Why offshore asset protection is superior to domestic

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Trusts have been used since the Crusades to protect assets - this was the original reason trusts came into being. Over the past several hundred years this protective essence of the trust has been eroded in the US and other countries by court decisions and legislation which prevent one from 'having his cake and eating it too' in an asset protection sense.

Thus, in the US, very limited (if any) asset protection is available for the settlor (creator) of a trust if he or she is also a beneficiary of his or her trust. In order to obtain meaningful asset protection for a settlor-beneficiary one must establish a trust in a non-US jurisdiction with favorable trust protection laws.

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THE OFFSHORE TRUST.

The offshore asset protection trust (APT) is inherently more protective than a domestic trust for several reasons, not the least of which is its 'foreignness'.

Consider the thought processes of a claimant's attorney contemplating a lawsuit to recover assets from a trust in a foreign country. He knows little or nothing of the country's laws, procedures, customs, costs, or even its currency. These factors are immediate hurdles in a legal obstacle course upon which he is about to embark.

Because of these hurdles, the APT is not an attractive target of litigation, as its domestic counterpart likely will be. The domestic trust and its trustees are subject to local US jurisdiction, and both are just as easily included in litigation (on some legal theory or another) as is the settlor – not so with the APT. The very fact that the APT is an offshore trust will have a significant deterrent effect on the claimant's decision regarding whether or to what extent to pursue trust assets. In addition, since 2005, a domestic trust can be 'undone' for up to 10 years after it is established if the settlor goes through bankruptcy. This means that if any protection is available through the use of a domestic asset protection trust, that protection cannot be certain until 10 years have elapsed with respect to each transfer of assets into the domestic trust.

Moreover, the trust laws of certain foreign jurisdictions are far more protective than our domestic trust laws. Therefore, if the claimant is (somehow) undaunted by the geographical, financial, and procedural hurdles of the APT obstacle course, he will be confronted with the brick wall of the foreign legal system as the final hurdle.

The components of this brick wall in a properly selected offshore jurisdiction are the facts that: the claimant will have to start his lawsuit all over again – from square one, because the foreign jurisdiction will not recognize his US judgment, he will have to utilize an attorney in the foreign jurisdiction, that foreign attorney will likely not take the case on a contingency fee basis (as US attorneys do), and the applicable foreign statute of limitations will likely have expired by the time the litigation reaches the foreign jurisdiction. Game over!

Because the US court system is often unpredictable, the key to truly effective asset protection is to remove the ability of any US court to reach the assets. If - and this is a big 'if' - an offshore trust has been properly structured and implemented it will be impossible for any US court to reach liquid assets held in the trust. Why? Because no US court will have any power over the foreign trustee – the company that administers the trust. Effective protection of real estate and other 'immovable' assets is accomplished by making the asset 'not worth going after' for a creditor. This is done by pledging the immovable asset as collateral for a loan from an offshore lender and securing the loan proceeds in the offshore trust with the other financial assets. This strategy will not work with a domestic trust.

US TAX CONSEQUENCES.

The APT is typically set up as a 'tax neutral' trust. This means that it does not save you any income tax nor does it cost you any income tax.

Unfortunately, whenever a planning technique becomes popular or receives some notoriety, all types of promoters come out of the woodwork. Some unscrupulous or misguided promoters have been claiming the APT can offer certain income tax advantages by 'going offshore'. This is never true for a US citizen or resident. Simply put: There are no legitimate income tax advantages available to a US citizen or resident using an offshore trust of any kind. In the authors' opinion, those who promote such advantages are either ignorant of the law, or just don't care what it says. Beware: If you follow the advice of such a promoter you will pay for his ignorance. ■