Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #229

Date: 10-Oct-13

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: **Jay Adkisson & David Slenn on In re Cutuli: $10 Million in Punitive Damages Result After Financially-Distressed Clients Seek Asset Protection Advice**

"There will come a time in every planner's career when a financially-distressed client will walk through the door seeking asset protection. Maybe the client is an old client and a friend. Maybe the client is a new client that has shopped a half-dozen lawyers before. In any event, the client will be desperate, perhaps untruthful, and will plead for the planner to do something, anything, in the nature of asset protection planning to save them from economic ruin -- or maybe just to set up some speed bumps so that they can get a better settlement.

It is this point in time which separates the smart planners from the foolhardy ones. The smart planners might voice sympathy for the client's plight, but will refuse to take the case, telling the client to come back later when the skies are clear again. The foolhardy planners will give in to their urges, do planning where it lawfully shouldn't be done, and thereby expose their clients, their own assets, and even their careers, to potentially dire consequences.

Sometimes you just have to say 'no.'"

We close the week with commentary by **Jay Adkisson** and **David Slenn** on what can only be described as an amazing case.

Jay Adkisson is the current Chair of the American Bar Association's Committee on Captive Insurance, Vice-Chair of the Committee on Insurance and Financial Services, and an American Bar Association Advisor to the Uniform Law Commission Drafting Committee to amend the Uniform Fraudulent Transfer Act. He has twice testified as an Expert Witness to the U.S. Senate Finance Committee regarding tax scams. Jay is a partner in the law firm of **Riser Adkisson LLP**, with offices in Athens, Georgia, Newport Beach, California, and Henderson, Nevada.

David Slenn is a senior associate in the Naples, Florida office of **Quarles & Brady LLP**. David has more than eight years of experience in estate planning and taxation. He is a Vice Chair for the Captive Insurance Committee and past Chair for the Asset Protection Planning Committee of the American Bar Association. Additionally, David is an American Bar Association Advisor to the Uniform Law Commission Drafting Committee to amend the Uniform Fraudulent Transfer Act. 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.

Jay Adkisson and **David Slenn** are both **ABA Advisors** to the **Uniform Law Commission Drafting Committee for the Uniform Fraudulent Transfer Act**.

Before we get to their commentary, members should note that two new **60 Second Planners** by **Bob Keebler** were recently posted to the **LISI** homepage:

- In his first Podcast, Bob reports on Zavadil v. Commissioner, a case involving deductible charitable contributions made by an agent-corporation that **Chuck Rubin** reported on in Charitable Planning Newsletter #203**.** You don't need any special equipment to listen to Bob's Podcast- just click on this link
- In Bob's second Podcast, he comments on Steinberg v. Commissioner, where the **t**he Tax Court held that the actuarial value of a promise by a donee to pay any estate tax resulting from inclusion of the gift tax in the estate of the donor may be taken into account in valuing the gift. You don't need any special equipment - just click on this link

Join **Bob Keebler** for his 2-day IRA Class Held Thursday, October 17th - Friday, October 18th titled "*Sophisticated Planning and Drafting for IRA Qualified Plan Distributions, Your IRA Complexities, Simplified*." During this class Bob will focus on "*What the Lawyer, CPA, and Financial Advisor Need to Know About Sophisticated Planning and Drafting for IRA & Qualified Plan Distributions, Including How to Plan with a $5,250,000 Exemption.*" To be held at: *Springhill suites by Marriott, 1011 Tony Canadeo Run, Green Bay, WI 5430.* For room reservations call: (920) 569-8500. Reference 'Keebler' when reserving your room to receive discounted rate. Continuing Education Credits Offered**:** 16 hours of continuing education credit for Certified Financial Planners on 10/17 & 10/18 (confirmed) 16 hours of continuing education credit available for Wisconsin Lawyers on 10/17 & 10/18 (awaiting confirmation). Click this link to register, or call 920-593-1700 or email: contactus@keeblerandassociates.com

Now, here is **Jay Adkisson** and **David Slenn's** commentary:

EXECUTIVE SUMMARY:

A couple in deep financial distress tried to protect their assets by a variety of means, including interspousal transfers. A California court entered judgment against the couple for their fraudulent transfers, and tacked on $10 million in punitive damages.

Later, after the couple fled to Florida, the Bankruptcy Judge entered an *ex parte* order allowing the Trustee to enter their home and take evidence that the couple had engaged in asset protection planning. Back in California, the couple's attorney has been sued by the Trustee on a number of theories relating to the fraudulent transfers.

FACTS:

Sometimes the Courts will "throw the book" at a debtor and all those who assist the debtor in hiding assets or defrauding creditors; this is such a case.

Kathleen Ann Smith Cutuli ("Smith") owed a $6 million debt to creditor Elie. To avoid paying Elie, Smith entered into a Pre-marital Agreement (a/k/a "Pre-Nuptial") with her husband to be, Gregory Cutuli ("Cutuli"), whereby, through that agreement, and a later Addendum to it, Smith transferred nearly all her assets to Cutuli thus leaving her with nothing for Elie to collect on.

Smith then fled California following the judgment, and a bench warrant was issued by the California court for her arrest, with bail set at $100,000. Elie obtained charging orders against Smith's company, Napa Smith Brewery & Winery, LLC ("Smith Winery"), and had a Receiver appointed for Smith.

The California Action

As part of the scheme to protect Smith's assets, Cutuli sued Smith in Napa County, California, Superior Court to quiet title to a piece of real property in California. Smith failed to defend, and Cutuli won a $10 million default judgment against her.

Neither Smith nor Cutuli advised Elie of the Cutuli v. Smith lawsuit, but somehow Elie learned about it and filed a Complaint in Intervention, and became a party in that action. Elie's Complaint charged that Cutuli and Smith had conspired to cheat Elie from collecting against Cutuli's assets, including the California property, by way of making various fraudulent transfers.

Settling in Florida, Smith then filed for Chapter 7 bankruptcy there, and Cutuli tried to use the automatic stay from the Florida bankruptcy in the Cutuli v. Smith lawsuit to stop Elie's claims against him. However, the Florida bankruptcy court ruled that Cutuli's claims against Smith were not covered by the automatic stay and ordered that Elie could pursue both Cutuli and Smith in the California action.

When trial began of Elie's claims, Cutuli started to testify, and then refused to appear

back in Court. The judge held Cutuli in contempt, and issued a bench warrant for his arrest.

Meanwhile Cutuli's attorney, Michael Rupprecht, moved in the trial to exclude certain key documents that he claimed had been "inadvertently disclosed" and were subject to attorney-client privilege. The Court rejected this motion, commenting:

> With respect to the claim of privilege, the court found that documents within Trial Exhibit 190 and 191 had been redacted by Mr. Rupprecht prior to production, suggesting the documents were not inadvertently disclosed, and that many of the documents were generated by or provided to third-parties (including admitted non-client Greg Cutuli). The court further found that a sufficient showing had been made at trial that the services of Mr. Rupprecht had been "sought or obtained to enable or aid [one or more individuals] to commit or plan to commit a crime or fraud." (Cal. Evid. Code sec.956). Specifically, the court found that based upon Mr. Cutuli's testimony to date, documentary evidence of substantial transfers of funds to and from Mr. Rupprecht, evidence of Cutuli's ongoing discussions with Mr. Rupprecht (during a time that Rupprecht represented Smith and Cutuli had pending lawsuits against Smith), testimony by Mr. Cutuli that he had sent large amount of money to Mr. Rupperecht (during a time that Rupprecht represented Smith and Cutuli had pending lawsuits against Smith), testimony by Mr. Cutuli that he "may have" provided funds to Mr. Rupprecht to be "held" in the attorney's client-trust account, a review of Trial Exhibits 190 and 191 suggesting apparent documentation of trips and contacts in locations such as the Isle of Jersey, Isle of Man, and Cayman Islands, known to the court to be havens for off-shore banking, and Mr. Cutuli's repeated impeachment at trial on these issues, there was sufficient evidence to support a finding of fraud with respect to the services being provided by Mr. Rupprecht. As such, pursuant to Evidence Code section 956, no privilege could be claimed.

The Court found that Cutuli was not a credible witness, and struggled just to get his stories straight. Further, there was substantial evidence that Cutuli and Smith had removed and destroyed evidence, and attempted to hide key evidence relating to the assets of Napa Smith Brewery and Winery LLC which they owned. Thus:

> The Court finds that Cutuli conspired with Smith and each of the defaulting entity defendants to delay and defraud creditors, to destroy or hide evidence, to engage in abuse of court processes, and to harm Elie. It appears to the court from the evidence adduced that Smith's counsel, Mr. Michael Rupprecht

> participated in activities to further said acts of fraud.

It was not difficult for the Court to find that Cutuli and Smith had engaged in a fraudulent transfer. Among other things, the terms of the Premarital Agreement were that assets would be transferred at some future date, and not presently. Alternatively, the Addendum provided for no consideration for Smith's transfers of assets to Cutuli, and there was an obvious intent to defraud Elie out of his collection rights.

Similarly, the Court held that Smith and Cutuli's attempt to allocate all their debts to Smith by way of the Pre-Marital Agreement and Addendum was unlawful and unenforceable under California law, and also amounted to another form of fraudulent transfer.

Smith had also transferred three vehicles to Cutuli -- a Porsche, BMW, and Tesla, worth an aggregate of $340,000-- for zero consideration, and just a few weeks after judgment was entered against Smith. It was easy for the Court to find that these transfers amounted to fraudulent transfers under the circumstances, and the Court entered judgment against Cutuli for the value of the cars.

In addition to hard assets, cash went missing as well:

> The court finds that funds were diverted by Cutuli and Smith with the assistance and use of various accounts held in the names of entities controlled by Smith and Cutuli which had the effect of transferring monies from Smith to Cutuli in an apparent effort to remove those monies from the reach of creditors. Specifically, substantial evidence demonstrates several large transactions between Kathleen Smith, Greg Cutuli and in many cases, Kathleen Smith's counsel, Michael Rupprecht. When questioned about the transfers at trial Cutuli either denied their existence - only to be impeached by the documentary evidence, or feigned a lack of knowledge of the transactions. Cutuli admitted the transactions were genuine, but offered no legitimate, good-faith explanation for the transactions.
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> * * *
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> Mr. Cutuli eventually admitted to taking funds from Smith, admitted that he acted as a conduit for Smith, admitted that he had an "arrangement" with Smith to handle her business affairs while she avoided an outstanding bench warrant, and admitted that he paid moneys to and received monies from Smith's attorney - Michael Rupprecht. Cutuli also admitted he may have

> transferred money to Rupprecht in order to have the attorney hold those funds in the attorney's trust account. The Court finds that Cutuli and Smith engaged in a fraudulent conspiracy to transfer funds away from the reach of creditors, to delay and hinder creditors and collection efforts, to fraudulently transfer funds to Cutuli and other entities controlled by Smith and Cutuli, and to hide funds.
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> The court finds that in furtherance of the conspiracy between Smith and Cutuli, the couple, at minimum, used attorney Rupprecht's services in furtherance of the conspiracy to fraudulently transfer and hide funds. The court further finds that a sufficient showing was made at trial that the services of Mr. Rupprecht had been "sought or obtained to enable or aid [one or more individuals to commit or plan to commit a crime or fraud." (Cal. Evid. Code sec.956). Specifically, the court finds that based upon Mr., Cutuli's testimony at trial, documentary evidence of substantial transfers of funds to and from Mr. Rupprecht, evidence of Cutuli's ongoing discussions with Mr. Rupprecht (during a time that Rupprecht represented Smith and Cutuli had pending lawsuits against Smith), testimony by Mr. Cutuli that he had sent large amount of money to Mr. Rupperecht (during a time that Rupprecht represented Smith and Cutuli had pending lawsuits against Smith), testimony by Mr. Cutuli that he "may have" provided funds to Mr. Rupprecht to be "held" in the attorney's client-trust account, a review of Trial Exhibits 190 and 191 suggesting apparent documentation of trips and contacts in locations such as the Isle of Jersey, Isle of Man, and Cayman Islands, known to the court to be havens for off-shore banking, and Mr. Cutuli's repeated impeachment at trial on these issues, there is sufficient evidence to support a finding of fraud with respect to the services being provided by Mr. Rupprecht and therefore finds that any documents or evidence that would otherwise have been shielded by the attorney-client or attorney work product privilege are offered no such protection.

Next, the Court found that Smith and Cutuli had encumbered their home with a $1 million mortgage to avoid collection by Elie, and incurring such obligation also amounted to a fraudulent transfer. However, the lender -- which apparently had no knowledge of Smith's financial distress -- established that it was a "good faith transferee" and therefore was not liable to yield its security interest so that Elie could collect on the equity.

Elie had also sued Smith personally and the Smith Winery as her alter ego, and since both defaulted, the Court accepted the allegations as true. To get money out of the

Smith Winery, Smith and Cutuli engaged in "three sided deals" whereby Cutuli was paid personally for moneys from the Smith Winery's customers which should have gone directly to the Smith Winery. The Court held that these deals were fraudulent transfers, and ordered that the moneys be returned to the Smith Winery and placed into the possession of the Receiver.

Similarly, the Court found that Smith and numerous other asset-holding LLCs (also named as defendants) were alter egos. Not only was there substantial comingling of personal and business assets, but:

> The court finds that there exists such a unity of interest and ownership between the entities and individuals that the separate personalities of each do not in reality exist, and there would be an inequitable result if the acts in question are treated as those of the entities or individuals alone. * * * Moreover, substantial inequity will occur but for the alter ego finding. Specifically, absent such a finding, Smith and Cutuli will continue to be able to play their shell-game of transferring assets between themselves and the various entities they control.

It almost goes without saying that the Court also set aside Cutuli's default judgment against Smith to quiet title to their home. Cutuli's bogus lawsuit was just another part of the Smith-Cutuli conspiracy:

> The court finds that part of Smith and Cutuli's conspiracy to avoid creditors, including Elie, involved using Cutuli's lawsuit against his wife and co-conspirator as an instrumentality through which the couple could transfer assets from Smith to her husband. The court finds that Smith, while working with Cutuli to sell the couple's business, while engaging in numerous cash transactions with Cutuli, and while large sums of money flowed to and from Smith's counsel Michael Rupprecht, allowed Cutuli to enter Judgment against her. Because Elie was not a party to the judgment, he lacked standing to object to the entry of judgment or to attack the judgment by motion. (See e.g. Cal. Code Civ. Proc. sec.473(b).). The result was effectively a $10,000,000 blank check to Cutuli that would allow the couple to transfer Smith's assets from Smith to Cutuli in furtherance of their scheme to hamper Elie's efforts to collect on his Judgment. The court finds that Cutuli's argument that the lawsuit, judgment, and amount of judgment were supportable were not credible. The court finds that extrinsic fraud exists with respect to the Cutuli-Smith Complaint, lis pendens, and judgment and that said complaint and

> judgment are being used as an instrumentality of fraud.

Elie very creatively brought a lawsuit against Cutuli for abuse of process, urging that Cutuli's lawsuit to quiet title was not brought for any legitimate purpose, but simply to cheat Elie by using the $10 million default judgment that Cutuli obtained (and which, as noted above, was set aside as a fraudulent transfer). The Court agreed that Cutuli's lawsuit was bogus and amounted to an abuse of process.

The Court specifically found that Smith, Cutuli, and their entities conspired to fraudulently transfer assets and conduct other acts, such as the filing of the bogus quiet title lawsuit, for the purpose of cheating Elie out of his collection rights. Moreover, that Cutuli had falsely testified at trial showed that the conspiracy was ongoing.

Moving on to damages, the Court set aside various transfers from Smith to Cutuli, and entered judgment for compensatory damages for fraudulent transfers of almost $2.8 million, plus another $1.8 million in attorney's fees, and $227,032 in interest -- for a total of $4.8 million.

But worse for Smith and Cutuli, the Court also found that punitive damages were justified because of the conspiracy, fraudulent transfers, and abuse of process they had engaged in:

> The court finds clear and convincing evidence that defendants acted with intent to cause injury, that their conduct was despicable and was done with willful and knowing disregard of the rights of Elie. The court finds the defendants' conduct was despicable and subjected Elie to cruel and unjust hardship in knowing disregard of his rights. The court finds the conduct of each defendant to be vile, base and contemptible such that it would normally be looked down upon and despised by reasonable people. The court further finds that defendants and each of them intentionally misrepresented or concealed a material fact and did so intending to harm plaintiff. The court finds the misconduct of defendants to have been part of a continuous pattern or practice and finds that each defendant acted with trickery and deceit.
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> Because of the defendants' misconduct, a precise picture of the defendants finances in unknown. However, the court finds that based upon the personal finance statements in evidence, the multiple accounts uncovered during trial demonstrating millions of dollars of transactions, the high-value properties controlled by Smith and Cutuli, and the anticipated income stream from the

> NSBW and 1 Executive Way liquidation, it is reasonable to infer that the defendants have access to resources in the range of several tens to upwards of 100 million dollars. In order to punish the defendants for their wrongful conduct, the court finds an award of compensatory damages to be appropriate. Therefore, the court awards punitive damages in the amount of $10,000,000.00.

Note that these punitive damages are probably not dischargeable in bankruptcy by Smith and Cutuli.

The Court also granted broad relief to Elie, including findings that the funds and assets of Smith's various LLCs were available to satisfy the judgment, the Pre-Marital Agreement and Addendum was set aside to the extent that it interfered with Elie's enforcement actions, the fraudulent transfers were voided and those assets made available for Elie's collections, a constructive trust was imposed over Smith's and Cutuli's assets, and a mandatory injunction was entered requiring that the proceeds of certain assets were to be paid directly to Elie.

The Florida Action

It will be recalled that Smith moved to Florida, and there she filed for bankruptcy in an attempt to stop Elie's collection action in California, and try to shed herself of Elie's judgment entirely.

A Bankruptcy Trustee was appointed, and Elie timely filed a claim in the bankruptcy case. Smith meanwhile hired The Andersen Firm out of Florida to represent her and Cutuli's interests. The Bankruptcy Trustee commenced aggressive discovery against Smith, Cutuli and their companies.

Based on the couple's past misconduct, the Court entered an emergency Seizure Order ex parte (which means that none of Smith, Cutuli, or their attorneys knew about it until it was too late for them to do anything about it) which allowed the Trustee to enter Smith's home in Florida and seize cash, assets, and physical and electronic data (read: computers):

> 7. The Trustee conducted searches of electronic and documentary information relating to possible asset protection mechanisms employed by Debtor.
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> 8. Based upon those searches the Trustee's counsel identified email communications between the Debtor, her husband Greg Cutuli, and The

> Andersen Firm.
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> 9. The electronic communications apparently included emails between the Debtor, Greg Cutuli, and The Andersen Firm attorney, Matt Harrod, purporting to relate to "offshore info" and "information on the WY LLC in regards [sic] to asset protection ..." [ECF 866–1 at para. 5; 866–2]. Other emails request a "description regarding the protections offered by the [sic] Wyoming LLC that we are about to enter into" and state "I would like to discuss it [sic] with our accountant and one of Kathy's attorneys." [ECF 866–3 at p. 6 of 15].
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> 10. One email attachment describes the "benefits of the Wyoming Close Limited Liability Company," including a discussion of the limitations that structure imposes on creditor's rights and specifically the limited efficacy of charging orders issued against Wyoming LLCs. [ECF 866–2 at p. 7 of 15]. Another attachment states: "Asset Protection: It is difficult for a member's creditor to reach the assets of the LLC. Under Wyoming law, the creditor of a member can only reach distributions made to the member, but the creditor cannot force the LLC to make such distributions." [ECF 866–2 at p. 1 of 15; and 12 of 15].
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> 11. The Trustee contends The Andersen Firm holds itself out as a law firm providing estate planning and asset protection services to its clients. [ECF 866–1 at para. 6; see also http://www.theandersenfirm.com/asset-protection-planning.htm], that the email communications between the Debtor, Greg Cutuli, and The Andersen Firm occurred during the same time period that Greg Cutuli and the Debtor were allegedly engaged in a "conspiracy to defraud creditors" and, therefore, the Trustee should be allowed to obtain discovery from The Andersen Firm to determine whether assets rightfully belonging to the estate were transferred in an effort to defraud the creditors of the estate.

Smith and Cutuli filed objections to the Trustee's discovery, claiming that what the Trustee discovered was protected by Attorney-Client Privilege. The matter came to a head when the Bankruptcy Court heard the Objection to the Subpoena Duces Tecum issued by the Trustee.

These objections went nowhere. For starters (and many asset protection planners might not know this) when a debtor files for bankruptcy, and the Trustee pursues an avoidance action, Attorney-Client privileged is waived as to the Trustee since,

among other things, the Trustee is the lawful successor to the debtor for attorney-client privilege purposes.

Second, the Court noted that the Anderson firm was trying to simultaneously represent Smith, the debtor, and Cutuli, against whom Smith's bankruptcy estate was attempting to recover assets -- an adverse action:

> Here, the Debtor's privilege (stemming from her former legal representation by The Andersen Firm) "passed to the Trustee's control on the Petition Date." Id. at 807. As such, the Trustee is entitled to invoke the "co-client exception" to obtain otherwise privileged documents relating to The Andersen Firm's former co-client(s) with the Debtor. Id; accord In re Fundamental Long Term Care 489 B.R. 451, 455 (Bankr.M.D.Fla.2013)(bankruptcy trustee, standing in the shoes of the debtor's wholly owned subsidiary was entitled to invoke the co-client exception to the attorney-client privilege); In re Hotels Nevada, LLC, 458 B.R. 560, 564 (Bankr.D.Nev.2011)(debtor and non-debtor documents held by law firm discoverable by bankruptcy trustee based on co-client exception).
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> Thus, to the extent The Andersen Firm may have represented Greg Cutuli, it did so while jointly representing the Debtor. The Trustee, now standing in the shoes of the Debtor, is adverse to Greg Cutuli; the Trustee has filed adversary proceedings against Greg Cutuli for the benefit of the Debtor's estate * * * and is attempting to liquidate assets that Greg Cutuli claims are owned by him, for the benefit of the Debtor's estate. * * * As such, any privilege held by Greg Cutuli cannot be asserted against the Trustee in his efforts to obtain evidence. See In re Hotels Nevada, LLC, 458 B.R. at 573. Therefore, the attorney-client privilege asserted on behalf of Greg Cutuli is overruled.

But even beyond all that, the Court held that the crime/fraud exception to attorney-client privilege would apply. This requires the Court to find both prongs of a two-part test, namely, whether the client was engaged in criminal or fraudulent conduct when the advice of counsel was sought or committed a crime or fraud based on that advice, and, second, whether the attorney's assistance was obtained in furtherance of the crime or fraud.

Application of the crime/fraud exception was pretty easy for the Court in this case, since:

> the Trustee has demonstrated that the Debtor and Greg Cutuli attempted to defraud creditors by transferring and hiding assets at or before the time The

> Andersen Law Firm was consulted, and that they may very well have used the services of The Andersen Firm to further a scheme to defraud. The California court ruled that the Debtor, Greg Cutuli, and their entity alter-egos committed fraudulent transfers, both at the time they received, and subsequent to receiving, "off-shore" and "asset protection" advice from The Andersen Firm. On October 13, 2011, the California Superior Court for the County of Napa issued a judgment explicitly finding that the Debtor, Greg Cutuli, and numerous of their alter-ego entities "engaged in a civil conspiracy to carry out the fraudulent transfers." [Internal citations omitted]

The Court continued:

> The Napa Superior Court found that, with respect to the fraudulent transfers that occurred in early 2008, the travel activities of Smith and Cutuli including "apparent documentation of trips and contacts in locations such as the Isle of Jersey, Isle of Man, and Cayman Islands, known to the court to be havens for off-shore banking," evidence the couple's conspiracy to hide assets. The Napa Superior Court also found that the Debtor and Greg Cutuli, through communications with asset protection attorney Michael Rupprecht "sought or obtained to enable or aid [one or more individuals] to commit or plan to commit a crime or fraud."
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> As such, the Court concludes that there is sufficient evidence already in the record to indicate that when the Debtor and Greg Cutuli sought advice from The Andersen Firm regarding "asset protection" and "off-shore accounts," they were in the process of committing fraud, and subsequently committed fraudulent acts after consulting with The Andersen Firm. Electronic communications located at the direction of the Trustee included emails between the Debtor, Greg Cutuli and The Andersen Firm's attorney Matt Harrod purporting to relate to "offshore info" and "information on the WY LLC in regards [sic] to asset protection...." Other emails request contact information for other attorneys in other states. Additionally, the unredacted portions of documents submitted by The Andersen Firm in their Opposition reference "investments," "funding," "trusts," a "portfolio," various "assignments," "Acts" and numerous entries that the Court believes relate to the management of assets and perhaps the creation of one or more LLCs or other corporate structures.
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> Whether The Andersen Firm was aware of the reasons the Debtor and Greg Cutuli used their services is not relevant to the application of the crime-fraud

> exception and this Court makes no finding on that issue. The fact that The Andersen Firm's services were used during (and prior to) a scheme involving the commission of multiple acts of fraud related to the information obtained through said services is sufficient. Therefore, the Court overrules The Andersen Firm's objections to the subpoena under the crime-fraud exception to the attorney-client privilege. [Internal citations omitted]

In footnote 3, the Court further discussed just how easy it is for the crime/fraud exception to apply in bankruptcy:

> Bankruptcy courts have held that merely raising an "inference that ... transfers may have been fraudulent" is sufficient to invoke the crime-fraud exception. In re Campbell, 248 B.R. 435, 440 (Bankr.M.D.Fla.2000).

And with that, the Court overruled the Objection to the Supoena Duces Tecum and the Trustee was allowed to obtain the discovery that it sought.

Back To California

Meanwhile, the Trustee had not forgotten about California attorney Michael Rupprecht, and now back in the Superior Court of Napa County brought suit against him and his law firm for:

> (1) Unlawful and Unfair Business Practices;
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> (2) Injunctive Relief re Unlawful and Unfair Practices;
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> (3) Racketeer Influenced and Corrupt Organizations Act Violations per 18 USC secs. 1961-1968;
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> (4) Negligence
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> (5) Fraudulent Transfers
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> (6) Deceptive Acts and Practices Pursuant to Consumers Legal Remedies Act;
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> (7) Breach of Fiduciary Duty;
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> (8) Conspiracy;

(9) Accounting; and

(10) Constructive Trust

In addition to Rupprecht's acts in assisting the Cutulis, the Complaint focused substantially on Rupprecht using his attorney trust account as a conduit for client funds -- a sure way to get sued. But the Complaint also focused on Rupprecht's communications with offshore bankers on behalf of the Cutulis, and also on his website in which he held himself out to be an asset protection planning expert:

> Rupprecht actively markets himself as an attorney having "extensive experience in ... asset protection." As of May 18, 2011, the website for Rupprecht's law firm, (www.rupprechtlaw.com), referenced "Asset Protection" as one of its main practice groups and stated, that:
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> Asset protection is another important aspect of long-term planning. Once a crisis presents itself, it is usually too late to take any significant steps toward asset protection if such precautions have not been taken already ... [A] comprehensive asset protection and estate plan may include many other instruments and vehicles, including offshore planning and employment of international asset protection strategies. (A copy of the relevant portion of Rupprecht's website is attached hereto as Exhibit A).

Indeed, the Complaint turned into an indictment of Rupprecht's entire asset protection planning practice, as the Trustee asked the Court to essentially shut down this part of his practice entirely:

> The unlawful business practices of Rupprecht are likely to continue and therefore will continue to mislead the public because Rupprecht holds himself out as a professional who renders sound legal advice yet instead he performs the above-referenced unfair and unlawful activities under the guise of providing legitimate business services, which presents a continuing threat to the public.
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> As a direct and proximate result of Rupprecht's conduct, Rupprecht has received and will continue to receive fees for his unethical and unlawful services that rightfully belong to members of the general public who have been adversely affected by Rupprecht's conduct as well as to Plaintiff by virtue of the money and assets lost due to Rupprecht's actions.

The Complaint sought significant damages against Rupprecht, including punitive

damages. Considering the facts, the Trustee's Complaint is unlikely to be dismissed, and Rupprecht faces the prospect of years of expensive and time-consuming litigation.

COMMENT:

This case presents so many lessons -- all of them painful -- that it is difficult to know where to begin. Let's start with the most obvious.

This case has nothing to do with legitimate asset protection, which is planning for clients before a claim arises, with a claim being defined as an event that ultimately gives rise to liability. Instead, this is simply post-claim fraud on creditors, with nothing legitimate about it. No attorney should have assisted with anti-creditor planning in this matter, and those that did should think better about it in the future.

Second, we see again that post-claim attempts to hide assets can significantly backfire. Here, the Court tacked on another $2 million in attorney's fees and interest, and $10 million in punitive damages -- double the amount of the original debt. Moreover, punitive damages are typically not dischargeable under 11 U.S.C. section 523(a)(6); see also In re Larsen, 2012 U. S. App. LEXIS 7793 (7th Cir. 2012).

The next time you hear someone say, "The only thing that happens if a court finds a fraudulent transfer is that the transfer is reversed," you now show him or her a $10 million reason why they don't know what they are talking about.

Third, where somebody is attempting to defeat the rights of creditors, bankruptcy is probably the last place they want to end up. Here, Smith apparently voluntarily filed a Chapter 7 petition to try to wipe out Elie's debt, but instead all that has happened is that a Bankruptcy Attorney is uncovering more assets and evidence of acts to cheat creditors.

Suffice it to say that this is not going to end well for Smith and Cutuli.

Fourth, in the creditor-debtor context, one should not count on attorney-client privilege to block the production of sensitive evidence. We see it blown here twice, since both the crime/fraud exception and the co-client exception is used to penetrate the privilege. The upshot of this is that planners must presume that all their client communications will see the light of day. Smart planners will advise clients not to send e-mails or attachments that describe anything like planning against a particular creditor or potential creditor, and an attorney's files should ideally be clean of such

references.

Fifth, we see once again that the phrase "asset protection" is about the worst thing that could be mentioned in the post-judgment context. Here, both the California court and the Florida bankruptcy court made a big deal out of the fact that Smith's and Cutuli's attorneys held themselves out to plan in the area of "asset protection". But in other cases, such as those involving disputes over estate and gift taxes, creditor protection could be a significant nontax purpose of a business entity used as part of an overall estate plan.

Whatever planners may think of asset protection planning as a legitimate area of practice, the Courts in the creditor/debtor arena often don't see it that way. Instead, the courts often view asset protection not as a legitimate practice area, but instead as debtors engaged in planning to cheat their creditors -- and it is mainly because of cases like this (which, again, do not involve anything like legitimate asset protection planning) why Courts usually harbor that impression.

Put another way: What might sound like a good idea to help clients while in the comfortable confines of one's conference room, might later sound like an utterly blatant scheme to cheat creditors in the courtroom. Very simply, judges want to see debtors pay their debts, and they get mad when debtors engage in schemes to keep from paying their debts. Superficial explanation that the debtor was engaged in "estate planning" or anything else, usually falls on deaf ears when it is obvious to the Court what is really going on.

Sixth, note the snowballing effect of these cases -- if just one judge indicates that the debtor is hiding assets, then the tendency for the rest of the judges is to pile on. That is why initial impressions to the Court are so important, since once the Court gets a whiff that a debtor is engaging in shenanigans to cheat creditors, the Court will start making adverse rulings for the debtor and this will reverberate all throughout their subsequent hearings. It becomes an 8-ball that they can never get out from behind.

Seventh, we see again that alter ego is used by Elie to by-pass the charging order protection for Smith's LLCs. For those who think that they can just dummy up some LLCs, stuff assets into them, and creditors will never touch those assets, think again.

Eighth, the attorney providing asset protection advice should understand how his or her jurisdiction views secondary liability for his or her role in fraudulent transfers. In some jurisdictions, such as Florida, the courts have held that an attorney cannot be liable either under a conspiracy or aiding and abetting theory for a client’s fraudulent

transfer. Contrast with California, where some courts have viewed a fraudulent transfer as a tort that can support causes of action for conspiracy and/or aiding and abetting a fraudulent transfer. Thus, it would not be surprising to see a creditor pursue (and have a much stronger case against) a California planner as opposed to a Florida planner in a case such as this.

In addition to the secondary liability issue, a court might also need to determine whether an attorney who accepts the client’s funds in a trust account will be considered an initial transferee in a bankruptcy case. With such status, the attorney could be held strictly liable for the funds held in the trust account, unless the attorney can successfully assert the mere conduit defense. If the court finds the attorney did not act in good faith, it could very well deny the application of such defense.[i]

Ninth, there are numerous cases where creditors have successfully been awarded attorney fees and punitive damages in fraudulent transfer cases. This is so because some states actually provide for attorney fees under their modified version of the Uniform Fraudulent Transfer Act, and other states award such fees under the “catch-all” provision of the UFTA. The facts are somewhat egregious in cases where fees and penalties have been awarded.

In conclusion, this case is a real disaster -- a bad situation made incredibly worse by the debtor's post-claim hijinks. The only silver lining of this dark cloud is that is it incredibly instructive in what planners should not do. I strongly urge readers to take the time to read the full text of the two Opinions and the Second Amended Complaint which are referenced below.

There will come a time in every planner's career when a financially-distressed client will walk through the door seeking asset protection. Maybe the client is an old client and a friend. Maybe the client is a new client that has shopped a half-dozen lawyers before. In any event, the client will be desperate, perhaps untruthful, and will plead for the planner to do something, anything, in the nature of asset protection planning to save them from economic ruin -- or maybe just to set up some speed bumps so that they can get a better settlement.

It is this point in time which separates the smart planners from the foolhardy ones. The smart planners might voice sympathy for the client's plight, but will refuse to take the case, telling the client to come back later when the skies are clear again. The foolhardy planners will give in to their urges, do planning where it lawfully shouldn't be done, and thereby expose their clients, their own assets, and even their careers, to

potentially dire consequences.

Sometimes you just have to say "no."

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

Jay Adkisson

David Slenn

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In re Cutuli, 2013 WL 5236711 (S.D.Fla., Sept. 16, 2013). http://goo.gl/t9WjzdElie v. Smith, 2011 WL 9349985 (Cal.Super.Napa, Oct. 13, 2011); http://goo.gl/UzNQaX; Trustee v. Rupprecht, Trustee's Second Amended Complaint (Cal.Super.Napa., Feb. 6, 2013). http://goo.gl/QeRqgh

CITATIONS:

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[i] See In re Harwell, 628 F.3d 1312, 1322 (11th Cir. 2010); Kahama VI, LLC v. HJH, LLC, 2013 WL 5177843; see also Asset Protection Planning Email Newsletter - Archive Message #168; and Has the Warning Bell Sounded for Asset Protection Planners?, 24 Prob. & Prop. 48.