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Bankruptcy Pitfalls of Big Law LLPs for Big Law Firms And Suggested Alternative(s)

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Introduction

Large law firms' (Big Law Firms[2]) use of the limited liability partnership form of business organization (Big Law LLPs) has been growing more and more common since the early 1990s.[3] A number of such Big Law LLPs have hit economic hard times, with some Big Law LLPs either voluntarily filing for—or, not uncommonly, being required by creditors to file for—bankruptcy.[4]

Under a combined reading of the Revised Uniform Partnership Act of 1997 (RUPA) and the Uniform Fraudulent Transfer Act of 1984 (UFTA), it is clear that partners in such Big Law LLPs may not safely draw personal compensation of any kind or type whatsoever from their Big Law LLPs pre-petition once those Big Law LLPs have otherwise become insolvent.[5]

Thus, RUPA section 401(h) provides: ***"A partner [including a partner in a limited liability partnership] is not entitled to remuneration for services performed for the partnership …."*** *See also* UFTA section 4(a)(2), where it is said: ***"A transfer made … by a debtor is fraudulent … if the debtor made the transfer … without receiving a reasonably equivalent value in exchange for the transfer … and the debtor [was insolvent].***"[6] This

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[2] *See* http://en.wikipedia.org/wiki/List_of_100_largest_law_firms_by_revenue.

[3] *See* Susan Saab Fortney, *Tales of Two Regimes For Regulating Limited Liability Law Firms In The U.S. and Australia: Client Protection And Risk Management Lessons*, 230 (Texas Tech School of Law Legal Studies Research Paper No. 2010-15), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427298 ("Since the birth of the limited liability partnership (LLP) structure in the United States in 1992, the limited liability firm has evolved as a popular organizational structure for United States' lawyers practicing in large law firms."); Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 Business Lawyer 1387, 1401 (2003) (among firms with 50 or more lawyers in 2002, 48% were LLPs).

[4] *See*, *e.g*., *In re Brobeck, Phleger & Harrison, LLP*, United States Bankruptcy Court for the Northern District of California, Case No. 03-32715 (BrobeckBK); *In re Coudert Brothers LLP*, United States Bankruptcy Court for the Southern District of New York, Case No. 06-12226 (CoudertBK); *In re Dewey & LeBoeuf, LLP*, United States Bankruptcy Court for the Southern District of New York, Case No. 12-12321 (DeweyBK); *In re Heller Ehrman, LLP*, United States Bankruptcy Court for the Northern District of California, Case No. 08-32514 (HellerBK); *In re Howrey LLP*, United States Bankruptcy Court for the Northern District of California, Case No. 11-31376 (HowreyBK); *In re Thelen, LLP*, United States Bankruptcy Court for the Southern District of New York, Case No. 09-15631 (ThelenBK). *See also* http://en.wikipedia.org/wiki/Category:Defunct_law_firms_of_the_United_States.

[5] The fraudulent transfer based-theory of claw-back liability as against Big Law LLP partners appears to have been advanced for the first time by the BrobeckBK Chapter 7 trustee. *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0002, n. 2 and n. 3; *see also* BKPIT0053 at ¶11 (citing Cal. Corp. Code §§ 16401(h), 16957). All adversary proceedings between the BrobeckBK Chapter 7 trustee and the various Brobeck LLP partners were settled without any final, non-appealable judgment on the merits by Bankruptcy Judge Dennis Montali respecting the BrobeckBK Chapter 7 trustee's claw-back claims. *See*, *generally*, David M. Stern, *Law Firm Bankruptcies 8-9* (Program 11, 85th Annual Meeting of the State Bar of California, October 11, 2012).

[6] While—given that changes to RUPA § 401(h) are nowhere forbidden by RUPA § 103(b)(1)-(9) (any more than changes to RUPA § 306(a) are not forbidden by RUPA § 103(b)(1)-(9))—RUPA § 401(h) may be changed by agreement by Big Law LLP partners *inter se*; nonetheless RUPA § 401(h) is very likely ***not*** subject to change by agreement by Big Law LLP partners *vis-à-vis* individual creditors without the agreement of such individual creditors. *See* RUPA § 103(b)(10) and Cmt. 12 (mandating that "the rights of a third party under the Act may not be restricted by an agreement among the partners to which the third party has not agreed"). *Cf. Annod Corp. v. Hamilton & Samuels*, 100 Cal.App.4th 1286 (2002) (holding a general partnership agreement which allowed partners to draw salaries rather than limit themselves to profit sharing trumped general partnership law for purposes of determining issue of what constituted reasonably equivalent value under California version of UFTA § 4(a)(2) [Cal. Civil Code § 3439.04]). Note, however, that *Annod* does not discuss the California version of RUPA § 103(b)(10) (Cal. Corp. Code § 16103(b)(10)) and its flat prohibition on partners' modifying, *inter alia*, the California version of RUPA § 401(h) (Cal. Corp. Code § 16401(h)), to the prejudice, *inter alia*, of a partnership's individual creditors without their consent. Meaning *Annod* disregards the fact that (i) allowing limited liability partners to make an agreement, *inter se*, to convert partners from a profit-sharing-only-model under RUPA § 401(h) to a contractual fees-for-services-model amounts to restricting third persons' rights to avoid dilution on account of the partners' fees-for-services claims, just like (ii) allowing general partners (without their first complying with RUPA § 306(c)) to make an agreement, *inter se*, contractually limiting the partners' joint and several liability under RUPA § 306(a) amounts to restricting third persons' rights to recourse against partner's personal assets, is clearly an act by the partners in derogation of RUPA § 103(b)(10) and is thus ineffectual as against third persons. Further note that RUPA § 401(h)'s mandatory limitation on partner's rights to remuneration as coming from profits only is in stark contrast to the fees-for-services rights to remuneration held by shareholders who also happen to be employees of professional services corporations. *See* A.B.A. Committee on Corporate Laws, *Professional Corporation Supplement to the Model Business Corporation Act*, 32 Business Lawyer 289 (1976) (containing no equivalent to RUPA § 401(h)). *See also* Revised Uniform Limited Liability Company Act of 2006 (RULLCA) § 405(g) (defining "distribution" as not including any fees-for-services paid to a member of a limited liability company by said limited liability company, even while limited liability company is insolvent). *See also* n. 21, *infra*, for further discussion of the impracticability of a Big Law Firm employing the limited liability company form of organization as an alternative to either the limited liability partnership or the professional services corporation form of

'no remuneration of right' restriction in RUPA not only ultimately exposes partners in failed Big Law LLPs to post-petition claw-back claims by bankruptcy trustees, it also creates a serious risk of unlimited post-petition liability for such partners in failed Big Law LLPs under alter ego doctrine.[7]

This latter problem has its origins in (i) the fact limited liability partners are almost certainly subject to the alter ego doctrine in or out of bankruptcy;[8] as well as (ii) the fact that—of all the various types of persons entitled to organize as professional services limited liability partnerships—lawyers who are partners in failed Big Law LLPs will be presumed to know the laws governing their chosen form of business organization. Meaning such lawyers will be disbelieved by juries as, when and if they dare testify that they accepted compensation from their then-insolvent Big Law LLPs in ignorance of the clear legal restrictions forbidding their receipt of any such post-insolvency compensation.[9]

Big Law LLP Partners and Alter Ego

Limited liability partnerships are, at the election of their partners, taxable as partnerships.[10] Such partnerships otherwise provide just as much insulation from personal liability to such partners as corporations, including professional services corporations, provide for their shareholders.[11] As previously noted, however, and when it comes to partners' rights to distributions, RUPA does not distinguish limited liability partnership distributions from general partnership distributions, i.e., RUPA section 401(h) does ***not*** recognize such distributions as a matter of right in either case.

Surprisingly, however, most, if not all, Big Law LLP partners refuse to grasp the simple notion that they can't have their cake and eat it too. Meaning they can't—at least not as partners in any sort of partnership, be it a general or a limited liability one—borrow money on a secured basis from banks to pay themselves draws and then, if insolvency is retroactively found, reasonably hope to avoid claw-back and/or alter ego liability to their creditors. Especially if their failed entity, like the once proud but now hopelessly insolvent Howrey LLP, actually goes bankrupt.

Thus, experience teaches that Big Law Firm bankruptcies inevitably result in two main things: (i) massively uncollectible accounts receivable and (ii) the application by bankruptcy trustees of 20/20 hindsight, a very particularized weltanschauung[12] which inevitably winds up characterizing Big Law Firms that wind up bankrupt as having been insolvent long before their petition dates.

From an alter ego perspective RUPA's disallowance as a matter of right of partner distributions *vis-à-vis* general partners is not significant because—with there being ***no veil*** to pierce in the first instance—general partners in general partnerships are not subject to alter ego

organization.

[7] Following a Big Law LLP's filing for bankruptcy—and as between a bankruptcy trustee and the individual creditors of a Big Law LLP—the issue of who, if anyone, exclusively owns alter ego is an issue largely beyond the scope of this article. The potential alter ego liability of Big Law LLPs' partners to at least someone remains a major problem for those unfortunate partners in any case. Note that in pari delicto defenses available to such Big Law LLP partners as against bankruptcy trustees in most (if not all) jurisdictions are likely ***not*** available to them as against individual creditors' alter ego rights when such individual creditors' alter ego rights are independently recognized by applicable nonbankruptcy law, all as is described *infra*.

[8] *See In re Adelphia Communs. Corp.*, 376 B.R. 87, 108 (Bankr. S.D.N.Y. 2007) (where the bankruptcy court explained in a limited partnership context [***not*** in a limited liability partnership context] that: "Although most veil-piercing cases have been decided in the context of corporations rather than partnerships there is nothing about the nature of a limited liability partnership [where the limited partner is sometimes likened to a shareholder] that would preclude recourse to veil piercing as an equitable remedy in appropriate circumstances."); see also https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0007 citing Alan Bromberg and Larry Ribstein, Bromberg & Ribstein on Limited Liability Partnerships etc., § 7.02 (2012 ed.) (Bromberg) and the authors' extended discussion (at p. 243, n. 48a) of the fact that *In re: Rambo Imaging, L.L.P.,* 2007 WL 3376163 *10 (Bankr. W.D. Tex. 2007) has held 11 U.S.C. § 101(9)(A)(ii) defines a bankrupt limited liability partnership as constituting a corporation post-petition, while elsewhere within § 7.02 arguing against such treatment of bankrupt limited liability partnerships as corporations on various public policy grounds—regardless of the clear language of 11 U.S.C. § 101(9)(A)(ii).

[9] *See*, *e.g.*, *Supple v. City of Los Angeles*, 201 Cal. App. 3d 1004, 1011 (1988) ("A lawyer is presumed to know the laws and rules of procedure which govern the forms of litigation, the legal remedies, which he selects and pursues.")

[10] *See* Bromberg § 7.05(a) (noting that limited liability partnerships may elect to be taxed as pass-through entities rather than stand-alone entities).

[11] RUPA § 306(c). *Cf*. cmt 3 to RUPA § 306, which reads, in pertinent part: "Subsection (c) alters classic joint and several liability of general partners for obligations of a partnership that is a limited liability partnership. Like shareholders of a corporation and members of a limited liability company, partners of a limited liability partnership are not personally liable for partnership obligations incurred while the partnership liability shield is in place solely because they are partners. As with shareholders of a corporation and members of a limited liability company, partners remain personally liable for their personal misconduct."

[12] *See* http://en.wikipedia.org/ wiki/World_view.

doctrine to begin with.[13] However, RUPA's disallowance as a matter of right of partner distributions *vis-à-vis* limited partners in limited liability partnerships (who have a great deal to lose if ***that otherwise existing veil*** is pierced) is highly significant.[14]

Why? Because looting one's own law firm post-insolvency but pre-bankruptcy—all to the detriment of innocent individual creditors—is suicidal for the wealthy, highly educated members of America's legal elite who are the typical partner constituency in Big Law Firms.[15] Especially before lay jurors who will be instructed that such evidence is highly relevant to their determination to impose an alter ego remedy on such clay pigeon defendants.[16]

Exceptions to the Applicability of In Pari Delicto as Same Otherwise Might Eliminate the Alter Ego Liability of Big Law LLP Partners

Big Law LLP partners sued for alter ego may raise an in pari delicto defense as against a bankruptcy trustee similar to the one such Big Law Firms often successfully raise when they are sued for looking the other way while the management of their corporate clients loot such entities. Always assuming, of course, that it is a bankruptcy trustee that is doing the claiming against such Big Law Firms under 11 U.S.C § 541(a)(1) and ***not*** some individual creditor(s) of a debtor—or a bankruptcy trustee in his or her capacity as a creditor representative under 11 U.S.C. § 544(a)(1)—claiming one of the latter 'owns' alter ego.[17]

In this last connection, the reader should note that there is a ***very*** lively debate going on in the HowreyBK about who—if anyone, and, if one there be, then who, as between individual creditors of Howrey LLP and the HowreyBK Chapter 11 trustee (acting in one or more capacities)—exclusively 'owns' alter ego in that bankruptcy case.[18] Alternative approaches to this 'who-owns-what-and-if-so-how-do-they-own-it' issue in the HowreyBK may be summarized as follows:

1. The trustee owns alter ego post-petition under 11 U.S.C. § 541(a)(1) because the debtor may self-pierce the corporate veil post-petition (Theorem 1).
2. The trustee owns alter ego post-petition under 11 U.S.C. § 544(a)(1) because alter ego, to the extent dependent on evidence of corporate looting, is derivative of the trustee's rights under 11 U.S.C. § 544(a)(1) (Theorem 2).
3. The individual creditors own alter ego post-petition because no one 'owns' evidentiary facts and, in most jurisdictions, alter ego is a remedy

[13] *See Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 499 (Tex. App. Texarkana 2002), where the Court explained: "Alter ego is inapplicable with regard to a [general] partnership because there is no veil that needs piercing …."

[14] In many ways, this absolute nightmare scenario of a Big Law LLP partner's winding up having alter ego applied to his or her Big Law LLP is even worse for such a Big Law LLP partner than his or her being subjected to the so-called "jingle rule" in a general partnership context would be. *Compare* 11 U.S.C. § 723 (which requires general partners to make up net deficit in general partnership bankruptcy cases, subject to the protections, for example, of 11 U.S.C. § 502(b)(6) [one year cap on lease liability]) with alter ego doctrine which, in the context of a long term real estate lease, does not implicate the protections of 11 U.S.C. § 502(b)(6).

[15] As the saying attributed to Aristotle goes, "nature abhors a vacuum." *See* http://en.wikipedia.org/wiki/Horror_vacui_(physics). Consistent with this aphorism, lay juries will likely not abide lawyers not paying just debts otherwise due lay persons and then hiding behind corporate forms based on their claims that such lawyers, of all people, meant no harm because they were, sadly, ignorant of the law.

[16] Alter ego has often been held to present a jury question in the federal courts. *See*, *generally*, https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0004, n. 5, citing cases; *see also International Financial Services Corp., v. Chromas Technologies Canada, Inc.*, 356 F.3d 731, 736 (7th Cir. 2004) discussing right to jury trial in alter ego cases, citing, *inter alia*, *Wm. Passalacqua Builders v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir. 1991) for the proposition that alter ego historically presents a mixed question of law and equity, rendering the issue of the right to jury trial for alter ego inherently uncertain. Next, the reader should note that commingling is relevant evidence of alter ego and, as such, and even in isolation, such evidence will support a plaintiff's jury verdict finding alter ego should be applied. *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0223, citing Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 Or. L. Rev. 853, 856-58 (1997).

[17] In most, if not all federal circuits, in pari delicto is typically a very potent defense indeed to any 11 U.S.C. § 541(a)(1) claim by a bankruptcy trustee. *See*, *generally*, William McGrane, *The Erroneous Application of the Defense of In Pari Delicto to Bankruptcy Trustees*, 29 Cal. Bankr. J. 275 (2007). There is, however, an exception to the in pari delicto doctrine's application where a bankruptcy trustee is suing insiders who are "control persons" of a Big Law LLP, as same are defined at 11 U.S.C. § 101(31)(B)(iii). This exception to the ordinarily sweeping application of in pari delicto as a bar to any and all 11 U.S.C. § 541(a)(1) claims by a bankruptcy trustee where the pre-petition debtor entity was also at fault in bringing about whatever wrong occurred does ***not*** mean most Big Law LLP partners may ***not*** assert in pari delicto against 11 U.S.C. § 541(a)(1) claims by bankruptcy trustees. This is true because the number of control persons in any Big Law LLP likely consists of far fewer Big Law LLP partners than all partners otherwise likely to be found liable for alter ego on a commingling basis. The key issue is really who 'owns' alter ego, since only 11 U.S.C. § 541(a)(1) claims by bankruptcy trustees are affected in any way by in pari delicto, all as is set forth, *infra*.

[18] *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0001-BKPIT0277.

that follows a substantive cause of action (here a claim by creditors against the debtor) (Theorem 3).

Theorem 2 is Bankruptcy Judge Dennis Montali's approach to the issue of who owns alter ego.[19] Theorem 2 has the singular virtue, from the bankruptcy trustee's standpoint, of eliminating the risk of in pari delicto as same undoubtedly has no application to a bankruptcy trustee when such a trustee is out exercising his avoidance powers.

Theorem 1 is the law in many states, as confirmed—in a bankruptcy context—by many federal circuits.[20] Theorem 1, however, like any claim belonging to a bankruptcy trustee based on 11 U.S.C. § 541(a)(1) suffers from the risk of being barred by in pari delicto, a subject which is itself largely beyond the scope of this article.

Finally, Theorem 3 is the absolute nightmare result for Big Law LLP partners, a nightmare which is, in turn, entirely compounded by the fact in pari delicto logically has no more application as against innocent individual creditors than it has against a bankruptcy trustee claiming under 11 U.S.C. § 544(a)(1).

Alternatives to Big Law Firms' Use of Limited Liability Partnership

Professional services corporations (as designed for use by lawyers) in many states, including Delaware, Nevada, New York and Vermont may ***only*** be owned by members of the State Bar of the state of incorporation (Exclusively Domestic Shareholder Owned PCs).[21]

Certain states, however, including California, Illinois, Texas and South Carolina, are less restrictive and allow stock in professional services corporations (for use solely by lawyers) which are incorporated in those states to be owned in whole or in part by members of State Bars ***other*** than the state of incorporation (Foreign and/or Domestic Shareholder Owned PCs).[22]

Big Law Firm professional services corporations which become domesticated in states allowing Foreign and/or Domestic Shareholder Owned PCs (as opposed to Exclusively Domestic Shareholder Owned PCs) which otherwise register as foreign professional services corporations everywhere other than their state of incorporation where such Foreign and/or Domestic Shareholder Owned PCs practice law may thus avoid the otherwise potentially devastating combined effect of RUPA §§ 103(b)(10), 401(h) and UFTA § 4(a)(2) once economic hard times hit any such Big Law Firms then using a corporate rather than a partnership form of organization.[23]

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[19] *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0112-BKPIT0117. In the only case law the writer's research has discovered, Theorem 2 was initially accepted at trial by a bankruptcy court only to be later rejected by a District Court on appeal. *See Pinewood Enterprises, L.C. v. Williams (In re Living Hope Southwest Medical Services, LLC*, 481 B.R. 485, 498-99 (W.D. Ark. 2012) (holding any factual overlap between trustee's fraudulent transfer claims and individual creditors' derivative alter ego claims did ***not*** provide bankruptcy court with any proper basis under 11 U.S.C. § 362(a)(3) for barring individual creditors' prosecution of an alter ego case).

[20] As between Chapter 11 trustee, Mr. Diamond, on the one hand, and Howrey Claims, LLC (as opposed to Bankruptcy Judge Montali, who chose to only addresses the trustee's rights under 11 U.S.C. § 544(a)(1)), on the other hand, the alter ego debate in the HowreyBK is largely about whether, for 11 U.S.C. § 541(a)(1) purposes, District of Columbia law differs from California law on the issue of self-piercing, with California—unlike a number of other states—incontrovertibly being a non-self-piercing jurisdiction. *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0164-BKPIT0169.

[21] This article does not discuss the possible use of the limited liability company form of organization as an alternative to either limited liability partnership or professional services corporations by Big Law Firms. This is because many states forbid the use of limited liability companies to practice law and, not coincidentally, such states also refuse to allow foreign limited liability companies that practice law in their state of incorporation the right to register as foreign limited liability companies. *See, generally*, Larry Ribstein and Robert Keatinge, 1 *Ribstein and Keatinge on Limited Liability Companies*, 215-17, Appendix 4-10 (2nd ed. 2013) (scheduling purpose restrictions or lack thereof in states adopting the RULLCA). Professional services corporations engaged in the practice of law in one domestic jurisdiction, on the other hand, may register as foreign professional services corporations engaged in the practice of law as universally as may limited liability partnerships engaged in the practice of law in one domestic jurisdiction universally register as a foreign limited liability partnership engaged in the practice of law thereafter. *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0278-BKPIT0280.

[22] *See* https://mcgrane.egnyte.com/h-s/20130812/fb76ae185a724b2c at BKPIT0278-BKPIT0280.

[23] *See supra* n. 6 (describing how shareholders of professional services corporations are not precluded from receiving compensation on a fees-for-services basis); *see also* n. 10, *supra* (describing how limited liability partnerships—unlike the large professional service corporations described below—are treated as pass-through entities). Various limitations on the ability of any corporation to elect pass-through entity treatment—including the limit that such pass-through corporations have no more than 100 shareholders—likely make any a pass-through election unavailable to any Big Law Firm which is otherwise considering a conversion from a Big Law LLP to a Foreign and/or Domestic Shareholder Owned PC. *See, generally*, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations.

Whether possible additional tax costs—there is presently a flat 35% federal corporate income tax imposed on earned income by professional service corporations—outweighs the benefits of avoiding claw-back and alter ego liability on the part of Big Law LLP partners once insolvency occurs is a choice each Big Law Firm must make for itself. Avoiding corporate income tax, however, is rightly considered an art form by most Big Law Firm tax departments. It is not difficult to imagine that solutions to

Absent some comprehensive legislative reform,[24] the use of Foreign and/or Domestic Shareholder Owned PCs seems an obvious 'best practices' solution for allowing Big Law Firms to avoid the claw-back and alter ego pitfalls otherwise inherent in the presently too risky Big Law LLP form of organization.[25]

Conclusion

The obvious alternative to using Big Law LLPs is for Big Law Firms to ***finally*** stop pretending that 21st Century Big Law can sensibly be practiced in any sort of 19th Century 'partnership' mode. Instead Big Law Firms must and should 'go corporate' by using the professional services corporation form of organization, domesticating their Big Law Firms only in those corporate-friendly states which permit lawyers licensed in foreign jurisdictions to constitute some or even all of the shareholders of such professional services corporations designed for use by lawyers.

Among other potential venues, South Carolina—well known as corporate-friendly[26]—very specifically allows Big Law Firms the option of employing a Foreign and/or Domestic Shareholder Owned PC. A Foreign and/or Domestic Shareholder Owned PC might, for example, first domesticate itself in South Carolina and thereafter register itself as a foreign professional services corporation in any of the myriad other states in which the Big Law Firm in question may wish to actually practice law. Staying a limited liability partnership—wherever one is (or may wish to become) domesticated[27]—likely constitutes

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double taxation, including (i) Big Law Firm's keeping overall share ownership to no more than 100 shareholders so as to allow election of pass-through status or, in a non-pass through context (ii) Big Law Firm's utilizing direct contribution capitalization schemes and otherwise distributing all possible retained earnings on an annual basis as salary may moot any adverse tax effect of Big Law Firms choosing professional services corporations as their 'best practices' form of organization. In any case, letting the tax tail wave the business dog ignores the fact that dealing with the Internal Revenue Service on audit is a walk in the park when compared with dealing with bankruptcy trustees and/or individual creditors as alter ego plaintiffs post-insolvency. In this latter regard, Big Law Firms should note that "Those who cannot remember the past are condemned to repeat it." *See* http://en.wikipedia.org/wiki/George_Santayana

[24] The May 21, 2011 draft version of the proposed Harmonized Uniform Partnership Act (Amendments to Uniform Partnership Act (1997) (HUPA), while defining "distributions" as not including "reasonable compensation for present or past services" as set forth in HUPA § 102(4)(B) still leaves RUPA §§ 103(b)(10) and 401(h) in place. HUPA thus ultimately fails to avoid the application of UFTA § 4(a)(2) in a fees-for-services context given that Big Law LLP partners are still left with no right to receive any fees for services despite HUPA § 102(4)(B)'s definition of "distributions" as such fees for services still constitute just the sort of 'something for nothing' transaction which UFTA § 4(a)(2) necessarily forbids post-insolvency. The writer suggests modifying the presently proposed language of HUPA § 401(j) to add the ***bracketed*** text below: "A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership [***provided, however, that the restriction of this subsection on remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership shall have no application to any limited liability partnership governed by this Act as the term limited liability partnership is used in § 303(c)***]."

[25] In the HellerBK the members of Heller Ehrman LLP were, in the main, various professional services corporations whose lawyer-shareholders were also employees of each such professional services corporation. As these lawyer-shareholders were not individual partners of Heller Ehrman LLP, the HellerBK model may be argued to represent an alternative solution to the dilemma presented Big Law Firms by the combined effect of RUPA §§ 103(b)(10), 401(h) and UFTA § 4(a)(2). However—and because using the Heller Ehrman LLP model continues to keep the limited liability partnership form of organization in the mix—this alternative 'solution' should be viewed skeptically as it runs the risk that the lawyer-shareholders of the various member professional services corporations will be characterized as having taken salaries other than in good faith if the lawyer-shareholders are shown to have known the Big Law LLP utilized in such a Heller Ehrman LLP model was legally bound ***not*** to pay any post-insolvency compensation to member professional services corporations—from which monies the lawyer-shareholders' own salaries were necessarily derived—and thus such lawyer-shareholders may be held liable to a bankruptcy trustee as subsequent transferees under UFTA § 8(b)(2); *see also* 11 U.S.C. § 550(a)(2) (governing immediate transferees). Or, even more likely, the professional services corporations in a Heller Ehrman LLP model may themselves wind up being characterized as mere conduits, and the lawyer-shareholders will then face being held liable to a bankruptcy trustee as first transferees under UFTA § 8(b)(1); see also 11 U.S.C. § 550(a)(1) (governing initial transferees). ***Thus, why a Big Law Firm would want to stack entities emulating the Heller Ehrman LLP model when a single professional services corporation model that is entirely clear of all RUPA §§ 103(b)(10), 401(h) and UFTA § 4(a)(2) problems is entirely unclear to this writer.*** In contrast, McKool Smith (doing business as McKool Smith Hennigan in California) is a Big Law Firm organized as a professional services corporation under the laws of Texas that includes numerous foreign (*i.e.*, non-Texan) lawyer shareholders. McKool Smith Hennigan demonstrates the efficacy of using the professional services corporation form of organization advocated by this article as being what is most sensible for all Big Law Firms. *See* http://www.mckoolsmith.com/firm.html.

[26] *See* http://sccommerce.com/sc-advantage/pro-business-environment.

[27] Both Delaware and Tennessee's version of RUPA § 103(b) (*see* Del. Code Ann. § 15-103 and Tenn. Code. Ann. § 61-1-103) do not include (b)(10). For those Big Law Firms stubbornly devoted to limited liability partnership form of organization, domesticating in one of these two states despite the presence of RUPA § 401(h) in each (see Del. Code Ann. § 15-401(h) and Tenn. Ann. § 61-1-401(h)) may be an option. Though the words of Comment 12 to RUPA § 103(b)—which explain the rationale for RUPA § 103(b)(10)—caution against reading too much into the absence of RUPA § 103(b)(10) in Delaware and Tennessee. Thus, Comment 12 to RUPA § 103 reads, in full: "***Although stating the obvious***, subsection (b)(10) provides expressly that the rights of a third party under the Act may not be restricted by an agreement among the partners to which the third party has not agreed. A non-partner who is a party to an agreement among the partners is, of course, bound. *Cf*. RUPA § 703(c) (creditor release)." (***Emphasis*** added.)

Big Law LLP management malfeasance by way of that managements continuing to gratuitously expose Big Law LLP partners to serious financial risks in these otherwise most uncertain of financial times for Big Law Firms in general.

The advice contained in this article derives from an ancient wisdom first stated in the Good Book: "Physician, heal thyself."[28]

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37 states have adopted RUPA. A review of the partnership laws of the 12 common law states which have not adopted RUPA reveals no instance where such a state exempts limited liability partnerships from the equivalent of RUPA § 401(h) in any manner more efficaciously than does Delaware or Tennessee. Louisiana's limited liability partnership statute (La. Rev. Stat. Ann. § 9:3431) limits that civil law state's several only general partnership liability where malpractice and fraud by limited liability partners is at issue.

[28] Luke 4:23.