Self-Settled Trusts After Wacker

Reports of the Death of Self-Settled Trusts Have Been Exaggerated

©2018 by Jonathan G. Blattmachr, Abigail E. O’Connor & Martin M. Shenkman
General Disclaimer

- The information and/or the materials provided as part of this program are intended and provided solely for informational and educational purposes. None of the information and/or materials provided as part of this power point or ancillary materials are intended to be, nor should they be construed to be the basis of any investment, legal, tax or other professional advice. Under no circumstances should the audio, power point or other materials be considered to be, or used as independent legal, tax, investment or other professional advice. The discussions are general in nature and not person specific. Laws vary by state and are subject to constant change. Economic developments could dramatically alter the illustrations or recommendations offered in the program or materials.
Thank you to our sponsors

- Peak Trust Company
  - Matthew Blattmachr
  - (888) 544-6775
  - mblattmachr@peaktrust.com
  - First DAPT and involvement with ING trusts
Thank you to our sponsors

- InterActive Legal
  - Vanessa Kanaga
  - (321) 252-0100
  - vkanaga@interactivelegal.com
  - sales@interactivelegal.com
Tony 1 Trust v. Wacker (AK Sup Ct Mar. 2018)

After both Montana and the US Bankruptcy Courts entered default judgments on a lawsuit claiming that the transfers to an Alaska trust were fraudulent, the trustee commenced an action in Alaska courts seeking a judgment that the decisions in Montana and the US Bankruptcy Court were essentially void because Alaska Statute 34.40.110 provides that any court proceeding relating to transfers to self-settled Alaska trusts must be determined exclusively by Alaska courts. The Alaska Supreme Court refused.

Some have contended that the decision is the death knell for self-settled trusts created in any DAPT state by a resident of a non-DAPT state. But the truth is far different.
Background of Self-Settled Trusts

- Self-Settled Trusts. Whenever Someone Creates a Trust from Which He or She May Receive Distributions, It Is a Self-Settled Trust—that Is, A Trust One Has Created (or “Settled” as the English Say) for One’s Self. That Is Not Per Se Sinful.

- IRAs Are Self-Settled Trusts.

- Before 1997 (the Alaska Trust Act), Creditors of the Settlor Throughout the US Could Attach the Assets in a Self-Settled Trust Regardless of Why Created or When the Claim Arose. It Was Just a Rule.

- Now about 18 States Allow DAPT.
Distinction to Fraudulent Transfers

- All states basically void, or make voidable, fraudulent transfers. The identity of the transferee does not matter (family member, friend, trust, LLC). It is the intention of the transferor that counts (whether to hinder, delay or defraud creditors).

- And even though most fraudulent transfer claims are made under state law, the US Bankruptcy Code was amended in 2005 to add additional restrictions. US Bankruptcy Code Section 548(e) provides that a transfer to a self-settled trust (or similar device) may be set aside if it occurred within ten years of the filing of the petition for bankruptcy and was made “with an actual intent to hinder, delay or defraud” a creditor.
Fraudulent Transfer Acts

- Uniform Fraudulent Conveyance Act (Alaska).
- Uniform Fraudulent Transfers Act (Most States).
- The Uniform Voidable Transfers Act (“UVTA”) at Section 4, Comment 8, makes mention that a transfer to a self-settled domestic asset protection trust (DAPT) is voidable if the transferor’s home state does not have DAPT legislation. (Nine states have adopted the UVTA).
Contrast to Self-Settled Trusts

- Self-settled trusts are clearly different than fraudulent transfers. Nearly everyone in America takes some action to avoid future claims that might otherwise arise.
  - Prenuptial Agreements and Pre-Marriage Trusts to Avoid Right of Election Claims (revocable trust in some states may defeat elective share).
  - Acquiring Homestead Property – e.g. FL.
  - Tenants by entirety -- e.g. NJ for real estate, PA for even intangibles.
  - IRAs and Qualified Plans.
  - Using Limited Liability Business Entities.
Legitimate Reasons for a Self-Settled Trust

- Good Estate Planning Especially in Light of the Temporary Increase in the Wealth Transfer Exemptions.
- The Magic of Compounding.
- What If the Settlor Wants Access to the Gifted/Sold Assets?
  - Self-Settled Trusts?
  - Non-Reciprocal SLATs?
Estate Taxation and Self-Settled Trusts


- What If Home State Allows Creditor to Attach (Uniform Voidable Transfers Act)?

- Key: Can Settlor Merely “Relegate” the Creditors to the Trust Per Rev. Rul. 76-103?
Other Legitimate Reasons for Self-Settled Trusts

- ING Trusts: What They Are; What They May Do: State Income Tax Avoidance, Greater Deduction(s) under Sections 199A and 164.

- Salty SLATs
  - Need for Adverse Party
  - Gift In? Gift out?

- Income tax savings are an independent (non-asset protection) reason for creating non-grantor trusts.
Avoid Being a Self-Settled Trust

- Restatement (Second) of Trusts, Section 156(2) (1959) provides in relevant part “[w]here a person creates for his own benefit, a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.” (Emphasis added).

  - What about a Hybrid DAPT? (Allow the Grantor to Be Added as a Beneficiary; After 10 Years; only if no spouse).

  - What About a Trust Where Distributions to the Settlor Can Only Be Made by the Exercise of a Special Power of Appointment Held by a Non-Fiduciary? (A Collateral Power of Appointment).

  - In ING power to distribute back to settlor held by committee who are not acting in fiduciary capacity. Some call it a power of appointment committee. This avoids self-settled trust status.
Is Wacker Just a Case of Bad Facts Make Bad Law?

- Are Bad FLP cases Viewed Differently than Bad DAPT Cases?
- Rush University Case. (Available on the handout bar)
- Wacker: The court did not hold that Alaska law would allow the creditors of the grantor access to the trust’s assets. And that is the key. If the trust is located in a jurisdiction, such as Alaska, Nevada or Delaware, which does not automatically and permanently subject trust assets to the claims of the grantor’s creditors, it may well be upheld.
- Governing Law (Restatement (second) Conflict of Laws, Sec. 270/273 on Governing Law vs. Sec. 6 on Validity.
What Should Practitioners Do? - 1

- Encourage Clients to Continue Planning.
  - Use of the Temporary Increase in the Wealth Transfer Tax Exemptions.
    - If Cannot Afford to Transfer that Much Wealth Consider Non-Reciprocal Trusts (But Best in a DAPT Jurisdiction in Case the IRS Convinces a Court to Uncross the Trusts Especially If Trust Comes Back for Settlor).
  - Self-Settled Trusts

  - ING Trusts—Will Work Only If Not Subject to Creditor Claims.
  - Salty SLATs—Use a DAPT Jurisdiction Especially If the Trust Comes Back for Settlor.
What Should Practitioners Do? - 2

- How to draft documents?
- Dealing with INGs, SALTY-SLATs, traditional grantor non-reciprocal SLATs and more under the new planning paradigm.
- Using drafting software.
What Should Practitioners Do? - 3

- Existing DAPTs
- Check Them Out, Consider Decanting or Court Modification.
- Writing to Clients.
- Is a client a current client, inactive client, former client or what?
- Writing to former Clients.
- Is the communication an attorney advertising.
Questions?

- We’ll answer questions even if it goes over the time.
- Please post questions in the chat bar time permitting.
- Any questions not responded to can be emailed to the speakers (see below).
Summary and Conclusions

- Asset Protection Planning Is a Common Occurrence.

- Self-Settled Trusts Can Be Used for Many Legitimate Purposes Where Asset Protection Is Merely a Necessary Consequence of Their Use, Not the Primary Reason for Their Use.

- Don’t Use a Self-Settled Trust as the Primarily Tool for Asset Protection; Rather, Acquire Exempt Assets and take other steps.

- Self-Settled Domestic Asset Protection Trusts May Serve Legitimate (Non-Fraudulent Transfer) Purposes and, Therefore, Are Alive and Well.
Additional information

Abby O'Connor
abigail.oconnor@hklaw.com

Jonathan G. Blattmachr
jblattmachr@hotmail.com

Martin M. Shenkman
shenkman@shenkmanlaw.com
CLE Credits

- For more information about earning CLE credit for this program or other Martin Shenkman programs please contact Simcha Dombush at NACLE. 212-776-4943 Ext. 110 or email sdombush@nacle.com
Thanks Again To Our Sponsors:

PEAK TRUST COMPANY
Elevated Trust & Wealth Management Solutions

InterActive Legal