GASSMAN CROTTY & DENICOLO, P.A.

ATTORNEYS AT LAW

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Edited By: Brandon Ketron

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Thurricane is a prescription medication that provides a biological synergism between high barometric pressure and reading legal humor. Side effects include: blurry vision, dry mouth, knowledge and other adverse reactions.

[Hurricane Preparedness]

In Re Rensin: Pigs Get Fat, But What About a Hippo? by Alan Gassman, Martin M. Shenkman, Wesley Dickson and Joe Cuffel

"How an FTC Judgment, a Transported Offshore Trust and Florida Annuity Purchases All Caused the Perfect Storm for a Unique and Noteworthy Bankruptcy Court Opinion."

State's Attempts To Tax Trusts by John Beck

"Recently, a number of states have attempted to tax the income generated by trusts based on the connections that the trust has with the state. It appears that some states may be overreaching in an attempt to line their pockets with tax dollars that they may not be entitled to."

The Tax Neutral Dedicated Charitable Trust by Alan Gassman and John Beck

A deferred deduction charitable trust should be considered by any taxpayer interested in establishing a charitable trust or foundation.

Making A Late S-Election – Not Possible if the Operating Agreement or Ownership of a Company Would Not Qualify on the Effective Date by Alan Gassman

This article highlights two common pitfalls to avoid that can arise under a retroactive S-election scenario.

Humor

Upcoming Events

Hurricane Preparedness

We're going to assume you've read about the standard safety precautions to take in preparation of a tropical storm or hurricane. Instead of providing you with information you've probably read elsewhere, we've chosen to provide you with a few overlooked considerations that can save you and your family from potential disaster..

1. Take Pictures and Video of Everything

For insurance claim purposes, having photo or video evidence of your house prior to a storm is extremely beneficial. Without it, an insurance company will claim that the condition your house is in now was not a result of the hurricane.

Record both the inside and outside (especially the roof) of the house if you can, and save the file(s) in the cloud or somewhere safe. Documenting what belongings are inside the house is also suggested. When everyone goes to file claims with their insurance carriers after the storm, the people who have documentation and videotapes go first, the people with questions go last.

2. Park Your Cars Strategically

Where to park your car in the event of an impending tropical storm or hurricane is a consideration that should not be taken lightly. If you're in a place with risk for flooding, find a legal parking location in a parking garage, hill, or curb. If you have more important valuables to protect, such as an expensive window or generator, it might be wise to use your vehicle as a barricade to insulate what you are trying

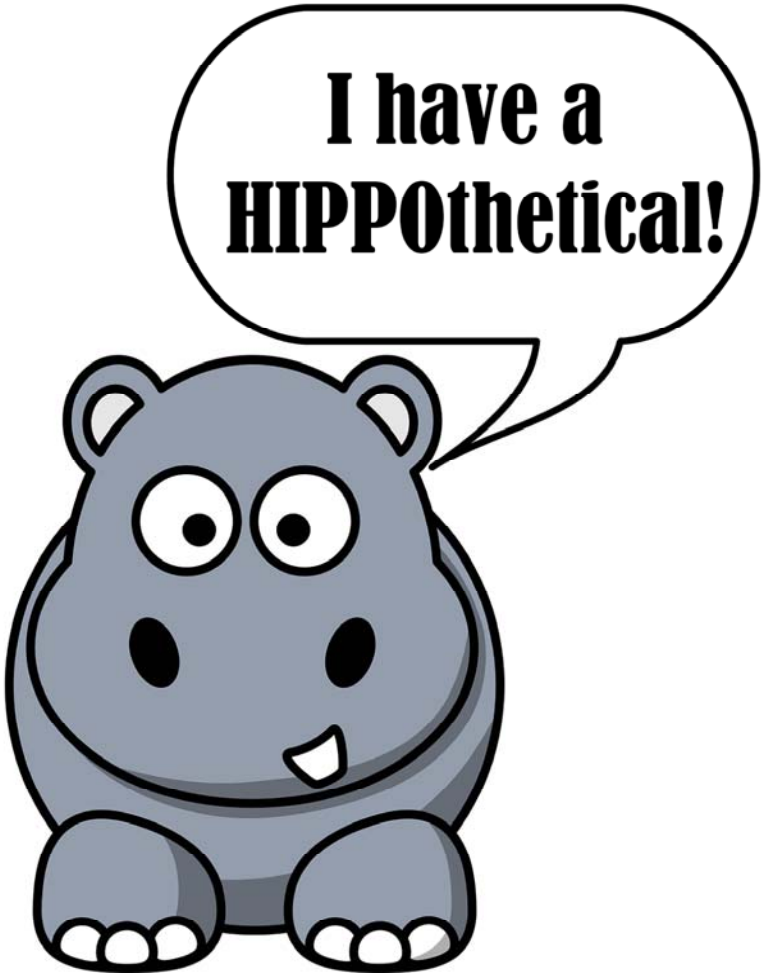
to protect from the storm.

3. Consider Purchasing a Flight

Some airline-booking services like Expedia offer a free cancellation on flight tickets within 24 hours of booking. Take advantage of this and allow yourself the opportunity to get to a safe place. If the storm changes course and you no longer need the flight, then cancel it.

4. Identify a Shelter that Takes Pets

Don't forget about your furry loved ones! Don't assume that you will be able to bring your pet to an emergency shelter, call your local office of emergency management to identify which shelter is your best option.



In Re Rensin: Pigs Get Fat, But What About a Hippo?

How an FTC Judgment, a Transported OffshoreTrust and Florida Annuity Purchases All Caused the Perfect Storm for a Unique and Noteworthy Bankruptcy Court Opinion

By: Alan Gassman, Martin M. Shenkman, Wesley Dickson and Joe Cuffel

EXECUTIVE SUMMARY:

The Judge found that an old and cold asset protection trust formed in the Cook Islands and moved to Belize was subject to Florida law and not protected from the creditors of a Florida resident who was the settlor and beneficiary, but also found that monies that were recently added to the trust, and used by the trustee to buy a creditor exempt annuity, could not be attached. The reasoning was that the debtor himself did not engage in a transfer to avoid creditors, so that the Florida Fraudulent Transfer Statute did not apply. The trust, which was formed and originally funded well before the debtor allegedly engaged in deceptive trade practices in a business that advertised for individuals with poor credit to buy computers over time caused over $14,000,000 dollars of debt owed to the FTC that could not be discharged, has so far managed to preserve over $2,000,000 that the asset protection trust invested in customized Cayman Islands annuity contracts. This app arently favorable result occurred despite the judge ruling that Florida law would apply to the Belize Trust, and that creditors would have been able to reach the trust assets if they were not held in annuities.

The May 2019 Florida Bankruptcy Court ruled in the case of *In Re Rensin*. *Rensin* is a story involving alleged consumer fraud charges against a company called BlueHippo. Money was scattered across three islands, and subject to a $14,000,000 dollar FTC judgment. The bankruptcy of Mr. Rensin is now completed, and the debt was not discharged, so litigation continues. The below discussed Bankruptcy Court decision was not appealed by either party, and is the last word we may receive for many years on questions 2 and 3 below.

The well-written Bankruptcy Court opinion addresses the following questions:

1. Will Florida or Belize law apply to the Trust? If Florida law applies, then will the trust assets be considered as being accessible to the trustee in bankruptcy? Unfortunately, the court came to the conclusion that Florida law should apply, and only cited prior cases that have come to the same conclusion, without any discussion of what the rationale for ruling this way was. The cases cited have the same issue.

2. Will the annuities, annuity payments, and the Regions Bank account that was funded from annuity payments be protected from creditor claims under Florida Statute Section 222.14 when the trust was the "owner" of the annuities, but Mr. Rensin was the named beneficiary under the policies?

3. Does Florida Statute 222.30, which aims to prevent transfers made by a debtor into otherwise exempt assets to avoid the reach of creditors, apply to allow the transfers of the annuities to be held for Mr.

4. What happens to Mr. Rensin's Florida homestead?

Practitioners in states other than Florida should evaluate the lessons of Rensin, as several important points will apply in other contexts, even if the applicable state law differs from the Florida statutes above.

FACTS:

Mr. Rensin sold a business in 2001 for approximately $9,000,000 and placed the proceeds with SouthPac Trust Company in the Cook Islands under an irrevocable trust (hereinafter referred to as the "Joren Trust" or the "Trust") of which he was the beneficiary.

He subsequently started a business called BlueHippo Funding, which allowed people with bad credit to send $100 initially, and then make subsequent layaway payments, to qualify for full financing of a computer. According to an FTC press release the business was a sham, and "The FTC alleged that less than one percent of consumers who signed up with BlueHippo received the financed computers they applied for, and undisclosed conditions to redeem "store credits" were rigged to discourage consumers from using them."

The BlueHippo website, as it existed in 2008, offered to "provide an effective alternative [to purchasing computers] for people with limited financing options due to less than perfect credit or no credit at all." They called themselves "the nation's leading direct response merchandise lender," and claimed to specialize in providing computers and televisions.

Apparently, Mr. Rensin's BlueHippo business had approximately $14,000,000 of sales volume, and paid him compensation of at least $315,000, plus whatever profits were made. The FTC won a litigation battle and succeeded in having a judgment based on gross sales, as opposed to actual costs incurred by customers who were allegedly mislead by not being able to use trade in credits to pay for shipping and handling or profits. During the pre-bankruptcy litigation, a 2010 Federal District Court judgment was entered in the amount of $609,856.38, based upon "consumer injury" due to "belated and/or failure to deliver computers." This was appealed to the Second Circuit Court of Appeals, which concluded that the appropriate measure of damages was "full compensation" in the form of total refunds to customers as "the appropriate baseline for contempt damages" when the loss to consumers is the result of "con turnacious conduct." Conturnacious means willful disobedience to authority. After this appeal, the Federal District Court entered a judgment for $13,400,627.60, the FTC motioned to hold Mr. Rensin in contempt, and Mr. Rensin filed a Chapter 7 Bankruptcy, with one purpose being to counteract the FTC's "relentless effort to jail him for non-payment of a money judgment he could not afford to pay." During the Bankruptcy, the FTC continued to attempt to have the Federal District Court enforce a requested contempt order to place Mr. Rensin in jail, but the Second Circuit Court of Appeals ruled that the automatic stay law in Bankruptcy prevents non-bankruptcy courts from placing a debtor in jail when the core purpose of the contempt order is to collect money that is a debt owed by the Debtor in Bankruptcy.

While engaged in the above litigation with respect to both BlueHippo, and as an individual, Mr. Rensin apparently did not object or may have asked SouthPac to transfer the trusteeship of the Joren Trust from the Cook Islands to Orion Trust Company in Belize. Orion Trust Company is affiliated with the law firm of Arguelles & Company, LLC, and is considered to be a reputable trust company in Belize, having a U.S. educated lawyer as its named partner. For many years, Belize has been a very debtor-friendly country, which basically has no fraudulent transfer statute that can be used to override last minute transfers to trusts there, even those intended to avoid creditors, as long as the creditor does not have a judgment against the debtor in Belize. The website for Orion Trust Company shows 12 employees, including a banker who has 30 years' of experience, including work at Barclays' branches in Belize and the Cayman Islands. The founder of Arguelles & Co mpany, LLC, Emil Arguelles, is a member of both the Belize and New York Bars, and has an undergraduate degree from Marquette University in Milwaukee, WI.

There is no allegation that any of the "Hippo money" was transferred to the Trust, although Mr. Rensin transferred $350,000 to his lawyer towards the end of 2015, and apparently instructed the lawyer to transfer these funds to the Belize trustee. The Trust also paid Mr. Rensin around $8.6 million in

distributions during the course of the lengthy litigation. This money was reportedly used to pay legal fees and some creditors.

While we do not know if the annuity purchases were the only transactions that occurred with respect to the Trust, we do know that the fixed annuity transferred approximately $15,000 to Mr. Rensin per month. Additional funds were used by Mr. Rensin to purchase a home in Florida, seemingly to utilize the state's gracious homestead protections. These protections were lost upon the filing of bankruptcy, which begs the question as to why Mr. Rensin went into bankruptcy. What we do know about the Trust's transactions is that the Trust used all, or almost all, of its assets to purchase two annuity contracts from a Cayman Islands annuity carrier in December of 2015. These annuities were apparently written to provide lifetime payments to Mr. Rensin, with the residue of assets held under the variable annuities to be owned by the Trust after Mr. Rensin's death.

One annuity went to "fixed payment mode" immediately upon funding. As mentioned above, this gave Mr. Rensin the irrevocable right to receive $15,000 per month for the rest of his life, with the remainder of the annuity assets to be held by the Trust under the "annuity wrapper" after his death.

Under the second annuity contract, Mr. Rensin had no enforceable legal right to receive payments until the contract went into "payment mode." Until then, the Trust had the ability to prevent Mr. Rensin from receiving payments from this "variable" annuity. This annuity gave Mr. Rensin a right to borrow up to 90% of the value of the assets held under each contract, but the Trustee had the right to cancel the annuity at any point in time, effectively making Mr. Rensin's right to borrow subject to veto.

Mr. Rensin also had a $79,014 Regions Bank account that was funded solely from the $15,000 per month payments received from the annuities, which he claimed was exempt under Florida Statute 222.14, which provides, in relevant part, that "[t]he cash surrender values of . . . proceeds of annuity contracts issued to citizens or residents of the state . . . shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor. . ."

The Bankruptcy Court did not discuss whether Mr. Rensin might be found to be in contempt of court for not turning over assets under the trust that he might be alleged to have control over. This will be a tough argument to win for the Trustee in Bankruptcy, given the Bankruptcy Court's findings as to the degree of independence that the Trustee had under the Trust.

DISCUSSION:

1. What Law is Binding on Whether Creditors Can Reach into the Trust?

Mr. Rensin argued that Belize law should apply. He claimed that, since the Trust and the Trust assets were located in Belize, the ruling should be subject to its laws. The FTC, however, argued that Florida law would be more appropriate, as the state was the venue for the court proceedings and recently became the home of the defendant. Those who have used domestic asset protection trusts should take note that this is at least the third Bankruptcy Court decision to determine that the law of the domicile of the settlor of an asset protection trust applies to allow creditors into the trust, and that domestic asset protection trusts may be at risk if they cannot be moved offshore during the pendency of litigation that might arise from matters that occur after such trusts have been formed and funded. However, these cases have solely been bankruptcy cases, which have not been appealed, so it is not certain whether the same result will apply in other instance s.

Despite the fact that bankruptcy courts are split on which choice-of-law rules apply in state bankruptcy cases, the court determined that Florida law should apply in this case. Additionally, the opinion

indicated that under these rules, the law of another jurisdiction will not apply if that law is contrary to a public policy of Florida.

The judge cited previous bankruptcy court decisions, including *In re Brown* and *In re Lawrence*, which all had a similar result without explanation of how the courts have come to this conclusion, as discussed below. This, however, was the first decision known to the authors where an "old and cold" asset protection trust that was formed and funded well before a creditor problem was known or expected to have had occurred, was found to be subject to the law of the jurisdiction where a debtor resided. This seems to fly in the face of ages old international law, and may put international tax and business planning principals in doubt. Will offshore jurisdictions be willing to work with U.S. residents if they have to be concerned as to whether the law of the jurisdiction of the trust company will apply? News of these questionable and unexplained decisions may have a material detrimental effect upon U.S. individuals and companies that attempt to do business outside of the U.S., and give other countries an edge over companies that attempt to do business outside of the U.S., and give other countries an edge over U.S. persons and businesses in a time where global competitiveness is of prime importance.

Like the aforementioned Bankruptcy Court decisions, the judge did not discuss the U.S. Supreme Court case of *Hanson v. Denckla*, which determined that Delaware law had to apply to a Delaware trust when the State of Florida had no *in rem* jurisdiction over the testatrix. While this case was ultimately decided based upon the lack of personal jurisdiction, the Supreme Court analyzed the legitimacy of a "Full Faith and Credit Clause" argument that Delaware courts would have to honor the decisions of the Florida courts, and visa-versa. The Supreme Court found that Delaware was not required to honor the judgment of the Florida court, given that the Florida court lacked initial jurisdiction. When there is no Full Faith and Credit rule that applies to offshore planning, *Hanson v. Denckla* is even stronger precedent. Richard Nenno, who is possibly the most well-published and respected author in this area confirms that "*Hanson* c ontinues to be the starting point for analyzing whether personal jurisdiction exists in trust cases." The authors expect that appellate decisions will take notice of this when future cases are appealed, and note that a good many creditors have concluded that offshore trusts are not easily accessible to them, as evidenced by the many favorable settlements and few cases filed in court that have occurred over the years.

The *Hanson v. Denckla* decision, as well as subsequent decisions that support the proposition that Florida law should *not* apply to trusts that are validly formed and funded outside of Florida, are discussed in depth in LISI Newsletter #363 by Alan Gassman and Kateline Tobergte, and includes the following discussion:

> For a party to bring a claim in a non-DAPT state court against a DAPT, it must establish that the court has jurisdiction over the trust or the trustee. The settlor's domicile is a factor when determining if jurisdiction exists, but is not determinative. In the 1958 case of *Hanson v. Denckla*, the U.S. Supreme Court decided that if a state court lacks jurisdiction over a trust and trustee(s), the state law of the state court with jurisdiction over the trust controls even if it affects the application of laws in the state court lacking jurisdiction.[4]
>
> In *Hanson v Denckla*, Mrs. Donner established a trust while domiciled in Delaware. She later became domiciled in Florida where she executed a will and, shortly before her death, exercised her inter vivos power of appointment, which appointed $400,000 to a previously established Delaware trust and $500,000 to Denckla and Stewart. The will entered probate in Florida. Denckla and Stewart argued that the appointment to the trust was not "effectively exercised," so the $400,000 should pass to them through the residuary clause. The Florida court ruled that the appointment was testamentary and therefore void under Florida law. Before the Florida decree had been entered, a declaratory judgment action was brought in

> Delaware to determine who was entitled to the trust assets. The Delaware court ruled that the appointment was proper and the assets had been properly paid out to the trustees.
>
> The decision went to the U.S. Supreme Court. The U.S. Supreme Court held that "[t]he Florida court did not have *in rem* jurisdiction over the corpus of the trust or personal jurisdiction over the trust company," and found that the Delaware court decision was controlling. The Supreme Court reasoned that the minimum contacts required for a state court to have personal jurisdiction over a non-resident were not met by a unilateral action of a resident. That means that Florida did not have personal jurisdiction because of the unilateral transfer of funds from Mrs. Donner, a Florida resident, to the Delaware trust. The Supreme Court also reasoned that *in rem* jurisdiction could not be established just because the owner is or was domiciled in Florida. Furthermore, the Florida court did not have jurisdiction just because the validity of the inter vivos appointment affects Florida's application of Florida probate law. This case makes two important point s: (1) a settlor's domicile is not determinative of jurisdiction; and (2) the laws in Delaware were not trumped just because Florida had contradicting laws. This is analogous to the issue between DAPT states and non-DAPT states. A settlor's domicile does not dictate the protections afforded a trust because courts must have jurisdiction to hear a claim, and the settlor's domicile does not automatically create jurisdiction. Also, just because one state is DAPT and another is non-DAPT does not mean that the DAPT laws can be trumped by the non-DAPT state.

Richard Nenno, a Managing Director at Wilmington Trust Company and a prolific author on the topic of estate planning, discusses *Hanson* in his award winning Bloomberg BNA Portfolio 867-2, which is an essential reference guide for those who engage in this planning:

> The leading case in this area is *Hanson v. Denckla*, which involved a controversy concerning the right to part of the principal of a trust established in Delaware by a Pennsylvania trustor who subsequently moved to Florida. The U.S. Supreme Court held that a Delaware court was under no obligation to give full faith and credit to a judgment of a Florida court that lacked jurisdiction over the trust's assets and the trustee. The Court, affirming the decision of the Supreme Court of Delaware, discussed the jurisdictional issues as follows:
>
> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."
>
> *Hanson* remains controlling precedent. In fact, it was cited as such numerous times in at least three U.S. Supreme Court cases that have been decided since 2011. [324] *Hanson* continues to be the starting point for analyzing whether personal jurisdiction exists in trust cases. Since *Hanson*, numerous cases have found that insufficient minimum contacts existed to create personal jurisdiction. (Internal citations omitted.)

Notwithstanding the conclusion that Florida law should apply to this Trust, the judge noted that the court did not have jurisdiction over Orion Trust Company, which is probably because it was not served and has never done business in the United States. Reasonable minds can agree that, even if the trust company had been a party, the case would not have ended any differently. The Joren Trustee would have thumbed his or her nose at the Bankruptcy Court's decision, based upon the below-referenced ruling by the Belize Supreme Court in this matter.

It is interesting to note that during the ongoing litigation, the trustee of the Joren Trust (the Belize trust that Mr. Rensin created) sought guidance from the Supreme Court of Belize. The Belize Supreme Court advised the Trustee not to hand over any assets to the FTC. The Bankruptcy Court decision repeatedly notes that its authority would carry more weight, and would be broader in scope, had the Joren Trustee been added as a party to the litigation, so stay tuned for the hoped for sequel to this interesting drama. Nevertheless, it is doubtful that any Belize Court will follow the instructions of a U.S. Bankruptcy Court without confirming that it is consistent with Belize law. Mr. Rensin may therefore be able to move to Belize or another country that does not respect U.S. judgments and live "happily ever after" with free economic rights unless or until the injured parties file suit in Belize and get an independent judgment to pursue there, in which event t he Trust may still be immune, even if it still were in Belize once a judgment has been received there.

Even if the Belize Supreme Court were to agree with the Bankruptcy Court's opinion, it is unlikely that the Cayman Islands insurance carrier that is apparently holding the annuity contract assets would turn those assets over without an order from a Cayman Islands court, if they are still in the Cayman Islands years from now when such an order might someday be obtained. Like Belize, the Cayman Islands do not recognize U.S. judgments, so a trial on the merits of reaching into the annuity contract would have to be won by the creditors, if the Cayman Islands law would even recognize a cause of action.

One reason that the Trust may have been moved to Belize was so that it could receive contributions from Mr. Rensin that would not be reachable by creditors. The Cook Islands has a two-year lookback statute. Belize has a "that day" statute, meaning that a creditor cannot chase fraudulent transfers into the trust unless the creditor had a judgment against the debtor, in Belize, on "that day."

2. Does Florida's Fraudulent Transfer Statute That Applies to Transfers Into Exempt Assets Apply As If This Were a Transfer By Mr. Rensin?

The court found that the fixed annuity, which was paying $15,000 a month, qualified for protection under the Florida statutes. Therefore, Mr. Rensin's interest would be exempt from attachment by creditors, assuming that Section 222.30 of the Florida Statutes did not apply. Section 222.30 is aimed at preventing the conversion of assets that would be subject to creditor claims into exempt assets for the purpose of avoiding creditors, but as we see below, the statute only applies if the debtor makes the transfer. The Bankruptcy Trustee argued that allowing a transfer of funds into annuity contracts "only encourage[s] fraudulent or inappropriate behavior."

Despite the state's argument, the Bankruptcy Court determined that Mr. Rensin did not make any transfer into the annuities, let alone a transfer for the purpose of avoiding creditors. Instead, the Trustee of the Joren Trust independently decided to invest the monies into the annuity contracts. Even if Mr. Rensin *may* have wanted to transfer the funds, the Trustee determined, in the end, whether or not the funds were to be transferred. Because of Mr. Rensin's lack of total control over the transfer, Section 222.30, in this case, did not apply. Had he maintained control over the decisions involving the Trust, the analysis by the judge would have been different.

The judge applied this finding to all of the monies placed in the annuities, including $350,000 that Mr. Rensin transferred to a lawyer, who then transferred it to the Joren Trust, in order to acquire the variable annuity (just months before the $13.4 million judgment was handed down). The court reasoned that there was apparently no *direct* evidence indicating Mr. Rensin required or requested that the annuity contract be procured with the $350,000.

3. Are the Annuities Protected Under the Florida, Belize or Cayman Islands Law?

After reaching the conclusion that Section 222.30 did not apply to the transfer of funds to the annuity contracts, the court looked at whether the annuity contracts, and payments from the contracts, were property of Rensin's bankruptcy estate. They held that "[a]lthough exempt from administration, Mr. Rensin's payment rights under [both] annuities . . . are property of the estate."

Next, the Court looked at the two annuities separately, in order to determine the rights associated with both.

The court closely examined the language of the first annuity contract, which provided for fixed payments, and determined that it fit within the language of the statute. While the court found that the Trustee in Bankruptcy has the right to attach and own the remainder interest in the annuity contract, doing so will presumably not result in the loss of Mr. Rensin's sole right to receive payments of $15,000 per month each month for the rest of his life, and to have monies held under the Regions account or other future bank accounts that he may open and fund with such payments also be exempt from creditor claims.

The court also closely examined the language and circumstances of the second annuity contract, which it referred to as a "variable annuity." This name stems from the ability of the trust company, as owner, to control investments, and to make withdrawals when it deems appropriate. The court found that Mr. Rensin's interest in the annuity contract was not an annuity subject to Florida Statute Section 222.14 because Mr. Rensin had no right to benefit from the annuity unless or until it began making payments. The court indicated that the annuity contract included confusing language because there was no definition or rule set forth on when payments would begin.

It is noteworthy that a "Super-Creditor" can break into otherwise protected assets per federal law, so this opinion will be of no solace to those who may owe money to the government. These types of creditors, which include the SEC, the FTC, or the Department of Justice (as to restitution and Medicare penalties imposed), are creditors that are provided congressionally mandated collection abilities that far exceed those of traditional creditors.

Citing Florida Statute Section 222.14, Mr. Rensin argued that he was entitled to exempt the payments ($15,000 monthly) from administration in the bankruptcy issue. Section 222.14, in relevant part, allows certain annuity payments to be protected from the reach of creditors. There was no discussion as to whether the lawyer who transferred the $350,000 may have liability under Bankruptcy Code Sections 548(a)(1) or 550(a)(1), which is what occurred in the case of *In re Harwell*. This case was discussed in LISI Newsletter #243, which can be viewed by clicking here. Perhaps the legal counsel was outside the United States and also has his assets held by the Orion Trust Company, thus being immune from liability from a practical standpoint.

Any lawyer involved in this kind of conduct should tread very carefully, if at all, to assist a debtor in the way that Mr. Rensin was assisted. The best advice from a U.S.-based lawyer may be to have the would-be client hire reputable offshore counsel in order to determine how to proceed.

4. What Happens to Mr. Rensin's Florida Home?

This issue did not require a great deal of pontification from the Bankruptcy Court. When filing for bankruptcy, Mr. Rensin only claimed a $160,375 homestead exemption because "he acquired the home within 1,215 days prior to the petition date[,]". The Bankruptcy Court agreed with the Trustee's contention that his entire exemption was lost because of 522(o) of the Bankruptcy Code, which disallows the entire homestead exemption to the extent that the transfer of assets into the homestead has occurred within ten years of filing for the purpose of keeping assets out of the reach of creditors. Mr.

Rensin, in a last ditch effort, attempted to claim a *Maryland* homestead exemption (for a home in Florida). The Court found that the only state exemption law which applied was Florida's.

CONCLUSION:

The uncertainty, and perhaps unmerited discrimination by Bankruptcy Court judges against asset protection trusts seems to be continuing in terms of finding, without legal explanation, that the law of the debtor's residence should control whether creditors can reach into the trust.

Advisors with clients who are using domestic or offshore asset protection trusts must communicate the risk that courts may rightly or wrongly apply the law of the residence of the settlor, making "belts and suspenders" planning a necessity. Examples of such planning strategies include using multiple member LLC's and limited partnerships that have charging order protection, possibly having the client live in a DAPT friendly state, and being able to move the trust offshore to avoid the application of the full faith and credit clause of the U.S. Constitution, while also considering possible contempt of court and other risks that are inherent with aggressive conduct.

By the judge's ruling, an independent trustee can purchase an asset that is exempt from creditor actions in the state of a debtor's domicile and place it in the debtor's name, even if a court rules that the law of the residency of the state applies. Many states have statutes that are worded identically or almost the same as Florida's, so this back door safety hatch could be a very nice thing for debtors to have in their back pocket. Mr. Rensin moved to Florida to protect his homestead, and he quickly moved his Trust to Belize to protect his assets, while the Trustee moved the Trust moneys into annuity contracts that turned out to be protected by Florida law.

Judge Kimball wrote an excellent opinion on the topic of the annuities, which explains his findings and helps to clarify: Florida Statute Section 222.30, when an annuity is protected under Florida law, and when an offshore trust will be respected in great part, notwithstanding that the law of the debtor's residence may apply.

If this had been a 2014 judgment as the result of an otherwise innocent car accident or a business deal gone awry, the result may have been different. Bankruptcy judges typically feel a duty to creditors who have been the victims of fraud, and will continue to "legislate" when they can until higher court decisions may overrule these Bankruptcy Court level decisions.

As mentioned above, the court spent most of its decision on the treatment of the annuities. Although the variable annuity was not considered as held by Mr. Rensin, or protected under Belize law, Mr. Rensin had no interest in it that a creditor could take. The Joren Trustee can now easily convert it to a fixed annuity. These annuities turned out to be a house made of sticks or bricks, depending on whether the Florida non-bankruptcy courts agree with this conclusion, if and when a state court supplemental proceeding's cause of action is pursued.

State's Attempts To Tax Trusts

By: John Beck

Recently, a number of states have attempted to tax the income generated by trusts based on the connections that the trust has with the state. It appears that some states may be overreaching in an attempt to line their pockets with tax dollars that they may not be entitled to.

In the *Kaestner* case, North Carolina tried to tax the undistributed income of a trust that was held for the benefit of a North Carolina resident. The North Carolina beneficiary only moved to North Carolina after the trust was created and was only a discretionary beneficiary, but North Carolina took the position that it was entitled to tax all of the income generated by the trust, whether or not it was distributed to the beneficiary.

The trust had no other connection to the State of North Carolina. The Grantor was not a North Carolina resident, and the current Trustee was not a North Carolina resident. The trust did not hold any North Carolina-based assets.

The North Carolina Supreme Court held that the trust did not satisfy the minimum contacts component of the due process clause, so the state was not entitled to tax the income of the trust. The North Carolina Supreme Court also stated that the trust is a separate legal taxable entity from the beneficiary, and that the state could not tax the trust solely because the beneficiary of the trust lived in the State of North Carolina.

The Supreme Court reached the unanimous decision that the trust did not have sufficient connections to the State of North Carolina to tax all of the income of the trust but was clear that the decision only applied to the specific facts of the *Kaestner* case, leaving the door open for the various states to attempt to tax trusts based upon their connection to the state. It is conceivable that multiple states may attempt to tax the same trust.

Another recent case of interest is *Chase Manhattan Bank v. Gavin*, as ruled on by the Connecticut Supreme Court. In the *Chase* case, Connecticut taxed the income of the trust based upon the fact that the beneficiary was a Connecticut resident, and that the beneficiary was entitled to all current income, and possessed a testamentary power of appointment after attaining a specific age.

The difference between this case and the *Kaestner* case is that it was not a discretionary beneficiary and was entitled to all of the income of the trust.

Additionally, the beneficiary was afforded all of the protections provided to a trust beneficiary under Connecticut law, and Connecticut used that argument to justify taxing the entire income of the trust.

The Connecticut Supreme Court held that it did have the ability to tax all of the income of the trust based upon the fact that the beneficiary was entitled to receive all of the income of the trust and had a power of appointment, even though the beneficiary had not reached the age at which she could exercise such power of appointment.

Given the fact that many trusts have multiple beneficiaries and these beneficiaries are likely to move to other states at some point in their lifetime, it is important to take steps to protect trust income from state taxes. Not only do discretionary trusts help avoid creditor claims, they can also help to avoid subjecting the trust's entire income to state income taxes.

Another strategy to help protect trust income from state income taxes is to put further limitations on a power of appointment. It may be a good idea to require the approval of a Trust Protector in order to grant a beneficiary a power of appointment.

The Tax Neutral Dedicated Charitable Trust

A simple and inexpensive way for families to commit funds or assets to charitable purposes.

By: Alan Gassman and John Beck

Many taxpayers consider establishing charitable trusts and foundations to make a visible commitment to charitable purposes.

One advantage of having a family controlled charity is an immediate income tax deduction for contributions that may be held by the entity and used over time for charitable purposes.

Other advantages include recognition of the family's commitment, the ability to operate as a charitable organization, involvement of family members in charitable endeavors, and the sense of satisfaction that comes from making a commitment and following through on an individualized basis.

In many situations, the tax deduction from the contribution is not important, because the family may not be in a high income tax bracket, the family may already be using whatever tax deductions are available for donations, or the family may have losses or large deductions that make the charitable income tax deduction of little use, or better recognized in a future year where the donors may be in a higher income tax bracket.

A major "turnoff" for families establishing charitable foundations and trusts includes the need to pay an $800 application fee to the IRS, and to file a Form 1023 Application to obtain 501(c)(3) status, which is generally more time consuming and expensive than forming the organization. Additionally, there is the need to file annual Form 990's, and other formalities that have to be followed by a 501(c)(3) organization, along with the knowledge that the Form 990 will be available to the general public on 990finder.foundationcenter.org.

Another downside of operating a charitable foundation is the requirement that it distribute at least 5% of the foundation's assets each year to other charities, or to spend 4.25% of the foundation's assets each year on the active conduct of a charitable activity. Although the foundation's assets may grow faster than 5% per year, there is a chance that the investments may not reach this level of return, or the charitable donor may not want to distribute funds every year.

The foundation is also greatly restricted when it comes to dealing with related persons, even if such dealings are at arm's-length or benefit the foundation more than the related person.

As the result of the above, some charitable taxpayers will choose to establish a deferred deduction charitable trust, which can be recognized and exist as a charitable organization under state law, and for practical purposes, while being considered to be "disregarded" and continued as owned by the taxpayer for federal income tax purposes.

Other than the above, the only difference between a typical 501(c)(3) charitable trust and a trust that can be disregarded for federal income tax purposes can be that the disregarded trust benefits not only Section 501(c)(3) charities, but also tax exempt organizations that can include police and firemen

benevolent associations (under Section 501(c)(8)) and cemetery associations (under Section 501(c)(13)). This entity will not need to meet annual distribution requirements and the Grantor can exchange trust assets for assets of equal value and/or add charitable organizations as beneficiaries of the trust.

Let's take, for example, John and Molly DoGood, who are retired schoolteachers who have always wanted to use $250,000 from a large inheritance that John received to set up a scholarship and mentorship program for disadvantaged high school students who would not go to college without having extra financial and moral support.

John and Molly are in the 24% tax bracket, and have $120,000 of adjusted gross income, so they can donate up to $72,000 to a private operating foundation, or $36,000 to a private foundation, each year without their income tax deduction being limited based upon applicable adjusted gross income limitations. They would like to create a private foundation and donate $36,000 each year to fund scholarships, saving up to $8,640 in taxes each year.

John is in poor health, and wants to make sure that the funds are used for these purposes, "no matter what happens," and they have been working with a local community college which can accept donations and award the scholarships, while giving recognition to John and Molly's charitable trust and efforts.

John and Molly form the John and Molly DoGood Charitable Foundation, and John places the $250,000 into a trust account, and they receive recognition from the community college, and can operate as a "family foundation" from a publicity and community support standpoint.

John and Molly run the trust and receive an income tax deduction for the monies that pass from the trust to the community college, and do not have to file a Form 1023, Form 990's or any other documents.

Their activities remain private, to the extent permitted under state law, and in compliance with the terms of the trust.

At a later time, they may choose to convert the trust to qualify as a 501(c)(3) charity by excluding the non-501(c)(3) organizations from having possible benefits, filing a Form 1023 and then filing annual Form 990's, and otherwise complying with the rules that apply for such organizations.

Making A Late S-Election – Not Possible if the Operating Agreement or Ownership of a Company Would Not Qualify on the Effective Date

By: Alan Gassman

Many taxpayers form limited liability companies or regular corporations well after the fact that they would have liked the entity to be taxed as an S-corporation, and therefore make a retroactive election to do so.

Under the S-corporation rules, an S-election may be made to be effective up to seventy-five (75) days before the actual filing of the Form 2553 with the IRS, and under Revenue Procedure 2013-30 a late S-

election can be effective within three years and seventy-five days of the intended effective date if it can be shown that the taxpayer intended to make an S-election but did not do so.

Two common problems can apply under a "retroactive S-election" scenario:

1. The Operating Agreement, ownership, or another aspect of the Company does not qualify for S-election status as of the effective date of the election. For example, entities that make an S-election are not allowed to have an "second class of stock" or "capital accounts" of owners that vary as between them.

Many LLC Operating Agreements contain provisions that are intended to facilitate operations that are in compliance with federal partnership tax law, and an S-election made effective when a "partnership tax" Operating Agreement is in place may be ineffective, and can result in having the Company taxed as a C-corporation (and therefore double taxed on income distributed to shareholders).

2. For an election going back more than seventy-five (75) days, Revenue Procedure 2013-30 referred to above requires affirmation that there was an intention to make the S-election as of the effective date. Quite often there is no such intent, or there might have even been an intent to have the entity taxed as a partnership or disregarded.

In addition, if the Operating Agreement and other corporate documentation and status as of the retroactive effective date does not meet all of the requirements for S-election status, then the same issue as applies under Section 1 above can prevent the S-election from being effective.

Language that we recently used for a client's Operating Agreement to allow an S-election to be made within seventy-five (75) days of formation, or later (going back as far as seventy-five (75) days from when the S-election is made) is as follows:

> **Compliance with S Corporation Rules.** Each of the above provisions, and any other provision under this Agreement, shall be construed and administered in a manner to facilitate qualification of the Company as an S corporation for if and when S corporation status is elected.

If the requirements of Revenue Procedure 2013-30 are not met, then a private letter ruling is required to obtain late election relief.

Humor


I already promised…you can have Labor Day off
WORTH, JA

Upcoming Events

Recent Updates

Complimentary Learning at Lunch Webinar Series

Date	Event	Details	Information
		Alan Gassman, Brandon Ketron and John Beck present: Understanding the Section 469 Passive	

8/30/2019	Leimberg Webinar Services (LISI)	Loss Rules: Traps For The Unwary & Important Related Planning Concepts Advisors Must Know About from 3 PM to 4:30 PM ET	REGISTER HERE
9/3/2019	Learning at Lunch Webinar Series	David Finkel presents: The Freedom Formula: How to Succeed in Business Without Sacrificing Your Family, Health, or Life from 12:30 PM to 1 PM ET	REGISTER HERE
9/5/2019	Learning at Lunch Webinar Series	Ken Crotty presents: Nuts and Bolts of Florida LLC Law and Practices from 12:30 PM to 1 PM ET	REGISTER HERE
9/12/2019	Learning at Lunch Webinar Series	Michael Lehmann presents: Form 1023 Line by Line from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
9/13/2019	Leimberg Webinar Services (LISI)	Alan Gassman and Srikumar Rao present: Successfully Handling Ethical and Professional Challenges for Estate Planners and Tax Professionals: Lead the Field With Passion, Enjoyment and Meaning for Yourself, Your Team and Your Clients from 1 PM to 2:30 PM ET	REGISTER HERE
9/13/2019	FOMA Mid-Year Seminar at Grand Hyatt Tampa Bay in Tampa, FL	Alan Gassman presents: Asset Protection and Protecting Your Family from 4PM to 5PM ET	REGISTER HERE
	Leimberg Webinar	Ken Crotty presents: Avoiding Disaster on	

9/19/2019	Services (LISI)	Highway 709 from 3 PM to 4:30 PM ET	REGISTER HERE
9/19/2019	Learning at Lunch Webinar Series	Colleen Flynn presents: Hiring Employees-10 Practical and Legal Strategies from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
9/26/2019	Learning at Lunch Webinar Series	Colleen Flynn presents: Terminating Employees from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
9/26/2019 through 9/27/2019	Notre Dame Tax & Estate Planning Institute at Century Center in South Bend, IN	Please visit our display table in the Exhibit Hall for a free book	REGISTER HERE
9/27/2019	Notre Dame Tax & Estate Planning Institute at Century Center in South Bend, IN	Alan Gassman presents: Application of Section 199A, and its Interaction with Other Income Tax Rules, to Real Estate Investors, Operators and Developers from 3:30 PM to 4:30 PM ET	REGISTER HERE
10/1/2019	RCS Faces of Domestic Violence Luncheon	Please consider supporting this great event	MORE INFORMATION
10/3/2019	Learning at Lunch Webinar Series	Barry Flagg presents: New York Best Interest Rule for Life Insurance – A Game Changer from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
10/3/2019	Leimber Webinar	Alan Gassman and Ken Crotty present: Estate Tax Planning with Family	REGISTER HERE

	Service (LISI)	Entities After *Powell* and *Strangi* from 3 PM to 4:30 PM ET	
10/10/2019	Learning at Lunch Webinar Series	Jonathan Blattmachr presents: On the Front Line with JB; What America's Number One Estate Planner is Thinking from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
10/10/2019 through 10/12/2019	Florida Bar Tax Section Fall Meeting at The Don CeSar in St. Pete Beach, FL	Please attend to support this great event	REGISTER HERE
10/17/2019	Learning at Lunch Webinar Series	David Finkel presents: Five Simple, Easy Ways to Increase Your Professional Practice's Profit by $50,000 or More from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
10/22/2019	Florida Bar Tax Section CLE Wealth Protection for the Advanced Practitioner at University of Miami Law School in Miami, FL	Alan Gassman and Leslie Share presenting from 1 PM to 5 PM ET	REGISTER HERE
10/24/2019	FICPA USF Accounting Conference at The Barrymore Hotel Tampa Riverwalk in Tampa, FL	Alan Gassman presenting from 8 AM to 8:50 AM ET	REGISTER HERE
		Christopher Denicolo presents: Florida	

10/24/2019	Learning at Lunch Webinar Series	Revocable Trust Debate--Separate, TBE or JEST--What is BEST? from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
10/24/2019	FICPA Florida Gulf Coast University Accounting & Tax Conference at Embassy Suites Fort Myers in Estero, FL	Alan Gassman presenting	REGISTER HERE
10/31/2019	Learning at Lunch Webinar Series	Barry Flagg presents: Should Irrevocable Life Insurance Trusts (ILITs) be domiciled in NY? from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
11/7/2019	Learning at Lunch Webinar Series	Michael Lehmann presents: Noncash Charitable Giving - Part 1 from 12:30 PM to 1 PM ET (Moderated by Ken Crotty)	REGISTER HERE
11/7/2019	FICPA University of Florida Accounting Conference at Hilton U of F in Gainesville, FL	Alan Gassman presents: Creative Planning and Traps for the Unwary Under Section 199A from 9:35AM to 10:25 AM ET	REGISTER HERE
11/10/2019 through 11/15/2019	Maui Mastermind Wealth Summit at The Fairmont Orchid in The Big Island, HI	Alan Gassman presents: Important Qualities of Clients who Hit Multiple Grand Slams AND How to Avoid Legal Entanglements that can Ruin the Best of Plans and Intentions from	REGISTER HERE

		TBD to TBD	
11/14/2019	Learning at Lunch Webinar Series	Michael Lehmann presents: Noncash Charitable Giving - Part 2 from 12:30 PM to 1 PM ET (Moderated by Ken Crotty)	REGISTER HERE
11/14/2019	Maui Mastermind Wealth Summit at The Fairmont Orchid in The Big Island, HI	Alan Gassman presents: Estate Planning and Legal Considerations for Life Post Exit: What do you need to set up today for life post exit? from TBD to TBD	REGISTER HERE
11/21/2019	Learning at Lunch Webinar Series	Alan Gassman presents: Planning for Florida Dental Practices and Their Owners from 12:30 PM to 1 PM ET	REGISTER HERE
12/5/2019	Learning at Lunch Webinar Series	Barry Flagg presents: What To Ask For To be Able to Actually "Read" A Life Insurance Illustration? from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
12/7/2019	Mote Vascular Foundation Symposium at TBD	Alan Gassman presents: Estate, Medical Practice, Retirement, Tax, Insurance, and Buy/Sell Planning – The Earlier You Start the Sooner You Will Be Secure from 10:20 AM to 11:50 AM ET	Registration available soon
12/12/2019	Learning at Lunch Webinar Series	Barry Flagg presents: Indexed Universal Life – Who Says Hedge Funds Are Only For the Rich? from 12:30 PM	REGISTER HERE

		to 1 PM ET (Moderated by Alan Gassman)	
12/19/2019	Learning at Lunch Webinar Series	Alan Gassman presents: Success Tips for First Year Lawyers (and all other professionals) - Part 1 from 12:30 PM to 1 PM ET	REGISTER HERE
12/26/2019	Learning at Lunch Webinar Series	Alan Gassman presents: Success Tips for First Year Lawyers (and all other professionals) - Part 2 from 12:30 PM to 1 PM ET	REGISTER HERE
1/9/2020	Learning at Lunch Webinar Series	David Finkel presents: The Ten Must-Follow Rules to Leverage Your Personal Assistant to Make Your Life More Fun, Profitable, and Enjoyable from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
1/16/2020	Learning at Lunch Webinar Series	David Howell and Larry Rybka present: How to Retire in the Magical Retirement Income Castle in the Clouds from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
1/21/2020	Community Foundation of Sarasota County - Distinguished Speaker Series at TBD	Alan Gassman presents: Creditor and Trust Planning Strategies You May Not Know About from TBD to TBD	REGISTER HERE
	Learning at	Christopher Denicolo presents: Explaining the Installment Sale to a	

1/23/2020	Lunch Webinar Series	Defective Trust from 12:30 PM to 1 PM ET (Moderated by Alan Gassman)	REGISTER HERE
1/30/2020	Learning at Lunch Webinar Series	Alan Gassman presents: The Biggest Mistakes Physicians Make As Owners and Non-Owners in Medical Practices from 12:30 PM to 1 PM ET	REGISTER HERE
2/6/2020	All Children's Estate, Tax, Legal & Financial Planning Seminar	Please attend to support this great event	REGISTER HERE
2/12/2020 through 2/14/2020	The Florida Tax Institute at Marriott Waterside Tampa in Tampa, FL	Please visit our display table in the Exhibit Hall for a free book	REGISTER HERE
5/1/2020	USF Resident Intern meeting at Tampa General Hospital in Tampa, FL	Alan Gassman presents: "Contract Negotiations" from 4 PM to 5 PM ET	MORE INFORMATION
5/15/2020	USF Resident Intern meeting at Tampa General Hospital in Tampa, FL	Alan Gassman presents: "Contract Negotiations" from 4 PM to 5 PM ET	MORE INFORMATION
5/29/2020	USF Resident Intern meeting at Tampa General Hospital in Tampa, FL	Alan Gassman presents: "Contract Negotiations" from 4 PM to 5 PM ET	MORE INFORMATION
6/5/2020	USF Resident Intern meeting at Tampa General Hospital in Tampa, FL	Alan Gassman presents: "Contract Negotiations" from 4 PM to 5 PM ET	MORE INFORMATION

We welcome contributions for future Thursday Report topics. If you are interested in making

a contribution as a guest writer, please email Alan at agassman@gassmanpa.com

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