

## The Asset Protection Year In Review 2015

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2015 will be remembered as the year when the number of appellate opinion dealing with creditor-debtor issues and, by extension, asset protection issues, fell off dramatically from the veritable flood of such opinions that started in 2011 as a result of the real estate bubble that finally started to burst in 2007.

The bankruptcy attorneys that were making \$1,200 an hour, and working (or at least billing) 20 hours per day, seven days a week, some five years ago, once again have their feet comfortably up on their desk and are thinking of justifications for their law firms to keep them around. Meanwhile, ordinary creditor-debtor lawyers are finally going on their overdue vacations after trimming back their office staff.

At the same time, asset protection planning is showing a substantial uptick, as is the proliferation of tax shelters. Most folks are back to making money, and worried about keeping what they have, whether from creditors or the tax man (mostly the latter). Heck, there are even folks out there who are making enough money that they are worried for the first time about estate taxes, even after Congress raised the exclusion to \$5+ million in 2013.

The good news is that planners have clients once again, and they no longer have to worry so much about this area of law changing so much with new court opinions. The bad news is that we are not getting answers to so many questions as we have in the last half-decade.

But we did get some answer in 2015, so let's dive into what we found out.

### CHARGING ORDERS

A good example of the falloff in appellate opinions is found in the realm of cases involving charging orders. The year opened with new opinions come out at the rate of about two a week, and ended the year without any charging order opinions in November and December.

Only California has a statute that tells parties and the court how to handle charging orders, which are required by the so-called "Harmonized Acts" (RUPA, RULLPA and RULLCA), but which Acts don't explain how to get them. In every other state, the procedure is left to be made up on an *ad hoc* basis, which of course has the potential to confuse everybody. However, an opinion in the *Textron Financial* case to some degree cleared up what this procedure should look like outside of California, see [Charging Order Procedural Issues Confronted in Textron Financial](#) (2015/10/18).

Yet, even California law does not address the priority that a lien created by a charging order has, or not, over competing judgment liens and consensual liens. This area of the law remains a mess, and carries the potential for bad decisions, see [Questionable Charging Order Priority Decision In Chase Bank Case](#) (2015/08/27).

The purpose of so-called charging order "exclusivity" is to protect the non-debtor members of an LLC or partnership from being forced into what amounts to an involuntary partnership with the debtor/member's creditor. But what if that creditor is another member? Should charging order

exclusivity still be the result? See [The MacDaddy Of All Intra-Member Charging Order Versus Levy Disputes In Voll](#) (2015/03/29). Hint: It's an issue that can be easily solved by including language in the Operating or Partnership Agreement, by nobody ever does.

Few issues in asset protection planning are more technically daunting than what happens when a member of an LLC goes into bankruptcy. This is explained in [The LLC Member In Bankruptcy: Ehmman And Its Progeny](#) (2015/06/20).

One significant issue involving charging orders has seemingly been resolved by the courts: If the debtor/member has an interest in an out-of-state LLC, whose laws apply? The courts have now consistently held that the court where the action is pending may issue a charging order against an interest in an out-of-state LLC, see [Mahalo To Charging Order Issued Against Interests In Out-Of-State Non-Party LLCs](#) (2015/02/22) and [EarthGrains Turns Up The Heat With Utah Charging Order Against Nevada LLC](#) (2015/09/19).

However, when it comes to whether a U.S. court can issue a charging order against a foreign LLC, the jury is still out, although this issue will apparently be resolved state-by-state. Compare [Florida Charging Order Foreclosure Of A Nevis LLC In Barber](#) (2015/02/18), with [Charging Order Jurisdictional And Foreign LLC Issues Become Clearer In Vision Marketing](#) (2015/10/14).

## **FRAUDULENT TRANSFERS**

Since cases involving fraudulent transfers are usually brought only after the original judgment has been obtained, opinions involving these issues frequently lag those of ordinary creditor-debtor issues. Thus, 2015 was once again a banner year for fraudulent transfer cases.

Before we get there, however, one of the most important developments in fraudulent transfer law in 2015 did not come from a court case, but rather from Prof. Ken Kettering, who was the Official Reporter of the Uniform Voidable Transaction Act (a/k/a the 2014 Revisions to the Uniform Fraudulent Transfer Act), who wrote this definitive article on the UVTA, see [Kettering Article On The UVTA, er, UFTA-2014, Provides The Definitive Guide To Changes](#) (2015/06/19)

Otherwise, we saw some juicy issues set to rest, such as whether litigation fees in the underlying case that were earned by the debtor's litigation counsel could be a fraudulent transfer, see [Attorney's Fees Deemed To Constitute Reasonably Equivalent Value In Magnum Steel](#) (2015/10/16). Another case told us that a moveable asset could be fraudulently transferred even if never physically moved to the debtor, so long as the title changed, see [Silver Bars and Fraudulent Transfers in Rego Group](#) (2015/10/27).

Punitive damages awarded for a fraudulent transfer continued to a hot topic in 2015, such as [Kekonas' Punitive Damages Award For Fraudulent Transfers Gets Bigger On Appeal](#) (2015/05/27). That debtors could be denied a discharge for participating in even a small-dollar fraudulent transfer in the one-year period before the filing of a bankruptcy case was upheld in [Debtor's Pre-Petition Transfers Result In Denial Of Discharge In Drumm](#) (2015/01/16).

2015 was another bad year for attorneys who were caught up in fraudulent transfers, see [Minnesota Attorney Suspended For Assisting With A Fraudulent Transfer In Sheehan](#)

(2015/09/30), and [Cevdet Aksut — Fraudulent Transfer Means Civil Conspiracy And Civil RICO Claims Against Law Firm](#) (2015/07/30). But at least one law firm was able to dodge the fraudulent transfer bullet by asserting the "innocent scivener's defense", see [Nevada Supreme Court's Fraudulent Transfer Ruling Keeps Innocent Law Firm Out Of The Woods](#) (2015/04/02).

Asset protection planning is much more dangerous for attorneys who are in the numerous states that criminalize fraudulent transfers, which I have listed at [U.S. Jurisdictions That Criminalize Fraudulent Transfers](#) (2015/11/22).

Of all the fraudulent transfer issues that came up in 2015, possibly the most interesting are the two that involve the concept of "utility to creditors", which is shorthand for saying that what the debtor received in consideration for a transfer is always viewed through the eyes of creditors. The first opinion to come down was [Medici Gambles At The Venetian But It Is The Venetian Who Gets Played](#) (2015/03/14), where a debtor blew \$500,000 in Vegas, and the casino ended up having to pay the money back to a bankruptcy trustee. This opinion was followed by a case where a couple of million in advertising bought by a debtor was held to have no utility to creditors in [The Fifth Circuit Slices The Golf Channel Into The Pond](#) (2015/03/18) -- a decision so roundly criticized that the court took back its decision, and punted the whole thing to the Texas Supreme Court in [The Fifth Circuit Declares A Mulligan In The Golf Channel "Innocent Transferee" Case](#) (2015/07/27).

Another juicy issue that was answered was that involving the common situation where a couple go through a divorce to try to keep some of their assets from creditors, see [Son of BOSS Leads To A Divorce And Fraudulent Transfer Troubles In Baker](#) (2015/08/22), where the court discussed the special test for fraudulent transfers that is applied in the case of divorce.

Two more of my articles may be of interest because they address a couple of very common misconceptions held by asset protection planners, see [The Common But False Myth Of The Asset-For-LLC Interest Exchange In Asset Protection Planning](#) (2015/03/31), and [The Fraudulent Transfer Laws Do Indeed Apply To Future Creditors](#) (2015/04/27).

## TRUSTS

As with 2014, etc., the most important opinion in asset protection planning relating to trusts was the opinion which *didn't* come down, but everybody has been waiting on, was an opinion that either validated or invalidated the use of so-called Domestic Asset Protection Trusts (self-settled spendthrift trusts) to protect the assets of a beneficiary that was not resident in a state that had adopted DAPT laws. So, everybody in that situation is still a legal lab rat.

The one opinion that did not directly deal with that issue, but got pretty close to it, portended future bad news in a conflicts-of-law analysis, see [Utah Supreme Court Decides Conflict-Of-Laws Issue In Revoking Dahl](#) (2015/02/16).

Otherwise, it was a bad year for the Qualified Personal Residence Trust (QPRT), as a substantial opinion came down from the Ninth Circuit which allowed the Bankruptcy Trustee to invade the QPRT and sell the settlor's home to satisfy creditors, see [QPRT Deemed Revocable And Fails To Protect Home In Ferrante](#) (2015/09/30).

The courts also expanded the application of alter ego theories to circumvent trusts used for asset protection in [Hiding Assets In Sham Trust Results In Alter Ego Finding And Denial Of Discharge In Chantel](#) (2015/07/26). Indeed, it is the continued application of alter ego theories to trusts which make trust planning for asset protection much more uncertain than in years past, and planners need to keep a close eye on those sorts of issues.

Meanwhile, living trusts used for asset protection of the beneficiary saw some good news as the *Castellano* opinion was reversed, see [Estate Planning Bar Breathes Sigh Of Relief As Castellano Gets Turned Around](#) (2015/05/25), although in another case the living trust failed to live up to its expectations, see [Living Trust Loses To Creditors In Lewiston](#) (2015/06/27).

Although not an asset protection issue, the viability of Nevada Dynasty Trusts was settled in [Nevada Dynasty Trusts Strike Gold In Perpetuities in Bullion Monarch](#) (2015/04/24), against some dubious claims which had been made, and widely circulated, about those trusts.

In an opinion that will be of intense interest to those who represent lenders, banks got a nasty surprise about how a transfer to a trust can put the bank on notice of the need to sue in [Lenders Beware! Notice Of The Borrower's Trust Planning Can Start A Statute of Limitations Running](#) (2015/01/28).

Finally, newbies to the field of asset protection might find my article [A Short History Of Asset Protection Trust Law](#) (2015/01/26) to be of some interest.

## **CREDITOR-DEBTOR LAW**

Some folks seem to think that if the mere fact that they have creditors chasing them doesn't mean they should gear down their lifestyle. This turned out to be a bad idea in [The SEC Gets High Living Debtor Sent To Jail In Greenberg](#) (2015/05/30).

Otherwise, I spend part of the year writing about common questions sent to me by readers, including [Secrecy Does Not An Asset Protection Plan Make](#) (2015/01/14), [The Amazingly Confusing Life Insurance Exemption From Creditor Claims](#) (2015/04/11), and [The California Private Retirement Plan: Separating Fact From Fiction](#) (2015/12/28).

The year 2015 ended with lots of folks getting drones as Christmas gifts, and the FAA looking to regulate drones so as to keep them from meeting and greeting passenger jets in flight. But creditors have taken their own interest in drones, see [Of Drones and Debtors](#) (2015/02/27), which are turning out to be one of the most interesting tools for keeping tabs on deadbeats since the under-the-bumper GPS trackers became popular.

## **SCAMS AND STUPIDITY**

Old asset protection scams never die, they just wait a while until folks forget about them and they come out of the woodwork again, see [The Corporation Sole Scam – Still Going Strong](#) (2015/06/28). And then, once you think that the word has gotten out that hiding assets offshore isn't as great as sliced bread, you see a case like [Hiding Assets Offshore To Cheat Ex-Wife Leads To Criminal Conviction Of Dr. Brandner](#) (2015/11/12)

## **CAPTIVE INSURANCE**

Congress provided the biggest news in 2015 for captive insurance companies, by increasing the premium limit of so-called 831(b) captives to \$2.2 million starting in 2017, and increasing it according to an inflation index thereafter. But Congress also greatly restricted the ownership of captives by heirs and trusts, see [Congress Makes 831\(b\) Captives Much Better And Deals With \(Some\) Abuses In 2015 Appropriations Bill](#) (2015/12/19).

The IRS is continue to pour considerable resources into investigating captives that have been misused as tax shelters, see [Treasury To Study Possible Abuses Of Small Captive Insurance Companies](#) (2015/05/11). Indeed, 2016 will very likely give us our first taste of how the U.S. Tax Court views these entities in some of their more abusive postures, see [The Sum Of All Fears About IRC 831\(b\) Tax Shelter Captives In Avrahami](#) (2015/11/29).

In other news, the Department of Justice took down two promoters of abusive captive-like insurance arrangements in [Donaldson And Crithfield Enter Guilty Pleas In Foster Dunhill Tax Fraud Case](#) (2015/08/13), while one of the big corporate captives won a big victory against the IRS in [Residual Value Insurance Scores Big Win In U.S. Tax Court](#) (2015/09/28).

## **TAX**

Speaking of the IRS, the Service also won a big victory against so-called PPLI policy in [Investor Control Dooms Private Placement Life Insurance Policy In Webber](#) (2015/07/21), and 2015 saw the IRS for the first time in many years designate an abusive deal as a "Listed Transaction", see [Ghosts Of Tax Shelters Past And The Return Of The Listed Transactions](#) (2015/11/30).

## **LAGNIAPPE**

Last but not least, a project that is near and dear to my own heart, which I have proposed to the Uniform Law Commission, [A Call For A Uniform Anti-SLAPP Act](#) (2015/08/30).