

**JURISDICTIONAL CONSIDERATIONS
IN ESTABLISHING A PROTECTIVE TRUST**

OFFSHORE TRUSTS: HOW THE LANDMARK CASES HAVE AFFECTED DRAFTING
ISSUES AND SELECTION OF JURISDICTION

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I. INTRODUCTION. The recently decided U.S. cases illustrate the impact of various drafting and implementation errors that can be made when formulating an asset protection structure. Equally important to an understanding of asset protection planning is a review of the types of jurisdictions in which a protective structure might be situated and the statutory and case law of those jurisdictions. This portion of the presentation will review key jurisdictions and will summarize some of the important statutory and precedential judicial decisions and trends in those jurisdictions.

II. PRELIMINARY ISSUES. Before focusing on specific jurisdictions, it is important to consider the following general issues, always keeping in mind that the most protective structures are those that are completely severed from the United States.

A. Aggressive Vs. Non-Aggressive Legislation. One alternative is to seek the protection of those jurisdictions which have aggressive asset protection legislation (such as the Cook Islands, Gibraltar, and the Bahamas); however, some clients may take greater comfort in the fact that jurisdictional ties will be severed and that there is greater security in more established offshore financial centers (such as the Isle of Man, the Channel Islands, or Liechtenstein). However, even if the only objective is asset protection, it is not necessarily appropriate to select a jurisdiction that has aggressive legislation because a potential claimant could assert that the presence of aggressive asset protection legislation is the only reason one selects such a jurisdiction, thereby lending support to a fraudulent transfer claim.

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There is an interesting dichotomy in the selection of a jurisdiction when the focus is on creditors' rights under fraudulent transfer law as opposed to when the focus is on creditors' rights under bankruptcy law. As suggested in the preceding paragraph, if the concern centers on fraudulent transfers, one might be well-advised to select a jurisdiction with non-aggressive legislation. On the other hand, such jurisdictions with aggressive legislation arguably provide more protection in the bankruptcy arena because, under bankruptcy law, the court is charged with determining what is "included" in the bankruptcy estate and must do so with reference to "applicable nonbankruptcy law."¹ The argument can certainly be made that the reference includes foreign law, and if, therefore, one has availed oneself of the protective statutes of the Cook Islands, for example, the assets should not be included in the bankrupt's estate and the court should grant the discharge.²

B. Reluctance To Relocate Assets. Another jurisdiction selection issue arises when a client does not want to move assets offshore. In such a case, even if there are no existing concerns about fraudulent transfers or bankruptcy discharges, one inevitably must choose a jurisdiction with highly specific asset protective legislation because such legislation is more likely to extend to assets not physically located in the applicable jurisdiction.

C. Consider The Likely Origin Of A Claim. This consideration will be very speculative because there should be no likely claims. Nevertheless, the nature of the client's activities may suggest that either a private party (e.g., medical malpractice claimant) or governmental agent (e.g., EPA demanding payments for environmental infractions) is the more probable plaintiff. A governmental claimant may well be able to achieve results in a foreign jurisdiction that a private party could not, particularly in a jurisdiction in which the U.S. is accustomed to dictating policy (for example, in the Caribbean). Additionally, marital claims may be more difficult to pursue in jurisdictions like Gibraltar or Bermuda because of the status of established precedent or statutory framework.

D. Local Law. Most foreign jurisdictions have some form of fraudulent transfer law or other regime designed to protect creditors or at least certain classes of creditors. These laws vary, as do the trust laws. Sometimes a settlor can be the sole beneficiary, sometimes a remainderman, sometimes a member of a class of current beneficiaries, and sometimes none of the above.

In the exercise of analyzing local law, there is a tendency to stop with the trust law and fraudulent transfer law. Other aspects of local procedural and substantive law that demand attention in a comprehensive review include the following.

- Rules regarding contingent fee contracts (e.g., are they permitted?) and the issuance of preliminary (or Mareva) injunctions³
- Theories for damages and the basis for amounts (e.g., are punitive damages allowed?)
- Rules regarding the awarding of attorney fees and court costs (e.g., is there a loser pay rule, and, if so, what is covered?)

- Statutes and case law on confidentiality
- Conventions or laws on the enforcement of foreign judgments
- Conventions or laws on allowing the taking of evidence (e.g., is the venue a party to the Hague Convention on taking evidence abroad?)
- Statutes and case law on conflicts of law
- Bankruptcy law
- Taxes

Such laws can, in fact, be as important as the basic trust law and fraudulent transfer law.

E. Economic and Political Stability. Great weight should be given to political and economic stability. Economic stability is typically integrated with political security, but not always. The ideal locale should have a certain economic substance measured by the status of its population, domestic output, infrastructure, and professional community. A healthy range in the choices of banks, accountants, trustees, attorneys, and investment advisors provides proof of a comforting level of professional and economic activity.

F. Costs. Of particular concern will be local fiduciary, legal, and accounting fees, formation costs, taxes (if any), etc. Obviously it is important to inquire in advance about all of these matters. As a general rule, reputable professionals in foreign jurisdictions have reasonable charges. Competition and professionalism seem to keep trustee, legal, and accounting fees at appropriate levels. It generally is advisable to consult with more than one attorney (or firm) and to inquire about that lawyer's charges as well as other costs and fees. Making it known that one will be conducting further inquiries before selecting professionals promotes competitive responses.

G. Transportation and Communications. Transportation and communications are very important. It is relatively easy to travel to most offshore jurisdictions, but certain issues need to be addressed.

- Does travel depend upon a politically sensitive connecting terminal?
- Do local holidays affect travel logistics?

Personal tastes are also a factor in the selection of jurisdiction. Some clients simply prefer to go to Europe and are comfortable there, while others may have the same attitude about the Caribbean.

H. Banks and Investment Advisors. Successful offshore trust structures require the participation of a foreign custodian bank. Thorough inquiries should be conducted regarding the bank's reputation, integrity, and fiscal solidity. The use of a branch of a well-known U.S. bank or an international bank must be carefully and cautiously considered. The bank's presence in other jurisdictions (for example, the U.S.) could compromise the level of protection otherwise

afforded the client's assets.⁴ Many banks in foreign countries have high quality money managers. However, it is not necessary to use the custodian's asset management personnel. Independent investment professionals can manage funds held by the custodian, providing flexibility to the structure.

I. Criminal Activities. One of the greatest risks in the use of an offshore trust is an erroneous choice of local professionals. In some offshore jurisdictions, there are trustees, lawyers, accountants, and bankers involved in tax evasion, money laundering, and perhaps other activities that are not necessarily illegal in the host country, but certainly are illegal under U.S. laws. Therefore, it is extremely important to be sure that one is dealing with honorable professionals. Obviously, references and professional listings are critical to the thorough examination of this issue.

The lawyer and client can also expect to be scrutinized by reputable professionals. Some foreign trustees, lawyers, bankers, and accountants who conduct their careers and lives in honest, ethical, and honorable fashions are wary of new business. Therefore, the attorney, as well as the client, might be asked for references and be subjected to fairly close examination. If one has thoroughly investigated the people with whom one has chosen to deal and presents them with detailed information and references, as well as with preliminary plans indicating intentions to plan aggressively but within the bounds of the legal and tax framework of the client's jurisdiction and the host jurisdiction, problems will be few. However, each jurisdiction and industry involved in the offshore trust business has enacted, or is in the process of enacting, more stringent due diligence requirements and procedures that will make establishing foreign structures more costly and time consuming in even the most transparent situations. As an example, the Swiss Bankers Association's Due Diligence Agreement (CDB 03), which was recently enacted to be effective July 2003, contains stricter "know your customer" rules in an attempt to establish the identity of the beneficial owner of assets. A copy of this Agreement is attached as Exhibit A.

J. Influences of Other Countries. Most offshore jurisdictions are small countries and are subject to the economic clout and political influence of larger countries. The U.S., for example, has the potential to force the Caribbean Basin Initiative on many Caribbean island countries. Many of the jurisdictions have some tie to the United Kingdom, which may retain powers over certain aspects of the international dealings of its former colonies or dependencies.⁵ The impact of these relationships should be considered and evaluated.

III. OVERVIEW OF SELECTED FOREIGN JURISDICTIONS. Selection of a jurisdiction is a challenge. Due to the logistical difficulties of having reliable contacts in every possible country and due to the burden of trying to follow the laws and the political and economic climates of many jurisdictions, it is very tempting to select one country and then do "cookie-cutter" structures for all clients. The attorney practicing in this arena should resist that inclination and become knowledgeable about the legal and nonlegal issues relevant to various jurisdictions. There are important differences among jurisdictions and the scene is not static. What works for one client may not be best for another; similarly, what works best this year may not work best next year. Trustees and lawyers in many jurisdictions are marketing their respective countries as being optimal for asset protection. Like marketing materials of any

salesman, the information is helpful, but requires careful scrutiny. The following presents an overview of certain offshore jurisdictions. The jurisdictions presented are representative of the types previously discussed (aggressive vs. nonaggressive legislation) and of various geographical locations.

A. Bahamas. The Bahamas is located in the western Atlantic Ocean off the coast of Florida. The capital and financial center of the Bahamas is Nassau, which is on the main island of New Providence. There is excellent airline service from the U.S. and a modern communications system. The Bahamas is an English speaking country with a common law legal system. Although completely independent of Great Britain, the Bahamas is still a member of the British Commonwealth. The official currency in the Bahamas is the Bahamian dollar, the value of which is equal to the U.S. dollar and is expected to remain so. The Bahamas is fairly stable politically, but there is substantial poverty and unemployment.

1. Confidentiality. Bahamian secrecy laws are codified in Section 15 of the Banks and Trust Companies Regulation Act, 2000. Despite attacks from the Organization for Economic Co-operation and Development (OECD) and the Financial Action Task Force (FATF), the Bahamas still maintains strict obligations of confidentiality and provides for severe criminal punishment for bankers or other professionals who reveal information about the identity, assets, liabilities, transactions, or accounts of a customer unless such disclosure is required by Bahamian law or the Bahamian courts, or unless the customer consents to the disclosure. The IRS has been successful, however, in penetrating bank secrecy in certain covert investigations, using suspect methods.⁶

Any encroachments on bank confidentiality that are allowed by Bahamian laws relate primarily to criminal conduct and to assisting Overseas Regulatory Authorities to fulfill their functions and responsibilities.

2. Taxes. The Bahamas is essentially a “no-tax” jurisdiction. It has no personal income tax, corporate income tax, value added tax, capital gains tax, withholding tax, gift tax, estate tax, or employment tax. Property taxes are imposed on both developed and undeveloped real estate. There are stamp duties on the sale of property and on most documents. Businesses and professionals operating in the Bahamas are subject to a business turnover tax on gross receipts from local sources.⁷

3. Fraudulent Disposition. Fraudulent dispositions are addressed by statute in the Fraudulent Dispositions Act, 1991. Under the statute, dispositions are voidable by the creditor prejudiced by the disposition if the transferor made the disposition with “an intent to defraud”. The statute defines “intent to defraud” as an intention of the transferor to defeat willfully an obligation owed to a creditor, and the burden of proof for establishing such intent is on the creditor. The statute of limitations is two years from the date of the applicable disposition.

4. Trusts And Other Entities.

[a] Trusts Act. The Trusts (Choice of Governing Law) Act 1989 affords trusts protection from forced heirship laws in the settlor’s home country

and contains provisions addressing inbound and outbound redomiciliation. If Bahamian law is designated as the trust's governing law, such designation is binding and effective.

- [b] Trustee Act. The Bahamas fairly recently enacted legislation (Trustee Act 1998) liberalizing the rules applicable to Bahamian trustees. For instance, trustees are now held to an "ordinary person" standard of care.⁸ Furthermore, a trustee may now delegate any power or discretion vested in him as trustee to another person.⁹ Finally, the new law gives trustees discretion not to inform even vested beneficiaries of the existence of the trust.¹⁰ While clearly helpful from an asset protection standpoint, these provisions may create future difficulties for beneficiaries.
- [c] International Business Company. Bahamian legislation also provides for the formation of an International Business Company (IBC). By combining an IBC with a trust, a double layer of confidentiality can be achieved.

5. Other Considerations.

- [a] U.S. Influence. Because the Bahamian economy is heavily dependent on U.S. tourism, there exists the potential for U.S. influence on treatment of entities established there by U.S. citizens. While there does not appear to be any current movement in this direction, it should be considered in the selection of a jurisdiction.
- [b] Grupo Torras S.A. et al v. S.F.M. Al-Sabah et al.¹¹ In this case, a Bahamian lower court judge determined that the Fraudulent Dispositions Act of 1991 would not insulate the defendant-trustee from a claim against the assets of the trust even if the two-year statute of limitations for fraudulent conveyance claims had passed. The ruling, issued in 1995, gave way to considerable controversy about the continued validity of asset protection trusts in the Bahamas.

The case presented genuine issues concerning retention of control over the trust or its assets by the settlor that influenced the ruling. However, the non-application of the Act (and, therefore, the inability of the defendant to protect itself with a statute of limitations defense) turned on the fact that the court found that the assets were not actually *owned* by the settlor at the time he transferred them to the trust because the assets were acquired by the settlor by fraud.

In 1997, the Bahamas Court of Appeal limited the *Grupo Torras* ruling to the specific facts of that case. Although the lower court's ruling therefore is not legally precedential, as a practical matter, its existence on the books

nonetheless somewhat diminishes the attractiveness of the Bahamas as an asset protection trust venue.

B. Bermuda. Bermuda is located in the Atlantic Ocean, approximately 600 miles due east from the North Carolina shoreline. It has regular air service with daily flights from New York, Boston, Atlanta, Philadelphia, Baltimore, and Toronto. Bermuda also has a state of the art communications systems. Bermuda, an English speaking country, is a common law jurisdiction. Bermuda is an old British “Overseas Territory” (former colony) and is part of the British Commonwealth. Bermuda may opt for independence from Britain but in a referendum in 1995 rejected this direction. The United Kingdom is responsible for defense and foreign relations; however, economically, Bermuda is more closely linked to the United States. Bermuda has a long tradition of stability and conservative government. The island has a balanced budget, is well-administered, and has a highly educated populace. Strict regulations and a conservative approach to business and socio-economic problems have resulted in the virtual absence of poverty, unemployment, and homelessness in Bermuda.

1. Confidentiality. There are no banking secrecy laws in Bermuda, but information is not readily available to third parties under English common law protection. Bermuda and the U.S. have a tax treaty that serves to implement some exchange of tax information provisions. However, the Attorney General must consult with an investigative committee before providing any information to foreign regulatory authorities.

2. Taxes. Bermuda is virtually tax-free. It does not have an income tax, gift tax, estate tax, business or value added tax, capital gains tax, sales tax, withholding tax, or accumulated profits tax. The majority of the government’s revenue, approximately 32%, is earned from customs duties. Additional forms of taxation in Bermuda include a payroll tax, a departure tax, a motor vehicle fee, and a betting tax that is set at 20%.¹² Foreign (“exempted”) companies incorporating in Bermuda can receive a guarantee exempting them from taxes until 2016.¹³

3. Fraudulent Disposition. Dispositions in fraud of creditors are addressed in several Bermuda statutes.¹⁴ One such statute, Section 36 of the Conveyancing Act of 1983 (as amended by the Conveyancing Amendment Act 1994), must be considered in the context of trusts established for the purpose of protection from future creditors. Under Section 36, a disposition with “requisite” intent is voidable by the affected creditor. However, under Bermuda law, “requisite intent” does not necessarily involve deceit or dishonesty, rather the dominant purpose of the disposition must be to deprive existing or potential creditors of assets which otherwise would have been available to them. Insolvency of the settlor at the time the trust is established is a badge of fraud. Furthermore, the provisions of Section 36 might apply to future creditors arising within two years after the relevant disposition if the requisite intent is present. (Generally, causes of action accruing before the transfer or within two years after can be pursued; a creditor has six years from the date of the transfer to bring an action.) If it is clear that the primary purpose of establishing a Bermuda trust is something other than creditor protection (*e.g.*, estate, financial, or tax planning), Bermuda’s fraudulent disposition law should not pose a problem, but caution is advised in this area.

4. **Trusts.** Bermuda is a good situs for the establishment of a trust, revocable or irrevocable, for the benefit of the settlor or his beneficiaries. However, trusts are subject to the rule against perpetuities. Bermuda passed specific laws governing trusts in 1989, The Trusts (Special Provisions) Act (the “Bermuda Act”). Among other provisions, the Bermuda Act contains language regarding a settlor’s capacity to create a trust, provides for redomiciliation of a trust, addresses jurisdiction of the Supreme Court of Bermuda in trust matters, and provides for selection of the trust’s governing law. Additionally, Section 11 of the Bermuda Act provides that in the absence of other Bermuda law or Bermuda public policy considerations to the contrary, a Bermuda trust cannot be varied or set aside by a Bermuda court pursuant to a law of another country regarding the effect of marriage, forced heirship, or insolvency of the settlor and creditor protection. Part II of the Bermuda Act has recently been amended to streamline Bermuda trusts for non-charitable purposes (“purpose trusts”). The Bermuda Act, among other things, now clarifies the conditions for the purposes of a purpose trust (sufficiently certain, lawful, and not contrary to public policy), does away with the requirement for a “designated person trustee” (*i.e.*, a Bermuda lawyer, accountant, or licensed trust company) and confirms the inapplicability of the rule against excessive duration and the application of the statutory perpetuity period (100 years). Development of trust law in Bermuda continues to keep pace with modern trends and provides flexibility in private and commercial contexts. Forthcoming legislation is expected on issues including trustees’ investment powers and powers of delegation, and reform of the law relating to pension trusts.

5. **Enforcement Of Foreign Judgments.** Because Bermuda only has reciprocal enforcement of judgment agreements with the United Kingdom, the West Indies, Nigeria, and the States and Territories of Australia, a Bermuda court will generally only assume jurisdiction with respect to a foreign (*e.g.*, U.S.) judgment if: (i) the judgment debtor is a resident of Bermuda; or (ii) the judgment debtor has agreed to or voluntarily submitted to the jurisdiction of Bermuda courts (*e.g.*, by visiting Bermuda). It is unlikely that a Bermuda court would entertain an action to enforce a judgment against a U.S. settlor of a Bermuda trust. However, a judgment creditor or trustee in bankruptcy could attempt to bring an action against a Bermuda trustee on the grounds that the trustee holds property on “constructive trust” for the creditor (*i.e.*, the trust arrangement is a sham). To prove a constructive trust, the creditor would have to show either: (i) that the original trust fails either wholly or partially; or (ii) that the trustees hold the property as agents of the settlor.

C. **Cayman Islands.** The Cayman Islands are located in the western Caribbean. There is regular air service to multiple U.S. cities and modern communication systems. The Cayman Islands, an English speaking British colony, is a common law jurisdiction, is partially self-governing, and quite stable. Its economy is very healthy although the cost of living is high. The official currency is the Cayman Islands dollar.

1. **Confidentiality.** Under Cayman secrecy legislation there are substantial penalties for revealing confidential information. A foreign government cannot obtain assistance in pursuing criminal matters unless the offense is an offense under Cayman law. Tax crimes as such are not. However, the U.S., the United Kingdom, and the Cayman Islands entered into an agreement in 1988, the Mutual Legal Assistance Treaty, under which the

parties will give each other information in certain drug investigations and white-collar crimes, including bank fraud. Furthermore, the legislation provides a mechanism for disclosure of information in limited circumstances; for example, in the course of a criminal investigation or when a bank must protect its own interests. If the person who is required to give evidence or make a disclosure resides in the Cayman Islands, that person must receive permission for such action from the Cayman Grand Court.¹⁵

2. Taxes. The Cayman Islands have no income tax, gift tax, estate tax, business or value added tax, property tax, accumulated profits tax, or capital gains tax. Certain guarantees against further taxes are available.

3. Fraudulent Disposition. Under the Fraudulent Disposition Law 1989, a disposition is voidable by a creditor prejudiced by the disposition if the disposition was made with “an intent to defraud.” “Intent to defraud” is defined as an intention of the transferor to willfully defeat an existing obligation owed to a creditor, and the burden of proof for establishing such intent is on the creditor. The statute of limitations is six years from the date of the applicable disposition.¹⁶

4. Trusts. There are three types of trusts available under Cayman law: ordinary, exempted, and Special Trusts (Alternative Regime) (“STAR”). An ordinary trust parallels the general common law trust concept. An exempted trust has the added benefits of a fifty-year government guarantee against taxation and is not subject to the rule against perpetuities but is limited to a duration of one hundred years. The Special Trusts (Alternative Regime) Law 1997 establishes an alternative trust regime, applying to a trust if the trust instrument so provides.¹⁷ A trust to which STAR applies is known as a “special trust.”¹⁸ STAR Trusts have several special features. For example, their objects may include non-charitable purposes, and it is up to the settlor to say who may have standing to enforce the trust. Additionally, the rule against perpetuities does not apply.¹⁹ Cayman trusts of all types can relocate to a different situs under certain circumstances. Forced heirship rights of other jurisdictions are unenforceable against a Cayman *inter vivos* trust.

5. Other Considerations. The Cayman legislation is aggressive and is designed to attract trust formation by individuals from beyond its jurisdiction. In recent years, however, the Cayman Islands have come under considerable pressure from the U.S. to address the issue of money laundering in drug cases. This pressure has in part resulted from the Cayman Islands’ notoriety as a money laundering center. While reputable Cayman bankers and lawyers carefully scrutinize new customers and expressly reject any illegal business, illegal activities are sure to continue there, and it is certain that U.S. pressure will continue to be brought to bear on the legislative process.

D. Cook Islands. The Cook Islands are located in the south Pacific Ocean east of Australia and south of Hawaii. The capital is Rarotonga, with a modern international airport and regular air services to Los Angeles, Hawaii, Tahiti, Fiji, and Auckland. The islands are remote from the world’s major financial centers, but have modern communication systems. The Cook

Islands are self-governing. Their closest link is with New Zealand, and they use New Zealand currency. English is the official language, and there is a common law legal system.

1. **Confidentiality.** The Cook Islands banking laws mandate secrecy about client information, with the penalty of one year imprisonment for a violation. In certain situations however, the Cook Islands' courts may have access to protected documents.²⁰

2. **Taxes.** So long as an international trust organized in the Cook Islands does not do business there, it is exempt from tax. (The Cook Islands permits a trust's affairs to be administered by a Cook Islands trustee company, and this does not constitute "doing business" there for tax purposes.)

3. **Fraudulent Disposition/Trusts.** The Cook Islands enacted comprehensive trust legislation in the International Trusts Amendment Act 1989. The legislation addresses "International Trusts" ("ITs") and the effect thereon of fraudulent dispositions and bankruptcy. With respect to fraudulent dispositions, a creditor seeking to set aside a disposition must prove beyond a reasonable doubt that:

- the disposition was made with an intent to defraud that particular creditor; and
- the transferor was rendered insolvent by the transfer. (If the fair market value of the settlor's property after the transfer to the trust exceeds the value of the creditor's claim at the time of the transfer, there is no intent to defraud.)

If the creditor meets this burden, the transfer is not void or voidable. Instead, the transferor must pay the creditor's claim from property which would have been subject to its claim but for the transfer, that is, from property in respect of which the action is brought. The statute expressly states that an IT will not be void by virtue of the settlor's bankruptcy. The limitations provisions are the following.

- If a creditor's cause of action accrues more than two years before a transfer to an IT, the transfer will be deemed not to be fraudulent, unless proceedings in respect of that cause of action had been commenced at the date of the relevant transfer.
- Also, if a creditor fails to bring an action within one year from the date the transfer to an IT occurs, the action is barred.
- Furthermore, if the transfer (whether initial or subsequent) to an IT occurs before a creditor's cause of action accrues, such a disposition will not be fraudulent as to that creditor, and "cause of action" means the first cause of action capable of assertion against a settlor.
- Finally, an Amending Act provides that for redomiciled trusts, the limitations period commences at the time of original transfer, even when the transfer was to an offshore center other than the Cook Islands.

Another section of the legislation sets forth certain circumstances which will not be deemed badges of fraud. Fraudulent intent cannot be imputed from: (i) transfer to an IT within two years of the accrual of a creditor's cause of action; (ii) retention of powers or benefits by the settlor; or (iii) the designation of the settlor as a beneficiary, trustee, or protector.

4. Trusts. Retained powers and benefits are explicitly addressed by statute. An IT cannot be “declared void or be affected in any way” because the settlor: (i) has the power to revoke or amend the trust, to dispose of trust property, or to remove or appoint a trustee or protector; (ii) retains, possesses or acquires any benefit, interest, or property from the trust; or (iii) is a beneficiary, trustee, or protector.

The rule against perpetuities has been repealed, but an IT may use a perpetuities period if the parties so desire. Other provisions of the legislation make selection of Cook Islands law binding and conclusive, ensure that an IT is not subject to forced heirship laws of other countries, and require non-recognition of a foreign judgment against an IT, its settlor, trustee, and protector.

An Amending Act also provides that community property transferred to an IT retains its character as community property.

5. Other Considerations.

[a] Insularity. Unlike other offshore centers, the economies of which are tied closely to the U.S. or United Kingdom, the Cook Islands presumably would not be subject to economic or political pressure to relax secrecy provisions or reduce the benefits of entity formation for protective purposes.

[b] Comprehensive Statutory Scheme. The Cook Islands have one of the most comprehensive bodies of statutory law governing trusts and fraudulent conveyances. The level of comfort one obtains with such statutory certainty should be a factor to weigh against the inconvenience of traveling to this venue.

[c] 515 South Orange Grove Owners, et al. v. Orange Grove Partners.²¹ In a 1995 decision appealing the issuance of a Mareva injunction against the trustees of an asset protection trust, the Court of Appeals in the Cook Islands found that a judgment creditor's action was not time-barred on the basis that the two-year statute of limitations on fraudulent conveyances in the International Trusts Act began to run on the date of the judgment against the settlor-transferor and did not commence when the cause of action accrued. Proponents of the Cook Islands legislation argued that the court misinterpreted the statute and rendered its judgment based on “bad facts.”

The International Trusts Act was amended in 1996 to “cure” the possible ambiguity in the statute. Accordingly, while settlors can take comfort in knowing that the statute of limitations will begin when a potential judgment creditor’s cause of action accrues, there remains at least some doubt as to which provision of the legislation might be susceptible the next time a court is presented with “bad facts” as it was in the Orange Grove case.

E. Gibraltar. Gibraltar is located off the southern coast of Spain. It has regular air service from London and modern communication systems. Gibraltar is a common law country that is a colony of the United Kingdom, and its constitution ensures that sovereignty will never be passed to another country against the will of the people of Gibraltar. The currency of Gibraltar is the Gibraltar pound, which is pegged to the British pound. English is the official language, but most inhabitants also speak Spanish.

1. Confidentiality. As more fully discussed below, trusts are subject to a limited disclosure requirement if protection under Gibraltar’s fraudulent disposition statute, the Bankruptcy (Amendment) Ordinance 1990 (the “Ordinance”), is sought; however, the disclosed information is confidential. The Banking Ordinance 1992 imposes strict requirements of secrecy.

2. Taxes. There is a 35% income tax on local businesses, but no tax on capital gains. Gibraltar allows the formation of “exempt companies,” which can conduct business anywhere but Gibraltar. These companies pay no income tax and can transact business from Gibraltar, but, in order to maintain exempt status, cannot do business with citizens or residents of Gibraltar. Similarly, income of a Gibraltar trust that is paid to a nonresident beneficiary is not subject to income tax.

3. Fraudulent Disposition. A disposition of assets by a nonresident settlor into a trust is not voidable by a creditor if:

- the settlor is an individual;
- the settlor is not insolvent at the time of the disposition;
- the settlor did not become insolvent as a result of the disposition; and
- the trust is registered in accordance with the Bankruptcy (Register of Dispositions) Regulations 1990.²²

The effect of registration pursuant to Section 42A of the Ordinance is to negate the application of the 1571 Statute of Elizabeth, especially the cases that interpret intent to defraud creditors once a transfer of property has the result of defeating the rights of creditors. The problem however is that this protection only applies to transfers that fully comply with the conditions of Section 42A of the Ordinance, one of the conditions of which being that the transfer does not render the transferor insolvent. The definition of “insolvent” contained in Section 42A.(3)(b) is as follows: “insolvent” means in respect of

a Settlor, any Settlor whose liabilities, both actual and contingent or prospective, exceed the value of his assets, [sic] Provided that no claim by creditors shall be deemed to be a contingent or prospective liability of a Settlor who at the time of making the disposition does not have actual notice of such a claim *or of the facts or circumstances which may render him liable to such a claim;*” (emphasis added). This definition of “insolvent” leaves open the question of whether the settlor had actual notice of “facts or circumstances which may render him liable” to a contingent or prospective claim.

In the case of professionals who may at some time in the future be liable for a claim based on facts or circumstances of which they are aware at the time that a transfer is made, even if no claim has been filed or threatened, it is possible given the wording of the statute that if a claim is made and later liquidated that the creditor will be able to argue that the transfer is not entitled to the protection of the Ordinance. Therefore, it is important to carefully consider whether Gibraltar is the appropriate situs for a trust when the settlor is involved in activities that might later give rise to a claim. Obviously, as case law develops in Gibraltar, the matter of the statute’s wording will become more concrete. The registration process excludes therefore those with actual knowledge of a contingent or prospective liability.

The Statute of Elizabeth governs non-registered trusts.

4. Trusts. The Bankruptcy (Amendment) Ordinance 1990 and the Bankruptcy (Register of Dispositions) Regulations 1990 expressly establish the concept of an asset protection trust. An asset protection trust must be registered as described above, and the trustee must affirm that: (1) the settlor has completed forms establishing his or her financial position and revealing contingent or prospective liability; (2) the trustee has taken reasonable steps to substantiate the information received from the settlor; and (3) the settlor has given the trustee an affidavit of solvency. The registry is not open to public inspection and any information delivered to it is kept secret and confidential. The common law rule against perpetuities has been replaced by a 100-year limitation. Furthermore, Gibraltar law allows easy redomiciliation, and Gibraltar common law does not recognize forced dispositions from other jurisdictions.

5. Trusteeship. The 1990 legislation defines a trustee as “a company with a permanent place of business in Gibraltar and authorized by the Commissioner to act as a trustee.” The regulations provide that the Registrar shall register a disposition of assets only when the trustee making the application:

- is the sole corporate trustee of the disposition;
- is judged by the Government (the Financial and Development Secretary) to have adequate financial and administrative resources to act as trustee in relation to the disposition;

- has obtained prior written approval from the Government of the inquiry forms administered to the settlor; and
- has indemnity insurance in an amount exceeding 1 million pounds.

Thus, it would appear that a corporate trustee with a Gibraltar situs is required with respect to Gibraltar trusts.

6. Enforcement Of Foreign Judgments. Judgments may be registered under specific reciprocal enforcement agreements with the U.K. and other Commonwealth countries, and the European Union. Judgments from other jurisdictions are not enforceable in Gibraltar. Claimants must sue under Gibraltar law.

F. Isle of Man. The Isle of Man is a British crown dependency situated in the Irish Sea and can be reached readily from London. English is the official language and it has modern communication systems. It is a common law jurisdiction and considered to be very stable.

1. Confidentiality. There is a strong tradition of confidentiality in the Isle of Man. Contractual agreements for the maintenance of a bank account generally prohibit the bank from divulging information regarding the client's affairs except by order of a Manx court or with the client's consent.

2. Taxes. There is no wealth tax, gift tax, estate tax, or capital gains tax in the Isle of Man. The Isle of Man does not tax nonresidents upon bank interest or income arising outside the Island. This principle extends to companies which are beneficially owned abroad and trusts with nonresident settlors and beneficiaries. Manx source income other than bank interest is taxed at 20%, which is the sole rate of tax on the income, net of necessary expenditures, of companies and trusts which do not claim nonresident status.²³

3. Fraudulent Disposition. The Manx government is reluctant to introduce specific statutes for the encouragement of asset protection trusts, believing that frivolous claims would be dismissed under existing law and fearing to disadvantage legitimate claimants. Currently, fraudulent dispositions are covered by the Fraudulent Assignments Act 1736 and the decisions under it and the general law of the Isle of Man, for example by the Companies Act 1931 to 1986 and by The Theft Act 1981. However, the Isle of Man's position with regard to fraudulent dispositions was clarified by In Re Heginbotham 1999 (Common Law Division, 15 February 1999). In it Deemster Cain ruled as follows, "A state of insolvency implies an inability to pay existing, or present debts. A person is not in a 'state of insolvency' merely because he may not be able to pay contingent or future debts, which may never materialise. . . . I would construe the term 'present debts,' however, to include known and ascertained debts which are to fall due on a date in the future. A transaction or contrivance designed to deprive known and ascertainable future creditors of timely recourse to property which would otherwise be applicable for their benefit. . . . would not be honest in the context of the relationship of debtor and creditor and would not therefore be bona fide."

4. **Trusts.** The law of trusts is governed by the Isle of Man Trustee Act 2001. Provisions found in this legislation are similar to those contained in the English statutory and case law regarding trusts. The Isle of Man Trustee Act 2001 governs the powers and duties of trustees, provides for the advancement of capital and income to beneficiaries, and governs the appointment and retirement of trustees. Other pertinent Manx legislation includes the Variation of Trusts Act of 1961 and the Manx Perpetuities and Accumulations Act of 1968, as those Acts have been amended by the Trustee Act 2001. In the “Edwards Report” changes were suggested to Manx trust law and the recent amendment to the Trustee Act is a direct result of this report.²⁴

5. **Perpetuities Period.** For instruments made prior to 1 January 2001 the perpetuity period is eighty years. For instruments made subsequent to 1 January 2001 the perpetuity period is one hundred fifty years.²⁵

6. **Enforcement Of Foreign Judgments.** While U.S. judgments are not recognized, the Isle of Man recognizes judgments from the following countries: Guernsey, Israel, Italy, Jersey, the Netherlands, Sumatra, and the United Kingdom.

G. **Jersey.** Jersey is the largest Channel Island and is located in the English Channel between France and England. In 933 the island became part of the area now known as Normandy, which today is a *département* of northern France. In 1204 the United Kingdom lost control of mainland Normandy, but Jersey remained loyal to the United Kingdom and has ever since. During the 20th century, a constitutional convention developed declaring that the United Kingdom will not interfere in matters of purely domestic concern or taxation.²⁶ Nevertheless, the United Kingdom retains responsibility for Jersey’s relations with foreign countries and its defense. Externally, Jersey’s political stability benefits from its geographical location and its settled links with the United Kingdom and the European Union. Internally, political life is marked by the absence of political parties with candidates for the States (Jersey’s parliament) almost invariably standing as independent candidates on the basis of local issues. The local economy is based mainly on finance, tourism, and agriculture. Although the official language of the Jersey court is French, the use of English is permitted and adopted in almost all proceedings. There is no exchange control in Jersey. Monies in any currency may flow into and out of the island.

1. **Confidentiality.** The Jersey courts have indicated that the rule laid down by the English Court of Appeal in *Tournier v. National Provincial and Union Bank of England*—declaring that a banker owes his customer a contractual duty of confidentiality, subject to certain limited exceptions—is applied in relation to banking matters in Jersey. Any breach of this duty could give rise to a claim for damages.²⁷ The duty is imposed with the opening of an account whereupon information about the customer should not be released by the bank. The duty of confidentiality goes beyond the state of the account and beyond the time that the account is closed. It extends to all transactions through the account and to information obtained from other sources resulting from the banking relations of the bank and the customer.

The circumstances in which disclosure can or must be made without the customer's consent pursuant to the *Tournier* decision have been modified and extended by statute over recent years. Examples of such laws are:

- The Bankers Books Evidence (Jersey) Law 1986;
- The Company Securities (Insider Dealing) (Jersey) Law 1988;
- The Drug Trafficking Offenses (Jersey) Law 1988;
- The Investigation of Fraud (Jersey) Law of 1991; and
- The Prevention of Terrorism (Jersey) Law 1996.

Provisions in the Banking Business Law enable the Finance and Economics Committee to obtain information from Jersey banks for the purpose of their supervisory functions.

2. Taxes. The only significant tax featured in Jersey tax planning is the income tax, a standard rate of 20%. As a general rule, a nonresident of Jersey is only liable for income tax on income arising in Jersey and, by concession,²⁸ this excludes Jersey bank interest. The administration of income tax is in the hands of the Comptroller of Income Tax. Both the comptroller and staff of the comptroller are required to take an oath of secrecy before the Royal Court and are bound by the oath not to disclose details of taxpayers to anyone except to the extent required in the event of a prosecution for an offense under the tax laws.²⁹ There are no capital taxes, inheritance taxes, or general purchase taxes. Certain limited excise duties are levied on alcohol, tobacco, and motor fuel purchased in Jersey. Jersey is included in the European Union for the purposes of the Common Customs Tariff. Accordingly, Jersey must apply the common external tariff to imports of goods into the island from countries outside the Common Customs Tariff area, but is not itself subject to the common external tariff in respect of exports of goods to countries within the Common Customs Tariff area. Jersey is outside the European Union for the purposes of value added tax. Persons owning or occupying Jersey realty are liable to pay rates administered by the parishes of Jersey. Other sources of revenue take the limited forms of stamp duty, payable in respect of transfers involving Jersey realty, and probate duty, related to the value of estate assets situated in Jersey. Additionally, companies are required to pay annual registration and renewal fees and Treasury duty on the creation or increase of authorized share capital, payable at a rate of 0.5% of the nominal or par value of the shares, subject to a minimum duty of £50. In Jersey, the mechanism of withholding tax on certain payments is used not only as a means of tax collection but also, in some cases, as a means of giving tax relief. Non-Jersey residents and exempt companies are not normally required to withhold tax on payments. Where probate of a will or letters of administration are obtained in Jersey, stamp duty is calculated according to the value of the estate situated in Jersey.

3. Fraudulent Disposition. Because Jersey law has its roots in Norman customary law, the Statute of Elizabeth has never had effect on the island. Thus, the Jersey position with regard to fraudulent disposition is largely nonstatutory. With respect to dispositions

which are governed by Jersey law, *Golder v. Société des Magasins Concorde Limited* is the leading case.³⁰ The court in that case found that in order to set aside a disposition, the creditor has to prove the intention to defeat creditors and their actual defeat by showing that the debtor is insolvent and that his insolvency was a result of the act being challenged.

Dispositions by transferors resident or carrying on business in Jersey are also covered by the Bankruptcy (*Désastre*) (Jersey) Law 1990 under which certain dispositions (which might include a disposition to a trust) may be unwound by the Royal Court if they are made at an undervalue. Under this law,³¹ a person enters into a transaction at an undervalue:

- within five years prior to a declaration en désastre (where the debtor is insolvent at the time of or becomes insolvent as a consequence of the transaction); or
- otherwise within two years prior to the declaration en désastre; the Viscount (the Officer of the Royal Court charged with the administration of the désastre proceedings) may apply to the Royal Court for such order as it thinks fit for restoring the parties' positions to what they would have been if the debtor had not entered into the transaction.

4. Trusts And Other Entities. In 1984 the existence of trusts was put on a statutory basis with the enactment of the Trusts (Jersey) Law of 1984, which is known generally as “the Trust Law.” The central provision of the Trust Law is that a valid trust is created wherever a trustee-beneficiary relationship exists for a charitable or, subject to the requirements of the Trust Law, noncharitable purpose.³² The Trust Law draws a fundamental distinction between Jersey trusts and foreign trusts.³³ The Trust Law has only a few provisions that relate specifically to foreign trusts, providing simply that they are governed by and interpreted in accordance with the relevant proper law subject only to certain exclusions as to legality and public policy.³⁴ Some provisions of the Trust Law relate to both foreign and Jersey trusts. These include a measure of personal liability of directors of trustee companies,³⁵ the rule that the trust property is not available to the trustee's personal creditors,³⁶ some protection for third parties dealing with a trustee,³⁷ and the three-year period of limitation of actions.³⁸ With regard to Jersey trusts, the Trust Law mainly restates traditional trust principles as known in English law, although there are some differences. Most importantly, Jersey trusts are generally valid and enforceable in accordance with whatever lawful terms the settlor chooses to establish.³⁹ As such, the provisions of a trust may be written in almost any way, and may provide any degree of flexibility between completely fixed trusts (where the interest of the beneficiaries are decided at the outset) and totally discretionary trusts (where the interest of the beneficiaries are at the discretion of the trustees).

No particular formality is required for the creation of a Jersey trust. The trust property must only be held by the trustee, and the terms of the trust must be lawful and clear. The beneficiaries of a trust must be identifiable by name or ascertainable by reference to a class or relationship with some person.⁴⁰ An express power may be included in the trust

for the addition or exclusion of persons to or from the class of beneficiaries.⁴¹ Beneficiaries may disclaim their interests under the trust.⁴² Any property except Jersey realty may be held in a Jersey trust.⁴³ Jersey realty may, however, be held indirectly in trust (*e.g.*, through a holding company). Subject to the terms of the trust, after provision of the initial assets, further assets may be added to the same trust. Indeed, the most common arrangement is to start with a purely nominal initial trust fund and to add the “real” assets later.

5. Enforcement Of Foreign Judgments. No direct enforcement of a judgment of a foreign court can occur until it is registered in Jersey. Foreign judgments are capable of being registered in Jersey if they fall within the Judgments (Reciprocal Enforcement) (Jersey) Law 1960. Jersey can direct to which country the 1960 Law applies; these include England, Wales, Scotland, Northern Ireland, the Isle of Man, and Guernsey. The judgment (i) must be of a superior court and must be final and conclusive, (ii) must be for the payment of a liquidated sum of money not with respect to taxes, fines, or penalties, and (iii) must not have been given prior to 1960. The law provides for the setting aside of the registration of a foreign judgment. The court will set aside registration if it considers, among other things, that the foreign court had no jurisdiction to hear the original action. Registration will also be set aside (i) if the foreign judgment does not fall within the 1960 Law, (ii) if the defendant was not given due notice of the foreign proceedings, (iii) if the foreign judgment was obtained by fraud, (iv) if the enforcement of the foreign judgment would be contrary to Jersey public policy, or (v) if the rights under the foreign judgment are not vested in the applicant.

Once registered, a foreign judgment has the same force and effect for the purposes of execution as a judgment given by the Royal Court itself. If a foreign judgment cannot be registered, the judgment creditor will have to sue on the judgment debt, in a similar manner to any other creditor suing on an ordinary debt, in order to be able to enforce it in Jersey.

H. Liechtenstein. Liechtenstein is a small principality located between Switzerland and Austria. It is necessary to fly to Zurich, then drive or take a train to reach Liechtenstein. Liechtenstein is a very stable, civil law country, with strong ties to Switzerland. The Swiss franc is the legal tender of Liechtenstein. The official language is German, though English is often used. The capital of Liechtenstein is Vaduz.

1. Confidentiality. Liechtenstein’s enforcement of bank secrecy is even greater than that of Switzerland, providing heavy sanctions for breach of professional secrecy. Liechtenstein has a tax treaty with Austria only, and a customs union with Switzerland. Attorney/client and fiduciary/beneficiary privileges are very strong in Liechtenstein.

2. Taxes. A nominal Capital Tax of 0.1% is levied upon entities if they are involved in investments and/or commercial activities outside Liechtenstein. Thus, the nominal Capital Tax is levied upon entities involved in investment (*i.e.*, non-commercial) activities, such as the Trust, Establishment, and Foundation discussed below. For assets located in the country owned by persons domiciled in the country, estate, inheritance, and

gift taxes are imposed. Liechtenstein entities are also subject to value added tax (VAT) of 6.5%.

3. Fraudulent Disposition. A Liechtenstein statute regarding claims by creditors provides that creditors of a settlor can only bring a claim against trust property under fraudulent conveyance law or in accordance with the law of donations or succession. A creditor under this rule must acquire a judgment that is enforceable in Liechtenstein. Thus, while there is not the kind of statutory limitation in Liechtenstein found in other jurisdictions regarding what constitutes a fraudulent disposition, judgments from other jurisdictions are difficult to enforce in Liechtenstein. A creditor with a foreign judgment must bring the action anew in a Liechtenstein court, which requires, among other things, a deposit of 10% to 15% of the judgment and/or a sum which will cover potential attorneys fees. Liechtenstein law expressly disallows contingent fee contracts and punitive or exemplary damage awards and the losing party must pay all fees and costs of both sides.

Liechtenstein law contains a statute of limitations in connection with dispositions in fraud of creditors.

- A creditor must bring a claim within one year of the transfer in order to set the transfer aside unless the debtor acted with intent to damage the creditor, in which case the limitations period is five years.
- If, however, a creditor serves a brief on the trustee via the Liechtenstein court system informing the trustee of its intention to set aside the transfer, and does so within the five-year statutory period, the time to file suit is extended to ten years from the date of transfer.

4. Trusts. Although a civil law jurisdiction, Liechtenstein law recognizes several trust and trust-like entities.

- [a] The Trust. Liechtenstein is the only country in Europe with a detailed law of trusts. The Liechtenstein law of trusts is based on codification of an Anglo-American model. Contrary to common law, however, Liechtenstein trust law does not contain a rule against perpetuities; a Liechtenstein trust may therefore exist for an unlimited period of time. Redomiciliation is very easy in Liechtenstein. Purpose trusts may be created for any purpose as long as it is not illegal, immoral, or impossible.
- [b] The Establishment (*Anstalt*). The Establishment is an autonomous fund with its own legal personality which exists to serve the interests of one or more beneficiaries named by the Establishment's founder. The founder may name himself as either the sole beneficiary or one of a number of beneficiaries. Under Liechtenstein law, an Establishment is liable only for its own commitments. This characteristic, combined with the flexibility provided by Liechtenstein law for designing an Establishment to suit

individual needs, makes the Establishment an excellent vehicle for family wealth planning.

[c] The Foundation (Stiftung). The Foundation is a legally recognized dedication of assets to a particular purpose. The purpose of a Foundation might be, for example, to provide for a particular family. The purpose and management of the assets of a Foundation are effected in accordance with instructions issued by the founder of the Foundation.

I. Nevis. Nevis is located in the eastern Caribbean, 225 miles southeast of Puerto Rico, and is in the same time zone as the eastern United States. Nevis was settled under British rule in 1793. However, since 1988, Nevis and St. Kitts have comprised a single sovereign nation. Rated among the world's most stable countries, Nevis has exhibited a vibrant multi-party political system and deep-seated respect for human and property rights. The economy of Nevis, with virtually 100% employment and one of the highest per capita incomes in the Caribbean, is highly stable. The official language of Nevis is English. The currency is the Eastern Caribbean dollar, and there are no exchange controls applicable to offshore businesses.

1. Confidentiality. The Confidential Relationship Act of 1985 applies to all those in the financial community, including, but not limited to, banks. Anyone disclosing banking, financial, and trust documents without court order is subject to criminal penalties, including fines or imprisonment.

2. Taxes. While Nevis collects several taxes from businesses engaged in business onshore, offshore trusts, offshore corporations, and offshore limited liability companies are tax exempt so long as they do not transact business on the island.⁴⁴ These entities only pay an annual government fee of \$200. The government has a narrow definition of what constitutes doing business in Nevis. Maintaining bank accounts in Nevis, holding board meetings in Nevis, maintaining corporate or financial records in Nevis, maintaining an administrative or managerial office in Nevis with respect to assets and activities outside of Nevis, being a partner in a Nevis partnership, or acquiring real property in certain industrial or tourist facilities in Nevis approved by the government will not constitute doing business in Nevis.

For corporations doing business on the island, tax rates are as high as 40% of net income. However, the government is willing to provide tax holidays, tax reductions, and import duty waivers to businesses contributing to the economic well being of the island as a whole.⁴⁵

As offshore trusts are not permitted to own property on the island, there is no property tax applicable to offshore trusts.

The present government of Nevis and the opposition party, which was in power from 1983 to 1992, have both expressed the intention of enacting no future taxation of offshore trusts and companies.

3. Fraudulent Disposition. The Statute of Elizabeth⁴⁶ is specifically repealed in Nevis for international trusts.⁴⁷ Instead, Nevis adopted the Nevis International Exempt Trust Ordinance (the “Ordinance”) which provides that:

- a creditor must prove beyond a reasonable doubt that the trust was settled or established, or property disposed to a trust with the principal intent to defraud creditors;⁴⁸ and
- a creditor must prove beyond a reasonable doubt that the settlement, establishment, or disposition rendered the settlor insolvent.⁴⁹

If both of these are established by the plaintiff, the trust shall only be liable to the extent that the settlor had an interest in the contributed property immediately after the settlement, establishment or disposition.⁵⁰ These remedies in the Ordinance are the exclusive remedies, whether by statute, in equity, or at common law, that a creditor, defined as any person who alleges a cause of action,⁵¹ has against the settlor, a trust or any person who transfers property to a trust on behalf of a settlor.⁵²

4. Trusts And Entities. At the time of its enactment in September 1994, the Ordinance was among the most comprehensive asset protection trust laws in the world. The main focus of the Ordinance is to provide asset protection strategies. The Ordinance, among other things, provides for spendthrift trusts, overrides the common law rule against perpetuities, overrides forced heirship, repeals the Statute of Elizabeth, and prohibits the enforcement of foreign judgments. Prior to 1994, all trusts, domestic and international, were subject to the Trustee Ordinance of 1961. While domestic trusts remain subject to the 1961 law, international trusts are now governed by the Ordinance.

Nevis limited liability companies provide the members of the LLC with full protection from company obligations, similar to a corporation,⁵³ while simultaneously permitting them to contractually form a company that is best tailored to fit each situation, similar to a partnership.⁵⁴ Unique among offshore LLC statutes, the Nevis LLC statute provides asset protection through an exclusive charging order remedy⁵⁵ and estate planning opportunities through strict valuation provisions in compliance with IRS dictates.⁵⁶ Also unique to the Nevis LLC statute is the ability to form an LLC with only one member.⁵⁷

Known in the vernacular as NBCOs, reflecting the name of the authorizing legislation—the Nevis Business Corporation Ordinance, 1984—Nevis’ offshore corporations are formed when articles of incorporation are filed with the registrar. An NBCO may be used for international commercial and financial ventures, as a private trust company to be the trustee of a Nevis trust, as an offshore bank, or as an open end investment company.

5. Enforcement Of Foreign Judgments. Foreign judgments are not recognized if the judgment is based upon law that is not consistent with Nevis law.

IV. DOMESTIC VENUES FOR ASSET PROTECTION TRUSTS.⁵⁸ Alaska, Delaware, Nevada, and Rhode Island (the “Domestic Venues”)⁵⁹ have enacted legislation with a view toward becoming viable venues for establishing asset protection trusts. Although all four statutes appear to offer substantial asset protection (especially against the claims of future creditors), none of these states can be as protective a site for establishing trusts as an offshore jurisdiction because they are a part of the United States and are, therefore, bound by the United States Constitution. By virtue of the “full faith and credit” mandate in the Constitution,⁶⁰ a state’s courts must recognize judgments rendered under the laws of less debtor-friendly states. In addition (and as more fully discussed below), the enactment of laws enabling asset protection trusts may itself violate the Constitution’s contracts clause,⁶¹ which prohibits states from enacting any law that substantially impairs the obligations of parties to existing contracts or makes them unreasonably difficult to enforce. Finally, due to the supremacy clause⁶² of the Constitution, no state statute can protect debtors from conflicting federal law (such as bankruptcy law).

Even if state asset protection trust legislation passes constitutional muster, however, it does not necessarily defend an asset protection trust from some of the arguments available to a creditor through other existing state laws. The new statutes, existing statutory provisions, and common law provide various opportunities for a sympathetic court, whether in Alaska, Delaware, Nevada, Rhode Island, or elsewhere, to set aside or penetrate the trust structure in favor of creditors.⁶³

A. Emerging Trends.

1. Foreign Capital Depository Acts. Financial privacy is an important and legitimate goal in asset protection planning. For instance, wealthy individuals can be targets of crimes or frivolous lawsuits when their fiscal information is readily available. But even though U.S. citizens expect privacy as a fundamental right, financial confidentiality is difficult to achieve in domestic venues. Many offshore jurisdictions offer banking privacy to U.S. citizens that they can’t get at home. Unfortunately, this heightened privacy might also attract individuals wishing to hide their illegal activities from the U.S. government, which has led to federal initiatives that have stripped Americans of practically all confidentiality when it comes to financial transactions.⁶⁴

The Montana Foreign Capital Depository Act⁶⁵ and the Colorado Foreign Capital Depository Act⁶⁶ are good examples of state governments addressing the reality of financial crimes at the local level while allowing privacy for bank customers. These Acts allow foreign persons or entities to charter a depository that may have accounts from individuals who are not citizens or residents of the U.S. or from entities or trusts whose shareholders, settlors, members, beneficiaries, or partners are not citizens or residents of the U.S. As a promotional tool, these Acts prohibit disclosure of financial records unless illicit activity is suspected. To protect against money laundering, they require depository institutions to implement “know your customer” policies and security measures “to prevent theft, fraud, and corruption.”⁶⁷ More importantly, however, the Acts reflect the desire of U.S. jurisdictions to attract foreign investors by offering “a prudent blend of financial privacy, asset protection, and profitability.”⁶⁸

Montana senator Michael Sprague has predicted that the depositories could bring in up to \$1 billion in annual revenues to the state of Montana. This was thought to not be a difficult goal to reach in Montana with plenty of foreign investors eager to deposit the minimum \$200,000 to the depositories. Each depository is required to pay a \$50,000 license fee to the Montana Commerce Department, a \$10,000 annual charge, and a tax equal to 1.5% of deposits (derived from fees charged depositors.)⁶⁹ However, to date, Montana has yet to charter a foreign capital depository.

2. States Repealing the Rule Against Perpetuities. In an attempt to allow assets to stay in trust longer, some states have either repealed the Rule Against Perpetuities altogether,⁷⁰ have exempted certain trusts,⁷¹ or have allowed a trust instrument to expressly state that the Rule Against Perpetuities shall not apply.⁷² And nearly all states have exceptions to the Rule, the most common being for charitable trusts.

B. Overview of Domestic Venue Asset Protection Trust Legislation.

1. The Alaska Trust Act. Under the Alaska Trust Act,⁷³ a person who transfers property to a trust may make the beneficial interests subject to spendthrift provisions. That is, the beneficial interests are protected by provisions in the trust agreement from being alienated, either voluntarily or involuntarily, before they are distributed to the beneficiaries. Furthermore, as long as a settlor (a) did not make the transfer with an intent to defraud creditors, (b) is not in default by thirty (30) or more days on child support payments, (c) retains no right to mandatory distributions, and (d) has no power to revoke or terminate the trust, the Alaska Trust Act will allow that settlor to be a discretionary beneficiary of such a trust and will prevent that settlor's creditors from gaining access to the trust assets.⁷⁴ Thus, a settlor can protect assets from the claims of creditors by placing them in such a trust and nevertheless continue to enjoy the benefit of such assets.⁷⁵

2. Fraudulent Transfers Under Alaska Law. Two principal uniform laws form the basis of fraudulent transfer law in most states: the 1918 Uniform Fraudulent Conveyance Act (UFCA) and the 1984 Uniform Fraudulent Transfers Act (UFTA). Alaska has enacted neither. Its statute simply declares that transfers are void if made with "intent to hinder, delay, or defraud" creditors.⁷⁶ Unlike the two uniform laws, the Alaska law makes no attempt to define the term "creditor," leaving the class of plaintiffs as broad as the courts wish to make it, potentially including unknown future creditors, a class of creditors that neither the UFCA nor the UFTA includes in its definition of "creditor."

At first glance, one of the potential key advantages of Alaska's fraudulent transfer statute seems to be that it does not acknowledge the existence of "badges of fraud," which are circumstances surrounding the transfer that by themselves are considered evidence of an intent to defraud, thereby easing a creditor's burden of proof. However, the Supreme Court of Alaska has acknowledged repeatedly the existence of at least eight badges of fraud in its opinions.⁷⁷ Six of these badges are quite similar to items on the UFTA list of badges of fraud. Two, however, are, on their face, much broader than any of the UFTA badges.

- [a] First, Alaska courts consider *depletion* of the assets of a transferor so as to hinder or delay creditor recovery to be a badge of fraud.⁷⁸ Both the UFTA and UFCA consider transfers that render the debtor “insolvent” to be suspect, but the Alaska precedent as established by its Supreme Court would allow a creditor-friendly court to go much further. In fact, it can be argued that the creditor would not be in court at all unless his attempts at recovery were “hindered or delayed” by a depleting transfer.⁷⁹
- [b] Second, the Alaska list of badges of fraud includes transfers made when the relationship between the transferor and transferee is such that “there are circumstances which of themselves incite distrust and suspicion.”⁸⁰ The UFTA recognizes “transfers made to insiders”⁸¹ as a badge of fraud, but the Alaska language could include almost anyone, allowing a court to view virtually any relationship as suspicious. Specifically, the relationship between a settlor and the trustee of his or her self-settled trust would seem by its very nature to fit within the Alaska “circumstances which of themselves incite distrust and suspicion” language.

The Alaska fraudulent transfer statute does not specify a burden of proof for a creditor seeking to establish that a fraudulent transfer took place. In most states, civil fraud (including fraudulent transfer) must be proven by “clear and convincing evidence,” a very high standard for a creditor to meet. In Alaska, the burden of proof is by a “preponderance of evidence,” the burden of proof in most civil lawsuits.⁸² This means that a creditor needs much less convincing evidence to void a transfer in Alaska than in most other states. Therefore, due to the combination of (i) no definition of “creditor,” (ii) broadly described badges of fraud, and (iii) a low standard of proof, a creditor presumably would have *less difficulty* voiding transfers to trusts under Alaska law than under the law of most other states.

The statute of limitations for fraudulent transfers in Alaska is creditor-friendly, even as amended by the new legislation. Existing creditors of the settlor must file suit within the later of four years from the date of the transfer or one year from the date the creditors could have “reasonably discovered” the transfer.⁸³ Therefore, a creditor-friendly court could presumably extend the limitations period forever by declaring that the creditor could not have “reasonably discovered” the transfer until just before he or she brought suit. In contrast, many offshore asset protection jurisdictions have provisions in their laws that either limit, or nearly deny, a creditor’s ability to pursue a fraudulent transfer action. The Cook Islands, for example, limits such challenges to creditors of the settlor whose causes of action are less than two years old at the time of transfer to the trust and gives such creditors one year from the date the trust was settled to sue.⁸⁴ In addition, the Cook Islands statute generally denies the concept of badges of fraud and specifically lists several common badges of fraud and specifically denies the evidentiary effect of each one. For example, the statute specifically denies that an intent to defraud a creditor will be imputed to a debtor who transfers all of his or her assets to a Cook Islands trust while that creditor’s cause of action against him or her is pending in court.⁸⁵ The burden of

proof is likewise placed on the creditor, who must meet the burden of proof “beyond a reasonable doubt,”⁸⁶ the highest standard possible, which generally is used in the U.S. only in criminal cases.

3. The Uniform Foreign Money Judgments Recognition Act. Alaska is one of the minority of states that has passed the Uniform Foreign Money Judgments Recognition Act. This act requires Alaska to recognize and enforce all foreign judgments that grant or deny recovery of a sum of money “in the same manner as the judgment of a sister state which is entitled to full faith and credit.”⁸⁷ As long as the judgment was rendered by an impartial tribunal having valid jurisdiction, judgment against the settlor anywhere in the world could potentially result in delivery of trust assets to the creditor. The Alaska version of the Act requires no reciprocity for enforcement. Therefore, whether the rendering country would give an Alaska judgment the same effect is irrelevant.⁸⁸ Hence, although an Alaska judgment would be unenforceable in every offshore jurisdiction where asset protection trusts commonly are settled, any judgment rendered in a foreign country would be given the equivalent of full faith and credit in Alaska.

4. The Availability of Punitive Damages and Attorney’s Fees. When a creditor sues to have a transfer rendered void as fraudulent, the creditor often seeks both attorney’s fees and punitive damages. Under Alaska law, all costs, including attorney’s fees, are awarded to the victor in all civil lawsuits.⁸⁹ This provision discourages frivolous lawsuits but is an anomaly in United States law. Punitive damages are awarded only for torts,⁹⁰ but that does not necessarily preclude a creditor-plaintiff from receiving them. Although a creditor’s underlying cause of action may be based on contractual principles, he or she may have a specific tort claim (such as civil fraud) related to that action.⁹¹ Also, even though there appears to be no law specifically on point in Alaska, fraudulent transfer claims are generally considered tort actions in that they are classified as civil fraud cases. In such a case, the possibility of both punitive damages and attorney’s fees is present and could cause the creditor’s award to rise far above his actual damages.

C. The Delaware Trust Act. The Delaware statute attempts to achieve a result similar to the Alaska statute in a somewhat parallel manner. The Delaware Qualified Dispositions in Trust Act,⁹² provides that a transferor may make a disposition of property in a trust and also be a discretionary beneficiary of such trust. The trust must expressly name Delaware law as the governing law of the trust, be irrevocable, and contain Delaware’s statutory spendthrift language.⁹³ As long as the settlor is not made a mandatory beneficiary, the assets in trust are free from the claims of the settlor’s creditors.⁹⁴ However, the protection from creditors does not extend to (a) existing claims for alimony or support of a spouse, former spouse, or children, (b) a division of marital property, and (c) tort claimants.⁹⁵ Furthermore, creditors’ rights under the Delaware fraudulent transfer act are expressly protected.⁹⁶

1. Fraudulent Transfers Under Delaware Law. Unlike Alaska, Delaware has passed a version of the Uniform Fraudulent Transfers Act (UFTA).⁹⁷ As a consequence, there is a measure of certainty about important terms and concepts. First, the UFTA is a comprehensive statute drafted in an attempt to remove as many ambiguities as possible from fraudulent transfer law. Second, the statute is intended to have the same meaning in

every adopting jurisdiction, and, as a result, clarification of UFTA language has been resolved through litigation. Third, the UFTA offers qualifying creditors clear procedural direction. In certain circumstances, creditors are able to void transfers as fraudulent without showing any “intent to defraud” on the part of the debtor, and those creditors who do need to prove a debtor’s “intent to defraud” are given the benefit of eleven “badges of fraud” by which the court may infer such an intent.⁹⁸

The UFTA divides creditors into two categories: present creditors and future creditors. Both present and foreseeable future creditors are allowed to void transfers on a “constructive” fraud theory (*i.e.*, without having to prove actual intent to defraud or rely on the presence of badges of fraud) if the debtor made the transfer in exchange for less than “reasonably equivalent value,” and the debtor either was left with an unreasonably small amount of assets for the business or transaction in which she was engaged (or in which she was about to engage), or the debtor intended to incur debts beyond her ability to pay them when they came due.⁹⁹ Thus, because a transfer in trust usually is not for “reasonably equivalent value,” chances are good that such a transfer can be voided as fraudulent by the settlor’s creditors if the other factors are present.

Both categories of creditors also can void transfers made with “actual intent to hinder, delay or defraud.”¹⁰⁰ However, this intent does not have to be proven with regard to the specific creditor making the claim. A creditor can void a transfer as long as he can show that it was made with the intent to hinder delay or defraud *any* creditor. Furthermore, a creditor does not have to prove fraudulent intent as such. The UFTA allows a creditor to show fraudulent intent via certain recognized badges of fraud, from which the court can infer that the debtor made the transfer with intent to defraud creditors.¹⁰¹ The eleven UFTA-listed badges of fraud include insolvency, transfers to insiders, retention of possession or control by the debtor, and transfer of substantially all of the debtor’s assets.¹⁰²

Present creditors are given even greater protection. They can void transfers made for less than “a reasonably equivalent value” by debtors who are actually insolvent before the transfer is made, or who are made insolvent by the transfer.¹⁰³ The UFTA defines insolvency as either the inability of a debtor to pay debts as they become due (“the income test”), or the circumstance in which the value of a debtor’s overall debts exceeds the overall value of her assets (“the balance sheet test”).¹⁰⁴ In addition, present creditors may void transfers made by insolvent debtors in respect of antecedent debts to insiders who have reason to know of the debtor’s insolvency.¹⁰⁵ For individual debtors, “insiders” specifically include (but are not limited to) relatives, partnerships of which the debtor is a general partner, and corporations of which the debtor is a “director, officer, or person in control.”¹⁰⁶ Because the definition of “insider” is not limited to the above-named persons or entities, a creditor could argue that the trustee of a self-settled spendthrift trust is an insider and should know that the settlor was insolvent at the time of the transfer.

The limitation period under the Delaware UFTA differs depending on the basis of a creditor's cause of action. A creditor attempting to void a transfer on the basis of the debtor's "intent to defraud" must bring her suit within four years after the transfer was made or the obligation was incurred, or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant.¹⁰⁷ For actions to void transfers based on failure to receive "reasonably equivalent value" from the transferee, a creditor has four years from the date of the transfer, whether or not he could have reasonably discovered the transfer.¹⁰⁸ However, for transfers made by an insolvent debtor in respect of an antecedent debt to an insider who had reason to know of the insolvency, the limitations period is only one year.¹⁰⁹

Delaware's new trust law modifies the UFTA statute of limitations framework. Under the new trust law, a present creditor must bring his claim within four years after the transfer to the trust was made, or within one year after the creditor "could reasonably have discovered" the transfer. Future foreseeable creditors are only allowed four years from the date of the transfer, whether or not they could have reasonably discovered the transfer and regardless of the theory under which they are proceeding.¹¹⁰ These provisions apply "notwithstanding" the provisions of the UFTA.¹¹¹ This alteration may be partly pro-debtor, but also has some pro-creditor aspects. On the pro-debtor side of the coin, the new trust law limits the ability to extend the four-year statute (by claiming that the transfer "could not have reasonably been discovered") to creditors whose claims arose before the transfer, so that future creditors bringing an action based upon "intent to defraud" must do so within the standard four-year period. However, on the pro-creditor side of the coin, if the provisions of the Delaware asset protection trust law really do apply notwithstanding the UFTA limitations periods, the statute seems to allow both present and future creditors a minimum of four years to bring any action to void a transfer to a trust, including actions to void transfers in respect of antecedent debts to insiders, which are allotted only one year under the UFTA. Furthermore, present creditors may be able to take advantage of the limitations extension for transfers that "could not have reasonably been discovered" in any cause of action they bring, not only those based on a debtor's "intent to defraud." Thus, this modification of the UFTA by the Delaware statute may actually be pro-creditor in its overall effect.

Beyond the statutory language, there are some Delaware cases which seem to be cause for concern from a debtor's point of view. Delaware does not have a statute specifying the standard of proof for fraudulent transfers or for civil fraud claims in general. The normal burden of proof for civil fraud claims is "clear and convincing evidence," a very high standard for a creditor to meet, even if badges of fraud are present. However, in at least two Delaware cases, when the transfer in question was between blood relatives, the burden was *shifted to the debtor*.¹¹² In other words, in order to avoid summary judgment, a debtor must come forward with some evidence showing an *absence* of the intent to defraud. This is typically quite difficult to prove and therefore is an extremely creditor-friendly position. Both cases were decided before Delaware's enactment of the UFTA, however, so it is not clear whether or to what extent these cases still have precedential value.

2. **Recognition of Foreign Money Judgments.** Unlike Alaska, Delaware has not passed a law calling for the recognition of foreign money judgments. Delaware courts would only be required to enforce a foreign judgment if a treaty requiring such recognition existed between the United States and the nation in which the judgment was rendered. Thus, in this respect, Delaware is a more debtor-friendly jurisdiction than Alaska.

3. **Availability of Attorney Fees and Punitive Damages.** Like Alaska, Delaware law requires that costs be awarded to the victorious party in civil lawsuits.¹¹³ However, these costs do not include attorney's fees, which are excluded by statute.¹¹⁴ Delaware follows the majority rule for punitive damages as well: they may only be awarded in cases involving contracts when the plaintiff's cause of action is actually based in tort.¹¹⁵ That position might be problematic, however, for a debtor in a fraudulent transfer action. A fraudulent transfer action is generally classified as "civil fraud," and, hence, a tort. A judge might award punitive damages, especially when confronted with a trust specifically intended to allow the settlor/debtor to enjoy assets while shielding them from otherwise valid claims of creditors.

4. **The Nevada Trust Act.** The Nevada legislation¹¹⁶ is intended to effect asset protection results similar to the Alaska and Delaware statutes, but it has certain idiosyncrasies (an action for fraudulent transfer may be brought four [or more] years after the transfer)¹¹⁷ and weaknesses, from the settlor's point of view (an action for enforcement of a judgment from another state¹¹⁸ may be brought within six years after the date of the judgment). This provision, alone, considerably reduces the asset protection capabilities of a Nevada asset protection trust.

A Nevada asset protection trust must be irrevocable and all or part of the trust corpus must be situated in Nevada. The settlor must be domiciled in Nevada or the trust must have a qualified trustee. The settlor may be a potential beneficiary of trust principal and income. As to claims against the settlor existing on the date of the transfer to the trust, the statute of limitations is the later of (i) two years after the transfer, or (ii) six months after the transfer was (or could reasonably have been) discovered by the creditor. As to claims against the settlor arising after the date of the transfer to the trust, the statute of limitations is two years after the transfer.

The Nevada asset protection trust legislation is new and has yet to be the subject of litigation. However, it does not appear to improve upon the Delaware or Alaska models. Indeed, a creditor's ability to enforce out-of-state judgments makes the Nevada asset protection trust vulnerable.

5. **The Rhode Island Trust Act.** The Rhode Island Qualified Dispositions in Trust Act¹¹⁹ is virtually identical to the original, unamended 1997 Delaware Qualified Dispositions in Trust Act. The Rhode Island statute does not, however, incorporate the 1998 and 1999 amendments to the Delaware law.

A Rhode Island asset protection trust must be irrevocable and state that Rhode Island law governs the trust. The trust must contain a spendthrift clause and have a qualified trustee. The settlor may be a potential beneficiary of trust principal and income. As to claims against the settlor existing on the date of the transfer to the trust, the statute of limitations is the later of (i) four years after the transfer, or (ii) one year after the transfer was (or could reasonably have been) discovered by the creditor. Of great comfort to settlors (and similar to the Alaska asset protection law), the statute bars enforcement of a judgment obtained in another jurisdiction. As to claims against the settlor arising after the date of the transfer to the trust, the statute of limitations is four years after the transfer.

Similar to the recent Nevada legislation, the Rhode Island Qualified Dispositions in Trust Act is too new to have been the subject of litigation. However, there is no reason to believe it improves upon the Delaware or Alaska models or adds any new dimension to Domestic Venue asset protection.

D. Domestic Venue Asset Protection Legislation Vulnerabilities.

1. **Full Faith And Credit Problems.** If a judgment creditor of a settlor of an asset protection trust wants to pursue trust assets in a post-judgment enforcement action, the creditor ultimately must involve a court that has jurisdiction over the trust assets or over a party in control of the trust assets.¹²⁰ The assets of a Domestic Venue trust could be reached by a creditor who never even sets foot in the applicable state's courts. More likely, however, the assets could be reached by a creditor who appears in the situs state court on a *pro forma* basis to have the court enforce a judgment rendered by the court of another state. As will be shown, this ability of creditors to sue effectively outside the situs state obviates some of the protection the drafters of the Domestic Venue statutes intended to provide.

2. **Jurisdiction.** In order for a judgment creditor of the settlor to enforce a judgment against assets of a trust that the settlor has created and funded, the creditor must proceed in a court that has jurisdiction over some aspect of the trust. If the trust is a Domestic Venue trust, this does not necessarily mean the Domestic Venue court. Another state's court may have jurisdiction over the trustee, the settlor, or the trust assets.¹²¹

A court could have jurisdiction over the trustee or settlor in a number of ways. First, individuals are always subject to the jurisdiction of courts within their domiciles.¹²² Generally, this means that a non-Domestic Venue trustee or settlor is subject to the jurisdiction of his or her home state's courts. Jurisdiction may also exist under the long-arm statute if the trustee or settlor has sufficient contacts with the forum state.¹²³

Corporations are subject to the jurisdiction of the courts in the state of their incorporation.¹²⁴ They can also be subject to the jurisdiction of courts in any state in which they do business.¹²⁵ For large corporate trustees such as banks, including those based or with offices in a Domestic Venue, this could effectively give jurisdiction to the courts of many states.

A state's courts also will have jurisdiction over all property within the state's borders.¹²⁶ This includes real property, bank and brokerage accounts, and shares of stock issued by corporations incorporated in that state.¹²⁷ If a trust holds stock in many different corporations, its property may be subject to the jurisdiction of several states' courts. Furthermore, any non-Domestic Venue activities in which the trust participates will likely involve the maintenance of accounts outside that state, which would become targets of creditors seeking to pursue their claims outside of the Domestic Venue courts.

3. Legal Theories. The mere fact that a court outside of a Domestic Venue has jurisdiction to hear a creditor's post-judgment enforcement action does not guarantee a creditor victory. The creditor must also advance an argument that convinces the court that it should enforce the underlying judgment on the merits against the assets of the judgment debtor's Domestic Venue asset protection trust. A judgment creditor's arguments typically will fall into one or more of the following categories, which might be pled individually or in the alternative: (i) the asset protection features of the Domestic Venue trust offend public policy in the state where the post-judgment action is brought and, therefore, the governing law of the trust (Domestic Venue law) should be ignored in favor of the law of such state;¹²⁸ (ii) the settlor's transfer to the Domestic Venue trust was a fraudulent transfer and, therefore, should be set aside; or (iii) the Domestic Venue trust is a "sham" trust or is the alter ego of the settlor and, therefore, because the settlor never really parted with dominion and control over the trust assets, the court should disregard the trust structure.

[a] Governing Law. A court that has determined that its jurisdiction is proper must decide whether to apply its own state's law or the governing law of the trust (*i.e.*, Domestic Venue law). The general rule for trusts is that courts will apply the governing law of the trust.¹²⁹ However, there is an exception to this rule. If the state where a court exercises jurisdiction has a sufficiently strong public policy against a pertinent provision of the governing law of the trust, the court will ignore the governing law provision of the trust agreement and substitute its state's law to resolve the matter before the court.¹³⁰

[b] Public Policy. One of the key provisions of the Domestic Venue laws are that they permit and recognize the validity of "self-settled" discretionary trusts. That is, a settlor can set up a trust, the assets of which are not reachable by the settlor's creditors, and still retain an interest in the trust (*i.e.*, the ability to receive distributions at the discretion of the trustee). Nearly all other states have either statutory or case law to the effect that self-settled discretionary trusts are void with respect to creditors' claims for public policy reasons.¹³¹ Therefore, all assets of such a trust that are subject to the settlor's ability to receive discretionary distributions are also fully reachable by the settlor's creditors. Thus, if the court outside of a Domestic Venue decides that this rule is a sufficiently strong tenet of its state's public policy, the court may decide to ignore the asset protection provisions of the Domestic Venue statute in favor of its own and declare

the trust assets reachable by creditors, thereby eliminating the protection the trust was designed to achieve.¹³²

- [c] Sham or Alter Ego. The court outside of a Domestic Venue could apply Domestic Venue law and nonetheless invalidate the trust on the basis that it is a “sham” or the “alter ego” of the settlor.¹³³ Because many of these trusts will be used chiefly to provide asset protection, the settlor will be the primary (or only) beneficiary. He or she may also be a co-trustee, a protector, or otherwise retain significant control over the trust. A court faced with these facts might be very receptive to an argument that the settlor is not really a “discretionary” beneficiary, as the Domestic Venue laws require.¹³⁴ Moreover, pursuant to a pattern of behavior revealing a relationship between the trustee and settlor suggesting that the settlor did not, in fact, part with dominion and control over the trust assets, the creditor might persuade a court to disregard the trust structure because it is a sham or the alter ego of the settlor. Discovery by the creditor to reveal facts indicative of such a pattern of behavior will be accomplished under U.S. procedural rules, which have been promulgated pursuant to the due process guarantees of the Constitution. This contrasts sharply with discovery attempts in foreign countries concerning facts related to foreign trust activities, which may be a fairly burdensome, if not impossible, task.¹³⁵
- [d] Fraudulent Transfer. The court outside of the Domestic Venue also could apply Domestic Venue law, but nonetheless permit a creditor to reach trust assets by determining that the judgment debtor’s transfer of assets to the Domestic Venue trust was a fraudulent transfer under applicable state law.¹³⁶ If the creditor prevails, the transfer of such assets to the trust will be void, resulting in full ownership and possession of such trust assets by the settlor, free of any trust and subject to the creditor’s claim. It should be possible for a judgment creditor to bring the post-judgment fraudulent transfer claim in a Domestic Venue court in connection with the creditor’s appearance to enforce the underlying judgment on the merits via full faith and credit. It also should be possible, however, for such a claim to be heard and judgment rendered in a court outside of the Domestic Venue that has jurisdiction over the judgment debtor.
- [e] Enforcement. Even though a court outside of the Domestic Venue might render a judgment in favor of the creditor pursuant to one of the three foregoing arguments, the creditor’s battle is not over. The creditor must also find a way to have this second judgment enforced against the assets of the Domestic Venue asset protection trust. If the court’s jurisdiction is based on the situs of trust assets, the court should be able to force the turnover of those assets from the judgment debtor to the creditor by a court order (attachment, garnishment, etc.) that forces the party in possession of the assets to give them to the judgment creditor.

However, if the court has jurisdiction over the trustee or settlor but not over the assets, the situation will be different. The court might issue a turnover order against the trustee or the settlor or both, but unless the trust itself had been invalidated in the post-judgment proceeding (*e.g.*, the court had determined that the trust was a sham), a well-drafted trust instrument might make it impossible for the trustee to comply (possibly through an “anti-duress” clause requiring a trustee or protector to ignore orders compelling distributions). A valid Domestic Venue asset protection trust also would not allow the settlor to compel distributions or to terminate the trust.¹³⁷ Therefore, both the trustee and the settlor might be able to claim the defense of “impossibility.”¹³⁸ The creditor would then have to take the judgment to the jurisdiction where the trust assets are located to enforce the judgment obtained in the post-judgment proceeding.¹³⁹ If that jurisdiction is any state of the U.S., including Domestic Venues, the judgment should be enforced pursuant to the application of the full faith and credit clause of the U.S. Constitution, and the court will order the turnover of trust assets located in that state.

All state courts are bound by the Constitution and federal statutes to give full faith and credit to judgments rendered by the courts of sister states.¹⁴⁰ As long as the deciding court had proper jurisdiction, and the judgment was not procured by fraud, the sister state court, including courts in Domestic Venues, must recognize it and give it the full effect that such judgment would have had if rendered by the sister state’s court.¹⁴¹ This rule applies even if the other state’s court rendered its judgment based upon a misapprehension of Domestic Venue law and even if the judgment was based upon a cause of action that would be against Domestic Venue law and public policy.¹⁴² Furthermore, the Restatement of Judgments provides that a cause of action for money “merges” into the judgment and that a judgment for money by itself--the underlying cause of action having been resolved--cannot offend the public policy of a jurisdiction that simply is recognizing a judgment.¹⁴³ Thus, a creditor could procure a non-Domestic Venue judgment in a post-judgment enforcement proceeding against trust assets and present it to a Domestic Venue court. The Domestic Venue court would have no choice but to honor the judgment.¹⁴⁴

[f] Exemptions. Whether assets are exempt from the claims of creditors is determined by the law of the forum.¹⁴⁵ Accordingly, an attempt by a creditor to enforce a judgment against the settlor of a self-settled discretionary trust in a Domestic Venue would be unsuccessful if the creditor could not prove a fraudulent conveyance, sham, or alter ego claim. In other words, when a creditor requests a Domestic Venue court to enforce a sister state judgment against the settlor of an asset protection trust created under Domestic Venue law, the Domestic Venue court would probably use Domestic Venue exemption laws to determine what assets the creditor could reach. The asset protection trust laws of Alaska and

Delaware, for example, exempt self-settled discretionary trusts from claims of both the settlor's and the beneficiaries' creditors. However, if an Alaska or Delaware court was sympathetic to the creditor, it is possible that the court would employ another state's exemption law. The Restatement of Conflict of Laws permits the law of the forum to give way when another state has the dominant interest in the matter before the court.¹⁴⁶ The court could decide that another state (such as the debtor's domicile) had a more significant interest in the matter and use that state's law. If the other state had no exemption for assets held in self-settled discretionary trusts, the trust assets would no longer be protected.

If, on the other hand, the sister state judgment by its terms gives the creditor ownership of specific trust assets located in Alaska or Delaware, for example, neither Alaska's nor Delaware's law will protect the assets. That is because Domestic Venue courts are precluded by full faith and credit from questioning the judgment itself, as discussed above. Therefore, if the judgment declares that a particular trust asset belongs to the creditor, an Alaska or Delaware court cannot revisit the issue. The court would have to accept that the asset did not belong to the trust and therefore it could not be considered exempt trust property. The court would have no choice but to order that the necessary steps be taken to turn that asset over to the creditor. This concept would also apply if a judgment of a court of a sister state court voided a transfer to an Domestic Venue trust under its own fraudulent transfer law or found the trust to be either a sham or the alter ego of the settlor. Domestic Venue courts would be forced to honor such a ruling and either order that the party in possession of the trust assets turn the assets over to the creditor or order that the trust assets be returned to, or be deemed to be held by, the settlor. If the court orders the latter, the creditor would then be able to reach the assets by suing in the debtor's state of domicile.

E. Supremacy Clause Concerns. In some instances, a judgment creditor facing a judgment debtor who has been rendered "insolvent" by virtue of a transfer to an asset protection trust will force the debtor into involuntary bankruptcy. In that case, pursuant to a judgment against the settlor rendered by a United States Bankruptcy Court under Bankruptcy Code rules, it is possible that the Constitution's supremacy clause¹⁴⁷ will come into play. Article VI, Section 2 of the U.S. Constitution provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to Contrary notwithstanding." The Bankruptcy Code takes precedence over any conflicting state law as a result of the effect of the supremacy clause.

Typically, a debtor will argue that Section 541(c)(2) of the Bankruptcy Code exempts his or her beneficial interest in a trust that is subject to restrictions on its transfer which restrictions are enforceable under applicable nonbankruptcy law. The debtor's position would be that the "applicable nonbankruptcy law" is that of the trust, not the debtor's domicile. Accordingly, the

restrictions on the debtor/beneficiary's ability to transfer trust assets of an asset protection trust should be determined by looking to the law governing the trust.¹⁴⁸

The creditor, on the other hand, could advance two arguments against the use of Domestic Venue law to determine whether the trust assets are exempt from creditors' claims. One of these implicates the supremacy clause. First, the creditor could contend that Section 541(c)(2) does not apply in the case of a Domestic Venue asset protection trust. To support this argument, the creditor could point out that the legislative history of Section 541(c)(2) indicates that it was intended to protect "spendthrift trusts,"¹⁴⁹ arguably in the traditional understanding of such trusts, which are trusts created by one party for the benefit of another party that contain provisions restricting the beneficiaries' ability to transfer or assign their interests in the trust. The argument would assert that not only were Domestic Venue asset protection trusts not contemplated when Congress considered passing Section 541(c)(2), but they are not "spendthrift trusts" as understood by Congress at such time. Hence, prior to the passage of the Domestic Venue statutes, only trusts settled by someone other than the debtor could contain valid spendthrift provisions or other restrictions prohibiting hypothecation or alienation of trust assets that protect the debtor. Furthermore, a creditor could argue that language of the new statutes that protects Domestic Venue trusts from creditors' claims¹⁵⁰ is not a restriction on transfers within the meaning of Section 541(c)(2). Instead, it is in the nature of an exemption.¹⁵¹

If a creditor could convince a bankruptcy court that a beneficial interest in a Domestic Venue self-settled trust either was not the sort of interest Congress intended to protect under Section 541(c)(2) or that the Domestic Venue statutes do not contain a restriction on transfers within the meaning of Section 541(c)(2), then the debtor would be faced with the prospect of arguing that the protection afforded Domestic Venue trusts by their statutes was an exemption to be respected independently of Section 541(c)(2). By virtue of the supremacy clause, however, this argument would be successful only if made by a Domestic Venue debtor because Section 522(b)(2) of the Bankruptcy Code provides that the exemptions to be applied in bankruptcy are those of the debtor's domicile state, regardless of where the assets subject to the exemption are located.¹⁵² Thus, unless the settlor was a domiciliary of the Domestic Venue, Section 522(b)(2) of the Bankruptcy Code (due to the supremacy clause) would mean that the debtor's home state, lacking an exemption for self-settled trusts, would apply. Therefore, the trust assets would be reachable by the creditor under the domiciliary state's rule against creditor protective self-settled trusts.

Additionally, the creditor could plead (alternatively) that even if Section 541(c)(2) did apply, the "applicable nonbankruptcy law" should be determined by a "governmental interest" or "significant relationship" test, asserting that the interests of the debtor's domicile prevail over those of the Domestic Venue. Thus, the enforceability of transfer restrictions under Section 541(c)(2) should be determined under the domiciliary state's laws.¹⁵³

F. Contract Clause Problems. The Constitution prohibits states from enacting any law that impairs the "Obligation of Contracts."¹⁵⁴ This provision is known as the "contract clause," and was specifically intended by the framers to prevent the states from passing extensive debtor relief laws.¹⁵⁵ In order to run afoul of the contract clause, the law in question must substantially impair the obligations of parties to existing contracts or make them unreasonably

difficult to enforce.¹⁵⁶ Even when the law meets one of these criteria, it is not automatically void; instead it is subjected to the “strict scrutiny” standard of review: *i.e.*, to be valid, it must be narrowly tailored to promote a compelling governmental interest.¹⁵⁷

A creditor has a potential legitimate argument that the Domestic Venue statutes violate the contract clause by eliminating the creditor’s ability to seize assets to which he would otherwise have had access before the enactment of such statute. Even though the U.S. Supreme Court has in the past recognized a distinction between laws that regulate the substantive obligations of contracts and those that merely regulate the remedies for breach of those contracts, this distinction is no longer rigidly followed. Moreover, a creditor could argue that the new statutes do not just affect the remedies of the creditor, but they also alter the substantive obligations of the settlor/debtor. Because the settlor can potentially continue to use the assets that have been “discretionarily” distributed, the settlor’s enjoyment of the trust assets is not impaired, but the possibility of creditors reaching those assets is restricted. Because the debtor will not be harmed if he refuses to repay the debt, the debtor’s obligation to do so becomes illusory. A creditor could argue that by changing its law to allow the assets of discretionary self-settled trusts to be protected from creditor’s claims, Domestic Venues have thwarted the repayment obligations of debtors who choose to set up such a trust. While a full review of debtors’ potential arguments in defense of a contract clause violation is beyond the scope of this outline, one defense would be an argument that fraudulent transfer laws offset the impairment of creditor/debtor contracts inherent in the Domestic Venue asset protection trust statutes, providing present and foreseeable creditors with a viable remedy when faced with a debtor who has transferred assets to avoid his repayment obligation.

G. U.S. Constitutional Arguments in Perspective. The foregoing sections have described three potential U.S. Constitutional arguments a judgment creditor might advance when faced with the challenge of reaching assets of a Domestic Venue asset protection trust to satisfy his or her judgment. Note that a creditor would have *no* U.S. Constitutional arguments to advance if dealing with a foreign asset protection trust. In the analysis of the U.S. Constitutional arguments with regard to Domestic Venue trusts, however, it is important to keep the *effect* of such arguments in perspective.

The effect of a “full faith and credit” argument is to weaken the Domestic Venue statutes by permitting judgments rendered under the laws of jurisdictions outside of the Domestic Venues to be enforced against assets of Domestic Venue asset protection trusts in spite of the fact that such judgment might not have been rendered under Domestic Venue law. It should also be noted that full faith and credit does not help debtors force the application of Domestic Venue law in other states. That issue is resolved under conflicts of laws principles.¹⁵⁸

In contrast to the weakening effect of the full faith and credit argument, the effect of a successful contract clause claim would be to invalidate the part of the new statutes that impairs contracts by protecting discretionary beneficial interests in self-settled trusts from the claims of settlors’ creditors. Even though a contract clause argument would undoubtedly be hard fought, the contract clause argument is probably the only viable Constitutional claim that could potentially obliterate the Domestic Venue asset protection trust laws.

Finally, the supremacy clause argument has yet another effect. Applicable in this case only in the bankruptcy context, the supremacy clause dictates that the provision of the bankruptcy code requiring exemption laws of the settlor's domicile to be applied reigns supreme. Accordingly, assuming a creditor could convince a bankruptcy court that the exemption for beneficial interests in trusts under Section 541(c)(2) should not protect assets of Domestic Venue asset protection trusts, it is possible that only Domestic Venue domiciliaries would benefit from the new laws in the bankruptcy context. Unlike the weakening or invalidating effect, respectively, of the full faith and credit and contract clause arguments, the supremacy clause has the effect of narrowing the possible class of persons who might benefit from the new statute.

H. Aside from Constitutional Problems, the Status of Domestic Venues as Pro-Debtor Jurisdictions is Questionable. Although many of the barriers to the entry of the Domestic Venues into the asset protection arena exist because of their status as states of the United States, problems also exist with the statutes as written, as well as with existing provisions of local laws. That is, even if Domestic Venues were not prevented by the U.S. Constitution from becoming asset protection trust havens, the Domestic Venue statutes do not give the maximum possible protection to settlors. This is due to the failure of the legislation to control the effect of other aspects of Domestic Venue laws.

The new legislation of the Domestic Venues purport to give settlors a viable alternative to locating their asset protection trusts offshore. These laws are only partially successful. The statutes require additional work to close creditor-friendly loopholes, but the major problem faced by Domestic Venues is that each is one of the fifty United States and is subject to the restrictions of the U.S. Constitution. Domestic Venues are unable to bring their laws in line with the more aggressive asset protection laws in some offshore jurisdictions, because to do so would violate constitutional mandates. Quite simply, their statehood prevents them from being able to control fully a creditor's right to obtain and enforce judgments against trust assets. Therefore, a settlor who is contemplating choosing a Domestic Venue as the jurisdiction for an asset protection trust must realize that a stateside trust cannot protect assets as well as a trust in an offshore jurisdiction. Although there may be other reasons for locating an asset protection trust in a Domestic Venue,¹⁵⁹ those states cannot match offshore jurisdictions when it comes to the primary reason for creating such a trust: shelter from the claims of creditors.

1. 11 U.S.C. §541.

2. It should be noted that a creditor does not have to choose between pursuing a debtor under state fraudulent transfer law or under federal bankruptcy law. However, a state fraudulent transfer claim would probably be the easier of the two for a creditor to pursue.

3. *Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A.*, 2 Lloyd's Rep. 509 (1975).

4. See, e.g., *U.S. v. Levine et. al.*, 951 F.2d 1466 (6th Cir. 1991) (Mr. Levine had an account at a branch of a Swiss bank in the Bahamas, and despite Bahamas bank secrecy laws, U.S. authorities gained access to information about the account by exerting pressure on the U.S. branch of the Swiss bank).

5. See, e.g., *British Overseas Territories Report*, Secretary of State for Foreign and Commonwealth Affairs, Partnership for Progress and Prosperity, British Overseas Territory, March 1999.

6. See M. Langer, *Practical Int'l Tax Planning* (3rd Ed. 1990) at ch. 20 (discussing "Operation Tradewinds" and "Project Haven," IRS investigations conducted using arguably questionable methods).
7. Bahamas Business License Act (No. 8 of 1980).
8. Gibson, "Revamping Trust Legislation-The Bahamian Story," *Offshore Investment* (July/August 1998) at 8.
9. *Id.*
10. *Id.*
11. *Grupo Torras, S.A. v. S.F.M. Al-Sabah, et. al*, 1 Lloyd's Rep. 7 (Eng.C.A.1995).
12. Bermuda Government, Office of the Tax Commissioner
13. Bermuda Exempted Undertakings Tax Protection Act (1966).
14. See Section 45(1) of the Bankruptcy Act 1989; Section 36 of the Conveyancing Act 1983; Section 47(1) of the Bankruptcy Act 1989 (fraudulent preferences); Section 41 of the Matrimonial Causes Act 1974; and Section 21 of the Succession Act 1974.
15. See The Confidential Relationships (Preservation) Law, 1976, as amended in 1979.
16. Compare the Bahamas statute of limitation of two years.
17. STAR Section 3.
18. STAR Section 2(1).
19. The Perpetuities (Amendment) Law 1997.
20. The interlocutory judgment of the Cook Islands High Court illuminates the current tension in the Cook Islands between its secrecy laws and the necessity for discovery and is attached as Exhibit B.
21. *515 South Orange Grove Owners, et al., v. Orange Grove Partners*, Plaint No. 208/94, High Court of the Cook Islands (Civ.Div.) (CA 1/95 and CA 31/96).
22. See The Bankruptcy (Amendment) Ordinance, 1990.
23. IM Tax Act of 1970 (as amended), §1.
24. *The Edwards Report*, published by the Stationery Office Limited and is available from the Publications Centre, P.O. Box 276, London, SW8 5DT, England.
25. Trustee Act 2001, Part 6, Paragraph 38.
26. There may be some attempt at erosion of this concept as a result of the changes suggested by *The Edwards Report, Id.*
27. *Tournier v. National Provincial and Union Bank of England*, 1 KB 461 (1924).
28. Comptroller of Income Tax, "Concession and Practice" (February 2000), Concess 1.
29. Income Tax (Jersey) Law 1961, Art 11 and First Schedule.
30. *Golder v. Société des Magasins Concorde Limited* [1967] JJ 721; see also *Grupo Torras S.A. v. S.F.M. Al Sabah et. al* (2001) (in which the Royal Court [Samedi Division] refused to allow a distribution out of the trust to the settlor for purposes of reducing his debt).
31. Bankruptcy (*Désastre*) (Jersey) Law 1990, Art 17.
32. Trusts (Jersey) Law, 1984, Art. 2.
33. *Id.*, Art. 1(1).
34. *Id.*, Art. 45.

35. *Id.*, Art. 52.
36. *Id.*, Art. 50(4).
37. *Id.*, Art. 51.
38. *Id.*, Art. 53.
39. *Id.*, Art. 10(1).
40. *Id.*, Art. 9(1).
41. *Id.*, Art. 9(2).
42. *Id.*, Art. 9(4)-9.
43. *Id.*, Arts. 8, 10(2)(a)(iii).
44. Nevis Int'l Exempt Trust Ordinance § 43; Nevis Bus. Corp. Ordinance § 123(1); and Nevis Ltd. Liab. Co. Ordinance §83(2).
45. Fiscal Incentives Act (No. 17 of 1974).
46. 13 Eliz. Ch 5 (1571).
47. Nevis Int'l Exempt Trust Ordinance §49.
48. *Id.*, §24(1)(a).
49. *Id.*, §24(1)(b).
50. *Id.*, §24(2).
51. *Id.*, §24(10).
52. *Id.*, §24(9).
53. Nevis Ltd. Liab. Co. Ordinance §19.
54. *Id.*, §13.
55. *Id.*, §43.
56. *Id.*, §§40(4), 41; *see* IRC §2704(b).
57. Such an entity could elect to be disregarded for U.S. tax purposes.
58. The following discussion is based, in part, on Leslie C. Giordani and Duncan E. Osborne, "Will the Alaska Trusts Work?" 3 *J. of Asset Prot.* No. 1 (Sept/Oct 1997), and Leslie C. Giordani and Duncan E. Osborne, "Stateside Asset Protection Trusts: Will They Work?" *Estate and Personal Finance Planning* (Edward F. Koren ed., West Group 1997).
59. In addition to the existing Alaska, Delaware, Nevada, and Rhode Island statutes, asset protection trust legislation is now pending in New York. (In 1986, Missouri amended its spendthrift trust statute in a way which might permit creation of asset protection trusts, but the statute was not specifically drafted or clearly amended with this purpose in mind.)
60. *U.S. Const.*, Art. IV, Sec. 1.
61. *U.S. Const.*, Art. I, Sec. 10.
62. *U.S. Const.*, Art. VI, Sec. 2.
63. In designing an asset protection structure, the lawyer must do more than simply read the Domestic Venue asset protection legislation. To probe for weaknesses, the lawyer must envision how the attack on the trust is likely to be played out. Also, note that the same thorough analysis is called for in reviewing asset protection features of foreign jurisdictions.

64. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*; see also the *Gatekeeper Initiative* proposed by the U.S.-led working group of the Financial Action Task Force (FATF).
65. MT ST §32-8-101 *et seq.*
66. COLO REV STAT §11-37.5-101 (1999).
67. MT ST §32-8-301.
68. MT ST §32-8-102.
69. Brigid McMenamín, “Rocky Mountain High,” *Forbes*, November 3, 1997.
70. Idaho, Illinois, New Jersey, Rhode Island, South Dakota, and Wisconsin.
71. Alaska, Arizona, Delaware, and Ohio.
72. Maine and Maryland.
73. AK ST §13.36.070-220
74. AK ST §34.40.110(b).
75. Based in part on the inability, under the Alaska Trust Act, of the settlor-beneficiary’s creditors to reach her interest in a trust created under said statute, the IRS recently ruled that the settlor-beneficiary’s transfer to the trust was a completed gift for gift tax purposes. However, the ruling did not specifically address whether or not the assets would be included in the settlor’s estate for estate tax purposes. PLR 9837007.
76. AK ST §34.40.010.
77. See, e.g., *Pattee v. Pattee*, 744 P.2d 658 (Alaska 1987); *Sylvester v. Sylvester*, 723 P.2d 1253 (Alaska 1986); *Gabaig v. Gabaig*, 717 P.2d 835 (Alaska 1986); *First Nat’l Bank of Fairbanks v. Enzler*, 537 P.2d 517 (Alaska 1975).
78. *Sylvester v. Sylvester*, 723 P.2d 1253 (Alaska 1986); *First Nat’l Bank of Fairbanks v. Enzler*, 537 P.2d 517 (Alaska 1975).
79. It can be argued that the Alaska law renders this badge of fraud inapplicable to Alaska trusts because it states that no trust or transfer is void or voidable because it “avoids or defeats a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the settlor or by way of marital or similar right.” AK ST §13.36.310. However, the language “hinder or delay creditor recovery” is so broad that the statutory protection would be strengthened if §13.36.310 were revised to specifically make this badge of fraud inapplicable.
80. *First Nat’l Bank of Fairbanks v. Enzler*, 537 P.2d 517 (Alaska 1975).
81. *Uniform Fraudulent Transfer Act*, §4(b)(1) (1984).
82. *Gabaig*, 717 P.2d at 839.
83. AK ST §34.40.110.
84. *Cook Islands International Trusts Act 1984*, §13B(3).
85. *Id.* at §13B(5).
86. *Id.* at §§13B(1), 13B(7).
87. *Uniform Foreign Money Judgments Recognition Act*, 13 U.L.A. 261, §3. See AK ST §09.30.100 *et. seq.*
88. In fact, the Uniform Act requires no reciprocity. However, both Massachusetts and Texas have amended their versions to require it.
89. AK ST §09.60.010; Ak.R.C.P. 82.
90. *Lee Houston & Assoc., Ltd. v. Racine*, 806 P.2d 848, 856 (Alaska 1991).

91. *Id.*
92. Del. Code Ann. tit. 12, §3570 *et seq.*
93. *Id.*
94. Del. Code Ann. tit. 12, §3571 and §3572.
95. Del. Code Ann. tit. 12, §3573.
96. Del. Code Ann. tit. 12, §3572.
97. Del. Code Ann. tit. 6, §1301 *et seq.*
98. UFTA §4(b); Del. Code Ann. tit. 6, §1304(b).
99. UFTA §4(a)(2); Del. Code Ann. tit. 6, §1304(a)(2).
100. UFTA §4(a)(1); Del. Code Ann. tit. 6, §1304(a)(1).
101. UFTA §4(b)(1)-(11); Del. Code Ann. tit. 6, §1304(b)(1)-(11).
102. *Id.*
103. UFTA §5(a); Del. Code Ann. tit. 6, §1305(a).
104. UFTA §2; Del. Code Ann. tit. 6, §1302.
105. UFTA §5(b); Del. Code Ann. tit. 6, §1305(b).
106. UFTA §1(7)(i); Del. Code Ann. tit. 6, §1301(7)(i).
107. UFTA §9(a); Del. Code Ann. tit. 6, §1309(1).
108. UFTA §9(b); Del. Code Ann. tit. 6, §1309(2).
109. UFTA §9(c); Del. Code Ann. tit. 6, §1309(3).
110. Del. Code Ann. tit. 12, §3572(b).
111. *Id.*
112. *Mitchell v. Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982), *aff'd*, 461 A.2d 696 (Del. 1983); *United States v. West*, 299 F. Supp. 661 (D. Del. 1969).
113. Del. Code Ann. tit. 10, §5101.
114. *Id.*
115. *See, e.g., Pierce v. International Insurance Company of Illinois*, 671 A.2d 1361 (Del. 1996); *Jardel Co., Inc., v. Hughes*, 523 A.2d 518 (Del. 1986).
116. Nev. Rev. Stat. §166.001 *et seq.* (1999).
117. Nev. Rev. Stat. §112.230.
118. Nev. Rev. Stat. §11.190.
119. RI ST §18-902-1 *et seq.*
120. In many cases, an attack on an asset protection trust will be either the second phase of a lawsuit or a second suit entirely. The first action will have been the cause, cast in tort or contract, that gave rise to the liability. The second action will likely be against the trust in an effort to satisfy the judgment.
121. It can be argued that trustees are “necessary parties” to all suits involving trust assets, *i.e.*, that they must be joined in such action for the court to validly adjudicate the dispute. However, since the revision of Federal Rule of Civil Procedure 19 in 1966, there has been a general trend by both state and federal courts away from characterizing any party not present as “necessary” or “indispensable.” Instead, many states (and all federal courts) have moved to a

more pragmatic analysis, where certain parties should be joined “if feasible.” *See, e.g.*, Fed.R.C.P. 19 (Federal Courts); C.C.P. §389 (California); CPLR §1001 (New York); Tex.R.C.P. 39 (Texas). This approach gives courts more latitude to adjudicate disputes without joining additional parties. For example, the Texas Supreme Court, in *Cooper v. Texas Gulf Industries*, 513 S.W.2d 200, 204 (Tex. 1974), said “[i]t will be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined.”

122. *See, e.g., Milliken v. Meyer*, 311 U.S. 457 (1940).

123. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

124. *Restatement 2d, Conflict of Laws*, §41 (1971).

125. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

126. *See, e.g., Green v. Van Buskirk*, 72 U.S. 307 (1866); 74 U.S. 139 (1868).

127. *Id.*

128. *See In re Brooks*, 217 B.R. 98 (Bankr. E.D. Conn. 1998) (on grounds of public policy, court applied Connecticut law to determine the enforceability of spendthrift provisions of self-settled Jersey and Bermuda trusts; *held*, spendthrift provisions were unenforceable and trust assets therefore were property of the bankruptcy estate.)

129. *See, e.g., Scott on Trusts*, §626(c) (4th ed. 1989); *First Nat’l. Bank v. National Broadway Bank*, 156 N.Y. 459, 51 N.E. 398 (1898).

130. With regard to trusts, *see, e.g., In re Brooks*, 217 B.R. 98 (Bankr. E.D. Conn. 1998); *In re Larry Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); *First Nat’l Bank in Mitchell v. Dagget*, 497 N.W.2d 358 (Neb. 1993). With regard to the general principle that foreign law will not be used if it contravenes the forum state’s public policy, *see, e.g., Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918) (Cardozo, J.); *see, generally*, Scoles and Hay, *Conflict of Laws*, §3.15 *et. seq.* (2d ed. 1993).

131. All states that have dealt with this issue have declared, either by statute or case law, that spendthrift provisions in self-settled trusts are void against existing creditors and that a wholly discretionary interest retained by the settlor will be interpreted in light of the trustee’s discretionary authority to distribute *all* trust assets, thereby allowing creditors complete access to them. *See, e.g.,* Duncan E. Osborne and Elizabeth M. Schurig, *Asset Protection: Domestic and International Law and Tactics*, Ch. 14 (four volumes, West Group, updated quarterly, 1995). For example, in Texas, “[p]ublic policy does not countenance devices by which one frees his own property from liability for his debts, or restricts his power of alienation of it; and it is accordingly universally recognized that one cannot settle upon himself a spendthrift or other protective trust, or purchase such a trust from another, which will be effective to protect either the income or the corpus against the claims of his creditors, or to free it from his own power of alienation. The rule applies in respect of both present and future creditors and irrespective of any fraudulent intent in the settlement or purchase of a trust.” *In re Shurley*, 115 F.3d 333 (5th Cir. 1997), citing *Glass v. Carpenter*, 330 S.W.2d 530, 533 (Tex.Civ.App. - San Antonio 1959, writ ref’d n.r.e). The Second Circuit, Seventh Circuit, and Tax Court have read the laws of New York, Indiana, and Maryland, respectively, to say that a settlor’s discretionary right to income is not reachable by his or her creditors, but no state court has concurred with this conclusion. Furthermore, commentators have correctly noted that settlors have not chosen to rely on the circuit courts’ interpretation. *See, e.g.,* Hompesch, Rothschild, and Blattmachr, “Does the New Alaska Trusts Act Provide an Alternative to the Foreign Trust?” 2 *J. of Asset Prot.* No. 9 (July/Aug 1997). Missouri Revised Statutes §456.080 has been interpreted to allow creditor-proof discretionary trusts, but, again, settlors have not chosen to rely on this interpretation. Missouri courts have traditionally disallowed creditor protection for self-settled trusts, and the local bankruptcy court has specifically declared that the statute does not change the “existing” rule prohibiting self-settled creditor protective trusts. *In re Enfield*, 133 B.R. 515 (Bankr. E.D. Mo. 1991).

132. *See In re Brooks*, 217 B.R. 98 (Bankr. E.D. Conn. 1998). Another dispute in which a court might choose to apply the law of the debtor’s domicile, and not Alaska or Delaware law, is in the context of a community property claim. In the states that have adopted a community property system of marital property ownership (*e.g.,* California, Texas, New Mexico), with few exceptions, all property acquired during a marriage belongs equally to both spouses, regardless of which spouse actually earned it. Thus, the validity of a claim against trust assets made by the spouse of a

settlor domiciled in a community property state would have to be decided under the law of the settlor's domicile, even in an Alaska court. For example, although the Alaska statute provides that no trust or transfer is void or voidable because it "avoids or defeats a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the settlor or by way of marital or similar right" (AK ST §13.36.310), to the extent it deprives the settlor's spouse of property rights that had vested in a community property state, it probably violates substantive due process. Any conveyance to a trust made with the intent to deprive the spouse of her community interest would be fraudulent, and it is unlikely that the courts would defer to the Domestic Venue's economic interest in maintaining a haven for fraudulently funded trusts.

133. For a discussion of these causes of action, *see, generally, Scott on Trusts* §§156, 156.2 (4th ed. 1989).

134. *See, e.g.,* AK ST §34.40.110. *Cf.* PLR 9837007, in which the IRS ruled that a transfer to a trust created under the Alaska statute would be a completed gift for gift tax purposes "[b]ased on the representation that there is no express or implied agreement between the Donor and the Trustee as to how the Trustee will exercise its sole and absolute discretion to pay income and principal among the beneficiaries."

135. For example, offshore trust jurisdictions generally are not parties to the Hague Convention on the Taking of Evidence Abroad on Civil or Commercial Matters.

136. For a general discussion of fraudulent conveyance issues in the asset protection trust context, *see, e.g.,* Duncan E. Osborne and Elizabeth M. Schurig, *Asset Protection: Domestic and International Law and Tactics*, Ch. 2 (four volumes, West Group, updated quarterly, 1995).

137. *See, e.g.,* AK ST §34.40.110.

138. Many courts are suspicious of the defense of impossibility. A court has the option of confining the defendant in jail until he or she either produces the assets, or the court is satisfied the defense has merit. As the Supreme Court has said, "[his or her] denial of possession is given credit after demonstration that a period in prison does not produce the goods." *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948); *see also SEC v. Bilzerian*, 112 F. Supp.2d 12 (D.C.C., 2000); *In re Lawrence*, 279 F. 3d 1294 (CA 11th Cir 2002).

139. Alternatively, the creditor would have the option of asking the court to issue a turnover order against the settlor with regard to future distributions. Presumably, the trustee would then cease making distributions to the settlor. The creditor would not benefit, but the settlor would lose the ability to enjoy the assets himself.

140. *U.S. Const.*, Art. IV, Sec. 1; 28 U.S.C. 1738.

141. *See* Scoles & Hay, *Conflict of Laws*, 2d ed. (1992), at 968-986.

142. *See, e.g., Restatement 2d, Judgments* §17 (1982); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

143. *Restatement 2d, Judgments* §17, 18 (1982).

144. Domestic Venue courts would also be required to honor a judgment that trust assets are community property and that, therefore, a portion of those assets is not the property of the settlor, but rather is the property of his or her spouse.

145. *Restatement 2d, Conflict of Laws*, §132 (1971).

146. *Id.*

147. *U.S. Const.*, Art. VI, Sec. 2.

148. *See, e.g., In re Remington*, 14 B.R. 496 (Bankr. NJ 1981) (court held that Pennsylvania law [the law of the trust] applies to determine extent of New Jersey debtor's right to trust assets).

149. *See* HR Rep. No. 595, 95th Cong., 1st Sess. 369 (1977).

150. *See, e.g.,* AK ST §13.36.310.

151. The Alaska statute simply denies creditor access to self-settled discretionary trusts. Unlike certain other states' laws (*e.g.,* Delaware), it does not statutorily confer "spendthrift trust" status on such trusts.

152. United States Bankruptcy Code, 11 U.S.C. §522(b)(2).
153. See, e.g., *In re Larry Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) (holding that New York law should determine debtor's rights in a Jersey (Channel Islands) trust because "the trust, the beneficiaries, and the ramifications of [debtor's] assets being transferred in to the trust have their most significant impact in the United States . . . and that application of Jersey's substantive law would offend strong New York and federal bankruptcy policies."). This second argument is similar to the argument a creditor might advance in a non-bankruptcy context to convince a court not to apply the governing law of the trust.
154. *U.S. Const.*, Art I, Sec. 10.
155. Wright, *The Growth of American Constitutional Law* 64 (1967); *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 427-428 (1934) (Hughes, J. discussing historical background of the contract clause).
156. Wright, *The Contract Clause of the Constitution* (1938); Nowak and Rotunda, *Constitutional Law*, at 11.8 (5th Ed. 1995).
157. The U.S. Supreme Court first used the contract clause to invalidate a state law on the basis of unreasonable interference with contracts in *Fletcher v. Peck*, 10 U.S. 87 (1810). The Court continued to use the clause for this purpose throughout the nineteenth century. See, e.g., *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Ogden v. Saunders*, 25 U.S. 213 (1827); *Bronson v. Kinzie*, 42 U.S. 311 (1843). However, the clause fell into obscurity during the Court's "substantive due process" era, because "substantive due process" gave the Court greater discretion in passing on the constitutionality of state legislation. Thereafter, the contract clause was considered of little or no importance until its revival in 1977 in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The next year, it was used by the Court to invalidate a statute for unreasonable interference with private contracts in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), and the Court has continued to use a contract clause analysis for this purpose. See, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).
158. See Hompesch, Rothschild, and Blattmachr, "Does the New Alaska Trusts Act Provide an Alternative to the Foreign Trust?" 2 *J. of Asset Prot.* No. 9 (July/Aug 1997) at 12-14.
159. One reason would be transfer tax planning. For a discussion of possible planning opportunities, see Blattmachr, Blattmachr, and Rivlin, "A New Direction in Estate Planning: North to Alaska," *Trusts & Estates*, September 1997.