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## LIFE SETTLEMENTS

### Court adopts equitable ownership approach to identify owner of insurance policy

*Pruco Life Insurance Co. v. Brasner, US District Court for the Southern District of Florida, November 14, 2011*

Holding that the mere identification of the insured as the original owner of an insurance policy does not necessarily mean that the insured was the equitable owner of the policy, a US District Court relieved an insurer of both its obligation to pay \$10 million in death benefits and its duty to reimburse the premiums paid.

**Facts.** Pruco Life Insurance issued a \$10 million policy on the life of Arlene Berger in 2006. The policy was acquired through a plan developed in 2005 by Steven Brasner, a licensed insurance producer with Pruco Life Insurance, a subsidiary of Prudential Life Insurance Company of America.

Under Brasner's scheme, the premiums were paid through premium financing secured by Brasner for an irrevocable life insurance trust that became the owner and the beneficiary of the policy.

Brasner submitted the policy application, representing that Berger had net assets of nearly \$16 million, thereby grossly overstating Berger's actual net worth, which was under \$1 million.

The trust was finalized less than a month after the policy was issued, and the policy ownership and beneficiary designation were then changed to the trust.

Near the end of the two-year contestability period, the Berger policy was submitted to a potential buyer for its review. After the contestability period expired, the policy was

effectively sold. Mrs. Berger signed a document relinquishing all of her rights in the trust and an amendment to the trust agreement, permitting her husband to resign as trustee.

Bank of America notified the trust that its obligation to repay the premium financing loan was satisfied by its relinquishment of the insurance policy to Bank of America, which then became owner of the policy.

**Decision.** The court noted that while an insurance policy may be assigned in good faith to someone who has no insurable interest, an absence of good faith may be established by such factors as a pre-existing agreement that the policy will be assigned to someone who has no insurable interest, payment of some or all premiums by someone other than the insured, or lack of a risk of actual future loss.

The court found evidence to support the existence of all three factors and ruled that the policy was void *ab initio* due to lack of an insurable interest. As such, Pruco was also entitled to keep all premiums paid.

**Comments.** Life insurance, premium financing, and life settlements are all socially useful tools and, when used properly, are ethically responsible solutions to important problems people face in their lives. But, like gasoline, dynamite, and matches, they were never intended to—and cannot without harm to each—be used together. ■

*To have and to hold,  
to him and his heirs, forever.*





## AUSTRIAN FOUNDATIONS

### Entity classification of an Austrian foundation in Canada

*Peter Sommerer v. The Queen, Tax Court of Canada*

When characterizing a foreign entity not recognized under Canadian law, such as the Austrian foundation, the Canada Revenue Agency first determines the characteristics of the foreign entity under the foreign legislation, and then compares those characteristics with those of recognized categories under Canadian law so as to classify the foreign entity under one of those categories.

Applying this approach, the agency concluded that an Austrian foundation was a trust, while the taxpayer argued that it was a corporation.

In a recent decision, the Canada Tax Court rejected this long-standing approach—seeking to characterize the foundation as, in fact, either a trust or a corporation—in favour of a simple analysis of whether a trust relationship existed.

**Facts.** In 1996, Herbert Sommerer, a resident of Austria, established an Austrian private foundation for the benefit of his son Peter and the latter's family. All of the beneficiaries were resident in Canada.

At the time of the foundation's establishment in 1996, the foundation purchased from Peter shares that were subsequently sold by the foundation at a gain in 1998. Characterization of the foundation as either a trust or a corporation would affect the timing and amount of the taxable gain.

**Decision.** The court found that a trust relationship existed between Herbert Sommerer as the settlor, the foundation as the trustee, and Peter Sommerer and his family as the beneficiaries.

While the court noted the importance of the rule of three certainties under English trust law—certainty of intention, certainty of subject matter, and certainty of objects—its analysis focused on four essential features of a trust under Canadian law:

- segregated property,
- owned by a person (a trustee) having control of the property,
- for the benefit of persons (beneficiaries),
- to whom the trustee has a fiduciary duty enforceable by the beneficiaries.

## INSURABLE INTEREST

### Legislature clarifies insurable interest of trust in life of settlor

Despite the clear wording of Section 2704, Title 18 of the *Delaware Code*, which provides that the trustee of a trust established by an individual has an insurable interest in the life of that individual, a US District Court recently held that a trust had no such insurable interest where the trust's settlor intended to sell the beneficial interest of the trust.

Section 17 of *Trust Act 2011* now clarifies that a trust has an insurable interest in the life of the person who establishes—creates and initially funds—the trust without regard to whether beneficial interests in the trust are subsequently sold or otherwise transferred.

The court found the essential features existed in the relationship by which the foundation held the shares, and also found that the three certainties were met to create the trust. ■

## DUAL RESIDENTS

### Nationality determines residency of individual with important ties to both Belgium and France

*Monsieur DB c. L'Etat Belge, Tribunal de première instance de Bruxelles, May 14, 2010*

Where individuals maintain close and significant ties to both Belgium and France, the deciding factor in determining residency for tax purposes is nationality, according to a recent decision of the Belgian court.

**Facts.** The question was whether the mother of the applicant was a resident of Belgium at the time of her death, as maintained by Belgian authorities, or a resident of France, as maintained by the applicant.

Among the facts traditionally relied upon to establish residency included:

- The applicant's parents spent most of their winters in Belgium and most of their summers in southern France.
- The applicant's parents owned two homes in Belgium and one in France.
- The deceased was domiciled in France upon her death in the Summer of 1986.
- While the deceased's pensions were paid in France, she also had accounts in Belgium, although most of her fortune was in Luxembourg.

**Decision.** The court found that the deceased was staying regularly in both Belgium and France, and had retained important ties with both countries.

Faced with this ambiguity, the court referred to the *Belgian-French Treaty of 1959* dealing with the prevention of double taxation in respect of inheritance, which states that "in case of doubt as to the domicile of the deceased, the deceased is deemed to have been domiciled in the state of his nationality."

As a result, the court ruled that the deceased was resident in Belgium. ■



## ASSET PROTECTION TRUSTS

### Creditor succeeds in reaching Cayman trust funds

*Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd, UK Privy Council, June 21, 2011*

The Privy Council recently held that the Cayman Islands courts have jurisdiction to appoint receivers over a judgment debtor's power of revocation of Cayman-governed trusts of which the debtor is the settlor. Furthermore, the Cayman courts have jurisdiction to order that the power be assigned to the receivers.

**Facts.** Tasarruf Mevduati Sigorta Fonu (TMSF) was established by the Turkish state to restructure and administer failed banks whose banking licenses had been revoked.

In the execution of its mandate, TMSF had acquired the assets of Egebank, which had accumulated losses of over US\$1.2 billion. Investigations revealed that US\$490 million had been misappropriated from Egebank by a Mr Demirel.

From 1997 to 1999, Demirel settled two Cayman trusts with assets now valued at US\$27 million. The trust deed of both trusts reserved a power, personal to Demirel, to revoke the trust.

In 2001, Demirel had been rendered bankrupt in Turkey. The Turkish courts granted a judgment for US\$30 million in favor of TMSF against Demirel. In the course of the bankruptcy proceedings, TMSF undertook to make any assets recovered generally available to Demirel's creditors.

TMSF sued Demirel in the Cayman Islands courts for recovery of the Turkish judgment debt of US\$30 million. In 2008, TMSF obtained a summary judgment against Demirel as settlor of the trusts.

TMSF then sought to enforce the summary judgment by applying for the appointment of a receiver by way of equitable execution, with a view to reaching Demirel's power of revocation and the trust funds. The Grand

Court and Court of Appeal held that the Cayman courts did not have jurisdiction to make such an order.

The main questions for the Privy Council to decide were whether:

- The power of revocation of the trust was sufficiently close to the notion of property to enable an equitable appointment of a receiver.
- The appointment of a receiver could be made effective by ordering the settlor to transfer the power of revocation to the receiver.

**Decision.** The Privy Council noted that a power to revoke a trust does not carry with it a fiduciary duty; the only discretion that exists is whether the settlor exercises the power in his own favour. In this case, the court found that the settlor's power to revoke was such that, in equity, Demirel could be regarded as having rights tantamount to ownership—therefore, sufficiently close to the notion of property as to enable an equitable appointment of receivers.

The Privy Council held that the interests of justice required that an order to appoint receivers—coupled with an order that the settlor delegate his power to the receiver, in default of which the court would order the revocation—be made to render effective the judgment of the Cayman court.

**Commentary.** This decision serves as a warning to trustees and estate planners to carefully consider the implications of including a power of revocation in the trust deed. In circumstances where there is a judgment debt against the settlor, it is now clear that the court can unwind a revocable trust. ■

## MAREVA INJUNCTIONS

### Free-standing freezing relief granted against Cayman defendants

*VTB Capital Plc v. Konstantin Malofeev et al., Grand Court of the Cayman Islands, September 28, 2011*

In September 2011, the Cayman Islands refined its position on the granting of Mareva injunctions, which prevent defendants from transferring assets prior to the outcome of foreign litigation.

**Facts.** London bank VTB Capital sued Konstantin Malofeev, a Russian national, in England alleging banking fraud. In support of its action, VTB sought a freezing order against three defendants—Malofeev and two Cayman companies, which Malofeev controlled but which were not parties to the English litigation.

**Decision.** Interestingly, the court declined to grant a Mareva injunction against Malofeev on grounds that he was not within the court's jurisdiction, but granted a Mareva injunction against the two corporate defendants on public policy grounds.

## CELEBRITY ESTATES

### Post-mortem estate planning no solution for estate of Bob Marley

This year marked the 30th anniversary of the death of Jamaican singer-songwriter and musician Bob Marley. It also marked three decades of legal battles over his estate—worth around \$30 million when he died.

As Marley died with neither an estate plan nor a will, his assets were to pass under Jamaican intestate law. Seeking a more favorable distribution for Marley's widow, attorneys tried unsuccessfully to craft a post-mortem estate plan. This horror story over the late musician's estate offers another reminder of the importance of proper estate planning.