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**KEEPING CRIME FROM PAYING:
STRATEGIES AND TACTICS FOR RECOVERING FUNDS FROM
EMBEZZLING EMPLOYEES**

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Typically, the surety which has paid out on a fidelity bond will attempt to obtain reimbursement from the defalcating employee. Whether in its own name or pursuant to an assignment, loan receipt agreement, or subrogation receipt, the surety is entitled to step into the shoes of its bond principal and sue the embezzler. Its lawsuit will typically include several different counts, including counts for conversion, unjust enrichment or assumpsit, money had and received, breach of fiduciary duty, fraud, accounting and constructive trust. Quite often injunctive relief and punitive damages are also sought. These causes of action are not the focus of this paper. Rather, this paper will be intended to be a quick primer on some other legal and equitable tools that a surety may need to utilize when it has difficulty recovering its money after it has paid out on a loss due to employee embezzlement. The paper will also address the mechanics of offshore and domestic trusts and techniques that creditors can use to break them to reach the assets. Finally, the paper will briefly discuss actions against third party participants in the embezzlement scheme.

MISCELLANEOUS TOOLS FOR RECOVERY - A PRIMER

The law provides many tools for recovery against an embezzling employee. The requirements and procedure for each, even in the case of actions in federal court, are typically governed by state or local law and therefore vary. Nevertheless, there are some procedures and elements common to most jurisdictions. These include the following:

1. Attachment - Attachment is a prejudgment procedure whereby real or personal property is levied upon when the creditor fears that the debtor will abscond with such property prior to judgment. Attachments are governed by the law of the particular jurisdiction in which the action is pending.¹ In most cases, obtaining of a writ of attachment is dependent upon the filing of an affidavit in support of the attachment as well as a sufficient bond, often in double the amount of the property sought to be attached.

2. Replevin - Replevin is an action at law which provides a vehicle by which a party who claims an immediate right to possess certain personal property can recover the property from the person who is wrongfully withholding it. A party seeking replevin typically has the option of proceeding to trial with or without attempting to obtain pre-judgment possession of the property. If the plaintiff seeks to take possession of the property prior to judgment, he typically must file an affidavit, post a bond, and have written notice served upon the defendant.

3. Judgment Lien - A judgment lien is a lien which arises upon entry of a judgment. Typically, this lien is effective against the real property of a judgment debtor. Depending upon the jurisdiction, the judgment lien may be created automatically upon entry of judgment, or upon filing of a certified or authenticated copy with the recorder of deeds or circuit clerk. Like any lien, it may be foreclosed upon in accordance with the lien foreclosure law of the

¹ Moreover, even in the federal courts, Rule 64 of the Federal Rules of Civil Procedure provides that attachments "are available under the circumstances and in the manner provided by the law of the state in which the district court is held."

jurisdiction in which the real property is situated.

4. Enforcement of Foreign Judgments. The enforcement of “foreign judgments”, i.e. judgments from a federal or state jurisdiction other than the one in which the judgment is sought to be enforced, is mandated by the Full Faith and Credit Clause of the United States Constitution. This is accomplished in two major ways.

In order to enforce a judgment obtained in one federal court in another federal court, one must utilize **28 U.S.C. Section 1963. Registration of judgments for enforcement in other districts**, which provides that:

“A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. Such a judgment entered in favor of the United States may be so registered any time after judgment is entered. A judgment so registered shall have the same effect as a judgment of the district court where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.”

In order to enforce a judgment in most state courts, whether such judgment was obtained in another state court or a federal court, resort is usually to the state’s enactment of the Uniform Enforcement of Foreign Judgments Act,² which (with some variation state to state) provides:

Definition. In this [Rule or Statute] “foreign judgment” means any judgment, decree or order of the United States or of any other court that is entitled to full faith and credit in this state.

Filing and Status of Foreign Judgments. A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the clerk of any circuit court of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a circuit court of this state and may be enforced or satisfied in like manner.

² That Act has been adopted by 42 states.

Notice of Filing.

At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and mail proof of mailing same with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(d) Stay.

If the judgment debtor shows the circuit court that an appeal from the foreign judgment is pending or will be taken or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was entered.

If the judgment debtor shows the circuit court any ground upon which enforcement of a judgment of any circuit court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period upon requiring the same security for satisfaction of the judgment that is required in this state.

Optional Procedure. The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this [Rule or Statute] remains unimpaired.

Uniformity of Interpretation. This [Rule or Statute] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that adopt the "Uniform Enforcement of Foreign Judgments Law."

5. Levy - A levy is the post-judgment seizure by the sheriff or marshal of real or personal property, including funds, in aid of execution on a judgment. This seizure may be actual or constructive. In the case of funds, the proceeds of the seizure are typically applied directly to the judgment. In the case of real or personal property, the seized property is typically sold at a sheriff's or marshal's sale and the sale proceeds applied to the judgment.

6. Garnishment - A garnishment is utilized when the judgment creditor suspects that

another person or entity (the “garnishee”) is indebted to the judgment debtor or has in his or her possession, custody or control any property or funds belonging to the judgment debtor or in which the judgment debtor has an interest. In conjunction with garnishments, discovery may be typically served upon the garnishee so as to require the garnishee to provide to the judgment creditor, under oath, the extent of money or property held by the garnishee. The judgment creditor is entitled to recover from the garnishee, to the extent of the judgment creditor’s judgment, any amounts owed by the garnishee to the judgment debtor as well as any property or funds in the possession, custody or control of the garnishee which belong to the judgment debtor or in which the judgment debtor has an interest.

7. Post-Judgment Discovery of Assets. Most jurisdictions provide specific mechanisms for discovery of a judgment debtor’s assets. For example, Federal Rule of Civil Procedure 69(a) provides that: “In aid of the judgment or execution, the judgment creditor or a successor interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.” Thus, after obtaining a judgment, the judgment creditor can use all of the discovery tools that it had prior to obtaining the judgment in order to ferret out the assets of the debtor.³ These tools include:

- Depositions
- Subpoenas
- Interrogatories
- Requests for Production of Documents
- Requests for Inspection of Property
- Requests for Admission

In addition to the above discovery, most jurisdictions provide for a court-supervised method for obtaining information in regard to a judgment debtor’s assets. At these proceedings, often called judgment debtor’s examinations or citations to discover assets, the judgment creditor is permitted to examine the judgment debtor and other individuals in the courthouse before a judge. The advantage of these proceedings is that the judgment creditor may ask the presiding judge to compel the witness to answer questions concerning. The disadvantage of these proceedings is that courts frequently do not have the time or the desire to preside over lengthy judgment collection proceedings and therefore frequently limit the availability of these proceedings, notwithstanding the provision therefor in the jurisdiction’s rules of civil procedure.

8. Piercing the corporate veil - A creditor is sometimes faced with the situation where a debtor that does not appear to have any assets him or herself to satisfy a debt but is affiliated with, by ownership or otherwise, a corporation that does have assets with which to satisfy the debt. Not uncommonly, the debtor has utilized such corporation in such a fashion so as to

³ We have included as appendices the following forms which may be useful in the post-judgment collection process: Financial Statement (Appendix A); Deposition Notice and Request for Production of Financial Documents (Appendix B); Sample Questions for Judgment Debtor’s Deposition or Examination (Appendix C).

have the law deem the corporation the “alter ego” of the debtor and thereby allow the creditor to “pierce the corporate veil” and obtain access to the corporation’s assets. Piercing the corporate veil in order to collect a debt may be done as part of an underlying civil action against a debtor or after obtaining a judgment in aid of execution. Generally, in order to pierce the corporate veil, the creditor must show that (1) there has been an abuse of the corporate form such that one corporation has been made a mere instrumentality of another individual or corporation⁴; and (2) that adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice.⁵

9. Complaint for Nondischargeability pursuant to Section 523 of the Bankruptcy Code. When the jig is finally up, the embezzling employee may file bankruptcy. Although this usually does not bode well for the surety and its attempts to latch onto a quick recovery, the fidelity bond surety can usually fare better in bankruptcy than the rest of the embezzling employee’s creditors. This is because the surety can timely file a complaint for nondischargeability of its debt under 11 U.S.C. Section 523. The sections of that portion of the Bankruptcy Code which are of particular relevance to an embezzlement situation provide that the debtor is not entitled to a discharge of debts:

“(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;
use of a statement in writing—
that is materially false;
respecting the debtor’s or an insider’s financial condition;
on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
that the debtor caused to be made or published with intent to deceive...

for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;...

(6)for willful and malicious injury by the debtor to another entity or to the property of another entity...

provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union...

for any payment of an order of restitution issued under Title 18, United States Code.”

⁴ Evidence of this abuse of the corporate form can be shown by a number of factors, including: (1) failure to maintain adequate corporate records or to comply with corporate formalities; (2) commingling of funds or assets; (3) undercapitalization; (4) an individual or entity treating the assets of the corporation as its own; and (5) failure to maintain the facilities normally required to operate a separate business.

⁵ See, *Van Dorn Co. v. Future Chemical & Oil Corp.*, 753 F.2d 565 (7th Cir. 1985); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987)

Successful resolution of a nondischargeability complaint will result in a judgment for a nondischargeable debt in favor of the surety while many of the debtor's other debts are discharged. As a result, the surety may be able to recoup some of the its payments from the embezzler.

10. Involuntary Bankruptcy. Involuntary bankruptcy may be an effective technique for a creditor that is unsuccessful in obtaining payment but feels that (a) there are assets out there to satisfy its debt; or (b) simply wants to bring closure to the debt-collection process. This procedure is governed by Section 303 of the Bankruptcy Code⁶ The advantage of this procedure is that, under penalty of the crime of bankruptcy fraud, the debtor must provide full disclosure of his assets, which assets are then available to satisfy the claims of creditors. Moreover, a trustee may be appointed to take control of such assets for the benefit of the bankruptcy estate, thereby preventing the further diversion of assets by the debtor.

11. Creditor's Bill. One effective, although little used, equitable remedy is known as a creditor's bill or creditor's suit. This is usually brought by a creditor to enforce the payment of a judgment debt.⁷ The creditor is allowed to satisfy this debt out of assets normally not available through ordinary legal means.⁸ In other words, the creditor can reach legal and equitable assets of the debtor which are not accessible by liens, garnishments or attachments. The creditor's bill is a very versatile tool which can be applied to many situations, including setting aside fraudulent conveyances⁹.

There are generally several requirements that the creditor must meet before instituting a creditor's bill: 1) the creditor must have obtained a valid judgment against the debtor in a separate proceeding; 2) the creditor's judgment must have been executed and returned unsatisfied; and 3) the debtor does not have enough personal or real property to satisfy the judgment. Once you have satisfied these requirements, you can file a creditor's bill. Moreover, while the suit is pending, the court has the power to issue restraining orders and other injunctive relief to prevent the debtor from transferring assets.

The suit, in order to be effective, should accurately describe the property you are trying to recover.¹⁰ It is also necessary in an embezzlement situation to allege that the property exists, but that the property has been concealed or its whereabouts are unknown.¹¹ The creditor can then use discovery methods and demand from the debtor a general disclosure of the debtor's assets.¹² This disclosure will allow the court to satisfy the judgment by seizing any available legal or equitable assets that the debtor has revealed.¹³ If the debtor fails to cooperate with discovery or the order to disclose assets, the debtor could, depending on the intestinal fortitude of the presiding judge, face contempt charges, arrest and even imprisonment.

⁶ 11 U.S.C. Section 303. A copy of this provision is set out in Appendix E.

⁷ 21 Am Jur. 2d, Creditors' Bills, §1.

⁸ *Black's Law Dictionary* 369 (6th Ed. 1990).

⁹ 21 Am Jur. 2d, Creditors' Bills, §1.

¹⁰ 21 Am Jur. 2d, Creditors' Bills, §75.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Stephen V. Cheatham, *Creditor's Bills as Judgment Recovery Tools* (August 30, 1999).

12. Fraudulent Conveyance Suit. The creditor can also bring another equitable remedy action known as a fraudulent conveyance lawsuit, demanding that money or property be returned on the grounds of fraud.¹⁴ A fraudulent conveyance is any transfer of a debtor's assets made for the purposes of hindering, delaying or defrauding actual or potential creditors. The transfer can be to another person or entity, or to an instrument such as a trust.¹⁵ The courts have outlined several "badges of fraud" which can be used to help identify a fraudulent transfer. Among these "badges of fraud" are: 1) transfer of almost all of the debtor's assets; 2) transfer was made around the time that a debt was incurred; 3) no adequate consideration received for the transfer; 4) the debtor became insolvent after the transfer; 5) the transfer was made to family members; 6) the debtor concealed the transfer; 7) the debtor was either sued or threatened with a lawsuit shortly before the transfer; and 8) the debtor disappears after the transfer. The creditor has remedies similar to those in the above-mentioned creditor's bill: recovering the transferred assets by voiding the transfer or recovering damages of the debtor's property which are equivalent in value to the missing assets.¹⁶

13. Criminal Restitution. Restitution is frequently ordered as part of the sentencing of white collar criminals such as embezzlers. While this very frequently a source of subrogation for the fidelity bond surety, it is rarely a substitute for aggressive collection efforts. The authors' experience is that in most cases restitution payments dry up soon after the period of court-supervised probation or parole ends. Moreover, even when the embezzler fails to make ordered restitution payments while still under court supervision, courts are—out of historical abhorrence to "debtor's prisons", mercy or because of the overcrowding of prisons--loathe to send the embezzler back to prison. In short, while restitution payments will likely provide some subrogation, they very rarely result in full repayment of the embezzled funds.

TRUST-BUSTING AND THE CHALLENGES OF OFFSHORE TRUSTS AND DOMESTIC ASSET PROTECTION TRUSTS

Putting assets in trust in order to attempt to place the assets out of reach of creditors is a time-honored ploy of the swindler. Nevertheless, these trusts can be penetrated by conventional techniques such as the creditor's bill and a fraudulent conveyance lawsuit. However, for legal and practical reasons, the offshore trust provides a much greater challenge to the creditor. Embezzlers may simply drop out of sight by fleeing the country with the money or may remain in the country but send their money abroad. When this occurs, the tedious hunt for the money and/or the embezzler begins. Unfortunately, the net result is that frequently the creditor gives up due to the sheer magnitude and expense of locating funds, navigating foreign laws, and attempting to repatriate the funds. Embezzlers know this and take advantage of these practical realities. One prime place they like to send their funds to is offshore trusts.

On the surface, an offshore trust appears to be a match made in heaven for the embezzler. Many offshore trusts provide a myriad of protection devices which are appealing to an embezzler, and these protection devices at first glance seem to make the trust

¹⁴ In the bankruptcy context, 11 U.S.C. Section 548 permits the Trustee to avoid fraudulent transfers of assets and bring these assets back into the estate for the benefit of the bankrupt's creditors. A copy of this provision is set out in Appendix D.

¹⁵ Jay D. Adkisson, *Fraudulent Transfers*, (August 5, 1999).

¹⁶ Adam Starchild, *Transfers of Property: Is it a Fraud?* (August 6, 1999).

impenetrable. Some examples are:

- statutes of limitations as short as one year;¹⁷
- standard of proof is “beyond a reasonable doubt” rather than the easier “preponderance of the evidence”, which is used in the United States for fraudulent conveyances;¹⁸
- courts in offshore trust jurisdictions will often not enforce a judgment rendered in the United States;¹⁹
- the settlor of a trust can serve as both a trustee and a beneficiary;²⁰
- claimants must start lawsuits over de novo in foreign jurisdictions, and therefore are often barred under the short statute of limitations;²¹
- if a creditor files suit in the foreign jurisdiction, the creditor must hire a lawyer in that jurisdiction who does not charge a contingency fee;²²
- duress clauses which provide that if a settlor of a trust gives an order “under duress” (for example, a U.S. court judgment) to the trustee, the trustee can ignore that order;²³ and
- creditors can reach only that part of the trust which is deemed to be fraudulent.²⁴

There are other such protection devices, but perhaps the most devious one of them all involves a little game of switcheroo. In this type of trust, there are two trustees: a custodian trustee and a managing trustee.²⁵ The custodian trustee is located in the off-shore trust jurisdiction, and holds title to and has actual possession of the trust assets.²⁶ Meanwhile, the managing trustee is usually the settlor of the trust and remains in the United States.²⁷ This managing trustee makes all the decisions regarding management and administration of the

¹⁷ Robert J. Mintz, *Lawsuit Proof: Using Asset Protection Trusts*, http://www.rjmintz.com/Lawsuit_proof_Ch9.html (August 4, 1999).

¹⁸ David Jacquot, *A Primer on Offshore Asset Protection Trusts*, <http://www.wealthdefense.com/prod01.htm> (September 2, 1999).

¹⁹ Robert J. Mintz, *Lawsuit Proof: Using Asset Protection Trusts*, http://www.rjmintz.com/Lawsuit_proof_Ch9.html (August 4, 1999).

²⁰ *Ibid.*

²¹ Howard D. Rosen, *The How's and Why's of Offshore Trusts in Asset Protection Planning*, http://www.protectyou.com/OFFSH__TR-fr.html (August 30, 1999).

²² Howard D. Rosen, *Offshore Trusts Can Create Legal Obstacle Course for Claimants*, http://www.protectyou.com/MED_BUS-fr.html (August 4, 1999).

²³ Lawrence A. Caplan & Leo J. Spivack, *Offshore Asset Protection Trusts*, <http://www.virtuallaw.com/ap.htm> (September 3, 1999).

²⁴ Howard D. Rosen, *The Uses and Abuses of Offshore Trusts*, <http://www.protectyou.com/journal-fr.html> (August 4, 1999).

²⁵ Patricia A. Donlevy-Rosen & Howard D. Rosen, *New Cook Islands Legislation: Fine Tuning the Law*, <http://www.protectyou.com/apn5-4-fr.html>, (August 4, 1999).

²⁶ *Ibid.*

²⁷ *Ibid.*

trust.²⁸ When trouble arises, the creditor will usually go after the managing trustee in the United States since the courts have jurisdiction over him.²⁹ The trust instrument makes provision for exactly such an event. When the creditor sues the managing trustee, the managing trustee can automatically be removed as a trustee entirely.³⁰ The custodian trustee gains full power over the trust, including management of the trust.³¹ Since the original managing trustee is no longer involved with the trust, the suit which named him as a defendant is now void.³² The creditor must start over and sue the custodian trustee in the offshore jurisdiction, and face more difficulties such as the statutes of limitations and unfamiliar laws.³³ Many off-shore jurisdictions allow for this type of trust, which causes headaches for numerous creditors.

Although the assets located in these types of trusts seem to be unreachable, all is not lost. There are ways that creditors can crack these trusts and reach the assets, especially where embezzlement is involved and the embezzled assets can be directly traced abroad. For example, the Cook Islands in the Southwestern Pacific Ocean has become a popular place for off-shore trusts.³⁴ However, the Cook Island Courts have not especially warmed up to the idea of protecting criminals: “we would be loathe to interpret the International Trust Act as a statute which was intended to give succor to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors.”³⁵

Trustees and attorneys who help embezzlers establish these trusts may also be subject to charges. Under the Cook Islands’ Trustee Companies Regulations Act of 1996, legal advisors or trustees who “knowingly participate in the transfer of assets to the trust under fraudulent circumstances,” such as embezzlement, may also commit an offense and find themselves subject to sanctions or criminal penalties.³⁶ This legislation, therefore, provides some deterrent for trustees and attorneys when faced with aiding an embezzler.

Another important piece of Cook Islands’ legislation was passed in 1996. The Cook Islands’ Offshore Act was enacted to ensure that Cook Islands companies and trusts are not used to launder the proceeds of “serious criminal activity.”³⁷ Serious criminal activity is defined as “any activity which is or would be an offense under the Crimes Act of 1969 of the Cook Islands if such activity occurred in the Cook Islands, and if the offense carries a *maximum penalty of at least five years* (emphasis added).”³⁸ Embezzlement more often than not falls into this category, and the trust will be deregistered if the Cook Islands High Court is satisfied *beyond a reasonable doubt* that the assets in the trust are the proceeds of serious

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ A copy of the Cook Islands’ International Trust Act is set out in Appendix F.

³⁵ David Jacquot, *The Cook Islands: The Premier Offshore Asset Protection Jurisdiction*, <http://www.wealthdefense.com/newpage18.htm> (August 30, 1999)

³⁶ Alan Taylor, *TrustNet Group Newsletter: Legislative Developments in the Cook Islands*, <http://www.trust-net.com/oin.htm> (August 6, 1999)

³⁷ Ibid.

³⁸ Ibid.

criminal activity.³⁹

The Cook Islands also provide other “safeguards” to ensure that illegal funds are not used to set up trusts in their country. For example, trust companies in the Cook Islands will generally not accept a trust for registration unless it is submitted by a U.S. attorney “with whom the trust company is familiar and comfortable.”⁴⁰ Also, the settlor of the trust is required to provide the trust company with details concerning the settlor’s solvency, along with any current or possible lawsuits which have been or may be filed against the settlor.⁴¹ However, perhaps the most important “safeguard” that the Cook Islands can offer is this: a Cook Islands trust may protect assets that originally belonged to a settlor, *but will not offer protection of assets that were misappropriated by that settlor.*⁴² Thus, theoretically at least, offshore trusts will not enable an embezzler to protect assets to which that person did not have proper title to in the first place. Unfortunately, this offers little solace to the judgment creditor seeking to recover funds or assets which cannot be directly traced to the embezzlement.

Recent Action in the 9th Circuit: The Anderson Case

One hopeful sign for the judgment creditor comes in the form of a recent case out of the 9th Circuit, FTC v. Affordable Media, LLC, et al., (9th Cir. Case No. 98-16378, June 15, 1999). That case provides some hope for creditors in reaching assets stashed away by debtors in offshore trusts. Michael and Denyse Anderson were telemarketers, and had put assets into a Cook Islands trust in July, 1995.⁴³ A few years later, in April of 1997, they began working for a company known as The Sterling Group.⁴⁴ It turns out that The Sterling Group was defrauding its investors and customers, and the FTC went after The Sterling Group, the Andersons, and others involved with the scheme.⁴⁵ The FTC asked the Andersons to return the money they earned working for The Sterling Group, and eventually obtained an injunction which required the Andersons to withdraw money from their Cook Islands trust.⁴⁶ The Andersons refused, claiming the “impossibility defense.”⁴⁷ They claimed it was impossible to return the money since the trustee in the Cook Islands was prohibited from giving it to them; the Andersons’ Cook Islands’ trust had a “duress clause” in it, and the injunction put the Andersons “under duress” to return the money.⁴⁸ Since it was “impossible” to return the money, the Andersons claimed that the court could not hold them in contempt.⁴⁹ After all, the law of equity tells us that one cannot be held in contempt for failing to do something which is impossible for him to do.

³⁹ Ibid.

⁴⁰ Robert J. Mintz, *Lawsuit Proof: Protecting Your Assets from Lawsuits and Claims, Appendix B*, http://www.rjmintz.com/lawsuit_proof_appb.html (August 4, 1999)

⁴¹ Ibid.

⁴² TrustNet Group, *TrustNet Group Newsletter: Asset Protection - You Owe It To Your Clients*, <http://www.trustnet.com.hk/apt.htm> (August 6, 1999)

⁴³ FTC v. Affordable Media, LLC, et al., _____ F.3d_____ (9th Cir. Case No. 98-16378, June 15, 1999)

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

However, the court did not view it quite that way. The district court judge put the Andersons in jail for contempt of court anyway.⁵⁰ They stayed in jail for five months until the money in the trust was somehow, miraculously, made available to the FTC.⁵¹ The Andersons were then released from jail. After their release, however, the contempt order remained in effect.⁵² The Andersons appealed their case to the 9th Circuit. Much to their chagrin, the 9th Circuit affirmed the district court.⁵³ Therefore, in the 9th Circuit at least, the impossibility defense will no longer work (because the settlor creates the impossibility), and the debtor will remain in jail until the money is made available.⁵⁴ Debtors may also be exposed to other charges, such as obstruction of justice and conspiracy. Attorneys who assist these debtors may be subject to professional discipline.⁵⁵

It should be noted, however, that the Anderson case could be distinguished on the grounds that the settlors retained too much power in the trust.⁵⁶ The Andersons, it could be argued (and has been in the media), had more control than what is typical in an offshore trust.⁵⁷ Also, another interesting twist has recently developed in that a Cook Islands court has ruled that the 9th Circuit's decision to replace the Cook Islands trustee with the FTC was an invalid exercise of power.⁵⁸ In any case, though, as shown by the Affordable Media case, it may be possible to use the assistance of various law enforcement agencies in bringing back trust assets, as well as punishing those who have obstructed justice.

Domestic Asset Protection Trusts - Alaska and Delaware

Embezzlers may think that they have similar options closer to home than the offshore jurisdictions. Alaska and Delaware enacted asset protection trusts in 1997 which resemble the trusts which offshore jurisdictions offer⁵⁹, but creditors will find it easier to access assets in domestic trusts. In contrast with the offshore trust, the creditor can file anywhere where the court has jurisdiction over the person (the settlor, beneficiary, or trustee) or the res (the trust). Moreover, unlike the much tougher burden of proof for fraudulent transfer actions found in many offshore jurisdictions, most jurisdictions in the United States only requires a creditor to prove his case by a "preponderance of the evidence", rather than the more difficult "beyond a reasonable doubt."⁶⁰ The statutes of limitation for bringing a fraudulent conveyance action

⁵⁰ Jay D. Adkisson, *The Adkisson Analysis of The Anderson Case*, <http://falc.com/trusts.andr-dis.htm> (August 5, 1999)

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *FTC v. Affordable Media, LLC, et al.*, _____ F.3d _____ (9th Cir. Case No. 98-16378, June 15, 1999)

⁵⁴ Lynn Asinof, *The Wall Street Journal: U.S. Appeals Court Says Trusts Can't Be Used to Protect Assets*, <http://interactive.wsj.com/archive/retrieve.cgi?id=SB93172742657> (August 5, 1999)

⁵⁵ Jay D. Adkisson, *The Adkisson Analysis of The Anderson Case*, <http://falc.com/trusts.andr-dis.htm> (August 5, 1999)

⁵⁶ Patricia A. Donlevy-Rosen & Howard D. Rosen, *The Asset Protection News: The Cook Islands Stand Up to the U.S. - Anderson Revisited*, <http://www.protectyou.com/apn8-3-fr.html> (September 2, 1999)

⁵⁷ Lynn Asinof, *The Wall Street Journal: U.S. Appeals Court Says Trusts Can't Be Used to Protect Assets*, <http://interactive.wsj.com/archive/retrieve.cgi?id=SB93172742657> (August 5, 1999)

⁵⁸ Patricia A. Donlevy-Rosen & Howard D. Rosen, *The Asset Protection News: The Cook Islands Stand Up to the U.S. - Anderson Revisited*, <http://www.protectyou.com/apn8-3-fr.html> (September 2, 1999)

⁵⁹ Martin A. Goldberg, *Domestic Asset Protection Trusts: Will They Give You the Protection You Need?* <http://www.podiatrymgmt.com/articles/goldbert-98-6.htm> (September 3, 1999).

⁶⁰ Robert J. Mintz, *Lawsuit Proof: Using Asset Protection Trusts*, http://www.rjmintz.com/Lawsuit_proof_Ch9.html (August 4, 1999).

seeking trust assets in the United States, including those of Alaska and Delaware, are generally substantially longer than for offshore trusts, which frequently only allow for one to two years.⁶¹

From a substantive law standpoint, while offshore jurisdictions normally have their own definitions of “fraudulent conveyances” which do not take the “badges of fraud” into account,⁶² domestic asset protection trusts are subject to the “badges of fraud” analysis set out in the fraudulent conveyances section of this paper.⁶³ Finally, assets do not have to be present in some offshore jurisdictions, such as the Cook Islands.⁶⁴ Alaska and Delaware, on the other hand, require that at least some portion of the assets remain in those states.⁶⁵ This requirement has the effect of making at least some of the trust’s assets easier to find for creditors.⁶⁶

There are more difficulties for those who choose to set up asset protection trusts in the United States. Domestic asset protection trusts will probably find themselves open to Constitutional attacks which the offshore trusts are not subject to. Three such attacks come to mind: the Full Faith and Credit Clause, the Supremacy Clause and the Contracts Clause.⁶⁷ The Full Faith and Credit Clause declares that all states must acknowledge and recognize any judgment issued by any other state.⁶⁸ By asserting this argument against a domestic trust, a creditor can obtain a judgment in the state where the creditor lives and enforce it against the assets held in trust in another state.⁶⁹ The Supremacy Clause has possibilities for being a very interesting argument. At any time, Congress could pass legislation which would enable it to declare these types of trusts null and void.⁷⁰ The courts have already publicized their dislike for offshore asset protection trusts, so it may be only a matter of time for Congress to override these domestic trusts. Finally, the Contracts Clause in the Constitution does not approve of state-created methods which deprive creditors of their right to seize a debtor’s assets and nullifies the debtor’s repayment obligations.⁷¹ These domestic asset protection trusts have the potential to do just that and therefore may be held to violate the Contracts Clause.

⁶¹ Ibid.

⁶² Robert J. Mintz, *Lawsuit Proof: Using Asset Protection Trusts*, http://www.rjmintz.com/Lawsuit_proof_Ch9.html (August 4, 1999).

⁶³ Howard D. Rosen, *The Uses and Abuses of Offshore Trusts*, <http://www.protectyou.com/journal-fr.html> (August 4, 1999).

⁶⁴ Howard D. Rosen & Patricia A. Donlevy-Rosen, *Domestic Asset Protection Trusts: Do They Work?* <http://www.protectyou.com/domapt-fr.html> (September 3, 1999).

⁶⁵ David Jacquot, *Offshore v. Onshore Asset Protection Trusts*, <http://www.wealthdefense.com/newpage21.htm> (September 2, 1999).

⁶⁶ Ibid.

⁶⁷ Howard D. Rosen & Patricia A. Donlevy-Rosen, *Domestic Asset Protection Trusts: Do They Work?* <http://www.protectyou.com/domapt-fr.html> (September 3, 1999).

⁶⁸ David Jacquot, *Offshore v. Onshore Asset Protection Trusts*, <http://www.wealthdefense.com/newpage21.htm> (September 2, 1999).

⁶⁹ Howard D. Rosen & Patricia A. Donlevy-Rosen, *Domestic Asset Protection Trusts: Do They Work?* <http://www.protectyou.com/domapt-fr.html> (September 3, 1999).

⁷⁰ Ibid.

⁷¹ David Jacquot, *Offshore v. Onshore Asset Protection Trusts*, <http://www.wealthdefense.com/newpage21.htm> (September 2, 1999).

ACTIONS AGAINST BANKS AND OTHER THIRD PARTIES

In pursuit of subrogation, the fidelity bond surety may very well have viable causes of action against third parties that participated in the embezzlement in some way. Traditionally, sureties have looked to the common law for actions enabling them to recover funds from banks, financial institutions and other third parties which may have been involved in the transactions which resulted in funds being embezzled.⁷² The reason for this is that under the common law, a third party participant in a breach of trust would be liable for any loss caused by such breach even though such third party was not a transferee of the trust asset involved in the particular transaction. *Restatement (Second) of Trusts*, Section 326 (1959). Moreover, at common law, a bank acted at its peril and was charged with a legal duty to ensure that fiduciary funds transferred to or from it were not being transferred in breach of a fiduciary duty.

However, the enactment of the Uniform Fiduciaries Act (UFA) in approximately half of the states and the Uniform Commercial Code (UCC) in all fifty states (plus the District of Columbia, Virgin Islands and Guam) have altered the common law liability of banks by either displacing the common law entirely or providing significant defenses to a bank in situations where the bank is involved with a defalcating fiduciary.⁷³ Although, an in-depth discussion of the current state of the law on this subject is beyond the scope of this paper, suffice it to say that recourse against banks, financial institutions and other third parties is substantially more difficult since passage of the UFA and UCC.⁷⁴

CONCLUSION

In sum, the law provides a number of different tools and techniques for pursuing subrogation against an embezzler. These tools and techniques enable a determined creditor to pursue assets of the embezzler and his accomplices domestically and abroad. Moreover, even though it might be expensive and impractical to do so, the fidelity bond surety need not automatically write-off funds transferred into the much-vaunted offshore trust since even that is legally vulnerable.

⁷² See, e.g., *National Casualty Company v. Caswell Company*, 317 Ill.App. 66, 45 N.E.2d 698 (Ill.App. 1942); *State Bank and Trust Company v. Commercial Trust and Savings Bank*, 21 N.E.2d 157, 300 Ill.App. 435 (Ill.App. 1939); *Citizens National Bank of Waco, Texas v. Fidelity & Deposit Company of Maryland*, 117 F.2d 852 (5th Cir. 1941); *FDIC v. American Surety Corp.*, 39 F.Supp. 551 (W.D.Ky. 1941); *English v. Palmer National Bank of Danville*, 202 Ill.App. 372 (Ill. App. 1916).

⁷³ See, *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987).

⁷⁴ For a discussion of this law, see Bernard A. Reinert and John W. Rourke, "Issues in Litigation By and Against Banks Arising Under the Uniform Fiduciaries Act, Related Provisions of the Uniform Commercial Code and the Related Cases", 7th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 24, 1996.

APPENDIX A

FINANCIAL STATEMENT

Section 1 - Husband Information	Section 2 - Wife Information
Name	Name
Address	Address
City, state & zip	City, state & zip
Position or occupation	Position or occupation
Business name	Business name
Business address	Business address
City, state & zip	City, state & zip
Length of employment	Length of employment
Res. Phone Bus. Phone	Res. Phone Bus. Phone

Section 3 - Statement of Financial Condition as of _____, 19__			
ASSETS	HUSBAND	WIFE	JOINTLY OWNED
Cash on hand			
Cash in banks			
U.S. Gov't. & marketable securities - see Schedule A			
Non-marketable securities - see Schedule B			
Real estate owned - see Schedule C			
Accounts, loans, and notes receivable			
Automobiles			
Other personal property			
Cash surrender value-life insurance - see Schedule D			

Vested interest in deferred compensation/profit sharing plans - see Schedule F			
Interest in trusts			
Interest in Partnerships - Schedule G			
Other assets - itemize - see Schedule G if applicable			
Total Assets			
LIABILITIES			
Notes payable to banks - see Schedule E			
Notes payable to other institutions - see Schedule E			
Due to brokers			
Amounts payable to others - secured			
Amounts payable to other - unsecured			
Accounts and bills due			
Unpaid income tax			
Other unpaid taxes and interest			
Real estate mortgages payable - see Schedules C & E			
Other debts (car payments, credit cards, etc.) itemize - Schedule E			
Total Liabilities			
Net Worth			
Total Liabilities and Net Worth			

Section 4 - Income, Expenses, and Contingent Liabilities For Year Ended _____, 19__			
Personal Annual Income			
Salary, bonus & commissions			
Dividends & interest			
Real estate income			

Other income			
Total Annual Income			
Personal Annual Expenditures			
Mortgage/rental payments			
Real estate taxes & assessments			
Taxes - federal, state & local			
Insurance payments			
Other contract payments (car payments, charge cards, etc.)			
Alimony, child support, maintenance			
Other expenses			
Total Annual Expenses			
Contingent Liabilities			
Contingent liabilities (as endorser, co-maker or guarantor? On leases? on contracts?)			
Involvement in pending legal actions? liens or garnishments?			
Other special debt or circumstances?			
Contested income tax liens?			
Have you ever been declared bankrupt?			
If "YES" to any question(s) indicate amount and describe using additional sheets			

SCHEDULE A - U.S. GOVERNMENT & MARKETABLE SECURITIES

Number of Shares or Face Value of Bonds	Description	In Name of	Are These Registered Pledged or Held by Others?	Market Value

SCHEDULE B - NON-MARKETABLE SECURITIES

Number of Shares	Description	In Name Of	Are These Registered Pledged or Held by Others?	Value	Source Of Value

**SCHEDULE C - RESIDENCES AND OTHER REAL ESTATE
(PARTIALLY OR WHOLLY OWNED)**

Address and Type of Property	Title in Name of	% of Ownership	Date Acquired	Cost	Market Value of Your %	Monthly Payment	Current Loan Balance	Mortgage Maturity

SCHEDULE D - LIFE INSURANCE CARRIED, INCLUDING GROUP INSURANCE

Name of Insurance Company	Owner of Policy	Beneficiary and Relationship	Face Amount	Policy Loans	Cash Surrender Value

SCHEDULE E - BANK AND OTHER INSTITUTIONAL RELATIONSHIPS

Name and Address of Creditor	Original Loan/Line Amount	Date of Loan	Maturity Date	Unsecured or Secured (Last Collateral)	Amount Owned

SCHEDULE F - PROFIT SHARING PLANS

% Vested	Company Name	Account Number	Manner of Payout (Annuity, Lump Sum, etc.)	Distribution Date	Beneficiary	Amount

SCHEDULE G - BUSINESS VENTURES AND PARTNERSHIP INTERESTS

List Name and Address of Any Entity in Which You Are a Principal or Partner	Your % of Ownership	Your % of Value	Your Position/Title in the Entity	Total Assets of Entity	Line of Business	Years in Business

Each undersigned represents that the undersigned has read this Financial Statement, and provides the statement of the undersigned's financial condition to the recipient to obtain money, property, services, or an extension, renewal, or refinancing of credit (including the compromise of a disputed debt.) Each undersigned understands and represents that the information provided in the statement is true, correct and complete, and gives a correct and complete showing of the financial condition of each undersigned, and that the legal and equitable title to all assets listed herein is in the sole name of each undersigned, except as otherwise noted. Each undersigned understands and intends that the recipient will rely upon the information provided in its decision to provide money, property, services, or an extension, renewal, or refinancing of credit (including the compromise of a disputed debt,) and that the recipient may rely upon this information without making further inquiries or verifying the accuracy of the statement, or otherwise investigating beyond the statement. Each undersigned agrees to immediately notify recipient in writing of any change in name, address, or employment and of any material adverse change (1) in any of the information contained in this statement or (2) in the financial condition of any of the undersigned or (3) in the ability of any of the undersigned to perform its (or their) obligations to recipient. In the absence of such notice or a new and full written statement, this should be considered as a continuing statement and substantially correct. The recipient is authorized (but not required) to make all inquiries recipient deems necessary to verify the accuracy of the information contained herein, and to determine the credit-worthiness of the undersigned. Each of the undersigned authorizes recipient to answer questions about recipient's credit experience with the undersigned.

Signature Husband

Social Security No.

Date signed _____, 19____

Date of Birth

Signature Wife

Social Security No.

Dated signed _____, 19____

Date of Birth

**APPENDIX B
SAMPLE DEPOSITION NOTICE AND REQUEST FOR PRODUCTION FOR A
DEPOSITION IN AID OF EXECUTION**

IN THE CIRCUIT COURT OF

[Surety or fidelity bond principal])	
)	
)	
Plaintiff,)	
)	Cause No.
vs.)	
)	
[EMBEZZLER], et al.,)	
)	
Defendants.)	

DEPOSITION NOTICE

TO:

DATE &
TIME:

PLACE: Law Offices of Reinert & Rourke, P.C.
812 North Collins, Laclede's Landing
St. Louis, MO 63102

WITNESS
TO BE
DEPOSED:

PLEASE TAKE NOTICE, that at the above date, hour and place, Plaintiff shall cause the deposition of the above witness to be taken upon oral examination, pursuant to the _____ Rules of Civil Procedure, before a shorthand and suitable Notary Public. The witness will be deposed as to, inter alia, Defendant's means of satisfying the judgment against Defendant herein. By copy of this Notice, you are hereby requested to produce _____ for her deposition at the above place, date, and time and to produce the

requested documents at such deposition. This deposition shall continue from day to day without notice or at such time and place as the Deposition may reconvene upon Notice or agreement of the parties.

The witness is required to bring to the Deposition any and all documents (the originals must be produced when the witness has access to these or they are in the witness' possession or control) pertaining to her ability to satisfy the judgment herein. This includes but is not limited to:

1. Any and all documents, computer disks, printouts, account statements, contracts, claims, suit papers, legal documents, tax returns, financial statements, papers, checks, notes, instruments, correspondence, stock certificates, deposit slips, certificates of ownership or title, deeds, accounts receivable and payable, ledgers, books of account, as well as any other documents or papers pertaining to the assets, liabilities, income and property of the witness.
2. Any and all documents, correspondence, or instruments pertaining to any communications, transactions, or relations between or among Plaintiff, the IRS, the United States, the witness, any bank or financial institution, and any other Defendants.
3. Any and all documents, computer disks, printouts, notes, instruments, correspondence, stock certificates, deposit slips, certificates of ownership or title, deeds, accounts receivable and payable, ledgers, and books of account, as well as any other documents or papers pertaining to the assets, liabilities, income, accounts and property of the witness.
4. Any and all documents pertaining to the ownership or disposition of any assets, real or personal property within the last 5 years.
5. Any and all documents, correspondence, or instruments pertaining to any loans, transactions, or transfer of funds to any individual or entity, including any relatives.
6. Any and all documents produced, seized, or received in conjunction with the criminal investigation, the criminal tax fraud investigation and/or proceeding.
7. Any and all documents pertaining to your employment as _____ for Plaintiff.
8. Any and all documents pertaining to any transactions or communications between the witness, Defendants, or any other person or entity which involve the disposition of any assets or property of Plaintiffs, Defendants, or the witness.
9. Any and all documents pertaining to any funds or income or property received from or held by or invested with: _____ or any other brokerage, mutual fund company, credit union, bank, or any other financial institution or other person or entity.
10. Any and all documents pertaining to any gifts given to or from Defendants.
11. Any and all documents pertaining to any assets, liabilities, or expenses held jointly, individually, and/or in common by the Defendants.
12. Any and all documents pertaining to any insurance of the Defendants.

13. Any and all documents pertaining to any note, mortgage, or mortgage payments of Defendants or each of them.
14. Any and all documents pertaining to the presentence investigation report done in the prosecution involving Defendant, including but not limited to the report itself and your objections thereto.
15. Any and all documents pertaining to any trust in which you are a party (including but not limited to being settlor, trustee or beneficiary) or to which you have transferred or placed funds or assets.
16. A copy of your passport and all of the pages therein. If the witness has gotten a new passport within the last 5 years, the old one must also be produced.

The above documents are critical to such examination. Failure of the witness to produce such documents will result in Plaintiff seeking legal action, including sanctions and contempt, for the witness's failure to produce these documents at the deposition for questioning and copying.

REINERT & ROURKE, P.C.

By:

Bernard A. Reinert, #17774
John W. Rourke, #38111
812 N. Collins, Laclede's Landing
St. Louis, MO 63102
(314) 621-5743
• 621-8071 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by fax and mailed, postage prepaid, this ___th day of _____, 199_, to:

APPENDIX C

Sample Questions For a Judgment Debtor's Deposition or Examination

1. What is your name, address and telephone number?
2. What is your date of birth? What is your social security number?
3. Are you married? If so, give your wife's/husband's) first name and your wife's maiden name.
4. Do you have any children? If so, give their full names, ages and addresses.
5. What is your occupation?
6. Are you presently in business or employed? If so, give the name and address of each such business or employer.
7. If you are presently employed, state the particulars of any contract of employment and the amount of salary, commissions or other compensation which you have received over the last 2 years and which you are to receive and the amount of any arrears thereof.
8. If your wife/husband or any children are employed or in business, give the name and address of such employment or business and the salary or income derived therefrom.
9. If you are not the sole support of your family, state the amount of the contribution of each member of the family toward the support of the household.
10. If you are employed in business, state whether you are, any members of your family or other relatives are, or at any time were, proprietors, part owners, stockholders, directors or officers of any such business.
11. State what business you have conducted or been employed at and what positions you have held in the last five (5) years. For each, state the name and address of the business and the name and address of your immediate supervisor.

12. Do you live in an apartment or a house? If you live in a house, is it owned by either you or your wife/husband or any member of your family or a relative? If so, state when it was bought, for how much, what is the equity in the property and whose money was used.
13. If you rent, do you have a lease? Give the name and address of your landlord and state the terms and amounts of the lease. State who pays the rent and whether the rent is paid by cash or check.
14. Is the rent paid to date?
15. Do you have any boarders or subtenants? If so, give their names and the amount of rent paid by each. If the rent or any other bills are paid by check, give the particulars thereof, the name of the drawer of such checks and the banks upon which drawn?
16. Are you or your wife or children an officer, director, or stockholder of any corporation, limited liability company, partnership or other entity? If so, give the details, including the name and address of the corporation, the position held, the nature and amount of ownership.
17. Have you or your wife or children in your own name or jointly any bank account or account at a mutual fund company, brokerage, savings and loan, credit union or other financial institution - commercial, savings or otherwise? If so, state where and the amount of the balance thereof and the source of money in such account. If not, when and where did you last have such an account?
18. Do you have power of attorney, or other authority, to sign checks or other instruments for the payment of money on any bank account? If so, give the full details thereof.
19. Have you or your wife/husband or children a safety deposit box? If not, when did you last have one? Give the name and address of any bank or safety deposit company in

which such safety deposit box is, or was, maintained.

20. Do you have the right of access to any safety deposit box?

21. Do you have any accident, health, or life insurance? If so, answer the following:

- a. The name of the each company;
- b. Each policy number;
- c. The amount, type and date of issuance of each life insurance policy;
- d. The name and address of the beneficiary of each life insurance policy;
- e. The date and particulars of any change of beneficiary;
- f. The particulars of any assignment(s) of life insurance policies;
The dates and amounts of any loans against such policies.

22. If you have borrowed on any life insurance policies, what did you do with the money?

23. Are you receiving, or have you any claim for, disability payments on any insurance policy? If so, give the name of the company, the number and particulars of the policy and the amount thereof.

24. Is there any fire insurance on the contents in your home? If so, what is the amount, the name of the company issuing same and in whose name is it issued?

25. Do you have driver's license. If so, what cars do you drive?

26. Do you or your wife/husband or children own, or have any interest in, any of the following? For each, identify the nature and amount of property, who owns it and the whereabouts of such property.

- a. Real estate;
- b. Stock, bonds, mutual funds, or other securities;
- c. Mortgages on real property or personal property;
- d. Promissory notes, drafts, bills of exchange or other commercial paper;
- e. Judgments;
- f. Jewelry or antiques or art;
- g. Stamp collections or coin collections;
- h. Defense, war savings, or savings bonds;
- i. Automobile or truck;
- j. Patents, inventions, trade names, trade-marks, or copyrights;
- k. Joint ventures or other business enterprises;
- l. Warehouse receipts, bills of lading or other document of title.

27. Do you or your wife/husband or children own any other property not enumerated above? If so, give full particulars thereof.
28. If any of such property is mortgaged, pledged, encumbered or subject to any conditional bill of sale, give the full details and the status thereof.
29. Do you or your wife/husband or children have any personal property in pawn? If so, give the particulars thereof.
30. Have you applied for a loan from any bank, finance company or other lending institutions in the last three (3) years? If so, please identify the bank, finance company or other lending institution and state what disposition was made of such application. If such a loan was obtained, what did you do with the proceeds thereof?
31. Have you in the past three (3) years acted as co-maker, endorser or guarantor of any loan? If so, give the particulars thereof.
32. Have you issued any financial statement in the past three (3) years? If so, to whom and when?
33. Have you or your wife/husband purchased, or are you or your wife/husband buying, any articles on an installment plan? If so, give the full details thereof, the amount thereof, and the method by which installment payments are being made.
34. Do you or your wife/husband or children have any interest in the estate of any deceased person? If so, give full particulars thereof.
35. Are you or your wife/husband or children the beneficiary, settlor or trustee of any trust? If so, give the full particulars thereof.
36. Have you or your wife/husband or children inherited any money or property? If so, give the full particulars thereof.
37. Are you or your wife/husband or children the beneficiary of any will or policy of

insurance? If so, give the details.

38. Have you made a will?

39. Are you plaintiff or defendant in any court action, administrative proceeding, arbitration, mediation or other proceeding? If so, give the particulars thereof.

40. Are there any judgments of record against you? If so, give the dates, amounts, the courts where rendered and the name of the judgment creditors. Have you made any payments on any such judgments? If so, give the full details thereof.

41. Have you ever been in bankruptcy? If so, state when and in what court and the disposition thereof.

42. Have you ever made an assignment for the benefit of creditors? If so, when and in what county?

43. Has a receiver of your property been appointed by any court?

44. Are there any outstanding executions, orders or garnishments? If so, give the particulars thereof.

45. Have you any securities with any stock brokerage firm? If so, give the details.

46. Have you any account with any mutual fund, stockbroker or commodity broker? If so, give the particulars thereof. When did you last have any such account? Give the full particulars thereof.

47. What books and records do you keep showing your receipts and disbursements?

48. Within the past year, have you received any payments of money other than as already described? If so, state when and the amounts; give the particulars of any checks received and state what was done with the money.

49. Have you assigned any cause of action, judgment, insurance policy, salary, income or disability payments? If so, give the full particulars thereof.

50. Have you transferred any other property within the past five (5) years? If so, describe the property and give full details of any such transfer.
51. Have you filed any trade name certificates or fictitious name registration or partnership certificates? If so, under what name?
52. What are your average monthly expenses and how are they met?
53. Are you making payments to any creditors? If so, give the full details thereof.
54. Did you file federal or state income tax returns in the last three (3) years? If so, furnish copies of such returns along with any W-2 forms, 1099 forms and any other attachments or schedules to such returns.
55. Are you entitled to any refund or money from any person or entity, including any state, city, or federal government, or agency or department thereof?
56. Are you unable to pay your debts? Are you willing to be adjudged a bankrupt?
57. Are you a party to any contract of any kind? If so, give the details.
58. Are you acting or have you been named or appointed as executor, administrator, trustee, receiver, guardian or in any other capacity under any will, agreement or court appointment? If so, give the full particulars thereof.
59. What is the total of your liabilities, exclusive of this judgment, and what are the names and addresses of your creditors? When and for what purposes were these liabilities incurred?
60. What information can you give regarding any other parties that are jointly or severally liable on this obligation or that participated in any way in the transaction which gave rise to this judgment?

APPENDIX D

Avoidance of Fraudulent Transfers under the Bankruptcy Code

11 U.S.C. §548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section -

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

APPENDIX E

INVOLUNTARY BANKRUPTCY

11 U.S.C. § 303. Involuntary cases

(a) An Involuntary case may be commenced only under chapter 7 or 11 of the title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title----

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least \$10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$10,000 of such claims;

(3) if such person is a partnership----

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, and dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property

of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed.

Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if---

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all the petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment---

(1) against the petitioners and in favor of the debtor for---

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for---

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section---

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

APPENDIX F

INTERNATIONAL TRUSTS ACT (1984) (COOK ISLANDS) EXTRACT

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MODIFICATION OF THE COMMON LAW APPLICABLE TO INTERNATIONAL TRUSTS

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ASSET PROTECTION TRUSTS

Bankruptcy

13A. Notwithstanding any provision of the law of the settlor's domicile or place of ordinary residence or the settlor's current place of incorporation and notwithstanding further than an international trust is voluntary and without valuable consideration being given for the same, or is made on or for the benefit of the settlor, settlor's spouse, or children of the settlor or any of them, an international trust and a disposition to an international trust shall not be void or voidable in the event of the settlor's bankruptcy insolvency or liquidation (other than in the case of an international company registered pursuant to the International Companies Act 1981-

82 that is in liquidation) or in any action or proceedings at the suit of creditors of the settlor but shall, remain valid and subsisting and take effect according to its tenor subject to the provisions of section 13B.

Fraud

13B.(1) Where it is proven beyond reasonable doubt by a creditor that an international trust settled or established or property disposed to an international trust

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was so settled, established or disposed by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and

did at the time such settlement, establishment or disposition took place render the settlor, insolvent or without property by which that creditor's claim (if successful) could have been satisfied,

then such settlement, establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor's claim out of the property which, but for the settlement establishment or disposition, would have been available to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement, establishment or disposition and any accumulation to the property (if any) subsequent thereto.

(2) In determining whether an international trust, settled or established or a disposition, has rendered the settlor insolvent or without property by which a creditor's claim (if successful) may be satisfied, regard shall be had to the fair market value of the settlor's property, (not being property of or relating to the trust) at the time immediately after the settlement, establishment or the disposition referred to in subsection (1)(b) and in the event that the fair market value of such property exceeded the value of the creditor's claim, at that time, after the settlement establishment or disposition, the trust so settled or established or the disposition shall for all purposes be deemed not to have been so settled established or the property disposed of with intent to defraud the creditor.

(3) An international trust settled or established and a disposition to such trust shall for all purposes be deemed not to have been so settled or established, or the property disposed of with intent to defraud a creditor-

if settled, established or the disposition takes place after the expiration of 2 years from the date that creditor's cause of action accrued; or

where settled, established or the disposition takes place before the expiration of 2 years from the date that the creditor's cause of action accrued, that creditor fails to commence in a court of competent jurisdiction proceedings in respect of that creditor's cause of action before the expiration of 1 year from the date such settlement establishment or disposition took place,

provided that this subsection shall not have effect if, and subject to subsection (5), at the time of settlement, establishment, or disposition, as the case may be, proceedings in respect of that creditor's cause of action against that settlor have already been commenced in a court of competent jurisdiction.

(4) An international trust settled or established and a disposition of property to such

trust shall for all purposes be deemed not to have been so settled or established, or the property disposed of with intent to defraud a creditor if the settlement, establishment or disposition of property took place before that creditor's cause of action accrued.

(5) A settlor shall not have imputed to him an intent to defraud a creditor, solely by reason that the settlor -

has settled or established a trust or has disposed of property to such trust within two years from the date of that creditor's cause of action accruing;

has retained, possesses or acquires any of the powers or benefits referred to in paragraphs (a) to (f) of section 13C;

is a beneficiary, trustee, or protector;

has settled or established a trust, or has disposed of property to such trust, at a time when proceedings in respect of that creditor's cause of action against that settlor have already been commenced in a court of competent jurisdiction.

(6) Where an international trust is liable to satisfy a creditor's claim in the manner provided for in subsection (1) -

the creditor's rights to recovery shall be limited to that property referred to in subsection (1), or to the proceeds of that property, to the exclusion of any rights against the trustees of the international trust or any of them, against any other property of the international trust, or against any other of the property or assets of the trustees of the international trust, or any of them;

where the international trust is unable to satisfy the creditor's claim by reason of the fact that the property referred to in subsection (1) has been disposed of, other than to a bona fide purchaser for value, then any such disposition shall be void.

(7) For the purpose of this section the onus of proof of the settlor's intent to defraud the creditor lies on the creditor.

(8) For the purposes of this section and section 13K -

the date of the cause of action accruing shall be, the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action, and if there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, shall be the date that the cause of action shall have accrued;

the term "cause of action" means the earliest cause of action capable of assertion by a creditor against the settlor of an international trust or, as the case may be, against the settlor of property upon an international trust, by which that creditor has established (or may establish) an enforceable claim against that settlor;

where a creditor has, or asserts, or could have asserted, multiple or successive causes of action against a settlor (whether by virtue of the nature of the relevant circumstances of the case, or by reason of having attained the status of a judgment creditor in respect of one or more of such causes of action, or by reason of asserting or being able to assert an allegedly fraudulent settlement of or disposition to an international trust, or otherwise) the entitlement of such a creditor to relief under this section shall be determined, and the periods referred to in this section shall be calculated with reference to one only of the creditor's causes of action, being that cause of action which accrued first in time in accordance with paragraph (b);

nothing in paragraphs (b) or (c) shall apply so as to affect the right or requirement of a creditor to commence separate proceedings under this section in relation to a cause of action which is separate from and independent of another cause of action where the Court is satisfied, having regard to paragraph (c), that both the circumstances out of which the cause of action arose and the subject matter of that cause of action are wholly unrelated to those of the other cause of action.

(9) The provisions of this section shall apply to all civil actions and proceedings brought in the Court in which fraud, deceit, unconscionable conduct or any other inequitable conduct however described or any species of unjust enrichment is alleged, against any person (whether a party to the proceedings or not) with regard to the settlement or establishment of an international trust or the disposition of property to such a trust, or receipt of property by or for such a trust (or subsequent disposition of property from such a trust with the intention of prejudicing creditors of the settlor of such property or such trust), and the remedy conferred by subsection (1) shall be the sole remedy available in such an action or proceedings, to the exclusion of any other relief or remedy against any party to the relevant action or proceeding.

(10) The provisions of this section shall operate to the exclusion of any other remedy, principle or rule of law, whether provided for by statute, or founded in equity or in common law including, for the avoidance of doubt, the imposition of a constructive trust upon any interested party or the recognition and enforcement of any constructive trust imposed or recognized by the laws of any other jurisdiction.

(11) Subject to section 16(6), the provisions of this section shall apply to every international trust, and to every trust which having been registered as an international trust, is no longer so registered, and in respect of all dispositions to such a trust.

(12) For the purposes of this section the term "creditor" means a creditor of the settlor and includes any person who alleges a cause of action against a settlor.

(13) A creditor seeking to enforce a claim under this section in reliance on a foreign judgment may not enforce such claim until such time as it can demonstrate to the reasonable satisfaction of the court that,

it has exhausted all remedies available to it against the settlor's remaining property, and

all rights of appeal against that foreign judgment have been exhausted.

NOTE: The Statute of Elizabeth (enactment titled, 13 Elizabeth I Ch 5 (1571)) and Section 60 of the Property Law Act 1952 have no application to international trusts registered after 1991 by virtue of the Amendment Acts of 1991 and 1995-96.]

(14) For the purposes of assessing the liability of an international trust to a creditor under this section, where the amount of that creditor's claim against the settlor is, wholly or partly, in any way related to or evidenced by a foreign judgement, the Court in making any award in favour of that creditor shall disregard and exclude any amount awarded in that foreign judgement to that creditor which comprise any form of exemplary, vindictive, retributory or punitive damages (by whatever name), or is an amount of damages arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage (which types of damage are in this section together called "punitive damages").

(15) The burden of proof shall be on a creditor to establish that an amount awarded in a foreign judgement does not wholly or partly comprise punitive damages.

(16) Subsection (14) shall not apply if, at the time Of settlement, establishment, or disposition, as the case may be, an award of punitive damages has already been made in a foreign judgement against a settlor."

Retention of control and benefits by settlor

13C. An international trust and a registered instrument shall not be declared invalid or a disposition declared void or be affected in any way by reason of the fact that the settlor, and if more than one, any of them, either -

retains, possesses or acquires a power to revoke the trust or instrument;

retains, possesses or acquires a power of disposition over property of the trust or the subject of the instrument;

retains, possesses or acquires a power to amend the trust or instrument;

retains, possesses or acquires any benefit interest or property from the trust or any disposition or pursuant to the instrument;

retains, possesses or acquires the power to remove or appoint a trustee or protector;

retains, possesses or acquires the power to direct a trustee or protector on any matter;

is a beneficiary, trustee or protector of the trust or instrument either solely or together with others.

Foreign judgements not enforceable

13D. Notwithstanding the provisions of any treaty or statute, or any rule of law, or equity, to the contrary, no proceedings for or in relation to the enforcement or recognition of a judgement obtained in a jurisdiction other than the Cook Islands against any interested party shall be in any way entertained, recognized or enforced by any Court in the Cook Islands to the extent that the judgement -

is based upon the application of any law inconsistent with the provisions of this Act or of the Trustee Companies Act 1981-2; or relates to a matter or particular aspect that is governed by the law of the Cook Islands.

Heirship rights

13E. No international trust or any aspect of such trust governed by the laws of the Cook Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that such trust or disposition may avoid or defeat the right, claim or interest of a person held by reason of a personal relationship to the settlor or by way of heirship rights.

Spendthrift beneficiary

13F.(1) For the purposes of this Act, and notwithstanding any rule of law or equity to the contrary, it shall be lawful for an instrument or disposition to provide that any estate or interest in any property given or to be given to any beneficiary shall not during the life of that beneficiary, or such lesser period as may be specified in the instrument or disposition, be alienated or pass by bankruptcy, insolvency or liquidation or be liable to be seized, sold, attached, or taken in execution by process of law and where so provided such provision shall take effect accordingly.

Where property is given subject to any of the restrictions contained in subsection (1), the right to derive income from such property by a beneficiary and any income derived therefrom shall not pass by bankruptcy, insolvency or liquidation or be liable to be seized attached or taken in execution by process of law.

Where property is given subject to a restriction against alienation then the right to derive income from that property shall not be alienated for as long as that restriction remains in force.

A restriction imposed by this section or by an instrument or disposition that property or the right to derive income from such property shall not be alienated or that such property or the right to derive income or the income from such property shall not pass by bankruptcy insolvency or liquidation or be liable to be seized sold or attached or taken in execution by process of law may, at any time after such property has been given be removed if provided for in the instrument or disposition and in the manner specified therein.

Governing law

13G.(1) In determining the governing law of an international trust regard shall first be had to the terms of that trust and to any evidence therein as to the intention of the parties; and the other circumstances of an international trust may be taken into account only if the terms of the trust fail to provide such evidence.

A term of an international trust expressly selecting the laws of the Cook Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.

Where a trust instrument so provides, or where in accordance with the powers contained in a trust instrument, the law of the Cook Islands is chosen to govern a particular aspect of an international trust, and

laws other than that of the Cook Islands are chosen to govern other aspects of that trust, then the choice of Cook Islands law and the choice of that other law as to their respective aspects shall be valid effective and conclusive regardless of any other circumstances.

Where a trust instrument contains a power to change the governing law of that trust, that law may be changed to or from the law of the Cook Islands in accordance with that power, and that change shall be valid, effective and conclusive according to the terms of such power.

A change in governing law shall, not affect the legality or validity of, or render any person liable for, anything done before the change.

A change in the governing law of a trust shall not of itself interrupt the continuity of the relationships whether in equity or law established by the trust and, without limitation, shall not constitute a resettlement of the trust.

Subject to any other provision of this Act, the application of the governing law of a trust to that trust prior to a change in that governing law shall not be affected by that change.

The disposition of any property to or from a trust in accordance with the governing law of that trust at the time of the disposition shall not be avoided or otherwise invalidated by a subsequent change from that governing law to some other law.

Where the donee of a power to change or cause to change the governing law of a trust exercises that power in accordance with the terms of the power so conferred, then the exercise of that power by the donee shall be deemed to have been properly exercised.

The location of the interested parties, selection or imposition of jurisdiction, place of administration, or the situation of the property of the trust shall not in any way affect the validity or effect of a choice of the governing law of a trust made in accordance with the trust instrument.

Where the governing law of a trust is changed to or from the law of the Cook Islands, the trustees shall be empowered to make all such consequential alterations or additions to the trust instrument as the trustees shall consider necessary or desirable to ensure the provisions, rights, liabilities, powers and obligations of and under the trust instrument shall be as valid and effective under the new governing law as they were under the previous governing law.

Where a trust instrument contains provision for the governing law of a trust to change upon a determination being made in accordance with the trust deed as to either -

the happening or non-happening of a specified event; or
a state of affairs coming into existence,

and that determination as to the happening or non-happening of the event or the existence of the state of affairs is so made then that provision shall take effect accordingly.

Nothing in this section shall affect the application of section 13K(5) to an international trust.

Matters determined by governing law

13H.(1) All questions arising in regard to an international trust which is for the time being governed by the laws of the Cook Islands or in regard to any disposition of property upon the trusts thereof including, without prejudice to the generality of the foregoing, questions as to:-

subject to subsection 2(c), the capacity of any settlor;

any aspect of the validity of the trust or disposition or the interpretation or effect thereof;

the administration of the trust, whether the administration be conducted in the Cook Islands or elsewhere, including questions as to powers, obligations, liabilities and rights of trustees and their appointment and removal; or

the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined accordingly to the laws of the Cook Islands, without reference to the laws of any other jurisdictions with which an international trust or disposition may be connected.

Subject to the provisions of this Act subsection (1) shall -

not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does that subsection affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;

take effect subject to any express contrary term of the trust or disposition;

as regards the capacity of a corporation, not affect the recognition of the laws of its place of incorporation;

not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;

not validate any trust of real property or disposition or transfer of real property situate in a jurisdiction other than the Cook Islands which is void ab initio according to the laws of such jurisdiction;

not validate any testamentary trust or testamentary disposition which is invalid according to the laws of the testator's domicile.

A disposition of property located at a place beyond the Cook Islands to an international trust or a trust that shall subsequently become an international trust shall if made in accordance with the law of that place governing such disposition be deemed to be a valid disposition notwithstanding any law of the Cook Islands to the contrary.

Exclusion of foreign law

13I. Without limiting the generality of section 13H, it is expressly declared that no international trust governed by the laws of the Cook Islands and no disposition of property to be held upon the trust thereof is void, voidable, liable to be set aside or defective in any fashion nor may relief be had under section 13B, nor is the capacity of any settlor to be questioned by reason that:-

the laws of any foreign jurisdiction prohibit or do not recognize the concept of a trust either in part or in whole; or

the international trust or disposition avoids or defeats rights, claims or interests conferred by the law of a foreign jurisdiction upon any person or, contravenes any rules or foreign law or any foreign judicial administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests; or

the laws of the Cook Islands or the provisions of this Act or the principal Act are inconsistent with any foreign law.

Community property

13J.(1) Where a husband and wife transfer property to an international trust or a trust that subsequently become an international trust and immediately before being transferred, such property or any part or any accumulation thereto is, pursuant to the law of its location or the law of either of the transferors' domicile or residence, determined to be community property, then notwithstanding such transfer and subject to the terms of the trust deed, that property and any accumulation thereto shall, for the purposes of giving effect to that law, be deemed to be community property and be dealt with in a manner consistent with that law but in every other respect shall be dealt with in accordance with the trust deed and the governing law of that deed.

Notwithstanding anything to the contrary herein contained, nothing herein shall be construed so as to cause the trust, the trust fund, the trustees or any of them, the protectors or any of them, to be liable or obligated for any debt or responsibility of the settlor merely by reason of this section.

Commencement of proceedings

13K.(1) No action or proceedings whether pursuant to this Act or at common law or in equity to, -

set aside the settlement of an international trust; or
set aside any disposition to any international trust; or

(bb) seek relief or remedy under section 13B,

shall be commenced, unless such action or proceedings is commenced, -

in the High Court of the Cook Islands; and

before the expiration of 2 years from the date of,-

the settlement of the international trust; or

the disposition to the international trust,

as the case may be.

No action or proceedings whether pursuant to this Act or at common law or in equity shall be commenced by any person, -

claiming to have had an interest in property before that property was settled upon or disposed to an international trust; and

seeking to derive a legal or equitable interest in that property,

unless such action or proceedings is commenced -

in the High Court of the Cook Islands; and

before the expiration of 2 years from the date that the property referred to in paragraphs (a) and (b) was settled upon or disposed to an international trust.

No action or proceeding (whether substantive or interlocutory in nature) to which either this section or section 13B applies shall be heard, and no order shall be made or granted by the Court in respect of or relating to such action or proceeding (including any injunction or order that shall have the effect of preventing the exercise of, or the granting or restoring of, any right, duty, obligation or power, or of preserving, granting custody of, or detaining or inspecting any property, including for the avoidance of doubt any Anton Pillar order or any Mareva injunction) unless the Court having regard to the affidavit filed pursuant to subsection (4) shall first be satisfied, beyond reasonable doubt that-

commencement of the action or proceedings is not precluded by the provisions of subsections (1) or (2); and

the remedy or relief sought is not precluded by the provisions of subsection (6);

and in any action or proceedings to which section 13B applies that;

the remedy or relief sought is not precluded by the provisions of section 13B; and

the evidence as disclosed by the affidavit demonstrates the ability of

the plaintiff to prove those matters necessary to establish a right to relief under section 13B(1).

In every action or proceeding to which this section applies, or to which section 13B applies, the person or persons bringing the same (in this subsection referred to as the "plaintiff") shall, upon the commencement of such proceedings, file an affidavit which shall be made by the plaintiff or by any one of them (or in the case of a corporate plaintiff, by an officer thereof) who shall depose as to:

the facts and circumstances giving rise to the action or proceedings;

whether an action or proceedings have been commenced in any other jurisdiction between any of the parties to the action or proceedings or by any party against the settlor of any relevant trust or of property upon any relevant trust;

such of the circumstances of the plaintiff as are or may be relevant to determine the quantum of security to be paid by the plaintiff or if there is more than one plaintiff, any one or more of them, either as non-residents, or in connection with the making of any interim order; and

the date upon which the international trust or property, in respect of which the action or proceedings is brought, was settled or disposed of to the relevant international trust, as the case may be;

and in any case to which section 13B applies, the following further matters;

the facts and circumstances of the creditor's cause of action and if the creditor shall have multiple or successive causes of action the facts and circumstances of the creditor's cause of action which accrued first in time (as defined by and determined in accordance with section 13B);

the date upon which that creditor's cause of action accrued; and

whether an action or proceedings have been commenced in any jurisdiction in respect of that creditor's cause of action and if so, the date upon which that action or those proceedings were commenced.

Notwithstanding any other provisions of this Act, the provisions of this section and sections 13A to 13J inclusive of those sections, shall apply to every international trust governed, or expressed to be wholly or partly governed, by the law of the Cook Islands, including a trust that formerly was not wholly or partly governed by the law of the Cook Islands but in respect of which the governing law of the trust has been changed (whether before or after registration) so that the trust, or any aspects of it, are governed, or expressed to be governed, by the law of the Cook Islands, and, without limiting the generality of the foregoing and notwithstanding any other law to the contrary, after the date of registration –

the settlement or establishment of such trust;

every disposition to such trust, including any disposition occurring of registration or the change of law;

every proceeding commenced after the date of registration concerning such settlement, establishment or disposition -

shall be subject to the provisions of this section and of sections 13A to 13s inclusive of those sections as if upon the date that such settlement, establishment or disposition occurred, the trust was an international trust governed wholly and exclusively by the law of the Cook Islands.

In any action or proceedings commenced, whether pursuant to this Act or at common law or in equity wherein the usual or appropriate remedy (whether sought or not) would be either, -

the setting aside of the settlement of, or disposition to, an international trust; or

the award of a legal or equitable interest in property settled upon or disposed of to an international trust;

but the grant of such a remedy is or would be precluded either by subsections (1) or (2), or by section 13B, then neither damages nor any other relief or remedy which has the effect of providing relief or remedy alternative to or consequential upon that precluded by the said provisions, shall be awarded in such action or proceedings.

OTHER PROVISIONS

Perpetuity period

6.(1) Notwithstanding any rule of law or equity to the contrary the rule of law known as the rule against perpetuities or remoteness of vesting, and the rule of law known as the rule against perpetual trusts or against inalienability, shall each have no application to an international trust.

Notwithstanding subsection (1) a trust instrument may make provision for vesting of all or any part of the property of the trust upon such terms as are prescribed by the trust instrument including, but not limited to, provision for -
a period within which the property of a trust shall vest in any beneficiary of the trust; or

the happening of an event upon which the property of the trust shall vest in any beneficiary of the trust; or

the property of the trust not to vest in any beneficiary of the trust or the trust not to terminate.

Where a trust would, except for this subsection, be held by the Court to be void for uncertainty because of its terms relating to termination of the trust or vesting of the property of the trust, and such uncertainty would be removed by imposing a date for termination of that trust, then the trust shall terminate

on the date 100 years from the date of creation of the trust, and the property of the trust shall vest in the beneficiaries on that date, unless termination or vesting occurs earlier in accordance with the trust instrument.

Where a period or an event is specified within, or at the end of, or upon which the property of a trust shall vest in a beneficiary or where subsection (3) applies then, the property of the trust then remaining shall vest in the beneficiary in accordance with the provision which specifies that period or event (as the case may be), or in accordance with subsection (3), and such vesting shall apply in relation to all property then remaining of that trust and every general or special power of appointment under that trust shall be exercised in a manner consistent therewith.

Without limiting any other rights conferred on trustees to vary a trust instrument, the trustees of an international trust may, with the prior consent of the interested parties, or if permitted by the trust instrument, vary the terms of the trust instrument to make provision -

for a period being not less than the existing period provided for in the trust instrument within which the property of the trust shall vest in any beneficiary of the trust; or

for the happening of an event being an event that will occur beyond the period within which the property of the trust would otherwise vest in the beneficiaries and upon the happening of which the property of the trust shall vest in any beneficiary of the trust; or

to remove the period within which the property of the trust shall vest in any beneficiary.

Except where there is express provision to the contrary contained in the trust instrument, where the proper law of an international trust is to be changed from that of the Cook Islands to that of another jurisdiction, the trustees may with the consent of the interested parties, or if permitted by the trust instrument, vary the terms of the trust instrument to provide for a lesser period in which the then remaining property of the trust shall vest in any beneficiary so as not to infringe the law of that other jurisdiction.

Execution of a trust instrument

7. Notwithstanding any rule of law or equity to the contrary and except where there is express provision to the contrary contained in the trust instrument, a trust instrument and any counterpart thereof (whether an original or copy including a facsimile copy) may be executed by the settlor, trustee and any other parties thereto at different times and in different places whether within or outside the Cook Islands and a trust instrument so executed and a trust thereby created established or settled whether registered before or after the coming into force of this Act shall be as valid as if the trust instrument were executed by the settlor and those parties simultaneously at the time the trust instrument was executed by the settlor, and at a place within the Cook Islands.

Application of the rule in Saunders v. Vautier

10.(1) Notwithstanding any rule of law or equity to the contrary, where a trust

instrument empowers a trustee to accumulate income, or to refrain from making any distribution of capital or income until a specified date or event, or where any provision of the trust instrument otherwise prevents the making of any distribution of capital or income, notwithstanding that a beneficiary may, but for this section, otherwise be entitled to that accumulation or distribution, the trustee may, in his absolute discretion, subject to any other express terms of the instrument, give effect to that direction as he thinks fit notwithstanding that a beneficiary shall request the trustee to immediately distribute the accumulation or distribution and will give a valid discharge to the trustee for such distribution.

(2) Notwithstanding anything contained in any Act to the contrary or any rule of law or equity, the power to vary the terms of a trust or disposition so as to vary or remove the discretion to accumulate income or distribute capital of the trust or to modify or remove the discretion of the trustee to accumulate income or distribute capital shall have no application where subsection (1) of this section applies.

Charitable and Purpose Trusts

12.(1) Notwithstanding any rule of law to the contrary an international trust shall be deemed to be charitable or for purposes which are charitable where it is a trust substantially for one or more of the following objects or purposes, namely:

for the relief of poverty;

for the advancement of education;

for the advancement of religion;

for other purposes beneficial to the community;

notwithstanding that the object or purposes may not be of a public nature or for the benefit of the public, but may be for the benefit of a section of the public or members of the public, or that it may also benefit privately one or more persons or objects or persons within a class of persons or is liable to be defeated whether by the exercise of a power of appointment or disposition or that the trustee has the power to defer the enjoyment of any charity or other beneficiary of the trust for any period not exceeding the term of the trust, and notwithstanding further that the trust may be discretionary or contingent upon the happening of any event.

Notwithstanding any rule of law or equity to the contrary a trust settled or established by a non-resident of the Cook Islands shall not be void or voidable by virtue of the fact that the trust fund shall be held for a purpose or purposes, whether charitable or not; and any trust so created shall be enforceable on the terms set out in the trust instrument by the person or persons named in the instrument establishing the trust as the person or persons appointed to enforce the trust and the trust shall be enforceable at the instance of the person or persons so named notwithstanding that such person or persons are not beneficiaries under the trust.

A person appointed to enforce the trust may resign or be removed or replaced in accordance with the trust instrument.

If the person appointed to enforce the trust resigns, or is removed, or is unwilling,

refusing, unfit or unable to act, and if no successor can be appointed in accordance with the trust instrument, the trustees shall forthwith apply to the Court for directions or for another person or persons to be appointed by the Court to enforce the trust, and the Court shall be empowered to make an order appointing a person or persons to enforce the trust on such terms it sees fit, and pending appointment by the Court the Attorney-General shall be entitled, on such terms as he may require, to enforce the trust with the same rights and powers as the person appointed under the trust instrument to enforce the trust.

Recording of title

13.(1) For the purposes of identification and ease of administration, the trustees of an international trust may adopt a name for that trust.

A trust instrument may authorize the trustees to cause the ownership or title of property of the trust to be recorded or registered in the name of that international trust rather than in the name of the trustees.

Where the trustees of a trust cause the ownership or title of property of that trust to be recorded or registered in the name of that trust, the trustees shall where permitted by the jurisdiction of the relevant registry lodge with the relevant registry or recording authority an affidavit, which affidavit shall contain the following particulars namely, -

- the name of the international trust;
- the names and addresses of all the trustees;
- whether fewer than all the trustees are authorized to act on behalf of and in the name of the trust in any acquisition, conveyance, encumbrance, lease or other dealing with the property and if so -
 - designate the trustees or the manner in which the trustees shall be designated;
 - specify the limitations (if any) upon the authority of such trustees;
- be executed by all the trustees named pursuant to paragraph (b);
- where the affidavit does not provide for the matters contained in paragraph (c) then it shall be executed by at least one trustee named therein.

Upon lodging an affidavit with the relevant registry or recording authority the affidavit shall constitute prima facie evidence of the facts recited therein, the authority of the deponent to execute and lodge the affidavit, and the authority of the trustees who are thereby empowered to convey or otherwise act on behalf of the trust insofar as the same affects title to any interest in the property.

Subject to subsection (3), where an interest in property is recorded or registered in the name of an international trust, such interest shall only be conveyed, encumbered, leased or otherwise dealt with in the name of the trust by an instrument executed by all the trustees named in the affidavit.

Where an interest in property is recorded or registered in the name of an international trust pursuant to the trust instrument, the legal title to that property shall be deemed to be held by the trustees.

In the event of a change in any of the particulars contained in an affidavit under

subsection (3) the trustees for the time being shall provide a further affidavit in accordance with that subsection.

Trustees duties to beneficiaries

19A.(1) Subject to subsections (2) and (3), a trustee in the performance of that trustee's duties to beneficiaries and in the exercise of any power, function or discretion shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.

Subject to subsection (3), where a trustee's profession employment or business is or includes acting as a trustee on behalf of others, the trustee, in exercising any power, function or discretion shall exercise the care, diligence and skill that a prudent person engaged in that profession, employment or business would exercise in managing the affairs of others.

All duties and obligations of a trustee shall apply to that trustee only to the extent that a contrary intention is not expressed in the trust instrument and shall have effect subject to the terms of the trust instrument.

Delegation

19B.(1) Where a trust instrument authorizes a trustee to delegate any or all of that trustee's powers, duties, functions or discretions then that trustee may delegate any or all of such powers, duties, functions and discretions provided that a trustee may not delegate other than to a co-trustee, any powers, duties, functions or discretions involving the distribution or non-distribution of property of the trust to a beneficiary including, without limitation, distributions by way of payment, use, advancement, transfer or assignment.

Except where the terms of a trust specifically provide to the contrary, a trustee may -

delegate management of the property of the trust (including the selection of investments) and employ professional or skilled persons as investment managers;

employ professional or skilled persons to act in relation to any of the affairs of the trust or to hold any or all of the property of the trust.

A trustee, who in good faith makes or continues such delegation or appointment, shall not be liable for any loss to the trust arising from or as a consequence of a delegation or appointment under subsections (1) or (2).

A trustee may authorize a person referred to in subsection (2) to retain any commission or other payment usually payable in relation to any transaction.

Where a trustee enters into an agreement for the employment of an investment manager under paragraph (a) of section (2), the trustee may agree on the same terms as are customarily found in an agreement between an investment manager and beneficial (as opposed to fiduciary) owners of property, including terms excluding or limiting the liability of the investment manager for negligent performance of duties, and, unless the trust instrument otherwise provides, the trustee shall not be liable for breach of trust by virtue of agreeing to such terms.

Investments

19C.(1) A trustee may invest any trust funds in any manner of investment or in any kind of property authorized for the investment of trust funds by and under the trust instrument or otherwise permitted by law.

Where a trust instrument authorizes expressly, or by necessary implication, the investment of the property of the trust in any investments authorized by the law of the Cook Islands for the investment of trust funds, the instrument shall be deemed to authorize investment in such investments as may be expressed to be trustee investments by regulations made under this Act.

Where a trust instrument expresses trustees' powers of investment in general terms including powers to undertake any manner of investment in any kind of property, or including powers equivalent to those of a natural person then, notwithstanding any rule of law or equity to the contrary, the trustee shall have such power and be authorized to invest trust funds and property accordingly and every such authorization shall be given such fair large and liberal interpretation as to give full effect to its tenor and, except where the trust instrument so provides, any other provision in the trust instrument authorizing any specific manner of investment or investment in any specific property shall not derogate from or limit the generality of this section.

Nothing in this section shall preclude a trust instrument from expressly excluding any manner of investment in any kind of property.

Trustee's majority decisions

19D.(1) Where a trust instrument provides for majority decisions of trustees such provision shall be valid and effective on the terms set out therein.

Subject to any provisions contained in a trust instrument every -

decision made, resolution passed or power or discretion exercised by the trustees shall be valid if made passed or exercised by a majority of the trustees if there are more than 2 of them; and

thing done and every deed or other instrument executed by the majority of trustees shall be valid and effective as if done or executed by all the trustees.

Trustees limitation of liability

19E. Where any provision of a trust instrument limits the liability of a trustee, or provides relief or indemnity for a trustee, such provision shall be valid and effective according to its terms, and every such provision shall be given a fair, large and liberal interpretation so as to give full effect to its tenor, notwithstanding any rule of law or equity to the contrary.

Custodian trustees

19F.(1) Subject to the provisions of this section and to the trust instrument any person or group of persons may be appointed as custodian trustee under this section to be custodian trustee of any international trust in the same manner as a trustee may be appointed.

Notwithstanding any other provision of this Act, but subject to the provisions of

the trust instrument, where a custodian trustee is appointed of any international trust -

all of the trust property shall be held by transferred to or vested in the custodian trustee as if the custodian trustee were sole trustee, and for that purpose vesting orders may, where necessary, be made by the Court on application by the custodian trustee or the managing trustee, but without prejudice to the managing trustee's control of that property;

the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the managing trustee as fully and effectually as if there were no custodian trustee;

the sole function of the custodian trustee shall be to get in and hold the trust property, and invest its funds, and dispose of the assets, as the managing trustee in writing directs, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustee may in writing direct;

for the purposes of paragraph (c) a direction given by the majority of the managing trustees where there are more than one, shall be deemed to be given by all the managing trustees;

the custodian trustee shall not be liable to any interested party or third party for acting on any direction of the managing trustee, but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions, but without being under any obligation to do so;

the custodian trustee shall not be liable to any interested party or third party for any act or default on the part of the managing trustee or any of the managing trustees;

all actions and proceedings touching or concerning the property of the trust shall be brought or defended in the name of the custodian trustee and the custodian trustee shall not be liable for the costs thereof apart from the property of the trust;

no person dealing with the custodian trustee shall be concerned to enquire as to the existence of any direction, concurrence or otherwise of the managing trustee, or be affected by notice of the fact that the managing trustee has not issued any direction or concurred;

the power of appointing a new trustee or trustees when exercisable by trustees, shall be exercisable by the managing trustee alone, but

the custodian trustee shall have the same power as any other trustee of applying to the court for the appointment of a new trustee.

Subject to the provisions of the trust instrument and subsection (8), on the application of the custodian trustee, or a managing trustee, and on satisfactory proof that it is in the best interests of the beneficiaries, or that on other grounds, having regard to the trust instrument, it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose, and may also make such vesting orders and give such directions as in the circumstances, seem to the Court to be necessary or expedient.

Subject to the provisions of the trust instrument, in any case where remuneration or commission is payable to the trustee of any trust property, remuneration or commission may be paid to both the custodian trustee and the managing trustee, and subject as aforesaid the amount thereof shall be determined by the managing trustee if the managing trustee is entitled to fix its own remuneration.

Without limiting any provision of this section, and except as varied by the trust instrument, the provisions of this Act and the Trustee Companies Act 1981-82 relating to a trustee's powers, liabilities, functions, duties and discretions, shall apply equally to a custodian trustee, and in particular, without limiting the generality of the above, the custodian trustee –

(a) shall have the full powers of delegation conferred on trustees by section 19B;

(b) may permit assets to be held by or in the name of the managing trustee to facilitate the managing trustee's management and administration of the Trust assets, or as otherwise directed by the managing trustee.

For the purposes of this section a reference to a managing trustee shall be a reference to a trustee other than the custodian trustee.

Notwithstanding subsection (3) -

a custodian or managing trustee may resign, be appointed, be removed or be replaced in the same manner as a trustee or as prescribed by the trust instrument.

a trustee who accepts appointment as both managing and custodian trustee shall for all purposes be treated as, and be, an ordinary trustee, in which case the respective rights and obligations imposed on custodian and managing trustees under this section or the trust instrument shall have no further application to that trustee, and that trustee shall not be entitled to rely on the limited liability of a custodian trustee, nor charge remuneration as both a managing trustee and a custodian trustee.

Subject to the trust instrument, upon termination of the appointment of the custodian trustee and unless there is a simultaneous appointment of a new custodian trustee, the following provisions shall apply -

any restrictions upon the powers of the managing trustees by virtue of the appointment of the custodian trustee shall lapse, and the

managing trustees shall thereafter be the only trustees; and

the title to the property of the trust shall vest in the trustees.

The powers, duties, functions, discretions and office of the managing trustee, if vacant and not filled or replaced pursuant to subsections (2)(i) or (7)(a), may be assumed by or appointed to, a person or persons as prescribed in the trust instrument.

Advisor to Trustees

19G.(1) Subject to the provisions of this section, a trust instrument may provide for any person or group of persons (in this section referred to as an "advisor") to be appointed as advisor under this section to advise the trustees of a trust in respect of all or some of the matters relating to the property of the trust.

Where an advisor is appointed to an international trust the property and management of the trust, and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the trustee as fully as effectually as if no advisor was appointed except that;

the trustee may consult the advisor, and the advisor may advise the trustee, on any matter relating to the property of the trust for which the advisor was appointed;

the advisor shall not be liable as or considered a trustee of the trust in acting as an advisor;

where any advice or direction is tendered or given by the advisor, or the majority of advisors if there are more than one, the trustee may follow the same and act accordingly, without being under any obligation to do so, and the trustee shall not be liable for anything done or omitted by them by reason of the trustee following that advice or direction;

subject to the trust instrument, in any case where remuneration or commission is payable to the trustee of a trust, remuneration or commission may be paid to the advisor, at such rate as determined by the trust instrument, or by the trustee in the absence of any specific direction in the trust instrument.

No person dealing with the trustees shall be concerned to enquire as to the concurrence or otherwise of the advisor, or be affected by notice of the fact that the advisor may not have concurred.

Holding of title to property

19H.(1) Notwithstanding any rule of law or equity to the contrary a trust instrument may provide for the trustees of an international trust to delegate among themselves the function of holding title to trust property.

Notwithstanding any rule of law or equity to the contrary a trust instrument may further provide that where property of an international trust is situated in a jurisdiction in which a trustee or trustees reside, any one or more of those

trustees may hold title to that property in one or all of their names, and not in the name of all trustees of the international trust .

Where, whether before or after the coming into force of this Act, title to property is transferred to a trustee or trustees, other than to all of the trustees of an international trust, with the intention that it be held by that trustee, or those trustees, as trust property, then such transfer shall have the same effect as if the property had been transferred to all of the trustees to be held on the trusts set out in the trust instrument.

Protection of trust property

19I. Without prejudice to any rights or remedies available to the creditors of a trustee qua trustee, that trustee's personal creditors shall have no right or claim against any property of any trust held by that trustee qua trustee.

Protection for third parties

19J.(1) Where any property of a trust is disposed of by a trustee, including by way of sale, mortgage, charge, lien, or lease, to a third party for value, the title of the third party to the property, and the enforceability of any contract related to that disposition

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shall not be impeachable except on the ground of actual fraud by or with the knowledge of that third party; and

shall not otherwise be affected on the ground that the transaction was unauthorized or not within the power of the trustee, or that the relevant power (if any) was otherwise improperly or irregularly exercised,

and that third party shall not be concerned to see to the application of the money or consideration paid by him, or be responsible for the misapplication thereof.

Where any interested party has with the principal intent of defrauding a particular third party acted, or procured or permitted others to act, to dispose of or reduce the value of the property of the trust or the validity or enforceability of a trustee's indemnity, such action shall be voidable at the instance of the third party, provided that any disposition of property of the trust may not be avoided where that property has been disposed of to a bona fide recipient for value who at the time of the disposition did not have notice of the intention to defraud the third party.

For the purposes of this section -

"third party" means a person other than a person in a capacity as;

a settlor, trustee, protector or beneficiary of the trust ; or

any creditor of, or other person claiming through, a settlor, protector or beneficiary of the trust.

the term "trustee's indemnity" shall mean that trustee's right of indemnity against the property of the relevant trust.

Nothing in this section shall affect or limit the liability of a trustee to beneficiaries

for a breach of trust.

Protector of a Trust

20. Protector of a trust – (1) The terms of a trust instrument may provide for the office of protector of that trust.

(2) A protector shall have the powers, delegations or functions as are conferred on the protector by the trust instrument or by this Act, or as may be prescribed.

(3) A protector of a trust may also be a settlor, a trustee or a beneficiary of that trust.

(4) Subject to the trust instrument, a protector of a trust shall not be liable or accountable as a trustee or other person having a fiduciary duty to any person in relation to any act or omission in performing the function of a protector under the trust instrument.

(5) Where there is more than one protector of a trust then, subject to the trust instrument, any power or function conferred on the protectors may be exercised if the majority of the protectors for the time being agree upon its exercise.

(6) A protector who dissents from a decision of the majority of protectors may require his dissent to be recorded in writing and filed at the registered office of the trust, and subject to the trust instrument, shall not be liable for the acts of the majority of protectors pursuant to such decision.

(7) Any powers or functions conferred by this Act on a protector shall have effect subject to the terms of the trust instrument.

Consent of beneficiaries

21.(1) A trust instrument may provide for the protector or any other person or persons (in this section referred to as a "nominated person") to represent all or any beneficiaries who are minors, or beneficiaries yet to be ascertained, or beneficiaries not having legal capacity, or beneficiaries who, after the best reasonable endeavours of the trustees, are unable to be contacted (which beneficiaries are in this section referred to as a "represented beneficiary").

(2) A nominated person may, on behalf of a represented beneficiary, consent to or ratify any act or omission on the part of a trustee. Every consent or ratification provided shall be deemed to be the consent or ratification of the represented beneficiary and shall be construed by every Court as the consent or ratification of the represented beneficiary to that act or omission.

APPENDIX G

MISCELLANEOUS ASSET TRACING SOURCES ON THE INTERNET

- Fidelity and Financial Investigations (<http://www.fffiscc.com>)
- The Emerald Group (<http://emeraldgdp.com>)
- Carratu International (<http://www.carratu.com>)
- Dig Dirt, Inc. (<http://digdirt.com/mainhome.html>)
- Bishop International (<http://www.bishopinternational.com>)
- Sterling Response Private Limited (<http://home1.pacific.net.sg/~response/>)
- Silver Elm (<http://ppn.com/hk/se/asstrac.html>)
- Michael G. Kessler & Associates (<http://www.investigation.com/sas/htm>)
- Lee & Allen (<http://www.lee-and-allen.com>)
- Jenkins Renwick Investigation Group (www.jenkinsrenwick.com/html/legal.html)
- Advanced International Security Group (www.advancedint.com/investigate.htm)
- Nesser Consulting Group (www.iwaynet.net/~nesser/services/fraud.html)
- Jack Sandlin & Associates (www.indypi.com)
- Head Investigations (www.headinv.com)
- Net Detective 2000 (www.collector-club.com/DET/members/100242)
- Commonwealth Confidential Investigations (www.summsrecovery.cin/invest.html)
- Investigation Training Institute (www.investigationtraining.com/tipcur.htm)
- D/TEX Investigative Consulting (dtex-investigative.com)
- (intelligence-agency.com/search-criminal-records.htm)
- (www.hitekimgof.com/snoop/Investigative-Services.html)

JOHN W. ROURKE
Biographical Sketch

John W. Rourke is a shareholder and principal in the St. Louis law firm of Reinert & Rourke, P.C.. His practice emphasizes fidelity and surety bond claims and litigation, construction litigation, and commercial law. He is a graduate of the University of Virginia and the University of Missouri School of Law.

Mr. Rourke is licensed to practice law in Missouri, Illinois, and a number of federal courts. He is a member of the American Bar Association, the Missouri Bar, the Illinois State Bar Association, the Chicago Bar Association, and the Bar Association of Metropolitan St. Louis. He has been a contributor to or co-author of a number of papers and publications pertaining to fidelity law, surety law and construction law. Most recently, he co-authored Managing Construction Claims and Litigation for the Missouri Paralegal; Advanced Construction Law in Missouri; and Mechanics Lien Law and Strategies in Missouri.

LAUREN DERMODY REEVES
Biographical Sketch

Lauren Dermody Reeves joined the firm of Reinert & Rourke, P.C. in May of 1999. She received bachelor of science and bachelor of arts degrees in business administration from Northeast Missouri State University (now Truman State University) in 1996. Ms. Reeves a 1999 graduate of St. Louis University School of Law and received a Certificate of Employment Law.