

IF AN ASSET PROTECTION TRUST IS USED AS A RECEPTACLE FOR ASSETS, IS THIS AUTOMATICALLY A FRAUDULENT TRANSFER?

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Is a transfer of assets as a proactive risk management strategy a “per se” voidable transaction? There is ample case law to support that transfers made just to “cover all the bases” are not voidable transactions. For example, transferors who engage in professions, such as the legal or medical professions, which carry a multitude of risks, may desire to set aside a nest egg of funds that are better positioned to be safely isolated from the day-to-day risks of one’s daily endeavors. This does not equate to acting with intentions to hinder, delay or defraud a creditor.

If an asset protection trust is funded at a time that no creditor is on your trail, funding such a trust is permissible (and in fact legislatively sanctioned in seventeen states in the US and in many offshore

jurisdictions). The US Supreme Court (*Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961 (1999)) in addressing whether a debtor could be prevented from transferring assets prior to a judgement, stated that so long as the fraudulent transfer laws do not otherwise apply, the debtor can freely proceed with such transfers. In this seminal case, the United States Supreme Court chose not to apply an equitable pre-judgment remedy of a preliminary injunction restraining a party from transferring its assets, stating:

[W]e suspect there is absolutely nothing new about debtors trying to avoid paying their debts, or seeking to favor some creditors over others—or even about their seeking to achieve these ends through sophisticated . . . strategies. The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor’s use of his unencumbered property before judgment was not.

In other words, making transfers to protective structures is legitimate planning, so long as the transferor is not facing an existing or anticipated creditor with regard to an act that the transferor has already committed.

In cases where asset protection trusts have been successfully challenged, the courts’ rulings have been based mostly on (i) the settlor not properly moving assets into the trust; (ii) the trust provisions not being properly drafted; or (iii) fraudulent transfers that were determined from the

fact that either the debtor was motivated because of an expected claim or judgment, or the debtor did not retain sufficient assets to cover anticipated financial obligations. These successful challenges to such transfers are not determined simply from the fact that an “asset protection trust” was involved. If the latter were determinative, these various court rulings could have been a page or less in length.

Nevertheless, there is no guarantee that a court will not conclude there was an intention to delay creditors, and, if so, if the court has jurisdiction over the trustee who received the transfers, the trustee may be compelled to return those transfers. This uncertainty as to what a court may infer regarding intent in hindsight contributes to the popularity of offshore trusts that have a trustee who is not subject to the jurisdiction of the U.S. court nor bound by a U.S. judgment. For an example of offshore asset protection trust laws, see the laws of Antigua/Barbuda, Bahamas, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Jersey, Labuan, Mauritius, Nevis, Saint Vincent and the Grenadines, Seychelles, and the Turks and Caicos.

Although offshore trusts greatly enhance the armor around trust-owned assets, there is no such thing as a bulletproof structure. Much like the shingles vaccination or flu shot, taking such precautionary measures can go a long way in providing protection, but

due to the almost limitless nature of other strains and factors, it is always possible a creditor could penetrate assets to some degree (even if this is because the trust-creator and the trustee strategically and voluntarily cooperate with the creditor in the effort).

Nevertheless, proper planning almost undoubtedly leaves the transferor in an invariably better position than had he or she not taken any such proactive measures.