtor can be likened to a fire that is ready to spread to anybody that attempts to wrongfully assist, or innocently may just be in the wrong place at the wrong time, turning non-debtors into debtors of their own making with just the slightest change of the litigation breeze. When the debtor goes into bankruptcy, that breeze becomes a full gale, and the best advice that can be given to those desirous of assisting the debtor, or even doing business with them in the normal course, is often just to *Run!* For doing iffy transactions with a debtor, particularly one on the brink of or in bankruptcy, is playing with fire, and a fire that

can at times burn right through attorney-client privilege and result in a loss much worse than simply having to give the asset back.

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

Jay Adkisson

David Slenn

Philip Martino

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CITES:

In re Icenhower, 2014 WL 2883884 (9th Cir., June 26, 2014); *Diaz-Barba v. Kismet Acquisition, LLC*, 08CV1446 BTM (BLM), 2010 WL 2079738 (S.D. Cal. May 20, 2010); *S.E.C. v. Solow*, 682 F. Supp. 2d 1312, 1327 (S.D. Fla. 2010) aff'd, 396 F. App'x 635 (11th Cir. 2010); *Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2014 WL 2998557 (S.D.N.Y. July 6, 2014); *Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869 (2010).

The opinions expressed are those of the authors and do not necessarily reflect the views of Quarles & Brady LLP or its clients. This commentary is for general information purposes and is not intended to be and should not be taken as legal

advice.

CITATIONS:

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[i] "Neither Mr. Diaz nor Mr. Sanchez thought it odd that Mr. Icenhower directed them to pay virtually all of the consideration to third parties and not to H & G. (FFCL ¶ 40.) In addition, although the Villa constituted all the property H & G owned, there was no shareholder resolution authorizing the sale as required by H & G's Articles of Incorporation. (Id. at ¶ 41.)" *Diaz-Barba v. Kismet Acquisition, LLC*, 08CV1446 BTM (BLM), 2010 WL 2079738 (S.D. Cal. May 20, 2010).

[ii] "This is not a case where a party has the ability to choose between compliance with a U.S. court order or the laws of a foreign country. This is a case where Mexican laws and Mexican officials simply would not allow Diaz to do what the bankruptcy court ordered." *In re Jerry L. ICENHOWER, etc., et al., Debtors. Kismet Acquisition, LLC, Plaintiff/Appellee/Cross-Appellant, v. Alejandro Diaz-Barba; et al., Defendants/Appellant/Cross-Appellees*., 12-56329, 2013 WL 6910217 (9th Cir. Dec. 27, 2013)

[iii] *In re Jerry L. ICENHOWER, etc., et al., Debtors. Kismet Acquisition, LLC, Plaintiff/Appellee, v. Alejandro Diaz-Barba; et al., Defendants/Appellants., 12-56329*, 2013 WL 1452801 (9th Cir. Apr. 1, 2013). Courts have been especially wary of impossibility defenses in the offshore setting. "Where assets are held in an offshore trust, the 'burden of proving impossibility as a defense to a contempt charge will be especially high.'" *Bilzerian*, 112 F.Supp.2d at 26 (citing, *Affordable Media*, 179 F.3d at 1241 (9th Cir.1999))." *S.E.C. v. Solow*, 682 F. Supp. 2d 1312, 1327 (S.D. Fla. 2010) aff'd, 396 F. App'x 635 (11th Cir. 2010).

[iv] "[W]e emphasize that allowing trial courts to compel judgment debtors to bring out-of-state assets into Florida would effectively eviscerate the domestication of foreign judgment statutes." *Sargeant v. Al-Saleh*, 137 So. 3d 432, 435 (Fla. Dist. Ct. App. 2014), reh'g denied (May 5, 2014).

[v] 11 U.S.C. Section 541(a).

[vi] 28 U.S.C. Section 1334(e).

[vii] *See In re Icenhower*, 2014 WL 2978491 (9th Cir. July 3, 2014). Although there are limits to an extraterritorial application of the Bankruptcy Code (*see Morrison v.*

Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2014 WL 2998557 (S.D.N.Y. July 6, 2014)), in this case, the fraudulent transfer was deemed to occur within the United States, the transferees were United States residents, and the application of the *alter ego* doctrine resulted in the interest in Mexican realty being part of the bankruptcy estate *ab initio* and thus, an unauthorized post-petition transfer.

[viii] Perhaps this is one factor to be considered when choosing between domestic and foreign asset protection trusts.