



The Adkisson Analysis of The Anderson Case

the **ULTIMATE** asset protection methodology?
Private Placement Life Insurance 

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Introduction

This page considers the first true "asset protection" case, captioned: [FTC v. Affordable Media LLC](#), ___ F.3d ___ (9th Cir. Case No. 98-16378, June 15, 1999), but more commonly known as the "Anderson case". Here, the Ninth Circuit affirmed the decision of the U.S. District Court for the District of Nevada, to hold a San Diego couple (the Andersons) in contempt for failing to return assets which were held in a foreign asset protection trust (a/k/a "offshore trust"), which was located in the Cook Islands.

As background, so called "offshore trusts" have existed in one form or another for hundreds of years. However, it wasn't until the late 1980's that the concept of the true "foreign asset protection trust" (FAPT) -- that is, a trust specifically structured to thwart creditors -- became more than a novelty. At first, only a select group of the really top lawyers were involved in forming FAPTs, but by the late 1990's literally hundreds, if not thousands, of attorneys, CPAs, CFPs, "global financial consultants" and others were forming FAPTs for their clients, along with such multi-level marketers as Prosper International League and Global Prosperity Group, the latter two groups bringing offshore trusts to the masses by selling literally tens-of-thousands fill-in-the-blanks FAPTs on the cheap.

The IRS was the first to get sick of offshore trusts, and by August of 1996 had convinced Congress to include in the Small Business Protection Act certain rules which completely eliminated any tax benefits from the use of an offshore trust, and imposed harsh penalties on

[My Posting to the ABA Listserv, 27 June 1999](#)

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those who attempted to use them for tax avoidance purposes. Offshore trusts could still be formed, but these were "grantor" trusts which were stripped of the features which the IRS considered to be the most offensive.

But this merely slowed the momentum of those who were creating offshore trusts for asset protection purposes; it was still a growth industry, and an industry wherein a bunch of self-anointed "leading planners" bounced around the countryside giving seminars and writing law journal articles pontificating on how you could form an offshore trust, and have your family enjoy the benefits of the trust for most purposes, but then when a creditor came along, you could simply disclaim that you had any ownership in it, and the creditor would be forced to go away.

This latter was based on the notion of the so-called "impossibility" defense, that if you moved all your assets offshore and the trust was structured so that the trustee couldn't give them back to you if you were under "duress", then a U.S. court couldn't hold you in contempt. This probably would have worked if only a few offshore trusts had been quietly created and maintained. But with numerous books and law journal articles openly hawking that this was how you bamboozled the courts into believing that you didn't have any assets, although you really did under this charade of trust, a disaster was in the making.

Planners initially spent their time creating ingenious relationships which kept you substantially in control but not technically in control, such as the Protector arrangement whereby a person watches the Trustees but really isn't a Trustee, and drafting long and complicated trust agreements so that the client could maintain effective control, but technically argue that he didn't. Some planners carried this into the sublime, as with one oft-quoted idiot who claimed with a straight face to me that he was the best asset protection planner in America because his trust was at least 30 pages longer than anybody else's!

I suggested to him that he should bill by the pound.

For the last several years, a few asset protection planners -- certainly a minority -- have warned our colleagues that offshore trusts were like Communism, Prohibition, and Cold-

Fusion: It looks great in theory, but might not work in real life. Several planners who had been in the business for years, such as Arnold Cornez, the author of The Offshore Money Book, and Dr. Arnold Goldstein, author of many books on asset protection, quietly confided to me and others in the field that the mass-marketing would eventually kill offshore trusts, and that planners would be better to look for other, better alternatives, such as offshore LLCs, private annuity arrangements, etc.

I was one of those who warned early about using offshore trusts for asset protection, and only used them in the rarest of occasions, and then only for clients who were unlikely to be sued. I only assisted in forming one trust in 1998, and hadn't formed any this year. As a litigator, I know many judges, state and federal, and in talking to them could sense a growing backlash towards, as one judge friend expressed, "these offshore trust things" which were "created only for the purpose of telling me to go to hell."

Thus, from our first newsletter, in July of 1998, onward, I have been a steady and vocal critic of offshore trusts. This posture occasionally caused me to be shunned by other planners, and I received more than my share of hostile e-mail. But I wasn't alone, as Forbes, BusinessWeek, and other leading business periodicals all ran stories which were critical of offshore trusts. Those who were creating offshore trusts still said that the sky was blue, that whatever the popular press said, courts would just be forced to accept the impossibility defense because of the meticulous way these trusts were drafted.

It was around this time, more specifically on June 17, 1998, that the Honorable Lloyd D. George, a federal judge in Las Vegas, finally grew so fed up with a San Diego couple's attempts to stand behind their Cook Islands' trust, that he ordered them taken to custody and placed in jail until their assets were returned to the U.S.

Facts

Denyse and Michael Anderson were successful telemarketers, and had created a foreign asset protection trust in the Cook Islands in 1995. A couple of years later, they were hired to do telemarketing for a group which ultimately turned out to be defrauding its customers. The

Federal Trade Commission got interested, and sued the fraudsters. More importantly for us, the FTC also asked the Andersons to return the substantial moneys they earned on the telemarketing contracts. The Andersons refused to do this, stating that they weren't in the wrong, but were merely contractors and not involved in the fraud. The FTC sought, and won, a preliminary injunction against the Andersons which required them to return all their moneys held in the Cook Islands trust.

So, the Andersons were under court order to return the moneys in the Cook Islands trust. Thus, the Andersons faxed a letter to their Cook Islands trustee, telling the trustee that they had been ordered to bring the money back. The trustee, however, told the Andersons that -- under the terms of the trust -- the Andersons were under "duress" and being under duress the trustee was prevented -- under the terms of the trust -- from sending any moneys to them. Whereupon, the Andersons went back to the Judge and said, essentially, that they were sorry they couldn't comply with the court's order, but it was impossible for them to comply since the trustee was prohibited from giving the money back.

Note that this is precisely the type of facts where an offshore trust is supposed to protect assets: A government seizure; disputed facts; on paper the Andersons lacked the ability to force repatriation of the assets. Sure, the facts could have been better -- the Andersons being the Protector of their own trusts wasn't a smart thing (although many planners routinely form their offshore trusts with the client as Protector) -- but all-in-all this was precisely the sort of case where the offshore trust should have at least befuddled the mean 'ole government agency which were chasing the Andersons, and caused the proverbial "10 cents on the dollar" settlement you hear so much about.

But, contrary to theory, the judge didn't buy this defense of "impossibility" and, as related above, ordered the Andersons taken into custody, and held in jail in contempt. The Andersons immediately filed an appeal with the U.S. Court of Appeals for the Ninth Circuit.

From July to December of 1998, those in the asset protection business who were smart enough to know what was going on held their breath. And by Christmas, the Andersons were

free. Reportedly without paying any money to the court, the Andersons handed their passports to the judge, and literally walked away from the jail on Christmas eve with only loose change in their pockets. Although the Judge released the Andersons from incarceration, he continued the contempt so that they would be assured of assisting the Federal Trade Commission in the attempt to repatriate their assets.

Reasoning that the Anderson appeal was now more-or-less moot, and that the Ninth Circuit would not spend any significant time on it, interest in the Anderson case waned. It did make planners nervous to think that their clients could be sent to jail, but probably most planners simply over characterized Anderson as an "extreme" case, or mumbled something about "bad facts make bad law" and went back on with business as usual.

On June 7 of this year, the [Wall Street Journal](#) ran an article called "Hiding the Piggy Bank". The article recited the standard marketing hype of offshore trusts, including the bold quote that "Creditors are cut off at the knees." But the article concluded with the caveat that "some lawyers wonder whether the heyday of offshore trusts could be short-lived."

They only had to wonder for 8 more days.

The sky fell in on June 15. That day, a Ninth Circuit panel unanimously affirmed the district court's decision in the Anderson case, and issued an opinion which affirmed the district court and not only pooh-pooh'ed the Anderson's defense, but -- as discussed below -- used specific language which (in my opinion at least) eliminates foreign asset protection trusts as any kind of common planning tool.

I will be the first to tell you that, just as not everybody agreed on the state of the law before Anderson, not everybody agrees with my comments below. There are still highly-credentialed planners who believe in foreign asset protection trusts -- vociferously so. I personally believe that they are now firmly in the minority, since I believe that majority of planners have ceased their offshore trust formation activities and are now *at least* taking a wait-and-see approach to what happens.

But this isn't a popularity contest, and it will not be decided by either consensus of the asset

protection community, or a new wave of articles in the law journals. We have left the days of theory, and now have specific decisional authority on offshore trusts, just like most other bodies of law. And that authority is very, very bad for foreign asset protection trusts.

I don't think things will get better. As related above, this is a backlash which has been long in the building, and I personally expect that it will now snowball and get rapidly worse. I personally believe that Anderson is just the first flake in what will be an avalanche of unfavorable offshore trust decisions.

But now even I've regressed into theory, a bad habit from the days before Anderson. Let's talk about the real and the now, meaning the decision itself.

No More "Impossibility" Defense

The immediate upshot of the case is that the ultimate, last-ditch defense mechanism of offshore trusts -- the so-called "impossibility defense" has been effectively invalidated. It doesn't work, period-the-end.

The Ninth Circuit placed a very difficult standard on settlors to prove impossibility, and then moved the burden of proof so high that I would bet money that no settlor ever reaches it, or even gets very close. Judges now have the ability to consider the impossibility defense according to their gut feeling, and the Ninth Circuit has indicated that it accept even the flimsiest of evidence to back up that gut feeling. If the judge believes that you have some control over the trust -- irrespective of how many boxes of paperwork you produce, or possibly even an affidavit from God that you don't have control -- you will be going to jail until the money comes back, and the Ninth Circuit isn't going to bail you out.

But worse, for the reasons set forth below, I believe this case could stand as authority for the following very bad things to happen to those who use offshore trusts as an asset protection vehicle, relying upon the "impossibility" or "duress" defense:

- Such persons and their planners will have exposure to "Obstruction of Justice" criminal charges under the federal statutes (and potentially also under some similar

state statutes);

- Such persons and their planners will have exposure to civil conspiracy claims under the laws of most states;
- Planners who assist in forming these structures may be subject to claims of malpractice; and
- Attorneys who assist in forming these structures (whether they are challenged or not) could be subject to professional discipline.

For the foregoing reasons, I believe that the Anderson case has eliminated offshore trusts as a primary asset protection tool. An extended discussion of the case follows below.

NOT A Defense That "There Were No Creditors On The Horizon When The Trust Was Formed"

A sales argument often made by offshore trust promoters is that the trust will work "so long as there are no creditors on the horizon."

However, the Andersons' trust was created approximately two years before they even entered into the contract which was to cause them grief, and almost three years before the Federal Trade Commission filed suit against them.

At the time the Andersons filed their lawsuit, and during the time they were making transfers to their trust, there were NO creditors on the horizon.

To the contrary, even through trial nobody had a liquidated judgment against the Anderson -- the Federal Trade Commission was seeking a preliminary injunction to tie up assets, i.e., there had been no adjudication that the Andersons were even in the wrong.

Thus, claims that offshore trusts should work "so long as there are no creditors on the horizon" or if they are "old & cold" are false, and demonstrably so under the Anderson decision.

Better Structuring or Drafting of the Trust Will Not Help

Critically, the Ninth Circuit indicated that courts should look at the overall picture to see whether or not it was believable that the settlor didn't have control, and moving significant assets

overseas creates a *de facto* presumption of control: “While it is possible that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, we share the district court’s skepticism.” [Part III, Para. 10].

In other words, the Ninth Circuit essentially said something to the effect that courts should not concentrate on the structure of the trust or what paperwork is presented by the settlors. “Their pointing to a few provisions of the trust, alone, is insufficient to carry their burden or to establish that the district court’s finding that they remain in control of their trust was clearly erroneous.” [Part III, Para. 19]. In footnote 11, in discussing the Protector relationship, the Ninth Circuit made clear that issues such as who is Trustee or who is Protector are not dispositive, and the courts can look to other evidence as proof of control.

Instead, the rule is that if a district court has a gut feeling that the settlors really have some type of control, the district court is perfectly within its discretion to simply have the settlors incarcerated until the money comes back. And the district court is now allowed to base its decision on the scantest evidence. This is made clear by the following language:

“With foreign laws designed to frustrate the operation of domestic courts and with foreign trustees acting in concert with domestic persons to thwart the United States courts, the domestic courts will have to be especially chary of accepting a defendant’s assertions that repatriation or other compliance with a court’s order concerning a foreign trust is impossible. Consequently, the burden on the defendant of proving impossibility as a defense will be especially high.” [Part III, Para. 11].

Impossibly high to prove impossibility as a defense, an impossibilist might say, considering that the burden is already on the settlor -- not the creditor -- to prove the defense of impossibility. If the trial judge disagrees then the debtor must settlor must prove that the trial judge’s ruling constituted “clear error”

measured against this very high standard. Probably no litigant will ever meet this standard, and it is certainly not something you would want to count on to keep from going to jail.

Offshore Trusts Were Killed By The Extolling Of Their Virtues

The shooting down of offshore trusts was made especially easy for the Ninth Circuit by the wealth of ammunition supplied by those who extolled the FAPT's virtues. The Ninth Circuit was able to quote from several articles published in law journals which said essentially that offshore trusts are specifically designed to create this impossibility defense, so that debtors would get off for little or nothing.

Did anybody really believe that courts would tolerate structures which were designed to frustrate their orders? Yes. Some planners became so brash that they actually believed that by professional writing and other actions that they could somehow *legitimize* planning which had as its end result that the will of the court's was defeated. When offshore trusts were really taking off in the mid-1990's, and there was much interest in this new sector, it probably seemed like a good idea. There was, after all, some feeling of safety in running with the herd. "If everybody's doing it, it can't be all bad" was the common feeling among many practitioners in this area.

In retrospect, however, this is insane: The courts are *never* going to legitimize conduct which thwarts the will of the courts. It is not going to happen, and anybody who believes that they can legitimize planning which has as its result that courts cannot "do justice" as they see it, is delusional.

Yes, as an industry we can fight creditors. We've been fighting creditors for years on a variety of fronts, and have won our share of the fights. But we have got to get away from this concept of trying to deprive the courts of power -- it just isn't going to happen, unless you wholly remove both yourself and all your assets outside the country never to return -- and instead we must learn again to work *within* the system.

The "Distinguishable" Fallacy

Several well-respected proponents of offshore trusts have argued that the phrases contained

in Part III of the opinion which reference "people like the Andersons", etc., go to people who have committed egregious frauds and crimes against the general public, and now are trying to stand behind their offshore trust. Under their reasoning, there are "good" debtors who would not have been held in contempt by the court.

However, a closer analysis reveals that the court's use of the phrase "people like the Andersons" was meant to refer generally to persons who utilize FAPTs. At no point in Part III does the court say anything like "people like the Andersons who defraud the public" -- indeed, no mention at all of the Anderson's particular acts can be found in Part III. Instead, the Ninth Circuit eviscerates offshore trusts generally. This is apparent from the other comments regarding FAPTs which do not reference the Anderson's particular trust or situation:

- "These 'so called asset protection trusts are designed to shield wealth by moving it to a foreign jurisdiction that does not recognize U.S. judgments or other legal processes, such as asset freezes.'" [Part III, Para. 5]. This language is not specific to the Andersons, and it would be an accurate description of probably every FAPT ever formed.
- "Because these asset protection trusts move the trust assets beyond the jurisdiction of domestic courts, often times all that remains within the jurisdiction is the physical person of the defendant. Because the physical person of the defendant remains subject to domestic courts' jurisdictions, courts could normally utilize their contempt powers to force a defendant to return the assets to their jurisdictions. Recognizing this risk, asset protection trusts are designed so that a defendant can assert that compliance with a court's order to repatriate the trust assets is impossible." [Part III, Para. 5]. This language is also generic to all FAPTs.
- "Given that these offshore trusts operate by means of frustrating domestic courts' jurisdiction, we are

unsure that we would find that the Andersons' ability to comply with the district court's order is a defense to a civil contempt charge." [Part III, Para. 6]. Note the plural "these offshore trusts" -- refers to all offshore trusts and not just the Andersons' particular trust.

- "In the asset protection trust context, moreover, the burden on the party asserting an impossibility defense will be particularly high because of the likelihood that an attempted compliance with the court's orders will be merely a charade rather than a good faith effort to comply." [Part III, Para. 7] Note generic "asset protection trust context" language, and no mention of the Andersons.

- "Foreign trusts are often designed to assist the "settlor" in avoiding being held in contempt of a domestic court while only feigning compliance with the court's orders." [Part III, Para. 7] Note use of generic "Foreign trusts" and no mention of the Andersons.

- "With foreign laws designed to frustrate the operation of domestic courts and foreign trustees acting in concert with domestic persons to thwart the United States courts, the domestic courts will have to be especially chary of accepting a defendant's assertions that repatriation or other compliance with a court's order concerning a foreign trust is impossible." [Part III, Para. 7] All of this language is generic to all foreign trusts, and again no mention of the Andersons.

NONE of the language referenced above is specific to the Andersons particular trust or circumstances.

There is no decisional authority -- here or elsewhere -- for the proposition that a different debtor would have been treated differently than the Andersons. Directly to the contrary, the Ninth Circuit has looked at all FAPTs disparagingly, and has criticized them in generic terms.

I do not believe that there is a reasonable basis

for believing that any two settlors would be treated differently in this contempt context, irrespective of the legal basis of their lawsuit, and I would be surprised if anyone could come forward with any real authority (not the musings of others in law journals) for this proposition.

The truth we must all face is that courts are not going to put up with people who design structures to avoid the court's powers to enforce the court's judgments lawfully entered, and this principal will apply equally to the kind surgeon whose hand slips during surgery, as it will to alleged fraudsters like the Andersons. And I challenge anyone to come up with any decisional authority which would suggest that the surgeon would be treated differently in the "contempt" context than the Andersons.

Potential Obstruction of Justice / Professional Ethics Violations

From an asset protection planner's viewpoint, the following language used by the Ninth Circuit is especially chilling:

- "[T]he provisions of the trust were **intended to frustrate the operation of domestic courts**" [Part I, Para. 5]
- "Given the Andersons' history of spiring their commissions away to a Cook Islands trust, which was **intentionally designed to frustrate United States courts' powers** to grant effective relief to prevailing parties" [Part II, Section B, Para. 3]
- "The 'asset protection' aspect of these foreign trusts arises from the ability of people, such as the Andersons, **to frustrate and impede the United States courts** by moving their assets beyond those courts' jurisdictions" [Part III, Para. 5].
- "Foreign trusts are often designed to assist the settlor in avoiding being held in contempt of a domestic court while only **feigning compliance with the court's orders** . . ." [Part III, Para. 6].
- "With foreign laws designed to frustrate the operation of domestic courts and foreign trustees acting in

concert with domestic persons to
thwart the United States courts . . ."
[Part III, Para. 6].

The Ninth Circuit's use of the foregoing language could easily be used to justify the following in cases involving foreign asset protection trusts:

- Federal obstruction-of-justice charges against both the client and the planner;
- Civil conspiracy claims against both the client and the planner (and probably not covered by the planners Errors & Omissions insurance, being an intentional tort);
- Malpractice claims against the planner for advising the formation of a foreign asset protection trust; and

Where the planner is an attorney, disciplinary action for violating a variety of rules, including rules relating to:

- Meritorious Claims and Contentions;
- Expediting Litigation;
- Candor Towards the Tribunal; and
- Fairness to Opposing Party and Counsel.

A significant question exists as to whether you can be liable for these consequences for your formation activities pre-dating the Anderson decision. The answer is "possibly". You may be able to take the position that you didn't know that FAPTs were bad until Anderson was published; but the truth is that it will probably depend on the facts of each particular case.

Personally, I suggest that you consider remediation of your clients out of offshore trust structures, and the sooner the better.

The "Bad Facts Make Bad Law" Argument

I've already received countless comments from other planners that the Anderson case was one of "Bad Facts Make Bad Law" because the Andersons were out to defraud people. Two points:

First, the Andersons certainly took the position that all they were was an innocent contractor, i.e., there was two sides to this story, just as there are two sides to all lawsuits. You simply can't pick and choose which cases you like on the facts, and ignore the law from the rest. One side may be characterized badly, and that side may be yours. Certainly, your clients are expecting the work you do for them to work even if the sky falls in. You can't tell in advance which clients will be sued or for what. Clients who are "good" clients, who never do bad things, and don't get in trouble -- don't need asset protection plans. We just never know who those clients are. The best we can do is pre-screen our clients as best possible, and keep our fingers crossed. But this is no guarantee that our clients may not innocently find themselves in a bind as bad as or worse than the Andersons, as even in those unexpected cases our clients expect our plans to work -- or else we've defrauded them *ab initio*.

Second, and much more importantly, the Ninth Circuit didn't limit its disparaging remarks of offshore trusts to the Anderson's trusts, but spoke of ALL offshore trusts as being "intentionally designed to frustrate United States courts' powers", etc. In other words, the Ninth Circuit took aim at all foreign asset protection trusts in its opinions, not just the ones with "bad" facts as has been suggested.

There is no a word, not a suggestion, nothing -- in the opinion to suggest that any other debtors asserting the impossibility defense would have been treated any differently than the Andersons. To the contrary, the Ninth Circuit spoke *generically* of offshore trusts in the most disparaging fashion.

Anderson's Collateral Damage: A Roadmap for Creditors

The Anderson case sets out a simple two-step technique for creditors to get at assets held in an offshore trust:

- First, persuade the judge to issue an order compelling the grantors to return the assets to the U.S., and
- Second, when they refuse, have the judge hold them in jail for contempt until the assets are repatriated.

Anybody believe that the Anderson case will

not be mentioned at future CLE seminars given for creditors' attorneys? They will probably dissect the opinion more closely than most asset protection planners, since this opinion and its incarceration contempt remedy is their best tool ever to take on asset protection trusts, domestic and foreign.

Anderson's Collateral Damage: Low-Dollar Settlements May Disappear

You can also expect that creditors will no longer be willing to accept those "pennies on the dollar" settlements which asset protection planners constantly promise in their marketing materials. No longer do creditors have to worry about chasing assets on far-away reefs in front of unfriendly courts. From their perspective: Why take a low dollar settlement or suffer the frustration of foreign courts, when I can have the enjoyment of sitting in my own offices watching you sweat in jail until all the assets come back?

Summary and Conclusion

In my opinion, the Anderson case eliminated offshore trusts as any kind of regular asset protection tool. Now, a person who forms an offshore trust is likely to be incarcerated until the assets come back, whether he or she actually has the ability to bring the assets back or not. Such a person risks possible criminal penalties for obstruction of justice and like offenses, as well as additional civil liability for civil conspiracy, and related causes of action. This liability may arise both at the time you form the trust, and if the trust is ever challenged.

If you already have a foreign asset protection trust you should contact some skilled and licensed attorney immediately about doing remediation and getting you out of the structure as quickly as possible.

For planners, my personal belief is that from the date of the Anderson decision forward, the forming of offshore trusts is professional suicide. You can now be subject to possible charges of obstruction of justice and related criminal penalties. You can now become liable, along with your clients, for possible claims of civil conspiracy. You may also now be subject to professional discipline for forming an offshore trust. You may also be liable for malpractice.

If you have formed offshore trusts for your clients, you need to immediately warn them about the Anderson decision and its possible effects as you see them. Then, you need to assist your clients in backing out of offshore trust structures, if that is their decision.

We are passed the days of theory. We now have solid case law regarding foreign asset protection trusts, and it is B-A-D. This holding goes far beyond the minor technicalities of drafting, and brings both clients and their planners precipitously close to criminal charges, additional civil liability, malpractice claims and professional discipline. It should be taken very, very seriously.

My Posting to the ABA Listserv, 27 June 1999

I'm sure we'll hear a lot of this "bad facts make bad law" and criticism of the Andersons as fraud artists. However, I'm sure the Andersons see the case completely differently -- they simply had a marketing enterprise, and were hired by someone who unbeknownst to them was a fraud artist. Truth is, nobody knows what they might get sued for in the future, and good clients who will never be sued for anything which is egregious don't need asset protection plans. But only hindsight is perfect, and we don't know when our clients will be sued or for what, and no amount of screening (unless somebody has a really good crystal ball) will definitively answer those questions.

I agree that planners should screen their clients better, but this cow has been out of the barn for some time. Now, there are lots of unlicensed and unscrupulous planners running around and forming offshore trusts by baker's dozen, not to mention the multi-level marketing schemes which sell "three-tiered" offshore trusts and similar nonsense. These cases have an equal, if not better, chance of percolating up through the courts than those formed by the planners who do use some discretion, so in effect we might as well request that the tide not come in as we will have about the same result. We will have more cases on offshore trusts, and they will probably be based on facts similar to the Anderson decision. The risk that you are putting your clients in -- probably unbeknownst to them -- is that if something goes wrong and they have to stand behind their trusts, you are going to have to convince the judge that somehow their case is distinguishable, that

everybody else has bad debtors but you have good debtors and the judge should cut them a break, because after all they are good debtors and not bad debtors.

The odds of doing this are low, as judgment debtors rarely receive any sympathy by the courts. And never in the numerous trials and hearings have I been in have I seen much differentiation between "good" debtors and "bad" debtors. Sure, it helps if your clients have been trying to do the right thing, but that's not the type of thing you could or should count on.

But back to the decision.

Everybody can read the opinion for themselves -- the days of pontificating on what courts might or might not do when faced with an offshore trust are over -- and in discussing the case let's try to stay with the actual language of the Ninth Circuit, and not merely regurgitate the same old junk we've heard at CLE seminars for years.

The Ninth Circuit simply refused to buy the charade of It's-For-The-Benefit-Of-My-Family-But-I-Don't-Control-It which is at the heart of every foreign asset protection trust. This is made crystal clear by the following language: "While it is possible that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, we share the district court's skepticism."

You MUST see that this was the Ninth Circuit's way of telling us that when faced with offshore trusts the courts should ignore form and instead concentrate on substance, and the substance is whatever the gut feeling of the district judge tells him or her about whether the settlor has any control.

The Ninth Circuit tells us that the language of the trust is irrelevant: "Their pointing to a few provisions of the trust, alone, is insufficient to carry their burden or to establish that the district court's finding that they remain in control of their trust was clearly erroneous."

In footnote 11, they tell us that the protector relationship is not dispositive, and suggest that even had there been a completely independent protector that the result could have been the same: "[w]e have not considered whether other facts might support the Andersons' continuing control over the trust, regardless of who is the protector of the trust."

Why does the Ninth Circuit say courts should ignore the language and structure of the trust? Because offshore trusts are designed to bamboozle the courts, that's why: "[A]ny attempted compliance with the court's orders will be merely a charade rather than a good faith effort to comply. Foreign trusts are often designed to assist the settlor in avoiding being held in contempt of a domestic court while only feigning compliance with the court's orders".

The Ninth Circuit didn't take on the Anderson's trust -- it took on all foreign asset protection trusts in general -- and it left no doubt that such entities are greatly disliked by the courts:

"[T]he provisions of the trust were intended to frustrate the operation of domestic courts" [Part I, Para. 5]

"Given the Andersons' history of spiriting their commissions away to a Cook Islands trust, which was intentionally designed to frustrate United States courts' powers to grant effective relief to prevailing parties" [Part II, Section B, Para. 3]

"The 'asset protection' aspect of these foreign trusts arises from the ability of people, such as the Andersons, to frustrate and impede the United States courts by moving their assets beyond those courts' jurisdictions" [Part III, Para. 5].

"With foreign laws designed to frustrate the operation of domestic courts and foreign trustees acting in concert with domestic persons to thwart the United States courts" [Part III, Para. 6].

I have received HUNDREDS of e-mails from planners giving me their comments regarding this case (thank you), pro and con, but I have yet to even receive a SINGLE e-mail which explains the foregoing four VERY CRITICAL paragraphs. The reason: These paragraphs could apply equally to each and every foreign asset protection trust which has been created the last decade, and everybody knows it.

Some are just not willing to confront this fact.

And these are the most important paragraphs, because acts which are "frustrate and impede United States courts" are criminal in nature, and also violative of certain rules of professional conduct.

Some are not willing to confront this fact, either.

Until this language is addressed -- language which is generic to all foreign asset protection trusts, and not just that of the Andersons -- suggestions of "bad facts make bad law" or that this case is somehow distinguishable, completely miss the point.



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obligations can amount to a crime. You should therefore advise your planner immediately if you have any such obligations

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