

HANDS OFF MY LOOT!
WHY DOMESTIC SELF-SETTLED ASSET PROTECTION TRUSTS ARE GOOD FOR AMERICA

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Are you thinking that death and taxes are our only certainty . . . ? Well there's nothing I can do about the first, but if I lift the burden of the second, men might learn to see the connection between the two and what a longer, happier life they have the power to achieve. They might learn to hold, not death and taxes, but life and production as their two absolutes and as the base of their moral code.²

- Ayn Rand

Ayn Rand's classic novel, *Atlas Shrugged*, features a pirate named Ragnar Danneskjold. He sails the seas, destroying and looting government ships, most often relief ships sent to foreign countries filled with humanitarian aid and other such supplies for the welfare of the unfortunate. He describes his purpose as such: "What I actually am. . . is a policeman. It is a policeman's duty to protect men from criminals – criminals being those who seize wealth by force. It is a policeman's duty to retrieve stolen property and return it to its owners."³ The Pirate Ragnar in *Atlas Shrugged* has made it his life's mission to restore the wealth that has been taken from a select group of people in the form of taxes. He achieves this end by stealing it back from the government. In doing this, he is defending an ideology that proclaims that every whit of wealth a man acquires is his own, and should not be subject to being taken by force.

Certainly there are those who feel like this today,⁴ although the majority of people probably acknowledge the requirement that some form of tax is necessary for government to operate sufficiently. However, even beyond the blanket issue of taxation is a rather debatable form of wealth-transfer device which conjures up some of the same passionate feelings provoked

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² AYN RAND, *ATLAS SHRUGGED* 536 (Penguin Books 1985) (1957).

³ *Id.* at 535.

⁴ For a discussion of the constitutionality of taxation, see generally William B. Barker, *The Three Faces of Equality: Constitutional Requirements In Taxation*, 57 CASE W. RES. L. REV. 1 (2006).

by the Pirate Ragnar: the self-settled asset protection trust (SSAPT).⁵ Just as the pirate is forcefully re-taking wealth, SSAPTs serve as a way for far less drastic people to do that by, some might say, arrogantly guarding frustratingly visible wealth from one's own creditors.

Part I of this paper will define the SSAPT, and examine the basic controversy surrounding it. Part II will analyze the how the SSAPT is treated in state law, particularly Missouri, where statutory and case law are not in harmony with one another. Part III will seek to reconcile the pros and cons of the domestic SSAPT, and will argue for the utility of the SSAPT.

PART I: THE SSAPT AND ITS CONTROVERSY

Self-settled asset protection trusts (SSAPTs) are trusts in which the settlor (the one who creates and provides property for the trust) is also a beneficiary of the trust, and also perhaps the trustee.⁶ These trusts are controversial because they offer protection from creditors for the trust assets, and the concept of one being able to guard one's own assets from one's own creditors is a bitter concept for many to accept.⁷ However, valid arguments have been presented on both sides of the debate, and are worth analyzing.

The typical manifestation of an SSAPT is one where the settlor provides the assets that will make up the trust's corpus, perhaps the settlor names himself as trustee or co-trustee, and the trust documents list the settlor as beneficiary or co-beneficiary.⁸ A settlor must be cautious to not solely hold all three positions of settlor, trustee, and beneficiary, as merger may occur and the trust will be invalid.⁹ Avoiding merger is typically the reason that the settlor must involve another person in the trust's creation, either as co-trustee, co-beneficiary, or trust protector (in

⁵ See generally J. DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 557-60 (7th ed. 2005).

⁶ See Richard W. Nenno & John E. Sullivan, *Planning and Defending Domestic Asset-Protection Trusts*, SN028 ALI-ABA 865 (Nov. 2007).

⁷ See *id.*

⁸ See generally *id.*

⁹ See GEORGE GLEASON BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* 571 (West Publishing 1921).

jurisdictions which allow this).¹⁰ Following the traditional rules of trust creation, typically SSAPTs must be discretionary¹¹ and irrevocable,¹² and must contain a spendthrift clause¹³.¹⁴

The Traditional Rule

SSAPTs within the United States are a relatively new development, first appearing domestically within the last decade.¹⁵ Eight states have thoroughly accepted and adopted these trusts,¹⁶ while three have technically adopted statutes embracing the trust, but the statutes are seemingly unreliable, and the states' case law seems to question acceptance of SSAPTs.¹⁷ Outside of these states, the traditional rule regarding SSAPTs has been to disallow them.¹⁸ In fact, the Uniform Trust Code, and the Second and Third Restatement of Trusts do not authorize extending creditor protection to a trust wherein the settlor retains an interest as beneficiary, even if the trust contains a spendthrift clause,¹⁹ stating: "Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest."²⁰ These texts also do not authorize (or protect) a trust in which the settlor's interest is merely discretionary,²¹ stating: "Where a person creates for his own benefit. . . a discretionary trust, his transferee or creditors can reach the maximum

¹⁰ *See id.*

¹¹ In a discretionary trust, "the trustee has discretion over payment of either the income or the principal or both." DUKEMINIER, ET AL., *supra* note 5, at 533.

¹² If a trust is irrevocable, "the settlor may revoke or amend the trust." DUKEMINIER, ET AL., *supra* note 5, at 584-85.

¹³ A spendthrift clause is a term of a trust that prevents the beneficiary from voluntarily alienating her interest in the trust. *See* DUKEMINIER, ET AL., *supra* note 5, at 547.

¹⁴ *See generally* Nenno & Sullivan, *supra* note 6.

¹⁵ Darsi Newman Sirknen, *Domestic Asset Protection Trusts: What's the Big Deal?*, 8 TRANSACTIONS: THE TENN. J. OF BUS. LAW 133, 133 (2006).

¹⁶ *See* Nenno & Sullivan, *supra* note 6, at 876 (Alaska, Delaware, Nevada, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming).

¹⁷ *See id.* (Colorado, Missouri, and Oklahoma).

¹⁸ *See id.* at 873.

¹⁹ *Id.*

²⁰ RESTATEMENT (SECOND) OF TRUSTS § 156(1).

²¹ Nenno & Sullivan, *supra* note 6, at 874.

amount which the trustee under the terms of the trust could pay to him or apply for his benefit.”²²

These restrictions upon SSAPTs apply even when the trust was made in good faith, that is, not fraudulently or with the intent to hide assets from creditors (present or future).²³

The manifestation of this traditional rule may take different forms depending on the structure of the trust in question.²⁴ For example, in most states, the state’s statutes allow creditors to reach only the settlor’s interest in an SSAPT, not the entire SSAPT corpus.²⁵ This would mean that if a settlor had established a spendthrift trust wherein he designated himself to receive the income payments with the remainder of the corpus going to his co-beneficiary or issue, the settlor’s creditors would only be able to seize his income payments, but they could not disturb the principal, because this would trifle with the interest of someone other than the settlor.²⁶

The Evolution of the SSAPT Domestically

Alaska, in 1997, was the first U.S. state to authorize the use of SSAPTs.²⁷ However, prior to this, Americans were still utilizing the benefits of SSAPTs through the use of offshore trusts²⁸ in jurisdictions “including the Bahamas, the Channel Islands, the Jersey Islands, and Nevis.”²⁹ Offshore trusts offered several benefits to the American investor, not the least of which is the fact that these foreign jurisdictions were not required to enforce American judgments, therefore the settlor’s trust was completely safe from his American creditors.³⁰ One other attractive feature of offshore trusts is that many of them contain a change-of-situs clause, which provides that if

²² RESTATEMENT (SECOND) OF TRUSTS § 156(2).

²³ Nenno & Sullivan, *supra* note 6, at 874.

²⁴ *See id.* at 875.

²⁵ *Id.*

²⁶ *Id.* *See also* Menotte v. Brown, 303 F.3d 1261 (11th Cir. 2002).

²⁷ *See* Sirknen, *supra* note 15, at 136.

²⁸ *See generally* Alexander A. Bove, Jr., *Drafting Offshore Trusts*, TR. & EST., July 2004, at 45-46. For a comparison of domestic and offshore asset protection trusts, see Barry S. Engel & David L. Lockwood, *Domestic Asset Protection Trusts Contrasted with Foreign Trusts*, 29 EST. PLAN. 288 (2002).

²⁹ Sirknen, *supra* note 15, at 134.

³⁰ *See id.*

the trust assets are put in danger, the trust can essentially “flee” from jurisdiction to jurisdiction, thereby making it incredibly expensive and difficult for a creditor to “follow” the trust and expend the energy to recoup debts from such a shifting device.³¹ One estimate “from the year 2000 reported that United States citizens had transferred \$300 million in assets to foreign trusts and that the total amount of American money in offshore trusts exceeded \$1 billion. The number of Americans settling offshore trusts was estimated at around 100,000.”³²

American courts, understandably, looked at these offshore trusts as severely questionable and ethically dubious, and because of this, these trusts have been subject to varying and usually quite hostile treatment by the courts.³³ To illustrate, at least two circuits boast cases in which the settlor/debtor was imprisoned for being in contempt of court because he refused to relocate his trust assets back to the United States from an offshore trust.³⁴

Perhaps as a result of these harsh judgments, or perhaps of the increasingly litigious nature of American society, a push for American states to recognize a domestic form of the SSAPT began and eventually resulted in Alaska’s 1997 statute.³⁵

The Pros and Cons of the Domestic SSAPT

Over the last decade, domestic SSAPTs have been debated by experts and scholars, both sides putting forth valid arguments either for or against³⁶ recognizing a domestic form of the SSAPT.

Cons

³¹ *Id.* at 135.

³² *Id.* at 134-35 (citing Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 502 (2000)).

³³ See generally Sirknen, *supra* note 15, at 135.

³⁴ Fed. Trade Comm’n v. Affordable Media, L.L.C., 179 F.3d 1228 (9th Cir. 1999); *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002).

³⁵ See Nenno & Sullivan, *supra* note 6, at 875.

³⁶ See generally Randall J. Gingiss, *Putting a Stop to “Asset Protection” Trusts*, 51 BAYLOR L. REV. 987 (1999).

Perhaps the strongest and most common argument against the SSAPT is that a settlor should not be allowed to guard his own assets from his own creditors.³⁷ One authority argues: “You should keep your promises and pay your debts because it is the right thing to do. . . . [T]here is something disturbing about a country that would allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle.”³⁸ This principle is evident in many American court decisions regarding offshore trusts, and is illustrated by the above cases in which the courts, to satisfy creditors, were willing to imprison the settlors if they would not repatriate their assets.³⁹ It is this feature of the SSAPT that most likely conjures up the strongest feelings against the SSAPT, because the idea of being able to spend freely and accrue additional debts without having one’s own assets available to repay those debts smacks of dishonesty and underhandedness.⁴⁰

Another argument against SSAPTs is that they allow settlors to engage in reckless conduct with no fear of liability.⁴¹ Monetary liability, along with imprisonment, are the main methods by which laws are enforced in this country. If one is allowed to not only take on debts, but to act in a reckless manner that may injure another’s person or property without the fear that their assets will be utilized to settle those debts or judgments, then there is practically no recourse for the victim, the lender, or law enforcement, nor is there a deterrent in place to persuade people to act appropriately.

There may also be a more dire result of this recklessness within the realm of professional behavior.⁴² Take a lawyer, for example. In a typical situation, lawyers, along with other

³⁷ See Nenno & Sullivan, *supra* note 6, at 876-77; see also Sirknen, *supra* note 15, at 142.

³⁸ Karen E. Boxx, *Gray’s Ghost – A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000).

³⁹ *Supra* note 33.

⁴⁰ See generally Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

⁴¹ See Sirknen, *supra* note 15, at 142.

⁴² See *id.*

professionals, must be careful to advise clients correctly, to draft pleadings appropriately, to address the court with the proper decorum, and so forth. If lawyers do not abide by these mandatory professional standards, they are liable to their clients for malpractice, and may be fined, disbarred, imprisoned, or otherwise sanctioned. The serious consequences that a lawyer faces for malpractice, not the least of which are the monetary sanctions, serve as a deterrent and a motivator for the lawyer to practice law carefully, deliberately, and correctly.⁴³ However, if a lawyer can protect his assets from creditors and judgments by utilizing a SSAPT, any deterrent effect of potential malpractice liability is lost, and the lawyer may become more sloppy, unprepared, and perhaps misleading to the client, which is a general misfortune for the community at large.⁴⁴ This point may be even more distressing when pondering what may happen if doctors became reckless.⁴⁵ There is no doubt that this concern is a valid one.⁴⁶

Other, less passionately received, arguments against SSAPTs exist. Some critics argue that SSAPTs create an unfair advantage for the wealthy, because they are the only ones who can afford to set up and fund SSAPTs.⁴⁷ Some put forth the argument that SSAPT's are always fraudulent:

Both existing and future creditors may be misled into believing that their debtor's financial situation is sound, because he continues to enjoy the benefits of his property, and perhaps is in actual possession of it, although that property has been conveyed by a secret trust instrument to be held for the debtor. Generally there will be actual fraud. . . .⁴⁸

⁴³ For a general discussion, please see BARRY S. ENGEL, ERIC D. SANDERSON & EDWARD D. BROWN, ASSET PROTECTION PLANNING AND CONTEMPT OF COURT *in* ASSET PROTECTION STRATEGIES: PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES 347 (Alexander A. Bove, Jr., ed., 2002).

⁴⁴ See generally Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 38 (1996).

⁴⁵ See Sirknen, *supra* note 15, at 142.

⁴⁶ Anecdotal evidence exists that, because of ever-rising insurance premiums, "some doctors have opted to drop their malpractice insurance altogether in favor of moving their assets into a self-settled asset protection trust." Rachel Emma Silverman, *Litigation Boom Spurs Efforts to Shield Assets*, WALL ST. J., Oct. 14, 2003, at D1.

⁴⁷ See Sirknen, *supra* note 15, at 143.

⁴⁸ BOGERT ON TRUSTS § 223 at 448-49 (footnotes omitted).

Another argument is that SSAPTs infringe upon long-standing exempt property statutes which “provide that certain categories of property are not included in a debtor’s bankruptcy estate and therefore cannot be reached by creditors.”⁴⁹ The thought on this point is that legislatures have already enacted statutes which place limits on creditor’s rights to the extent that they feel is proper.⁵⁰ In a way, SSAPTs seem to laughingly disregard the legislature’s limits, and do away with all creditor’s rights without even acknowledging that these exempt property statutes have been in place far longer than any SSAPT statute.⁵¹ This argument, though, seems conflicted, since it is the same legislature who enacts the SSAPT statute as enacts the exempt property statute. However, it is still a sore point for some experts and scholars, especially those who think things were just fine in the old days before SSAPTs came along.

Pros

For each argument against the SSAPT, there seem to be at least two arguments in favor of it.

Perhaps the most patriotic reason given in support of the SSAPT is that America is one of the last remaining of the common law countries to adopt the SSAPT.⁵² As one commentator puts it:

America stands virtually alone in its rigid and virtually absolute adherence to the rule against self-settled trusts. . . . [B]etween the traditional English common law protective trust, the related statutory short form, the English discretionary trust, and the contemporary [asset protection trust] statutes of many other common law nations, much of the world allows self-settled trusts as a way to shelter assets from the settlor’s creditors, provided that the settlement did not violate fraudulent transfer laws.⁵³

⁴⁹ Sirknen, *supra* note 15, at 142-43.

⁵⁰ *Id.*

⁵¹ *Id.* at 143.

⁵² See Nenno & Sullivan, *supra* note 6, at 879.

⁵³ John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts*, 23 DEL. J. CORP. L. 423, 433, 441 (1998) (footnotes omitted).

It is interesting to ponder why the United States was so late to join the rest of the common law world. Perhaps the existence of the exempt property statutes was enough for those seeking creditor protection.⁵⁴ Or maybe the lobbying influence of big business on the government was enough to keep the SSAPT at bay until Alaska bucked the lobbyists and adopted its statute in 1997.⁵⁵ In any case, whether it is attributable to culture, government, separatist pride, or other features, a legal landscape without self-serving protection plans worked for a long time, and is still working in the vast majority of states.

Another argument in favor of the SSAPT is that, in what some see as pro-plaintiff America, SSAPTs can protect individuals from judgments on meritless claims.⁵⁶ In response to the argument that people shouldn't be allowed to protect themselves from their creditors, one commentator responds, "[W]hile some take the view that 'people should pay their bills,' others note that not all bills (e.g., judgments from meritless claims) are just."⁵⁷ This same commentator recounts a case in which the plaintiff ignored the safety warnings while installing a tire on a bicycle rim, and sued the tire company when injured.⁵⁸ The court ruled in the plaintiff's favor, thus prompting favorable commentary about the ability to protect one's own assets.⁵⁹ The commentator reasons that if the strongest argument against SSAPTs is that they make a settlor judgment proof, then that point is moot: "A person can [also] become judgment proof by becoming poor."⁶⁰

⁵⁴ See *supra* page 7.

⁵⁵ See *supra* page 4.

⁵⁶ Sirknen, *supra* note 15, at 144.

⁵⁷ *Id.* (quoting and citing to John A. Terrill, II, *Domestic Asset Protection Trusts*, ALI-ABA C.L.E. VIDEO L. REV., Nov. 5, 2002, at para. II. B. 7).

⁵⁸ *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998).

⁵⁹ See Sirknen, *supra* note 15, at 144.

⁶⁰ *Id.* at 145.

To find a compromise between these two positions, states can come up with more effective solutions than just banning SSAPTs outright.⁶¹ For example, states may feel compelled to pass legislation that places limits on the amounts of assets that can be protected by an SSAPT.⁶² Another compromise that has been suggested is that settlor's be required to give public notice of their SSAPT, perhaps by filing a document with the recorder's office that would show up on title searches and could be accessed at any time by curious creditors.⁶³ In short, the argument is that SSAPTs can be just as valuable to those who are seeking to protect their wealth against meritless claims and fraudulent encounters as they are to those who are trying to allow themselves to weasel out of their debts or to be unaccountably reckless. Those who argue in favor of SSAPTs seem to be suggesting that banning SSAPTs is an over-reaching way to get to the assets of the latter class, and that perhaps a fairer and less draconian compromise would be to enact some reasonable restrictions and/or requirements that the settlor of an SSAPT would have to abide by.

One thing that must be considered in this analysis is that all trusts are essentially asset-protection trusts, especially if they contain spendthrift clauses.⁶⁴ The purpose of creating trusts is mainly to avoid probate, to obtain favorable taxation situations when disposing of wealth, and also to place assets in a device that provides those assets with protection from creditors, judgments, and irresponsible family members. So the concept that a trust creates asset protection is hardly a novel one. However, the debate concerning SSAPTs revolves around the non-traditional fact that the SSAPT is being created by the settlor for the settlor's own benefit. Some commentators argue that denying settlors the very asset protection that would come in any other

⁶¹ See *id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *DUKEMINIER, ET AL., supra* note 5, at 547-48.

type of spendthrift trust, merely because that settlor created the trust to benefit himself, is stingy and questionable.⁶⁵ Decrying the different treatment of inheritance and gifts with that of self-earned wealth, one commentator states: “[W]e may well question the soundness of a rule which allows a man to hold the bounty of others free from the claims of his creditors, but denies the same immunity to his interest in property which he has accumulated by his own effort.”⁶⁶ The fact that one’s grandmother could leave her wealth to a beneficiary in a spendthrift trust, wherein the assets would be fully protected from creditors, and that the beneficiary is unable to protect his own assets by creating an identical trust for himself, is a hard one to justify, and seems to unduly punish successful people who work hard to acquire their own wealth.⁶⁷

One reason that SSAPTs are slowly creeping their way into states’ laws is that individuals, and U.S. companies, want them here.⁶⁸ Considering the immense amount of money Americans were putting into foreign SSAPTs,⁶⁹ it makes sense that American citizens would favor a domestic SSAPT that would avoid some of the immense technicalities, uncertainties, and difficulties that are involved in international transactions, especially in the case of personal wealth management.⁷⁰ Some such difficulties involve dealing with different languages, legal systems, business procedures, governmental systems, and currency, among others.⁷¹ There is no doubt that those American citizens who are already establishing foreign SSAPTs would rather deal with domestic SSAPTs, if only for the convenience it would present.⁷² Also, domestic

⁶⁵ See Sirknen, *supra* note 15, at 145.

⁶⁶ Duncan E. Osborne et al., *Asset Protection: Trust Planning*, SJ036 ALI-ABA 1419, 1429 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17-21, 2003) (quoting Erwin N. Griswold, *Spendthrift Trusts*, § 474, at 542-43 (2d ed. 1947)).

⁶⁷ See Robert T. Danforth, *Rethinking the Law of Creditor’s Rights in Trusts*, 53 HASTINGS L.J. 287, 347 (2002).

⁶⁸ See Nenno & Sullivan, *supra* note 6, at 882.

⁶⁹ See *supra* page 5.

⁷⁰ See Sirknen, *supra* note 15, at 135.

⁷¹ See *id.*

⁷² See generally David G. Shaftel, *Domestic Asset Protection Trusts: Key Issues and Answers*, 30 ACTEC J. 10 (2004).

SSAPTs make available a valuable wealth planning tool to those less savvy Americans who are either unaware, or too cautious to deal in the international arena.

In conjunction with the desire of American citizens, another argument is that American businesses and government would benefit from the establishment and approval of domestic SSAPTs.⁷³ The one billion dollars of American money⁷⁴ that is currently estimated to be held in offshore trusts could be held in American trusts, and American banks and businesses could be profiting from managing and establishing such trusts. Also, the United States government would benefit, above and beyond any economic upturn that would occur, in that the trusts would be subject to domestic taxation, where foreign trusts are typically beyond the reach of the I.R.S.⁷⁵

Another response to arguments against the SSAPT is that asset protection devices that individuals can utilize to protect their assets already exist in other forms besides the SSAPT.⁷⁶ Family limited partnerships (FLPs), tenancy-by-the-entirety property, retirement plans, limited liability companies (LLCs), homesteads, life insurance policies, and annuity contracts have all been listed as self-settled vehicles through which a settlor can protect his own assets from creditors.⁷⁷ One commentator recounts a method for protecting assets utilizing a standard spendthrift trust:

[P]roperty owners may choose informal means of protecting their assets. For example, the owner could transfer the property in trust, listing family members as beneficiaries. The owner could then grant a power of appointment to a trusted relative, who could then direct that trust assets be distributed back to the settlor. The owner also could transfer property outright to a family member, with the understanding that the property would be used for the benefit of the donor.⁷⁸

⁷³ See Nenno & Sullivan, *supra* note 6, at 882.

⁷⁴ See *supra* page 5.

⁷⁵ See Nenno & Sullivan, *supra* note 6, at 882.

⁷⁶ See *id.* at 881.

⁷⁷ *Id.*

⁷⁸ Sirknen, *supra* note 15, at 147.

These “trickier” methods of protecting assets presents that problem that, say, if the “trusted” family members decide to keep the assets for themselves, the settlor has no way to enforce their gentleman’s agreement to transfer back the assets.⁷⁹ Those who advance this argument make the point that SSAPTs are just more straightforward, less “deceitful” ways for accomplishing asset protection. The argument is, if people can protect their assets utilizing other vehicles,⁸⁰ what is the harm of the SSAPT, especially if it will prevent individuals from seeking ways to skirt the system?

There are also many tax benefits that may stem from the SSAPT, however, these are beyond the scope of this paper.⁸¹ Briefly, these benefits may occur concerning employment tax, taxable gifts, federal transfer tax, state death tax, grantor trusts, inheritance officer/director protection, future ventures, premarital planning, personal-injury awards, state income tax, nonresident aliens, and securities laws, among others.⁸²

Many compelling arguments exist both for and against adopting a domestic form of the SSAPT. Analyzing why specific states have, or have not, adopted the SSAPT is an interesting and real world manifestation of the viability of these arguments.

PART II: THE DEVELOPMENT OF DOMESTIC SSAPTs IN STATE LAW

The state of Missouri is very nearly the geographic center of the United States.⁸³ Therefore, it is fitting that the state of SSAPTs in Missouri has been the subject of a relatively static and slow-moving debate over the years with some for, some against, but most staying directly in the center with one leg in each arena, unwilling to commit. Unfortunately, these

⁷⁹ *See id.*

⁸⁰ *See supra* page 12.

⁸¹ For a discussion of these benefits, see Nenno & Sullivan, *supra* note 6, at 882-889.

⁸² *See id.*

⁸³ Interesting fact: the actual geographic center of the United States is near Lebanon, Kansas, roughly 230 miles from the Missouri border. Wikipedia, “Geographic Center of the Contiguous United States,” *available at* http://en.wikipedia.org/wiki/Geographic_Center_of_the_Contiguous_United_States (last viewed October 14, 2008).

“centrists” include the courts,⁸⁴ this fact adding to the somewhat unreliable history of SSAPTs in Missouri. However, before delving into a history of the SSAPT in Missouri, it will be helpful to review the status of the SSAPT in a few select states, since this may help illustrate the transition that Missouri has recently gone through, and point out some of the reasoning behind it.

As previously stated, Alaska, in April, 1997, was the first U.S. state to pass legislation that approved the utilization of the SSAPT.⁸⁵ Since the SSAPT in Alaska (“Alaska APT”) requires many of the same things other states require of their SSAPTs, this paper will treat the Alaska APT as a representative exemplar of the national approach.

Some of the requirements involved with creating an Alaska APT include:⁸⁶

- 1) First, create a trust.
- 2) The trust must be a spendthrift trust.⁸⁷
- 3) Some or all of the trust corpus must be deposited in Alaska.⁸⁸
- 4) Some of all of the trust corpus must be administered by an Alaskan trustee, such as a bank, a state-chartered trust company, or an Alaskan individual.⁸⁹
- 5) The trustee must maintain trust records and prepare income tax returns for the trust⁹⁰
- 6) The trust administration must take place, at least partially, in Alaska.⁹¹
- 7) It is allowable for the settlor to be a co-trustee, so long as the settlor maintains no power over discretionary distributions.⁹²
- 8) The terms of the trust must expressly set up the settlor’s rights in the trust property.⁹³
- 9) Before creating an Alaska APT, the settlor must sign a solvency affidavit.⁹⁴
- 10) An Alaska APT does not provide creditor protection for the settlor if:⁹⁵
 - a. Trust creation was intended to defraud creditors
 - b. The settlor retains power to, without authorization, revoke or terminate all or part of the trust⁹⁶

⁸⁴ See *infra* pages 19-20.

⁸⁵ Sirknen, *supra* note 15, at 137.

⁸⁶ Though generally taking from statute, a helpful guideline of the Alaska APT was utilized, and can be found at Nenno & Sullivan, *supra* note 6, at 982.

⁸⁷ ALASKA STAT. § 13.36.035(c)(4) (2008).

⁸⁸ *Id.* at § 13.36.035(c)(1)-(2).

⁸⁹ *Id.*; ALASKA STAT. § 13.36.390(2).

⁹⁰ ALASKA STAT. § 13.36.035(c)(3).

⁹¹ *Id.* at § 13.36.035(c)(4).

⁹² *Id.* at § 34.40.110(f).

⁹³ *Id.* at § 34.40.110(i).

⁹⁴ *Id.* at § 34.40.110(j).

⁹⁵ *Id.* at § 34.40.110(b).

⁹⁶ Please notice that this requirement stipulates that the trust be irrevocable *only* with regards to the settlor. It is entirely feasible under Alaskan law to have a revocable trust be a form of firm SSAPT, so long as the settlor does

- c. The trust is mandatory (at least as to the settlor)
- d. At the time the trust is created, the settlor has defaulted on his child support order by thirty or more days.

These requirements are fairly typical for domestic SSAPT creation and governance. At the very least, they provide guidance regarding the basic elements.

The above list of requirements is certainly not exhaustive, but merely illustrative of the typical requirements for setting up a domestic SSAPT. If the above requirements are not followed, in Alaska (which, again, is fairly typical of other jurisdictions), the Alaska APT is defeated, and a creditor will be able to reach the settlor's interest in the trust.⁹⁷ However, the creditor may only reach the settlor's trust assets to the extent necessary to pay the creditor's claim.⁹⁸ The settlor's one grace in this situation is that so long as there was no fraud involved in creating the trust, the settlor will be able to use his trust assets to pay the litigation costs before paying off the creditor's claim.⁹⁹ This may serve as a deterrent to creditors, and, though it may not save the settlor's trust assets, it will likely save the settlor from having to fund litigation out of non-trust assets.

Delaware followed very shortly after Alaska, passing its "Delaware APT" statutes in July, 1997.¹⁰⁰ Clearly, with Alaska and Delaware passing their laws so close in proximity, they can be looked at equally as domestic SSAPT trailblazers. Because of their parallel legislation, it is interesting to note some of the differences in their domestic SSAPT creation processes. For example, a domestic SSAPT under Delaware law must be an irrevocable trust,¹⁰¹ whereas Alaska

not have the sole and unauthorized power to revoke the trust. This is a concession that is not present in most typical domestic SSAPT provisions (i.e. Delaware, Missouri, Nevada, Missouri). The typical domestic SSAPT would require the trust to be irrevocable overall.

⁹⁷ See Nenno & Sullivan, *supra* note 6, at 984-85.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 975.

¹⁰¹ Sirknen, *supra* note 15, at 138.

would allow revocable trusts to qualify as enforceable SSAPTs under certain circumstances.¹⁰² This difference is notable, in that Alaska APT settlors very well could create a revocable SSAPT, which would allow them to protect their assets from creditors, while at the same time reserving the power to revoke the trust and reclaim all assets for themselves to the disadvantage of any other beneficiaries. Of course, the limits Alaska law establishes prevent the most egregious of abuse that could take place under this circumstance, as the specifics of the statute require that, if a revocable SSAPT is created, the settlor must not be able to revoke or terminate any or all of the trust “without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust.”¹⁰³ This offers a built-in protection against abuse. However, among other situations, it is not so far-fetched to conjecture that it is possible for two individuals in an alliance with one another to band together and revoke a trust after guarding assets from creditors, perhaps technically according to the rules, but nevertheless defrauding the creditor. There are also less fraudulent and less devious ways in which this rule may be evaded that would result in an initial guarding of assets from creditors, only to result, later down the road, to eventual revocation and restoration to the settlor of all control and benefit of his assets.

Another interesting difference between the Delaware and Alaska SSAPT guidelines is that, unlike Delaware, Alaska does not permit a creditor to defeat the Alaska APT because of constructive fraud.¹⁰⁴ Constructive fraud would occur in a situation that occurs:

[I]f the [settlor] was engaged or was about to engage in a business or transaction for which the [settlor’s] remaining assets were unreasonably small or intended to incur, or believed or reasonably should have believed that the [settlor] would incur, debts beyond the [settlor’s] ability to pay as they became due.¹⁰⁵

¹⁰² See *supra* note 90.

¹⁰³ ALASKA STAT. § 34.40.110(b)(2).

¹⁰⁴ See *Nenno & Sullivan, supra* note 6, at 991.

¹⁰⁵ *Id.*

Though theoretically significant, one commentator explains why he thinks this may not be anything to worry about:

The distinction between the Alaska and Delaware remedies is potentially significant, but probably only in a handful of cases. . . . Many instances of constructive fraud are also cases of actual fraud: transfers that result in insolvency and which also lack an exchange of reasonably equivalent value are often exchanges that were meant to hinder, delay, or defraud creditors. . . . Thus, the distinction between Alaska and Delaware is limited to only the remaining cases of constructive fraud, i.e., those cases that are not also instances of actual fraud. . . . Thus, this difference between the Alaska and Delaware statutes is really more theoretical than practical.¹⁰⁶

There has always been a very strong public policy governing how child support and alimony orders are to be given priority when it comes to creditors.¹⁰⁷ The basic idea is that it would offend the public conscience to allow an individual to shield one's assets, whether it be through a trust, declaring bankruptcy, or any other vehicle, while avoiding support responsibilities to children or ex-spouses. Of course, adding to this policy, beyond any emotional reaction, is the concept that if an individual does not support his family, then the state must. Courts are famously not amiable to this. Accordingly, an interesting difference exists between the Alaska and Delaware SSAPT legislation regarding these family law support obligations. The Alaska APT¹⁰⁸ legislation contains no exception for any sort of spousal alimony claims,¹⁰⁹ while the Delaware SSAPT legislation "permits a person, who was married to the trustor at or before the time that the trust was created, to reach the assets of a Delaware APT at any time."¹¹⁰ As to child support, Delaware once again abides by public policy by allowing a child support claim at

¹⁰⁶ *Id.* at 991-92 (quoting John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts*, 23 DEL. J. CORP. L. 423, 445 n.83 (1998)).

¹⁰⁷ See, e.g. Ira Mark Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107 (2008).

¹⁰⁸ This is also true for the Nevada SSAPT legislation.

¹⁰⁹ Nenno & Sullivan, *supra* note 6, at 992.

¹¹⁰ *Id.*

any time,¹¹¹ while an Alaska APT is open to such a claim only if the settlor is delinquent on a child support payment by 30 or more days *at the time they created the trust*.¹¹²

These restrictions on family support obligations by Alaska APT legislation seem to laugh in the face of a longstanding public policy understanding. It is because of this almost unbelievable disregard for a longstanding and much supported policy that there are some who believe that these restrictions cannot, in good conscience, be honored by the courts:

Alaska's narrow exception for child support orders that must have been in arrears more than 30 days at the time of the transfer, and Nevada's even more restrictive approach, may be wishful thinking. Recently enacted federal law not only requires states to give full faith and credit to child support orders in accordance with federal law, but also overrides the law of the forum with respect to any period of limitations in enforcing a child support order.¹¹³

It is likely that the high regard for the national policy that one needs to fulfill one's own family support obligations will override any seemingly airtight provisions in SSAPT legislation saying otherwise, no matter what state's legislation is being analyzed.

All nuances aside, certainly the analysis above sheds light on all of the particular issues state legislation regarding SSAPTs must deal with. Sometimes these varied issues may cause confusion between legislation and case law, particularly in states in which the SSAPT legislation is relatively new. This is certainly the case in Missouri, a state where multiple legal commentators have noted the disharmony between law and judicial interpretation.¹¹⁴

¹¹¹ *Id.*

¹¹² ALASKA STAT. § 34.40.110(b)(4). It should be noted that Nevada's requirement is stricter, allowing no child support claim at any time.

¹¹³ Nenno & Sullivan, *supra* note 6, at 992 (quoting Richard G. Bacon & John A. Terill, II, *Domestic Asset Protection Trusts Work – Should They?*, 26 TAX MGMT. EST., GIFTS & TR. J. 123, 137 (2001)).

¹¹⁴ See, e.g. John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 174 n. 54 (2004).

Although Alaska is generally credited with being the first state to enact domestic SSAPT legislation,¹¹⁵ Missouri, in fact, was already headed in that direction before Alaska even started thinking about it:

[The 1986 statute]¹¹⁶ allowed a trustor to create a self-settled trust for the benefit of a class of beneficiaries (including the trustor) on a discretionary basis. The statute provided that a spendthrift clause would prevent the trustor's creditors from reaching trust assets unless the creation of the trust was a fraudulent conveyance or the trustor was the sole beneficiary (of either income or principal), retained a power to revoke or amend the trust, or was one of a class of beneficiaries with the right to receive a specific portion of income or principal determined solely from the provisions of the trust instrument.¹¹⁷

However, because Missouri attorneys and fiduciaries largely ignored and did not promote the statute, these trusts did not become popular and did not become integrated into mainstream estate planning and asset protection advising procedure; indeed the validity of the legislation was also questioned by the federal court on more than one occasion.¹¹⁸

The first of these federal court instances was in the 1991 case of *In re Enfield*.¹¹⁹ This case involved a couple who filed for bankruptcy under Chapter 7.¹²⁰ The couple was seeking exemption of their respective pension plans from their "estate."¹²¹ Although the court held that the assets in their plans were exempt from the estate, the court made a point to emphasize that this was solely because they were public employees who were protected by public ordinances and statutes authorizing an anti-alienation clause on those assets.¹²² The court explicitly opines that the principles behind SSAPTs are "inequitable," stating:

Spendthrift trusts traditionally have been set up by individuals for the support of an improvident or financially unsophisticated family member. . . . [I]t is

¹¹⁵ See *supra* page 4.

¹¹⁶ MO. REV. STAT. § 456.080.3 (1987).

¹¹⁷ Nenno & Sullivan, *supra* note 6, at 989.

¹¹⁸ See *id.*

¹¹⁹ 133 B.R. 515 (Bkrtcy. W.D. Mo. 1991).

¹²⁰ *Id.*

¹²¹ *Id.* at 518.

¹²² *Id.* at 519.

inequitable to allow an individual to put his assets beyond reach of creditors through the simple expedient of creating a spendthrift trust.¹²³

This statement made by the court was too broad, as the statute actually did allow a settlor to create a spendthrift clause for himself, but with certain limitations.¹²⁴ However, the impression left by this court's blatant disregard for explicit statutory language was understandably frightening, and it is no wonder that legal practitioners became hesitant to encourage their clients to engage in this sort of asset protection.

Then, in 1995 in a situation similar to the one above, the U.S. Court of Appeals for the Eighth Circuit reversed the U.S. Bankruptcy Court for the Eastern District of Missouri, holding that the spendthrift provision of a trust was invalid under Missouri law.¹²⁵ The situation in this case is similar to the situation in *Enfield*, in that there was a couple who filed for Chapter 7 bankruptcy who were seeking to keep the corpus of their spendthrift trust out of their bankruptcy estate.¹²⁶ They had settled a trust, naming themselves as both the trustees and beneficiaries.¹²⁷ Although the bankruptcy court had agreed that the trust assets were protected, the Eighth Circuit disagreed and reversed, stating:

While the Markmuellers may have created a valid trust, the spendthrift provision can be invalidated on two distinct grounds: its revocability, and Markmueller's degree of control over trust assets. . . . [T]he spendthrift provision of a trust will not protect the settlor's beneficial interest in trust assets from creditors 'if at the time the trust was established . . . the settlor . . . retained the power to revoke or amend the trust.'¹²⁸

Although the court cites to the trust's revocability and beneficiary degree of control as reasons why the trust fails, this seems to be extremely slippery reasoning, as the statute does not

¹²³ *Id.*

¹²⁴ See Nenno & Sullivan, *supra* note 6, at 989.

¹²⁵ *Markmueller v. Case*, 51 F.3d 775 (8th Cir. 1995).

¹²⁶ *Id.* at 776.

¹²⁷ *Id.*

¹²⁸ *Id.* at 776-77 (citations omitted).

expressly prohibit those circumstances. This case is an example of the kind of contradictory judicial interpretation that makes legislators smack their palms to their foreheads, because what the Eighth Circuit did in its dicta is to simultaneously discourage citizens from engaging in these sorts of spendthrift trusts, discourage legal practitioners from assisting people to do so, and undo the entire goal of the statute, which was assumedly to bring more trust funds to Missouri.

For many years following these discouraging court decisions, and for apparent reasons, Missouri was not a favorable place for interested people to set up spendthrift trusts for personal asset protection. However, in July of 2004, Missouri enacted a statute, virtually identical to the former one, which essentially reaffirms its support of SSAPTs,¹²⁹ stating, in part:

With respect to an irrevocable trust with a spendthrift provision, a spendthrift provision will prevent the settlor's creditors from satisfying claims from the trust assets except:

- (1) Where the conveyance of assets to the trust was fraudulent as to creditors pursuant to the provisions of chapter 428, RSMo; or
- (2) To the extent of the settlor's beneficial interest in the trust assets, if at the time the trust became irrevocable:
 - (a) The settlor was the sole beneficiary of either the income or principal of the trust or retained the power to amend the trust; or
 - (b) The settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.¹³⁰

It is significant that the Missouri legislature essentially re-passed this statute.¹³¹ The clear message sent by this legislative action is a forceful public policy statement legislatively affirming Missouri's acceptance of the SSAPT as an acceptable and appropriate wealth planning device. However, there is a vast difference between legislative affirmance (or creation) of a

¹²⁹ See Nenno & Sullivan, *supra* note 6, at 989.

¹³⁰ MO. REV. STAT. § 456.5-505.3 (2007).

¹³¹ See Nenno & Sullivan, *supra* note 6, at 989

public policy and the public acceptance and utilization of that policy. It will be interesting to note in the coming years how citizens of Missouri react to this re-issuance of legislation, whether it be with elation or trepidation. As of fall 2008, there has been no judicial action concerning the newly passed statute. Considering the judicial history of treatment of SSAPTs in Missouri, this is not a surprise.

It is important to note, however, that 1987 and 2004 are vastly different time periods in the SSAPT scheme of things. In 1987, the so-called “asset protection trusts” were a controversial device which typically entailed sending your assets to a tropical island and a Swiss banker. Such devices smelled fishy, and conjured up images of men in white shirts and ties being hauled into prisons with their sport coats over their heads.¹³² However, perhaps now with the increasing popularity and acceptance of the domestic SSAPTs in other states, Missouri courts will be persuaded of their validity, and clients can have some security in knowing that their Missouri SSAPT will not be nullified judicially.

PART III: WHY THE SSAPT IS GOOD FOR AMERICA

The fact that people are keen to protect their wealth is not surprising, nor merely a modern fad. Such a desire has been around since the creation of monetary systems. So, it follows that the debate surrounding SSAPTs is not so much one of whether one should be able to guard his individual wealth, but rather one regarding at what expense. A folktale perhaps aptly describes the situation:

The hunters of the Western Ghats trap monkeys by placing narrow mouthed vessels filled with groundnuts. They also scatter a few groundnuts on the ground nearby. The monkeys arrive and eat the groundnuts. They look for more in the vessels. The narrow mouth of the vessel allows the hand to be squeezed through. The monkeys take a handful of groundnuts and the fist gets stuck in the vessel.

¹³² See generally Boxx, *supra* note 36.

They can take their hands out if they drop the groundnuts. But, the monkeys do not want to and stay trapped until the hunters come back.¹³³

One side of the debate might analogize that trapped monkey to American society at large. The opponents to SSAPTs argue that Americans are becoming too reckless and greedy with their asset protection strategies, and are setting themselves up to be societally trapped by a device of their own doing that perhaps encourages a fiscal irresponsibility that very well may be severely damaging to society. Just like the monkey who allows himself to be caught by the hunter because of his own overindulgence, the opponents argue that Americans should be happy with the mainstream wealth strategies they already have. In other words, stick to the groundnuts that are scattered on the ground and leave the vessel alone.

In response to this line of reasoning, proponents of the SSAPT might say that the vessel is not a death sentence at all. In fact, if the monkey were smart and could find a way to carry that vessel out of the hunting ground, his whole troop might benefit from the extra groundnuts that lay within. Hence, proponents argue that SSAPTs exist internationally, irrespective of whether domestic SSAPTs are approved. Why not bring that billion dollars¹³⁴ of trust assets to the American economy?¹³⁵

Essentially, the SSAPT debate comes down to this fundamental question: “Why [should] protection from creditors [be] available only to recipients of *inherited* wealth and not also to persons who *earn* wealth and then create a self-settled trust?”¹³⁶ Doesn’t added domestic protection for earned wealth provide incentives for Americans to contribute to the American

¹³³ Ancient Indian folktale, found in S. Mohan Raj, *The Road to Affluence*, THE HINDU FOLIO, August 27, 2000, available at <http://www.hinduonnet.com/folio/fo0008/00080380.htm> (last visited August 23, 2008).

¹³⁴ See *supra*, page 5.

¹³⁵ For more information, see generally Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356 (2005).

¹³⁶ DUKEMINIER ET AL., *supra* note 5, at 557.

economy, which, in turn, is good for everyone?¹³⁷ In fact, domestic SSAPTs can be a valuable wealth planning device that can exert a positive influence on American society at large.

However, it would be wise to exert some requirements for SSAPTs to follow to prevent SSAPTs from being used for fraud and deception.¹³⁸

Key to the avoidance of SSAPT fraud is the lawyer who assists the client with creation of the SSAPT.¹³⁹ One commentator, advising legal practitioners on how to choose for whom to assist with an SSAPT, describes the “best candidate” for such a trust:¹⁴⁰

A client who:

- 1) Has no current creditor problems (or has assets in excess of what is needed to cover existing and foreseeable claims);
- 2) Has a general concern about future claims by creditors;
- 3) Has assets that will not be needed to meet current and foreseeable living expenses; and
- 4) Will not want frequent access to the assets being protected.¹⁴¹

Further advice to attorneys advises them to do an up-front, thorough solvency analysis of the client, making sure that their debts do not exceed their assets, and that they can afford to fund the SSAPT in general.¹⁴² Lawyers should not overlook “the value of all debts, liabilities, threats, guarantees, contingent claims, pending lawsuits, and potential claims faced by the client,’ as well as all assets currently protected from creditors.”¹⁴³ After calculating the above figures, the practitioner is advised to then “fund the trust with *only a portion* of the leftover assets so that the

¹³⁷ See generally Sitkoff & Schanzenbach, *supra* note 129.

¹³⁸ See generally *supra* pages 10-11.

¹³⁹ See Sirknen, *supra* note 15, at 149-150. Also, for a discussion of ethical issues in this context, see generally Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP., PROB. & TR. J. 561 (2004).

¹⁴⁰ *Id.*

¹⁴¹ Richard W. Nenno, *Planning with Domestic Asset Protection Trusts*, SJ036 ALI-ABA 421, 430 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17-21, 2003).

¹⁴² See Osborne et al., *supra* note 61, at 1432.

¹⁴³ *Id.*

transfer does not render the settlor insolvent” (emphasis added).¹⁴⁴ The reason for this is as follows:

Because the fraudulent transfer statutes require proof that the transfer placed the transferor at risk of being unable to satisfy his obligations, courts are more likely to uphold the transfer if the settlor did not place all of his or her available assets into the trust.¹⁴⁵

The legal practitioner’s duty does not stop there:

In addition, practitioners should make sure that settlers understand they will not have access to the trust assets whenever they wish. One practitioner suggests that the trustor should include other beneficiaries in addition to himself and that, if possible, the trustee should never distribute trust assets to the trustor. If the settlor understands this concept from the beginning and still wants to create the [SSAPT], he or she probably has a legitimate estate planning motive.¹⁴⁶

If lawyers are keen on making sure their clients understand both the consequences and the inappropriate/illegal usages of SSAPTs, much potential fraud can be avoided, and SSAPTs can be more of a significant and useful tool.¹⁴⁷

Coupled with conscientious, apt, and able attorneys, legislatures should also implement certain restrictions upon the SSAPT.¹⁴⁸ These restrictions should quell or quash the most negative aspects of the SSAPT, namely, their usage to hide assets from creditors,¹⁴⁹ and to promote reckless behavior.¹⁵⁰ As was previously suggested,¹⁵¹ one idea to accomplish this end is to require legislation that places limits on the amounts of assets that can be protected by an SSAPT.¹⁵² Although this legislation would perhaps serve to prevent an individual from shielding extremely large amounts of assets from creditors, it would likely also discourage a client from

¹⁴⁴ *Id.* at 1433.

¹⁴⁵ Sirknen, *supra* note 15, at 149-50.

¹⁴⁶ *Id.*

¹⁴⁷ *See generally id.*

¹⁴⁸ *See supra*, pages 10-11.

¹⁴⁹ *See supra*, page 6.

¹⁵⁰ *See supra*, pages 6-7.

¹⁵¹ *See supra*, pages 10-11.

¹⁵² *See Sirknen, supra* note 15, at 145.

using a domestic SSAPT, and instead encourage the wealthiest clients to go overseas for their SSAPT management, thus frustrating the goal of the original domestic SSAPT legislation. Also, such a limit on SSAPT assets would be very hard to define, especially in the case of real estate, or other such investments, where the value is constantly fluctuating and subject to current economic conditions.

However, another compromise has been advanced¹⁵³ that should be seriously taken into consideration by lawmakers: a requirement that settlors of SSAPTs be required to give public notice of their SSAPT by filing a document with the recorder's office, which would be present on title searches for all creditors to see any time they wish.¹⁵⁴ This recording requirement is a good idea. Indeed, it would serve to discourage any settlors who wanted to "secretly" establish a domestic SSAPT for the purpose of shielding assets from current or foreseeable creditors, but this is not a bad thing. In fact, legislation should serve to discourage lawbreaking. The recordation requirement would not discourage legitimate settlors from creating an SSAPT, for if one has nothing to hide, then theoretically no harm can come from conducting one's business in the public eye. There may be a privacy concern involved, in that settlors may not want to have the exact details of their trust corpus available for public viewing. However, this concern could likely be tempered by recordation guidelines which were crafted to protect specifics. For example, the guidelines could require that the recorded document include a grand monetary total of the trust corpus, without requiring a specific asset list. Also, as discussed above, because real estate and investments are subject to fluctuation, an annual re-filing requirement could be implemented, requiring the settlors (or their attorneys or accountants) to annually file an updated form with the recorder's office which would contain the new corpus value. Although this would

¹⁵³ See *supra*, page 10.

¹⁵⁴ See Sirknen, *supra* note 15, at 145.

mean that the accuracy of the recorded document would be questionable during the year, it would at least be representative, and would provide creditors with a knowledge of a debtor's likely financial situation.

CONCLUSION

Each person desires to protect his or her wealth. Although it would be nice for each American to have a personal Pirate Ragnar¹⁵⁵ who would sail around and reclaim our individual wealth from unjust creditors, this is not a reality. Instead one is forced to take advantage of the less extreme wealth protection strategies like trusts. Self-settled asset protection trusts, although less understood and more prone to controversy (currently), are valuable wealth strategy devices that should be utilized domestically by Americans. Each jurisdiction should follow the trend begun by Alaska¹⁵⁶ and adopt legislation allowing the creation of domestic SSAPTs, arguably with a public notice requirement. Such legislation would move a vast amount of wealth from the international arena into the American economy, thus serving to bolster American coffers rather than Bahamian ones. SSAPTs would prove to be a boon to the economy, would create jobs, and would bolster settlor confidence in the security of their inter vivos assets in American trusts.

¹⁵⁵ *Supra* pages 1-2.

¹⁵⁶ *See supra* page 4.