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Cuomo Trust Likely Protects $1M From Lawsuit Damages

By **Anna Sanders**

Law360 (September 22, 2021, 3:22 PM EDT) -- More than $1 million that former New York Gov. Andrew Cuomo earned from a book trumpeting his response to the coronavirus pandemic will likely be protected from potential lawsuits brought by women whose allegations of sexual harassment pushed him to resign last month, experts said.

That's because the disgraced Democrat put about a fifth of his $5.1 million book deal into a trust for his three daughters, likely shielding the money from future creditors, according to attorneys who work in estate planning and related litigation. But they said the fate of the money will largely depend on exactly when Cuomo created the trust — and whether he had existing creditors already or understood that he might soon face litigation for his actions at the time.

"If you're creating a trust when you have known creditors and when you're basically creating the trust specifically to evade your creditors, then that's when the trust might not be as enforceable," said Christen K. Douglas of McDermott Will & Emery LLP, who advises high-net-worth clients on estate planning and trust and estate controversies. "But if he created the trust for the benefit of his descendants at a time when he did not have any of these known creditors and none of these lawsuits had been filed, then I think, on balance, the trust should be respected."

Douglas and other attorneys spoke to Law360 Pulse about the enforceability of Cuomo's $1 million trust in general terms without knowing its specific provisions or exactly when the money was transferred. The creation of the trust was disclosed by Cuomo's team this May.

Cuomo campaign spokesman Richard Azzopardi declined to comment. He also didn't answer questions on Tuesday about when the trust was formed, what kind was used, when money was transferred to it, when Cuomo first made plans to create one, or the terms of the trust.

"In general, trusts can be an effective way to shield property from creditors," Neil V. Carbone, a trusts and estates and estates litigation partner at Farrell Fritz PC, told Law360 by email. "Depending on the trust's provisions, it can shield property from the creditors of beneficiaries who are not also the settlor of the trust (i.e., the person who transferred his or her assets into the trust). Certain kinds of trusts, often referred to as 'asset protection trusts,' can also shield assets from the creditors of the settlor of the trust, even if the settlor is also a beneficiary of the trust."

Cuomo resigned in August after the state attorney general's office concluded he sexually harassed 11 women. But the former governor still faces legal challenges tied to the sexual harassment allegations, his office's response to the complaints and other matters authorities are still investigating, including the administration's handling of data on nursing home deaths, ethics concerns and the use of state employees to help craft the lucrative book, "American Crisis: Leadership Lessons from the COVID-19 Pandemic."

A state ethics agency last week voted to allow Cuomo to keep the $5.1 million he earned writing "American Crisis." Despite criticism from lawmakers who felt he was profiting off a mishandled pandemic that has killed more than 56,000 New Yorkers, the state Joint Commission on Public Ethics declined to rescind its approval for Cuomo to get outside income from the memoir.

He was paid a $3.12 million advance to write the book in 2020 and expects to collect another $2 million under his contract, his office disclosed this past spring. After taxes and expenses, Cuomo netted about $1.5 million for the book last year, according to a letter sent by PwC partner Mark T. Nash to Cuomo, his client. Cuomo donated $500,000 of those profits to the United Way of New York State.

"You have instructed that the remaining $1,037,508 be placed in a trust for your three daughters in equal shares," Nash wrote in the letter to Cuomo, copies of which were provided to reporters by Cuomo's team.

PwC declined to comment on or confirm the contents of Nash's letter.

The $1 million is likely to stay in the trust unless creditors can prove Cuomo knowingly transferred the money to evade them, bankrupt himself or shrink his own assets enough that liabilities can't be collected from him, experts said.

"Certainly trusts are used to protect assets from creditors; that is one of the functions that trust settlors typically create the trust for," said Benjamin S. Litman of Elman Freiberg PLLC, who represents clients in litigation arising from contested estate-planning vehicles and their administration. "You can create a trust in advance of knowing who the creditors are and that you might have creditors who could include plaintiffs in a given lawsuit, but if you know the identity of those creditors or that you're likely to face a lawsuit, and then try to create a trust that protects your assets, then it could be considered too late."

At least one woman who accused Cuomo of sexual harassment, Lindsey Boylan, said she intends to sue the former governor after the attorney general's report detailed how his administration tried to retaliate against her when she went public with her allegations last December. Boylan's attorney, Jill Basinger of Glaser Weil Fink Howard Avchen & Shapiro LLP, first indicated that they planned a lawsuit in August, months after Cuomo announced creation of the trust.

But this is where timing may matter. The money could still be fair game for lawsuit damages if Cuomo created the trust knowing he could face litigation for his actions.

"We could definitely make an equitable claim that creating a trust too late in the process — after Cuomo would have had knowledge that these lawsuits might have been coming against him at some point in time — that that would be an improper conveyance and therefore they should be able to essentially pierce the trust and get access to those funds if necessary," Litman said.

New York Attorney General Letitia James said in March her office would investigate allegations of sexual harassment against Cuomo, the same month the state Assembly announced it had begun an impeachment inquiry into the claims and the former governor's handling of nursing home deaths. While the $1 million trust is funded with book money earned last year, it's unclear whether the trust was created in 2020, before Cuomo faced the inquiries and criticism over his behavior.

"It's really a question of timing," Litman said. "In general, you could attack a trust and try to get access to its funds if it was created certainly after you were already sued or even, frankly, if you were not sued but knew that you had allegations pending against you, even if a lawsuit hadn't been formalized yet."

In order to void a transfer, including to trusts, present or future creditors must show that the debtor made the transfer with "actual intent to hinder, delay or defraud any creditor" or without getting a reasonably equivalent value in return, according to Carbone.

Recognizing the difficulty of proving a debtor's actual motives, under revamped rules signed by Cuomo that went into effect in April 2020, creditors can demonstrate intent through "badges of fraud," including the existence of an actual or threatened lawsuit at the time and the depletion of all or most of the debtor's funds through the transfer, Carbone said. And, under those new rules, a transfer must be challenged four years from the transfer or one year after the transfer was discovered, or could reasonably have been discovered, whichever is later.

"The creditor has the burden of establishing its claim by a preponderance of the evidence (enough evidence to make it more likely than not that the claim is true)," Carbone said.

The country's changing political dynamic could also help keep the $1 million funds secure in the trust.

After President Joe Biden was elected in November 2020, there was growing concern among the rich that current gift and estate tax exemptions would be decreased sooner than when they're already expected to sunset in 2026, according to Douglas.

"We had many, many clients who were trying to use up their gift tax exemption while they still had it, so I think that also helps Cuomo's case," she said. "As long as he created the trust without known creditors and he didn't fund it to the extent that he would totally deplete his assets outside the trust, it sounds like it's very likely his trust would be respected."

Cuomo accusers could invoke Title VII of the Civil Rights Act of 1964 — which guards employees and applicants from workplace sexual discrimination, including harassment — in lawsuits against him.

Unlike Title VII, New York law doesn't require victims to file administrative claims before proceeding with a lawsuit in state court. And individuals, in addition to employers, can be held responsible in civil court if they were "personally involved" in harassment, according to the attorney general's report. Employees can also be held individually liable if they violate the New York State Human Rights Law, which prohibits discrimination based on sex. As governor, Cuomo also signed a law in 2019 that strengthened the state's sexual harassment protections and increased potential liability for employers so that victims no longer have to prove the behavior was "severe or pervasive."

Cuomo could attempt to argue that the state, and not him personally, is liable for his actions as governor. He's already shielded from personal liability in lawsuits filed against him regarding his administration's management of the coronavirus pandemic or anything else he did in his professional capacity as head of the state's executive branch. But it would be difficult to argue that sexual harassment was committed in any official capacity.

He still expects to collect $2 million more from the book over the next two years, but it's unclear what will happen to the money. Azzopardi, Cuomo's campaign spokesman, didn't respond to a question from Law360 about whether the remaining money would also be put into a trust.

--Editing by Brian Baresch and Alyssa Miller.
