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## Emerald Casino trustee can seize late CEO's assets

By Patricia Manson  
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The wife of a corporate executive who helped drive Emerald Casino Inc. into bankruptcy must turn over certain assets to partially satisfy a \$219 million judgment against her late husband's estate, a federal judge ruled.

In a written opinion this week, U.S. District Judge Rebecca R. Pallmeyer ruled Kevin F. Flynn's transfer of stock options and other assets to his wife was constructively fraudulent.

Flynn, Emerald's former chief executive officer, transferred the assets after the casino was forced into bankruptcy by its creditors.

A debtor's transfer of assets is fraudulent if the debtor does not receive "a reasonably equivalent value" for the assets and if the debtor is insolvent at the time or is left insolvent as a result of the transfer, Pallmeyer wrote, quoting the Illinois Uniform Fraudulent Transfer Act.

The debtor, she continued, citing *Nostalgia Network Inc. v. Lockwood*, 315 F.3d 717 (7th Cir. 2002), "need not intend for the transfer to hinder his or her creditors in order for the transfer to be voidable under this provision."

And creditors are defined as persons who have a claim against a debtor, Pallmeyer wrote.

Quoting the act, she wrote a claim is a "right to payment" against a debtor, "whether or not that right has been reduced to a judgment."

Flynn's wife, Susan, does not deny that Emerald's bankruptcy trustee was a creditor of her husband "whose claim arose before the transfer was made," Pallmeyer wrote, quoting the act.

Susan, she wrote, also does not contend her husband received "a reasonably equivalent value" for the assets he transferred to her.

And Susan has presented no evidence that Kevin had the money to pay the \$219 million judgment the bankruptcy trustee later obtained against him and other Emerald executives, Pallmeyer wrote.

Under these circumstances, she held, the assets Kevin transferred to Susan are available to help pay the judgment obtained by the casino's bankruptcy trustee

Pallmeyer directed Susan to turn over the assets to the trustee, Frances Gecker of FrankGecker LLP.

The lead attorneys for Gecker are Catherine L. Steege of Jenner & Block LLP and Matthew J. Piers of Hughes Socol Piers Resnick & Dym Ltd.

The lead attorney for Flynn is Constantine L. Trela Jr. of Sidley Austin LLP.

The attorneys could not be reached for comment.

In 1992, Emerald obtained one of Illinois' original licenses for gambling along the Mississippi River.

Emerald began plans in 1998 to relocate to land in Rosemont, altering its ownership structure and amending its shareholders' agreement.

Emerald had entered into at least nine contracts with construction companies and architecture firms by October 1999.

But the casino failed to comply with rules that required it to inform the Illinois Gaming Board of its plans.

In 2001, the gaming board revoked Emerald's gaming license. That decision was ultimately upheld by the Illinois Appellate Court.

Emerald's creditors filed a petition that forced the casino into Chapter 7 liquidation under the U.S. Bankruptcy Code. The proceeding was converted to a Chapter 11 reorganization and then converted again to a Chapter 7 proceeding after Emerald officially lost its license in 2007.

Gecker sued seven Emerald executives in bankruptcy court, accusing them of wrongdoing that led to the casino's failure.

Now-retired U.S. bankruptcy judge Eugene R. Wedoff initially presided over a bench trial in the case.

But Pallmeyer took over the case and heard additional testimony before ruling against six of the executives in September 2014.

Pallmeyer found Emerald sustained \$272 million in damages.

Settlements by two of the executives brought the amount of damages still owed down to \$219.66 million.

In August 2017, the 7th U.S. Circuit Court of Appeals held the remaining four defendants were jointly and severally liable for that amount.

The ruling left the way open for Gecker to try to collect the entire amount from the wealthier defendants.

In attempting to collect the judgment, Gecker issued citations to parties including Susan Flynn.

Gecker then filed a motion in August 2017 to compel Susan to turn over assets that included an option to purchase 60,000 shares of LKQ Corp., which the auto-parts provider granted to Kevin in January 2009.

The assets also included 1,261 “restricted share units” of LKQ stock the company granted Kevin in May 2011 and an additional 4,078 units the company granted in May 2013.

Pallmayer did not give a value for the assets in her opinion.

Kevin received these assets under LKQ’s 1998 Equity Incentive Plan.

In June 2009, he designated Susan as the primary beneficiary of the plan if he died before receiving the distributions he was entitled to receive.

Under the Illinois Uniform Transfer on Death Security Registration Act, ownership of the assets passed to Susan outside of probate when Kevin died in August 2013.

In her opinion Wednesday, Pallmeyer rejected the argument that Kevin did not make any “transfers” as defined by the Uniform Fraudulent Transfer Act.

Such a holding would have put the stock options and restricted share units out of Gecker’s reach.

Pallmeyer acknowledged Kevin’s interests in the assets had not vested when he executed the beneficiary registration form in 2009.

But a “transfer” includes “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest with an asset,” Pallmeyer wrote, quoting the statute.

That definition, she wrote, is broad enough to cover a two-step process in which the grantor designates a beneficiary and the grantor’s death later causes the assets to pass automatically to the beneficiary.

The case is *In re Emerald Casino Inc.; Frances Gecker v. Estate of Kevin F. Flynn, et al.*, No. 11 C 4714.

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