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Creditors

Super Creditors: When Special Collection Powers Trump Debtor Protections

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In the early 2000's, Jamie Solow made millions of dollars from extremely risky "inverse floater" trading.[1] The unauthorized trading was covered up with falsified trade tickets and eventually contributed to his firm's miscalculation of net capital. The Securities and Exchange Commission ("SEC") pursued both the firm and Solow for their involvement in various violations of broker-dealer books and records, net capital, and reporting provisions.

On January 31, 2008, following a nine-day jury trial, a jury found Solow guilty of various securities violations. As part of Solow's punishment, he was required to disgorge his ill-gotten gains.

But Solow had one more transaction to complete. Shortly before the judgment was entered, Solow executed a trade that carried more risk than any other – this time with his own money. Solow transferred a substantial amount of his and his wife's assets to an offshore trust in the Cook Islands.[2] Solow later claimed that he was unable to pay the disgorgement amount.

The SEC pursued Solow and, in January 2010, a federal district court found Solow in contempt for failing to disgorge profits derived from securities violations. Since Solow would not comply with the disgorgement order, the court ordered Solow's incarceration until such time that he agreed to repatriate the offshore funds. If Solow refused to surrender, Judge Middlebrooks further ordered that the U.S. Marshals Service "take [Solow] into custody, and to effectuate the arrest, may enter his residence."

While relinquishing control over his assets seemed like a sound preventative measure, it actually turned out to be a costly mistake that earned Solow an extended stay at a Federal Detention Center.

What went wrong?

As will be discussed in this article, Solow engaged in asset protection planning at the wrong time and against the wrong creditor.

Many clients spend a small fortune for the services of an asset protection planner[3] ("planner"). The planner is often hired to assess financial condition and, when appropriate, erect "firewalls" around a client's exposed assets. The firewalls are often created through special trusts or business entities, both onshore and offshore. This article will identify "Super Creditors," like the SEC, whose super powers often result in the client, like Solow, getting burned by their very own firewalls. In some cases, the Super Creditor conflict may not be obvious and the results can be disastrous.

What Is a Super Creditor?

For the purposes of asset protection planning, a Super Creditor is a creditor that has all the "typical creditor" powers but with some important advantages rooted in statute, equity, or simply due to a large litigation budget.[4] These advantages enable the Super Creditor to more easily frustrate the integrity of asset protection planning employed by a client (who either is or becomes a debtor).

Many professionals equate Super Creditors with federal regulatory agencies such as the SEC, the Internal Revenue Service ("IRS"), and the Federal Trade Commission ("FTC"). These agencies are granted super powers via federal statute and can penetrate state law exemptions thanks to the Supremacy Clause. However, the most common Super Creditor is probably the states' child support collection agencies, and next after that are individual claimants pursuing child support.

For the planner, the risk of a Super Creditor conflict might be fairly obvious due to the nature of a client's occupation. But sometimes a Super Creditor conflict is not so obvious. For example, a client who happens to be an "executive officer" of a publicly-held company could become the target of an SEC investigation under the expanded restatement provisions of the Dodd-Frank Act. A "secret lien" created under the Internal Revenue Code may exist on a client's home that subsequently forms a part of an asset protection plan.[5] A Super Creditor could also be looming in the client's home as an "exception creditor" under state law.

For the client seeking "bullet-proof" asset protection planning, spending thousands of dollars on sophisticated techniques may appear to be a solid preventative measure. But such planning could wind up sowing the dragon's teeth. Thus, it is critical for the planner to identify the likelihood of all claims and recognize the emergence of, and the powers afforded to, Super Creditors.

The "Typical Creditor" Powers

Before addressing how Super Creditors have busted seemingly bullet-proof planning, a brief review of how a non-Super Creditor (a "typical creditor") combats asset protection planning is helpful. In typical creditor cases, an asset protection planning conflict arises when a client arranges his or her assets in a fashion that hinders a creditor's ability to satisfy its claim.

A creditor can seek relief from a debtor's transfer regardless of whether the transfer occurs before or after judgment under the applicable fraudulent transfer ("UFTA") or fraudulent conveyance ("UFCA") statute. The primary remedy under these statutes is to void the debtor's transfer of assets. In addition to seeking relief under UFTA or UFCA, transfers may also be attacked under the common law.[6]

A court may also grant relief before the debtor's assets are transferred. This can be accomplished through various methods, including a temporary injunction, appointment of a receiver, or a writ of attachment. The effect of these options is to allow the court to preserve its ability to fashion some sort of meaningful relief. Since these methods effectively take assets away from a debtor prior to an adjudication of the facts, the creditor must satisfy various due process requirements establishing the necessity of the requested relief (such as the posting of bond).

In many cases, a client will contractually provide a creditor with remedies. For instance, the typical creditor may have a perfected security interest in a client's property. The security interest would allow the creditor to satisfy a debt by seizing the collateral (replevin, foreclosure, etc.) and suing the client for any deficiency. Many loan documents contain provisions that specifically include a waiver of creditor exemptions under state law.[7]

Super Powers: Supremacy, Sovereignty and Public Policy

In addition to all of the aforementioned typical creditor powers, Super Creditors have some advantages that can help them bust through "bullet-proof" planning techniques. Unlike the typical creditor, the Super Creditor tends to have strong constitutional or statutory powers and a large litigation budget.[8] If the creditor is a spouse, public policy and statutes support the fair distribution of assets, regardless of what kind of sophisticated planning may have transpired.[9]

Super Defense: Immunity to Government and Private Parties

For the Federal Deposit Insurance Corporation ("FDIC"), the best offense is a good defense against debtors. According to Josh Glazov, a lawyer at Much Shelist in Chicago, after taking over a bank, "the FDIC enjoys nearly complete immunity against a host of claims and defenses that arise from dealings debtors have with a bank before the bank fails.[10] These include informal agreements (e.g., interest reductions, maturity postponements) that aren't properly written or aren't approved by a bank's board or loan committee. This immunity extends even to pre-failure torts and statutory violations. Moreover, it's not only the FDIC who is immune. So are the private buyers who purchase loans from the FDIC out of failed bank receiverships."

Glazov, the author of bankfailureblog.com, illustrates just how strong the FDIC's immunity is when challenged in court. "A prime example is *Langely v. FDIC*,[11] applying Section 13(e) of the Federal Deposit Insurance Act. There a pair of borrowers claimed that a bank officer defrauded them into buying a piece of real estate and borrowing the money to buy it. Even with a fraud lawsuit pending before the bank failed, the US Supreme Court held the FDIC was immune from the borrowers' fraud claims, denying the borrowers' ability to set their fraud damages off against payments due under the loan. During oral argument the borrowers' lawyer, referring to Section 13(e), lamented: 'the statute's mean, it's tough, it's not fair, it's really not fair!!' But the justices still voted 8-0 to enforce that statute, rendering the FDIC immune."

Super Offense: Disgorgement Power

But immunity defenses are not making headlines in the asset protection world. Instead, Super Creditors are drawing attention due to their offensive super powers. One of the most powerful weapons in the Super Creditor arsenal is the power to force the disgorgement of assets. Put simply, disgorgement is the process whereby a wrong-doer forfeits unlawfully obtained (or "ill-gotten") assets. Disgorgement is usually sought by a governmental agency pursuant to a statute authorizing its usage, but has actually been available to courts as a remedy crafted under their broad equitable discretion powers.[12]

Disgorgement should not be confused with a judgment; disgorgement offers the Super Creditor some distinct advantages over judgment enforcement remedies sought by the judgment creditor. Some debtors have (erroneously) argued that the law protecting an innocent spouse in judgments applies to disgorgement proceedings. The FTC summed up the distinction in a recent post-hearing brief, stating, "The FTC does not contest that state debtor protection laws would apply to certain of Defendants' assets if this case involved a run-of-the-mill creditor claim rather than a disgorgement order."[13]

For example, if a husband owns property in a tenancy by entirety with his wife, the entire property should be protected from the claims of the guilty spouse's judgment creditors.[14] However, as discussed in the *Solow* case, courts have allowed the use of disgorgement against innocent spouses.[15]

The mere issuance of a disgorgement order alone does not result in the worst asset protection nightmare. Instead, the client's refusal to disgorge assets (he or she paid a planner to protect) will trigger a series of events that could result in the client's incarceration.

Disgorgement Process

Upon finding enough evidence to proceed with a claim, the Super Creditor will usually have a receiver appointed to pursue a disgorgement order. The receiver will conduct a financial investigation and will typically request a preliminary injunction to freeze the client's assets until the disgorgement claim is adjudicated. Freezing a client's assets also makes it very difficult to retain the services of counsel; however, courts have denied that this violates the Sixth Amendment.[16]

Disgorgement does not require the Super Creditor to identify any particular injured parties or be exact in pleading the amount of damages.[17] Generally, the standard for determining the disgorgement amount is a reasonable approximation of profits and includes prejudgment interest to allow the recovery of the full amount of any unjust enrichment.[18] The court has discretion over where the disgorged funds ultimately go, even if it means that injured parties receive nothing.[19]

Civil Contempt and Incarceration

When a debtor makes transfers in close proximity to the disgorgement order and then claims inability to pay the disgorgement, the creditor will usually move for a contempt order. The client must then show why he or she should not be held in civil contempt for failure to disgorge. At this point, the client can assert the defense of "impossibility." If the client is truly destitute, it would be impossible to comply with the court order. In such a case, the remedial effect of civil contempt proves meaningless since ordering payment from an insolvent client would be akin to "squeezing blood from a turnip."

But the burden of proving impossibility must be done in good faith after considering all reasonable efforts to comply.[20] A court (applying what California attorney Jay D. Adkisson refers to as the "theory of disbelief") may find that even if the client's attempts to comply with its order were "substantial, diligent or in good faith," the fact that the client did not use *all reasonable efforts* establishes that the client did not rebut the *prima facie* showing of contempt.[21]

Some have attempted to engage in asset protection in close proximity to a disgorgement order, and the results have not been successful. Moving assets outside of the United States also raises a red flag, and extreme caution should be used when engaging in offshore planning if there are Super Creditor concerns. This is because courts have actually *raised the debtor's burden* of showing impossibility when the debtor used an offshore trust.[22] If the court determines that the client is recalcitrant and is not substantially complying with its order, the court could exercise jurisdiction over the client's body by ordering incarceration.[23] In determining whether a debtor is acting in good faith, Super Creditors have scrutinized the debtor's lifestyle in relation to the timing of the disgorgement order.[24]

New Trend in SEC Enforcement - Restatement Triggers Disgorgement

Although trading violations are usually foreseeable and avoidable, another set of securities rules could take the client by surprise and result in disgorgement. According to Washington, D.C. attorney Thomas O. Gorman, former Senior Counsel for the SEC Division of Enforcement, a recent trend in SEC enforcement involves § 304 of the Sarbanes-Oxley Act of 2002 ("SOX"). Section 304 provides that in the event that an issuer is required to prepare an accounting restatement due to material noncompliance with any of the issuer's required reporting, as a result of misconduct, "the chief executive officer and chief financial officer of the issuer shall reimburse the issuer" for any bonus or profits realized from the sale of securities during the 12-month period following the first public issuance or filing with the SEC.

In *SEC v. Jenkins*,[25] CSK Auto Corporation ("CSK") intentionally reported greater pre-tax income than the company had actually earned. The SEC did not allege that the CEO, Maynard L. Jenkins, was personally aware of the fraudulent concealment perpetrated by various CSK officers. In fact, the SEC filed complaints alleging that the officers had actually concealed the scheme from Jenkins. However, since Jenkins had certified the inaccurate financial statements, he was charged with violating § 304.

In response, Jenkins asserted various arguments and defenses. First, he argued that the reimbursement amount was not specific and did not properly trace portions attributable to the misconduct. Second, he argued that reimbursement was punitive and not remedial and that it posed due process concerns. Finally, Jenkins argued that since CSK was incorporated in Delaware, he should be indemnified by CSK since he had acted in good faith and in a manner that he "reasonably believed to be in or not opposed to the best interests of the corporation."[26]

The court acknowledged that there was no case law interpreting this particular fact pattern under SOX § 304. However, based on its interpretation of the statute, the court did not find any of Jenkins' argument compelling. In rejecting his state law indemnification argument, the court cited the Supremacy Clause and noted that the existence of a state statute does not alter the meaning of a federal statute.

The court concluded that § 304 requires only misconduct of the issuer and does not require misconduct by the issuer's CEO or CFO. What is so important about *Jenkins* is that a CEO may not have any clue as to the existence of improper conduct while transferring assets, including bonuses subject to a SOX § 304 claw-back, as part of an overall asset protection plan.

Gorman, the author of the securities litigation blog secactions.com, adds, "[N]o amount of planning is going to save you from this," and a "similar but in some ways more limited provision" also exists under the new Dodd-Frank Act. Under Dodd-Frank, the look-back period is now three years and applies to "executives," but places more limitations on the amount subject to disgorgement.

Adding to this problem is the fact that many aging executives continue to sit on the board of directors for publicly held companies. As these executives continue to advance in years, they become more prone to making mistakes that could subject them to disgorgement under a restatement. According to David A. Rismiller,[27] a corporate governance consultant, "many board members are held captive by aging CEOs. Some of the CEOs stay on the board and continue to drag companies down in performance." This is one reason that Rismiller supports age limits and enumerated responsibilities for CEOs. "If you are 70 and/or no longer handling responsibilities when you were elected director, you don't stand for re-election at the next annual meeting."[28]

Non-Governmental Super Creditors: Exception Creditors and Equitable Distribution

Normally, a trust agreement that contains a "spendthrift clause" will act to protect (to some degree) the beneficiary's interest from the beneficiary's creditors. However, state laws grant certain categories of creditors (commonly referred to as "exception creditors") the ability to pierce a trust's spendthrift clause protection.[29] Additionally, in divorce cases, courts will scrutinize one spouse's attempt to deplete "marital property" to the other spouse's detriment upon equitable distribution of such property.

In *Riechers v. Riechers*,[30] the husband formed a family trust in the Cook Islands for the purpose of protecting family assets for the benefit of the Riechers family members. Although the spouse and children were named beneficiaries, the spouse would cease being a beneficiary upon the entry of a divorce judgment. Years later, when the Riechers filed for divorce, the court determined that the trust contained marital assets. The fact that the marital assets were offshore did not deter the court in awarding the wife one-half the value of the Cook Islands trust. "In the case at bar, this court has no jurisdiction over the corpus of the Cook Islands Riechers family irrevocable trust. Nevertheless, the court has in personam jurisdiction over the defendant."[31]

Implications for Attorneys - Malpractice

Given the Super Creditor's unusual powers, it is plausible that a client may be shocked when the attorney's asset protection plan backfires. A client may argue that the attorney did more harm than good. In such cases, it is not unusual for the client to accuse the attorney of malpractice.[32] Some attorneys have successfully asserted that the client should not be able to recover if the client personally engaged in wrongful conduct.[33]

Any Creditor Can Be a Super Creditor

While federal regulatory agencies are credited with being the supreme Super Creditors, one should never underestimate the "typical" creditor. This is because many courts apply an equitable calculus in asset protection cases. The UFTA specifically provides for "any other relief the circumstances may require."[34] This "catch-all" provision has been interpreted narrowly and broadly by courts. Not only can this statutory catch-all provision be interpreted to provide the creditor with attorney fees[35] but also with punitive damages.[36] Additionally, a court might award attorneys' fees under the terms of an agreement between the parties, specific statutory authority, or the "special circumstances" exception to the American Rule. [37]

Typical creditors can also extend the statute of limitations in certain cases, relying on actions under the common law with remedies such as a resulting[38] or constructive trust.[39] This is because the typical statutes of limitations applicable under the statutory UFTA do not apply to non-statutory actions.[40]

Would the Proposed Planning Lead to Unfair Results?

The lesson to be learned from Super Creditor victories is evident; courts will strive to avoid inequitable results. "Because a Super Creditor is usually acting on behalf of the public and fulfilling some important public goal, such as to force a securities scammer to disgorge ill-gotten gains, it is natural that, as a practical matter, judges tend to favor Super Creditors and Super Creditors will ordinarily catch all the breaks, such as technical interpretations of collection statutes, etc.," says Adkisson, an author of a book on asset protection planning whose practice consists primarily of collecting judgments on behalf of creditors. "But the proper office of asset protection is not to protect 'bad actors' in the first place, and nobody should be particularly surprised when such planning fails."

In sum, the planner can minimize asset protection planning nightmares by engaging in planning before claims arise. Regardless of the timing issue, a planner should always provide the client with the disclaimer that no plan is impenetrable and that some creditors will receive special treatment.

Case	***Asset Protection Technique***	***Super Creditor***	***Outcome***
SEC v. Antar	Estate planning excuse for fraudulent transfers	SEC	Denied transfers
Riechers v. Riechers	Offshore trust	Spouse	Value of offshore assets included in marital estate
FTC v. Affordable Media	Offshore trust	FTC	Incarceration
FTC v. Neiswonger	State exemption (IRA)	FTC	Denied exemption
SEC v. Solow	Offshore trust; Tenancy by entirety	SEC SEC	Incarceration
United States v. Drye	Disclaimer by debtor	IRS	Disclaimer treated as fraudulent transfer

SEC v. Bilzerian	Offshore trust	SEC	Incarceration
FTC v. Bronson Partners	Limited Liability Company Multi-member protection	FTC	Alter ego applied to disregard LLC
FTC v. Leshin	State exemptions (IRA, wages and tenancy by entirety)	FTC	Denied exemptions
SEC v. Musella	State exemption (Wages)	SEC	Denied exemption

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1 *See* SEC, Order, *In the Matter of John M. Repine and Archer Alexander Securities Corp., Respondents,* Release No. 34-54937, File No. 3 ("Inverse floaters are a type of collateralized mortgage obligation ("CMO") issued by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corp. ("Freddie Mac"), or the Government National Mortgage Association ("Ginnie Mae"), which guarantee principal and interest payments on the securities. Inverse floaters are structured so that interest payments move in the opposite direction of a floating rate index, such as the London Interbank Offered Rate ("LIBOR"). Inverse floaters trade in the over-the-counter market, and are among the most thinly traded and volatile types of CMOs. CMOs issued and guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae are exempt from registration under Section 3(a)(2) of the Securities Act of 1933 ("Securities Act") and are "exempted securities" under Section 3(a)(12) of the Exchange Act. The antifraud provisions still apply to the offer, purchase, and sale of CMOs, however, even if the securities are not registered."

2 Presumably, Solow believed that the transfers could not be challenged because the assets were owned in a tenancy by entirety with his wife. Since the assets were immune from creditors of Solow under Florida law *ab inito*, any transfers out of the tenancy could not injure a creditor's rights. While this may be true under a fraudulent transfer analysis, the question under a contempt proceeding is whether the defendant made all reasonable attempts to comply with a court order.

3 Many professionals offer "asset protection" as part of their services. For the purposes of this article, "asset protection" refers to planning that helps insulate assets from creditors (as opposed to asset protection that aims to preserve a client's assets yet qualify for government assistance). Not all asset protection planners are attorneys; many are financial advisors (whose communications are obviously not protected by the attorney-client privilege).

4 The term "Super Creditor" has been used in other contexts, the most frequent being in tax law, bankruptcy, and FDIC settings. "The [c]ourt, citing other instances where it had held the Internal Revenue Service had superior rights to other creditors, found in essence that the Internal Revenue Service is a super creditor entitled to rights above and beyond the rights of other creditors of a disclaiming heir." *In re Nistler*, 259 B.R. 723 (Bankr. D. Or. 2001); "[Section 522(a)] vests the trustee with the ability of a judgment lien creditor to attach or seize both tangible and intangible property transferred by the debtor to a third party prior to filing for bankruptcy, but it does not transform the trustee into a "super creditor" with the ability to raise causes of action

separate from those possessed by the estate." *Alberts v. Tuft* (*In re Greater Southeast Cmty. Hosp. Corp.*), 333 B.R. 506, 519 (Bankr. D. Colo. 2005).

5 *See Wadleigh v. Commissioner*, 134 T.C. 280 (2010) ("The sec. 6321 lien is sometimes called a 'secret lien' because it arises by operation of law without any public filing requirement. *Hult v. Commissioner*, T.C. Memo. 2007-302.").

6 Some examples include the court's imposition or application of alter ego, resulting trust, constructive trust, and equitable lien. *In re Turner*, Slip Copy (9th Cir. B.A.P.); *Macedo v. Bosio*, 104 Cal. Rptr. 2d 1, 6 (Ct. App. 2001); *Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261-62 (1st Cir. 2004) (resulting trust); *OMOA Wireless S. De R. L. v. United States*, No. 06-148, 2010 BL 186661 (M.D.N.C. Aug. 11, 2010).

7 Whether the waiver is enforceable is an entirely different matter. *See Chames v. Demayo*, 972 So. 2d 850 (Fla. 2007); *Curtis v. O'Brien*, 20 Iowa 376 (1866) ("[A] person contracting a debt cannot by a contemporaneous and simple waiver of the benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution against defendant's objection upon exempt property. Such an agreement is contrary to public policy and will not be enforced.").

8 The financial crisis has prompted the SEC to bolster its 2011 fiscal year enforcement capabilities by requesting $1.258 billion from Congress in March 2010.

9 *Riechers v. Riechers*, 178 Misc. 2d 170, 679 N.Y.S.2d 233 (Sup. Ct. 1998).

10 Glazov explains the origin of the FDIC's immunity, declaring: "These immunities come from three places: (1) the *D'Oench, Duhme* doctrine named after the 1942 US Supreme Court case where it first appeared, (2) the federal holder in due course rule recognized by many of the lower federal courts, and (3) Section 13(e) of the Federal Deposit Insurance Act. But in the wake of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, federal circuit courts of appeal are split over whether the first two still operate."

11 *Langley v. FDIC*, 484 U.S. 86 (1987).

12 *See SEC v. Fischbach Corp.*, 133 F.3d 170 (2d Cir. 1997) ("The crafting of a remedy for violations of the 1934 Act lies within the district court's broad equitable discretion. *See, e.g., SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir.1996), *cert. denied*, __ U.S. __, 118 S. Ct. 57, 139 L. Ed. 2d 21 (1997); *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir.1991); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972). As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits. *See, e.g., SEC v. Patel* , 61 F.3d 137, 139 (2d Cir.1995); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1104."

13 *See also SEC v. Huffman*, 996 F.2d 800 (5th Cir. 1993), where the court held that a disgorgement order is not a "debt" as contemplated in the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001.

14 This approach was applied in *McGregor v. Chierico*, 206 F.3d 1378 (11th Cir. 2000), where the court held that "severance of a tenancy by the entirety for purpose of taking the property owned by a guilty spouse, works a partial taking of the innocent spouse's property." The court held that "it would be unjust to force [the wife] to relinquish any innocently held property rights."

15 As pointed out by Judge Moody in *Steffen v. Gray, Harris & Robinson, P.A.*, the *Chierico* opinion involved a final judgment, not a disgorgement order, and "[e]nforcement of a disgorgement order against property (real or personal) has been treated differently by courts from enforcement of a judgment." *See also Business Opportunity Con Artist Surrenders Million-Dollar Las Vegas*

Home, Gives Up Appeal in FTC Contempt Case, Feb. 9, 2011 (F.T.C.), where the FTC recently settled a case against Richard C. Neiswonger, who was ordered to pay $3.2 million stemming from deceiving consumers with false promotions and business opportunities. Neiswonger never paid. As a result, his wife and anyone else living in a family home were recently ordered to move out, with the proceeds of the sale of the home (less $100,000 given to the wife) to be credited towards the amount due. This was in addition to the FTC's prior seizure of Neiswonger's $379,000 retirement account.

16 *See Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) ("A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.").

17 "The primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched." *SEC v. Commonwealth Chem. Sec.*, 574 F.2d 90 (2d Cir. 1978).

18 Even if there were some uncertainty regarding the amount of defendants' ill-gotten gains, "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Febre v. FTC*, 128 F.3d 530, 535 (7th Cir. 1997).

19 *See SEC v. Pension Fund of America L.C.*, 377 Fed. Appx. 957 (11th Cir. 2010) ("In approving a distribution plan following disgorgement in an SEC enforcement action, 'it remains in the district court's discretion to determine how and to whom the money will be distributed, and the district court's distribution plan will not be disturbed on appeal unless that discretion has been abused.' *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997))."

20 *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976).

21 *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986).

22 "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). According to Delaware attorney Richard W. Nenno, the greatest strength of an offshore trust (being outside of the reach of a U.S. court) is also one of its biggest weaknesses. "Even if the trustee and the assets of a foreign APT are beyond the reach of a U.S. court, that court might have potent remedial powers at hand. For example, a U.S. bankruptcy court might deny the debtor a discharge under § 727 of the Bankruptcy Code, or a court might be able to compel the reregistration of trust assets. Moreover, courts have fined or imprisoned trustors of foreign APTs for civil contempt in four notorious cases." *See* Nenno & Sullivan, 868 T.M., Domestic Asset Protection Trusts.

23 Even if the client's assets are held primarily in an exempt form, the court may view the exempt assets as available for the purposes of satisfying the disgorgement order. "The [c]ourt finds that Yun could have borrowed against her house, her stock portfolio, her home equity line, her jewelry collection, her retirement annuity, or any combination of these or other assets." *S.E.C. v. Yun*, 208 F. Supp. 2d 1279 (M.D. Fla. Jun. 20, 2002).

24 In *FTC v. Leshin*, 618 F.3d 1221 (11th Cir. 2010), the FTC filed a brief apprising the court of the debtor's lifestyle post-disgorgement order, stating, "Similarly, [the defendant] has also continued to enjoy non-essential luxuries, such as having his house cleaned, making extra payments on his mortgage, contributing to his church, purchasing satellite television, paying for tennis lessons for his daughter, and eating out with his family. [Defendant] has not identified any steps he has taken

to reduce his discretionary spending -- despite having been on notice that he would have to disgorge his ill-gotten gains for more than a year." *See* FTC's Post-Hearing Brief Regarding Defendants' State Debtor Protection Claims (S.D. Fla.).

25 *SEC v. Jenkins*, 718 F. Supp. 1070 (D. Ariz. 2010).

26 8 Del. C. § 145(a).

27 Former Chairman, President, Chief Executive Officer and director of FirsTier Financial, Inc. and its lead bank, FirsTier Bank, N.A., Omaha, until FirsTier's merger with U.S. Bancorp.

28 The SEC adopted the proxy access rules in late August 2010 on a 3-2 vote. These rules could make it easier for shareholders to remove directors.

29 *See Booth v. Booth*, 2006 UT App 144 ("Thus, despite a trust's spendthrift provision, Utah law allows the child of a beneficiary, who is entitled to court-ordered child support, to 'obtain from a court an order attaching present or future distributions,' Utah Code Ann. § 75-7-503(2), even if the trustee has not yet distributed the beneficiary's interest"; *see also* Unif. Trust Code §§ 502, 503 (amended 2005), 7C U.L.A. 523-529 (2006). The comments to the UTC §§ 502 and 503 are instructive as to the intent of the sections. *See also* 28 U.S.C. § 1738B, which deals with full faith and credit for child support orders.

30 *Riechers v. Riechers*, 178 Misc. 2d 170 (Sup. Ct. 1998).

31 *Id*. at 174.

32 "Zelaya's Motion and supporting affidavits concede that the so-called 'wages' and 'salaries' received by Zelaya are not protected by Florida's Exemption Statute and suggest assignment of the blame to 'professional advice' from undisclosed 'professionals' who purportedly advised Zelaya as to how to structure receipt of his income through various corporate structures, including Hedge and Fund which only have had the effect of evidencing a multitude of fraudulent transfers from Zelaya to members of his immediate family, all insiders of Zelaya." *See* Zelaya's Motion at p. 6 and footnote 3.

33 *See Carpenter v. Holmes (In re TOCFHBI, Inc.)*, 413 B.R. 523 (Bankr. N.D. Tex. 2009); *see also Luzinski v. Peabody & Arnold LLP (In re Gosman)*, 2007 BL 231060 (Bankr. S.D. Fla. Mar. 09, 2007) ("Mr. Gosman, through the trustee, cannot sue Peabody for professional malpractice regarding the subject fraudulent transfers since both parties, Peabody and Mr. Gosman, would be considered to have committed a wrongdoing.").

34 Section 7(a)(3)(iii), Uniform Fraudulent Transfer Act.

35 *See Hansard Construction Corp. v. Rite Aid of Florida, Inc.*, 783 So. 2d 307 (Fla. 4th DCA 2001); *Profeta v. Lombardo*, 600 N.E.2d 360 (Ohio App. 1991); *Klein v. Weidner*, Slip Copy.

36 *Rodriguez v. Ramirez (In re Ramirez)*, No. 09-70051, Adv. Pro. No. 09-7004, 2011 BL 2343 (Bankr. S.D. Tex. Jan. 5, 2011) ("The harm the [creditors] suffered because of the fraudulent transfers was severe and foreseeable. Because the [creditors] did not receive the money to which they were entitled, they were forced to take out a loan to pay their property taxes. The loan was secured by a lien on the [creditor's] home. When the [creditor] family was unable to collect on their judgment on account of the fraudulent transfers, they were unable to repay the property tax loan. The property tax lender foreclosed on the house. But for the fraudulent transfers, the [creditors] would not have lost their home.").

37 *See Volk Constr. Co. v. Wilmescherr Drusch Roofing Co.*, 58 S.W.3d 897 (Mo. Ct. App. 2001)

("Courts adhere to state common law rules when assessing the availability of attorney's fees under the UFTA. *See Morris v. Askeland Enterprises, Inc.*, 17 P.3d 830, 832 (Colo. App. 2000). However, we find that the award of attorney's fees is justified under the 'special circumstances' exception to the American Rule, which includes situations where a party is shown to have engaged in intentional misconduct. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 156 (Mo. App. E.D.2000). The trial court specifically found that the Appellants completed the transfers with the actual intent to hinder, delay and defraud creditors of the Corporation. The record supports this finding. No abuse of discretion appears. We therefore affirm the award of attorney's fees to Respondent.").

38 *See Strange v. Sink*, 27 N.C. App. 113, 116 ("A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein and the beneficial interest is not otherwise effectively disposed of.").

39 *See OMOA Wireless S. De R. L. v. United States*, No. 06-148, 2010 BL 186661 (M.D.N.C. Aug. 11, 2010) ("A constructive trust arises when a person 'obtains legal title to property in violation of a duty' he or she owes to another. *Miller v. Rose*, 138 N.C. App. 582, 591, 532 S.E.2d 228, 234 (2000) (internal quotation marks and citations omitted). In such a case, equitable title is actually retained by the wronged party. *Bowen v. Darden*, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954))."

40 *See Cavadi v. DeYeso*, No. SJC-10674, 2011 BL 1797 (Mass. Jan. 04, 2011) ("Moreover, the drafters' comments to UFTA underscore the point, stating that, 'this Act is not an exclusive law on the subject of voidable transfers and obligations.' Comment 2 to UFTA § 1, 7A (Part II) U.L.A. 16 (Master ed. 2006). The reporter for the committee that drafted UFTA similarly states that 'neither the original . . . nor the revised Act . . . is a complete or exclusive law covering fraudulent transfers and obligations.' Kennedy, The Uniform Fraudulent Transfer Act, 18 UCC L.J. 195, 200 (1986))."

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