

**EASING THE STRESS OF THE
FINANCIALLY DISTRESSED:
WHAT YOU NEED TO KNOW ABOUT
PROTECTING YOUR CLIENTS' ASSETS**



BRENT W. HERRIN

COHEN POLLOCK MERLIN & SMALL, P.C.

3350 RIVERWOOD PARKWAY

SUITE 1600

ATLANTA, GEORGIA 30339

TELEPHONE: (770) 858-1288

FACSIMILE: (770) 858-1277

BHERRIN@CPAMS.COM

WWW.CPMAS.COM

CPM&S COHEN POLLOCK
MERLIN & SMALL, P.C.
ATTORNEYS AT LAW

A “Rich” Client Story



- **Characters:**
 - Iris and Benjamin “Ben” Rich – Your clients
 - Olivia Greathouse – Ben’s real estate business partner
 - Lyndon Monet – President of Monet Community Bank
 - Ivan Ben Rich – Son of Iris and Ben
 - Benjamin “Ben” E. Factor – Ben Rich’s Uncle
 - Penelope “Penny” Pincher – Ben Rich’s Great Aunt

Initial Client Meeting



- Meeting about estate planning matters.
- Financial condition:
 - Ben is 1/2 owner of Greathouse Neighborhoods
 - ✦ Greathouse is insolvent (assets of \$5million and debts of \$15million)
 - ✦ Both Ben and Olivia have guarantied all of the Greathouse debt.
 - ✦ Iris has guarantied some of the Greathouse debt.
 - Some unencumbered assets
 - A number of exempt assets

Guaranty Obligations



- **Ben has guarantied all debt of Greathouse.**
 - As of today, Ben is **insolvent** if you take into account his guaranty obligations, even if you include his exempt assets.
- **Iris has only guarantied one loan of a Greathouse subsidiary to the Monet Community Bank.**
 - As of today, Iris is **solvent** if you disregard exempt assets and take into account her guaranty obligations.

Ben's Seminar Ideas



- Transfer assets to revocable family trust to provide asset protection to Ben and Iris.
- Transfer assets to family members to hold them for him until the creditor issues are resolved.
- The asset protection seminar was not a good idea.
- Decide to move forward with traditional estate plan.

Monet Bank Lawsuit



- **Greathouse subsidiary debt**
 - Maker of note is BigHouse/Greathouse, LLC, a SMLLC subsidiary of Greathouse
 - ✦ BH/GH only asset is the land that secures Debt.
 - Greathouse Neighborhoods did not guaranty debt.
 - BH/GH has no desire to keep property.
- **Ben's guaranty on BigHouse debt**
 - No good defenses to the enforcement of guaranty.
 - Lyndon Monet has indicated that Bank is shopping the debt.

Purchase of Monet Bank Note



- **Bank needs to sell note.**
- **Purchase of note by friendly party.**
 - Uncle Ben E. Factor has indicated a willingness to assist Greathouse by purchasing note.
 - Discharge of indebtedness income with respect to purchase of related party debt.
 - Uncle Factor sets up a SMLLC to purchase the note.
- **Bank is unaware of the relationship between Uncle Factor and Ben Rich.**
 - Uncle Factor should consider separate counsel.
- **Purchase of note resolves:**
 - Suit against Greathouse SMLLC
 - Suit against Ben and Iris on Guaranty.

Default on Note to Big Bank



- Greathouse Neighborhoods defaults on note to Big Bank.
- Ben is a guarantor of Big Bank note.
- Negotiations with Big Bank result in settlement
 - Bank will take back property in lieu of foreclosure.
 - Greathouse agrees to pay \$250,000 in cash
 - Deficiency of \$250,000
 - ✦ Bank forgives the \$250,000 and releases Ben from his guaranty.
- Greathouse has COD income unless one of the exceptions is met.
- Big Bank issues IRS Form 1099-C to Ben for release of guaranty and release of accrued interest payments.

Foreclosure of Property



- **Foreclosure**
- **Deficiency**
- **Confirmation of Foreclosure Sale**
 - Report to Judge of Superior Court in the county in which the land is located within 30 days of the foreclosure sale.
 - Foreclosure knock-off bid must meet or exceed property's "true market value."
 - Debtor and guarantors are entitled to five days notice of the hearing.
- **Procedure for Confirmation Hearing**

Second Monet Bank Lawsuit



- **Greathouse Subsidiary debt**
 - Maker of note is Our First Greathouse, LLC, a SMLLC subsidiary of Greathouse
 - ✦ OFG only asset is the land that secures Debt.
 - Greathouse Neighborhoods did not guaranty the debt.
 - OFG has no desire to keep property.
- **Ben's guaranty on OFG debt**
 - No good defenses to the enforcement of guaranty.
 - Lyndon Monet has indicated that Bank wants a judgment even though Ben has no ability to pay except with exempt assets.
- **Iris's guaranty on OFG debt**
 - Iris's only affiliation with SMLLC is as Ben's spouse.
 - This is the only debt guaranteed by Iris.

Resolution of Second Suit



- **Our First Greathouse:**
 - Let Monet Community Bank have the property and/or judgment.
- **Ben:**
 - Bankruptcy candidate
- **Iris:**
 - Equal Credit Opportunity Act (“ECOA” claim)
 - ✦ A creditor may not require a spouse to guaranty debt if the applicant is creditworthy.
 - ✦ Regulations
 - ✦ Statute of limitations and Frank-Dodd FinReg.
 - ✦ File suit in State or Federal court.

Death of Aunt Penny Pincher



- Aunt Penny passes away on the eve of filing Ben's bankruptcy petition.
- Aunt Penny's will bequeaths \$5 million (her entire net worth) to Ben as an outright gift, if he survives her.
 - Gift goes to his descendants (Ivan Ben Rich) if he predeceases her.
- What can he do?
 - He doesn't want the money if it will only be used to satisfy his creditors.
 - Aunt Penny would not want this to happen.
- File a disclaimer and allow the gift to go to Ivan.
- Fraudulent Conveyance under the Bankruptcy Code?

NOL Tax Planning Before Bankruptcy



- Greathouse losses to Ben.
- Change in tax law to carryback NOLs 5 years.
- However, Ben wants to make election to forego the carryback and carry the losses forward because the losses will survive his bankruptcy filing.
- Is this election a fraudulent transfer the bankruptcy trustee can avoid?

The Untimely Death of Ben Rich



- Ben's estate is insolvent.
- At the time of his death he has a number of unencumbered assets and significant unsecured debt.
- Of course Greathouse Neighborhoods has experienced a terrible year.
 - Income tax refund opportunity – NOL Carryback
- Iris has only a few exempt assets.
- Year's support petition for Iris.

Summary



- Always be aware of fraudulent transfers.
- Never compromise exempt assets.
- Be aware of tax issues in settlements
- There is no “silver bullet” to protect your clients’ assets.
- Engage in asset protection planning before creditor issues arise.

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