

From: **Marty Harper** Subject: Notice to USAPA and its Officers and Directors



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Date: June 29, 2015 at 9:33 AM

To: John Gresham Brian O'Dwyer , Gary Silverman Marty Harper Kelly J. Flood Mr. Jeffrey Freund

Pierce, C. Grainger Jr.

Counsel,

The Ninth Circuit Court of appeals included in its opinion dated June 26 a remand for the District Court to address the West Pilots' claim for attorneys' fees, which was based on the common benefit doctrine. Consequently, the West Pilots are currently creditors of USAPA, and will seek reimbursement for their attorneys' fees and costs immediately upon issuance of the mandate. Even before the Ninth Circuit issued its opinion, USAPA and its officers and directors have acknowledged numerous times in publications to USAPA members that prior to being able to distribute excess treasury funds at dissolution to members on a pro rata basis, USAPA needs to reserve funds for USAPA's heretofore potential liability for the West Pilots' attorneys' fees and costs in the *Addington* litigation in its various iterations. USAPA and its officers and directors have also made avowals to the court in North Carolina to this effect. This is consistent with USAPA's Constitution and Bylaws, Article I, Section 3(A) ("All assets shall be liquidated, less any indebtedness...") USAPA and its officers and directors are on notice at this time that the potential amount of USAPA's indebtedness for the West Pilots attorneys' fees and costs sought under the common benefit doctrine is at least approximately \$4+ million. Based upon the Ninth Circuit's conclusion confirming that USAPA has acted only on behalf of East Pilots, USAPA should reserve the \$4 million out of East Pilots' share of whatever treasury funds will be distributed, and not out of the West Pilots' share.

To the extent that USAPA intends to quickly dissolve and begin to disburse its treasury funds, USAPA and its officers and directors must reserve at least \$4 million as potential liability to the West Pilots for attorneys' fees and costs, out of the East Pilots' share. Should the officers and directors of USAPA authorize USAPA to distribute all of its funds without appropriately accounting for and reserving this amount, the officers and directors, and any attorneys who counsel them to do so, may be personally jointly and severally liable for fraudulent transfers. This is true under North Carolina law (Uniform Fraudulent Transfer Act , N.C. Gen. Stat. § 39-23.4, et seq) even though the debt is not yet reduced to a judgment. See, e.g., *Kirkhart v. Saieed*, 107 N.C.App. 293, 294, 419 S.E.2d 580 (1992) (holding that a creditor is entitled to protection from fraudulent transfers even though a debtor transfers the assets prior to the creditor obtaining judgment against the debtor). Because USAPA and its officers and directors are on notice that the West Pilots' claim for fees based on the common benefit doctrine is imminent on issuance of the mandate, if USAPA fails to properly reserve the funds and, instead, depletes its treasury rendering it insolvent and unable to pay the debt owed to the West Pilots, USAPA, its officers and directors, and lawyers who counseled them to do so will be held liable for fraudulent transfers.

The US Bankruptcy code provisions regarding fraudulent transfers, in an action brought under the NC Uniform Fraudulent Transfer Act, have been applied to simple transfers of money into bank accounts. See, e.g., *In re Jenkins*, Case No. 12-50413, Adversary Proceeding No. 12-5033, United States Bankruptcy Court, W.D. North Carolina, Charlotte Division (December 12, 2012):

"A transfer is a disposition of an interest in property. The definition is as broad as possible . . . . Under this definition any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because possession, custody, and control are interests in property. A deposit in a bank account or similar account is a transfer." *In re Pulliam*, 279 B.R. 916, 920 (Bankr. M.D. Ga. 2002) (quoting S.Rep. No. 95-989, 95th Cong. 2d Sess. 27 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5813) (emphasis added).

To conclude, to the extent that USAPA intends to dissolve at this time and begins the distribution of its treasury funds to members, it must first reserve at least \$4 million out of the East

distribution of its treasury funds to members, it must first reserve at least \$4 million out of the East Pilots' share as indebtedness to the West Pilots for attorneys' fees and costs.

Thank you,

Marty

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