6-1-1994

It's Better in The Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer

Jonathan L. Mazrich

It's Better in The Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer

Jonathan L. Mezrich*

I. Introduction

Bob Smith[1] is a single, established physician in private practice in Philadelphia. He specializes in Obstetrics and Gynecology. He owns his own condominium (subject to mortgage), has a number of family heirlooms and valuable antiques, owns a car, has a substantial portfolio of stocks, bonds and mutual funds, and has a significant personal bank account. He practices medicine through a closely-held corporation (Bob Smith, Inc.), and maintains separate books and corporate business accounts.

Bob Smith, Inc. carries several million dollars of malpractice liability insurance. Nevertheless, in an increasingly litigious society,[2] Bob lives in constant fear of losing his personal property to a disgruntled parent who's child he was not able to save due to complications of pregnancy, or due to a suit stemming from a congenital abnormality or deformity. What might Bob do to protect himself personally from financial ruin?

If Bob was married, one possibility might be to transfer property into his wife's name,[3] or hold title to the condominium in tenancy by

---

*Jonathan L. Mezrich, J.D., LL.M., is a member of the Pennsylvania and District of Columbia bars. He works as an attorney at the Rockville, Maryland, law firm of Weinberg & Jacobs.

1. The names and descriptions used herein are purely fictional.

2. Hywel Jones, *Bahamian Asset Protection Trusts; The Latest Thing in Risk Management*, THE BAHAMAS HANDBOOK & BUSINESSMAN'S ANNUAL (1994) (available from the Bahamian Embassy, Washington, D.C.) (stating that "[T]here is no doubt that we are all becoming increasingly vulnerable to . . . irresponsible and almost random litigation . . . ."); PETER HUBER, GALILEO'S REVENGE 2 (1991) (stating that "Maverick scientists shunned by their reputable colleagues have been embraced by lawyers. Eccentric theories that no respectable government agency would ever fund are rewarded munificently by the courts."); ROBERT WILLS, LAWYERS ARE KILLING AMERICA 9 (1990) (stating that "anyone who watches television and reads newspapers realizes that America has a rising tide of litigation."); Kathy Kristof, *Protecting Assets is Not Only for the Wealthy*, L.A. TIMES, June 6, 1993, at D4 (stating "one lawsuit is filed every 30 seconds in the United States . . . . About one in every 10 adults gets sued each year.").

3. Rhonda H. Brink, *Planning Perspectives for Creditor Conscious Clients*, INST. ON EST. PLAN., 7-1, 7-47 (1988). Such a transfer would be subject to limitations under Pennsylvania's Uniform Fraudulent Transfer Act, 12 PA. CONS. STAT. ANN. §§ 5101-5110 (1994); *see infra* Part III.

the entireties. While this would afford some protection if done sufficiently before a claim arose so as not to be fraudulent, the rising rates of divorce in the United States suggest that this strategy might not be the most intelligent alternative.[4] Incorporation of personal property is sometimes useful, but judicial decisions are constantly broadening a claimant's ability to "pierce the corporate veil" or to show that a corporation is merely the "alter ego" of a defendant.[5] Another problem facing physicians is the staggering increase in the cost of insurance. In response to the increase of litigation in the United States, many insurance companies are now unwilling to insure higher risk practices, and some practitioners are unable to afford such insurance, even if available.[6] Multi-tiered corporations and domestic trusts sometimes slow down smaller creditors, but seldom do they truly insulate the ultimate individual shareholder. Bankruptcy appears to be the recent vehicle of choice in protecting individuals from financial obliteration, but it involves costs and may limit the ability of the individual to subsequently deal with cautious creditors or to obtain investment capital.

There is, however, one solution sometimes overlooked by attorneys advising their clients on asset protection. This is the off-shore trust. Once a popular investment vehicle because of its tax deferral possibilities, the off-shore trust's use for tax avoidance has been significantly curtailed by Congress. The off-shore, or foreign situs, trusts are now, in most cases, "tax neutral," offering no significant tax advantages or disadvantages.[7] Nevertheless, off-shore trusts are beginning to be touted by some practitioners as the most foolproof

---

4. Kathy Kristof, *How to Protect Your Assets and Sleep at Night*, L.A. TIMES, June 20, 1993, at D4.

5. Joan Warner, *Barricading Your Assets Before You're Sued*, BUSINESS WEEK, July 29, 1991, at 82 (stating that "In the old days, professionals who feared malpractice or liability suits incorporated themselves. But courts are increasingly letting creditors and litigants get past the corporate shield."). *See also* Brink, *supra* note 3, at 7-29.

6. Kristof, *supra* note 4. The same is true for a number of other professionals besides doctors, where individuals are expected to carry liability insurance, and might be sued in their individual, as well as professional capacity; *e.g.*, corporate officers, lawyers, accountants, architects, and tavern owners, etc. *See* Brink, *supra* note 3, at 7-4; Charles Bruce, Stephen Gray and Edward Luria, *Exploring the Protection of Assets Trusts*, TRUSTS & ESTATES, Nov. 1991, at 32.

7. E. Wyckoff, *U.S. Taxation of Foreign Trusts and U.S. and Non-U.S. Trust Grantors*, in U.S. TAXATION OF INT'L OPERATIONS 6241, 6247 (1991); Stephen Strahler, *Personal Preservation: Developers Go Offshore to Save Skin*, CRAIN'S CHICAGO BUSINESS, May 6, 1991, at 17 (quoting Donald Baker, an attorney with the Chicago office of Baker & McKenzie, who states that "[T]he trusts themselves . . . do not alter tax liabilities of the grantor, or owner. 'These trusts are transparent from a tax point of view.'").

method of asset protection available. This article will discuss the use of such foreign situs trusts as a wealth conservation tool, the tax implications, and the I.R.S. compliance requirements. The article will also discuss limitations under Pennsylvania's Uniform Fraudulent Transfers Act, ethical considerations under Pennsylvania's Rules of Professional Conduct, and whether these trusts should be permitted as a defense against future creditors and claimants in today's litigious society.

II. The "Asset Protection Trust"

The off-shore trust generally offers investors a higher degree of insulation from creditors and claimants than can be obtained domestically. In addition to asset protection, which should not be the *sole* stated purpose of the trust,[8] there are a variety of other beneficial uses for off-shore trusts of which a client should be made aware. Foreign situs entities are useful in estate planning. Trusts should be drafted in such a way to avoid probate and to carry out a settlor's testamentary wishes, should he or she die during the term of the trust.[9] To this end, an attorney should inquire to whom a settlor would like to transfer his or her assets upon death.

Foreign situs trusts are also beneficial vehicles for economic diversification, and may aid in expanding one's global investments.[10] Additionally, if the settlor desires to get married during continuance of a trust, in some state, off-shore trusts can serve as significant antenuptial protection of a settlor's separate assets.[11] Moreover, foreign trusts also offer a high degree of confidentiality, and may help to achieve anonymity with respect to wealth.[12] Finally, off-shore trusts may be used to plan for the contingency of changing one's domicile or citizenship, should one ultimately choose to retire in another jurisdiction.[13]

---

8. *See infra* notes 41-44 and accompanying text.

9. Duncan Osborne, *New Age Estate Planning: Offshore Trusts*, INST. ON EST. PLAN., 17-1, 17-11 (1993).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Other reasons cited by proponents of offshore trusts are: "the avoidance of forced dispositions;" "the preservation of entitlements (e.g. medicare and medicaid);" "marital property planning (e.g. partitions of community property, spousal gifts, and QTIP trusts);" and "tax planning (e.g. exemption equivalent trusts and $1,000,000 generation-skipping transfer exemption trusts)." *Id. See also* Richard S. Amari, *Asset Protection Trusts: Nuclear Bomb Shelter*, THE FLORIDA BAR JOURNAL, July/August 1992, at 17, 18 (stating that "the [Asset Protection Trust] is a flexible way to plan for the potential disability or unavailability of the grantor.").

It is important to understand that off-shore trusts may not be used to avoid existing, vested (matured) creditors, tort claimants in matters where a cause of action has already arisen, tort claimants with judgments or suits pending at the time of conveyance, or anyone who is a reasonably foreseeable creditor or claimant.[14] As to such persons, a transfer into trust is fraudulent and illegal.[15] However, asset protection trusts may be of significant value to protect against future creditors and presently unknown and unforeseeable claimants. Attorneys utilizing asset protection trusts should be careful to ensure that, in addition to the other valid uses discussed above, a client merely wishes to protect himself from the future, unforeseeable creditor or claimant, and is not seeking to defraud someone with an existing claim.

To use a trust for asset protection, a settlor will have to be willing to give up some or all control of his or her assets for a period of time. The basic theory is that assets, representing only a "nest-egg" portion of a settlor's estate, are placed in an irrevocable trust, for a period of years (typically ten of fifteen years).[16] The settlor will neither be a trustee, nor a beneficiary of the trust, and will merely retain a contingent reversionary interest in the property.[17] The contingency for the reversion will be whether or not the settlor exercises his right to renew the trust for another period of ten years (or whatever trust term is chosen) during the continuance of the trust.[18] The trust will be typically arranged so that the named beneficiary receives little or no income from the trust, so the assets will remain untouched during the continuance of the trust.[19] The key is control; the less control a settlor retains, the less likely assets can be reached by a future creditor or claimant.[20] Because the settlor typically will have no real vested rights to the assets in the trust, no power to revoke the trust during its continuance, and the named trustees and beneficiary are typically

14. For example, in the Bob Smith example, Bob cannot avoid liability to his mortgagee or a claim arising from treatment of a patient prior to the transfer.

15. *See infra* Part III.

16. Amari, *supra* note 13, at 18-19.

17. *Id.* at 18.

18. The trust indenture should provide that renewal is discretionary to the trustee. Amari, *supra* note 13, at 19. *See also* Bruce, Gray and Luria, *supra* note 6, at 35 (stating that "This extension power protects against the appearance of creditors near the end of the trust's initial term.").

19. Amari, *supra* note 13, at 18.

20. Brink, *supra* note 3, at 7-9; Osborne, *supra* note 9, at 17-52.

independent, if not unrelated, persons,[21] a creditor or claimant will be hard pressed to reach the trust assets, absent a showing of fraud.[22]

There are two basic ways (with many variations) to set up a foreign situs trust.[23] If a settlor has valuable assets that he does not actively use (such as bonds or retirement accounts), he or she may want to transfer these assets both in title, as well as physically, out of the country.[24] A transfer of these kinds of assets to a foreign trust, which could subsequently redeposit the funds in its own name in another jurisdiction (e.g., a Swiss bank account), presents an often insurmountable obstacle to the typical creditor, as well as offers the settlor confidentiality, diversification, and the protection of a politically stable banking community. The chief disadvantage is that in order to offer this degree of protection, a settlor will have to arrange the configuration so that all jurisdictional ties with the United States federal and state judicial systems are severed.[25] The settlor will have to give up all personal control and use of the assets for the period of the trust. The settlor also must have confidence in those that are selected as trustees.[26]

The second alternative is to select a foreign jurisdiction, and use it in conjunction with a newly created domestic entity, (for example, an

---

21. The Trustees will typically be foreign attorneys, off-shore Trust Companies with no U.S. branches or offices, or recognized international banking institutions.

22. *See infra* Part III for discussion of Pennsylvania's Uniform Fraudulent Transfers Act, 12 PA. CONS. STAT. ANN. § 5101-5110 (1994).

23. *See, e.g.*, Bruce, Gray and Luria, *supra* note 6, at 36; Osborne and Giordani, *Offshore Trusts: Asset Protection Features*, ASSET PROTECTION IN ESTATE PLANNING (seminar materials distributed at D.C. Bar 1994 Winter Convention) at 23.

24. A related question is, how wealthy must an individual be to benefit from such asset planning? Opinions of trust advocates differ. One Bahamian Trust Company manager notes that "[r]ealistically, it is probably not worth going through all this for much less than $1 million worth of assets which should probably represent no more than 30-40 per cent of a person's total estate." Jones, *supra* note 2. Other proponents perceive benefits at much lower thresholds. L.M. Sixel, *Keeping Cash Covered; Owners Find Ways to Save Their Assets*, THE HOUSTON CHRONICLE, July 13, 1992, at 6 ("Typically trustees will not open an account under $100,000 and some won't accept less than $500,000."); Barbara Wall, *The Offshore Trust: Notorious but Useful*, INTERNATIONAL HERALD TRIBUNE, Feb. 22, 1992 at 13 ("Because of the costs involved, advisors seldom recommend a trust to clients with assets under $500,000."); Kathy Kristof, *Protecting Assets is Not Only for the Wealthy*, L.A. TIMES, June 6, 1993, at D-4 ("While the strategies are now mainly popular with professionals . . . [Jay Mitton, an attorney at Mitton & Burmingham, Newport Beach, CA] predicts that anyone with a home and income over $30,000 may eventually turn to asset protection in some form."). It is this author's opinion that an asset protection trust may be a useful entity for any solvent person who has at least $30,000 - $50,000 of cash or assets that are not needed for a decade or so.

25. Osborne, *supra* note 9, at 17-52.

26. *Id.* at 17-53.

S corporation, family partnership or Limited Liability Company).[27] The trust would own 100% of the domestic entity, of which the settlor would act as chief executive officer and director (or general partner, in the family partnership).[28] In this arrangement, the assets would remain in the United States, but are potentially susceptible to local jurisdiction.[29] The goal of this strategy is that, although trust assets may be theoretically reachable, the more aggressive foreign law governing the trust and its assets will be applicable, and may defeat or discourage claimants.[30]

It is also possible to use a hybrid of these two strategies, where some of the settlor's assets are held by a trust-owned domestic entity for the settlor's use, and others are physically stored away safe in some foreign jurisdiction.[31] The questions for the settlor are which assets he or she can do without for the period of the trust, how much he or she can transfer and still remain solvent, and how comfortable he or she is in giving control of various assets to a foreign third party.[32]

---

27. Bruce, Gray and Luria, *supra* note 6, at 36.

28. *Id.*

29. *Id.*

30. Osborne, *supra* note 9, at 17-24. When using this alternative, a jurisdiction with more aggressive anti-creditor trust laws should be recommended. Osborne and Giordani, *supra* note 23, at 49. Thomas Carles, *Asset Protection Trusts: Potent Claims Shields*, N.J.L.J., Nov. 8, 1993, at 10 (Even if creditors likely will prevail under foreign law, the fear of application of a foreign law may induce a better settlement figure.).

31. The [domestic] assets would be reachable should a creditor "pierce the corporate veil," or show that the entity was the "alter ego" of the settlor.

32. It is especially important when using an asset protection trust that a settlor remain solvent, and retain sufficient funds to pay all reasonably foreseeable creditors and claimants. *See infra* note 38-39 and accompanying text. For this reason, estate planners suggest that the settlor transfer only a "nest-egg" portion of his or her estate into trust. Osborne, *supra* note 9, at 17-26. In the scenario presented above, Bob Smith may wish to transfer ownership of some portion of his stocks, bonds and mutual funds physically out of the country, to be held by the Trustee. Such securities will typically be held on the Trustee books in "non-certificated" form. Bruce, Gray and Luria, *supra* note 6, at 36. "They are usually held by a large 'depot' or custodian under a DTC number and are accounted for in the books of the custodian." *Id.* "That stock portfolio should represent no more than two-thirds of your net worth," Warner, *supra* note 5, at 82. Similarly, some portion of Bob's bank account could be transferred to the Trustees and redeposited by the Trust in a foreign bank, where it could accumulate interest, untouched for the period of the trust. "While some writers claim that any type of asset is appropriate to fund an [Asset Protection Trust], it is likely that the best assets are liquid . . . . [L]iquid assets such as cash, stocks, bonds and cash equivalents are most effective as a funding mechanism." Carles, *supra* note 30, at 10. However, "[t]he settlor must be careful not to put income-producing assets in a grantor trust where he or she will be taxable on that income, but ineligible for trust dispositions." Charles Bruce & Stephen Gray, *Offshore Protection-of-Assets Trusts*, U.S. TAXATION OF INT'L OPERATIONS: TAX IDEAS 13,701, 13,703 (1988). Bob could also decide whether his antiques and heirlooms needed to be kept in the United States, and if not, they could be best protected in a safety deposit box off-shore. Bob's car, condominium (subject to the mortgage agreement, and assignment rights therein) and

III. Pennsylvania's Uniform Fraudulent Transfers Act

Pennsylvania's Uniform Fraudulent Transfers Act ("UFTA" or "the Act"), may limit the use of an asset protection trust.[33] The Act determines when a transaction is fraudulent to creditors and claimants, and thus may limit when and to what extent one can transfer property into trust.

Under the Act, a "transfer" is defined broadly and would include a transfer to an off-shore trust. A "creditor" is defined as "a person who has a claim."[34] "Claim" is defined as "[a] right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured or unsecured."[35] This definition is broad enough to include tort claimants. Similarly, a "debt" is defined as "liability on a claim."[36] The UFTA thus covers basically all reasonably foreseeable creditors and claimants.

Section 5105 explains that if a person is "insolvent," or renders him or herself "insolvent" by a transfer for less than "reasonably equivalent value," the transfer is "fraudulent as to a creditor whose claim arose before the transfer was made."[37] Similarly, under Section 5104(a)(2)(i), if a transfer is made by a person engaged or about to

---

assets that are immovable or used by Bob regularly, could be transferred (to the extent Bob remains solvent), in title to a newly formed S corporation owned by the foreign trust, for Bob's use as an officer of the corporation. Again, the assets transferred should only represent a "nest-egg" amount, and Bob should not transfer all or substantially all his property into trust.

33. Pennsylvania's Uniform Fraudulent Transfers Act, 12 PA. CONS. STAT. ANN. §§ 5101-5110 (1994), was signed into law by Acting Governor Mark Singel on December 3, 1993, and became effective on February 1, 1994. This Act repealed Pennsylvania's Uniform Fraudulent Conveyances Act (39 PA. STAT. ANN. §§ 351-363), which had been in effect since 1921. *Legislative Bulletin*, THE PENNSYLVANIA LAWYER, March 1994, at 7; Frederic Clark, *New Pa. Uniform Fraudulent Transfers Act; Important Difference Included in Adoption of Statute*, THE LEGAL INTELLIGENCER, March 1994, at 10.

34. *Id.*

35. *Id.*

36. *Id.*

37. 12 PA. CONS. STAT. ANN. § 5105 (1994). Under § 5102 insolvency occurs when "at fair valuations, the sum of the debtor's debt is greater than all of the debtor's assets." A debtor will also be presumed insolvent if the debtor is "generally not paying . . . debts as they become due." 12 PA. CONS. STAT. ANN. § 5102(b). Under § 5103, "reasonably equivalent value" is given when "the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale or the exercise of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement or pursuant to a regularly conducted, non-collusive execution sale." 12 PA. CONS. STAT. ANN. § 5103. While a transfer to an asset protection trust is almost never made for reasonably equivalent value, this provision will be irrelevant so long as the transferor remains solvent. 12 PA. CONS. STAT. ANN. § 5105.

engage in a business for which the property retained is unreasonably small capital, the transfer will be fraudulent as to creditors during the continuance of such business, without regard to actual intent, if the transfer is made for insufficient value.[38] Thus it is important that a person not make him or herself insolvent in the transfer to the trust, and that the settlor retain sufficient funds to pay all reasonably foreseeable claims.[39]

Section 5104(a)(1), entitled "Transfers Fraudulent as to Present and Future Creditors," provides that a conveyance made with an actual intent "to hinder, delay or defraud any creditor of the debtor," is "fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred."[40] This section is troublesome for proponents of the asset protection trust.[41] However, it is not an insurmountable obstacle. It is thus important that asset protection not be the *only* reason for such a trust to be organized.[42] Foreign situs trusts can be justified as an important part

---

38. 12 PA. CONST. STAT. ANN. § 5104(a)(2)(ii) also provides that transfers made prior to a person's incurring debts beyond his or her ability to pay as they mature, is fraudulent as to both present and future creditors.

39. Note: it is irrelevant that a claimant is not reasonably foreseeable if the settlor's intent was to defraud. 12 PA. CONS. STAT. ANN.. § 5104(a)(1) (1994). It is also important to note that the provisions of § 5104 are applicable to "[t]ransfers fraudulent as to present *and future* creditors." 12 PA. CONS. STAT. ANN. § 5104 (emphasis added). Clearly in the Bob Smith example, *see supra* text accompanying notes 1-6, the debt owed the mortgagee of Bob's condominium cannot be avoided by such a transfer, and Bob will be expected to retain sufficient funds to cover this, as well as any other reasonably foreseeable obligation. Thus, a conveyance to trust likely will be fraudulent as to any patient Bob has already treated. However, the transfer would not be fraudulent as to wholly unanticipated future claimants.

> While it is perfectly ethical to take steps to ward off future liabilities, it may be improper to take drastic steps merely to keep one jump ahead of existing creditors. For example, a surgeon who maintains a responsible level of malpractice insurance and who is not aware of any pending claims or contingent liabilities should have no problem with transferring assets to protect against future hypothetical creditors.

Edward Lyon, *Some Trusts Protect Assets From Lawsuits*, NATIONAL UNDERWRITER, Oct. 26, 1992, at 9.

40. 12 PA. CONS. STAT. ANN. § 5104(a)(1) (1994).

41. "[T]he prospective creditor does not have to be reasonably foreseeable to the debtor at the time the initial transfer is made to the trust. Rather, a transfer is considered fraudulent as to anyone who becomes a creditor if the debtor's actual intent when making the transfer was to hinder creditors." Carles, *supra* note 30, at 12.

42. "Asset protection for asset protection's sake is generally held to be illegal . . . ," Kathy Kristof, *How to Protect Your Assets and Sleep at Night*, L.A. TIMES, June 20, 1993, at D4. "U.S. courts do not want financial criminals to manipulate the system to hide their assets from legitimate claims, so they generally void any technique that was used solely to protect assets from creditors and litigants. But they are hesitant to dismiss techniques that were employed for legitimate estate planning reasons." Kathy Kristof, *Protecting Assets is Not Only for the Wealthy*, L.A. TIMES, June 6, 1993, at D4.

of one's strategy of geographic diversification, a way to avoid probate at death, and by other non-fraudulent uses.[43] A client should be advised of the "non-asset protection" possibilities provided by such trusts, and the trust document should be tailored to satisfy the settlor's individual diversification and estate planning needs. Additionally, if a person retains sufficient assets to pay all reasonably foreseeable debts, and merely transfers a "nest egg" amount into trust, it is unlikely that he or she will be deemed to possess the requisite intent to defraud.[44]

Title 12, section 5107 discusses the remedies available to creditors. If a transfer is fraudulent, a creditor may obtain the following relief:

> (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
>
> (2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by applicable law.
>
> (3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> > (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

---

43. *See supra* note 13.

44. The Uniform Fraudulent Transfers Act, unlike its predecessor Uniform Fraudulent Conveyances Act, contains a list of eleven "badges of fraud," which are presumptive circumstantial evidence of a transferor's fraudulent intent. *See generally* Clark, *supra* note 33, at 10. They are:

1. The transfer or obligation was to an insider;
2. The debtor retained possession or control of the property transferred after the transfer;
3. The transfer or obligation was disclosed or concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. The transfer was of substantially all the debtor's assets;
6. The debtor absconded;
7. The debtor removed or concealed assets;
8. The value of the consideration received by the debtor was [not] reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

12 PA. CONS. STAT. ANN. § 5104(b)(1)-(11) (1994). It is thus important that the settlor be able to overcome the presumption of fraudulent intent raised by these "badges of fraud."

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.[45]

A creditor with a judgment also may "levy execution on the asset transferred or its proceeds."[46]

Another important change in Pennsylvania's Uniform Fraudulent Transfers Act from the predecessor Uniform Fraudulent Conveyances Act is the statute of limitations.[47] Section 5109 creates a four year statute of limitations for all fraudulent transfer actions, except those involving intentional fraud.[48] The limitation period for intentional fraud is the longer of four years or one year after the fraud was or could reasonably have been discovered.[49]

IV. Bahamian Trust Law

"To encourage investment in their countries, many smaller nations have enacted laws favorable to people trying to shield their assets."[50] The Bahamas, the Cayman Islands, BWI, the Cook Islands, and Gibraltar are popular jurisdictions for asset protection trusts due to their adherence to English common law, their vigorous trust laws replete with obstacles to creditors, their government mandated bank secrecy laws and traditions of confidentiality, a resort atmosphere that allows settlors to combine business with pleasure when dealing with trustees and checking on assets, and the fact that these countries conduct business primarily in the English language.[51]

The Bahamas is a popular country for foreign situs trusts due to its established banking and trust industry and its proximity to the United States. The Bahamas is a group of 700 islands and 2000 cays, the closest island being located just 50 miles off the coast of Florida.[52]

---

45. 12 PA. CONS. STAT. ANN. § 5107(a)(1)-(3).

46. 12 PA. CONS. STAT. ANN. § 5107(b). This avenue of relief is very unlikely to be utilized if the assets are no longer in a U.S. jurisdiction and reside in a jurisdiction that ignores U.S. judgments.

47. The Uniform Fraudulent Conveyances Act contained no internal statute of limitations; actions were governed by the applicable provisions of Pennsylvania's general statute of limitations. Clark, *supra* note 33, at 10.

48. 12 PA. CONS. STAT. ANN. § 5104(a)(1).

49. 12 PA. CONS. STAT. ANN. § 5109; Clark, *supra* note 33, at 10.

50. Carles, *supra* note 30, at 10.

51. Other jurisdictions such as Belize and Liechtenstein are also popular, although English is not the native tongue. In fact, foreign jurisdictions that do not conduct cases in English may in and of themselves cause difficulties for creditors pursuing assets in the foreign jurisdiction.

52. John Rodway, *Taxation and Investment in the Bahamas, in* INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION 1 (1993).

The Bahamas is an independent member of the British Commonwealth, has a tradition of adherence to English common law, and all business in The Bahamas is conducted exclusively in English.[53] The Bahamas is a politically and economically stable jurisdiction, has up-to-date communication technology, regular jet air service to the major U.S. east-coast cities, a significant presence of international legal, banking, and financial institutions, and is frequented as a "tourist paradise."[54] There are no local taxes on a trust situated in The Bahamas.[55] The Bahamas has criminally enforced bank and trust secrecy laws and a long-standing tradition of confidentiality.[56] Special corporate entities, called International Business Companies (IBCs) are permitted under Bahamian law and are designed for use with trusts.[57]

The Bahamas, like the other jurisdictions cited above, has gone to great lengths to make its laws appealing to foreign investors. A number of local trust laws make The Bahamas and other foreign situs particularly good places to protect assets. Bahamian fraudulent conveyance law, contained in the Fraudulent Dispositions Act, 1991, provides: "Subject to the provisions of this Act, every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced."[58] "Intent to defraud" is defined as "an intention of a transferor willfully to defeat an obligation owed to a creditor."[59] "Obligation" is defined as "an obligation or liability (which shall include a contingent liability) which existed on or prior to the date of a relevant disposition, and of which the transferor had actual notice."[60] Thus future creditors appear to have no recourse under Bahamian law. The burden of proof in establishing intent to defraud is on the creditor or claimant.[61]

---

53. *Id.*

54. Sidney Pine, Robert Whoriskey and Ralph Seligman, *The Tax and Business Benefits of the Bahamas*, *in* U.S. TAXATION OF INT'L OPERATIONS: TAX IDEAS 8841, 8844-5 (1986). Also useful is the fact that the value of one Bahamian dollar is equal to one U.S. dollar, and is expected to remain the same. Osborne and Giordani, *supra* note 23, at 29.

55. Rodway, *supra* note 51, at 31.

56. *International Banking and Trust Activities in The Bahamas*, THE CENTRAL BANK OF THE BAHAMAS AND ASSOCIATION OF INTERNATIONAL BANKS AND TRUST COMPANIES IN THE BAHAMAS 14 (1990) (available from the Bahamian Embassy, Washington, D.C.).

57. "By combining an IBC with a trust, one achieves a double layer of confidentiality, and the structure provides a simple distribution mechanism at the death of the settlor because only shares in the IBC and not trust assets are distributed. Osborne, *supra* note 9, at 17-32.

58. Fraudulent Dispositions Act 1991, No. 1 of 1991, Part 4(3) (Bah.).

59. *Id.* at Part 2.

60. *Id.*

61. *Id.* at Part 4(2).

The Bahamian courts do not honor foreign judgments, and so creditors will have to relitigate in The Bahamas to attach assets located in that jurisdiction.[62] Bringing suit in The Bahamas will be difficult for creditors because they will have to hire an attorney familiar with Bahamian law and procedure, and they will have to bear the expense of bringing their witnesses and evidence to The Bahamas.[63] Should a creditor desire to bring suit in The Bahamas, he or she will typically be required to post a significant bond if he or she does not reside or have assets in The Bahamas.[64] Also important is the fact that the Bahamian Statute of Limitations expires two years from the conveyance; if a creditor has not filed suit within two years of a transfer of assets into trust, the creditor will not be able to prevail in a Bahamian court.[65] Bahamian law also permits the use of "flight provisions" in trusts.[66] Such flight provisions permit a trustee to change the situs of the trust to another jurisdiction if the trust assets appear to be endangered by an act of state or the progress of a creditor.[67]

V. Tax Implications and Compliance with the IRS Filing Requirements

The goal of an asset protection trust is generally not the minimization of taxes.[68] As stated above, the treatment of an asset

---

62. Giselle Pyfrom, *Asset Protection Trusts: A Legal Perspective*, *in* THE BAHAMAS HANDBOOK AND BUSINESSMAN'S ANNUAL (1994) (available from The Bahamian Embassy, Washington, D.C.). Many plaintiff lawyers will not want to go to trial against a settlor because any judgment recovered likely will be uncollectible. Graham Button, *Pulling up the Drawbridge*, FORBES, April 27, 1992, at 80.

63. *See, e.g.*, Carles, *supra* note 30, at 10.

64. Pyfrom, *supra* note 61.

65. Fraudulent Dispositions Act, 1991, No. 1 of 1991, Part 4(3) (Bah.) ("No action or proceedings shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition."). Some jurisdictions are even more favorable. The Cook Islands, a group of independent islands near New Zealand, has a statute of limitations of one year from the date of conveyance, or two years from the cause of action. Button, *supra* note 61, at 80. Gibraltar bars creditors from suits immediately if the settlor was not insolvent after transfer and the trust is properly registered. Osborne and Giordani, *supra* note 23, at 43.

66. Trusts (Choice of Governing Law) Act 1989, No. 33 of 1989, (Bah.) provides:

> Provision for change of governing law
>
> 5. (1) Where a term of the trust so provides, the governing law may be changed to or from the laws of The Bahamas if —
>
> (b) in the case of a change from the laws of The Bahamas, the new governing law would recognize the validity of the trust and the respective interests of the beneficiaries.

Id. at Part 5.

67. *Id.*

68. "Currently, [subsequent to the 1976 Tax Reform Act] there do not appear to be any U.S. tax benefits in connection with foreign trusts created by U.S. grantors for U.S. beneficiaries."

protection trust is generally "tax neutral."[69] Most of the off-shore jurisdictions attractive to trust settlors will not locally tax the trust or settlor.[70] Under U.S. federal tax law, trusts are governed by Internal Revenue Code §§ 671-79. Generally, an asset protection trust should be treated as a "grantor trust," and the settlor will be taxed as if he were the "owner."[71]

Internal Revenue Code § 1491 imposes a 35% excise tax to the extent the fair market value of property transferred to a trust exceeds the basis of the property in the hands of the transferor.[72] I.R.C. § 1491, however, will not apply to the initial transfer of appreciated property transferred to a grantor trust.[73] Revenue Ruling 87-61 further explains that § 1491 should be imposed if and when a settlor renounces his or her powers over a trust during his lifetime (and ceases to be the "owner").[74]

It should be noted that there will be no gift taxes imposed on a transfer to the trust.[75] This is because the settlor will retain a

---

Osborne, *supra*, note 9, at 17-12. There may be a tax benefit if the trust is created "for the benefit" of foreign beneficiaries. *Id.* at 17-15.

69. *See supra* note 7 and accompanying text.

70. A settlor should note that if local taxes do apply, the settlor should inquire as to the applicability of the foreign tax credit. (I.R.C. § 901 (1991)), and whether there is a governing income tax treaty that may obviate double taxation. (There is no such treaty with The Bahamas.)

71. Amari, *supra* note 13, at 21; I.R.C. §§ 671, 679; Rev. Rul. 87-61, 1987-2 C.B. 219. "A trust is a 'grantor trust' if the grantor . . . (1) possesses a reversionary interest in either corpus or income which exceeds 5 percent of the value of the trust (or applicable portion) as of the date of the trust's inception . . . ." Bruce, Gray and Luria, *supra* note 6, at 38. Since the whole point of an asset protection trust is to preserve the assets, intact for the settlor,

> [t]he assets protection trust would be a grantor trust because (1) the grantor would have a reversionary interest greater than 5 percent in all trust assets, assuming (as is required) under Code Sec. 674(c) the maximum exercise of discretion by the trustees in favor of the grantor because the trustees may decide to retain all trust assets and income accumulated thereon and return such to the settlor at the end of the term of the trust selected by the settlor; note that extension of the trust's term by the trustee after the initial trust period is treated as a "new" transfer under Code Sec. 673(d).

Bruce, Gray and Luria, *supra* note 6, at 38. Similarly, under I.R.C. § 674, a trust will be a grantor trust if the grantor or a "nonadverse party" (i.e., the trustee) has the power to dispose of income or corpus of the trust. Bruce, Gray and Luria, *supra* note 6, at 38. Current tax treatment will not affect the trust's status as a separate entity in creditor litigation.

72. Osborne, *supra* note 9, at 17-16. Of course, with cash transfers the fair market value never exceeds basis so § 1491 will not apply.

73. *Id.*

74. *Id.*; Rev. Rul. 87-61, 1987-2 C.B. 219. As long as the trust is treated as a "grantor Trust," the settlor will be considered as still owning the trust assets, and will not be subject to the excise tax under § 1491. Rev. Rule. 87-61, 1987-2 C.B. 219.

75. Amari, *supra* note 13, at 21; Carles, *supra* note 30, at 10.

contingent reversionary interest, and thus the transfer is considered an incomplete gift for gift tax purposes.[76]

The I.R.S. is so concerned that foreign transfers not be used to evade U.S. income taxes that through their compliance forms they have practically "blue-printed" how to set up a foreign situs trust. These forms must be supplied by the settlor or the settlor may be subject to civil penalties, as well as possible criminal charges.[77] Compliance with the I.R.S. filing requirements may assist the settlor against a charge of fraudulent transfer, because the settlor will be able to demonstrate an intent to comply with legal requirements.

The following *one time* reporting requirements must be met in the first year of the trust. A settlor must report transfers of assets to the trust on Schedule B, III, of his Form 1040 in any year he makes a transfer.[78] The settlor must file a Treasury Form 3520, "Creation of or Transfers to Certain Foreign Trusts," within 90 days of a transfer.[79] The settlor also will need to file a Form 926, "Return by a U.S. Transferor of Property to a Foreign Corporation, Foreign Estate or Trust, or Foreign Partnership," with his tax return in the year of a transfer.[80] The trustee will be required to file Form 56, "Notice Concerning Fiduciary Relationship."[81]

The following *annual* tax reporting requirements must be met with respect to the trust. Again, in any year in which a settlor transfers assets to the trust, the settlor must report the transfer on Form 1040, Schedule B.[82] The settlor also must file an annual Form 3520-A, "Annual Return of Foreign Trust With U.S. Beneficiaries," assuming the named beneficiary is a U.S. resident.[83] The trustee will need to file an attachment to Form 1041, "U.S. Fiduciary Income Tax Return,"

---

76. Carles, *supra* note 30, at 10.

77. Temp. Treas. Reg. § 16.3-1(f). I.R.C. § 7203 provides:

> Any person required under this title . . . or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $25,000 . . . or imprisoned not more than 1 year, or both . . . .

78. Osborne, *supra* note 9, at 17-22. Because I.R.C. § 1491 imposes a 35% excise tax on appreciated assets not transferred in an initial transfer to a trust, a settlor will typically only make one initial sizeable transfer of assets to the trust, and will create a new trust if he or she desires to transfer subsequent assets out of the country.

79. Temp. Treas. Reg. § 16.3-1(a); I.R.C. § 6048; Wyckoff, *supra* note 7, at 6261.

80. Osborne, *supra*, note 9, at 17-22.

81. *Id.*

82. *Id.*

83. Temp. Treas. Reg. § 404.6048-1(a); Wyckoff, *supra* note 7, at 6261.

to report trust income.[84] To file a Form 1041, the trustee will need to obtain a U.S. taxpayer identification number from the I.R.S. using Form SS-4.[85] Finally, if any money or assets are paid out to a beneficiary of the trust, the beneficiary must report the income on Schedule B to his or her Form 1040.[86]

Additionally, under the U.S. Bank Secrecy Act, a person who physically transports, mails, or ships monetary instruments of more than $10,000 between the U.S. and a foreign country, must file Customs Form 4790.[87] A person who has a financial interest in, or signature or other authority over, one or more financial accounts of more than $10,000 in a foreign country, must report that relationship on his tax return, and file Treasury Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts."[88]

VI. Ethical Considerations under Pennsylvania's Rules of Professional Conduct

Because an asset protection trust can enable a client to fraudulently evade legitimate creditors and tort claimants,[89] a number of ethical considerations come into play.

Rule 1.2(d) of the Pennsylvania Rules of Professional Conduct provides that:

> A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[90]

The Comment to this rule adds:

---

84. Osborne, *supra* note 9, at 17-22.

85. *Id.*

86. *Id.* Additionally, although the offshore trust will be an incomplete gift for gift tax purposes, it is advisable that the settlor file Treasury Form 709, U.S. Gift Tax Return. Osborne and Giordani, *supra* note 9, at 18. It is also suggested that the settlor file a Form W-9 in the trust's name. *Id.*

87. Osborne, *supra* note 23, at 17-23.

88. *Id.*; E. Wyckoff, *U.S. Taxation of Foreign Trusts: U.S. and Non-U.S. Beneficiaries*, *in* U.S. TAXATION OF INT'L OPERATIONS 6273, 6283-85 (1991).

89. "The strategies are highly controversial, largely because they still protect criminals and con men just as effectively as they protect everyone else." Kathy Kristof, *Protecting Assets is Not Only for the Wealthy*, L.A. TIMES, June 6, 1993, at D4.

90. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1990).

> The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity . . . . Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.[91]

Thus, while a lawyer may clearly explain the asset protection trust as a valid tool to protect a nest-egg sum for his client, he or she must emphasize that a client cannot violate fraudulent transfer laws and use an off-shore trust to avoid creditors and claimants with valid claims. Since the trust will typically involve moving assets outside of the reach of U.S. courts, and because of the secrecy laws of many off-shore jurisdictions, an attorney will have to use the utmost care not to "knowingly assist" an abusive client to hide assets. An attorney also must be careful to ensure that his or her client remains solvent after the transfer, and that the client does not have litigation or debts outstanding at the time of the transfer. One advocate of asset protection trusts has suggested that attorneys should always protect themselves by obtaining complete financial and income information from a client, and has emphasized the need for an affidavit of solvency from the client to protect the lawyer from subsequent creditor suits.[92] A lawyer also must explain the I.R.S. requirements involved in transferring assets to a foreign trust, and should take steps to ensure a client's compliance.[93]

However, since a foreign situs trust is recognized as an accepted form of asset protection and estate planning, the client ought to be advised of the potential it affords. Rule 1.4(b) of the Pennsylvania Rules of Professional Conduct states, "A lawyer should explain a matter to the extent necessary to permit the client to make informed decisions

---

91. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt.

92. Osborne, *supra* note 9, at 17-50. It should be noted that once a client's assets are safely in a foreign jurisdiction, the lawyer tends to be the only "deep pocket" for creditors to pursue. Additionally, if the client has used the trust to commit fraud or a crime, the lawyer in some cases may be civilly or criminally liable for conspiracy. Clifton Kruse, *The Relationship of Asset Protection Planning to the Law of Fraudulent Conveyancing*, ASSET PROTECTION IN ESTATE PLANNING (seminar materials distributed at D.C. Bar 1994 Winter Convention), at 43; Osborne and Giordani, *supra*, note 23, at 20.

93. *See infra* text accompanying notes 96-104.

regarding the representation."[94] Yet the comment to Rule 1.3 of the Pennsylvania Rules of Professional Conduct notes:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.[95]

Thus while it appears that a thorough lawyer should explain the asset protection trust to the client, the lawyer need not advocate its use. Because these trusts can be used to injure third parties, a lawyer may use caution, rather than blinding zeal, in protecting a client's interest. A lawyer may advise against the use of a foreign situs trust if the lawyer believes that these trusts are unethical, subject to abuse, or unpalatably unfair to valid future creditors.[96]

While the I.R.S. does not forbid use of foreign situs trusts as long as no federal tax avoidance or evasion is achieved, the I.R.S. has a number of compliance forms that must be completed when assets are transferred off-shore.[97] Rule 4.1 of the Pennsylvania Rules of Professional Conduct, "Truthfulness in Statements to Others," provides:

> In the course of representing a client, a lawyer shall not knowingly . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality].[98]

Because a client may be subject in some cases to criminal tax prosecution,[99] and has the potential of committing income tax evasion[100] if he or she does not report a transfer, an attorney appears

---

94. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.4(b).
95. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT, Rule 1.3 cmt.
96. *Id.*
97. *See supra* notes 67-87 and accompanying text.
98. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 4.1.
99. *See supra* note 77 and accompanying text.
100. I.R.C. § 7201 provides:
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . . . or imprisoned not more than 5 years, or both . . . .

to be obligated to ensure that a client complies with the filing obligations of the I.R.S. An attorney's actions, however, are limited by the attorney's duty to maintain his or her client's confidences. The Comment to Rule 4.1 provides:

> Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.[101]

Rule 4.1(b) appears to require the attorney to advise creditors and claimants of a client's actions if disclosure is necessary to avoid aiding and abetting a fraudulent conveyance. The obligation is tempered by the attorney's duty of confidentiality.[102]

Rule 1.6 of the Pennsylvania Rules of Professional Conduct mandates that an attorney protect client confidences, unless certain criteria are met. One such criteria is:

> (c) a lawyer *may* reveal such information to the extent that the lawyer reasonably believes necessary:
>
> > (2) to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used.[103]

Thus a lawyer is *permitted* to advise creditors and claimants of a potential fraud to avoid being an accessory, but is apparently not ethically *obligated* to do so.[104]

Finally, Rule 4.4 of the Pennsylvania Rules of Professional Conduct discusses "Respect for Rights of Third Persons." While the text of this Rule describes the unethical obtaining of evidence, the Comment reveals that the rule imposes a more general, broader restriction. The Comment provides:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they *include* legal

101. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT, Rule 4.1 cmt.
102. *Id.*
103. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT, Rule 1.6(c)(2) (emphasis added).
104. *Id.*

> restrictions on methods of obtaining evidence from third persons.[105]

Thus, a lawyer's obligations in using asset protection trusts are somewhat flexible, and sometimes at odds, and an attorney generally must use his or her own judgment. An attorney must zealously protect the client, should advise the client fully on the availability and advantages of such trusts, but the attorney need not endorse the use of asset protection trusts. An attorney should not aid or assist a client in fraud, and should ensure that a client complies with I.R.S. regulations. Yet an attorney also must respect the rights of creditors and claimants. Nonetheless, an attorney is merely "permitted" to advise third person creditors and claimants if his client intends to use the attorney's services to defraud them, and only if such disclosure would prevent such fraud.

VII. Conclusion

It is clear that the use of an asset protection trust is a viable strategy under Pennsylvania law. It is the best legal way to fully insulate a nest-egg portion of a client's estate. Opponents of asset protection trusts object to the blatant attempt to put one's assets outside of the reach of potential and future creditors and claimants, many of whom have bona fide claims and no other avenue of recourse. This might be a better argument in a more conservative, less litigious world. However, asset protection is simply a reasonable reaction to today's "court-happy" society, and should be allowed until the U.S. judiciary or legal community finds a way to reign-in damaging, frivolous lawsuits and litigiousness. Asset protection is really just fair play.[106]

Off-shore trusts may be used when the settlor is solvent at the time of transfer, and has retained sufficient funds (or insurance) to cover all reasonably foreseeable claims. As stated, the settlor must have legitimate financial planning goals in addition to asset protection. Lawyers should have a better understanding of the uses for off-shore asset protection trusts, and these trusts should at least be explained, if not whole-heartedly endorsed, to an attorney's Pennsylvania clients in all cases where they would be useful, and non-fraudulent, planning tools.

---

105. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT, Rule 4.4 cmt. (emphasis added).

106. "Citing a flood of liability suits over the past 20 years, the attorneys believe offshore trusts help offset what they consider the U.S. justice system's tilting too far toward creditors' rights." Strahler, *supra* note 7, at 17.