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Roundtable Discussion

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Vanderbilt University Law School
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The Symposium panelists participating in this discussion included David Aronofsky, Barry S. Engel, Eric Henzy, Gideon Rothschild, and Professor Jeffrey A. Schoenblum

Professor Jeffrey Schoenblum:

Welcome to the Roundtable panel discussion. Each of the speakers is going to open with a few minutes statement. And then we're going to pose some questions to open discussion, so it will take people through the whole asset protection route from beginning to end, hopefully. And then, any questions you may have we believe we'll have sufficient time to ask those questions and have them answered. You may get very different views. And then we've just decided that the jury will decide whether asset protection trusts are a good thing or a bad thing. Okay. So pay attention.

Let me introduce the speakers, also, at this point. The first, David Aronofsky is the General Counsel for the University of Montana, who has written a very interesting piece on Montana's confidentiality law. He will take some time in his remarks to explain just what that is and who it's intended to service.

The next speaker is Gideon Rothschild. He practices in New York City and also happens to be the chairman of the relevant American Bar Association Committee on Asset Protection. And I believe he's in the process of putting together a book on that very topic.

Our next speaker is Barry Engel from Colorado. Barry has been the president of the Offshore Trust Institute. Frankly, I think some people would claim—I don't know if he would claim—that Barry Engel is the inventor of the offshore asset protection trust.

Mr. Barry Engel:

I'll claim that, sure.

Professor Jeffrey Schoenblum:

He'll claim that. So he's a legend. He doesn't look like a legend. Our last speaker here is Eric Henzy. He is an attorney who represented the trustee in bankruptcy in a very famous case from last year, 1998, the *Brooks* case, in which he successfully brought onshore assets that the parties had attempted to put offshore in an asset protection trust. This particular case, I think, caused some considerable consternation for proponents of asset protection trusts, because obviously if you have people like Mr. Henzy succeeding, it puts a major kink in the attainability of the objective sought. The Roundtable will also focus on the new confidentiality act in Montana and also consider the moves by Alaska and Delaware to bring some of the asset protection business and trust onshore. Having seen so much capital flee offshore, is there a way that asset protection can be afforded onshore? Is the onshore asset protection trust as efficacious as the offshore trust, especially since there is obviously a higher comfort level for clients generally with domestic trust administration? On the other hand, are there also certain risks that are not encountered offshore?

So to begin our discussion, why don't we start with Gideon, please.

Mr. Gideon Rothschild:

Okay. It's a pleasure and an honor to be here at Vanderbilt Law School. I think that the comments I would like to address just in the introductory remarks, is to show you what has occurred in the field of asset protection planning since I started dealing in this area about eight or nine years ago. And at that time, I got some very disturbing looks from colleagues of mine, esteemed colleagues in the trust and estates area, wondering why I would want to entrench myself in such a speculative area, something that reminded most people of the movie *The Firm*, that I'm sure most of you have seen or read the book, visioning swaying palm trees in the Cayman Islands and money laundering in one's mind.

The field has developed over the years and I think, as evidenced by the recent creation of a committee on Asset Protection Planning in the American Bar Association, it has obtained a reasonable amount of legitimacy, if you will. Yet, some people still, I think, feel that it might not be a legitimate device to protect individuals' wealth from the reach of future creditors. I think what we need to understand is that this type of planning, whether it's offshore trust planning or merely a transfer to a spouse by those people who feel they might be vulnerable to future creditors, is no different than engaging in what bankruptcy attorneys normally consider as pre-bankruptcy planning, which the Supreme Court has decided is legitimate planning.

In fact, recently there was a case out of, I believe it was Wisconsin, where an individual had purchased annuities only a few weeks before he filed for personal bankruptcy. And the bankruptcy court on the objections of the trustee in bankruptcy, held that the purchase of the annuities was not a fraudulent conveyance, was not done with intent to defraud creditors. And the annuities were exempt from the bankruptcy estate, because under applicable non bankruptcy law, that is under that state's law, annuities are exempt from creditors. Well, what is the difference, in fact, between a situation like that which, I view as actually more egregious, than a situation where you have a doctor who is concerned about the malpractice environment he or she finds themselves in, or is a high profile individual in the community who is likely to be involved in litigation in the future, but has no possible threats hanging over their heads at the present time, what is the problem with taking certain steps that they can take, legally, by using the laws of foreign jurisdictions, thanks to individuals like Barry Engel, who started this all, kind of, in the Cook Islands. By taking advantage of these laws, one can effectively shield one's assets from the reach of future creditors.

The emphasis on future creditors is critical. The cases that you might hear about that have been decided in the last year or two, which Eric will address in his presentation, I'm sure, and which we'll discuss in further detail, are unfortunately cases which had bad facts. As the saying goes, bad facts make bad law. I hope that the courts don't simply follow the precedent that has been set by these decisions in the last year and a half to judge whether asset protection planning, if you will, is a legitimate objective or not. I think that there has been a misapplication in the law to arrive at the decisions that the court has arrived at, which I think is the correct decision, because under those circumstances what arguably was a fraudulent conveyance, was justified. The decision of the court was justified, that is, in denying a discharge to the debtors.

But under the correct circumstances, there should be nothing wrong with an individual who wishes to protect his assets by using a trust. whether it be an offshore trust or an Alaska trust. And in conclusory fashion, I'd like to simply suggest to you that it is, in fact, perhaps in our public policy interest, to allow individuals to engage in asset protection planning onshore rather than offshore, and enhance the attractiveness of laws like Alaska, like Delaware. In fact, Colorado even has what many people don't know, a version of a self-settled spendthrift trust rule in their own laws for many years, which allows individuals to protect themselves from unforeseen future creditors. And just recently I learned that the state of Texas is considering legislation along the lines of Alaska's Trust Act, to protect self-settled spendthrift trusts. I think that this trend should be supported by other states under conflict of laws rules, and the reason it should be supported is because the opposite result would otherwise come about, in that individuals would be forced to go offshore to seek certainty in their asset protection, and there will be no recourse to those individuals that have been wronged, because of fraudulent conveyances perpetrated by the likes of debtors who use these vehicles improperly. And I think we'll hear more about this in the future. And I think I'll just conclude my comments with that.

Professor Jeffrey Schoenblum:

Thank you very much. Barry, do you want to go next?

Mr. Barry Engel:

Sure. Good afternoon ladies and gentlemen, it's a pleasure to be with you here. Nashville is a great place, and this is a great subject. Certainly one of my top five favorites. And I'd like to give you a little bit of perspective, at least from my point of view, on what asset protection means to me. Kind of like what did I do this summer for vacation.

Let's assume I have a million dollars, big assumption, but let's assume I have a million dollars. I can hold that million dollars in a managed account, whether in the U.S. or overseas. And I can hold that in my own name. And if you're a litigator and you're coming after me, and I suffer a judgment I could kiss my million dollars goodbye, because it'll be gone pretty easily, as soon as the judgment papers hit the particular management firm or brokerage house where the account happens to be. I can rearrange my affairs a little bit, and I can hold that account, let's say, in a limited partnership. And under the law, the fact that I am the now ninety-nine percent limited partner, and the substantial general partner of that partnership means that I no longer own the brokerage account, the funds, I own partnership interests. And under the law, partnership interests are harder to get, less attractive to the creditor. Additionally, I can further rearrange my affairs, and I can have a trust hold the ninety-nine percent partnership interest, and I can hold an interest as a general partner, thus making it even more difficult for a creditor someday to get.

In asset protection planning, all we really do at the end of the day, is to look at how property is held, and rearrange how property is held so that it's not as vulnerable as it otherwise was prior to our planning. That's what we're doing. And we're doing it at a time when there's nothing, three important words, pending, threatened, or expected, with respect to the client. We're doing it in advance. Obviously, it's a little difficult to buy fire insurance after the fire. Well, it's a little difficult to do proper asset protection planning if we don't do it prior to the particular event. Timing is everything. So what we're talking about is rearranging our affairs so that should something happen someday, the property is going to be less attractive and less exposed.

It's really a form of estate planning. In fact, while I use the term asset protection planning or the phrase asset protection planning frequently, I think the proper phrase really is integrated estate planning, for the proper plan will include aspects of financial planning, estate planning, and asset protection planning. And my view is, as an estate planner, which has been my background for more than twenty years, I hate to say, the fact of the matter is estate planners, even today, spend a disproportionate amount of time on things like minimizing taxes, providing for the smooth transition of property, etc., avoiding probate. And those are all important issues, but all of those important issues mean nothing if something should happen during the client's lifetime that dissipates the estate.

So Gideon and I are proponents of what we might refer to as well as lifetime estate planning. Doing those things, rearranging the assets in such a way, once again, so that if something were to happen, then the assets will be less available, less attractive, and hopefully when all is said and done, clearly not available. This is based on the principal, that as a general rule, creditors can get what you own, not what you once owned. Now, of course there are some exceptions to that general rule. So, for example, fraudulent conveyance principles. Fraudulent conveyance principles will allow the creditor to unwind transfers made. So if in the normal course of events I transfer half of my million dollar account to the Red Cross and three years later I have a creditor problem, that perhaps arose a year earlier, good luck to a creditor going to the Red Cross and trying to get the money. However, if there was a fraud involved, then certainly they're going to have an easier time.

So part of what we do here is to rearrange the assets in such a way that will involve to a great extent a divestiture of assets, giving them away at a time when there is nothing pending, threatened, or expected, the client really and truly divesting himself or herself of the property, but then doing it in a way where the client is able to retain elements of continued benefit and continued control. That's inconsistent to some extent, not entirely with our legal system. It's not inconsistent with other legal systems or systems of law around the world. And that is part of the reason why we go offshore for purposes of our planning.

Final comment I'll make at this time, the age old question. I've already heard somebody say, or perhaps read it in outline here, does this work? It's not that black and white. I believe the proper frame of reference is taking a look at where the person otherwise would have been in the absence of planning. So I've seen cases where at the conclusion of the matter it was settled for a penny and a half on the dollar. I think it worked pretty well there, at least if you were the defendant. If you're the plaintiff, maybe your consideration is it didn't work. But if you were the defendant, and it was the assets you placed in trust that were being attacked a penny and a half on the dollar is pretty good.

What if the settlement is fifty cents? I think it still worked. Maybe that's not as good of a settlement, but you can see the point. Our frame of reference is going to be, not that we expect to win every judgment or to win every claim, or to win every challenge or motion. But when all the dust settles, did the client and the estate come out better than it otherwise would have? Thank you very much.

Professor Jeffrey Schoenblum:

For a somewhat different perspective, Eric.

Mr. Eric Henzy:

Professor Schoenblum commented that people like "that" are getting involved in this area. I think he meant me. He's right, people like "that" are getting involved. What are people like "that"? In fact, I did not take a trust and estates course in law school. You can now withdraw the invitation to speak, there's still time. But people like me are getting involved. I think it's important I tell you I'm not a trust lawyer for a couple of reasons. One, it's that any just gross gaps in my knowledge of trust law, maybe you'll be a little forgiving. And two, the growth of the asset protection industry is bringing people like me into this field. As more "high net worth"—to use the politically correct terminology we heard about this morning—people are using these things more, attorneys like me, that's creditors rights or commercial litigation attorneys, are going after these things.

It's also important to know that people like me are getting involved in this because, and I would argue that the few cases that have come out would bear this out, people like me are the people who are sitting on the bench deciding whether or not these things are going to hold up. Trust lawyers don't end up as bankruptcy judges. I think we would probably all agree that the bankruptcy courts are really going to be the battle grounds on these things. Commercial litigators, business litigators, and bankruptcy lawyers end up on bankruptcy benches. They don't speak your language. By you, now, I mean you trust lawyer guys. They speak my language.

And some of the feedback I've gotten on the *Brooks* case, some of the things that's made the trust lawyers most apoplectic, I would say, are not things that are remarkable at all, I think, to most commercial litigator types, or probably even to most bankruptcy judges. So I think that in the years ahead we're going to have some real collisions of these two areas.

We're supposed to keep these introductory remarks to five minutes. And I think they were supposed to be just introductory remarks. But I'm going to cheat a little bit, and I'm going to respond already to something Gideon said, and I think to something Professor Schoenblum said. To the extent I haven't been clear so far, I think asset protection trusts are a bad thing. From the individual client's perspective, they're not a bad thing. I agree with Barry, that a win on these from my perspective is a percentage on the dollar. In *Brooks* we got a judgment essentially voiding this offshore trust. We then settled for approximately fifty cents on the dollar, because the enforcement problems were so significant. But from a societal perspective, I think that these asset protection trusts are a bad thing. And with respect to the domestic asset protection trusts, and by that I mean Alaska and Delaware, I just disagree as strongly as I can with Gideon. I'd go further than saying that the asset protection trusts are a bad thing. I'd say that they are a wrong thing. I don't mean that they're badly drafted. I don't mean that they are incorrect or anything like that. I mean, in the sense that they are bad almost from a moral perspective.

That comment is not directed at practitioners, because I agree with a remark of Barry's that I think has made it into print somewhere, and I actually heard him utter once, which is, I'm not a moralist, I'm a lawyer. And if the law is there, it's up to me to represent my client as vigorously as I can. I don't think the same is true of legislatures and of state governments. I think that legislatures and state governments have to take ethical issues and morals and justice into account when they're passing laws. I think that—

Mr. Barry Engel:

Is that yours or mine?

Mr. Eric Henzy:

All of ours. And, again, I'm not talking about offshore jurisdictions—

Mr. Barry Engel:

That's a tall order.

Mr. Eric Henzy:

—but I think that with respect to states, we do or we ought to share at least some thin or minimal ideas of justice. And one of those has always been that when you do something wrong, you have to pay for it. The liability system is, and has always been, one of our chief mechanisms for controlling human behavior. I'd like it, we'd all like it, if people did what was right because it was right, but they don't. The liability system has always, and it still does, control people's behavior. Doctors practice good medicine, people drive safely, and people perform their contracts at least in part because if they don't, they know that they may be deprived of wealth. And if you take that away, I think that it causes significant problems for our society.

So again, to the extent that I haven't been clear, I think that these are a bad thing. And I think it's outrageous that states in the United States are passing these type of schemes.

Professor Jeffrey Schoenblum:

Thank you for your very mild remarks. That's why we wanted you here. Thank you. Next, we're going to have remarks from David Aronofsky.

Mr. David Aronofsky:

I think I can counterpoint that on behalf of the Montana Legislature by saying that all but four of our 150 legislators would strongly disagree with most of what Eric just said. I'm probably here because (a) I'm Montana's only international law professor at the state's only law school; (b) the state's only legislation professor at the state's only law school; and (c) probably the only somewhat of an expert in the state that had nothing whatsoever to do with the deliberations and subsequent enactment of Montana's Foreign Capital Depository Act, which plainly and simply is a 1997 law that creates an onshore non-bank bank, strictly for offshore, that is non-U.S. assets. No U.S. money need apply, at least for now. The sponsor and I have had lengthy discussions about when, not whether, the Act will be amended to eliminate the bar against U.S. dollars coming into the non-bank banks.

We're presently in the process in Montana of sorting through the thousands, not hundreds, but thousands of inquiries to get down to the five or six serious ones from financial services companies which are interested enough and affluent enough, and sophisticated enough to take out a charter in our foreign capital depository and become depositories so that they can bring offshore capital into Montana. Our legislature did it for a very simple reason. Montana needs the money and has a very conservative anti-tax legislature dominating both houses. Tax increases are politically a non-starter. And even if they were, to pass them, our voters would probably repeal the increases at the ballot box, which they tend to do. So we have to find revenue from other sources, and we've created a series of incentives to do that in the Foreign Capital Depository Act that's been on the books for a little bit less than two years.

Much to my pleasant surprise, even though I was perhaps the state's leading skeptic when this law was adopted, I've been talking with a number of people around the world, primarily but not solely, general counsels for large financial institutions and trust companies in Latin America, and Asia and Europe, and I'm finding quite a bit of what appears to be significant interest in our law. We're talking through several of the reasons that it's unique, not the least of which is the subject Professor Jeffrey Schoenblum would like me to say a few words about, and that's Montana's unique confidentiality and privacy laws.

We have by our own State Supreme Court's express intent in a series of decisions dating back practically to the 1972 Constitution itself, the toughest U.S. privacy laws, bar none. That's intended. It will probably never be repealed. Never may be a strong term, but I think that anyone who would doubt my words about that need merely talk to our sheriffs, police chiefs, and attorney general, because they often lose privacy law cases that go up to the Supreme Court when individual privacy is concerned.

In fact, I was a little sympathetic to Mr. Brownbill's comments this morning about drafting legislation that doesn't seem to go anywhere. My law students and I draft lots of good bills that never go anywhere. But one of the ones that we drafted this past fall that passed, was a codification of a new Montana Supreme Court case that imposes a very, very high legal threshold to obtain civil information subject to confidentiality and privacy protection.

Why is that relevant to the Foreign Capital Depository Act? Because our legislature, in its effort to attract offshore capital into the state, has imposed some extremely rigorous criminal and civil penalties on the breach of confidentiality by our public officials on financial information related to these depositories and their customers. In fact, not only can officials be removed from office summarily, they can also go to jail if they disclose information about depositories and their customers. And I don't think our courts would have any trouble either imposing a conviction or affirming it on appeal if someone was dumb enough to breach that.

So I think that we have come at the asset protection game from a somewhat unique perspective. One, it's aimed at attracting offshore capital; two, it's aimed at protecting information about their capital once it's in Montana; and three, and this is where I think Eric would have a lot of trouble in our state, if he were called upon to represent offshore creditors trying to seek the assets in the depositories, we did something that I don't think any state in the country has ever had the nerve to do, and that is to amend the Uniform Judgment Enforcement and Recognition Statutes in Montana to make it almost impossible to recognize or enforce a money judgment from a non-U.S. corporation against a depository customer.

As you all probably know, comity is the primary reason that non-U.S. court judgments get enforced in this country. Our legislature has effectively eviscerated comity and codified this evisceration in the statute. It would be exceedingly difficult, if not impossible, I think, to get around this barrier to judgment enforcement and recognition when the judgment is issued from a non-U.S. court.

One of the initial skeptics besides me on this law was the U.S. Treasury Department. The money laundering folks were quite sensitive, anxious, nervous, cynical, and a few other adjectives I won't describe here, about whether Montana could, in fact, adopt such a statutory scheme without running afoul of the money laundering laws. I'm pleased to say the legislature was probably ahead of the Feds on that one, for what may be the most unique aspect of this law. We statutorily preempted our own state laws to the extent a federal money laundering statute or regulation conflicts with the Foreign Capital Depository Act. In the words of the sponsor of the legislation, this is intended to be snow white pure, to the extent human beings can make that happen.

On the other hand, and there is another hand or two, one of the interesting academic issues that involves state laws which attempt to regulate the financial activities is the extent to which the U.S. Constitution's Eleventh Amendment (a) makes it legally impermissible for the federal government to come after state agencies and officials for their own financial services regulatory activities in conflict with federal law, and (b) precludes even treaty application in such instances to states and their officials.

I would refer to a couple of footnotes in my paper about some very contemporary law review articles by distinguished legal scholars who have elaborated these points far more than I can here.

The other issue that's kind of interesting to me, and should be interesting to those of us who look at international treaties and agreements, is whether or not even international agreements and even treaties can be applied against state governments and their officials. Those of you who are familiar with the *Breard* case involving Paraguay versus the United States on the death penalty case, already know that our Supreme Court refused on Eleventh Amendment, and a few other grounds, to apply treaty law which, was clearly violated by the state government, against the State of Virginia and its officials to stop a death penalty case. The Court cited the Eleventh Amendment as the basis for doing that. Sandra Day O'Connor was on our campus less than a year ago for the second time in the last few years, and made crystal clear that at least five of the nine justices so strongly believe in the Eleventh Amendment, that the other four probably better reassess their whole approach to judging. In her words and based upon the Court's opinions, four of her colleagues and she view this whole sovereignty concept as co-equal, not the state subservient to the Feds when the Feds feel like it. Now that we have federal regulation of financial activity by the states being called into question under Eleventh Amendment immunity grounds, it lends even more interesting credence to those in Montana who say we are unique and like it that way. Time will tell whether it really happens.

Professor Jeffrey Schoenblum:

Thank you very much. We're going to take the asset protection trust step by step. But before we get to that, I do want to raise a point with each side here. With regard to the fellows who are speaking in favor of the trust, how can you so easily distinguish control from ownership?

And then on the other side, Eric, you said, well, people should pay a price for their mistakes, and so forth. But what if you have a tort structure that exacts an unfairly high price?

Mr. Barry Engel:

Well, I would suggest that there's a tremendous difference between the design of the typical, revocable living trust than the design of the typical, if there is such a thing, irrevocable trust, domestic irrevocable trust, then the design of a foreign based irrevocable trust. So I don't have much difficulty with the differences because of the design and perhaps the intentions of the settlors with respect to each. And with respect to the ability to access assets in a revocable living trust, I really think that that result is the appropriate result, particularly if the individual has the ability to revoke the trust.

Professor Jeffrey Schoenblum:

Well, how much control, then, do you have to give up in terms of an effective asset protection trust?

Mr. Barry Engel:

I've seen cases where minimal to no control was given up, and the results were effective when challenged, and I've seen the opposite of that. I think every case may be different. I believe clearly there is the distance factor. In other words, there is no question that the more distance a settlor puts between the assets and himself or herself, the more effective it'll be, ultimately, if challenged. So if we have a foreign trust that has the assets that are held in two or three different foreign jurisdictions, and the settlor is not a beneficiary, and the settlor is not a protector and has no other controls, that's on a one to ten scale, probably a 9.9 protection-wise. But from a flexibility point of view, meaning retained benefit and retained control, that's probably a two.

In my view, we can increase on that flexibility scale to perhaps an eight, again retain benefit, retain control, move way up on that scale, and only give up a little bit of ultimate protection, but, yes, some protection is given up, it is surrendered. So I think that that's a fair trade-off. A lot of clients will give up a little bit of ultimate protection in exchange for a big increase in flexibility, but certainly that may come back to haunt them. But as a planner, it's my job to determine at the outset, how far they want to go. How protective of a structure they want. After all, Professor, I can design something for them that is so protective that when the time goes and they need it, even they can't get it, and they may sue me. But I, of course, was my first own asset protection client, so I'm not worried.

Mr. Eric Henzy:

Well, on the question of a tort structure that's out of control, that's interesting. Barry and I spoke at a program in Connecticut in November. One of the speakers was an attorney from Alaska named Rich Hompesch. Rich Hompesch had a lot to do with drafting the Alaska statute and obviously he's practicing in this area. And I'll try to report faithfully, and Barry can call me on it if I don't, one of the things he said there in terms of the reasons why Alaska did this.

One of the reasons Alaska did this is because they looked around, looked down to the lower forty-eight, and they decided that our tort systems were out of control and they were going to do something about that. Well, if Tennessee and Tennesseans decide that Tennessee's tort system is out of control, Tennessee can do something about that. Tennessee can pass legislation that reigns in the tort system. For example, limits punitive damages, or limits what attorneys can take away. Connecticut has done that. There's restrictions on how much an attorney can take away in contingency fee cases. All kinds of restrictions to try to reign in the system, provide protection in medical malpractice cases for doctors. In Connecticut we have had obstetrician/gynecologists deciding to be just gynecologists, because they're tired of getting sued. Connecticut can do something about that, Tennessee can do something about that. But the notion that three or four hundred thousand people in Alaska ought to be deciding what folks in the lower forty-eight ought to be doing about their tort systems, it's just not supportable.

Mr. Barry Engel:

So then you don't like the concept of twenty thousand people on the Cook Islands deciding what the state of Tennessee, I take it—

Mr. Eric Henzy:

I don't. But it's not as offensive to me as domestic jurisdictions doing it. Because my point is that states in the United States ought to be sharing some minimal ideas of justice. The Cook Islands may have very different ideas of justice or what legal systems ought or ought not to have in them. So I don't like it that the twenty thousand people in the Cook Islands do it, but I like it even less that—I don't know how many people like in Alaska, I think it's not very many—people in Alaska decide what's in the best interests of people down here. And I'm going on, but frankly I don't really buy it, that that's the reason.

My concern, or my belief, is that what we really have here is what David Brownbill, I think the point he was making was about Delaware corporate law, referred to as law for sale. In the case of the Alaska statute, it was drafted by a New York attorney who's brother is the president of the Alaska Trust Company, and somehow or other the legislature of Alaska decided that it was a good thing to pass this law. I think what we have in Alaska, and what we have in Delaware now, is law for sale.

Mr. Barry Engel:

But, again, that's nothing new. I don't think.

Mr. Eric Henzy:

It's nothing new, but it doesn't mean that we have to be happy about it. Also, I view this to the extent that these asset protection trusts do well. And I'm assuming that both of you guys hope they do really well, and Rich Hompesch hopes they'll do really well in Alaska. The potential impact on our society is so great that maybe—law should never be for sale—but maybe it's better to have little law for sale than big law for sale, and I view this as big law for sale.

Mr. Barry Engel:

But isn't that a double-edged sword? I mean, you talk about the impact on society. You have obstetricians who are no longer practicing. You have people who are hesitant to go into business in certain areas—I mean, there is a huge cost to what has gone on in the last ten to twenty years as a result of what some would call, and not necessarily myself, believe it or not, but what some would call a legal system run amuck. So there are going to be costs on either side of that fence. And I believe very strongly that asset protection planning is truly a response to a problem. And if you fix the problem, whatever the hell that means, but if you fix the problem, then the interest in asset protection planning will go away.

Mr. Eric Henzy:

So Barry's argument is that there's a few—

Mr. Barry Engel:

One of my arguments—there's a lot to say.

Mr. Eric Henzy:

—he has lots of arguments. But one of his arguments is, there's a few people out there, twenty thousand people on the Cook Islands, and some small number of people in Alaska, that are—can figure out that we all down here have got it wrong, and that they know how to fix it and get it right.

Mr. Barry Engel:

I wouldn't say that.

Mr. Eric Henzy:

And that's just—it's just not supportable.

Mr. Barry Engel:

I wouldn't say it that way.

Professor Jeffrey Schoenblum:

Now, Gideon.

Mr. Gideon Rothschild:

Let me just point out a couple of things here in terms of if I was a bankruptcy lawyer, a creditor's-rights attorney, I think number one I'd probably be more inclined to support the Alaska law, because I think that it would give creditor's-rights attorneys and creditors certain avenues to succeed against those who wrongfully use the laws. We do have a balancing mechanism in our society, and that is called fraudulent conveyance law. The statute of limitations for fraudulent conveyance in New York is six years and in many other states it's four years. In Alaska there's a four-year statute. If someone creates a trust to be governed by Alaska law and transfers assets to an Alaska trust a creditor will have the right to challenge that transfer on fraudulent conveyance grounds for a period of four years from the date of the transfer, or if they were a creditor existing at the time that the trust was created, then they have up to one year from the date of discovery, or when they should have reasonably discovered the transfer. And so there are protective mechanisms for wrongfully transferring assets to a trust.

Now, I am a proponent of foreign trusts more so than domestic trusts for asset protection reasons, for the reason that they haven't been tested. And as long as we have a concern about whether full faith and credit will recognize an Alaska trust established by a New York resident or a Tennessee resident, there remains that uncertainty as to the efficacy of these structures. But if states would recognize the validity of these trusts, I think that it would serve a tremendous public policy objective, because, number one, the Internal Revenue Service wouldn't be worried about losing trillions of dollars to offshore trusts that would then be out of their control, out of their reach without any way to ensure that there is proper reporting and proper payment of taxes, as there would be if people would use Alaska or Delaware trusts. And creditors would not have the ability to recover assets in the event of a fraudulent conveyance situation. So I think having the Alaskan trust legislation actually enhances the creditor's rights.

Mr. David Aronofsky:

Federal law, under the Full Faith and Credit provision of the U.S. Constitution, gives a bankruptcy court in almost every instance the power to override any state law that I can think of, number one. Number two, I was reading a lot of Barry's materials earlier this morning, and he talks, I think in one of your cases, about the court's approach. You may not reach the assets, but you can reach the person who controls them in a lot of the trusts that we talked about this morning. It seems to me that between preemptive power in a bankruptcy court judgment and control over the individual who controls the assets offshore, there are plenty of legal ways to address the problems that you're citing, Eric.

Professor Jeffrey Schoenblum:

If we could go on at this stage to a few, almost bullet responses and then get a little more deeply into some issues and take some questions. Just to lay it out for those, particularly who aren't familiar with all the aspects of this. Just a basic question, who is a good candidate and who is not a good candidate for an asset protection trust, presumably offshore, but maybe we can even distinguish that, and consider Alaska and Delaware as well.

Mr. Barry Engel:

I would suggest if somebody has a net worth of a million plus, perhaps half million that's liquid, they are a good candidate for asset protection planning. There's a number of tools they could look at, not just the trust. And then of course, as the net worth increases, they're all the more a candidate, I believe, for the foreign trust. I think they should keep in mind that your million is going to mean as much to you as my five million means to me, as Gideon's fifty million means to him.

Professor Jeffrey Schoenblum:

Well, that gets to the next question, which is what's the cost? Because I think on a cost/benefit analysis, you know, the million, you're taking a larger piece of it to set this up, and especially if you have to defend it and so forth.

Mr. Gideon Rothschild:

Well, I think you'll find different fees charged by different folks. I've seen Bermuda trusts promoted to be set up for as little as fifteen hundred dollars, by some organizations, not law firms, out of Bermuda.

Professor Jeffrey Schoenblum:

Does this require you to lower your fees?

Mr. Gideon Rothschild:

No, we just don't recommend those trusts.

Professor Jeffrey Schoenblum:

All right. For a good solid—

Mr. Gideon Rothschild:

And I've seen, you know, good lawyers charging anywhere between, I'd say fifteen and thirty thousand dollars to set these offshore trusts up.

Professor Jeffrey Schoenblum:

How about the administrative costs?

Mr. Gideon Rothschild:

The administrative costs, actually, are not that expensive. The ongoing administrative expenses of these trusts, generally most of the foreign trustees, as well as the Alaska trusts that I've dealt with, and Delaware, because they're not actively managing the portfolio, usually—because often times there will be a custodian bank that's managing the portfolio and charging a management fee, or the settlor him or herself will be managing the portfolio through a structure like a limited partnership or a limited liability company that they retain control over—the foreign trustees charge a fee typically running around two to four thousand dollars per year. And then you have the ongoing administrative requirements of filing tax returns assuming you're a U.S. resident. You have to file, under the foreign trust reporting requirement, Forms 3520, 3520A, that I'm sure Carlyn McCaffrey, tomorrow, will be discussing.

Professor Jeffrey Schoenblum:

How do you actually go about setting up one of these? I know that you call, perhaps, one of the persons on the panel. But other than that, what are the actual steps?

Mr. Gideon Rothschild:

You don't have to fly to the Cook Islands.

Professor Jeffrey Schoenblum:

That's what I want to clarify.

Mr. Gideon Rothschild:

That's about an eighteen-hour plane ride, and I don't think anybody here—unless you enjoy scuba diving, there's really no reason to fly there.

Professor Jeffrey Schoenblum:

So let's say we had somebody in the audience who is not a lawyer, but is actually interested in an asset protection trust. Do they pick up the phone, and just call their local lawyer, or do they call the Cayman Islands, do they call, for example, Antony Duckworth in the Cayman Islands, or what do they do?

Mr. Gideon Rothschild:

Well, they can certainly call Antony in the Cayman Islands. Cayman Islands has a six year statute of limitations for such trusts, and Antony may even suggest a different jurisdiction be used other than the Cayman Islands. Or they can call a U.S. attorney, but I would recommend that whoever is called should be someone who really specializes in this field. This is an area that you generally wouldn't want to be dealing with a rookie, if you will, no different than going in for heart bypass surgery and dealing with an internist. I think that this area is so complicated in that it evolves around not only foreign trust law, but it also includes domestic tax issues, foreign tax issues, and fraudulent conveyance debtor/creditor issues, that anyone involved in this field has to have a multi-disciplinary approach in order to do it effectively.

Mr. David Aronofsky:

There are also treaty issues. You do have to look at what treaties your offshore jurisdictions have and haven't signed, because if one of them involves a judgment recognition and enforcement treaty without exceptions, you may be going to the wrong place if and when you're ever hit with a valid judgment.

Professor Jeffrey Schoenblum:

David, can you expand on that a little bit. What is a judgment recognition and enforcement treaty? What is the impact of it? How does it work?

Mr. David Aronofsky:

The way it would work, I think, would be when a jurisdiction, and I'm going to use a hypothetical, Cayman Islands, were exercising its sovereign power and subscribing to an international agreement that its own courts would recognize as binding law in that jurisdiction. Most jurisdictions, other than the U.S. take the position that international law which conflicts with domestic law supersedes domestic law. That's independently of whether any international court, such as the European Court of Justice, might issue a binding judgment on a member country of the European Union. I would want to know whether any of these jurisdictions do, in fact, find themselves bound under an international convention or agreement by a judgment enforcement and recognition convention of any kind that would permit a judgment outside that jurisdiction to be recognized and enforced if it comes from another signatory country, and whether there are any exceptions that would permit trusts, for example, to be excluded from that sort of a judgment enforcement or recognition. Very few U.S. lawyers could know that without consulting foreign counsel of a very high caliber.

Professor Jeffrey Schoenblum:

Okay. We're moving along. How do I decide which is the appropriate jurisdiction for an asset protection structure? What are the attributes that I'm looking for in those jurisdictions? There must be some key factors that I want to concern myself with. You don't have to get into the specific choices.

Mr. Barry Engel:

No, no. Let me just say that I think there are two schools of thought here on the question of where to go. One is that we want to go to a jurisdiction that has statutory specificity, meaning that a jurisdiction that has specific law addressing the many issues associated with the particulars of asset protection trusts. I like statutory specificity. I settled a case very recently. A client was sued a year ago. He thought I would be too expensive to call, so he went through the litigation process. And after spending about a hundred thousand dollars, he called me. He said, wasn't that trust I set up a couple of years ago supposed to do something? I said, well, yes. Bottom line to that was, once we sent a copy of the specific law to the adversary counsel, together with a letter of explanation as to how the trust comes in to play, within a week the case settled, and settled very cheaply. So I like statutory specificity. The other school of thought is, you want to go somewhere where the law doesn't look like designer legislation, because that'll look good to a judge some day. So those are the two school of thought.

I do prefer the specific approach. I will say there are two concurrent elements. You need a good team and you need a good jurisdiction. You can have the best law in the world, and if you don't have the right team in place, i.e., foreign funds managers, foreign trustees, foreign counsel, etc., the paper work is going to do you no good. You need the good team, you need the good counterparts. I'd rather, in a way, have a good team and bad law or a bad jurisdiction, than a bad team and good law or a good jurisdiction. Ideally, you have both. I'll stop there, unless you want me to mention some of the elements you look for a in a specific—

Professor Jeffrey Schoenblum:

Yes, I think that would be very helpful.

Mr. Barry Engel:

For example, I'll name the six that I deem to be the most important. I like it when a jurisdiction, and it's law, says specifically that we will not recognize foreign judgments. You need to come here and sue from scratch in a trial de novo on the merits of the case. I like a jurisdiction for my clients that has a heavy burden of proof, such as if they're going to attempt to show a fraudulent transfer, that fraudulent intent existed beyond reasonable doubt, as opposed to by the standard of clear and convincing evidence or by the standard of preponderance of the evidence. I like a short statute of limitations. Two years is the outside provision in the Cook Islands. The U.S. Bankruptcy Court has a one year statute, Gibraltar claims an instant protection or zero. You know, one man's "too long" is another man's "too short." So who's to say, in way, who is right and who is wrong, it just depends on which side of the fence you're on.

I also like certainty in the law that a settlor can be a beneficiary without impinging the efficacy of the structure, of the planning structure. I like statutory certainty that the settlor can retain the control. And finally, out of the fifteen that I've identified, anyway, number six would be I like that the burden of proving fraudulent intent is always on the creditor, as opposed to under U.S. law in some circumstances, it does shift to the settlor or the transferor.

Mr. Gideon Rothschild:

Obviously, a subset, I think of this consideration is whether you go offshore, to a jurisdiction offshore, or whether you remain onshore, meaning Alaska or

Delaware. And I think if the primary motivation for establishing such a trust is protection from future creditors, I think one still has to be concerned about the uncertainty that exists by remaining onshore, unless you're an Alaska resident or a Delaware resident. If you live outside of those jurisdictions, you have to deal with the conflicts of law concerns and the recognition of judgments and the U.S. Constitution. And until that gets resolved, it's anybody's guess.

Professor Jeffrey Schoenblum:

We're going to get into that after a little while, but I want to pick up with you, Eric. Barry said he prefers a tight statute. From your standpoint, which do you prefer? If you're attacking these. He talked about that making it easier from his side.

Mr. Eric Henzy:

Everything Barry said, just turn it around, and that's what I prefer.

Mr. Barry Engel:

I said you were a nice guy.

Mr. Eric Henzy:

That, too.

Professor Jeffrey Schoenblum:

This is really interesting. They happen to have a business, a real partnership, developing here.

Mr. Eric Henzy:

The thing I prefer the most, and this kind of picks up on what Gideon was saying, is that it be a domestic trust. That may sound inconsistent with what I was saying. I think these domestic trusts are bad. But I would go further than Gideon that there's uncertainty with these domestic trusts. I think they won't work.

Professor Jeffrey Schoenblum:

Wait, before you go any further, can we pin you down—okay. Barry or Gideon has set up one of these trusts, and let's say it's offshore. What would your arguments be to bring down the trust that one of these guys has set up? You've already done this in fact, winning a great case.

Mr. Eric Henzy:

I assume, and usually this is, I think, going to be the case, if I have to go to the Cook Islands, or I have to rely on the Cook Islands fraudulent conveyance statute or certainly if I have to rely on Gibraltar or Belize law, I lose. The attack in the *Brooks* case that I was involved in, and the attack in the *Portnoy* case, which is a case out of the Southern District of New York, was that the Belize, or the Cook Islands, or whatever the offshore jurisdiction's law it is, is not the applicable law.

The real battle ground in those cases was a choice of law issue. The bank that was aggrieved in the *Portnoy* case won on that. My client won in the *Brooks* case on that. The judge found the Connecticut law was applicable. And once you get—because what we're talking about is asset protection trust, remember, is self-settled trust. The settlor is the beneficiary. And in the *Brooks* case, the trustee of those trusts could distribute all the income and all of the principal. It was an irrevocable trust. But I'm not sure what irrevocable means if I distribute all of the rights of the trust and I'm left with an empty box, but all of the property is out of the trust.

And the judge found that Connecticut law was applicable for determining the validity of the trust. In forty-eight out of fifty states, the spendthrift provision in a self-settled trust is not valid. So once you win on the choice of law issue, you win. And that's what I argued throughout the case, that if I won on the choice of law issue I won.

Professor Jeffrey Schoenblum:

What if there is not mandatory access to the trust by the settlor, it's discretionary with the trustee?

Mr. Eric Henzy:

It really doesn't matter, because whether a trust is mandatory or discretionary, in most U.S. jurisdictions with a self-settled trust the spendthrift provision of the trust is not valid. The creditors can get at the *res* of the trust. So whether it's revocable or it's irrevocable, or it's mandatory or discretionary, on a self-settled trust theory, it really doesn't make any difference.

Mr. Barry Engel:

Can I respond to that? I don't know, really that that's entirely correct. You look at the typical pension trust, where you have, if I may, the doctors who are the shareholders in the pc, they're the trustees of the trust, and they're the principal participants under the plan. As a matter of federal law, and indeed, exemption law under most states, that self-settled trust is protected in that particular instance. Colorado has a statute going back to the 1850s that says I can create a trust and I can be a beneficiary of that trust, and it will not be available to my creditors who don't exist today, or come along in the foreseeable future, so long as I am not the primary beneficiary, that type of self-settled trust that Gideon already mentioned.

I would guess twelve or fifteen states have a similar statute on the books. So I don't really know that there's such a huge difference conceptually or philosophically between what jurisdictions like the Cook Islands have done, what jurisdictions like Gibraltar have done, and so on. I don't know that there's such a huge gap between what they have done and really what we have here, when you take a hard look at U.S. domestic trust law.

Mr. Gideon Rothschild:

I think when you look at the *Portnoy* case and you look at the *Brooks* case, as you've mentioned, public policy played a role in that decision because of the bad facts. The court cited section 270 of the Restatement of Conflict of Laws as the basis for invalidating the trust in those cases. Both of those cases, however, involved transfers which were arguably fraudulent at the time.

Given these egregious facts, it is not surprising, I admit, that the court found a way to invalidate the trust. I submit to you, though, that at the American Law Institute-ABA video program that I participated in about six months ago we had the Chief Judge of the Bankruptcy Court of Mobile, Alabama, provide an example in a non-egregious situation. Let's take a very straightforward situation. An individual who has a masters in business becomes an investment banker, he makes five million dollars, and then he decides he's had enough of investment banking. He wants to go to medical school. And he goes to medical school and opens up this practice. And he's got this five million dollars now, at risk, for which there is no protection. He's not married, he can't transfer these assets to his spouse. Perhaps even if he is married, he doesn't want to transfer it to his spouse for other reasons, among them being that most marriages—over fifty percent of all marriages end in divorce. And so he needs to do something with these assets. Now, he's not yet raised the scalpel on his first patient, and he transfers his five million dollars to an offshore trust that's created by Barry. Should that individual, if five years later he is charged with a negligent act, not be able to protect his assets using an offshore trust? The bankruptcy judge's own opinion of that situation would be that there's nothing wrong with such a transfer.

There's nothing wrong either morally, ethically, or legally with structuring the trust at the correct moment in time when there are no foreseeable creditors on the horizon. This is no different than any other pre-bankruptcy planning that debtors' attorneys very often recommend.

One last point. I suggest to you to look at section 273 of the Restatement of Conflict of Laws, and see that public policy is not a consideration in section 273. The courts, importantly in *Brooks*, dealt with section 270. Section 270 deals with validating a trust provided it does not offend a strong public policy with respect to the particular matter at issue. The particular issue here is not the validity of the trust, but whether the spendthrift clause should apply or not. And with respect to that, the conflict of laws under section 273 seem to dictate that the law designated by the settlor should apply. We can look at a number of cases, not in the foreign trust area, but in the domestic trust arena, where the choice of law that the settlor designated—there was a Massachusetts case that dealt with a Vermont resident who used a Massachusetts trust, dictated that Massachusetts law should apply to that trust, in order to avoid his spouse's rights under the elective share rules in Vermont. And the Massachusetts court held that Massachusetts law would govern since a settlor has the distinct right under the Conflict of Laws Rules to designate the law in which he or she wants to have the trust governed under. And there are a number of other cases like that, and I think that the only reason we got the results in *Portnoy* and *Brooks*, and now there's a more recent case out of Florida, is because of the egregious facts that surrounded those cases.

Mr. Eric Henzy:

I don't agree.

Professor Jeffrey Schoenblum:

All right. Let me go on to another point, because it's something that I've always wondered about, and maybe it can be clarified. As a practical matter, the client now wants to know how much, in the way of assets, should be transferred. I think I'd feel a little uncomfortable transferring all of my assets, but on the other hand, if I don't transfer all of my assets and there's a judgment, can't they just take all my assets I kept in order to make up for the ones they can't reach?

Mr. Barry Engel:

Well, I always advise clients to leave out at least $18,500, which is my fee, and then beyond that. . . . No, different people will have different goals. Some clients very clearly have in mind nest egging a portion of the estate. So perhaps twenty percent, perhaps a third of the estate is transferred. One of my clients refers to that, I think, very descriptively as his "go to hell" money. If everything falls apart, he has that. Other clients wish to take a more aggressive approach.

As a principle I always tell people something has to be left on the table, the more you transfer the more of a chance that you're going to be taken a look at if something happens in close time here. I would hesitate to transfer all but say ten or twenty percent of the estate, but, of course, that changes with the size of the estate, the nature of the business or profession of the individual, how close to retirement they are, what their track record it. After all, we might take a different approach for a high profile surgeon who for twenty years has never had a problem, as opposed to somebody who has been in practice for five years, and seems to be under a black cloud all of the time. In that case, we may not take the case at all.

And I think a very important point for those of you who have an interest in this and want to get into this area, or are maybe already in the area, is definitely don't feel compelled to take every case that comes in the door, there is too much good work out there. And the bad stuff could haunt you. You can have your license to practice pulled, you could have criminal sanctions imposed, you can be subject to civil liability. So over the course of the last ten or twelve years, we have structured around a thousand of these in our firm. We've had about fifty come under attack, so roughly five percent of what we have structured has come under attack, and I think that's a relatively low percentage when you consider the profile of the people that we have done this work for. And I think it's a low number because we are careful with respect to that big question of who do you take and how do you structure your planning.

Professor Jeffrey Schoenblum:

What would the actually preferred structure of this asset protection arrangement be? Barry mentioned a partnership and a trust, I don't know what procedure you use, Gideon, but for someone who is trying to get a picture of how this works, how would it work? I know Barry has this famous ladder that he uses to demonstrate the various steps in the provision of an asset protection structure. And it's not all offshore asset protection trusts and partnerships. There are domestic structures as well. But what would you do?

Mr. Gideon Rothschild:

I think I'd use a similar approach to Barry, but I think it depends on the client at the end of the day. If a client wants the maximum protection and he's willing to give up some flexibility and control, obviously the maximum protection is to move the assets physically offshore when there's no problem on the horizon and put it into the hands of a trustee. You can imagine, though, that most clients that might walk into my office, when I explain to them that they're going to take their life savings, perhaps, and transfer them to a Cook Islands' trustee, their reaction might be a what, where? Where are the Cook Islands? You know, I've got to pull out my atlas that I have in my office and point to where the Cook Islands are, let alone explain to them what this trustee might do with their money.

Many clients would prefer something just short of actually transferring their assets offshore, especially when there's no real threat on the horizon. And we might, in those situations, use a combination of structures. We might set up a partnership, for example, where the client, who is the general partner of his partnership, transfers a million dollars into the entity. He would retain a one percent interest. A ninety-nine percent interest in that partnership then would be assigned immediately to his foreign trust, appointing a foreign trustee as the trustee of that trust. And in that fashion, divesting himself, for all intents and purposes, of ninety-nine percent of the equity in that partnership. Any representations to a lender in future financial statements would only reflect that he owns a one percent interest in that structure with his trust owning now a ninety-nine percent interest. He can be a discretionary beneficiary of that trust, if he wishes, assuming that the jurisdiction designated allows him to remain a beneficiary of that trust. His spouse, if he is married, and his children may also be discretionary beneficiaries of that trust, as well as charities and any other individuals he would like to favor, either during his lifetime or upon his death. And this trust would also serve the purpose of being his primary dispositive instrument for estate planning purposes. It would contain, just like his will, his credit shelter provisions, his marital trust provisions, and his generation-skipping trust provisions, and the trust would become, in effect, his will substitute.

Mr. David Aronofsky:

I've got a question for Gideon on the discretionary beneficiary. How do you deal with a U.S. court order that tells you to exercise your discretion, with no latitude.

Mr. Gideon Rothschild:

Okay. Good question. Well, remember that you, the beneficiary, don't have the discretion—the discretion is in the trustee who must exercise discretion either in your favor or someone else's favor. Now, if that trustee is, in fact, a foreign trustee, then the U.S. court order would be ineffective against that trustee, because there's no jurisdiction. In addition to which, if you select the right jurisdiction, it may, in fact, be a violation of local law for that trustee to comply with any court order that is not rendered by their own courts.

Mr. David Aronofsky:

But that's a perfectly clean, no control instrument. I doubt that any of us is really talking about that, here. I'm talking about when the person against whom the order is issued has some reach on either the assets or the trustee.

Mr. Gideon Rothschild:

Well, let's talk about the different degrees of control that a client might want to keep. In the first instance in this bifurcated structure of the partnership and the trust, we have David as the general partner. Now, if in fact, the assets remained here under his control, it's very clear that a U.S. court has jurisdiction over him, and can compel him, if they wish to disregard this structure, to liquidate the partnership and, disregarding the trust, simply turn over those assets to the creditor. And that is the reason why, if in fact we were simply to leave this structure alone if a problem arose in the future, there wouldn't really be much asset protection available to David, although I believe there should be. Because, again, if we were to apply conflict of laws principles, and the court were to apply—let's assume—Cook Islands' law to that trust, then that trust and the trust's assets, i.e., the partnership interest the trust owns, should be protected from his creditors.

But we see from the *Brooks* case and the *Portnoy* case, that we can't rely on the courts ruling in our favor in those types of situations, possibly. And so the game plan, if you will, would be at the appropriate moment when a threat develops, years in the future after we've set the structure up, it would be advisable for the foreign trustee to direct David, as the general partner, to liquidate the partnership and move those assets offshore. Now this, mind you, is before any court order or judgment rendered against him. It's simply a safety procedure to get the assets belonging to the trust out of the U.S. court's jurisdiction. When that partnership is liquidated, David receives his one percent interest, that is all he owns. The ninety-nine percent interest that belongs to the trust is transferred offshore, now out of David's control and in the sole control of that foreign trustee, so that by the time the plaintiff might discover the existence of this trust—which is usually after a judgment is rendered against David individually—the assets have been moved offshore out of the U.S. court's jurisdiction.

Professor Jeffrey Schoenblum:

What if there is a letter of wishes or some other understanding, and the court orders the individual debtor to call up the bank in such and such place and say send back the money, that would be my wish.

Mr. Gideon Rothschild:

I'm going to let Barry respond to that one.

Professor Jeffrey Schoenblum:

And if the results aren't forthcoming, what about contempt or some other sort of punitive or coercive action.

And maybe Eric might want to respond to some of that, as well.

Mr. Barry Engel:

If you're my client, Professor, and this is just a hypothetical, my advice to you would be to do everything that the judge tells you to do. Don't mess around, he's a very powerful person sitting up there. The way that contempt law works, and this is very clear, and I had the privilege of addressing about sixty distinguished judges in Reno at the National Judicial College where they teach judges how to judge and play golf, and play tennis, and all sorts of things. And it was a strange sensation, telling these people how contempt law works. I thought I could be held in contempt of court following the program.

But, anyway, they confirmed in private conversation that this is it: the principle is that you cannot be held in contempt of court if you do not have the power or the ability to comply. That's the impossibility of performance defense. It's a complete defense. There's an exception to that defense, and that is the self-created impossibility. Importantly, however, there has to be a link in time, close link in time, between what you did to create the impossibility and that specific order. So if today I do something that in two years makes it impossible for me to comply, I can't be held in contempt of court. If the judge today orders me to bring those papers in next Tuesday, and on my way to court that morning I stop by "Shredders Are Us," and thereafter it's impossible to produce the papers, I obviously created the impossibility within a close nexus in time to that particular order. And under the planning that we do, there is not going to be that link in time, and we're not going to cut it so close that it's going to be difficult to tell if there is a link in time between the specific order and the inability to produce something.

Professor Jeffrey Schoenblum:

So even if there is proof of prior arrangement or understanding, or an indication that all along in practice the trustee is obedient to whatever request is made for assets or anything else by the settlor, you don't feel that that would have an effect?

Mr. Barry Engel:

Well, we had that specific question brought to a court not too long ago. And, in fact, in an article that everybody should have on "Does Asset Protection Planning Work" from the *Journal of Asset Protection*, we do have some language from the transcript, page, what's listed as twenty-four. And the judge says, "I've reviewed the law regarding contempt and the standards that are required. One thing I've learned a long time ago as a judge, you never order something you can't enforce. And if we order him to pay a million dollars, I have to be assured that's a reasonable order. As a matter of fact, contempt law says one should not issue orders that cannot be complied with. I'd look pretty silly if I entered orders that couldn't be enforced." That's from the transcript of a federal proceeding.

And by the way, it was found that he couldn't.

Mr. Eric Henzy:

The trusts that I've seen, and I'm not sure what Gideon or Barry put in their trusts, have not said the trustee "shall"—it's the trustee "may." And so I think, sure, it's a terrific remedy, and you could have a judge order a settlor to ask a trustee to send assets back, and either the trustee will or won't. But, again, the trusts that I've seen—and I would think that it would be kind of a drafting—

Professor Jeffrey Schoenblum:

This is what I'm getting at, the judge is pretty shrewd. And he's thinking, well, I'll just threaten to throw this guy in jail. Is the bank really on that other island going to let this guy be thrown into jail?

Mr. Gideon Rothschild:

Let me give you a real case. There is a case in Las Vegas where Mr. and Mrs. Anderson have been sitting in jail—they just got out two weeks ago, actually—they have been sitting in jail since last August for contempt of court.

And they got out. And how did they get out? Because eventually they must have sent a signal to the trustee, somehow, to send the money back. This appears to be another bad apple type of case. The F.T.C. had charged a company they were selling for with civil and criminal fraud and obtained a seizure order against them. When the judge discovered the existence of this trust, and the fact that the settlors, the Andersons, were the trustees who had *sole* control over the trust's assets, and were only discharged as trustees in the face of an order directing them to bring the money back so that they could—

Mr. Eric Henzy:

So they created the impossibility right then.

Mr. Gideon Rothschild:

—they created this impossibility of performance. It was their removal as trustees in the face of a court order that threw them in jail. And it was not until they got the money back from the trustee—approximately, I believe, a million and a half dollars—that the judge released them on the condition that they turn in their passports because apparently there was a belief that there was still more money offshore. And they were referred for criminal prosecution to the Justice Department.

So this is not something that can be dealt with lightly.

Mr. Barry Engel:

But there's a big difference in that design. You would never design your planning that way.

Mr. Gideon Rothschild:

Absolutely not.

Professor Jeffrey Schoenblum:

One or two more questions, as I know that we're running a little late, but this is very worthwhile and enlightening.

How about the tax aspects? The tax aspects of an asset protection trust from the American perspective?

Mr. Gideon Rothschild:

Actually, that's what, I believe, is the real reason Alaska passed their legislation, and then Delaware copied them. It was not because Alaska or Delaware wished to become a debtor's haven. It was because they saw the flight of money leaving this country for offshore places, and they also saw, particularly Alaska, what was happening in the dynasty trust planning arena. South Dakota and Delaware were the leading states to attract monies to their financial institutions because of the repeal of the rule against perpetuities. What that enabled individuals to do is to run trusts out forever, unlike individuals who reside in New York or most other jurisdictions. There are now eight states that have repealed the rule against perpetuities in the United States, and Alaska, Delaware, and South Dakota are the leading proponents of dynasty trusts simply because, in addition to the repeal of the rule against perpetuities, they don't have a state income tax for non-resident trusts.

Now, what does that mean insofar as why they had to pass asset protection legislation? Why couldn't they just repeal the rules against perpetuities in Alaska? The reason is related to a quirk in the tax laws. The Internal Revenue Code, the Regulations, and decisions and revenue rulings that have been promulgated by the Service and the courts over the last thirty years have ruled that if a settlor creates a trust and retains a beneficial interest, albeit a discretionary interest, does not retain any other rights whatsoever, then if the creditors of the settlor under local law can reach the trust assets, then section 2036 will apply to pull back the trust's assets into the settlor's estate. Also, the transfer to that trust would not be deemed a completed gift, because the creditors could reach it.

If we take that same rule of law, and look at the corollary of that rule as it applies to a jurisdiction in which the creditors of the settlor can not reach the trust assets, then the logical conclusion, from a tax perspective, is that the transfer to the trust would be a completed gift and it would be outside the settlor's estate at death. In fact, in a private letter ruling issued in 1993 dealing with a foreign trust, in which, under the jurisdiction's laws, the creditors would not be able to reach the trust's assets, and then in a 1998 private letter ruling issued last August, dealing with an Alaska trust, the conclusion was that these transfers were, in fact, completed gifts. Although the 1998 ruling did not conclude what the effect would be from an estate tax inclusion perspective, discussions that I've had with George Masnick, whose branch issued that ruling, indicate that the only reason the Service did not opine on the estate tax inclusion, was because it would depend on a facts and circumstances test.

If, for example, the settlor received distributions on a regular basis, section 2036 might apply finding an implied agreement between the trustee and the settlor. If there were no distributions to the settlor, on the other hand, during the settlor's lifetime, then section 2036 should not apply, according to the Service. It is that aspect of the tax law that the Alaska Trust Act impacts. Because now, using Alaska—and perhaps Delaware, although I'm not sure that Delaware has resolved some of the issues—someone creating an Alaska trust can accomplish significant estate tax benefits, by transferring assets thereto. We all know that transferring assets during lifetime is advantageous, because it gets all of the future appreciation out of the settlor's estate. But the biggest drawback to transferring assets for most people is the uncertainty that the future might hold. By allowing for a discretionary distribution to the settlor, if financial circumstances were to change in the future, you are able to accomplish, using an Alaska trust, what you might not have been able to accomplish before, without going offshore.

Professor Jeffrey Schoenblum:

To conclude this segment of the program, David, can you tell us in terms of Montana's law, is it particularly pertinent to persons practicing in the United States?

Mr. David Aronofsky:

It will be, in my view, to the extent that persons practicing in the United States are representing offshore individuals, companies, financial institutions, and trusts.

Professor Jeffrey Schoenblum:

If you have a foreign client?

Mr. David Aronofsky:

Exactly. That is the focus of our law. Many of our calls, and the ones that are coming to me these days, are from Americans as much as offshore counsel, who have these kinds of clients. They've all read the law by the time they reach me, but they want to confirm that it really means what it says, and how our courts react.

Professor Jeffrey Schoenblum:

How does it work with treaties?

Mr. David Aronofsky:

I would have said that until a couple of months ago when I started reading these new law review articles raising questions about the extent to which treaties do or don't apply to states, as opposed to individuals whose assets are within the jurisdiction of I.R.S., and I hope everyone understands that distinction here, that tax treaties would preempt state law. I guess to some extent they still do, unless the state itself is the party that's adverse to the I.R.S. in a proceeding. Then let me suggest that this is an open question. Because our preemption statute only goes to money laundering, not tax.

Professor Jeffrey Schoenblum:

So if the French government, under the French-U.S. Income Tax Treaty provision pertaining to Exchange of Information, asks for information on this account from the I.R.S. or the government—

Mr. David Aronofsky:

Here's the way it would play out, I think. They could get the information from a depository. They could get the information, I suppose, from the depositor if and when that person were within the jurisdiction of the U.S. Could they get that information from the State of Montana? Very, very questionable right now, if the state didn't want to give it to them, because the state could mount, in my judgment, an Eleventh Amendment immunity defense, claiming that the I.R.S. lacks jurisdiction under that treaty to get tax information from the State.

Now, the way around it, of course, is for the tax policy people with Treasury to go to their money laundering colleagues with a suspected money laundering allegation, to see whether the latter office would be willing to seek the same information, at which point our preemption statute probably would kick in. I'm not so sure that tax information is as gettable right now from the state as it would have been before the law was enacted.

Professor Jeffrey Schoenblum:

Questions.

Question:

From a policy point of view, if Mr. Eric Henzy is right about the societal ills, then what can be done? There is no bar to someone going offshore. What are you suggesting be done?

Mr. Eric Henzy:

I don't think there's a lot that any U.S. government can do about offshore trusts. I mean, I suppose you could pass a law that says it's a crime to send your money to an offshore trust. I don't think that's going to happen. So, I think the answer is, I don't think there's a lot you can do for offshore trusts.

On the domestic trust front, though, say with Alaska trusts, I think that the remedy is going to be court judgments that find the spendthrift provisions in invalid. What's going to be different from the offshore case is that you're going to have federal courts that have personal jurisdiction over those Alaska trustees. So those judgments are going to be enforceable. And to the extent that the domestic trusts are as successful as I'm sure the legislatures that are passing them would like them to be, and the practitioners that are doing them, you may see some Congressional action. Because I think it's just not going to be acceptable to have a small number of states that are setting these systems up, and potentially having a big impact on the liability systems in a whole bunch of other states.

Question:

Barry, I was wondering if U.S. assets that the ownership has been shipped offshore, have the same protections as offshore assets in an offshore trust?

Mr. Barry Engel:

Whether U.S. assets that have been shipped offshore have the same—

Professor Jeffrey Schoenblum:

Those assets that are held in an offshore trust have the same protection—I think this is what you're saying. Do U.S. assets held in an offshore foreign trust have the same protection as assets that have been shipped offshore themselves, and are held say in an account offshore, as well as the trust being offshore?

Mr. Barry Engel:

Well, that goes back, I believe, to the distance factor. I would say as a general principle, no. I have had some of the test cases involve U.S.-held real estate, where we had very good results, even though it was U.S.-held real estate. But clearly I think we can expect a much greater degree of ultimate protection, if we're dealing with things that can be moved if and when something happens. Perhaps the question is, when should they be moved? My strong bias is to have the movement take place today offshore when there's nothing pending, threatened, or expected. Most clients are reluctant to do that, perhaps then I would suggest that they at least establish the offshore relationships today. But clearly the more distance that exists today the more protection the structure can be expected to provide.

Question:

I'm wondering whether anyone can discuss certain practical problems, to which I've never had the answer so far. If you're sitting offshore and you're approached by an American, the question is, is this a good guy or a bad guy, which boils down to, is he telling you the truth. And I don't know how you deal with that. That's one of the reasons why it seems to me to be an extraordinarily dangerous kind of business, because if he turns out to be a liar, you're going to end up having to convince the court in the offshore place, as well as onshore, that you aren't liable and quite conceivably criminally liable.

Mr. David Aronofsky:

The last thing I wrote in my paper for this conference, addressed the "know-your-customer" controversy that has broken like a firestorm all over the United States within the past thirty days, focusing on the same question. Let me suggest, without an answer, because two or three of our federal regulatory agencies have proposed regulations which would require answers and give the financial institutions the negative incentive, if you will, to get the answers from the sources of money coming into their account. The uproar and protest of these regulations has been phenomenal, in my judgment, from the press, from political figures, from financial institutions, and from most people who even think that their financial secrets, to the extent that they have any, and most don't, are going to be disclosed to these federal regulators and put into some big computer bank which is already happening anyway. But the point is, we don't know how to answer that question in this country, so I don't know how you would be expected to know how to answer it in the Caymans.

Mr. Gideon Rothschild:

Let me maybe take a stab at it by telling you what I do when I undertake client situations. First of all, we try to vet clients out pretty carefully. Lets take, for example, a client that came in my office about a year ago with his lawyer. I start out by asking some preliminary basic questions, what's your name, address, phone number, what's your occupation. And when I started getting silent responses to those questions asking very simple basic information, the response I got was I'll tell you later, we decide to go further. And I decided, well, this wasn't the kind of response that I was looking for, and I pressed on and asked the attorney—and it was then disclosed to me that this individual had been indicted for criminal acts in the past, and so I decided that he was not going to be a future client of mine.

But on a serious note, what I do in each instance, I look at the smell test, first of all. Who is the individual being referred by? Did he come to me over the internet, or did he come to me through a reputable attorney or accountant that I've done business with in the past. Secondly, I have him or her complete a questionnaire, a detailed questionnaire that asks about background information, whether there are any lawsuits. Whether he's ever been a defendant in any actions, whether he's filed all of his tax returns. I ask for copies of the last three years of tax returns. We then go ahead and do a Lexis/Nexis search on the individual. Now, I admit that that's a costly undertaking. It costs us about a thousand dollars in Lexis fees to do this background search, and that's part of the reason why the fees are what they are. But I feel that there's a risk involved in undertaking each one of these clients and I need to minimize that risk in every way I can.

And lastly, the client is asked to sign an affidavit of solvency. And I should add that I ask the client for a balance sheet prepared by his accountant, to see if there are any contingent liabilities, etc. So it's unlikely that I would have allowed to be retained by a Portnoy or a Brooks, knowing the situations that existed at that time.

Mr. Barry Engel:

Just a comment. I think there's two parts to what you said, first, the know-your-customer aspects. And I don't know that we go as far as Gideon is describing, although I think we do turn over a sufficient number of stones to do more than we're required to do under our law. But the know-your-customer issue is certainly a big one for all of us. But your comment on the statute of limitations and I wouldn't agree at all, that if you're on the right side of the line there's no difference between two years or six years. My clients want the comfort and the confidence of knowing that once two years is gone, the assets that they settled are going to be protected. Because under our system, and I've seen it before, you know, you give an American lawyer, an American litigator, an opportunity and he'll turn that into ten opportunities. And so if two years and two weeks has passed for a claim to arise, and as far as he or she is concerned, there's still four years to go, we're going to have litigation expenses that we otherwise wouldn't have had to have incurred, and we're going to have some aggravation and some sleepless nights. Once the statute of limitations passes, we're very comfortable knowing we can tell the other side the statute ran a year ago, go tell it to the judge in the Cook Islands.

Professor Jeffrey Schoenblum:

Professor Mary Daly.

Professor Mary Daly:

I just wanted to make a comment, if I could. As you'll quickly learn tomorrow morning, I am not a professor of trust law, but I am a professor of ethics and I do dabble a little bit in sociology. I wanted to pick up on a couple of points that were made earlier and see if I can tie them together, especially Eric's point at the very beginning about the bad laws.

One of the things that absolutely fascinates me, is that in this discussion we have not heard names like Vanderbilt, Carnegie, or Rockefeller. We heard about doctors, lawyers, and I assume, well-to-do plumbers. But for the most part, we're hearing about ordinary people who have accumulated an unusual amount of wealth. What strikes me about all of this is that they're trying to isolate themselves in a very particular way from the rest of society. And what I'd like to suggest is that this is part of a phenomenon that we all ought to be looking at and thinking about, and that the sociologists are talking about—and that's the gated community. The structure of the U.S. society has changed in a very peculiar way over the last twenty-five years. More doctors and lawyers and wealthy plumbers are living in gated communities. These communities have private police forces and private schools. Their residents are removing themselves in very particular ways from the rest of society. And asset protection is part and parcel of that.

And to take it one step further, I will share with you my own concern about lawyers removing themselves from society. In the last five or so years, we've had a great number of states adopt statutes that allow for limited liability partnerships and limited liability corporations. In part these statutes were a response to actions that were brought by government regulators against law firms and against the large accounting firms in connection with the savings and loan crisis. What these statutes have done, however, is to give us, as lawyers, and as law firms, very unique sorts of protections, so that we can isolate ourselves and our assets.

The sociologists of the legal profession have insisted that one reason why we are allowed to self-regulate is because we've made a contract with society. Society lets us self-regulate because we put our personal assets on the line. We are partners in the traditional sense, and if something goes wrong, if I give bad legal advice, or my partner gives bad advice, our personal assets are at risk. Limited liability partnerships and limited liability corporations changed that. And what the sociologists are saying is that five or ten years down the road, we may see more outside regulations of the legal profession, because we are no longer observing the essential terms of the contract.

Mr. Gideon Rothschild:

I'd like to respond to that, if I may. I think the answer to that perhaps may lie in things like mandatory malpractice insurance for lawyers. We already have mandatory malpractice insurance for doctors in most states. But that doesn't explain why someone in a vulnerable position should not be able to limit their risk exposure, by, say, forming an LLC. We have situations today like the eight million dollar coffee cup verdict that we've all read about. We've read about punitive damages being awarded because a lawyer committed sexual harassment. And the question really boils down to, are we insurers to an unlimited degree of whatever wrongdoing we might be accused of, rightly or wrongly. I think there are a lot of juries and judges that don't necessarily apply the law properly in every instance. We also have theories today that didn't exist years ago. Twenty years ago we didn't have to worry about punitive damages. We didn't have to worry about environmental liabilities. We are exposed to more and more liabilities today than ever before. And I don't think that it's wrong to be able to limit that exposure. If the legislative response to that is every attorney should have malpractice insurance of two million dollars, and everyone that drives a car should have liability insurance of two million dollars at a minimum, then perhaps that would be fine as far as I'm concerned. But I think that there's no reason why I should pay ten million dollars for an injury that someone sustains, when the next guy who causes the same injury, may only have to dig out fifty thousand dollars because that's all they're able to pay.

Mr. David Aronofsky:

That's not what's going on here, Gideon, in my view. If it were just civil liability that could be insured against you wouldn't have had the need to raise the question and we wouldn't be in the asset protection business at all. We're talking about an immense distrust, in my view, of the federal, and to a lesser extent, state and local government officials whose actions you can't insure against. It's really that simple. I talk to people who feel this distrust all the time in Montana because an increasing number seem to be gravitating out there. It's not why I moved there, but I'm in the minority. The fact of the matter is, it's I.R.S., it's H.H.S. investigators of Medicare fraud and abuse. Not that any has occurred, but try telling that to a doctor who has just spent a million dollars on a health care law firm after an audit that the doctor can't win, because how do you disprove the negative, to use the question that comes up all the time in law professing. No, I think what's driving this asset protection industry, if you will, has much more to do with concern about the government getting you, whether it should or not, that you can't insure against, than it is concern about private litigation liability, because the latter is always insurable and the judges and juries have a knack of making sure that justice is done in almost every case in those situations. So it's the government, it's not the private liability, in my judgment, that's doing it.

Mr. Barry Engel:

If I may, I think clients that I have seen who were asset protection motivated certainly have a concern that there might be the audit, there might be whatever, at the government level. But I think for the most part, there's just kind of a free-floating sense of anxiety, that, you know, you never know what's going to happen. And I've been in practice or business for twenty, thirty years. I've been successful, I've built up a nice size estate, and I'm going to be around for a while longer. And what are the chances of somebody jumping on me from a great height at some point, you know. Relatively high, if they're going to be around in practice or business for another ten, twenty, thirty years. So they say, oh, okay, I can spend some money today and put myself in a position so that if something happens my assets are not as exposed as they would be if something were to happen tomorrow, I like that, let's do that.

And I don't know if it's—I certainly appreciate and respect your comments. My perspective is, it's not as perhaps as heavy as the gated community or the like. I think it's people simply saying I've worked hard, I've got it, I've seen some weird stuff, I don't want to take any chances.

Professor Jeffrey Schoenblum:

But implicit in that is the question, why do people have to worry about that?

Mr. Eric Henzy:

I take your point, sure.

Professor Jeffrey Schoenblum:

Ms. Carlyn McCaffrey.

Ms. Carlyn McCaffrey:

Sort of an attempt to the response of Professor Mary Daly and to Eric. I'm not really sure that I know where I come out of the morality of kind of self-protective, asset protection process. But I think that when we're thinking about it, we should keep in mind that the fact that we don't see the Rockefellers and the Vanderbilts setting up these trusts, we see the lawyers, the doctors and the plumbers, is because the Rockefellers and the Vanderbilts don't have to do it, because their parents did it for them, and in virtually every state in the United States it's perfectly legitimate and unchallengable for a parent to set up an asset protection trust for her children. Creditors can't reach them. And all we're talking about here is whether the middle class, the upper middle class, moving into the upper class can do the same thing for themselves when they didn't have parents rich enough to do it for them.

Mr. Eric Henzy:

Interesting perspective.

Mr. Gideon Rothschild:

And just to add to that, it's interesting to note that in the research I did recently I discovered that, in England, they still to this day invalidate spendthrift trusts for a third party beneficiary. So we have a dichotomy here between English law and American law, and who's to say who's public policy is right or wrong.

Professor Jeffrey Schoenblum:

Why weren't the Rockefellers reachable? Has there been some government action since the time of the Rockefellers that makes assets much more vulnerable?

Ms. Carlyn McCaffrey:

No, because if I happen to acquire enough money as a Rockefeller myself today, I could do the same thing for my children under the laws of every state of the United States.

Professor Jeffrey Schoenblum:

Can't the government get to Rockefeller's assets now—

Ms. Carlyn McCaffrey:

Not after I put them in the trust for my children. And my children can be beneficiaries, and I can put it in Delaware, and it'll go on forever.

Mr. Gideon Rothschild:

You may not want to do that.

Mr. Eric Henzy:

You're making sort of a class argument, which I'm not sure I'm really buying, because—

Ms. Carlyn McCaffrey:

You're saying this process that the Rockefellers set up for their children is as immoral as the plumber sets up for himself?

Mr. Eric Henzy:

Whatever my view of the Rockefeller's trust, I don't think that because what the Rockefellers might be—because they're doing it doesn't mean it's okay for other people to do the self-settled trust idea over here. And you know, my only one—the class thing that it's somehow or other okay for doctors and lawyers and dentists to do it because the Rockefeller's did it for their kids. You know, I'm just not seeing it.

Ms. Carlyn McCaffrey:

I'm not saying that. I just don't know whether you think that the Rockefeller set up by their parents are equally bad, or is there something worse about a trust that you set up for yourself?

Mr. Eric Henzy:

It's hard for me to justify this, given what I've said. But, for however many hundreds of years or whatever, the principle has been that you can't set up a trust for your own benefits, and that's what's being attacked or changed right now. The principle has always been that the Rockefellers could take their money and dump it into a trust for the benefit of their kids. And I can't tell you there's a great big distinction there. I think the only distinction is, is the idea that if you want to give your money away you can give your money away. But if you want to keep your money, you want to keep the beneficial ownership of your money and your assets, then it's going to be available to satisfy the claims of your creditors.

Am I in love with the idea that because one of the Vanderbilt or the Rockefeller kids run somebody over and they can't get them because they got all their money in trusts that their parents set up, no, but you know, that's how it is.

Professor Jeffrey Schoenblum:

Wasn't there a recent Mississippi decision—

Mr. Gideon Rothschild:

Yes, the *Sligh* case.

Professor Jeffrey Schoenblum:

Could you comment?

Mr. Barry Engel:

Well, in fact there are a number of limitations to the spendthrift trust rule, even in the United States. And so it's not as black and white as one might first—what it might first appear to be. There are tax agencies, the I.R.S. can reach into a spendthrift trust, and the I.R.S., by the way, has been successful into reaching into IRAs and pension plans. And most recently in the Mississippi case—

Mr. David Aronofsky:

Don't forget to cite the statute that reversed that.

Mr. Barry Engel:

No, the Mississippi Supreme court upheld the *Sligh* decision.

Mr. Gideon Rothschild:

It was the reverse statutory—

Mr. David Aronofsky.

But the legislation changed the law after the decision.

Mr. Barry Engel:

Oh, after the decision. Yes. There was a statute that changed the law after the decision. But the spendthrift trust rule was invaded prior to the statutory change. But the self-settlor trust rule—the spendthrift trust rule has been around for over a hundred years. And yet there are judges that see it appropriate, under certain circumstances, that it should not be preserved and protected.

Professor Jeffrey Schoenblum:

And that was not a case involving—

Mr. Barry Engel:

That was a DWI tort. And the defendant didn't have any assets, any resources to satisfy the claims of the plaintiff. And his mother had set up this trust for him, possibly knowing that he was reckless and likely to cause injury to society. And the Mississippi Supreme Court held that the trust should pay for his wrongs here.

Professor Jeffrey Schoenblum:

Thank you all very much.