Pursuing FBAR Penalties of Deceased Taxpayers

HALE E. SHEPPARD

Numerous cases in recent years have centered on the definition of "willfulness" in the context of civil FBAR penalties but none has focused on an extremely important issue—from whom can the IRS and DOJ collect FBAR penalties if the individual who committed the violations dies before or during the process?

Many taxpayers think that they can escape penalties for not reporting foreign accounts on FinCEN Form 114 (Report of Foreign Bank and Financial Accounts) (FBAR) by running out the clock—that they will be relieved of payment obligations if they die before the IRS assesses the penalties or the U.S. Department of Justice (DOJ) collects them through litigation. This notion is logical, but wrong, and it triggers serious consequences for unsuspecting people linked to taxpayers with undisclosed foreign accounts. Through an analysis of several recent cases, this article explains how liability for large "willful" FBAR penalties can spread to persons including executors, personal representatives, beneficiaries, surviving spouses, distributees, fiduciaries, trustees, and others who have authority over, or receive assets from, deceased taxpayers with FBAR problems.

Obligations Associated with Foreign Accounts

Basic Duties

U.S. individuals have four main duties when they hold a reportable interest in a foreign financial account: (1) check the "yes" box in Part III (Foreign Accounts and Trusts) of Schedule B (Interest and Ordinary Dividends) to Form 1040 (U.S. Individual Income Tax Return) to disclose the existence and location of the foreign account; (2) declare

HALE E. SHEPPARD, B.S., M.A., J.D., LL.M., LL.M.T., is a Shareholder in the Tax Controversy Section of Chamberlain Hrdlicka and Chair of the International Tax Group. He specializes in tax audits, appeals, and litigation, and international tax compliance and disputes. Mr. Sheppard is a frequent contributor to the JOURNAL, including on FBAR. He can be reached at (404) 658-5441 or hale.sheppard @chamberlainlaw.com. This article was previously published in the JOURNAL OF INTERNATIONAL TAXATION.

all income generated by the account (e.g., interest, dividends, and capital gains) on Form 1040; (3) report the account on Form 8938 (Statement of Specified Foreign Financial Assets), which is enclosed with Form 1040; and (4) file an FBAR electronically.[1]

FBAR Standards, History, and Penalties

Congress enacted the Bank Secrecy Act in 1970.[2] One purpose of this legislation was to require the filing of certain reports, like the FBAR, when doing so would help the U.S. government carry out criminal, tax, and regulatory investigations.[3] The statute, in conjunction with the corresponding regulations and FBAR Instructions, generally requires the filing of an annual FBAR when (1) a U.S. person, including U.S. citizens, U.S. residents, and domestic entities (2) had a direct or indirect financial interest in or signature or some other type of authority over (3) one or more financial accounts (4) located in a foreign country (5) the aggregate value of which exceeded $10,000 (6) at any point during the year at issue.[4]

Concerned with widespread FBAR noncompliance, the U.S. government has taken action in recent years. Notably, Treasury transferred authority to enforce FBAR duties to the IRS in 2003.[5] The IRS has been empowered since then to investigate potential FBAR violations, issue summonses and administrative rulings, assess civil penalties, and take "any other action reasonably necessary" to enforce the FBAR rules.[6]

Congress enacted new FBAR penalty provisions in 2004.[7] The IRS may now penalize any U.S. person who fails to file an FBAR when required, regardless of the reason.[8] For nonwillful violations, the maximum penalty is $10,000 but the IRS can waive it if the violation was due to "reasonable cause."[9] Higher penalties apply when there is intent. Specifically, when a taxpayer willfully fails to file an FBAR, the IRS can assert a penalty equal to $100,000 or 50% of the balance in the account at the time of the violation, whichever is larger.[10] Given the large balances in some unreported foreign accounts, FBAR penalties can be enormous.

First Case to Analyze the Crucial Issues

Numerous cases in recent years have centered on the definition of "willfulness" in the context of civil FBAR penalties.[11] However, none has focused on an extremely important issue—from whom can the IRS and DOJ collect FBAR penalties if the individual who committed the violations dies before or during the process? This was addressed in an ongoing case, *Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.*[12]

Facts

The facts in this case are relatively straightforward, at least compared with many other FBAR cases involving multiple accounts, foreign entities, transfers between banks, layers of ownership, and more. Steven came to the United States from Hungary in the 1950s after internment in a German concentration camp during World War II. He later became a U.S. citizen. His highest level of formal education was fifth grade and he worked most of his adult life as a machinist in New York City. He inherited a commercial building in the 1990s but realized that he lacked the ability to manage it effectively. Therefore, he sold the building, opened an account at UBS in Switzerland, and sent the funds to the account in 1993. The record is unclear about whether Steven reported the sale of the building on the relevant Form

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1 The Form 8938 filing duty did not take effect until 2011, which is after the years on which the cases analyzed in this article focus. Therefore, Form 8938 issues are not explained here. For a detailed analysis of these issues, see the following articles by this author: "The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance," 38(3) Int'l Tax J. 11 (2012); "Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules after IRS Issues Final Regulations," 41(2) Int'l Tax J. 25 (2015); "Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting," 42(3) Int'l Tax J. 5 (2016); and "Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns," 95(5) Taxes 31 (2017).

2 P.L. 91-508, Title I and Title II (10/26/1970).

3 Id. at section 202.

4 31 U.S.C. section 5314; 31 C.F.R. section 1010.350(a).

5 68 Fed. Reg. 26489 (05/16/2003).

6 31 C.F.R. section 103.56(g), 68 Fed. Reg. 26489 (05/16/2003).

7 American Jobs Creation Act, P.L. 108-357 (10/22/2004).

8 31 U.S.C. section 5321(a)(5)(A).

9 31 U.S.C. section 5321(a)(5)(B)(ii).

10 31 U.S.C. section 5321(a)(5)(C)(i). Since May 2018, there has been uncertainty regarding the maximum FBAR penalty. Two district courts issued opinions stating that the willful FBAR penalty is capped at $100,000 per violation because the IRS failed to update the operable Regulations after Congress amended the law to increase penalties. See Colliot, case No. AU-16-CA-01281-SS (DC Tex., 2018), and Wadhan, Civ. Action No. 17-CV-1287-MSK (DC Colo., 2018).

11 For details on the recent court battles regarding "willful" FBAR penalties, see the following articles by this author: "Court Bucks the Trend in Willful FBAR Penalty Cases: Merely Signing Tax Returns Does Not Establish Willfulness," 44(6) Int'l Tax J. __ (2018); "What Constitutes a 'Willful' FBAR Violation? Comprehensive Guidance Based on Eight Important Cases," 29 JOIT 32 (November 2018); "Court Holds That Pervasive Ignorance Is No Defense to Willful FBAR Penalties: This and Other Lessons from *United States v. Garrity*," 44(4) Int'l Tax J. 51 (2018); "Willful FBAR Penalty Case Shows Importance of Protecting Privileged Communications: What *Kelley-Hunter* Adds to the Foreign Account Defense Discussion," 44(1) Int'l Tax J. 15 (2018); "Reasonable Cause Defense in Nonwillful FBAR Penalty Case: Early Teachings From *Jarnagin*, 29 JOIT 46 (September 2018); "First Taxpayer Victory in a 'Willful' FBAR Penalty Case: Significance of *Bedrosian* for Future Foreign Account Disputes," 29 JOIT 54 (March 2018); "Can Recent 'Willful' FBAR Penalty Cases Against Taxpayers Help Tax Firms Fend Off Malpractice Actions?," 43(4) Int'l Tax J. 33 (2017); "U.S. Gov't Wins Fourth Straight FBAR Penalty Case: *Bohanec* and the Evolution of 'Willfulness'," (Parts 1 and 2), 28 JOIT 34 (August 2017), 28 JOIT 22 (September 2017); "Government Wins Second Willful FBAR Penalty Case: Analyzing What *McBride* Really Means for Taxpayers," 118 J. Tax'n 187 (April 2013); "Third Time's the Charm: Government Finally Collects 'Willful' FBAR Penalty in *Williams*," 117 J. Tax'n 319 (December 2012); "District Court Rules That Where There's No Will, There's a Way to Avoid FBAR Penalties," 113 J. Tax'n 293 (November 2010).

12 122 AFTR2d 2018-6040 (DC Fla., 2018). The information in this article derives from the following sources: Complaint filed 09/29/2016; Amended Complaint filed 12/14/2016; Defendant's Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment and Incorporated Memorandum of Law filed 01/05/2017; Response in Opposition to Defendant's Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment and Incorporated Memorandum of Law filed 01/19/2017; Defendant's Second Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment and Incorporated Memorandum of Law filed 10/24/2017; Response in Opposition to Defendant's Second Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment and Incorporated Memorandum of Law filed 12/11/2017; and Order filed 09/25/2018.

1040 and paid the corresponding U.S. income taxes before transferring the funds to UBS. Thus, the beginning balance might have consisted of post-tax or pre-tax funds, but this distinction has no bearing on the case.

Steven's son Robert ("Son") had signature authority over the UBS account, which he used to communicate periodically with UBS representatives about the status of the account over the years. Son worked in the financial services industry as a stockbroker and account manager at major companies.

The account generated passive income each year, such as interest, dividends, and capital gains. Steven did not report the income on his annual Forms 1040; denied expressly the existence of the UBS account on Schedule B to Forms 1040; and never declared the account on an FBAR. Steven might have self-prepared his Forms 1040 for certain years but he used a professional tax preparer for at least 2006-2009. He did not notify the professional tax preparer of the foreign account.

In March 2009, UBS sent a letter to Steven indicating that it was closing accounts for U.S. accountholders, recommending that he contact a U.S. tax professional to obtain advice about tax and information-reporting obligations related to the account; confirming that UBS was cooperating with the IRS and DOJ; and explaining possible consequences (including civil examinations and criminal investigations) for U.S. accountholders who decide not to disclose past transgressions to the IRS voluntarily. As of June 30, 2009 (deadline for filing the 2008 FBAR), the balance in the UBS account was $1,228,600.

In response to the letter from UBS, Steven closed the account in July 2010 and wired the funds to his domestic investment firm, Raymond James Financial Services. Son was listed as the sole beneficiary of, and the trading agent for, Steven's account there. Son also helped Steven with other financial affairs.

The professional tax preparer who assisted Steven with Forms 1040 for 2006-2009 sent a letter to Son in August 2010 indicating (1) the need to report the UBS account on late FBARs and to file Forms 1040X (Amended U.S. Individual Income Tax Return) to declare the unreported income; (2) that Steven had met personally with the tax preparer a few days earlier and that he did not plan to authorize UBS to release account data to the IRS; and (3) that Steven opposed rectifying matters proactively with the IRS, as the tax preparer had advised.

The details on the IRS audit are scarce but the key is that the IRS assessed the highest possible penalty against Steven on September 20, 2014, for failing to file the 2008 FBAR. The penalty was $614,300 (50% of the balance of the UBS account at the time of the violation).

Steven declined to pay the FBAR penalty voluntarily. He died on August 21, 2015, and his will identified Son as the personal representative and sole beneficiary of the estate. Son sent copies of the will to various parties to obtain Steven's property after his death but did not file the will publicly, initiate a probate proceeding, or otherwise notify creditors, including the IRS, of the death of Steven.

Two DOJ Complaints

When a taxpayer refuses to pay the FBAR penalty, the law obligates the DOJ to file a collection lawsuit within two years of the date that the penalty was assessed. One day before the two-year deadline, the DOJ filed the original complaint with the proper district court on September 29, 2016. The case was styled *United States of America v. Steven Schoenfeld.* In the original complaint, the DOJ asked the district court to enter judgment against Steven and in favor of the U.S. government for the FBAR penalty, as well as late-payment penalties and interest charges since the date of assessment.

The problem, of course, is that Steven had been dead for over a year by the time the DOJ filed the original complaint, naming Steven, and only Steven, as a defendant. Approximately one month after the DOJ filed the original complaint, in late October 2016, an attorney communicating on behalf of "the Schoenfeld family" sent a letter to the DOJ referencing the case, explaining that Steven was dead, and indicating that no probate proceeding had been opened because there were no assets that required probating.

Thus updated, the DOJ filed an amended complaint with the district court on December 14, 2016. This one was styled differently, *United States of America Estate of Steven Schoenfel-d*and *Robert Schoenfeld, v. a distributee of the Estate of Steven Schoenfeld.*In explaining these two new defendants, the amended complaint said that (1) Steven died in 2015; (2) the claim against Steven is enforceable against his estate pursuant to 28 U.S.C. section 2404; and (3) Son is named as a defendant because Steven had no surviving spouse, Son is the closest living relative, and on Steven's death, all his assets were distributed to Son.

In summary, the original complaint named only Steven as a defendant, and it was filed timely with the district court within two years of the assessment of the FBAR penalty. By contrast, the amended complaint named the estate and Son (as a distributee of the estate) as defendants, and it was filed late, after expiration of the applicable two-year period.

Defendants' Positions

Counsel for the defendants filed two motions with the district court, essentially asking it to determine that the DOJ lacked legal grounds to bring an FBAR penalty collection action against Steven, his estate, or Son. These motions contain a long list of theories on which defendants base their positions, some of which are too tedious and hyper-technical for this article. Summarized below are the most comprehensible and relevant arguments that the defendants raised:

- A dead person lacks the capacity to be sued under Federal Rule of Civil Procedure 17(b). Steven was dead when the DOJ filed the original complaint, so he lacked capacity to be sued and was not a valid defendant. Therefore, the original complaint was null and void *ab initio.*
- Under Federal Rule of Civil Procedure 11, the DOJ had an affirmative duty to ascertain reasonably the identity of the proper defen-

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13 Order filed 09/25/2018, page 8.

14 See Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 541 (2010).

dant before filing the original complaint. The DOJ did not make reasonable inquiries, such that it cannot claim lack of knowledge now to absolve itself of its error of naming a dead man, Steven, as the sole defendant in the original complaint.

- The two-year period to bring an FBAR penalty collection lawsuit under 31 U.S.C. section 5321(b)(2)(A) has expired. The IRS assessed an FBAR penalty against Steven on September 30, 2014, so it had until September 30, 2016, to start a suit. The original complaint, while timely, should be nullified and considered void because it named a dead man, Steven, as the only defendant. Because the original complaint was void and, thus, never existed, the filing of an amended complaint beyond the two-year period does not save the DOJ because there are no available remedies such as amendment of the original complaint, substitution of defendants, or relation back of the amended complaint to the date that the original complaint was filed.
- The DOJ cannot rely on 28 U.S.C. section 2404 to name the estate as a defendant. This provision says: "A civil action for damages commenced by or on behalf of the United States…*shall not abate on the death of a defendant but shall survive and be enforceable against his estate* as well as against surviving defendants." (Emphasis added.) This provision would apply only if the DOJ had filed the original complaint when Steven was alive, and then he died. It has no relevance in a situation like this one where the only named defendant, Steven, was already dead when the DOJ filed the original complaint.
- The estate lacks capacity to be sued under Federal Rule of Civil Procedure 17. At the time of death, Steven's only asset was a domestic brokerage account with Raymond James Financial Services, held jointly with rights of survivorship by Son. Because the account passed automatically to Son, Steven had no assets that required formal probate, and neither Son nor anyone else petitioned the courts to open a probate estate for Steven. Notably, even after the DOJ learned in October 2016 that Steven had died and that no probate estate had been opened, it did not use its right under Florida law as an "interested person" to petition the probate court for administration (i.e., to open a probate estate for purposes of having a personal representative appointed by the court). Consequently, no formal "estate" exists under Florida law. Moreover, the DOJ's argument that Son is the de facto personal representative of the "estate" solely because he was so nominated in Steven's will is meritless. Under Florida law, a personal representative can be nominated in a will but only a probate court can legally appoint a personal representative for an estate.
- Even if the estate had capacity to be sued under Federal Rule of Civil Procedure 17, the DOJ would still have problems. Under Florida law, an estate has no capacity to be sued in its own name—all proceedings must be directed by and toward the personal representative of the estate. In its amended complaint, the DOJ named Son as a defendant, not as the personal representative of the estate but rather as a "distributee." Accordingly, even if the estate were a proper defendant, which it is not, the DOJ failed to engage the person authorized to act on behalf of the estate.
- The DOJ did not state in the amended complaint, as required, a specific a legal theory on which a distributee would be liable for the civil FBAR penalties. To the extent that the DOJ is claiming some type of transferee liability under Section 6901, this theory is flawed because Section 6901 applies only in cases of particular "taxes" under Title 26 (Internal Revenue Code), not to civil FBAR penalties assessed under Title 31.
- The FBAR penalty is actually punitive/criminal rather than remedial/civil. Therefore, it does not survive the death of the taxpayer against whom it was assessed, Steven. When he died, the collection action died, too. Evidence of the punitive character of the "willful" FBAR penalty is apparent from the relevant figures: the UBS account that Steven failed to disclose on the 2008 FBAR generated $8,781 in unreported income, yet the FBAR penalty was $614,300.

Given the large balances in some unreported foreign accounts, FBAR penalties can be enormous.

District Court Rulings and Analysis

The district court, in what the IRS and DOJ surely will characterize as a major victory, issued a split decision on four main issues. The rulings and the corresponding rationales are explored below.

First issue. The first issue was whether a deceased individual like Steven can be a defendant in an FBAR penalty collection lawsuit. The district court dispensed with this matter swiftly: "Under Florida law, a decedent lacks the capacity to be sued…. Thus, there is no dispute that this action could not proceed against [Steven]."[13]

Second issue. The second issue was whether the original complaint is a legal nullity or an amendable document, and if it is the latter, does the amended complaint "relate back" to the date that the original complaint was filed?

Can the original complaint be amended? As explained above, the defendants focused on the following key dates: (1) September 30, 2014, when the IRS assessed the FBAR penalty against Steven; (2) August 21, 2015, when Steven died; (3) September 29, 2016, when the DOJ filed the original complaint naming only Steven as a defendant; (4) September 30, 2016, when the two-year deadline for the DOJ to start an FBAR penalty collection lawsuit lapsed; and (5) December 14, 2016, when the DOJ filed the amended complaint, identifying two new defendants—the estate and Son as a distributee of the assets of the estate.

Keeping these dates in mind, the defendants argued that the original complaint was timely but should be considered a nullity because it failed to name a proper defendant. Since the original complaint never existed from a legal perspective, the DOJ cannot "amend" it by filing the amended complaint. Moreover, even if the DOJ were able to file an amended complaint, it would have no effect because it was filed after the two-year deadline, and it cannot "relate back" to the date that the DOJ filed the original complaint because it was a nullity.

The district court rejected the preceding line of reasoning for two main reasons. First, the primary case that the defendants cited did not consider the relevant question. Instead of dealing with the issue of whether a lawsuit started by a proper party (DOJ) but naming a dead person (Steven) is a legal nullity, the case on which the defendants relied considered whether a lawsuit started by a party that lacked capacity to sue in the first place is a legal nullity. Second, the district court said that the majority of the federal courts that have focused on the proper issue have agreed that the lawsuit is not a legal nullity and can be fixed by amendment.

When was the amended complaint filed? The DOJ was not out of the woods yet, though, because the district court emphasized that the DOJ had to file a timely lawsuit, and this did not occur here, unless the "relation-back" doctrine applies. In other words, the district court held that the original complaint was not void from the outset and that the DOJ could amend it, but the DOJ needed to do so before the regular two-year deadline for starting an FBAR penalty collection lawsuit expired. Here, by the time the DOJ realized that Steven was dead and filed the amended complaint, the two-year deadline had already expired. Thus, the district court said that the DOJ was out of luck unless the relation-back concept applies, such that the amended complaint is deemed to have been filed on the same date as the timely original complaint.

In addition to pursuing distributees, the IRS also hounds executors and fiduciaries for FBAR penalties.

To resolve the relation-back issue, the district court first looked to Federal Rule of Civil Procedure 15(c)(1):

> An amendment to a pleading [like the original complaint] relates back to the date of the original pleading when
>
> (A) The law that provides the applicable statute of limitations [specifically] allows relation back; [or]
>
> (B) The amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out, or attempted to be set out, in the original pleading; or
>
> (C) *The amendment changes the party or the naming of the party against who the claim is asserted, if [part (B) described above] is satisfied, and if, within the period provided by Rule 4(m) for serving the Summons and Complaint, the party to be brought in by amendment (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or such have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. [Emphasis added.]*

The district court focused its analysis on two issues, both of which derive from Federal Rule of Civil Procedure 15(c)(1)(C) above:

- *Did the DOJ make a "mistake"?* The first issue was whether the DOJ made a "mistake" when it named Steven as the sole defendant in the original complaint. The defendants maintained that this was not a "mistake" but rather a "deliberate choice" by the DOJ because the DOJ knew Son's identity and involvement at the time of filing the original complaint but chose not to name him as a defendant. The DOJ countered that it was unaware that Steven had died when it filed the original complaint, not receiving notice until after expiration of the two-year period for starting an FBAR penalty collection lawsuit.

The district court began by saying that the term "mistake" must be construed liberally in favor of the party initiating the lawsuit—here, the DOJ. It then acknowledged that the DOJ made a "deliberate choice" to name Steven as defendant in the original complaint but did so because of the mistaken belief that he was alive. Referencing a 2010 Supreme Court decision,[14] the district court said that Federal Rule of Civil Procedure 15(c) contemplates amendments to pleadings when a party files a lawsuit against a non-legal entity as a result of a misunderstanding about the entity's status. It then concluded: "Here, the Government…filed suit against a defendant without capacity [i.e., Steven] based on a misunderstanding regarding the legal status of the defendant. Rule 15(c) operates to address precisely this type of mistake."[15]

The defendants also claimed that the DOJ's failure to learn of Steven's death before filing the original complaint constituted a breach of its duty to perform a "reasonable inquiry" before making a representation to the district court under Federal Rule of Civil Procedure 11. The district court rejected this argument on two grounds. First, the defendants were comparing apples to oranges in that whether a mistake in a pleading warrants the district court's imposition of sanctions against a party under Federal Rule of Civil Procedure 11 is completely unrelated to the relevant issue of whether a party's action or inaction represents a "mistake" for purposes of Federal Rule of Civil Procedure 15(c) and the relation-back analysis.

Next, the district court said that Federal Rule of Civil Procedure 15(c)(1)(C)(ii) asks what the prospective defendant (estate and Son) knew or should have known, not what the plaintiff (DOJ) knew or should have known when it filed the original complaint. The court concluded that the DOJ's mistaken belief as to Steven's legal status sufficed for purposes of amendment under Federal Rule of Civil Procedure 15(c), "regardless of whether, with a more diligent inquiry, it could or should have known of [Steven's] death."[16]

Were the estate and Son aware of potential problems? With the matter of whether the DOJ committed a "mistake" resolved, the district court turned to whether the potential defendants, the estate and Son, actually knew or should have known that the FBAR penalty collection lawsuit would have been focused on them instead of on Steven if the DOJ had realized that Steven had died before filing the original complaint. The district court began by noting that the defendants did not even dispute this issue. Nevertheless, for the sake of completeness, the court said that (1) it was "obvious and apparent" from the face of the original complaint that the DOJ believed mistakenly that Steven was alive, because the DOJ referred to him repeatedly in the present tense; (2) the defendants protected their interests by hiring an attorney to represent them before the DOJ, which shows that they knew of their potential liability; and (3) the defendants received a copy of the original complaint well within the relevant time period, which undermines any argument that they might be prejudiced by having to defend themselves on the merits of the case.

Summary of district court holdings on second issue. The preceding is a lot to digest, even for the most ardent lover of tax procedure. To clarify matters, below is the summary of the district court's holdings on the second issue:

> Here, the Court finds that the original complaint was not a legal nullity which rendered this action void *ab initio*, and therefore, it could be cured by amendment. Further, the Court concludes that the amended complaint relates back to the date of the filing of the original complaint because the claims relate to those set forth in the original complaint, Defendants received notice of the action within the Rule 4(m) period, the Government was mistaken as to the parties' legal statuses, and Defendants knew, or at the very least, should have known, that but for this mistake, they would have been named as defendants. Accordingly, the Amended Complaint is not barred by the statute of limitations.[17]

Third issue. As stated above, the DOJ filed an amended complaint with the district court styled *United States of America v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.* The amended complaint includes the following grounds for pursuing these two new defendants: (1) the claim against Steven is enforceable against his estate pursuant to 28 U.S.C. section 2404 because Steven died in 2015; and (2) the claim against Steven is also enforceable against Son because he is the closest living relative and, on Steven's death, he inherited all of Steven's assets. In challenging the motions that the defendants filed seeking to dismiss all claims, the DOJ added yet another theory: even if the first two grounds in the amended complaint fail, the DOJ may nevertheless proceed against the estate and Son on equitable principles. Each of the three grounds that the DOJ advanced is examined below.

Pursuing the estate under 28 U.S.C. section 2404. The relevant provision, 28 U.S.C. section 2404, says: "A civil action for damages commenced by or on behalf of the United States…shall not abate *on the death of a defendant but shall survive and be enforceable against his estate* as well as against surviving defendants." (Emphasis added.) The district court began its analysis by explaining that an estate's capacity to be sued is dictated by the law of the state where the court is located (here, Florida). Under Florida law, an estate is not an entity that can be a party to litigation—only its personal representative can be a party. Despite state law, the DOJ argued that it can still sue the estate under federal law, 28 U.S.C. section 2404, because of the broad definition of "estate" for these purposes.

The district court recognized that there are no decisions directly on point in the Eleventh Circuit so it turned to a leading district court case in Kansas, which held that "estate" in this context means all of the property in which the decedent had an interest at the time of death, including any property transferred to others, by will or by the laws of intestate succession. Despite this positive start for the DOJ, the district court discredited swiftly the argument that the DOJ could legally pursue the estate under 28 U.S.C. section 2404. The court said that the plain language of the provision, along with its legislative history, indicate that it contemplates only the continuation of a legal action that was brought against a defendant who died *after* the action started, which was not the situation with Steven, who died *before* the DOJ filed the original complaint.

Pursuing Son as sole distributee. The DOJ underscored in the amended complaint that Son is the closest living relative of Steven, he is identified as the personal representative of the estate in Steven's will, and he was the sole distributee of Steven's property after his death, including the funds from the unreported UBS account. For these reasons and others, the DOJ maintained that it should be able to pursue Son for the unpaid FBAR penalty.

The district court said that the issue of whether a distributee is a proper party to a lawsuit has arisen most frequently in the context of determining the proper party for substitution under Federal Rule of Civil Procedure 25, the relevant portion of which is:

> *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, [then] the court may order substitution of the proper party. A motion for substitution may be made by any party or by

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15 Order filed 09/25/2018, pg. 17.
16 Id. at 17-18.
17 Id. at 19.

the decedent's successor or representative.

Although the DOJ did not substitute Son under Federal Rule of Civil Rule 25 after Steven's death, the district court said that case law regarding substitution of distributees is "instructive" to the issue at hand, which is the capacity of Son, as a distributee, to be sued by the DOJ. The court resolved this issue readily, pointing out that, in applying Federal Rule of Civil Rule 25, many other courts have determined that substitution can be made by an executor, administrator, or distributee of an estate. Adhering to this precedent, the court confirmed that the DOJ could go after Son:

> Here, there is no genuine dispute that [Son] is the sole distributee of the Estate, as [Son] testified that he received 100% of his father's assets…. Thus, the Court finds that as a distributee of the estate, [Son] has the capacity to be sued under [Federal Rule of Civil Procedure] Rule 17. Accordingly, as to [Son], the Motion is due to be denied, as the Government may pursue its claim against him.[18]

Pursuing estate or son as bad actors. The DOJ showed little restraint in criticizing what it considered bad acts by Son, characterizing them as the cause of all the procedural problems. The DOJ said the following in support of its request to attack the estate or Son under equitable principles:

> Defendants attempt to capitalize on their choice not to probate [Steven's] estate. With knowledge of [Steven's] outstanding debts [including the large FBAR penalty already assessed by the IRS], Defendants opted to distribute his assets quietly outside the law. Because of that strategic decision, a number of Florida probate requirements were not met: [Steven's] estate was not publicly administered; his personal representative was not formally appointed; and [his] creditors, including the United States, were not notified of his death. Defendants now contend that these omissions, which are entirely of their own creation, preclude the United States' suit. As one would suspect, the law does not permit a decedent's successor in interest to avoid known federal liabilities, and bar the United States' claims, by privately distributing the decedent's assets. As detailed below, the United States' claim survives [Steven's] death and is enforceable against the Defendant Estate and its distributee.[19]

The district court acknowledged that courts have an interest in not rewarding parties with unclean hands, but it refused to use its judicial discretion here. With notably little analysis, the court said that it would not apply equitable principles to override the law because the DOJ did not provide a sufficient legal basis for doing so, particularly against a defendant (the estate) that lacks the legal capacity to be sued.

Fourth issue. The final issue in the district court was whether the cause of action against Steven for collection of FBAR penalties assessed against him during his lifetime disappears, or "abates," on his death. This would occur if the FBAR penalty were considered penal/criminal instead of remedial/civil. Putting a finer point on it, the district court was tasked with deciding whether a "willful" FBAR penalty, constituting 50% of the value of the unreported foreign account at the time of the violation (regardless of (1) the size of the income tax liability caused by the nondisclosure; (2) whether the value on the date of the violation was an aberration and far exceeded the value throughout the relevant year; (3) whether the funds in the unreported account were pretax or post-tax; and (4) other mitigating factors) should be considered remedial/civil or penal/criminal.

The court first acknowledged that no federal statute addresses specifically whether an FBAR penalty collection action survives a taxpayer's death so it must look to federal common law for answers. Based on a Supreme Court case,[20] the district court applied a two-part test. The court must first determine whether Congress expressed a preference for treating the penalty as civil or criminal and if congressional intent is for civil, this will be upturned only on presentation of the "clearest proof" that the penalty is criminal in effect.[21] The district court determined quickly that Congress intended the FBAR penalty to be civil, resting largely on the relevant provision, 31 U.S.C. section 5321 being titled "Civil Penalties," while the following provision, 31 U.S.C. section 5322, is "Criminal Penalties."

The second part of the test required the district court to analyze seven factors to decide whether the FBAR penalty, which was intended as a civil penalty, is so punitive in purpose or effect that it has been transformed into a criminal penalty.[22] These factors are less than optimal in terms of clarity:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

The district court handled the first three factors quickly, stating that the

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18 Id. at 24.

19 Response in Opposition to Defendant's Second Motion to Dismiss Amended Complaint or in the Alternative for Summary Judgment and Incorporated Memorandum of Law filed 12/11/2017, pages 1-2.

20 See Hudson, 522 U.S. 93 (1997).

21 Order filed 09/25/2018, page 26.

22 Citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

23 Order filed 09/25/2018, pages 31-32.

24 Id. at 35.

25 Id. at 36-37.

26 Civil Action No. 2:17-cv-02891 (DC N.J., 2017). The information in this article derives from the following sources: Complaint filed 04/27/2017; Answer and Demand for Jury Trial filed 06/19/2017.

27 Case No. 3:15-cv-243 (D.C. Conn.). The information in this article derives from the following sources: Complaint and Jury Demand filed 02/20/2015; Defendant's Answer and Affirmative Defenses filed 04/24/2015; Expert Report by Howard B. Epstein, CPA, dated 04/28/2017; Memorandum and Order Regarding Standard of Proof filed 04/03/2018; Plaintiff's Motion in Limine to Exclude the Testimony of Howard B. Epstein filed 04/03/2018; Plaintiff's Memorandum in Support of Its Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed 04/03/2018; Defendant's Opposition to Plaintiff's Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed 04/24/2018; Joint Trial Memorandum filed 05/04/2018; Stipulation Regarding Determination of Factual and Legal Issues filed 05/30/2018; Memorandum and Order Regarding Proposed Expert Testimony of Howard B. Epstein filed 06/01/2018; Jury Instructions filed 06/12/2018; Verdict Form filed 06/13/2018.

FBAR penalty involves a monetary fine, not imprisonment; monetary fines have been viewed traditionally as civil; and while the taxpayer's intent can affect the size of the fine, the IRS can assess an FBAR penalty regardless of the taxpayer's state of mind. With respect to the fourth factor, the court acknowledged that large FBAR penalties promote retribution and deterrence, which are the historical aims of punishment, but maintained that *all* civil penalties have some degree of these characteristics, and this does not necessarily convert them into criminal penalties. Regarding the fifth factor, the court recognized that a willful FBAR violation can trigger both civil and criminal penalties but emphasized that Congress enacted two separate provisions (31 U.S.C. sections 5321 and 5322), which shows its intent to create two different violations and remedies. In addressing the sixth factor, the court emphasized that in addition to retribution and deterrence, large FBAR penalties have other purposes, including recouping lost tax revenues, and reimbursing the U.S. government for the significant expense of conducting an examination, administrative appeal, and litigation. Finally, concerning the seventh factor, the court found that the FBAR penalty is not excessive, citing multiple cases upholding penalties equal to 50% of unreported tax liabilities, as well as one district court case decision labeling the highest FBAR penalty appropriate.

The court summarized its holdings:

> Having carefully considered Congress's expressed preference that the FBAR penalty be considered a "civil sanction" and the seven…factors, the Court finds no indication much less "the clearest proof" necessary to establish that the FBAR penalty is, in fact, penal in nature.[23]

The court went on to distinguish various cases that the defendants cited for the notion that the highest FBAR penalty is "disproportionately punitive." Interestingly, in explaining why all of the authorities that the defendants cited were unpersuasive, the district court clarified that it will not, and should not, contemplate the actual financial effect on Steven, the estate, or Son. Alluding to the defendants' statements that the total tax liability associated with the unreported foreign account in 2008 was $1,377, while the FBAR penalty was $614,300, the court refused to take these figures into consideration because binding precedent requires the court to evaluate the relevant statute (31 U.S.C. section 5321) on its face, and not the resulting penalties in a particular situation, to determine if the penalty should be considered penal/criminal. "Thus, the court will not evaluate the specific [FBAR] fine assessed against [Steven]," stated the district court.[24]

The IRS and DOJ are now raising, and the district courts are largely accepting, creative theories for pursuing payment from a long list of parties.

District Court—Summary of Ultimate Conclusions

Mercifully, after a detailed, technical analysis, the district court offered a summary of its holdings. Following is a sentence-by-sentence format to facilitate review:

> In sum, the Court finds that the original complaint was not a legal nullity which rendered this action void *ab initio*, and therefore, could be cured by amendment.
>
> The amended complaint, filed by the [DOJ] as a matter of right, relates back to the date of the filing of the original complaint and as such is not barred by the statute of limitations.
>
> Additionally, although the [DOJ] cannot state a claim against the Estate under [28 U.S.C. section 2404], it has stated a claim against [Son] as a distributee of the Estate.
>
> Finally, the Court finds that the [DOJ's] claim did not abate upon [Steven's] death.[25]

Multiple Theories of Liability for FBAR Penalties

All the holdings from *United States of America v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld* are extremely important to Steven, his estate, and Son, but the last two holdings also have generalized significance for other taxpayers. Whether or not the DOJ ultimately manages to convince the district court (or perhaps a jury) that Steven's FBAR violation was "willful," from this point forward, it is likely that the IRS and DOJ will advance the position in other cases that (1) an FBAR penalty does not disappear on death of the transgressor; and (2) while the DOJ might be able to name an estate as a defendant, depending on the applicable state law, it can pursue executors, administrators, personal representatives, and distributees of estates. Indeed, as seen in the examples below, the DOJ is already taking similar positions elsewhere.

Moser

In addition to pursuing distributees, the IRS also hounds executors for FBAR penalty liabilities. One example is *David Moser and John Moser, Co-Executors of the Estate of Walter Moser.*[26] Walter Moser held an unreported foreign account, was audited, and was assessed a willful penalty on April 30, 2015, for not filing a 2007 FBAR. Within a year, which was after the FBAR penalty had been assessed but before the two-year period for the DOJ to file a collection lawsuit had expired, Walter died. His two sons, David and John, were appointed co-executors of his estate. The DOJ filed a timely collection lawsuit in district court on April 27, 2017, naming the two sons as defendants in their capacity as co-executors and requesting that the district court "enter judgment in favor of the United States and against David and John Moser, in their capacities as the co-executors of the decedent estate of Walter Moser…."

Garrity

Adding to the list of persons from whom recompense might be sought, the DOJ has been known to pursue "fiduciaries" of an estate. An illustration is *Diana M. Garrity, Paul G. Garrity, Jr., and Paul M. Sterczala, as fiduciaries of the estate of Paul G. Garrity, Sr., deceased.*[27] The taxpayer died at 84 in February 2008 and a probate case was opened in March 2008. By May 2008, the IRS had started an audit of the taxpayer. In 2009, the funds from the unreported accounts were distributed among the taxpayer's three sons, only one of whom the IRS also considered a "fiduciary" of the taxpayer's estate. In February 2013, the IRS assessed the highest possible FBAR penalty against the taxpayer for not filing a 2005 FBAR, $936,691.

The DOJ realized ultimately that voluntary payment would not be forthcoming and it started a timely FBAR penalty collection action in district court in February 2015. Interestingly, the IRS did not pursue the "distributees" of the funds from the undisclosed accounts, naming instead three individuals as "co-fiduciaries" to the estate. In this regard, the complaint asked the district court to "[e]nter judgment in favor of the plaintiff United States of America and against the defendants Diane M. Garrity, Paul G. Garrity, Jr., and Paul M. Sterczala, as fiduciaries of the estate of Paul G. Garrity, Sr., deceased, for the FBAR penalty assessed against Paul G. Garrity, Sr., with regard to the 2005 income tax year…."

Many FBAR cases are decided by judges but the fiduciaries opted for a jury, which sided with the DOJ on all points, rendering the following decisions: (1) the taxpayer had a financial interest in or signature or some other type of authority over the unreported foreign account in 2005; (2) his failure to file the 2005 FBAR was "willful;" and (3) the amount of the penalty was proper because it was equal to, or less than, 50% of the balance in the unreported account as of the date of the violation.

Kelley-Hunter

Another recent FBAR penalty case of interest is *Nancy E. Kelley, individually and as representative of the Estate of Burt Hunter.*[28]

Background, audit, penalties. Nancy and Burt, both U.S. citizens, moved to France in 1998. The account on which the IRS and, later, the DOJ focused was held at UBS in Switzerland. Although unclear from the record, it appears that Nancy and Burt, or one of their advisors, formed a foreign corporation to hold the UBS account to obscure the true ownership. This entity, established in Mauritius and controlled by just one bearer share, was called Towers International, Inc. The evidence showed that Nancy and Burt controlled the UBS account despite the existence of Towers International, Inc.

In February 2009, Nancy and Burt received a notice from UBS that it had disclosed the account to the U.S. government. Four months later, Nancy filed a late 2007 FBAR and a timely 2008 FBAR, reporting the UBS account.

The IRS later opened an audit, eventually assessing a willful penalty related to the 2007 FBAR in December 2013. Both Nancy and Burt had a reportable interest in the UBS account, such that the IRS originally assessed the most extreme penalty against each of them—a 50% penalty for Nancy and a separate 50% penalty for Burt.

The taxpayers did not pay the FBAR penalties. Consequently, the DOJ filed a complaint in district court within the two-year period, in December 2015.

Husband dies and focus shifts to wife. Burt died in January 2016, approximately one month after the DOJ filed its complaint, at which point the focus of the litigation shifted solely to Nancy. First, in May 2016, the DOJ filed a motion with the district court to remove Burt as a defendant and substitute him with Nancy as representative of Burt's estate. The district court quickly approved the substitution. Next, in October 2016, Nancy filed an answer in the case, clarifying in the opening sentence that the answer was being filed "solely in her individual capacity and not in any respect on behalf of her late husband or in any representative capacity." Nancy never filed an answer or any other pleading in her role as representative of Burt's estate and the deadline for doing so passed. The effect of such inaction was that all facts that the DOJ alleged in the complaint concerning Burt were deemed admitted. Accordingly, the DOJ filed a motion for default Judgment against Nancy, asking the district court to rule that in her capacity as representative of Burt's estate, she was personally liable for the 50% FBAR penalty assessed against Burt. The district court granted the motion for default judgment, thereby imposing on Nancy a bill for Burt's FBAR penalty plus all interest and late-payment penalties that had accrued since the IRS assessed the penalty nearly four years earlier, in December 2013.

Additional district court holdings. In its complaint, the DOJ emphasized that with respect to 2007, the taxpayers (1) held a multi-million dollar account at UBS through a foreign entity, Towers International, Inc., (2) did not report the passive income that the account generated on Schedule B of 2007 Form 1040 even though an e-mail showed that a UBS representative sent this data to them; (3) did not acknowledge the existence and location of the UBS account in Part III to Schedule B of the 2007 Form 1040; and (4) did not file a timely 2007 FBAR reporting the UBS account. The DOJ also underscored that Nancy self-prepared the 2007 Form 1040, and both Nancy and Burt swore to its accuracy and completeness under penalties of perjury.

The records reveal that Nancy and Burt retained at least two reputable U.S. law firms to defend them throughout the FBAR litigation but the attorneys ceased to participate when Nancy and Burt stopped paying their fees, refused to follow their advice, and insisted on disobeying mandates by the district court regarding discovery and other matters. Ultimately, the DOJ asked the district court to find in its favor concerning the FBAR penalty assessed against Nancy by filing a motion for summary judgment. Nancy never filed any documents in opposition so the district court ruled in favor of the DOJ again.

The district court issued a rather short opinion, indicating that the pivotal element, willfulness, "can prove challenging to establish, but not here." In deciding that willfulness existed and that the DOJ was entitled to collect the FBAR penalty against Nancy, the district court noted that (1) Nancy prepared and filed Forms 1040 personally in earlier years disclosing foreign accounts, such that she was aware of the obligation to do so; (2) Nancy sent e-mails to her accountant "that display a consciousness of guilt;" and (3) willful blindness satisfies the required mental state for a willful FBAR violation, and Nancy "certainly acted with at least that degree of intent."

Park

This last case shows just how expansive the DOJ can be in identifying parties who are, or who might be, liable for an FBAR penalty assessed against a deceased taxpayer: *Jung Joo Park, individually and as trustee of the Que Te Park Declaration of Trust and as the De Facto representative of the estate of Que Te Park; John Doe, as personal representative of the Estate of Que Te Park; Charles Park, individually, and as successor co-trustee of the Que Te Park Declaration of Trust; James Park, individually and as successor co-trustee of the Que Te Park Declaration of Trust; and Nina Park, individually, and as successor co-trustee of the Que Te Park Declaration of Trust.* [29]

Facts. The case is complicated and still developing. The available documents provide the following key facts. Que Te Park ("Mr. Park") was a U.S. citizen, originally from South Korea, who died in July 2012. He was survived by Jung Joo Park ("Surviving Spouse Park") and three children, Charles, James, and Nina Park, all of whom are U.S. citizens. Mr. Park operated businesses that sold bracelets that supposedly affected the "chi" of the wearer to relieve pain, arthritis, and other ailments. The products were sold through various outlets, including cable TV infomercials. Mr. Park was wildly successful for a time, with large sales and even larger profits. He later encountered problems including with the Federal Trade Commission and bankruptcy courts.

In 2007, Mr. Park placed certain assets in a domestic revocable trust, established by the Que Te Park Declaration of Trust ("Domestic Trust"), which became irrevocable on his death. Mr. Park was the grantor and original trustee, Surviving Spouse Park was the successor trustee, and the three children were named successor co-trustees, but only if Surviving Spouse Park was unable/unwilling to fulfill her role. The terms of the Domestic Trust required, among other things, that the acting trustee pay all claims allowable against the estate of Mr. Park on his death. Moreover, the terms mandated that when Mr. Park died, the acting trustee was to divide the assets in the Domestic Trust into a "Marital Trust" for the benefit of Surviving Spouse Park, and a "Family Trust" for the benefit of Surviving Spouse Park during her lifetime, followed by distributions to the descendants of Mr. Park, including his three children, on her death.

Also, in 2007, Mr. Park executed a will naming Surviving Spouse Park as executrix and the three children as successor co-executors. The will indicated that on Mr. Park's death, essentially all his assets should have been transferred to the Domestic Trust. The will was not probated in the United States after his death such that, at the time that the DOJ filed the complaint in the district court to recover the FBAR penalty, no personal representative or administrator had been appointed to act officially on behalf of the estate of Mr. Park. Nevertheless, Surviving Spouse Park always acted as a representative of the estate before the IRS, apparently notifying the IRS (incorrectly) that Mr. Park died without a will or any assets. In 2007, Mr. Park fled the United States to avoid his creditors and the courts, after refusing to surrender all his property to, and participate in an examination of his assets with, a representative of a U.S. Bankruptcy Court.

Mr. Park filed a timely 2007 FBAR but it omitted seven out of ten foreign accounts, which were located in Switzerland, China, and South Korea. He did not submit a timely 2008 FBAR, waiting until June 10, 2010 (approximately one year after the deadline) to file.

When he died in 2012, Mr. Park had various foreign assets, the largest of which were the unreported foreign bank accounts and various real properties in South Korea. Although the will indicated that all such assets belonged to the Domestic Trust, Surviving Spouse Park and Charles Park, with the assistance of South Korean probate attorneys, sold the real properties and distributed the proceeds of over $3.6 million directly to Surviving Spouse Park and the three children.

Multiple, creative theories of liability. The IRS started an audit in 2011, learned of Mr. Park's death during the audit in 2012, and eventually assessed a willful FBAR penalty for 2008 of approximately $3.5 million on November 21, 2014. The DOJ filed an FBAR penalty collection lawsuit on November 21, 2016, exactly two years from the date that the penalty was assessed.

The initial complaint filed with the district court contained seven separate counts, only the most relevant of which are set forth below. They give a good look at just how broadly the DOJ, and perhaps the courts, will apply liability for FBAR penalties imposed against deceased taxpayers.

Count two claims that under Illinois common law principles, FBAR penalties are recoverable from the Domestic Trust and, to the extent that the assets in the Domestic Trust are insufficient to cover the total due (which had reached approximately $3.98 million at the time that the DOJ filed the initial complaint), the DOJ can seek recovery from "any recipient of assets" from the Domestic Trust.

31 U.S.C. section 3713(a)(1)(B) says that a claim of the U.S. government will be paid first when the assets of an estate of a deceased debtor, in the custody of the executor or administrator, are not enough to pay all debts. 31 U.S.C. section 3713(b) generally provides that a representative of an estate paying any part of a debt of the estate before paying a claim of the U.S. government is liable to the extent of any shortfall to the U.S. government. Based on these rules, along

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28 120 AFTR2d 2017-6778 (DC D.C., 2017). The information in this article derives from the following sources: Complaint filed 12/10/2015; Answer filed 10/28/2016; Motion for Default Judgment as to Estate of Burt Hunter filed 07/11/2017; Order Granting Motion for Default Judgment as to Estate of Burt Hunter filed 07/27/2017; Motion for Summary Judgment Against Nancy Kelley-Hunter filed 10/16/2017; Order Granting Motion for Summary Judgment Against Nancy Kelley-Hunter filed 12/12/2017; and Memorandum Opinion filed 12/12/2017.

29 *Jung Joo Park et al*, Civil Case No. 16 C 10787 (DC Ill., 2017); Complaint filed 11/21/2016; Third Amended Complaint filed 08/10/2018; Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint filed 09/28/2018; Plaintiff's Opposition to Motion to Dismiss filed 10/30/2018.

with Illinois common law regarding transferee liability, Count three alleges that (1) Surviving Spouse Park, as trustee of the Domestic Trust and as the de facto representative of the estate of Mr. Park, was required to first pay the claims of the U.S. government, including the FBAR penalty; (2) by signing joint Forms 1040 for 2004-2007, Surviving Spouse Park admitted to having knowledge of the foreign accounts, and she knew or should have known about the possibility of an FBAR penalty against Mr. Park for not filing a timely 2008 FBAR; (3) despite having such information and notice, Surviving Spouse Park distributed property belonging to the Domestic Trust to persons other than the U.S. government, in violation of 31 U.S.C. section 3713; (4) as trustee of the Domestic Trust, Surviving Spouse Park had a fiduciary obligation to pay the FBAR penalty; and (5) to the extent that the assets of the Domestic Trust cannot satisfy fully the claim of the U.S. government because of the improper distributions that Surviving Spouse Park made as trustee, Surviving Spouse Park will be personally liable under 31 U.S.C. section 3713.

Count four attempts to set aside "fraudulent" transfers of assets of the Domestic Trust to Surviving Spouse Park and the three children. This allegation is founded on the following reasoning by the DOJ: Mr. Park purportedly transferred (1) his interest in the Domestic Trust to the Marital Trust, of which Surviving Spouse Park is a trustee and beneficiary ("Marital Transfer"); and (2) property of the Domestic Trust to the Family Trust, of which defendant Surviving Spouse Park is a trustee, and of which Surviving Spouse Park and the three children are beneficiaries ("Family Transfer"). Surviving Spouse Park later transferred certain property of the Domestic Trust to each of the three children ("Subsequent Transfers"). The U.S. government's claim arises out of the 2008 FBAR violation, which occurred on June 30, 2009. Thus, at the time of the Marital Transfer, Family Transfer, and Subsequent Transfers, Mr. Park had already committed the FBAR violation. The Marital Transfer, Family Transfer, and Subsequent Transfers were made without receiving reasonably equivalent value in exchange, and were made when Mr. Park was insolvent. Therefore, they were "fraudulent" as to creditors of Mr. Park, including the U.S. government.

Conclusion

This article demonstrates that death generally does not relieve a taxpayer of the obligation to satisfy FBAR penalties and the burden often falls on friends and family. This is because the IRS and DOJ are now raising, and the district courts are largely accepting, creative theories for pursuing payment from a long list of parties. These include, but are certainly not limited to, executors, court-appointed and de facto representatives, beneficiaries, surviving spouses, distributees, fiduciaries, trustees, and recipients of fraudulent transfers. Attention in recent years has focused on an arguably sexier issue—what exactly constitutes a "willful" violation in the FBAR context? However, as this article shows, an equally important issue is who will be legally responsible for paying the tab if a taxpayer against whom the willful FBAR penalties were assessed dies? ●