

# A Fresh Look at State Asset Protection Trust Statutes

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*This Article examines the rise of state asset protection trust (“APT”) statutes. It juxtaposes two apparently contrary trends: an increase in formal legal responses suggesting that the trusts created under these statutes are likely to have at best limited enforceability and an increase in the adoption and use of these statutes. After summarizing the legal background out of which these two trends arise, I analyze the characteristics of the states that have chosen to adopt them to date and conclude that the size of a state is less predictive of adoption than broader social and economic characteristics of the populace.*

*This Article closes with a discussion of why the use of the statutes is growing. In general, the limited litigation, coupled with apparently increasing enactments and usage, suggests the statutes are producing something useful that investment professionals can sell.*

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## I. INTRODUCTION

Recognizing my general lack of familiarity with trust law, the organizers of the conference graciously invited me to talk about the intersection of trust law and bankruptcy. To be specific, they offered the topic of bankruptcy court treatment of the recent spate of state "asset protection trust" statutes (often referred to as "APT" statutes). In general, these statutes allow an individual (the "settlor" of the trust) to shelter assets by transferring them to a trust that his creditors cannot reach; if the settlor can continue to control the assets when they are in the trust,<sup>1</sup> the arrangement trades a minor inconvenience for immunity from liability.

I had heard a little about this subject years ago when Lynn LoPucki first described the "Death of Liability."<sup>2</sup> At that time, he pointed to these statutes as a prominent harbinger of the soon-to-arrive death of liability; the opportunity they offered the crafty to shield their assets from creditors seemed almost too good to be true. I also had a general sense that APT statutes had become much more common through the years, but that was about the sum of my knowledge. When the organizers told me of the burgeoning adoptions, and that cases applying those statutes were just beginning to reach the bankruptcy courts, I thought it would be interesting to engage in an analysis of APT statutes.

This Article is the result of that inquiry. In general, the story offers a fascinating juxtaposition of two apparently contrary trends: formal legal responses suggesting with steadily increasing specificity that the trusts created under the statutes are likely to have, at best, limited enforceability, coupled with a continuing increase in adoption and (so far as I can tell) use of the statutes. There seems to be little or no link between the formal legal rules, which suggest that trusts created under the statutes are unenforceable, and the institutions adopting and using the statutes, which operate on the implicit premise that trusts created under the statutes provide "real" legal protections.

This Article proceeds in three parts. First, I summarize the legal background, starting with the long-standing use of offshore APTs; then I discuss the development of "onshore" APTs in this country. I emphasize the legal and practical obstacles that have made the use of offshore APT statutes a relatively minor feature of American insolvency planning.

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1. That, of course, is a big "if." I elaborate on that question below.

2. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 1 (1996).



Second, I discuss the adoption of the state statutes, examining the factors that motivate a state's decision to adopt an APT statute (what you might call the "supply" of and "demand" for debtor-protective legislation). Although the steadily continuing adoptions suggest it is too early to draw firm conclusions, the pattern of adoption suggests a more complex explanation than the mere "size" of the state. Rather, I argue that broader social and economic characteristics of the populace itself seem to be relevant, at least among those states that already have adopted the statutes.

Third, I discuss the response of the legal system to the state-level APT adoptions. If the state-level enactments are motivated (as opponents suggest) by the aspirations of particular states to become havens for debtors seeking to avoid payments to creditors in other states, we might naturally expect a federal legal response limiting that kind of gamesmanship. Thus, it is no surprise to see federal legislation (a targeted amendment to the Bankruptcy Code) and a growing body of case law undermine the effectiveness of those statutes. In general, those cases suggest that the statutes are likely to have little or no substantive effect to protect assets from creditors.

At the same time, the limited litigation, coupled with apparently increasing enactments and usage, suggests the statutes are producing something useful that investment professionals can sell. I conclude with some brief speculations about the possibility of a new equilibrium developing that accommodates both the formal legal invalidity and the burgeoning actual use of the trusts.

## II. LEGISLATING THE DEATH OF LIABILITY?

What makes the APT interesting to me is its value in illustrating the dynamic responses of a legal system to a new external stimulus—in this case, the impulse to ease the ability of the wealthy to insulate themselves from liability. Without expressing an opinion on the propriety of adopting the statutes,<sup>3</sup> it is enough for my purposes to acknowledge a felt need for limiting the statutes' scope. As one early writer comments, "[a]n orderly system of liability is too important to society to allow vast amounts of wealth to be placed out of the reach of

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3. I have little interest in expressing a normative view about the desirability of those statutes. Suffice it to say that most (though not all) academics consider the subject find them offensive. Compare, e.g., Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 56–80 (1994) (articulating traditional opposition to asset protection trusts), with Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2686 (2006) (making the case for asset protection trusts).

creditors.”<sup>4</sup> The question for investigation in this Article is what societal institutions have done (or not done) to keep the APT in check.

As background, it is useful to begin with a discussion of the “original” legal framework, from which I can trace the formal developments that, over time, have endeavored to loosen the constraints on the wealthy.

### *A. The Baseline*

The traditional rule, in this country at least, has been that an asset-protection (or self-settled) trust is not effective to transfer assets out of the reach of creditors. In order to understand that rule, consider Debtor, who hopes to protect himself from Creditor. To do that, Debtor creates a trust for Debtor’s own benefit and transfers all of Debtor’s savings to a trust for which Debtor is the sole beneficiary. So long as the trust is irrevocable,<sup>5</sup> the transfer of the assets to the trust should mean that Debtor (as settlor) no longer owns them, and thus Creditor cannot reach those assets by pointing to Debtor’s status as settlor. To prevent Creditor from reaching Debtor’s interest as beneficiary, Debtor (as settlor) provides in the trust instrument that Debtor’s interest as the beneficiary of the trust will not be subject to the claims of Creditor.

The legal status of provisions that limit the ability of creditors to reach trust assets is not controversial. First, creditors ordinarily cannot reach the interest of a beneficiary in a trust that contains such a limitation (a so-called “spendthrift” trust).<sup>6</sup> Thus, if a wealthy father conveys assets into a trust for his minor children and provides that creditors cannot reach those funds, the funds will remain protected from creditors. The Restatement (Third) of Trusts makes an exception, however, for our situation: “[a] restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid.”<sup>7</sup> It is one thing, then, to convey assets to a family member but quite another to convey them to oneself; trust law understandably respects the common legitimate reasons for the first transaction but disregards the artifice of the second.

The comments to the Restatement (Third) make it plain that the purpose of the rule invalidating self-settled spendthrift trusts is to

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4. Eric Henzy, *Offshore and Other Shore Asset Protection Trusts*, 32 VAND. J. TRANSNAT’L L. 739, 743 (1999).

5. RESTATEMENT (THIRD) OF TRUSTS § 25, cmt. e (2003) (explaining the consequences of a revocable trust).

6. *Id.* § 58(1).

7. *Id.* § 58(2).



protect creditors. Among other applications, the comments construe the rule broadly to cover a range of scenarios that might otherwise seem debatable. The most obvious is that the rule is absolute: creditors seeking to pierce through to the trust's assets need not prove any intent on the part of the settlor to "hinder, delay, or defraud."<sup>8</sup> That is, the rule "does not depend on the settlor having made a transfer in fraud of creditors."<sup>9</sup>

There is nothing new about this. Similar rules appeared in the Restatement (Second) of Trusts (published in 1959)<sup>10</sup> and in the classic treatment of the subject by Erwin Griswold;<sup>11</sup> the prohibition on self-settled spendthrift trusts is a typical feature of relevant state statutes.<sup>12</sup>

### *B. The Offshore Asset Protection Trust*

In stark contrast to the unyielding clarity of American law on the subject, foreign jurisdictions for many years have maintained legal systems that enforce trust limitations preventing creditors from reaching assets placed in self-settled trusts.<sup>13</sup> Specifically, a few small jurisdictions, such as the Cook Islands or the Caymans, have recognized the enforceability of such trusts for decades.<sup>14</sup> In the earlier years, perhaps, the purpose of the trusts, at least in part, was to limit tax liability for settlors in the United Kingdom, which explains why most popular jurisdictions for offshore APTs are members of the Commonwealth.<sup>15</sup> But by the 1980s they began to be used with increasing frequency by wealthy U.S. nationals as a tool to protect themselves against liability to their American creditors.<sup>16</sup>

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8. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (1984).

9. RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. e.

10. RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1959).

11. ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS §§ 474–475 (2d ed. 1947).

12. *E.g.*, UNIF. TRUST CODE § 505(a)(2) (2000).

13. See Marty-Nelson, *supra* note 3, at 62 (explaining that certain countries are popular with U.S. settlors due to this protection).

14. By the nature of the problem, it is difficult to identify all of the relevant jurisdictions. LoPucki offers the following list gleaned from a variety of sources: Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Isle of Man, Jersey, Liechtenstein, Malta, and the Turks and Caicos Islands. LoPucki, *supra* note 2, at 33 n.143.

15. See Antony G.D. Duckworth, *The Offshore Trust*, 32 VAND. J. TRANSNAT'L L. 879, 881–83, 930–32 (1999) (noting that tax was a major influence in the birth of these centers and many of the offshore centers had rules inherited from England).

16. See *id.* at 930 (noting the emerging interest of American businessmen in the early 1980s).

LoPucki provides a detailed discussion of offshore APTs in *The Death of Liability*, emphasizing their long-term potential as a device for vitiating the enforceability of judgments against the forethoughtful.<sup>17</sup> But several features of offshore APTs have limited their potential to effect a mainstream incursion upon the enforceability of judgments. The most obvious feature is that offshore APTs are relatively expensive, necessarily involving overseas professionals and, typically, some overseas travel. Still, as the costs have come down, offshore APTs have become more accessible to individuals of less-than-fabulous wealth; for example, one expert estimated that by 2000 the costs had fallen to less than \$20,000 to set up a trust, which, together with annual fees of several thousand dollars, is “a relatively small price to pay to put assets out of the reach of creditors.”<sup>18</sup>

The difficulties that arise from the transfer of assets to a trust impose a more practical limitation. The more “real” (and thus legally reliable) the transfer is, the less practical control the settlor will have over the assets, and the harder it will be for the settlor to retrieve them in case of voluntary need. As Jim White puts it, “Any time a potential debtor puts its assets beyond the reach of creditors with the expectation of continuing to enjoy them or of later getting them back, there is the persistent threat that the transferee will prove unfaithful or incapable.”<sup>19</sup>

More importantly, it rapidly became clear that because the offshore APTs would not be respected in this country, their value for protecting assets was limited to assets that effectively could be moved offshore. The basic problem is that American courts, when considering trusts formed by American individuals for the apparent purpose of protecting assets from American creditors, typically applied the law of the jurisdiction with the “most significant interest”<sup>20</sup> in the matter—the jurisdiction of the settlor’s residence.

The Bankruptcy Court for the Southern District of New York took that view early on in the widely cited *Portnoy* decision.<sup>21</sup> Similar

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17. LoPucki, *supra* note 2, at 32–38.

18. Henzy, *supra* note 4, at 740. Whatever one might think about the judgment that those costs are small, they plainly would put this device out of the useful reach of middle-class businesses and professionals.

19. James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability Essay*, 107 YALE L.J. 1363, 1409 (1998).

20. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (1971) (articulating that standard).

21. *Marine Midland Bank v. Portnoy (In re Portnoy)*, 201 B.R. 685, 697 (Bankr. S.D.N.Y. 1996).



decisions from bankruptcy courts in Connecticut<sup>22</sup> and Florida<sup>23</sup> seemed to have settled the application of American trust principles to offshore APTs. Importantly, as mentioned above, mainstream American law invalidated these trusts without regard to the circumstances of their creation (that is, without proof of fraud). Thus, the decision to apply American law effectively invalidated the offshore APT, at least from the perspective of American courts. In sum, these trusts protected assets that could be placed in the foreign (haven) jurisdiction, but American courts did not enforce them to protect assets subject to domestic jurisdiction.<sup>24</sup>

### C. The Domestic Asset Protection Trust

These matters stood until 1997, shortly (coincidentally?) after the publication of *The Death of Liability*,<sup>25</sup> when Alaska adopted the first domestic APT statute.<sup>26</sup> Noting the prompt action by Delaware to follow Alaska's lead,<sup>27</sup> LoPucki predicted that these laws would "mark a historic change in the policy of American jurisdictions toward judgment proofing."<sup>28</sup> As was immediately obvious, these statutes were likely to make the practice of asset protection much easier, both because they would be cheaper to arrange and because of the greater ease (and comfort level) of transactions wholly situated in this country.<sup>29</sup>

Worried that American states would seek to become havens like the Cook Islands or the Caymans, scholars quickly proclaimed concerns that a "race to the bottom" would force the quick spread of such legislation. The most articulate advocate of that view was Stewart Sterk, who responded to the "visible and tangible" competition between

22. *Sattin v. Brooks (In re Brooks)*, 217 B.R. 98, 101–02 (Bankr. D. Conn. 1998).

23. *Goldberg v. Lawrence (In re Lawrence)*, 227 B.R. 907, 917–18 (Bankr. S.D. Fla. 1998).

24. *E.g.*, Henzy, *supra* note 4, at 753–60. For a contrary view, which seems quite strained to this writer, see Gideon Rothschild et al., *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 32 VAND. J. TRANSNAT'L L. 763, 767–78 (1999) (arguing that the results in *Portnoy* and *Brooks* are inconsistent with normal conflicts principles but rest instead on the "bad facts" of those particular cases).

25. See Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L.J. 1413, 1415 (1998) (noting the juxtaposition).

26. Alaska Trust Act, 1997 Alaska Sess. Laws ch. 6, § 8 (codified at ALASKA STAT. § 34.40.110 (2013)).

27. Qualified Dispositions in Trust Act, 71 Del. Laws, ch. 159 (1997) (codified at DEL. CODE ANN. tit. 12, §§ 3570–3576 (2014)). The Delaware legislature explained that the purpose of the statute was "to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts." H.R. 356, 139th Leg., 1st Sess. (Del. 1997) (LEXIS) (synopsis).

28. LoPucki, *supra* note 25, at 1415.

29. See Henzy, *supra* note 4, at 740–41 (making that point).

the states with a careful analysis of “imperfections in the competitive process . . . that undermine the claim that interstate competition will generate efficient trust law rules.”<sup>30</sup>

Sterk worked directly in the tradition of Cary’s work on the race to the bottom in Delaware.<sup>31</sup> He emphasized the likelihood that a “systematic bias may . . . lea[d] state governments to [excessive] . . . incentive[s] to attract new businesses.”<sup>32</sup> He starts from the premise that trusts (like corporations) readily can be moved from state to state.<sup>33</sup> Then, if a state assumes that three-quarters of the trusts taking advantage of the state’s regime are from other states, it would benefit from adopting an APT statute, even if it thought that the net effect of the statute would be negative.<sup>34</sup>

Sterk posited a two-stage model of the long-term effects of interstate competition for trust law.<sup>35</sup> The underlying assumption of his model reasons that the adverse costs of the statutes would be the losses to creditors and the related diminution of investment.<sup>36</sup> Conversely, the benefits would flow from the increase in local financial assets.<sup>37</sup> The first stage considers small trust-importing states, where the balance would tip toward adoption; most of the losses would be borne by citizens of other states, and the benefits of increased local financial assets would be felt locally.<sup>38</sup> Less charitably, it is easy to characterize that activity

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30. Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom*, 85 CORNELL L. REV. 1035, 1039 (2000).

31. See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (arguing for federal regulation of corporate conduct to prevent “the absurdity of this race for the bottom.”). Cary’s work has been examined and clarified by so many scholars in the four decades since he first wrote that any effort to summarize the scholarly reaction is fruitless. To get a flavor for the developments from a few of the most important contributions qualifying Cary’s thesis, see Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–62 (1977) (arguing against Cary’s proposed “interventionist rules” because they ignore the cost side of the analysis); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 265–73 (1985) (finding that reincorporation in Delaware is not a negative present value event and sometimes produces “positive abnormal returns” for shareholders).

32. Sterk, *supra* note 30, at 1058.

33. *Id.* at 1065–66.

34. *Id.* at 1065–68.

35. *Id.*

36. *Id.*

37. That certainly includes increased business for the local estate planning bar and commercial trustee community. See John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2656–57 (2006) (noting a desire to attract local business as a reason why states adopt APT legislation).

38. See Sterk, *supra* note 30, at 1066–69 (explaining why smaller states have taken the lead in developing APT statutes).



as “preying on” neighboring states by “exporting” adverse legal effects.<sup>39</sup> Still, it is just as easy to construct a contrary, quasi-heroic perspective, in which the statutes are a populist reaction to the outrages of the broken American liability system—dominated by insane juries that hand out appalling verdicts for punitive damages, which leads to malpractice premia that make it all but impossible for doctors and lawyers to provide the services our communities so sorely need. Suffice it to say that it will be difficult to collect data assessing the sincerity of either perspective or the extent to which it motivated support for any particular statute.

Of course, the harms to creditors can be overstated. Adam Hirsch, for example, has emphasized that the trusts may do relatively little harm to subsequent creditors because the settlors’ divestitures of assets are relatively clear.<sup>40</sup> Thus, he contends, the main potential harm is to preexisting creditors, against whom the conveyance is likely to be voidable as a fraudulent conveyance.<sup>41</sup> That is, of course, little solace to involuntary creditors, a problem that Hirsch acknowledges.<sup>42</sup>

The second stage of Sterk’s model considers the incentives of larger states in which a much larger share of the trust creditors would be local. If his relatively simple conception of the costs and benefits were correct, then the balance, at least initially, would tip decidedly against adoption by large states like California.<sup>43</sup> Still, Sterk reasoned, if capital were perfectly mobile, so that a disparity in asset protection would drive substantially *all* California-originated trust business to Alaska, in the end even California (and other large states) would be driven to adopt APT statutes.<sup>44</sup>

### III. THE RACE IS ON, OR IS IT?

My role, fifteen years later, is to assess this race. Did it happen? Was it a race to the bottom? Has it affected the legal system in any substantial way? More importantly for this Article, what can the

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39. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 51 (2005).

40. Hirsch, *supra* note 3, at 2688–89.

41. *Id.* at 2688–92.

42. *Id.* at 2695–97.

43. See Sterk, *supra* note 30, at 1069–70 (arguing that smaller states are in a better position initially to export the costs of APTs). The analysis of Eason, *supra* note 37, at 2654–61, is quite similar to that of Sterk, except that Eason (writing with the benefit of hindsight) can observe that the trend in adoption had not yet shifted to Sterk’s second stage (adoption by large states).

44. See Sterk, *supra* note 30, at 1070–72 (explaining this hypothesis through the use of game theory).

pattern of adoption tell us about the motivations that promote (and retard) the adoption of APT statutes? In general, I extend Sterk's analysis in two directions. After summarizing the bare facts of adoptions, I first explore the characteristics of the states that have adopted the statutes. Although the data points are few, the evidence suggests that broader attributes of the nature of the state's economy are at least as relevant, if not more relevant, than the size of the state alone. Second, I provide some tentative evidence to support Sterk's prediction that the statutes will come over time to larger and larger states.

My analysis begins with the bare facts regarding the dissemination of APT statutes. In one sense, the prophets of adoption were not wholly disappointed. Although adoptions were slow during the early 1990s, they have continued sporadically, with the most recent adoptions by Idaho and Utah in 2013.<sup>45</sup> In all, a dozen states have followed the lead of Alaska and Delaware, so that fourteen states now have APT legislation.<sup>46</sup>

Of course, fourteen states is hardly a consensus. The more relevant question for our purposes is what the adoptions can tell us about the accuracy of the various public-choice theories articulated a decade or more ago at the advent of onshore APT statutes. Even before the advent of the onshore statutes, commentators assumed that "nations compete for foreign investment by refusing comity with respect to the enforcement of judgments and providing havens for judgment debtors from their foreign creditors."<sup>47</sup> This suggests that it is useful to identify the factors that might have led American states to participate in such a race to the (intended) disadvantage of their sister states.<sup>48</sup>

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45. See *infra* n.46 (which provides details of all of the adoptions).

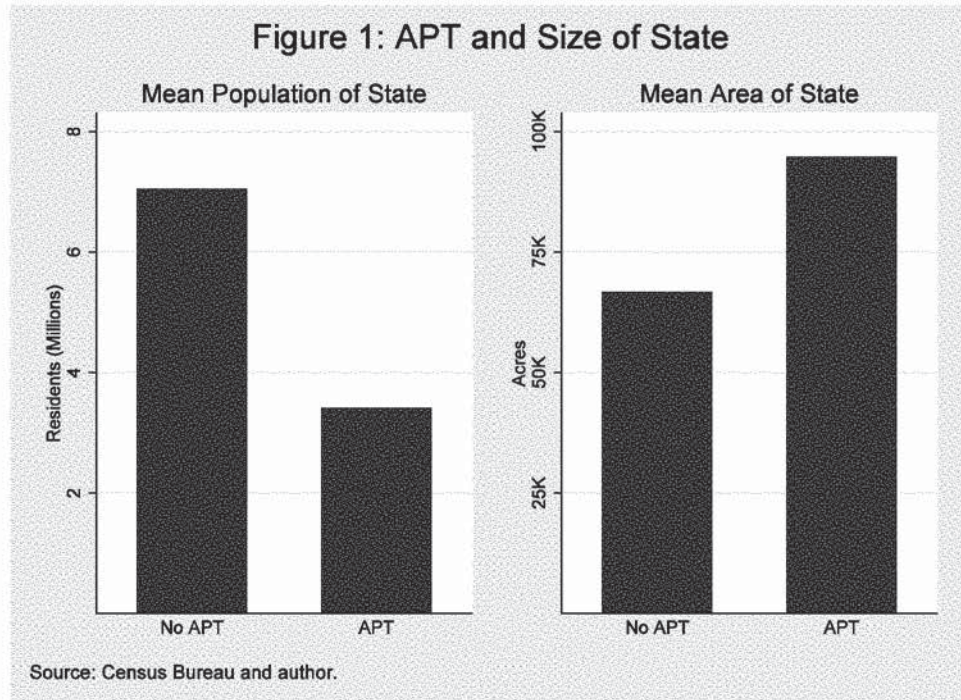
46. The other states, in order of enactment, are Rhode Island and Nevada (1999), Missouri and Oklahoma (2004), South Dakota (2005), Tennessee and Wyoming (2007), New Hampshire (2009), Hawaii (2010), Virginia (2012), and finally Ohio and Utah (2013). The Appendix provides detailed citations to all of those statutes. I omit Colorado from the list, because the nineteenth-century statute on which APT advocates rely is both less clearly effective than the modern legislation and plainly unrelated to any interstate competition. See Eason, *supra* note 37, at 2661 n.197 (summarizing the Colorado situation); Joseph G. Hodges, II & Eugene P. Zuspann, II, *Can Some Colorado Trusts Provide Protection from Claims of Creditors?*, 28 COLO. LAW. 61, 61-63 (1999) (providing a detailed discussion).

47. LoPucki, *supra* note 2, at 32-33.

48. The analysis is complicated by the likelihood that states might adopt APT statutes for reasons not closely tied to the avoidance of liability. It is clear, for example, that one common use of asset-protection trusts is to make more fully effective the division of property in a marital prenuptial agreement. See Duncan E. Osborne, *Asset Protection Planning to Avoid Marital Claims*, AM. COLL. OF TR. AND EST. COUNS. (Summer 2007 Meeting, Salt Lake City, Utah) (on file with author). Another common use of the trust is to exclude assets from the gross taxable estate of the



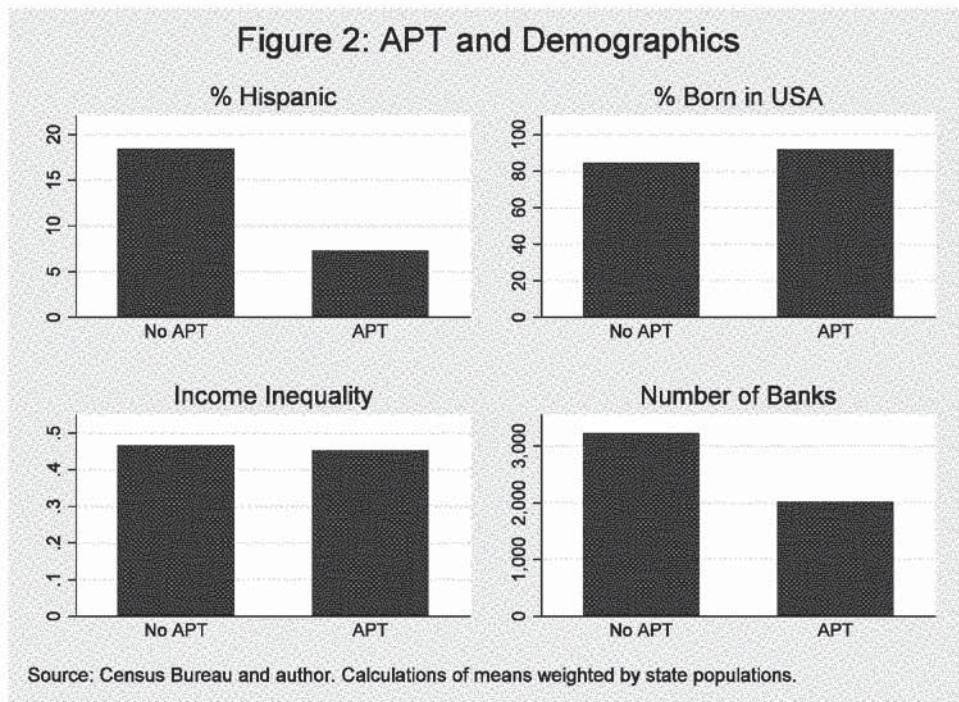
As suggested above, the first question to examine is whether the most useful way to understand the pattern of adoption is to look at size. To start with the simplest problem, it is not at all obvious what the best measure of size would be. If we are looking at acreage, Alaska and Nevada (pro-APT states) are quite large. Similarly, if we are looking at population, Ohio and Virginia (recent APT adopters) are both well above the median.



Moving beyond anecdotal impressions, Figure 1 illustrates that the States that have adopted APT statutes are somewhat smaller in population than states without such statutes and somewhat larger in area. To be sure, simple pairwise correlation tests indicate that the relations between population and area, on the one hand, and APT adoption, on the other, are weak at best.<sup>49</sup> For present purposes, though, I use population as the most useful indicator of size.

settlor at death. *E.g.*, Charles D. Fox IV et al., *Perpetual Trusts and Creditor Protection: Looking at New Possibilities*, at G-18 to G-27 (1998, unpublished CLE presentation) (on file with author).

49. Neither is significant at the 5% level.



Based on the intuition that something other than raw size might be important, I integrated data from the Census Bureau on a variety of state-level social and economic indicators with the database of APT adoptions. In contrast to the data related to size, several of the social and economic variables do relate significantly to APT adoption. For illustrative purposes, Figure 2 displays the four variables that have significant relations to the fact of adoption.<sup>50</sup> The share of Hispanics in the population and the percentage of the population born in the United States are closely related variables. The pairwise correlations, at least, suggest that APT statutes are more likely to appear in states that have a lower percentage of Hispanics and a higher percentage of U.S. natives in the population. The bottom panels relate to economic activity. On those points, APT statutes appear to be more likely in states with less disparity in income distributions and less likely in states with a greater number of banks.<sup>51</sup>

Although the number of observations is slight (51), the correlations are suggestive as a group. For example, the correlations

50. Each of the variables in Figure 2 relates significantly to APT adoption at the 5% level.

51. To be clear, all of the comparisons discussed in this paragraph are weighted by the populations of the individual states.



tend to indicate that socioeconomic diversity in the population dampens the demand for the statutes. That might be true, for example, if socioeconomic diversity relates to the existence of important interests that would support and oppose APT statutes, preventing a sufficient consensus to motivate adoption. Conversely, the presence of banks might correlate with hostility to debtor-protective legislation, as banks would lobby their legislators to oppose such statutes.

These bivariate correlations, however interesting, raise the immediate question of whether any of these relations would be significant in a multivariate model. The results of a multivariate model<sup>52</sup> assessing the likelihood a particular state has an APT at the present time suggests that the measure of income inequality is significant at the ten percent level and that none of the other variables is significant even at the ten percent level.<sup>53</sup> Given the correlations among the various explanatory variables and the small number of observations, it is not surprising that the results are only marginally significant. It is intriguing, though, that the effects of income inequality appear to be more important than the effects of any other indicator.

To illustrate the combined relations among income inequality, population, and APT adoption, Figure 3 provides a scatterplot of income inequality against population, with the APT states marked in blue and the non-APT states marked in red.<sup>54</sup> Several things about that figure are interesting. The first is the strength of the positive correlation between income inequality and total population;<sup>55</sup> as the green line indicates, the data roughly mark out a swath that rises from left to right with increasing population. Second, adopting jurisdictions (indicated in blue) cluster in the bottom left quadrant of the population; most of the adopting states are below the mean (indicated as zero in Figure 3) on *both* population and inequality of income distribution. This suggests that the statutes are most commonly adopted in the states that are both relatively small *and* relatively balanced in the distribution of income.

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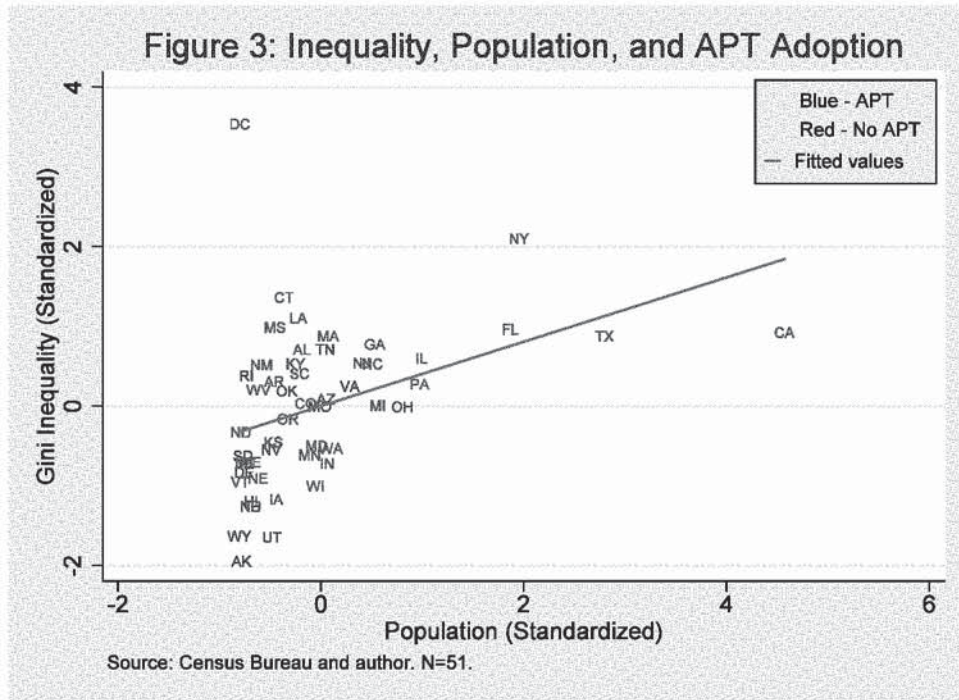
52. Results are available upon request.

53. I also explored political orientation, based on using the percentage of individuals voting Republican in the last Presidential election. The results suggested no substantial relation with APT adoption. This makes sense, given the conflicting policy effects of the statutes—helping the wealthy (which Republicans commonly support), but assisting the bankrupt in avoiding payment of debts (which Republicans commonly oppose).

54. To put the variables on the same scale, each variable is standardized. The figure displays the number of standard deviations that any given state is above, or below, the mean value for Gini inequality or population, as the case may be. Thus, the mean on both variables, as represented in the scatterplot, is zero.

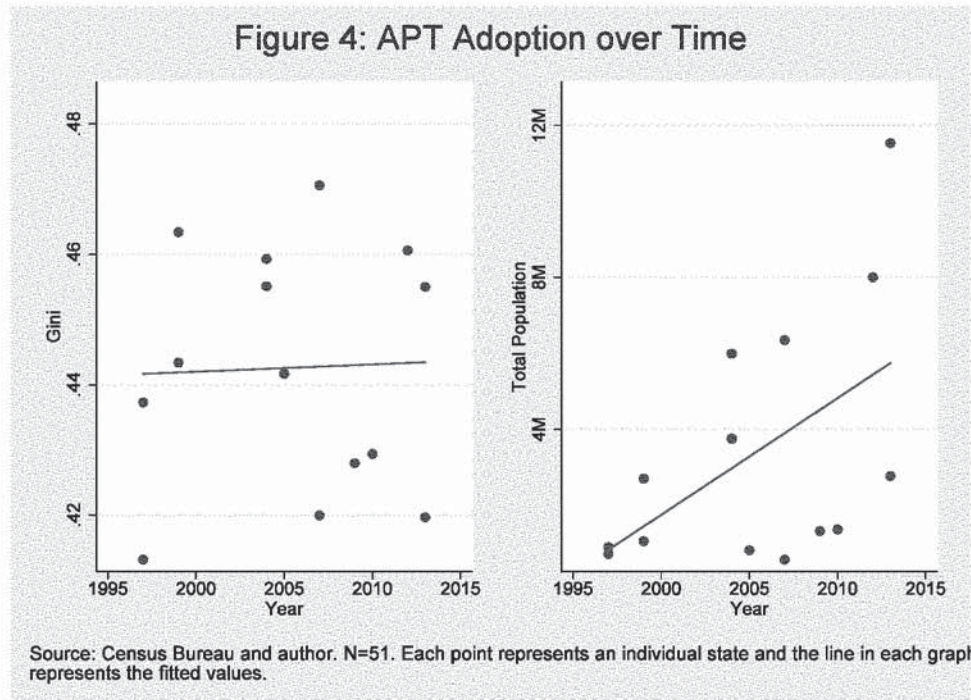
55. Pairwise correlations indicate that the relation is significant at the 5% level.

None of the adopting states are near the top of the distribution in *either* population or income inequality.



The next question of interest is whether the data suggest a trend in adoption. Specifically, what do the data suggest about Sterk's prediction that over time the larger states would start to adopt the statutes? Figure 4 presents the limited data available on that point, comparing the income inequality and population of the adopting states to the progressing years of adoption. Here, the data (admittedly sparse) provide considerable support for Sterk's hypothesis, suggesting that population in fact is important, as the population of states at the time they adopt APT statutes was larger in recent years than past years.





To close, the evidence of Figure 4 provides yet another qualification to the analysis summarized above. If the types of states that are adopting APT statutes are continuing to change, then there is every reason to think that the characteristics associated with adoption are changing as well. Still, even that tentative discussion does suggest that the conditions that support adoption are far more intricate, and socially grounded, than a simple correlation with size of the state's population.

#### IV. LAW ON THE GROUND: LIABILITY IN THE APT WORLD

Next, this Article considers how the legal system has responded to state APT adoptions. As suggested above, the natural response in a federal system to state legislation premised on externalizing costs to other states would be a federal-level prohibition; conceptually, the out-of-state effects of APT statutes are no different from downwind air pollution.<sup>56</sup> So it should be no surprise that federal legislators promptly responded to the earliest spate of APT adoptions with a specific

<sup>56</sup> See, e.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014) (discussing externalities of air pollution).

provision targeting the use of APTs, the so-called Talent Amendment to the Bankruptcy Code.<sup>57</sup> Adopted in 2005 as Section 1402 of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")<sup>58</sup> and codified as Bankruptcy Code § 548(e),<sup>59</sup> that provision directly extends the statute of limitations to ten years for any "transfer . . . made to a self-settled trust or similar device."<sup>60</sup>

Lest there be any doubt about the motivation for the enactment, the House Report explains it as a response designed to close the "self-settled trust loophole."<sup>61</sup> Representative Delahunt captured the perspective of those supporting the provision when he commented: "This loophole [i.e., the tolerance for state APT laws] is, in my judgment, evidence of how the current bankruptcy system provides two bankruptcy laws, one for the well connected and one for middle class families."<sup>62</sup> The parallelism between the quick federal response and the analysis of the preceding section bears noting: if diversity of interest within all but the most homogenous of the individual states prevents enactment of legislation supporting APTs, it should be no surprise that support for those statutes is ineffective at the federal level.

Of course, there is no a priori reason to suppose that federal legislation will be any more effective in its intended purpose than state legislation. The most important inquiry would examine what the effects of the dueling pro- and anti-APT statutes have been on the ground. With adoptions by Ohio, Utah, and Virginia in the last two years, there is little reason to think that the process of adoption has ended. Specifically, what have the proponents of state-level APT adoptions gotten for all of their efforts (and, presumably, substantial campaign contributions)?<sup>63</sup> My sense, admittedly based on the earliest returns of

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57. This Talent Amendment is to be distinguished from the Talent-Nelson Amendment, Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2266 (codified at 1049 U.S.C. § 987) (prohibiting high-interest loans to military personnel and their dependents).

58. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23, 214-15 (2005).

59. For ease of explication, subsequent references to provisions of the Bankruptcy Code are by section number only. All citations refer to the Bankruptcy Code as presently in force in Title 11 of the United States Code.

60. Section 548(e)(1)(A).

61. H.R. Rep. No. 109-31, pt. 1, at 109th Cong., 1st Sess. 449 (2005) (comment of Rep. Cannon).

62. *Id.* at 448 (comment of Rep. Delahunt).

63. The discussion here is in the same vein as the discussion in Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 397 (concluding that unintended consequences limited the benefits from the adoption of BAPCPA expected by the proponents who had sought bankruptcy reform for the benefit of credit-card lenders).



less than a handful of cases, is that the proponents have to this date gotten very little, and certainly nothing worth any substantial investment in the legislation. To make that point, it is useful to consider separately the differing situations of same-state settlors (seeking to use an APT statute adopted by their principal state of activity) and out-of-state settlors (seeking to take advantage of an APT statute adopted by another state).

### *A. Same-State Settlors*

Two points are important here. First, from the point of view of federal public policy, there is quite a bit less to complain about regarding the application of an APT statute to the affairs of a person primarily operating in the state. If the Texas legislature adopts a statute easing the ability of Texas debtors to escape the collection efforts of Texas creditors, it seems at least reasonably likely that the most substantial harms (or benefits) of that statute will accrue to the constituents of the adopting legislators.<sup>64</sup> Although the increasing integration of the national and global economies suggests that effects will never be borne *entirely* in the principal jurisdictions, the likely externalization of harms is at its lowest in that situation.

More broadly, concerns about the deteriorative effect of “haven” jurisdictions have no purchase on those kinds of in-state transactions. As summarized above, the outraged complaints about the offshore jurisdictions adopting APT statutes focus exclusively on the scenario in which American debtors are using offshore statutes to escape the collection efforts of American creditors, based on payment of fees to professionals in the offshore jurisdiction. Who would complain if the owner of a Cayman Islands business used the Cayman APT statute to escape Cayman creditors?

Given that perspective—that this is the best-case scenario for enforcement of an APT—it is surprising that the limited litigation to date suggests that even same-state settlors gain relatively little from the use of APTs. The leading case here (admittedly perhaps the only

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64. That is not to say that Texas middle-class workers, for whom asset protection is unavailable, would feel themselves fairly treated by a system that permits the ready evasion of liability but limits the instrument of evasion to the wealthy. It is simply to say that their interests are more fairly represented in a system in which both the creditors and debtors are in the same jurisdiction than they are in a system in which the creditors and debtors are, for the most part, in distinct jurisdictions. The obvious example would be creditors in California (which has no APT statute) unable to enforce debts against debtors in Nevada (which does have an APT statute).

relevant example) is *Battley v. Mortensen*.<sup>65</sup> Mortensen, the debtor in that case, was a chronically unemployed geologist whose principal asset was an acre of unimproved property near Seldovia, Alaska.<sup>66</sup> Mortensen received clear title to the asset in connection with a 1998 divorce from the spouse with whom he originally had purchased the property. In 2005, he transferred the property to a self-settled trust as permitted by Alaska law.<sup>67</sup>

Thereafter, Mortensen's financial affairs steadily deteriorated, the product of sporadic income and the use of speculative investments in an effort to obtain funds to pay living expenses. Not surprisingly, the records of his financial affairs are confused. It is plain, however, that his credit card debts "ballooned" in the years after the trust was created; his outstanding credit card debt at the time the trust was created appears commensurate with his liquidity at that time.<sup>68</sup> When he sought relief from an Alaska bankruptcy court in 2009, he listed about \$26,000 in personal property, against more than \$250,000 in credit card debt. He did not list his interest in the trust as property of the estate.<sup>69</sup>

In many ways, *Mortensen* is the most palatable case for respecting the transfer of assets into an APT. His connection to Alaska is undoubtedly genuine; the dispute involves Alaska real estate, to which the application of Alaskan law can hardly be controversial. Similarly, the record includes no substantial evidence that the conveyance was designed to defraud an existing creditor. Moreover, he is by no means the paradigmatic high-income individual seeking to shelter a luxurious lifestyle from importunate creditors; his income in the preceding five years ranged from a low of about \$3,000 to a high of about \$33,000.<sup>70</sup> By all accounts, Mr. Mortensen's decision to place the assets in a trust was as benign an example of "insolvency planning" as a lawyer can expect to observe.

Still, it was understandable given the assets at stake that the trustee in bankruptcy tested the validity of the trust. Given the gap of more than four years between the conveyance to the trust and the bankruptcy filing, the trustee sought to invalidate the transfer as a fraudulent conveyance under the ten-year statute of limitations of the

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65. *Battley v. Mortensen (In re Mortensen)*, 10 Alaska Bankr. Rep. 146 (Bankr. D. Alaska 2011).

66. Seldovia is a small town on the Kenai Peninsula, south of Anchorage.

67. *Mortensen*, 10 Alaska Bankr. Rep. at 147, 150.

68. *Id.* at 152. Mortensen owed about \$15,000 to AT&T, \$6,000 to Capitol One, and \$12,000 to Discover. *Id.* at 159–60.

69. *Id.* at 153.

70. *Id.* at 148–49.



Talent Amendment (§ 548(e)). The problem for the trustee, however, was that the statute requires more than constructive intent; it requires “actual intent to hinder, delay, or defraud” a creditor.<sup>71</sup> The trustee’s argument faced an uphill battle: Mortensen testified that he simply wanted to preserve the property for his children, and the absence of any apparent contemporaneous creditors provided support for that argument. To be sure, the trust document did state that the purpose of the trust was “to maximize the protection of the trust estate . . . from creditors’ claims of the Grantor [Mortensen],” but Alaskan law provides that “a settlor’s expressed intention to protect trust assets from . . . potential future creditors is not evidence of an intent to defraud.”<sup>72</sup>

That language would seem to foreclose a challenge in a case like Mortensen’s under Alaskan state law, but the question in *Mortensen* was how far the federal court in Alaska would go to accommodate the views of the Alaska legislature. And the answer, plainly, is not so far. Referring to the legislative history quoted above denigrating Alaska’s “self-settled trust loophole,”<sup>73</sup> the court concluded that it “would be a very odd result for a court interpreting a federal statute aimed at closing a loophole to apply the state law that permits it.”<sup>74</sup> Emphasizing that § 548(e) explicitly refers to future creditors,<sup>75</sup> the court concluded the very act of placing assets in a self-settled trust provides the necessary evidence of intent to defraud.<sup>76</sup>

To be sure, the opinion could be read more generously. The court also emphasized Mortensen’s solvency at the time the trust was created.<sup>77</sup> The court offered a discussion of Mortensen’s financial position in order to show that the existing credit card debts at the time he created the trust provided an independent basis for finding the requisite intent.<sup>78</sup> But how often will a client of Mortensen’s general level of wealth come seeking the protection of an APT with no cognizable credit card debt on his balance sheet? If this record

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71. Section 548(e)(1)(D). The language is identical in relevant respects to the long-unchanged phrasing of §548(a)(1)(A), which includes a two-year statute of limitations.

72. ALASKA STAT. § 34.40.110(b)(1) (2013).

73. See *supra* note 61 and accompanying text (describing Congress’s intention to close the loophole).

74. *Mortensen*, 10 Alaska Bankr. Rep. at 158.

75. Section 548(e)(1)(D) protects “any entity to which the debtor was, or became, on or after the date that [the] transfer was made, indebted.”

76. *Mortensen*, 10 Alaska Bankr. Rep. at 158.

77. *Id.* at 156.

78. *Id.* at 159–60.

demonstrates intent to defraud, the quest for enforcement of an APT will be like the proverbial camel seeking to pass through the needle's eye.

In sum, if *Mortensen* stands for anything, it is the court's "bottom line" assessment that Mortensen's use of an APT was "a clever but fundamentally flawed scheme to avoid exposure to his creditors."<sup>79</sup> Importantly, because that decision came from the only bankruptcy jurisdiction in Alaska, the likelihood of successful reliance on that statute seems all but remote.

### B. Out-of-State Settlers

The situation for out-of-state settlers is quite different. First, from the same public policy perspective that could tolerate application of an APT statute to a resident, application of the statute to an out-of-state settlor is much more troublesome. The situation described in the Sterk model, in which the benefits of the statute accrue to the adopting state but the costs burden the state in which creditors are located, presents precisely the externalization of harm that consistently has troubled opponents of APT statutes. It is therefore *precisely* the problem that Alaska and Delaware (and more recently Ohio<sup>80</sup>) are at least *trying* to become havens attractive to the most foresightful of debtors.

Here, however, the judicial response has been even harsher than in *Mortensen*.<sup>81</sup> Relevant here are *Green v. Zukerkorn*<sup>82</sup> and *Waldron v. Huber*.<sup>83</sup> *Zukerkorn*, the earlier of the two, is easily disposed of. *Zukerkorn* involved a California bankruptcy of a debtor who was the beneficiary of a Hawaii-governed spendthrift trust created by his mother. Because California law was slightly more hostile to spendthrift trusts than Hawaii law,<sup>84</sup> the trustee in the son's bankruptcy sought to

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79. *Id.* at 161.

80. See Scott Martin, *Nevada Trust Big Says Ohio Takes Place of Delaware as Top Trust Choice*, THE TR. ADVISOR (Apr. 28, 2013), available at <http://thetrustadvisor.com/tag/best-asset-protection-states>, archived at <http://perma.cc/Z7AL-PQLZ> (suggesting that Ohio's new statute responded to legislators "watch[ing] their residents' wealth flow across the country" and that it has left Delaware "vulnerable to billions of dollars in out-of-state assets slipping away").

81. This should come as no surprise. It is only a slight exaggeration to say that the analysis of the opinions summarized below in the text tracks the predictions of Henzy, *supra* note 4, at 747–55.

82. *Green v. Zukerkorn* (*In re Zukerkorn*), 484 B.R. 182 (B.A.P. 9th Cir. 2012).

83. *Waldron v. Huber* (*In re Huber*), 493 B.R. 798 (Bankr. W.D. Wash. 2013).

84. California law would have permitted an order taking 25% of the income from the trust for the benefit of creditors, while Hawaii law would have enforced the spendthrift provision in accordance with its terms. *In re Zukerkorn*, 484 B.R. at 188–89.



collect funds from the trust for the benefit of the son's creditors. Largely because the settlor had lived in Hawaii when she created the trust, the court declined to invalidate the trust's provisions. In passing, however, explaining why the Hawaii statute was not so offensive to California public policy as to justify invalidation, the appellate panel offered a disparaging comparison to self-settled trusts:

The Trustee has not identified any recognized standard of morality in California that is impacted by the application of Hawaii law [or explained] how upholding . . . an otherwise valid spendthrift trust adversely affects the general interests of Californians. *Although self-settled trusts are void and against public policy in California . . . the . . . Zukerkorn Trust is not a self-settled trust.*<sup>85</sup>

The court could hardly offer a plainer hint of the outcome of a case involving a Hawaiian APT.

*Waldron v. Huber* addresses the central question: how will a court in one state treat an APT formed under the law of another state? The answer is plain—not well. Huber was a real estate developer who had worked in the Puget Sound area for more than forty years. By 2007, his affairs had begun to unravel. The court noted four suits filed against him, each seeking to enforce a commercial promissory note (each in an amount exceeding a half-million dollars). At this point, Huber set up an Alaskan APT, to which he transferred the shares representing controlling ownership of the bulk of his operating businesses.<sup>86</sup>

The court's response was to offer a series of parallel reasons why the protections of the trust should not avail. In general, the opinion reads as if the court's pronounced distaste for APTs motivated it to insulate its decision from appellate review by providing so many justifications that at least one would be sure to withstand appellate scrutiny.

The first and most obvious question was whether the protections of the trust should be invalidated as offensive to the law of Washington: if the court applied Washington law to evaluate the trust rather than Alaska law, the trust's protections for Huber would vanish. Going straight to the Restatement provisions summarized above, the court explained that the trust would fail if Alaska had no significant relation

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85. *Id.* at 193 (citation and internal quotation marks omitted) (emphasis added). The Court quoted a California case explaining:

It is against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it, and where the settlor makes himself a beneficiary of a trust any restraints in the instrument on the involuntary alienation of his interest are invalid and ineffective.

*Id.* at 193 n.14 (citation omitted).

86. The discussion in this paragraph summarizes in re *Huber*, 493 B.R. at 802–06.

to the trust.<sup>87</sup> Here, the settlor and beneficiaries resided in Washington, the assets (to the extent they had a location) were located in Washington, the affected creditors were located in Washington, and the attorney that prepared the documents for the trust was located in Washington.<sup>88</sup> On that record, the court could only conclude that Alaska's relation to the trust was "minimal," while Washington's was "substantial."<sup>89</sup>

Although that conclusion seemed hard to dispute, the court went on to explain that it also would have invalidated the trust as offensive to the public policy of Washington. Relying on *Portnoy's*<sup>90</sup> invalidation of an offshore APT and applying comment b to § 270 of the Restatement (Second) of Conflicts, the court summarily concluded that the trust was so offensive to Washington policy as to warrant invalidation.<sup>91</sup>

As a third reason for invalidation, the court turned to § 548(e), the statute at issue in *Mortensen*.<sup>92</sup> For reasons that the discussion above makes clear, this issue was much simpler here than in *Mortensen* because the undisputed factual record established several of the traditional "badges of fraud" as to creditors existing when the trust was created.<sup>93</sup>

The court used § 544(b)(1), which permits a bankruptcy trustee to enforce the Uniform Fraudulent Transfer Act ("UFTA") against bankrupt debtors, as a fourth reason to invalidate the transfer. Given the previous analysis of badges of fraud with regard to § 548, the court had no difficulty identifying § 544(b) as yet another basis for invalidating the trust.<sup>94</sup>

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87. *Id.* at 807–08 (citing and applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (1971)).

88. *Id.* at 808–09. The court does not state whether the trust instrument was executed in Washington or Alaska. It would be shockingly lax if the parties did not bother to execute the documents in Alaska, but presumably Huber would have emphasized the point if it was available to him.

89. *Id.* at 809.

90. *See supra* text accompanying note 21.

91. *In re Huber*, 493 B.R. at 809–10.

92. *Id.* at 810–11. Lest the opinion seem unduly one-sided, the court declined to use "reverse piercing" to invalidate the trust under the alter-ego doctrine. The court noted that the cases applying that doctrine (all federal) had rested on a detailed analysis of the forum's doctrine. Because Washington had no relevant authorities, the court found it a stretch to accept the trustee's argument on that point. *Id.* at 810.

93. *Id.* at 812–14 (finding that Huber transferred assets in the face of litigation, transferred substantially all of his assets, had significant indebtedness at the time of the transfer, and effectively retained the transferred property).

94. *Id.* at 814–16.



Finally, and most importantly, the court considered the possibility that it might deny Huber a discharge under § 727, which authorizes denial of a discharge upon proof that a debtor “transferred” or “removed” property within one year before the petition was filed.<sup>95</sup> Here, although the trust had been created more than a year before the petition, the trustee relied on Huber’s use of assets from the trust to support his living expenses during the year before filing. In the end, the court held that the trustee was not entitled to a summary judgment denying discharge because the trustee lacked direct evidence that Huber acted for the “specific purpose” of defrauding his creditors.<sup>96</sup>

Reasonable minds certainly can differ on how harshly to receive the message of the *Huber* court. After all, *Huber* involved a debtor almost paradigmatic in his efforts to avoid payment—the direct opposite of *Mortensen*—and so the possibility remains that a debtor more favorably situated than Huber might get a better reception.

Two problems, however, suggest such a sanguine interpretation is dubious. First, the court’s choice-of-law analysis, at least overtly, has little or no relation to the facts of this case. Rather, on that point, the decision stands for the unremarkable proposition that choice-of-law analysis for onshore APTs will closely resemble the now-settled analysis invalidating APTs in the offshore context.<sup>97</sup>

Second, there is, at least in the existing reporters,<sup>98</sup> no reason to think courts will be receptive to these trusts even on the best of facts. *Mortensen* is evidence enough on that point, and the sentiments of that decision are echoed in *Zukerkorn*. Because the § 548(e) analysis articulated in *Mortensen* apparently would invalidate *any* APT, in state or out of state, the road to successful protection must run, at a minimum, over the barrier of the existing precedents.

#### V. LINGERING QUESTIONS: YOU GET WHAT YOU PAY FOR, OR MAYBE EVEN LESS!

So where does that leave us? As far as the evidence suggests, the process of state adoption is moving forward undiminished, while federal courts assessing the legislation in litigation seem to be uniformly hostile. It is less clear, however, that the advent of the onshore APTs

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95. Section 727(a)(2).

96. In re *Huber*, 493 B.R. at 816–17.

97. See *supra* Section II.B.

98. The lapse of time suggests that there was no appeal in in re *Mortensen*; there is, as of yet, no evidence of an appeal in in re *Huber* (or in re *Zukerkorn*).

has had some cognizable effect on the market for APT use. Most obviously, it has lowered the costs substantially. The facts of *Mortensen*—particularly, the use of such a vehicle by a debtor far below the midpoint of the income distribution—are illustrative. This reality suggests, at least, something of a democratization of the death of liability. On the other hand, the available empirical evidence suggests that any flow of assets into (or out of) a jurisdiction based on the existence of an APT statute is slight, at best.<sup>99</sup>

Still, there is little reason to hope that the onshore APT will be any more effective at insulating assets from creditors than the offshore APT. Given the long-standing results in *Portnoy* and the cases that followed it, the inhospitable reception should come as no surprise. With the cases to date providing some confirmation that judges are not (so far) inclined to abandon the reasoning of the offshore trust cases, the likelihood of enforcement remains bleak, whatever the fact pattern (as summarized in Table 1).

**Table 1: APT Enforceability**

Debtor/Geography	Cases	Result
Offshore	<i>Portnoy</i> , etc.	Fails choice of law
Onshore/In-State	<i>Mortensen</i>	Passes choice of law but fails Talent/UFTA
Onshore/Out-of-State	<i>Huber</i>	Fails choice of law and Talent/UFTA

The real question is what to make of the paucity of cases. We could read the small number of cases as flowing from a consensus that the plain ineffectiveness of the trusts makes it futile to litigate their validity. On this reading, *Mortensen* is instructive because it suggests that in a relatively small consumer bankruptcy with no substantial debts owed other than to credit card issuers, the trustee nevertheless readily found the resources to overcome the obstacles of the Alaska APT.

On the other hand, we might read the small number of cases as proof that the costs of litigation are so high (as compared to the potential assets to be reached) as to make litigation fruitless. On this

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99. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410–12 (2005). By comparison, it appears that abolition of the Rule Against Perpetuities is related to an increase in a state's trust assets of about 20% (\$6 billion) and in average account size of about \$200,000. *Id.* at 410.



reading, the ability of strongly motivated debtors to combine the use of an APT with other strategies<sup>100</sup> means that creditors will routinely find themselves stymied by the costs of fighting through the entire matrix of asset-protection strategies, whatever the ultimate legal penetrability of any single strategy.<sup>101</sup>

The discussion above suggests yet another example<sup>102</sup> of how ineffective it is to “purchase” legislation for the benefit of a particular interest. The analysis in this Article suggests that the onshore APT statutes are providing little or no formal legal benefit to the settlors that use them. They presumably provide considerable benefits to the attorneys and investment professionals that recommend and implement them.<sup>103</sup> But that seems a far cry from the “build it and they

100. The one most commonly mentioned to me by commenters is the Nevada limited liability limited partnership (the LLLP); under Nevada law, the sole remedy of a creditor seeking to enforce a judgment against that entity is to obtain a charging order from a Nevada court, a remedy which is (apparently) not expeditious. *E.g.*, *Montana v. Blixseth (In re Blixseth)*, 484 B.R. 360, 368 (B.A.P. 9th Cir. 2012). For a strong recommendation that practitioners combine the APT with a limited liability partnership of some form, see Jonathan G. Blattmachr et al., *Asset Planning on America's Last Frontier: Alaska Trusts, Limited Partnerships, and LLCs*, 23 ACTEC NOTES 240, 240 (1997). See also Barry A. Nelson, *Asset Protection & Estate Planning: Why Not Have Both?*, Presentation at the 46th Annual Heckerling Inst. on Est. Plan., 47–61 (2012), available at [http://www.ficpa.org/Content/Files/Docs/Ematerials/Materials\\_12AS\\_NelsonCombinedSupplementalMaterials.pdf](http://www.ficpa.org/Content/Files/Docs/Ematerials/Materials_12AS_NelsonCombinedSupplementalMaterials.pdf), archived at <http://perma.cc/YZK4-JW6E> (discussing tenancy by the entirety as a method of asset protection).

101. I note that the Nevada LLLP, discussed *supra* note 100, does not promise the complete protection from creditors that the APT promises, but rather simply complicates and extends the process of collection.

102. See *supra* note 63 (discussing prior work making a similar point about BAPCPA).

103. One interesting aspect of the APT landscape is the strongly positive advice attorneys and accountants offer their clients about the likely benefits of APTs. *E.g.*, Kurt A. Friesen, *Domestic Asset Protection Trusts: 15 Years After Alaska and Delaware*, A.B.A. TRUSTS & INVESTMENTS, March–April 2012, at 6, 9 (emphasizing the “fact-specific” nature of *in re Mortensen* as a basis for the conclusion that it does not “negate the utility” of APTs); Geoff N. Germane, *Utah's New Domestic Asset Protection Statute Makes State a Top Choice to Shield Assets*, KIRTON MCKONKIE (April 2013), available at <http://www.kmclaw.com/newsroom-alerts-Domestic-Asset-Protection-Trust-DAPT.html>, archived at <http://perma.cc/SZX5-RAMQ> (emphasizing the “numerous practical uses” of the Utah statute, which “should earn [Utah] an invitation into the upper echelon of asset protection trust jurisdictions,” without mentioning the likelihood that most provisions of the statute would not withstand judicial scrutiny); Williams Mullen, *Client Alert: Gift and Creditor Protection Planning with Virginia's New Self-Settled Spendthrift Trust Statute*, WILLIAMS MULLEN (May 21, 2012), available at <http://www.williamsmullen.com/news/client-alert-gift-and-creditor-protection-planning-virginia%E2%80%99s-new-self-settled-spendthrift-trust>, archived at <http://perma.cc/4AJE-KDJY> (acknowledging that Virginia's statute is not as favorable as those of other jurisdictions but asserting, without mention of *in re Mortensen* or *in re Huber*, that the statute “create[s] immense planning opportunities for clients and their families”); Steven J. Oshins, *The Hybrid Domestic Asset Protection Trust*, A.B.A. SEC. ON REAL PROP., TR., AND EST. L. (RPTE eReport) (June 2013), available at [http://www.americanbar.org/content/dam/aba/publishing/rpte\\_e-report/2013/3\\_june/te\\_articles.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/rpte_e-report/2013/3_june/te_articles.authcheckdam.pdf), archived at <http://perma.cc/J6VC-53HY> (emphasizing that “no non-bankruptcy creditor has challenged [an

will come" expectations that an APT statute could turn a state into a haven for incoming financial investment.<sup>104</sup>

Recognizing that the question of formal legal enforceability is important only to the extent it tracks any practical shift of outcomes,<sup>105</sup> one final topic to consider is whether there is any reason to expect the judicial hostility to change: has the law already become so settled against APTs that the future will leave them as a strategy effective only as an ultimately unenforceable hurdle designed to heighten the costs of collection? As mentioned in Section III, there is some reason to think that the APT adoptions are both continuing and also coming in progressively larger states. As summarized in Section IV.A, one of the principal bases for the ineffectiveness of APT is the apparent perception (displayed most plainly in *Mortensen*) that use of the statutes is something outlandish, unusual, with no good justification. As the statutes pass into the legislative enactments of more and more large states, and thus come to govern the affairs of a larger share of the nation's populace, surely there is some chance that judicial perspectives on the statutes will shift as well. Still, given the ordinary mechanisms of common-law development, the ever-growing body of negative case law will make it harder and harder for the common law ever to shift into a favorable pattern. It may be that only time will tell.

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APT] all the way through the court system [successfully]"). For a rare critical assessment of the situation, see Jay Adkisson, *Why Dahl Doesn't Support the Viability of Domestic Asset Protection Trusts*, FORBES (July 10, 2013), available at <http://www.forbes.com/sites/jayadkisson/2013/07/10/why-dahl-doesnt-support-the-viability-of-domestic-asset-protection-trusts/3/>, archived at <http://perma.cc/KNX6-PMBH> ("A client would have to be dosing on mescaline to go for an asset protection plan like that.").

104. See *supra* note 99 (documenting evidence that the trusts in fact are not associated with any cognizable inflow of investments).

105. As suggested *supra* at notes 100–01 and accompanying text, the relation between the formal unenforceability and practical enforceability of APT statutes is not yet clear.



## VI. APPENDIX

**Table 2: List of State Asset Protection Statutes**

STATE	YEAR OF ADOPTION	CITATION
Alaska	1997	ALASKA STAT. ANN. § 34.40.110 (2013)
Delaware	1997	DEL. CODE ANN. tit. 12, § 3571 (2014)
Rhode Island	1999	R.I. GEN. LAWS ANN. § 18-9.2-1 (2013)
Nevada	1999	NEV. REV. STAT. § 166.010 (LexisNexis 2013)
Oklahoma	2004	OKLA. STAT. ANN. tit. 31, § 10 (West 2014)
Missouri	2004	MO. ANN. STAT. § 456.5-501 (2013)
South Dakota	2005	S.D. CODIFIED LAWS § 55-16-1 (2014)
Tennessee	2007	TENN. CODE ANN. § 35-16-101 (2014)
Wyoming	2007	WYO. STAT. ANN. § 4-10-510 (2014)
New Hampshire	2009	N.H. REV. STAT. ANN. § 564-D.1 (2014)
Hawaii	2010	HAW. REV. STAT. § 554G-1 (LexisNexis 2014)
Virginia	2012	VA. CODE ANN. § 64.2-745.1 (2014)
Ohio	2013	OHIO REV. CODE ANN. § 5816.14 (LexisNexis 2014)
Utah	2013	UTAH CODE ANN. § 25-6-14 (2013)