THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Wills, Trusts & Estates

Potential personal liability of estate trustees and their lawyers

By **Bradley Phillips**

Bradley Phillips

(April 29, 2020, 2:28 PM EDT) -- When it comes to the doctrines of *plene administravit* and *devastavit*, timing is important.

Plene administravit

Plene administravit, which is Latin for "fully administered," is a doctrine and defence that is available to an estate trustee when a creditor brings a claim against the estate but there are no, or insufficient, assets in the estate to satisfy any judgment and costs.

One might think that if there are no assets in the estate the smart play for the estate would be to defend the litigation for two years (until the limitation period expires) so as to have the plaintiff maintain focus on the estate (that has no assets and is therefore "judgment proof") while any potential claims against the estate's beneficiaries become statute barred. Some commercial litigators employ this strategy to protect individual shareholders when plaintiffs sue a shell company. However, in the estate context that would be a mistake, given that the estate trustee may find him or herself personally exposed to the creditor's claim.

If plene administravit is pleaded as a defence and a court concludes that the assets of the estate were in fact distributed prior to the estate trustee obtaining any notice of the claim, it may provide a defence to the estate trustee. Pleading plene administravit however, does not automatically provide a complete defence to an estate trustee. Rather, when pleaded, the doctrine shifts the onus to the plaintiff to prove that estate assets existed or ought to have existed in the hands of the estate trustee to satisfy the judgment *at the time the action was commenced*.

The *failure* to plead plene administravit as a defence can have significant personal repercussions for an estate trustee. This is because in the absence of an express pleading of plene administravit, the estate trustee will be taken to have conclusively admitted that the estate has the assets to satisfy the judgment and if ultimately there are insufficient assets to satisfy the judgment and costs, the court may look to the estate trustee personally for any such award that may be made as against the estate.

On a positive note, all hope is not lost if an estate trustee fails to plead plene administravit. First, whereas historically the failure to plead plene administravit created strict liability for the estate trustee, over time, the court has found that the failure to plead does not automatically result in the estate trustee having personal liability — although it certainly still makes their defence more challenging.

Second, a court may allow an estate trustee to amend their defence to add the doctrine later, even if it was not originally pleaded, in certain circumstances. In *Brummund v. Baumeister Estate*, [2000] O.J. No. 4840, the Court of Appeal upheld a trial judge's decision to allow the defendant estate trustee to amend his defence at the conclusion of the trial to plead the doctrine. The Court of Appeal held that the plaintiff was not prejudiced by the amendment. In particular, the plaintiff had charged the estate trustee with the related doctrine of devastavit, discussed below, which resulted in the same facts pertaining to plene administravit being fully canvassed at trial (hence there being no

prejudice for the late amendment of the pleading).

Devastavit

In order to attract personal liability against an estate trustee, a creditor/plaintiff must charge the estate trustee with devastavit. Devastavit, or a wasting of assets, was defined by the Court of Appeal in the leading case, *Commander Leasing v. Aiyede* [1983] O.J. No. 3269, to be "…mismanagement of the estate and effects of the deceased, in squandering or misapplying the assets contrary to the duty imposed on them, for which the executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased."

In *Commander Leasing*, the estate trustee distributed the proceeds of the estate to the beneficiary (herself), *after* a claim had already been initiated by a creditor of the estate, of which the estate trustee was aware. The plaintiff also charged the estate trustee with devastavit. The Court of Appeal first found that as the doctrine of plene administravit had not been pleaded by the estate trustee, she was deemed to have admitted that the estate had assets available to satisfy the judgment at the time the claim was commenced.

Despite this finding, the estate trustee still had the opportunity to explain why there had been a depletion of the assets in response to the charge of devastavit. However, the court found in *Commander Leasing* that as no bona fide explanation for the distributions was provided, the doctrine of devastavit applied and accordingly, the estate trustee was held to have personal liability to the estate's creditor.

As can be noted from the definition of devastavit set out in *Commander Leasing*, for an estate trustee to be charged requires more than just taking actions that resulted in losses by the estate. If a court finds that an estate trustee has acted honestly and reasonably in fulfilling their obligations as trustee, a loss of assets will not result in a finding of devastavit.

Needless to say, it is imperative for both the estate trustee and his/her lawyer to be familiar with these doctrines given the personal liability of the estate trustee that could arise if plene administravit is not pleaded as a defence. A lawyer who fails to advise his or her clients of the need to raise this doctrine in a defence may expose their clients to personal liability, which in turn could lead to the lawyer being named in an action arising from their failure to provide their clients with this important information.

Bradley Phillips is a partner and a member of Wagner Sidlofsky's LLP's *estate and commercial litigation groups.*

Photo credit / seb_ra ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Richard Skinulis at* Richard.Skinulis@lexisnexis.ca *or call 437- 828-6772.*

© 2020, The Lawyer's Daily. All rights reserved.