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- Estate Planners Beware: Fraudulent Conveyances Can Unravel the Best Made Plans.

Individual Highlights:

Douglas B. Lang
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Personal Liability of Corporate Officers: Do You Think You're Bulletproof ?

Generally, under Florida law officers of a corporation are not liable for corporate acts simply by reason of the officer's relation to the corporation. A corporate officer may not be held individually liable on a contract *unless* he signed in an individual capacity, or unless the corporate veil was pierced or the corporate entity should be ignored because it was found to be formed or used for fraudulent purposes, or where the corporation was merely the alter ego of the shareholder.

However, individual officers and agents of a corporation may be held personally liable for their tortious acts, even if such acts were committed within the scope of their employment or as corporate officers. A corporate officer or representative of a corporation is not shielded from individual liability for his own torts. Fraud in the inducement is a recognized intentional tort that can subject a corporate officer to individual liability. However, it is not necessary that the corporate officer commit the fraud or

misrepresentation himself as participation in a civil conspiracy will satisfy the requisite legal standard.

Fraud is not the only tort that can subject a corporate officer to individual liability. In fact, Florida courts have made clear that there is no need to allege fraud, physical injury or intentional conduct. Mere **negligence** has been held to subject corporate officers to personal liability under various circumstances. For example, a corporate officer was found subject to a individual liability by *negligently* causing Brine (*cont'd on p.2*)

Estate Planners Beware: Fraudulent Conveyances Can Unravel the Best Made Plans

Estate planners and their clients need to be aware of the havoc that fraudulent conveyances can wreak on estate or asset protection plans. Florida law provides various statutory and common law remedies to undo and reverse fraudulent transfers or conversions by putting the property back in the debtor's hands where the property becomes subject to the creditor collection process or to award damages in an amount equal to the assets transferred.

The use of various planning devices such as trusts for creditor protection purposes and for more traditional estate plan-filing goals such as the reduction of estate and generation-skipping transfer (GST) taxes is entirely proper for individuals with neither an outstanding judgment nor a pending, threatened, or expected claim.

However, many people wait until a "problem" has arisen and then try to "plan". At this point it may be too late.

The Florida Uniform

Fraudulent Transfer Act essentially prohibits transfers made while the debtor was insolvent and for less than reasonable value or to actually hinder, delay or defraud creditors. Of course, not every transfer made while insolvent or while a claim by a creditor is pending, threatened or expected is fraudulent. However, Florida courts, recognizing the difficulty in proving actual intent to defraud creditors, have held that such intent may be presumed from evidence of "badges of fraud". (*cont'd on p.2*)

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The Firm practices throughout the State of Florida with particular emphasis in the areas of

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Marital and Family Law Litigation
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The hiring of a lawyer is an important decision that should not be based solely on advertisement. Before you decide, ask us to send you free written information about their qualifications and experience.

The content in this newsletter is not legal advice. Legal advice can only come from a qualified attorney who is familiar with all the relevant facts and circumstances of a particular case and the applicable law.

Corporate Officer Liability (cont'd)

Plus solution to flow onto the public street and damaging the property of plaintiff.

Recently, in *Estate of Canavan v. National Healthcare Corp* the District Court of Appeals held that the managing member of an LLC could be held personally liable for his negligence as the sole manager of a nursing home. In reaching its decision the Court noted that the defendant was responsible for approving the nursing home's budget, that he functioned as the sole member of the governing

body of the nursing home, that federal law (42 C.F.R. Sec. 483.75(d) (2002)) makes the governing body legally responsible for establishing and implementing management and operation policies, that he ignored complaints of inadequate staffing while cutting operating expenses, and that the pressure sores, infections, and other medical problems suffered by the decedent were the direct result of understaffing of the nursing home. The appeal to the Florida Supreme Court was dismissed without

decision.

The scope of personal corporate liability appears to be expanding. Plaintiff's attorneys are likely to pursue such claims especially where corporate assets and insurance are insufficient to satisfy potential damages. To protect against such liability you should make certain that business liability coverage is adequate as your homeowners policy will likely not cover such claims.

Estate Planners Beware (cont'd)

Examples of "badges of fraud" include:

1. lack of or insufficient consideration for the transfer.
 2. recently obtained judgment against transferor.
 3. close or insider relationship
 4. insolvency or substantial indebtedness of transferor.
- and the transferee(s).

One of the key "badges" is whether the debtor was insolvent when the

transfer was made. Florida Statute 726.103, states that, "a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets" or secondly, the debtor is generally not paying his debts when due." Critical to assessment of solvency is whether the debtor's assets that are exempt from creditors such as homestead property, annuities, and retirement funds are included. Bankruptcy law excludes exempt assets in computing

solvency but the federal tax code definition includes exempt assets. Florida courts have not yet squarely addressed the issue. However, the courts have made clear that homestead property is exempt from the fraudulent transfer statute. This likely indicates that such property would not be included in computing "solvency". Whether other exempt property would be treated similarly is unclear. Stay tuned!

Douglas B. Lang Joins Firm

Douglas B. Lang has joined the Firm as a member.

With more than 20 years of experience in state and federal courts, Mr. Lang has represented U.S. and foreign corporations and individuals in a wide range of matters, including business torts, commercial contract

disputes, construction matters, loan and guarantee claims, professional negligence, insurance coverage and property subrogation claims. His expertise in commercial and tort litigation will enhance the firm's existing litigation capabilities.

He is admitted to practice in Florida, Georgia, New Jersey, New York, Pennsylvania, Texas and various federal trial and appellate courts. Mr. Lang received his J.D. in 1982 from Seton Hall University Law School. He obtained his A.B., magna cum laude, in 1979 from Princeton University.