

## SmolenPlevy Winter 2009-2010

### Attorney Profile - Jason Smolen

Jason Smolen is thinking about advising his clients to move. Not that he wants them out of the area--far from it. But with the economy uncertain, the deficit burgeoning and new taxes a possibility, financial savings for many could mean a change of address. Unusual? Yes. But it's the type of innovative thinking that has established Smolen as a recognized leader in business and estate law.

"Right now my clients are very concerned about the direction their taxes are going," explains Smolen, SmolenPlevy's cofounding principal. "Part of my job is to figure out how to mitigate their exposure to higher taxes and that includes looking in which state they should live." As Smolen sees it, there is a lot of fluidity in where people live in the Washington DC metropolitan area. For instance, clients who move out of Maryland could save on two fronts, income tax presently and later, estate taxes for their heirs. "Maryland is extraordinarily expensive," says Smolen. "There's a so-called 'millionaires surtax' on annual income over a million dollars--and higher taxes on any estate valued over a million dollars. My question is, tax-wise, why would you ever want to live in Maryland if you have other choices?"

As to where clients should relocate, Smolen says Virginia offers some savings--both from an income tax and estate tax perspective. The Sunshine State also has its benefits, with no income tax. "I had one client buy a house in Florida, basically for free," Smolen says. "It was paid for by the money they saved on taxes just by moving out of their original home state--and it wasn't an inexpensive house."

Smolen doesn't proffer this advice lightly, realizing the enormity of the recommendation. "I'm not suggesting that money is more important than social, family and community connections," he says. "But if the clients' children and other family members are grown or gone, you'd be remiss not to talk about what states are more tax friendly than others." In some cases, Smolen suggests keeping a house in their current state, but not making it their primary place of residence.

This bold thinking reflects Smolen's creative approach to clients' concerns. "We leave nothing off the table when we give our clients options," says Smolen. But as forward thinking as he is, Smolen makes it a point to consider each idea thoroughly. "We're aggressive thinkers, but conservative implementers," he says. "Whatever options we come up with, we want to absolutely make sure each will work while best addressing the clients' concerns."

Smolen has been gaining recognition for his knowledge of complex business transactions, trusts and estates for more than three decades. In 1977, Smolen teamed with fellow George Mason University School of Law graduate, Alan Plevy, to create SmolenPlevy. Early on, Smolen says, "I did anything and everything," referring to the breadth of his areas of practice. "It was an incredibly valuable time, because it gave me a wide range of experiences to determine what I enjoyed doing the most, and where I could be most valuable to our clients." Over time, Smolen concluded that his passion was in helping clients shape business and estate strategies, rather than in the courtroom. His practice areas now include general

corporate and business law, tax planning, mergers, acquisitions & sales, fiduciary services, succession planning and trusts & estates.

Along with his experience, Smolen feels one his greatest strengths is his ability to listen to clients and learn about their issues. "That's the only way to come up with well thought out and creative solutions to accomplish their objectives."

Smolen adds the challenge is to match a client's wants with their legal needs. "We don't just have square pegs and square holes. It's mostly a world of gray--not black and white." For instance, Smolen recalls the time a client asked for a simple review of a will that had been written elsewhere. Smolen looked over the document and told the client it was exactly everything they had originally asked for, except it would have cost the client millions of dollars in unnecessary taxes. Smolen solved the problem by revising the document and revising their corporate structure. But the scenario is familiar. "Often clients will come in and think they need just this or that," Smolen says. "But that's like going to the doctor and demanding a particular medicine. There needs to be analysis of the issues before one can say that a particular remedy is appropriate. It's important to me to learn the client's goals, whether it's for their business or their estate plan-and frequently, suggest and implement something they're not previously knowledgeable about or considering. More often than not, our conversation reveals there are other issues that need to be resolved."

Smolen's expertise has gained him accolades and plenty of media attention. SmartCEO Magazine just nominated him as one of its prestigious Legal Elite, cementing his reputation as a "go-to" attorney in the DC area. His analysis of the issues surrounding Michael Jackson's controversial will received television coverage from FOX 5 and WUSA 9, while his comments on the proper approach to firing during the economic downturn were quoted nationwide, including online on Forbes.com and USA Today. George Mason University's Alumni Magazine just ran a large profile, spotlighting Smolen, his business partner and their firm's success.

And what is Smolen recommending to his clients right now? "A review of their estate plan," answers Smolen, "Especially if it's something you had written 10 years ago. The laws have changed, your life has changed and your plans need to change too." As Jason Smolen proves, that review will be thorough and far-reaching--perhaps even leading to new states.

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## Lender Must Return Debtor's Vehicle

Theodore entered into an installment contract with a corporate creditor for the purchase of a new automobile. A few years later, he defaulted on his installment payments, and the creditor repossessed the vehicle. Not long after that, Theodore filed for bankruptcy in federal bankruptcy court.

Needing his car to commute to work, he requested that the creditor return the vehicle to his bankruptcy estate. When the creditor refused to return the vehicle, absent what it deemed "adequate protection" of its interests, Theodore moved for sanctions under a Bankruptcy Code provision, claiming that the creditor had willfully violated the automatic "stay" provision in the Bankruptcy Code. The stay provision forbids a creditor from committing any act to obtain possession of property from the bankruptcy estate, or to "exercise control" over the property of the estate, once the debtor has filed for bankruptcy.

In Theodore's case, the creditor could not be said to have acted to obtain possession of the vehicle after the bankruptcy filing, because it already possessed the car at that point. Thus, one issue was whether it could be said to have "exercised control" over the vehicle by simply keeping it and refusing to return it to the debtor, as opposed to selling or doing something else with it.

A federal appellate court answered this question in the affirmative. It held that, upon the request of a debtor that has filed for bankruptcy, a creditor must first return an asset in which the debtor has an interest to his or her bankruptcy estate and then, if necessary, seek adequate protection of its interests in the bankruptcy court. To hold that "exercising control" over an asset refers only to selling or otherwise destroying the asset would not be logical, given the central goal of reorganization bankruptcy. That goal is to gather together all of the debtor's property in the bankruptcy estate, so that the debtor may rehabilitate his or her credit and pay off his or her debts. This applies to all property, even property (such as Theodore's car) that is lawfully seized before the filing of a bankruptcy petition.

The court essentially ruled that the creditor's position had put things in the wrong order. Instead of being permitted to hang on to the vehicle until it felt satisfied that its interests would be protected, the creditor had to first return the asset to the bankruptcy estate. Then, if the debtor failed to show that he could adequately protect the creditor's interests, the bankruptcy court was empowered to condition the right of the estate to keep possession of the asset on the provision of certain specified adequate protections to the creditor.

Some other considerations also weighed in favor of placing the onus on the creditor, rather than on Theodore, to seek relief from the court if it believed that its interests were not adequately protected. First, the whole purpose of reorganization bankruptcy, be it corporate or personal, and of the stay in particular, is to allow the debtor to regain his financial foothold and repay his or her creditors. Properly implemented, a stay allows a debtor free use of his or her assets while the court works with both the debtor and the creditors to establish a rehabilitation and repayment plan. In theory at least, these assets generate money that could contribute to paying down the debtor's obligations. In Theodore's case, if his car remained in the hands of the creditor, it could hamper him from going to work (or, in other cases, from finding work), which is crucial for getting the funds necessary to pay off his debts.

Second, allowing a creditor to maintain possession of an asset until it decides on its own that adequate protection is in place, or until the debtor moves for the asset's return, gives the creditor an unfair bargaining advantage over other secured creditors.

Finally, requiring the debtor, rather than the creditor, to bear the costs of seeking court relief hurts not only the debtor but all of the debtor's other creditors by draining the value of the bankruptcy estate. The court reasoned that it makes more sense for all creditors to move before the court in a consolidated proceeding to have their assets adequately protected than for a debtor to file multiple motions piecemeal in an attempt to recover assets that may be scattered among many creditors.

## Medicaid Benefits And Special Needs Trusts

A permanently disabled Medicaid recipient residing in a nursing home challenged an informal rule issued by the federal Department of Health and Human Services which requires that, for purposes of determining the benefits due to a Medicaid-eligible individual, states must consider income placed in a Special Needs Trust for that individual's benefit. (Medicaid provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs.) The challenged rule

effectively prevents Medicaid recipients from using Special Needs Trusts to shelter their monthly Social Security Disability Insurance (SSDI) income from certain Medicaid determinations. In the case before the court, the plaintiff's legal guardian had created a Special Needs Trust on the plaintiff's behalf and had been depositing into it the plaintiff's monthly SSDI benefits, minus some income deductions that were not at issue.

The end result of applying the challenged agency rule is that income placed in a Special Needs Trust is not considered in making the first determination of eligibility for Medicaid, but is considered in making the second determination of the extent of benefits to which an eligible individual is entitled. Relying on the agency rule, appropriate officials may count the income that an institutionalized individual places in a Special Needs Trust when determining how much of the individual's income he or she must contribute to the cost of his or her care.

In his class action lawsuit, the Medicaid recipient, on his behalf and that of similarly situated persons, unsuccessfully argued that the rule conflicts with the express language of a part of the Medicaid laws. A federal appeals court rejected the plaintiff's reading of the pertinent statute, instead concluding that Congress did not speak to the precise question presented by his claim. Under accepted principles of administrative law, this meant that the federal agency was free to "fill the gap" left by Congress. When it did so, that was an appropriate exercise of the agency's authority, to which the court deferred.

## Golfer Can't Be Sued For Errant Shot

Azad and Anoop were friends and frequent golf partners. The friendship was no doubt strained when they became adversaries in litigation arising from an injury to Azad during a golf outing. A shot struck by Anoop hit Azad in the eye, causing a serious injury. There was a factual dispute as to whether, when he saw his wayward shot heading for Azad, Anoop yelled "fore" or some other warning, as golf etiquette would dictate. Anoop said he did call out something, while Azad and another witness said they heard no warning at all.

In the end, whether or not a verbal warning had occurred made little difference in the case, because the court ruled that Anoop had no legal duty to give such a warning under the circumstances. Anoop did not owe his fellow golfer a duty to give a warning about a shot, where Azad was out ahead of Anoop but at least 50 degrees away from the intended line of flight. Some courts have spoken of a duty to warn those within the "foreseeable danger zone" of a golf shot, but even they recognize that, at some point, the distance and angle are great enough to take the injured person out of the danger zone. Ironically, you could say that the worse the shot (and, thus, the more unexpected the path that the ball takes), the less likely it is that there could be a duty to warn.

An even more basic flaw in the lawsuit stemmed from the court's conclusion that, from the time he stepped onto the first tee, Azad had assumed the commonly appreciated risks of playing golf, one of which is that golfers hit lots of misdirected shots. The risks that participants in sporting or recreational activities are deemed to have consented to are those which are inherent in participation in the sport. Relieving a participant from liability furthers a policy of facilitating free and vigorous participation in sporting and recreational activities. While Azad's case was unsuccessful, this should not be taken to mean that a golf course is lawless terrain, where golfers can do whatever they please with impunity. Reckless or intentional conduct, or concealed or unreasonably increased risks, can still result in liability

for injuries, but hitting a lousy shot and not yelling "fore" is not enough to make a duffer pay damages to another golfer unlucky enough to be in the line of fire.

## Tax Breaks For College Costs

Persistently increasing college costs may have joined death and taxes as inevitable facts of life. Still, it is usually possible to soften the blow of escalating costs of higher education by taking advantage of an assortment of income tax breaks provided by the federal government. The options and their ramifications for your tax bill are not as simple as they might be, so it may be prudent to get some professional advice. Given the large sums of money at stake, you do not want to leave any smart moves unmade for lack of information and timely advice.

### *American Opportunity Tax Credit*

This year, the American Opportunity Tax Credit effectively replaces the Hope Scholarship Credit. Taxpayers spending at least \$2,000 for tuition, fees, books, and materials for higher education can save \$2,000 in taxes with a dollar-for-dollar credit. Expenses over \$2,000 bring an additional tax credit of 25 cents on the dollar, and, if expenses reach \$4,000, there is a maximum credit of \$2,500. The credit is available per student, so that a family with more than one college student can achieve even larger total benefits. Up to 40% of the American Opportunity Tax Credit is refundable, so that some of the tax credit may be received as a tax refund if the credit for which the taxpayer qualifies exceeds his or her income tax liability. This credit phases out for taxpayers with a modified adjusted gross income between \$80,000 and \$90,000 (\$160,000 and \$180,000 for married couples filing jointly).

### *Lifetime Learning Credit*

While the American Opportunity Tax Credit is limited to the first four years of education after high school, the Lifetime Learning Credit, as the name suggests, may be claimed for any year of higher education, such as years spent in graduate or professional schools. Another distinction between the two credits is that the Lifetime Learning Credit is available for any course of study relating to job skills at an accredited school, whereas the American Opportunity Tax Credit requires that the student be enrolled at least on a half-time basis. The phaseout income ranges are lower than for the American Opportunity Tax Credit, by margins of \$30,000 for individuals and \$60,000 for married couples filing jointly.

Calculated at 20 cents on the dollar, the Lifetime Learning Credit maxes out at \$2,000, for \$10,000 in tuition and related expenses. It is not refundable. Unlike the American Opportunity Tax Credit, which is determined per student, the Lifetime Learning Credit is calculated per taxpayer, so any one taxpayer has the above maximum no matter how many individuals in a family are studying at the postsecondary level. A taxpayer may not use both credits for the same student in the same year, but different credits may be used for different students' expenses in the same year.

### *Tuition and Fees Deduction*

A tax credit, by shaving off the actual tax bill, does more for a taxpayer's bottom line than a deduction, which only reduces the income on which the tax will be imposed. Still, there is a third option in the form of a tax deduction for tuition and related fees, although it cannot be used in the same year for the same student as either of the tax credits previously described. This deduction, which is available even for taxpayers who do not itemize deductions, can be as large as \$4,000 for modified adjusted gross incomes up to \$65,000 (\$130,000 for married couples filing jointly). The deduction is cut in half for even one dollar above those incomes, and disappears altogether when the income levels top \$80,000 (\$160,000 for married couples filing jointly). Another limitation on this deduction is that it cannot be claimed for expenses paid with money from a Section 529 plan or withdrawals from a Coverdell Education Savings Account.