Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection

John K. Eason

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POLICY, LOGIC, AND PERSUASION IN THE EVOLVING REALM OF TRUST ASSET PROTECTION

John K. Eason*

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INTRODUCTION

The concept of using legal structures to protect property from those who might otherwise have some claim to it is an idea with deep roots. This concept, for example, accounts for the rise of the “use” in early English history. That device arose in feudal England to circumvent claims of the King, overlords, and the eldest son’s claim to inherit land. The use ultimately evolved to become the modern day trust. Following that evolution, American courts in the late nineteenth century gave validity to the protective variation known as the spendthrift trust. As the spendthrift trust enjoyed surprisingly rapid acceptance during that period, the trust’s most recognized critic, John Chipman Gray, observed that “the change in the law... as to spendthrift trusts... has been in several jurisdictions during the last dozen years so rapid and complete as to form an interesting episode in legal history.”

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1 See Joel C. Dobris, Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore, 62 ALB. L. REV. 543, 557 n.57 (1998) (discussing the English use as a tool to avoid creditors and otherwise applicable legal rules); John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L.J. 625, 632-33 (1995) (discussing early uses of the trust form to avoid feudal and other legal restrictions); Henry Hansmann & Ugo Mattei, The Function of Trust Law: A Comparative Legal and Economic Analysis, 73 N.Y.U. L. REV. 434, 451-54 (1998) (discussing how a primary role of trust law is to rearrange the relationship between creditors and the parties to a trust). See generally Stewart E. Sterk, Asset Protection Trusts: Trust Law’s Race to the Bottom?, 85 CORNELL L. REV. 1035, 1040-41 (2000) (“[T]he Anglo-American trust has endured because it has proven to be a powerful tool for accomplishing a wide range of objectives. . . . [I]t should not be surprising that, since their conception, settlers have often used trusts to avoid otherwise applicable legal rules.”).


3 “Spendthrift trusts” are defined and discussed in more detail at infra note 21 and the accompanying text. For two of the more important early cases recognizing the validity of spendthrift trusts, see Nichols v. Eaton, 91 U.S. 716 (1875), and Broadway National Bank v. Adams, 133 Mass. 170 (1882). As to the uniquely American status of spendthrift trusts, see Lawrence M. Friedman, The Dynastic Trust, 73 YALE L.J. 547, 572 (1964) (describing “a peculiarity of American trust law, the spendthrift trust doctrine”); George P. Costigan, Jr., Those Protective Trusts Which Are Miscalled “Spendthrift Trusts” Reexamined, 22 CAL. L. REV. 471, 474 (1934) (“[T]he doctrine [of spendthrift trust law] is modern American . . . .”). To this day, spendthrift trusts are not recognized in England, where the use originated. IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 150 (4th ed. 1987).

4 JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, at xii (2d ed. 1895). With regard to the early acceptance of spendthrift trusts, see, for example, Friedman,
There have been a number of recent developments that could easily place Gray’s observation as characterizing the turn of the twenty-first century. Indeed, consideration of those developments recently prompted one leading modern-day trust scholar to comment that “[w]e may come to look back to these times and recognize that we are looking at a period of time when there was great change in the nature of the trust, especially as to spendthrift rules.” Among the developments provoking such commentary are the efforts of a number of offshore jurisdictions to attract trust business by enhancing asset protection for locally-based trusts, which efforts generally began in the mid-to-late 1980s. Those efforts ultimately became a domestic phenomenon as Alaska in 1997, followed by four other jurisdictions since, adopted comprehensive legislation validating protection from creditors through the self-settled trust device. Prior to this, the rejection of such self-created settlor protections was so common as to be assumed, though cogent arguments undermining the bases for this prohibition have appeared from time to time.

5 Dobris, supra note 1, at 562 n.83. Professor Dobris also notes that “[w]e are in a moment in time when our ideas about what a trust is, what it is for, and how to operate it are under consideration and, indeed, are changing meaningfully.” Id. at 543.

6 See Sterk, supra note 1, at 1035-40 (discussing offshore trust movement); Dobris, supra note 1, at 551-53 n.44 (discussing origins of offshore movement and relating that movement to domestic trends).

7 The additional four states are Delaware, Nevada, Rhode Island, and most recently, Utah. For a detailed overview of the domestic legislation in each state, see ASSET PROTECTION STRATEGIES 489-97 (Alexander A. Bove, Jr., ed., A.B.A. 2002); and Rosen & Rothschild, supra note 2, Part VII.A.

8 See, e.g., ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS § 282.1 (2d ed. 1947) (“It is almost universally held that a person cannot create an effective spendthrift trust for his own benefit . . . ”); RESTATEMENT (SECOND) OF TRUSTS § 156 (1959) (denying protections to self-settled spendthrift, discretionary, and support trusts); Sterk, supra note 1, at 1043 (discussing the foundation for the historical prohibition against self-settled trusts).


The “settlor” of a trust can be generally identified as the person who provides any portion of the property or other consideration that funds a trust. The settlor may or may not also be the person who executes the trust instrument, and there may be multiple settlors of a single trust. For purposes of this Article, “settlor” generally refers to a single individual who both executes a trust...
The recent and noticeable break with the traditional denial of self-settled trust protections is not the only significant recent development, however. The self-settled asset protection trust movement is accompanied by the recent completion of two major law reform projects. The drafting and recommendation for state adoption of a Uniform Trust Code is one such project. The Restatement (Third) of Trusts is the second. Taken together, these developments have recently affected and will undoubtedly continue to influence the evolution of trust asset protection in the coming years.

This Article considers these developments and their potential impact on the future course of trust asset protection. The approach here is not, however, one of debating the analytical or moral propriety of asset protection trusts, as others have provided meaningful insight on that topic. Nor is the effort here to catalogue all of the rules adopted by the drafters of the two reform projects noted above. Again, others have facilitated our understanding of such matters. This Article instead seeks to complement those prior works by considering what these trends in operation suggest for the future course of trust asset protection.

instrument and provides the property that funds the trust. For a further discussion of “settlor” status, see RESTATEMENT (THIRD) OF TRUSTS § 58 cmts. e-f & reporter’s note.


10 The Restatement (Third) project was undertaken by the American Law Institute in the late 1980s. Portions of the Restatement (Third) relating to fiduciary investments were completed in 1990. A tentative draft of those portions of the Restatement (Third) relating to spendthrift trusts and creditors rights was approved in 1999 and received final approval in 2001. For more on the nature and purpose of the UTC, see infra Part III.

11 See sources cited supra note 8; see also Boxx, supra note 4, at 1251-61; Randall J. Gingiss, Putting a Stop to “Asset Protection” Trusts, 51 BAYLOR L. REV. 987 (1999); Lynn Lopucki, The Death of Liability, 106 YALE L.J. 1 (1996).

12 See, e.g., Valerie J. Vollmar, Simply Explained: UTC Article 5 on Creditors’ Rights, UTC NOTES (Nat’l Conf. of Comm’rs on Unif. State Laws), Winter 2004, at 5, available at http://www.utcproject.org/utc/uploads/UTCNotes_Dec04_print.pdf; Alan Newman, The Rights of Creditors and Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise, 69 TENN. L. REV. 771, 773 (2001); Edward C. Halbach, Jr., Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End, 88 CAL. L. REV. 1877 (2000). There are many other issues relating to these projects that continue to be worthy of further discussion but which are at best only touched upon here. Such issues include the projects’ impact on rights to Medicaid benefits, the consequences where beneficiaries serve as trustees, rights to “overdue distributions,” and the trustee’s need to consider a beneficiary’s non-trust resources in making distribution decisions.
There are, of course, no certainties in this regard—only ideas. Part II, however, deals with known quantities by providing a brief explanation of the nature of traditional trust protections. Those protections include the spendthrift trust, discretionary trust interests, and self-settled arrangements, all of which are to some extent touched upon in this Article. Part III ventures into the realm of ideas through a discussion of the noted reform projects, with an emphasis on the UTC for reasons that should become apparent. Beginning with matters affecting the protections traditionally afforded discretionary trust interests and the criticisms directed at the reform projects' approaches to those protections, the discussion in Part III proceeds to consider those special or "exception" creditors who might prevail over the protections typically afforded both discretionary and spendthrift trusts. Among the observations presented is the idea that the UTC holds a significant place in the development of trust asset protection—not so much because of the conclusions its drafters reached as to particular rules, but more because of the express invitation the UTC presents to state legislatures to ponder their own trust protections and corresponding placement in the modern asset protection community.

Part IV next provides insights into both the current and evolving status of trust asset protection by relating the noted reform projects to several trust protection developments seen in the last decade or so. This leads to an exploration in Parts V and VI that gives more attention to self-settled trust protections. That exploration proceeds from a recognition of interest group politics as related to the UTC movement in Part V, to an evaluation of potential ideological influences on the future course of trust asset protections in Part VI. Along the way, consideration is given to the federal influences on that course. Those influences are at least in part derived from the potential repeal of estate and generation-skipping transfer taxes, recent bankruptcy legislation, and the status of the federal/state Medicaid program. Among the observations presented is the idea that these ideological and federal concerns push in multiple directions, often at the same time and in a conflicting manner, with a very uncertain but potentially significant effect on the evolution of trust asset protection.

With regard to the diverse and divergent directions of evolving trust asset protection law, one final point bears mentioning in relation to the structure of this Article. There has been some divergence, if not tension, between the recent academic and more practice-oriented writings on trust asset protection. In light of practitioner claims that

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13 Professor Lischer captured the essence of this tension in a recent article, where he noted that much of the practice-oriented literature has come from those promoting asset protection trusts in connection with their utilizing them for their clients. Henry J. Lischer, Professional Responsibility Issues Associated with Asset Protection Trusts, 39 REAL PROP. PROB. & TR. J. 561,
proclamations from the ivory tower" are "unhelpful," it might be tempting in this regard to analogize to the early spendthrift trust debate.\textsuperscript{14} There, the practical reality of widespread and rapid acceptance of such trusts overshadowed Professor Gray's nineteenth century expressions of outrage over those protections.\textsuperscript{15} In the context of the matters discussed here, however, separating the theoretical from the practical would be misguided, if not impossible. At the outset, for example, a blend of academic, theoretical, and practical concerns both motivated and guided the UTC and Restatement (Third) projects.\textsuperscript{16} As the exploration here progresses from the bases and nature of those reform projects, to local politics affecting their implementation, to the more pervasive area of federal legislation and the popular concerns that might affect its course, this Article similarly ventures between matters of policy and equity as affected by, or as affecting, practical circumstances and outcomes. The development of this Article, therefore, in many ways mirrors the current evolution of the protective concerns discussed here.

I. AN EXPLANATION OF "TRADITIONAL" TRUST PROTECTIONS

Creditor-protected trust variations have in common a beneficiary's enjoyment of the underlying trust property via distributions from the trust, coupled with some limitation or restraint upon the beneficiary's ability to transfer—and creditors' rights to reach—the trust interest from which that enjoyment derives.\textsuperscript{17} Absent such a limitation, the beneficiary would have full power to transfer her rights in the trust.\textsuperscript{18}

\textsuperscript{14} The quoted language is from Osborne \& Owen, supra note 13.

\textsuperscript{15} See supra note 4 and the accompanying text regarding this aspect of the early spendthrift trust debate. For characterizations of Gray's outspoken criticism of spendthrift trusts as a "tirade," "bitter renunciation," and other terminology, see Anne S. Emanuel, Spendthrift Trusts: It's Time to Codify the Compromise, 72 NEB. L. REV. 179, 180 (1993).

\textsuperscript{16} Even a cursory glance at the members of the UTC drafting committee members list reveals a strong academic presence, coupled with input from members of the practicing bar.

\textsuperscript{17} See generally JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 543-44 (7th ed. 2005); Emanuel, supra note 15, at 183.

\textsuperscript{18} See RESTATEMENT (THIRD) OF TRUSTS § 56, pt. 4, introductory note (2001). Thus, for example, the beneficiary could transfer her right to receive distributions of income from the trust,
Her creditors would likewise be able to force an involuntary transfer of that trust interest. Trust "asset protection" comes into play when the settlor structures the trust so that the beneficiary, her assignees, and her creditors are denied the ability to effect a transfer of the beneficiary’s trust interest.

A settlor might, for example, subject the trust to a provision that expressly denies the beneficiary any right to transfer her trust interest, either voluntarily or involuntarily at the behest of creditors. A trust subjected to this type of direct restraint is called a "spendthrift trust." A spendthrift trust protects the beneficiary’s interest even where the trust mandates distributions to that beneficiary.

A settlor might alternatively craft an indirect restraint that protects the beneficiary’s interest. The settlor might provide, for example, that the beneficiary’s interest simply terminates upon a creditor’s attempt to attach the interest, but this would be counterproductive to the settlor’s purpose of providing a lasting benefit to the trust beneficiary. Settlors therefore often take the approach of granting the trustee discretion to

but could not transfer any legal interest in the underlying trust property by virtue of which income is earned in support of such distributions. In other words, absent some express trust provision to the contrary, the beneficiary lacks any legal authority to transfer the underlying trust property directly and free of the trust. Absent the grant of powers of appointment to others, that authority instead resides with the trustee.

19 RESTATEMENT (SECOND) OF TRUSTS §§ 152, 153 (1959). For a good explanation of the manner in which a creditor might actually liquidate or realize upon the value of a beneficiary’s unprotected interest in a trust, see EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS’ ESTATES AND TRUSTS 627 (6th ed. 2000).

20 This characteristic sometimes arises by operation of law or some presumption of settlor intent, as opposed to any specifically expressed intent of the settlor.

21 See RESTATEMENT (SECOND) OF TRUSTS § 152 cmts. b-c. A spendthrift restraint might be included in the trust instrument as an expression of the trust settlor’s intent that the beneficiary’s interest be so restricted and thus protected, or the provision might apply, for example, by operation of some statute or presumption that deems the particular type of trust at issue to be subject to a spendthrift restraint. The anti-alienation characterization reflects the fact that such provisions present a direct restraint on the ability to alienate an interest in property, which restraints are in most other instances void. See generally Gregory S. Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189 (1985) (discussing restraints on alienation).

22 Of course, the spendthrift restraint only applies to the trust interest; once property is distributed from the trust and into the hands of the beneficiary, that property becomes subject to the claims of the beneficiary’s creditors. For a further explanation of how creditors might anticipate or otherwise recover against an unprotected trust interest, see SCOLES ET AL., supra note 19, at 627.

23 See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 150 (describing and recognizing such a forfeiture provision as valid); SCOTT & FRATCHER, supra note 3, § 150 (discussing forfeiture provisions). A variation on this theme is the "protective trust," whereby upon creditor action, the beneficiary’s interest converts from one calling for mandatory distributions to one pursuant to which the trustee is granted discretion to make distribution among any of a group of beneficiaries, of which group the protected beneficiary is a member. Id. The term "protective trust" may be used in this Article, however, to denote the more general idea of a trust that includes features designed to protect the beneficiary’s trust interest from creditor claims.
make distributions if and to the extent the trustee deems appropriate.\textsuperscript{24} This type of “discretionary trust” provides a degree of protection from the beneficiary’s creditors by virtue of the nature of the beneficiary’s interest.\textsuperscript{25} In this regard, courts and commentators have sometimes described the beneficiary as having no “right” to receive a distribution except upon the trustee’s discretionary decision to make such a distribution.\textsuperscript{26} Traditional analysis often describes the beneficiary as having only a “mere expectancy” of receiving distributions, which interest is then said to fall short of the “property” right required for alienation (whether voluntary or at the behest of creditors) to be possible.\textsuperscript{27}

A variation on this idea is the “support trust.” A support trust is one that guides (i.e., limits) by some standard the trustee’s discretion in making distributions.\textsuperscript{28} Commonly encountered standards include requiring that distributions be made as necessary to satisfy the beneficiary’s support, educational, general maintenance, and/or healthcare needs. A support trust traditionally affords a degree of protection, because any distribution (to either the beneficiary or a

\textsuperscript{24} In order to be effective against creditors the discretion must include the right to withhold distributions entirely, and not relate simply to the timing or manner of payment. Where the trustee has full discretion to withhold distributions, the trust is sometimes called a “purely” discretionary trust. \textit{Scott & Fratcher, supra} note 3, § 155.

\textsuperscript{25} See \textit{Restatement (Second) of Trusts} §§ 154 cmt. b, 155 cmt. b (describing that in “support trusts” and “discretionary trusts” it is the inherent “nature of the beneficiary’s interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary’s interest”); \textit{Scott & Fratcher, supra} note 3, § 154 (same).


\textsuperscript{27} See generally \textit{Scott & Fratcher, supra} note 3, § 155 (discussing protection afforded by virtue of the nature of the interest as discretionary); \textit{George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees} § 228 (rev. 2d ed. 1992) (same). The traditional view of discretionary trust protections was grounded in the notions that (i) a beneficiary could not compel a trustee to exercise the trustee’s discretion so as to make distributions; (ii) a beneficiary’s creditors could only step into the shoes of the beneficiary upon attaching a trust interest; and therefore (iii) a beneficiary’s creditors could not compel a distribution from a purely discretionary trust. \textit{Restatement (Second) of Trusts} § 155 cmt. b (“[B]ut the transferee or creditor cannot compel the trustee to pay anything to him, because the beneficiary could not compel payment to himself or application for his own benefit.”); \textit{Dukeminier et al., supra} note 17, at 544 (“The creditor cannot, by judicial order, compel the trustee of a discretionary trust to pay him. The theory is that, because the beneficiary has no right to a payment, neither does the beneficiary’s creditor.”). As the UTC and Restatement (Third) project drafters are quick to point out, however, this is inaccurate in the purest sense. Specifically, even where the settlor grants “sole and absolute” discretion to the trustee, the trustee’s decisions are always subject to judicial reversal if made arbitrarily or in bad faith. See \textit{infra} text accompanying notes 108-109.

\textsuperscript{28} See \textit{Restatement (Second) of Trusts} § 154.
creditor) that is outside the scope of the specified standard would exceed the trustee’s authority and would therefore be prohibited.29

The protection afforded by a support trust is not as strong as in the case of a purely discretionary trust, however. Among other reasons, creditors of a support trust beneficiary may be able to force a distribution in satisfaction of claims relating to the provision of goods or services contemplated by the specified standard—a standard not present in the case of a pure discretionary trust.30 On the other hand, courts have sometimes had difficulty distinguishing the two types of trusts, and a third or “hybrid” trust emerged.31 A hybrid or “discretionary support trust” couples an ascertainable standard with words of absolute discretion.32 This hybrid trust presents special difficulties that courts most often confront in the context of claims that the beneficiary’s trust interest in some way affects her entitlement to public assistance, such as Medicaid.33

Considering the noted trust protections together, discretionary and support trust variations achieve some measure of asset protection without regard to the inclusion of a spendthrift provision. The inclusion of a spendthrift provision in a discretionary or support trust, however, is desirable from an asset protection standpoint and commonly seen in practice.34 In this regard, the discretionary and spendthrift forms are

29 See RESTATEMENT (SECOND) OF TRUSTS § 154 cmt. b; SCOTT & FRATCHER, supra note 3, § 154; Marty-Nelson, supra note 26, at 24; see also Part III.B, infra.
30 RESTATEMENT (SECOND) OF TRUSTS § 157. For further elaboration on the protections traditionally afforded discretionary versus support trust interests, see the text accompanying infra Part III.B.
31 See Evelyn Ginsberg Abravanel, Discretionary Support Trusts, 68 IOWA L. REV. 273, 277-83 (1982) (defining and distinguishing creditors’ rights in relation to discretionary, support, and hybrid trusts); Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 COLUM. L. REV. 1425 (1961) (considering, among other issues, the extent to which the trustee’s discretionary judgment should be subjected to judicial review—an issue of importance in the context of creditors’ rights, as discussed supra in this Part II and infra Part III.B.).
33 See the discussion in RESTATEMENT (THIRD) OF TRUSTS § 60 reporter’s note (2001); UNIF. TRUST CODE § 503 cmt. (2000); BOGERT & BOGERT, supra note 27, §§ 228-229.
34 For example, where the trustee has exercised discretion by deciding to make a distribution or where the trustee’s discretion is limited to the particular timing or manner of an otherwise required distribution, the beneficiary’s interest is vulnerable in the absence of a spendthrift provision, as the prospect of payment to the beneficiary is no longer subject to the trustee’s absolute discretion to withhold payment. “Moreover, if the trustee of a discretionary trust without a spendthrift or forfeiture clause is served with process by a creditor of the beneficiary, he will be liable to the creditor if he thereafter exercises his discretion and elects to pay the beneficiary.” Marty-Nelson, supra note 26, at 28. If a discretionary or support trust includes a spendthrift restraint (as should be the case where creditor-protection is a planning objective), the issue is more easily resolved in that the restraint will preclude most creditor claims from attaching to the trust interest in the first instance. See, e.g., UNIF. TRUST CODE § 504 cmt. (dealing with discretionary trust interests, and noting: “This section will have limited application . . . . Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement . . . does this section become relevant.”); RESTATEMENT
complimentary, frequently used in tandem, and often loosely equated in terms of their general effect upon the rights of creditors.\(^{35}\)

Two final points are notable in prelude to the discussion which follows. First, the widely accepted and longstanding common law rule is that the protections described above are not available in the case of self-settled arrangements.\(^{36}\) "Self-settled" means that the same individual is not only the settlor funding the trust, but also a trust beneficiary eligible to receive distributions from the trust.\(^{37}\) In those situations, courts have traditionally ignored a spendthrift provision and, in the case of discretionary or support trusts, granted creditors access to the maximum portion of the trust property available for distribution to the settlor under the trustee’s discretionary power.\(^{38}\) As noted above, however, offshore trends have undermined previously widespread domestic adherence to this creditor-friendly outcome.\(^{39}\)

The second point implicates the criticisms alluded to in Part I, above. Since the early days of spendthrift trust recognition, the policy debate over the efficacy of protecting trust assets from the claims of the beneficiary’s creditors has been an ongoing one that even today lacks any "consistent or enduring resolution."\(^{40}\) Although many arguments have been advanced over the course of this debate, the conflict generally pits respect for a settlor’s right to transfer her property subject to limitations—such as "I give this interest to X, to the exclusion of X’s

\(^{35}\) See supra note 34; SCOTT & FRATCHER, supra note 3, § 152 ("[C]ourts do not always clearly appreciate the distinction between spendthrift trusts and trusts for support and discretionary trusts . . . . "); Rosen & Rothschild, supra note 2, at pt. VI.B.1.b ("[A] discretionary distribution provision should always be accompanied by a spendthrift provision."); Emanuel, supra note 15, at 185 (noting how the discretionary nature of a trust interest can compliment the protection afforded solely by virtue of a spendthrift restraint).

\(^{36}\) See sources cited supra note 8. The origins of this prohibition against self-settled trust protections can be traced to at least 1487. See SCOTT & FRATCHER, supra note 3, § 156 (tracing the origin of this rule to the 1487 Statute of King Henry VII, Stat. 3 Hen. VII, c.4, which voided conveyances in trust for the use of the transferor). For a recent treatment of the subject which challenges conventional doctrine, however, see Danforth, supra note 8, at 287.

\(^{37}\) BLACK’S LAW DICTIONARY 1518 (7th ed. 1999); see also In re Brooks, 217 B.R. 98, 102 (D. Conn. 1998) (defining self-settled trust as a trust created and (at least in part) funded by someone who is included as a beneficiary of the trust). For the definition of "settlor," see supra note 8

\(^{38}\) RESTATEMENT (SECOND) OF TRUSTS § 156 (1959); RESTATEMENT THIRD § 58 cmt. b (2001).

\(^{39}\) See the text accompanying supra notes 6-8 and infra Part V.B regarding the offshore trust movement.

\(^{40}\) A good overview of the policy debate can be found in the Reporter’s Note to Restatement (Third) § 58.
creditors”—against public policy concerns deemed sufficiently important to trump the settlor’s wishes. An early and general concern, for example, was that competent people should not have the right to enjoy property while avoiding their just debts.\textsuperscript{41} For practical purposes, however, such general objections failed to take hold,\textsuperscript{42} and adherence to the settlor’s rights argument can be seen in modern decisions upholding trust protections.\textsuperscript{43} As Erwin Griswold noted, this protective outcome represents a policy choice, as opposed to a conclusion that must logically flow from the implicated legal principles.\textsuperscript{44} The choices that continue to be made in that regard today find us with:

[A] general acceptance of [the] fundamental common-law principle that a property owner, being free either to bestow property rights and benefits upon others or to withhold them, can bestow those rights and benefits through the trust device with the settlor’s chosen conditions and restraints so long as those conditions and restraints are not, in the conventional terminology of trust law, unlawful or contrary to public policy.\textsuperscript{45}

In light of this truth, the debate has in more recent years focused upon the more specific question of which (if any) creditors have claims that are so compelling that public policy demands the elevation of those claims above respect for the donor’s rights to condition her transfer.\textsuperscript{46} In any event, both the general policies and specific parameters of the noted debate remain evident in the current developments that have

\textsuperscript{41} GRAY, supra note 4, at vii; see also JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY iii (1st ed. 1883) (“How far the law will allow a man to enjoy rights in property which he cannot transfer, and which his creditors cannot take for their debts, is a question becoming more and more frequent in this country.”). It is not the purpose of this Article to exhaustively repeat or directly revisit the arguments of Gray and others regarding the merits and demerits of trust asset protection. Such arguments pro and con are addressed in scores of scholarly articles and are summarized nicely in BOGERT & BOGERT, supra note 27, § 223; RESTATMENT (THIRD) OF TRUSTS § 58 reporter’s note to cmt. a; and SCOTT & FRATCHER, supra note 3, § 152. Instead, the focus here centers more upon recent developments and their implications for the noted debate, and vice-versa.

\textsuperscript{42} See, e.g., Boxx, supra note 4, at 1197 (“Courts and commentators overrode Professor Gray’s concerns without ever addressing them directly.”).

\textsuperscript{43} See, e.g., Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1082-83 (Ohio 1991). The court there stated that “[t]he most important argument against spendthrift trusts is that they are unfair to the beneficiary’s creditors because they allow the beneficiary to enjoy the trust property without paying his debts.” The court then went on to deny this objection “both logically and as a matter of policy.” Id. The court also cited the freedom of disposition argument so articulately proffered by Justice Miller in Nichols v. Eaton, 91 U.S. 716 (1875), as “most persuasive.” From this the court went on to reason that prior Ohio precedent rejecting spendthrift trusts should be reversed. Scott, 577 N.E.2d at 1082.

\textsuperscript{44} GRISWOLD, supra note 8, § 554 (“There is no syllogistic basis for the spendthrift trust. If such trusts are valid, it is not [inherently] because the owner of property may dispose of it as he sees fit, but because the particular restriction in question is not contrary to public policy.”).

\textsuperscript{45} RESTATEMENT (THIRD) OF TRUSTS ch. 12 introductory note.

\textsuperscript{46} See Newman, supra note 12, at 773 (“[T]he debate has not ended; rather, its focus has shifted to determining which claims of creditors should be allowed to override the protection generally afforded. . . .”); Emanuel, supra note 15, at 195 (same).
begun to guide the direction of trust asset protection. The following Part III addresses two of those developments.

II. LAW REFORM PROJECTS

The undertaking and completion of the UTC and Restatement (Third) law reform projects will no doubt influence the parameters of trust asset protection in the coming years. In particular, the growing momentum behind the UTC, coupled with the UTC's explicit invitation for state legislatures to examine exactly what their trust law is and should be, may ultimately prove to be as significant as the bare recommendations embodied in either project. As states tweak the UTC to their own preferences and precedents in a conflicting era of personal responsibility and creditor-defeating strategies, their choices confirm that the historic debate over such protections endures—although the parameters of that debate do seem to have shifted to the question of who, among various creditors, should be allowed to pierce the trust protections a settlor has adopted. In that regard, the reform projects have likely defined a floor of asset protection, with some states then opting to embrace even greater protections than those resulting from years of coextensive study by both the UTC and Restatement (Third) drafters.

This Part provides a brief explanation of the Restatement (Third) and UTC projects, beginning with an explanation of the nature of and motivations behind both. The Article then considers some of the areas of divergence (as well as similarity) in the reform projects' provisions, and in particular the sharp criticism those provisions have recently evoked. Part IV ultimately provides insights into both the current and

evolving status of trust asset protection by relating those projects to noted trust protection developments of the last decade or so.

A. Nature and Purpose of Reform Projects

The drafting of the Restatement (Third) and UTC proceeded "in close coordination."\(^{48}\) Despite the relationship, however, the Restatement (Third) and UTC are distinct in their nature and purpose. A Restatement serves to collect and summarize the common law of trusts, and where conflict among courts exists, to delineate what is perceived to be the better rule.\(^{49}\) Courts obviously look to their own precedent first, but where such precedent is lacking or called into question, the 1957 Restatement (Second) of Trusts has been a key—if not the key—judicial resource.\(^{50}\) The drafters of the most recent third iteration of the Restatement of Trusts no doubt anticipate a natural succession to that role. For reasons explained below, however, their expectations may not be wholly satisfied in the area of creditors' rights.

The UTC is distinguishable from the Restatement (Third) in that the UTC represents the first effort to provide a comprehensive uniform model act on the substantive law of trusts.\(^{51}\) The UTC drafters hope for


\(^{49}\) English, supra note 47, at 313-14; Halbach, Jr., supra note 12, at 1881-82.

\(^{50}\) The Restatement (Second) was approved by the American Law Institute in 1957. Work on the Restatement (Third) began in the late 1980s, with provisions relating to creditors' rights finding approval in 1999. UNIF. TRUST CODE prefatory note. With regard to the role of the Restatements in formulating state law, see, for example, UNIF. TRUST CODE § 106 cmt. ("To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and into more general sources, such as the Restatement of Trusts. . . ."); Robert F. Collins, Address at the 2004 NAELA Symposium, Hilton Head, South Carolina: The Greater Asset Protection Self-Settled Special Needs Trusts (May 20-23, 2004) (noting that Restatement (Second) § 156, dealing with the issue of the validity of spendthrift trusts, is "ubiquitous," having been adopted by almost every state). Two other important general sources are the treatises by SCOTT & FRATCHER, supra note 3, and BOGERT & BOGERT, supra note 27. For a recent and relevant instance of a court looking to and then reversing its on precedent with regard to spendthrift trusts, see Scott v. Bank One Trust Co., 577 N.E.2d 1077 (Ohio 1991).

\(^{51}\) UNIF. TRUST CODE prefatory note. There are also other, less comprehensive uniform acts that pertain to trusts and their administration. Id.
widespread state legislative adoption, and progress is being made towards that goal.\textsuperscript{52} The UTC drafters recognize, however, that states may make changes to the UTC to conform it to local precedent or policy.\textsuperscript{53} This is particularly so with regard to the creditors' rights provisions appearing in UTC Article 5, which "were the most widely debated" provisions of the UTC.\textsuperscript{54}

Uniformity thus did not alone drive the UTC project. As explained by a leading trust law scholar and member of the UTC drafting committee:

The impetus for drafting the Uniform Trust Code originally came from relatively sparsely populated states. . . . Because the case law on trusts in these jurisdictions is thin, planners have been troubled by the lack of authoritative guidance on what the trust law of the state is. The Code was meant to serve that need. As the drafting progressed, however, the Code began to attract considerable interest from advisory groups in states that have a mature trust law, as they discovered how often the comprehensiveness of the Code exposed gaps or could help cure defects in the local law.\textsuperscript{55}

Despite the UTC's comprehensiveness, the drafters also recognized that it would not be possible to legislate on every issue or scenario.\textsuperscript{56} The Prefatory Notes to the UTC therefore point out that the UTC's provisions are to be supplemented by the common law of trusts.\textsuperscript{57} In fact, the UTC must generally be understood as an attempt to codify that common law in much the same way that the Restatements attempt to elucidate and advise on the common law. The UTC drafters proceeded from notable case law, statutes previously adopted in some states, and the major secondary sources that propound upon the common law of trusts.\textsuperscript{58} This consultation included both the Restatement (Second) and the (then) developing Restatement (Third).\textsuperscript{59}

\textsuperscript{52} Id. As of July 31, 2005, fifteen states had adopted the UTC, and it was being studied by at least that many additional states. See also supra note 47.

\textsuperscript{53} See Suzanne Brown Walsh et al., What is the Status of Creditors Under the Uniform Trust Code, 32 EST. PLAN. 29, 31 (2005) ("The subject of creditors rights varies greatly from state to state and, therefore, before enacting the UTC, many states make changes to conform the UTC to their current law.").

\textsuperscript{54} English, supra note 47, at 333.

\textsuperscript{55} Langbein, supra note 47, at 79.

\textsuperscript{56} UNIF. TRUST CODE prefatory note ("The Uniform Trust Code, although comprehensive, does not legislate on every issue. Its provisions are supplemented by the common law of trusts and principles of equity.").

\textsuperscript{57} Id.; see also id. § 106 cmt.

\textsuperscript{58} UNIF. TRUST CODE prefatory note; David M. English, The Uniform Trust Code, at pt. I.G., available at http://d2d.ali-aba.org/_files/thumbs/course_materials/SL003-CH01_thumb.pdf (last visited Apr. 13, 2006) ("The primary source of trust law in most states is thus the Restatement (Second) of Trusts and the multivolume treatises by Scott and Bogert."); see also SCOTT & FRATCHER, supra note 3; BOGERT & BOGERT, supra note 27.

\textsuperscript{59} UNIF. TRUST CODE prefatory note. The Restatement Reporter's Notes are similarly liberal in referencing the UTC.
This partially explains, then, the more than 100 cross-references that appear in the comments to the Restatement (Third) and UTC. Additional explanation can be found in the timing of both projects and their drafters' shared intent to improve the status and understanding of American trust law.

B. Change and Controversy

This UTC/Restatement sibling-like relationship from infancy to current maturity has led to a general association of the two projects as relatedly significant in the future (albeit now a bit more current) development of modern trust law. On the other hand, the projects have not been unquestioningly hailed as favorable to that development. This is particularly true in the area of creditors' rights against beneficial trust interests. More specifically, the projects have provoked unitary criticism based on a perception that each serves to weaken common law protections traditionally afforded trust beneficiaries against the claims of their creditors. Interestingly, however, the projects have not been defended in tandem by their proponents on this issue. In fact, despite the numerous associations that appear in the original UTC comments, UTC proponents have of late expressly disclaimed similarity to the Restatement (Third) on certain issues pertaining to creditors' rights. Appreciating these arguments begins by relating certain of the project drafters' positions, to what is often understood to be the traditional approach to variations on trust protection.

1. Discretionary and Support Trusts

One noteworthy position taken is the rather bold decision by both projects' drafters to disavow the traditional distinction between discretionary and support trusts for creditors' rights purposes. Recall that a "discretionary trust" is one under which the trustee is granted

60 Merric & Oshins Part 3, supra note 48, at 478.
61 See, e.g., Halbach, supra note 12, at 1881-82 (discussing Restatement (Third) and UTC creditors' rights provisions); Dobris, supra note 1, at 551 n.51 & 575-77 (same); Merric & Oshins Part 1, supra note 48 (same); Merric & Oshins Part 2, supra note 48 (same); Merric & Oshins Part 3, supra note 48 (same).
62 See supra note 48; infra note 81; discussion infra Part III.B.2.
63 See infra Part III.B.5.
64 UNIF. TRUST CODE § 504 & cmt.; RESTATEMENT (THIRD) OF TRUSTS § 50 & cmt. a & reporter's note (2001). This disavowal does not affect the rights of beneficiaries to challenge a trustee exercise (or nonexercise) of discretion. UNIF. TRUST CODE § 504; RESTATEMENT (THIRD) OF TRUSTS §§ 50 & 60. With regard to the traditional distinction, see supra Part II.
broad discretion in making distributions. The support trust variation guides (i.e., limits) by some standard the trustee’s discretion in making distributions. As noted above, support trust variations have therefore traditionally suffered from the potential weakness that a provider of necessaries—and in some states dependent spouses and children—might be permitted to force a distribution because their claims are sometimes said to fall within the purview of the standards that the settlor sets to guide the trustee. In that case, the trustee must make distributions in an amount and at times that are reasonable in relation to the standard.

Under the traditional approach, then, courts and planners generally regarded the protection afforded a “pure” discretionary trust as being greater than that afforded a support trust or a hybrid trust. For all practical purposes, creditors’ rights outcomes traditionally depended upon a court’s belief that a particular type of trust—discretionary, support, or some blend of the two—had been created by the settlor, thus leading to the protective consequences often associated with the particular type of trust. Much litigation therefore focused on discerning which discretionary trust variation the settlor intended. The project drafters felt that these labels, as embodied in the Restatement (Second) and decisions influenced thereby, were “arbitrary and artificial... difficult... and costly... to attempt to draw.” The Restatement (Third) drafters specifically complained that the noted legal analysis

65 See supra Part II.
66 See supra Part II.
67 See supra Part II. Compare RESTATEMENT (SECOND) OF TRUSTS § 155(1) (1959) (stating the rule that a creditor of a beneficiary of a discretionary trust cannot compel a distribution), with id § 157 (listing creditors who are not prohibited from proceeding against a beneficiary’s interest in a spendthrift or support trust). DUKEMINIER ET AL., supra note 17, at 545 (“The traditional view is that the beneficiary of a support trust [i.e., a trust which includes an ascertainable standard to guide the trustee’s distribution decisions] cannot alienate her interest. Nor can creditors of the beneficiary reach the beneficiary’s interest, except suppliers of necessaries may recover through the beneficiary’s right to support [Citing Restatement (Second) § 154].”). The textbook authors go on to explain that “[u]nlike the case of a pure discretionary trust, however, there is authority which holds that the beneficiary’s children and spouse may enforce claims for child support and alimony against the beneficiary’s interest in a support trust.” Id. Spouses and children are sometimes excepted from the trust protections because the settlor’s purpose to support the beneficiary is deemed to include support of those relying upon the beneficiary for support. See RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. c. An alternative explanation is simply that a beneficiary should not be able to enjoy trust distributions while ignoring those to whom the beneficiary owes a support obligation. See SCOTT & FRATCHER, supra note 3, § 157.1 (discussing rationales for allowing spouse and child creditors to recover against an otherwise protected trust).
68 See supra Part II.
69 See, e.g., RESTATEMENT (THIRD) OF TRUSTS §§ 50, 60 & reporter’s notes (noting this and also noting the difficulties courts have in making these distinctions).
70 Id. § 60 & reporter’s note.
produce[s] dubious categorizations and almost inevitably different results (based on fortuitous differences in wording or maybe a "fireside" sense of equity) from case to case for beneficiaries who appear, realistically, to be similarly situated as objects of similar settlor intentions.\(^{71}\)

The drafters of both projects therefore concluded that the particular label ascribed to a discretionary trust, regardless of any standard present, should not dictate creditors' rights consequences.\(^{72}\) Both the UTC and Restatement (Third) thus provide that a single rule should govern creditors' rights in relation to any discretionary trust interest.\(^{73}\) The drafters were convincing in their rationales and support for their position. Yet criticism arose because of the creditors' rights consequences that were previously believed to attach to the now abandoned discretionary-support trust labels.\(^{74}\)

2. Criticism

Critics assailed the drafters' position and argued that by abandoning the distinction between discretionary and support trusts, the project drafters similarly eliminated the distinct protection traditionally afforded the pure discretionary trust.\(^{75}\) Critics worried that the UTC and Restatement (Third) also served to liberalize the standard by which

\(^{71}\) Id.

\(^{72}\) Id.; UNIF. TRUST CODE § 504 & cmt (2000).

\(^{73}\) RESTATEMENT (THIRD) OF TRUSTS § 60 & reporter's note; UNIF. TRUST CODE § 504 & cmt. Since most trusts today include a spendthrift provision, and since a spendthrift provision precludes all but the most favored (or "exception") creditors from recovering against the beneficiary's trust interest regardless of its nature, the abolition of the discretionary/support trust distinction is most relevant in the case of claims by the most prevalent of those special creditors—namely, children, (ex)spouses, and government entities where public benefits (e.g., Medicaid) are at issue. See BOGERT & BOGERT, supra note 27, § 222 n.7 ("It is common knowledge that nearly all trust instruments which are prepared by lawyers in fact contain spendthrift clauses.").

\(^{74}\) See supra notes 25-31 and the accompanying text for an explanation of the protections traditionally associated with these discretionary trust variations, based upon the particular nature of the beneficiary's interest.

\(^{75}\) See UTC National Committee Evaluates Concerns, UTC NOTES (Nat'l Conf. of Comm'rs on Unif. State Laws), Winter 2004, at 4, available at http://www.utcproject.org/utc/uploads/UTCnotes_Dec04_print.pdf (noting "claims made regarding the asset protection aspects of the UTC made in both Trust & Estates and Estate Planning magazines as well as on some estate planning online listerves"); see also Merric & Oshins Part 1, supra note 48 (three-part practitioner-authored series condemning the UTC & Restatement (Third) positions regarding asset protection); Merric & Oshins Part 2, supra note 48 (same); Merric & Oshins Part 3, supra note 48 (same); Mark Merric, Robert D. Gillen, and Jane Freeman, Malpractice Issues and the Uniform Trust Code, 31 EST. PLAN. 586 (2004) (similarly condemning perceived lessening of creditor protections); Mark Merric & Douglas W. Stein, A Threat to All SNTs: in UTC Jurisdictions, Government Agencies Can Now Tap Into Supplemental Needs Trusts that Lack Special Needs Language, 143 TR. & EST. 38 (2004).
courts are to review (and possibly direct) trustee discretion. The specific complaint was that by abolishing the distinction between discretionary and support trusts, the trustee’s discretion for all such trusts becomes subject to a more demanding “reasonableness” standard, and therefore becomes more easily subject to judicial compulsion.\textsuperscript{76} Claiming “radical changes to the common law ... are adopted by both the UTC and the Restatement Third” in this regard,\textsuperscript{77} the critics vociferously condemned the projects:

The Restatement Third adopts a substantially similar approach to that of the UTC by imposing a reasonableness standard of review for a discretionary trust. In this respect, the Restatement Third is in no sense a restatement of the current law of trusts. As related to the common law of almost all states, the Restatement Third is a complete rewrite of history in this area.\textsuperscript{78}

In the eyes of the critics, then, both projects exposed even “pure” discretionary trusts to the claims of dependent spouses, children, and the government in public benefits cases. In fact, the critics were so convinced of this that they alleged that a failure to advise clients about the decrease in asset protection in states adopting the UTC could result in malpractice liability.\textsuperscript{79}

3. Response

Among other forums, the primary criticisms appeared in a three part diatribe published in late 2004 in the prominent practitioner journal, \textit{Estate Planning}.\textsuperscript{80} Placing such allegations before the estate planning bar has led some practitioners to conclude that the trust asset protection landscape faces a fundamental shift in favor of creditors wherever the

\textsuperscript{76} In other words, the beneficiary no longer has a “mere expectancy” because she can force a distribution if to do so would be reasonable, and thus, so can her creditors. Protection for such trusts would therefore become more dependent upon spendthrift language and not the particular nature of the beneficiary’s interest. The protections afforded a spendthrift trust are sometimes subject to the exceptions noted in Part IV, infra.

\textsuperscript{77} Merric & Oshins Part 2, \textit{supra} note 48, at 421.

\textsuperscript{78} Merric & Oshins Part 3, \textit{supra} note 48, at 486. For a recent analysis of how Restatement articulations may not accurately reflect judicial precedent, see Danforth, \textit{supra} note 8.

\textsuperscript{79} Merric & Oshins Part 3, \textit{supra} note 48, at 486; Walsh et al., \textit{supra} note 53, at 36.

\textsuperscript{80} For other similarly-authored and similarly-critical articles, see \textit{supra} notes 48, 75. What might be described as the “Merric” view has received broad circulation, appearing not only in the noted practitioner journals, but also in other widely-seen forums. \textit{See, e.g.}, Steven J. Oshins, \textit{Asset Protection Other Than Self-Settled Trusts: Beneficiary Controlled Trusts, FLPs, LLCs, Retirement Plans and Other Creditor Protection Strategies}, 39 U. MIAMI SCH. L. PHILIP E. HECKERLING INST. ON EST. PLAN. ¶ 300 et. seq. (Tina Hestrom Portundo ed., 2005); Ashlea Ebeling, \textit{The Great Trust Rebellion}, FORBES, Aug. 16, 2004 (“Merric and other renegades say the code compromises families’ privacy, endangers their estate plans and favors their creditors. The rebels are winning some battles.”).
UTC and Restatement (Third) take hold.\textsuperscript{81} Perhaps in part because of this, members of the UTC National Committee responded directly to the public criticisms. Specifically, members of the UTC National Committee in February, 2005, used the same \textit{Estate Planning} publication, as well as other forums, to communicate a point by point rejoinder to each of the critics' arguments.\textsuperscript{82} Employing strong language, the UTC proponents contend that the criticisms are based upon "misinterpretations of the UTC, a disregard of pertinent UTC provisions, or a misunderstanding of existing law."\textsuperscript{83} In one forum, the UTC proponents described the criticisms as "scare tactics."\textsuperscript{84} In another forum, the UTC Reporter faulted critics for "criticiz[ing] the Restatement [Third] . . . and then assum[ing] that the UTC is the same." The UTC proponents' rejoinder appears to have the better of it, ultimately concluding that "[t]he UTC will actually do the opposite of what the critics assert; it will increase the creditor protection of most trusts in most states."\textsuperscript{85} This, by and large, appears to be true.

4. Understanding (and Distinguishing) the UTC and Restatement (Third)

UTC proponents posit many specific arguments in defense of the UTC, as much elaboration has been required in order to address the criticisms. A synthesis of those arguments reveals four simple points worthy of emphasis here. First, the UTC codifies the traditional

\textsuperscript{81} See \textit{supra} note 80. Consider also the following excerpt from one law firm's website, which reflects the penetration of the view expressed by Merric and others: North Carolina is considering adoption of the Uniform Trust Code. The Uniform Trust Code may be perceived as overturning 100 years of trust law and eliminates the difference between discretionary and support trusts. If North Carolina adopts the UTC without modification, the new trust law would likely eliminate the foundation on which much special needs trusts, Medicaid trusts and asset protection planning is based. Under the UTC, a beneficiary now has a right to sue the trustee for reasonableness in making distributions. A beneficiary had virtually no right under current law, the standard is bad faith. Under the UTC (if adopted), there is [sic] reasonableness standard. The question then becomes: With the elimination of the prior asset protection for discretionary trusts, does a creditor now have the right to sue for a distribution? \textit{See} \url{http://www.strausslaw.com/Intro_Agent_Protection.pdf} (last visited Apr. 13, 2006).

\textsuperscript{82} See, e.g., Walsh et al., \textit{supra} note 53; \textit{US Trust Law Experts Respond to Attack on Uniform Trust Code, available at} \url{http://www.nccusl.org/nccusl/UTCresponse_Feb04.htm} (last visited Apr. 13, 2006).

\textsuperscript{83} Walsh et al., \textit{supra} note 53. In a separate forum, the UTC proponents similarly condemned the critics for their alleged "mischaracterizations and misinformation about the UTC and about American trust law in general." \textit{US Trust Law Experts Respond to Attack on Uniform Trust Code, http://www.nccusl.org/nccusl/UTCresponse_Feb04.htm} (last visited Apr. 13, 2006).


\textsuperscript{85} Walsh et al., \textit{supra} note 53, at 30.
common law rule affirming the protections afforded by spendthrift provisions—as well certain exceptions to those protections already recognized in many states. Second, the UTC’s pronouncement that a trustee must exercise discretion in good faith does not change the common law, even with respect to the “purest” discretionary trusts. Third and also relevant to discretionary trusts, the UTC is quite clear in stating that (with one categorical exception discussed below), “a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if ... the discretion is expressed in the form of a standard ... or ... the trustee has abused the discretion.” Fourth and finally, any contrary impressions created by the provisions and commentary of the Restatement (Third) are inapposite, as the Restatement (Third) and UTC differ on important points regarding creditors’ rights.

5. Disassociation

Elaboration is necessary to appreciate these four points in the context of the future course of trust asset protection. Taking the last point first, the recent efforts by the UTC proponents to distance the UTC from the Restatement (Third) on the subject of creditors’ rights could be telling as to the directions these projects might lead. Specifically, in rebutting critics claims, the UTC proponents have been careful to note that:

Some critics . . . treat the UTC and the Restatement Third as if they were one unified whole . . . . The two—although each is important in its own right—do not serve the same purpose, and not only are not identical, but are quite divergent on a number of important points.

This is the author’s effort to state the arguments succinctly. For a perspective more intent on defending the UTC and more detailed in the assertions made, see the sources cited at supra notes 47 & 90. Regarding the traditional view of discretionary trust protections, see supra notes 23-35 and the accompanying text.

UNIF. TRUST CODE § 504(b) (2000). Although a creditor might still be able to attach a discretionary interest that is not accompanied by spendthrift language, the creditor (with the exception noted in Part III.B.6., infra), would be precluded from actually “busting” the trust by compelling a distribution in the creditor’s favor. Although the creditor could in this situation cut off the beneficiary’s right to receive distributions—an important bargaining tool favoring the creditor—it is unlikely that a discretionary trust in practice would be unaccompanied by the simple formality of spendthrift language. See supra notes 34-35; Walsh et al., supra note 53, at 31. Thus, the discussion here focuses on the general right to compel distributions. With regard to the noted categorical exception, see infra Part III.B.6.

Walsh et al., supra note 53, at 31. The UTC Reporter has also characterized UTC criticisms as improperly “conflat[ing] the UTC and the Restatement Third together, criticiz[ing] the Restatement, and then assum[ing] that the UTC is the same. The creditor provisions of the
The two works may indeed have distinctly different impacts where followed. As noted above, UTC section 504 is clear in providing only one categorical exception to its express rule that creditors may not "step into the beneficiary's shoes" and exercise that beneficiary's right to compel a distribution from a discretionary trust (of any type).\footnote{UTC and the Restatement Third are very different." David English, \textit{The UTC and Crummey Powers, UTC NOTES (Nat'l Conf. of Comm'rs on Unif. State Laws), Winter 2004, at 7, available at http://www.utcproject.org/utc/uploads/UTCNotes_Dec04_print.pdf (last visited Apr. 13, 2006).} Regardless of the beneficiary's right to compel and regardless of the standard used to judge whether compulsion is warranted, therefore, the UTC simply and unequivocally denies creditors any such right.\footnote{\textit{UNIF. TRUST CODE} § 504(b). With regard to the one exception, see the text \textit{infra} Part III.B.6. For statements of the traditional view that a creditor merely steps into the beneficiary's shoes, see \textit{supra} notes 23-33 and accompanying text.} Thus, the abolished distinction between discretionary and support trusts does not empower creditors to compel distributions from any discretionary trust variation under the UTC.\footnote{\textit{92 Again and for purposes of both accuracy and clarity, there is one categorical exception to this rule, as discussed at \textit{infra} Part III.B.6.}}

The Restatement (Third), however, is much less definitive in delineating its position on this issue. The Restatement (Third) could even be read to suggest, as critics claim, a broadening of creditors' rights in the context of a discretionary trust. More specifically, Restatement (Third) section 60 provides that a discretionary trust beneficiary's creditors—of whatever variety of trust or creditor—may "receive or attach any distributions the trustee makes or is required to make."\footnote{\textit{94 RESTATEMENT (THIRD) OF TRUSTS} § 60 (2001).} The comments to that section elaborate upon this right, but have difficulty deciding exactly when the right might be meaningful:

A . . . creditor . . . cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so. It is rare, however, that the beneficiary's circumstances, the terms of the discretion[.] . . . and the purposes of the trust leave the beneficiary so powerless. The exercise or nonexercise of fiduciary discretion is always subject to judicial review to prevent abuse . . . [and] the rights of a discretionary beneficiary's . . . creditor are also entitled to judicial protection . . . . On the other hand, a trustee's refusal to make distributions might not constitute an abuse as against a[]. . . . creditor . . . .\footnote{\textit{95 Id.} § 60 cmt. e. The Reporter's Note to comments b and c understates the Third Restatement's significant departure from the traditional conception of asset protection with respect to discretionary trust interests: "These Comments, and the basic rule of [section 60] are consistent with \textit{Restatement Second, Trusts} § 155 (on discretionary trusts); \textit{but they give effect to assignments and attachments in a way that id.} § 155 \textit{would not} . . . ." Id. cmt. b & c, reporter's note (emphasis added). The Reporter's Note goes on to describe the argument that such interests would be protected in bankruptcy under 11 U.S.C. § 541(c)(2) (2000) as "dubious" and "wrong." Id.; see \textit{infra} notes 234-243 and the accompanying text with respect to § 541(c)(2). Cf. \textit{In re}}
In non-UTC states, courts looking to the Restatement (Third) for guidance on the rights of creditors in relation to a discretionary trust interest are likely to find the matter no more satisfying than was formerly the case with attempts to distinguish discretionary trusts from support trusts.96 Courts looking at similar facts today could—notwithstanding abolition of the discretionary trust distinctions under the Restatement (Third)—easily reach very different conclusions on the protection or exposure of these interests to creditor claims.97 The observations of one seemingly neutral group of textbook authors support this conclusion: "[i]f the drafters of the Restatement [Third] wanted to kill the asset protection features of discretionary trusts, then they should have come out and said so. Instead, they fuzzed up the law, which will invite litigation."98

The Restatement (Third) may have therefore made little progress in refining the issue of creditors' rights regarding discretionary trust interests, despite the project's stated abolition of the discretionary/support trust distinction. The UTC, in contrast, provides clarification and certainty on the issue of creditors' rights in such trusts.99 That certainty appears to work to the distinct disadvantage of creditors, particularly with regard to discretionary trusts that are other than "purely" discretionary. This is because the UTC is straightforward in denying most creditors a right to compel a distribution from any variation of the discretionary trust.100

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96 See the text accompanying supra notes 31-32 and 68-74 regarding the difficulties in distinguishing discretionary trusts from support trusts.

97 The Restatement (Second), in contrast, clearly stated that creditors were precluded from compelling a distribution from a discretionary trust. In the case of support trusts, by contrast, the Restatement (Second) provides that creditors may compel a distribution in satisfaction of their claim, where the claim relates to satisfying the support standard. RESTATEMENT (SECOND) OF TRUSTS §§ 154, 155 (1959). With regard to courts reaching different results on similar facts under the Restatement (Second) distinction based on discretionary versus support trust status, see the text accompanying supra notes 68-74.

98 DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES, TEACHER'S MANUAL 8-32 (7th ed. 2005) [hereinafter DUKEMINIER ET AL., TEACHER'S MANUAL].

99 See text accompanying supra note 91.

100 See supra note 97 and the text accompanying supra notes 23-33 and 88 regarding the ability of creditors to compel a distribution from a support trust.
6. Creditor Caveat

An important caveat to the foregoing UTC explanation should not be overlooked, however. Specifically, the UTC embraces several exceptions to the protections afforded by both spendthrift clauses and discretionary interests. In responding to criticisms on this point, UTC proponents emphasize that the recognized exceptions “are [already] reflected in statutes or case law in most jurisdictions.”

With respect to discretionary trusts, the UTC identifies dependent spouses, former spouses, and children as potential judgment creditors having the power to compel a distribution from a discretionary trust. Regardless of whether or not their claims were previously recognized in most states, these are not unimportant creditors. Their claims have the potential to be substantial and ongoing. Critics who contend that the growing UTC movement threatens the protections traditionally afforded discretionary trust interests are therefore to some extent correct, at least in states formerly following the Restatement (Second) view and not previously recognizing (or addressing) exceptions to that protection. Ultimately, however, the UTC position simply represents a logical implementation of a public policy choice favoring a class of dependent creditors over a settlor’s protective intentions, as embodied in the chosen discretionary trust structure.

Furthermore, beyond the bounds of the noted exception for dependent spouses and children, the protections afforded discretionary trusts (of whatever traditional variety) are solid under the UTC formulation. And even with regard to spouse and child creditors, the compelled distribution is limited under the UTC to “such amount as is equitable,” and in no event more than what the beneficiary would herself have been entitled to in the trustee’s proper exercise of discretion. Further still, and consistent with the traditional view that a creditor at best steps into the shoes of the beneficiary, spousal and child creditors may only compel a distribution where the trustee has failed to comply with some standard guiding distributions, or where the

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101 The exceptions are set forth in UNIF. TRUST CODE §§ 503, 504 (2000).
102 Walsh et al., supra note 53, at 29; see also UNIF. TRUST CODE § 503 cmt. (spendthrift exceptions recognized elsewhere); RESTATEMENT (THIRD) OF TRUSTS § 60 reporter’s note to cmt. e (2001) (discretionary trust exceptions recognized elsewhere); Walsh et al., supra note 53, at 31 (“[T]he assertion that no creditor can reach a discretionary trust is not the rule in every state.”). For criticisms, see the sources cited supra notes 48 and 75.
103 UNIF. TRUST CODE § 504(e). The spouse or child must have an order or judgment for support that she seeks to enforce.
104 The Restatement (Second) position is described supra notes 27-33 and the accompanying text.
105 With regard to public policy and settlor intentions, see the text accompanying supra notes 40-46.
106 UNIF. TRUST CODE § 504(c)(2).
trustee has otherwise abused its discretion.107 These creditors are not, therefore, simply given carte blanche to access the trust for satisfaction of their claims.

As to the critics' claim that a state's adoption of the UTC will enhance creditors' rights by virtue of the UTC's inclusion of a good faith standard for judging a trustee's discretionary decisions, the common law has always embraced some minimal "good faith" standard, though perhaps expressed in different ways.108 No trustee is or ever has been beyond judicial supervision, regardless of how broadly the settlor has worded a grant of discretion.109 In any event, the express bar to all but dependent creditors compelling distributions, as set forth in UTC section 504(b), diminishes the relevance of this standard to the universe of other creditors.

So even in states where adoption of the UTC would in fact change prior law (or prior reliance on the contrary Restatement (Second) position), the change falls short of a radical undoing of discretionary trust protections. In laying a foundation for a straightforward and analytically sound approach to creditors rights, a state's adoption of the UTC will at worst clarify a previously troublesome area of law. Clarification is not a weakening of common law protections, except perhaps to those who find solace in confusion and the ability to mold the "fuzzed up" law to a particular beneficiary's facts.110 Beyond that, the only complaint that seems to have real traction is disagreement with the drafters' decision to include spouse and child claimants as exception

107 Id. § 504(c).
108 Walsh et al., supra note 53, at 29. One group of leading textbook authors puts it this way: The traditional view, aptly summarized by the excerpt from the Scott treatise at page 544, is that the beneficiary does not have a property interest even though the beneficiary can bring suit to compel payment to him if the trustee's failure to do so is in bad faith. This is the odd thing about the standard conception of the beneficiary's interest in a discretionary trust as "no property right." If the trustee acts in bad faith, the beneficiary can reach some of the income or principal. As we saw in the prior section, the beneficiary always has the right to challenge the trustee's failure to make a payment, no matter the extent of the trustee's discretion (albeit the intensity of the court's scrutiny will be less if the trustee is vested with extended discretion). So perhaps we should say that the beneficiary has no property interest that his creditors can reach, but the beneficiary can compel the trustee to do its duty.

DUKEMINIER ET AL., TEACHER'S MANUAL, supra note 98, at 8-31. With regard to the UTC's embracing a "good faith" standard for judging trustee discretionary actions, see the comment to UNIF. TRUST CODE § 814(a), wherein it is provided that "[a] grant of discretion establishes a range within which the trustee may act. The greater the grant the broader the range."

109 See supra note 108; Langbein, supra note 47, at 77 ("A trust whose terms authorise bad faith performance is not a trust; it is illusory, because it undercuts the requirement that there be enforceable duties, and that the trust be for the benefit of the beneficiaries.").

110 For the assertion that the Restatement (Third) has "fuzzed up the law" regarding creditors' rights in discretionary trust interests, see the text accompanying supra note 98. For difficulties relating to the traditional distinction between discretionary and support trust, see the text accompanying supra notes 27-35 and supra Part III.B.1.
creditors in the case of all variations of the discretionary trust.\textsuperscript{111} Again, that is a matter of policy preference, not of logic in the sense that unyielding protections must follow from the nature of the trust.\textsuperscript{112} In this regard, the nature of the interest is what the law says it is, and by eliminating the often confusing distinction between purely discretionary and other variations of that trust, the UTC improves the law. Again, disagreement with the existence of exceptions or the degree of resulting protections is simply a disagreement with a policy choice. Apart from divergent opinions on the decisions that necessarily follow from that choice, both academics and practitioners alike should regard this clarity and focus as favorable to the development of trust asset protection.

7. The UTC in Operation

As to policy choices, however, the UTC is hardly prompting wholesale abandonment of spendthrift and discretionary trust protections—traditional or otherwise. As of July 31, 2005, fifteen jurisdictions had adopted some version of the UTC.\textsuperscript{113} Most of those jurisdictions have either rejected or modified the treatment of discretionary trust protections embodied in UTC section 504. More specifically, of the fifteen adopting jurisdictions, seven have chosen to omit UTC section 504 in its entirety.\textsuperscript{114} An eighth jurisdiction adopted the protective clarification that only a beneficiary can compel, without including the spousal and child exceptions found in the UTC.\textsuperscript{115} Four of the remaining states have chosen to grant the right to compel only to dependent children, rejecting the policy arguments equating spousal claims.\textsuperscript{116} This latter position is interesting in that courts sometimes explain the spousal and child support exceptions as based on the premise that both claims reflect a beneficiary's duty, not a debt, and

\textsuperscript{111} UNIF. TRUST CODE § 504(c).

\textsuperscript{112} With regard to the traditional view that protections are inherent in the nature of a discretionary trust, see supra text accompanying notes 27-35.

\textsuperscript{113} The term "jurisdictions" is sometimes used in lieu of "states," since the District of Columbia is included among the fifteen jurisdictions that have embraced the UTC. The other adopting jurisdictions are: Kansas, Wyoming, New Mexico, Nebraska, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, and most recently, North Carolina.

\textsuperscript{114} The jurisdictions are New Mexico, Kansas, Tennessee, Missouri, Arkansas, Oregon and the District of Columbia. Links to an explanation of variations for each jurisdiction's UTC enactment can be found at UTCproject.org, http://www.utcproject.org/utc/DesktopDefault.aspx (last visited Apr. 13, 2006). As of the date of this writing, the North Carolina legislation was not examined there, but can be found at North Carolina General Assembly—Senate Bill 679 Information/History (2005-2006 Session), http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=SB679 (last visited Apr. 13, 2006).

\textsuperscript{115} That state is Maine.

\textsuperscript{116} These states are North Carolina, Virginia, South Carolina, and Wyoming.
public policy objects to someone enjoying trust benefits while neglecting such duties. Yet, the twelve states that reject either all or the spousal exceptions in UTC section 504 have made a straightforward policy choice; namely, that the claims of all creditors (in eight states) and spouses (in four additional states) are subordinate to the policy of respecting the donor’s intentions in creating the indirect protections traditionally associated with a beneficiary’s discretionary trust interest. So viewed, this legislative conclusion raises a final but important point about the UTC and its potential impact relative to the Restatement (Third)—and indeed, relative to the common law itself.

C. The Legislative Dimension

Specifically, the UTC as adopted by a given state is a legislative directive. The Restatement (Third), by contrast, can be viewed as potentially influential, but ultimately merely advisory. Respected representatives of the estate planning bar and the UTC National Committee recently captured the importance of this distinction:

Restatements can be very persuasive in court proceedings in jurisdictions with no rule on a certain point. On the other hand, once a state enacts a uniform law, its judges must follow it, and any Restatement dealing with that subject, if different, is not relevant.

To emphasize a point not expressly stated in the foregoing, a state legislature’s enactment of the UTC not only limits judicial latitude in the legislated area, but also trumps a state’s existing judicial precedent, to the extent that precedent is inconsistent. Of course, the legislature may embrace its state courts’ precedent by incorporating consistent rules within a chosen statutory scheme. With respect to states adopting the UTC, judicial precedent also remains relevant for filling gaps and

117 See Duvall v. McGee, 826 A.2d 416 (Md. 2003) (denying recovery to tort claimants because they are merely judgment creditors, and discussing the distinct nature of spousal and child support claims).

118 Walsh et al., supra note 53, at 30. Interestingly, this comment was made in the specific context of the recent push by UTC proponents to distance the UTC from the Restatement (Third) on the matter of creditors’ rights, as noted in the text supra Part III.B.5. The noted representatives of the estate planning bar are four estate planning attorneys, each of whom bears the distinguished and invitation-only status of American College of Trust and Estate Counsel (ACTEC) Fellow. These four individuals are also members of the UTC National Committee, which was formed in 2004 to consider issues relating to the UTC and its adoption nationally, and which consists of the chairs of select state study committees as well as certain of the UTC’s drafting committee members. As to ACTEC, the organization’s website explains its purpose and membership (“Fellow”) status. See American College of Trust and Estate Counsel, Information on Our Members and Membership in ACTEC, http://www.actec.org/public/MemberInfo.asp (last visited Apr. 13, 2006).

119 Absent some constitutional or other negating infirmity, of course.
understanding the legislation.\textsuperscript{120} As explained in more detail below, however, what the legislature fails to say can be as important to legislative meaning as what the legislature specifically chooses to include in its statutory directive.\textsuperscript{121}

III. \textbf{PUTTING IT ALL TOGETHER: LOOKING BACK TO SEE AHEAD}

The foregoing ideas should be kept in mind when contemplating the likely future direction of trust asset protections in what could well become a UTC world.\textsuperscript{122} As is often the case, however, we must consider the past in light of what we perceive to be current trends if we are to have any logical basis for appreciating future possibilities.\textsuperscript{123} The discussion which follows pursues such logic by placing several recent trust asset protection developments in the context of the growing UTC movement, thus tying the foregoing discussion together in two ways. The first is demonstrative, as the remainder of this Part shows the particular nuances of the interaction between judicial precedent, Restatement guidance, and legislative directives in shaping trust asset protection. Extrapolation from those lessons then allows conclusions to be drawn as to how, why, and where the UTC is pushing the evolving

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 56-58 and accompanying text.
\item See \textit{Jackson v. Fidelity Deposit Co.}, 608 S.E.2d 901, 906 (Va. 2005), for an application of the Latin maxim expression \textit{unius est exclusio}, which is "a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Of course, the maxim has been criticized:
\begin{itemize}
\item Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. The best example is probably \textit{expressio unius est exclusio alterius}, which is a rather elaborate, mysterious sounding, and anachronistic way of describing the negative implication. Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.
\item United States v. Mo. Valley Const. Co., 741 F.2d 1542 (8th Cir. 1984) (quoting Reed Dickerson, \textit{The Interpretation and Application of Statutes} 234-35 (1975)). On the other hand, the context of a state's consideration of the UTC and adoption of that legislation without the proffered exceptions is significant, as discussed in the text accompanying notes 145-149, infra.
\item In light of the numerous discussions of offshore versus domestic asset protection trusts, precision perhaps suggests that I narrow this to a UTC \textit{country}.
\item See, e.g., \textit{GRISWOLD}, supra note 8, § 9 ("[S]pendthrift trusts can be fairly looked upon as the current development in this periodic movement in the law. The fate of similar restraints on alienation in earlier stages of our legal history may indicate that limitations on the scope of spendthrift trusts can be expected."). Eric A. Posner, \textit{The Political Economy of the Bankruptcy Reform Act of 1978}, 96 MICH. L. REV. 47, 126 (1997) ("Because of the indeterminacy of the normative arguments for and against various kinds of... reform, one must rely on experience and history.").
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American trust asset protection environment. Again, conclusions in that regard derive as much from the UTC drafters' proposition that states examine their trust laws for possible codification, as from the technical specifications actually embodied in the UTC's preferred rules.\(^{124}\)

Consideration of the past begins in 1997.\(^{125}\) In that year the Mississippi Supreme Court decided *Sligh v. First National Bank*.\(^{126}\) The decision and the responses it engendered are well-known among trust and estate practitioners and scholars. Most briefly, *Sligh* involved a tort judgment against the beneficiary of two spendthrift trusts. The tort creditor-plaintiff, William Sligh, had suffered permanent paralysis and other severe complications as a direct result of an automobile accident caused by a drunken driver, namely, the spendthrift trust beneficiary.\(^{127}\) Sligh sought satisfaction of his judgment by claiming against the beneficiary's spendthrift trust interest because the beneficiary had no other assets.\(^{128}\)

Typical of the development of the common law, the *Sligh* court first noted its own precedent. Specifically, the Mississippi Supreme Court had accepted the validity of spendthrift trust protections in 1892 by joining the growing list of states then accepting those trust protections.\(^{129}\) The *Sligh* court, however, faced the more focused question of whether public policy now demanded an exception to those protections in the case of tort-victim-creditors. More specifically, should there be such an exception where the trust beneficiary's

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\(^{124}\) This is in part because many states are, in fact, rejecting certain aspects of the UTC creditors' rights provisions in favor of trust protections that are stronger than those envisioned by the UTC drafters. *See discussion supra* Part III.B.6-7; *see infra* text accompanying notes 150-154.

\(^{125}\) As to choice of year and the above promise of "recent" developments, it is enlightening to consider "recent" in the context of the 130-plus year debate over the efficacy of the spendthrift trust and the creditors' rights (or more descriptively, the lack of rights) such trusts entail. From that perspective, developments in 1997 and beyond are readily considered "recent."

\(^{126}\) 704 So. 2d 1020 (Miss. 1997).

\(^{127}\) *Id.* at 1023. Sligh presented a compelling case, having suffered a broken spine, the loss of use of both legs, the loss of sexual function, and the loss of the ability to control bladder and bowel functions. Particularly egregious were facts suggesting that the beneficiary was "an habitual drunkard . . . [who] regularly operated motor vehicles while intoxicated . . . [resulting in] numerous automobile accidents." *Id.*

\(^{128}\) *Id.*

\(^{129}\) *Id.* at 1024-25. U.S. Supreme Court Justice Miller's logical defense of spendthrift trust protections as articulated in the 1875 U.S. Supreme Court decision *Nichols v. Eaton* is often credited with starting a movement that by century's end saw the growing spread of spendthrift trust acceptance. *See Nichols v. Eaton, 91 U.S. 716, 725 (1875); John K. Eason, Developing the Asset Protection Dynamic: A Legacy of Federal Concern, 31 HOFSTRA L. REV. 23, 36-42 (2003)* (exploring the role of the *Nichols* decision in the evolution of American spendthrift trust law). As to the fluidity of the common law and the particular policy rationales it chooses to emphasize at various times, see Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1082 (Ohio 1991) (citing *Nichols* and Justice Miller's freedom of disposition argument as proffered in *Nichols* as "most persuasive" in reasoning that prior Ohio precedent rejecting spendthrift trusts should be reversed).
intentional or grossly negligent conduct led to the victim-creditor’s claim against the spendthrift trust? The idea that exceptions grounded in public policy might be warranted can be traced to the earliest spendthrift trust decisions and serve as a basis for much of the debate over asset protection trusts generally. Prior to Sligh, policy considerations led courts to articulate several generally recognized exceptions to spendthrift trust protections. The prohibition against protection for self-settled trusts or in cases of fraud are longstanding examples. Beyond that, some (but not all) states had recognized a list of “exception” creditors—a special group of creditors who, by their nature or the nature of their claim, are permitted to proceed against a beneficiary’s trust interest notwithstanding a spendthrift provision. Public policy generally did not, however, trump settlor intentions in the case of tort creditors.

Having no past decisions of its own elaborating on the parameters of spendthrift protections (beyond the then-standard denial of self-settled protections), the Sligh Court consulted the list of exception creditors proffered in Restatement (Second) section 157. Reflective of the common law from which it derived, the “rule” of Restatement (Second) section 157 did not list tort creditors among the excepted class. Commentators, however, had previously suggested (and continue today to suggest) that tort creditors, being involuntary in their dealings with the trust beneficiary, should be added to the list of exception creditors. The Sligh Court emphasized these commentaries, and in

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130 Common law statements of the spendthrift protective rule universally limit that protection to instances where it would not be contrary to public policy.

131 In the influential 1882 decision Broadway National Bank v. Anna, 133 Mass. 170 (1882), for example, the court justified recognition of spendthrift restraints by reference to respect for the donor’s intentions. That court stated the simple maxim that the settlor’s “intentions ought to be carried out, unless they are against public policy.” Id. at 173. With regard to the debate over the efficacy of trust protections, see the text accompanying supra notes 40-46.


133 Id. § 157. The exception noted above for spouse and child claimants in the case of discretionary trusts also represents this dynamic in action. See supra Part III.B.6.

134 See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 59 reporter’s note to cmt. a (2001) (acknowledging that tort claimant exception as proposed by Erwin Griswold “has not generally had much influence on legislation or judicial decisions”); Newman, supra note 12, at 800 (noting that “most courts have declined to create such an exception” and citing authority); Laurene M. Brooks, Comment, A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature, 73 MARQ. L. REV. 109, 125 (1989) (“Cases addressing whether tort creditors should be able to reach the beneficial interest in a spendthrift trust, although scarce, overwhelmingly reject an exception for tort victims.”), discussed in Emanuel, supra note 15, at 197-98; see also Duvall v. McGee, 826 A.2d 416, 422 (Md. 2003) (rejecting a tort creditor exception).

135 See, e.g., SCOTT & FRATCHER, supra note 3, § 157.5 (“It may well be held that it is against public policy to permit the beneficiary of a spendthrift trust to enjoy an income under a trust without discharging his tort liabilities . . . .”); Newman, supra note 12, at 828 (“In this new environment [where beneficiaries are often given substantial control over their trusts], the question of whether tort creditors . . . should be barred from reaching the [spendthrift trust]
particular the opinion expressed in the comments to the Restatement (Second) that:

The enumeration in this [Restatement (Second)] of situations in which the interest of the beneficiary...can be reached is not necessarily exclusive. The interest of a beneficiary...may be reached...if considerations of public policy so require. Thus, it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach [the beneficiary's] interest.136

From this the Sligh Court held that public policy demanded the addition of tort victims to the list of exception creditors, at least where the tort-feasor-beneficiary's conduct was intentional or grossly negligent.137 Such is the judicial process of the evolving common law of trust asset protection. The Restatement (Third) carries forward this process through its continued endorsement of the judicial flexibility suggested in the just-quoted language.138

Judicial prerogative in the evolving law of trust asset protection is, however, subject to limitation where decisions catch the legislature's attention. In Mississippi, for example, the legislature disagreed with Sligh—if not so much with the judicial latitude then certainly with the ultimate conclusion weakening spendthrift trust protections in that state. The legislature thus proceeded promptly to take control of the evolution of such protections.139 More specifically, the legislature effectively overturned the Sligh decision by enacting a statute validating trust protections, excepting only self-settled trusts.140

The UTC will likely have the same effect in the jurisdictions where it is adopted, even though many state courts will have never considered the myriad facts that might implicate public policy relative to the parameters of available trust protections.141 This is because the UTC provides a limited list of exception creditors. The UTC section 504

beneficiary's interest ... deserves reconsideration.

136 Restatement (Second) of Trusts § 157 cmt. a. The Restatement (Third) carries this philosophy forward. Including tort creditors among the class of excepted creditors was clearly a minority position both when the Restatement (Second) was approved and at the time of the Sligh decision. See also supra note 134 regarding the lack of case authority for a tort creditor exception.

137 Sligh v. First Nat'l Bank, 704 So. 2d 1020, 1029 (Miss. 1997).

138 Restatement (Third) of Trusts § 59 cmt. a(2).

139 Some would view this as a favorable development. See infra note 155 and accompanying text.

140 The Mississippi legislation is entitled the "Family Trust Preservation Act of 1998" and is set forth at Miss. Code Ann. § 91-9-501 (2005). The act did include an exception to trust protection where the trust is self-settled. Id. § 91-9-509. The statute was clear, however, that this was the only exception. Id. §§ 91-9-503, 9-507. As to the Mississippi legislation's "effectively" overturning the Sligh decision, see Newman, supra note 12, at 801-03.

141 See Duvall v. McGee, 826 A.2d 416, 422 (Md. 2003) (noting "the paucity of authority on the subject" of a tort creditor exception).
exception creditor list in the case of discretionary trust interests includes, as noted above, only dependent spouse and child claimants. With regard to spendthrift trusts, the UTC identifies three classes of exception creditors in section 503:

1. a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;

2. a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust; and

3. a claim of [the] State or the United States to the extent a statute of [the] State or federal law so provides.¹⁴²

Most importantly, and in contrast to the Restatement (Third) position noted above, the UTC expressly provides that the identified exception creditors are the only creditors who can pierce the protections of a spendthrift provision.¹⁴³ This rules out more than simply a tort creditor exception. For example, the trust interest of a beneficiary acting in breach of her fiduciary duties would be immune from any judicially discerned public policy exception—even where the claim is one for recovery based upon a breach of duty while administering the estate of the very settlor who created the trust!¹⁴⁴

Many legislatures considering the UTC, moreover, have chosen to omit the UTC’s entire list of exception creditors from their own enactments, thus solidifying the sanctity of the spendthrift trust with regard to all creditors, not just those who are victims of a beneficiary’s malfeasant conduct. In Arkansas, for example, prior to the legislature’s consideration of the UTC, Arkansas judicial precedent recognized an exception to spendthrift protections in the case of spousal support

¹⁴² UNIF. TRUST CODE § 503 (2000). The second exception would cover, for example, “a beneficiary’s lawyer in trust litigation who has obtained a judgment against the beneficiary for failing to pay the lawyer’s fees.” See, e.g., Valerie J. Vollmer, Simply Explained: UTC Artile 5 on Creditors’ Rights, http://www.abanet.org/rppt/publications/estate/2004/2/Vollmar.pdf (last visited Apr. 13, 2006). Though this exception is quite defensible, the UTC and Restatement diverge on this point. The Restatement omits the service provider exception and instead makes an exception for claims by providers of necessaries. RESTATEMENT (THIRD) OF TRUSTS § 59.

¹⁴³ UNIF. TRUST CODE § 502(c); id. art. 5 gen. cmt. (“Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary’s creditor from reaching the beneficiary’s interest . . . “); see also Walsh et al., supra note 53, at 33 (“[T]he UTC list of exception creditors is exclusive.”). Even without this proviso, the result would likely be the same, because “[w]here the legislature has made specific exceptions, [courts] must presume no others were intended.” The quoted language is from a case in which a tort creditor exception was denied, based primarily upon the court’s feeling that the legislature had spoken on the topic, and based upon what the legislature did not say (i.e., no exception provided for tort creditors) in its spendthrift trust legislation. The only exceptions in that legislation were for self-settled trusts and trusts funded via fraudulent transfer. Scheffel v. Krueger, 782 A.2d 410, 412 (N.H. 2001).

¹⁴⁴ This was in fact the outcome in Jackson v. Fidelity Deposit Co., 608 S.E.2d 901, 906 (Va. 2005). That outcome was clearly a consequence of state legislation that provided a specific list of exceptions.
Upon adopting that state’s version of the UTC, however, the Arkansas legislature chose to omit UTC section 503 and its list of exception creditors. The legislature similarly omitted the section 504(c) exception in the case of discretionary trust interests as vulnerable to dependent spouses and children. While it might be said that the legislature simply chose to defer to the common law treatment of such claims, this is not the likely result. As one author recently noted in commenting on the Arkansas UTC’s omission of spouses as an exception creditor in the case of spendthrift trust protections:

The chair of the [Arkansas UTC] Study Committee has stated that it is not the intent of the Committee to weaken [the common law of Arkansas, which recognized a spousal exception], but if this section [503] does not become law, how can the legislature’s rejection of this section not have that effect? A compelling argument can certainly be made that if a legislature refuses to enact a provision, it is because it does not wish the content of that provision to become statutory law.

Looking beyond the borders of Arkansas, there is hardly a uniform trend to support the critics’ general claims that the UTC will abrogate spendthrift trust protections. More specifically, only four of the fifteen UTC adopting jurisdictions have chosen to include the section 503 spendthrift trust exceptions basically as written. Five jurisdictions, by contrast, have expressly chosen to reject those exceptions by altogether omitting UTC section 503 from their enacted legislation, although one of those jurisdictions does recognize state claims as an exception. The remaining six jurisdictions include some but not all of the proffered exceptions. The most common middle ground includes as exception creditors the beneficiary’s dependent children, while rejecting or severely curtailing the rights of (former) spouses to

146 See Foster, supra note 145, at 228-36 (discussing the new Arkansas UTC legislation).
147 Id.
148 As to the common law supplementing the UTC, see the text accompanying supra note 57-60. For the idea that courts have latitude to create exceptions where a statutory scheme is silent on the subject, see Emanuel, supra note 15, at 205. That view is likely inapposite in the case of the UTC, because, as explained in the text supra, the legislature has the entire UTC (including the list of exception creditors) before it when it decides which portions are in accord with the laws and policies of that state. Where the legislature adopts those portions of Article 5 that deal with creditors’ rights while omitting the exception provisions, it is a difficult path to argue that the legislature simply felt that matter was one better left to the courts.
149 Foster, supra note 145, at 231.
150 The states are New Hampshire, Missouri, New Mexico, and Nebraska. New Hampshire limits the recovery rights of a spouse to satisfaction of only the most basic needs.
151 The states are Arkansas, Oregon, Maine, and Kansas, with Tennessee including an exception only for government claimants.
152 The jurisdictions are North Carolina, Virginia, South Carolina, Utah, the District of Columbia, and Wyoming.
Although some might thus call the result in ten jurisdictions "pro-creditor" because some creditors are granted special status, the corresponding reality is that the new trust legislation effectively ends any prospect of further judicially-derived, policy-based creditor exceptions to spendthrift trust doctrine in all fifteen jurisdictions.

Some might consider this development a positive one—i.e., such policy decisions are, in fact, better reserved for the legislature. One might even say that a recognition of the judicial trends in public policy exceptions to spendthrift trust protections underlies the new legislation, thus rendering it a synthesis of years of judicial deliberation. It could also be argued that over those years, the courts have refined public policy in relation to respecting the settlor's desired protections such that further broadening of those exceptions is simply unnecessary, if not unwarranted. On the other hand, legislatures are likely to be less flexible and responsive than the courts when it comes to adapting prior laws and rationales to unanticipated new facts and policy concerns—and there will always be unanticipated new facts and policy concerns.

Still, and notwithstanding the swift action by the Mississippi legislature to protect trust beneficiaries after Sligh, it is hard to imagine a state legislature intervening to deny spendthrift trust protection in a given case or as to some heretofore excluded class of creditors, regardless of particularly compelling facts or policy concerns. The UTC adoptions to date bear this out. From this perspective, then, going forward the UTC could be viewed as effectively setting a baseline for trust protections, from which states will generally only move towards

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153 See, e.g., N.C. GEN. STAT. § 36C-5-503 (providing an exception for "a beneficiary's child who has a judgment or court order against a beneficiary for support and maintenance," but no exception for spouses).

154 See UNIF. TRUST CODE § 502(c) (2000). For an explanation of the operation of this provision, see Newman, supra note 12, at 798 n.139.

155 See, e.g., Dobris, supra note 1, at 572 n.139 ("In this era of timid judges it is not beyond the realm of imagination to say that it is appropriate for bold legislatures . . . to usurp equity's role and expand the spendthrift trust as nineteenth century American courts were willing to do."); Emanuel, supra note 15, at 203-09 (favoring statutory solution to spendthrift trust issues, and proposing model statute); GRISWOLD, supra note 8, § 565 (also proposing model statute).

156 Consider in this regard the case of Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001), where the spendthrift trust beneficiary not only molested a child (here the creditor was seeking to recover against the trust), but also videotaped the event and broadcast it over the Internet. The spendthrift trust debate would query: Should deference to a deceased settlor's right to dispose of her largess to the exclusion of creditors trump any avenue towards recovery for the child? In New Hampshire at the time, and likely in a UTC jurisdiction, the question is practically moot absent contrary legislation.

157 It could be argued in opposition that states have been responsive to trending trust and estate issues. The (legislatively) swift response to Sligh, the recent trend favoring self-settled trust statutes, and the current UTC movement all serve as examples. In each case, however, public choice theory could be said to affect outcomes, with interest groups lobbying either to maintain or enhance existing trust protections. The estate planning bar as well as commercial trustees are notable in this regard. See in this regard infra Part V.

158 See supra Part III.B.7; see text accompanying supra notes 142-149.
enhanced protections. Of course, one could argue for or against this proposition and likely find some support for either view. While the following Part does not intend to resolve those differences, the happenings discussed in Part V do seem to support the baseline assertion.

IV. THE POLITICS OF PROTECTION

Specifically, expansion of spendthrift trust vulnerabilities is unlikely due to the lack of any identifiably cohesive interest group stating the case for more or broader exceptions.\(^5\) This is due in part to the influence of those who often have a hand in advising state legislatures with respect to the adoption of that state’s trust and estate legislation. Local professional advisors have an interest in maintaining aspects of local trust law that serve their clients and, not without coincidence, preserve or enhance the desirability of their services. Local attorneys, for example, are likely to derive a much greater share of their business from planning estates, relative to trying to “bust” trusts. Planning estates necessarily implicates asset protection, and the extent of the marketing of that service in recent years cannot be denied.\(^6\)

As to the effect this might have on legislation, consider the influence of the state Bar in the case of the Kansas legislature’s adoption of the UTC, as well as that adoption’s effect on the future course of Kansas common law. As the UTC Reporter explained:

The Kansas [UTC study committee] agreed with [the UTC section 503] list of exceptions, but following introduction of the UTC [in the legislature], the Kansas Bar objected. The Kansas UTC as finally enacted eliminates these exceptions. This likely represents a change in Kansas law. While the Kansas courts have not ruled specifically on whether exceptions to a spendthrift provision exist, such

\(^{159}\) One group of textbook authors have commented in this regard that “perhaps the exceptions have saved the rule. By carving out an exception for spousal and child support, courts and legislatures have removed a powerful and sympathetic interest group from the debate over spendthrift trusts. Who is left now to agitate for change?” DUKEMINIER ET AL, TEACHER’S MANUEL, supra note 98, at ch. 7.

\(^{160}\) A July 31, 2005 Google search of “attorney & ‘asset protection’ & service” resulted in 240,000 hits, the first few pages of which were dominated by the marketing of asset protection planning services. See also, for example, the Utah Bankers Association website, which asks the question “Why does Utah deserve your trust business?” The answer provided is that “It has trust laws which allow for the trust provisions you—the creator of a trust—want.” First on the demonstrative list that follows is “Utah allows you to protect your assets against creditors.” The site then touts limited state income taxation of trusts, followed by the 1,000 year dynasty trust potential. See Utah Banker’s Association, http://www.uba.org/displaycommon.cfm?an=23 (last visited Apr. 13, 2006).
exceptions are well-established in the Restatement [Second], on which the Kansas courts have traditionally relied.\textsuperscript{161}

In addition to local professionals, the interest of a state's commercial trustee community must be acknowledged. Indeed, both groups have played a significant role in motivating several state legislatures to adopt domestic asset protection trust statutes for the express purpose of competing with similar vehicles offshore.\textsuperscript{162} More specifically, despite widespread adherence to the traditional rule barring self-settled protective trusts, at least seven state legislatures have now been persuaded to abandon that rule.\textsuperscript{163} Those states now permit a settlor to place assets in a spendthrift trust of which the settlor is a beneficiary, without subjecting that trust to the settlor's creditors' claims. In a clear demonstration of the local interests expecting to benefit from such legislation, five of these states generally require that some portion of the trust assets reside in the state and that some portion of the trust administration occur in the state.\textsuperscript{164}

The potential gains to these interest groups are substantial. A recent empirical study considering states that have relaxed their Rule Against Perpetuities to permit perpetual trusts, for example, shows that when coupled with more lenient state tax laws, such changes account for the movement of over $100 billion in trust funds to the trending jurisdictions.\textsuperscript{165} This, in turn, represents annual trustee fees of over $1 billion, not to mention the impact upon local attorneys called upon to ensure that such trusts comply with local laws.\textsuperscript{166} Although the study authors' opinions were inconclusive as to the impact of the new domestic asset protection trust legislation in this regard—perhaps because the phenomenon is as yet too recent to gauge—it is reasonable to expect that this research will only further inspire the noted interest

\textsuperscript{161} English, supra note 47, at 334.

\textsuperscript{162} See, e.g., Robert H. Sitkoff & Max Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356, 417 (2005) ("The story of jurisdictional competition in trust law is a story of successful lobbying by banks and trust lawyers, the principal beneficiaries of attracting new trust business to the state."); Sterk, supra note 1, at 1060 n.126 ("Organized interest groups, including the bar and trust companies, seek legislation that will enable them to generate more business."); DUKMINIER ET AL., supra note 17, at 558 (noting the underlying DAPT motivation to attract trust business, discussing interest groups, and relating DAPT movement to movement to repeal the Rule Against Perpetuities); John K. Eason, Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations, 52 FLA. L. REV. 41, 63 n.79 (2000) (discussing the fact that the drafters of the Alaska DAPT legislation were shareholders in Alaska Trust Company, an entity doing trust business in the state).

\textsuperscript{163} Those states are Alaska, Delaware, Rhode Island, Nevada, Utah, Missouri, and South Dakota. See supra notes 36-39 and the accompanying text for a definition of a self-settled protective trust, as well as for a discussion of the traditional prohibition.

\textsuperscript{164} Those states are Alaska, Delaware, Rhode Island, Nevada, and Utah.

\textsuperscript{165} Sitkoff & Schanzenbach, supra note 162, at 359, 404.

\textsuperscript{166} Id. at 411.
groups to pursue all available competitive trust advantages in their states' laws. Even without conclusive empirical quantification, asset protection is clearly perceived by the local interest groups as a desirable and marketable competitive advantage. This perception appears to be justified. It is therefore reasonable to conclude that the noted interest groups will continue their efforts to influence legislation in this area.

A. Revving Up the Race to the Bottom?

Perhaps because their motives are more pure, the UTC and Restatement (Third) drafters reject the recent trend favoring self-settled, domestic asset protection trusts (DAPTs). The drafters instead endorse the traditional rule that a settlor's creditors may reach any portion of a self-settled trust that is available for the settlor's benefit. In reaching this conclusion, the drafters expressly acknowledge the recent trend to the contrary and explain their rejection in their respective commentaries. Despite this rejection, however, the study and adoption of the UTC could provide a prime opportunity for those who favor DAPTs to bring their case to the attention of a given legislature. How states respond may ultimately shed light upon trust law's new "race to the bottom."

More specifically, Professor Sterk has argued that the adoption of self-settled domestic asset protection legislation by several domestic jurisdictions could prompt other states to adopt similar legislation, leading to more widespread abandonment of the traditional prohibition

167 Id. at 415 ("Unfortunately, our data do not yet allow us to confirm or deny the existence of a significant domestic APT business. . ."); Rachel Emma Silverman, Looser Trust Laws Lure $100 Billion, WALL ST. J., Feb. 16, 2005, at D1 (discussing Sitkoff and Schanzenbach research and noting that "[t]he authors found 'tentative evidence' that permitting asset protection trusts might increase a state's trust business, but caution that the data set was limited"); DUKEMINIER ET AL., TEACHER'S MANUEL, supra note 98, at ch. 7 ("[T]heir findings on APTs were indeterminate, perhaps because the phenomenon was too new to be reflected in the data.").

168 See supra note 162.

169 See, e.g., Sitkoff & Schanzenbach, supra note 162, at 378-39 ("[S]tatutory validation of self-settled asset protection trusts, and . . . state fiduciary income taxes . . . are the principal additional margins, beyond perpetuities law, on which the states compete for trust funds.") (footnote omitted).


171 UNIF. TRUST CODE § 505(2); RESTATEMENT (THIRD) OF TRUSTS § 58(2).

172 UNIF. TRUST CODE § 505 cmt.; RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b.

173 This fact is acknowledged by the UTC drafters. See Legislative Update 2004, UTC NOTES (Nat'l Conf. of Comm'rs on Unif. State Laws), Summer 2004, at 3 ("It is likely that some states will follow Utah and choose to enact asset protection statutes and much of the rest of the UTC."). The drafters, however, recommend against this approach. English, supra note 58, at pt. VI.H.4 ("Although not encouraged, it is possible for states to combine the UTC with a provision insulating self-settled in spendthrift trusts from creditor claims, as has been done in Utah.").
against self-settled creditor-protected trusts. Professor Sterk's analysis includes consideration of the interest groups at work in getting such legislation passed. As noted, one reason that states adopt such legislation is a desire to attract trust business, which undoubtedly favors the local estate planning bar and commercial trustee community. Another possible reason to abandon this prohibition is that the potentially negative consequences of allowing such liability immunity will be visited largely upon other states. More specifically, the states thus far leading the DAPT movement tend to be less-populated states that do not garner recognition as major financial centers. A key objective for these states, therefore, is to attract trust business from persons not resident in the DAPT state. Given the mobility of trust capital, if enough of these smaller states join the DAPT movement, logic dictates that more significant financial players will have an incentive to adopt similar legislation in order to retain their trust business—thus, trust law's race to the bottom.

So far, only two of the fourteen UTC adopting states have incorporated DAPT-enabling legislation into their UTC enactment. In both cases, the extent to which the self-settled trust protections were affected by the state's consideration of the UTC or were wholly independent of that process is not entirely clear. On the other hand, it does not take a great leap of faith in either case to conclude that UTC consideration has facilitated the move to greater self-settled trust protections in those states.

B. The Missouri Example

Missouri is one of the states with legislation suggesting a link between the UTC and enhanced protection for self-settled protective trusts. By way of background, over a decade before the recent DAPT trend began in Alaska, a Missouri statute authorized creditor protection

174 Sterk, supra note 1, at 1038-39.
175 Id. at 1057-61. For a more recent treatment of the effect of interest groups on significant trust law trends, see Sitkoff & Schanzenbach, supra note 162, at 404, 411, 416-20.
176 Danforth, supra note 8, at 287; Sterk, supra note 1, at 1058-61 & n.126. See generally DOBRIS, supra note 32, at 583-84.
177 See Danforth, supra note 8, at 364.
178 Sterk, supra note 1, at 1069.
179 This renders the "moral hazard" and other potentially negative consequences of DAPT legislation an externality to the DAPT state, since DAPT settlors will generally not be acting in the DAPT state and the thwarted creditors will also not generally be located in the DAPT state. See Sterk, supra note 1, at 1066-74.
180 Id. at 1065-72; DOBRIS, supra note 32, at 583.
181 See infra text accompanying notes 182-195.
for self-settled trusts. Protection generally applied if a spendthrift provision was present, the settlor was not the sole trust beneficiary, and trust distributions were discretionary. Federal courts applying Missouri law, however, cast considerable doubt upon Missouri's place as a self-settled asset protection state by denying protection in cases involving self-settled trusts. This led many asset protection commentators to mention Missouri only in passing when discussing favorable domestic asset protection jurisdictions.

In 2005, however, the Missouri legislature clarified the state's position, in conjunction with the state's adoption of the UTC. This was accomplished by specifically limiting the reach of UTC section 505(a)(2) as adopted in Missouri. That provision as envisioned by the UTC project drafters provides that creditors can reach the assets of a self-settled trust. The Missouri version of that section, on the other hand, limits the reach of creditors to only self-settled trusts without a spendthrift provision. The legislature has thus clearly embraced the straightforward idea that a spendthrift provision is enforceable even though the trust at issue is self-settled.

The newly enacted UTC legislation in Missouri represents a reaffirmation, or perhaps a reemphasis, of the legislature's decision that such trusts are not contrary to that state's public policy. Any future contrary decision by courts applying Missouri law would now seem to clearly contravene the legislature's intent. Despite this pronouncement, however, Missouri has yet to truly join the DAPT trend via the adoption of detailed legislation stating the requirements for self-settled trust protections in the nature of the local, business-enhancing models seen in Alaska, Delaware, Rhode Island, Nevada, and Utah. Whether Missouri


183 See sources cited supra note 182. There were other conditions as well, such as the absence of any fraudulent transfer in funding the trust and the settlor not possessing any right to amend or revoke the trust.

184 See, e.g., Markmueller v. Case, 51 F.3d 775, 776 n.3 (8th Cir. 1995) (discussing statute yet concluding that "[t]he public policy of Missouri is that one may not settle their own spendthrift trust and avoid their creditors"); In re Enfield, 133 B.R. 515, 519 (Bankr. W.D. Mo. 1991) ("Certainly, it is inequitable to allow an individual to put his assets beyond reach of creditors through the simple expedient of creating a spendthrift trust.").

185 For a justifiably equivocal statement of Missouri's position in the asset protection landscape, see Boxx, supra note 4, at 1203 n.30 ("Missouri may also recognize self-settled trusts as enforceable to some degree.").

186 MO. REV. STAT. § 456.5.505(2)-(3) (2005).

187 UNIF. TRUST CODE § 505(a)(2) (2000). The focus here, of course, is on irrevocable trusts. For rules regarding creditor access to revocable trusts, see UNIF. TRUST CODE § 505(a)(1) and (a)(3).

188 MO. REV. STAT. § 456.1.505(2)-(3).
now proceeds to take this additional DAPT step after almost a decade of more general self-settled trust legislation and conflicting judicial decisions should prove informative in evaluating the impact of the UTC movement upon the progression of trust law’s noted race to the bottom.

C. The Utah Example

Utah is another state evidencing a link between the UTC and enhanced protection for self-settled protective trusts. In the case of Utah, the legislature has adopted detailed DAPT legislation similar to the Alaska model. The suggestion of a relationship between the state’s consideration of the UTC and adoption of DAPT legislation proceeds from the implications of timing.

More specifically, Utah legislators first introduced UTC legislation in December of 2001. In October of 2002, the Utah legislative committee studying the UTC expressly posed the following question as relevant to the state’s UTC study:

[The] UTC provides that creditors of [a] settlor can reach ... assets of an irrevocable trust where the settler [sic] retains beneficial rights. This is consistent with current Utah law[,] but should Utah follow Nevada, Alaska, Rhode Island, and Delaware and allow creditor protection in self-settled irrevocable trusts? 

The answer ultimately proved to be “yes.” After the foregoing question was posed and while the UTC was still under review in the whole, Utah became a DAPT jurisdiction by enacting DAPT legislation aimed specifically at enhancing local trust and professional service business. Specifically, Alaska-modeled DAPT legislation was introduced in Utah on January 31, 2003 and became law on March 22, 2003. When the UTC was finally enacted a year later, the legislature altered the Utah version of UTC section 505 to except from creditor claims a self-settled irrevocable trust that complies with the

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190 UTAH CODE ANN. § 75-7-101 (2005); Utah SB 43 (proposed Dec. 19, 2001); Utah SB 47 (enacted Mar. 17, 2004).
192 See supra note 189.
requirements of Utah’s DAPT statute.\textsuperscript{194} Thus, in the case of Utah, the UTC was not directly used as a platform to promote and codify DAPT legislation as part of the enactment of the broader UTC legislation. On the other hand, the introduction and passage of DAPT legislation following contemplation of the issue as expressly raised by the UTC study committee seems significant. The Utah experience arguably supports the idea that when state legislatures are called upon to consider their common law of trusts in the UTC context, the door is opened to consideration of where the state wants to align in the trending DAPT environment.\textsuperscript{195} Whether such logic is tortured or predictive should be demonstrated over the next several years, and that in itself is reason to take notice.

\section*{D. The Colorado Barometer}

Given that only two states have adapted their versions of the UTC to incorporate self-settled trust protections, it could be argued that the UTC is having little effect on the potential race-to-the-bottom. Since the UTC comments directly address and then reject the DAPT trend, the lack of contrary action by most UTC adopting states might be viewed as a solid endorsement of the traditional position. On the other hand, it may be that acceptance of such a break with common law tradition is simply too drastic a change to introduce in the context of a complex statutory scheme that generally seeks to codify major portions of a state’s common law. If this is the case, it will be interesting to follow whether the noted interest groups soon begin to push for a seemingly straightforward amendment to the newly enacted statutory schemes, while trust matters remain fresh on the legislature’s mind.\textsuperscript{196} In other words, whereas Utah proceeded on simultaneous but separate UTC-

\textsuperscript{194} The DAPT legislation was adopted on March 22, 2003, while the state’s UTC was being studied. The UTC was subsequently approved by the Utah legislature on March 17, 2004, and is set forth in the fraudulent transfer provisions of the Utah statutes, rather than as part of the UTC. See supra notes 189-193.

\textsuperscript{195} Support for this idea can be found in the comments of the UTC drafters, as noted at supra note 173.

\textsuperscript{196} The comments from the following New Hampshire law firm website demonstrate the notion that after the UTC becomes law, asset protection “tweaking” can begin in earnest:

\begin{quote}
[F]or obvious public policy reasons, the Uniform Trust Code may have liberalized access to spendthrift trusts and discretionary trusts, but only for the very limited purposes and persons described above. Still, during the drafting of the Code and since then, there has been much debate about these Code provisions. They certainly will be the subject of further debate during the drafting of technical amendments to the Uniform Trust Code and ultimately they may be amended by subsequent legislation, to more fully restrict access to spendthrift trusts and discretionary trusts.
\end{quote}

DAPT paths, states may proceed down the UTC path before separately moving towards a pro-DAPT change to their common law.

Colorado may be an interesting case to follow in this regard. DAPT proponents often reference Colorado as permitting self-settled trust protections. This reference derives from a nineteenth century statute that proponents construe as supporting self-settled trust protections. The Colorado UTC study committee, however, took a different view of the import of that statute and proceeded to recommend to the legislature that UTC section 505 be enacted as envisioned by the UTC drafters—i.e., sans self-settled trust protections and consistent with the study committee’s view of existing Colorado law. As to where Colorado seems to be headed, however, consider the case noted above involving the Kansas Bar’s (successful) lobbying contrary to that state’s study committee’s recommendation on the matter of exception creditors. Query whether interested groups will pursue an analogous legislative outcome in Colorado, either during or reasonably subsequent to legislative action on the UTC.

E. Tort Creditors Finally Find a Niche?

Straying a bit to contemplate DAPT legislation more generally, it is interesting to note that of the five DAPT states, three permit tort creditors to pierce the DAPT veil, with limitations. Utah favors tort creditors where the settlor’s conduct was intentional, criminal, or fraudulent. Delaware and Rhode Island limit relief to claims arising prior to the settlor’s transfer to the DAPT. This undoubtedly reflects

197 COLO. REV. STAT. § 38-10-111 (2005) ("All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, or real property, made in trust for the use of the person making the same shall be void as against the creditors existing of such person."). See Richard W. Nenno, Planning With Domestic Asset-Protection Trusts, SK069 A.L.I.-A.B.A. 283, at pt. VIII.C (Apr., 2005), available at http://www.abanet.org/rppt/meetings_cle/2005/spring/pt/AssetprotectionPlanning/NENNO_hand.pdf, where in discussing Colorado’s place as an asset protection jurisdiction the author notes: Although the Tenth Circuit has held that the assets of an irrevocable self-settled Colorado trust, the creation of which was not a fraudulent transfer and of which the settlor was not the sole beneficiary, were immune from claims of future creditors, Colorado attorneys and financial institutions have not promoted the technique and the Colorado Supreme Court has questioned the statute’s validity. The referenced cases are Connolly v. Baum, 22 F.3d 1014 (10th Cir. 1994); In re Cohen, 8 P.3d 429, 432-34 (Colo. 1999).

198 See Colo. Bar Ass’n, Section 505, Creditor’s Claim Against Settlor, http://www.cobar.org/group/display.cfm?GenID=2537 (last visited Apr. 13, 2006) (“Apart from ‘38-10-111, C.R.S. and cases arising under such section dealing with creditor claims during life of the settlor there is no Colorado law on point.”).

199 See supra text accompanying note 161.


a current manifestation of the traditional spendthrift trust debate. Self-settled trusts have long been disfavored because deference to a settlor’s intent is not as strong a policy consideration where the settlor retains some ties to the property. This is generally because the settlor’s intent in the case of a self-settled arrangement leans more towards immunizing her property from her own creditors’ claims, rather than exercising her right to dispose of that property freely—as is the case when the settlor makes a completed transfer to a trust that exclusively benefits third parties other than the settlor.\textsuperscript{202} As noted in the discussion of \textit{Sligh} above, tort creditors have generally been disfavored as exception creditors in the case of third-party created spendthrift trusts.\textsuperscript{203} That three of the five DAPT states would (i) disavow the traditional prohibition against protections for self-settled trusts, while (ii) excepting tort creditors from the protections afforded self-settled arrangements but not third party arrangements, demonstrates the continuing flux in the parameters of the spendthrift trust debate.

\textbf{F. Digression with a Purpose}

There is an ulterior motive underlying the seeming digression in the foregoing Part IV.E. Specifically, that side note foreshadows a more policy-based transition in the direction of this Article. The discussion thus far has progressed from philosophies both academic and practice-centered, to legislative formulation and underlying interest group politics. The following Part V rounds out this progression by relating federal policies and politics, as well as popular sentiments, to the subject of trust asset protection. Exploring these influences complements the foregoing consideration of law reform projects and state legislative happenings. This is because ultimately, some synthesis of all of these matters will drive the future course of trust asset protection.

\section*{V. The Federal Dimension}

In addition to the UTC and DAPT movements at the state level, federal policies and politics should have a significant impact on trust asset protection in the coming years. The most obvious of these is the potential repeal of federal estate and generation-skipping transfer taxes. There have also been stirrings in the bankruptcy field that could directly

\begin{footnotesize}
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\bibitem{Boxx} \textit{Boxx, supra} note 4, at 1252.
\bibitem{Supra} \textit{See supra Part III.}
\end{thebibliography}
\end{footnotesize}
affect the parameters of self-settled trust protections, to the particular detriment of domestic jurisdictions relative to their offshore counterparts. Finally, budget pressures at both the state and federal level combine with ongoing public discussions over elder care (e.g., Social Security, Medicare, Medicaid) to create an environment in which the purposes and scope of protective trusts may gain increased attention, and thus, increased scrutiny and possibly constraints.

A. Estate and GST Tax Repeal

The potential repeal of federal estate and generation-skipping a/k/a "death taxes" raises many issues, three of which are particularly relevant to the matter of trust asset protection. The first of these issues is straightforward and relates to the wealth currently affected by the noted transfer taxes. If these taxes are repealed or if the dollar level at which the taxes apply is raised significantly, there will obviously be more wealth available to pass to future generations.\(^{204}\) In light of the trend in many states to exempt trust interests from the Rule Against Perpetuities, passing such wealth in trust becomes particularly appealing.\(^{205}\) Wealthy individuals contemplating their mortality will no doubt appreciate the potential for enduring dead-hand control over their wealth for what may conceivably be a thousand years or more.\(^{206}\) Also appealing will be the idea that if transfer tax repeal does occur but fails to withstand the test of time, trusts created during the tax hiatus may acquire the additional attribute of being "grandfathered" upon reinstatement of the taxes, absent some retroactive application. Such grandfathering has been seen in the past. In the case of the generation-skipping transfer tax, for example, grandfathering resulted in exemption from future application of the tax to trusts created prior to its 1986 effective date.\(^{207}\)

\(^{204}\) One recent compromise proposal would leave the estate tax in place, but raise the exemption level to $10 million and lower the tax rate to 15%. Joseph J. Schatz, *House Hits 4-0 on Estate Tax Repeal*, 63 CONG. Q. 1013 (April 11-15, 2005). With regard to the potential repeal estate and generation-skipping transfer taxes, see, for example, Dennis L. Belcher & Mary Louise Fellows, *Report on Reform of Federal Wealth Transfer Taxes: Task Force on Federal Wealth Transfer Taxes*, 58 TAX LAW. 93 (2004), and STAFF OF THE JOINT COMM. ON TAX'N, 106TH CONG., JCX-14-01, DESCRIPTION OF PRESENT LAW AND PROPOSALS RELATING TO FEDERAL ESTATE AND GIFT TAXES (Comm. Print 2001).

\(^{205}\) With regard to the potential repeal of the Rule Against Perpetuities, see Sitkoff & Schanzenbach, *supra* note 162.

\(^{206}\) Utah, for example, has extended the Rule Against Perpetuities to a 1,000 year period for interests in trusts. UTAH CODE ANN. § 75-2-1203 (2005).

\(^{207}\) Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431, 100 Stat. 2085, 2731. The actual date for exemption was articulated by reference to trusts that were irrevocable as of September 25, 1985. *Id.* See generally STAFF OF THE JOINT COMM. ON TAX'N, 109TH CONG., JCS-2-05, OPTIONS TO IMPROVE TAX COMPLIANCE AND REDUCE TAX EXPENDITURES, 392-95 (Comm.
The ramifications of transfer tax repeal or significant reduction have deeper implications for the future of trust asset protection. Although trusts often serve as mechanisms employed to reduce federal transfer taxes over time, that objective is actually a corollary of the larger estate planning objective of providing for the certain and orderly transfer of property to the objects of the settlor's bounty. Structuring transfers to reduce the impact of such taxes simply takes into account one important means by which the settlor's objectives might be disrupted by forces external to the settlor's particular dispositive plans—unless, of course, the settlor wishes to bestow her largess upon the government. The government is, through its power to levy taxes, merely one of the many creditors that might disrupt the settlor's plans over time.

This raises a second point with respect to transfer taxes and trust asset protection. Specifically, lessened concern over repealed or reduced transfer taxes should heighten settlor awareness of other creditors who retain the potential to disrupt the settlor's dispositive plans. Indeed, typically conservative practitioners may find it advantageous in the coming years to join the growing list of attorneys marketing asset protection as either co-equal to or encompassing the more specific and always appealing idea of tax planning. As observed in a recent National Law Journal article commenting on the potential repeal of estate and GST taxes, "[w]hile it is true that a great deal of the estate planner's practice is tax driven, a stronger emphasis on wealth preservation for current and future generations will provide plenty of work to keep estate planning attorneys off the unemployment lines." The prospect of a perpetual trust, coupled with the general fear of runaway liability in a litigious society (which fear is often cited as a key motivation behind the DAPT trend), could elevate more
general asset protection concerns to a place that is second only to questions of who gets what, when.\footnote{See, e.g., Bockstein & MacGrady, supra note 210, at 13 ("As American society grows more and more litigious, however, a number of states are changing their public policy to some degree in order to permit the creation of what is commonly known as an asset protection trust (or self-settled spendthrift trust.")};\footnote{See MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005). A review of the book by Karen C. Burke and Grayson M.P. McCouch can be found at TaxProf Blog. Karen C. Burke & Grayson M.P. McCouch, Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth, (June 1, 2005), http://taxprof.typepad.com/taxprof_blog/files/burke_mccouch.pdf (book review). An interview with Mr. Graetz highlighting some of the book's conclusions can be found at Jasper L. Cummings, Jr., Interview with Professor Michael J. Graetz, NEWS Q. (A.B.A. Sec. Tax'n), Spring 2005, at 16, 16-19. As to the validity of some of the repeal proponents claims, see, for example, Richard Schmalbeck, Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes, 48 CLEV. ST. L. REV. 749 (2000).} This could cut in two directions, or as so often occurs with the American public today, in both directions without consistent resolution.

More specifically, with an increasing emphasis on and concern for asset protection planning comes: (i) an increased awareness of available asset protection mechanisms, including trust options; (ii) an increased understanding of to whose needs such devices are best suited; and (iii) a potentially greater demand for locally available trust asset protection alternatives, along with increased utilization of such devices where warranted. This raises a third issue in relation to the potential for transfer tax repeal. That issue pertains to public policy, how it is shaped, and federal outcomes fostered by interest groups and ideology.

Specifically, the recent push to repeal federal estate and GST taxes succeeded because of a savvy appeal to the "morality" of taxing death. Apart from the genius of the "death taxes" moniker itself, commentators recognize repeal proponents for their adept manipulation of the public debate to focus on such evils (whether real or imagined) as death taxes causing the destruction of family businesses and farms, causing the same income to be taxed twice, and generally punishing the successful realization of the American dream of upward mobility and prosperity.\footnote{Burke & McCouch, supra note 212.} As two commentators recently put it: "[t]hey presented repeal as a seductively simple, unambiguous moral imperative that appeared to promote both virtue and justice."\footnote{Burke & McCouch, supra note 212.} Popular anti-death tax sentiment was also fostered by the unrealistic optimism of most Americans, with 40% believing that they will soon be among the richest 1% in our
economic social order.\textsuperscript{214} This no doubt partially explains why appeals to "tax cuts for the wealthy" failed to carry the day.

Query whether the arguments levied and opinions shaped by the death tax debate might have some impact on the future of trust asset protection, particularly the self-settled variety. As discussed below, objections to such protections have, in fact, recently been voiced in both the popular media and Congress over the perceived advantages that self-settled trusts provide to the wealthy.\textsuperscript{215} If objections do persist, will public indifference once again be grounded in an optimistic assumption by most Americans that they are soon to need this protection to shield their own certain future wealth? Another dynamic to consider is the influential baby-boomer demographic.\textsuperscript{216} Specifically, the baby-boomers' desire to preserve their own inheritances—both to be received and to be passed on—could affect the tenor of any meaningfully popular sentiment towards asset protection trust devices.\textsuperscript{217}

On the other hand, there are several reasons to believe that the tepid public resistance to the repeal of a tax paid only by the richest Americans will not carry over into any potential debate over trust asset protection, which also tends to favor the wealthy.\textsuperscript{218} Regardless of whether one views tax repeal opponents as one in the same with those likely to decry asset protection trusts, it is likely that any resistance to the trust asset protection movement will articulate a better case than did transfer tax repeal opponents. Given that transfer tax repeal and asset protection both involve advantages for those with wealth to plan for, the general failures (thus far, anyway) of those arguing against tax repeal should provide an education relevant to those arguing for more limited parameters for trust asset protection. The tax repeal opponents are often faulted for responding to the anti-tax moral case with bare technical arguments supporting the imposition of the tax.\textsuperscript{219} Commentators suggest that those opponents would have been much better served by pursuing a moral stance that presented the issue as one of "opportunity and democratic values...embellished...with compelling stories of

\textsuperscript{214} Id.
\textsuperscript{215} See infra notes 244-254.
\textsuperscript{216} The baby-boom generation currently numbers about 78 million, with approximately 4 million per year reaching the age of 60 beginning in January, 2006. Hillary Chura, More American Retirees Seek Havens Abroad, N.Y. TIMES, July 30, 2005, at C5. See generally A. KIMBERLY DAYTON, THOMAS P. GALLANIS & MOLLY M. WOOD, ELDER LAW, CASES, MATERIALS, 1-14 (2d ed. 2003) (providing a good overview of the demographics of the aging American population).
\textsuperscript{217} Joel C. Dobris, Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance, 24 REAL PROP. PROB. & TR. J. 1, 7 (1989).
\textsuperscript{218} As will be discussed in more detail below, such a debate is, in fact, brewing.
\textsuperscript{219} Burke & McCouch, supra note 212.
prodigal heirs . . . born on third base yet behav[ing] as though they have hit triples."\textsuperscript{220}

Those arguments may resonate when it comes to inherited wealth passed on in trust for children and other descendants. Indeed, those arguments basically echo the attack on spendthrift trusts posited by John Chipman Gray in his well-known 1890s treatise.\textsuperscript{221} Self-settled asset protection trusts, however, present a different situation than does inherited wealth—perhaps one more in line with American capitalistic ideals. In this regard, an argument often presented in defense of self-settled trust protections is "[w]hy should a person be allowed to live debt free on the bounty of others [i.e., inherited wealth] while property which he has accumulated by his own effort [i.e., self-settled wealth] is denied the same immunity?"\textsuperscript{222} Those hoping to curtail the protections attributable to the DAPT movement will therefore need additional, timely arguments if they hope to avoid the fate of transfer tax repeal opponents.

**B. The Bankruptcy Debate**

It appears that DAPT opponents at the federal level are stating a plausible moral case that is not so complex as to be missed by those members of the public who participate in our political processes. As to the politicians themselves, some might question the likelihood that any meaningful resistance to the DAPT movement will arise. Those doubters would be remiss, however, to discount the significant role that another aspect of federal legislation—and the politics that accompany such legislation—might play in this regard. Specifically, the recently passed Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") sparked coherent (though unvictorious) opposition to self-settled asset protection trusts.\textsuperscript{223} The "opposition" here encompasses both those opposing the Act’s passage and those decrying self-settled asset protection trusts, the two groups generally being the same.

That opposition grounded its arguments in part on the disparate advantages afforded the wealthy under federal bankruptcy laws.\textsuperscript{224} But their arguments went further. The opposition also proceeded from the simple moral premise upon which the Act was defended by its

\textsuperscript{220} Id.
\textsuperscript{221} Regarding Gray’s arguments, see the text accompanying supra notes 40-46.
\textsuperscript{222} GRISWOLD, supra note 8, § 557.
supporters; namely, that one ought to pay one's debts. More specifically, the Act was touted by its supporters as cracking down on credit card scofflaws who fail to pay their consumer credit debts by seeking shelter under the Bankruptcy Code. That concept is in itself relevant to the perception and acceptability of asset protection trusts, echoing as it does Gray's spendthrift trust rant against a paternalistic state and the obligation to pay one's debts.

In the present setting, the argument finally met with some limited success. In particular, similar arguments motivated changes to the homestead exemption allowed under federal bankruptcy laws. Homestead exemptions basically allow debtors to protect their homes from utilization in payment of creditors in bankruptcy. The exemption has been attacked both because it varies so drastically in amount across states, and because it permits the wealthy to shield millions from creditors by purchasing expensive (and bankruptcy-protected) homes in states like Florida or Texas.

The opposition to the unrestrained homestead exemption met with only partial success. In lieu of imposing an absolute cap on the protections afforded across state lines via the homestead exemption, the opposition's victory was confined to limiting a debtor's ability to manipulate the homestead exemption by moving to a homestead-generous state in anticipation of filing bankruptcy. Specifically, the recently enacted legislation caps the homestead exemption at $125,000 unless the debtor resided for more than three and one-half years in a state permitting a higher exemption amount.

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225 See, e.g., Michael R. Crittenden, Bankruptcy Bill has Parties Dug In, 63 CONG. Q. WKLY. 572 (March 7, 2005) (noting that the purpose of the Act was to "make it more difficult for personal bankruptcy filers to escape debts they could repay," and further noting that "supporters say it would prevent the abuse of the bankruptcy code by those able to repay their debts").

226 See, e.g., id.

227 GRAY, supra note 4, at ix, x.

228 For an explanation of the homestead exemption, see Eason, supra note 129, at 65-66. With regard to the politics of bankruptcy legislation, public choice theory, and exemption policy in particular, see Richard M. Hynes et al., The Political Economy of Property Exemption Laws, 47 J. L. & ECON. 19 (2004); Posner, supra note 123, at 106-08.

229 In those states, there is no dollar limit on the amount that can be shielded from creditors via the homestead exemption. See, e.g., Patrick McGeehan, In Florida, No Wolves at the Door, N.Y. TIMES, Jan. 16, 2005, § 3, at 6. For a treatment of the homestead exemption as it exists in the fifty states, see ASSET PROTECTION STRATEGIES, supra note 7, at 175-92; NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 299-301 (1997) (setting forth state-by-state designation of homestead exemption in table form).

230 Again, the "opposition" on the issue of limiting the homestead exemption can loosely be associated with the "opposition" as identified in the text, supra.

231 See 11 U.S.C. § 522(p) (West, Westlaw through 2005). Even this victory may prove to be illusory, however, as one of the first rulings to apply the new provision held that the homestead cap only applied in states that had not "opted-out" of the federal exemption scheme. In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005). Approximately 35 states had opted-out, thus greatly reducing the reach of the recently imposed $125,000 cap. For a list of the "opt-out" states, see COLLIER ON BANKRUPTCY ¶ 522.01 (Alan N. Resnick & Henry J. Somner eds., 2005).
Legislative proposals seeking to curb the self-settled asset protection trust phenomenon proceeded from some of the objections raised in the homestead exemption debate. Specifically, APT opponents proposed amending the Bankruptcy Code to limit the amount of assets that a settlor could shield in a self-settled trust.\textsuperscript{232} The mechanism for this limitation involved the application of Bankruptcy Code § 541(c)(2) and the same $125,000 limit approved in the case of homestead exemption manipulation.\textsuperscript{233}

Section 541(c)(2) allows courts to respect an anti-alienation provision—thus precluding application of the affected property to satisfaction of creditor claims in bankruptcy—to the extent the provision is enforceable under "applicable nonbankruptcy law."\textsuperscript{234} A spendthrift provision is generally regarded as constituting such a restriction, the question usually being whether or not the provision is enforceable under nonbankruptcy law in a given situation. Thus, if a bankrupt debtor is the beneficiary of a trust that includes a spendthrift provision, and if that spendthrift provision is enforceable under applicable state law, then the debtor's beneficial trust interest and the underlying trust property supporting that interest remain beyond the reach of creditors, regardless of value.\textsuperscript{235}

Section 541(c)(2) has proven to be very important in the case of third-party spendthrift trusts.\textsuperscript{236} The provision also plays an important role in shielding retirement plan assets from the claims of creditors, even though many such plans could be regarded as in the nature of a self-settled arrangement.\textsuperscript{237} In the latter case of retirement plan assets,
ERISA specifically imposes an enforceable spendthrift restraint on such plan interests. Beyond that, however, non-retirement plan self-settled arrangements have (until recently) never found significant shelter under section 541(c)(2). The basic reason is that self-settled spendthrift provisions typically have not been enforceable under state law by virtue of the widely-followed traditional rule to that effect. Such trusts therefore failed the basic requirement for protection under section 541(c)(2). When DAPT legislation first appeared on the scene, some questioned whether section 541(c)(2) would apply to a suddenly enforceable self-settled arrangement. The concern was that, because of the widespread unenforceability of such arrangements when section 541(c)(2) and its predecessor provisions were enacted, self-settled arrangements were simply beyond the scope of legislative contemplation, and therefore beyond the scope of protection under section 541(c)(2). Despite such concerns, the bare language of the statute suggests that APT settlors have a significant avenue for sheltering assets in bankruptcy by virtue of the new state DAPT legislation and its interaction with federal bankruptcy law. Past judicial pronouncements in the context of section 541(c)(2)’s application to self-settled retirement plan interests support this conclusion.

As the culmination of an eight-year congressional battle left the Bankruptcy Act heading for almost certain passage in early 2005, the idea that section 541(c)(2) might shelter self-settled, non-retirement

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238 See Employee Retirement Income Security Act of 1974 § 206(d)(1), 88 Stat. 829 (codified as amended at 29 U.S.C. § 1056(d)(1) (2000)). The comparable tax provision is found in 26 U.S.C. § 401(a)(13). See also Scott & Fratcher, supra note 3, § 156.3, at 185 (noting that pension trusts are arguably self-settled in that “the trust is created in consideration of services rendered by the employees, and that the employees are therefore the settlors”).

239 See, e.g., In re Dyke, 943 F.2d 1435, 1444 (5th Cir. 1991) (“Not all...retirement plans...are spendthrift trusts: those retirement plans which are self settled do not qualify. And, in particular, if the beneficiaries of a plan enjoy access to and control over the funds in the plan, then the plan is not a spendthrift trust.”). See generally Peter Spero, Asset Protection Legal Planning Strategies § 10.04(2)(d) (2005) (discussing spendthrift protections and self-settled trusts).


241 Several of the state DAPT statutes make clear that the authorizing state law is intended to fall within the ambit of Bankruptcy Code § 541(c)(2). See, e.g., Utah Code Ann. § 25-6-14(1)(a) (2005) (“The [spendthrift] provision shall be considered to be a restriction on the transfer of the settlor’s beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code...”).

242 The language of 11 U.S.C. § 541(c)(2) is set forth in supra note 234.

plan asset protection trusts gained increasing attention and was dubbed the "millionaires loophole" in the popular media.\textsuperscript{244} These stories fueled sharp criticism of the perceived loophole by members of Congress.\textsuperscript{245} In particular, opponents of the Act sought to close this loophole, criticizing Republican backers of the Act for what opponents alleged was a simple case of favor-the-rich hypocrisy.\textsuperscript{246} Specifically, and as noted, the Act was intended to make it more difficult for consumers to escape payment of their debts. Many of the Act's opponents alleged that the Act worked to the particular disadvantage of the poor and middle class, and to the advantage of the consumer credit card industry.\textsuperscript{247} Self-settled asset protection trusts, by contrast, were not affected by the Act and were viewed as a debt-avoidance measure available only to the wealthy.\textsuperscript{248} Some found this loophole even more troubling than the unlimited amounts that could be sheltered through the homestead exemption, since utilization of a DAPT did not even require a move to the debtor-friendly state.\textsuperscript{249}

Against this background, Senator Charles Schumer (D–NY) proposed an amendment to the Act that would, if passed, significantly impact the utility of self-settled asset protection trusts.\textsuperscript{250} Specifically, the Schumer amendment would apply to a debtor in bankruptcy who possessed an interest in a self-settled trust entitled to exclusion from the bankruptcy estate by operation of section 541(c)(2). In such case, any transfer to the self-settled trust made within ten years of the bankruptcy


\textsuperscript{246} See, e.g., Id. (Statements of Sen. Feinstein and Sen. Clinton) ("What about the wealthy deadbeats?"); Crenshaw, \textit{supra} note 244 ("Critics of the bill argued that if Congress were going to pass a law making bankruptcy less hospitable for poor and middle-income people, it ought to do the same for the wealthy."); \textit{Bankrupt Bankruptcy Bill}, \textit{N.Y. Times}, Mar. 3, 2005, at A30 (editorial desk) (noting similar disconnect). Regarding the political party dynamics of the bankruptcy legislation, see Crittenden, \textit{supra} note 225, at 572-73.

\textsuperscript{247} See \textit{supra} notes 244-246.

\textsuperscript{248} See \textit{supra} notes 244-246

\textsuperscript{249} The availability of the homestead exemption generally depends upon the laws of the state in which the debtor resides at the time of filing bankruptcy, although under the new Act there is a forty-month residency requirement that must now be met before advantage may be taken of the limitations (or lack thereof) under a state's exemption laws. Regarding the homestead exemption, see \textit{supra} notes 228-231 and the accompanying text.

\textsuperscript{250} The proposed amendment is set forth in full at 151 CONG. REC. S1980-81 (daily ed. Mar. 3, 2005).
filing could be set aside, to the extent the aggregate amount of all such transfers exceeded $125,000.251 In support of his amendment, Senator Schumer explained:

Here is the problem. In five States... millionaires and even billionaires can stash away their assets... in a special kind of trust, so that they can hold onto that windfall even after filing for bankruptcy [because]... creditors wouldn't be able to reach anything in those trusts... With this loophole, the wealthy won't need to buy houses in Florida or Texas to keep their millions... It is a basic way for wealthy people to not pay their debts.252

Characterizing the issue as one of fairness in the treatment of wealthy versus other debtors in bankruptcy, Senator Ted Kennedy (D-MA) similarly argued that "average families... cannot take advantage of this loophole... [but] that's all right because the asset protection trust scam was... designed to protect millionaire deadbeats."253 Despite these appeals, however, the Schumer amendment was defeated in the Senate 56 to 39, with Republicans generally united in opposition.254

The Senate did, however, pass another amendment affecting DAPTs. That amendment was sponsored by Senator Jim Talent (R-MO). The amendment relates to Bankruptcy Code § 548(a)(1)(A), which provides for a one year limitations period during which the bankruptcy trustee can set aside any transfer deemed to have been fraudulent.255 The Talent amendment extended that one year limitations period to ten years, but only in the case of a transfer to "a self-settled trust or similar device" made with "actual intent to hinder, delay, or defraud creditors."256

Clearly, then, self-settled asset protection trusts have appeared plainly on the congressional radar screen. Beyond this simple fact, there are two possible ways to view rejection of the Schumer Amendment and passage of the Talent Amendment. Each view suggests a markedly different future for the viability of these self-settled protective trusts.

As to the Talent amendment, DAPT proponents view its passage as troubling, but more so because of its sloppy language (e.g., "trust or similar device") than a feeling that Congress was truly after DAPTs

251 Id.
253 Id. (statement of Sen. Kennedy).
254 Id.
255 Id. (statement of Sen. Talent).
generally or determined to meaningfully impede their effectiveness. The amendment’s “actual intent” requirement, and the fact that most DAPT states already provide that a fraudulent transfer to a DAPT can be avoided in any event, serve as the basis for this confidence. Further still, the amendment would have virtually no real effect on those using DAPTs for the purposes and in the manner many practitioners advocate. Specifically, many asset protection planners assert that an APT should only be used to shelter a “nest-egg,” and that settlors should retain sufficient funds to discharge any anticipated debts when the trust is funded. Some even suggest that an APT should include a provision directing the trustee to satisfy any claim based upon a debt that was incurred prior to establishment of the trust. To these practitioners, the Talent amendment may have little effect beyond the unsatisfying feeling that a settlor might have to litigate a matter as to which she ultimately feels confident of victory. For all practical purposes, then, the Talent amendment was perhaps a simple face-saving gesture passed with an eye towards hindering malfeasant corporate directors, and not a frontal assault on DAPTs.

Continuing with this viewpoint, DAPT proponents hailed the defeat of the Schumer amendment as having quite favorable implications for the burgeoning DAPT market. Proponents claim that the congressional discussions of the amendment confirm that DAPTs

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257 David G. Shaftel & David H. Bundy, Impact of New Bankruptcy Provisions on Domestic Asset Protection Trusts, 32 EST. PLAN. 28, 30 (2005), available at http://shaftellaw.com/docs/article 25 pt3.pdf (“If the new amendment is construed and applied similarly to Bankruptcy Code section 548 and UFTA, then the enactment of this provision will have added little to the law in this area.”).

258 As to the difficulty proving actual intent to defraud in the case of a self-settled trust, see 151 CONG. REC. S2138 (daily ed. Mar. 7, 2005) (Statement of Sen. Schumer); see also Sterk, supra note 1, at 1047 (“[P]roving actual intent is notoriously difficult.”). Professor Sterk also discusses the debtor-friendly provisions of Alaska’s self-settled spendthrift trust statute, noting as particularly creditor-unfriendly the statute’s inclusion of an actual intent standard, without any constructive fraud provision. Id. at 1053.

259 Duncan E. Osborne & Elizabeth M. Schuring, What ACTEC Fellows Should Know About Asset Protection, 25 ACTEC NOTES 367, 370-71 (2000) (explaining that asset protection attorneys should conduct a “solvency analysis” of prospective APT clients and suggestion that sheltering 30% of that portion of the client’s wealth that accounts for the client solvency); Shaftel, supra note 240, at 17 (“A ‘rule of thumb’ has developed concerning the portion of a client’s assets which should be transferred to a DAPT . . . no more than one-third.”); see also Costigan, Jr., supra note 3, at 491-92 (opining that self-settled trusts should be respected where the settlor “keeps out of the trust assets sufficient to discharge his existing debts”); A. JAMES CASNER & JEFFREY N. PENNELL, 1 ESTATE PLANNING § 4.1.4 (6th ed. Supp. 2002) (discussing protection of a “nest-egg” portion of a settlor’s wealth).

260 See, e.g., Rosen & Rothschild, supra note 2, at pt. I.D.4.b (suggesting this approach).

261 See, e.g., Crenshaw, supra note 244 (“[A]nyone prescient enough to set up a trust and move assets into it well before getting into trouble would likely be untouched by the new rule.”).

262 The stated purpose of the Talent amendment was “[t]o deter corporate fraud and prevent the abuse of State self-settled trust law.” 151 CONG. REC. S2138 (statement of Sen. Talent).
fall squarely within the section 541(c)(2) bankruptcy exclusion.\textsuperscript{263} Those proponents take the matter a step further by arguing that consideration of the two noted amendments—and in particular the failure of the Schumer amendment—"placed squarely before Congress the question of whether DAPTs, formed without fraudulent transfers, should be allowed. Congress decided affirmatively, by a wide margin."\textsuperscript{264} In this view then, Congress has presumptively endorsed the extensive asset protection afforded by DAPTs. Apart from the fraudulent transfer inconvenience, under this view the prospects for continued growth in the prevalence of such trusts look favorable, to say the least.

While there is some merit to the foregoing reasoning, a ringing congressional endorsement of DAPTs is hardly apparent. The idea that section 541(c)(2) encompasses DAPTs, moreover, is not much of a revelation in light of the "plain language" interpretation given that provision by the Supreme Court in its 1992 \textit{Patterson v. Schumate} decision.\textsuperscript{265} There are even a few negatives associated with the Talent amendment that suggest it should not be so quickly dismissed. As DAPT proponents themselves point out, for example, the Talent amendment is hardly a model of drafting clarity. That amendment will likely require technical corrections, and possibly judicial construction, before its full import is settled.\textsuperscript{266} This presents further opportunity for imposing more stringent limitations. Regardless of its actual effect, moreover, the Talent amendment could deter more conservative settlors from pursuing DAPTs. This is because regardless of the lack of any associated fraud, some settlors may find a meaningful disincentive in the fact that their trusts would remain subject to litigation for the extended limitations period.\textsuperscript{267}

As to the import to be accorded the defeat of the Schumer amendment, a keener understanding of Senate politics should leave DAPT proponents troubled. Republican opposition to that amendment likely had as much to do with a desire to get the Act through the Senate without complicating amendments as it did with any particular

\textsuperscript{263} See Shaftel & Bundy, supra note 257, at 28.
\textsuperscript{264} Id. at 30.
\textsuperscript{265} Patterson v. Shumate, 504 U.S. 753 (1992). The court in that decision expressly disavowed any need to consult the legislative history because, according to the court, the plain language of the statute was clear. See generally Eason, supra note 237, at 218-20. As to section 541(c)(2) sheltering DAPTs, a similar question was raised on the Senate floor, to which Senator Schumer responded that the exclusion in that case was "pretty clear-cut," as opined upon by congressional staff attorneys. 151 Cong. Rec. S2138-39 (Mar. 3, 2005) (statement of Sen. Schumer).
\textsuperscript{266} Shaftel & Bundy, supra note 257, at 30-31; Rothschild, supra note 256, at 493-94.
\textsuperscript{267} The perceived importance of this vulnerability is evident from one of the touted features of both domestic and offshore APT legislation that is designed to lure trust business. That advantageous feature is a shortened statute of limitations for bringing fraudulent transfer claims. See Shaftel, supra note 240, at 17-18 (discussing this issue).
endorsement of DAPTs. This is because the bankruptcy legislation was a Republican favorite, twice vetoed by President Clinton.\textsuperscript{268} That legislation had been languishing in the halls of Congress for over eight years.\textsuperscript{269} Prior efforts to push the Act through the Republican-controlled Congress, for example, were once thwarted by Democrats' introduction of an amendment that would remove bankruptcy protection for certain abortion protestors.\textsuperscript{270} The Republican Senators therefore wanted to keep the legislation "clean" through the current battle, in order to increase the likelihood and speed of enactment.

But if the Schumer amendment's defeat can be attributed more to political maneuvering than to substance, how then does one explain passage of the Talent amendment? A plausible explanation is that, in contrast to the Schumer amendment, the Talent amendment was acceptable because: (i) it was Republican-sponsored and therefore likely to encounter little resistance in the Republican-dominated House; (ii) it provided an opportunity for Republicans to "save face" by saying they had addressed the recently publicized DAPT "millionaire's loophole"; and (iii) it simply modifies an existing Bankruptcy Code provision by extending its limitations period, whereas the Schumer amendment would effectively supplant federal deference to state law regarding the efficacy of certain protective trusts—that deference representing a federalism aspect of bankruptcy legislation for over 100 years.\textsuperscript{271}

Given this explanation, the comments on the Senate floor of Republican Senator Charles Grassley (R-IA) are worthy of note. Senator Grassley took a leading role in defeating the Schumer amendment. Consistent with the above explanation of the amendment's failure, Senator Grassley first cited the pursuit of an unencumbered Senate bill as he appealed to a need for further study to avoid the Schumer amendment's potential for "unintended consequences."\textsuperscript{272} Most interestingly however, Senator Grassley then proceeded to clarify his stance on the Schumer amendment when he said: "[b]e sure . . . that my opposition to this amendment doesn't mean that I will not ultimately find that this issue needs to be addressed at some future date."\textsuperscript{273} Apparently, other Republican senators felt likewise. More specifically, Senator Schumer reported afterwards that he counted ten Republican senators stating that they would have voted in favor of the amendment were it not for the Senate leadership's strong push to reject all

\textsuperscript{268} For a detailed explanation of the history of this bankruptcy legislation, see Eason, \textit{supra} note 237, at 231-32 n.265.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.}
\textsuperscript{272} 151 CONG. REC. 1994 (statement of Sen. Grassley).
\textsuperscript{273} \textit{Id.}
Democratic efforts to encumber the legislation with amendments, without regard to how meritorious those amendments might seem.\textsuperscript{274}

This outlook may prove prescient, because it may be difficult for those recently favoring the Act to oppose a future version of the Schumer amendment without seeming hypocritical, given the rhetoric emanating from the Republican side of the isle about assuming personal responsibility for one's debts. With the excuse/pressure to pass a clean bill no longer present, a future introduction of this amendment might very well find its way into the Bankruptcy Code. Given the strong language employed by supporters of the Schumer amendment—"outrageous"\textsuperscript{275} and "shocking loophole"\textsuperscript{276} for example—it seems reasonable to speculate that a similar amendment will in fact be forthcoming. The most plausible arguments against passing such an amendment in the future will likely be (i) an assertion that the Talent amendment adequately addresses the problem, and (ii) concern that the Schumer amendment raises federalism concerns by trumping state decisions as to the validity of spendthrift trust protections.\textsuperscript{277} Whether these arguments succeed, fail, or result in strengthening of the Talent amendment's limitations, it does bear the potential to meaningfully affect the DAPT movement.\textsuperscript{278}

The idea that an amendment similar to Schumer's could pass Congress presents an interesting consequence. The Schumer amendment would clearly weaken the potential protection afforded by a DAPT. Such an amendment would, however, likely have little effect on a properly structured offshore APT (OAPT). Although a bankruptcy court has nationwide jurisdiction and can thus deal with any DAPT, that court does not have international jurisdiction.\textsuperscript{279} In part because of this, and in part because of constitutional and other uniquely domestic

\textsuperscript{274} Stephen Labaton, Senate Rejects Efforts to Alter Bankruptcy Legislation, N.Y. TIMES, Mar. 4, 2005, at C4. The Senate, for example, rejected a Democratic amendment that would have provided additional bankruptcy protections for families affected by military service in the Middle East. Another amendment would have helped families facing bankruptcy due to enormous uninsured medical bills.


\textsuperscript{276} Id.

\textsuperscript{277} Regarding this federalism issue, see the text accompanying supra notes 123, 271.

\textsuperscript{278} Although self-settled trust are not banned under the Schumer amendment, they would face significant new exposure to creditors' claims. Recall that unlike the Talent amendment, the Schumer amendment does not require "actual intent" or other triggers apart from the $125,000 threshold and section 541(c)(2) exclusion. If nothing else, this may push all but the young-wealthy to simply skip the DAPT trend and move directly to the more traditional and protection-certain third party spendthrift trust. See, e.g., Crenshaw, supra note 244, at F1 (quoting Harvard Professor Elizabeth Warren as stating, with regard to the possibility that the protections sought through a self-settled trusts might be thwarted under the Bankruptcy Code: "Only a childless, unmarried, orphaned hermit who could think of no one to make the ultimate beneficiary . . . of his trust . . . has to worry").

\textsuperscript{279} 11 U.S.C. § 1334(e) (2000). For a detailed discussion of the limits of bankruptcy court jurisdiction in the context of APTs, see Sterk, supra note 1, at 1089-100.
concerns, a properly structured OAPT is likely to provide immunity from domestic creditor claims more quickly and more certainly than would a DAPT.\footnote{For comparisons of the protection afforded DAPTs relative to that afforded by OAPT’s, and a rundown of particular advantages inherent in the OAPT model, see, for example, Rosen & Rothschild, supra note 2, at pt. VII.A.6; Nenno, supra note 197, at pt. XV.} The bankruptcy trustee, for example, would have little practical ability to levy against offshore trust assets, regardless of any ten year limitations period or the absence of an exclusion under section 541(c)(2).\footnote{See supra note 279.} It would seem that the most a court could do would be to deny the debtor-settlor a discharge from her debts in bankruptcy.\footnote{With regard to alternative sanctions against a trust settlor where the trust assets remain beyond the court’s reach, see, for example, Lischer, supra note 13, at 576-96; Sterk, supra note 1, at 1100-01; Bergman, supra note 211, at 19-21.}

If a settlor truly relinquishes control of an OAPT located in a debtor-friendly offshore jurisdiction, moreover, a court would have little basis for holding a debtor-settlor in contempt of court, as has been done in a few cases where settlor control or blatant fraud were evident.\footnote{See Lischer, supra note 13, at 584-85 n.94 (discussing academic versus practitioner spin on the import of these cases); Rosen & Rothschild, supra note 2, at pt. VI.I.1 (“Other cases with similarly egregious fact patterns will likely garner similar results.”).} Thus, from a planning perspective at least, an enacted Schumer amendment may simply undermine DAPTs, while luring more dollars into offshore asset protection vehicles.\footnote{With regard to the potential flight of trust capital from the United States to offshore locales, see Sterk, supra note 1, at 1106, 1114-15 (“The bigger problem is with offshore trusts ... [w]ith respect [to which] American courts have fewer tools to enable creditors to reach trust assets. As a result, offshore trusts remain attractive ...”); Rosen & Rothschild, supra note 2, at pt. XV (comparing advantages offered by OAPTs relative to DAPTs, and vice-versa); Eason, supra note 162, at 101-04 (discussing drawbacks of limitations on APTs that would impact the domestic variety more severely than the offshore variety, due to constitutional and other concerns unique to the domestic trust).} The Internal Revenue Service would not be happy with this consequence.\footnote{For a discussion of the IRS concern that offshore trusts serve primarily as a vehicle for tax evasion, see Eason, supra note 162, at 51-53, 101-04.} Query also whether interest groups benefiting from the annual $1 billion in trustee fees flowing to trust-friendly (though not necessarily asset protection) states might see this as a negative development and thus lobby their local congressmen to oppose the legislation.\footnote{As reported by Sitkoff & Schanzenbach, supra note 162, at 411.} To the extent that seems plausible, one should not overlook the sway such groups have had at the state level in getting DAPT and other trust-friendly laws passed.\footnote{See supra text accompanying notes 159-181.} In any event, the Schumer amendment prospect bears close watching for those interested in charting the future course of the DAPT phenomenon.
C. Medicaid Dynamics

Another aspect of the potential federal influence on the future of protective trusts relates to the Medicaid program. The Medicaid program was established by Congress in 1965, is jointly funded by the federal and state governments, and is administered by each state within federal parameters. The program exists to provide healthcare coverage for those with low incomes and insignificant assets. In fact, Medicaid “is the nation’s largest public health insurance program and pays for nearly half of all nursing home care in the country.”

Because the costs of long-term nursing home care can quickly impoverish those who do not qualify for government-supported care, “Medicaid planning” has become a popular legal strategy among those who are “wealthy” by Medicaid standards. The basic idea of Medicaid planning is for an individual to impoverish herself for Medicaid qualification purposes while simultaneously preserving her assets for, among other things, surviving spouses and lineal descendants. As this technique spreads, the government finds itself confronting the prospect of maintaining the Medicaid program in the face of increasing healthcare costs and a rapidly aging American populace.

The competing objectives of individuals (seeking to qualify) and the government (seeking to limit costs) have led to “look-back” rules whereby an individual forfeits Medicaid eligibility for three years or more following certain asset transfers, as well as federal


289 CMS Website, supra note 288.


291 See generally Jane Gross, In Effort to Pare Medicaid, Long-Term Care is Focus, N.Y. TIMES, June 27, 2005, at A1 (discussing the Medicaid and long-term care financing situation, and some of the strategies employed by individuals trying to maximize their options under the current system).

292 There are, of course, certain protections built into the qualification guidelines to protect a couple’s income and assets for use by the non-institutionalized spouse. A detailed explanation of Medicaid qualification criteria, state variations, and Medicaid planning strategies is beyond the scope of this Article. For further details, see, for example, Frolick & Brown, supra note 288, at ch. 14. For examples of Medicaid planning situations, see Thomas D. Begley, Jr. & Andrew W. Hook, Legal Ethical Issues in Transferring Assets for Medicaid Planning: Case Studies and Contrasts, 30 EST. PLAN. 522 (2003).

legislation mandating that states seek to recover costs from the estates of former Medicaid recipients.\textsuperscript{294}

With this background in mind, there is much that can be said about Medicaid in the context of trust asset protection. The government’s role as creditor and the effects of trust interests upon a trust beneficiary’s eligibility for Medicaid are important issues. Not surprisingly, much has been said about the technical structuring of trusts to minimize conflict with Medicaid-related objectives.\textsuperscript{295} In light of the current discussion of federal policies affecting the asset protection environment, however, different concerns are addressed here. In this regard, it is helpful to understand the current Medicaid program as representing a conflict—or perhaps competition is the better word—among four policy dynamics. Considered together, these dynamics may have important implications as to how protective trusts are perceived and tolerated in the coming years.\textsuperscript{296}

First among the referenced dynamics is the reality of the current government budget situation at both the state and federal level.\textsuperscript{297} Couple that with the rising cost of healthcare and the imminent aging of the baby-boom generation, and the prospects for maintaining even the currently flawed system of financing long-term care seem bleak.\textsuperscript{298} This reality helps to explain the call in President Bush’s latest budget proposal for more stringent rules regarding the asset transfers that often

\textsuperscript{294} A Medicaid recipient’s estate might have value notwithstanding the income and resource eligibility criteria, because not all assets or sources of income count in this determination. Homes, for example, are often excluded. See generally FROLICK & BROWN, supra note 288, at ch. 14 (discussing qualification criteria, asset transfers, potential penalties, and Medicaid estate recovery); Janel C. Frank, How Far is Too Far? Tracing Assets in Medicaid Estate Recovery, 79 N.D. L. REV. 111 (2003) (discussing Medicaid program and estate recovery process).


\textsuperscript{296} Although in the Medicaid context protections are typically afforded via discretionary trust interests, little is lost by generalizing about spendthrift trust concerns, in this broader context of variations on protected versus vulnerable trusts and trust interests.


\textsuperscript{298} See, e.g., Bernard A. Krooks, Eldercare, TR. & EST., Jan. 2003, at 47 (“Facing severe budget shortfalls, of which long-term care is one, if not the single largest item, many states are aggressively restricting access to Medicaid. And courts are backing them.”).
accompany a "Medicaid planning" strategy of self-impoverishment. 299 States are similarly acting to restrict access to Medicaid-funded long-term care for those perceived to have the means to provide more for themselves. 300

This implicates a second policy dynamic that is as much a circumstance of the current political environment as it is of the burgeoning federal budget deficit (if the two are in fact distinct). Specifically, there is an increasing push for what has been called an "ownership society," a corollary of which is the increasing call for "personal responsibility." 301 Such calls were part of the debate over the Bankruptcy Act noted above and have also gained attention in the context of reforming Social Security. 302 In the Medicaid context, these concepts translate into the idea that individuals should bear more responsibility for the financing of their own long-term care. 303 A report recently released by the National Governors' Association, for example, identifies as its first theme reform proposals that include "a number of incentives and penalties for individuals to take more responsibility for their health care." 304

The call for more personal responsibility in financing long-term care (the second noted dynamic), coupled with increasing limitations on asset transfers and other strategies designed around the Medicaid program (the first noted dynamic), together implicate a third policy dynamic. Simply stated, the combined effect of implementing the referenced policies can only serve to expose and likely deplete the assets of current and future seniors. Affected seniors might otherwise have transferred such assets to subsequent generations. Preserving assets for both the senior's supplemental care and transfer to subsequent generations are, in fact, the primary goals of the genre of legal practice that has come to be known as Medicaid planning. 305 In this regard, one commentator has observed that "children... want 'their

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299 An overview of and links to the President's fiscal year 2006 budget proposal can be found at http://www.whitehouse.gov/infocus/budget/2006 (last visited Apr. 13, 2006); see also Gordon, supra note 297.
301 In the Social Security context, for example, the "ownership society" mantra played a prominent role in the spinning of President Bush's private account proposal.
303 Bernard A. Krooks, Taking Stock, TR. & EST., Jan. 2004, at 46 (including by-line "Every man for himself: governments are trying to shift health care costs back to individuals; while the feds are leading people into the commercial market, states are offering no alternatives—they just want to cut benefits.").
304 Governor's Report, supra note 293; see also Gross, supra note 291.
305 See supra text accompanying notes 291-294 regarding Medicaid planning.
heritances. . . . Simply put, the engine that drives the divestment of assets to qualify for Medicaid is the children. They feel entitled to an inheritance . . . .”

The relevance of this to trust asset protection arises through interaction with a fourth policy dynamic. Specifically, the depletion of assets either to pay for long-term care directly or to become eligible for Medicaid-paid care is a distinctly middle-class phenomenon. Simply stated, the poor by definition don’t have much anyway and are therefore generally eligible for Medicaid. The rich don’t need (or necessarily want) Medicaid-paid care because they can make other, likely better, arrangements. A middle class senior, by contrast, is not eligible for Medicaid prior to self-impoverishment, which is likely in the case of age-related infirmity given that most middle class seniors generally cannot afford to sustain payment for long-term care. As one Elder Law attorney recently testified before Congress, these seniors face a “lose-lose” situation—lose their health and face a staggering cost of care, or impoverish themselves in order to qualify for Medicaid benefits. It is this situation that has led some to view the Medicaid outcome as “the estate tax on the disabled,” or perhaps more accurately, the estate tax on the middle class age-infirmed.

An article recently appearing in the popular press touched upon all four of the policy dynamics noted here. In discussing the current U.S. long-term care situation and the efforts to reform Medicaid, that article’s author explained:

The idea is to restrain the explosive growth in the taxpayer contribution to the cost of long-term care for middle class Americans in frail old-age by making it harder to qualify for government benefits and shifting costs to individuals . . . . Lawmakers are rushing . . . proposals to remove from the Medicaid rolls people who are not poor by standard definitions . . . . [This issue of] long-term care . . . holds a disproportionate place on the national agenda because of the baby boom generation, 78 million strong. Many of the boomers are managing their parents’ care, snarled in Medicaid’s

306 Dobris, supra note 217, at 7-8.
308 Id. Those arrangements might include the purchase of long-term care insurance, or perhaps simply using some portion of their assets to pay for long-term care directly. See Krooks, supra note 298, at 47.
309 The cost of a nursing home for elders can be as high as $100,000 per year, and so for a few years’ stay this represents a total estate depletion that is much less significant to those standing in line to inherit millions, than to someone standing in line to inherit (absent such costs) say, $500,000. See Gross, supra note 291.
310 See Krooks Statement, supra note 307.
311 Id.
regulations and hoping to preserve an inheritance to pay for their own old age.\textsuperscript{312}

As the foregoing attests, the policy dynamics considered here are not simply ideas buried in the halls of academia or under the green visors of government actuaries and accountants. This is mainstream, every day stuff.

\section*{D. Are We There (Where?) Yet?}

So, consider where this leaves us. We have the baby boom generation, many of whose members are both becoming seniors themselves and facing the prospect of overseeing care (and assets) for their own elderly parents. The situation is common and personally felt. At the same time, we have an environment where "gaming the system" through asset divestment or other means of preserving wealth are the object of growing government attention and limitation. Such strategies are under attack by those who would impose more "personal responsibility" for the generally unavoidable costs of declining health in old age.\textsuperscript{313} The consequences, in turn, are visited primarily upon the middle class, to the detriment of middle class inheritances. Yet, at the same time, we see a federal debtor-creditor framework that facilitates the preservation of unlimited wealth through self-settled and other protective trusts, which, depending upon the chosen state law, may obviate the need to pay any creditors at all. Looking deeper, we also find a tax system on the verge of permitting unlimited (or greatly increased, from a middle class perspective) sums of wealth to pass from generation to generation. Couple all of this with the growing movement to embrace perpetual trusts at the state level, and Gray's feared land where "men not paying their debts should be kept in luxury on inherited [or now, even self-made protected] wealth"\textsuperscript{314} has perhaps never been closer to realization.

But whether the policy dynamics underlying these movements will find purchase outside the realm of stereotypically described liberal academics, northeastern congressmen, and likewise geographically-challenged editorialist has yet to be seen. Beyond the halls of Congress and state capitols, it is unclear what will move the broader public, if anything. Will they be moved by their optimism for their own prospects

\textsuperscript{312} Gross, \textit{supra} note 291.

\textsuperscript{313} Of course, death prior to the onset of physical or mental deterioration that requires skilled nursing care is an alternative, as is the prospect of having a family that can and will care for the senior outside of the nursing home environment. The alternatives, however, are not necessarily available or acceptable to many seniors.

\textsuperscript{314} \textit{GRAY, supra} note 4, at 246.
of becoming wealthy, or their own middle class reality of dwindling inheritances in light of greater restrictions (increased asset transfer penalties) and vulnerabilities (estate recovery) and private costs in the Medicaid context. One could further wonder which might prevail: the general American aversion to aristocratic privilege, or the equity of allowing the self-made man to do for himself what the wealthy have long been able to do for their heirs? Whether the currently powerful conservative movement can maintain its mantra of personal responsibility while resisting changes to the current asset protection landscape—particularly the self-settled variety—is another question that will bear upon trust asset protections in the coming years. Should protection for the self-made fall, moreover, one would have to ponder whether similar protections for unlimited amounts of inherited wealth would thus be rendered vulnerable too.

**CONCLUSION**

I have attempted to set forth above several ideas for consideration in evaluating the likely future course of trust asset protection. I am sure there are many more questions, as well as ideas and arguments when it comes to answering those questions. As to predictions about where all of this will lead, however, I defer once again and finally to the words of John Chipman Gray: “I am no prophet, and certainly do not mean to deny that [these protective trusts] may be in entire harmony with the Social Code of the [new] century.”

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315 On the latter point, see GRISWOLD, supra note 8, § 557.
316 GRAY, supra note 4, at x.