

Trusts Study Group subcommittee recommendations – October 1, 2009

IV. Asset-protection Trusts subcommittee

The subcommittee recommends adoption of a statute allowing the creation of self-settled spendthrift trusts in Mississippi, and that the statute contain the following provisions:

1. Requirements to come within protection of the statute:
 - a. The trust instrument must: (1) be irrevocable; (2) expressly state that Mississippi law governs the validity, construction, and administration of the trust; and (3) contain a spendthrift clause;
 - b. Before transferring assets to the trust, the settlor must sign a solvency affidavit;
 - c. Some or all of the trust assets must be deposited in Mississippi; and
 - d. A Mississippi trustee must be appointed or must otherwise participate materially in the administration of the trust.
2. Qualifications of trustee
 - a. The trustee must be a resident individual (other than the settlor) or corporation whose activities are subject to supervision by the state bank regulator, FDIC, Comptroller of Currency, or Office of Thrift Supervision.
 - b. Under the proposed statute, a Mississippi trustee would automatically cease to serve if it failed to meet the above requirements.
3. Limitation of claims
 - a. Under the proposed statute and subject to the exceptions set forth below, the only allowable claim against the assets of a Mississippi self-settled spendthrift trust would be under the Uniform Fraudulent Transfer Act (UFTA).
 - b. For creditors whose claims arose before creation of the trust:
 - i. The act would set aside transfers made with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.
 - ii. Statute of limitations: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.
 - c. For creditors whose claims arise after creation of the trust:
 - i. The act would set aside only those transfers made with actual intent to defraud.
 - ii. Statute of limitations: four years after the transfer.
4. Exceptions allowing invasion of trust assets
 - a. The statute would allow the following non-UFTA claims:
 - i. Claims resulting from the settlor's breach of an agreement or court order as to child support, alimony, or equitable distribution, but, in the case of alimony or equitable distribution, only if the ex-spouse was married to the settlor before or on the date of transfer.
 - ii. Claims arising as a result of death, personal injury, or property damage occurring before or on the date of transfer, for which the settlor was liable either directly or through vicarious liability.
5. Transfer of trusts into Mississippi:
 - a. A trust may become subject to the statute if moved to Mississippi provided that the trust meets the statutory requirements listed in (1) above, except the trust instrument would not have to state that Mississippi law applies.

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- b. For purposes of the statute of limitations, if a trust is moved from another jurisdiction, the transfer would be deemed made on the date the property was originally transferred in trust, whether before or after the effective date of the Mississippi statute.
6. Protection of trustees:
 - a. The proposed statute would bar all claims by creditors against the trustee of a self-settled spendthrift trust, advisor of such a trust, or any person involved in the counseling, drafting, preparation, execution or funding of such a trust, unless brought under the UFTA.
7. The settlor would retain the following powers:
 - a. The power to veto distributions;
 - b. A non-general testamentary power of appointment;
 - c. The power to replace a trustee advisor with an unrelated non-subordinate party;
and
 - d. The power to serve as an investment advisor.
8. Trust advisors / protectors
 - a. Under the proposed statute, a trust could have one or more advisors (including the settlor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from the trust.
9. Miscellaneous
 - a. The statute would provide that a spendthrift clause constitutes a transfer restriction described in § 541(c)(2) of the Bankruptcy Code.
 - b. The statute would provide that express or implied understandings regarding distributions to the settlor are invalid.