DOMESTIC ASSET PROTECTION TRUSTS: WHAT'S THE BIG DEAL?

BY DARSI NEWMAN SIRKNEN*

INTRODUCTION

Within the last decade, a few American states have enacted legislation allowing self-settled spendthrift trusts, or "asset protection trusts" ("APTs"). Before these statutes were enacted, a number of foreign countries recognized these trusts, but they had never before been recognized in the United States.[1] Professors, practicing lawyers, and other scholars have written numerous articles concerning this relatively new device. Several of these articles have been negative, expressing outrage that such "court and creditor thwarting"[2] trusts that are "an affront to the public policy of the other . . . states"[3] have moved from their traditional offshore homes to take up residence in the United States. But is all the outrage really justified? This paper examines the domestic APT and offers the conclusion that the APT is worth far less attention than authors recently have given it.

I. TRADITIONAL RULE: NO SELF-SETTLED SPENDTHRIFT TRUSTS

The APT seems to defy traditional rules because it allows a settlor to transfer assets to the trust, retain an equitable interest in those assets, and yet protect those assets from creditor claims through the use of a spendthrift provision—a provision prohibiting voluntary or involuntary alienation of a beneficiary's interest in a trust. However, section 156 of the Restatement (Second) of Trusts states that a spendthrift provision in a self-settled trust is invalid as to claims made by the settlor's creditors.[4]

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* J.D., Concentration in Business Transactions, with Highest Honors, 2006, The University of Tennessee College of Law; B.A., *summa cum laude*, 2002, The University of Tennessee. Ms. Sirknen is an Associate with Woolf, McClane, Bright, Allen & Carpenter, PLLC, in Knoxville, Tennessee, where her practice is centered on tax and estate planning. The author would like to thank Professor Amy Morris Hess for her valuable input and guidance on this article.

[1] Available offshore jurisdictions include Bermuda, the Bahamas, the Cook Islands, the Jersey Islands, and Nevis. Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 503 (2000) [hereinafter *Pallbearers*].

[2] *Id.* at 542.

[3] Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987, 992 (1999) [hereinafter Gingiss].

[4] Cases adopting this Restatement rule include Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996); In re Jordan, 914 F.2d 197 (9th Cir. 1990); In re Brooks, 844 F.2d 258 (5th Cir. 1988); In re Robbins, 826

This is the case even without proof of fraudulent intent on the part of the settlor in making the transfer to the trust. Another example of a traditional rule that disapproves of APTs is section 505 of the Uniform Trust Code, which provides that, in the case of a self-settled discretionary trust, the settlor's creditors may reach the maximum amount that the trustee *could* pay to the settlor, regardless of whether the trustee actually distributes the money or whether the trust contains a spendthrift provision.[5]

II. OVERVIEW OF ASSET PROTECTION TRUSTS

Before domestic states began authorizing the use of APTs, United States citizens could transfer assets to offshore APTs in foreign jurisdictions including the Bahamas, the Channel Islands, the Jersey Islands, and Nevis.[6] The following section outlines the terms that United States grantors commonly include in offshore trusts and the advantages of each. Section II.B summarizes the recent domestic legislation authorizing APTs and compares the trusts permitted by the domestic statutes with the offshore trusts.

A. Offshore Trusts

As noted above, United States law has not been friendly to the APT. For this reason, several foreign countries began allowing APTs, thus attracting capital from United States settlors interested in protecting their wealth from creditors.[7] Foreign jurisdictions are attractive because their courts are not required to enforce United States judgments.[8] An estimate from the year 2000 reported that United

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F.2d 293 (4th Cir. 1987); Ahern v. Thomas, 733 A.2d 756 (Conn. 1999); Brent v. Md. Cent. Collection Unit, 537 A.2d 227 (Md. Ct. App. 1988); Cohen v. Comm'r of Div. of Med. Assistance, 668 N.E.2d 769 (Mass. 1996); In re Hertsberg Inter Vivos Trust, 578 N.W.2d 289 (Mich. 1998).

[5] The Uniform Trust Code was adopted by the National Conference of Commissioners on Uniform State Laws in 2000. For statutes adopting § 505 with minimal changes, *see* D.C. CODE ANN. § 19-1305.05 (LexisNexis 2006); KAN. STAT. ANN. § 58a-505 (2006); MO. REV. STAT. § 456.5-505 (2006); NEB. REV. STAT. § 30-3850 (2006); N.H. REV. STAT. ANN. § 564-B:5-505 (LexisNexis 2006); TENN. CODE ANN. § 35-15-505 (2006); WYO. STAT. ANN. § 4-10-505 (2006).

[6] *Pallbearers*, *supra* note 1, at 503.

[7] Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 567 (2004).

[8] *Id.* at 568.

States citizens had transferred $300 million in assets to foreign trusts and that the total amount of American money in offshore trusts exceeded $1 billion.[9] The number of Americans settling offshore trusts was estimated at around 100,000.[10]

Offshore trusts have several features that add to their invulnerability to creditor attacks. For example, they usually have a "protector" whose consent is required before the trustee can perform certain acts.[11] The protector may replace a trustee at any time and also may be able to change the trust beneficiaries.[12] In addition, offshore trusts often contain an "anti-duress clause," which mandates that the trustee is not to honor a request if it is made under legal compulsion (i.e., a court order to repatriate assets to the United States).[13] These trusts also often exclude certain people from becoming a beneficiary, trustee, or protector. In most cases, anyone appointed by a court is excluded.[14] Finally, the trust instrument may provide for a change of trust situs if the assets are put in danger.[15] Many creditors are not willing to follow a trust as it flees from one jurisdiction to another, perhaps making several situs changes before the creditor finally throws its proverbial towel into the ring.[16]

Several United States courts have had occasion to rule on the validity of offshore APTs. Because of traditional United States rules, these courts have been consistently hostile to the offshore trusts.[17]

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[9] *Pallbearers*, *supra* note 1, at 502.

[10] *Id.*

[11] *Id.* at 506.

[12] *Id.* at 506-07.

[13] *Id.* at 507.

[14] *Id.*

[15] *Id.* at 508.

[16] *Id.*

[17] *See, e.g.,* In re Lawrence, 279 F.3d 1294 (11th Cir. 2002); Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999); In re Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998); In re Portnoy, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) (although the foreign choice-of-law provision in the trust instrument could bind the debtor and his trustee, it could not bind the debtor's creditors); Breitenstine v. Breitenstine, 62 P.3d 587 (Wyo. 2003) (where one spouse transferred marital property to an

B. Domestic Trusts

Alaska enacted the first domestic APT statute in 1997.[18] In the years that followed, Delaware, Nevada, Rhode Island, and Utah passed statutes allowing APTs. Each state's statute requires that at least one trustee be located in the host state, that the trust instrument invoke the host state's law, that part of the trust res be held within the host state, and that part of the trust administration occur in the host state.[19] Each statute offers protection from the settlor's creditors if the settlor is merely a discretionary beneficiary of the trust.[20] Delaware, however, goes one step further and allows creditor protection even if the settlor retains the right to the trust income during his life.[21]

There are several advantages of domestic APTs over foreign APTs. The most obvious is that the settlor can avoid the uncertainties of transferring property to a jurisdiction that has a different language, political system, legal structure, and currency.[22] In addition, the United States is unquestionably more politically and economically stable than any of the offshore APT host countries. Another advantage of domestic trusts is that they allow the settlor to avoid the foreign trust reporting requirements imposed by the Internal Revenue Code.[23]

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offshore trust without the knowledge or consent of the other spouse and the court lacked jurisdiction to direct judgment on the out-of-state property). In *Affordable Media* and *Lawrence*, the court ordered the debtor imprisoned for contempt for refusing to repatriate assets.

[18] Gingiss, *supra* note 3, at 1008; *Pallbearers*, *supra* note 1, at 508.

[19] *See* ALASKA STAT. § 13.36.035 (2006); DEL. CODE ANN. tit. 12, § 3570 (2006); NEV. REV. STAT. 166.015 (2006); R.I. GEN. LAWS § 18-9.2-2 (2006); UTAH CODE ANN. § 25-6-14 (2006).

[20] *Pallbearers*, *supra* note 1, at 516.

[21] DEL. CODE ANN. tit. 12, § 3570(10)(b)(3) (2006).

[22] *Pallbearers*, *supra* note 1, at 515.

[23] *Id.*; *see also* I.R.C. § 6048 (2006).

1. Alaska

Alaska's Trust Act became effective April 2, 1997.[24] It was amended in 1998 and 2003.[25] Under the amended Act, a creditor existing at the time of the transfer to the trust must bring an action to set aside the transfer as fraudulent within the later of four years after the date of the transfer or one year after the date the creditor discovers the transfer, and the creditor must prove that he asserted a claim before the settlor made the transfer.[26] In addition, the Act requires a creditor to prove a fraudulent transfer by proof of *actual* fraud (i.e., "intent" to defraud the creditor), rather than merely constructive fraud (i.e., if the settlor had incurred large debts or reasonably believed that he would be incurring such debts in the near future at the time he made the transfer to the trust).[27] Alaska's statute provides that, if a court sets aside the trust as a fraudulent transfer, the trustee has a first lien against the trust property in an amount equal to the trustee's cost of defending the action.[28] After the trustee's lien is satisfied, the creditor may defeat the transfer to the trust only to the extent necessary to pay its claim and related costs.[29]

There are two significant disadvantages to the Alaska Act. First, it does not define "creditor," which could allow courts to broaden the class of possible plaintiffs.[30] Second, Alaska has adopted the Uniform Foreign Money Judgments Recognition Act, which extends the "full faith and credit" given to other states' judgments to judgments of foreign countries as well.[31]

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24 Gingiss, *supra* note 3, at 1008.

25 *See* 2003 Alaska Sess. Laws 138; 1998 Alaska Sess. Laws 105.

26 ALASKA STAT. § 34.40.110(d) (2006).

27 *Id.* § 34.40.110(b)(1).

28 *Id.* § 13.36.310(c)(1).

29 *Id.* § 13.36.310(b).

30 Richard W. Nenno, *Planning with Domestic Asset Protection Trusts*, SJ036 ALI-ABA 421, 499 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17-21, 2003) [hereinafter *Planning with APTs*].

31 *See* ALASKA STAT. §§ 09.30.100-.180 (2006).

2. Delaware

The Delaware Qualified Dispositions in Trust Act was signed into law on July 9, 1997.[32] It has been amended several times since then. The Act requires the trust to invoke Delaware law, be irrevocable, and contain statutory spendthrift language.[33] The Delaware Act does not protect the trust property from existing claims for alimony (but only if the former spouse was married to the settlor before the trust was created), child support, division of marital property, or existing tort judgments.[34] However, these exceptions would probably exist even if they were not named in the statute, because public policy dictates against allowing former spouses or children to go without support while settlors maintain their standards of living with funds received from a trust.[35]

For purposes of the Delaware Act, a "qualified trustee" is any person "authorized by the law of [Delaware] to act as a trustee and whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision."[36] Although the trust instrument may appoint co-trustees not fitting this description, the Delaware trustee must hold some of the trust property in Delaware and "materially participate in the administration of the trust."[37] If any court declines to apply Delaware law in a proceeding against the trustee, the trustee ceases to act and a successor trustee will take its place.[38]

As in Alaska, creditors with existing claims at the time of the settlor's transfer must bring any action to defeat the disposition within the latter of four years after the disposition or within one year after the creditor discovered or should have discovered the transfer.[39] The creditor must prove by clear and convincing evidence

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[32] 71 Del. Laws 159 (1997).

[33] DEL. CODE ANN. tit. 12, § 3570(10) (2006).

[34] *Id.* at tit. 12, § 3573..

[35] *Planning with APTs*, *supra* note 30, at 447; *see also* RESTATEMENT (THIRD) OF TRUSTS § 59 (2003).

[36] DEL. CODE ANN. tit. 12, § 3570(9)(a) (2006).

[37] *Planning with APTs*, *supra* note 29, at 444.

[38] DEL. CODE ANN. tit. 12, § 3572(g) (2006).

[39] *Id.* at tit. 12, § 3572(b)..

that the transfer was fraudulent.[40] Any creditor claims arising after the transfer must be brought within four years of the transfer, but this exception is available only to creditors who existed or were foreseeable at the time of the transfer.[41] If there are multiple creditor claims, each creditor must bring a separate suit attacking the trust.[42] As in Alaska, the trustee may use trust assets to pay the costs of litigation before it satisfies a successful claim.[43]

3. Rhode Island

Rhode Island's Qualified Dispositions in Trust Act became effective July 1, 1999.[44] It is virtually identical to the original, unamended Delaware Act. Unlike the Delaware Act, however, the Rhode Island Act has no provision protecting trustees and attorneys who engage in what later turns out to be a fraudulent transfer and no provision allowing corporations and other entities, in addition to individuals, to create APTs.[45]

A Rhode Island APT must be irrevocable and invoke Rhode Island Law.[46] It also must contain a spendthrift clause and have a qualified trustee, which is defined the same as under the Delaware statute.[47] The Rhode Island Act bars original actions against the trust as well as actions for enforcement of judgments obtained in other

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40 *Id.*

41 DEL. CODE ANN. tit. 12, § 3572(b)(2) (2006); *see also* Richard W. Nenno, *Perpetual Dynasty Trusts, UPAIA Section 104 and Total Return Trust Statutes, and Domestic Asset Protection Trusts*, SH022 ALI-ABA 1843, 1941 (ALI-ABA C.L.E. Course of Study Nov. 18-22, 2002).

42 DEL. CODE ANN. tit. 12, § 3574(a) (2006).

43 DEL. CODE ANN. tit. 12, § 3574(b)(1) (2006).

44 1999 R.I. Pub. Laws 402.

45 *Compare* DEL. CODE ANN. tit. 12, § 3572(d) & (e) (2006), *and* DEL. CODE ANN. tit. 12, § 3570(8) & (11) (2006), *with* R.I. GEN. LAWS § 18-9.2-4(a) (2005), *and* R.I. GEN. LAWS § 18-9.2-2(7) (2005).

46 R.I. GEN. LAWS § 18-9.2-2(9) (2006).

47 *See* R.I. GEN. LAWS § 18-9.2-2(8) (2006).

jurisdictions.[48] It also states that any action to set aside a transfer must be based on Rhode Island's version of the Uniform Fraudulent Transfer Act.[49]

4. Nevada

Nevada's APT legislation became effective October 1, 1999.[50] In order to protect the settlor from creditor's claims, the trust must be irrevocable; the settlor must retain no right to mandatory distributions of income or principal; and the transfer of property to the trust must not have been "intended to hinder, delay or defraud known creditors."[51] The settlor of the trust must be a Nevada resident, or there must be a qualified trustee.[52] The Nevada statute contains a provision that makes Nevada trusts considerably less protective than those of the other APT states. It allows an action for enforcement of a judgment obtained in another state for up to six years after the date of the judgment.[53]

5. Utah

Utah's APT legislation became effective December 31, 2003.[54] The Utah Act provides seven exceptions, under which creditors may reach trust property to satisfy their claims. The exceptions are 1) existing claims for child or spousal support; 2) claims for state taxes or state public assistance; 3) any claim if the settlor retains a right to mandatory distributions; 4) any claim where the transfer was made with the intent to defraud an existing creditor or the transfer renders the settlor insolvent; 5) any claim for a judgment arising from an action commenced before or within three years after the trust is created; 6) any claim if the trust is revocable; and 7) claims of

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48 R.I. GEN. LAWS § 18-9.2-4(a) (2005).

49 *Id.*

50 1999 Nev. Stat. 299.

51 NEV. REV. STAT. § 166.040(1)(b) (2006).

52 *Id.* § 166.015(2).

53 *Id.* § 11.190.

54 2003 Utah Laws 301; *see also* UTAH CODE ANN. §25-6-14(1)(a) (2006).

creditors who were induced by the settlor to extend credit by a promise that trust assets would be available to the creditor.[55]

6. Other states

Missouri enacted a statute in 1989[56] allowing a trustor to create a self-settled discretionary trust for a class of beneficiaries (including the trustor).[57] The statute provides that trust assets will be protected from creditors unless the transfer to the trust was a fraudulent conveyance, the trustor is the sole beneficiary, or the trust is revocable.[58] Federal courts in Missouri have questioned the effectiveness of the statute;[59] however, and Missouri estate planners do not rely on the statute.[60]

In 1999, a Texas legislator introduced a bill identical to the Alaska Act, but the Texas House never acted upon it.[61] In addition, New York considered, but did not adopt, APT legislation in 2003.[62]

III. ARGUMENTS AGAINST APTS

In the wake of the domestic APT legislation, one should pause to consider whether this legislation is desirable. The following sections will discuss the major arguments advanced against APTs.

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55 UTAH CODE ANN. § 25-6-14(c) (2006).

56 1989 Mo. Laws 145.

57 MO. ANN. STAT. § 456.5-505 (West 2006).

58 *Id.* § 456.5-505(3).

59 *See, e.g.,* Markmueller v. Case, 51 F.3d 775, 776 n.3 (8th Cir. 1995); In re Enfield, 133 B.R. 515, 519 (Bankr. W.D. Mo. 1991).

60 *Planning with APTs*, *supra* note 30, at 459.

61 John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 175 n. 54 (2004).

62 *See* Duncan E. Osborne et al., *Asset Protection: Trust Planning*, SJ036 ALI-ABA 1419, 1437 n. 51 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17-21, 2003) [hereinafter Osborne et al.].

A. Impairs Moral Duty

Probably the most common argument against APTs is that allowing settlors to protect assets from claims of their creditors impairs their moral duty to pay their debts and to refrain from reckless conduct.[63] Liability for civil debts and incarceration for criminal activity are the two means by which governments enforce the law.[64] If a judgment cannot be enforced, liability no longer has any effect.[65] One commentator actually claims that APTs cause settlors to engage in risky behavior. He uses the illustration of a physician deciding which tests to run on a patient: "If the physician runs insufficient tests and misdiagnoses the patient, she risks malpractice liability . . . . If, however, the physician can insulate her assets from patient claims, she can afford to run fewer tests, because she will not bear the full costs of malpractice liability."[66] However, another commentator notes that "the magnitude of the effect of an APT on conduct is not known (and perhaps not determinable);" therefore he gives little weight to this argument.[67] In any case, APTs provide no more incentive for their settlors to engage in risky conduct than do traditional spendthrift trusts for their beneficiaries.

B. Removes Limits of Exempt Property Statutes

Federal and state exempt property statutes provide that certain categories of property are not included in a debtor's bankruptcy estate and therefore cannot be reached by creditors. "The limitations in the exempt property statutes reflect the judgment of the legislature as to amounts that are appropriately exempt from creditor claims . . . ."[68] APTs thumb their noses at these statutes because there is no

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[63] *Pallbearers, supra* note 1, at 542; Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1040-41 (2000) [hereinafter Sterk].

[64] *Pallbearers*, *supra* note 1, at 481.

[65] *Id.*

[66] Sterk, *supra* note 63, at 1067.

[67] *Pallbearers*, *supra* note 1, at 543.

[68] *Pallbearers, supra* note 1, at 544.

limit on the amount of property that can be transferred into such a trust.[69] Likewise, there is no limit on the *nature* of property that the settlor may transfer.[70]

C. Available Only to the Wealthy

One author argues that APTs violate the concept of equal protection of the laws because they allow the wealthy to avoid their debts while the poor or the middle-class are not given the same opportunity.[71] This is purportedly because only the wealthy have the financial means to fund an APT.[72] However, that same author admits that there are a number of other planning options, as well as other aspects of the law, of which only the wealthy may take advantage.[73] In addition, if the wealthy are the only ones able to fund an APT, it follows that perhaps they are the only ones in need of such a trust to protect the amount of their assets that exceed the amount they need for day-to-day living.

IV. ARGUMENTS FOR APTS

While there are instances in which clients abuse APTs, "[a]lmost all estate planning lawyers, almost all of the time, represent honorable, law abiding clients, men and women who daily contribute to society by their productivity and with their generosity, who pay their bills and their taxes, and who are not deadbeats, cheats, frauds or criminals."[74] For these clients, APTs can fit nicely into their estate planning and wealth preservation framework. The following sections discuss the major arguments advanced in favor of APTs.

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 545. Some of these other options will be discussed in section IV. C., *infra*.

[74] Osborne et al., *supra* note 62, at 1428.

A. Protects from Meritless Claims

Professor Lynn LoPucki wrote an article entitled *The Death of Liability*,[75] which offered a negative view of "judgment-proofing" strategies such as the APT. However, one author argued that the article could have been called *The Death of Responsibility*.[76] He cited a case in which the plaintiff was injured while mounting a tire on a wheel rim because he admittedly ignored all of the warnings that were printed on the tire.[77] Interestingly, the court ruled in favor of the plaintiff in that case. The author noted that, "[i]n a system where persons such as [the plaintiff] are apparently unwilling to accept responsibility for their own actions, even if they are negligent, why should Professor LoPucki or anyone else wonder why there is also some number of persons unwilling to accept responsibility for their own liabilities?"[78] He notes that, while some take the view that "people should pay their bills," others note that not all bills (e.g., judgments from meritless claims) are just.[79] Because of the above-referenced case and many others like it, many people view the United States litigation system as extremely pro-plaintiff.[80] For this reason, coupled with the rising cost of liability insurance and the decreasing scope of coverage, many have turned to liability limitation strategies like the APT.[81]

One argument against the assertion that APTs help protect against meritless claims is that courts can weed out obviously meritless claims by granting motions to dismiss and motions for summary judgment, and by imposing sanctions for frivolous claims.[82] However, as the case noted above illustrates, these procedural mechanisms are not always effective. The second argument is that legislatures can make changes

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75 106 YALE L.J. 1 (1996).

76 John A. Terrill, II, *Domestic Asset Protection Trusts*, ALI-ABA C.L.E. Video L. Rev., Nov. 5, 2002, at para. II. B. 4 [hereinafter Terrill].

77 *See id.* (discussing Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998)).

78 Terrill, *supra* note 76, at para. II. B. 6.

79 *Id.* at para. II. B. 7.

80 *Pallbearers*, *supra* note 1, at 499.

81 John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 46 (2000).

82 *Pallbearers*, *supra* note 1, at 527.

in the litigation system if they feel that changes are necessary.[83] This is seen as a better solution than the APT because the APT protects from both meritless and meritorious claims.[84] The flaw with this argument is that at least some legislators believe that changes are necessary. Several have proposed changes, but no legislature has adopted a change that will fix the problem. If the legislatures will not act, individuals have no choice but to act to protect themselves.

Professor Lischer has raised another argument against the meritless claims defense. He says that "protection from liability is available to any person who desires such protection. A person can become judgment proof by becoming poor."[85] Obviously, this is an undesirable alternative for anyone. One wonders if, given the choice, Professor Lischer would rather create an APT or "become poor."

There are other reforms that would be more effective at curbing abuse of APTs than banning the use of APTs altogether. States could place limits on the amounts that can be transferred to an APT and require settlors to give public notice when they fund such a trust.[86] In addition, states already place limits on the types of creditors against which APT protection is effective.[87]

B. Allows Settlor to Enjoy Same Benefits Enjoyed by Traditional Spendthrift Beneficiaries

When a person inherits wealth or is the donee of a gratuitous transfer, he can request that the donor place those assets in a spendthrift trust for his benefit.[88] Thus, if self-settled spendthrift trusts are not allowed, people who accumulate wealth through their own efforts are disfavored.[89] Dean Griswold has stated, "[W]e may well question the soundness of a rule which allows a man to hold the bounty of

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[83] *Id.* at 528.

[84] *Id.*

[85] *Id.* at 529.

[86] Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 364 (2002) [hereinafter Danforth].

[87] See previous discussion of domestic APT laws at § II B.

[88] Osborne et al., *supra* n. 62, at 1429.

[89] *Planning with APTs*, *supra* note 30, at 433.

others free from the claims of his creditors, but denies the same immunity to his interest in property which he has accumulated by his own effort."[90]

In addition, beneficiaries of gifts that are *not* placed in a spendthrift trust may be punished for the donor's failure to plan.[91] Similarly, when a court creates a trust with a personal injury award, that trust often will be self-settled and therefore subject to creditor claims.[92] The APT merely allows people to do for themselves what they already may do for others.[93]

C. Other Asset Protection Opportunities Already Exist

There are various asset protection arrangements currently available in the United States. One example is the family limited partnership. While a creditor may reach an individual's interest in such a partnership, he usually cannot force the liquidation of the partnership in order to reach the underlying assets.[94] In addition, the partnership is unlikely to distribute profits to the creditor, yet the creditor may still become liable for income tax on his share of the undistributed profits.[95]

Also, many states have enacted legislation protecting the homesteads of their residents. While not completely exempt from creditor claims, usually only tax liens, purchase-money debt, or debt used to construct or improve the homestead are allowed against homestead property.[96]

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[90] Osborne et al., *supra* note 62, at 1429 (quoting ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS, § 474, at 542-43 (2d ed. 1947)).

[91] *Planning with APTs*, *supra* note 30, at 433.

[92] *Id.* at 494.

[93] Danforth, *supra* note 86, at 361.

[94] Osborne et al., *supra* note 62, at 1437.

[95] *Id.* ("Even in the absence of distributions, the creditor may be subject to income tax on his share of partnership profits."); *see* Evans v. Comm'r, 447 F.2d 547 (7th Cir. 1971) (holding that a taxpayer who transferred his partnership interest to a corporation in which he was the sole stockholder was no longer a partner for federal income tax purposes; instead, the corporation was responsible for the tax on its share of partnership income); Rev. Rul. 77-137, 1977-1 C.B. 178 ("An assignee acquiring substantially all of the dominion and control over the interest of a limited partner is treated as a substituted limited partner for Federal income tax purposes.").

[96] Osborne et al., *supra* note 62, at 1434-35.

Another available asset protection tool is a retirement savings plan qualified under the federal Employee Retirement Income Security Act ("ERISA"). ERISA sets minimum standards for most pension and health plans in private industry in order to provide protection for the individual employees participating in these plans. It requires all plans to include a spendthrift provision prohibiting the alienation of plan benefits.[97]

Yet another device is the tenancy by the entirety. Because tenants by the entirety own the property as a single unit, neither person can unilaterally sever the tenancy.[98] Thus in most cases, the creditor of one spouse cannot take that spouse's interest in the property without the consent of the other spouse.[99] The problem with a tenancy by the entirety is that it is available only to married couples, and some jurisdictions do not recognize it at all. The APT can provide protection to anyone who chooses to settle one.

In addition to the formal arrangements noted above, property owners may choose informal means of protecting their assets. For example, the owner could transfer the property in trust, listing family members as beneficiaries. The owner could then grant a power of appointment to a trusted relative, who could then direct that trust assets be distributed back to the settlor.[100] The owner also could transfer property outright to a family member, with the understanding that the property would be used for the benefit of the donor. The problem with both of these solutions is that the donor cannot enforce any promise made by the trusted family member to use the property for the donor's benefit. With an APT, although a settlor usually cannot retain a right to mandatory distributions, he still may bring an action against the trustee for abuse of discretion if the trustee refuses to distribute trust assets to him, especially if the settlor is the only beneficiary.

D. Valid Estate Planning Purposes

Many people would like to make large inter vivos gifts in order to minimize the size of their estates for tax purposes when they pass away. However, some people worry that they may need those assets in the future and are reluctant to give

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97 Danforth, *supra* note 86, at 337.

98 *Id.* at 334.

99 *Id.*

100 *Id.* at 343.

up complete control over the assets while they are still living.[101] An APT may potentially remove the trust assets from the settlor's estate while still allowing the trustee to make discretionary distributions to the settlor if the settlor later requires some of those assets.

In order to remove property from his estate, the settlor must make a completed gift of the property to the trust. Settlors make completed gifts when they have given up "dominion and control" of the assets.[102] If settlors retain a special power of appointment over the trust assets or if they retain the right to mandatory distributions of income or principal, they do not part with control of the property and thus do not make a completed gift.[103]

One test that the Internal Revenue Service ("the Service") has used to determine whether or not a gift is complete is the "reach of the creditor" test. The Service ruled that if settlors "could . . . effectively enjoy all the trust income by relegating [their] creditors to the trust for settlement of their claims," they have not made completed gifts.[104] In that same ruling, the Service noted that if the settlor moved the trust to a state where his or her creditors could not reach the trust assets, the transfer would be a completed gift for tax purposes.[105] Thus, if an APT is enforceable, the settlor's creditors cannot reach the trust assets, and the settlor can make a completed gift and exclude the trust assets from his or her estate.

The trust laws of each APT state allow certain types of creditors to attach trust assets. These exceptions could cause the transfer not to be a completed gift.[106] A stringent rule requiring a trust to be totally infallible, however, would mean that no APT could avoid estate inclusion. Interestingly, the Service has indicated that

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101 Terrill, *supra* note 76, at para. IV. A (referencing paragraph titled "Tax Consequences of Domestic Asset Protection Trusts").

102 Treas. Reg. § 25.2511-2(b) (2006).

103 *Id.*

104 Rev. Rul. 76-103, 1976-1 C.B. 293.

105 *Id.*

106 *See* Treas. Reg. § 20.2036-1(b)(2) (2006) (stating that "[t]he 'use, possession, right to the income, or other enjoyment of the transferred property' is considered as having been retained by or reserved to the decedent to the extent that [it] . . . is to be applied toward the discharge of a legal obligation of the decedent, . . . [including] a legal obligation to support a dependent during the decedent's lifetime.").

completed gifts are indeed possible with APTs. In Private Letter Ruling 98-37-007, the Service ruled that a transfer to an Alaska APT was a completed gift.[107] The Service later ruled that several transfers to California self-settled trusts were not completed gifts, but this was because California does not recognize self-settled trusts.[108] One author reports two instances in which a settlor reported the creation of a Delaware APT as a completed gift and paid the required gift tax.[109] When the settlor passed away, the Service did not attempt to include the trust assets in his estate.[110]

1. How to Do it Right

Although there is good authority for the argument that APTs would allow assets to be excluded from the settlor's estate for tax purposes and thus that APTs serve a valid estate planning purpose, the practitioner can and should take steps to ensure that his client does not have a fraudulent purpose for creating the trust. These same steps can help defend the trust against later attacks. One practitioner notes:

> The "best candidate" for a domestic asset protection trust is a client who: 1. Has no current creditor problems (or has assets in excess of what is needed to cover existing and foreseeable claims); 2. Has a general concern about future claims by creditors; 3. Has assets that will not be needed to meet current and foreseeable living expenses; and 4. Will not want frequent access to the assets being protected.[111]

Practitioners should first do a solvency analysis of the client, making a list of all the client's assets and then subtracting "the value of all debts, liabilities, claims, contingent liabilities, threats, guarantees, contingent claims, pending lawsuits, and potential claims faced by the client,"[112] as well as all assets currently protected from

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[107] I.R.S. Priv. Ltr. Rul. 98-37-007 (July 10, 1998).

[108] I.R.S. Tech. Adv. Mem. 1999-17-001 (Jan. 15, 1999).

[109] *See Planning with APTs*, *supra* note 30, at 464.

[110] *Id.*

[111] *Id.* at 430.

[112] Osborne et al., *supra* note 62, at 1432. Alaska now *requires* settlors to sign a solvency affidavit before they can transfer assets to an Alaska APT. ALASKA STAT. § 34.40.110(j)(2) (2006).

creditors. The practitioner should then fund the trust with only a portion of the leftover assets so that the transfer does not render the settlor insolvent.[113] Because fraudulent transfer statutes require proof that the transfer placed the transferor at risk of being unable to satisfy his obligations, courts are more likely to uphold the transfer if the settlor did not place all of his or her available assets into the trust.[114] In addition, practitioners should make sure that settlors understand they will not have access to the trust assets whenever they wish. One practitioner suggests that the trustor should include other beneficiaries in addition to himself and that, if possible, the trustee should *never* distribute trust assets to the trustor.[115] If the settlor understands this concept from the beginning and still wants to create the APT, he or she probably has a legitimate estate planning motive.

E. Economic Stimulus: Keeps Assets in the U.S.

Corporate trustees, estate planning lawyers, and settlors presumably all benefit financially from the use of APTs. Obviously, some of these benefits flow back into the economy of the states allowing APTs (since at least one trustee must be located in the APT state) and even states that do not allow APTs (from settlors, if they are not domiciliaries of an APT state, because they may continue to use some of the trust assets to purchase goods and services in their home states). Moreover, trustees must invest the trust assets, and they will probably be conservative in making distributions; thus the trust encourages savings.[116] The rise of domestic APTs should allow substantial amounts of assets to be invested in the United States rather than being transferred to the foreign trustee of an offshore trust.

F. Encourages More Due Diligence from Creditors

Currently, APTs are more likely to involve settlors with consumer debt, rather than with high-dollar commercial debt.[117] In the past several years, much of that consumer credit came from unsolicited "pre-approved" credit card offers in the mail. The "due diligence" (if one could call it that) of these creditors consists of,

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[113] *See* Osborne et al*., supra* note 62, at 1433.

[114] Danforth, *supra* note 86, at 332.

[115] *Planning with APTs*, *supra* note 30, at 514, 517.

[116] Danforth, *supra* note 86, at 362.

[117] *Pallbearers*, *supra* note 1, at 532.

perhaps, a cursory review of the proposed debtor's credit report and nothing more. The opponents of APTs suggest that, if a state allows APTs, it might discourage the extension of such unsecured credit because those loans would become essentially nonrecourse to the extent of the properties the settlor has transferred to an APT.[118] However, APTs could potentially benefit the public by encouraging all creditors to actually be diligent in extending credit, thereby reducing credit losses and decreasing the burden that those losses place on the public in the form of higher interest rates and fees.[119] Lenders could, at the least, request information concerning any assets in a self-settled spendthrift trust so that they can determine whether the debtor is approaching insolvency, or they could require security for loans they extend to settlors of APTs.

G. Income Tax Issue

In addition to the estate tax benefits a settlor can gain from an APT, he may also receive income tax benefits. If the settlor's transfer to the APT is a completed transfer, then the trustee is the legal owner of the property.[120] Therefore, the trust, rather than the settlor, is the appropriate taxpayer for the income, deductions, and credits attributable to the trust property.[121] When the settlor is also a permissible beneficiary of the trust, however, an additional requirement must be satisfied to prevent the settlor from being taxed on trust income whether or not it is actually distributed to him. Settlors can only avoid this tax liability if the trustee may only distribute income to them with the consent of an "adverse party."[122] This requires that the settlor name additional trust beneficiaries, because the Code defines "adverse party" as "any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust."[123]

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118 *Id.* at 546.

119 *Id.* at 534.

120 *See id.* at 560.

121 *Id.*

122 I.R.C. § 677(a)(1) (2005).

123 I.R.C. § 672(a) (2005).

H. Harshness of the Traditional Rule

The Restatement rule allowing creditors access to property held in a self-settled spendthrift trust actually gives creditors more rights than the settlor.[124] With domestic APTs, settlors usually cannot retain the right to compel distributions. Under the Restatement rule, however, their creditors can do essentially that.[125] In addition, the Restatement rule applies regardless of whether or not there are other trust beneficiaries in addition to the settlor.[126] The rule allows creditors of the settlor to access property in which other parties have a beneficial interest.[127]

V. WHY APTS MAY NOT WORK

Although the statutes of the five APT states allow considerably more protection than the traditional rule offers, these states are still not as effective as offshore jurisdictions at protecting assets from the settlor's creditors. A variety of constitutional provisions prevent domestic venues from offering the same protection as their offshore counterparts. The sections that follow will discuss those provisions as well as other possible impediments.

A. Full Faith and Credit Clause

The Constitution requires all states to give "Full Faith and Credit" to judgments rendered by the courts of other states.[128] Therefore, if a creditor sues a debtor in a non-APT state and wins a judgment, he should be able to enforce that judgment in an APT state against trust assets, even though the non-APT state court may have misinterpreted or declined to apply the law of the APT state.[129] However, the Full Faith and Credit Clause does not require the APT state to enforce a judgment if the non-APT forum did not have jurisdiction over either the trust assets

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[124] Danforth, *supra* note 84, at 295.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] U.S. CONST. art. IV, § 1.

[129] Osborne et al., *supra* note 62, at 1444-45.

or the trustee.[130] To prevent a non-APT court from having jurisdiction, the trustee should be a resident of the APT state or a corporation doing business only in the APT state (so that it does not have "minimum contacts"[131] with the forum state), and the trustee should hold all trust assets within the APT state (so that a non-APT court cannot have *in rem* jurisdiction over trust assets).[132]

B. Contracts Clause

The Contracts Clause prohibits states from enacting laws that impair the obligation of contracts.[133] This provision "was specifically intended by the framers to prevent the states from passing extensive debtor relief laws."[134] A state's law violates this clause if it "substantially impair[s] the obligations of parties to existing contracts or make[s] them unreasonably difficult to enforce."[135] These laws will be subject to the "strict scrutiny" standard of review and thus must be narrowly tailored to further a compelling government interest.[136] APTs, however, should not be vulnerable under this provision because the clause prohibits impairment of *existing* contracts, and most APTs have an exception that allows creditors existing at the time the trust is created to bring claims within a certain number of years.[137]

C. Supremacy Clause/Bankruptcy Law

Section 541(c)(2) of the Bankruptcy Code provides 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 in a case under this title."[138] This would

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130 *See* Hanson v. Denckla, 357 U.S. 235 (1958). This case involved a traditional trust rather than an APT. The Supreme Court held that a Delaware Court did not have to give full faith and credit to a Florida judgment when the Florida court lacked jurisdiction over the trustee. *Id.* at 255.

131 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

132 *Planning with APTs*, *supra* note 30, at 466.

133 U.S. CONST. art. I, § 10, cl. 1.

134 Osborne et al., *supra* note 62, at 1446.

135 *Id.*

136 *Id.*

137 *Planning with APTs*, *supra* note 30, at 489.

138 11 U.S.C. § 541(c)(2) (2006).

appear to include restrictions of an APT, thus excluding APT assets from the debtor's bankruptcy estate. However, the legislative history of the statute mentions "spendthrift trusts," and one could argue that the legislature had traditional spendthrift trusts in mind and did not contemplate the future use of self-settled spendthrift trusts.[139] Also, "[b]ecause bankruptcy cases are not diversity cases, the bankruptcy court is not required to apply local choice-of-law rules."[140] Bankruptcy courts use federal principles in deciding which state's law to apply in resolving questions of federal law.[141] This allows the court to ignore local rules when there are "controversies implicating important federal bankruptcy policy."[142] In addition, bankruptcy courts have national jurisdiction.[143] Thus they can render a valid judgment against the trustee or trust assets no matter where they are located in the United States.[144]

D. Creditors May Sue Outside the APT State

Another state's courts may have jurisdiction over the trustee or the trust assets, depending on where they are located. In addition, corporate trustees will be subject to the jurisdiction of any state in which they do business. The Restatement (Second) of Conflict of Laws section 270 provides as follows:

> An inter vivos trust of interests in movables is valid if valid . . . under the local law of the state designated . . . to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which . . . the trust has its most significant relationship . . . .[145]

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139 Osborne et al., *supra* note 62, at 1445.

140 Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 988 (2001).

141 *See In re* Koreag, 961 F.2d 341, 350 (2d Cir. 1992) ("[F]ederal principles should guide our consideration of which jurisdiction's substantive law applies in cases arising out of federal law.").

142 *Id.* at 350-51.

143 28 U.S.C. §1334(e)(1); *In re* Cardinal Indus., Inc., 109 B.R. 748, 751-52 (Bankr. S.D. Ohio 1989).

144 Gingiss, *supra* note 3, at 1012.

145 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (1971).

Thus a creditor may argue that APTs offend the public policy of the forum state so the court should ignore the trust's governing law. This would be an especially compelling argument in the case of a forum state resident who settles an APT in a different state, in a dispute with a creditor that is resident in the forum state, over a transaction that occurred solely in the forum state.[146] Section 273 of the Restatement, however, provides that "[w]hether the interest of a beneficiary of a trust . . . is assignable by him and can be reached by his creditors is determined . . . by the local law of the state . . . in which the settlor has manifested an intention that the trust is to be administered."[147] This section does not provide a different rule in the case where the trust's governing law violates a strong public policy of the forum state.[148] At least one practitioner argues that this means that a court should follow a trust's governing law without question when addressing the ability of creditors to reach trust assets.[149]

There are at least two ways for trustees to avoid having out-of-state courts enter judgments against them. First, they can refuse to appear in the out-of-state court. If they appear, they are in effect conceding that the out-of-state court has jurisdiction over them, and the jurisdictional issue cannot later be relitigated in an enforcement action in the APT state. If they do not appear, however, the out-of-state court will enter a default judgment against them, but an APT state court may later refuse to enforce the judgment against trust assets because it may decide that the out-of-state court did not have jurisdiction over the trustee.[150]

The trustee's second option is to take an offensive posture and bring a declaratory judgment action in the APT state. Obviously, the APT state will use its own law to uphold the trust, and the Full Faith and Credit Clause will require other states to uphold that judgment. Although the APT state courts may not have personal jurisdiction over the creditor, they will most likely have jurisdiction over the trust assets, since all APT statutes require at least some of the assets to be held within the APT state. If the trustee sends notice of the proceeding to the creditor and gives him an opportunity to come defend his position, the creditor can still be

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[146] *Pallbearers*, *supra* note 1, at 555.

[147] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 273 (1971).

[148] *Planning with APTs*, *supra* note 30, at 470.

[149] *See id.*

[150] Danforth, *supra* note 86, at 321-22.

bound by the judgment of the APT state.[151] Thus, creditors existing at the time of the declaratory action will be estopped from bringing later challenges to the trust.

VI. WHY APTS COULD WORK

Section 156 of the Restatement (Second) of Trusts contains over 100 annotations concerning self-settled trust cases. One APT state practitioner notes that "clients create such trusts even when they know that they might not work" due to the chance that they *could* be effective.[152] The following sections discuss the factors that provide hope to domestic APT settlors.

A. Full Faith and Credit Clause Applies to Legislative Acts

The Full Faith and Credit Clause applies to acts as well as judgments. However, the Supreme Court has noted that "[o]ur precedent differentiates the credit owed to laws . . . and to judgments" and that the Full Faith and Credit Clause does not require "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[153] Thus, this is a fairly weak argument that courts must give effect to the laws of other states. However, in *Phillips Petroleum Co. v. Shutts*,[154] the Supreme Court did not allow a court to ignore another state's statutes, holding that Kansas could not apply its own law to all members of a class merely because it had jurisdiction over the parties, who had no other relationship to Kansas.[155] In addition, the APT statutes all allow actions to enforce judgments within a certain time period after the settlor transfers assets to the trust. Several courts have held that a time limitation on such actions (rather than an outright ban) is procedural rather than substantive and therefore does not violate the Full Faith and Credit Clause.[156]

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[151] Sterk, *supra* note 63, at 1112-13.

[152] *Planning with APTs*, *supra* note 30, at 434.

[153] Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003) (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998)).

[154] 472 U.S. 797 (1985).

[155] *Id.* at 822.

[156] *See, e.g.,* Matanuska Valley Lines, Inc. v. Molitor, 365 F.2d 358 (9th Cir. 1966); Foley v. Foley, 641 S.W.2d 138 (Mo. Ct. App. 1982); Wener v. Perone & Cramer Realty, Inc., 528 S.E.2d 65 (N.C. Ct. App. 2000); Oakley v. Wagner, 431 S.E.2d 676 (W. Va. 1993).

B. "Applicable Nonbankruptcy Law"

As noted above, section 541(c)(2) of the Bankruptcy Code provides that a spendthrift restriction enforceable under applicable nonbankruptcy law is also enforceable under the Bankruptcy Code. Although some argue that this provision only extends to traditional spendthrift restrictions and not those found in self-settled trusts, the Supreme Court has held that an ERISA-qualified savings plan is excludable from the bankruptcy estate under this provision.[157] The Court stated that "[t]he natural reading of [section 541(c)(2)] entitles a debtor to exclude from . . . the estate *any* interest in a plan or trust that contains a transfer restriction enforceable under *any* relevant nonbankruptcy law."[158] Retirement plans are arguably self-settled because the employee makes contributions or his employer makes contributions as part of the employee's compensation package. Because ERISA requires qualified plans to contain anti-alienation clauses, it appears that the Supreme Court is in effect saying that transfer restrictions in self-settled trusts make the assets in those trusts excludable from the bankruptcy estate. However, the author found no bankruptcy case to date in which a court has decided whether section 541(c)(2) applies to domestic self-settled spendthrift trusts.

C. State Exemption Rules

Even if spendthrift provisions in self-settled trusts are not excludable from the bankruptcy estate under "applicable nonbankruptcy law," they could be respected independently as a state exemption rule. However, the exemptions that the bankruptcy court will apply are those of the debtor's state of domicile,[159] so this argument would be effective only in the case of a debtor who is a resident of an APT state.

VII. WHY APTS ARE NOT SUCH A BIG DEAL

Many authors express outrage that some states now allow wealthy settlors to retain the enjoyment of their property while their creditors go unsatisfied. Some essentially predict the country's moral downfall due to this horrendous new "trick" up the sleeves of wealth protection planners. But is all the outrage really warranted? One professor has stated, "The treatment of spendthrift trusts can make a nice legal

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[157] Patterson v. Shumate, 504 U.S. 753 (1992).

[158] *Id.* at 758 (emphasis added).

[159] 11 U.S.C. § 522(b)(2) (2006).

point . . . but it strains credibility to believe that a change in the law will affect more than a handful of people each year."[160] As of 2003, a little over five years after the first APT legislation became effective, a Delaware practitioner estimated that "a few hundred" Delaware APTs had been created with a market value exceeding $2 billion.[161] He also indicated that "several" Nevada APTs and "a few" Rhode Island APTs had been created.[162] An Alaska practitioner estimated that 310 nonresidents and 125 residents of Alaska had created Alaska APTs.[163] It is almost certain that more trusts have been created in the last couple of years, but these numbers are still not astronomical considering the total population of the United States, or even the population of the APT states alone. Despite hundreds of trusts being created, however, the author has been unable to find *any* case in which a creditor has brought a challenge to a domestic APT. In addition, the number of bankruptcy filings in Alaska from 1997 to present and in Utah from 2003 to present has remained roughly the same.[164] Statistics from Delaware show that the number of bankruptcy filings between 1997 and 2001 nearly doubled, but this could be due to the introduction of a new computer system in 2001 that does not continue to track cases filed and resolved prior to that date.[165] In any case, this information may indicate that perhaps the settlors of these trusts really have legitimate motives other than thwarting courts and creditors. And for those few settlors who intend to abuse the system (for there will always be abuse, whether it is of the APT system, available tax planning devices, or something else), there are other disincentives more powerful than negative APT commentary. For example, concealing or failing to disclose any property from the court in a bankruptcy case is a crime punishable by a $5,000 fine, a five-year prison term, or both.[166] Even if the debtor does not commit a crime, the bankruptcy court

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160 Elizabeth Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333, 1335 n. 17 (1984).

161 *Planning with APTs*, *supra* note 30, at 443.

162 *Id.* at 454, 457.

163 *Id.* at 450 (citing David G. Shaftel, *Alaska's Experience with Self-Settled Discretionary Spendthrift Trusts*, 29 EST. PLAN. 506, 506 (Oct. 2002)).

164 *See* Statistics for U.S. Bankruptcy Court, District of Alaska, http://www.akb.uscourts.gov/stats.htm (last visited Oct. 21, 2006); Bankruptcy Filing Statistics for the U.S. Bankruptcy Court, District of Utah, http://www.utb.uscourts.gov/clerks_office/statistics.htm (last visited Oct. 21, 2006).

165 This information was obtained through e-mail from Deborah Colmyer, Process Specialist, U.S. Bankruptcy Court, District of Delaware (July 11, 2005). E-mail on file with the author.

166 18 U.S.C. § 152 (2006).

can find that he is not entitled to a discharge from his debts because he transferred property "with intent to hinder, delay, or defraud a creditor" within one year before filing his bankruptcy petition.[167] Even outside the realm of bankruptcy, defrauding creditors is a crime under several other state and federal laws.[168]

CONCLUSION

Asset protection trusts are merely the newest in a long line of asset protection devices, and they are subject to abuse as much as virtually any other legal device.[169] As with other devices, however, for the most part APT settlors will have honest motives and should be allowed to protect the assets they have amassed through years of working and prudent investing. Eventually all the commentators will realize that APTs are really no big deal.

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[167] 11 U.S.C. § 727(a)(2) (2006).

[168] *See, e.g.,* 18 U.S.C. § 658 (2006); ALA. CODE § 13A-9-48 (2006); ALASKA STAT. § 11.46.730 (2006); DEL. CODE ANN. tit. 11, § 892 (2006); WYO. STAT. ANN. § 6-3-607 (2006).

[169] *See* Osborne et al., *supra* note 62, at 1432 ("Despite numerous . . . abuses in tax planning, no one has yet called for an end to tax planning. . . . [T]hough there have been abuses of asset protection planning tools and methods, that should not end the right to asset protection planning for those clients who are willing to play by the rules.").