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Subject: Jonathan E. Gopman, Anna E. Els & Michael A. Sneeringer – Of Waivers and Exemptions: Protecting Exempt Assets in Florida Following the *Kearney Construction* Case

"The recent opinion issued by the Eleventh Circuit in Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America illustrates how easily courts can undermine the significance of statutory exemptions by misconstruing the public policy considerations of such protections. The Kearney court managed to gloss over the fundamental and generally accepted principle that Florida's exemption statutes are to be liberally construed in favor of a debtor and contradicts legislative intent underlying the enactment of these provisions. Additionally, the court's assertion that an exemption may be waived under the circumstances is dubious and unconvincing.

Such an outcome should concern practitioners seeking to establish effective planning strategies for clients with exempt assets in Florida. Nevertheless, the ruling appears to be an outlier and one deserving of certification to the Florida Supreme Court for resolution."

Jonathan E. Gopman, **Anna E. Els** and **Michael A. Sneeringer** provide members with their commentary on the recent Florida case of *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*.

Jonathan E. Gopman is a partner in **Akerman LLP**'s Naples office and former Chair of the firm's Trusts & Estates Practice Group. He currently serves as a Co-Vice Chair of the Asset Protection Planning Committee of the Real Property, Trust and Estate Law Section of the ABA (for the 2018-2019 bar year) and is a Fellow of the American Bar Foundation. He is a Fellow in the American College of Tax Counsel. He is an adjunct professor at Ave Maria School of Law, currently serving on its Curriculum Advisory Committee and he chaired its first annual Estate Planning Day Conference held in April of 2014. He is a member of the

legal advisory board of Commonwealth Trust Company and STEP. He is AV rated. In 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 he was selected for inclusion in The Best Lawyers in America® and as a Florida Super Lawyer for 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 and included in Florida Trend's Legal Elite for 2010 and 2011. In the Dec. 2005 and 2007 issues of Worth Magazine he was recognized as one of the top 100 estate planning attorneys in the US. He was a co-author of the former revised BNA Tax Management Portfolio on Estate Tax Payments and Liabilities. He has authored and co-authored numerous articles on asset protection and estate planning and chapters in books on asset protection and frequently lectures on these topics throughout the world. He is co-author and co-editor of "The Tools &Techniques of Trust Planning 1st Edition" in 2016 with Stephen R. Leimberg. He has been interviewed for and quoted in a number of publications such as the New York Times, Bloomberg, Forbes, Wealth Manager and Elite Traveler. He is the originator of the idea for the statutory tenancy by the entireties trust ("STET") in 12 § 3574(f) of the Del. Statutes and now part of the Nevis International Exempt Trust Ordinance. His articles and presentations have served as an impetus for changes to the trust laws of several states. In Feb. of 2011, he was appointed to a special committee of the Nevis government and Nevis International Service Providers Assoc. to revise the Nevis International Exempt Trust Ordinance. He recently concluded this project with the passing of a new Ordinance in May of 2015. He was the principal draftsperson of this Ordinance and continues to work with the Nevis government consulting on other laws. He also provided advice and consultation on the proposed revised charging order statute for the Nevis Limited Liability Company Ordinance and together with his former colleague, Linda Charity, provided advice and consultation on the content of the proposed banking ordinance in Nevis. He received his J.D. from Florida State University College of Law (with High Honors) and his LL.M. (in Estate Planning) from the University of Miami School of Law.

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Here is their commentary:

EXECUTIVE SUMMARY:

The Eleventh Circuit's recent opinion in *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*[1] is an unfortunate and bewildering result which appears to contradict longstanding precedent under Florida law, legislative intent and public policy underlying Florida's expansive and generous exemptions which favor the protection and preservation of certain assets from seizure by creditors. While it is a troubling outcome, the holding is nevertheless an anomaly deserving of a fair amount of skepticism and suspicion by practitioners. It is the hope of the authors that the case will generate sufficient criticism that the Florida Supreme Court will deliver the ultimate answer.

FACTS:

Bing Kearney (the "**Debtor**") obtained a line of credit from Moose Investments of Tampa LLC ("**Moose**") and pledged collateral as security for the line pursuant to a security agreement executed on March 1, 2012 (the "**Agreement**"). The Agreement provided in pertinent part:

> As security for any and all Indebtedness (as defined below), the Pledgor hereby irrevocably and unconditionally grants a security interest in the collateral described in the following properties[:] all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all goods (including inventory, equipment and any accessories thereto), instruments (including promissory notes)[,] documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation[s], any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles.[2]

The scope of the collateral subject to the Agreement subsequently became relevant when litigation ensued. Multiple appeals by various appellants resulted. The issue presented in the most recent appeal before the Eleventh Circuit considered whether the Debtor's pledge included the assets held in his Individual Retirement Account ("**IRA**") at US AmeriBank sufficient to constitute a genuine issue of material fact for purposes of summary judgment.[3]

Observing that the Agreement appeared to constitute an "unambiguous pledge" of all assets and rights of the Debtor, the court proceeded to consider the Debtor's intent to include the IRA on his affidavit in connection with the Agreement.[4] The Debtor argued that the IRA should not have been included based upon affidavits previously submitted by both the Debtor and the manager of Moose, respectively. Relying upon the district court's findings of inconsistencies, contradictions and "self-serving" tendencies regarding the affidavits, the court rejected this argument along with the Debtor's assertion that the IRA had not been perfected as a security interest because it had never been delivered to Moose.[5] With only an oblique reference to Florida's statutory protection for IRAs, the court held that the district court had correctly included the IRA as part of the Debtor's security.

COMMENT:

Florida law affords generous protections to cash and other property payable to an owner, a participant, or a beneficiary from, and any interest of any such individual in a retirement or profit-sharing plan qualified under §§ 401(a), 403(a), 403(b), 408 (that is, an IRA), 408A (that is, a Roth IRA), or 409 of the Code by exempting such assets from the claims of creditors of the beneficiary or participant.[6] The exemption applies if the retirement account qualifies as a qualified plan or IRA under the Code. The exemption also applies to governmental and church plans that qualify for tax-exempt status under §§ 414, 457, and 501(a) of the Code.[7] This exemption is in addition to any other exemption from process provided by state or federal law, such as ERISA, which notably does not apply to assets held in an IRA.[8]

Exemptions such as the foregoing have historically been liberally construed in favor of protecting the subject interest holder.[9] For example, Florida's homestead protection, a paramount exemption which

is engrained in both the state's constitution and statutes, has been consistently interpreted generously by courts in favor of protecting the family home.[10]

This liberal construction standard extends to other Florida exemptions analyzed by courts. To illustrate, in *Chase Bank USA, N.A. v. Alfie*,[11] the defendant ("**D**") testified that she lived with her elderly parents and provided more than one-half (1/2) of their economic support. Thus, D argued she was eligible to claim the head of family exemption under the Florida wage exemption pursuant to former Florida Statutes Section 222.12.[12] D claimed her parents were "other dependents" under Florida Statutes Section 222.11. The Court relied on the interpretation of the term "head of family" test[13] where the debtor may show either of the: (1) existence of a legal duty to support arising out of the family relationship at law known as a "family in law"; or (2) continuing communal living by at least two (2) individuals under such circumstances that one is recognized as in charge, known as "family in fact". The court held that D did not qualify under the "*family in law test*" since she had no legal obligation to support her mother and father. Nonetheless, the court found that D did satisfy the "*family in fact test*" as she is the person "in charge" and possessed "a moral obligation to provide support for her elderly, unemployed parents whose sole source of income is a combined $600 per month from social security."[14] Finally, the court also recognized that exemption statutes should be construed liberally in favor of a debtor.[15] Thus, the court held that the term "other dependent"[16] should apply to D's elderly and unemployed parents.

Public policy motivations constitute an important factor for courts weighing the rights of creditors against the potential burden a debtor may place upon the taxpayer. It is also significant that the definition of "asset" contained within Florida's version of the Uniform Fraudulent Transfer Act omits from its scope any asset which is generally exempt under nonbankruptcy law.[17]

Interpreting Florida's statutory protections for wages earned by heads of family, the court in *Killian v. Lawson*[18] emphasized the public policy ramifications of such protections in that they "should be liberally construed in favor of a debtor so that he and his family will not become public charges."[19] Notwithstanding the substantial latitude granted to "honest debtors,"[20] courts are also careful to ensure that such protections do not encourage or enable fraud upon creditors.[21]

Despite substantial precedent which reliably applies Florida's exemption protections in favor of debtors, the *Kearney* court appeared to disregard the breadth of this authority. Instead, the court chose to construe the statutory IRA exemption narrowly and rigidly against the debtor. Such an interpretation contradicts the enduring legislative objective in Florida of ensuring that debtors avoid becoming public charges of the state. The holding also avoids the court's duty to follow the rulings of higher courts when faced with similar issues.

Further, the conclusion of the court in *Kearney* that the Debtor effectively waived the protections of Florida's exemption for IRAs pursuant to the Agreement demonstrates a tremendous disservice to Florida precedent concerning exemption waivers. The language from the Agreement cited in *Kearney* and reproduced above exemplifies the type of "boilerplate" language from which courts have historically attempted to shield the layman debtor.[22] Instead, an effective waiver must be "knowing, voluntary, and intelligent."[23]

Merely having entered into the Agreement would not appear to satisfy the foregoing stringent standard. Instead, the Debtor would have had to demonstrate a thorough understanding of the rights being surrendered. That does not seem a standard that can be proven under the facts in *Kearney*. This procedural hurdle implemented by courts is intended to discourage routine waivers of important rights provided to Florida residents where public policy concerns are pervasive.

Additionally, it is important to note that federal law specifically forbids the use of any portion of an IRA as security for a loan.[24] If such a pledge occurs, the portion (or whole) of the IRA will cease to be treated as an IRA and will instead be deemed a taxable distribution.[25] The court in *Kearney* appears to have overlooked the seemingly broad consequences of facilitating waivers in this manner notwithstanding existing case law which expressly cautions against general tacit contractual waivers and federal statutes which prohibit such pledges.

Procedurally, the decision in *Kearney* is also faulty because the issues raised were deserving of an *en banc* review.[26] Cases which are of exceptional importance merit the *en banc* standard rather than the three judge panel presiding in the *Kearney* case. Finally, the public policy considerations seem worthy of review by the Florida Supreme Court as a question of great public importance.[27]

Conclusion

The *Kearney* decision is deeply flawed for its seeming indifference to established case law, legislative pronouncements and public policy concerns which together form the basis for creditor protection for IRAs. While the holding is the exception rather than the rule among courts interpreting exemption statutes, it appears prudent to cautiously proceed with planning in this area until the issue is clarified by the Florida Supreme Court.

HOPE THIS HELPS YOU HELPS OTHERS MAKE A *POSITIVE* DIFFERENCE!

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is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of **LISI**.

CITATIONS:

[1] *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*, 2019 WL 5957361 (Fla. 11th Cir. Nov. 13, 2019).

[2] *Id.* at *1.

[3] The other issue presented to the court involved the argument that only the Debtor's *pro rata* portion of the IRA was subject to garnishment. However, the court concluded that this issue had not been preserved on appeal.

[4] *Id.* at *2.

[5] *Id*.

[6] Fla. Stat. § 222.21(2)(a).

[7] *Id.*

[8] 29 U.S.C. § 1051. A qualified plan must contain an anti-alienation provision. 29 U.S.C. § 1056(d)(1).

[9] *See e.g. Slatcoff v. Dezen*, 76 So.2d 792 (Fla. 1954) (insurance); *Havoco of Am. Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001) (homestead); *Connor v. Seaside National Bank*, 135 So.3d 508 (Fla. 5th DCA 2014) (annuities).

[10] *See e.g.*, *Milton v. Milton*, 58 So. 718, 719 (1912); *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987)).

[11] *Chase Bank USA, N.A. v. Alfie*, 22 Fla. L. Weekly Supp. 1101b (Fla. Broward Cty. Ct. Mar. 16, 2015).

[12] Fla. Stat. § 222.12. Although cited in this 2015 decision, Fla. Stat. § 222.12, "Proceedings for exemption", was repealed effective July 1, 2013.

[13] *Mazzella v. Boinis*, 617 So.2d 1156 (Fla. 4th DCA 1993) (citing *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980) and *Holden v. Estate of Gardner*, 420 So.2d 1082, 1083 (Fla. 1982)).

[14] *See Nationwide Fin. Corp. v. Thompson*, 400 So.2d 559 (Fla. 1st DCA 1981).

[15] *Mazzella v. Boinis*, 617 So.2d 1156 (*citing Patten Package Co. v. Houser*, 102 Fla. 603, 136 So. 353 (1931); *Farland Loan & Savings Co. v. Pittman*, 108 Fla. 442, 146 So. 554 (1933); *Slatcoff v. Dezen*, 76 So.2d 792 (Fla. 1954)).

[16] Fla. Stat. § 222.11.

[17] Fla. Stat. § 726.102(2)(b).

[18] *Killian v. Lawson*, 387 So.2d 960 (Fla. 1980).

[19] *Id*. at 962 (citing *Patten Package Co. v. Houser*, 102 Fla. 603, 136 So. 353 (1931); *Elvine v. Public Finance Co.*, 196 So.2d 25 (Fla. 3d DCA 1967)).

[20] "[E]xemption laws were 'designed for the honest debtor'. . .". *Slatcoff v. Dezen*, 76 So.2d 792, 793 (Fla. 1954) (citing 22 Am.Jur., Exemptions, Section 140).

[21] *Pasco v. Harley*, 75 So. 30 (Fla. 1917).

[22] *See e.g. Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

[23] *Id*. at 861 (citing *State v. Upton*, 658 So.2d 86, 87 (Fla.1995)).

[24] I.R.C. § 4975(e)(4).

[25] *Id*.

[26] Rule 9.331, Fla. R. App. P. (2018).

[27] Fla. Const. art. 5, § 3(b)(4).