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Global Business & Development Law Journal

Volume 11 | Issue 2 Article 6

1-1-1998

Piercing Offshore Asset Protection Trusts in the Cayman Islands: The Creditors' View

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I. INTRODUCTION

Offshore Asset Protection Trusts (OAPTs), whether established in the Cayman Islands[1] or in other offshore jurisdictions,[2] are typically trusts created under the laws of selected foreign jurisdictions for the primary purpose[3] of shielding assets transferred to the trust from future creditors.[4] OAPTs offer added protection of assets

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1. The Cayman Islands consist of three islands, Grand Cayman, Cayman Brac, and Little Cayman, which lie directly south of Cuba and east of Jamaica, approximately 460 miles south of Miami. *See* MARSHALL J. LANGER & DENIS A. KLEINFELD, PRACTICAL INTERNATIONAL TAX PLANNING 60-1 (3d ed. 1985 & Supp. 1997). Grand Cayman is the largest island and is about 76 square miles, twenty-three miles long and eight miles wide in places. *Id.* Grand Cayman also contains the capital and the primary commercial center of Georgetown. *Id.* The population as of 1997 is about 30,000 people, of which, approximately 95% live in Grand Cayman. Id. at 60-2. English is the official language of the Caymans, therefore, many U.S. investors find business communications easier than in other foreign jurisdictions. *Id.*

2. In addition to the Cayman Islands, popular jurisdictions for OAPTs include the following: the Bahamas; Bermuda; British Virgin Islands; Cook Islands; Isle of Man; Turks and Caicos; and St. Kitts and Nevis. *See* David D. Beazer, *The Mystique of "Going Offshore,"* 9 UTAH B. J. 19, 19-20 (1996). The Bahamas offer professional services, such as licensed banks, trust companies, and insurance management, which are exceptional and well established, and are particularly good for banking. *Id.* Bermuda is part of the United Kingdom and there is parity with the U.S. dollar. *Id.* The British Virgin Islands are attractive because the currency is the U.S. dollar, however, there are few professional services. *Id.* The Cook Islands offers very aggressive trust law, but there are limited professional services, and the location is remote. *Id.* The Isle of Man is under its own court system, the professional services are excellent, and the Isle has an aggressive marketing practice. *Id.* Turks and Caicos are self-governing and dynamic, but both are relatively new as offshore players, and there are few professional services. *Id.* Lastly, St. Kitts and Nevis provide aggressive trust law, but both are similar to Turks and Caicos in that they are new players in the offshore financial market and have few professional services. *Id.*

3. In addition to asset protection, settlors have used OAPTs for estate planning, economic diversification, antenuptial protection of the settlor's separate assets, confidentiality, anonymity with respect to wealth, avoidance of forced disposition of assets, and to plan for the contingency of changing one's domicile or citizenship. *See* Jonathan L. Mezrich, *It's Better in the Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer*, 98 DICK. L. REV. 657, 659 (1994); *see also* KATHRYN A. BALLSUN, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS, Vol. 1, §4-10, 4-24 (Duncan E. Osborne ed., 2d ed. 1997) (describing that reasonable client motivation for implementing wealth preservation techniques are economic diversification; presentation of a low profile to disguise wealth; income or estate tax planning; avoidance of the forced disposition of assets; a change in domicile; or marital planning); *see also* Beazer, *supra* note 2, at 21 (adding that OAPTs can be used to protect the settlor from investment activities outside of his main area of work, stop loss where an institution requires an open-ended guaranty, protect retirement benefits, protect inheritance or proceeds from the sale of a business, and provide a method to limit toxic waste liability exposure).

4. *See* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 12 (1994) (explaining that OAPTs are generally trusts created under the laws of certain foreign jurisdictions in order to shield the assets transferred to the trust from future creditors); *see also* PAUL E.

without the trust settlor divesting complete control over the transferred assets,[5] unlike domestic spendthrift trusts which do not allow the self-settling feature found in Cayman Islands OAPTs.[6] Current estimates suggest that US$5 trillion of foreign trust funds are held in OAPTs.[7]

OAPTs recently have become the most popular means[8] of asset protection, and their widespread use may continue to grow in light of potential new federal bankruptcy legislation which would make uniform the exemption amount for homestead property.[9] If state exemptions are eliminated by the implementation of a

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HAUSER & DEBORAH CHAPNICK, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS, Vol. 2, §25:01, 25-2 (Duncan E. Osborne ed., 2d ed. 1997) (including creditors such as tax authorities, ex-spouses and plaintiffs with personal injury, environmental and other claims); *see also* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Are They Tax Neutral?*, 7 J. INT'L TAX'N 107, 107 (1996) [hereinafter Marty-Nelson, *Are They Tax Neutral?*] (explaining that OAPTs are created by U.S. citizens for reasons that have little to do with tax consequences).

5. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 13 (relating that one of the primary reasons why OAPTs are utilized is because they offer added protection without the settlor divesting total control over the transferred assets); *see also* Marty-Nelson, *Are They Tax Neutral?, supra* note 4, at 107 (stating that the majority of OAPTs are established by U.S. citizens for reasons that have little to do with possible tax consequences, rather, the appeal of OAPTs is usually the protection from potential creditors, which is usually greater than protection found domestically).

6. Domestic spendthrift trusts refer to any type of trust that contains mandatory distribution language providing that the beneficial interest of a beneficiary may not be assigned by him or reached by his creditors. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 22. Accordingly, a creditor cannot reach the beneficiary's interest by attachment, garnishment, or other legal process. *Id.* Once trust income is distributed to the beneficiary, creditors may attach the funds, provided the attachment occurs before the beneficiary spends the funds. *Id.* at 22-23. Another important feature of a domestic spendthrift trust is that the trust cannot be self-settled. *Id.* at 30. In other words, the settlor cannot reserve an interest in the trust property, such as being a beneficiary or maintaining some degree of control over the trust disposition of the trust property. *Id.* This feature is one of the main differences between domestic spendthrift trusts and OAPTs. *Id.* Courts reason that creditors of the beneficiary of a spendthrift trust are not defrauded since creditors should not extend credit to a trust beneficiary before first exercising due diligence to determine if the trust is limited by a spendthrift clause. *Id.* at 20.

7. *See* Beazer, *supra* note 2, at 19 (reporting that a sum in excess of US$5 trillion passes each year through offshore financial centers, which are foreign countries with not only favorable trust law, but also favorable banking, tax, partnership and corporate laws).

8. *See* William D. Zabel and Kim E. Baptiste, *Asset Protection And Estate Planning: Three Scenarios,* 134 TRUSTS & ESTATES 47, 53 (Dec. 1995) (reporting that in recent years, OAPTs have become increasingly popular as a means of shielding one's assets from potential creditors); *see also* Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts,* 23 ESTATE PLANNING 65, 65 (1996) (stating offshore jurisdictions have been popular for decades with foreigners to escape forced heirship provisions in their home countries, to avoid hostile government takeovers, or to obtain favorable tax benefits).

9. The popularity of OAPTs may continue to increase in light of the October, 1997 recommendations by the special National Bankruptcy Review Commission panel. *See* Sougata Mukherjee, *Reforms to Be Hashed out in D.C.,* SACRAMENTO BUS. J., Sept. 19, 1997, at 1, 8. The panel was established three years ago to propose solutions that would ease the burden on bankruptcy courts and perhaps offer greater security for debtor and creditors. *Id.* at 8. One of the most significant proposals is a uniform mandatory federal exemption of up to US$100,000 for homestead property, and US$20,000 for personal property (US$40,000 for a couple). *Id.* Currently, even though bankruptcy is exclusively under the federal courts' jurisdiction, each state has its own exemption rules. *Id.* Consequently, debtors are encouraged to abuse bankruptcy by domicile-forum-shopping for states which have the most liberal exemption rules, like Florida and Texas where debtors are allowed to keep million-dollar homes. *Id. See also* William D. Zabel and Kim Baptiste, *Asset Protection And Estate Planning: Three Scenarios,* 134 TRUSTS & ESTATES 54, 55 (Nov. 1995) (mentioning that under the Florida homestead exemption, FLA. STAT.

uniform mandatory federal exemption, there is a strong likelihood of a surge in the transfer of assets into OAPTs.[10]

Another reason for the OAPT popularity explosion is that the traditional settlor base of multi-millionaires has expanded to include many service professionals and businesses which are vulnerable to potentially financially devastating litigation risks.[11] Increasingly, many physicians, attorneys, accountants, securities professionals, and real estate entrepreneurs are seeking foreign asset protection.[12] Additionally, people who are concerned about possible marriage dissolution litigation or future physical disability and institutional care have used OAPTs to shield their assets from potential creditors.[13]

OAPTs are touted by ecstatic promoters to be virtually invulnerable against future creditors.[14] However, OAPTs rarely provide complete legal protection from creditors.[15] Rather, OAPTs do serve as effective roadblocks against creditors to sufficiently complicate matters; thus, deterring trustees in bankruptcy and creditors from committing the resources necessary to pierce such structures successfully.[16] By using an OAPT, a debtor may acquire sufficient leverage to resolve disputes on more

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§§222.01, .02 and .05 (1990), the home of a Florida resident cannot be reached by creditors absent any actual or constructive fraud); urban homesteads in Texas could cover expensive homes in Dallas or Houston because an urban homestead can encompass one acre of land. *See also* Norman H. Glickman, *Asset Protection Trusts and International Estate Planning*, 241 PRAC. L. INST. / EST. PLAN. & ADMIN. 419, 460 (1995). Rural homesteads cover one-hundred acres for a single person and two-hundred acres for a family. *Id.* Moreover, senior citizens are allowed an increased amount of acreage to be covered under the homestead exemption. *Id.*

10. *See supra* note 9 and accompanying text (surmising the changes in bankruptcy law may cause a surge in the popularity of OAPTs).

11. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 14 (explaining that one reason behind the explosion in OAPTs is the class of settlors has expanded from its traditional base of the "super-rich" to include less well-heeled newcomers whose professions or businesses leave them vulnerable to potentially devastating litigation risks).

12. *See* Lynn R. Saidenberg, *Estate Planning and Creditors' Rights*, 233 PRAC. L. INST. / EST. PLAN. & ADMIN. 81, 85 (1993) (stating that professionals such as accountants, physicians, securities professionals, real estate entrepreneurs are at risk from business related creditor claims).

13. *See id.* (relating that people concerned about possible marital litigation or future disability and institutional care are at risk from related creditor claims).

14. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:01, 25-2 (surmising that OAPTs rarely provide complete protection in law against creditors).

15. *See id.*; *see also* ANTONY G.D. DUCKWORTH & RICHARD LYLE FINLAY, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS, Vol. 3, § 33:59, 33-46 (Duncan E. Osborne ed., 2d ed. 1997) (stating that an OAPT is unlikely to withstand a determined attack if it is considered fraudulent in other jurisdictions, such as the United States, with which the debtor has substantial connections or in which the property or the beneficiaries of the OAPT are situated); *see also* Glickman, *supra* note 9, at 604 (declaring that even the most carefully structured plan may be challenged by creditors in the United States or elsewhere).

16. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:01, 25-2 (indicating that the real purpose of OAPTs is to complicate matters sufficiently so as to deter trustees in bankruptcy and creditors from committing the resources necessary to attack such structures successfully); *see also* Zabel & Baptiste, *supra* note 8, at 53 (explaining that OAPTs are established to make it very difficult to collect United States judgments since foreign statutes place both physical and legal obstacles in the path of creditors seeking to enforce judgments); Beazer, *supra* note 2, at 20 (discussing how the legal restrictions in foreign jurisdictions create an effective barrier to all but the most tenacious creditors).

favorable terms.[17] On the other hand, determined creditors will not be at a loss for both direct[18] and indirect[19] ways to make the settlor's life miserable in efforts to coerce the settlor to release OAPT assets.[20] Additionally, if the creditor draws a judge who shares the belief that the OAPT is illegal and against public policy, the creditor may be successful in obtaining a favorable judgment against the debtor.[21]

First and foremost, the creditor must determine whether the judgment against the debtor is large enough to justify the expense of either pursuit into a foreign jurisdiction[22] or further pursuit in the United States courts using indirect means.[23] For instance, creditors of an estate in bankruptcy with few assets will understandably not throw good money after bad.[24] In other words, can the expense and uncertainties of pursuit can be reduced sufficiently to make the pursuit of an OAPT worthwhile?[25]

This Comment is written on the premise that the creditor seeks to collect a judgment against an individual debtor whose domestic assets are insufficient to satisfy the judgment,[26] and where the debtor has transferred assets into an OAPT in

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17. *See* Rothschild, *supra* note 8, at 65-66 (stating that the negotiating table is where the true test occurs of whether a creditor can reach the assets of a properly formed OAPT); *see also* Beazer, *supra* note 2, at 20 (explaining that the goal of an OAPT is to create an impenetrable barrier that in a "worst case scenario" will allow the debtor to effectively manage a negotiated settlement).

18. *See infra* notes 161-282 and accompanying text (relating the direct methods a creditor may take in piercing an OAPT).

19. *See infra* notes 283-547 and accompanying text (relating the indirect methods a creditor may take in piercing an OAPT).

20. HUGH LOWE, ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS, Vol. 1, §26:06, 26-9 (Duncan E. Osborne ed., 2d ed. 1997) (noting determined creditors will not be at a loss for ways to make the settlor's life miserable).

21. *See* LOWE, *supra* note 20, at §26:06, 26-9 (surmising if a creditor draws a judge who shares the belief that the trust is scandalous and illegal, the creditor may be successful in making the debtor's life sufficiently miserable to coerce the release of assets).

22. *See generally* HAUSER & CHAPNICK, *supra* note 4, at §25:01, 25-2 (explaining creditors of a bankruptcy estate may be reluctant to risk the extra investment in accounting and legal fees needed to identify and attack a bankrupt's asset protection trust).

23. *See infra* notes 283-547 and accompanying text (relating the indirect steps a creditor may take in the United States court system against a debtor with an OAPT in the Cayman Islands); *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:59, 33-46 (explaining that jurisdictions, such as the United States, may be in a position to dismantle the OAPT by direct or indirect means).

24. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:01, 25-2 (stating creditors of a bankruptcy estate with few assets understandably will not wish to throw good money after bad).

25. *See id.* (explaining to the extent that the expenses and uncertainties associated with attacking an OAPT can be reduced, trustees and creditors are more likely to proceed with attacking the OAPT).

26. Assets that have been transferred, whether into an OAPT or into domestic asset protection structures, can be set aside by the transferor's creditors or trustee in bankruptcy if proven that the transfer was made with an intent to defraud either future or present creditors. *See* Zabel and Baptiste, *supra* note 8, at 55. Under the Uniform Fraudulent Conveyance Act (UFCA) transfers of assets may be avoided and the assets recovered for the benefit of creditors if made with actual fraud or constructive fraud. HAUSER & CHAPNICK, *supra* note 4, at §25:03, 25-5. The Uniform Fraudulent Transfer Act [hereinafter "UFTA"] adopts many of the concepts of the federal Bankruptcy Code. *Id.* Actual fraud occurs when a transfer is made with an actual intent to defraud any present or future creditor. *Id.* To determine the intent of the debtor, the U.S. court will often look to see whether any "badges of fraud" were present at the time of the transfer. *Id.* at 25-6. Examples include, but are not limited to: (1) transfers involving family members; (2) the transferor's continued possession or control over the property after the transfer; (3) secrecy

the Cayman Islands prior to becoming insolvent. This Comment also examines the creditors' remedies by discussing five subjects: first, the General Legal Framework of the Cayman Islands;[27] second, the Trust Law in the Cayman Islands;[28] third, the Creditor Protection Laws in the Cayman Islands;[29] fourth, the Direct Approaches to Pierce an OAPT in the Cayman Islands;[30] and last, the Indirect Approach a Creditor May Take in the United States ("U.S.") Court System against a Debtor with an OAPT in the Cayman Islands.[31]

II. GENERAL LEGAL FRAMEWORK OF THE CAYMAN ISLANDS

A. History

The Cayman Islands is a British colony acquired by settlement, therefore, English common law and statutory law were brought with the English immigrants and have since been confirmed by local legislation.[32] English judicial decisions have persuasive authority in the Cayman Islands courts, and in local practice, the courts generally follow English precedent except as varied by local statute.[33]

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involved in the transfer; (4) a conveyance of substantially all of the transferor's assets; (5) inadequate consideration received for the transfer; (6) the transferor either having been sued or threatened with suit at the time of the transfer; and (7) transfers occurring shortly before or after the debt was incurred or the judgment was entered. *Id.* at 25-7, 25-8. A transfer will be set aside on the basis of constructive fraud if the transferor: (1) receives less than reasonably equivalent value which, as a the rule-of-thumb, is 70% of the fair market value, and (2) is insolvent at the time the transfer is made or is rendered insolvent as a result of the transfer. Zabel and Baptiste, *supra* note 9, at 58.

27. *See infra* notes 32-40 and accompanying text (explaining the general legal framework of the Cayman Islands).

28. *See infra* notes 41-121 and accompanying text (explaining the trust law of the Cayman Islands).

29. *See infra* notes 122-160 and accompanying text (explaining creditor protection laws in the Cayman Islands).

30. *See infra* notes 161-282 and accompanying text (explaining direct approaches a creditor may take in piercing OAPTs in the Cayman Islands).

31. *See infra* notes 283-547 and accompanying text (explaining the indirect approaches a creditor may take in piercing OAPTs in the Cayman Islands).

32. *See* ORREN MERREN, OFFSHORE TRUSTS 78-79 (Dennis Campbell & Susan Cotter eds., 1995) (explaining that the legal framework in the Cayman Islands is a combination of English Common Law and statutory law). *See also* DUCKWORTH & FINLAY, *supra* note 15, at §33:28, 33-17, 33-18 (describing the Cayman Islands as a British colony acquired by settlement, and as a result, the settlers are deemed to have brought with them English law, both common law and statutory law). The current enactment which confirms by legislation the extension of English law to the Cayman Islands is the Cayman Interpretation Law of 1963, in which Section 40 states: "All such Law and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Islands shall continue to be laws in the Islands save insofar as any such laws or Statutes have been, or may be, repealed or amended by the Law of the Islands." *Id.* at 33-17.

33. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:09, 33-7 (explaining that English Common Law applies in the Cayman Islands except as varied by local statute). The United Kingdom remains responsible for the external affairs, internal security and defense of the Cayman Islands. *See id.* at §33:28, 33-18 (relating that English judicial decisions are of persuasive authority in the Cayman Islands); *see also* LANGER & KLEINFELD, *supra* note 1, at 60-2 (describing that the Cayman Islands legal system is based on English common law); *see also* THOMAS H. REYNOLDS & ARTURO A. FLORES, FOREIGN LAW, CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, Cayman Islands, 1 (1989, Vol. I & Supp. 1997) (stating that major areas of public

B. Cayman Islands Court System

There are four tiers to the Cayman Islands legal system: (1) Juveniles' Court, Traffic Court and the Senior Magistrate's Court; (2) The Grand Court; (3) The Cayman Islands Court of Appeal; and (4) Britain's Privy Council which is locally represented by a Judicial Committee.[34]

The Juveniles' Court, Traffic Court and the senior Magistrate's Court are courts of summary jurisdiction which collectively deal with relatively minor offenses, small civil claims and have minor appellate jurisdictions from various administrative tribunals.[35] The Grand Court is the superior court of first instance and has general civil and criminal jurisdiction as well as inherent jurisdiction.[36] It is in the Grand Court where a creditor will appear at first instance to adjudicate the cause of action against the OAPT debtor-settlor.[37] The Grand Court also hears all appeals from the Summary Court.[38] The Cayman Island Court of Appeals hears all appeals from the Grand Court.[39] Finally, there is an appeal from the Court of Appeal to the Judicial Committee of the Privy Council in civil and criminal matters with leave.[40]

III. TRUST LAW IN THE CAYMAN ISLANDS

Since the Cayman Islands is a British colony, local legislation on trust law is modeled after the English common law, English principles of equity and the English law of trusts.[41] The principle legislation is the Trusts Law (Revised), based upon

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law and most matters related to civil procedure, service of process and private international law, are governed by United Kingdom practice or Common Law); *see also* MERREN, *supra* note 32, at 78-79 (specifying the legal framework in the Cayman Islands is a combination of English Common Law and statutory law). Subject to relevant and applicable statutes, the Common Law of England, including the rules of equity, governs the establishment and administration of modern trusts in the Cayman Islands. *Id.* at 79. The British government is represented in the Cayman Islands by a Governor whose responsibilities include defense, foreign affairs, internal security and the administration of justice. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:10, 33-8.

34. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:29, 33-18 (noting the four different tiers of the Cayman Islands legal system); *see also* LANGER & KLEINFELD, *supra* note 1, at 60-3 (relating that appeals from the Cayman courts go to the Cayman Islands Court of Appeal and then ultimately to the Privy Counsel in England).

35. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:29, 33-18 (laying forth the function of the Juveniles' Court, Traffic Court and the Senior Magistrate's Court).

36. *See id.* (laying forth the function of the Grand Court).

37. *See generally id.* (explaining the jurisdiction of the Grand Court).

38. *See id.*

39. *See id.*

40. *See id.* Notable decisions of the Cayman Islands courts are reported in the *Cayman Islands Law Reports* published by Law Reports International. *Id.*

41. *See* MERREN, *supra* note 32, at 79 (explaining the Cayman Islands follows English common law as varied by local statute); *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:37, 33-22 (relating the Cayman Islands acquired English law including principles of equity and the law of trusts).

England's Trustee Act of 1925 and the Variation of Trusts Act of 1958.[42] This legislation does not aim to codify the law, rather, it is primarily concerned with the appointment and retirement of trustees, their powers and protections, and the powers of the court.[43] However more applicable, the Trusts (Foreign Element) Law of 1987 affords comprehensive conflict-of-law rules in relation to trusts[44] and establishes the ability to choose the governing law of the trust.[45]

A. Trusts (Foreign Element) Law of 1987

The Trusts (Foreign Element) Law of 1987 ("Trusts Law") establishes the settlor's ability to choose the governing law of his trust.[46] When a trust expressly selects Cayman Islands law, the term is effective regardless of any other circumstances, even when the administration of the trust is to be conducted elsewhere.[47]

The Trusts Law also provides that in a trust governed by Cayman Islands law, all trust-related questions are to be determined exclusively by Cayman Islands law without reference to the laws of any other jurisdiction.[48] This includes issues regarding the settlor's mental capacity, questions of interpretation and validity, issues of administration, questions regarding the existence, extent and exercise of powers, and issues concerning contributions of property to the trust.[49] However, there are exceptions: the statute cannot be used to validate any trust or disposition of foreign

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42. *See* MERREN, *supra* note 32, at 83 (indicating the Trusts Law (Revised) of the Cayman Islands was originally enacted in 1987 and is modeled upon the English Trustee Act of 1925); DUCKWORTH & FINLAY, *supra* note 15, at §33:37, 33-22 (relating the principle trust law legislation is the Trusts Law (Revised), based on England's Trustee Act of 1925 and Variation of Trusts Act of 1958).

43. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:37, 33-23, 33-24 (indicating the Cayman Islands Trust Law (Revised) does not set out to codify the law and is concerned primarily with the appointment and retirement of trustees, their powers and protections, and the powers of the court).

44. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:37, 33-23 (explaining the Trusts (Foreign Element) Law of 1987 provides a comprehensive set of conflict-of-law rules in relation to trusts). Most notably, the Trusts (Foreign Element) Law of 1987 addresses the issue of forced heirship. *Id.* Forced heirship is when the court has discretion to override the testator's will and make provisions for the spouse and dependents. *Id.* at 33:48, 33-32. When the law was enacted, it was a novel response aimed principally to combat New York's forced heirship laws. *Id.* at 33:37, 33-23. As a result, anti-forced heirship laws were prompted in nearly all other offshore centers. *Id.*

45. *See* MERREN, *supra* note 32, at 85-86 (indicating the Trust (Foreign Element) Law 1987 (as amended in 1995) clarifies the English conflict of laws provisions as to choice of governing law choice of forum); *see* DUCKWORTH & FINLAY, *supra* note 15, at §33:47, 33-31 (explaining the Trusts (Foreign Element) Law establishes the ability to choose the governing law of a trust). A term of a trust expressly selecting Cayman Islands law is effective regardless of any other circumstance, even when the trust administration will be conducted elsewhere. *Id.* at §33:47, 33-31, 33-32.

46. *See* CAYMAN TRUSTS (FOREIGN ELEMENT) LAW §4.

47. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:47, 33-31, 33-32 (explaining a term of a trust expressly selecting Cayman Islands law is effective regardless of any other circumstances, even when the trust administration will be conducted elsewhere, though there are usually strong or compelling reasons to locate the trust administration in the Cayman Islands).

48. *See id.* at 33-32.

49. *See id.* (describing some of the trust-related questions that may arise).

real property; the statue cannot be used to validate any testamentary trust or disposition which is invalid according to the laws of the testator's domicile; and when transferring foreign property to the trust, movable or immovable, the foreign transfer formalities must be observed.[50]

Moreover, the Trusts Law provides that a Cayman Islands trust is not to be regarded as defective in any fashion by reason that the laws of another jurisdiction prohibit or do not recognize the concept of a trust,[51] or by reason that the trust avoids the rights of forced heirs or other persons claiming a personal relationship with the settlor.[52]

B. Exclusion from the Hague Convention on Trusts

The Hague Convention on Trusts ("HCT") provides that participating countries permit a settlor to choose the applicable law or laws governing the trust.[53] However, any compulsory interest required by the law of the decedent's last domicile may be enforced regardless of the settlor's choice of law.[54] This overriding feature is contrary to an OAPT settlor's interest in shielding his assets from future creditors.[55]

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50. *See id.*

51. *See* LANGER & KLEINFELD, *supra* note 1, at 14-7 (stating most European civil law countries do not recognize the concept of the common law trust or anything comparable). For example, Germany might recognize such a trust under its conflict-of-laws rules, even if created by a German resident or citizen, if the underlying property were situated outside of Germany. *Id.* However, Germany would probably recognize the foreign law only if there were sufficient ties to the other jurisdiction whose law governs the trust and if recognition of the foreign law would not violate German public policy. *Id.* If the trust is recognized, the trustee's authority to administer and dispose of the trust property will also be recognized. *Id.* If the trust is not recognized, it is quite possible that the trustee might be considered to be the absolute owner of the trust property. *Id.* This might make the trust property subject to claims by the trustee's creditors in some civil law countries. *Id.*

52. *See* CAYMAN TRUSTS (FOREIGN ELEMENT) LAW §6. There are no forced heirship laws in the Cayman Islands, and testators have total freedom of disposition; *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:48, 33-32, 33-33; *see also* Rothschild, *supra* note 8 (discussing the avoidance of New York state's forced heirship law is one reason why the popularity of OAPTs has grown in recent years).

53. *See* LANGER & KLEINFELD, *supra* note 1, at 14-9 (recognizing under the HCT that a settlor will be permitted to choose the applicable law or laws governing the trust). In 1984, the Hague Conference on Private International Law adopted the HCT. *Id.* The HCT deals with trusts created voluntarily and evidenced in writing. *Id.* A country adhering to the HCT may agree to apply its terms to all trusts or only to those from other signatory countries. *Id.* The HCT is designed to deal with common law trusts created by persons from common law countries. *Id.* A country need not recognize a trust when its significant elements are more closely connected with civil law countries that do not recognize the legal entity of a trust. *Id.* In other words, the HCT will not assist in recognition of a trust created in a common law country by a person who is a citizen and resident of a civil law country. *Id.* at 14-10.

54. *See* LANGER & KLEINFELD, *supra* note 1, at 14-9 (explaining that the forced share or other mandatory interest required by the law of the decedent's last domicile may be applied regardless of the settlor's choice of law).

55. *See supra* notes 1-4 (relating that the primary purpose of OAPTs is to shield assets transferred to the trust from future creditors).

Although the majority of English common law countries have adopted the HCT, the Cayman Islands requested specifically to be excluded[56] because Article 13[57] of the HCT was perceived by the Cayman Islands legislature as allowing the recognition of a judgment against the validity of an OAPT from another HCT participant.[58] Therefore, the settlor-lenient Cayman Islands Trust Law governs.[59] For example, under Cayman Islands Trust law, the settlor may simultaneously be trustee, one of at least two beneficiaries, and protector of the trust.[60] Additionally, a short statute of limitations for any local cause of action[61] and strict confidentiality requirements with criminal sanctions for violations are imposed upon all professionals dealing with trusts.[62]

C. Cayman Island of OAPTs Allow for Stronger Settlor Controls than Lawful in the United States

OAPTs in the Cayman Islands allow settlor control far beyond that tolerated in domestic trusts.[63] For instance, the OAPT settlor may simultaneously: (1) be one of at least two beneficiaries and the trustee; (2) be the "protector"[64] or an "advisor"; and (3) include his own "letter of wishes"[65] with the trust giving non-binding instructions to the trustee.[66] However, similar to U.S. laws, if the settlor is the trustee, protector

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56. *See* MERREN, *supra* note 32, at 79-80; *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:30, 33-18 (explaining that the power to enter into a treaty or other agreement is reserved to the British government. However, a treaty or other international agreement does not automatically become law, rather, it must be brought into effect by the appropriate Cayman Island legislation too). At present, there are no present plans to become a party to the HCT. *Id.* at §33:37, 33-23.

57. Article 13 of the HCT states, "No state shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee are more closely connected with states which do not have the institution of the trust or the category of trust involved." MERREN, *supra* note 32, at 80, n. 5.

58. *See id.* at 80.

59. *See generally* DUCKWORTH & FINLAY, *supra* note 15, at §33:38, 33-23, 33-24 (describing types of trusts in the Cayman Islands).

60. *See infra* notes 68-88 and accompanying text (explaining the settlor can be the beneficiary and protector of the Cayman Islands trust).

61. *See infra* notes 253-260 and accompanying text (relating the Cayman Islands' statute of limitations for a creditor to bring a cause of action).

62. *See infra* notes 261-274 and accompanying text (detailing the Cayman Islands confidentiality laws).

63. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (stating OAPTs invite settlor control far beyond that tolerated in domestic trust).

64. *See infra* notes 78-88 and accompanying text (describing the role of a "protector" in relation to OAPTs).

65. *See infra* notes 89-98 and accompanying text (explaining the definition and function of a "letter of wishes").

66. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (explaining OAPT settlors may be a beneficiary, a protector, and may include a letter of wishes which gives non-binding instructions to the trustee).

and sole beneficiary, there is no trust because the entire legal and equitable interest in the trust property is vested in one person.[67]

1. Settlor as Beneficiary and Trustee

The settlor of a trust under the Cayman Islands Trust Law may be the trustee and also be a beneficiary.[68] Typically, the true goal of the settlor-beneficiary is to retain dominion and control of his or her assets while protecting the assets from creditors.[69] This self-settled arrangement is unavailable in the United States.[70] U.S. courts refuse to protect a settlor who is also a beneficiary of a self-settled spendthrift trust because the arrangement is against public policy,[71] and thus, creditors of the settlor may reach the maximum trust amount distributable to the settlor.[72] Settlors view OAPTs as the solution to this U.S. rule of law against self-settled spend-thrift trusts.[73]

However, while a settlor can achieve a self-settled trust by transferring assets into an OAPT in the Cayman Islands, the management, control, and enjoyment of the transferred assets gained by being settlor, beneficiary, trustee, and sometimes protector can actually be the settlor's downfall.[74] If the creditor can prove "beyond

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67. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:41, 33-26 (explaining the settlor can be the trustee and at least one of two beneficiaries).

68. *See id.* (relating that the trust is void if the settlor is the trustee and the sole beneficiary).

69. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (professing the true desire of an individual who seeks to protect his assets through an OAPT has been described as not to make a transfer into a trust from the benefit of spouse or children but rather to make a transfer into a trust that he or she controls and of which he or she is a beneficiary).

70. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (discussing how the feature of maintaining control and being a beneficiary is not an available option in the United States).

71. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (explaining U.S. courts refuse to protect a settlor who is also a beneficiary of a self-settled spendthrift trust). "[A] trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee." Restatement (Second) of Trusts §62 (1957). "It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it." SCOTT & FRATCHER, THE LAW OF TRUSTS, §156 at 167 (4th ed. 1987 & Supp. 1994); *contrasting* Mezrich, *supra* note 3, at 657 (promoting that OAPTs are "really just fair play" considering our litigious world and "court-happy" society).

In the U.S., most state courts will often not permit a self-settled spendthrift trust to be protected from creditors. HAUSER & CHAPNICK, *supra* note 4, at §25:05, 25-8. Transfers to self-settled spendthrift trusts are sometimes considered fraudulent, while in other cases they may be disregarded as against public policy. *Id.* Where the trust is discretionary, the courts will typically consider the settlor's actual control over the trust assets. *Id.* at 25-9.

72. *See generally* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 62 (indicating U.S. courts refuse to protect a settlor who is a beneficiary of a spendthrift trust).

73. A self-settled trust is one in which the settlor of the trust reserves an interest in the trust property. Restatement (second) of Trusts, §156 (1959). The interest retained by the settlor may be an interest as a beneficiary of the trust, or it may be the retention of a certain degree of control over the disposition of the trust property. Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 30, 62.

74. *See infra* note 76 and accompanying text (indicating if a settlor retains management and control of the trust, the trust may potentially be considered a sham).

a reasonable doubt"[75] to the Cayman Islands courts that the settlor's true intentions in creating the OAPT were to maintain significant management, control and enjoyment of the assets, the OAPT under English common law is treated as a sham, and thus a fraudulent conveyance.[76] Creditors may then reach the transferred assets in satisfaction of U.S. judgments.[77]

2. *Settlor as Protector*

The role of protector is unique to foreign trusts.[78] Protectors are appointed for several different purposes and are granted many different broad powers by the settlor.[79] These powers may include: (1) to oversee the activities of the trustees; (2) to remove and replace trustees; (3) to authorize payout to beneficiaries; (4) to vary beneficiaries; and (5) to change jurisdictions, or situs, of the trust assets or applicable law.[80] Since the involvement of the protector varies per OAPT instrument, there is no typical definition or category.[81] The protector may in some instances have the

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75. *See Marty-Nelson, Having Your Cake and Eating It Too, supra* note 4, at 60-61 (suggesting the plaintiff's standard of proof is notably severe; the plaintiff must prove his pleadings beyond a reasonable doubt, instead of the "preponderance of the evidence" standard adopted in U.S. civil proceedings).

76. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:42, 33-27 (indicating if a settlor retains management and control of the trust, the trust may potentially be considered a sham).

77. *See generally infra* notes 162-282 and accompanying text (describing the direct methods a creditor may use to pierce the OAPT, which then would allow the creditor to reach the assets in satisfaction of judgments).

78. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 64 (explaining in addition to OAPTs allowing the settlor to also be the beneficiary, OAPTs allow the unique role of settlor as protector).

79. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:45, 33-30 (indicating the role of protector consist of many roles); *see also* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 64 (relating the protector is given broad powers from the settlor).

80. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (describing various powers of a protector).

81. *See* DUCKWORTH & FINLAY, *supra* note at 15, at §33:45, 33-30 (indicating the role of the protector will be defined by the trust document). An example of a clause providing for a protector is as follows:

> Notwithstanding anything to the contrary herein contained, and in particular anything conferring an absolute or uncontrolled discretion on the Trustees hereof, all and every power and discretion vested in the Trustees by this Settlement and incorporated herein by this reference shall only be exercisable by them subject always to the power of the Protector to veto any exercise by the Trustees of such power or discretion, and accordingly the Trustees shall be required to provide the Protector with reasonable prior notice before any such powers or discretions may be exercised so as to allow the Protector reasonable advance opportunity within which to veto or refrain from vetoing the exercise of the power of discretion. The Protector's exercise or non-exercise of this veto power shall be communicated in writing to the Trustees and failure to so communicate in a timely fashion, provided notice is actually received by the Protector, shall be treated by the Trustees as a veto by the Protector of the proposed exercise of the power or discretion; however, if one or more of the Trustees reasonably believe that failure by the Protector to so communicate is due to the Protector being restrained or enjoined from doing so, then such failure to communicate shall be treated by the Trustees and deemed for all purposes hereof as acquiescence by the Protector to the proposed exercise of the power or discretion. It is further provided that, notwithstanding anything to the contrary otherwise herein expressed or implied, no discretion or power conferred upon the Protector, or upon any other person by this Settlement or by any rule of law, or arising in consequence of the exercise of any power conferred upon the Protector, or any other person by this Settlement, shall be exercised, and nothing contained herein shall operate, so as to

same duties, liabilities and accountability as a trustee.[82] However, the role of protector is usually a fiduciary unless the protector is also a beneficiary.[83]

Prior to 1994, the role of protector could not be held by the settlor.[84] Rather, a trusted family member, friend, or professional would be named by the settlor. Arguably, this person was a straw man.[85] Now, in the Cayman Islands and in many other offshore locations,[86] the settlor is allowed to name himself or herself as protector without adversely affecting the creditor protection status of the OAPT.[87] As protector, a settlor has virtually unlimited power over the trustee, and thus, over the OAPT.[88]

3. Settlor's Letter of Wishes

The settlor of an OAPT typically provides the trustee with a non-binding letter of wishes expressing the settlor's desires as to the disposition of property.[89] In practice, the letter of wishes carries clout despite it having no legal binding effect.[90] It is true that the trustee, if not also in the dual role of the settlor, may disregard the settlor's expressed desires, but in reality, the trustee rarely deviates from the settlor's instructions since the settlor could instantly replace him with someone more

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cause the Protector to be successful in ordering any action or causing any result that is not of the Protector's own free will; or that is otherwise the result of the Protector acting under duress or influence of an outside force.

Rothschild, *supra* note 8, at 70-71.

82. *See* Lowe, *supra* note 20, at §26:08, 26-11 (stating that in some OAPTs, all significant power may reside in the protector, not in the trustee); *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:45, 33-30 (surmising since the role of protector is so varied depending upon a particular trust document, it is conceivable that the protector is empowered with significant control).

83. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:45, 33-30 (stating unless the protector is a beneficiary to whom powers are given so that he can protect his own interests, the protector is likely to be categorized as a fiduciary).

84. *See generally* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (explaining settlors used to appoint a third party as protector, and even though the third party was a straw man, there was some illusory appearance of separate control).

85. "Straw man" is defined as "A 'front'; a third party who is put up in name only to take part in a transaction. Nominal party to a transaction. Person who purchases property for another to conceal identity of real purchaser, or to accomplish some purpose otherwise not allowed." BLACK'S LAW DICTIONARY 1421 (6th ed. 1990); *see* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (claiming the protector is arguably a straw man).

86. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 64 (stating that the Cook Islands and Belize allow the settlor to be named protector).

87. *See generally id.* at 64 (reporting the Cook Islands and Belize now allow the settlor to name himself protector without adversely affecting his creditor protection status).

88. *See id.* at 65 (determining when a settlor is also the protector he has almost unlimited power over the trustee).

89. *See id.* (relating the settlor of an OAPT commonly provides the trustee with a non-binding letter of wishes expressing the settlor's intentions as to the disposition of property).

90. *See id.* (explaining the letter of wishes has no legal effect, yet it still carries clout).

cooperative.[91] With the settlor potentially being the beneficiary, trustee, and protector along with the letter of wishes, OAPTs typically have the outward appearance and form of a discretionary spendthrift trust.[92]

The combined authority of the protector and the letter of wishes does not positively direct the trustee's actions[93] so as to make the trustee a straw man.[94] However, it is possible to perceive the trustee being indirectly guided by the protector to make certain trust distributions or other administrative decisions.[95] For instance, the protector's right to remove and replace the trustee is a very common and significant power over the trustee.[96] If the trustee did not follow the wishes of the protector, the trustee could be instantly replaced with another who would execute the wishes of the protector.[97] Armed with the settlor's letter of wishes, the OAPT document is likely also protected by a flight clause.[98]

4. Flight Clauses in the OAPT Document

Nearly every OAPT contains a flight clause.[99] A flight clause[100] provides that the trustee can relocate the OAPT assets to another foreign situs if any event threatens the trust or its assets.[101] Examples of events which could trigger the flight of the

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91. *See infra* note 96 and accompanying text (explaining the trustee's power to instantly replace an uncooperative protector); *see also* Marty-Nelson, *supra* note 4, at 65 (determining the trustee almost never strays outside the settlor's expressed intent contained in the letter of wishes).

92. *See supra* note 71 and accompanying text (defining "spendthrift trust"); *see also* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (comparing an OAPT with a discretionary spendthrift trust).

93. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (surmising that the combined authority of the protector and the letter of wishes does not affirmatively direct the trustee's actions).

94. *See* BLACK'S LAW DICTIONARY, *supra* note 85 (defining the term "straw man").

95. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 65 (indicating the combined authority of the protector and the letter of wishes could be perceived as indirectly guiding the trustee's discretion in making trust distributions).

96. *See id.* (stating the protector has the right to remove and replace the trustee).

97. *See generally id.* (determining the magnitude of the protector's power to replace the trustee is significant in the event the letter of wishes is not carried out).

98. *See infra* notes 99-111 and accompanying text (explaining the function of a flight clause in an OAPT document).

99. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66.

100. Flight clauses are also known by other names such as "Cuba clauses," Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66, or "flee clauses," Rothschild, *supra* note 8, at 69.

101. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66. An example of a flight clause is as follows:

> The Trustees may by a signed declaration in writing, at any time or times and from time to time, during the trust Period, as they deem advisable in their discretion for the benefit or security of this Trust Fund or any portion hereof, remove (or decline to remove) all or part of the assets and/or the situs of administration thereof from one jurisdiction to another jurisdiction and/or declare that this Settlement shall from the date of such declaration take effect in accordance with the law of some other state or territory in any part of the World, and there upon the courts of such other jurisdiction shall have the power to effectuate the purposes of this Settlement to such extent. In no event, however, shall the law of some other state or territory be any place under the law of which: (1) substantially all the powers and provisions herein declared and contained would not be enforceable or capable of being exercised and

assets are creditors' actions, the threat of political instability,[102] an unfavorable change in the offshore location law,[103] or the prospect that the situs nation may enter into a treaty with the United States or other nation which undermines the security of the trust.[104] The trust agreement can contain various provisions to permit a change of trustees, the situs of the trust, or its assets.[105] These provisions can give the trustee or a trust protector a discretionary power to change the situs by appointing new trustees, removing assets to a different jurisdiction, or amending the trust to comply with the new laws of the jurisdiction.[106]

Flight clauses are a creditor's nightmare.[107] An OAPT's flight clause may be established to automatically transfer the assets if a creditor attempts to freeze the assets in the trust's domicile.[108] Creditors are dismayed when it is discovered that the assets have been removed from the original jurisdiction and have fled to another foreign jurisdiction.[109] Creditors must evaluate whether the pursuit and hopeful

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so taking effect; or (2) this Settlement would not be irrevocable. From the date of such declaration, the law of the state or territory named therein shall be the Applicable Law, but subject always to the power conferred by this paragraph and until any further declaration be made hereunder. So often as any such declaration as aforesaid shall be made, the Trustees shall have liberty to make such consequential alterations or additions in or to the powers, discretions, and provisions of this Settlement as the Trustees may consider necessary or desirable to ensure that the provisions of this Settlement shall be so valid and effective as they are under the Applicable Law governing this Settlement at the time the power contained herein is exercised. The determination of the Trustees as to any such removal or change in Applicable Law shall be conclusive and binding on all persons interested or claiming to be interested in this Settlement.

Rothschild, supra note 8, at 69.

102. *See* MERREN, *supra* note 32, at 78 (explaining OAPT settlors face a formidable risk when large sums of money and other fungible assets are invested in volatile foreign countries); *see also* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66 (listing political or economic unrest in the situs as one reason why a flight clause may be enacted). While most trust settlors of OAPTs deem U.S. trust law as the enemy, at least the enemy is predictable. *Id.* The potential for a military coup in the situs nation is an event for which flight clauses are specifically drafted. MERREN, *supra* note 32, at 78. However, the Cayman Islands has a long history of political stability which is a favorable factor to many settlors seeking to establish an OAPT. DUCKWORTH & FINLAY, *supra* note 15, at §33:03, 33-5.

103. *See Rothschild, supra* note 8, at 69 (indicating that a change in law may enact a flight clause); *see also* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 67 (listing the proposed enactment of unfavorable gift, income or estate tax laws by the situs nation as one of the reasons why a flight clause may be enacted).

104. *See* Saidenberg, *supra* note 12, at 100 (explaining that a flight clause permits the trustee to move the trust to another place should the tax or other laws of the governing jurisdiction change or should the economic climate become unstable).

105. *See Rothschild, supra* note 8, at 69.

106. *See id.*

107. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66.

108. *See Rothschild, supra* note 8, at 69.

109. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 66.

capture is a worthwhile expenditure of money and time.[110] Still another prophylactic device against piercing an OAPT is an anti-duress clause in the OAPT document.[111]

5. Anti-Duress Clause in the OAPT

OAPTs typically contain an anti-duress clause when the settlor retains management and control over the OAPT through the power to remove and replace the trustee.[112] The purpose of an anti-duress clause is to protect the settlor from any indirect actions[113] that a creditor may attempt to use to coerce the trustee into repatriating the assets to the United States,[114] such as a suit for contempt[115] or a suit for bankruptcy fraud.[116] The anti-duress clause typically directs the foreign trustee to ignore any order or instructions given under duress.[117]

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110. *See supra* notes 22-25 and accompanying text (explaining the initial considerations a creditor must determine before pursuing the assets of an OAPT).

111. *See infra* notes 112-117 and accompanying text (explaining the function of an "anti-duress" clause in an OAPT).

112. *See Rothschild, supra* note 8, at 69.

113. *See infra* notes 283-547 and accompanying text (explaining that creditors may use indirect methods, such as criminal charges of contempt and bankruptcy fraud, to coerce the settlor-debtor or trustee to repatriate the OAPT assets to the U.S.).

114. *See Rothschild, supra* note 8, at 69; *see also infra* notes 283-547 and accompanying text (explaining the possible strategies that a creditor may indirectly use to coerce the trustee into transferring the trust assets back to the U.S.).

115. *See infra* notes 317-78 and accompanying text (describing how a creditor may coerce the debtor to transfer the OAPT assets back to the U.S. by threatening a suit for contempt).

116. *See infra* notes 379-502 and accompanying text (explaining how a creditor may coerce the debtor to repatriate the OAPT assets by threatening a suit for bankruptcy fraud).

117. *See Rothschild, supra* note 8, at 69. A sample of an anti-duress clause is as follows:

> Settlor directs that this Settlement be administered consistent with its terms, free of judicial intervention and without order, approval, or other action of any court. To the extent any person is granted the power hereunder to compel any act on the part of one or more of the Trustees, or has the authority to render advice to one or more of the Trustees, or to otherwise approve or compel any action or exercise any power that affects or will affect this Settlement, each Trustee is directed, to the extent the respective Trustee then in office would not be subject to personal liability or personal exposure (for example, be being held in contempt of court or other such sanction by a court having jurisdiction over the respective Trustee): (I) to accept or recognize any instructions or advice, or the effects of any approval or compelled action or the exercise of any power, which are given by or are the result of persons acting of their own free will and not under compulsion of any legal process or like authority; and (ii) to ignore any advice or any directive, order, or like decree, or the result or effects thereof, of any court, administrative body or any tribunal whatsoever or of past or present Trustees, of any Protector hereunder, or of any other person, where (a) such has been instigated by directive, order, or like decree of any court, administrative body or other tribunal, or where (b) the person attempting to compel the act, or attempting to exercise the authority to render advice, or otherwise attempting to compel any action or exercise any power which affects or will affect this Settlement, is not a person either appointed or so authorized or the like pursuant to the terms and conditions of this Settlement.

Id. at 69-70.

D. Location of the OAPT Assets Need Not Be Physically in the Cayman Islands

The OAPT assets need not be physically located in the Cayman Islands so long as the OAPT is established and administered in the situs.[118] Frequently, settlors are more secure knowing their assets are physically "at home"[119] despite the Cayman Islands being a stable British colony free of military coup and unrest for decades.[120] When the settlor of an OAPT allows some or all of the assets to remain in the United States, the aggrieved creditor will encounter less struggle to establish jurisdiction over the assets.[121]

IV. CREDITOR PROTECTION LAWS IN THE CAYMAN ISLANDS

Even when a creditor is successful in obtaining a judgment against the debtor in a U.S. court, the creditor faces an obstacle in collecting on the judgment.[122] If the debtor has transferred his assets into an OAPT in the Cayman Islands, the creditor will face a difficult task of persuading the Cayman Islands government to give comity[123] to the U.S. judgment unless actual fraud can be proven by the creditor.[124]

The principle legislation regulating OAPTs in the Cayman Islands against Creditors is the Bankruptcy Law.[125] While the recognition and enforcement of similar foreign laws and orders, such as U.S. bankruptcy laws and orders, is largely a matter of common law, the recognition and enforcement are varied by local Cayman Islands law which favors the settlor.[126]

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118. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 67 (informing assets need not be located abroad, so long as the trust is established and administered in the foreign situs).

119. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 67 (stating that settlors of OAPTs are more comfortable with their assets close by).

120. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:03, 33-5 (describing the Cayman Islands as a location of economic and political stability).

121. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 67. To accomplish a secure feeling of not having assets located in the Cayman Islands while still keeping them out of creditors' reach, Settlors may transfer the physical location of their assets to a neutral foreign location, such as the stable financial centers of London or Zurich. *Id.*

122. *See generally infra* notes 161-282 and accompanying text (explaining how a creditor may face obstacles in collecting a judgment).

123. "Comity" is defined as "[A] willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

124. *See supra* notes 75-76 and accompanying text (explaining how initially establishing an OAPT might be considered a fraudulent conveyance).

125. *See* MERREN, *supra* note 32, at 89-90; *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:37, 33-23 (indicating the Companies Law (Revised) is additional legislation for dealing with OAPTs of non-individuals).

126. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:51, 33-35 (discussing the Cayman Islands Trusts (Foreign Element) Law).

A. Cayman Islands Bankruptcy Law

The Bankruptcy Law (Revised) allows for the bankruptcy of persons who, whether a British subject or not, at the time when any act of bankruptcy was done or suffered by him: (1) was personally present in the Cayman Islands; or (2) ordinarily resided or had a place of residence in the Cayman Islands; or (3) was carrying on business in the Cayman Islands, personally or by means of an agent or manager; or (4) was a member of a firm or partnership which carried on business in the Cayman Islands.[127]

Creditors of a debtor who is subject to the Bankruptcy Law may present a bankruptcy petition to the court alleging a bankruptcy act within the previous six months.[128] Without alleging any ground, the debtor may present a bankruptcy petition against himself.[129] The effect of such a bankruptcy order is to vest the debtor's assets in the trustee in bankruptcy who is responsible for transferring the assets and administering the estate.[130] However, at the court's discretion, the debtor may be discharged, suspended, or have conditions imposed upon the discharge of his assets depending upon the surrounding circumstances and the conduct of the debtor.[131]

Bankruptcy may affect antecedent dispositions by the debtor in three primary ways: (1) relation back;[132] (2) fraudulent preference;[133] and, (3) voidable settlements.[134]

1. Relation Back

The relation back effect of the bankruptcy order is to avoid dispositions in the period six months prior to the presentation of the petition.[135] The bankruptcy order typically vests retroactively all the debtor's property automatically in the trustee in bankruptcy. The bankruptcy order extends to all assets which were the debtor's at the time of the act of bankruptcy, voluntary or involuntary, on which the bankruptcy petition was founded.[136] However, for the bankrupt party, another creditor, or a

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127. *See* CAYMAN BANKRUPTCY LAW (REV) §2.

128. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:52, 33-36 (explaining a creditor may present a bankruptcy petition to the Cayman Islands court alleging an act of bankruptcy within the preceding six months).

129. *See id.*

130. *See id.* (indicating the effect of a bankruptcy order is to vest the debtor's property in the trustee in bankruptcy who is responsible for getting in the assets and administering the estate).

131. *See id.* (informing the discharge of the debtor may be suspended or refused by the court, and the court may impose conditions on the discharge depending upon the circumstances).

132. *See infra* notes 135-140 and accompanying text (explaining the concept of relation back).

133. *See infra* notes 141-47 and accompanying text (explaining the concept of fraudulent preference rules).

134. *See infra* notes 148-150 and accompanying text (explaining the concept of voidable settlements).

135. *See* CAYMAN BANKRUPTCY LAW (REV) §§14, 118.

136. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:52, 33-36 (the bankruptcy order has retroactive effect, extending to all property which was the debtor's at the time of the act of bankruptcy on which the petition was founded).

modified purchaser for value without notice, there are saving clauses[137] for various types of transactions, especially dispositions for valuable consideration,[138] provided the creditor had no notice of an act of bankruptcy on the part of the debtor.[139] In addition to relation back, antecedent dispositions may also be affected by fraudulent preference rules.[140]

2. *Fraudulent Preference Rules*

The purpose of fraudulent preference rules is to prevent one or more creditors from being preferred over another creditor for payment of debts owed.[141] A transaction cannot be impeached on grounds of fraudulent preference unless it occurred within six months before the bankruptcy order.[142] It must be proven that at the time of the transaction, the debtor was insolvent, or in other words, the debtor was unable to pay from his own money his debts as they fell due.[143]

Cayman Islands Bankruptcy Law provides for the avoidance of settlements.[144] The definition of "settlement" includes any conveyance, gift or transfer of property.[145] A settlement is voidable against the debtor's trustee in bankruptcy if the bankruptcy order is made within two years after the settlement,[146] or if the bankruptcy order is made within ten years after the settlement, unless it can be established that at the time of settlement the debtor was able to pay all of his debts without the aid of the settled property and, the interest of the debtor in the settled property had passed to the trustee on the execution of the settlement.[147]

3. *Voidable Settlements*

However, there are certain types of settlements which are excluded from being void, such as marriage settlements.[148] Additionally, when the debtor dies leaving an insolvent estate, the voidable settlement rules apply in favor of a creditor as though a bankruptcy order had been made at the moment of the debtor's death.[149] Most

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137. "Saving clause" is defined as "an exception of a special thing out of the general things mentioned in the statute." BLACK'S LAW DICTIONARY 1343 (6th ed. 1990).

138. "Disposition" is defined as "the giving up of, or the relinquishment of, anything." *Id.* at 471.

139. *See* CAYMAN BANKRUPTCY LAW (REV) §118.

140. *See infra* notes 141-47 and accompanying text (relating how fraudulent preference rules may affect antecedent dispositions prior to voluntary or involuntary bankruptcy).

141. DUCKWORTH & FINLAY, *supra* note 15, at §33:52, 33-36.

142. *See id.* at 33-37.

143. *See id.*

144. *See id.* (describing voidable settlements).

145. *See id.* (defining "settlement").

146. *See id.*

147. *See id.*

148. *See id.* (explaining marriage settlements are excluded).

149. *See id.*

importantly, the creditor must present the bankruptcy petition within six months after the debtor's death.[150]

B. Recognition of United States Bankruptcy Law and Orders

The Cayman Islands applies English common law rules in relation to the recognition and enforcement of U.S. judgments.[151] Under the common law rules, a foreign judgment may be enforced if it is either in rem or in personam.[152] The foreign judgment may be enforced if it is in rem, and the subject matter is property, movable or immovable, situated in the foreign country.[153]

If the in personam foreign judgment is given by a court with proper jurisdiction, the Cayman Islands court will also require under common law that the judgment: (a) be for a debt or definite sum of money, irrespective of taxes or penalties; (b) is final and conclusive; and, (c) cannot be impeached on grounds of fraud, public policy or natural justice.[154] Additionally, the creditor must establish that the judgment debtor was present in the foreign country when proceedings were commenced, or that the judgment debtor submitted to the jurisdiction: (1) by prior agreement; (2) by appearance; or, (3) by being the plaintiff or making a counterclaim.[155]

Moreover, if a foreign judgment does not qualify under the common law rules for enforcement, it may nonetheless be entitled to recognition under estoppel on the

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150. *See id.*

151. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:36, 33-21 (relating that English common law rules apply in relation to the recognition and enforcement of foreign judgments). *See generally supra* note 33 and accompanying text (explaining the Cayman Islands generally follow English common law as varied by local legislation). In addition, a foreign judgment may be enforceable in the Cayman Islands under one of the statutory regimes: the Foreign Judgments (Reciprocal Enforcement) Law (Revised) [hereinafter "Foreign Judgments Law"] or Maintenance Orders (Enforcement) Law (Revised) [hereinafter "Maintenance Orders Law"]. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:36, 33-21. The Foreign Judgments Law provides a comprehensive framework for the enforcement of foreign judgements; however, the statute only relates to specific designated jurisdictions. *Id.* Currently, Australia has been the sole designated jurisdiction. *Id.* The Maintenance Orders Law provides for the enforcement of foreign maintenance orders; however again, the statute only relates to specific designated jurisdictions. *Id.* To date, England, Ireland, Jamaica and Belize are the only designated jurisdictions. *Id.* Since the U.S. is not a designated jurisdiction under either of the two statutory regimes, judgments originating from the U.S. will be examined by the Cayman Islands court under English common law. *See generally id.*

152. *See id.* at 33-22 (describing that under English common law, a foreign judgment will be recognized if it is in personam or in rem). "In personam jurisdiction" is defined as "power which a court has over the defendant himself in contrast to the court's power over the defendant's interest in property or power over the property itself (in rem). BLACK'S LAW DICTIONARY 731 (6th ed. 1990). A court which lacks personal jurisdiction is without power to issue an in personam judgment." *Id.* "In rem" is defined as "proceedings [which] encompass any action brought against person in which essential purpose of suit is to determine title to or to affect interests in specific property located within territory over which court has jurisdiction." *Id.* at 793.

153. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:36, 33-22 (describing the requirements to recognize a foreign in rem judgment).

154. *See id.* (listing the requirements to recognize a proper in personam foreign judgment).

155. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:36, 33-22 (noting requirements to recognize a proper in persona foreign judgment).

principle of res judicata.[156] A party to the foreign proceedings may be estopped in the Cayman Islands proceedings from asserting or denying a cause of action whose existence, or nonexistence, has already been determined by the foreign court.[157] A party may also be estopped from relitigating a matter of fact or law under principles of res judicata.[158]

When a foreign bankruptcy claim is presented for enforcement in a Cayman Islands court, the foreign claim may be recognized if arguments based on theories of in personam, in rem or estoppel related res judicata are used.[159] However, if the creditor seeks to begin a cause of action against the debtor in a Cayman Islands court, various direct approaches may be employed.[160]

V. DIRECT APPROACHES TO PIERCE ASSET PROTECTION TRUSTS IN THE CAYMAN ISLANDS

Before an action may be started in a Cayman Islands court or in an U.S. court, the creditor must first discover the existence of the OAPT in order to pierce it.[161] Once the OAPT is discovered, it may be necessary for the creditor to simultaneously begin a cause of action in the United States and in the Cayman Islands since the Cayman Islands courts may not recognize a U.S. court judgment.[162] If the creditor waits too long, the statute of limitations may bar any cause of action.[163]

A. Discovery of OAPTs in the Cayman Islands

Despite there being several legal theories which a creditor might use to challenge an OAPT, in practice, it can be difficult to pierce an OAPT.[164] Knowledge of the OAPT itself, its beneficiaries, the identity of the persons controlling it, or the value

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156. "Res judicata" is defined as "[the] rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990); *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:35, 33-22 (explaining how a foreign judgment may be recognized under the estoppel principles of res judicata).

157. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:36, 33-22.

158. *See supra* note 156 and accompanying text (defining "res judicata").

159. *See supra* notes 151-158 and accompanying text (explaining how theories based on in rem, in personam or estoppel related res judicata may be used in a Cayman Islands court where the English common law is applied).

160. *See infra* notes 161-282 and accompanying text (detailing various direct approaches to use in the Cayman Islands court against debtors who maintain local OAPTs).

161. *See infra* notes 164-241 and accompanying text (describing various methods to discover the existence of a debtor's OAPT).

162. *See generally infra* notes 242-282 and accompanying text (describing steps and considerations when beginning a cause of action in the Cayman Islands court system).

163. *See infra* notes 253-260 and accompanying text (describing the statute of limitations for a creditor's action in the Cayman Islands).

164. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:12, 25-23 (explaining there are a number of legal theories which a bankruptcy trustee or creditor might use to challenge an [O]APT, but in practice it can be difficult to mount a successful attack).

and location of its assets may be difficult to discover.[165] In the absence of this information, a creditor is unlikely to proceed very far with allegations of fraudulent transfer.[166] Even if the creditor suspects that the debtor has established an OAPT in the Cayman Islands to shield his assets, the creditor must first consider whether the pursuit is worthwhile even if an OAPT is discovered.[167]

A creditor seeking to obtain information about an OAPT will almost certainly concentrate his attention on the OAPT's trustees or other fiduciaries.[168] Generally, these fiduciaries are professionals who keep fairly complete and accurate records regarding the establishment and ongoing administration of the OAPT.[169] Large correspondence files full of pertinent letters exchanged between the debtor and others about the receipt and disposition of the OAPT funds will assist in tracing assets through bank and security accounts.[170] The correspondence may also indicate the degree to which the fiduciary followed the debtor's instructions, which is extremely helpful in establishing that the debtor maintained dominion and control over the OAPT assets.[171] Acquiring access to the trustee's files in many cases is also another useful way of circumventing the Cayman Islands confidentiality laws.[172]

1. Hague Evidence Convention and the Common Law

The Hague Evidence Convention ("HEC") is a tool available in both the United States and in England.[173] The Cayman Islands follows English common law as varied by its own local laws.[174] The HEC allows a court in one country to request a court in

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165. *See id.* at 25-23 (relating there may be little known about the [O]APT itself).

166. *See id.* (surmising in the absence of the OAPT beneficiaries, the identity of the persons controlling it, or the values and location of its assets, a trustee in bankruptcy is unlikely to get very far with allegations of fraudulent transfer).

167. *See id.* (indicating the creditor may well decide that the uncertain reward of challenging an [O]APT is simply not worth the cost of even attempting to do so); *see also supra* notes 22-25 and accompanying text (relating the initial considerations a creditor must evaluate before launching pursuit of the OAPT).

168. *See id.*

169. *See id.* at 25-23 (stating fiduciaries are professionals who keep complete and accurate records); *but see id.* at 25-24 n.1 (describing other final professional fiduciaries rarely, if ever, are careful about the contents of their files). Despite the lack of careful file records, it is almost always worth the time and trouble to gain access to these materials, as they frequently contain material which is prejudicial to the bankrupt and to the OAPT. *Id.*

170. *See id.* (indicating the fiduciaries' records may include a large correspondence file which might assist in tracing assets).

171. *See id.* at 25-23, 25-24 (explaining fiduciaries' records may establish the degree of control the settlor-debtor maintained over the OAPT).

172. *See id.* at 25-24 (anticipating access to the trustee's files may help to circumvent confidentiality laws); *see also infra* notes 261-274 and accompanying text (describing Cayman Islands confidentiality laws).

173. *See id.* at 25-25 (stating the Hague Evidence Convention is used by both the U.S. and British). For purposes of litigation in the U.S. courts, the Hague Evidence Convention is a permissible, but not a mandatory, method for acquiring evidence located overseas. *Id.* at 25-25, n.3.

174. *See supra* note 33 and accompanying text (describing the Cayman Islands law is founded on English common law, except as varied by local statute).

another country to enforce requests for evidence to be used in the requesting country at trial.[175]

2. *Order for Examination*

An order for examination in the United States is a special procedure designed to compel the judgment debtor to give information concerning his property.[176] The judgment creditor is accorded the widest scope for inquiry concerning property and business affairs of the debtor.[177] In the context of a debtor with an OAPT in the Cayman Islands, it is hopeful that the debtor will reveal the existence of the OAPT during the examination proceeding; however, if the debtor believes that he does not have a sufficient interest in the OAPT, or that he is exempted, he may not reveal the OAPT's existence.[178] Additionally, the procedure may be used to require the debtor or a third person to turn over property to the levying officer.[179] The order for examination can be analogized as being the postjudgment equivalent of a deposition.[180] Although all states have some form of an order of examination procedure, this Comment will focus upon California's order for examination procedure.[181]

a. Advantages

There are four main advantages to using an order for examination: first, a lien is created upon all of the debtor's nonexempt personal property;[182] second, turnover

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175. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:12, 25-25.

176. *See* Young v. Keele, 188 Cal. App. 3d. 1090, 1093 (1987) (holding that the order of examination offers a wide scope of inquiry for the creditor concerning the property and business affairs of the judgment debtor); *see also* ALAN M. AHART, CALIFORNIA PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS, 6G-1 (explaining the purpose of an order of examination to aid judgment creditors to gather facts about judgment debtor's current and future assets, liabilities and income).

177. *See generally* CAL. CIV. PROC. CODE § 708.110 (1997) (defining the scope of an order for examination, service and contents); Young, *supra* note 176, at 1093. The judgment creditor may inquire as to the debtor's future employment prospects and the debtor's future or contingent interests such as possible inheritances. Ahart, *supra* note 176, at 6G-15.

178. *See infra* note 238 and accompanying text (explaining that when a settlor of an OAPT transfers assets into the trust, he may believe that his interests in the assets are sufficiently removed from his possession to protect them from creditors).

179. *See* Imperial Bank v. Pim Electric, Inc., 33 Cal. App. 4th 540, 546-547 (1995) (describing that an order of examination may be used to require the debtor or third party to turn over property to the assigned levying officer).

180. *See* Ahart, *supra* note 176, at 6G-1 (analogizing an order of examination as the postjudgment equivalent of a deposition).

181. *See infra* notes 176-222 and accompanying text (relating an analysis of California's statutes and case law for an order of examination used to discover a judgment debtor's current and future assets, liabilities and income).

182. *See infra* notes 186-94 and accompanying text (discussing how an order of examination automatically creates an one year lien on all of the debtor's non-exempt property).

orders are obtainable;[183] third, the procedure is a highly effective method for the discovery of the debtor's assets;[184] and lastly, settlements are encouraged.[185]

The service of an examination order on the judgment debtor creates an automatic one-year lien on all of the debtor's nonexempt personal property.[186] The creditor need not actually examine the debtor to keep the lien in effect.[187] The lien continues for one year from the date of the order unless modified by the court.[188] However, the lien may not be enforced after the judgment expires.[189] Similarly, where the examinee is a third party, a one-year lien is created on the debtor's interest in property in the third person's possession and control, provided such property is adequately described in the creditor's application for the order and is valued at US$250 or more.[190] Despite the overall advantages of the automatic lien, there are limitations with which the creditor need be aware.[191] For instance, the lien is subject to exemptions the judgment debtor may claim, and the lien may also be lost upon transfer of the property to bona fide purchasers in the ordinary course of business.[192] Also, if the lien is not perfected by obtaining an examination order for turnover,[193] execution and levy or appointment of a receiver to satisfy the debt, the lien may be avoided by a bankruptcy trustee.[194]

At the end of the examination, the creditor may obtain a turnover order which requires the debtor or third person to deliver the identified assets to the levying officer or, in some cases, directly to the creditor or a receiver.[195] Such turnover orders are enforceable by contempt and may be far more effective than levying on property under a writ of execution.[196]

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183. *See infra* notes 195-96 and accompanying text (discussing the availability of a turnover order).

184. *See infra* notes 198-99 and accompanying text (discussing how the order of examination is a highly effective method for the discovery of the debtor's assets).

185. *See infra* notes 200-02 and accompanying text (discussing how the order of examination encourages settlements).

186. *See Pim Electric*, *supra* note 179, at 552-53 (informing that a service of an order to examine a judgment debtor creates a lien on all of the debtor's nonexempt personal property); *see also* Ahart, *supra* note 176, at 6G-1 (relating that an examination order on the judgment debtor creates a one-year lien on all of the debtor's nonexempt personal property).

187. *See* CAL. CIV. PROC. CODE § 708.110(d) (1997) (establishing the duration of the creditor's lien upon the judgment debtor's nonexempt personal property as a result of the service of an order of examination).

188. *See id.*

189. *See id.*

190. *See* Ahart, *supra* note 176, at 6G-1.

191. *See id.* at 6G-9.

192. *See* CAL. CIV. PROC. CODE §§ 697.740, 697.910, 697.920 (1997) (establishing limitations on the creditor's lien created by servicing the order for examination upon the judgment debtor).

193. *See infra* notes 195-96 and accompanying text (explaining the use of a turnover order after the examination is completed).

194. *See* In re Hilde, 189 Bankr. L. Rep. 776, 781-83 (9th Cir. 1995) (holding that if the lien is not perfected, the lien may be avoided by a bankruptcy trustee).

195. *See id.*

196. *See Pim Electric*, *supra* note 179, at 549-50 (describing an order for examination may be enforced by contempt).

An in-person examination under oath may be a more effective means to discover assets than propounding written interrogatories[197] or employing a special asset search firm.[198] Spontaneous responses to in-person questions may elicit information from the debtor that may not occur with other methods which allow the debtor to carefully ponder and formulate responses to avoid revealing assets.[199]

Settlements are encouraged by using an in-person examination of the judgment debtor or a third party.[200] This procedure is likely to get the attention of the debtor and demonstrate that the creditor is serious about collecting the judgment.[201] The hope is that the judgment debtor will be motivated to settle in good faith.[202]

b. Disadvantages

The two main disadvantages of an order for examination is that it is an expensive procedure and the judgment debtor is alerted to the intentions of the creditor.[203] Although the examination is the most effective and quickest method in obtaining information on the judgment debtor's assets, liabilities and income, it is also the most expensive method since more attorneys' time is required for preparation as well as the actual examination.[204] Additionally, the judgment creditor might be able to obtain the same information more cost-effectively by propounding written interrogatories, employing a private asset search firm or conducting its own investigation.[205]

Once the judgment debtor is served notice of the order for examination, he is alerted to the intentions of the creditor to seek collection.[206] Consequently, the debtor might attempt to dissipate, transfer or conceal assets, or may file bankruptcy.[207] The debtor's personal property will generally be subject to the one-year lien;[208] however, the lien might be lost by the debtor's sale to a bona fide purchaser.[209]

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197. *See infra* notes 223-33 and accompanying text (explaining the use of written interrogatories as opposed or in addition to an in-person order for examination).

198. *See* Ahart, *supra* note 176, at 6G-1, 2 (indicating that an in-person examination is more effective than submitting a list of written interrogatories to the judgment debtor).

199. *See generally id.* at 6G-1-21 (relating the aspects of an order for examination proceeding).

200. *See id.* at 6G-2 (informing that an in-person examination of the judgment debtor encourages the settlement of the judgment).

201. *See id.* (relating that the in-person examination will get the attention of the judgment debtor to show him the creditor is serious about collecting the debt).

202. *See id.*

203. *See id.* (indicating that there are disadvantages to the use of an in-person order of examination).

204. *See id.*

205. *See id.*

206. *See id.*

207. *See infra* notes 234-41 and accompanying text (describing the listing of bankruptcy schedules as a potential method for discovering OAPTs in the Cayman Islands).

208. *See supra* note 188 and accompanying text (stating that a one-year lien is placed upon all of the debtor's nonexempt personal property).

209. *See* Ahart, *supra* note 176, at 6G-2.

c. Procedure

Upon service of the examination order, the judgment debtor must appear in court, or before a referee,[210] to furnish information to aid in enforcement of the money judgment against him.[211] A third party, for instance a nondebtor spouse or family member, may be examined only if he is in possession or control of property in which the judgment debtor has an interest, or if that person owes over US$250 to the judgment debtor.[212] Additionally, any person with knowledge leading to enforcement of the judgment can be subpoenaed to testify before the court or a referee in an examination proceeding in the same manner as a trial witness.[213]

A court order for an examination may be issued ex parte[214] if the judgment creditor has not examined the judgment debtor during the preceding 120 days.[215] However, a judgment creditor who has examined the debtor within the previous 120 days must show good cause to examine the debtor twice within 120 days.[216] Good cause, as determined by the referee, might exist where the creditor learns after the previous exam that the debtor has acquired new assets, or has begun a new job for an unknown employer; or if the creditor discovers that the debtor lied about his assets at the previous exam.[217]

The examination will usually be more effective if the documents showing the judgment debtor's assets and liabilities are present at the examination.[218] Along with

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210. An examination may be conducted by a referee appointed by the court. CAL. CIV. PROC. CODE §708.140 (a) (1997). The referee may issue, modify or vacate any order relating to enforcement of the judgment; and may issue protective orders and warrants. *Id.* The referee has the same power as the court to grant adjournments and subpoena witnesses. *Id.* However, unless the parties stipulate otherwise, only the court that ordered the referee has the power to punish for contempt for disobeying an order of the referee, award attorney fees, and determine a contested claim of exemption or a third party claim. *Id.* at §§ 708.120, 708.170, 708.140(a).

211. *See* CAL. CIV. PROC. CODE § 708.110(a) (1997) (explaining the judgment debtor must appear in court to furnish information to aid in the enforcement of the money judgment).

212. *See* CAL. CIV. PROC. CODE § 708.120(a) (1997) (indicating the requirements which must be met to examine a third party during a judgment debtor's order for examination).

213. *See* CAL. CIV. PROC. CODE § 708.130, 708.140 (1997) (establishing that the examination of other persons with information which may lead to the enforcement of the judgment is acceptable under California law). Examples of persons with knowledge leading to enforcement of the judgment are the debtor's bookkeeper, accountant or nondebtor spouse. *Id.*

214. "Ex parte" is defined as "A judicial proceeding, order, injunction, etc., [is said to be ex parte when it] is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

215. *See* CAL. CIV. PROC. CODE § 708.110(b) (1997) (relating the ex parte examination procedure for an order for examination).

216. *See* CAL. CIV. PROC. CODE § 708.110(c) (1997) (describing that good cause is required to examine the judgment debtor twice within 120 days of the first examination).

217. *See* Ahart, *supra* note 176, at 6G-4 (listing examples of what might constitute good cause to allow a creditor to examine a judgment debtor twice within 120 days of the first examination).

218. *See id.* at 6G-9 (suggesting that the creditor subpoena the judgment debtor's documents revealing his liabilities and assets prior to the examination). Examples of documents to be subpoenaed are checkbooks, canceled checks, payroll check stubs, passbooks, bank statements, financial statements, deeds, promissory notes, stock registers, records of accounts payable and receivable, and state and federal income tax returns. *Id.* If personal

the service of the examination order, the creditor should also serve the judgment debtor and other appropriate third parties with subpoenas for documents showing the debtor's assets and liabilities.[219] Federal and state tax returns, which may reveal the existence of an OAPT, are typically privileged documents, but if the judgment debtor brings them into the examination in response to the subpoena, the privilege is waived.[220]

In the event that the creditor elects not to use an order for examination due to the disadvantages of cost, the possibility of the debtor transferring the assets in an attempt to protect his assets, or other particular reasons unique to the situation,[221] the creditor may decide to use written interrogatories or an inspection demand.[222]

3. Written Interrogatories and Inspection Demands

A judgment creditor is entitled to serve written interrogatories or an inspection demand on a judgment debtor to obtain information to aid in enforcement of a money judgment.[223] However, there are both advantages and disadvantages to these methods of discovery.[224]

a. Advantages

Written interrogatories and inspection demands are less expensive than a judgment debtor examination and usually require less preparation time particularly when a standard form is used which already sets out prepared interrogatories.[225]

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records of an individual judgment debtor are subpoenaed from a nonparty custodian, like a bank, attorney, accountant, title company or brokerage firm, special time and notice requirements must be met. CAL. CIV. PROC. CODE § 1985.3 (1997).

219. *See id.*

220. *See id.* (explaining that the privilege not to disclose tax returns is waived if the debtor brings his returns to the exam).

221. *See supra* notes 203-09 and accompanying text (enumerating the disadvantages of using an order for examination to discover the assets, liabilities and income of the judgment debtor).

222. *See infra* notes 223-33 and accompanying text (relating the advantages and disadvantages of using either written interrogatories or inspection demands in lieu of an order for examination).

223. *See* CAL. CIV. PROC. CODE §§ 708.010(a), 708.020(a), 708.030(a) (1997).

224. *See infra* notes 225-33 and accompanying text (listing advantages and disadvantages of using interrogatories and inspection demands as part of the discovery process).

225. *See* Ahart, *supra* note 176, at 6G-21, 25 (explaining the advantages of using written interrogatories and inspection demand). At a minimum, a creditor's written interrogatories should seek the following information: first, the name and address of the judgment debtor's spouse and employer, and their respective income and expenses; second, identifying information about the debtor such as his social security number, driver's license number, date of marriage, and number of dependents; third, the description, value and location of all of the judgment debtor's and spouse's real and personal assets; fourth, the name and address of all other creditors of the judgment debtor and the debtor and the debtor's spouse, the amount owed to them, and whether they have any liens or encumbrances on the debtor's property; and finally, the present value, description and location of all real and personal assets valued at over US$200 transferred by the debtor or his or her spouse to third persons, including relatives, in the last three to five years, and the consideration paid for each such transfer. *Id.* at 6G-23.

Interrogatories can also be used to prepare a later examination of the judgment debtor, or to follow up on questions not completely answered at an examination.[226]

b. Disadvantages

The greatest problem with written interrogatories and an inspection demand is that judgment debtors frequently do not answer them, and a sanction award for failure to answer is often uncollectible.[227] Written interrogatories and an inspection demand are also slow since the judgment debtor has at least thirty days to answer an interrogatory, as opposed to the instantaneous responses in an examination proceeding, and an inspection generally will not occur for at least thirty days after service on the demand.[228] Furthermore, service of interrogatories and a demand does not create a lien on the debtor's nonexempt personal property.[229] Moreover, interrogatories and an inspection demand cannot be sent to third persons, such as a nondebtor spouse.[230]

c. Procedure

Written interrogatories and an inspection demand may be served on the judgment debtor any time while the judgment is enforceable.[231] However, both may not be propounded within 120 days after the judgment debtor either (1) was examined by the judgment creditor; (2) responded to an earlier set of interrogatories; or (3) responded to an inspection demand.[232] The judgment debtor need not respond to interrogatories or inspection demands that violate any of these three limitations.[233]

4. Bankruptcy Schedules

Under the United State Bankruptcy Code, a debtor in bankruptcy must file a schedule of assets with the court.[234] Not only must assets which are plainly a component of the debtor's bankrupt estate be listed, but all assets which may comprise the bankrupt estate must be used.[235] Even if the asset is ultimately determined to not be property of the estate under 11 U.S.C., section 541, subsection

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226. *See id.* at 6G-22.

227. *See id.* at 6G-22, 26.

228. *See id.* (explaining that the written interrogatory and inspection demand processes are slow).

229. *See id.* (relating that the written interrogatory and inspection demand do not create a lien on the judgment debtor's personal property).

230. *See id.* (describing that the written interrogatory and inspection demand can only be served to the judgment debtor and not to any third parties).

231. *See* CAL. CIV. PROC. CODE § 708.010(a) (1997).

232. *See* CAL. CIV. PROC. CODE §§ 708.020(b), 708.030(b).

233. *See id.*

234. *See* 18 U.S.C. § 152(1) (1997).

235. *See* 18 U.S.C. § 152(1); *see also* United States v. Martin, 408 F.2d 949, 953 (7th Cir. 1969).

(a), 18 U.S.C., section 152 imposes sanctions on those who preempt a court's determination by failing to report the assets.[236]

If the debtor truthfully discloses every asset which plainly belongs to his estate and every asset which *may* belong to his estate, the creditors' efforts in discovering the OAPT in the Cayman Islands would really be quite simple.[237] However, the debtor is likely to not include the OAPT on the bankruptcy schedule for either of two reasons: first, as a matter of law, he will claim no interest in the OAPT; or secondly, he had so little possibility of an interest that he was under no duty to report it on the bankruptcy schedule.[238]

If an OAPT is subsequently discovered to have not been disclosed, the creditor may use this as evidence to help establish criminal charges of the debtor's bankruptcy fraud.[239] Bankruptcy fraud, along with other potential criminal charges,[240] are ammunition with which the creditor may use to indirectly coerce the debtor to repatriate the OAPT assets.[241]

B. Beginning a Cause of Action in the Cayman Islands

It is unlikely that a Cayman Islands court will recognize a judgment issued by a U.S. court against the settlor of an OAPT.[242] The creditor, therefore, may elect to initiate a separate action in the Cayman Islands simultaneously with the U.S. action.[243] The Cayman Islands legal system is less sympathetic towards creditors than the U.S. courts.[244] For instance, the burden of proof required by the Cayman Islands

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236. *See* United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984) (explaining that the bankruptcy law requires a bankrupt to disclose the existence of assets whose immediate status in bankruptcy is uncertain).

237. *See* 18 U.S.C. § 152(1).

238. *See* LOWE, *supra* note 20, at §26:12, 26-17 (surmising that a bankrupt's defense for not listing an asset on the bankruptcy schedule might rest entirely on the questionable legal proposition that as a matter of law, he had no interest in the trust, and furthermore, he had so little possibility of an interest that he was under no duty to report it on the schedule); *see also* Patterson v. Shumate 504 U.S. 753 (1992) (holding the anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under § 542(c)(2) of the Bankruptcy Code). 11 U.S.C. § 542(c)(2) (1977) excludes from the bankruptcy estate property of the debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law." *Id.* at 753.

239. *See infra* notes 379-500 and accompanying text (describing the elements of bankruptcy fraud in the United States).

240. *See infra* notes 379-547 and accompanying text (describing indirect methods a creditor may use in the U.S. courts in order to pierce an OAPT).

241. *See infra* notes 379-547 and accompanying text (describing civil and criminal contempt, bankruptcy fraud, miscellaneous offenses, and pursuit of the debtor's attorney as indirect methods the creditor may use to coerce the settlor-debtor to repatriate the OAPT assets).

242. *See infra* note 255 and accompanying text (describing the leniency in the Cayman Islands towards OAPT settlors who infuse the economy with millions of investment dollars).

243. *See* Lynn F. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 32 (1996) (indicating that the creditor must sue in the foreign legal system where the assets are located in order to recover the amount due); *see also* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 59-60.

244. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 59-60.

courts is higher than in the U.S. courts.[245] Additionally, the statute of limitations is also considerably shorter than in the United States, and the triggering event which starts the clock running occurs earlier than in the United States.[246] Furthermore, although there are fiduciary duties connected with professionals, such as attorneys and trustees, the Cayman Islands have strict confidentiality laws which are imposed upon all professionals and anyone who is connected with the formation of an OAPT.[247] If the Cayman Islands confidentiality laws are violated, both civil and criminal sanctions may be imposed upon those with any knowledge of the OAPT.[248]

1. The Burden of Proving a Fraudulent Conveyance is Higher than in the United States

When a United States creditor attempts to pierce, or gain legal access to, an OAPT in the Cayman Islands, he must prove that the transfer of assets into the OAPT was fraudulent.[249] The standard to which the creditor must prove the fraudulent transfer is "beyond a reasonable doubt"[250] rather than the U.S. courts' "preponderance of the evidence" standard.[251] This is a formidable task since under the Cayman Islands' own fraudulent conveyance law, the creditor must prove an intent to actually defraud by the settlor-debtor.[252]

2. Statute of Limitations

Even if the creditor has a strong substantive case against the OAPT settlor-debtor in the Cayman Islands court, the creditor must initiate the cause of action within the

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245. *See infra* notes 249-52 and.accompanying text (relating the burden of proof required for creditor's actions in the Cayman Islands).

246. *See infra* notes 253-60 and accompanying text (describing the statute of limitations for creditor's actions in the Cayman Islands).

247. *See infra* notes 261-74 and accompanying text (explaining the confidentiality laws in the Cayman Islands).

248. *See infra* notes 317-78 and accompanying text (indicating both civil and criminal contempt sanctions imposed upon violators of confidentiality laws).

249. *See* Marty-*Nelson, Having Your Cake and Eating It Too, supra* note 4, at 60.

250. "Beyond a reasonable doubt" is defined as "[F]ully satisfied, entirely convinced, satisfied to a moral certainty, [the] phrase is the equivalent of the words clear, precise and indubitable." BLACK'S LAW DICTIONARY 161 (6th ed. 1990).

251. "Preponderance of the evidence" is defined as "[E]vidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

252. *See supra* notes 122-60 and accompanying text.

procedural statute of limitations of six years.[253] This statute of limitations begins to run from the date the assets are transferred.[254]

Therefore, if the creditor deems the amount due him to be sufficient enough to tread into a foreign jurisdiction whose laws are settlor-friendly,[255] the creditor may need to begin a cause of action simultaneously with the U.S. action, or even prior to the U.S. action, in order to fall within the Cayman Islands statute of limitations.[256]

In initiating the local cause of action, the creditor may encounter difficulty in discovering vital documents which would trace how the OAPT was funded,[257] who the key players are,[258] and where the trust assets are located.[259] Cayman Islands confidentiality laws, which apply to all persons associated with the establishment and administration of an OAPT, were drafted specifically to protect, and thereby attract, foreign settlors and investors.[260]

3. *Confidentiality Laws*

"Confidential information" is information within the normal course of business regarding all property which the recipient thereof is not permitted by the principal to divulge.[261] "Principal" is defined as a person to whom another person has disclosed confidential information in the course of the transaction of business of a professional nature.[262] In the context of a trust, principal encompasses a settlor while the trust is being established, and then the trustee is a "professional person"[263] to whom such confidential information is imparted.[264] However, a trust beneficiary is not considered

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253. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 61; *see also Rothschild, supra* note 8, at 67. In comparison to other offshore locations, the Cayman islands is actually the most accommodating to Creditors. Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 61. The Island of Cyprus and the Bahamas narrows the statute of limitation to two years. *Id.* The Cook Islands offers the least favorable statute of limitations by requiring a Creditor to commence suit against the Settlor-Debtor no later than two years after the Creditor's cause of action has accrued, or within one year of the transfer of assets. *Id.*

254. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 61.

255. *See* International Trusts Act §§13B(3)(a), (b) (1984) (stating that island countries rewrote their laws to protect trusts from creditor attachment).

256. *See supra* notes 253-55 and accompanying text (explaining the statute of limitations for creditor's actions in the Cayman Islands).

257. *See supra* notes 164-241 and accompanying text (describing methods of discovery).

258. *See supra* notes 66-88 and accompanying text (explaining that the settlor can be the trustee, beneficiary and protector of an OAPT in the Cayman Islands).

259. *See supra* notes 118-21 and accompanying text (relating that the location of the OAPT assets need not be physically in the Cayman Islands to be administered by a Cayman Islands trustee).

260. *See infra* notes 261-74 and accompanying text (describing confidentiality laws in the Cayman Islands).

261. *See* MERREN, *supra* note 32, at 80.

262. *See id.*

263. "Professional person" includes a bank, trust company, attorney-at-law, accountant, insurer, broker or agent. MERREN, *supra* note 32, at 82, n.13.

264. *See id.* at 80-81.

a principal since it is likely that the beneficiary would be seeking disclosure of confidential information from the trustees.[265]

The Confidential Relationships (Preservation) Law 1979 (as amended) ("CRL") applies to all confidential information in regards to business of a professional nature which originates or is brought into the Cayman Islands, and to anyone coming into possession of confidential information at any time thereafter, whether the person(s) is within the Cayman Islands jurisdiction or not.[266]

However, confidences are allowed to be breached in limited situations and only by specific methods.[267] For instance, when a professional to whom a confidence has been divulged is subpoenaed, or voluntarily intends to reveal evidence relating to the confidential information, in any jurisdiction of the world, he is obligated under law to apply for directions from the Grand Court[268] sitting in camera.[269] Moreover, revealing the confidential information is allowed in narrow instances when the CRL does not apply.[270]

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265. *See id.* at 81.

266. *See* CAYMAN ISLANDS CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW, §3(1); *see also* DUCKWORTH & FINLAY, *supra* note 15, at §33:34, 33-21 (explaining the Confidential Relationships Law may impose criminal sanctions for an improper breach of confidence in a professional relationship).

267. *See* MERREN, *supra* note 32, at 82. The Mutual Legal Assistance Treaty [hereinafter "MLAT"], between the U.S. and the United Kingdom (with exclusive reference to the Cayman Islands), came into effect on March 19, 1990. *Id.* at 76. The MLAT is implemented in the Cayman Islands by the Mutual Legal Assistance (United States of America) Law 1986 [hereinafter "MLAL"]. *Id.* "No other mutual legal assistance treaty is in effect with another country besides the U.S.." *Id.* at 77. According to MLAL, § 10, "any person who divulges confidential information or gives testimony in conformity with a request pursuant to the MLAT is deemed not to have committed an offense under the CRL or under the Banks and Trust Companies Law, nor can any civil liability be grounded against the person making such disclosure or giving such testimony by reason thereof." *Id.* at 76. The MLAT covers exchange of information concerning all criminal offenses common to the Cayman Islands and the U.S., including insider trading, foreign corrupt practices and racketeering under U.S. law. *Id.* However, pure tax offenses are not included under the MLAT or any other treaty or agreement. *Id.* The Cayman Islands maintaining that it is a tax haven, not a crime haven. *Id.*

268. *See supra* notes 36-39 and accompanying text (explaining the function of the Cayman Islands' Grand Court).

269. *See* MERREN, *supra* note 32, at 82, n.11. Under the CRL, §3A(3) and (4), the criteria that the judge considers when deciding what confidential information can be revealed is "(1) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim; (2) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy"; and under CRL, §3A(6)(c) "in any criminal case, the requirements of the interest of justice." *Id.* at 82, n. 12.

The judge may order that confidential information be divulged subject to restrictions and safeguards to protect particular persons and portions. For instance, restriction to certain named persons may be concealed by using coded names or alphabetical letters, numbers or symbols. Id. at 82.

270. *See id.* The CLR "does not apply to the seeking, divulging or obtaining of confidential information:

(1) In compliance with the Grand Court's directions pursuant to Section 3A;

(2) By or to any professional person: (a) acting in the normal course of business; or (b) with the consent, expressed or implied, of the relevant principal;

(3) By or to a senior local police officer investigating a criminal offense, the Financial Secretary or certain other duly authorized persons;

(4) By or to a licensed bank, including a trust company, in any court proceedings or, with the approval of the Financial Secretary, any other relevant professional person when reasonably necessary for protection of the bank's interest or for the protection of any person against crime; or

In the event of a breach of confidence in a professional relationship, criminal sanctions are possible, whereas a breach of confidence in a non-professional relationship potentially allows for civil remedies.[271] The nonprevailing party must also pay the legal expenses of the prevailing party.[272] Additionally, criminal penalty may also be imposed for up to two years in prison,[273] and threats of a breach of confidence may be restrained by an injunction.[274]

4. The English Rule

Unlike in the United States, where each litigating party pays for their own legal fees, the Cayman Islands has adopted the English Rule where the losing party must pay for the prevailing party's legal fees.[275] Additionally, attorneys handling cases in the Cayman Islands are not allowed to provide services on a contingency agreement.[276] Thus, the English Rule may deter the creditors from pursuit into the Cayman Islands if their case is not strong or if the judgment amount is outweighed by the risk of unsuccess.[277]

C. Reversionary Interests in Cayman Islands OAPTs Are Available to Creditors

Although OAPTs are generally irrevocable, they usually terminate within a specified period of time as determined by the settlor, often ten to fifteen years.[278] Upon termination, the OAPT assets typically revert to the grantor, but sometimes the assets are distributed to the beneficiaries according to the trust document instructions.[279] Settlors view the reversionary aspect of the OAPT as a positive and desired feature so as to protect their assets from creditors, while maintaining the right to recover their assets in the distant future.[280]

Creditors may also view the reversionary aspect of the OAPT as a positive aspect. If it is possible for the settlor to reacquire their assets, whether in the near or

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(5) In accordance with the provision of this or any other Cayman Law."
Id. at 82-83.

271. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:34, 33-21 (explaining civil actions are available for breach of confidences, but criminal sanctions are available for the breach of a confidence in a professional relationship).

272. *See infra* notes 275-77 and accompanying text (describing the English rule used in the Cayman Islands court system).

273. *See* MERREN, *supra* note 32, at 83.

274. *See* DUCKWORTH & FINLAY, *supra* note 15, at §33:34, 33-21.

275. *See Rothschild, supra* note 8, at 67 (relating the English Rule requires the losing party to pay the other's legal fees and prohibits attorneys' from working on a contingent fee basis).

276. *See id.* (describing the English rule prohibits attorneys from working on a contingent fee basis).

277. *See id.* (explaining the English Rule may chill a creditor's desire to proceed further with litigation in an offshore jurisdiction); *see also supra* notes 275-77 and accompanying text (explaining the English Rule).

278. *See* Marty-Nelson, *Having Your Cake and Eating It Too, supra* note 4, at 70.

279. *See id.*

280. *See id.*

distant future, this fact proves that the OAPT was not irrevocable under U.S. law, and the creditor may attach all assets with which the debtor-settlor has interest.[281]

Moreover, if the debtor in U.S. bankruptcy proceedings fails to list the OAPT in which he has a reversionary interest, he may later be subject to bankruptcy fraud when that OAPT interest is subsequently discovered.[282]

VI. INDIRECT APPROACHES A CREDITOR MAY TAKE IN THE UNITED STATES COURT SYSTEM AGAINST A DEBTOR WITH AN OFFSHORE ASSET PROTECTION TRUST IN THE CAYMAN ISLANDS

After obtaining a favorable judgment against the debtor in a U.S. court, the creditor may have difficulties in persuading the debtor and the Cayman Island OAPT trustee to relinquish the assets in order to satisfy the judgment.[283] Additionally, the Cayman Islands government is likely to favor the OAPT settlor unless actual fraud can be proven in the Grand Court within the procedural requirements of the court system.[284] The creditor may elect to then *indirectly* persuade the debtor to satisfy the judgment against him.

The creditor may legally use the U.S. court system to charge the debtor with civil contempt,[285] criminal contempt,[286] bankruptcy fraud,[287] and other various white-collar crimes.[288] The threat of a possible conviction and time in prison may sufficiently convince the settlor-debtor to relinquish assets to satisfy the judgment despite an anti-duress clause drafted into the OAPT.[289]

Moreover, in lieu of, or in conjunction with, a criminal pursuit of the debtor, the judgment creditor may pursue the debtor's attorney and other professional fiduciaries who assisted in establishing and transferring assets into the OAPT.[290] Criminal charges of aiding and abetting,[291] conspiracy to commit fraud,[292] and threat of disbarment for violation of the applicable professional code of ethics[293] may sufficiently encourage the debtor's attorney or other professional fiduciaries to

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281. *See infra* notes 403-05 and accompanying text.

282. *See supra* notes 164-241 and accompanying text (describing discovery methods a creditor may use to locate a debtor's OAPT).

283. *See supra* notes 122-24 and accompanying text (surmising a creditor may have difficulty convincing a Cayman Islands OAPT trustee to relinquish the assets).

284. *See supra* notes 34-40 and accompanying text.

285. *See infra* notes 317-50 and accompanying text (explaining civil contempt).

286. *See infra* notes 351-78 and accompanying text (explaining criminal contempt).

287. *See infra* notes 379-502 and accompanying text (describing bankruptcy fraud).

288. *See infra* notes 503-17 and accompanying text (listing various white collar crimes).

289. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause).

290. *See infra* notes 518-49 and accompanying text (suggesting a creditor may pursue the debtor's attorney as a way to reach the debtor).

291. *See generally infra* notes 539-40 and accompanying text.

292. *See infra* notes 520-23 and accompanying text (suggesting the debtor's attorney may be charged with conspiracy to commit fraud).

293. *See infra* notes 524-49 and accompanying text (relating the attorney's professional responsibility).

persuade their client to relinquish sufficient funds from the OAPT.[294] Additionally, civil charges may be brought against the attorney and other professionals who assisted the debtor with the OAPT.[295] To best illustrate the interaction of an indirect approach a creditor may take in the U.S. court system against a debtor with an OAPT in the Cayman Islands, the following hypothetical is offered.[296]

A. Hypothetical

For purposes of this section, the following hypothetical is used to illustrate options in the criminal and civil pursuit of a creditor to indirectly persuade the repatriating of OAPT assets: the debtor is a U.S. citizen who is now insolvent and owes substantial amounts to aggressive creditors. The debtor is also the settlor of an OAPT in the Cayman Islands, which was established five years ago when the settlor had no financial liabilities, existing or foreseen.[297] Under the terms of the OAPT, the trustee is given full discretion to pay all or part of the income and principal to the settlor and his family members as the initial beneficiaries. The trustee also has the discretion to remove those beneficiaries and to name any other person or entity as a beneficiary. The trustee also has the discretion to make no distributions at all. The OAPT contains both an anti-duress clause[298] and a flight clause.[299]

Typically, under U.S. law, creditors are entitled to satisfaction from the assets of this OAPT since it is a discretionary trust for his own benefit.[300] The creditors are allowed to reach the maximum amount which the trustee, in his discretion, could distribute to the settlor.[301] Here, the trustee could distribute the entire OAPT principle and income to the settlor despite the other beneficiaries, therefore, the creditors may reach all of the assets.[302] Insofar as the OAPT seeks to defeat U.S. public policy against a self-settled discretionary trust,[303] it is void for illegality.[304]

The creditor will direct the U.S. court's attention to three features of the OAPT in order to void the OAPT: first, the anti-duress clause permits the trustee to ignore a U.S. court order.[305] Second, the flight clause allows the trustee to move the assets

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294. *See infra* notes 531-49 and accompanying text (explaining the debtor's attorney may be coerced to convince his client to release the OAPT assets).

295. *See infra* notes 542-46 and accompanying text.

296. *See infra* notes 317-549 and accompanying text (describing indirect approaches a creditor may take to pierce an OAPT).

297. *See supra* notes 63-98 and accompanying text (explaining the settlor's authority).

298. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause in an OAPT).

299. *See supra* note 99-111 and accompanying text (defining a flight clause in an OAPT).

300. *See supra* notes 68-77 and accompanying text (describing self-settled discretionary trusts).

301. *See* LOWE, *supra* note 20, at §26:02, 26-3 (informing when a person creates a discretionary trust for his own benefit the creditors may reach the maximum amount which the trustee could in his discretion pay to the settlor).

302. *See* SCOTT & FRATCHER, *supra* note 71, at §156.2, 175-76.

303. *See supra* notes 68-67 and accompanying text.

304. *See generally* SCOTT & FRATCHER, *supra* note 71, at §62.

305. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause in an OAPT).

around the world to prevent them from resting long enough for a U.S. court or even the situs jurisdiction to enforce an attachment.[306] Lastly, the OAPT trustee has the authority and discretion to terminate all payments to the settlor while any court order is pending, then to reinstate him as a beneficiary when the threat abates.[307]

If the creditor is successful in convincing the U.S. court that the settlor created the OAPT for the primary purpose of asset protection,[308] and that the OAPT is making the settlor a discretionary beneficiary in violation of U.S. public policy,[309] the OAPT would be illegal and void from the outset.[310] Instead of an OAPT, all that would remain is a foreign bank account with instructions to the banker to pay the money to the settlor or his designee upon request, unless the money is threatened by any court order, in which event the banker is to take the money and run.[311] Then when the threat subsides, the banker is to resume honoring demand withdrawals.[312] If the creditor is successful in persuading the U.S. court in this scenario, the settlor may be faced with civil[313] or criminal contempt,[314] bankruptcy fraud,[315] and perhaps other miscellaneous white collar offenses.[316]

B. Civil and Criminal Contempt

The settlor-debtor may be faced with both civil and criminal contempt charges.[317] The difference between civil contempt and criminal contempt in this context is that civil contempt is coercive while criminal contempt in punitive.[318] On one hand, the settlor-debtor sentenced with civil coercive contempt is sent to jail because he has refused to obey a court order, such as to release assets from the OAPT.[319] He will

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306. *See supra* notes 88-111 and accompanying text (defining a flight clause in an OAPT).

307. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause in an OAPT).

308. *See supra* notes 3-6 and accompanying text (explaining the primary purpose of an OAPT).

309. *See supra* notes 68-77 and accompanying text.

310. *See generally id.*

311. *See* LOWE, *supra* note 20, at §26:02, 26-4 (deducing the settlor would be left with a foreign bank account once the creditor proves the OAPT was illegal and void from the outset).

312. *See id.*

313. *See infra* notes 317-50 and accompanying text (describing civil contempt).

314. *See infra* notes 351-78 and accompanying text (describing criminal contempt).

315. *See infra* notes 379-502 and accompanying text (describing bankruptcy fraud).

316. *See infra* notes 503-17 and accompanying text (listing various miscellaneous white collar crimes).

317. *See* LOWE, *supra* note 20, at §26:04, at 26-4 (explaining there are two kinds of contempt: civil and criminal).

318. *See* Hicks v. Feiock, 485 U.S. 624, 632 (1988) (explaining the test to determine whether the punishment is for criminal or civil contempt).

319. *See* LOWE, *supra* note 20, at §26:04, 26-5 (relating the difference between civil contempt and criminal contempt). *See also Hicks*, 485 U.S. at 633 (explaining civil action is coercive and criminal action is punitive). Another branch of civil contempt is "compensatory" contempt, in which the sanction is intended to repay the aggrieved party for losses it has suffered as a result of the contumacious actions; U.S. v. Rylander, 656 F.2d 1313, 1317, n.4 (9th Cir. 1981) *rev'd on other grounds* 460 U.S. 752 (1983). In the case of a debtor, compensatory contempt is unlikely to arise, however, because the settlor is unable to pay compensatory assessments to his creditors; LOWE, *supra* note 20, at §26:05, 26-5, 25-6.

remain in jail so long as he continues to disobey, yet he is said to "have the keys to the jail in his own pocket" because he has the power to perform the act which will gain his release.[320] On the other hand, a sentence for criminal contempt is for a definite term, and it is intended to punish.[321]

In theory, the settlor-debtor cannot be held in civil contempt for failure to do an act which is impossible.[322] This situation is precisely why an anti-duress clause is drafted into the OAPT.[323] In contrast, the settlor-debtor may be found to be in criminal contempt because it was his own actions that rendered the performance impossible.[324]

1. Impossibility as a Defense to Civil Contempt

A debtor who is imprisoned for civil contempt is able to free himself of contempt simply by doing what the court has ordered.[325] Therefore, if it is impossible for him to perform that which is ordered of him, he cannot be held in civil contempt.[326] Moreover, impossibility is still a defense to civil contempt even if the circumstances allude that the debtor-contemnor purposefully created the impossibility in order to frustrate his own performance.[327]

However, the burden is upon the debtor-contemnor to prove to the court that the ordered act is in fact impossible with which to comply.[328] He must show "categorically and in detail" why he cannot comply with the court order.[329] The burden of proof is difficult to meet if the debtor is the trustee, or if there is evidence

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320. *See* Penfield Co. v. SEC, 330 U.S. 585, 590 (1947) (describing those who are imprisoned until they obey the court order carry the keys of their prison in their own pocket).

321. *See* LOWE, *supra* note 20, at §26:04, 26-5 (explaining criminal contempt is punitive). *See also Hicks*, 485 U.S. at 633 (describing the purpose of criminal contempt is to punish the contemnor).

322. *See* LOWE, *supra* note 20, at §26:04, 26-5 (explaining the creditor will claim the act the court is requesting of him is impossible).

323. *See supra* notes 112-17 and accompanying text (describing an anti-duress clause in an OAPT).

324. *See* LOWE, *supra* note 20, at §26:07, 26-10 (promoting the idea that self-induced impossibility is not a defense to criminal contempt).

325. *See id.* at 26-5 (suggesting a settlor cannot be held in civil contempt if it is impossible for him to carry out the court order because a person found in civil contempt must always be able to purge himself of contempt by doing what the court has ordered); *but see Rylander*, 460 U.S. at 752 (reasoning impossibility is a defense to coercive civil contempt even if circumstances suggest that the contemnor deliberately created the impossibility in order to prevent his own performance).

326. *See* LOWE, *supra* note 20, at §26:05, 26-5 (reasoning a person held in civil contempt cannot be held if it is impossible for him to carry out the order).

327. *See Rylander*, 460 U.S. at 757 (reasoning that when compliance with the court order in question is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action).

328. *See* LOWE *supra* note 20, at §26:05, 26-6 (stating the person held in civil contempt has the burden of proving impossibility); *Rylander*, 460 U.S. at 757 (mentioning that the burden of proof is upon the party claiming impossibility).

329. *See* NLRB v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir. 1973); *see also Hicks*, 485 U.S. at 638, n.9 (establishing that precedent is clear that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order).

that the debtor has influence over the trustee, which shows the debtor still has management and control over the OAPT assets.[330]

When the settlor explains to a U.S. judge that it is impossible for him to obey the order, he must, at a minimum, introduce the trust document and testify that he requested the trustee to return the assets, but that the trustee, consistent with the anti-duress clause,[331] refused to comply, and the settlor had no power to force the return of the assets.[332] However, it is likely that the court will not believe the settlor since he was responsible for the incorporation of the anti-duress clause into the OAPT.[333] Impossibility is not proven "by evidence or by the settlor's own denials which the court finds incredible in context."[334]

The approved method to test a respondent's credibility is "trial by ordeal,"[335] which is essentially throwing the contemnor into jail to see if the experience will coerce him to comply with the court order. If he continues to claim impossibility while sitting in jail, then perhaps the court will believe the settlor is not willfully disobeying.[336]

Despite the debtor-contemnor's willingness to serve jail time and denial of possibility, the defense of impossibility is not granted generously.[337] Courts have held that an act is not impossible to perform merely because it would violate the law of a foreign state, such as the Cayman Islands.[338]

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330. *See* Fortin v. Commissioner of Internal Revenue Service, 692 F.2d 612, 616 (9th Cir. 1973).

331. *See* note 112-17 and accompanying text (describing an anti-duress clause in an OAPT).

332. *See* LOWE, *supra* note 20, at §26:05, 26-6 (describing the situation where the person held for civil contempt declares he tried to get the trustee to return the assets, but the trustee refused to do so).

333. *See id.* (stating the contemnor may claim the defense of impossibility, but it is likely the court will not accept this defense).

334. *See* Maggio v. Zeitz, 333 U.S. 56, 75-76 (1948).

335. *See* LOWE, *supra* note 20, at §26:05, 26-6 (explaining the method of "trial by ordeal").

336. The credibility of his denial is to be weighed in the light of his present circumstances. *Id.* It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. *Id.* His denial of possession is given credit after demonstration that a period in prison does not produce the goods. *Id.* The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the type of evidence mentioned above, to convince the court that his is not a willful disobedience which will yield to coercion. *Id.*

337. *See id.*

338. Chase Manhattan Bank [hereinafter "CMB"] claimed the defense of impossibility when the New York court ordered CMB to produce a customer's records held by its Hong Kong branch even though production would violate an injunction issued by the Hong Kong Supreme Court ordering it not to release the records on pain of contempt. U.S. v. Chase Manhattan Bank, 584 F. Supp. 1080 (S.D.N.Y. 1984). When CMB refused to produce the records, the federal court held it in contempt and ordered it to pay a substantial daily fine until they were produced. U.S. v. Chase Manhattan Bank, 590 F. Supp. 1160 (S.D.N.Y. 1984). The court was not sympathetic to CMB's dilemma, reasoning that the banks's predicament was due to having chosen to do business in a jurisdiction in which the law is at odds with those of its home jurisdiction. *Id.* at 1163. The court commented that CMB was not in an "impossible" position, rather, it was in a "difficult" position by facing conflicting orders from two courts. *Id.*; *see also* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992) (upholding a contempt sanction for noncompliance with discovery order despite the fact that disclosure would violate secrecy statute of People's Republic of China); *but see* United States v. First Nat. Bank of Chicago, 699 F.2d 341, 342 (7th Cir. 1983) (potential Greek criminal penalties deterred court from ordering production).

2. *The Debtor's Difficult Burden of Proving Impossibility to Charges of Civil Contempt*

To defend against a charge of civil contempt, the debtor-respondent is obligated to prove that he has made all reasonable efforts to obey the order of the court to release assets from the OAPT.[339] It is insufficient to prove only substantial good faith efforts.[340] The respondent might be required to do more than just request the assets or documents be turned over by the foreign trustee.[341] He may be also required to show his efforts to remove the foreign trustee and begin suit in the Cayman Islands.[342] Additionally, "all reasonable efforts" may include determining the legal rights of the trustee and settlor under the OAPT and consulting with a local Cayman Islands attorney to make all attempts to compel disclosure and release of assets.[343]

Thus, it is quite possible that a court would reject a settlor's simple explanation of impossibility of performance to the request of the Cayman Islands trustee to release assets from the OAPT.[344] Moreover, the court may find the settlor's explanation incredulous and determine that the settlor colluded with the trustee to prevent recovery of the OAPT assets.[345]

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339. *See* LOWE, *supra* note 20, at §26:06, 26-8 (reporting to defend against a charge of contempt, the respondent is obligated to prove that he has made "all reasonable efforts" to obey the order of the court); *see also* In re Power Recovery Systems, Inc., 950 F.2d 798 (1st Cir. 1991) (explaining that all reasonable efforts must be shown to prove impossibility).

340. *See* United States v. Hayes, 722 F.2d 723, 726 (11th Cir. 1984) (demonstrating the effort a citizen of the U.S. must make to obey a court order to obtain information from a person in a foreign jurisdiction). Hayes, as a trustee, had invested in numerous Panamanian partnerships. *Id.* at 724. On each occasion he had named Thom, a Swiss citizen, as managing partner. *Id.* at 724. The Internal Revenue Service (IRS) sought the partnership documents, and the district court ordered Hayes to produce them. *Id.* Hayes reported back to the court that the documents were in Thom's possession in Switzerland. *Id.* He said he had made two trips to Switzerland to try to retrieve them, but Thom refused to relinquish them because he was fearful of a separate tax investigation. *Id.* The district court found that Hayes was not in contempt because he had made "substantial good faith efforts" to comply with the order. *Id.* However, the court of appeals vacated the finding and remanded for further consideration, holding that while Hayes may have made substantial good faith efforts to obey, he had not made all "reasonable efforts, as required". *Id.*

341. *See id.* at 724 (remanding the case for further consideration as to whether respondent made all reasonable efforts, as opposed to substantial efforts, to obtain the court ordered documents).

342. *See id.* at 726 (suggesting that the trustee, Hayes, should have taken steps to remove the foreign managing partner in order to prove that "all reasonable efforts" were made to comply with the court order to produce Panamanian partnership documents).

343. *See id.* at 726 (explaining that the trustee Haye's efforts to secure partnership documents from the foreign managing partner should have included steps to remove the partner, attempts to discover his own legal rights as trustee, and consultation with a local attorney in order to demonstrate "all reasonable efforts" to obey the court order).

344. *See* LOWE, *supra* note 20, at §26:06, 26-9 (reasoning that it is not entirely unlikely that a court would reject the settlor's explanation that the trustee refused to deliver the assets and that there was nothing he could do about it).

345. *See id.* (surmising that the court might find a settlor's defense of impossibility to be incredible); *see also supra* notes 112-17 and accompanying text (defining an anti-duress clause).

The well prepared settlor will likely present expert testimony to establish that an OAPT in the Cayman Islands with an anti-duress clause[346] is not a sham, and that OAPT trustees in the Cayman Islands in fact do refuse to turn over assets under compulsion.[347] The settlor-debtor may also need to show what substantial steps he has taken in the Cayman Islands to obtain the assets or to remove the trustee.[348]

Without demonstrating to the court that "all reasonable efforts" to obtain the trust assets were made, the settlor may find himself in civil contempt and be sentenced to prison until he is ready to complete "all reasonable efforts" to obtain the release of OAPT assets.[349] In the event that civil contempt does not convince the settlor to repatriate the OAPT assets, charges of criminal contempt may be an appropriate next step for the creditor.[350]

3. *Criminal Contempt*

The crux of criminal contempt is a willful violation of a court order,[351] not just claims of impossibility.[352] Some U.S. courts have suggested that the test for whether charges of criminal contempt are warranted is if the respondent has acted in "bad faith" when he rendered performance impossible.[353]

Even if the respondent's act in creating the impossibility occurred before the issuance of the court order, there is some authority that if the act was done in anticipation of that order, impossibility would not provide a defense and that the act was instead willful.[354] For example, in In re Coffelt,[355] a sentence of imprisonment for criminal contempt was upheld, despite the defendant's inability to pay the US$10,000 into the registry as ordered, because he had disposed of the money one month before the court ordered him to pay the amount.[356] The court refused to accept the defense of impossibility because the defendant "was evading compliance with the

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346. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause).

347. *See id.*

348. *See supra* note 342 and accompanying text (suggesting the debtor must prove impossibility by showing his efforts to remove the foreign trustee and begin suit in the Cayman Islands to repatriate the OAPT assets).

349. *See supra* note 339 and accompanying text (suggesting all reasonable efforts to have the trustee release the OAPT assets must be shown by the debtor).

350. *See infra* notes 352-78 and accompanying text (describing criminal contempt).

351. *See* LOWE, *supra* note 20, at §26:07, 26-10 (describing that the criminal contempt in its essence is a willful violation of an order of the court; the contempt is complete when the papers are burned); *see also* Nilva v. United States, 352 U.S. 385 (1957) (contemnor refused to produce papers after trial court issued subpoena duces tecum).

352. *See supra* notes 325-50 and accompanying text (describing impossibility in the context of civil contempt).

353. *See* Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 935 (2nd Cir. 1992); *see also* In re Marc Rich & Co., 736 F.2d 864, 866 (2nd Cir. 1984).

354. *See* LOWE, *supra* note 20, at §26:07, 26-10.

355. *See* In re Coffelt, 389 S.W. 2d 234, 237 (1965).

356. *See id.*

forthcoming decree."[357] The defendant's act of alienation occurred shortly before the issuance of a court order and in direct anticipation of the court order.[358]

In the hypothetical, the settlor of the OAPT conveyed his property years before, not months before the court ordered him to relinquish the property,[359] but the distinction is not necessarily controlling.[360] A creditor may simply direct the court's attention to the anti-duress clause contained in the OAPT,[361] which leaves no doubt that the conveyance was made in anticipation and avoidance of the very order the court seeks to enforce.[362] Creditors may also argue that even though the conveyance into trust was made several years prior to the court order, the complete alienation did not occur until the court issued its court order.[363]

Therefore, the creditors' argument should seek to lead the court to accept that when a settlor purposefully acts in order to render himself unable to obey a court order to repatriate the OAPT assets, he should be held in criminal contempt because the settlor-debtor acted in bad faith when he rendered performance impossible.[364] Indeed, this should be true whether the settlor did the act after he received the order or he did it in *anticipation* of the order.[365] It should be immaterial that the act was done years in advance of the order and at a time when there was no particular reason to believe such an order would be forthcoming.[366] It should also be sufficient that the act was done with the intent to frustrate such an order.[367]

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357. *See id.*(emphasis added); *see also* In re Fuller, 50 S.W. 2d 654, 657 (1932) (dictum); *but see* In re Guetersloh, 935 S.W. 2d 110, 11 (Tex. 1996) (holding that a person may not be held in constructive contempt for actions taken before court reduces order to writing).

358. *See* LOWE, *supra* note 20, at §26:07, 26-10 (citing cases which involved acts of alienation occurring shortly before a court order and in direct anticipation of it).

359. *See supra* notes 297-316 and accompanying text (illustrating a hypothetical).

360. *See* LOWE, *supra* note 20, at §26:07, 26-10 (reasoning that the distinction between months and years is not a controlling fact in determining that the settlor of an OAPT transferred property in anticipation of a court order to turn over assets).

361. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause in an OAPT).

362. *See* LOWE, *supra* note 20, at §26:07, 26-10, 26-11 (suggesting that creditors will contend that there is no question that the conveyance into the OAPT was made in anticipation and avoidance of the very kind of turnover order which it seeks to enforce).

363. *See id.* (analogizing the anti-duress provision may be analogized to a spring gun). In the case of a spring gun, although the defendant cocked the shotgun and set the trip wire five years ago, it was not until today that the wayfarer was killed by it. *Id.* The tortious act is not remote in time; it occurred today. *Id.* The anti-duress clause, like the spring gun, may have been cocked years ago, but it was not triggered until the court issued a turnover order. *Id.*

364. *See supra* notes 351-63 and accompanying text (discussing criminal contempt when a settlor willfully refuses to comply with a court order to turn over the OAPT assets).

365. *See supra* note 354 and accompanying text (reasoning a contradicting act done in anticipation of disobeying a court order gives reason for criminal contempt).

366. *See generally supra* notes 351-63 and accompanying text (discussing criminal contempt).

367. *See generally supra* notes 351-63 and accompanying text (discussing criminal contempt).

Furthermore, the creditor should argue that it is inaccurate to say that the settlor acted years ago and not thereafter.[368] At some recent time, he knew that creditors' actions were imminent, and he had good reason to anticipate that a court might soon direct him to retrieve his assets from the trustee.[369] The settlor most likely could have deleted the anti-duress clause from the OAPT had he wished to do so.[370]

Additionally, if the intention of the settlor was to simply put his property beyond the reach of distant creditors, he could have properly given his assets to his children or other donees.[371] However, by transferring his assets to an OAPT with an anti-duress clause,[372] while maintaining management and control over them,[373] the settlor established a self-settled trust with the intent of defrauding creditors.[374] Therefore, the OAPT is illegal, as against public policy,[375] and even more poignant is that he conspired unlawfully with a foreign trustee to disobey a lawful order of a U.S. court.[376] Faced with the potential charge of criminal contempt, which includes a prison term, the settlor may likely be coerced to repatriate the OAPT assets to satisfy creditors' judgments.[377] The settlor may also be criminally charged with conspiracy to commit bankruptcy fraud and witness tampering which may add further incentive to transfer the OAPT assets back to the United States.[378]

C. Bankruptcy Fraud

In the hypothetical,[379] the settlor did not intend to declare bankruptcy when the OAPT was established; however, he has now either decided that voluntarily declaring bankruptcy would be beneficial to his interests, or his creditors have placed him into involuntary bankruptcy.[380]

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368. *See* LOWE, *supra* note 20, at §26:08, 26-12 (relating the creditor might argue a person who deliberately does an act in order to render himself unable to obey a court order may be held in criminal contempt, whether he did the act after he received the order or he did it in anticipation of the order).

369. *See id.*

370. *See* LOWE, *supra* note 20, at §26:08, 26-12 (surmising it is very likely that if the settlor had wished to delete the anti-duress provision from the trust at the time creditors' actions were imminent, he could have done so).

371. *See* LOWE, *supra* note 20, at §26:08, 26-12 (reasoning that the settlor could have given his money to his children in order to put the money beyond the reach of distant creditors).

372. *See supra* notes 112-17 and accompanying text (defining an anti-duress clause).

373. *See supra* notes 71-77 and accompanying text (describing management and control over an OAPT).

374. *See supra* notes 71-77 and accompanying text (defining a self-settled trust).

375. *See supra* note 71 and accompanying text (explaining a self-settled trust is against U.S. public policy).

376. *See* LOWE, *supra* note 20, at §26:08, 26-13 (concluding that in establishing a self-settled OAPT, the settlor conspired unlawfully with a foreign trustee to disobey a lawful order of a U.S. court).

377. *See generally supra* notes 351-63 and accompanying text (discussing criminal contempt).

378. *See infra* notes 379-85 and accompanying text (discussing bankruptcy fraud).

379. *See supra* notes 297-316 and accompanying text (relating a hypothetical).

380. *See* 11 U.S.C. § 303 (1997) (distinguishing involuntary bankruptcy from voluntary bankruptcy).

Even though bankruptcy fraud is rarely prosecuted,[381] some U.S. Attorneys' offices appear to be taking a greater interest in prosecuting this offense.[382] The two primary statutes in which the settlor-debtor may be charged for bankruptcy fraud are 18 U.S.C. section 152, "Concealment of assets; false oaths and claims; bribery"[383] and 18 U.S.C. section 157, "Bankruptcy fraud."[384] To avoid confusion in nomenclature, the two statutes will be referred to by "section 152 fraud" and "section 157 fraud."[385]

1. Section 152 Fraud

Section 152 fraud sets out three different offenses: concealment, false statements and bribery.[386] The courts have given the statute an extremely broad interpretation, holding that it "attempts to cover all the possible methods by which a bankrupt or any other person may attempt to defeat the Bankruptcy Act through an effort to keep assets from being equitably distributed among creditors."[387] There are nine paragraphs which describe possible offenses in great detail;[388] however, the

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381. *See* McCullough, *Bankruptcy Fraud: Crime Without Punishment*, 96 COM. L.J. 257, 257-258 n.8 (1991) (reporting that 679,980 bankruptcy filings were made in 1989, but federal prosecutors filed only 75 complaints of bankruptcy crimes that year, compared with 82 criminal complaints for fishing violations).

382. *See* NORTON BANKRUPTCY LAW AND PRACTICE, Vol. 3, at §49:2,49-3 (2d ed. 1994).

383. 18 U.S.C. § 152 is the traditional code section in which charges of bankruptcy were founded prior to the 1994 enactment of 18 U.S.C. § 157.

384. 18 U.S.C. § 157 was enacted to codify the broad new Bankruptcy Reform Act. *See* LOWE, *supra* note 20, at §26:16.50, 26-25.

385. *See infra* notes 481-93 and accompanying text (discussing §157 fraud).

386. *See infra* note 388 and accompanying text (listing nine elements of fraud).

387. *See* Stegeman v. United States, 425 F.2d 984, 986 (9th Cir. 1970); *see also* United States v. Goodstein, 883 F.2d 1362, 1369 (7th Cir. 1989).

388. *See* LOWE, *supra* note 20, at §26:10, 26-13, 26-14 (summarizing § 152 fraud). The nine paragraphs provide that the offense of bankruptcy fraud is committed in relation to any bankruptcy case if a person knowingly and fraudulently:

1. conceals any property belonging to the estate of the debtor;
2. makes a false oath or account;
3. makes a false statement;
4. presents or uses a false claim;
5. receives property from the debtor after the case is filed, with intent to defeat the provisions of the bankruptcy law;
6. gives, offers, receives or attempts to obtain any benefit for acting or forbearing to act in a bankruptcy case;
7. transfers or conceals property in contemplation of a bankruptcy case by or against him or any other person or corporation, or with intent to defeat the provisions of the bankruptcy laws;
8. after the filing of a bankruptcy case or in contemplation of such filing, conceals, destroys, or falsifies any recorded information relating to the property or financial affairs of a debtor; or
9. after the filing of a bankruptcy case, withholds from a trustee or other officer of the court entitled to possession, any recorded information relating to the property or financial affairs of a debtor.

paragraphs of immediate concern to the hypothetical settlor are paragraphs one[389] and seven.[390]

In the context of the hypothetical,[391] a case for bankruptcy fraud under section 152 (1) has been made if the settlor's property has been knowingly and fraudulently concealed after bankruptcy proceedings have begun.[392] A case for bankruptcy fraud under section 157(7) has been made if the settlor's property has been knowingly and fraudulently transferred or concealed in contemplation of a bankruptcy proceeding; or with intent to defeat the provisions of the Bankruptcy Code.[393]

The principle issues, then, are whether any interest in the trust is property belonging to the estate of the debtor,[394] whether there has been a transfer or concealment of that property by the settlor or by others working in concert with him,[395] whether those acts were done knowingly and fraudulently,[396] and whether those acts were done in contemplation of a bankruptcy proceeding or with intent to defeat the provisions of the bankruptcy laws.[397]

a. OAPT Assets as Property of the Estate of the Debtor

The "property of estate" of the debtor is defined as encompassing "all legal or equitable interests of the debtor in property as of the commencement of the case."[398] However, one restriction is property which has an anti-alienation provision enforceable under "applicable nonbankruptcy law" which then may be excluded from the bankruptcy estate.[399] Notably, in light of the anti-duress clause[400] and flight clause

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389. *See* 18 U.S.C. § 152 (1) (1998). The statute reads "whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case arising under title 11, any property belonging to the estate of a debtor . . . shall be fined not more than US$5,000 or imprisoned not more than five years, or both." *Id.*

390. 18 U.S.C. § 152 (7) reads:

> A person who in a personal capacity or as an agent or officer of any person or corporation in contemplation of a case under Title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of Title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation . . . shall be fined not more than US$5,000 or imprisoned not more than five years, or both.

391. *See supra* notes 287-316 and accompanying text (relating a hypothetical).

392. *See supra* notes 386-90 and accompanying text (discussing § 152 fraud).

393. *See infra* notes 481-93 and accompanying text (explaining § 157 fraud).

394. *See infra* notes 398-403 and accompanying text (indicating OAPT assets as property of the estate of the debtor).

395. *See infra* notes 404-25 and accompanying text (relating the transfer of OAPT property).

396. *See infra* notes 426-36 and accompanying text (discussing the concealment of OAPT property).

397. *See infra* notes 437-68 and accompanying text (explaining the fraud elements of knowingly and fraudulently).

398. *See* 11 U.S.C. § 541(a)(1) (1997).

399. *See* 11 U.S.C. § 541(c)(2); *see also* Patterson v. Shumate, *supra* note 238 and accompanying text.

400. *See supra* notes 112-17 and accompanying text (explaining the function of an anti-duress clause in an OAPT).

in the OAPT,[401] 11 U.S.C., section 541, subsection (c)(1) invalidates agreements, if not within a section 541(c)(2) restriction, under which the debtor's interest in property is altered by his entering into bankruptcy.[402]

If the settlor has retained any amount of interest in the OAPT through management, control, or enjoyment of the trust assets, it appears that at least some part, if not all, of the OAPT would be "property of the estate" and within reach of creditors.[403] Indeed, if the OAPT is declared void for illegality and against public policy,[404] all of the OAPT assets belong to the settlor as if the trust did not exist, and hence the trust assets are available for attachment by creditors.[405]

b. Transfer of OAPT Property

The Bankruptcy Code's definition of "transfer" is extremely broad so as to be all-inclusive.[406] The legislative history of this definition confirms its breadth.[407] The creditor may plausibly argue that there was at least one transfer of assets, if not two transfers: the first was when the settlor initially transferred assets to fund the

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401. *See supra* notes 99-111 and accompanying text (relating the function of a flight clause in an OAPT).

402. *See* 18 U.S.C. § 541(c)(1) states in pertinent part:

> [A]n interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

Id. This subsection goes on to protect spendthrift provisions, but only if they are enforceable under general trust law. 18 U.S.C. § 541(c)(2) (stating that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title").

403. *See* LOWE, *supra* note 20, at §26:11, 26-16 (explaining the transfer into trust may be void for illegality and thus the trust assets would belong to the settlor and available for the creditor to attach).

404. *See supra* notes 300-04 and accompanying text.

405. *See* LOWE, *supra* note 20, at §26:11, 26-16 (explaining that the transfer into trust may be void for illegality and thus the trust assets would belong to the settlor).

406. *See* 11 U.S.C. § 101(54) (1997) (stating "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption).

407. S. REP. NO. 989 95th Cong., 2d Sess. 26-27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5813. A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible. Many of the potentially limiting words in current law are deleted and the language is simplified. Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control are interests in property. A deposit in a bank account or similar account is a *transfer. Id.*; *see also* Thomas Moers Mayer, Sheltering Assets in 1994, 402 PRAC. L. INST. / REAL EST. 375, 398 (1994) (indicating that fraudulent transfer law is aimed at closing every loophole by which a debtor can shift assets away from her creditors).

OAPT,[408] and the second, was when the foreign trustee invoked the anti-duress[409] and flight clauses,[410] hence, ignoring the turnover order issued by a U.S. court.[411]

On one hand, the debtor-settlor may contend that he never legally transferred assets to an OAPT since any bank account withdrawal or change in title were not transfers in any significant sense.[412] By withdrawing money out of a bank account or changing title to property, as it were, the debtor-settlor may claim he "merely moved his assets from one of his pockets to another."[413] Thus, prior to any indication of insolvency, the debtor-settlor reasons he did not illegally transfer anything to anyone since the withdrawal or change in title did not reduce the assets available to his creditors at the time.[414] Rather, the assets merely changed form.[415] It is only subsequently did the debtor-settlor turnover the management and control to the OAPT trustee.[416] Some courts have found support in this argument.[417]

On the other hand, as the legislative history indicates, depositing money into a bank account is a transfer, then conversely, later withdrawing money from that account should also be another transfer.[418] Moreover, some courts have held the relationship between a bank and its depositor is one of debtor and creditor; therefore when funds are deposited, title to those funds passes immediately to the bank.[419] The debtor-settlor then owns claims against the bank, and when he withdrew from his account, he transferred debt for money.[420] In other words, when the debtor-settlor withdrew money, he parted with his claims against the bank, thus satisfying the Bankruptcy Code's definition of transfer.[421]

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408. *See* LOWE, *supra* note 20, at §26:13, 26-20 (arguing that the first transfer of assets occurred when the settlor established the trust).

409. *See supra* notes 112-17 and accompanying text (describing anti-duress clause).

410. *See supra* notes 99-111 and accompanying text (defining a flight clause).

411. *See* LOWE, *supra* note 20, at §26:13, 26-20 (explaining that a second transfer occurred when the foreign trustee invoked the anti-duress clause planted into the OAPT).

412. *See* Bernard v. Sheaffer (*In re* Bernard), 96 D.A.R. 11749 (1996) (describing debtors contention that withdrawing bank funds were not transfers in any meaningful sense).

413. *See id.*

414. *See id.* (reasoning a debtor did not transfer assets if the assets were still owned by the debtor).

415. *See id.*

416. *See supra* note 76 and accompanying text.

417. *See* Matter of Agnew, 818 F.2d 1284, 1289 (7th Cir. 1987) (deciding a bankruptcy transfer must be an actual transfer of valuable property belonging to the debtor which reduced the assets available to the creditor).

418. *See supra* note 397 and accompany text (stating a deposit in a bank account or similar account is a transfer).

419. *See* Crocker-Citizens National Bank v. Control Metals Corp., 566 F.2d 631, 637 (9th Cir. 1977) (informing in California, it is a well-settled principle of law that the relationship between a bank and its depositor is that of debtor and creditor). *See also* Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (explaining a person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance).

420. *See* Bernard, *supra* note 412 at 11750-751 (explaining when the debtors made withdrawals from their bank account, they parted with their claims against the bank, and thus satisfied the Bankruptcy Code's definition of transfer).

421. *See supra* note 406 and accompanying text (defining the Bankruptcy Code's definition of "transfer").

Furthermore, if the initial transfer is deemed to not be a transfer and invalid, so that the transferor retained interest, it may be possible to prove that an alienation of that retained interest occurred when the trustee invoked the anti-duress[422] and flight clauses.[423] In the context of the hypothetical,[424] the implementation of the anti-duress and flight clauses by the OAPT trustee demonstrates that the trustee used the authority which had been given to him five years previously in order to transfer the settlor's interest away from the U.S. bankruptcy court.[425]

Even if the debtor is deemed to have not "transferred" his assets, as defined under Section 152,[426] he still may be liable for bankruptcy fraud if he has "concealed" assets from the reach of creditors.[427]

c. *Concealment of OAPT Property*

It has been held that "concealment" does not merely mean hiding assets; rather, it also includes withholding knowledge or preventing disclosure or recognition of the assets.[428] Under bankruptcy law, the debtor in bankruptcy must file a schedule of assets which includes all assets plainly belonging to the bankrupt and all assets which *may* belong to the bankrupt.[429]

Typically, criminal bankruptcy fraud does not consider events which occurred in the year prior to the bankruptcy filing to be of any particular significance.[430] However, under the doctrine of "continued concealment,"[431] the creditor may move the criminal act—concealment—closer to the time of filing than the precipitating

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422. *See supra* notes 112-17 and accompanying text.

423. *See supra* notes 99-111 and accompanying text.

424. *See supra* notes 297-316 and accompanying text.

425. *See supra* notes 112-17 and accompanying text.

426. *See supra* notes 386-482 and accompanying text.

427. *See supra* notes 486-95 and accompanying text.

428. *See* United States v. Porter, 842 F.2d 1021, 1024 (8th Cir. 1988).

429. *See supra* notes 234-41 and accompanying text (describing a schedule of assets).

430. *See* Mayer, *supra* note 407, at 398 (explaining that the fraudulent transfer provision of the Bankruptcy Code only applies to transfers within a year of bankruptcy); *see also* LOWE, *supra* note 20, at §26:12, 26-18 (stating that the criminal bankruptcy fraud statute does not attach any particular significance to events that occur in the year prior to filing).

431. *See* LOWE, *supra* note 20, at §26:12, 26-17 (describing that the courts have utilized the "continued concealment" doctrine to permit time travel). If the debtor transfers title, but retains the benefits of ownership, he has concealed property. *See* 18 U.S.C. § 727(a)(2) (1997). Even though the transfer may have occurred years prior to the filing, if the facts show that the debtor continued to maintain a beneficial interest into the year which preceded the filing, the continued concealment doctrine deems that the concealment occurred during the year. *See* LOWE, *supra* note 20, at §26:12, 26-17, 26-18. This can be as simple as conveying a home to a relative while continuing to live in it rent free. *Id.*; *see generally* In re Oliver, 819 F.2d 550 (5th Cir. 1987) (holding the debtors' transfer of record title to their home seven years before bankruptcy, and their continued retention of secret beneficial interest therein, constituted concealment with "intent to hinder, delay, or defraud a creditor" for purpose of denying discharge). As long as the debtor continues to enjoy the benefit after the transfer, he continues the concealment. *See* LOWE, *supra* note 20, at §26:12, 26-18.

act—the transfer—which in the hypothetical occurred five years prior to filing.[432] In other words, acts which occurred five years prior to the filing may be brought forward as an ongoing act if the debtor continued to enjoy the benefit of the asset after transfer to the OAPT.[433] If enjoyment of the asset continues up to within one year prior to filing, then the concealment is considered within the required time frame.[434]

Even if the assets are deemed to be the settlor's property[435] that was either transferred[436]or concealed,[437] the prosecutor must also prove that the debtor knowingly and fraudulently transferred or concealed the assets. [438]

d. Knowingly and Fraudulently

"Knowingly" merely means that the act must be done "voluntarily and intentionally, not because of mistake or accident."[439] When the statute proscribes an act done "with intent to defeat the provisions of Title 11,"[440] it is establishing a specific intent crime.[441] At a minimum, specific intent requires the actor *knew* that his transferring assets into an OAPT in the Cayman Islands would be a contributing factor in defeating the U.S. bankruptcy laws, and by some formulation, the settlor had a *purpose* to bring about that event.[442]

Whether the debtor knowingly and fraudulently transferred the assets to the Cayman Islands OAPT is a question for the trier of fact.[443] As a mental element of bankruptcy fraud, the determination will largely be based upon circumstantial evidence.[444]

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432. *See supra* notes 297-316 and accompanying text (relating an illustrative hypothetical).

433. *See supra* note 403 and accompanying text.

434. *See supra* notes 403-05 and accompanying text.

435. *See generally supra* notes 278-81 and accompanying text.

436. *See supra* note 406 and accompanying text.

437. *See supra* notes 383 and accompanying text.

438. *See infra* notes 439-70 and accompanying text (explaining the debtor must have knowingly and fraudulently transferred assets into an OAPT in contemplation of bankruptcy).

439. *See* LOWE, *supra* note 20, at §26:15, 26-21.

440. *See* 18 U.S.C. § 152(b).

441. *See* United States v. Micciche, 525 F.2d 544, 547 (8th Cir. 1985).

442. *See* United States v. LaRouche Campaign, 695 F. Supp. 1265, 1272 (D. Mass 1988) ; *see generally* De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570 (1992).

443. *See* LOWE, *supra* note 20, at §26:12, 26-18 (explaining that whether the debtor at the time of transfer contemplated being forced into bankruptcy is a question for the trier of fact). Juries have a great penchant for cutting through what they perceive as subterfuge. *See id.* at §26:16, 26-24. The debtor-settlor takes a risk that a jury could not imagine that the trustee would ever withhold anything from the settlor unless the settlor wanted him to do so. *Id.*

444. *See* United States v. Haymes, 610 F.2d 309 (5th Cir. 1980). The defendant made forty transfers of funds to himself from his failing corporation over a six-month period. *Id.* The jury found that he did not act in contemplation of bankruptcy when he made eleven transfers during the first two months; however, he did contemplate bankruptcy when he made twenty-nine subsequent transfers during the last four months. *Id.* The jury

In the hypothetical, there is no evidence that the original transfers to the Cayman Islands OAPT were made at a time when the settlor was in such financial disintegration that he must have been in contemplation of bankruptcy.[445] "Knowingly" would therefore be a difficult element for the prosecutor to prove since it is hard to say that the settlor had the *specific* purpose to defeat the provision of the bankruptcy code. However, the prosecutor may advance three other theories which do not require such a specific intent: concealment,[446] witness tampering,[447] and conspiracy.[448]

First, there may have been a concealment which would also suffice for charges of bankruptcy fraud.[449] If the original transfer into the OAPT was fraudulent, and if the settlor continued to enjoy the benefits of the transfer until the time when he must have contemplated bankruptcy, the settlor may be criminally liable for *knowingly concealing* his estate property in contemplation of bankruptcy.[450]

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believed that the financial condition of the company had deteriorated to such an extent that by the third month, the defendant must have contemplated bankruptcy. *Id.*; *see also* Martin, 408 F.2d at 954 (questioning whether defendants thought only state liquidation procedures, and not bankruptcy laws, would apply to a failing insurance company); *see also* United States v. Thomas, 953 F.2d 107, 110 (4th Cir. 1991) (adjudicating whether defendant must have contemplated bankruptcy at time of transfer because his attorney had told him it appeared the matter would have to be resolved by bankruptcy at some point); *see also* Matter of Vecchione, 407 F. Supp. 609, 615 (E.D.N.Y. 1976) (commenting that "persons whose intention is to shield their assets from creditor attack while continuing to derive the equitable benefit of those assets rarely announce their purpose. Instead, if their intention is to be known, it must be gleaned from inferences drawn from a course of conduct.").

445. *See supra* notes 297-316 and accompanying text (relating an illustrative hypothetical).

446. *See supra* notes 428-38 and accompanying text (describing the criminal act of "concealment" in the context of bankruptcy fraud).

447. *See infra* notes 451-57 and accompanying text (explaining the criminal act of "witness tampering" in the context of bankruptcy fraud).

448. *See infra* notes 379-85 and accompanying text (relating the criminal act of "conspiracy" in the context of bankruptcy fraud).

449. *See supra* notes 428-34 and accompanying text (describing concealment and the doctrine of continued concealment).

450. *See supra* note 445 and accompanying text (discussing the bankruptcy fraud element of "in contemplation of bankruptcy or with intent to defeat bankruptcy laws").

Next, witness tampering is covered under 18 U.S.C. section 1512[451] and makes it a crime to corruptly persuade another, or attempt to do so, to prevent that person's testimony in an official proceeding or to cause or induce that person to withhold testimony or other object, to alter or conceal an object with the intent to impair its integrity or availability for use in an official proceeding, or to evade legal process summoning the person to appear as a witness or to produce an object in an official proceeding.[452] The key word under this statute is "corruptly," which has been given a broad and all inclusive meaning.[453] It has been held to mean something as circular as an act done with the purpose of obstructing justice,[454] and as little as an act done with the intent to secure an unlawful advantage, or benefit either for one's self or another.[455]

Notably, witness tampering does not specifically require that an official proceeding be pending or about to be instituted at the time of the offense.[456]

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451. 18 U.S.C. § 1512 (1997) states in pertinent part—

(b) Whoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-

(1) Influence, delay, or prevent the testimony of any person in an official proceeding;

(2) Cause or induce any person to—

(A) Withhold testimony, or withhold a record, document or other object, from an official proceeding;

(B) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) Evade legal process summoning that person to appear as a witness, or to produce a record document, or other object in an official proceeding; or

(D) Be absent from an official proceeding to which such person has been summoned by legal process . . . shall be assessed a fine . . . or imprisoned not more than ten years, or both . . .

(e) For the purposes of this section—

(1) An official proceeding need not be pending or about to be instituted at the time of the offense . . .

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) That the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the U.S., a U.S. magistrate a bankruptcy judge, a Federal grand jury, or a Federal Government agency . . .

(g) There is extraterritorial federal jurisdiction over an offense under this section.

452. *See generally supra* note 428-38 and accompanying text.

453. *See* United States v. Browning, 630 F.2d 694, 701 (10th Cir. 1980). The definition is so broad that "corruptly" has been held unconstitutionally vague when applied to charges of lying to Congress. United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). However, the definition has been otherwise upheld. United States v. North, 910 F.2d 843, 881 (D.C. Cir. 1990) (declaring "corruptly" to be understood according to common meaning).

454. *See* United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981).

455. *See* United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985).

456. *See* 18 U.S.C. § 1512(e)(1). Contrast the crime of "obstruction of justice" under U.S.C. § 1503 (1997) which requires judicial proceedings pending before the statute is violated. It reads in pertinent part: "Whoever . . . corruptly or by threats of force or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished by up to ten years in the penitentiary and by a fine . . ." *Id.*

continuing to benefit and enjoy those assets is fraudulent and would constitute an effort to gain such an unlawful benefit.[457]

Finally, a conspiracy occurs when two or more persons agree to perform a criminal act, and one of them does an act in furtherance of the agreement.[458] It is a felony to conspire to commit a crime such as bankruptcy fraud.[459] If the OAPT assets are part of the debtor's estate, the foreign trustee is obligated by the Bankruptcy Code to release the assets to the trustee in bankruptcy.[460] If the foreign trustee refuses to obey, he is concealing property of the debtor in violation of section 152 fraud.[461]

The settlor in the hypothetical had conveyed his assets into the Cayman Islands OAPT at a time when he did not have any present or contemplated creditors.[462] He did not anticipate any immediate plans to enter into bankruptcy proceedings, but a charge of conspiracy does not require such plans.[463] It is sufficient for conspiracy that the OAPT trustee had the authority to disobey a U.S. court order and spirit away the assets from the Cayman Islands to another foreign situs if there should ever be a bankruptcy.[464] Additionally, two people who agree that one or both of them will lie to a grand jury, if ever brought before one, are guilty of criminal conspiracy to commit perjury.[465] It is immaterial that a grand jury proceeding is not imminent since the plan has been set to violate the Bankruptcy Code should the need arise.[466]

Therefore, despite the prosecutor's difficulty in being able to establish that the settlor had the specific intent and purpose to defeat the U.S. bankruptcy laws when he transferred property into the OAPT,[467] the three alternate charges of asset concealment,[468] witness tampering[469] and conspiracy[470] require a less exacting standard which may result in a successful criminal conviction of the settlor-debtor for bankruptcy fraud.

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457. *See supra* notes 68-77 and accompanying text (explaining the shielding one's assets in an OAPT while continuing to enjoy the benefits of those assets is illegal and void as against public policy).

458. *See* 18 U.S.C.§ 371 (1997).

459. *See id.*

460. *See* 11 U.S.C. §§ 542, 543 (1997).

461. *See* 18 U.S.C. § 152(1), (7) (1998).

462. *See supra* notes 297-316 and accompanying text (relating an illustrative hypothetical).

463. *See* LOWE, *supra* note 20, at §26:17, 26-28 (declaring that conspiracy charges do not require that the settlor have and plans to enter into bankruptcy proceedings).

464. *See id.* (explaining that if the OAPT trustee has the authority to withhold the assets from a U.S. court order and transfer the trust assets to another jurisdiction, the arrangement is sufficient to charge the settlor with conspiracy to commit bankruptcy fraud).

465. *See* 18 U.S.C. § 371.

466. *See* United States v. Parkhill, 775 F.2d 612 (5th Cir. 1985) (attorney convicted of filling out false bankruptcy schedule for debtor); *see also* United States v. Bartlett, 633 F.2d 1184 (5th Cir. 1981) (attorney convicted for assisting in concealment of debtor's assets).

467. *See supra* notes 439-48 and accompanying text.

468. *See supra* notes 449-50 and accompanying text.

469. *See supra* notes 451-57 and accompanying text.

470. *See supra* notes 458-61 and accompanying text.

e. In Contemplation of Bankruptcy or with Intent to Defeat Bankruptcy Laws

The most difficult element of bankruptcy fraud to prove would be that the original transfer into the OAPT was made in contemplation of bankruptcy or with intent to defeat bankruptcy laws.[471] In other words, the original transfer was made with the intent to hinder, delay or defraud creditors.[472] In essence, all OAPTs are designed and intended to hinder creditors[473] because almost all OAPTs contain anti-duress clauses[474] and flight clauses which are designed to keep assets away from creditors.[475] Moreover, the mere fact of filing bankruptcy demonstrates an intention to delay creditors.[476]

In the hypothetical, the settlor had no creditors present or foreseen when the OAPT was established.[477] The prosecutor would have a difficult task describing who were the victims of the alleged fraudulent transfer. However, there are two other arguments that the prosecutor may present: first, if the court can be convinced that the trust was void for illegality from the beginning,[478] this fact would constitute powerful evidence of at least a generalized fraudulent intent;[479] second, if the settlor retained the use and enjoyment of the transferred property through the time when the creditor appeared on the horizon, it indicates very strongly that the settlor's actions were taken in contemplation of bankruptcy, and that fraudulent intent was behind the transfer.[480] In addition to section 152 fraud,[481] the prosecutor may also bring charges under section 157 fraud.[482]

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471. *See* LOWE, *supra* note 20, at §26:12, 26-19 (describing that the most difficult element for the prosecutor to prove would be that the original transfer was fraudulent).

472. *See supra* note 431 and accompanying text; *see also* In re Cohen, 142 B.R. 720, 728-730 (B.C. ed. Pa. 1992); *Thomas*, 953 F.2d at 108 n.1 (defining "fraudulently" as willfully and with the intent to deceive normally for the purpose of causing financial loss to another or bringing about financial gain for oneself).

473. *See supra* notes 3-6 and accompanying text (describing the reason OAPTs are established in the Cayman Islands and other offshore locations is to protect assets from future creditors).

474. *See supra* notes 112-17 and accompanying text (explaining OAPTs typically include anti-duress clauses which instruct the trustee to disregard any instructions given by the settlor under duress, such as an order by the settlor to release the assets in response to a U.S. court order).

475. *See supra* notes 99-111 and accompanying text (describing that OAPTs typically include flight clauses which instruct the trustee or protector to change the situs of the trust when triggering events occur, such as a military coup or an attachment by a U.S. court).

476. *See* In re Wojtala, 113 B.R. 332, 335 (B.C. ed Mich. 1990).

477. *See supra* notes 297-316 and accompanying text (relating a hypothetical scenario to help illustrate indirect methods creditors may take in attempting to pierce OAPT in the Cayman Island).

478. *See supra* note 21 and accompanying text (relating that a self-settled trust, as the majority of OAPTs are, is illegal and against public policy).

479. *See* LOWE, *supra* note 20, at §26:12, 26-19 (stating that a determination that the OAPT was void for illegality from the outset would constitute powerful evidence of at least a generalized fraudulent intent).

480. *See* In re Cadarett, 601 F.2d 648, 651 (2nd Cir. 1979).

481. *See supra* notes 386-438 and accompanying text (analyzing 18 U.S.C. § 152 "Concealment of assets; false oaths and claims; bribery").

482. *See infra* notes 483-95 and accompanying text (analyzing 18 U.S.C. § 157 "Bankruptcy fraud").

2. *Section 157 Fraud*

Section 157 fraud is a broad statute that is markedly different from the traditional Section 152 fraud statute.[483] While Section 152 defines prohibited acts with precision, Section 157 does not.[484] Rather, Section 157 follows the broad and far reaching model of the federal mail fraud and wire fraud statutes.[485] The mail and wire fraud statutes prohibit the doing of certain lawful acts, such as making a telephone call, if they are in furtherance of any scheme or artifice to defraud.[486] The courts have interpreted the mail and wire fraud statutes broadly to prohibit any dishonest activity carried out through the mail or over the wires.[487] Section 157 will likely be interpreted similarly to the wire and mail fraud statutes since all three use the same textual language.[488] Courts may find that fraud exists when there is a lack of moral uprightness, fundamental honesty, fair play, and right dealing.[489]

The prosecutor in the hypothetical may have an easier time convicting the settlor-debtor of bankruptcy fraud under Section 157 than under the traditional bankruptcy Section 152 fraud statute since Section 157 encompasses a broader circle of

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483. 18 U.S.C. § 157 (1994) provides that: "A person, who having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

(1) files a petition under Title 11;

(2) files a document in a proceeding under Title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under Title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than five years, or both."

484. *See* 18 U.S.C. § 157.

485. *See* 18 U.S.C. § 1341 (1997) (mail fraud); 18 U.S.C. § 1343 (1997) (wire fraud). Mail and wire fraud statutes carry severe penalties. 18 U.S.C. § 5E1.2 (L.C.P. 1995). Typically, the sentence is five years in the penitentiary and a fine; however, the sentence is up to thirty years and a US$1 million fine if the fraud affects a financial institution. *Id.*

486. *See generally* United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) (defendant was convicted of mail fraud upon proof that he had used the mails to transmit document from the County Recorder's office in connection with straw real estate transactions intended to conceal defendant's assets from his creditors).

487. *See generally* Cadle Co. v. Schultz, 779 F. Supp. 392, 399 (N.D. Tex 1991). Defendant was convicted of mail and wire fraud despite his violation of a state Uniform Fraudulent Transfer Act, which carried no penalties. *Id.* The court held that the defendant's acts were part of a scheme to defraud, and thus sufficient to support conviction under the mail and wire fraud statutes. *Id.* The three reasons that the court gave in support of the holding were first, violation of state common law may constitute a scheme to defraud within the meaning of federal statutes; *Id.* second, a scheme to violate a state statute violates public policy, which constitutes a scheme to defraud; *Id.* and third, the language of the mail fraud statute is broad enough to encompass any conduct that fails to reflect moral uprightness . . . fundamental honesty, fair play and right dealing in the general and business life of members of society. *Id.*

488. The textural language common to the scheme to defraud, wire fraud and mail fraud reads "a person commits an offense if having devised or intending to devise a scheme or artifice to defraud, the person does particular acts for the purpose of executing such a scheme or artifice or attempting to do so." 18 U.S.C. §§ 157, 1341, 1343.

489. *See* Cadel, *supra* note 487, at 399.

activities.[490] The OAPT could conceivably be found fraudulent under either statute since the settlor intended to shield his assets from creditor piercing while continuing to enjoy the benefits of those assets[491] or because the trust fails to reflect moral uprightness, fundamental honest, fair play, and right dealing.[492] Under Section 152, the jury will have to find that the settlor created the anti-duress clause and flight clause in contemplation of bankruptcy or with an intent to defeat the bankruptcy law.[493] However, under Section 157, the jury will only have to find that the settlor had filed a document in a bankruptcy proceeding for the purpose of executing the scheme.[494] Therefore, although the prosecutor will likely use both Section 152 and Section 157 to prosecute the settlor-debtor, Section 157 opens many transactions and simple daily acts to criminal sanctions if they fail to reflect moral uprightness, fundamental honesty, fair play, and right dealing.[495]

3. Bankruptcy Fraud Summary

Essentially, the prosecutor in the hypothetical[496] would argue that the settlor-creditor committed bankruptcy fraud in establishing the OAPT in the Cayman Islands. The settlor sought an advantage that the law of the United States does not permit: he tried to shield his assets from creditors, present or unforeseen, while at the same time retain de facto control over the trust and a beneficial interest in the assets.[497] The purpose of bankruptcy laws is to grant a discharge "only to the honest bankrupt who surrenders all that he possesses to his creditors and not to one who by a process of legal necromancy is living in luxury upon an estate which equitably belongs to them."[498]

The settlor-debtor's denial of fraudulent intent is unpersuasive since he adopted two instruments which smack of fraud: one, he attempted to shield his assets in a self-settled trust, the OAPT in the Cayman Islands, which is illegal and void against public policy;[499] second the settlor-creditor agreed with his trustee to defy a court[500] order, which is not only against public policy, but it is also a crime.[501]

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490. *See supra* notes 483-85 and accompanying text.

491. *See supra* notes 68-77 and accompanying text.

492. *See supra* note 489 and accompanying text.

493. *See supra* notes 386-482 and accompanying text.

494. *See supra* notes 483-502 and accompanying text.

495. *See supra* notes 382-85 and accompanying text.

496. *See supra* notes 297-316 and accompanying text.

497. *See supra* notes 415-17 and accompanying text.

498. *See* In re Quackenbush, 102 F. 282, 285 (N.D.N.Y. 1900).

499. *See supra* note 21 and accompanying text (stating that a self-settled trust is against public policy in the U.S.).

500. *See generally supra* notes 483-99.

501. *See supra* notes 317-24 and accompanying text (explaining civil and criminal contempt which are punishable by fine or imprisonment); *see also* 18 U.S.C. § 1512(b) (1997) which makes it a felony offense to corruptly persuade another person to withhold testimony or objects from the court.

Even if the prosecutor is unsuccessful in establishing the settlor's requisite intent to defeat U.S. bankruptcy laws under Section 152,[502] he may fair better with charges under Section 157, which allows for a broader inclusion of acts constituting fraud.[503]

D. Miscellaneous White Collar Offenses

The creation, funding and operation of an OAPT in the Cayman Islands might enter into conflict with various other criminal U.S. statutes[504] in which the debtor may be charged.[505] The prosecution of these crimes are likely not to be as successful as contempt[506] or bankruptcy fraud[507] since they have no particular applicability to OAPTs, but they are possible depending upon the particular circumstances and should not be overlooked.[508] Briefly, these crimes include transporting stolen property,[509] withholding assets from a financial institution,[510] internal revenue code violations,[511] bank fraud,[512] fraud against the government,[513] currency transactions

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502. *See supra* notes 386-482 and accompanying text.

503. *See supra* notes 483-502 and accompanying text.

504. *See infra* notes 505-16 and accompanying text.

505. *See* LOWE, *supra* note 20, at §26:28, 26-45 (observing that the creation, funding and operation of an offshore trust may conflict with a number of other criminal statutes).

506. *See supra* notes 317-78 and accompanying text.

507. *See supra* notes 379-502 and accompanying text.

508. *See* LOWE, *supra* note 20, at §26:28, 26-45 (predicting that other non-offshore trust related crimes are not likely to be successful).

509. *See* 18 U.S.C. § 2314 (1997) (moving trust money across international state borders, besides being bankruptcy fraud, could constitute the offense of transporting stolen property across state lines); *see also* 18 U.S.C. § 2315 (1997) (transporting stolen property is an offense).

510. *See* 18 U.S.C. § 20 (1997) (defining broadly "financial institution"); *see also* 18 U.S.C. § 1032 (1997) (concealing assets acquired by the Federal Deposit Insurance Corporation as receiver is an offense); 18 U.S.C. § 658 (1997) (concealing or converting property pledged to foreign credit agencies is an offense).

511. *See* 26 U.S.C. § 7201 (1997) (evading taxes is an offense); *see also* 26 U.S.C. § 7206 (1997) (concealing goods with intent to evade tax is an offense).

512. *See* 18 U.S.C. § 1344 (1997) (defrauding a financial institution is an offense and "fraud" is defined broadly); *see also* 18 U.S.C. § 20 (defining broadly "financial institution").

513. *See* 18 U.S.C. § 1001 (1997) (explaining that to make a false statement or covering up a material fact in any matter within the jurisdiction of any department or agency of the U.S. is an offense which has broad coverage).

and structuring,[514] RICO and racketeering,[515] forfeitures,[516] and liens for unpaid fines.[517]

If the creditors' civil contempt and criminal pursuit of the settlor-debtor are fruitless, or even if the pursuit is promising, he may target the debtor's attorney who may have considerable influence upon his client to repatriate the OAPT assets.[518]

E. Pursuit of the Debtor's Attorney

Although the attorney's acts in establishing the OAPT may be criminal and deserving of punishment, the creditor may persuade the attorney to attempt to convince his client, the debtor, to repatriate the OAPT assets if he refrains from pressing charges for conspiracy[519] and breach of the attorney's applicable code of professional responsibility.[520]

1. Conspiracy to Commit Fraud

A conspiracy occurs when two or more persons agree to perform a criminal act, and one of them does an act in furtherance of the agreement.[521] It is a felony to conspire to commit a crime such as bankruptcy fraud.[522] If the act of creating the trust with its anti-duress and flight clauses constitutes a criminal conspiracy, the attorney

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514. *See* 31 U.S.C. § 5324 (1997) (structuring domestic and international transactions to evade reporting requirements is an offense); *see also* 31 U.S.C. § 5316 (1997) (failing to report exports or imports of monetary instruments worth more than US$10,000 is an offense); 31 U.S.C. § 5314 (1997) (failing to keep specific records of transactions and relations with foreign financial agencies is an offense); 31 U.S.C. § 5315 (1997) (requiring reports on foreign currency transactions is a civil penalty); 26 U.S.C. § 6050-I (1997) (engaging in business to fail to report cash receipts of more than US$10,000 is an offense and structuring is prohibited); 18 U.S.C. § 664 (1997) (embezzling or converting from any employee benefit plan covered by ERISA is an offense).

515. *See* 18 U.S.C. § 1961 (1997) (investing income derived from a pattern of racketeering activity or collection of unlawful debts is an offense). "Pattern of racketeering activity" means two acts in a ten-year period. *Id.* at §1961(5). "Racketeering activity" covers vast array of criminal offenses, including any act indictable under the Currency and Foreign Transactions Reporting Act. *Id.* at § 1961(1). "Unlawful debt" means debt incurred through loan-sharking or illegal gambling. *Id.* at § 1961(6); *see also* 18 U.S.C. § 1952 (1997) (traveling or using mail in interstate or foreign commerce to facilitate or distribute proceeds of racketeering enterprises is an offense).

516. *See* 18 U.S.C. § 1467 (1997) (proceeds from illegal obscenity must be forfeited to the government); 18 U.S.C. § 1955 (1997) (proceeds from illegal gambling must be forfeited to the government); 18 U.S.C. §§ 2253, 2254 (1997) (proceeds from child pornography must be forfeited to the government); 18 U.S.C. § 3681 (proceeds from a criminal's story must be forfeited to the government); 21 U.S.C. §§ 853, 881 (1997) (proceeds from narcotics must be forfeited to the government).

517. *See* 18 U.S.C. § 3613 (1997) (lien arises on all property of defendant at the time the fine is imposed).

518. *See infra* notes 518-49 and accompanying text (explaining that pursuit of the debtor's attorney may be an indirect method to persuade the debtor to repatriate the OAPT assets).

519. *See infra* notes 520-23 and accompanying text.

520. *See infra* notes 524-49 and accompanying text.

521. *See supra* note 465 and accompanying text.

522. *See supra* notes 386-502 and accompanying text.

who drafted the trust may be implicated.[523] Attorneys may be prosecuted for preparing documents which they know will further a criminal scheme, regardless of whether the attorney has anything to gain form the consummated crime.[524]

2. *Professional Responsibility*

Attorneys who have clients that seek counsel for the protection of their assets must consider the degree to which their involvement will either cause them to be a co-conspirator, to breach the rules of professional conduct,[525] or cause them to breach their fiduciary duty by not presenting and explaining the option of an OAPT.[526] Essentially, does an attorney become involved too much or too little with the use of an OAPT?[527] If there is a reasonable chance that the attorney can be accused of conspiracy or some other crime associated with his OAPT client, the creditor may use this fact as leverage to persuade the debtor's attorney to use his influence upon his client to persuade the repatriating of the assets.[528] However, the creditor and his own attorney must reasonably believe the debtor's attorney was sufficiently involved in the conspiracy or else a frivolous suit may cause the creditor and his attorney to be accused of malicious prosecution.[529]

It should be noted that although violations of ethical rules, such as the Model Rules, have been used by courts to establish evidence of an attorney's negligence in malpractice suits by clients, courts genèrally have refused to apply ethics to create attorney liability to non-clients.[530] Accordingly, even though an attorney's violation of an ethical rule prohibiting his knowing assistance in a client's fraudulent conveyance may lead to sanctions by a Bar Association, it is highly unlikely that the court would apply such violation to establish liability vis-a-vis a creditor or a

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523. *See supra* note 465 and accompanying text; *see also* Model Rules of Professional Conduct Rule 1.2(d), comment (1983). A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking.

524. *See* United States v. Brown, 943 F.2d 1246 (10th Cir. 1991) (attorney convicted for using trust account to conceal funds and drafting documents used in scheme); *see also* United States v. Parkhill, 775 F.2d 612 (5th Cir. 1985) (attorney convicted of filling out false bankruptcy schedule for debtor); *see also* United States v. Bartlett, 633 F.2d 1184 (5th Cir. 1981) (attorney convicted for assisting in concealment of debtor's assets).

525. *See supra* notes 520-23 and accompanying text (discussing how an attorney may be tried as a co-conspirator to a fraudulent conveyance).

526. *See generally infra* notes 529-49 and accompanying text (describing how an attorney may need to present and explain to his client the option of using an OAPT).

527. *See generally supra* notes 518-19 and accompanying text.

528. *See id.*

529. "Malicious prosecution" is defined as "[prosecution] begun in malice without probable cause to believe the charges can be sustained." BLACK'S LAW DICTIONARY 958 (6th ed. 1990).

530. *See generally* Glickman, *supra* note 15, at 610-11 (raising the attorney's ethical questions and diligence). The attorney may also be criminally charged with aiding and abetting his client to fraudulently convey assets to an OAPT. *Id.* The attorney may also be civilly liable as a joint tortfeasor. *Id.*

client.[531] Again, an ethical violation may still be used as leverage to persuade the debtor's attorney to convince his client to repatriate the assets.[532]

An attorney is bound by ethical rules, such as rule 1.2(d) of the American Bar Association Model Rules of Professional Conduct, which prohibits attorneys from assisting a client in conduct that the attorney *knows* is fraudulent.[533] Under the "Terminology" section of the Model Code, the word "fraudulent" denotes "conduct having a deliberate purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."[534] "Deliberate purpose to deceive" can be more succinctly described as "intent to defraud," which is the standard to which an attorney's advice and the client's conduct is measured.[535] Hence, the attorney may discuss, but not encourage or assist, conduct that might result in a creditor being defrauded.[536]

In order for the attorney to reasonably assure himself that his client is not attempting to defraud creditors by establishing an OAPT in the Cayman Islands, he must conduct his own reasonable due diligence investigation.[537] The attorney must analyze the legitimacy of his client's intent prior to rendering the services and to formulate his advice accordingly.[538]

Even if the debtor-client defrauded his creditors prior to retaining the attorney's services, the attorney should be able to advise the client without restraint or concern that the attorney's advice will inadvertently result in an allegation of defrauding creditors.[539] However, any advice by the attorney which *furthers* a client's fraudulent conduct after the engagement of the attorney's services, or prevents such conduct from being discovered, would make the attorney an active participant in the proposed

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531. *See id.* at 611-12.

532. *See generally supra* notes 518-19 and accompanying text.

533. Model Rules of Professional Conduct 1.2(d), Scope of Representation: "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 the client, and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law."

534. *See* Model Rules of Professional Conduct, Terminology (1983).

535. *See* BALLSUN, *supra* note 3, at §4-07, 4-11 (surmising that "deliberate purpose to deceive" can more succinctly be said to mean "intent to defraud" which becomes the benchmark for measuring an attorney's advice and the client's conduct).

536. *See generally* Allen v. State Bar, 20 Cal. 3d 172 (1977) (holding that an attorney defrauding a client, misappropriating her funds, deceiving a client while pursuing a scheme to transfer her real property for purposes of defrauding creditors and using deceit to obtain an inter bank transfer of funds held in the name of a deceased person warrant disbarment).

537. "Due diligence" is defined as "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured on any absolute standard, but depending on the relative facts of the special case." BLACK'S LAW DICTIONARY 457 (6th ed. 1990).

538. *See generally supra* notes 525-26.

539. *See* Model Rules of Professional Conduct Rule 2.1 (1983).

fraudulent conduct.[540] The attorney's participation would be in violation of the rules of professional conduct and probably would result in criminal liability as well.[541]

In some jurisdictions, such as in California, a creditor may make efforts to attach and recover from attorneys or other professionals who counsel the grantor-debtor concerning establishment over transfers into the OAPT.[542]

The Arizona Court of Appeals set forth four required elements to determine if a judgment creditor has a valid civil claim against the judgment debtor's attorney for damages arising from conspiracy to defraud:[543] (1) the plaintiff must be the judgment creditor;[544] (2) the party against whom damages are claimed must be guilty of actual fraud, as opposed to constructive fraud;[545] (3) before the defendant can be found liable for money damages, there must be a showing that the remedies directly provided by the Uniform Fraudulent Conveyance Act (UFCA) are inadequate;[546] (4) damages are limited to the amount of the judgment creditor's judgment or the value of the property at the time of transfer, whichever is less, along with incidental expenses; damages, therefore, are not speculative.[547]

Accordingly, an ethical violation by the debtor's attorney may be used to support a proceeding to disbar him, but it is highly unlikely that an ethical breach will give rise to criminal liability.[548] In order to criminally link the debtor's attorney to the fraud scheme, it must be shown that the attorney's actions were done with the intent to defraud the creditor.[549] However, in either instance, leverage is gained to persuade the attorney to use his influence upon his client to transfer the assets in satisfaction of the judgment claim.[550]

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540. *But see* In re D.H. Overmyer Telecasting Co., Inc., 77 B.R. 128 (B.C.N.D. Ohio 1987) (indicating a debtor's attorney was not liable to creditors as a joint participant in a fraudulent conveyance of property). The court though the attorney's close working relationship with the property owner and preparation of documents for the fraudulent conveyance were insufficient to establish joint and several liability. *Id.*

541. *See supra* notes 520-23 and accompanying text.

542. *See generally* Wolfridge Corp. v. United Service Auto Assn., 149 Cal. App. 3d 1206, 1211 (1983) (declaring attorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy); McElhanon v. Hing, 728 P.2d 256, 264-265 (Ariz. 1985) (finding attorney's actions in furthering and participating his client's fraudulent conveyance were not privileged, and there was sufficient evidence which supported the finding that attorney was a conspirator to fraudulently hinder and delay the judgment creditor).

543. *See* McElhanon, *supra* note 541 at 403 (listing the four required elements for a judgment creditor to recover money damages from the judgment debtor's attorney for damages arising from conspiracy to defraud).

544. *See id.*

545. In other words, the attorney must know that the transfer will leave the debtor insolvent, that the purpose of the transfer is to hinder, delay, or defraud the judgment creditor-plaintiff. *Id.*

546. For example, the fraudulently transferred property is no longer in the hands of the fraudulent transferee, or that by reason of the delay or some other reason resulting from the fraudulent transfer, the property has lost its value or has substantially decreased in value. *Id.*

547. *See id.*

548. *See supra* notes 520-23 and accompanying text.

549. *See generally id.*

550. *See supra* notes 518-19 and accompanying text.

VII. CONCLUSION

The once exclusive OAPT settlor base of multi-millionaires has expanded recently to include many service professionals concerned with litigious financial devastation, forced state heirship laws or marriage dissolution.[551] The popularity of OAPTs as a means to shield assets from potential or current creditors may likely increase due to new bankruptcy legislation limiting the federal exemption allowed for homestead property.[552] Also, popularity may increase due to the far reaching internet which provides ample practitioner articles and advertisements raising public awareness of OAPTs.[553]

However, despite ecstatic promoters' claims of OAPTs being invulnerable to piercing by future creditors,[554] bankruptcy trustees and creditors have been provided by statute[555] with ample tools to pierce such entities,[556] and recent case law suggests that they will have the support of the courts if they do so.[557] Therefore, the real question for the bankruptcy trustee and creditors is, "[I]s the time and money required to pierce the OAPT worthwhile?"

For example, on one hand, if the judgment against the debtor is US$75,000, a bankruptcy trustee or creditors will not spend US$100,000 in legal and other associated fees to collect the judgment. On the other hand, if the judgment against the debtor is US$10 million, spending US$100,000 would be worthwhile.

OAPTs, in reality, act as roadblocks to bankruptcy trustees and creditors, but if it is determined that the efforts to pierce the OAPT are worthwhile, these roadblocks can be effectively removed.[558] The bankruptcy trustee and creditors may use both

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551. *See supra* notes 11-13 and accompanying text.

552. *See supra* notes 9-10 and accompanying text.

553. *See generally* Ken Sisco, *The Ultimate Asset Protection and Estate Planning Tool* (visited Sept. 18, 1997) <http://kensisco.com/ulttool.htn> (explaining why clients would want to put their assets offshore); Ken Sisco, *How Much in Assets Offshore Does One Need Before It Is Cost Effective?* (visited Sept. 18, 1997) <http://kensisco.com/costeff.htn> (proposing economic reasons are a small part of most people's motivation for establishing OAPTs). The author suggests that estate tax savings and peace of mind knowing that assets are unavailable to creditors and to the prying eyes of the community are matters to consider in determining the cost effectiveness of an OAPT. *Id.*; *see also* Ken Sisco, *All Foreign Trusts Are Not Created Equal* (visited Sept. 18, 1997) <http://kensisco.com/updates.htn (answering a reader's inquiry regarding the effect of the Small Business Job Protection Act of 1996 on OAPTs in different countries such as the Cook Islands, Cayman Islands, Belize, and Liechtenstein); *see also* Ken Sisco, *Security and Privacy Through International Transactions* (visited Sept. 18, 1997) <http://kensisco.com/securpri.htn (relating tax evasion is only one reason for OAPTs). The author suggests that diversity of investment, efficiency of investment, government oppression and privacy are additional reasons for using OAPTs. *Id.*

554. *See supra* notes 14-15 and accompanying text.

555. *See generally supra* notes 161-282 and accompanying text.

556. *See generally supra* notes 283-549 and accompanying text.

557. *See supra* notes 176,179, 194, 236 and accompanying text.

558. *See supra* notes 14-25 and accompanying text.

direct approaches in the Grand Court of the Cayman Islands[559] and indirect approaches in a U.S. court to pierce the OAPT in the Cayman Islands.[560]

However, the hottest position in efforts to pierce the OAPT may be that of the fiduciary who helped set up the OAPT, and who may serve as the trustee.[561] The fiduciary should carefully consider his potential exposure to both civil and criminal penalties, especially if he or the transferred assets have ties to the United States.[562] Even if the fiduciary himself has no ties to the United States, he may still be vulnerable to demands for information despite the confidentiality laws of the Cayman Islands,[563] which are not readily recognized by a U.S. court who has before it a debtor-settlor claiming insolvency while his assets are in a OAPT.[564] The fiduciary and the settlor-debtor should not assume that establishing an OAPT in the Cayman Islands is a guarantee of confidentiality.[565]

If the fiduciary who helped set up the OAPT is a U.S. attorney, additional considerations of professional responsibility are raised.[566] An attorney should withdraw from representing a client if such representation is conditioned upon an attorney's participation in a fraudulent scheme, or if the attorney's advice advances a fraudulent act.[567] The issue of whether an attorney's silence facilitates the commission of criminal fraud becomes much more attenuated if the attorney has withdrawn from representation after learning of the client's intent to commit a fraudulent act.[568]

The Model Rules of Professional Conduct[569] ("Model Rules") and the Model Code of Professional Responsibility[570] ("Model Code") sections which authorize an

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559. *See supra* notes 161-282 and accompanying text.

560. *See supra* notes 283-549 and accompanying text.

561. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:27, 25-55 (surmising there is likely to be no hotter position that that of the fiduciary who helped set up the [O]APT and may serve as its trustee).

562. *See id.* (warning fiduciaries who helped set up the OAPT should consider carefully their potential exposure, particularly if they have ties to the United States).

563. *See id.* at 25-55, 25-26 (reasoning even if a fiduciary has no such ties to the United States, he may still be vulnerable to demands for information).

564. *See supra* notes 297-316 and accompanying text.

565. *See* HAUSER & CHAPNICK, *supra* note 4, at §25:27, 25-56 (warning fiduciaries who set up OAPTs and their clients should not necessarily assume that presence in a tax haven is a guarantee of confidentiality); *see also supra* notes 261-74 and accompanying text (explaining the confidentiality law of the Cayman Islands).

566. *See supra* notes 524-49 and accompanying text.

567. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 92-366 (1992) (commenting on when an attorney should withdraw from representation); *see also* HENDRICKSON, EATON & VAN WINKLE, ETHICAL ISSUES IN INTERNATIONAL ESTATE PLANNING V-22 (1990).

568. *See* ABA Comm. on Professional Ethics and Grievances, *supra* note 566 (raising the issue of an attorney's silence in facilitating the commission of the client's fraudulent act).

569. Model Rule 1.16(b) (1983) reads "... [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effects on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetuate a crime or fraud."

570. Model Code DR 2-110(c) reads "A lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in another matter, unless such request to withdraw is because: (1) His client... (b) personally seeks to pursue an illegal course of conduct." Additionally, Model Code EC 2-32 reinforces

attorney to withdraw from representing a client who is, or will be involved, in fraudulent or criminal conduct are arguably too qualified and indefinite to be of much guidance or comfort to the practicing attorney. Perhaps in recognition of this ambiguity, the ABA issued Formal Opinion 92-366 ("Formal Opinion"), "Withdrawal When A Lawyer's Services Will Otherwise Be Used to Perpetuate a Fraud,"[571] which states that an attorney's duty to withdraw from representing a client if the client is engaging, or intends to engage, in fraudulent conduct is absolute.[572] Under the Formal Opinion, an attorney is obligated to withdraw from representing a client even if fraud is only suspected.[573] By mandating definite behavior, the Formal Opinion should be regarded as increasing the liability of attorneys who assist clients in the creation and maintenance of OAPTs in the Cayman Islands which have as their primary objective the perpetuation of a fraud upon existing and known or reasonably ascertainable creditors.

Without the assistance of attorneys, debtors will have greater difficulty in shielding their assets in OAPTs from their creditors in violation of U.S laws and public policy.[574] Attorneys who are approached to assist debtors in asset protection must evaluate not only their professional responsibility to the client, profession and general public, but the attorney must also consider their own personal liability for potential civil and criminal charges.[575]

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the slightly evasive tone of Model Code DR 2-110 when it provides "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances . . . A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client."

571. ABA Comm. on Professional Ethics and Professional Responsibility, Formal Opinion 92-366 (1992) states:

> First, the lawyer must withdraw from any representation of the client that directly or indirectly, would have the effect of assisting the client's continuing or intended future fraud. Second, the lawyer may withdraw from all representation of the client, and must withdraw from all representation if the fact of such representation is likely to be known to and relied upon by third persons to whom the continuing fraud is directed, and the representation is therefore likely to assist in the fraud. Third, the lawyer may disavow any of her work product to prevent is use in the client's continuing or intended future fraud, even though this may have the collateral effect of disclosing inferentially client confidences obtained during the representation. In some circumstances, such a disavowal of work product (commonly referred to as a 'noisy' withdrawal) may be necessary in order to effectuate the lawyer's withdrawal from representation of the client. Fourth, if the fraud is completed, and the lawyer does not know or reasonably believe that the client intends to continue the fraud or commit a future fraud by use of the lawyer's services or work product, the lawyer may withdraw from representation of the client, but may not disavow any work product.

572. *See id.*

573. *See id..*

574. *See supra* notes 524-49 and accompanying text.

575. *See supra* notes 518-49 and accompanying text.