

# This is not a theoretical world – actual solutions to creditor issues

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## Combined aggressive long term asset protection planning with legal exemptions from creditors – a winning combination – an example of real world results<sup>1</sup>

**T**his article is based on real life facts and circumstances. I was retained to represent Sidney Debtor (Debtor) in matters relating to significant debt obligations in the County of “Atlantica”. The obligations exceed EUR6 million and existed as a result of the Bankruptcy of Bustedco, Ltd.<sup>2</sup>

Debtor is married and is a citizen of the United States of America and resident of Florida.

Debtor and his family were concerned that these obligations could “wipe out” years and years of hard work and adversely affect the security of his family. The family also wanted to avoid the significant cost, aggravation, and uncertainty of protracted litigation in Atlantica and the US.

Debtor was a client of mine previous to these matters. Four or five years before Debtor started working with Bustedco, we put together with Debtor an asset protection plan which included utilisation of Florida Law Exemptions against Claims of Creditors and three offshore asset protected trusts.

We approached the bankruptcy Liquidator (Liquidator) to settle the EUR6 million obligation on “discounted” basis taking into consideration the difficulty the Liquidator would have in collection any assets of Debtor and satisfy these obligations. As a part of the negotiation process a settlement conference was scheduled in Atlantica with the Liquidator and Liquidator’s counsel.

In anticipation of the settlement conference, I delivered to the bankruptcy Liquidator a package of materials relating to Debtor’s assets which disclosed the manner in which Debtor maintained his assets. Our thought was that full disclosure would assist the Liquidator in determining that settlement was better than litigation.

Attached to this article is a copy of a letter which was sent to the Liquidator before the settlement conference. This letter explains the overall situation and what we believe to be the difficult road the Liquidator would have in collecting any meaningful assets and settlement of the alleged debt.<sup>3</sup>

We attended the initial settlement conference in Atlantica. After 15 minutes, the Liquidator advised us that the creditors committee wanted a settlement of 100% of the alleged amount due plus attorney’s fees, court costs and interest. The Liquidator would not agree to any discount. The Liquidator was prepared to go immediately to the courts of Atlantica. He believed he would obtain a judgment against Debtor and proceed to domesticate that judgment in the US.

We flew home.

Eight months following the initial settlement conference we were ordered to appear at a court supervised mediation in Atlantica. Prior to the mediation, the court appointed mediator received all of the same information that was supplied to Liquidator.

I requested that prior to the mediation the mediator seek an opinion of Florida Counsel (at Debtor’s expense) as to matters relating to Florida’s exemption laws against claims of creditors. The mediator agreed that this was a good idea. The mediator retained a Florida Attorney who confirmed all of the matters discussed in my initial letter to the Liquidator.

We returned to Atlantica for the mediation. The Liquidator and Debtor’s counsel presented lengthy arguments as to the strengths and weaknesses of their respective cases. Following these presentations, the mediator advised both sides that the issues raised were somewhat novel and neither side could assume that the Atlantica court would rule in their favour. The mediator then wanted to discuss settlement possibilities. Again the Liquidator held to the “full pay” settlement proposal.

The mediator then discussed my materials along with the opinion the mediator received from Florida counsel. The mediator asked me to

provide my thoughts on settlement possibilities. Those thoughts can be summarised as follows:

- The Liquidator represented the creditors committee. The creditors committee did not have sufficient resources to pursue the litigation beyond the territorial limits of Atlantica.
- Bustedco is exactly that - busted and has no money.
- Debtor is neither a citizen nor resident of Atlantica and maintains no assets in Atlantica.
- Most of Debtor’s assets are either held in asset protected trusts (as disclosed) or subject to the laws of Florida.
- Even if Liquidator prevails in the Atlantica action, his judgment would be virtually uncollectible.
- Neither the creditors in the creditors committee nor Debtor should waste precious assets and time litigating an issue that will result in significant attorney’s fees and no practical resolution.
- I had settlement authority to resolve the matter if it can be resolved on a negotiated basis with a fair settlement taking into account all economic and legal realities.

The mediation continued for the next five hours.

I will disclose the result of that mediation in a brief follow up instalment to this article next month.<sup>4</sup>

## ENDNOTES

1. The information contained herein is provided for information purposes only and should not be construed as legal advice.
2. All names, places and other similar relevant information contained in this Article or the attached letter have been changed to preserve confidentiality.
3. This Article does not take into consideration any United States Federal Income Tax or Estate Tax Issues. All tax issues are beyond the scope of this Article.
4. Readers of this article and the attached letter should not act or refrain from acting based upon the information contained herein without first consulting with and seeking the advice of an attorney.

May 15, 2011

[VIA FEDERAL EXPRESS]

**ATTORNEY/CLIENT PRIVILEGED CONFIDENTIAL NON-DISCOVERABLE SETTLEMENT MATERIALS**

Mr. Foreign Lawyer  
 As Liquidator in the Bankruptcy of BUSTEDCO, LTD  
 c/o Mr. I.M. Flunky, Acting Counsel  
 Basement #1  
 123 Dead End Street  
 Holeintheground, Atlantica

Re: Sidney Debtor (Debtor)

Dear Mr. Foreign Lawyer:

As you know, we are United States counsel for Debtor. We are working with Mr. Valued Colleague who is Atlantica counsel for Debtor.

In anticipation of our settlement meeting, I wanted to provide you with background materials which we will discuss when we meet in Atlantica on June 6, 2011. All of these materials are submitted to you for settlement purposes. Therefore, these materials are non-discoverable in any court proceeding. The submission of these materials does not in any way represent a waiver or admission of any kind on the part of Debtor. This letter will (i) describe the attached materials; (ii) provide you with certain relevant background information on Debtor; (iii) give you general information on the law in Florida concerning collection of debt against a Florida resident, and (iv) provide you with detailed information relating to Debtor's Offshore Trust Planning.

We believe that a thorough review of these materials along with our discussions on June 6, 2011 will lead you to conclude and agree with us that the best interest of all parties is the prompt resolution and settlement of these issues on an amicable basis.

Please review these materials with your team. We look forward to working with you and your team toward the amicable resolution of these matters.

As a basis for the upcoming settlement discussions, please note the following:

- A. If you, as Liquidator, obtain a judgment against Debtor in Atlantica, we recognize that any asset that Debtor owns in Atlantica may be available for seizure in satisfaction of that judgment. Debtor has very limited assets in Atlantica (See Tab "B" for Affidavit of Darling Daughter as to assets of Debtor in Atlantica. A durable power of attorney was issued by Debtor to Darling Daughter who now serves as Debtor's "agent", "attorney" and/or "attorney-in-fact".
- B. In the event Debtor's assets in Atlantica are insufficient to satisfy any judgment, the judgment creditor (in this case you as Liquidator) will have to incur the additional financial expense and delay caused by domesticating Atlantica judgment against Debtor in Florida.
- C. Any attempt to satisfy a judgment in Florida will be determined pursuant to the laws of the State of Florida insofar as the collectability of the judgment and the exemption from collection of various assets which Debtor may own in Florida.
- D. Florida is a "Debtor's haven" as Florida law provides various generous exceptions from assets being seized by creditors of a Florida resident.
- E. In the event you domesticate a judgment obtained in Atlantica against Debtor and seek to enforce collection in Florida, you will be required to retain counsel in Florida to represent your interests. You will also be responsible for all Court costs, discovery expenses and the like that you incur. We believe that this matter is not a "contingent fee" type of matter and therefore you will incur ongoing out-of-pocket hard dollar attorney's fees on a going forward basis.
- F. Debtor is a resident of the State of Florida. As such, Debtor will utilize all available exemptions under Florida Law from collection of any judgment that may be rendered against him.
- G. Below is general information on assets which under Florida law are exempt from claims of creditors. These exemptions present significant difficulty to any judgment creditor in collecting assets from a Florida resident to satisfy a judgment, regardless of the jurisdiction in which the judgment is obtained.
- H. Florida law is clear. Florida law will determine whether assets maintained by a Florida resident in Florida are available for seizure by a judgment creditor. Any such determination must be fully litigated in Florida courts. This presents any judgment creditor with delay in collection and significant increase costs of collection as the judgment creditor will have to retain Florida counsel to proceed in any effort to collect assets of the Florida resident.
- I. The following is an overview of assets which are generally exempt from claims of creditors under Florida law:
  - i. Homestead (Personal Residence). Florida law protects Florida residents' principal residence from forced judicial sale for the benefit of creditors other than mortgagees, government instrumentalities collecting unpaid taxes, mechanic lienors and in some situations, the Internal Revenue Service. You as Liquidator are not such a creditor (See Tab "C" F.S.A. Const. Art. X, Section 4(a)(1); Fla. Stat. Section 222.01, et. al.).
  - ii. Insurance and Annuities. Florida Statute Sections 222.13, exempts life insurance from the claims of creditors of the Debtor insured. Additionally, the "cash surrender value of life insurance policies issued upon the lives of citizens or residents of the state [Florida] and the proceeds of annuity contracts issued to citizens or residents of a state ... shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract ...." (See Tab "D", Fla. Stat. Section 222.14 and 222.14).
  - iii. Interest in Retirement Plan. Under Fla. Stat. Section 222.21 (2) (a), "money received by any Debtor as a pensioner of the United States within three months next preceding the issuance of an execution, attachment or garnishment process may not be applied to the payment of the debts of the pensioner when it is made ...." Also, Fla. Stat. Section 222.21(2)(a) states that "[a]ny money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under Section 401 (a), Section 403 (a), Section 403 (b), Section 408, or Section 409 of the Internal Revenue Code of 1986, as Amended, is exempt from all claims of creditors of the beneficiary or participant." In *Patterson v. Schumate*, 112 S.Ct. 2242 (1992) the United States Supreme Court held that the ERISA exemption for pension and profit sharing plans preempt state law (See Tab "E" Fla. Stat. Section 222.21 (2)(a)).
  - iv. Wages. Fla. stat. Section 222.11 deals with the exempt status of wages. The exemption is limited to the wages of the head of a Florida household for money payable for the personal labor or services. Debtor is the head of the household. This exemption is

limited to wages and not to self-employment income. The exemption is also limited to "disposal earnings" which are earnings of any head of a family remaining after the employer deducts all applicable deductions required by law (See Tab "F" Fla. Stat. Section 222.11(b)).

- v. Disability Income Benefits. Fla. Stat. Section 222.18 exempts disability income benefits under any policy or contract of life, health, accident or other insurance of whatever form (See, Tab "G" Fla. Stat. Section 222.18).
  - vi. Tenancies-by-the-entireties (Assets Owned by Husband and Wife). The common law principle of tenancy-by-the-entireties is ownership of any assets by a husband and wife during their marriage. Debtor is married. Each spouse has the right of survivorship in the property and such property is not subject to partition by creditors. Creditors of one spouse cannot generally make a claim for payment of a judgment against one spouse by utilising tenancy by the entireties assets owned by both spouses. One spouse cannot terminate tenancy by the entireties property and partition it, and defeat the survivorship rights of the other spouse. The Florida courts have consistently held that tenancy-by-the-entireties property is not subject to execution by judgment creditors of an individual spouse Debtor. In re Koehler, 6 B.R. 203 (Bankr. M.D. Fla. 1980). As Debtor's wife is not a party to Atlantica Litigation, generally, their assets held as tenants by the entireties will not be subject to the claims against Debtor individually. Debtor and his family understand the benefits afforded them under Florida law. They hold their assets in such a manner as to minimize loss to potential creditors.
- K. Attached as Composite Tab H are copies of Debtor's Three (3) Offshore Trusts. The situs for the Trusts are (i) the Cook Islands, (ii) the Cayman Islands and (iii) the Bahamas. Each of these Trusts were formed at least three (3) years before any obligations or issues relating to Bustedco existed. All transfers to these Trusts took place prior to the formation of Bustedco and/or debt obligation relating thereto.
- (i) See Tab I for copies of all United States Internal Revenue Disclosure Forms relating to each of the Trusts.
  - (ii) See Tab J for certified Statement from "Big Four" Accounting Firm substantiating dates of transfer to each of the Trusts.
  - (iii) See Tab K for Affidavit of Trustees as to date of transfers into each of the Trusts.
- L. Attached as Tab L is a copy of Debtor's Financial Statement as prepared and certified by Big Four Accounting Firm. A review of this Statement clearly indicates that Debtor's Assets are principally either exempt from the claims of the Liquidator as a result of Florida Law or beyond the Liquidator's Seizure abilities due to the fact that assets are held in offshore asset protected trusts implemented and funded prior to the existence of any alleged obligations.

I look forward to working with you, Mr. Valued Colleague and your team in order to effectuate the prompt resolution and settlement of the above-referenced matter.

Please let me know if you have any questions on any of these materials as I want to be adequately prepared for our upcoming meeting on June 6, 2011.

Very truly yours,

Richard J. Alan Cahan  
For the Firm

RJAC:sh/tfj  
Enclosures

cc: Ms. Darling Daughter  
Mr. Valued Colleague (Via PDF)