

# Should you consider an offshore asset protection trust?

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for the Post Register

Have you worked hard to build your business into a successful enterprise? Have you saved hours to create a prospering professional practice? Have you carefully and frugally handled your finances over the years so that your portfolio has become a sizable "nest egg" for your "golden years"? If so, your future is looking very bright. Or is it? Suddenly, someone sues you without any warning, and everything changes in terms of your financial security.

How do you react to the bad news? First, you wonder how good the liability shield of your corporation or limited liability company really is. Then, you drag out your insurance policy to carefully review the fine print to make sure there are no gaps in coverage. Finally, you decide to call your attorney to see whether your business, your home and your "nest egg" is really protected if the party suing you prevails in court.

Does this scenario sound like something that will never happen to you? Can you be so sure in today's litigious society? What impact will the "air" of success surrounding your booming business or prospering profession have on an attorney looking for a "deep pocket" in litigation? What kind of "scent" will your "nest egg" carry to a hungry claimant who feels he or she has been "wronged" in some manner by you or your company?

Whether you like it or not, you and everyone else who is reading this article face the possibility of a lawsuit at some point in the future. What have you done to protect your business, your profession or your financial "nest egg" from the clutches of an unwanted creditor? After all, insurance policies do have "loop holes", creditor exemptions are not without limitations, the jury system is far from perfect, and skillful litigation attorneys are always looking for a new way to "pierce" an entity's shield protecting you against personal liability.

What is the solution? Consider one of the strongest asset protection tools available, an offshore Asset Protection Trust or APT. What is an APT? It is a trust which has been established in a country outside of the United States with laws favorable to an individual desiring to protect his or her business or personal assets from the claims of unwanted creditors. In a nutshell, it is a jurisdictional "strongbox" located offshore for holding your most prized financial possessions.

How does the APT work? In the offshore asset protection arena, some countries provide better protection than others. The key to its success is to pick a jurisdiction that has asset protection laws which level the "playing field" against a tenacious team of litigation lawyers representing an injured plaintiff. Currently, one of the most popular spots for setting an APT is the Cook Islands in the South Pacific. However, there are

many other jurisdictions worthy of consideration depending on an individual's situation.

What factors should be considered in making a selection? One of the main factors is the time period imposed for setting aside transfers of assets under a particular country's fraudulent conveyance laws. Such laws are designed to prevent individuals from transferring assets to intentionally avoid the claims of creditors. For example, most fraudulent conveyance laws do not allow an individual to transfer assets when claims are pending or where the transfer bankrupts the individual.

With this factor in mind, assets should be transferred into an APT before a litigation "storm" develops. In other words, offshore trust asset protection planning must be done while an individual is financially sound and at a time when no claims have been asserted or the assets remaining in the transferring individual's name are sufficient to cover any pending claim. There are other factors to consider, too, and each factor needs to be carefully analyzed by a competent professional in deciding whether an APT makes sense for you.

Who should consider this type of planning? Accountants, architects, engineers, lawyers, physicians, dentists, and any other professionals who may be sued for malpractice or negligence. Business executive, officers and directors of a corporation, partners and members in a partnership or limited liability company, and principals of any other successful business are also prime candidates. Anybody with a "nest egg" of around \$500,000 or other substantial assets should explore an APT. Failing to do so in these circumstances may be like the ostrich keeping its "head in the sand".

What does it cost? The charges for creating an APT typically run between \$15,000 and \$20,000. The charges may include the creation of a family limited partner-

ship as part of the package. The inclusion of a family limited partnership allows the individual creating the trust to keep most, if not all, of his or her assets close at hand until an unexpected claim surfaces or a lawsuit strikes without any warning. The charges should also include the initial fees of the offshore trustee. After the trust has been created, the offshore trustee's annual maintenance fees typically run between \$1,500 and \$2,500.

Is an APT's strength in secrecy? The answer is an emphatic "no!" To the contrary, the APT's strength comes from its disclosure to creditors and any other interested party. The structure works because a good "choice of law" is made. Where a correct choice has been made, the documentation has been skillfully drafted, and the trust has been properly funded with appropriate assets, an unwanted creditor will have to chase your portfolio across an ocean (and, perhaps, even several oceans) only to ultimately run into a "brick wall".

Are there any adverse tax consequences in using an APT? The answer is that there should not be. A properly structured APT is completely tax neutral. There should be no transfer tax implications unless desirable in a particular individual's situation, and the tax treatment of income should remain the same. Once the trust documents have been properly drafted and implemented, the key to maintaining a "tax neutral" position is to disclose the creation of the trust to the Internal Revenue Service and to comply with all reporting requirements in the Internal Revenue Code.

Can estate planning be done through an APT? Yes. It can be an excellent estate planning tool, either alone or in conjunction with other estate planning instruments. For example, an APT could be used as the main mechanism for taking advantage of the annual gift tax exclusion, the unified credit or the generation skip-

ping transfer tax exemption. An APT could also be used in conjunction with a family limited partnership. And, the APT can do these things while shielding your estate's assets against unwanted creditor claims, where many traditional estate planning techniques may not be able to do so.

What are the disadvantages of an APT? One disadvantage is an individual's lack of absolute control over distributions from the trust and many other administrative responsibilities and functions which are held by the offshore trustee. However, it is this lack of control which creates the asset protection feature. In other words, the more control an individual retains over such decisions, the less asset protection will be available to him or her. Still, an individual must feel comfortable with the offshore trustee who will be in charge of holding and managing the assets which are placed into the offshore trust.

Another disadvantage is the fact that the offshore trustee may need to invest the assets of the offshore trust in foreign securities markets and other similar investments if and when an assault upon assets occurs. These types of investments will not receive the protection provided by various governmental institutions and laws in the United States, such as the State of Idaho's Department of Finance or its "blue sky" laws and regulations, or the Federal Deposit Insurance Corporation or the Federal Securities and Exchange Commission and any of the corresponding laws and regulations.

The cost of establishing and maintaining an APT in an offshore jurisdiction can also discourage its use by many who should take advantage of this

type of planning. This cost, however, becomes insignificant when an individual is faced with a lawsuit or claim which could end with the confiscation of everything he or she has toiled for years to acquire. Once the APT is established, the annual trustee's fees can be a fraction of the cost of a good malpractice policy or commercial liability policy for most businesses or professions.

A word of caution is in order. An APT should only be viewed as a supplement to, and not a replacement of, adequate liability insurance coverage. In fact, an individual's failure to carry such insurance coverage may undermine asset protection planning through an APT, since a person cannot leave his or her creditors without any recourse. In asset protection planning, the goal should not be to completely avoid the claims of creditors. It is merely to avoid becoming the target defendant of a litigant or claimant who sees you as a "deep pocket".

Do you need to take a closer look at the possibility of using an APT in your situation? Most estate planning is spent on preserving wealth built by you for the next generation. It should also include protecting such wealth for your use during your lifetime. Have you adequately protected your business, your profession or your "nest egg" from the claims of unwanted creditors? If not, perhaps you should consider consulting with a qualified professional and advisor on the subject today.

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