

Offshore Asset Protection Trusts Offer the Best Defense Against Creditors' Claims

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OFFSHORE ASSET PROTECTION TRUSTS, trusts that are established in other countries, offer the best protection against creditor claims. Whereas there appear to be no reported court decisions which address the asset-protection features of domestic trusts, the protection features of foreign, asset-protection trusts have been respected by the courts when these issues have been litigated.

Many highly compensated individuals who have had substantial assets which ordinarily would be at risk from creditor claims—such as doctors, lawyers, bankers, executives, entertainers, small business owners and others—have benefited by establishing such trusts. However, certain issues must be addressed before you can determine whether an Offshore Asset Protection Trust would be beneficial to you.

First, you should consider the fact that the trust must be irrevocable and cannot be changed. Moreover, once you establish the trust you cannot retain significant control over the assets that are transferred to it. However, in certain instances, you may be able to offer advice regarding investment decisions made by the trustee. In addition, the trust assets must actually be located in a foreign jurisdiction. The trust's assets may be exposed to claim(s) of creditors if they are held in the United States with an Offshore Asset Protection Trust merely holding title.

Since the trust cannot be used to avoid current creditors, the time to establish an Offshore Asset Protection Trust is now, before any claims or potential claims arise. Offshore Asset Protection Trusts that were created prior to such claims and which are properly drafted have withstood the claims of large and sophisticated creditors.

The trust cannot be used to evade taxes, although respected methods of trust drafting will often prevent transfers from being subject to federal gift and estate tax and may achieve other tax saving goals as well. Accordingly, the trust can be established as part of a well-crafted estate plan. Once you establish an Offshore

Asset Protection Trust, your assets will be governed by the laws of the foreign jurisdiction, which may be beneficial in several respects.

First, certain foreign jurisdictions do not recognize judgments obtained in the United States and require the underlying claim to be litigated, or, in some cases, re-litigated before their courts. Generally, these jurisdictions require creditors to use local attorneys who are prohibited from receiving contingency fees. This makes any creditor-initiated litigation very expensive. In addition, the foreign jurisdiction's laws usually will require a higher standard of proof than United States courts when the validity of the claim is litigated (e.g., that under the applicable foreign law the plaintiff's claim is valid "beyond a reasonable doubt" rather than just a preponderance of the evidence), and the claim itself may be barred from being brought in the jurisdiction due to the expiration of time under the local (often very short) statute of limitations.

Offshore Asset Protection Trusts should only be prepared by attorneys specializing in the area. The establishment of such a trust requires a thorough knowledge of many disciplines, including creditors' rights, federal bankruptcy law, federal gift and estate tax law, state law and the laws of foreign jurisdictions. These trusts are expensive precisely because of the professional knowledge, expertise and time required to create them correctly.

Several countries are especially receptive to the establishment of asset-protection trusts, such as Bermuda, the Cook Islands, and the Cayman Islands. However, the laws of each jurisdiction are different and must be scrutinized in order to ensure that the trust that you establish is tailored to meet your needs. One size definitely does not fit all when it comes to Offshore Asset Protection Trusts. ■

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