



## Duke Law Firm, P.C.-in the News

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### Seminars/Conferences

#### **CFC Boot Camp:**

One-day "Boot Camp" workshop at Caesars Palace, Las Vegas, Friday, December 7, 2007, 8:00 am to 5:00 pm. The price is \$375 but **a discount of 20% (\$75) is available for the next 15 advance reservations on a first-come, first-served basis.** Further details are available at [Offshore Press Tax Workshop for Controlled Foreign Corporations](#). To reserve space at the early-bird discount rate, please call Vernon Jacobs at 913-362-9667 (mobile number is 913-481-3480), or send an email to [Jacobs@offshorepress.com](mailto:Jacobs@offshorepress.com) with CFC Boot Camp in the subject field.

#### **Controlled Foreign Corporation Tax Guide, Third Edition**

The updated Controlled Foreign Corporation Tax Guide, Third Edition, by Vernon K. Jacobs and J. Richard Duke, is now available for purchase by either hard copy or Internet:

<http://www.offshorepress.com/>

#### **Circular 230**

August 23, 2007, Richard Duke attended the Regions Morgan Keegan Trust annual seminar in Birmingham, AL titled "Estate Planning Hallmarks: Compliance and Complexity," featuring Roy M. Adams and Charles A. Redd. The speakers pointed out that the biggest misconception regarding Circular 230 is that the legend used at the end of letters, e-mails, etc., (for example, the statement that the letter, message or any contents cannot be used by anyone for

avoiding U.S. tax penalties, or promoting, marketing or recommending to another party any transaction or matter addressed) protects the lawyer in all written communications. The legend only protects the professional with respect to: (1) a reliance opinion (more likely than not); and (2) a marketed opinion. If the written statement does not pertain to a reliance opinion or a marketed opinion, then no legend protects the professional and his comments must be a tax opinion as required by Circular 230.

#### **Stephan Jay Lawrence No Longer Incarcerated**

A tax lawyer in Coral Gables, Florida, informed J. Richard Duke that on the December 12, 2006, Alan S. Gold, United States District Judge in the State of Florida, signed an order releasing Stephan Jay Lawrence from his incarceration of more than six years. The reasoning of Judge Gold, as stated in the Omnibus Order, United States District Court, Southern District of Florida, is as follows:

I conclude that Lawrence has come to value his money (whatever may be left) more than his liberty. Clearly he is not to be rewarded, but, at the same time, our Constitution prohibits imprisonment for unlawful debt. Because I find that there is no realistic possibility that Lawrence will comply with the contempt order, although he still has the ability to do so, his incarceration may not last indefinitely. In light

of the fact that Lawrence has "steadfastly" refused to comply, regardless of the number "intervals" I have reviewed the matter, I am obligated to adhere to the holding of the Eleventh Circuit that "... the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion." Under this holding, I must release Lawrence from his confinement despite his failure to purge himself of contempt.

#### **Facts Regarding Lawrence Case**

The U.S. District Court for the Southern District of Florida vacated and remanded to the Bankruptcy Court in the matter of *In re Stephan Jay Lawrence*. Appealed from the bankruptcy court, the U.S. District Court affirmed the Turn Over Order (*Order Granting Trustee's Motion to Compel Debtor to Turn Over Trust Res and to Fully Disclose All Trust Transactions and Order to Show Cause Notice Pursuant to Fed. R. Bankr. P. 9020(b)*), as well as the Contempt Order and the October 5, 1999, Incarceration Order. The 11th Circuit Court of Appeals affirmed the U.S. District Court.

Mr. Lawrence established a Jersey trust on or about January 8, 1991, two months prior to the conclusion of a 42-month arbitration dispute with Bear, Stearns and Co., Inc. involving the failure of Mr. Lawrence, an options trader, to meet a margin call by Bear Stearns. The arbitration hearings concluded with a \$20.4 million award in favor of Bear, Stearns and Co., Inc. Mr.

Lawrence funded the trust with 90 percent of his liquid assets. The trust was amended on February 7, 1991, adding specific spendthrift language and moving the trust to the Republic of Mauritius. On January 23, 1993, the trust was amended to prohibit Mr. Lawrence's powers from being executed under duress or coercion and to further provide that his life interest terminated in the event of Mr. Lawrence's bankruptcy. In March 1995, an amendment declared Mr. Lawrence to be an "excluded person."

The court stated that paragraph 12 of the Deed of Appointment grants Mr. Lawrence the right to remove and appoint trustees at his discretion. The court further stated that this power is not affected by the amendment making Mr. Lawrence an excluded person. In addition, the court did not accept Mr. Lawrence's statement that he was powerless to repatriate the trust assets as required by the Turn Over Order under the impossibility of performance defense claim primarily due to his ability to remove and appoint a trustee. The court stated that Mr. Lawrence must show a present inability to comply with a court order and must go beyond a mere assertion of inability. The court further stated that the impossibility claim by Mr. Lawrence was self-created and was an invalid defense.

The court also found from "the entirety of the record ... it defies reason—it tortures reason—to accept and believe that [Mr. Lawrence] transferred over \$7,000,000 in 1991, an amount then constituting over ninety percent of his liquid net worth, to a trust in a far away place [Mauritius] administered by a stranger—pursuant to an Alleged Trust which purports to allow the trustee of the Alleged Trust total discretion over the administration and distribution of the trust res. The court declines to abandon common sense and to torture reason in the manner urged by [Mr. Lawrence]." The court

continued by upholding the district court by stating that "The import of the various clauses and provisions in the trust instrument, especially those giving the trustees absolute and uncontrolled discretion, when read together show that Mr. Lawrence, as settlor and prospective beneficiary, retained de facto control over the Trust through his ability to appoint Trustees who could in their absolute discretion reinstate the appellant [Mr. Lawrence] as a beneficiary and assign the entire proceeds." The court further agreed with the conclusion of the bankruptcy court and the district court "that Lawrence clearly established this Trust for his own benefit and to shelter these assets from an anticipated adverse arbitration judgment."

The following are the words of an apparent irate judge:

In this case, the logical and inevitable inference created by the timing of the Trust's creation, only two months prior to the Bear, Stearns arbitration judgment, is that Lawrence was seeking to shelter his assets in a protected offshore trust. In addition, the January 21, 1993 spendthrift provisions were enacted while the appellant, the Settlor of the Trust, clearly had the discretion under Clause 12 of the Deed of Appointment to remove and appoint trustees. The Trustees, in turn, had the ability to grant the entire corpus of the Trust to the settlor. Therefore, the appellant effectively had dominion over the property of the Trust, and the spendthrift provisions are not enforceable as a shield against creditors.

Lawyers for Berger Singerman, the attorney for Bear Stearns, made comments about the Lawrence case at two Annual Wealth Protection Conferences, sponsored by The Florida Bar.

Richard Duke summarizes Mr. Singerman's comments as follows: Berger Singerman chose to avoid the issues of whether fraud had been committed or a fraudulent transfer had been made by Mr. Lawrence and instead focused on the fact that Mr. Lawrence had control over the foreign trust through the: (i) right to replace a trustee; (ii) right to substitute and add beneficiaries; and (iii) other rights. Mr. Singerman stated that this bundle of rights caused the trust assets to be deemed property of the bankruptcy estate and was sufficient to bring the trust res into the bankruptcy estate. Mr. Lawrence argued, in defense, the doctrine of impossibility of defense; however, the court refused to follow this doctrine because it was self-created. Berger Singerman chose not file a lawsuit in Mauritius because of its limited statute of limitations with respect to fraudulent transfers and because Mauritius requires actual fraud to be proved beyond a reasonable doubt by its client, the creditor.

Richard Duke summarizes Mr. Fierberg's as follows: Mr. Fierberg stated that Mr. Lawrence was a high-flying option trader and he originally sued Bear Stearns but the case was dismissed because of an arbitration clause. In summarizing the facts of the case, Mr. Fierberg stated that Mr. Lawrence established a personal account in Jersey, and then later transferred this account to the trustee of a Jersey trust. The Jersey trust contained no duress clause and no spendthrift provision. Berger Singerman filed an 18-count complaint against Mr. Lawrence, asking that Mr. Lawrence not be discharged in bankruptcy. Mr. Fierberg stated that Mr. Lawrence's trust document was poorly drafted and contained a provision permitting Mr. Lawrence to borrow with no interest. The court conducted a three-day deposition and found concealed beneficial interests and, due to the control by Mr. Lawrence, the court further found that the assets in the trust were assets

of the trustee in bankruptcy (property of the estate). The court ordered Mr. Lawrence to turn over the assets. Mr. Lawrence refused; therefore, the court held Mr. Lawrence in contempt of court and he was incarcerated. Mr. Fierberg stated that the Lawrence case was a road map for trustees in bankruptcies to bring foreign trust assets into the bankruptcy trustee's possession. This road map is based on control over the foreign trust by the settlor who has filed for bankruptcy. He stated that it was malpractice for an attorney to file under Chapter 7 with respect to foreign trust assets where the language in the foreign trust shows that the settlor will be found to be in control of the trust.

The court stated, "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings."

The 11th Circuit reminded the lower courts:

As we affirmed the challenged orders, we are constrained to remind the district and bankruptcy courts that civil contempt sanctions are intended to coerce compliance with a court order. In Wellington we acknowledge that, "When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights." The district court must make an individual determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that "although incarceration for civil contempt may continue indefinitely, it cannot last forever."

The 11th Circuit Court of Appeals upheld the determination by the

bankruptcy court that the trust assets were a part of the bankruptcy estate. The 11th Circuit upheld the reasoning for this due to the control that Mr. Lawrence retained over the foreign trust.

### **American's Putting More Money Into Foreign Funds**

In the article titled "Credit Woes Spread In Commercial Paper" The Wall Street Journal, August 14, 2007, A14:

So far this year, U.S. investors on balance have put \$81.28 billion into foreign funds, compared with \$8.09 billion into plain-vanilla U.S. stock mutual funds, according to Investment Company Institute, a mutual fund trade association. (Traditionally, U.S. investors almost always have put more money into U.S.-stock funds.)

**Abu Dhabi: Carbon-Neutral City**  
Business 2.0 magazine, August 2007, Volume 8 Number 7, at page 33, reports that Abu Dhabi, one of the largest suppliers of oil, is planning to build the world's first carbon-neutral city. The 3.7 square-mile city, called Masdar, will cut its electricity bill by harnessing wind, solar and geothermal energy, while a total ban cars within the city walls may reduce the long-term health costs associated with smog. Construction begins in January 2008 with a tentative completion date of 2009.

### **Abu Dhabi in the News**

In the July 6, 2007 issue of The Wall Street Journal article titled "Apollo Talks With Arab Fund," by Henry Sender, Page C1:

While little known in the U.S., the Abu Dhabi Investment Authority is believed to be the wealthiest investment fund among the Persian Gulf countries, with estimates of its value ranging from \$500 billion

to as much as \$1 trillion. It is considered one of the most sophisticated investors in the region.

Analysts believe it may well be the largest investor in emerging-market stocks and it has a long history of investing in private-equity funds and investing alongside them in some of their larger purchases. The organization also invests in hedge funds and property. It already has a close relationship with Apollo, since it took up about \$600 million, or almost half, of Apollo's offering of an investment fund, AP Alternative Assets LP, that listed in Europe last year.

While much of the world's attention has been focused on China, the coffers of the Gulf countries collectively hold greater sums. HSBC calculates that the six members of the Gulf Cooperation Council, which includes Saudi Arabia, Kuwait and the members of the United Arab Emirates, hold a quarter of all U.S. Treasuries. The countries have \$1.6 trillion to invest abroad, and that will swell to \$2.5 trillion in just three years.

### **U.S. Attorney to Appeal Dismissal of Charges in KPMG Case**

*Beth Bar*  
[New York Law Journal](#)  
July 18, 2007

Southern District U.S. Attorney Michael Garcia has filed a notice of appeal in the dismissal by a federal judge of charges against 13 of 16 former KPMG partners facing criminal tax fraud charges.

Southern District of New York Judge Lewis A. Kaplan, in *United States v. Stein*, 05 Crim. 888, said Monday that the government

violated the defendants' substantive due process rights by pressuring KPMG into refusing to pay the former employees' legal fees, and "with greatest reluctance" held that dismissal was the appropriate remedy.

The notice of appeal was dated Monday and signed by Assistant U.S. Attorney John M. Hillebrecht. In a statement Monday, Garcia said that the government "respectfully disagrees" with Kaplan as to whether there was a constitutional violation in the case. "We will continue to pursue appellate review," he said.

Yusill Scribner, a spokeswoman for the government, declined further comment Tuesday.

Five other defendants still face an October trial before Judge Kaplan - three former KPMG partners and two from outside the company, including an attorney.

*See also: July 2007 Duke Law Firm Newsletter for additional information regarding KPMG:*

<http://www.assetlaw.com/news.htm>

### **Law Firms Focused on Subprime Loans**

The NATIONAL LAW JOURNAL, August 8, 2007, reports that at least two law firms have formed a practice group focused on subprime lending issues and litigation. The Journal further states:

As more homeowners default on subprime loans, they're setting off a cascade of legal troubles that range from bankruptcies of the institutions that provided the loans to investment losses on securities backed by the home mortgages to state and federal probes of possible misrepresentations about the loans.

### **Subprimes**

In the article titled "Bear Seizes Most of Funds' Collateral," The

Wall Street Journal, July 27, 2007, C5:

Putting another nail in the coffin of the Troubled High-Grade Structure Credit Strategies hedge funds, lenders at Bear Sterns Cos. have seized most of the funds' collateral following its failure to meet a recent margin call.

Bear's move, which according to someone close to the situation came after with more than a week of waiting for additional cash or collateral to repay Bear's \$1.6 billion line of credit, leaves the High-Grade fund with little or no remaining capital and few assets of any value.

### **In the article titled "Markets Crisis Tests Resolve Of Fed, Officials" The Wall Street Journal, August 13, 2007, A1:**

Among today's big fears: at commercial and investment banks, thinking they have used derivatives to lay off the risk of defaults, will discover they effectively bought insurance from hedge funds whose financial survival depends on credit from those same commercial and investment banks; that big firms are exposed to troubled markets in ways they don't realize of haven't disclosed; or that players with heavy borrowing will have to dump their holdings and make everything worse.

Today's crisis, enlarged part, reflects an inability to accurately value collateral—such as pools of mortgages—and uneasiness about the computer models used to value complex securities. That leads those who have money to insist on higher rates and tougher terms, and in

some cases to keep more money in reserve just in case.

### **In the article titled "Credit Woes Spread In Commercial Paper" The Wall Street Journal, August 14, 2007, C3:**

Turmoil in credit market spread further [August 13] when Coventree Inc., a Toronto based financial company that arranges commercial paper for companies looking for short-term cash, indicated it couldn't sell \$950 million in new debt.

Though Coventree is a little-known company far from Wall Street, debt traders were buzzing about its problems because it could be a sign of broadening trouble in some of the most liquid debt markets.

But the recent disruption in the market for subprime mortgages and related securities has spread to some of the safest investments. In the case of commercial paper, some companies use instruments linked to subprime mortgages as collateral for their commercial paper programs. Overall, asset based commercial paper programs total \$1.2 trillion.

### **In the Wall Street Journal article titled "Can the Financial Markets Make a Comeback?" By Ethan Penner, August 27, 2007, Page A11:**

What happened? There was so much liquidity, where did it all go? And what the heck do subprime residential mortgages have to do with commercial real estate? ...

... As a quick primer, securitization is the aggregation of large pools of assets by Wall Street firms such as Lehman Brothers and Goldman Sachs, as well by the securities divisions of major banks such as Wachovia, Citigroup and Bank of America, which sell securities backed by those pools as collateral, primarily in the form of rated bonds. At the core of the enormous growth of securitization is the huge growth of these firms' balance sheets. The equity values of these companies have grown in the past two decades from the neighborhood of \$1 billion up to levels ranging from \$20 billion-\$75 billion for those unaffiliated with bank parents -- and those affiliated with banks now have access to balance sheets supported by equity accounts ranging up to \$225 billion ...

... For the past 25 years securitization-based finance (gather, package, carve up into different risk categories, and resell) has been replacing the portfolio-lending model (invest in a single class of debt and hold to maturity, funded by deposits or the like) as the dominant means of financing in the United States. While all of this started and has been focused in the U.S., the mechanism has become global, taking hold and growing rapidly in both Europe and Asia ...

... Securitization may be the only business in the world where the appraiser is hired by, paid by, and thus works for, the seller rather than the buyer. It would be unthinkable, for

example, in a real estate transaction for the seller of a property to expect that the buyer would accept a seller-provided appraisal as the basis of their valuation.

Yet, this is exactly what transpires in the bond market, where the sellers, Wall Street firms that aggregate assets and pool them into carefully "sliced and diced" securities, hires and works carefully with the appraiser, the rating agencies, to maximize their arbitrage. Importantly, appraisers at the rating agencies are paid a small fraction of the pay of the investment bankers they work with, and many aspire to work at one of the firms that they are representing, thereby creating a heightened conflict.

It's imperative to note here that I have worked with many rating agency analysts, have hired some and remain friends with others -- and they are mostly talented and knowledgeable, and trying to do the best job they can to balance their corporate objectives to maximize market share and revenues, the investment banking community's desire to find the arbitrage between assets and securities, and the needs of the bond-buying community, who invest their trust in the integrity of the ratings that are provided.

However, these people are only human. The potential for conflicts and misaligned incentives are more potent over time than even the best of intentions.

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