

The Trustee as the Target

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November 1997

Presented at the IBC Conference on Offshore Trust Services

This paper addresses the potential liability of the offshore trustee of an asset protection trust ("APT") to creditors of the settlor in the United States or creditors in other countries who may be able to avail themselves of the U.S. courts. Trust companies in offshore financial centers market APTs by promising that trust assets are beyond the reach of courts and creditors in the first world. APTs are established by fearful creditors who anticipate that they will be subject to future claims, perhaps because they are about to embark on a risky undertaking. It does not take an actuary to predict that sooner or later the trustee of an APT will be called upon to defend itself in a proceeding brought by a settlor's creditors. The premise that a trustee located in an offshore jurisdiction is secure from creditors, however, is yet to be seriously tested, and may prove to be a myth. If the trustees in their offshore redoubts are not immune, the APT industry has a major problem waiting in the wings. This paper explores ways that a creditor might outflank the APT trustees and engage them on hostile ground.

I. The Corporate Trustee as the Defendant of Choice

The trustee is an indispensable party to any action by a creditor to invalidate a trust⁽¹⁾ or to impose transferee liability as a result of a fraudulent conveyance. Frustrated creditors have powerful incentives to shift the focus of their efforts from the defendant to the trustee of the APT. At the end of the day, the creditors do not care who pays them. If the settlor is judgment-proof, then the trustee will serve just as well.

Although the corporate trustee is offshore, in many respects it may be an easier target than the APT and represent the weak point in the asset protection scheme. Unlike the evasive trust, the trustee is a visible, fixed target. A corporate trustee cannot disappear or shift its office to a new location. If the trust company is part of a larger organization, creditors may seek to enforce judgments against affiliates of the trustee, assets of the trustee in the hands of affiliates, or debts owed by the affiliate to the trustee.

Second, a corporate trustee has a reputation to protect. In the long run the trust company will not want its name to be associated with disreputable debtors, particularly criminal debtors. If a trustee has a reputation for serving corrupt clients, affiliates of the debtor may find themselves barred from doing business in other jurisdictions. The Federal Reserve Bank, for example, might exercise its discretion to deny the application of an affiliate of the trust company to open a branch in the United States or to engage in securities activities.

Third, the trustee is a deep-pocket. As a financial institutions, it will have to have correspondent accounts with other banks throughout the world that are subject to seizure.

Fourth, the trustee has knowledge and control over the settlor's assets. Information disclosed by the trustee can lead the creditor to find concealed assets in the hands of nominees, custodians, and other third parties.

Fifth, the trustee is in a position to exert influence on the settlor to reach an accommodation with

creditors.

Sixth, it is not expensive to obtain a default judgment against a trustee who does not choose to appear and defend. The creditor can then devote its resources to collection. Moreover, once a creditor has a judgment in hand, it has greater incentive to spend the money required to trace assets and bring enforcement proceedings.

Finally, if enough pressure is exerted on the trustee, it may resign. The alternative trustee may decline to step into the breach, and the protector may not be able to find a replacement. While trusts normally will not be allowed to fail for lack of a trustee, the circumstances may be such that no one will step forward. The court may have no recourse other than to declare that the trust has failed of its purpose, and revert the assets back to the settlor and/or his creditors.

As the legal owner of the trust assets and the transferee of property from the settlor, the trustee is personally liable to creditors if the trust or dispositions are held to be void as to creditors. The trustee remains liable even if the assets are transferred to a successor trustee in another jurisdiction beyond the reach of creditors. Thus, the flight provision in the trust instrument could work to the detriment of the corporate trustee. The money may have been spirited away, but the trust company is left holding the bag. Before letting assets slip out of its possession and control, the original trust company might do well to assure that it will be protected.

II. Avoiding the Futility of Frontal Attacks in APT Jurisdictions

Since the laws of the leading offshore jurisdictions are tilted against the judgment creditor,⁽²⁾ it rarely will make sense for creditors to attempt a frontal assault in the courts of the place where the trust is located. The Cook Islands and the Bahamas, for example, require that suits be brought within two years of a transfer of assets to the trust and do not recognize foreign judgments.⁽³⁾ As a practical matter, it is unlikely that a judgment creditor could obtain a judgment in a contested case within two years, particularly where the defendant avails itself of opportunities for appeal. Likewise, future creditors whose claims arose after the disposition to the trust will be barred from recovery under Bahamian, Cayman, and Cook Island law.⁽⁴⁾ Unless the creditor has a clear-cut case under the law of the place where the trust was domiciled, the creditor would be well-advised to attack the trust and the trustee where the settlor is amenable to personal jurisdiction (assumed to be the United States for purposes of this paper) and then seek to enforce the judgment in jurisdictions other than where the trust is domiciled.

A foreign creditor or bankruptcy trustee may be able to bring an action in the U.S. courts to take advantage of the liberal discovery rules and substantive law. The Bankruptcy Code, for example, authorizes foreign trustees to initiate either primary or ancillary proceedings in the federal courts.⁽⁵⁾ Outside the bankruptcy context, courts in the United States are generally receptive to enforcing foreign money judgments unless the proceedings offend U.S. notions of due process or the result is repugnant to public policy.⁽⁶⁾ Assuming there is an adequate basis for jurisdiction, the defendant has the burden of convincing the court that there is some other more convenient forum. The fact that the creditor would not be able to get a fair hearing in the jurisdiction where the trust is domiciled because of creditor-protection legislation would certainly favor leaving the plaintiff's choice of forum undisturbed. Finally, foreign creditors may be able to borrow the broad discovery provisions of U.S. law in aid of asset protection litigation pending outside the United States⁽⁷⁾ and obtain discovery that would not otherwise be available under the law of their home country.⁽⁸⁾

III. Theories for Obtaining Judgments Against the Trustee and the Trust

At some point the creditors or trustee in bankruptcy is going to discover the existence of the APT and the trustee. It may be before, during, or after the judgment is obtained against the debtor. If the APT is uncovered during discovery, the creditor has the option of amending the complaint to assert a cause of action against the trustee on a variety of theories discussed below. The existence of the APT, however, may not come to light until after the creditor has a judgment against the debtor, perhaps during the course of a debtors' examination. If so, the judgment creditor will have to initiate a separate action against the trustee. From the creditors' standpoint, it is preferable to join the trustee as a defendant in the main action.

Without going into great detail, a corporate trustee of an APT may be held liable to the trustee in bankruptcy or a creditor or any number of theories in the United States. A U.S. court is almost certain to disregard the creditor protection laws of the offshore jurisdiction if the debtor is a U.S. person and the laws of the offshore jurisdiction are unduly hostile to creditors. The more unbalanced the law in favor of the debtors, the less deference will be paid to the foreign law. In United States v. Edwards⁽⁹⁾, for example, the defendant was convicted under 18 U.S.C. 152 for failing to include his interest in a condominium as an asset of the estate. After a judgment had been entered against him, the defendant conveyed title to the condominium, which was located in Barbados, to his son. The defendant, however, continued to pay the mortgage on the property, to collect rent, and claimed it as his own on his tax returns. Ten months after the transfer, the defendant filed for bankruptcy and filed schedules stating that he had no assets. Fifteen months afterwards the son reconveyed the condominium to his father. By way of defense to failing to list his interest in the condominium as an asset, the defendant alleged that Barbados law only recognized legal interests, not equitable interests in property. In rejecting this defense, the court observed that even if this were true, the failure of Barbados to recognize equitable interests was so utterly alien to the American legal tradition that it would not be recognized. The court stated that "a sovereign that enacted a legal system of 'no questions asked' as long as the proper forms of conveyance are followed would quickly become something of a financial 'outlaw state,' providing a haven for those who would circumvent the bankruptcy and creditor laws of the United States."⁽¹⁰⁾. Thus, a U.S. court would pay short shrift to provisions of an offshore jurisdiction purporting to bar claims of future creditors or allowing a settlor to retain excessive control over or enjoyment of trust assets. Instead, the courts will apply U.S. legal principles to reach what it perceives to be a just result.

A. Transferee Liability Under the Fraudulent Conveyance Statutes

The trustee may be held liable as the transferee of a fraudulent conveyance⁽¹¹⁾. If the court finds that a transfer was fraudulent as to creditors, it may reclaim the property for the benefit of creditors notwithstanding fine points of limited partnership or trust law. The defendant in Interpool Ltd. v. Patterson, 890 F. Supp. 359 (S.D.N.Y. 1995), transferred assets to a limited partnership while a Racketeer Influenced and Corrupt Organization Act ("RICO") suit was pending against him. The RICO action alleged that the defendant, while Interpool's agent for the sale of used shipping containers, sold containers to himself and his co-conspirators at sweetheart prices.

The defendant and his wife were the general and limited partners of the newly-created limited partnership. In a second transaction, the defendant transferred his 95.613% limited partnership interest to a family trust of which he and his wife were sole beneficiaries. In theory, distributions could only be made to the limited partners by unanimous agreement of the general partners. The limited partnership agreement prohibited encumbrance of partnership interests. Similarly, the family trust agreement provided that the trustee would have discretionary powers to pay so much of the net income of the trust and/or principal as the trustees deemed advisable. Finding that the transfers were constructively fraudulent, the court cut through the legal niceties and ordered the defendants to turn the property over to the U.S. Marshalls. The court also entered a restraining order enjoining further transfers of any

property in the defendants' custody or control.

In the notorious case of Duttle v. Bandler & Kass, 1992 WL 162636 (S.D.N.Y. 1992) Judge Kimba Wood held that defendant William Werner had fraudulently transferred assets to a Liechtenstein trust while a RICO action was pending against him. After securing a judgment against Werner, the judgment creditors went after the trust claiming that the trust assets belonged to the judgment debtor. Although Werner's wife was the nominal settlor, she had no credible explanation for how she had acquired the property conveyed to the trust. Accordingly, the court determined that her husband was the actual settlor. Judge Wood held that the trust was invalid because it had been established to defraud creditors. The decision does not make any mention whatsoever of the law governing the trust.

B. Bankruptcy

A bankruptcy trustee in the United States succeeds to the legal and equitable interests of the debtor in the trust. ⁽¹²⁾ The courts have ruled that the estate includes the property of a trust where the settlor retains control over the trust assets or continues to utilize the trust property for his own benefit. ⁽¹³⁾

C. Retained Power and Alter Ego Theories

Creditors in most states, including trustees in bankruptcy, can reach the assets of a self-settled trust ⁽¹⁴⁾ despite the inclusion of a spendthrift provision. ⁽¹⁵⁾ The laws in some states permit creditors to reach the assets of a trust where the trustee has discretion to distribute income to the debtor even if the debtor is only a member of a class of potential beneficiaries.

The courts can be expected to employ an analysis similar to the "alter ego" approach to disregard the separate corporate existence of an offshore trust where the debtor has retained excessive powers over the trust and to respect the separate existence of the trust would work a fraud on creditors. ⁽¹⁶⁾ Liability over the trust could be established by a showing either of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties. ⁽¹⁷⁾

In Duttle v. Bandler & Kass, supra, the magistrate judge found that the Liechtensteinian trust was invalid as the alter ego of the judgment debtor.

As an alternative grounds for attacking the trust, the court may find that the settlor has reserved so much power over the trust, either de jure or de facto, that the trustee is merely the agent or nominee of the settlor/debtor. In the course of litigation, the trustee will have to produce records of all communications with the trustee or private bankers acting on the settlor's behalf. If the settlor was exercising effective control over the trust, the court is likely to find that the trustee was an agent regardless of what the trust instrument says. The likelihood of the trust surviving close scrutiny is lessened to the extent that the trust document is an off-the-shelf product (a short form trust) or the trust is domiciled in a notorious asset production jurisdiction.

D. Equitable Liens

A bankruptcy trustee can reach assets in the hands of the trustee if it can persuade the court that the debtor retained an equitable interest in the property despite the nominal transfer of ownership. ⁽¹⁸⁾ In Re Tesmetges, 47 B.R. 385 (E.D. N.Y. 1984) the court held that a conveyance of a residential property from the bankrupt to his sister as a "dowry" eight years prior to the bankruptcy filing was a sham. After the transfer the debtor continued paying taxes and the mortgages on the property. The sister was not even

informed of the existence of a second mortgage on the dwelling. The bankruptcy judge implied from the circumstances that there was a confidential relationship between the bankrupt and his sister, and that there had to be an implied agreement that he continued to be the owner of the property. No evidence was presented that the gift to his sister left the debtor insolvent at the time or that the transfer was made to hinder, delay, or defraud creditors.

The court also finessed another obstacle to the creditor. Although the New York statute of limitations for bringing an action in equity is six years, the court ruled that the period did not begin to run until a demand had been made on the transferee for the return of the property. The debtor and his sister had an agreement that she would hold the property. Thus, the period only began to run when the trustee, stepping into the debtor's shoes, demanded that the dwelling be turned over to the estate.

A trustee, like Mr. Tesmetges' sister, occupies a confidential relationship vis a vis the settlor. If the settlor retained any vestiges of control, as permitted by the law of the extreme offshore financial centers, a U.S. court would not have to work hard to find that a bankruptcy trustee or judgment creditor had an equitable lien in the property.

E. RICO

The complaint may allege that the trustee is a participant in a Racketeer Influenced and Corrupt Organization Act or other conspiracy to defraud creditors. RICO generally prohibits investing the proceeds from a pattern of racketeering activity in an enterprise whose activities involve interstate or international commerce, acquiring or maintaining through a pattern of racketeering activity an interest in or control over such an enterprise, conducting or participating in the conduct of such an enterprise's affairs through a pattern of racketeering activity or conspiring to engage in any of these prohibiting activities.⁽¹⁹⁾ A creditor could sue the trustee of an offshore trust claiming, for example, that the proceeds of securities fraud were being funneled into an enterprise consisting of the trust or that the trustee was conspiring with its customer in the United States to launder the criminal proceeds of serious crimes. The act of transferring stolen property outside the United States is, in itself, a predicate act for RICO.

The Orange Grove case conceivably could have been brought as a RICO case by alleging that the developers used the mails to make false representations to the purchasers with respect to the quality or size of the condominium units. The transfers of the profits from the sales to the Cook Islands could have served as an additional predicate acts. The proceeds of the racketeering activities were invested in an enterprise consisting of the 25/25 1993 Investment Trust. As trustee of the trust, Southpac would have been named as a RICO defendant in the California action.

Another approach would be to allege that the offshore trustee was involved in a RICO conspiracy to defraud creditors through a pattern of fraudulent transfers from the United States to the offshore jurisdiction. In Stochastic Decisions Inc. v. DiDomenico the second circuit affirmed a RICO judgment against an attorney who helped judgment debtors avoid creditors through transfers of assets to various controlled entities.⁽²⁰⁾

RICO provides for trebled damages and attorneys' fees. The government may also bring criminal RICO proceedings and move to forfeit the defendant's assets.

F. Money-Laundering

The concept of money-laundering goes far beyond transfers of the proceeds of drug crimes. Money

laundering has been defined as "the process of converting or 'cleansing' property knowing that such property is derived from serious crime for the purpose of disguising its origin. The concept of money laundering generally covers those who assist that process and ought reasonably to be aware that they are assisting such process."

In general, a corporate trustee could be convicted of money-laundering if it knew or should have known that transfers to the trust from the United States: (i) originated from some form of unlawful activity and, in fact, (ii) the transfer was intended to disguise or conceal the location, source, ownership or the control of the proceeds of "unspecified unlawful activity."⁽²¹⁾ Alternatively, the trustee could be indicted if it facilitated the transfer knowing that the disposition was intended to promote the carrying on of a specified unlawful activity. The term "specified unlawful activity" includes an extensive laundry-list of white collar crimes such as bribery, bankruptcy fraud, embezzlement by a bank employee, environmental offenses, concealing assets from a receiver of a failed bank, mail and wire fraud, securities fraud, violations of the International Emergency Economic Sanctions Act, and importation of an alien for an immoral purpose.⁽²²⁾ The very act of transporting converted money to an offshore account could serve as a predicate act for a money-laundering indictment.

An offshore trustee could be found to have wrongful intent to commit a money-laundering offense if it turned a blind eye to evidence of wrongdoing on the part of the settlor. The prosecution in a money laundering case may establish "knowledge" by means of circumstantial evidence. Similarly, the knowledge requirement can be met where the defendant has been willfully blind. In United States v. Giraldi,⁽²³⁾ the Fifth Circuit upheld the felony conviction of a former private banker with American Express International Bank. There was no question that the funds deposited in the bank were derived from drug sales. The principal issue at trial was whether defendant Giraldi "knew" that the funds were tainted.

The Fifth Circuit affirmed Giraldi's conviction on circumstantial evidence finding that he had falsified bank records and that he had failed to make an adequate inquiry into the background of his customer. There was no adequate explanation for the wealth deposited in the account. The court noted that the nominal account holder worked as a gas station manager and had no plausible means for acquiring wealth. Giraldi had been trained in know your client practices and had even served as an instructor in this area.

On November 21, 1994, American Express Bank International paid a civil penalty of \$32 million to rid itself of a criminal indictment for money laundering arising out of Giraldi's private banking activities. The Bank was prosecuted because it failed to have adequate controls in place to detect money laundering and because it refused to cooperate with the authorities in their investigation.

Getting a judgment against a remote trustee and enforcing the judgment, of course, are two different things. The remainder of this paper examines creative ways that a judgment creditor or trustee in bankruptcy could reach the assets of a faraway trustee. There is no doubt that the existence of the APT complicates the creditors' task, but a determined creditor can find a way if enough money is at stake. It should be borne in mind that the judgment creditor may be a financial institution or a government with virtually unlimited resources.

IV. Establishing Jurisdiction over a Foreign Trustee

The initial hurdle in obtaining a judgment against a remote trustee is to convince the court that it has jurisdiction to enter a default judgment. In many respects, the basis for asserting jurisdiction is more important than the nature of the claims asserted in the complaint. A foreign court is more likely to

scrutinize closely the basis of the U.S. court's jurisdiction than it is to review the complaint for substantive errors of law.

A foreign trustee with a physical presence in the United States is clearly subject to U.S. jurisdiction, and offshore trustees refrain from doing business in the U.S. for just that reason. The fact that a foreign trust company has no presence in the United States, however, does not necessarily mean that it is beyond the long-arm jurisdiction of the U.S. courts.

A. "Tag" Service

A U.S. court can exercise jurisdiction for all purposes over a nonresident trust company if the defendant is served with a summons and complaint within the jurisdiction. ⁽²⁴⁾ Thus, a resourceful creditor could arrange to have an officer or director of the offshore trust company served with process while they are visiting the United States (e.g., to speak at a conference on trusts). Assuming that the trust company had "minimum contacts" with the United States, jurisdiction would stand. The fact that the trust company had customers in the United States, corresponded with customers in the United States, and maintained accounts in the United States would probably be sufficient to meet the minimum "minimum contacts" standard.

- Affiliate as Agent for Jurisdictional Purposes

The recent case of Koehler v. Bank of Bermuda, Ltd. 101 F.3rd 863 (2d Cir. 1996) illustrates the risk of having any affiliations with the United States. The plaintiff obtained a default judgment against a customer of Bank of Bermuda International Ltd. ("Bank of Bermuda"), a Bermudan bank, in Maryland. He then proceeded to register the judgment in New York and sought to levy on stock certificates held as collateral by the Bank of Bermuda in Bermuda. The judgment creditor did so by serving garnishment papers on an officer of Bank of Bermuda (New York) Ltd. ("Bank of Bermuda (N.Y.)"), an indirect subsidiary of the Bank of Bermuda chartered under the laws of New York. Despite the formal separation of parent and subsidiary, the judgment creditor claimed that the New York bank acted as the agent of Bank of Bermuda in New York and that it was simply a "department" of its parent bank. As proof for this contention, the judgment creditors pointed to annual reports and promotional materials which portrayed Bank of Bermuda and Bank of Bermuda (N.Y.) as part of a unified global banking network that offers customers a wide variety of banking services and a choice of locale in which to have those services performed. Bank of Bermuda moved to dismiss for lack of jurisdiction on the grounds, inter alia, that it was not licensed to do business in New York, that it did not have an office or employees in New York, and that customers of Bank of Bermuda could not make deposits to their accounts in New York and that the Bank of Bermuda (N.Y.) could not make loan commitments or advances on behalf of the Bank of Bermuda.

The court held that the plaintiff had satisfied its burden of making a prima facie showing that jurisdiction existed over the Bank of Bermuda. The showing was sufficient to establish that Bank of Bermuda was doing business in New York through an agent, Bank of Bermuda (N.Y.). The Second Circuit Court of Appeals dismissed an interlocutory appeal as unripe. Thus, Bank of Bermuda would have been subjected to the burden and expense of discovery and a trial before the jurisdictional issue could be decided. Fortunately for the Bank of Bermuda, the judgment debtor convinced the Maryland court to vacate the default judgment on the grounds of improper service and lack of diversity jurisdiction. ⁽²⁵⁾

Some offshore trust companies publicize that they have relationships with law firms and investment advisors in the United States. The names of these entities in the United States appear on the web page

and promotional materials of trustees. The presence of these parties in the United States may provide a basis for asserting personal jurisdiction over remote trustees. Moreover, documents subpoenaed from these advisors may enable plaintiffs to trace assets. The attorney-client privilege will not provide a shield if there is any evidence of fraud or criminal conduct⁽²⁶⁾

If the case ever goes to trial, the judgment creditors may not be able to sustain their burden of establishing jurisdiction under the agency theory. In the interim, they will have succeeded, however, in obtaining ample discovery and burdening the trustee with litigation in a foreign court. The proponents of APTs generally do not claim that they are foolproof, but rather that they will deter litigation and promote settlement on favorable terms. By the same measure, utilizing the long-arm statutes to assert jurisdiction over a foreign trustee may even the scales and sweeten the creditor's prospects of a favorable settlement.

C. Transacting Business in the Jurisdiction

Jurisdiction over a nonresident foreign bank may be obtained by virtue of an active correspondent banking relationship with a New York bank if there are minimal additional contacts with the United States.⁽²⁷⁾ A plaintiff may also be able to obtain in rem jurisdiction by attaching assets in a correspondent banking account.⁽²⁸⁾

Plaintiffs may be able to satisfy its burden of establishing long-arm jurisdiction by producing evidence of meetings in the United States related to the trust or communications between the offshore trustee and the settlor and/or beneficiaries in the United States.⁽²⁹⁾ It is common practice for representatives of offshore trust companies to visit the United States from time to time in order to promote their trust services. Such visits may help satisfy "minimum contract" requirements for long-arm jurisdiction. Moreover, private bankers in New York may be in the habit of relaying instructions from the settlor to the trust company offshore. Finally, assets may be situated in New York even if they are technically booked offshore. If there are contacts with the United States, even isolated contacts related to the subject matter of the suit, the defendant trustee may be held to be transacting business in the United States for purposes of long-arm jurisdiction.⁽³⁰⁾

As an example of the expansive reach of long-arm jurisdiction, the Minnesota Court of Appeals recently held that a Belize internet gaming service was subject to personal jurisdiction in a criminal action for deceptive trade practices, false advertising, and consumer fraud. The court found that the due process requirements of minimum contacts were satisfied by the fact that Minnesota residents accessed the defendant's web site, the defendant advertised on-line and maintained a toll-free number, and at least one resident of Minnesota was on the defendant's mailing list.⁽³¹⁾

- Minimum Contacts for Purposes of Federal Jurisdiction

For purposes of RICO and actions based on federal statutes, the court is empowered to exercise in personal jurisdiction over a foreign defendant if the defendant has "minimum contact" with the United States as a whole. As an alleged participant in a RICO conspiracy, the settlor's activities in the United States are attributable to the offshore trustee. Moreover, jurisdiction may exist over RICO conspiracies occurring outside the United States where there is some conduct in the United States or there are harmful effects in the United States.⁽³²⁾

Creditors can make use of the expansive jurisdiction of RICO to obtain jurisdiction over foreign defendants. They can then take advantage of the court's supplementary or pendent jurisdiction to include common law counts (e.g., fraud, fraudulent conveyance, conversion) arising out of the same set of facts

even though the court's jurisdictional reach is more limited with respect to common law claims. While foreign courts may not recognize a RICO judgment, the creditors can enforce the RICO judgment in the United States while seeking recognition of the common law counts in other countries where the trustee may have interests or relationships.

- Bankruptcy Jurisdiction

U.S. bankruptcy courts claim dominion over the debtor's property wherever located. If the estate has an interest in the APT under U.S. law, the trustee may be sued in an ancillary proceeding to force a turn over of the property. A bankruptcy court is likely to take an expansive view of its jurisdiction over persons having possession of assets alleged to belong to the estate..

F. In Rem Jurisdiction

Courts in the United States can exercise in rem jurisdiction to adjudicate rights to property located in the United States.⁽³³⁾

- Waiver of Jurisdictional Defenses

An offshore defendant may be deemed to have waived its defense of lack of jurisdiction if it fails to participate in discovery related to jurisdiction.⁽³⁴⁾ In Duttle v. Bandler & Kass, the court held that a Liechtenstein trust waived its defense of lack of in personam jurisdiction by failing to appear for depositions in Paris. The settlor was not permitted to raise the defense of lack of in personam jurisdiction on behalf of the absent trustee.

A foreign trustee runs the risk of being held in contempt if it fails to produce documents in response to discovery requests notwithstanding bank secrecy laws of the offshore jurisdiction.⁽³⁵⁾ An alert defendant can obtain jurisdiction for discovery by serving a subpoena duces tecum on a bank official traveling in the United States.⁽³⁶⁾

- Conspiracy

If the complaint alleges that the offshore trustee conspired with the settlor to defraud creditors, the acts of the settlor in the United States will be attributed to the trustee for jurisdictional purposes.⁽³⁷⁾

The offshore trustee faces a dilemma. It can challenge the jurisdiction of the court without being deemed to have attorned to the jurisdiction. If the court rejects its jurisdictional defense, however, the trustee will be precluded from attacking jurisdiction of the court in a subsequent proceeding to recognize the judgment abroad. Conversely, if it defaults, the allegations in the complaint will be deemed to be true for purposes of subsequent enforcement proceedings abroad. The trustee has to gamble that a foreign jurisdiction will be offended by the exercise of long-arm jurisdiction. Courts in the OECD countries can be expected to have little sympathy for asset protection schemes and dishonest debtors. Moreover, the concept of long-arm jurisdiction in international cases is gaining acceptance. If the equities favor the creditor, the court where recognition is sought may bend the rules (see, e.g., the Grupo Torras and Orange Grove cases).

V. Enforcing A Judgment Against the Trust and the Trustee Outside the Trust Domicile

Assuming a judgment debtor has obtained a judgment jointly and severally against the trust and trustee,

the practical issue is how can the judgment be collected. There is little doubt that the existence of an APT complicates the judgment debtor's task, and gives the debtor a major advantage in settlement negotiations. Nevertheless, if the stakes are large enough, a determined creditor (a bank, an official receiver, the government) can effectively attack the settlor and the trustee without venturing into the trustee's home court.

- Flank Attacks on the Trustee

One of the first things a judgment creditor would do is to ask the court to enter an injunction barring the trustee and the settlor from transferring or dissipating trust assets. ⁽³⁸⁾ Federal courts in the United States, for example, granted injunctions freezing the assets of the Marcos estate throughout the world. ⁽³⁹⁾ If the courts have in personam jurisdiction over a defendant, they may go further and order the defendant to turn over property situated outside the jurisdiction. ⁽⁴⁰⁾ In a recent case, the Second Circuit upheld a civil forfeiture of assets in an account held in an account in the United Kingdom. ⁽⁴¹⁾

In United States v. First National City Bank, 379 U.S. 378, 85, S. Ct. 528 (1965) the Supreme Court upheld an injunction prohibiting Citibank from transferring funds of the defendant which were on deposit in its branch bank in Uruguay ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control whether the property be within or without the United States.", 379 U.S. 384).

A corporate trustee would have to consider carefully whether it wished to take the risk of defying an order of a U.S. court, particularly one backed by monetary sanctions that accrued on a daily basis for as long as the contempt continued. In extreme cases, defiance of a court order could lead to indictments for criminal contempt against named officers of the trust company, and international arrest warrants might be issued. The officers in question would certainly be barred from traveling to the United States, and they would run the risk of arrest if they ventured into any country with an extradition treaty with the United States.

A creditor can also seek to levy against the correspondent accounts of the trust company with banks or affiliates anywhere in the United States. It usually is not difficult to determine who the correspondent banks are because the names of correspondent banks are generally published in promotional materials. Similarly, creditors can levy on debts owed by U.S. banks to foreign institutions. In New York it is child's play to send out a shotgun restraining order to all the major banks in the city.

A creditor can seek to register the judgment in the leading financial centers. As offshore financial centers gain in notoriety, the first world countries will have cause in common to assist each other in enforcing judgments against entities located in those centers. With trade barriers crumbling and economies become increasingly interdependent, the expectation is that courts in the OECD countries will be more inclined to grant comity to foreign judgments. The United States has a long tradition of giving deference to foreign judgments ⁽⁴²⁾

The European countries have enacted the conventions for the reciprocal enforcement of judgments in the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the 1988 Lugano Convention. Thus, an English money judgment is entitled to recognition throughout the European Community. Negotiations are underway at the Hague on a convention that would extend recognition to U.S. judgments. In the not distant future, a U.S. money judgment may command recognition throughout the European Community. In the meantime, a U.S. creditor conceivably could register a judgment obtained against an offshore trustee in the United Kingdom and then use the

resulting U.K. judgment to go after the assets of the trustee in other parts of the European Community. (43)

There has been progress in the bankruptcy and banking areas toward international cooperation in multinational windups. In theory, bankruptcy courts exercise universal jurisdiction and acquire ownership of the debtor's property wherever located. (44) In the B.C.C.I. and the Maxwell cases, protocols were worked out among administrators in different countries to harmonize inconsistencies in the bankruptcy laws of the different jurisdictions and to maximize the recovery for creditors (45).

In recent years countries have begun to work together in the war against drugs. The English High Court recently enforced a U.S. forfeiture order of amounts held in a London bank account in the name of C Ltd. a Liberian company. In Re F. Judgment of November 29, 1996, (46) The U.S. government was able to trace funds in the account back to the sale of a ranch in California that had been purchased with the proceeds of drug sales. The California court dismissed the existence of C Ltd. as a sham company that conducted no business and existed solely for the purpose of disguising the identity of the true owners of the account who were involved in drug smuggling. In short, the prognosis is for the balance to swing in favor of the debtor and against the creditors as nations harmonize their legal systems to promote international trade and commerce.

A creditor can also complain to the regulatory authorities in the United States and other OECD countries about the refusal of a foreign trust company to honor court orders and judgments. While the trustee itself may have no interests in the United States, its affiliate may be seeking to be licensed or already may be regulated by the banking authorities. The Basle Committee on international banking as adopted consolidated supervision as a standard for international bank supervision regardless of formal separations among affiliated banks in different countries. Thus, perceived misconduct on the part of a bank subsidiary in one jurisdiction may have adverse consequences in another jurisdiction where an affiliate is doing business. The Federal Reserve Board, for example, might cite a refusal to honor U.S. court orders as grounds for denying an affiliate of the bank permission to expand its U.S. operations or to engage in new activities.

Applying these strategies to the Cook Islands as a test case, there are five licensed trust companies located in Rarotonga - Bermuda Trust (Cook Islands) Ltd., HSBC Trustee (Cook Islands), Southpac Trust Ltd., Asiaciti Trust Pacific Ltd., and TrustNet(Cook Islands) Ltd. Each of these companies appears to have a vulnerability that can be exploited by its creditors. Bermuda Trust and HSBC Trustee advertise on their web page that they are part of a much larger organization that has operations in the United States. They may have correspondent accounts with the U.S. affiliates that can be attached. The Bank of Bermuda and HSBC Holdings plc are world-class financial institutions. It is doubtful that the parent banks would be pleased if their Cook Island affiliate were defying an order of a U.S. court to freeze or turn over assets. The Federal Reserve Board might take a dim view of such conduct as well.

Southpac advertises that it has a related office in Los Angeles on its home page. Depending on the nature and quality of the dealings between the Los Angeles and Rarotonga, a creditor may be able to claim that Southpac was doing business in California through the individuals in Los Angeles. Certainly, a creditor could subpoena the records in the office of the Los Angeles representative and depose the individuals.

Trust companies may also have offices in other more creditor-friendly jurisdictions. Asiaciti Trust Group, for example, has offices in Singapore, Hong Kong, Mauritius, Western Samoa, New Zealand, and China. A creditor could seek to register its judgment against the trustee in one of these forums where the courts would grant comity to a U.S. judgment (e.g., New Zealand, Hong Kong) or bring an

original action in these jurisdictions.

B. Trends Favoring the Judgment Creditor

There is no denying that the existence of an APT complicates enforcement of a judgment, and may lead judgment creditors to abandon claims or settle on less favorable terms. There are, however, practical considerations and emerging judicial trends that favor the judgment creditor.

1. *Inconvenience to the Judgment Debtor*

Debtors who engage in asset protection planning to thwart future creditors probably live in developed countries with efficient court systems. A debtor under siege by creditors may have to flee the jurisdiction to avoid being inundated with court orders, supplementary proceedings, and levies. Expatriation may not be an attractive alternative for a debtor with family ties to the United States. If the debtor moves to a first world country, the creditors are likely to follow. The only secure place may be to live in Rarotonga with their money.

To the extent that high net worth individuals living in Latin America establish offshore trusts, they may have to give up their apartments in New York or homes in Miami. They enter the country at the risk of being subpoenaed to attend a debtor's examinations.

2. *The Assets Cannot Be Invested Offshore*

There are rarely adequate investment or consumption opportunities in the jurisdiction where the asset protection trust is organized. Thus, the trust assets will almost certainly be invested in another jurisdiction where they may be more vulnerable to creditor attacks. In the usual course, the assets will be held by an independent custodian or in a nominee account far from the situs of the offshore trust. Somewhere, however, there will be a paper trail leading back to the assets. If the assets can be located, they can be seized. The trick is finding the assets.

The ownership of most publicly-traded securities in companies registered in the United States is not certificated, but rather recorded in electronic form at the Depository Trust Corporation in New York. A creative plaintiff might find a way to freeze all the assets held under the trust company's name at the DTC. Alternatively, the creditor might find, through discovery or by means of an asset search, the names of the custodian or successor trustee, and freeze all the assets under that name. Law enforcement officials in the United States, undoubtedly, have ways to decipher the codes.

4. *Broad Powers to Compel Disclosure*

Bankruptcy trustees and debtors in supplementary proceedings have broad discovery powers to search out hidden assets. The debtor can be subjected to a searching interrogation. Creditors can subpoena all the judgment debtor's tax returns, bank statements, brokerage records, telephone, and financial records in the hands of third parties. The recent amendment to the tax provisions governing offshore trusts impose new reporting requirements that will assist judgment creditors to locate assets in the hands of an offshore trustee. ⁽⁴⁷⁾

5. *Assets Cannot Always Be Easily Liquidated*

A potential flaw in the asset protection scheme is that unless the assets of the trust are invested entirely in marketable securities, cash or cash securities, the assets may not be liquidated on a moment's notice.

Trustees may be reluctant to liquidate assets because an abrupt sale may lead to losses and/or adverse tax consequences. If, for example, assets are held by a family limited partnership in the U.S., a creditor may be able to obtain an *ex parte* freeze or attachment of the assets before the assets can be liquidated and transferred offshore. Moreover, attempts to borrow the equity against real property on short notice and transfer the proceeds offshore may be unrealistic. As anyone who has refinance a home knows, it takes time to arrange loans. Banks may not be willing to lend to limited partnerships without personal guaranties from the principals. In addition, the debtor may incur criminal liability if he fails to disclose the existence of a potential claim or pending litigation to a federally-insured bank.

6. Time is on the Judgment Creditor's Side

Time is on the judgment creditor's side. Judgments usually are good for an extended period of time. In New York, for example, the statute of limitation for suing on a judgment is twenty years. Interest continues to accrue at the statutory rate of nine percent as long as the judgment remains unsatisfied. A judgment creditor can afford to be patient until the right opportunity presents itself to seize assets belonging to the trust company.

7. Judicial Outrage

Experienced litigators know that judges are prone to bend the law to the benefit of a judgment creditor if the debtor's conduct smacks of fraud or fast-dealing.⁽⁴⁸⁾ If the underlying claim that gave rise to the judgment debt was fraud or criminal conduct, the courts are apt to be receptive to drastic measures to reach assets in which the judgment creditor has a beneficial interest. An outraged judge can find ways to circumvent elegant legal concepts and artful drafting. Typically, trial judges are vested with broad discretion to make findings of fact, to supervise discovery, and to grant injunctive relief. Appellate courts rarely find that a trial court has abused his discretion, and the appeal process is time-consuming. A defendant who is perceived by the court to be a fraudster or the aider and abetter of a fraudster is in for a difficult time regardless of the niceties of trust law.

8. Increased Dissemination of Information

Another trend favoring creditors is the increasing dissemination of information. Judgment creditors will find it easier to track deadbeat debtors as they travel from one jurisdiction to another and to trace assets using the Internet and other electronic tools. The U.S. government, of course, has extraordinary powers to compile intelligence and to track flows of money. In an exceptional case (e.g., cases involving drugs or terrorism), political pressures can be brought to bear to extradite defendants and material witnesses. The Cayman Islands, the Bahamas, and other offshore financial centers in the Caribbean have Mutual Legal Assistance in Criminal Matters treaties. A U.S. judgment creditor can take advantage of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Hague Evidence Convention") to obtain discovery outside the United States. The United Kingdom has extended the Hague Evidence Convention to many of its offshore colonies including many of those offering APTs.

9. Civil Contempt

The judgment creditor may be able to compel the judgment debtor to instruct the corporate trustee to turn over assets on pain of being held in contempt and thrown in jail. The debtor's protestations that he is unable to comply with the court order because the trust instrument contains an "anti-duress" provision may fall on deaf ears, particularly if the debtor has enjoyed the benefit of the trust assets or otherwise exercised control over the trust. Artful drafting can only go so far to protect the settlor from incurring the wrath of the court. It is true that civil contempt is a coercive sanction and thus a person held in civil

contempt must be able to comply with the court order.⁽⁴⁹⁾ The burden of proving impossibility of compliance, however, rests on the shoulders of the contemnor who must convince the court that he made all reasonable efforts to comply.⁽⁵⁰⁾ It would not be a pleasant task to have to explain to a suspicious judge that an offshore trustee was free to disregard the court's order, particularly where the settlor retained far-reaching powers over the asset protection trust. If the judge were not convinced, the settlor could spend a long time in jail before being rescued by an appellate panel. In an extreme case, defendants who are unable to comply because of their own bad faith actions may be tried for criminal contempt.⁽⁵¹⁾ When put to the acid test, one wonders whether an offshore trustee would abandon a settlor to the tender mercies of a judge who was bound and determined to throw their customer in jail unless certain documents were produced or assets transferred. In a crisis situation, the trustee might well be able to find the consents that would be required to comply with the court order.

10. *Denial of a Discharge in Bankruptcy*

The failure of a debtor to list an interest in an APT on his schedule of financial affairs or to retain a copy of the trust instrument may allow a creditor to successfully oppose the granting of a discharge in bankruptcy.⁽⁵²⁾ In such event, the creditors could continue to levy against the debtors' assets as long as the judgment remained valid. It could also serve as a basis for a conviction of bankruptcy fraud.⁽⁵³⁾

11. *Enlisting the Aid of the Law Enforcement Authorities*

When all else fails, a judgment creditor can request that the judgment debtor be investigated and criminal charges brought. This will not work, of course, in the routine tort case, but it may work where there has been money-laundering, mail fraud, bankruptcy fraud, or a fraud on creditors. The target of an investigation may make restitution as part of a plea bargain or in a bid to receive a reduced target. Moreover, law enforcement authorities can enlist their counterparts in other part of the world to locate fugitives and missing assets.

V. The Limitations of Due Diligence and the Need for Bail-Out Strategies

The conventional wisdom is that corporate fiduciaries should not accept appointment as trustees where there transfers to the trust would constitute conveyances intended to hinder, delay or defraud known claims. Any reputable trust company will conduct extensive due diligence prior to accepting appointment as a trustee. The legitimate trust company will demand assurances that the settlor will be solvent after the transfer, that he is engaged in a lawful business, that he is not the subject of pending claims, and that his assets were lawfully acquired. A thorough "know your customer" investigation should head off most fraudulent conveyance claims because cases where future claimants have been able to establish fraudulent conveyance are rare.

The problem with due diligence is that it is limited. There is almost no way to determine what skeletons customers have in their closets that can come back to haunt them and the trustee of their APT. While a thorough due diligence review will weed out obvious risks such as notorious drug dealers and known felons, it is unlikely to reject seemingly respectable customers who are engaged in white collar crimes. Until the crisis hits, the fraudsters of this world - the Robert Maxwells, the Charles Keatings, the Shiek Farrads, the Leona Helmsleys, the Rafael Salinases - have little difficulty producing testimonials as to their good character. Clark Clifford was able to hoodwink the Federal Reserve Board about the ownership of First American Bank. Yet persons of this ilk may already have incurred liability for criminal acts and the funds that they entrust to the trustee may be tainted as a result. A true fraudster, of course, would have little compunction providing the asset trustee with false or misleading assurances.

Where assets are obtained by fraud, any conveyance of these funds is necessarily fraudulent as to the victims.

Moreover, having established an offshore trust, the settlor may feel free to embark on further misadventures. Far away in a fiscal paradise, the trustee has limited abilities to police the settlor's activities or to scrutinize each subsequent disposition to the trust. The settlor may incur substantial criminal or civil liabilities for activities seemingly in the ordinary course of business, for example, failure to pay tax returns, environmental violations, securities fraud, and outright fraud. Thus, the trust company cannot relax its due diligence once the trust is settled. Creditors are free to challenge future dispositions even if the validity of the trust is beyond reproach. Due diligence is required not only to protect subsequent dispositions from being invalidated, but to protect the trust company itself from transferee liability. The trust company will have to repeat the entire due diligence exercise each time transfers are made to the trust. It is, however, much hard to disengage once the trustee has accepted the settlor as a customer.

Of even greater concern, the trust company could incur criminal liability if it turned a blind eye once it is on notice of criminal conduct by the settlor. Criminal conduct for money-laundering purposes embraces a broad range of crimes including tax evasion, bankruptcy fraud, and mail/wire fraud. As the recipient of laundered funds, the trustee is likely to be tarnished by association with the settlor and runs a serious risk of being indicted as a co-conspirator. Thus, the prudent offshore trustee must build-in a bail out provision allowing it to resign if the settlor engages in criminal or quasi-criminal conduct after the trust is settled.

Even if trust companies can fend off creditor claims, the victories will be pyrrhic if the trust company gains an unsavory reputation. A respectable trust company does not want to find itself defending the interests of swindlers and fraudsters. In due course, the trustee itself will attract the attention of law enforcement authorities with unwelcome results. Faced with a losing proposition, the trust company would be well-advised to have a bail out provision so that it can dump dishonest customers.

Conclusion

Asset protection legislation is in its infancy, and it has yet to be determined whether trust companies can offer creditor protection services with impunity. While offshore trust companies are located on islands, it is hard to be an island unto oneself in the modern world. Creditors may find ways to make the trust companies responsible for paying the debts of disreputable debtors. What was thought to be a marketing opportunity may prove to be a disaster in the long run.

1. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228 (1958)

2. The Cook Island International Trust Amendment Act of 1984, as amended in 1991, provides, inter alia, that: (1) foreign judgments against an international trust will not be recognized; (2) the settlor can retain broad power and benefits without invalidating a trust; (3) an international trust shall not be fraudulent against a creditor of the settlor if the transfer of property takes place more than two years after the date upon which the creditors cause of action arose or if it does occur within this period, and the creditor fails to bring that action within one year from the date of such transfer; (4) self-settled spendthrift clauses are enforceable; (5) the creditor must prove "beyond reasonable doubt" that the settlor established a trust with "principal intent" to defraud that creditor and, in addition, that the settlor did not retain sufficient assets to satisfy the claims of that creditor, (6) an international trust will not be

void or voidable as a consequence of the settlor's bankruptcy, and (7) transfers cannot be held to be fraudulent as against a creditor whose claim arises after the establishment of the trust or the disposition of property to the trust

3. The legislatures of the offshore jurisdiction have filled the judicially-created loopholes that allowed some creditors to bring claims despite restrictive pro-debtor legislation (e.g., the Orange Grove case and In re Rahman).

4. Despite the hysteria about future creditors, it does not appear that many future creditors are successful in proving that they have been victimized by a fraudulent conveyance that pre-dated the events giving rise to their claims. Neal L. Wolf, "The Right of 'Future Creditors' Successfully to Maintain Actions Under the Fraudulent Conveyance Statutes", *Journal of Asset Protection* (May/June 1997).

5. 11 U.S.C. 304

6. Twenty-five states and the Virgin Islands have enacted the Uniform Foreign Country Money-Judgments Recognition Act ("UFCMJRA"). In New York the UFCMJRA is codified in the New York Civil Law and Practice Rules, Article 53.

7. 28 U.S.C. 1782. Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir.), cert. denied, 113 S. Ct. 179 (1992)(defendant in Hungarian breach of contract case allowed to take depositions and compel production of documents in the United States).

8. Application of Silvia Gianoli Aldunate, 3 F.3d 54 (2d Cir.), cert denied. 114 S. CT. 443 (1993). Chilean court-appointed guardian of an incompetent permitted to take depositions and obtain documents from persons in the United States who allegedly secreted millions of dollars belonging to the incompetent. The Second Circuit rejected arguments that would limit discovery to information discoverable in the home jurisdiction. Matter of the Application of Euromepa S.A., 51 F.3d 1095 (2d Cir. 1995) (French litigants allowed to utilize U.S. discovery procedures).

9. 905 F. Supp. 45 (D. Mass. 1995)

10. Id., at 48.

11. United States v. Red Stripe, 792 F. Supp. 1338 (E.D.N.Y. 1992); N.Y. Debtor-Creditor Law (Uniform Fraudulent Conveyance Act), 273; 28 U.S.C. 3306(a)(2); Florida Uniform Transfer Act, 726.109(2)(a).

12. 11 U.S.C. 541(b)

13. In re Nemeroff, 74 B.R. 30 (Bkrcty., E.D. La. 1987)(bankruptcy court finds that irrevocable trusts were a sham where debtors made transfers to the trust with actual intent to defraud creditors, retained possession and enjoyment of the property placed in trust, and the trusts terminated upon death so that the nominal beneficiaries would never receive any benefit from the trusts); In re Shurley, 171 B.R. 769 (Bkrcty., W.D. Tex. 1994).

14. A self-settled trust is a trust where the settlor is also a beneficiary.

15. In re Crosby, 162 B.R. 276 (Bkrcty. C.D. Cal. 1993); California Probate Code, 15304(a). The court looked past the fact that the trust had been settled by a corporation where the beneficiary of the trust was

the president and only employee of the corporate settlor. The trust assets were deemed to be included in the bankruptcy estate for the benefit of creditors where the beneficiary could demand a complete distribution of the trust assets at any time. New York Estates, Powers and Trust Statute, 7-3.1. Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A., 100 A.D.2d 544, 473 N.Y.S.2d 242 (2d Dept. 1984).

16. See, e.g., Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131 (2d Cir. 1991). In an action brought by a judgment creditor to collect a judgment from the parent of the corporate debtor and the individual shareholders of the parent court, the second circuit set aside a directed verdict of the trial court in favor of a parent corporation and its individual shareholders on the grounds that the corporate form could be disregarded corporate structure was used for personal rather than business ends to commit a wrong. The court noted that New York law permits the corporate form to be disregarded where excessive control causes the complained of loss.

17. The courts have recently begun to employ a "reverse alter ego" theory whereby corporate entities are held liable for the debts of their principals upon a showing of domination and a disregard for the corporate formalities. Sun Dar Associates v. MDO Development Corp., NYLJ 7/27/97 at 22 (Sup. Ct. N.Y. Co. 1997); Towe Antique Ford Foundation v. I.R.S., 999 F.2d 1387 (9th Cir. 1993).

18. Anticipating that he might be sued for false arrest or for some other act in connection with his duties as a police officer, a husband transferred ownership of a farm to his wife without consideration with the understanding that she would deed the farm back to him as tenants by the entirety when she retired. The underlying motivation for the transfer was to protect the welfare of three of his children who were unable to care for themselves. The transfer did not render him insolvent and he had no creditors. After retiring, the husband brought suit against his then estranged wife. Although the transfer presumably violated the statute of frauds, the court directed the defendant wife to convey the wife to herself and her husband as tenants by the entirety.

19. 18 U.S.C. Secs.1962(a)-(d)

20. Stochastic Decisions Inc .v. DiDomenico, 995 F.2d 1158 (2d Cir. 1993)(attorney who masterminded scheme to aid judgment debtor to make fraudulent conveyances held liable under civil RICO). The predicate acts were bankruptcy fraud, mail fraud, and wire fraud, committed over a five year period.

21. 18 U.S.C. 1956(a)(2)

22. 18 U.S.C. 1956(C)(7)

23. 86 F3d 1368, 1996 WL 339177 (5th Cir. 1996)

24. Burnham v. Superior Court of California, Co. of Marin, 495 U.S. 604, 110 S.Ct. 2105 (1990).

25. Koehler v. Dodwell, Civ. Action No. S92-2982 (default judgment vacated by a memorandum Order dated October 20, 1997)

26. In re Hunt, 153 BR 445 (Bankr.. N.D. Tex 1992)(attorney-client privileged waived with respect to fraudulent transfers); U.S. v. Zolin, 491 U.S. 554, 109 S.Ct. 2619 (1989)

27. F.D.I.C. v. Interbanca Banca Per Finanziamenti a Medio Termine, s.p.a., 405 F. Supp. 1118 (S.D.N.Y. 1975); Segovia v. Pinnacle Bank, (Sup. Ct., N.Y. Co.), N.Y.L.J (October 22, 1996)

28. Banco Ambrosiano v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65, 476 N.Y.S.2d 64 (1984); Segovia v. Pinnacle Bank, (Sup. Ct., N.Y. Co.), N.Y.L.J. (October 22, 1996)

29. U.S. courts are not alone in asserting jurisdiction over non-resident trustees. T v. T and others (Joinder of Third Parties) [1996] 2 Family Law Reports 357 (1995). The Family Division of the High Court exercised long-arm jurisdiction over a Jersey Trustee under the English Rules of the Supreme Court whereby a court could join as a party to the proceedings any other party whose presence before the court was "necessary" or where it was "just and convenient" for the resolution of issues.

30. Duttle v. Bandler & Kass, 1992 WL 162636 (S.D.N.Y. 1992)(Liechtenstein trust company held to be transacting business in New York under CPLR 302(a)(1) because trustee attended two meetings in New York, assets held by the trustee were in New York, and numerous telephone calls and correspondence related to the trust occurred between New York and the offshore trustee.

31. Minnesota v. Granite Gate Resources, Inc., (App. File C6957227 Sept. 5, 1997).

32. North South Finance Corp. v. Al-Turki, 100 F.3d 1046 (2d Cir. 1996)(RICO claim based on predicate acts of securities fraud involving stock of a French Bank was dismissed where there were no adverse effects in the United States); Alfadda v. Fenn, 935 F.2d 475 (2d Cir. 1991)(RICO jurisdiction existed where predicate acts occurred primarily in the United States).

33. Pack v. United States, 77 A.F.T.R.2d 96-972, 1996 WL 149345 (E.D. Cal. 1996)(court relied on in rem jurisdiction to seize interests in the proceeds of real property located in the United States where foreign trustees did not appear to contest action for unpaid taxes)

34. Daval Steel Products v. M/V/ Fakredine, 951 F.2d 1357 (2d Cir. 1991)(corporation barred from presenting evidence on "alter ego" liability where defendant ignored unequivocal court orders to produce witnesses and documents; Satcorp Intern'l Group v. China Nat Import & Export, 917 F. Supp. 271 (S.D.N.Y. 1996)(Chinese corporation's jurisdictional defense stricken for failure to comply with discovery orders directed to jurisdictional facts).

35. Matter of Marc Rich & Co., 707 F.2d 663 (2d Cir. 1983)(Swiss trading company could be held in contempt for failing to produce documents related to tax evasion regardless of Swiss secrecy laws and actions taken by the Swiss government to block compliance with the subpoena, including seizing subpoenaed documents. The court upheld a fine of \$50,000 a day until the Swiss company complied with the grand jury subpoena).

36. The managing director of a Castle Bank and Trust Company (Cayman) Ltd. was served with a grand jury subpoena while in the lobby of the Miami International Airport. In re Grand Jury Proceedings, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976). He was forced to testify concerning the activities of Castle and its clients despite his protestations that his testimony would violate the bank secrecy laws of the Cayman Islands. While the courts are more apt to disregard foreign secrecy laws in a criminal proceeding, they will also do so in civil litigation, particularly in a case involving violations of civil RICO or securities fraud. Alfadda v. Fenn, 149 F.R.D. 28 (S.D.N.Y. 1993).

37. American Trade Partners v. A-1 International Importing Enterprises, Ltd., 755 F. Supp. 1292, 1304 (E.D. Pa. 1990)

38. Pashaian v. Eccelston Properties, Ltd., 85 F.3d 77 (2d Cir. 1996); Gelfand v. Stone, 727 F. Supp. 98 (S.D.N.Y. 1989). In the Grupo Torras case, Saville J. granted a worldwide Mareva injunction against

Sheikh Fahad and ordered full disclosure of the full value of his assets, wherever located.

39. In Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988), a RICO and common law fraud action brought by the Republic of the Philippines against the Marcos, the Ninth Circuit Court of Appeals affirmed a preliminary injunction issued by the trial court that restrained the defendants from transferring various assets wherever located. The injunction was grounded on the court's in personam jurisdiction over the defendants. Subsequently, the Ninth Circuit upheld a second preliminary injunction in a class action brought by victims of alleged civil rights violations. The injunction was operative on a world-wide basis. In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F3d 1467 (9th Cir. 1994). After judgment was entered in favor of the plaintiffs for \$1.2 billion in punitive damages and \$800,000 in compensatory damages, the district court ordered the Estate of Ferdinand Marcos to assign its rights, title, and interest in various Swiss bank accounts to the plaintiffs. In re Estate of Marcos Human Rights Litigation, 910 F. Supp. 1470 (D. Hawaii 1995)

40. In the celebrated case of Madden v. Rosseter, 114 Misc.416, 187 N.Y.S 462 (N.Y. Sup. Ct. 1921), aff'd 196 A.D. 891, 187 N.Y.S. 943, a New York state court issued a mandatory injunction requiring a California defendant to deliver a race horse in California to the plaintiff's stock farm in Kentucky

41. In United States v. All Funds on Deposit in any Accounts Maintained in Names of Mesa or de Castro, 63 F3d. 148 (2d Cir. 1995), cert. denied, 116 S.Ct. 1541 (1996). the Second Circuit concluded that the district court had constructive control over bank accounts in England because of the demonstrated cooperation of the British government in freezing the account pursuant to the 1988 Treaty concerning the investigation of drug trafficking offenses and the seizure and forfeiture of proceeds and instrumentalities of drug trafficking and the Drug Trafficking Offenses Act of 1986. The High Court issued a restraining order freezing the account based on a request from the United States. The United Kingdom essentially acted as an agent for the United States.

42. See, e.g., Morguard Investments Limited v. De Savoye, [1990] 3 S.C.R. 1077 (Canada)

43. The United Kingdom has applied a double standard in the recognition of U.S. judgments. On the one hand, courts in the United Kingdom can exercise jurisdiction over foreign defendants utilizing Order 11. On the other hand, the United Kingdom will not recognize U.S. judgments unless the court had jurisdiction under restrictive common law principles (residence, carrying on business and the claim arose from said business, voluntary appearance, assertion of counterclaims). In one recent case, the English Court of Appeal refused to recognize a U.S. default judgment against a non-resident English company. Adams v. Cape Industries plc., [1990] 2 WLR 657. It seems probable, however, that the U.K. courts in the future will take a more favorable view of long-arm U.S. long-arm jurisdiction, particularly with regard to fraudulent transfers to jurisdictions that are known to be anti-creditor.

44. 11 U.S.C. 541(a)

45. The reorganization of Maxwell Communications Corporation PLC, an English corporation, proceeded simultaneously in the High Court of Justice in the United Kingdom and in the Southern District of New York. The English High Court appointed joint administrators and the bankruptcy court for the Southern District of New York appointed an examiner with instructions to harmonize the proceedings. See e.g., In re Maxwell Communications Corp. plc., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff'd, 93 F.3d 1036 (2d Cir. 1996).

46. See, 13 International Law Enforcement Reporter at 362 (September 1997)

47. Any U.S. person who receives a distribution directly or indirectly from an offshore trust, including loans, must report the distribution to the IRS on form 3520. Failure to file triggers a draconian 35% penalty and an additional penalty of 5% of the principal for each month the distribution is not reported up to a maximum of 25%. I.R.C. 6039F(c)(1)(A)-(B). The identity of the donor, however, does not have to be disclosed unless requested by the IRS.

48. Judge Sawyer, for example, has been criticized in the Grupo Torras case for misconstruing the facts in favor of the creditors.

49. United States v. Rylander, 460 U.S. 752, 103 S. CT. 1548 (1983)

50. United States v. Hayes, 722 F.2d 723 (11th Cir. 1984)(contemnor must make more than substantial, diligent or good faith efforts to comply); United States v. Rizzo, 539 F.2d 458 (5th Cir. 1976)

51. In re Marc Rich & Co., 736 F.2d 864 (2d Cir. 1984); Donovan v. Sovereign Security, Ltd., 726 F.2d 55 (2d Cir. 1984)

52. People's Bank of Charles Town v. Colborne (In re Colborne), 145 BR 851 (Bankruptcy ED Va. 1992)(creditor denied bankruptcy discharge because he failed to disclose existence of a reversionary interest in an APT).

53. See , In re Edwards, *supra*.