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KEEPING IT UNDER WRAPS: TRADE SECRECY FOR OFFSHORE ASSET PROTECTION PLANS

THOMAS A. BRUNTY, J.D.

I. INTRODUCTION: THE BASICS OF THE ASSET PROTECTION PLANNING INDUSTRY

The potential loss of assets through creditor actions and judicial attachment is a matter of grave concern to many businesses and wealthy individuals. These individuals fear that excessive, unjust, or otherwise improper creditor claims and judicial actions have the potential to wreak financial havoc or ruin upon their businesses and/or strip their private investment portfolios of their value.¹ Some analysts believe that venal creditor claims have become a chronic, severe problem within the American legal system. These analysts feel that anyone with a substantial asset portfolio is a fit target to be dragged into court for almost any cause, such as professional malpractice, officers' and directors' liability, automobile accident liability, home owner's liability, divorce, and others.² Some contend that this situation has become so frightful that at present, "predatory litigation haunts the dreams of every thinking professional."³

This concern is widespread, and has spawned a considerable industry in the field of asset protection planning.⁴ This field occupies a somewhat unique milieu, having essentially evolved as a distinct taxon under the broader rubrics of financial and organizational planning. It is defined by the efforts of asset protection planners ("Planners") who have come to specialize in the development of legal plans and strategies to reduce their clients' exposure to capital risks arising from taxation or creditor actions.⁵ Practices may vary widely within the industry, and substantial disagree-

1. James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 138 (1997).

2. *Id.*; see also Jonathan L. Mezrich, *It's Better in the Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer*, 98 DICK. L. REV. 657, 657 n.2 (1993).

3. F. BENTLEY MOONEY, JR., *CREATING & PRESERVING WEALTH*, i-ii (Probus Publishing Co. 1991).

4. See JAMES S. HENRY, TAX JUSTICE NETWORK, *THE PRICE OF OFFSHORE REVISITED 5* (2012), available at http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

5. See *id.* at 13 (full review of the scope of these activities at the institutional level).

ment exists as to the most suitable means of achieving the optimal ends of asset protection. Even a matter so seemingly basic and fundamental as the selection of proper types of legal entities can be a matter of heated polemics and debate.⁶ Thus, while all Planners presumably pursue the same goals, there is no single method recognized as the most appropriate means of achieving them.

Opinions differ widely as to what constitutes the optimal measures to protect assets effectively, or what the most specifically advantageous methods of deploying those measures may be. In crafting particular sets of methods, models, and procedures that best reify their ideas, Planners develop a unique expression of intellectual processes that some may wish to protect as intellectual property (IP). This gives rise to a number of important questions, including: If asset protection plans and models constitute IP, what is the best means of achieving their protection? Though not traditionally considered applicable to advisory enterprises, might trade secrecy be used effectively to protect asset protection plans?

A number of elements and industry characteristics suggest the applicability of trade secrecy to processes and proceeds of asset protection planning. Planners are extremely sensitive to consumer perception of their market. Experts in this field often go to great lengths in order to create and preserve a perceived store of uniquely enhanced value, or *cachet*, in their services. It is this singular quality that gives asset protection plans their substantial economic value, justifying the often considerable expense that clients pay for planning services. To enhance this perception, and preserve its attendant value, Planners often make overt efforts to keep their planning models confidential. They may provide only generalized descriptions of their plans and the associated benefits they offer to prospective clients, while making more detailed information available only upon personal consultation.⁷

Such protective measures are consistent with the treatment of the information contained in asset protection planning documents as trade secrets. These measures seem to reflect a recognized need to preserve a corpus of economic value borne of the singular skills and creativity necessary to produce an effective asset protection plan. They exhibit a number of the recognizable hallmarks and indicia of trade secrets, and arguably

6. Ritchie W. Taylor, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 *BYU J. PUB. L.* 163, 166-68 (1998); Lin Hanson, *Don't Use an LLC for Asset Protection - Here Are Ways a Creditor Can Pry Open an LLC to Get at a Member-Debtor's Personal Assets*, 96 *ILL. B.J.* 314, 314 (2008).

7. JEFFREY H. CORBETT & PATRICK J. KISH, *BEHIND THE OFFSHORE VEIL passim* (Worldwide Business Consultants, Inc. 1998).

provide a basis upon which these plans may be afforded trade secret protection.

Based on these and other factors, a tentative hypothesis emerges that the documentary forms, terms, and operative instructions contained in offshore asset protection plans may be developed and kept as trade secrets. The present article examines the potential viability of claiming trade secrecy as a means of protecting such plans, including not only their content but also the techniques and processes used in their development. It briefly surveys the characteristic features and issues attendant to trade secrets generally, and discusses the possible modes in which the standards and elemental treatments normally governing trade secret protection may be applied to asset protection planning. For reasons stated, *infra*, the present analysis gives a special emphasis and address to a specific subset of asset protection plans involving the use of Foreign Asset Protection Trusts (FAPTs). While acknowledging that the extension of trade secret protection to FAPT plans may be problematic in some respects, this treatment will show that trade secret claims offer a potentially viable means by which Planners may protect the proprietary content of the organizational models they create, or at least assert colorable claims of a legally protected interest.

The present analysis proceeds on the following assumptions:

1. the Planner requires prospective clients to sign non-disclosure agreements in order to obtain specific information regarding a plan or planning model;⁸
2. these non-disclosure agreements closely restrict the dissemination of plan contents to the prospective client, and to any independent professionals with whom that client wishes to consult on strictly a need-to-know basis;⁹ and
3. any detailed plans provided to these clients bear conspicuous captions identifying the subject material as private, proprietary, and/or confidential.

8. Such agreements are used by a variety of offshore planners. See *Tax Havens and Tax Administration: Arrangements we are concerned about*, AUSTRALIAN TAXATION OFFICE (Oct. 18, 2011), https://www.ato.gov.au/Business/International-tax-for-businesses/Previous-years/Investing-overseas/Tax-havens-and-tax-administration/?page=8#Arrangements_we_are_concerned_about; *Black Holes & UFOs*, QUATLOOS!, <http://www.quatloos.com/taxscams/blackhol.htm> (last visited Nov. 2, 2014).

9. QUATLOOS!, *supra* note 8; Ike Devji, *Physicians Facing Increased Risk as Investment Fraud Targets*, PHYSICIANS PRACTICE (Feb. 15, 2011), <http://www.physicianspractice.com/blog/physicians-facing-increased-risk-investment-fraud-targets>.

II. THE FUNDAMENTALS OF ASSET PROTECTION PLANNING: STRATEGIES, PRINCIPLES, AND PRECEPTS

The most essential feature of asset protection plans is that they generally operate on principles of compartmentalization and limitation of liability.¹⁰ The premise underlying this is that one may freely transfer assets into a separate entity for which the transferor has no associated liability (or at least none that would exceed the value of the transferred assets), with the result that whatever income or liabilities arise from those assets will belong to the transferee alone.¹¹ Once legal title has been safely conveyed to the transferee, creditors may be told they are no longer capable of reaching those assets, simply because they no longer belong to the transferor. The act of transference thus cleans out the transferor's cupboard, so to speak, so that any creditors who come knocking at the transferor's door afterward will simply go away hungry and disappointed.¹² This essential premise is informed by a rather basic axiom: creditors and tax authorities can neither seize nor tax from a debtor what the debtor does not own or control.

Among the more common entity types used to achieve this end are conventional statutory trusts, limited partnerships, limited liability companies ("LLCs"), and corporations.¹³ Alternative and somewhat more controversial forms are those based in offshore jurisdictions, including dedicated FAPTs¹⁴ and various species of foreign "common law trust organizations."¹⁵ The attributes and effects of these entity forms can differ dramatically, and they often must be deployed in complex and complementary arrays in order to achieve the precise results that advisors and their clients desire.¹⁶ Thus, while these entity forms may themselves be relative-

10. Christopher M. Riser, *Asset Protection Basics: Using Partnerships and LLCs*, 24 No. 1 PRAC. REAL EST. LAW. 27, 38-39 (2008); Julia Gold, *Series Limited Liability Companies — Too Good To Be True?*, 12 NEV. LAW. 18, 19 (2004).

11. PETER SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS, ¶ 8.01 Thomson/RIA (Supp. 2012).

12. Jay Adkisson, *Ten Rules for Asset Protection Planning*, FORBES (Jul. 13, 2011), <http://www.forbes.com/sites/jayadkisson/2011/07/13/ten-rules-for-asset-protection-planning/> (illustrating this concept with a "chips and table" analogy).

13. DUNCAN E. OSBORNE & ELIZABETH MORGAN SCHURIG, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS § 17:10, pt. 2 (2012), available at Westlaw; DARRELL AVISS & LARRY CHAMBERS, STRATEGIES FOR PROTECTING WEALTH 36 (McGraw-Hill Professional 2006); Taylor, *supra* note 6, at 164.

14. RICHARD C. LAWRENCE & CHRISTINA M. BALTZ, *Foreign Trusts and Alternative Vehicle*, A.L.I.-A.B.A. Continuing Legal Education (2003); Richard C. Ausness *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 189 (2007).

15. See FREDERICK H. MILLER & NEIL B. COHEN, SECURED TRANSACTIONS 9A HAWKLAND UCC SERIES § 9-102:19 [Rev]; Smith v. Anderson, (1880) L.R. 15 Ch.D. 247 (for common law trust organizations generally).

16. See e.g. THOMAS AZZARA, TAX HAVENS OF THE WORLD, *passim* (Tax Haven Reporter, 8th ed. 2003).

ly well known within the standard repertoire of asset protection tools, the optimal means and modi of adopting and/or utilizing them often are not.

The distinction between onshore and offshore strategies comprises one of the key divisions found within the taxonomy of asset protection planning.¹⁷ Onshore planning is generally perceived as far more conventional than its offshore counterpart (with the possible exception of the use of domestic asset protection trusts¹⁸), and typically involves greater use of corporations, various forms of partnership, and LLCs than offshore planning does.¹⁹ Alternatively, offshore planning frequently involves the expansive use of purpose-built trusts, specifically formed to achieve added benefits of extra-territoriality and the special protections afforded under adverse legal systems.²⁰ This generally requires a Planner to possess a high level of expertise encompassing exotic, adventitious legal systems, largely removed from and in some instances practically inscrutable to domestic observers.²¹ All of this appears to make FAPT planning models more naturally susceptible to trade secret protection than onshore planning models might be. For these and other reasons (including economy of analysis), this article will specifically focus on FAPT planning (“Planning”).

III. ESTABLISHING AND MAINTAINING A TRADE SECRET: THE ELEMENTAL REQUIREMENTS

The precise character of what may constitute a trade secret is not a subject of ready or finite delimitation. No exact definition of a trade secret is available, making it necessary to define the essential constitution of any specific trade secret by a set of broad, subjectively (and often relatively) interpreted characteristics.²² The determinative weight of these characteristics, in turn, varies somewhat depending upon the authority consulted. The

17. This distinction may sometimes appear arbitrary, in that asset protection plans often integrate both onshore and offshore elements into a single, comprehensive scheme of protections and operations. See Taylor, *supra* note 6, at 183.

18. See John A. Warnick & Sergio Pareja, *Selecting a Trust Situs in the 21st Century*, 16 Prob. & Prop. 53, 55 (2002).

19. See Taylor, *supra* note 6, at 165.

20. These may include requirements for statutory comity, *de novo* proceedings for the establishment of claims, enhanced judicial burdens upon creditors, judgment caps, and others. *Id.* at 169–75; JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION, at 9 (2013), available at <http://www.fas.org/sgp/crs/misc/R40623.pdf>; U.S. CHAMBER OF COMMERCE, THE OFFSHORE ASSET PROTECTION TRUST, http://www.uschambersmallbusinessnation.com/toolkits/guide/P12_3815; ROBERT LAMBERT, ASSET PROTECTION SEMINAR: 10 SESSION 13–15 (Trustmakers LLC 2007).

21. David B. Mandell & Jason M. O’Dell, *Offshore Asset Protection*, PHYSICIAN’S MONEY DIGEST (Sept. 22, 2011), <http://www.physiciansmoneydigest.com/personal-finance/Offshore-Asset-Protection>.

22. See *e.g.*, Tony Mason v. Jack Daniel Distillery, 518 So. 2d 130, 132–33 (Ala. Civ. App. 1987).

primary governance of trade secrets in the United States is found in the Uniform Trade Secrets Act (UTSA), which defines a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²³

Since localized versions of the UTSA have been adopted as governing law by forty-seven states (plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands),²⁴ its basic definition enjoys the weight of statute in most state judicial systems.²⁵ This gives the UTSA the broadest sway in determining the constitution of trade secrets within domestic jurisprudence, since trade secret interests and their attendant causes of action are governed by state law, and at present are not covered under any federal statute.²⁶ Some jurisdictions, however, continue to subscribe to other authorities, and may use other primary definitions accordingly.²⁷

Besides (and in some respects, as a complement to) the UTSA, other authorities also bear upon the legal status and definition of trade secret. Perhaps the most influential and persuasive of these are the Restatements that specifically address trade secret jurisprudence. The Restatement of Torts contains commentary defining a trade secret as “any formula, pattern, device or compilation of information which is *used* in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”²⁸ This highlights the so-called “Use Requirement” imparted by the Restatement’s definition.²⁹ This commentary goes

23. UNIF. TRADE SECRETS ACT § 1 (amended 1985).

24. Trade Secrets Act, UNIFORM LAW COMMISSION (2014), <http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act>.

25. There is some variance among the individual state versions of the UTSA. Not all states have adopted the same version of the UTSA, with some opting for the 1979 version and others the amended 1985 version. *United States of America Uniform Trade Secrets Act, model law, as amended in 1985*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/wipolex/en/details.jsp?id=3934> (last visited Nov. 2, 2014). Some states have also modified the text of the act to accommodate local common law values and precepts, as well as other conventions.

26. Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427, 429 (1995).

27. MICHAEL H. BUNIS & ANITA SPIETH, COMMON LAW V. UTSA: THE LAST STATES STANDING 1 (2012), available at <http://www.choate.com/uploads/113/doc/bunis-spieth-law360-common-law-v-utsa-the-last-states-standing.pdf> (The authors treat Texas as a “holdout state,” but Texas adopted the UTSA after this source was published).

28. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) (emphasis added).

29. Two of the remaining “holdout” states that continue to utilize common law definitions (i.e. Massachusetts and New York, with Texas having adopted the UTSA in May 2013), actually extend this requirement to “continuous use.” BUNIS, *supra* note 27, at 2.

on to enumerate a number of pertinent factors that further aid in the definition of a trade secret, including:

1. the extent to which the information is known outside of a claimant's business;
2. the extent to which it is known by employees and others involved in the claimant's business;
3. the extent of measures taken by the claimant to guard the secrecy of the information;
4. the value of the information to the claimant and to the claimant's competitors;
5. the amount of effort or money expended by the claimant in developing the information; and,
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.³⁰

The Restatement (Third) of Unfair Competition also provides a definition of trade secrets, which, in contrast to the more fulsome definitions found in the USTA and Restatement of Torts' commentary, is a model of brevity. This Restatement defines a trade secret merely as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."³¹ The terseness of this statement conveys not just a pronounced economy of language, but through its omission of the more delimiting terms found in preceding authorities it also imputes a wider breadth and latitude to its meaning. As such, the Restatement (Third) of Unfair Competition is interpreted as following the USTA's purposeful *tendenz* toward substantially expanding the scope of coverage beyond that of the Restatement of Torts.³² Its definition effectively includes all information of any economic value as a potential trade secret,³³ and seemingly encompasses information that may have fallen beyond even the definitional scope of the UTSA.³⁴ Resultantly, the Restatement (Third) of Unfair Competition seems to provide the broadest avenues of inclusion by

30. RESTATEMENT (FIRST) OF TORTS § 757 cmt. B.

31. RESTATEMENT THIRD OF UNFAIR COMPETITION § 39 (1995).

32. Edmund W. Kitch, *The Expansion of Trade Secret Protection and the Mobility of Management Employees: A New Problem for the Law*, 47 S.C. L. REV. 659–64 (1996).

33. *Id.* at 662.

34. *See id.* at 662–64 (explaining that The Restatement (Third) of Unfair Competition is broadly viewed as an accommodation of the protective mandates found in Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the General Agreement on Tariffs and Trade, with its formulation comprising a significant and obligatory step toward TRIPS compliance).

which offshore asset protection plans and other unusual stores of proprietary value may be regarded as trade secrets.³⁵

As noted before, the Restatements often comprise complementary authority to that of the UTSA. Even in states that have adopted the UTSA, courts frequently refer to the Restatements for insight and guidelines regarding the application of their statutes to the particular facts and circumstances of cases before them.³⁶ This suggests that a sound, comprehensive determination of applicable trade secret protections may only be made by treating the UTSA and Restatements together in an expansive definitional matrix. To this end, offshore asset protection plans, like any body of purportedly confidential information, should satisfy a substantial number of the enumerations found within this collective if they are to receive substantial protection as trade secrets.

The common denominator among the UTSA and the Restatement (Third) of Unfair Competition is that they both define a trade secret as a body of *information*, and information comprises the essence of a Planning model. The definition found in the Restatement of Torts is somewhat more problematic, however, in that it requires a trade secret to comprise “a formula, pattern, device or *compilation* of information,” not just a body of information itself.³⁷ Since the whole premise upon which a Planning model may be considered a trade secret is that it departs from the mere compilation of information, it may be internally inconsistent and self-defeating for a Planner to attempt to label her proprietary plans as compilations.

Under a Restatement of Torts mode of analysis, then, the critical issue relative to FAPT Plans would likely be whether they comprise or contain a formula or pattern. Insofar as these Plans implement patterned, integrated schemes or *formulations* that prescribe the interaction between a set of operative procedures and formational elements, a claimant may plausibly assert that an FAPT Plan satisfies the Restatement’s criterion as a formula. Thus, just as with the UTSA and Restatement (Third) of Unfair Competition, the substance of an FAPT Plan may satisfy the Restatement of Torts’ basic subject matter requirement for trade secrets.

35. RESTATEMENT THIRD OF UNFAIR COMPETITION §§ 44–45 (expanding the prescribed scope of injunctive relief and other remedies available to those who claim misappropriation of their trade secrets).

36. See, e.g., Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202 (Wis. 1978).

37. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) (emphasis added).

A. Reasonable Steps to Maintain Confidentiality and the Conference of Economic Advantage

The efforts toward confidentiality outlined in the Introduction and statement of assumptions would appear to constitute reasonable steps and efforts to maintain secrecy as required by both the UTSA and the Restatement of Torts. The use of captions (or “legends”) identifying material as confidential has particularly been recognized as a reasonable means of preserving the confidentiality of specialized commercial information, even after its limited publication and/or distribution.³⁸ Such captions provide notice of the confidential nature of a Plan’s content to all recipients, and establish the framework of the confidential relationship underlying the documents’ release.³⁹

The enhanced marketing potential conferred by the confidentiality of a Planner’s work also appears to satisfy the economic advantage prongs within the requirements of the USTA and the Restatements. The entire basis for the economic value of a Planner’s work lies in that the organizational Plans she produces are not commonly known, and ostensibly provide a unique set of economic protections and benefits to her clients. The arcane rarity of the expertise necessary to produce a well-developed Plan justifies the high premium in provender that clients are willing to yield to a Planner. Thus, the Planner derives a direct, substantive economic advantage from her ability to preserve the confidential nature of the information she offers.

B. Rarity of Expertise – Distinguishing FAPT Planning Models from Common Industry Knowledge

As noted previously, Planners diverge in their assessment of the most advantageous strategies, techniques, and specific organizational structures to be used in the development and implementation of offshore Plans. Planners offer highly varied services, and they often take elaborate steps to promote the special features and benefits of particular Plans to clients, emphasizing the unique store of value that they provide. The more ambitious among them may even brand their individual Planning models, giving them catchy names or trademarks designed to convey concurrent airs of distinction and broad acceptance.⁴⁰ Within the fiercely competitive environment

38. See *Data General Corp. v. Digital Computer Controls, Inc.*, 357 A.2d 105, 109, 111 (Del. Ch. 1975).

39. See *id.*

40. Examples include Scrantom, Kleinfeld, and Jeeves’ Pegasus Plan and Mark Chappell’s Contractual Company model (see *infra*, note 45); the Wealth Preservation Fortress, <http://www.wealthpreservationfortress.com/wpf.shtml>.

of their industry, Planners are quick to point out apparent deficiencies in competitors' offerings while ardently promoting the advantages of their own.⁴¹

Planners generally have a distinct vision of the best manner in which to achieve optimal protection of their clients' assets and interests, and the content of their Plans reflects these unique perspectives. While inherent novelty or uniqueness is not an essential element of a trade secret,⁴² a trade secret must possess at least a modicum of originality that separates it from the common knowledge of its industry.⁴³ Thus, the rarity of the expertise underlying FAPT Plans and the novelty that extends to the Plans themselves become pertinent factors in assessing claims of trade secrecy.

By its very essence, proper Planning does not comprise a simple process of compiling readily available data and information known throughout the industry. If it did, then logically the work product of the blandest, least discerning mind would be of essentially the same quality as that of the best and brightest in the field. If this were the case, it would not really matter whose Plan a client might choose to implement. Rather, the art of Planning is one of refinement, by which effective models are distilled from an overwhelming welter of information through the discreet, expert application of select principles. Ideally, this results in a Planning model of unique quality; one that can be tailored to the needs of a class of clients to render their assets as safe and secure as possible.

The process underlying these models requires a Planner to choose from a myriad of available options and then interweave them into a design fashioned with attention to the peculiar needs of a select group of clients. The Planner must be able to integrate a variety of techniques, such as multi-jurisdictional formations and/or tiering, compartmentalization of equities, repository and depository sequences, sequences of mixed entity types, and others.⁴⁴ Often, the solutions encoded in FAPT Plans are wholly the products of extrapolation from legal precepts, principles, and theories found in diverse legal systems, and may feature organizational structures and

41. See, e.g., Mooney, *supra* note 3, 98–104.

42. *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d, 1971 LEXIS 7272, 621, 624 (7th Cir. 1971) (applying Wisconsin law) (citing *Cataphote Corporation v. Cecil W. Hudson and Hudson Industries Inc.*, 422 F.2d 1313, 1315 (5th Cir. 1971)).

43. *Id.*, available at *Cataphote Corporation v. Hudson*, 444 F.2d 1313, 1315 (5th Cir. 1971).

44. Sebastian R. Gibson, *Offshore Asset Protection*, AVVO, (2011), <http://www.avvo.com/legal-guides/ugc/offshore-asset-protection>.; Dave Robertson, *Private Trust Banking-21st Century Offshore Banking*, ESCAPE ARTIST, Jan. 26, 2012, <http://assetprotection.escapeartist.com/private-trust-offshore-banking/>.; OFFSHORE ASSET PROTECTION STRUCTURES, <http://www.sterlingoffshore.com/about-offshore/asset-protection.html> (last visited Nov.13, 2014).

claimed entity types rarely seen in the United States.⁴⁵ Just as often, the unique value within a Plan derives from a Planner's specific techniques for crafting cooperative agreements and affiliations with offshore trust companies, which are categorically distinct from general industry knowledge.⁴⁶ Even the choice of domiciliary jurisdictions comprises a critical variable, for jurisdictional laws and procedures that may work optimally for one Planning approach may be directly antagonistic to another.⁴⁷

As this indicates, effective Planning does not comport with any standardized methods or models. Instead, effective Planning processes deploy highly individualized formulations based on sophisticated legal and financial principles. Planning models must be specifically formulated to achieve a precise, complementary balance between disparate elements, distilled from a particularized blend of knowledge and cumulative, often experientially acquired, expertise. One size does not fit all, and this places Planning models beyond the domain of standard industry knowledge, and within the more exclusive realm of proprietary information.

C. *The (Un)Ease of Replicability*

The issues of novelty and rarity partially overlap that of non-replicability, for the former somewhat portend and produce the latter. The rarity of their predicating knowledge and expertise, along with their highly distinctive and individualized character, makes Planning models difficult to replicate by fair and legitimate means. These models must be crafted to allow clients to negotiate a veritable legal minefield, striking a delicate balance between legal risk and pecuniary security and reward. The nature of the potential pitfalls and liabilities that an FAPT Plan must neutralize are such that a fully integrated plan may be extremely difficult to reverse-engineer merely by observing its effects. These issues include problems of situs law, scope of entrustment, title characterization, and arm's length transactions and self-dealing.⁴⁸

45. , ST. VINCENT'S TRADITION AS AN OFFSHORE CENTRE, <http://www.mondaq.com/x/7381/offshore+financial+centres/Legislation+and+Developments>, (last visited Nov. 11, 2014) (discussing the Pegasus corporate/trust hybrid; MARK CHAPPEL, SECRETS OF OFFSHORE TAX HAVENS (ABM Publishing Co.1985), for a discussion of the Contractual Company, a proprietary form of a common law trust organization.

46. Grant Morris Dodds, *Offshore Trusts*, <http://www.gmdlegal.com/offshore-trusts/> (last visited Nov. 11, 2014).

47. Compare EscapeArtist.com, Why You Should Favor Offshore Jurisdictions without Tax Information Exchange Agreements, http://www.escapeartist.com/OREQ21/Asset_Protection.html; with PanamaLaw.us, Offshore Jurisdiction Comparison, http://www.panamalaw.us/offshore_jurisdiction_comparison.html#sthash (both last visited Apr. 28, 2014).

48. See, e.g., Federal Trade Commission v. Affordable Media LLC, 179 F.3d 1228 (9th Cir. 1999);

Judicial treatment of the terms commonly found in FAPT indentures amply illustrates the nature and overlapping extent of these problems.⁴⁹ Courts have roundly expressed concern regarding these terms, and have frequently addressed them by applying painful sanctions and remedies against FAPT principals and beneficiaries.⁵⁰ Certain key structural elements, routinely endorsed and sanctioned by the statutes and/or common law of FAPT domiciliary jurisdictions,⁵¹ sharply distinguish FAPT indentures from those of other, more basic and conventional trust types. These elements express a novel conception of trust law, one which appears in conflict with a number of basic tenets of domestic trust jurisprudence. The most notable among these are:⁵²

1. self-settlement, the process by which the same, single party or person who settles and funds the trust also becomes its beneficiary;⁵³
2. a co-trustee provision, whereby the settlor/beneficiary is also named co-trustee to supervise the trust alongside of a foreign “primary” trustee;⁵⁴
3. a discretionary clause, which establishes the trustees’ authority to grant or withhold distributions from any beneficiary or all beneficiaries, or to make unequal distributions among any or all beneficiaries, or to sell, liquidate, or otherwise dispose of the trust’s corpus at the trustee’s sole discretion;⁵⁵
4. a form of anti-alienation clause, stating that the beneficiar(y)(ies) cannot transfer, assign, hypothecate, pledge, or otherwise dispose of the beneficial interest to a third party, nor

In re Brown, (Bankr. Alaska 1996), available at http://www.assetprotectioncorp.com/forums/ubbthreads.php/topics/6097/Choice_of_Law_In_re_Brown; In re Portnoy, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); In re B.V. Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998), available at <http://chapter11cases.com/2012/07/01/in-re-brooks-217-br-98-bankr-court-d-connecticut-1998/>.

49. *See id.*

50. *See id.*

51. AMY M. HESS, THE LAW OF TRUSTS AND TRUSTEES: A TREATISE COVERING THE LAW RELATING TO TRUSTS AND ALLIED SUBJECTS AFFECTING TRUST CREATION AND ADMINISTRATION, 15, (3d ed. 2014); BLACK’S LAW DICTIONARY, 1654 (9th ed. 2009).

52. Some authorities suggest some departure from this enumeration. *see* Lorenzetti, *supra* note 1 at 146–50.

53. BLACK’S LAW DICTIONARY, *supra* note 51.

54. Debra Baker, *Island Castaway*, 84 A.B.A. J. 54, 54–56, (1998).

55. *See* FREDERICK J. TANSILL, *Offshore Asset Protection Trusts: Non-Tax Issues*, 421 A.L.I.-A.B.A. Continuing Legal Education (2007), available at http://files.alicle.org/thumbs/datastorage/skoobesruoc/pdf/CN035_chapter_11_thu mb.pdf.

can such dispositions be made on the beneficiary's behalf or recognized by the trustee;⁵⁶

5. an anti-disclosure clause, providing that the trust beneficiary retains no right to demand or request that the trustee make specific disclosures regarding trust properties, holdings, or administrative affairs, either to the beneficiary or to others acting on her behalf;⁵⁷
6. a duress clause, which,
 - prohibits the trustee from making any discretionary distributions of trust property to any party under circumstances, and
 - requires the foreign or "primary" trustee to remove the settlor as Co-Trustee (where such an appointment has been made), under any circumstances where the foreign trustee, in its sole judgment, determines that the beneficiary has been subject to any form of coercion or compulsion, legal, judicial, or otherwise, in regard to any matter affecting or affected by the property held by or administration of the trust, making it "impossible" for the trustee to return trust assets to the beneficiary, even when (and especially if) the beneficiary is under a court order to do so;⁵⁸
7. an ambulation ("flee" or "flight") clause, specifying that the trust's domicile may be changed to any other jurisdiction at the sole discretion of the foreign trustee, either by relocation of the trustee or by appointment of an alternate or "emergency" trustee domiciled in the new jurisdiction, in the event that the duress clause becomes operable or in the event that political or legal action, acts of war or insurrection, or under any other event or circumstance that the trustee(s) determine(s) to threaten the operation or legal validity of the trust in its original situs;⁵⁹ and,

56. Restatement Third of Trusts, § 58 (2001); Christopher Paul, *Innovation or a Race to the Bottom? Trust "Modernization" in New Hampshire*, 7 PIERCE L. REV. 353, 357–58 (2009).

57. LAWRENCE, *supra* note 15, pt. I § G.

58. Lorenzetti, *supra* note 1, 146–47.

59. *Id.* at 147–9; ROB LAMBERT, CUBA CLAUSE & DEFINITION OF EVENT OF DURESS, <http://www.assetprotectiontraining.com/cuba-clause-definition-event-duress> (last visited Nov. 11, 2014).

8. the appointment of a trust Protector, whose duty it is to oversee the trustee and veto the trustee's actions if necessary (often the settlor is appointed to fill this office as well).⁶⁰

A number of other items and techniques appurtenant to the trust document(s) are routinely interwoven with the above elements in order to enhance each FAPT Plan's unique operating character and slate of purported benefits. This can effectively make a particularized FAPT Plan difficult, if not impossible, to replicate without expropriation of proprietary knowledge. Such appurtenances may include methods and instructions for surviving contempt orders arising from the "impossibility" defense,⁶¹ plans for effective (yet informal) control of adverse trustees (should self-settlement be eschewed or co-trusteeship adopted) through the use of "letters of wishes"⁶² and similar mechanisms. They may also include structured contingency and fund distribution plans in cases where (a) flight or trustee replacement clauses must be actuated, or (b) contempt orders must be willingly sustained as part of the plan's overall strategy,⁶³ which are intended to minimize the potentially negative external effects of a trust's indenture.

As this suggests, the task before a Planner may often be viewed as one of actually *inviting*, while concurrently massaging and forfending, a series of conflicts that inhere between competing legal systems and their stated policy objectives. This requires a Planner's honed capacity to select, discard, and blend the distinguishing elements of an FAPT indenture into a singular, comprehensive Plan that; (a) provides for security of capital; (b) allows a client beneficiary ease of access to and/or use of capital within a context of economic substance sufficient to prevent findings of sham transactions; while (c) synergistically supporting associated investment programs, operating plans of going ventures, and contingency plans for principals; (d) without benefit of any standardized legal tables or other

60. Baker, *supra* note 54; LAWRENCE, *supra* note 15; *see* Jerald R. Breitenstine v. Nancy L. Breitenstine, 62 P.3d 587 (Wyo. 2003); *see also* Federal Trade Commission v. Affordable Media, LLC, 179 F.3d, 2001 WL 583100, 1228 (9th Cir. 1999), *passim*.

61. *See* FTC v. Affordable Media, LLC, 179 F.3d 1228; *In re* Stephan Jay Lawrence v. Alan L. Goldberg, 279 F.3d 1294 (11th Cir. 2002).

62. *See* Tansill, *supra* note 55 for examples of this type of planning.

63. Such planning is suggested in, e.g., Richard Lewis, Comment, *The Foreign Irrevocable Life Insurance Trust as Asset Protection: Potential for Abuse and Suggestions for Reform*, 9 CONN. INS. L.J. 613, 632 (2003); James M. Duggan, *In re Lawrence – Not Exactly Shawshank Redemption, But another Great Tale of Patience and Hope*, THE WEALTH PRESERVATION INSTITUTE, <http://www.thewpi.org/?a=PG:816> (last visited Nov. 13, 2014).

authorities with which to consult. It is the rarity of the accumulated insight and particular skill set necessary to achieve these ends that may make particularized FAPT models difficult for others to duplicate by fair and legitimate means.

D. Positive and Negative Know-How

Often, the essential matter of a Planner's trade secret need not be found in the direct objects and terms specified within a Planning model. Rather, it may simply lie in the know-how necessary to develop that model, subsequently encoded within the body of the Plans derived from it. Know-how itself may be classified as a trade secret, as well as any prescriptive method of applying that know-how to a given task, object, or function.⁶⁴ Mere knowledge of how best to arrange pre-existing, readily available elements to achieve a desired effect may itself comprise a viable trade secret, as may the mere knowledge of the sources from which those elements are available.⁶⁵ As such, the unique know-how required to produce FAPT Plans, including the knowledge of which jurisdictions' laws may be invoked in concert with others to achieve certain beneficial effects, may comprise a protectable trade secret.

There is also the element of negative know-how, the substance of which may qualify for trade secrecy under the UTSA and Restatement (Third) of Unfair Competitions' definitions.⁶⁶ For example, a Planner's knowledge of what jurisdictions to avoid in order to attain the prescribed goals of a Plan, or what forms or terms to avoid in the jurisdiction(s) selected, may prove as valuable to a Planner and her clients as the positive knowledge of what content to put into the Plan. For Planners who do business in states where the UTSA governs trade secrecy claims, the negative know-how components of an FAPT Plan may be of vital substance.

64. *Schulenberg v. Signatrol, Inc.*, 212 N.E. 2d 865, 866 (Ill. 1965).

65. *See Water Services, Inc. v. Tesco Chemicals, Inc.*, 410 F.2d 163, 165 (5th Cir. 1969).

66. UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1, cmt. (1985); RESTATEMENT (THIRD) OF UNFAIR Competition § 39, cmt. e (1995). Conversely, since the Restatement of Torts' definition includes the use requirement, it effectively excludes negative know-how from trade secrecy. RESTATEMENT (FIRST) OF Torts § 757, cmt. b (1939).

IV. MAINTAINING CONFIDENTIALITY: PRESERVING AND DEFENDING THE TRADE SECRET

One of the primary practical arguments against trade secrecy for any form of financial or organizational planning is that it may prove difficult to prevent essentially innocent or untraceable disclosure. Whenever a Planning client shows the content and terms of a Plan to an outside consultant or advisor, the consulted professional will surely add that information to his collective knowledgebase. That professional, in turn, may use the information contained in the Plan to assist other clients in the future, without the Planner ever receiving notice of the fact. If this knowledge is subsequently transmitted to third parties without any notice or indication of the original claim of trade secrecy, the original Planner may have no recourse against these parties other than pursuing injunctive relief against them. The difficulty and expense in attempting to prove the chain of transmission by which these third parties came into possession of the Planner's confidential information may prove enormous, making it impractical for the Planner to enforce her rights in court. Similarly, any time the Plan is fully discovered or disclosed in a judicial proceeding against one of its principals, the full terms of the Plan may become a matter of public record. These and other developments could compromise the confidentiality of the Plan's information, eliminating any trade secrecy it may have had.

These concerns may be partly allayed through the use of the restrictive captions noted, *supra*. Similar devices have been held to extend the protection of confidentiality beyond the primary relationship of the original communicant and recipient of the information, imposing legal restraints on any third parties who might wish to use the information without permission or privilege to do so.⁶⁷ Of course, this provides no practical relief against third parties who receive Plan content orally without being apprised of its confidential nature.

As for possible disclosure through judicial proceedings, it should be remembered that one of the primary characteristics that sets a skilled Planner apart from others is her ability to render Plans that ensure discreet, low-profile operations, avoiding the attention of creditors and other claimants. A skilled Planner may never find his Plans substantially disclosed pursuant to a lawsuit or other action, simply because their principals may never be brought into court. Beyond this, those collateral or corollary elements not included in the indenture, attachments, or exhibits to an FAPT may not be

67. *Data General Corp. v. Digital Computer Controls, Inc.*, 357 A.2d 105, 109, 111 (Del. Ch. 1975).

immediately discoverable, and any trade secrets they contain may survive the disclosures mandated in a judicial proceeding.

Ultimately, one must remember that while trade secrecy may be perpetual and indefinite,⁶⁸ it is not necessarily permanent.⁶⁹ Trade secrets are eventually ceded back to the industries that spawned them.⁷⁰ A trade secret may be only briefly transitory, almost evanescent, yet still be wholly legitimate as a protected property. The protections of trade secrecy for financial or organizational Plans may or may not be long-lived, but their duration may be sufficient to enhance the economic value that Planners derive from their services, making them still worthwhile. If a Planner is concerned by the potentially fleeting nature of trade secrecy, however, the pursuit of other protections may seem more desirable.

V. ALTERNATIVES TO TRADE SECRECY: COPYRIGHT AND PATENT

Copyright appears to be invariable as a means of protecting FAPT Plans as IP. The publication requirements of copyright would publicly disclose the workings of FAPT Plans, making them accessible to any persons who might wish to copy them. A copyright protects only the expression of ideas or concepts fixed within tangible media of expression, not the ideas or concepts themselves.⁷¹ Thus, the very act of copyrighting would make the ideas and concepts within a Planning model publicly accessible to all who may wish to use them without using the same expressive medium, thus conferring to the Planner no continuing rights or interest in that information itself.

Patents, on the other hand, appear to present a more complex yet (to the most optimistic) potentially more viable option. The world of patent law is presently in a state of flux concerning the patentability of business strategies and methods. Until quite recently, a body of emerging case law seemed to confirm the idea that business strategies and methods comprised patentable subject matter. This was most directly expressed by the U.S. Court of Appeals for the Federal Circuit in *State Street Bank & Trust Co. v.*

68. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989) (quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186–87 (1933)); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231–32 (1964).

69. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 498–99 (1974).

70. See *id.* at 490 for a discussion of the “ripeness-of-time” with a recitation of sources.

71. 17 U.S.C. § 102(b) (2012).

Signature Financial Group, Inc., in which the court ultimately deemed a system designed for implementing an investment structure patentable.⁷²

State Street Bank effectively expanded the scope of patentable subject matter beyond that dealing with ordinary industrial processes and tangible devices, by specifically including business methods as patentable processes.⁷³ Following *State Street Bank*, creators of strategic business methods began filing a “proliferation” of applications for U.S. patents to protect their works.⁷⁴ The tendency to patent these items became so pronounced that some analysts believed it had precipitated something of a crisis, owing to the “avalanche of business method and financial transaction applications moving through the [U.S. patent] system.”⁷⁵ The American Bar Association found this matter so compelling that it formed a special Tax Strategy Patenting Task Force specifically to address the issue.⁷⁶

Prior to *State Street Bank*, there had been a judicially-created “business method” exception that excluded business methods and strategies from the field of patentable subject matter.⁷⁷ The appellate court in *State Street* took careful pains to reject that exception, calling it ill-conceived in a judgment crafted with the specific intent to “lay [it] to rest.”⁷⁸ Broadly interpreted, *State Street* instructed that the only requirement for the patentability of business methods is that they “produce a useful, concrete, and tangible result,”⁷⁹ even if that result is as insubstantial and ephemeral as “a final share price momentarily fixed for recording and reporting purposes.”⁸⁰ This would seem to encompass methods that preserve the core value of assets from taxes and creditor claims to at least the same extent that it would methods for establishing share prices, which suggests that FAPT

72. 149 F.3d 1368, 1377 (1998).

73. LINDA M. BEALE, *Is Bilski Likely the Final Word on Tax Strategy Patents? Coherence Matters*, 9 J. MARSHALL REV. INTELL. PROP. L. 110, 110 (2009).

74. ANISH PARIKH, *The Proliferation of Tax Strategy Patents: Has Patenting Gone Too Far?*, 7 J. MARSHALL REV. INTELL. PROP. L. 202, 204 (2007).

75. BEALE, *supra* note 73.

76. Press Release, American Bar Ass’n, Tax Strategy Patenting Task Force, <http://apps.americanbar.org/tax/press/2006/patentingtaxstrategies.doc> (last visited Nov. 13, 2014).

77. *State St. Bank & Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998).

78. *Id.*

79. *Id.* at 1373 (quoting *In re Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994) (*en banc*)); BEALE, *supra* note 73.

80. *State St. Bank*, 149 F.3d at 1373.

Plans would be just as susceptible of patent protections as share-pricing methods.

Events since *State Street Bank*, however, seem to call into question the patentability of certain business methods (which would include the formulation of FAPT Plans). Revisiting the issue of business methods as patentable subject matter in *In re Bilski*, the Federal Circuit, without formally overturning its decision in *State Street Bank*, rejected claims that a business model and method of hedging risk in the commodity and energy markets comprised patentable subject matter.⁸¹ The Supreme Court affirmed the Federal Circuit's implicit reversal of its own position in *State Street Bank* (though deploying different reasoning than that expressed in the appellate decision), finding that the financial models considered in *Bilski* merely represented the incorporation of abstract ideas, and were therefore barred from patentability under 35 U.S.C. § 101.⁸² Though not conclusive, this affirmation of the judicially created "abstract idea" exception suggested that organizational models designed to minimize or eliminate one's risk of capital loss due to creditor action or taxation, which are seemingly just as abstract as specific designs to reduce risk of capital loss in markets, might now be found unpatentable.

A clearer, more resolute determination regarding the patentability of financial planning processes recently appeared to be at hand, with the Supreme Court granting certiorari to review the Federal Circuit's decision in *Alice Corp. v. CLS Bank International*.⁸³ Many hoped the Supreme Court would use this case as an instrument to define more clearly the limits of method patentability, since the Court's willingness to hear arguments appeared substantially motivated by its desire to finish the task it undertook in *Bilski*. The Court's cursory, indecisive treatment in *Bilski* had failed to provide adequate definition to the exclusionary limits of patentability, leaving it difficult (if not impossible) to understand precisely what factors and conditions render an idea too abstract to be patentable.⁸⁴ This issue begged for clearer resolution, and the Supreme Court seemed poised to provide it in *Alice*. In rendering its decision, however, the Supreme Court did little to clear the muddied waters in which business method patents are submerged.

The patents at issue in *Alice* direct claims to a very broad and fundamentally abstract idea, namely, the notion of using intermediaries to reduce settlement risk in financial transactions. As in *Bilski*, the *Alice* Court found

81. *In re Bilski*, 545 F.3d 943, 960, 963–64 (Fed. Cir. 2008).

82. *Bilski v. Kappos*, 561 U.S. 593, 609, 611–12 (2010).

83. *Alice Corp. v. CLS Bank Int'l*, 134 S.Ct. 734, 735 (order granting cert.).

84. Mark A. Lemley et al., *Life After Bilski*, 63 *Stan. L. Rev.* 1315, 1316 (2011).

that the subject patents disclose only fundamental ideas constituting basic abstractions underlying longstanding practices, and thus fail to qualify as patent-eligible subject matter. Drawing substantially upon its prior decision in *Mayo Collaborative Services, v. Prometheus Labs, Inc.*, the *Alice* Court articulated a two-step analytical framework to determine patent eligibility of methods under Section 101:

1. determine whether the claims at issue are directed to one or more patent-ineligible concepts (i.e. laws of nature, natural phenomena, and abstract ideas); if so,
2. determine whether the elements of the subject claim or claims, either individually or in an ordered combination, incorporate an inventive step comprising an element or combination of elements sufficient to ensure that the practice of the patented method would amount to something significantly more than a patent on the ineligible concept itself.⁸⁵

In pronouncing this framework, the *Alice* Court declined its opportunity to provide clear definitional guidelines governing the patentability of methods. The framework articulated in *Alice* fails to provide specific standards or criteria by which to assess patentability, and questions remain as to how much “more” an inventor must add to an underlying abstraction in order for a business method to constitute patentable subject matter. While the Court noted that the plaintiffs in *Alice* did not do “*enough*” (italics in the original) to transform an underlying abstract idea into a patent-eligible invention, it failed to state what transformative substance or measure would have been sufficient to do so. Thus, *Alice* still leaves us with no threshold test and advances no predictable basis upon which to make a reliable determination of method patentability. In taking guidance from *Alice*, the U.S. Patent and Trademark Office recognizes that the basic inquiries to determine subject matter eligibility remain just as ambiguous as they were formerly under the *Bilski* guidance.⁸⁶

The only real advance made by *Alice* seems to be that it closes a potential loophole around *Bilski*, by blocking generic implementations of

85. *Alice Corp.*, 134 S.Ct. at 2355.; see *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S.Ct. 1289, 1297–98 (2012).

86. Memorandum from Andrew H. Hirshfeld, Deputy Comm’r for Patent Examination Policy, United States Patent and Trademark Office, *Preliminary Examination Instructions in View of the Supreme Court Decision in Alice Corporation Ply. Ltd. v. CLS Bank International, et al.*, (June 25, 2014), available at http://www.uspto.gov/patents/announce/alice_pec_25jun2014.pdf.

abstract concepts.⁸⁷ Though it may seem a minor point, this lone advent may foreclose upon a number of business method patents that fail to disclose unique technological innovations governing a strict implementation of their underlying concepts. Anticipation of this doctrinal refinement may have already affected the outcome of a once much heralded case, *Finaceware, Inc. v. UBS Fin. Servs.*, which was filed in the United States District Court for the Southern District of New York during the course of *Alice's* litigation.⁸⁸ The plaintiff in this lawsuit, Finaceware, accused UBS Financial Services, a major international financial planning and advising firm, of infringing two financial advising patents that Finaceware had received in 2009 and 2010.⁸⁹ The subject patents cover processes designed to facilitate the objective assessment of a client's financial goals, as well as a claimed proprietary model to determine the best means by which to achieve them.⁹⁰ The firm PIEtech, Inc., which authored and distributed the allegedly infringing software used by UBS, was permitted to join the suit upon its own motion as an intervening party.⁹¹ The patents at issue in *Finaceware* appear somewhat parallel in scope to the patents rejected in *Bilski* and *Alice*. The claims of at least one of these patents exceed the software, code, and/or digital processing systems used in a financial advising practice, and seem to encompass the information and assessments underlying the very process of advising.⁹²

This litigation wrought great alarm among industry analysts, who feared that if this suit were successful, it would give the United States Patent and Trademark Office dispensation to grant patent monopolies on not just “the core tenets of . . . financial planning” but “the financial planning process itself.”⁹³ The potential success of Finaceware in this action threatened to reduce the financial planning world to a virtual fiefdom, by

87. Jonathon C. Anderson, *Supreme Court Invalidates Business Method Patent: What You Need to Know About Alice Corp. v. CLS Bank Int'l*, FAEGRE BAKER DANIELS, (July 2, 2014), <http://www.faegrebd.com/21765>.

88. Complaint, *Finaceware, Inc. v. UBS Fin. Servs., Inc.*, No. 11 CIV 5503, 2011 WL 3565794 (S.D.N.Y. Aug. 8, 2011).

89. *Id.*

90. Karen DeMasters, *Lawsuit Against UBS Has Far-Reaching Implications For Advisors*, FINANCIAL ADVISOR, Aug. 11, 2011, available at <http://www.fa-mag.com/news/lawsuit-against-ubs-has-far-reaching-implications-for-advisors-8017.html>.

91. *Finaceware, Inc. v. UBS Fin. Servs., Inc.*, No. 11 Civ. 5503, 2011 WL 6092311, at *4 (S.D.N.Y. Dec. 6, 2011).

92. U.S. Patent No. 7,765,138 (filed Dec. 15, 2004); U.S. Patent 7,562,040 (filed July 27, 2007).

93. DeMasters, *supra* note 90.

effectively conferring exclusive rights to private parties to “own the financial planning process and . . . charge a tariff for its use.”⁹⁴

The parties eventually settled this action in November 2012.⁹⁵ Upon the settlement’s announcement, the financial planning community breathed a collective sigh of relief.⁹⁶ While the parties concluded and maintained their settlement in confidence, conspicuous elements and absences in public reports of their accord suggest that Financeware held little hope of being able to enforce its patents. Granted, the defendants in the suit seem to have agreed to drop their challenges to the validity of Financeware’s patents.⁹⁷ UBS, however, continued to use the disputed financial advising software and systems without interruption, and PIETech suffered no apparent impedance of its operations, adding substantially to both its client list and commercial volume during and after the litigation.⁹⁸ This continuation and expansion of the defendants’ trade occurred even though the parties reported no licensing activity between the litigants, and the software remains in distribution with no visible sub-licenses attached.⁹⁹ This suggests that the litigants may have anticipated the subtle strengthening of *Bilski*, with the implicit result that Financeware essentially conceded to its opponents.

The denouement of *Financeware* holds great significance for the potential patentability of FAPT Plans. It suggests that patents claiming specialized knowledge and methods of assessing information and recommending patterns of action may be difficult to enforce going forward, even assuming the issuance of such patents after *Alice*. While *Financeware* did involve patents disclosing computerized implementation, the broader issues underlying that case place it virtually on all fours in relation to FAPT Planning and analysis. At least one of Financeware’s patents contains claims directed to a financial planning approach alone, disclosing methods and formulas designed to achieve optimal financial and organizational outcomes without reference or recourse to any specific mechanical

94. *Id.*

95. Resolution of Patent Litigation, PRWEB, <http://www.prweb.com/releases/2012/11/prweb10112026.htm> (last visited July 24, 2014).

96. Brooke Southall, *MoneyGuidePro Back on a Roll*, RIA BIZ (Nov. 9, 2012), <http://www.riabiz.com/a/17433610/moneyguidepro-back-on-a-roll-after-the-blip-of-being-sued-by-wealthcare-pietechs-ceo-says-as-settlement-is-signed>.

97. Resolution of Patent Litigation, WEALTHCARE CAPITAL MANAGEMENT, http://www.financeware.com/home_page.aspx?showsnippet=11.08.12.wem (last visited July 24, 2014)

98. Southall, *supra* note 96.

99. *Id.*; PIETECH, INC., <https://www.moneyguidepro.com/> (last visited July 24, 2014).

device or other tangible expression of art. This gives the *Financeware* patents a common basis with those prospectively sought by Planners. That this plaintiff appears to have felt incapable of compelling alleged infringers to cede appreciable ground suggests that patents may not afford workable protection for Planning methods or models, absent their disclosure of a novel technological means of implementation.

Following *Alice*, the quest to resolve the question of business method patentability may now be pursued through other cases, such as *Ultramercial, Inc. v. Hulu, LLC*.¹⁰⁰ The patent at issue in *Ultramercial* directs claims primarily to a business method that merely comprises a linkage between product sales and sponsored advertising over the Internet. That patent was initially ruled invalid by a federal district court on the basis of its claims directing to mere abstractions, but that decision was subsequently reversed by the Court of Appeals for the Federal Circuit.¹⁰¹ A petition for a writ of certiorari was filed following the Federal Circuit's reversal, to which the Supreme Court responded by vacating the appellate decision and remanding the case for further consideration in light of *Alice*.¹⁰² The claims in the *Ultramercial* patent appear equally broad to those repudiated in *Alice* and *Bilski*, and thus the patent may well be invalidated upon remand.

Should *Ultramercial* somehow produce a favorable outcome for its plaintiffs, it may commend patents as a viable means of protecting FAPT Plans as IP. Regardless of *Ultramercial* and its outcome, however, there is an important exception to patentability that would inalienably render the discrete tax planning components within an FAPT Plan vulnerable. The question of patent protection for tax planning elements has been negatively resolved by statute, leaving a Planner with no prospect to achieve anything more than partial patent protection for her methods. Section 14 of the Leahy-Smith America Invents Act of 2011 ("AIA") disallows the patentability of tax strategies, in whatever context they may arise. Sec. 14 states in pertinent part:

TAX STRATEGIES DEEMED WITHIN THE PRIOR ART.

IN GENERAL.—For purposes of evaluating an invention under section 102 or 103 of title 35, United States Code, any strategy for reducing, avoiding, or deferring tax liability, whether known or unknown at the

100. *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1342 (Fed. Cir. 2013).

101. *Id.* at 1337.

102. *Ultramercial*, 722 F.3d 1335, vacated sub nom. *Wildtangent, Inc. v. Ultramercial, LLC*, No. 13–255 (U.S. June 30, 2014).

time of the invention or application for patent, shall be deemed insufficient to differentiate a claimed invention from the prior art.¹⁰³

The AIA, however, seems to leave the patentability of severable, *non-tax strategy* elements of FAPT Plans untouched. Succeeding language in Sec. 14 preserves the patentability of non-tax strategy elements contained within financial management plans by excluding them from the preclusive ambit of Sec. 14(a):

(c) EXCLUSIONS – This section does not apply to that part of an invention that –

. . . .

(3) is a method . . . or system used solely for financial management, to the extent that it is severable from any tax strategy or does not limit the use of any tax strategy by any taxpayer or tax advisor.¹⁰⁴

Thus, a Planner who integrates tax planning elements into her methods may achieve only partial protection via patent, regardless of any future judicial treatments.

In the ambiguous wake of the *Alice* and *Bilski* decisions, and with the pendant uncertainty of *Ulramercial*, it is not clear whether even the non-tax strategy portions of FAPT Plans may be successfully preserved via patents. This holistic uncertainty, combined with the expansive disclosures required by the patent application process, may render the pursuit of patents unfavorable as a device to protect FAPT Plans. As such, trade secrecy seems to present the most viable means presently available for Planners to protect their planning methods and models as IP.

VI. POLICY CONCERNS – *SHOULD* TRADE SECRECY BE ALLOWED FOR FAPT PLANS AND OTHER FORMS OF FINANCIAL PLANNING?

There are legitimate questions as to whether allowing the protection of FAPT Plans as trade secrets would promote sound public policy objectives. Some arguments against offering such protections parallel those generally posited against the issuance of patents for methods of tax, legal, investing, and financial planning. Critics contend that the availability of IP protection generally creates a chilling effect on advisory practices and inhibits the dissemination of information by attorneys and other advising professionals to their clients.¹⁰⁵ The potential of lawsuits for unintentional infringement is considered generally unhealthy for the operating environment in advising

103. Leahy-Smith America Invents Act, P.L. 112–29, § 14(a), 125 Stat. 284 (2011).

104. *See id.* § 14(c)(2).

105. Steve Seidenberg, *Crisis Pending*, 93 A.B.A. J. 42, 42 (May 2007), available at http://www.abajournal.com/magazine/article/crisis_pending.

industries, in that it curtails the ability of professionals to advise their clients freely.¹⁰⁶ An infringement lawsuit need not target or immediately affect individual advisors in order for them to begin harboring reservations about applying the full weight of their knowledge and resources to a client's needs. The mere news or threat of lawsuits based on IP claims could produce a chilling effect, by increasing potential liabilities and thus raising the cost of doing business in financial and advising industries substantially.¹⁰⁷

Similarly, allowing trade secret protection for professional planning and advising models may result in professional advisors and consultants being inhibited from freely offering opinions regarding any plans they may be asked to review. Advisors may become concerned that by incorporating treatments of proposed plan elements into their professional work product, they might violate the claimed confidential interests of a third party. This could potentially lessen the general availability of counsel to clients, seriously impacting the important policy objective of ensuring access to sound legal and professional advice. It might also impair an advisor's ability to render effective advice in her ongoing practice, as she may be reluctant to add the specific treatments and critiques of the terms she encounters in a protected plan to the body of knowledge she imparts to others in the future.

Contrarily, extending trade secret protection to professional advising models may actually work to expand the potential for optimization of standard advising techniques. Such protections would enhance the incentives to perform vigorous exploration and analyses of case law, tax codes, regulatory law and statutes, and other authorities bearing upon an advisor's practice. The proceeds of these initiatives would tend to expand the overall knowledgebase available to those involved in the advisor's field, resulting in a net expansion of art within that industry. It must be remembered that trade secrets are eventually absorbed into the industries in which they arise, and arguably tend to become part of the standard art more quickly and readily than patented subject matter.¹⁰⁸ At that point, the fund of knowledge freely available to society will be greater than it would have been had trade secrecy not been available to provide an initial incentive to individual research and initiative.

These concerns exemplify a key point underlying the disparity and potential conflict between patent and trade secrecy law. Patent law expresses

106. *Id.*; Demasters, *supra* note 90.

107. Demasters, *supra* note 90.

108. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), *passim*.

a strong federal policy favoring the disclosure of innovation.¹⁰⁹ As an incentive to this disclosure, patent law offers a legal monopoly to applicants for a fixed period of time, during which the art of the patent is fully disclosed and available to stimulate further innovation within the subject industry. Trade secrecy, on the other hand, actually requires that innovations not be disclosed to the public at any time during the effective life of the secret. While courts have found that the policy imperatives underlying patent and trade secret law do not necessarily conflict,¹¹⁰ the fact remains that these bodies of law impel individuals toward opposite behaviors and effects.

Hence, if making innovative financial and organizational planning information more readily and publicly available is a top priority, then sound policy would promote patent protection as a complement to trade secrecy. Alternatively, if granting statutory monopolies on any part of what may be viewed as an essentially public practice seems counterproductive or unfair, a policy endorsing trade secrecy alone may be preferable. A third approach would be to deny both patent and trade secret protection to all financial and organizational advising methods, since the negative consequences of allowing proprietary interests to dominate these fields would outweigh any possible incentives to invent that either patents or trade secrecy can provide. The optimal balance of policy interests and objectives relative to IP protections for professional advising industries has yet to be struck, leaving these and other policy questions unresolved.

A. FAPT Planning and Tax and Creditor Rights Policies

As they relate to tax effects, policy discussions regarding FAPTs comprise an extension of the overarching, systemic dialogue regarding tax policy itself. A policy of granting trade secrecy protection to Planning techniques effectively provides an incentive to form FAPTs for the purpose of tax avoidance. Thus, the basic issue here becomes whether, by providing an incentive to craft and implement sophisticated Planning models that may facilitate the avoidance of taxes, a policy of granting trade secret protection to Planning models would harm or hinder society at large.

Some argue that by encouraging taxpayers to resort to foreign lands and legal systems to avoid domestic taxes, FAPTs and similar forms of Planning create a deleterious draw upon the U.S. tax base and encourage

109. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

110. *Id.*

tax evasion.¹¹¹ For this reason, many decry Planners' efforts as essentially unethical, or even immoral or illicit.¹¹² Some see all forms of offshore planning as fundamentally indefensible in light of their purported drain on tax coffers, which may exceed 250 billion dollars annually worldwide.¹¹³

Alternatively, some economists feel that tax-saving mechanisms that divert monetary gains away from economic tax loss have a net beneficial effect on the overall economy. Their studies indicate that the net deadweight economic loss caused by governmental system extraction via the income tax exceeds fifty percent of all revenues taken.¹¹⁴ Net deadweight economic losses tend to increase as implemental measures make it more difficult for taxpayers to avoid income taxation, lowering the overall efficiency of the economic system. This owes to the fact that as anti-tax avoidance policies make it increasingly difficult to circumvent taxation, the greater the costs imposed by the system in association with tax avoidance, and correspondingly, the greater the costs that taxpayers are forced to bear in order to achieve it.¹¹⁵

Systems and apparatuses that decrease net dead weight economic losses caused by taxation are ultimately beneficial, as they convert substantial portions of those losses to net monetary holdings in the domestic market.¹¹⁶ They increase the private capital resources of the U.S. economy,¹¹⁷ making it more efficient. This furthers the interests and effects of sound economic policy, so that any effort to reduce or remove the incentives given to Planners to assist their clients in avoiding taxes may actually be counterproduc-

111. Robert M. Morgenthau, *These Islands Aren't Just a Shelter from Taxes*, N.Y. TIMES, May 6, 2012, available at <http://www.nytimes.com/2012/05/06/opinion/sunday/these-islands-arent-just-a-shelter-from-taxes.html>.

112. RICHARD MURPHY, TAX JUSTICE NETWORK UK, TAX HAVENS CREATING TURMOIL 5 (2008), http://www.un-negs.org/cfr/upload/1234518529_80.47.24.143_CreatingTurmoil.pdf; Paul Valley, *There is No Moral Case for Tax Havens*, THE INDEPENDENT (Aug. 28, 2011), <http://www.independent.co.uk/voices/commentators/paul-valley-there-is-no-moral-case-for-tax-havens-2345096.html>.

113. Henry, *supra* note 4, at 16–17.

114. Martin Feldstein, *Tax Avoidance and the Deadweight Loss of the Income Tax*, 81 REV. ECON. & STAT. 674, 678 (Nov. 1999).

115. *Id.* at 674; David A. Weisbach, LINE DRAWING, DOCTRINE, AND EFFICIENCY IN THE TAX LAW 54, (U. Chicago, John M. Olin Law & Economics, Working Paper No. 62, 1998).

116. Feldstein, *supra* note 114; Weisbach, *supra* note 115.

117. This is especially true since U.S. transferor assets held in FAPTs are generally invested directly back into the U.S., *see* Taylor, *supra* note 6, at 167.

tive to the economic interests of society as a whole.¹¹⁸ This seems to confirm a foundational tenet lying at the heart of trade secret policy and jurisprudence; namely, that trade secret protection should reduce the squandering of resources that attends extravagant or excessive steps to preserve one's self-interest. Ultimately, offshore tax avoidance mechanisms act as a check on the excesses of domestic tax policies, and help drive better tax policies in high-income nations.¹¹⁹ Similar observations and effects apply to other loss avoidance aspects of Planning, such as insulation from questionable claims and allegations brought by potential creditors and litigants.

B. FAPT Planning and Foreign Policy

Hosting FAPTs and other asset protection vehicles typically provides a valuable source of income and economic stimulus to domiciliary jurisdictions.¹²⁰ By encouraging the development of offshore financial industries, Planners may help ease local financial burdens and taxation levels within these jurisdictions (often dubbed "tax havens"),¹²¹ and thus raise their standards of living.¹²² In cases where foreign policies deliberately harm offshore financial industries, the local financial effects may prove disastrous,¹²³ especially since conditional factors often make it impossible for an offshore financial center to cease its reliance upon offshore formation and servicing revenues.¹²⁴ Beyond this, offshore financial centers provide meaningful checks on the magnitude of global socio-political abuses by giving threatened or repressed people a safe capital outlet and mechanism for fleeing persecution.¹²⁵ Thus, Planners may help to preserve and ease

118. Weisbach, *supra* note 115.

119. Daniel J. Mitchell, *Why Tax Havens are a Blessing*, FOREIGN POLICY (Mar. 17, 2008), http://www.foreignpolicy.com/articles/2008/03/16/why_tax_havens_are_a_blessing.

120. Adam H. Rosenzweig, *Why are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 932–33 (2010).

121. Mitchell, *supra* note 119.

122. Daniel J. Mitchell, *In Praise of Tax Havens*, FREEMAN (June 10, 2009), http://www.fee.org/the_freeman/detail/in-praise-of-tax-havens#axzz.

123. Peter Gumbel, *Cyprus Rescue: The Destruction of a Tax Haven*, TIME, Mar. 25, 2013, <http://business.time.com/2013/03/25/cyprus-rescue-the-destruction-of-a-tax-haven/>.

124. Rosenzweig, *supra* note 120, at 962–63.

125. Mitchell, *supra* note 119.

access to personal liberty in the world, and U.S. policies should provide incentives for Planning activities.

VII. CONCLUSION

FAPT Planning models may be fitting objects for trade secret protection. Where the critical factors of uniqueness or originality, economic value, reasonable steps to establish and maintain secrecy, and insularity from common industry knowledge are present, Planning models satisfy the requirements to be afforded protection as trade secrets under the law. The alternative dynamics and interplay between trade secrecy and patent protection have yet to be defined for financial planning models in general, but trade secrecy appears to present a viable IP option for Planners regardless of whether FAPT Plans are ultimately found to be patentable. While policy concerns and analyses remain mixed, legitimate policy goals and imperatives exist that support providing the incentive of trade secrecy protection to Planning activities. On these bases, trade secrecy protection should be recognized for those Planners who take the requisite steps to protect their specific FAPT models, as it would with any other body of formulated information.