

**CROSS-BORDER RECOVERY OF FRAUDULENT TRANSFERS  
AND FOREIGN ASSETS**

By: Robert C. Furr, Esq.  
Furr and Cohen, P.A.  
2255 Glades Road, Suite 337 W  
Boca Raton, Florida 33431  
(561)395-0500 - (561)338-7532 fax  
E-mail: [rfurr@furrcohen.com](mailto:rfurr@furrcohen.com)

A. **How to Begin the Process**

You are never going to find foreign assets or fraudulently transferred assets that are located overseas unless you first discover that they were in the United States and how they were removed. Use all the tools in your investigative process to make that determination, including:

1. The procedures available to you in a bankruptcy case. Pursuant to 11 U.S.C. § 341(a), at the First Meeting of Creditors you can examine the debtor's affairs. That examination should include questions regarding foreign assets, transfers of assets overseas, travel abroad, use of passports, assets protection trusts, and were there any employment of professionals overseas or in the United States for asset protection. Pursuant to Rule 2004, you can issue subpoenas to parties to gather such information and you can take further discovery of the debtor or perhaps the debtor's professionals under the Crime Fraud Exception if appropriate.
2. Don't forget that many foreign banks have branches in the United States and you may be able to subpoena those branches to obtain information on foreign accounts.
3. If the debtor is a corporation, you can waive the attorney/client privilege and seek information from debtor's professionals. Remember, there is no accounting privilege in Federal Court and the debtor's accountants and other financial professionals may have information that you can discover without the debtor raising a privilege. If the debtor is a

corporation, the privilege belongs to the Trustee. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985).

B. **Doe Consents the Hague Convention and Letters Rogatory**

1. In Doe v. The United States, 487 U.S. 201 (1988), the Supreme Court held that an individual can be compelled to sign a consent authorizing foreign banks to disclose records and that such consent does not violate the debtor's individual Fifth Amendment rights. You could consider requesting the Court for a *Doe* order or *Doe* consent to obtain this information. A copy of the headnotes from this case is attached.

2. The United States is a party to the Hague Convention of taking the evidence abroad and under that Convention you may request through the bankruptcy court, the assistance of a foreign government obtaining the production of evidence. Information on the Hague Convention can be obtained from the Hague Conference website at <http://www.hcch.net> and at 28 U.S.C. § 1781. Unfortunately, with the Hague Convention request, the debtor will be duly notified of the request for information. (Copies of pages from the Hague Convention website and the statute are attached.)

There is also a Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commerical Matters and this can also be found on the website.

3. You can also take depositions outside the United States under Federal Rules of Bankruptcy Procedure 7028 under Fed.R.Civ.P. 28(b) by Letters Rogatory. A Letter Rogatory requests that a court of one country provide judicial assistance to the court of another. The Department of State will help U.S. lawyers process those Letters Rogatory and under 28 U.S. §

1781 there is an express provision for the Department of State to process Letters Rogatory to and from foreign jurisdictions. These are usually used for jurisdictions that are not parties to the Hague Convention. Check with the U.S. State Department regarding a method of doing this. A copy of the Federal rule is attached.

4. Also go to such places as ChoicePoint and other computer search engines and see if you can find information which would be helpful. Of course now it is easy to search public records in various counties where the debtor may have had property to determine if the properties had been transferred and those search engines may be used when starting your investigation.

### C. **Assets Protection Jurisdictions**

1. Asset Protection Jurisdictions are countries which provide a haven for fraudulent transferred assets. Traditionally, you might think of Switzerland, Grand Cayman Islands, Belize, and the like as those kind of jurisdictions.

2. An asset protection trust is a traditional trust with an additional party, the Trust Protector. Remember your basic trust law, the parties to a trust are usually a settlor, a trustee, and a beneficiary. An asset protection trust creates another party, a protector, and the protector is authorized to transfer the assets from one jurisdiction to another to protect them from an attempt to pierce the Trust. Another common provision of an asset protection trust is that the trust will have a choice of law provision which will give the laws of the asset protection jurisdiction as the place for the court to look to enforce the trust. In an asset protection trust litigation case in the United States, the courts generally will not follow the choice of law provision in the trust because it is against the public policy of the area where the court has

jurisdiction. That is, if you have a bankruptcy case pending in Miami and the trust provides that it is to be interpreted according to the laws of Belize, if the laws of Belize are against the public policy of Florida, the Court will follow the law of Florida. That is pretty commonly done in the example that is attached in a case my office recently handled.

D. **Foreign Discovery**

1. It is possible for a trustee in bankruptcy to bring an action in a foreign state to recover fraudulently transferred or hidden assets. In the United Kingdom, you can request an order called a “No Say Order”, issued pursuant to Section 34 of the Supreme Court Act of 1981, as amended by Art. 5 of the *Civil Procedure (Modification of Enactments) Order* 1998 (SI 1988 No. 2940) and the principles laid down in *Norwick Pharamcal*, [1974] AC 133, *Bankers Trust v. Shapiro*, [1980] 1 WLR 1274, and *Mercantile Group v. Aiyela*, [1994] QB 366. A No Say Order can be granted *ex-parte* and directs the recipient of the order to produce records to the Trustee without notice to the debtor. This does not effectuate recovery of assets; it simply gives information.

E. **Mareva Injunctions and Orders**

1. The United Kingdom will grant a “Mareva Order”. *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, 2 Lloyd’s Rep. 509 (1975). In this case, the English Courts issued an interlocutory injunction to prevent the debtor from disposing of assets. Prior to 1999, the federal courts would grant these kind of orders in the United States. The Supreme Court, however in 1999, declined to follow *Mareva* in a case called *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.* (“Grupo”), 527 U.S. 308, 1999 S.Ct. 1961, 144 L.Ed2d 319 (1999). *Grupo Mexicano* should be restricted to its facts which involve a pre-

judgment injunction. Once a judgment has been recovered or fraudulently transferred or once there is a preliminary injunction sought under the fraudulent transfer act, this case should not be followed.

2. In addition to Mareva injunctions, English Courts might impose the “Anton Pillar Order” where there is a substantial likelihood that legal process may be frustrated through the local destruction of evidence. It allows law enforcement officials acting on a creditors behalf to use force and surprise to get access to documents that the Court has been convinced may be destroyed. These sort of remedies are available in English related Common Law jurisdictions.

3. The Courts in the Isle of Mann, the Cayman Islands, the Channel Islands and many other former English Colonial countries have entered both Mareva Orders and Anton Pillar Orders. Look at the law of the particular country where the assets are located and you may well find other provisions in those laws that would be helpful in going after assets.

#### F. **The Failure of the Asset Protection Trust**

\_\_\_\_\_1. The United States Courts have been very unfriendly to asset protection trusts for assets outside the United States or assets in the United States. Remember that the new provisions of BAPCPA gives a ten-year look back on asset protection trusts. 11 U.S.C. § 548(e)(1)(2). Bankruptcy Courts have issued orders requiring the settlor of the trust to bring the assets back to the United States and have incarcerated those settlors for failure to do so. One such has been sitting in federal detention in Miami for a number of years for his failure to obey the Court’s Order.

2. In past years an was article written by my office regarding the *Anderson* case, which is a prominent case regarding asset protection trust and the power of the Court to

incarcerate a debtor who fails to obey a court order to return assets. A copy of the article is attached.

G. **Mutual Legal Assistance Treaties (MALT)**

1. Mutual Legal Assistance Treaties and other agreements the United States has with other countries were first used in cases involving criminal matters but are now being used for cases of embezzlement and financial fraud and corporate fraud. It is possible for State and Federal Courts and the Bankruptcy Courts to use these treaties to recover assets.

2. Each country designates a civil authority to regulate the treaties. The treaties include the powers to compel witnesses, compel the production of documents, and the issue of warrants and service of process, and to pierce through banking secrecy havens and freeze or seize assets. These treaties are effective in many venues where assets are hidden, including the Bahamas, the Caymans, the Guernsey, Isle of Jersey, Cook Islands, Switzerland, Lichtenstein, Luxemburg and also Bermuda, Turks and Cacos, Monte Carlo, Cypress, the Isle of Mann and other secrecy havens. The SEC, the Treasury Department, the Justice Department and the Department of State can all use MALTs to seek information about funds in certain countries. You would have to get a local, state or federal prosecutor to make a simple request to Justice Department lawyer in Washington for assistance. It helps to have victims with substantial funds to be recovered in order to get the government to help. Once a request is made, the Justice Department's attorney sends a request to the foreign government to freeze the accounts on behalf of either the United States Government or the victim. A local official goes to the bank in the country and freezes the accounts. The freeze is held until the prosecution is completed. Type in

the words Mutual Legal Assistance Treaty in your web browser and you will find many sites with useful information about different countries.

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