



## Article

The following appeared as an article in TRUSTS & TRUSTEES Volume 11, Issue 1, November 2004.

## The Eulich decision's impact on contempt of court principles and APTs

*by Barry Engel*

For more information about TRUSTS & TRUSTEES see:  
[www.trusts-and-trustees.com](http://www.trusts-and-trustees.com)

# The Eulich decision's impact on contempt of court principles and APTs

by Barry S. Engel, Esq.  
Engel & Reiman pc  
Colorado, USA

A Memorandum Opinion and Order (“Opinion”) was entered on 18th August 2004 in the US District Court for the Northern District of Texas in **John F. Eulich and Virginia Walsh Eulich v United States of America**, Civil Action No. 3:99-CV-1842-L. Therein, the court “determine[d] that clear and convincing evidence establishes that John F. Eulich failed to comply with the court’s Order of Enforcement dated 17th September 2002, and did not make all reasonable efforts to comply with it.” Mr Eulich accordingly was held in civil contempt of court. The court made a statement which has been considered by some to set a new precedent in contempt law (at least in the Northern District of Texas). This article addresses and analyses this concern.

“... it is noteworthy that so very few have resulted in contempt of court decisions.”

“... it does not take long for asset protection trust detractors to pronounce asset protection trusts as D.O.A.”

“Have asset protection trusts died again as a result of the District Court’s decision in *Eulich*?”

## FACTUAL BACKGROUND

The Opinion relates to an Internal Revenue Service (“IRS”) investigation of the Eulichs for tax years 1995, 1996 and 1997. As part of the investigation the IRS sought documents relating to the Mona Elizabeth Mallion Settlement Trust No. 16 (the “Trust”), a Bahamian trust that has “between \$75,000,000 to \$100,000,000 (sic) in assets.” *Eulich*, at p11. The documents were not forthcoming from the Eulichs, and in fact production thereof by the Canadian Imperial Bank of Commerce and Trust Co. (Bahamas) Ltd. (the “Foreign Trustee”) was found by the court to have been blocked by Mr Eulich. *Eulich*, at p8.

On 27th June 2003 the Government filed a “Motion to Hold [Eulich] in Contempt of the 17th September 2002 Order of Enforcement.” The court referred the Motion to the magistrate judge and a hearing was held on 12th March 2004. The magistrate judge issued his report on 26th April 2004, “recommending that the court hold Eulich in civil contempt of court, as the magistrate judge found by clear and convincing evidence that Eulich [had] not complied with the court’s enforcement order and that [he had] failed to make all reasonable efforts to comply with the court’s enforcement order.” *Eulich*, at p3. A fine of approximately .06 per cent per annum of the value of the Trust was recommended by the magistrate judge, with the further recommendation that the fine be tolled once Eulich files proceedings to compel disclosure by the Foreign Trustee of the sought-after documents. Eulich and the IRS both filed objections to the magistrate judge’s report.

## LEGAL ANALYSIS

Considering the number of “asset protection trusts” that have been established over the years, and considering the number of these trusts that have been challenged, it is noteworthy that so very few have resulted in contempt of court decisions. But when there is such a decision, it does not take long for asset protection trust detractors to pronounce asset protection trusts as D.O.A. This was the situation with what is commonly referred to as the *Anderson* case. Many readers will

remember *Anderson* (*Federal Trade Comm’n v Affordable Media*, LLC, 179 F.3d 1228 (9th Cir. 1999)) for the fact that the trust settlors (Mr and Mrs Anderson) were incarcerated for a number of months when funds held in a foreign situs asset protection trust were not repatriated by them following a court order to do so. A number of planners cynical about asset protection trusts declared these trusts as good as dead, with little to no analysis of the *Anderson* case. Their focus was simply on the fact that the Andersons had been incarcerated. There was no regard for the fact that judicial decisions are case specific and fact sensitive. Sight was lost of the key element in *Anderson*; namely, that at the time of the court order, the Andersons in fact had the power to cause the trust to pay funds over. Naturally, and consistent with established contempt of court law, when Mr and Mrs Anderson did not exercise their powers in a fashion designed to bring about compliance with the court order, they were found to be in contempt of court.

Have asset protection trusts died again as a result of the district court’s decision in *Eulich*?

To answer this question, we start with the *Eulich* court’s analysis of Mr Eulich’s five objections to the magistrate judge’s recommendations. The court started by correctly citing a number of legal principles applicable in US contempt law, stating that:

[a] movant seeking a civil contempt order must establish, by clear and convincing evidence, “(1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court’s order”... Once the movant has shown a prima facie case, the respondent can defend against it by showing a present inability to comply with the subpoena or order ... [T]he court ... will not be blind to evidence that compliance is factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action<sup>2</sup> ... and the party subject to a court order is “under a duty to make in good faith all reasonable efforts to comply” with the order (*Eulich*, pp5-6).

# The Eulich decision's impact on contempt of court principles and APTs



While analysing Mr Eulich's second objection, the court in dicta made a statement that is the *raison d'être* for this article. In this dicta the court noted that "Eulich made a conscious decision to set up the Trust in The Bahamas. He thus created the present dilemma regarding the disclosure or nondisclosure of the documents in question ..." *Eulich*, at page 6. The *Eulich* court then stated: "Eulich cannot benefit from a situation that he himself created." (emphasis added). *Eulich*, at page 6. The court then cited three cases purportedly in support of this statement, namely, *Hayes*, *Bryan* and *Pesaplastic*. Each of these three cases is analysed below, and as demonstrated none supports a broad application of the notion that [one] cannot benefit from a situation that he himself created.

The reader can certainly take "judicial notice" of the fact that clients of law firms and accounting firms benefit every day from situations they themselves created. If this statement by the *Eulich* court is in fact true generally, then *Eulich* dealt a blow to marital deduction planning, charitable planning, life insurance planning, and the like, and not just asset protection planning (at least in the Northern District of Texas). Applying a rule of reason, one can easily conclude that this statement is indeed not applicable in the general context.

This statement not being applicable as a statement of the law generally, the question then arises as to its applicability in the contempt of court context. Is this an accurate statement of law with general applicability in the context of contempt, or is it an overly broad statement that in reality has narrow application in the contempt of court context?

To support the statement in question, the *Eulich* court first cited *United States v Hayes*, 722 F.2d 723 (11th Cir. 1984). In *Hayes*, the IRS requested that Hayes produce certain documents related to a tax shelter operation. Hayes partially complied with the order, but did not provide information related to certain foreign partnership agreements. The 11th Circuit held that the IRS satisfied its prima facie burden by demonstrating that Hayes did not comply with the court's order, and overturned the district court's ruling that he could not be found in contempt of court because apparently Hayes made "some effort" to comply with the summons. The 11th Circuit Court of Appeals found the district court's application of a "some effort" standard to be an abuse of the court's discretion, and the district court's decision was overturned.

*Hayes* has nothing to do with either the impossibility of performance defence to a charge of contempt of court, or with the self-created impossibility exception thereto. Hayes does, however, cite *In re Grand Jury Proceedings - United States v Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), commonly known as "the *Nova Scotia*" case, by stating: "We note generally that the obedience of judicial orders is of paramount importance and that courts do not lightly excuse a failure to comply." The *Nova Scotia* case involved a Bahamian bank that was served with a subpoena by a federal grand jury. The bank refused to produce documents, claiming that production would violate Bahamian law. The 11th Circuit Court of Appeals upheld the district court's civil contempt order, concluding that the inevitability of conflict between laws of different countries did not excuse one who chooses transnational commercial operation from compliance with United States law." In other words, one who can comply must comply, and the fact that he will then have to suffer the consequences under foreign law is, in essence, his problem. The provisions of foreign law may cause one to make a difficult choice, but this difficulty is not tantamount to an impossibility.

As can be seen, neither *Hayes* nor the *Nova Scotia* case supports the broad statement that "one cannot benefit from a situation that he himself created."

The *Eulich* court then cites the United States Supreme Court case of *United States v Bryan*, 339 U.S. 323 (1950) for the proposition that "[a] court will not imprison a witness for failure to produce documents which he does not have **unless he is responsible for their unavailability** ..." (emphasis added). In *Bryan*, the respondent was the executive secretary of the Joint Anti-Fascist Committee, and had custody of the group's records. The Committee on Un-American Activities of the United States House of Representatives (the "Committee") had attempted without success to procure this group's records. When called before the Committee to explain why she refused to hand over the requested records, Ms Bryan indicated that she refused to comply because the Committee had no constitutional right to demand any records. Bryan was convicted of failing to produce records in compliance with a Committee Subpoena. The Court of Appeals reversed the lower court's ruling. On appeal, the United States Supreme Court reinstated Bryan's conviction. The relevant portion of this opinion states: "Ordinarily, one charged with contempt of court for failure to

**"Eulich cannot benefit from a situation that he himself created."**

**"... the inevitability of conflict between laws of different countries did not excuse one who chooses transnational commercial operation from compliance with United States law."**

**"A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability."**

# The *Eulich* decision's impact on contempt of court principles and APTs

"... attorneys also failed to produce some of the documents that were in fact still in their possession."

"It can thus be seen that none of the cited cases supports the *Eulich* court's dicta ..."

"... the time-nexus factor is a crucial element in each of the decisions."

comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, **unless he is responsible for their unavailability.**" (emphasis provided). Importantly, *Bryan* involved willful refusal; there was no impossibility of performance issue in *Bryan*.

The third case cited by the *Eulich* court in support of its statement that "Eulich cannot benefit from a situation that he himself created" is *Pesaplastic, C.A. v Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir. 1986). *Pesaplastic* is cited by *Eulich* for the proposition that "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings." *Eulich*, at page 7. The *Pesaplastic* court itself cited *United States v Asay*, 614 F.2d 655 (9th Cir. 1980), for the suggestion that "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings." *Pesaplastic* at page 1521, citing *Asay* at page 660. Here again, the question arises if this is an accurate statement of the law with general applicability in the context of contempt, or if this is an overly broad statement that in reality has narrow application?

In *Pesaplastic*, a judgment was entered in favour of *Pesaplastic, C.A.* against *Tedruth Plastics Corporation*. The court ordered *Tedruth's* attorneys to provide certain documents and to keep other documents within the state of New Jersey. *Tedruth's* attorneys asserted the impossibility defence, claiming they were unable to keep the documents in New Jersey because they belonged to another client. Under these circumstances, were the attorneys justified in refusing to turn over the files on the grounds of impossibility? Aside from the court's concern with the credibility of the *Tedruth* attorneys (apparently, the attorneys had also previously demonstrated the ability to recover some of the documents), the *Tedruth* attorneys also failed to produce some of the documents that were in fact still in their possession. The *Pesaplastic* court stated that *Tedruth* and its lawyers could not raise the defence of impossibility "because their own actions were responsible for their subsequent inability to comply," and the court then went on to explain this statement in context:

"First, even before the documents were removed ... the Law Firm failed to provide meaningful discovery by refusing to identify the responsive documents. Second, despite the fact that *Tedruth* and the Law Firm argue that they have no control over the documents,

certain boxes of those documents were selectively removed from the shipment ... Finally, although *Tedruth* and the Law Firm argue that they were unable to persuade *Cities Service* to return the documents, it is clear that as soon as they were held in contempt a second time, immediate arrangements were made for the return of the documents. Thus, the very fact that they were ultimately able to secure the return of the documents suggests that compliance with the court's order was not impossible and that all reasonable efforts were not made in the first instance."

The *Pesaplastic* court cited *United States v Asay*, 614 F.2d 655 (9th Cir. 1980), wherein the IRS issued six summonses to an accountant, Clifford H. Asay, Jr. Mr Asay was required to produce for examination his records and all books and records currently in his possession pertaining to certain taxpayers. Upon consulting with his attorney, and the attorney for the taxpayers who were under investigation, Mr Asay followed their advice and returned all books and records not prepared by his accounting firm to the taxpayers the day before he was scheduled to appear before the IRS. Mr Asay then appeared before the IRS and refused to testify or produce any documents, explaining that he had returned all documents to the taxpayers. Mr Asay also delivered a letter indicating that he was resisting the summons on six grounds, including:

1. fourth amendment privileges;
2. the information was already in the government's possession;
3. the statute of limitations as to the open years had run;
4. the requests for production were second examinations unlawful under 26 U.S.C. § 7605(b);
5. the summonses constituted an abuse of discretion; and
6. the summonses constituted selective law enforcement.

Mr Asay was found in contempt of court and on appeal the finding was affirmed.

Thus it can be seen that none of the cited cases supports the *Eulich* court's dicta, and that the *Eulich* court's statement is an overly broad statement that in reality has narrow application, as opposed to an accurate declaration of contempt law generally. *Hayes* involved partial compliance with an order, and not full compliance as is required to avoid a charge of contempt. *Bryan* involved a continuing refusal,

# The *Eulich* decision's impact on contempt of court principles and APTs

even up to the point in time that the order was disobeyed. *Pesaplastic* involved willful noncompliance in the face of an order, as did the *Asay* case it cited.

## THE TIME-NEXUS FACTOR

What these cited cases do support, however, is that the time-nexus factor is a crucial element in each of the decisions. These cases all support the point that the true inquiry is not just whether the person created the impossibility, but when did that person create the impossibility? To illustrate this principle of the time-nexus factor, assume two business partners have a falling out and the next day Partner A disposes of the business records he has in his possession. A year later litigation is filed (it being irrelevant who files the complaint), and a year after that each of the partners is ordered to produce his business records. Partner A is certainly "responsible for their unavailability," but does that mean he can be held in contempt of court for failing to produce them because he disposed of them two years earlier? Does this make sense either at a visceral level or at a legal level?

Other cases not cited by the *Eulich* court show the place and importance of the time-nexus factor. If a time-nexus is found such that the individual knew at the time the impossibility was created that a court order would likely be entered, the court can be expected to find the inability to comply was self-created, and the impossibility of performance defence will be lost.

Consider a United States Supreme Court case that was apparently not argued before the *Eulich* court and that is one of the seminal decisions on the time-nexus factor. *Maggio v Zeitz*, 333 U.S. 56 (1948) involved a turnover proceeding, wherein the US Supreme Court noted that such a proceeding "is one primarily to get at property rather than to get at a debtor." *Maggio*, 333 U.S. 56, 63. The United States Supreme Court in *Maggio* also states, at pages 63 to 64:

"The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendants **at the time of the proceeding** .... (emphasis added) [W]e do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property, and its proceeds have already been dissipated, no matter when that dissipation occurred. Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it

violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow."

Concerning the time-nexus factor, the Supreme Court in *Maggio* stated at pages 70 to 71:

"*Maggio* makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. **But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case** (emphasis added). He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings possessed any real or personal property that could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question."

The *Maggio* court also notes at page 72 that coercing performance is the principle behind holding one in contempt of court, and that "to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably."

When determining whether an alleged contemnor has the ability to comply with a court's order, the court is generally limited to examining the facts and circumstances that exist at the time the order is issued that creates the impossibility on the part of the contemnor. For example, in *United States v Rylander*, 460 U.S. 752, 757 (1983), the United States Supreme Court stated:

"In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question. While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production." (citations omitted)

Particularly when the sanction to be imposed is imprisonment, the court will require a present ability to perform as of the time of the contempt

*"But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case."*

*"... the court is generally limited to examining the facts and circumstances that exist at the time the order is issued that creates the impossibility ..."*

*"... when the sanction to be imposed is imprisonment, the court will require a present ability to perform as of the time of the contempt hearing."*

# The *Eulich* decision's impact on contempt of court principles and APTs

hearing. For example, in *Bowen v Bowen*, 471 So2d 1274, 1277 (Fla. 1985) the Florida Supreme Court stated, “[b]ecause incarceration is utilised solely to obtain compliance, it must be used only when the contemnor has the ability to comply.”

The impossibility of performance defence was outlined by the Second Circuit Court of Appeals in the case of *Badgley v Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986), as follows:

“The purpose of civil contempt, broadly stated, is to compel a reluctant party to do what a court requires of him. Because compliance with a court’s directive is the goal, an order of civil contempt is appropriate ‘only when it appears that obedience is within the power of the party being coerced by the order’ *Maggio v Zeitz*, 333 US 56, 69, 92 L.Ed. 476, 68 S.Ct. 401 (1948). A court’s power to impose coercive civil contempt is limited by an individual’s ability to comply with the court’s coercive order. *Shillitani v United States*, 384 US 364, 371, 16 L.Ed. 2d 622, 86 S.Ct. 1531 (1966); *Maggio v Zeitz*, supra, 333 US at 72-73. A party may defend against contempt by showing that his compliance is ‘factually impossible.’ *United States v Rylander*, 460 US 752, 757, 75 L.Ed. 2d 521, 103 S.Ct. 1548 (1983).”

In contrast to the cases cited above, consider *Ex Parte Coffelt*, 389 S.W.2d 234 (Ark. 1965), wherein the defendant disposed of funds that were subject to a court order one month prior to the issuance of the order. Further, the defendant had reason to be aware that a court order would be issued at the time he disposed of the funds. The Arkansas Supreme Court determined that this situation was a self-created impossibility, and therefore, the impossibility of performance defence was unavailable.

## CLOSING

The result of the *Eulich* decision, like other contempt of court decisions claimed by some to be the death knell of asset protection planning, is consistent with the law on contempt of court as it has been for decades. The result in *Eulich* is not a departure from established, time-tested and true principles of contempt law. This is true even with respect to the statement in dicta that “*Eulich* cannot benefit from a situation that he himself

created,” when that statement is analysed in context and with reference to the precedent the *Eulich* court cited. Interestingly enough, as noted earlier herein, the *Eulich* court did state that Mr *Eulich* himself blocked production of the documents by the Foreign Trustee, presumably in close time proximity to the order of the court. While this alone would suffice for a finding of contempt, this important factor did not (at least on its face) receive any further consideration by the court.

## Barry S. Engel

Engel & Reiman pc  
The Equitable Building, Suite 500  
730 - 17th Street  
Denver, Colorado 80202  
United States of America

Tel: +1 303 741 1111  
Fax: +1 303 694 4028

Email: [b.engel@engelreiman.com](mailto:b.engel@engelreiman.com)  
[www.engelreiman.com](http://www.engelreiman.com)

Barry S. Engel is the lead author of the Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning, published by CCH Incorporated, Chicago, Illinois. Mr Engel is also the founder of Shore To Shore magazine, the Official Publication of The Offshore Institute as published from 1993 to 2000 by Highbury House Communications PLC, London. He is currently a member of the editorial board of Cambridge-based Trusts & Trustees. Mr Engel is also the designated specialist for FindLaw.com’s professional section on asset protection planning, is a Senior Fellow of The Estate and Wealth Institute at Michigan State University, and is a Fellow of the National Network of Estate Planning Attorneys. He received his law degree (with honours) from the University of California, Hastings College of the Law in 1979, and his Bachelor of Science degree in business (with an accounting emphasis, magna cum laude) from the University of Colorado at Boulder in 1976. He is the founding principal in Colorado-based Engel & Reiman pc.

“The result in *Eulich* is not a departure from established, time-tested and true principles of contempt law.”

## Endnotes

1. Dicta is material that is extraneous to a judicial decision; that part of a judicial opinion which is merely a judge’s editorialising; opinions expressed by the judge on points that are not necessary to the result of the case. Dicta is regarded as being of little to no authority.
2. Interestingly enough, this is a principle the *Eulich* court cited but which contradicts its own dicta.