A Closer Look at U.S. Asset Protection Trusts

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CHAPTER 1

A Closer Look at U.S. Asset Protection Trusts

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Background and Current Trends

The last hundred years of our history has fostered an increasing number of risks to individual wealth. For instance, the United States judicial system has developed in a way that causes many wealthy individuals to feel exposed to legal judgments that are wholly disproportionate to any actual liability. This fear, along with a general distrust of governmental regulatory agencies and the potential liability arising from future United States legislation, has led many United States persons to look for ways to protect themselves from these risks. The “spendthrift trust” (which protects a non-settlor beneficiary’s assets by not allowing the beneficiary to alienate their interest in the trust and by disallowing the beneficiary’s creditors from reaching the trust assets) was created at the end of the nineteenth century in response to the general social fear and unease arising out of the unstable business environment during those times. Though creditors and many scholars disliked spendthrift trusts,[1] individuals demanded them, courts approved of them,[2] and by the first part of the twentieth century, nearly every state had adopted the spendthrift trust concept by either statute or common law.[3] State legislation allowing spendthrift trusts was passed in response to a concern that property conveyed in trust for beneficiaries would be used as collateral for the beneficiary’s debts or otherwise imprudently assigned by a financially irresponsible, or “spendthrift,” beneficiary.

Given the relative merit of a settlor’s desire to protect a beneficiary from himself, some states’ legislatures agreed to codify this concept, and other states’ courts approved it under common law. But they balanced this arguably pro-debtor result with the corresponding concept that an individual should not be able to use a trust relationship to protect assets for his or her own benefit. Thus, spendthrift statutes and case law generally prohibit a person from settling a spendthrift trust for his or her own benefit (a “self-settled spendthrift trust”). Many non-U.S. jurisdictions, however, allow a settlor to be a beneficiary of a trust that contains anti-alienation provisions similar to a spendthrift trust—otherwise known as asset protection trusts. This feature of non-U.S. law, along with other asset-protective aspects of offshore jurisdictions, has led many U.S. persons to settle trusts in foreign jurisdictions.

Recently, however, the attitude in the United States toward protecting assets for future generations has been shifting. One interesting trend has been the deterioration of 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, have exempted certain trusts from the Rule, or have allowed a trust instrument to expressly state that the Rule does not apply. Many states have not altogether eliminated the Rule Against Perpetuities, but have instead extended the common law Rule. (For a summary of the states’ various laws concerning the Rule Against Perpetuities, see the chart attached as Exhibit A to this chapter.)

A more radical shift in the attitude toward asset protection is evident in some states' outright allowance of asset protection trusts by statute. In particular, Alaska, Delaware, Nevada, Rhode Island, and Utah (the "Domestic Venues")[4] have enacted legislation with a view toward becoming viable venues for establishing asset protection trusts. Oklahoma has also recently passed asset protection legislation. This current trend could be due to a desire to bolster the state's economy by keeping wealth onshore in local financial institutions and by drawing wealth from other states. It could also be due to the fact that state legislators have realized that fraudulent transfer law offers sufficient protection to creditors against transfers to protective trusts (thus negating the need for a blanket prohibition on self-settled spendthrift trusts). Whatever the reason, it is possible that we are seeing the beginning of a trend that, like the spendthrift trust concept at the turn of the twentieth century, will result in every state eventually either enacting some sort of asset protection trust statute or recognizing the validity of protective trusts under common law.

The Uniform Fraudulent Transfer Act

Because fraudulent transfer law is so tightly intertwined with the workings of the asset protection trust statutes in the Domestic Venues, a preliminary discussion of the Uniform Fraudulent Transfer Act is helpful to understand the differences among these trust statutes.

All of the Domestic Venues, except Alaska, have adopted the Uniform Fraudulent Transfer Act (UFTA) in some form. The UFTA is a comprehensive statute drafted in an attempt to remove as many ambiguities as possible from fraudulent transfer law, and is intended to have the same meaning in every jurisdiction that adopts it. A "fraudulent transfer" is generally defined as a transfer of assets that is made with the intent to defeat the rights of creditors. In certain situations, fraudulent transfers can be voided, and the creditor can thus reach the transferred assets to satisfy a debt. In certain circumstances, the UFTA allows creditors to void transfers as fraudulent without showing any "intent to defraud" on the part of the debtor. And in those situations in which a creditor must prove a debtor's "intent to defraud," creditors are given the benefit of eleven "badges of fraud" by which the court may infer intent.[5]

For the purpose of determining what must be proved in court, the UFTA divides creditors into two categories: present creditors (those whose claim arose before the transfer) and future creditors (those whose claim arose concurrent with or after the transfer).

Both classes of creditors are allowed to void transfers on a "constructive" fraud theory (*i.e.,* without having to either prove actual intent to defraud or to rely on the presence of badges of fraud) if the debtor made the transfer in exchange for less than "reasonably equivalent value" and 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 if the debtor intended to incur debts beyond her ability to pay them when they came due.[6] Thus, because a transfer in trust is usually 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 present and future creditors can also void transfers made with "actual intent to hinder, delay or defraud."[7] However, this intent does not have to be proven with regard to the specific creditor making the claim. Rather, 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.[8] Furthermore, a creditor does not have to prove actual fraudulent intent—the UFTA lists certain recognized badges of fraud from which the court can infer that the debtor made the transfer with the intent to defraud creditors.[9] These 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.[10]

In addition to these methods for present and future creditors to void transfers, the UFTA gives present creditors even greater protection. Without having to show any intent, a present creditor 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.[11] 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").[12]

Present creditors may also void transfers made by insolvent debtors in satisfaction of prior debts to "insiders" who have reason to know of the debtor's insolvency.[13] 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."[14] 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 have known that the settlor was insolvent at the time of the transfer.

The applicable limitation period under the UFTA differs depending on the basis of a creditor's claim. A creditor attempting to void a transfer on the basis of the debtor's "intent to defraud" must bring 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.[15] For actions to void transfers based on the debtor's failure to receive "reasonably equivalent value" from the transferee, a creditor has four years from the date of the transfer.[16] For transfers made by an insolvent debtor in satisfaction of a debt owed to an insider who had reason to know of the insolvency, and whose claim arose prior to the claim of the creditor who was defrauded by the transfer, the limitation period is only one year.[17] This very short one-year limitation period reflects the UFTA's balanced approach toward protecting creditors while simultaneously encouraging debtors to pay their oldest debts first. This philosophy is reflected in an even more striking way with regard to various commercial transactions (for example, transfers made in the ordinary course of business of the debtor and the insider) in which transfers are not voidable *at all*, even though the transfer itself was fraudulent as to a creditor.[18]

Domestic Venue Asset Protection Legislation

The Alaska Trusts Act[19]

Overview of Recent Amendments

Since Alaska first enacted its protective trust legislation in 1998 it has extensively amended its statutes in an effort to make the laws more clear and comprehensive. These amendments have effected numerous changes to the trust laws, some of which bring Alaska's statutes in line with the other Domestic Venues (such as providing that a spendthrift provision in a protective trust should be honored under §541(c)(2) of the Bankruptcy Code[20]), and some of which set Alaska apart as a desirable protective trust jurisdiction.

From the recent activity in the Alaska legislature, it appears that Alaska is currently focused on fine-tuning its trust laws as often as possible in order to correct any weaknesses and potential ambiguities. Therefore, this chapter will describe Alaska's law in the context of the most recent changes (in 2003 and 2004) in existence at the time of this chapter's publication. Most of the recent changes relate to Alaska's fraudulent transfer law, and will be discussed in the section entitled "Fraudulent Transfers Under Alaska Law." The non-fraudulent transfer features of Alaska's trust laws are highlighted below.

Alaska law provides that a settlor may be a beneficiary of a spendthrift trust, as long as the trust is irrevocable and distributions to the settlor are fully discretionary.[21] A settlor-beneficiary of an Alaska trust may serve as co-trustee, so long as the settlor has no power over discretionary distributions,[22] and the settlor may retain the power to appoint trust protectors and trust advisors without placing the trust at risk of losing its protected status.[23] And to prevent claims that the settlor never relinquished control of the trust assets, Alaska law provides that any agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant, or permit the settlor to have, greater rights or authority than stated in the trust instrument (such as a "Letter of Wishes") is void.[24] (This new provision mimics Delaware's statute[25] and applies retroactively to all trusts created before the 2003 amendments became effective). A settlor who creates a protective trust for his own benefit must, before transferring assets to the trust, sign a sworn affidavit stating that, among other things listed in the statute, he is solvent and is not making the transfer with the intent to defraud creditors.[26]

Fraudulent Transfers under Alaska Law

Alaska, unlike the other Domestic Venues, has not enacted the UFTA. Its statute simply declares that transfers are void if made with an "intent to hinder, delay, or defraud" creditors.[27] At first glance, one of the potential key advantages of Alaska's fraudulent transfer statute is 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 (and thus easing a creditor's burden of proof). However, the Supreme Court of Alaska has repeatedly acknowledged the existence of at least eight badges of fraud in its opinions.[28] Six of these badges are quite similar to those listed under the UFTA . But two are much broader than any of the UFTA badges.

First, Alaska courts consider "depletion" of the transferor's assets so as to hinder or delay creditor recovery to be a badge of fraud.[29] Under the UFTA, transfers that render the debtor "insolvent" are suspect, but Alaska Supreme Court precedent would allow a creditor-friendly court to go much further. In fact, in 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.[30]

Second, Alaska's 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."[31] The UFTA recognizes "transfers made to insiders"[32] as a badge of fraud, but the Alaska language is so broad that it 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 "circumstances which of themselves incite distrust and suspicion."

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 lowered to a "preponderance of the evidence," which is the burden of proof in most civil lawsuits.[33] This means that a creditor requires less convincing evidence to void a transfer in Alaska than in most other states. Therefore, due to the combination of (i) broadly described badges of fraud, and (ii) a low standard of proof, a creditor presumably could have less difficulty voiding transfers under Alaska law than under the law of most other states.

In contrast to the potentially creditor-friendly aspects of Alaska fraudulent transfer law described above, the recent amendments made some rather debtor-friendly changes to the fraudulent transfer statutes. One recent amendment significantly narrowed the class of creditors allowed to reach the assets of an Alaska trust. Prior to the change, a creditor could satisfy a claim out of "a beneficiary's" interest in a spendthrift trust if a transfer to the trust was intended to defraud creditors or "other persons." The statute now clearly provides that only creditors of the settlor (not "other persons" who may have been defrauded) may reach the settlor's beneficial interest (not just "a beneficiary's" beneficial interest) in an Alaska Trust.[34] Furthermore, a creditor seeking to void a transfer as fraudulent must prove that the transfer was made with the intent to defraud *that very creditor.*[35] It is important to note that this provision is quite a deviation from the UFTA, which allows a creditor to void a transfer if he shows that the transfer was made with the intent to defraud *any* creditor.[36]

As amended, Alaska's trust law generally requires present creditors of the settlor to file suit within four years from the date of the transfer. A present creditor may also bring an action within one year from the date the creditor could have "reasonably discovered" the transfer if the creditor either (1) can demonstrate, by a preponderance of the evidence, that the creditor asserted a specific claim against the settlor before the transfer, or (2) files a suit that asserts a cause of action based on an act or omission of the settlor that occurred before the settlor transferred assets to the trust.[37] In effect, this provision greatly restricts the class of present creditors who are able to reach trust assets, and it obviates the concern under the prior version of the statute that a creditor-friendly court could extend the limitations period indefinitely by declaring that the creditor could not have "reasonably discovered" the transfer until just before he or she brought suit.

Protection for Third Parties Assisting Clients with Asset Protection

Alaska's fraudulent transfer law protects individuals assisting clients with asset protection by providing that there is no cause of action for conspiracy to commit a fraudulent transfer against a person who participates in preparing and funding a protective trust. "Preparing and funding" a trust includes the preparation and funding of a limited partnership or a limited liability company if the LP or LLC interests are later transferred to the trust. [38] Though some may argue that this protection could cause attorneys to be lackadaisical in their due diligence and know-your-customer policies, this aspect of the statute provides needed protection for innocent attorneys who could be misled by settlors who hide their true financial condition and claim to make transfers for valid reasons.

Recognition of Other States' Judgments in Alaska

A creditor who obtains a final judgment in another state must bring an action to enforce that judgment in Alaska within ten years of the date of the judgment.[39] However, a creditor seeking to enforce a judgment (whether rendered in an Alaska court or another state's court) against a protective trust must bring the action to an Alaska court within the limitations periods defined in the trust law.[40]

There is a very strong argument that this provision is unconstitutional under the full faith and credit clause[41] of the U.S. Constitution. It is true that the enforcement of a sister state's judgment may be barred by the statute of limitations of the forum state because statutes of limitations are deemed to affect procedure only and not the substance of the action.[42] And some have argued that because the Alaska law makes no distinction between its own judgments and those of other states, it does not run afoul of the full faith and credit clause.[43] But upon closer analysis, this provision of Alaska's statute begins to look less like a procedural bar than a substantive one. This is best illustrated with an example. Assume that a creditor brings two separate fraudulent transfer claims in Texas against two different debtors: the first debtor transferred assets outright to his sister who lives in Alaska, and the second debtor transferred assets to an Alaska trust. In each action, the Texas court, after determining that its jurisdiction is proper, decides that the creditor was indeed defrauded by the transfer and enters a judgment voiding the transfer and allowing the creditor to recover the fraudulently transferred property. Five years later, the creditor takes his valid Texas judgments to Alaska for enforcement. Because Alaska's civil statutes provide a ten-year limitation period for actions to enforce judgments from other states, the creditor is not barred as to the first debtor, who fraudulently transferred assets to his sister, and the Alaska court is bound by the full faith and credit clause to recognize the Texas judgment. But because the creditor did not attempt to enforce his second judgment against the Alaska trust within the short time limitation set forth in the statute, he has no remedy—and arguably, he has been denied the only remedy available to him.

But, some may argue, an Alaska creditor would be equally barred. This is true, but it ignores the fact that the full faith and credit clause requires states to recognize the valid, binding judgments of other states and prohibits courts from questioning the substance of another state's validly rendered judgment. The Alaska statute provides that enforcement actions are barred "unless the action is brought under [the trust law's 'intent to defraud' section] and within the limitations period" set forth in the trust law.[44] Therefore, it appears that a creditor who holds a final judgment from another jurisdiction is forced to prove his fraudulent transfer case all over again in an Alaska court. In essence, the Alaska statute limits other states' rights to control the substantive issues before their courts and to expect their decisions to be enforced in other states.

It could be argued that, under the UFTA, the creditor is not harmed because he is not limited to recovering only the fraudulently transferred property, but may enforce his judgment against assets outside of the trust.[45] But the fact that the creditor has other avenues of enforcement does not change the fact that the Alaska statute requires Alaska courts to question the substance of other states' judgments, which contravenes the full faith and credit clause.

Recognition of Foreign Money-Judgments in Alaska

Alaska has adopted the Uniform Foreign Money-Judgments Recognition Act, which could potentially affect the integrity of an Alaska asset protection trust. 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."[46] As long as an impartial tribunal exercising valid jurisdiction rendered the judgment, that judgment could potentially result in the transfer of trust assets to the creditor. In addition, the law requires no reciprocity for enforcement. Therefore, whether the rendering country would give an Alaska judgment the same effect is irrelevant.[47] 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.

The Availability of Attorney's Fees and Punitive Damages in Alaska

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.[48] This provision discourages frivolous lawsuits but is an anomaly in United States law. Punitive damages are awarded only for torts,[49] but that does not necessarily preclude a creditor-plaintiff from receiving them in a fraudulent transfer action. 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.[50] Also, even though there is no case 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.

The Delaware Qualified Dispositions in Trust Act

The Delaware Qualified Dispositions in Trust Act[51] provides that a transferor may make a disposition of property in a trust and also be a discretionary beneficiary of the trust if the trust expressly names Delaware law as the governing law of the trust (except in the case of a disposition to a qualified trustee by a non-qualified trustee[52]), is irrevocable, and contains Delaware's statutory spendthrift language.[53] 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.[54] Additionally, the assets are exempt from bankruptcy judgments to the extent that the qualified trustee has not distributed the property or income of the trust to the beneficiary.[55] The protection from creditors, however, 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.[56]

In June of 2003, Delaware amended its trust law to provide that, in any action brought against a trustee of a Delaware protective trust, where the court declines to apply the law of Delaware "in determining the validity, construction, or administration of such trust, or the effect of a spendthrift provision" of the trust, then the trustee will immediately—without further order of any court—cease to be trustee of that trust.[57] Upon the trustee's ceasing to be trustee, the trustee's only power is to convey the trust property to the successor trustee named in the trust instrument, or if no successor is named, to the trustee appointed by the Delaware Court of Chancery.[58] (This amendment is effective retroactively to all Delaware trusts that meet the requirements of the Delaware Qualified Dispositions in Trust Act.) Presumably, the Delaware legislature added this provision based on a supposition that the successor trustee named in the instrument or appointed by the Court of Chancery would not be subject to the jurisdiction of a non-Domestic Venue court, and therefore, the creditor would be forced to bring his action in a Delaware court, which would apply Delaware law.

While this provision doesn't appear to violate the full faith and credit clause of the U.S. Constitution[59] (which applies only to final judgments), it has three major practical weaknesses. First, if trust assets are located in a non-Domestic Venue, the non-Domestic Venue court can still exercise jurisdiction over the new trustee.[60] This would negate the protection that the new Delaware legislation was intended to provide. Second, if a non-Domestic Venue court finds that Delaware's trust laws offend public policy in that state, it would arguably ignore this new provision and continue to treat the "removed" trustee as if she were still serving as trustee.[61] The third weakness is that a Delaware trust would likely be drafted to mimic the new statutory language, causing the trustee to be removed if the court attempts to apply non-Domestic Venue law to the trust. A non-Domestic Venue court could find that this trust provision also violates public policy and is therefore void; in any event, such a trust provision may very well result in enraging the judge and in gaining judicial sympathy for the claimants.

Despite these weaknesses, the Delaware legislature must be commended for its creative attempts to push itself ahead of the other Domestic Venues for asset protection trusts.

Fraudulent Transfers under Delaware Law

Delaware has passed a version of the UFTA,[62] but the Delaware Qualified Dispositions in Trust Act modifies the UFTA statute of limitations framework. Under the limitations set forth in Delaware's trust law, a future creditor is allowed only four years from the date of the transfer, regardless of the theory under which they are proceeding[63] (where, under the UFTA, future creditors may bring an action under a theory of "actual intent" within one year after the creditor "could reasonably have discovered" the transfer[64]). Furthermore, the Delaware trust law provides that a trustee may make a qualified disposition,[65] and that the date of the original transfer to the trustee counts toward the statute of limitations period.[66] These alterations to the UFTA limitations make Delaware's asset protection trust framework decidedly pro-debtor. A further pro-debtor aspect of the Delaware trust law is that a creditor must prove his fraudulent transfer case with "clear and convincing evidence"[67] (which is the highest burden of proof in court), even if badges of fraud are present.

But despite the pro-debtor language of the statute, there is some Delaware case law that is cause for concern from a debtor's point of view. In at least two Delaware cases, the burden was *shifted to the debtor* when the transfer in question was between blood relatives.[68] In other words, 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 is therefore an extremely creditor-friendly position. However, both cases were decided before Delaware enacted the UFTA and the Qualified Dispositions in Trust Act, so the extent of their precedential value is doubtful, especially considering that the trust law expressly places the burden of proof on the creditor.[69]

Protection for Third Parties Assisting Clients with Asset Protection

Delaware's trust law does not provide explicit protection for professionals who assist in the implementation of a protective trust.

Recognition of Other States' Judgments in Delaware

Unlike the other Domestic Venues, Delaware's civil statutes do not set forth a limitation period for actions to enforce a judgment from another state—so a judgment creditor could bring this type of action at any time. Delaware's trust law, however, requires a creditor seeking to enforce a judgment (whether rendered in Delaware or another state) against a protective trust to bring the action to a Delaware court within the limitations periods defined in the trust law.[70] In other words, a judgment creditor who seeks to satisfy a judgment out of a Delaware trust must bring his action for enforcement within the limitation periods set forth in the trust law. Although slightly different than Alaska's law, this provision has potential full faith and credit issues (as discussed in the section entitled "Recognition of Other States' Judgments in Alaska").

Recognition of Foreign Money-Judgments in Delaware

Delaware has also adopted the Uniform Foreign Money-Judgments Recognition Act, which, like the Alaska version of the Act, requires Delaware 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."[71] This is required regardless of whether the foreign jurisdiction would recognize a Delaware judgment.

The Availability of Attorney's Fees and Punitive Damages in Delaware

Like Alaska, Delaware law requires that costs be awarded to the victorious party in civil lawsuits.[72] These costs do not include attorney's fees, which are excluded by statute.[73] 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.[74] This could be problematic, however, for a debtor in a fraudulent transfer action because a fraudulent transfer action is generally classified as "civil fraud," and hence, is 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.

The Spendthrift Trust Act of Nevada[75]

In order to qualify as a protective trust in Nevada, the trust must be irrevocable and all or part of the trust corpus must be sitused in Nevada. The settlor must be domiciled in Nevada, or if the settlor is not domiciled in Nevada, the trust must have a "qualified trustee" as defined by the trust statute. The settlor may be a discretionary beneficiary of trust principal and income. Additionally, a self-settled trust will be treated the same as a traditional spendthrift trust in bankruptcy proceedings.[76]

Fraudulent Transfers under Nevada Law

Like Delaware, the Nevada trust law alters the UFTA limitation periods,[77] but Nevada's alteration of the limitation appears to be more debtor-friendly than Delaware's. For example, *all* present creditors, regardless of the theory under which they are proceeding, must bring an action within two years after the transfer is made, or within six months after the creditor reasonably should have discovered the transfer. Furthermore, *all* future creditors are barred after two years, with no allowance for whether the transfer "reasonably should have been discovered" at a later date.

Protection for Third Parties Assisting Clients with Asset Protection

Nevada's trust law does not provide explicit protection for professionals who assist in the implementation of a protective trust.

Recognition of Other States' Judgments in Nevada

An action to enforce a judgment from another state must be brought in a Nevada court within six years after the date of the judgment.[78]

Recognition of Foreign Money-Judgments in Nevada

Nevada has not passed a law calling for the recognition of foreign money-judgments. As such, Nevada courts would only be required to enforce a foreign money-judgment if a treaty requiring recognition existed between the United States and the nation in which the judgment was rendered.

The Availability of Attorney's Fees and Punitive Damages in Nevada

In Nevada, attorney's fees are awarded to a prevailing party only if they are authorized by statute.[79] Because Nevada's version of the Uniform Fraudulent Transfer Act does not allow for the recovery of attorney's fees, it appears that the victor of a fraudulent transfer claim would not be able to recover them. But a Nevada court has discretion to award attorney's fees if it determines that the "defense of the opposing party was brought without reasonable ground."[80] Lastly, Nevada also allows punitive damages in cases of civil fraud.[81]

The Rhode Island Qualified Dispositions in Trust Act

The Rhode Island Qualified Dispositions in Trust Act[82] is very similar to the Delaware Legislation. Because the Rhode Island and Delaware Acts are so similar, and because both states have adopted the UFTA, this chapter will only highlight the major differences between the two. First, Rhode Island requires an asset protection trust to expressly name Rhode Island law as the governing law of the trust in all cases—it does not, as Delaware does, carve out an exception for a disposition by a non-qualified trustee to a qualified trustee. Second, where Delaware's statute clearly states that a creditor must prove his fraudulent transfer case with "clear and convincing evidence," Rhode Island's statute is silent. Third, where the Delaware statute provides that the interest of the transferor or beneficiary of the trust property may not be transferred or assigned in a bankruptcy proceeding,[83] Rhode Island makes no such provision. And fourth, Rhode Island's modifications of the UFTA's limitation periods, unlike Delaware's modifications, may have some unintended pro-creditor aspects. In fact, before recent amendments to the Delaware law, the Delaware legislation was identical to Rhode Island's—these amendments may indicate that lawmakers in Delaware were aware of the pro-creditor weaknesses in the original statute.

To illustrate why the limitations set forth in Rhode Island's statute may be pro-creditor, it is best to contrast it with Delaware's current (post-amendment) statute. Both trust laws state that the trust law's limitation period applies, "notwithstanding the provisions of [the UFTA]". But this phrase is placed in two completely different parts of each statute—and it is this placement that makes the critical difference. In the Delaware trust law, only the subsection governing *future creditors* applies "notwithstanding" the provisions of the UFTA. Rhode Island's statute, on the other hand, applies to both future *and* present creditors "notwithstanding" the provisions of the UFTA. To clarify the discussion that follows, we should look at the two statutes side by side. The "notwithstanding" phrase of each statute has been highlighted for emphasis.

Delaware (12 DE ST §3572)	**Rhode Island (RI ST §18-9.2-4)**
(b) A creditor's claim [for fraudulent transfer] shall be extinguished unless: (1) The creditor's claim arose before the qualified disposition was made, and the action is brought within the limitations [for present creditors under the UFTA]. (2) **Notwithstanding the provisions of [the UFTA]**, the creditor's claim arose concurrent with or subsequent to the qualifie disposition and the action is brought within 4 years after the qualified disposition is made.	(b) **Notwithstanding the provisions of [th UFTA]**, a creditor may not bring an action [fo fraudulent transfer] if: (1) The creditor's claim against the transferor arose before the qualified disposition was made, unless the action is brought within four (4) years after the qualified disposition is made or, if later, withi one year after the qualified disposition was c could reasonably have been discovered by the creditor; or (2) The creditor's claim against the transferor arose subsequent to the qualified disposition, unless the action is brought within four (4) years after the qualified disposition is made.

The effect of Delaware's statute is to override only the UFTA's limitations that apply to future creditors. Thus, in Delaware, all future creditors are barred after four years, regardless of the cause of the action under which they are proceeding. This is decidedly debtor-friendly in comparison to the UFTA, which allows future creditors to bring an action within one year after the transfer "could reasonably have been discovered" if the creditor's action is based on the transferor's "intent to defraud." As discussed before, this part of the UFTA could effectively result in no real limitation period in a creditor-friendly court. For present creditors in Delaware, the UFTA's limitation periods still apply.

In contrast to the Delaware statute, the effect of the Rhode Island statute is that the *entire* UFTA limitations framework is superceded by the trust law. This has two possible pro-creditor results. First, actions by present creditors to void "transfers to an insider for an antecedent debt" may be brought within four years of the transfer (see subsection (b)(2) of the Rhode Island statute above), where under the UFTA, these actions are allotted only one year. Second, present creditors can take advantage of the (possibly unlimited) limitations extension for transfers that "could not have reasonably been discovered" in *any* cause of action they bring (see subsection (b)(1) of the Rhode Island statute above), where under the UFTA, this extension is available only for present creditors' claims based on the debtor's "intent to defraud." One debtor-friendly aspect of the Rhode Island limitations, however, is that, like Delaware's statute, future creditors are completely barred after four years, regardless of whether they allege an "intent to defraud" (while the UFTA allows future creditors to extend this period if the transfer could not have reasonably been discovered until a later date).

While the above analysis has not been substantiated in a Rhode Island court, the amendments to the previously identical Delaware statute hint that Delaware legislators guessed that the prior statute would be interpreted this way.

A further difference in the Rhode Island and Delaware limitations statutes is that, in Delaware, a trustee who makes a qualified disposition can count the date that the trustee originally received the property toward the statute of limitations period. Rhode Island, however, does not allow a trustee to make a qualified disposition at all.

All of these differences reveal that Rhode Island should consider amending its trust law the way that Delaware amended its law if it wants to remain competitive as a Domestic Venue for asset protection trusts.

Protection for Third Parties Assisting Clients with Asset Protection

Rhode Island's trust law does not provide explicit protection for professionals who assist in the implementation of a protective trust.

Recognition of Other States' Judgments in Rhode Island

Of the four Domestic Venues that have civil statutes limiting the time in which an action to enforce an out-of-state judgment must be brought, Rhode Island has the longest limitation period: twenty years.[84]

Recognition of Foreign Money Judgments in Rhode Island

Rhode Island has not passed a law calling for the recognition of foreign money-judgments. Thus, like Nevada, Rhode Island courts would only be required to enforce a foreign judgment if a treaty requiring recognition existed between the United States and the nation in which the judgment was rendered.

The Availability of Attorney's Fees and Punitive Damages in Rhode Island

The prevailing party in a civil lawsuit in Rhode Island is entitled to recover all costs.[85] The term "costs," however, does not include attorney's fees.[86] As for the availability of punitive damages in the fraudulent transfer context, they will generally only be awarded when the defendant's actions "are so willful, reckless, or wicked that they amount to criminality."[87] Whether adequate facts exist to support an award of punitive damages is a question of law for the court to decide,[88] and once the court has determined the case to be a proper one for punitive damages, the finder of fact will decide, in its discretion, whether the plaintiff is entitled to such an award.[89]

The Utah Self-Settled Spendthrift Trust

In 2003, the Utah legislature inserted asset protection trust legislation into its version of the UFTA,[90] making Utah the fifth state to permit the creation of self-settled spendthrift trusts.[91] In general, a Utah protective trust must be irrevocable, the settlor must not be a mandatory beneficiary,[92] the trustee must be a "trust company" as defined by the Utah statutes,[93] and some or all of the trust assets must be located in Utah.[94] Like other Domestic Venues, with the exception of Rhode Island, Utah law also provides that self-settled trusts are protected from bankruptcy judgments.[95]

One major weakness of the Utah legislation is the interaction of its definition of a "creditor" with its very broad exceptions to the spendthrift protection provided in the statute. The statute defines a creditor as a person holding or seeking to enforce a judgment, as well as a person with a "right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[96] Keeping in mind this broad definition, one major exception to settlor spendthrift protection is for judgments rendered within three years after the trust was settled.[97] The judgment need not be in any way related to a fraudulent transfer claim, nor does the statute require the judgment creditor to seek satisfaction of the debt out of the settlor's assets that are outside of the trust. As a consequence, the legislative environment is very much creditor-friendly despite Utah's attempt to make itself a viable asset protection forum.

Fraudulent Transfers under Utah Law

Interestingly, the Utah asset protection trust legislation is contained within Utah's Uniform Fraudulent Transfer Act.[98] This alone seems to resolve any confusion about the interaction between the trust law and the UFTA: any provision in the trust law that contradicts other provisions of the UFTA would govern a fraudulent transfer action against an asset protection trust. The most notable provision of the new law is that all creditors—both present and future—are limited to "actual intent" claims when attempting to satisfy a claim out of a trust that meets the statute's requirements.[99] In addition, the creditor must show that the fraudulent transfer was made with respect to that particular creditor, as opposed to any creditor.[100] Of course, a creditor attacking a Utah trust under a fraudulent transfer claim would be given the benefit of the eleven badges of fraud set out in the UFTA[101] to prove intent, but this provision appears to make the Utah trust legislation quite debtor-friendly.

On the other hand, the law allows any creditor, without having to prove any other elements of a fraudulent transfer, to reach trust assets if the transfer to the trust was made when the settlor was insolvent or if the transfer rendered the settlor insolvent.[102] Contrast this with the UFTA, which generally allows a creditor to set aside a transfer that renders the debtor insolvent only if the transfer was also made for less than "a reasonably equivalent value."[103] By removing the need to prove that the transfer was also made for less than a reasonably equivalent value, Utah lawmakers may be envisioning a situation in which a settlor sells assets to a trust for fair market value and then squanders the proceeds of the sale so that his creditors cannot fulfill the debt. Utah's trust law appears to prohibit such a two-step transaction. Alternatively, the Utah legislators may just be recognizing the fact that transfers to a trust are usually for "less than a reasonably equivalent value," and thus the need to prove this element under the UFTA is an unnecessary step in a fraudulent transfer action against an asset protection trust.

Prior to 2003, Utah trust law set out its own statute of limitations framework, which shortened the UFTA's limitation periods slightly: present creditors had to bring their claims within three years of the transfer or within one year after the transfer was, or reasonably could have been, discovered by the creditor; and future creditors had only two years after the transfer within which to bring their claims.[104] However, the 2003 changes repealed these provisions, and no substitute provision was passed. Consequently, fraudulent transfer causes of action are now subject to the statute of limitations of the Utah Fraudulent Transfer Act, which mirror those under the UFTA.

Protection for Trustees and Third Parties Assisting Clients with Asset Protection

Similar to Alaska, Utah's statute explicitly provides protection for trustees or "anyone involved in the counseling, drafting, preparation, execution, or funding of the trust" against any claims for aiding a fraudulent transfer.[105] A person may assert a cause of action only against the trust assets or the settlor,[106] and satisfaction of a claim is limited to only that part of the trust or transfer to which it applies.[107]

Recognition of Other States' Judgments in Utah

A creditor must bring an action to enforce another state's final judgment in a Utah court within eight years of the judgment.[108]

Recognition of Foreign Money Claims in Utah

Like Nevada and Rhode Island, Utah has not passed a law calling for the recognition of foreign money-judgments. Therefore, a Utah court would only be required to enforce a foreign judgment if a treaty requiring recognition existed between the United States and the nation in which the judgment was rendered.

The Availability of Attorney's Fees and Punitive Damages in Utah

A Utah court must award attorney's fees to a prevailing party if "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."[109] Thus, it is possible that the court could find that a settlor's defense of a creditor's lawsuit meets these requirements and award attorney's fees to the creditor. And Utah case law suggests that punitive damages are available in a lawsuit based on fraudulent transfer.[110]

Oklahoma: The Newest Domestic Venue?

In June of 2004, the Oklahoma Legislature enacted the "Family Wealth Preservation Trust Act."[111] The law protects up to $1million of the principal of a "preservation trust" (plus any income or appreciation above $1million) from the settlor's creditors, even if the trust is revocable by the settlor.[112]

This legislation does not necessarily authorize self-settled spendthrift trusts in Oklahoma (because the settlor is not a "qualified beneficiary" of a preservation trust). However, a preservation trust may be revocable by the settlor, and no court may order the settlor to revoke the trust.[113] Additionally, the settlor's spouse is a permissible beneficiary of a preservation trust. The practical effect of this is that the settlor can benefit from the trust, albeit indirectly. These unique features reveal a conscious effort by the Oklahoma legislature to increase investment in Oklahoma by creating a protective environment for assets.

A brief summary of the requirements of a preservation trust is as follows.[114] A preservation trust must have an Oklahoma-based trust company (or bank that maintains a trust department) serving as trustee. The trust assets must consist of "Oklahoma assets," which are defined as: stock issued by an Oklahoma-based company; obligations issued by the State of Oklahoma or a county or municipal government of Oklahoma; an account in an Oklahoma based-bank; or real property located in Oklahoma.[115] Additionally, the trust instrument must recite that the income generated from the trust corpus is subject to taxation under Oklahoma's income tax laws. And finally, the trust must have "qualified beneficiaries," which are (generally) defined as the settlor's children and grandchildren, the settlor's spouse, or a charitable organization.[116]

Fraudulent Transfers Under Oklahoma Law

Oklahoma has adopted the UFTA,[117] and the Family Wealth Preservation Act explicitly makes transfers to preservation trusts subject to the Oklahoma UFTA.[118] Therefore, the UFTA's limitations periods apply, except that the trust law provides that a transfer into a preservation trust within three years of the settlor filing for voluntary bankruptcy will be presumed to be a fraudulent conveyance. This presumption will not apply in the event of an involuntary bankruptcy.

Recognition of Other States' Judgments in Oklahoma

An action to enforce a judgment rendered in another state must be brought within three years of the date of judgment.[119] This extremely short limitation period is much more protective than any of the Domestic Venues, especially in terms of the full faith and credit clause. Unlike Alaska and Delaware, it does not ask the Oklahoma court to distinguish other states' judgments based on the underlying cause of action, and therefore, it is more like a constitutionally-allowable procedural bar, rather than a substantive one, even though Oklahoma allows a creditor five years to enforce a judgment rendered by an Oklahoma court.[120] (But query whether an argument could be made that the unequal treatment of non-Oklahoma judgments versus Oklahoma judgments is a violation of the U.S. Constitution's full faith and credit clause.)

Recognition of Foreign Money Judgments in Oklahoma

Oklahoma has also adopted the Uniform Foreign Money-Judgments Recognition Act, which, like the other Domestic Venues' versions of the Act, requires Oklahoma 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."[121] This is required regardless of whether the foreign jurisdiction would recognize a judgment from Oklahoma. Similarly, there appears to be no limitations period to enforce such a judgment.

Availability of Attorney Fees and Punitive Damages

In Oklahoma, attorney fees are not taxable as costs or recoverable as damages unless authorized by statute or by an enforceable contract.[122] Under the provisions of the UFTA and its counterpart in the Oklahoma statutes, attorney fees are not mandated by the statute hence they are unrecoverable in fraudulent transfer cases.

Attorney fees might be awarded in a civil fraud case because civil fraud is considered a tort. Accordingly, it is established that Oklahoma follows the American Rule concerning attorney fees: The American Rule precludes the award of such fees in the absence of a specific statute allowing their recovery or a specific contract between the parties, with narrowly defined exceptions."[123] As applied to tort cases, Oklahoma law also requires that the plaintiff show that the defendant acted in bad faith, vexatiously, or oppressively.[124] Thus, provided a fraudulent transfer could be couched in terms of a tort action, it appears attorney's fees could be recoverable.

In regard to punitive damages, the Oklahoma statutes provide that: "In an action for the breach of an obligation, not arising out of contract, the jury, in addition to actual damages, may award punitive damages" based on the level of mental intent of the defendant.[125] The section applies to all civil actions and punitive damages may be awarded where fraud is shown.[126]

Domestic Venue Asset Protection Trust Vulnerabilities[127]

Judicial Vulnerabilities

In addition to fraudulent transfer claims, other legal theories are available to judgment creditors attempting to reach trust assets, such as: (1) there is an implied agreement between the settlor and the trustee, making the trust's asset protection features fail under Domestic Venue law itself; (2) the asset protection features of the Domestic Venue trust offend public policy in the state where the post-judgment action is brought, and thus the governing law of the trust (Domestic Venue law) should be ignored in favor of the law of the non-Domestic Venue state;[128] (3) the Domestic Venue trust is a "sham" trust, or is the "alter ego" of the settlor, meaning that the settlor never really parted with dominion and control over the trust assets, and therefore, the court should disregard the trust structure; and (4) the exemption laws of the non-Domestic Venue should apply to the trust assets, and thus those assets are not protected from creditors' claims. Furthermore, if a creditor prevails on one of these theories, a court could pressure an uncooperative settlor to turn over trust assets by jailing her for civil contempt.

Implied Agreement

It is possible that a creditor could reach the trust assets by arguing that the trust fails to meet the requirements of the Domestic Venue law itself. 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 there is an implied agreement between the settlor and the trustee regarding distributions to the settlor. If so, the settlor would not really be a "discretionary" beneficiary as the Domestic Venue laws require,[129] and thus the settlor should not be allowed the spendthrift protection afforded by those laws. This argument is not available in Alaska and Delaware, however, because their statutes make any express or implied agreement between the trustee and the settlor void as a matter of law.[130]

Governing Law and Public Policy

A court that has determined that its jurisdiction is proper must also 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.[131] But 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 it.[132]

One of the key provisions of the Domestic Venue laws is the allowance of self-settled spendthrift trusts. As discussed at the beginning of this chapter, all other states have either statutory or case law that voids self-settled spendthrift trusts for public policy reasons.[133] 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 that the trust was designed to achieve.[134] Trust assets located in the non-Domestic Venue jurisdiction are particularly vulnerable in this situation because the court has jurisdiction over them and can order that they be turned over to the creditor.

Alter Ego and Sham

Even if a non-Domestic Venue court were to apply Domestic Venue law, a creditor could still attack the trust on a number of other grounds. For instance, if the facts indicate a relationship between the trustee and the 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[135] or the alter-ego[136] of the settlor. The case law in this area has generally been developed in the offshore asset protection trust area, but there is nothing to indicate that a sympathetic court would not apply these theories to a Domestic Venue trust. In fact, these theories may be easier to pursue against a domestic trust because discovery by the creditor to reveal facts supporting these arguments will be accomplished under U.S. procedural rules, which have been promulgated under 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 on the part of the creditor.[137]

Exemptions

Whether assets are exempt from the claims of creditors is determined by the law of the forum state.[138] In other words, when a creditor asks a Domestic Venue court to enforce a sister state's judgment against the settlor of an asset protection trust created under Domestic Venue law, the Domestic Venue court would most likely use Domestic Venue exemption laws to determine which 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. 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, an implied agreement, or that the trust is a sham or is the alter ego of the settlor.

But if an Alaska or Delaware court were sympathetic to the creditor, it is possible that the court could 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.[139] The court could decide that another state (such as the debtor's domicile) has a more significant interest in the matter and use that state's law. If the other state has no exemption for assets held in self-settled discretionary trusts, the trust assets might no longer be protected.

Civil Contempt

A fairly recent development in the area of offshore asset protection trusts deserves some mention in the domestic asset protection trust context. The now-notorious case of *Federal Trade Commission v. Affordable Media*[140] (known as "the Anderson case") gained its notoriety from the fact that the settlors were jailed for six months for civil contempt due to their refusal to repatriate assets transferred to a foreign asset protection trust; other courts have followed suit.[141]

In the past, concerns about imprisonment were often answered by the principle that impossibility is a defense to civil contempt.[142] That is, an individual cannot be jailed for failing to perform an act that is impossible to perform. But the growing body of precedent for jailing settlors for civil contempt is evidence of the fact that courts are becoming increasingly intolerant of debtors who claim impossibility in a contempt proceeding when the impossibility was "self-created." For instance, one court stated that, "if [the debtor] cannot convince the trustees or Trust Protector to return his assets to him, it is a problem of his own making."[143] If faced with bad enough facts, a court could just as easily use this reasoning to incarcerate a settlor of a Domestic Venue trust.

Constitutional Vulnerabilities

Although all of the Domestic Venue statutes appear to offer substantial asset protection (especially against the claims of future creditors), none can offer the level of protection afforded by trusts established in offshore jurisdictions. This is because the Domestic Venues 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,[144] a Domestic Venue's courts must recognize judgments rendered under the laws of non-Domestic Venue 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,[145] 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 clause[146] of the Constitution, no state statute can protect debtors from conflicting federal law (such as bankruptcy law).

Full Faith and Credit Clause Issues

The threshold issue in analyzing the Domestic Venue legislation under the full faith and credit clause of whether the trustee is a necessary party to all suits involving trust assets has not yet been fully addressed by the courts. However, in the fraudulent transfer context, there is a strong argument that due process requires that the transferee be joined.[147] Because a fraudulent transfer is valid as between the parties, and the transfer is generally viewed to be only "voidable" by a court, rather than void *ab initio*,[148] the transferee has a legal right in the property that due process affords him the chance to protect. Therefore, because a trustee holds legal title to property transferred to it, a trustee who is a transferee of a fraudulent transfer should be a necessary party to a suit or action involving the trust property. If this is the case, most discussion of the full faith and credit clause is moot because, unless the trustee is subject to the jurisdiction of a non-Domestic Venue court, the creditor would have to bring suit in the Domestic Venue in order for the dispute to be properly adjudicated. Thus, barring application of one of the legal theories discussed in the above sections (implied agreement, alter ego, etc.), the plaintiff would find himself in a forum that is generally friendly to the trust, and the trust assets would nearly always be protected.

Although the question of whether due process requires a transferee to be joined in a fraudulent transfer action remains open, it is well-settled that due process allows a plaintiff to sue a non-resident if that person has minimum contacts with the forum state[149] or if the non-resident owns assets in the state that are also the subject of the litigation.[150] In this context, the Domestic Venue statutes do not go far enough to protect the assets or the trustee of a protective trust from being subject to the jurisdiction of a non-Domestic Venue court. For instance, the Domestic Venues (and Oklahoma) don't require a protective trust to be administered solely by resident trustees, and generally require only some, but not all, of the trust assets to be located within that state's jurisdiction.[151]

Furthermore, despite any due process concerns that may be present in not joining the trustee in an action that involves trust assets, there has been a general trend by both state and federal courts away from characterizing any party not present as "necessary" or "indispensable" since the revision of Federal Rule of Civil Procedure ("Federal Rule") 19 in 1966. Federal Rule 19 provides that parties who are subject to service of process should be joined "if feasible."[152] 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*,[153] said that "[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." And in the fraudulent transfer context, the UFTA itself states that a judgment under that Act may be entered against either the transferee (*i.e.*, the trustee, whom the creditor may not be able to reach in a non-Domestic Venue jurisdiction) *or* against the person for whose benefit the transfer was made,[154] (*i.e.,* the settlor, who may reside in a non-Domestic Venue).

On the other hand, there is case law that has developed after the revision of Federal Rule 19 suggesting that the fraudulent transferee *is* a necessary party. These cases fall into three categories: (1) cases decided in states that have adopted a version of Federal Rule 19 and the decision is based upon that Rule,[155] (2) cases decided in states that have adopted a version of Federal Rule 19 but do not discuss that Rule,[156] and (3) cases decided in states that have not adopted a version of Federal Rule 19 at all.[157] The one thing that these cases all have in common, though, is that the transferee was already subject to the deciding court's jurisdiction.[158] Because none of these cases involve a situation in which the transferee was not subject to service of process by the deciding court, they do not shed much light on whether the court, considering the more pragmatic approach of Federal Rule 19 and its state-rule counterparts, would still decide that the transferee is an indispensable party even if that transferee were outside the court's jurisdiction.

Thus, because this issue remains open, and because it is still quite likely that another state's court could enter a valid binding judgment affecting the assets of a Domestic Venue trust, an analysis of the full faith and credit vulnerabilities of the Domestic Venue legislation is called for.

Jurisdiction, Enforcement, and the Full Faith and Credit Clause

As with any asset protection structure—foreign or domestic—the lawyer must probe for weaknesses by envisioning how an attack on a trust is likely to be played out. 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 be the cause, cast in tort or contract, that gave rise to the liability, and will result in a judgment. The second phase of the creditor's attack will be a post-judgment enforcement proceeding, usually against the trust, in an effort to satisfy the judgment.

In order to pursue the trust assets in the first action, 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. 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.[159] 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 another state's long-arm statute if the trustee or settlor has sufficient contacts with the forum state.[160] Corporations are subject to the jurisdiction of the courts in the state of their incorporation.[161] They can also be subject to the jurisdiction of courts in any state in which they do business.[162] For large corporate trustees such as banks based, or with branches, in a Domestic Venue, this could give jurisdiction to the courts of many states. A state's courts will also have jurisdiction over all property within the state's borders.[163] This includes real property, bank and brokerage accounts, and shares of stock issued by corporations incorporated in that state.[164] 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.

For a judgment creditor to pursue trust assets in the second phase (the post-judgment enforcement action), the creditor must ultimately involve a court that has jurisdiction over the trust assets or over a party in control of the trust assets, which could likely be the Domestic Venue itself. As will be shown, because a judgment creditor who has obtained a favorable judgment in a non-Domestic Venue state against the assets of a Domestic Venue trust has the benefit of the full faith and credit clause of the U.S. Constitution, it is this post-judgment phase of the attack against an asset protection trust that obviates some of the protection the drafters of the Domestic Venue statutes intended to provide, and causes a Domestic Venue trust to be inferior to a foreign trust.

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.[165] 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 the judgment and give it the full effect that it would have had if rendered by the sister state's court.[166] 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.[167] 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 is simply recognizing a judgment.[168] 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.[169] And if the sister state judgment by its terms gives the creditor ownership of specific trust assets located in Delaware, for example, Delaware's law will not protect the assets. This is because Domestic Venue courts are precluded by the full faith and credit clause 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 thus could not be considered exempt trust property. In turn, the court would be bound 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 a 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.

In sum, because of the full faith and credit clause, the assets of a Domestic Venue trust could be reached by a creditor who either never sets foot in the applicable state's courts or 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. Foreign jurisdictions, on the other hand, are not bound by the Constitution to honor U.S. judgments; therefore, a creditor pursuing the assets of a foreign trust must bring an entirely new lawsuit in the foreign jurisdiction. This feature of a Domestic Venue trust alone significantly weakens its asset protection capabilities when compared to a foreign trust.

Supremacy Clause Concerns

In some instances, a judgment creditor facing a judgment debtor who has been rendered "insolvent" due to a transfer to an asset protection trust will force the debtor into involuntary bankruptcy. In that case, the debtor will find himself under the jurisdiction of the United States Bankruptcy Court, which will apply federal bankruptcy law, and it is possible that the Constitution's supremacy clause[170] will come into play. The supremacy clause 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 the Contrary notwithstanding." In short, the Bankruptcy Code takes precedence over any conflicting state law as a result of the supremacy clause.

Typically, a debtor will argue that Section 541(c)(2) of the Bankruptcy Code excludes from the bankruptcy estate his or her beneficial interest in a protective trust. Section 541(c)(2) states that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law" is enforceable under the Bankruptcy Code. The debtor's position would be that the "applicable nonbankruptcy law" is that of the trust, not the debtor's domicile, and 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.[171]

The creditor, on the other hand, could advance three arguments against the use of Domestic Venue law to determine whether the trust assets are exempt from creditors' claims. 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"[172] in the traditional understanding of spendthrift trusts—which are trusts created by one party for the benefit of another party (not the settlor). 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 that 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.

Second, a creditor could argue that the language of the new statutes that protects Domestic Venue trusts from creditors' claims is not a restriction on transfers within the meaning of Section 541(c)(2), but is in the nature of a state-law exemption.[173] In this case, the debtor would have to argue that the protection afforded Domestic Venue trusts by their statutes must be respected independently of Section 541(c)(2). But this argument would be successful only if made by a debtor domiciled in a Domestic Venue 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.[174] Thus, unless the settlor is a domiciliary of the Domestic Venue, Section 522(b)(2) of the Bankruptcy Code would cause the debtor's home state laws, which lack an exemption for self-settled trusts, to apply. Therefore, the trust assets would be reachable by the creditor under the domiciliary state's rule against creditor protective self-settled trusts.

Finally, the creditor could plead in the alternative 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.[175]

Contract Clause Problems

The Constitution prohibits states from enacting any law that impairs the "Obligation of Contracts."[176] 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.[177] If a state law substantially impairs the obligations of parties to existing contracts or makes them unreasonably difficult to enforce, it will run afoul of the contract clause.[178] But the law will not be automatically void; instead it will be subjected to the "strict scrutiny" standard of review: to be valid, it must be narrowly tailored to promote a compelling governmental interest.[179]

A creditor could potentially argue 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 the 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 affect only 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, while the possibility of creditors reaching those assets is restricted. And because the debtor will not be harmed if he refuses to repay the debt, the debtor's obligation to do so becomes illusory. While a full review of debtors' potential arguments in defense of a contract clause violation is beyond the scope of this chapter, one defense would be that fraudulent transfer laws offset the impairment of creditor/debtor contracts inherent in the Domestic Venue asset protection trust statutes by providing most creditors with a viable remedy when faced with a debtor who has transferred assets to avoid his repayment obligation.

U.S. Constitutional Arguments in Perspective

The foregoing sections have described three potential U.S. Constitutional arguments a judgment creditor might advance when attempting to reach the assets of a Domestic Venue asset protection trust in satisfaction of a 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.[180]

The effect of a successful contract clause claim, unlike the effect of a full faith and credit claim, would be to invalidate the part of the statute that impairs contracts (*i.e.*, the protection of 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.

Conclusion

Recent amendments to these laws show that Domestic Venue legislators are still working on weaknesses in the statutes themselves. But regardless of how perfectly the legislators may be able to craft these statutes, a number of arguments will remain available to creditors attempting to reach the assets of a Domestic Venue trust. A major barrier to the entry of the Domestic Venues into the asset protection arena exists due to the fact that they are all part of the United States, and are thus subject to 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 fully control 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 established in an offshore jurisdiction. Although there may be other reasons for locating an asset protection trust in a Domestic Venue,[181] those states cannot match offshore jurisdictions when it comes to sheltering trust assets from the claims of creditors.

EXHIBIT A

State	Rule Against Perpetuities?	Statute Setting forth RAP, Repealing RAP, or Providing Exceptions to RAP
Alabama	Yes	Ala. St. §35-4-4
Alaska	Yes	AK ST §34.27-051 *et seq.*
Arizona	Yes*	ARS §§33-261, 14-2901 *et seq*. *But no trust need ever terminate i the trustee has the power to sell assets and the trust was revocabl at creation.
Arkansas	Yes	Common Law
California	Yes	Cal. Prob. Code §§21200—21231
Colorado	Yes	CRS §15-11-1101 *et seq*.
Connecticut	Yes	Conn. Gen. Stat. §45a-491 et seq.
Delaware	Yes*	25 Del. C. §503 *No RAP on personal property in trust, 110 years on real property in trust.
D.C.	Yes	DC ST §19-901 *et seq.*
Florida	Yes	FL ST §689.225 *et seq.*
Georgia	Yes	OCGA §44-6-200 *et seq*.
Hawaii	Yes	HRS §525 *et seq*.
Idaho	No	ID Code §§55-111
Illinois	Yes*	IL ST Ch. 765, §305/4 *No RAP for trusts created after 1/1/98 if trust expressly states that the RAP doesn't apply, and the trustee has the power to sell assets
Indiana	Yes	Ind. Code §32-17-8-1 *et seq*.
Iowa	Yes	Iowa Code §558.68
Kansas	Yes	KSA §59-3401 *et seq*.
Kentucky	Yes	KRS §381.215
Louisiana	Yes*	LA RS §9:1803 *No "real" RAP; interests must ves immediately.

State	Rule Against Perpetuities?	Statute Setting forth RAP, Repealing RAP, or Providing Exceptions to RAP
Maine	Yes*	33 ME RSA §§101—106 *No RAP for trusts created after 9/18/99 if trust expressly states tha the RAP doesn't apply, and the trustee has the power to sell or mortgage property or to lease property for any period beyond the time required for an interest create under the instrument to vest in orde to be valid under the RAP.
Maryland	Yes*	MD Est. & Trust §§11-102(e), 11-103 *No RAP if trust expressly states that the RAP doesn't apply, and th trustee has the power to sell or mortgage property or to lease property for any period beyond the time required for an interest create under the instrument to vest in orde to be valid under the RAP.
Massachusetts	Yes	MGLA c. 184A §1 *et seq.* * Legislation is pending in Massachusetts to enact the Unifor Probate Code's RAP provision (§2-901)
Michigan	Yes	MCLA §§554.51, 554.53, 554.71 t 554.78
Minnesota	Yes	Minn. Stat. §501A.01 *et seq*.
Mississippi	Yes	Common Law
Missouri	Yes	Common Law
Montana	Yes	Mont. Code Ann. §72-2-1001 *et seq*.
Nebraska	Yes	Neb. Rev. Stat. §76-2001 et seq.
Nevada	Yes	NRS §111.103 *et seq*.
New Hampshire	Yes	Common Law
New Jersey	No	NJSA §§46:2F-9—46:2F-11
New Mexico	Yes	NMSA §45-2-901 *et seq*.
New York	Yes*	NY Est. Pow. & Trust §9-1.1 *Perpetual Trust Legislation is pending in New York as of the dat of publication. 2003 NY S.B. 2292
North Carolina	Yes	NC Gen. Stat. §41-15 *et seq*.

State	Rule Against Perpetuities?	Statute Setting forth RAP, Repealing RAP, or Providing Exceptions to RAP
North Dakota	Yes	NDCC §47-02-27.1 *et seq*.
Ohio	Yes*	OH ST §2131.08 *Repealed for certain trusts, as provided for in OH ST §§1746.14, 1747.09, and 2131.09
Oklahoma	Yes*	OK Const. Art. 2, Sec. 32: 60 Ok St. Ann §31 * No RAP if contingent remainder takes interest before first remainde reaches 21 years old or upon another contingency.
Oregon	Yes	ORS §105.950 *et seq*.
Pennsylvania	Yes	20 Pa.C.S. §§6104—6107
Rhode Island	No	RI GL §34-11-38
South Carolina	Yes	SC ST §27-6-10 *et seq*.
South Dakota	No	SDCL §43-5-8
Tennessee	Yes	TCA §66-1-202 *et seq*.
Texas	Yes	TX Prop. Code §112.036
Utah	Yes*	UT ST §75-2-1203 *et seq*. Recently extended to 1,000 years after the creation of a nonvested interest.
Vermont	Yes	27 VSA §501
Virginia	Yes	Va Code §55-13 *et seq*.
Washington	Yes	RCW §11.98.130 *et seq*.
West Virginia	Yes	W.Va. ST §36-1A-1
Wisconsin	No*	Wis. Stat. §700.16(5) *No RAP if the trustee has the power to sell trust assets, or if a person in being has an unlimited power to terminate the trust.
Wyoming	Yes*	WY ST §34-1-139 *RAP recently extended to 1,000 years for trusts created after 7/1/03 if trust states that the trust will terminate no later than 1,000 years after the trust's creation, the trust is governed by Wyoming law, and the trustee maintains a place of business in, administers the trust in or is a resident of, Wyoming. Traditional "21 years after a life in being" RAP still applies to real property in trust.

1. Jesse Dukeminier and Stanley M. Johanson, *Wills, Trusts, and Estates* (Aspen Law & Business, 6th ed., 2000), at 632, citing J. Gray, *Restraints on the Alienation of Property* (1883).

2. *See Nichols v. Eaton*, 91 U.S. 716 (1875); *Broadway National Bank v. Adams*, 133 Mass. 170 (1882).

3. Dukeminier and Johanson at 632, citing J. Gray, *Restraints on the Alienation of Property* (2d ed., 1885) ("State after State has given in its adhesion to [the spendthrift trust] doctrine . . . and yet I cannot recant").

4. 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.

5. UFTA §4(b).

6. UFTA §4(a)(2).

7. UFTA §4(a)(1).

8. *Id*.

9. UFTA §4(b)(1)-(11).

10. *Id.*

11. UFTA §5(a).

12. UFTA §2.

13. UFTA §5(b).

14. UFTA §1(7)(i).

15. UFTA §9(a).

16. UFTA §9(b).

17. UFTA §9(c).

18. *See* UFTA §8(f).

19. AK ST §13.36.105-220; AK ST §13.36.310; AK ST §34.40.110.

20. AK ST §34.40.110(a).

21. AK ST §34.40.110.

22. AK ST §34.40.110(g).

23. AK ST §34.40.110(i).

24. AK ST §34.40.110(j). In the estate tax context, because this new provision, like the Delaware statue, makes implied agreements void as a matter of law, it could eliminate an argument by the IRS that the settlor retained the use and enjoyment of the assets under IRC §2036 due to an implied agreement, and the trust assets should thus be included in the settlor's gross estate. In the gift tax context, this provision supports an argument all transfers to Alaska (and possibly Delaware)

asset protection trusts are always completed gifts; see, for example PLR 9837007, in which the IRS based its finding that a transfer to an Alaska trust was a completed gift on the taxpayer's "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."

25. Del. Code Ann. tit. 12, §3571.

26. AK ST §34.40.110(l).

27. AK ST §34.40.010.

28. *See, e.g., Pattee v. Pattee,* 744 P.2d 658 (Alaska 1987) (overruled on other grounds); *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).

29. *Sylvester,* 723 P.2d 1253 (Alaska 1986); *First Nat'l Bank of Fairbanks*, 537 P.2d 517 (Alaska 1975).

30. 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.

31. *First Nat'l Bank of Fairbanks,* 537 P.2d 517 (Alaska 1975).

32. Uniform Fraudulent Transfer Act, §4(b)(1) (1984).

33. *Gabaig,* 717 P.2d at 839.

34. AK ST §34.10.110(b).

35. AK ST §34.40.110(b).

36. UFTA §4(a)(1).

37. AK ST §34.40.110(d).

38. AK ST 34.40.110(e).

39. AK ST §09.10.040.

40. AK ST §34.40.110(l).

41. U.S. Const., Art. IV, Sec. 1.

42. *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312 (1839); *Matanuska Valley Lines, Inc., v. Molitor*, 365 F.2d 358 (9th Cir. 1966).

43. *See, e.g.,* Richard G. Bacon & John A. Terrill, II, *Domestic Asset Protection Trusts Work—Should They?* 2000 Annual Meeting, The American College of Trust and Estate Counsel, March 3-7, 2000

44. AK ST 34.40.110(l).

45. UFTA §8(b).

46. *Uniform Foreign Money Judgments Recognition Act,* 13 U.L.A. 261, §3. *See* AK ST §09.30.100 *et. seq.*

47. In contrast, both Massachusetts and Texas have amended their versions of the Uniform Act to require reciprocity.

48. AK ST §09.60.010; Ak.R.C.P. 82.

49. *Lee Houston & Assoc., Ltd. v. Racine,* 806 P.2d 848, 856 (Alaska 1991).

50. *Id.*

51. Del. Code Ann. tit. 12, §3570 *et seq.*

52. Del. Code Ann. tit. 12, §3570(10)(d).

53. Del. Code Ann. tit. 12, §3570.

54. Del. Code Ann. tit. 12, §3571 and §3572.

55. Del. Code Ann. tit. 12, §3570(10)(c).

56. Del. Code Ann. tit. 12, §3573.

57. Del. Code Ann. tit. 12 §3572(g).

58. *Id*.

59. U.S. Const., Art. IV, Sec. 1.

60. *Shaffer v. Heitner*, 97 S.Ct. 2569 (1977); *see also Green v. Van Buskirk,* 72 U.S. 307 (1866); 74 U.S. 139 (1868).

61. See note at 132, *infra*.

62. Del. Code Ann. tit. 6, §1301 *et seq.*

63. Del. Code Ann. tit. 12, §3572(b); this limitation applies "notwithstanding the provisions of" the UFTA.

64. UFTA §9(a).

65. Del. Code Ann. tit. 12, §3570(8).

66. Del. Code Ann. tit. 12, §3572(c).

67. Del. Code Ann. tit. 12, §3572.

68. *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).

69. Del. Code Ann. tit. 12, § 3572.

70. Del. code Ann. tit 12, §3572(e).

71. Del. Code Ann. tit. 10, §4801.

72. Del. Code Ann. tit. 10, §5101.

73. Del. Super. Ct. R. Civ. P. 54.

74. *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).

75. Nev. Rev. Stat. ch. 166.

76. Nev. Rev. Stat. §21.080(2).

77. Nev. Rev. Stat. §166.170.

78. Nev. Rev. Stat. §11.190.

79. Nev. Rev. Stat. §18.010.

80. Nev. Rev. Stat §18.010(b)(2).

81. Nev. Rev. Stat §42.005.

82. RI ST §18-9.2-1 *et seq*.

83. Del. Code. Ann. tit. 12 §3570(10)(c).

84. RI ST §9-1-17.

85. RI ST §9-22-5.

86. *DiIorio v. Cantone*, 49 R.I. 452, 144 A. 148 (1929).

87. *Greater Providence Deposit Corp. v. Jenison*, 485 A.2d 1242 (R.I. 1984).

88. *Sherman v. McDermott*, 329 A.2d 195 (R.I. 1974).

89. *Scully v. Matarese*, 422 A.2d 740 (R.I. 1980).

90. UT ST §25-6-14.

91. UT ST §25-6-14(1)(a)

92. UT ST §25-6-14(2)(c)(iv)

93. UT ST §7-5-1.

94. UT ST §25-6-14.

95. UT ST §25-6-14(1)(a).

96. UT ST §25-6-14(2)(b).

97. UT ST §25-6-14(2)(c)(i).

98. UT ST §25-6-1 et seq. The new trust legislation is contained in a new section 25-6-14 of Utah's UFTA.

99. UT ST §25-6-14(2)(c)(ii).

100. UT ST §25-6-14(2)(c)(ii).

101. UT ST §25-6-5(2).

102. UT ST §25-6-14(2)(c)(vi).

103. UFTA §4(a)(2); UT ST §25-6-5(b).

104. UT ST § 25-6-14(4).

105. UT ST §25-6-14(4)(a).

106. UT ST §25-6-14(4)(b)(ii).

107. UT ST §25-6-14(3).

108. UT ST §78-12-22.

109. UT ST §78-27-56.

110. *See Macris & Associates,* Inc*. v. Neways, Inc.*, 16 P3d 1214 (Utah, 2000); *Despain v. Despain*, 682 P.2d 849 (Utah, 1984).

111. 31 Okl. St. Ann. §10 *et seq.*

112. 31 Okl. St. Ann. §12.

113. 31 Okl. St.Ann. §16.

114. 31 Okl. St. Ann. §11(5).

115. 31 Okl. St. Ann. §11(2).

116. 31 Okl. St. Ann. §11(6).

117. 24 Okl. St. Ann. §112 *et seq*.

118. 31 Okl. St. Ann. §17.

119. 12 Okl. St. Ann §95 (A)(2).

120. *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312 (1839); *Matanuska Valley Lines, Inc., v. Molitor*, 365 F.2d 358 (9th Cir. 1966).

121. Del. Code Ann. tit. 10, §4801.

122. *In Re* Shaid, 254 B.R. 40, 43 (10th Cir. BAP(Okla.), 2000).

123. *In Re Adoption of K.M.S.,* 997 P.2d 856, 857 (Okla.Ct.App.1999).

124. *York v. Fields*, *846* P.2d 360, 361-62 (Okla.1992).

125. 23 Okl. St. *Ann* §9.1(A).

126. *LeFlore v. Reflections of Tulsa, Inc*., 708 P.2d 1068 (Okla.1985).

127. The discussion in this section 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), with the permission of Leslie C. Giordani of Giordani, Schurig, Beckett & Tackett, LLP.

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. Nev. Rev. Stat. §166.040; RI ST §18-9.2-4; UT ST §25-6-14(2)(c)(iv).

130. AK ST §34.40.110(j); Del. Code Ann. tit. 12, §3571.

131. *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).

132. 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).

133. 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).

134. *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 is arguable that this statute 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.

135. *See SEC v.* Bilzerian 112 F. Supp. 2d 12 (D.C. Cir. 2000); *See also Johnston v. Commissioner*, T.C. Memo 2000-315. *Cf. Alsop v. Commissioner*, T.C. Memo 1999-172 (finding no *intention* to create a valid trust, but labeling it as a "sham trust.")

136. *See In re* Gillespie*,* 269 B.R. 383 (Bkrtcy. E.D. Ark., 2001)*; Cohen v. United States*, 1998 WL 953979 (D. Cal. 1998, unreported); *But see In re Vebeliunas,* 252 B.R. 878 (Bkrtcy. S.D.N.Y., 2000) and *Wilshire Credit Corp. v. Karlin*, 988 F.Supp. 570 (D. Mass. 1997) in which the corporate "alter ego" theory is rightly rejected by the courts as applying to trusts.

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

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

139. *Id.*

140. 179 F.3d 1228 (9th *Cir*. 1999).

141. *See In Re Stephan Jay Lawrence*, 279 F.3d 1294 (CA 11th Cir 2002) and *SEC v. Bilzerian*, 264 B.R. 726 (Bankr.M.D.Fla., 2001); see also *Chadwick v. Janecka*, 312 F.3d 597 (CA 3rd Cir 2002) (Court found that 7 years incarceration for contempt not unconstitutional when debtor is able to pay judgment but refuses to do so).

142. *U.S. v. Rylander*, 460 U.S. 752, 757 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production.")

143. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 28 (D.C. Cir. 2000); *see also American Insurance Company v. Coker*, 251 B.R. 902, 905 ("Debtors' proposed defense of impossibility is invalid in that the law does not recognize the defense of impossibility when the impossibility is self created").

144. *U.S. Const.,* Art. IV, Sec. 1.

145. *U.S.* Const*.,* Art. I, Sec. 10.

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

147. U.S. Const. Amend. 14; *see Sniadach v. Family Finance Corp.*, 89 S.Ct. 1820 (1969); *Tanaka v. Nagata*, 868 P.2d 450 (Hawai'i, 1994); *see also Reception of the Uniform Fraudulent Transfer Act*, 43 S.C.L.Rev. 655, 673 (1992).

148. *See, e.g., Becker v.* Becker, 416 A.2d 156, 162 (Vermont, 1980).

149. *International Shoe* C*o. v. Washington,* 326 U.S. 310 (1945).

150. *Shaffer v. Heitner*, 97 S.Ct. 2569 (1977).

151. *See generally* AK ST §13.36.320(a); AK ST §13.36.035(c)(1); Del. Code Ann. tit. 12, §3570(9)(b); Del. Code Ann. tit. 12, §3570(9)(a); Nev. Rev. Stat. §166.015(1); Nev. Rev. Stat. §166.015(2); RI ST §18-9.2-2(8)(ii); RI ST §18-9.2-2(8)(i); UT ST §75-7-208(3)(a); UT ST §7-5-1(1)(d)(ii); 31 Okl. St. Ann. §11(3); 31 Okl. St. Ann. §11(2).

152. *See, e.g.*, Fed.R.C.P. 19 (Federal Courts); C.C.P. §389 (California); CPLR §1001(b) (New York); Tex.R.C.P. 39 (Texas). A majority of the states have adopted Fed.R.C.P. 19 in some form.

153. 513 S.W.2d 200, 204 (Tex. 1974)

154. UFTA §8(b).

155. *Sylvester*, 723 P.2d 1253 (Alaska, 1986); *Friedman v. Friedman* 509 N.Y.S.2d 617 (New York, 1986); *Becker v. Becker*, 416 A.2d 156 (Vermont, 1980); *Murray v. Murray*, 358 So.2d 723 (Mississippi, 1978); *Johnson v. Johnson*, 572 P.2d 925 (Nevada, 1977);

156. *Dempsey & Spring, P.C. v. Ramsay*, 435 N.Y.S.2d 336 (New York, 1981);

157. *Mihajlovski v. Elfakir,* 355 N.W.2d 264 (Michigan, 1984); *Elmore v. Elmore*, 557 S.W.2d 910 (Missouri, 1977); *Guice v Modica*, 337 So.2d 302 (Louisiana, 1976).

158. Federal Rule 19 requires that a party first be subject to service of process and that their joinder not deprive the court of jurisdiction over the subject matter of the action before a determination can be made as to whether it's feasible that they be joined.

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

160. *International Shoe Co.,* 326 U.S. 310 (1945); *Shaffer*, 97 S.Ct. 2569 (1977).

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

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

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

164. *Id.*

165. *U.S. Const.,* Art. IV, Sec. 1.

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

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

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

169. 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.

170. U.S. Const., Art. VI, Sec. 2.

171. *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).

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

173. The Alaska statute, for *example*, 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.

174. United States Bankruptcy Code, 11 U.S.C. §522(b)(2).

175. *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.

176. *U.S.Const.*, Art I, Sec. 10.

177. 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).

178. Wright, *The Contract Clause of the Constitution* (1938); Nowak and Rotunda, *Constitutional Law,* at 11.8 (5th Ed. 1995).

179. 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).

180. *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.

[181]181. 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.