

## Spotting Advanced Planning Issues: Offshore Trusts

In this litigious society, every professional and business owner should be aware of asset protection methods. Here are some things you should know about one of those methods – offshore planning:

- It's NOT a method to defraud creditors
- It's NOT a way to evade taxes
- It's NOT a way to "hide" assets
- It's NOT illegal or run by drug lords (it's actually listed on your 1040 tax return!)
- It's merely planning with the laws of a jurisdiction other than the United States

*The two primary benefits of offshore planning are that it reduces your client's attraction as a target, and it provides a strong incentive for an early and reasonable settlement by a creditor or predator.*

### **An Example: Offshore Planning in the Bahamas**

Let's consider an example of offshore planning using an international trust sited in the Bahamas. There are dozens of offshore jurisdictions that may be more or less appropriate depending on circumstances.

Your client, a doctor, decides to protect a "nest egg" of \$3,000,000. He sets up an irrevocable trust with a trust company in the Bahamas. He appoints Bahamian corporate trustees with complete discretion over the trust, but he's able to provide guidance for their investment and distribution decisions with a "Letter of Wishes." All of this is also overseen by a domestic "Trust Protector" such as the client's attorney.

The doctor should not, of course, be transferring funds in the middle of, or in anticipation of a lawsuit because the funds may be reached in the case of a "fraudulent conveyance."

Absent a fraudulent conveyance, action can only be brought against the Bahamian trust by creditors with *claims existing at the time of transfer* who are known to the Trustmaker! The creditor has the burden of proof. Furthermore, even if the creditor can establish the claim, action is barred if it has been more than 2 years since the transfer. Foreign law and judgments by foreign courts are not recognized by Bahamian courts,

so any legal proceedings must be re-initiated in the Bahamas. A creditor suing in the Bahamas is considered a foreign plaintiff. As such, he must make a substantial cash deposit with the court. Plus, it will be hard to establish jurisdiction because the Trustmaker is not physically in the Bahamas, nor are his assets (except those owned inside the trust).

Furthermore, the Bahamas has no registration, filing, or disclosure for trusts. They DO, however, have stringent confidentiality laws with civil and criminal penalties for those who violate them. Gaining enough information to formulate a claim is difficult. That is what usually leads to a reasonable out of court settlement, such as for *the amount of the doctor's E&O insurance policy coverage.*

If all else fails, trustees may be fired and replaced, assets migrated, or the trust itself migrated to a new jurisdiction where the process starts all over again. If after all of this, a creditor is successful in setting aside the transfer, the creditor can only satisfy his own claim, leaving the balance of assets intact within the trust.



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KETRA A. MYTICH, LTD.  
6809 N. KNOXVILLE AVE., SUITE B.  
PEORIA, IL 61614-2866