THE AVER ADVISORY

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contact@averassociates.com

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LIFE SETTLEMENTS

Insurers increasingly successful in litigating payment obligations

Lincoln National Life Insurance Company v. Snyder et al., Civ. No. 09-888-SLR, Delaware District Court, July 15, 2010 | Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust, 2010 WL 3395661,Delaware District Court, Aug. 30, 2010

Promoters of life settlements suffered a serious blow this past summer after two decisions from the US District Court in Delaware held that life insurance policies issued under such arrangements are void from their inception, thereby relieving the insurer of any duty to pay a death benefit.

Facts. The case of *Lincoln National* v. *Snyder* is typical of life settlements. In 2005, two promoters persuaded 76 year-old Harry Wisner to apply for an $18.5 million life insurance policy from Lincoln National. The promoters planned to sell the policy to stranger investors on the secondary life insurance market.

To facilitate the arrangement, Wisner created an irrevocable life insurance trust, naming Bayard Snyder as the trustee and his wife as beneficiary of the trust. Wisner submitted an application for the life insurance policy, naming the trust as the proposed owner and beneficiary. The application was signed by the trustee on behalf of the trust as the proposed owner.

Wisner died at age 79, about two years after taking out the policy. The trust then filed a claim for Wisner's death benefit. Lincoln National launched an investigation, which revealed that the beneficiary interest in the trust had been sold to an unknown party and that Wisner had received funds in connection with the transfer of the beneficiary interest.

In a second case, *Principal Life* v. *Rucker*, the insured Lawrence Rucker created a trust, naming it the original beneficiary of a $3.5 million life insurance policy. Christiana Bank, the trustee, was named the original owner of the policy.

Shortly after the policy was issued, the trust sold its beneficial interests to a second trust. The first trust remained the named beneficiary of the policy, but the second trust was the actual beneficiary and would receive the death benefits under the agreement. The insurer sought a declaratory judgment that the policy was void, from the outset, for lack of an insurable interest.

Decisions. In both cases, the District Court for Delaware held that the life insurance policies were void *ab initio* for lack of an insurable interest.

Delaware law defines an insurable interest as benefits that are payable to individuals related closely by blood or by law who have a substantial interest out of love; or to any other individual with a lawful interest in having the life of the insured continue.

The court noted that, while an insured may name his own trust as the owner and beneficiary, that right must be considered in light of the public policy reasons for which the insurable interest doctrine exists.

In these recent cases, the court held that the life insurance policies were procured as part of pre-negotiated agreements to sell the interest in the policies. Furthermore, the trusts were created solely to circumvent the law. Accordingly, the policies lacked an insurable interest at their inception, and were void as contrary to public policy and Delaware's insurable interest statute.

Commentary. These cases expressly reject arguments supporting the validity of stranger owned life insurance, and treat the sale of beneficial interests as equivalent to the sale of the insurance policy itself. ■

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HOLIDAY HOMES

CROATIA

Saga on property in Croatia taken from foreigners during communist era seems to have reached the end

Croatian Supreme Court decision 25 May 2010

Foreigners in Croatia have a right to claim compensation for, or return of, their property taken during the communist era. This right was recognized in a 2008 ruling by the Croatian Administrative Court, which held in favour of the immediate descendant of a Brazilian national.

The Croatian State Attorney's Office launched an appeal against that ruling. The Croatian Supreme Court rendered a judgment on May 25, 2010 entirely rejecting the appeal and upholding the challenged decision.

The insistence of the Government of the Republic of Croatia not to recognize a foreigner's right to have their property returned, or to compensation, must be understood against the background of more than 4,000 requests being made from abroad. Such requests have emanated primarily from Israel, Austria, USA, Serbia, Argentina and Brazil. It is estimated that these requests, if accepted, will cost the Republic of Croatia between €350 and €500 million. ■

CYPRUS

Right of Greek Cypriot refugees to reclaim land in northern Cyprus effective through European Union law

Apostolides v Orams, European Court of Justice, 28 April 2009, case C-420/07

This is a landmark legal case decided in the European Court of Justice on April 28, 2009. *Apostolides* v. *Orams* concerned the right of Greek Cypriot refugees to reclaim land in northern Cyprus, from which they were displaced after the 1974 Turkish invasion. The case determined that although Cyprus does not exercise effective control in northern Cyprus, cases decided in its courts are effective through European Union law.

Background. In 1974, Mr. Apostolides, an architect, was displaced with his family from his property in Lapithos as a result of the Turkish invasion and the subsequent military occupation of the northern part of Cyprus.

In 2002, Mr and Mrs Orams, resident in England, invested £160,000 of their retirement fund to acquire the land from a third party and to construct a villa on the premises. The third party claimed to have acquired the property from the Turkish Republic of Northern Cyprus (TRNC). The Orams used the property in Cyprus for vacations and maintained their home in the UK.

In 2003, the *de facto* administration of northern Cyprus eased crossing restrictions along the ceasefire line, allowing displaced Cypriots to visit their old properties. Apostolides visited his property and saw the construction of the house.

Legal Proceedings in Cyprus. Apostolides took his case to the Nicosia District Court, demanding the eviction of Orams from his property. Northern Cyprus is not recognised internationally as a state. Apostolides argued that although Cyprus had lost control over the northern part of the island following the Turkish invasion, its laws still applied even if they were not easily enforceable.

In November 2004, the Nicosia District Court ordered the Orams to demolish the villa and all improvements, to deliver immediate possession of the land to Apostolides and to pay damages including monthly rent until the judgment was complied with.

The Orams appealed this decision, which was heard at the Supreme Court of Cyprus. The appeal was dismissed.

Appeal Proceedings. Due to the island's division, the judgment reached by the Cypriot court was not enforceable. As such, Apostolides used EU regulations to have the judgment registered and applied against the Orams' assets in the UK. The Orams were represented in the English courts by Cherie Blair; the wife of Prime Minister Blair. In September 2006, the High Court of Justice ruled in favour of the Orams.

Apostolides appealed the decision at the Court of Appeal, which in turn referred the case to the European Court of Justice (ECJ) in Luxembourg. The ECJ in turn decided in favour of Apostolides and ruled that British courts were able to enforce the judicial decisions made in Cyprus, which uphold the property rights of Cypriots forced out during the invasion.

Implications. This case has been described as a landmark test case as it sets a precedent for other Cypriots (primarily Greek Cypriot refugees) to bring similar actions to court.

The importance of the case is illustrated by the fact that the Orams were funded by Turkish property developers, while Apostolides was supported by Greek-Cypriot interests. Both the British High Commission in Cyprus and the Foreign and Commonwealth Office have issued warnings regarding the purchase of property in northern Cyprus.

Following the final ruling by the Court of Appeal in England, Apostolides' lawyer stated that he was considering similar lawsuits against foreign tourists using hotels in the TRNC which were owned by Greek Cypriots and lost during the 1974 Turkish invasion. ■

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TRUST RECOGNITION

Assimilation of an English charitable trust to a Belgian non-profit association

In the Matter of Le Trust de droit anglais T.G.O.S.H.C.C., Case No. 2006/AR/2935, Court of Appeal of Brussels, September 9, 2009

Facts. In 1954, RD prepared a will establishing as his sole heir a charitable trust running a hospital in Great Britain. RD was unmarried and domiciled in Belgium. The will was filed with a Belgian notary in 1998. RD died in 1996 without any legal heir.

In April 2000, the tax authorities claimed inheritance tax from the charitable trust in an amount of €1,3 million, which was paid by the trust in August 2000. The trust then claimed a tax refund of €985,000 on the grounds that it was over-assessed and wrongly denied the reduced rate applicable to a Belgian non-profit organization.

Decision. It was found that a charitable trust is an entity peculiar to English law, which features two institutions-a trust and a charity-rather than only a trust as discussed by the trial judge.

The court held that the trust is in a situation comparable to a Belgian non-profit association (association sans but lucrative) and thus qualified for the reduced inheritance tax rate. The claim was accepted as filed for the entire amount claimed by the charitable trust. ■

SETTLOR MISTAKE

Court considers principle of mistake to set aside transfer by settlor

In the Matter of The Lochmore Trust, [2010] JRC 068

Facts. The settlor received tax advice to the effect that certain shares should be contributed to a trust by way of sale with the price outstanding as a loan rather than a gift into the trust. A sale would avoid an inheritance tax charge of 20%. A trust was established with the shares being the sole trust property. The settlor's tax advisers did not review the deed prior to the trust's establishment.

While the settlor thought the shares had been transferred by way of sale, the trustee was unaware of this requirement and transferred beneficial ownership of the shares to the trust as a mere gift. When the mistake was caught several years later, it was estimated that the consequent tax liability would be £800,000. As a result, the settlor sought to set aside the transfer of the shares on the grounds of his mistake.

Decision. The court found that the settlor made a mistake. The settlor was advised of the potential tax charge and, but for his mistake, would not have i) entered into the transaction, ii) established the trust, or iii) contributed the shares to the trust.

The mistake was also considered to be so serious as to render it unjust for the trustee and beneficiaries to retain the shares as trust property. Accordingly, the court declared the trust invalid and set aside the transfer. ■

CELEBRITY ESTATES

German auto magnate Ferdinand Piech chooses foundations for succession planning solution

September 2010. Ferdinand Karl Piech, head of car giant Volkswagen and luxury brand Porsche, recently announced that he shifted his share holdings to Austrian foundations in order to ensure a smooth transition after his death.

Austrian-born Piech, grandson of Ferdinand Porsche, transferred his holdings to two foundations, Ferdinand Karl Alpha and Ferdinand Karl Beta, including a 7% stake in the holding company that controls both Porsche and VW. A 10% stake in Europe's largest auto dealership, the Salzbourg-based Porsche Holding, was also transferred to the foundations.

According to press reports, the succession plan will guarantee that Ursula Piech, his fourth wife, retains control of the fortune should the 73-year-old VW patriarch die.

Ursula Piech is 19 years younger than Piech and was initially a caregiver to his children. While she is to take control of the foundations upon Piech's death, the plan provides that she would lose control again, if she remarried.

Some of the 12 children from Piech's four marriages reportedly do not agree with the arrangement and suggested that they may contest it in court. "Most of my descendants support me," Piech told the press.

Self-made Chinese billionaire says competent children don't need an inheritance

August 2010. When 88-year-old Chinese real-estate tycoon Yu Pengnian donated the remaining $470 million of his $1.2 billion fortune to charity, it was confirmed that none of his children would inherit any of his wealth. Yu, who was born poor, donated his fortune to his charitable foundation, which will provide financial support to people in China's poorest regions. As for his children, Yu explained, "If my children are more capable than me, it's not necessary to leave a lot of money to them. If they are incompetent, a lot of money will only be harmful."

Many observers with more modest wealth also struggle with the question of how much is too much to leave to their children? In many cases, too much is when a child's inheritance deprives them of the desire to be self-sufficient. Fortunately, proper estate planning can address these concerns and help clients control the amount and timing of distributions, thereby ensuring children remain productive members of society, while at the same time protecting them from financial hardship. ■