
Gideon Rothschild and Daniel S. Rubin(1) examine the real implication of the Anderson case for asset protection planning

In the close-knit world of asset protection planning, the U.S. Court of Appeals' recent decision in Federal Trade Commission v. Affordable Media, LLC, et al.(2) (colloquially known as the 'Anderson' case after its individual litigants, Denyse and Michael Anderson), has caused quite a stir, with at least one commentator citing the decision as the 'death knell' of offshore asset protection trusts. At the other extreme, a number of asset protection advocates are citing the case as merely representative of the old adage that 'bad facts make bad law' which, perhaps, too blithely deprecates the significance of a Court of Appeals' decision. As is most often the case, however, somewhere between the histrionics and the diffidence lies the real implication of the Anderson case, which this article shall attempt to elucidate.

## Factual background

The case itself arose out of the Andersons' telemarketing of $5,000 investments in a company which sold, over late-night television, such novelties as talking pet tags and water-filled barbells. Promising potential investors a fifty per cent return in sixty to ninety days, the Andersons supposedly made more than six million dollars in commissions which they then transferred to an irrevocable 'asset protection' trust situated in the Cook Islands.(3) Allegedly unbeknownst to the Andersons, the promised return on investment was, to say the least, unrealistically high, and the company was only able to pay its initial investors by using the monies of later investors. When this Ponzi(4) scheme ultimately fell apart, the Federal Trade Commission brought civil suit on behalf of the thousands of investors with the purpose of recovering the Andersons' allegedly ill-gotten profits. Upon motion by the Federal Trade Commission, the District Court issued an order which, among other things, required the Andersons to repatriate the trust's offshore holdings. When the Andersons faxed such instruction to the trust's Cook Islands trustee, however, the Cook Islands trustee invoked an 'anti-duress' clause in the trust agreement, thereby resulting in the automatic removal of the Andersons as co-trustees of the trust and ensuring that the trust's assets would not be repatriated. The Federal Trade Commission then moved to hold the Andersons in civil contempt for failing to effectuate the repatriation of the trust's assets. For factual reasons, the District Court rejected the Andersons' defence that compliance with the order was impossible and imprisoned the Andersons pending repatriation of the trust's assets (the Andersons were

released after five months without any funds having been repatriated). The Anderson case of which we now speak is, in pertinent part, the Court of Appeals' review of the Andersons' claimed impossibility of performance defence.

## General background

The offshore, asset protection trust used by the Andersons is an increasingly common, if complex, structure used to protect an individual's assets from the claims of potential future creditors. In its most basic form, it is a trust which designates the law of a debtor-friendly, offshore jurisdiction (rather than that of the United States settlor's domicile), as controlling the trust's governance and effect in order to benefit from such offshore jurisdiction's abolition of the so-called 'self-settled spendthrift trust rule'.(5) That rule provides that although an individual can put money or property in trust for another and have it protected from his creditors, an individual generally cannot do the same for himself. This is true whether the settlor's creditors are present or future, reasonably anticipated or impossible to foresee, as an intent to defraud creditors is not required.(6) Jurisdictions which have repealed the self-settled spendthrift trust rule, such as the Cook Islands, allow a trust established for one's own benefit to be protected from future (but not current) creditors.(7) Moreover, under well established conflict of laws principles, the settlor's choice of law with regard to the governance of his inter vivos settlement of trust should be respected by any forum court.(8)

The problem with asset protection trusts, apparent in Anderson and, perhaps, influencing the result in that case, is the fact that most domestic courts suffer from a strong prejudice against asset protection trusts. In the first instance, judges (like the rest of us) are provincially minded and hence favour their own law over that of other jurisdictions notwithstanding that the designation of another jurisdiction's law is universally recognised as a trust settlor's right.(9) Moreover, the self-settled spendthrift trust rule is so strongly ingrained in the psyche of most domestic courts that, upon public policy grounds and depending upon the equities of the particular case, the repeal of the self-settled spendthrift trust rule in another jurisdiction might not be enforced by a domestic court.(10) Therefore, the trust's assets should be invested offshore to achieve optimum protection in the event of a misapplication of the governing conflict of laws principles, thus forcing the creditor to litigate in an offshore jurisdiction which will likely apply its own law.

Another linchpin of the asset protection trust is its 'anti-duress clause'. An anti-duress clause, such as the one used in Anderson,(11) provides that to the extent that an individual with the power to give direction to the trustees is not acting of his own free will (such as if he were acting pursuant to a court order), his direction should be ignored.(12) Since the offshore trustee will be bound to ignore such direction and since the offshore trustee cannot be forced to repatriate the trust's assets, the settlor will generally be regarded as insulated from civil contempt by reason of impossibility of performance.(13)

## Analysis

Although some critics of offshore trusts have suggested that Anderson effectively vitiates the impossibility of performance defence (mostly by focusing on the fact that the Andersons were, in fact, jailed for civil contempt in an attempt to coerce compliance with the court's order), that is a gross misstatement of the case. In fact, the United States Supreme Court has itself repeatedly cited impossibility of performance, even when self-induced, as a legitimate and absolute defence to civil contempt. For example, in the 1983 matter of United States v. Rylander,(14) Justice Rehnquist stated that: ÒÉIn a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in questionÉWhile

the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt actionÉÓ(15)

The logic behind allowing impossibility of performance as a defence to civil contempt is obvious since civil contempt is not intended as a punishment (which would implicate certain Constitutional rights and concerns), but rather as a coercive measure presumed necessary to obtain compliance with a court order.(16) In recognition of this principle, the United States Supreme Court in its 1948 decision in Maggio v. Zeitz,(17) pointed out that: ÒÉto jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the bankrupt estate.Ó(18)

Further, ÒÉno matter how reprehensive the conduct is it does not warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow.Ó If the record establishes that there in fact is a present inability to comply with a production order, the Òcivil [contempt] inquiry is at an end insofar as the court may coerce compliance because obedience to the order is no longer within the contemnor's power.Ó(19)

The Court of Appeal's decision in Anderson is in perfect accord with the foregoing law. The issue in Anderson was not whether impossibility would avoid contempt but rather whether the Andersons were able to prove that their required performance was actually impossible. According to the Court of Appeals, Ò[i]n finding the Andersons in civil contempt, the district court rejected the Andersons' impossibility defence, specifically finding that the Andersons 'in the judgement of the Court [and] from the evidenceÉheard are in control of this trust.''(20) For its part, the Court of Appeals simply had no basis to reverse the trial court's findings of fact under the applicable standards of 'abuse of discretion' and 'clear error'. Moreover, by relying on the procedural issues of standard of review and burden of proof, the Court of Appeals was able to put off determining the thornier issues of impossibility of performance. The Court of Appeals readily admitted the limited precedential effect of its decision by stating that: ÒÉwe are unsure that we would find that the Andersons' [alleged] inability to comply with the district court's order is a defence to a civil contempt charge. We leave for another day the resolution of this more difficult question because we find that the Andersons have not satisfied their burden of proving that compliance with the district court's repatriation order was impossible.Ó (21)

In fact, that facet of the Anderson case which should be of most concern in future asset protection planning with offshore trusts is the suggestion that the impossibility of performance defence upon which such trusts rely, though unimpeded by the Anderson decision, will likely be difficult to demonstrate.(22) Fortunately, to a large extent the Andersons' difficulty in proving their alleged impossibility of performance defence followed from the unusual and ill-thought set-up and administration of their trust. The fact that the Andersons were co-trustees of their own trust would make the Anderson decision surprising only if the Court of Appeals had found that the Andersons did not have control, since the very nature of a trusteeship is control over the trust's assets.

Indeed, the Court cited to the fact that the Andersons had previously been able to obtain in excess of $1 million from the trust in order to pay their taxes.(23) Although the Andersons' co-trusteeship was terminated by the Cook Islands trustee following the Andersons' request to repatriate the trust's assets, the close nexus between the court's order and the impossibility of compliance could not bode well for their defence and, even after they were terminated as co-

trustees, the Andersons remained on as 'protectors' of the trust until they realised that such capacity also impinged upon their asserted impossibility of performance defence. As the Court of Appeals pointed out: ÒThe provisions of the trust also make clear that the Andersons' position as protectors gives them control over the trust [since]Éwhether or not an event of duress has occurred depends upon the opinion of the protectorÉ.It is clear that the Andersons could have ordered the trust assets repatriated simply by certifying to the foreign trustee that in their opinion, as protectors, no event of duress had occurred.Ó(24)

By failing to certify, in their capacity as protectors, that no event of duress had occurred, the Andersons induced the impossibility of their own performance after the district court's order.

It should also be kept in mind that the issues in Anderson, as in any case, were not considered in a vacuum. Notwithstanding the fact that the trust was created before the Andersons began promoting the alleged Ponzi scheme, the trust was funded with the proceeds of that scheme, making it rather difficult for the Andersons to sympathetically argue the merits of their defence. Since the trust established by the Andersons was, it would seem, created with an eye towards their likely liability in promoting a fraud, the Andersons are far from perfect 'poster children' for legitimate asset protection planning. This is, of course, a far different situation from the typical asset protection client; for example, a wealthy surgeon who is concerned about the increasing tide of medical malpractice claims and the potential for a catastrophic judgement. Obviously, a future creditor would be hard pressed to convincingly claim that the surgeon's trust was established for the purpose of allowing him to later cause intentional injury with impunity. Instead, the surgeon's situation is more analogous to a business person running his operations in the corporate form rather than in his individual name. On that basis, a court should be able to review the facts of other trusts in a kinder light if, of course, the facts of the case warrant such treatment.

Of course, to the extent that the effectiveness of the Andersons' trust is measured by the security of the trust fund, rather than that of its settlors, the fact that the trust fund remains securely offshore makes the trust an overwhelming success. In fact, in likely recognition of the impotency of its efforts before the federal courts, the Federal Trade Commission was ultimately forced to bring suit against the trust before the High Court of the Cook Islands.(25) Although the particulars of that matter are beyond the scope of this article, the Federal Trade Commission's myriad claims against the trust fund have, to date, been unsuccessful.

## Planning

Although the Anderson decision does not provide much in the way of guidance to the asset protection bar (since, in a fit of territoriality, the Court of Appeals painted offshore asset protection trusts as irreparably evil with an unnecessarily broad brush),(26) it does provide some guidance, if only by negative implication.(27) In the first instance, although it may be permitted under the law of certain offshore jurisdictions, an offshore asset protection trust should not be structured so that the settlor is the trustee, or even a co-trustee, unless part of the settlor's planning also includes his timely expatriation. In addition, the settlor should probably not even be a protector (especially if he lives under the shadow of the Ninth Circuit) since the Anderson court felt that Òthese offshore trusts allow settlors, such as the Andersons, significant control over the trust assets by allowing the settlor to act as a co-trustee or 'protector' of the trust.Ó(28) On this point, the Court of Appeals also stated that: ÒThe district court's finding that the Andersons were in control of their trust is well supported by the record given that the Andersons were the protectors of their trust. A protector has significant powers to control an offshore trust.Ó Perhaps the most telling evidence of the Andersons' control over

the trust was their conduct after the district court issued its temporary restraining orderÉAfter the Andersons claimed that compliance with the repatriation provisions of the temporary restraining order was impossible, the Commission revealed to the court that the Andersons were the protectors of the trust. The Andersons immediately attempted to resign as protectors of the trust. This attempted resignation indicates that the Andersons knew that, as the protectors of the trust, they remained in control of the trust and could force the foreign trustee to repatriate the assets.(29)

Although the Court of Appeal's reasoning regarding the Andersons' attempted resignation as protectors is an obvious nonsequitor, in order to enhance the impossibility of performance claim which may later have to be made, prospective settlors would be well advised to forego acting as either a trustee or as a protector.

Unfortunately, however, many settlors will insist upon being a protector as a 'cost' of establishing the trust due to concerns (whether or not reasonable) over the fidelity of an institutional trust company on the other side of the globe. In such instances, careful consideration must be given to appropriately circumscribe the protector's powers. At the very least, the protector's powers should be drafted as purely negative (i.e., the power to veto certain trustee actions, but an absence of authority to institute any such actions). In particular, however, the client, as protector, should not have the power to determine whether an event of duress has occurred since, as the Court of Appeals duly noted in Anderson: ÒÉit is clear that the Andersons could have ordered the trust assets repatriated simply by certifying to the foreign trustee that in their opinion, as protectors, no event of duress had occurred.Ó(30)

In order to further distance the settlor from any impermissible control over the trust, the settlor should consider vesting supervision of the trust in a committee of protectors (which can include the settlor), rather than in himself as sole protector.

Another alternative to the settlor acting as trustee or protector, however, is to allow the trustee to designate an 'investment advisor' to the trust. Depending on how the governing provision is drafted, this position could enable the settlor or another person to manage the trust's investments and thereby provide a level of security that the offshore trustee will not abscond with the trust corpus. At the same time, however, control over the trust corpus would be clearly divided between investment discretions, retained by the settlor, and distribution discretions, which would lie with an independent trustee. This structure may be preferable to the client retaining control over the trust corpus by 'wrapping' the corpus within a limited partnership of which the settlor is a one per cent owner since distribution decisions would not be within the settlor's discretion if he is acting solely as investment advisor.

Even if the settlor does not retain any direct controls over the trust fund, however, the trustees and protectors, though technically independent, are at the very least, going to be considerate of the settlor's interests. This, however, is not at variance with other trusts where trustees have discretion.

Notwithstanding the foregoing, however, the settlor must remain conscious of the potential creditor argument that the settlor retained indirect control over the trust, as evidenced by the manner in which the trust was administered. For example, if the settlor creates a pattern whereby he makes frequent requests to the trustees for a distribution of trust assets, invariably followed by an actual distribution, a creditor may argue, with some effect, that the pattern is indicative of an indirect control over the trustees. In the face of such an argument, the fact that

the settlor is named as a mere discretionary beneficiary of the trust, along with a number of other individuals such as the settlor's spouse and descendants, could be deemed self-serving. This is not to say, of course, that distributions can not, or should not, be made for extraordinary purposes (since, if this were not the case, the settlor would be better off creating a non-self-settled trust), but such distributions should be made sparingly and with the understanding that each such distribution may diminish the asset protection afforded by the trust. The best asset protection is, therefore, afforded when the settlor lives off of his earned income and retained assets and treats the trust in the same manner as he would a tax deferred retirement account (i.e., for the future). When and if distributions are made pursuant to the request of a beneficiary, the trustees should record the considerations upon which the decision to comply (or refuse) the request was made.

In order to avoid a harmful pattern of distributions, the most likely repetitive distributions, such as distributions which the settlor may require by reason of the income tax which will pass through to the settlor from the trust under the Internal Revenue Code's grantor trust rules,(31) should be mandated under the trust agreement rather than left to the trustees discretion. Specifically, the trustees should be required to pay, directly to the governing tax authority rather than to the settlor, any increase to the settlor's income tax liability accruing by reason of assets held in trust and not otherwise distributed out to the settlor before such taxes are due to be paid. Such a provision will forestall any creditor argument that such distributions were indicative of a retained control over the trustees.(32)

Finally, even though it does not speak to control, the circumstances surrounding the creation or funding of the trust clearly will bear upon its recognition by the judiciary as a valid entity, separate and apart from the settlors.

Therefore, the settlement should be as distant as possible from a potential creditor's claim. What this means is that the trust should be set up as early as possible for the purpose of guarding against creditors arising in the far future, rather than creditors who have a basis, however implausible, to argue that their claims were anticipated by the settlor in establishing the trust. To the extent that the trust can be established years before a creditor issue arises, it is likely that much more leeway will be afforded the administration of the trust without a feasible threat of contempt arising. Similarly, the trustees should not ignore the substantial non-asset protection purposes of an offshore trust, including, for example, the fact that a foreign trust can invest in opportunities unavailable to U.S. persons, including offshore life insurance products.

## Conclusion

The Anderson court's failure to laud the benefits and legitimate application of offshore asset protections trusts was understandable in light of the Andersons likely multi-million dollar fraud upon thousands of innocent, if not particularly astute, investors. Similarly, its decision can only be thought of as rational since the District Court's factual findings were not so clearly erroneous or abusive as to warrant reversal. Although the dicta of Anderson will likely be used to inflame judicial opinion against future defendants, and creditors can, therefore, feel buoyed by the result, the real precedential effect of the Anderson case will likely be limited to the procedural issues upon which the court ruled. Prospective settlors, therefore, remain well advised to seek the advice of experienced and competent counsel since the consequences of a misstep in this area of the law have now been finally shown to have potentially serious adverse consequences. In the end, the effectiveness of any asset protection plan will be a function of how skillfully the planner structures the plan, how it is administered and how it is

defended.



## Information key

2 @ 179 F.3d. __ (9th Cir., 1999); 1999 U.S. App. LEXIS 13130.

3 The Cook Islands, located in the South Pacific, enacted the world's first comprehensive body of asset protection legislation with the International Trusts Act 1984.

4 According to the Court, 'Éthe venture in fact was a Ponzi schemeÉ'. 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *1; 'Nor did the Andersons conduct continuing diligence efforts to ensure that the media units were profitable investments rather than the Ponzi scheme that they proved to be.'. 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *17.

5 A spendthrift trust has been defined as 'É[a] trust created to provide a fund for the maintenance of a beneficiaryÉ and at the same time to secure the fund against his improvidence or incapacity; provisions against alienation of the trust fund by the voluntary act of the beneficiary or by his creditors are its usual incidents.' See Black's Law Dictionary 1400 (6th ed. 1990). A 'self-settled' spendthrift trust is one in which the settlor retains an interest as a beneficiary, even if it is only to receive distributions in the discretion of a trustee (other than the settlor).

6 See, e.g., 5A Aston W. Scott & William F. Fratcher, The Law of Trusts § 156, at 165-167 (4th ed. 1989), 'It is immaterial that in creating the trust the settlor did not intend to defraud his creditors. It is immaterial that he was solvent at the time of the creation of the trust.' See also, Restatement (Second) of Trusts § 156, cmt.a (1959), ('The rules stated in this section are applicable although the transfer is not a fraudulent conveyance. The interest of the settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.').

7 See Gideon Rothschild, Establishing and Drafting Offshore Asset Protection Trusts, Estate Planning Vol. 23, No. 2 (Feb. 1996). 8 See, e.g., Restatement (Second) Conflict of Laws § 273 (1971), ('Whether the interest of a beneficiary of [an inter-vivos] trust of movables is assignable by him and can be reached by his creditors is determinedÉby the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered, and otherwise by the local law of the state to which the administration of the trust is most substantially related.'); 5A Aston W. Scott & William F. Fratcher, The Law of Trusts § 626, at 419 (4th ed. 1989), ('If the settlor creates a trust to be administered in a state other than that of his domicil, the law of the state of the place of administration, rather than that of his domicil ordinarily is applicable. Thus a settlor domiciled in one state may create an inter vivos trust by conveying property to a trust company of another state as trustee and delivering the property to it to be administered in that state. In that case the law of that state will be applicable as to the rights of creditors to reach the beneficiary's interest. This permits a person who is domiciled in a state in which restraints on alienation are not permitted, to create an inter vivos trust in another state where they are permitted and thereby take advantage of the law of the latter state.'). See also, Convention on the Law Applicable to Trusts and on their Recognition,

Oct.

8. 1984, art. 6 reprinted in 23 I.L.M. 1389, 1389 (1984), ('A trust shall be governed by the law chosen by the settlor.'); Surman v. Fitzgerald (In re Fitzgerald), 1 Ch. 573 (1904), rev'g 1 Ch. 933 (1903), (stating that although restraints on the alienation of beneficial trust interests are not permitted under English law, they are not so far contrary to public policy as to preclude the English courts from enforcing them in trusts validly created under Scottish law). In fact, '[i]t would seem that the policy of a state, whether it be to restrain alienation in order to protect the beneficiary, or to permit alienation in order to protect creditors and assignees, is not so strong as to preclude the application of the law to the contrary prevailing in another state.' 5A Aston W. Scott & William F. Fratcher, The Law of Trusts , § 626 at 414. Although several courts have used public policy considerations to justify the application of the forum's laws, the authors submit that such result-oriented application was dictated by the egregious facts present in such cases. See, infra note 9. For an in-depth consideration of the conflict of law issues surrounding self-settled spendthrift trusts, see Gideon Rothschild, Daniel S. Rubin and Jonathan G. Blattmachr, Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?, 32 Vanderbilt J. Transnat'l L.3, 763 (1999).

9 Supra note 8.

10 See, e.g., Goldberg v. Lawrence (In re Lawrence), 227 B.R. 907 (S.D. Fla. 1998); Sattin v. Brooks (In re Brooks), 217 B.R. 98 (Bankr. D. Conn. 1998); Marine Midland Bank v. Portnoy (In re Portnoy), 201 B.R. 685 (Bankr. S.D.N.Y. 1996).

11 The anti-duress clause in Anderson provided that the 'Étrustee hereof shall automatically cease to be a trustee upon the happening of an event of duress within the territory where such trustee is É resident (in the case of an individual) and upon ceasing to be a trustee pursuant to this clause such trustee shall be divested of title to the property of this trust which shall automatically vest in the remaining or continuing trustee (if any) located in a territory not having an event of duress and the form for administration of this trust shall notwithstanding any other provision in this deed be deemed to be the place of residence or incorporation (if a corporation) of such continuing trustee.'

12 Under the Anderson trust agreement, an event of duress included 'Éthe issuance of any order, decree or judgment of any court or tribunal in any part of the world which in the opinion of the protector will or may directly or indirectly, expropriate, sequester, levy, lien, or in any way control, restrict or prevent the free disposal by a trustee of any monies, investments or property which may from time to time be included in or form part of this trust and any distributions therefrom.' 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at

13 The Ninth Circuit in Anderson unfortunately characterized this aspect of the trust (i.e., the effect of the anti-duress clause) in a less than flattering light by stating that 'Éthese offshore trusts operate by means of frustrating domestic courts' jurisdictionÉ' FTC v. Affordable Media LLC, 179 F.3d at ___; 1999 U.S. App. LEXIS *33. In reality, however, it is unfair to claim that an offshore asset protection trust 'operates' by means of frustrating domestic courts' jurisdiction since existing legal principles validate a settlor's choice of governing law without qualification; the anti-duress clause is only made necessary because of the potential for a court to misapply (or even ignore) those principles.

14 United States v. Rylander, 460 U.S. 752 (1983). See also, United States v. Bryan, 339 U.S. 323, 330 (1950) ('Ordinarily, one charged with contempt of court for failure to comply with a court order

makes a complete defense by proving that he is unable to comply.').

15 460 U.S. at 757.

16 A distinction must be made, however, between civil coercive contempt and civil compensatory contempt; since civil compensatory contempt is designed to compensate for a loss, impossibility of performance is not a defense thereto. See, e.g., United States v. Asay, 614 F.2d 655 (9th Cir, 1980).

17 Maggio v. Zeitz, 333 U.S. 56 (1948).

18 333 U.S. at 72.

19 Falstaff Brewing Corporation, et al. v. .Miller Brewing Company, et al., 702 F.2d 770, 781 (9th Cir. 1983), citing Maggio v. Zeitz, supra.

20 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *36.

21 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *34. Interestingly, in its 1983 decision in Falstaff Brewing Corporation, et al., v. Miller Brewing Company, et al., supra at note 18, the Ninth Circuit stated that '[g]enerally, impossibility of performance is a complete defense to a charge of contempt. An exception exists in the criminal context where the impossibility is self-induced. This court, in dicta, has asserted that self-induced inability is not a defense to a charge of compensatory civil contempt. It is clear, however, that inability - whether or not self-induced - is a complete defense to a charge of coercive civil contempt. [Emphasis added; citations omitted].

22 According to the Ninth Circuit in Anderson, '[i]n the asset protection trust contextÉthe burden on the party asserting an impossibility defense will be particularly high because of the likelihood that any attempted compliance with the court's order will be merely a charade rather than a good faith effort to comply.' 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *34-35.

23 The Andersons had previously been able to obtain in excess of $1 million dollars from the trust in order to pay their taxes. Given their ability to obtain, with ease, such large sums from the trust, we share the district court's scepticism regarding the Andersons' claim that they cannot make the trust assets subject to the court's jurisdiction.' 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *38.

24 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *43.

25 United States on behalf of its agency the U.S. Federal Trade Commission v. Asiatrust Limited, as trustee of the Anderson Family Irrevocable Trust, Plaint. No. 57/99, High Court of the Cook Islands (Civil Division).

26 Arguably this prejudice is well past due for a change since, at present, at least five 'onshore' jurisdictions have also repealed the self-settled spendthrift trust rule. See Alaska Stat. § 34.40.110 (Lexis 1998) (effective Apr. 2, 1997), Colorado Rev. Stat. §38-10-111 (1997), Delaware Code Ann. Tit. 12, §§ 3571-3576 (Supp. 1998) (effective July 1, 1997), Missouri. Ann. Stat. § 456.080 (West 1992), and Nevada Rev. Stat. § 166.040 (effective Oct. 1, 1999). See also, Estate of Uhl v. Comm'r, 241 F.2d 867 (7th Cir., 1957), and Estate of German v. Comm'r, 7 Cl. Ct. 641 (1985), cases involving federal estate tax issues but holding that certain self-settled spendthrift trust protections are afforded,

respectively, under Indiana and Maryland law. In addition, H.R. 1553, 76th Leg., (Tex.) (introduced Feb. 17, 1999), available in Westlaw, TX-BILLS Database, will, if enacted, also permit individuals to create effective self-settled spendthrift trusts in Texas. Query whether the Court of Appeals would have espoused the same negative inference against a domestic trust settled by the Andersons (residents of the State of Nevada), in view of Nevada's recent repeal of the self-settled trust rule.

27 In addition, there are several other reported decisions involving offshore asset protection trusts. See, Higashi v. Brown (In re Brown), No. 95-3072 (Bankr. D. Alaska 1996); In re Lawrence, supra at note 9; In re Brooks, supra at note 9; In re Portnoy, supra at note 9.

28 28 179 F.3D;1999 U.S. App. LEXIS 13130 at *38.

29 179 F.3D;1999 U.S. App. LEXIS 13130 at *41.

30 179 F.3D at;1999 U.S. App. LEXIS 13130 at *43.

31 26 U.S.C. §§ 672-678; In particular, note 26 U.S.C. § 677(a).

32 For example, in Anderson the Court of Appeals cited to the Andersons' ability to obtain from the trust, with ease, in excess of $1 million dollars in order to pay taxes as indicative of their retention of control over the trust. 179 F.3d at ___; 1999 U.S. App. LEXIS 13130 at *38.

BACK TO CONTENTS