

10-1-2008

Thunder in Paradise: The Interplay of Broadening United States Anti-Money Laundering Legislation and Jurisprudence with the Caribbean Law Governing Offshore Asset Preservation

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Thunder in Paradise: The Interplay of Broadening United States Anti-Money Laundering Legislation and Jurisprudence with the Caribbean Law Governing Offshore Asset Preservation Trusts

Evan Metaxatos*

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* Juris Doctor candidate, May 2009, University of Miami School of Law. B.S., North Carolina State University. I would like to dedicate this article to my family, Harry, Kitsa, and Peter Metaxatos. They taught me to fly, but kept me grounded. This article would not be possible without them. I would also like to thank the late Professor Alan C. Swan, whose advice and guidance were invaluable.

I. INTRODUCTION

Traditional notions of 'offshore accounts' bring to mind images of large sums of money gained through illegitimate means and purposefully concealed from the view of United States authorities, or earned legitimately but shielded from otherwise applicable taxes by means of its location in an offshore account. While there may be some historical basis for this assumption, the modern offshore asset preservation trust is far removed from such preconceived notions and much more nuanced.

Over \$5 trillion dollars is invested in banks, mutual funds and trusts located across the world's 35 international offshore financial centers¹ and many law-abiding customers are increasingly placing their money in what have simultaneously been called offshore asset preservation trusts, asset protection trusts, or self-settled trusts.² In reality, asset preservation trusts offer few tax advantages;³ their primary benefit is instead derived from the privacy they provide their beneficiaries and settlors, their flexibility, and their ability to withstand the jurisdictional furor of foreign judgments.⁴

Offshore asset preservation trusts have come under attack in recent years, however, by both U.S. legislators and courts frustrated in their attempts to enforce judgments in foreign jurisdictions. Much of this pressure is the result of the frequent use of asset preservation trusts in concealing and shielding assets derived from fraudulent schemes and money laundering associated with the illegal drug trade.⁵ An increasing amount of pressure, however, is being directed towards these trusts due to their use in more legally ambiguous activities such as protection of assets from foreign civil judgments.⁶ Attacks on asset preservation trusts have come in the form of an increasingly broadening view of the reach of American jurisdiction, the enactment of new legislation for the purpose of combating the money laundering, and

1. Alexandra Marks, *Americans Move Piggybanks Offshore*, CHRISTIAN SCI. MONITOR, Oct. 9, 1997, at 2.

2. GILBERT KODILINEYE & TREVOR A. CARMICHAEL, COMMONWEALTH CARIBBEAN TRUSTS LAW 319 (2nd ed. 2002).

3. Barry S. Engel, *Integrated Estate Planning with Foreign-Situs Trusts*, 31 TAX ADVISER 102, 3 (2000).

4. *Id.*

5. Marks, *supra* note 1.

6. *Id.*

international cooperation with offshore jurisdictions.⁷

This article will first discuss the general benefits to be derived from the management of both legitimate and illegitimate offshore asset preservation trusts, and whether some of the more ambiguous features of such trusts lead to the conclusion that they are fraudulent on a *de facto* basis. It will then address the steps the United States has taken recently, both legislatively and judicially, to reach the assets in these trusts, and some of the international cooperative efforts undertaken to combat the illegitimate ways in which people have used offshore asset preservation trusts. This article will next focus on the myriad of responses to U.S. pressure by various offshore Caribbean jurisdictions, with special focus on the Bahamas and the Cayman Islands. Lastly, the article will address whether American laws have over-reached in their attempt to combat money laundering, the sufficiency of the Caribbean response to American pressure, and what the drafter of an asset preservation trust should keep in mind when forming and managing a 'legitimate' offshore asset preservation trust.

II. THE BENEFITS OF ESTABLISHING AN OFFSHORE ASSET PRESERVATION TRUST

It is no coincidence that the rising popularity of offshore asset preservation trusts in recent years has paralleled the sharp rise of litigation in the United States.⁸ As an increasingly large segment of the population has found themselves subject to liability by U.S. courts, they have sought to protect themselves from potential creditors by placing their assets beyond the reach of a court's jurisdiction. Once reserved for the ultra-wealthy, asset preservation trusts can now be opened over the internet in order to shield doctors from malpractice suits or insulate assets in dispute during a divorce proceeding.⁹ While both domestic and foreign asset protection trusts may be able to provide a base level of protection against U.S. creditors, foreign trusts provide additional benefits because of their geographical location, divergence from certain

7. See generally SHAZEEDA A. ALI, MONEY LAUNDERING CONTROL IN THE CARIBBEAN 233 (2003).

8. D. Osborne, *Asset Protection for United States Clients*, 4 J. OF INT'L TR. & CORP. PLAN. 12 (1995).

9. Barry Flynn, *Many Steer Clear of Offshore Opportunities: Secret "Asset-Protection Trusts" Can be Legal or Not, But They're Risky Either Way*, ORLANDO SENTINEL, May 14, 2001, at A6.

common law forced heirship laws, the ability for a trust to be “self-settled,” and immunity from foreign judgments.

Both the role asset preservations trusts play in avoiding foreign judgments and the legally tenuous means by which they accomplish their role have lead some critics to conclude that such trusts are fraudulent devices by their very nature.¹⁰ Others argue, however, that as punitive damage awards in the United States continue to increase, people are justified in moving their assets to offshore jurisdictions where such unreasonable awards are less likely to be awarded, and that U.S. courts should respect the laws and sovereignty of these foreign jurisdictions.¹¹

A. *Tax Benefits*

Contrary to popular belief, harboring money in an asset preservation trust does not immunize either the settlor or the beneficiary of the funds from tax liability in their home country. Although the settlor of such trusts typically does not have to pay taxes in the offshore jurisdiction where the trust is located, the settlor is still liable for any taxes in their home jurisdiction where the assets were initially procured.¹² Avoidance of taxes is therefore not an important factor contributing to the decision of a settlor to go offshore.¹³ The benefits of such trusts have instead been characterized by the degree of control they afford their settlors, their protection by strict banking confidentiality laws, and the immunity they enjoy from foreign judgments.

B. *Self-Settled Trusts*

The defining characteristic of an offshore asset preservation trust is its allowance of the settlor to retain control over both the management of the trust and its ultimate retention.¹⁴ The very

10. See generally *Fed. Trade Comm'n v. Affordable Media, L.L.C.*, 179 F.3d 1228, 1240 (9th Cir. 1999).

11. Marks, *supra* note 1.

12. G. Scott Dowling, Comment, *Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act*, 17 *TRANSNAT'L LAW* 259, 273-274 (2004).

13. It will be discussed later, however, that the typical offshore jurisdiction will only be willing to enforce a foreign criminal judgment if the crime for which the defendant was convicted for in their home jurisdiction is also a crime in the jurisdiction where the trust is located. Since offshore jurisdictions typically do not have income taxes, they do not have laws making failure to pay income taxes a crime.

14. Mario A. Mata, *Consolidating a FLP or FLLC with a Self-Settled Trust to Enhance a Client's Wealth Preservation Strategies*, *ALI-ABA COURSE OF STUDY* 133,

idea of a self-settled trust¹⁵ seems paradoxical to people who view a trust as an instrument in which the settlor relinquishes control of his assets.¹⁶ Typically a settlor must still show caution in the amount of control he exerts over trusts.¹⁷ As offshore legislation expands such power, however, a settlor increasingly has more latitude to govern the disposition of his assets. For instance, under Cayman Island trust legislation, a settlor can revoke, vary, or amend the trust instrument; instruct a trustee regarding how the funds should be invested; change the forum law by which the trust is governed; and reserve for himself a beneficial interest in the trust.¹⁸ Engaging in such activities with an ordinary trust would typically lead to the trust being considered a sham,¹⁹ but this is much more difficult when these powers are statutorily authorized. As a result of such power, it can be nearly impossible for a Caribbean court to conclude that an asset preservation trust is a sham which would render it vulnerable to foreign judgments.²⁰

C. *Strict Banking Secrecy Laws*

People also flock to offshore asset preservation trusts in order to reap the benefits of their unrivaled banking secrecy laws.²¹ While some people may use offshore trusts in order to conceal illicit funds from the eyes of U.S. investigators, others do it because they fear 'Big Brother' or simply wish to keep their affairs private.²² For instance, an offshore jurisdiction will typically not force production of confidential information unless the debtor has

156 (2006) (explaining that the settlor of an asset preservation trust can also be its ultimate beneficiary, a feature unique to asset preservation trusts).

15. Mario A. Mata, *Frequently Asked Questions Regarding Offshore Wealth Preservation Trusts*, ALI-ABA COURSE OF STUDY 775, 779 (2007) (although five U.S. states also have trust laws which allow for this, such trusts are nevertheless vulnerable to judgments both by their sister states and federal courts).

16. RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959).

17. See *Abdel Rahman v. Chase Bank (CI) Trust Co. Ltd.*, [1991] J.L.R. 103 (Cayman Is.) (where widow was able to set aside a self-settled trust which avoided forced heirship laws on the ground that the settlor's complete control over the trust amounted to a "sham").

18. *Trusts Law* § 14, (2001 Rev.) (Cayman Is.).

19. RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959).

20. Ali, *supra* note 7, at 43.

21. *United States v. Miller*, 425 U.S. 435 (1976) (holding that a bank customer had no Fourth Amendment privacy interest in the protection of bank records. As a result of *Miller*, United States and trust companies are now forced to comply with a court's subpoena for private bank records. Offshore trusts, however, are free from *Miller's* requirement and many Caribbean countries have therefore developed their trust legislation in response to *Miller*).

22. Marks, *supra* note 1, at 1.

committed a crime in their home jurisdiction which is also a crime in the offshore jurisdiction.²³ Because many offshore jurisdictions also have no income or estate taxes, there are no comparable tax crimes by which the debtor can be held liable for and therefore forced to comply with a subpoena.²⁴

It should be noted, however, that no jurisdictions' confidentiality laws can be said to be absolute and some offshore jurisdictions do divulge information in limited circumstances. In the Bahamas, for instance, a court will grant a U.S. court order requiring the disclosure by a bank or trust company of confidential information in some circumstances, so long as the subpoena *duces tecum* is limited in scope and specific.²⁵ In the Cayman Islands, disclosure of confidential information is allowed when done in accordance with any other law of the Cayman Islands.²⁶ Although the circumstances in which an offshore jurisdiction will comply with a U.S. court order are still substantially limited, such circumstances are broadening as a result of U.S. pressure to combat money laundering.

D. Circumventing Forced Heirship Laws

Another benefit derived from offshore asset preservation trusts is their avoidance of common law rules regarding forced heirship. When the owner of a property in a U.S. jurisdiction typically wishes to convey his or her interest in a property to another, forced heirship, marital property, and other laws may interfere with how the owner of the property wishes it to be distributed.²⁷ For instance, many states still enforce a rule against perpetuities,²⁸ which restrains the long-term distribution of property. If the property is held in an offshore asset preservation trust, how-

23. Mata, *supra* note 14, at 156-157.

24. *Id.*

25. Nissan Motor Corp. v. Adesco, [1989-1990] 1 L.R.B. 412 (Bah.).

26. Ali, *supra* note 7, at 51 (It should be noted, that this is a gateway allowing the inclusion of anti-money laundering provisions as a reason for compelling the release of confidential information. As such provisions later evolve and broaden, Cayman Island courts may be increasingly willing to comply with U.S. court orders to release information. For instance, in *Re H*, [1996] C.I.L.R. 238, a trustee was allowed to testify in a Pennsylvania trial regarding the details of a trust without being held liable in the Cayman Islands).

27. Mata, *supra* note 14, at 157.

28. *See, e.g.*, Nash v. Scott, 966 S.W.2d 936 (Ark. Ct. App. 1998); Smith v. Smith, 744 A.2d 988 (Del. 1999) (upholding the rule against perpetuities, which requires that a future interest must vest within 21 years after all lives in being at the time of the instrument's creation).

ever, such laws are of no consequence. In addition to abolishing the rule against perpetuities,²⁹ most foreign jurisdictions have also abolished forced heirship laws and spousal right laws.³⁰ The flexibility of offshore asset preservation trusts therefore allows the owner of property to have more control over who ultimately receives his property and allows a property owner to maintain this control for longer periods of time.

E. Immunity From Foreign Judgments

Perhaps the most important feature of an offshore asset preservation trust in the eyes of a settlor is its seeming invincibility from judgments rendered in foreign jurisdictions. This invincibility results from simple obstacles, such as the geographic distance between the United States and these foreign jurisdictions, as well as very complex jurisdictional issues arising from the independent judicial systems these countries enjoy that are free to disregard the orders of U.S. courts.

Once a judgment for damages is entered against a criminal or civil defendant by a U.S. court, the prevailing party will typically wish to have this judgment enforced. If the assets are in the United States, this is a simple process in which the deciding court simply issues a court order, which all U.S. financial institutions are required to comply with, to turn over the assets.³¹ Foreign institutions, however, are under no obligation to comply with a court order from the United States. Courts must therefore either have their judgments recognized by the foreign jurisdiction, or exert pressure on the settlor to comply with their court orders.³²

1. Settlor Under Pressure

When U.S. courts attempt to exert pressure on a settlor, a number of unique issues arise. In an asset preservation trust the settlor is typically also the beneficiary.³³ This might lead one to the conclusion that when the settlor owes money, withdrawing the needed money from an asset preservation trust is well within the

29. See, e.g., Perpetuities Law, 1995 (Cayman Is.) (abolishing the rule against perpetuities); Mata, *supra* Note 14, at 183 (explaining that Nevis has also abolished the rule against perpetuities); Fraudulent Dispositions Ordinance of 1994, §6 (Anguilla) (abolishing the rule against perpetuities).

30. See, e.g., Trusts Law §§ 90 to 92 (2002 Rev.) (Caymanian law specifically excluding claims of forced heirship from foreign jurisdictions).

31. See, e.g., *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002).

32. Ali, *supra* note 7, at 239-240.

33. Mata, *supra* note 14, at 156-157.

purpose for which the trust was created.³⁴ The primary purpose of an asset preservation trust, however, is to protect against foreign judgments.³⁵ Because withdrawing money in order to pay off a foreign judgment runs afoul of the main purpose for such trusts, foreign financial institutions have typically argued that actions by the settlor in furtherance of this goal should not be complied with, and Caribbean courts have agreed. For instance, the Cayman Islands have refused to recognize a receiver of an offshore trust appointed by a U.S. court,³⁶ and have likewise refused to recognize consent forms signed in compliance with an order of a foreign court.³⁷

Several additional features unique to offshore asset preservation trusts also help to alleviate pressure on the settlor that follows a judgment of liability in a U.S. court. First, their usual inclusion of a 'flee clause' permits the settlor to change the situs³⁸ of the trust to a more favorable jurisdiction if it seems that the trust may come under legal attack.³⁹ Therefore, while a settlor may initially maintain a trust in a jurisdiction which affords preferential treatment in the management of the trust, if litigation is imminent, the settlor can change the situs of a trust to an alternate jurisdiction which will minimize a creditor's ability to enforce a judgment against the trust.⁴⁰ By including a 'flee clause' in an offshore asset preservation trust, not only are creditors discouraged from bringing suit, but if they are prepared to bring suit they may initially over-commit resources in a jurisdiction which will ultimately not litigate the issue.

Most often, however, the decision to move the situs of a trust pursuant to a 'flee clause' is not made by the trustee, but is

34. If the settlor of an asset preservation trust needs money, then so does the beneficiary, and payment of a debt would seem to be a reasonable goal of establishing such a trust.

35. Ali, *supra* note 7, at 40.

36. *Stutts v. Premier Capital Trust* [1992-1993] C.I.L.R. 605 (Cayman Is.) (refusing to recognize a receiver appointed by an American court on the grounds that it would be a recognition of the authority of foreign penal laws).

37. In *Matter of ABC Ltd.*, [1984] C.I.L.R. 130 (Cayman Is.) (arguing that a consent form signed in compliance with the demand of a foreign court is not true consent at all because the signor is under duress and may be subject to civil or criminal penalties if he does not sign the form).

38. BLACK'S LAW DICTIONARY 1421 (Bryan A. Garner ed., 8th ed. 2004) (defining the 'situs' of the trust as the jurisdiction in which the trust is located for deciding what procedural and substantive law should apply).

39. See, e.g. *The Trustee Act of 1975* (Berm.), available at http://www.commonlii.org/bm/legis/consol_act/ta1975122/

40. Ali, *supra* note 7, at 41-42.

instead made by the 'protector'⁴¹ of the trust, another benefit unique to offshore asset preservation trusts. If a protector feels that the trustee is acting under the duress of a foreign jurisdiction, it is typically within his authority to remove the trustee; invoke a 'flee clause' in order to move the trust to another situs; and freeze benefits payable to beneficiaries.⁴² These illustrations make it clear that attempts by a U.S. court to exert pressure of a settlor in order to seize assets are typically met by a number of unique obstacles if the funds are located in an offshore asset preservation trust.

2. Enforcement of Foreign Judgments

If exerting pressure on a settlor/beneficiary in the United States is unsuccessful, an American court will typically seek to have its judgment enforced in the jurisdiction where the assets are located. In order for a court's judgment to be enforced, however, it must first be recognized.⁴³ In the United States, a court will typically recognize the judgment of a foreign court as a matter of comity,⁴⁴ so long as the foreign court is able to impartially administer justice.⁴⁵ This does not mean, however, that foreign jurisdictions will reciprocate this comity in recognizing the judgments of U.S. courts. When foreign countries do not automatically recognize the judgment of a U.S. court as a matter of comity, such countries may also enter into both bilateral and multilateral treaties with the United States in order to have their judgments enforced.⁴⁶ As this article will discuss, U.S. pressure has compelled various Caribbean jurisdictions to enter into such agreements to enforce foreign judgments, but only in limited circumstances. In other circumstances, Caribbean courts still fail to recognize the judgments of American Courts and creditors are typically required to argue the case anew in a foreign jurisdiction.

41. BLACK'S LAW DICTIONARY 1260 (Bryan A. Garner ed., 8th ed. 2004) (defining the protector as an individual, typically a lawyer in the offshore jurisdiction, who is granted certain well-defined veto powers over the proposed actions of a trustee but is not either the trustee or beneficiary of the trust).

42. Mata, *supra* note 14, at 161.

43. Ali, *supra* note 7, at 239-240.

44. Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining 'comity' as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

45. *Id.* at 202-203.

46. Ali, *supra* note 7, at 256.

3. Problems Associated with Trying a Case Anew in the Caribbean

Trying the case anew, however, poses additional problems for a creditor. The creditor must typically hire a new lawyer to try the case in the jurisdiction where the assets are located. To complicate matters, many Caribbean countries prohibit lawyers from working on a contingency basis,⁴⁷ which may create a financial burden that many creditors are unable to overcome. There is also no guarantee that the Caribbean court will rule in the creditor's favor,⁴⁸ or that the judgment will be for the same amount. Furthermore, many offshore jurisdictions have a statute of limitations which may bar a creditor from trying the case anew.⁴⁹

F. Benefits to Caribbean Countries of Harboring Asset Preservation Trusts

Although the benefits of an offshore asset preservation trust for a settlor are clear, such trusts also benefit the jurisdictions in which they are harbored. Many of the Caribbean jurisdictions which house these trusts are still emerging economies, attempting to shift from systems based on agriculture to economies based on tourism and financial services.⁵⁰ In accomplishing this transformation, the subtle nuances of their trust legislation can sometimes be a double-edged sword, simultaneously attracting foreign investors with their lax regulations and jurisdictional independence, and frustrating foreign governments because of their failure to cooperate with judgments aimed at assets harbored abroad. Foreign governments such as the United States, however, are not without their means of persuasion, and it has been the task of Caribbean governments to strike a proper balance regarding their trust legislation.

47. See, e.g., *Resorts Intern., Inc. v. Spinola*, 705 So. 2d 629, 630 (Fla. Dist. Ct. App. 1998) (stating the Bahamas do not allow lawyers to provide services on a contingency fee basis); Stacey K. Lee, *Piercing Offshore Asset Protection Trusts in the Cayman Islands: The Creditors' View*, 11 *TRANSNAT'L LAW.* 463, 496 (1998) (the Cayman Islands are not allowed to provide legal services on a contingency agreement).

48. As we will see later, many Caribbean jurisdictions have different standards by which they evaluate fraudulent dispositions and tax violations.

49. See, e.g., *Fraudulent Disposition Act of 1991 § 4* (Bah.), available at <http://privatetrustco.com/public/FDA.PDF>.

50. Ali, *supra* note 7, at 52 (noting that Caribbean economies have benefited from the influx of revenue generated from licensing fees and increased capital inflows).

III. THE UNITED STATES RESPONSE TO THE PROBLEM OF MONEY LAUNDERING

The ability of offshore asset preservation trusts to withstand the enforcement of foreign judgments has led to their increasing popularity for both legally ambiguous uses such as shielding assets from divorce proceedings and the avoidance of what might be considered excessive punitive damages awards,⁵¹ to outright illegal uses such as the laundering of money associated with the illegal drug trade.⁵² The United States has therefore sought to lift the veil of secrecy surrounding offshore asset preservation trusts and attack the protections these trusts provide their settlors. The United States first took aim at the problem of money laundering.

Money laundering was not even addressed as a problem in the United States until 1970⁵³ and was not made a crime until 1986 when Congress enacted the Money Laundering Control Act.⁵⁴ The Money Laundering Control Act made it a crime to launder the proceeds of criminal activity by engaging in financial transactions, with either the intent to promote that criminal activity, to conceal the origins of the profit, or avoid reporting requirements on the money.⁵⁵ Although early anti-money laundering legislation was drafted with the problem of illicit drug trafficking in mind, the scope of what courts are willing to consider “financial transactions” for purposes of identifying money laundering has expanded in recent years to include other transgressions as well.⁵⁶ As financial institutions have come under increasing pressure to divulge information regarding the origins of money suspected to be gained through illegal activities, money laundering has moved offshore where such laws are not applicable.

A. *The Jurisdictional Reach of U.S. Anti-Money Laundering Laws*

The attempts of U.S. investigators to pursue money launderers offshore have been met with a number of obstacles, however, that have required both bold new legislation and judicial ingenu-

51. Flynn, *supra* note 9.

52. *Id.*

53. Bank Secrecy Act, 31 U.S.C. §§ 5311-5332 (2001) (requiring that financial institutions report certain transactions which have a high degree of usefulness in criminal, tax, or regulatory investigations).

54. Money Laundering Control Act, 18 U.S.C. § 1956 (2006).

55. *Id.*

56. Dowling, *supra* note 12, at 281.

ity to overcome. The most obvious problem facing investigators is jurisdictional in nature. How can a U.S. court enforce a judgment, subpoena, or court order against a person or financial institution located in another sovereign country? As mentioned earlier, in order to enforce a judgment, a court must either compel the settlor or financial institution to voluntarily comply with the court order, or persuade the Caribbean jurisdiction to recognize the judgment of the U.S. court.⁵⁷

Where either the settlor or the financial institution managing the trust has a presence in the United States, courts have often relied on exerting pressure. While the protections afforded to the settlor of an asset preservation trust have been discussed, these protections do not necessarily extend to the financial institutions which act as trustees. For instance, many courts will hold the U.S. subsidiary of a financial institution⁵⁸ liable for the refusal of their branch in a foreign jurisdiction to comply with a court order.⁵⁹ The financial institution is therefore faced with the unappealing dilemma of either complying with a U.S. court order regarding the disposition of a foreign trust, or violating the trust laws of where the trust is located. If the financial institution has a significant presence in the United States then the scales may tip in favor of complying with a U.S. court order because the financial institution may have more to lose.

But what happens when there is no domestic branch of a financial institution to hold responsible and the structure of an asset preservation trusts nullifies any pressure a court can exert over a settlor? The U.S. court must then seek to have its judgment enforced by a Caribbean court. As mentioned earlier, however, in order for a court's judgment to be enforced, it must first be recognized. Because most Caribbean jurisdictions do not recognize U.S. judgments as a matter of comity, enforcement of U.S. judgments takes place under a patchwork of treaties that provide incomplete coverage.

57. See, e.g., *United States v. Bank of Nova Scotia*, 740 F.2d 817, 827 (11th Cir. 1984) (explaining that while the court exerted pressure on the settlor here in order to comply with a court order, this can also lead to a recognition of prescriptive jurisdiction in certain instances).

58. M. Hopson, *Applicability of United States Anti-Money Laundering Statutes to Foreign Banks*, 8 J. INT'L BANKING L. 310 (1996).

59. 18 U.S.C. § 1957(d)(2) (2006) (holding "persons" in the United States responsible for criminal monetary transactions over \$10,000 taking place outside of the United States).

1. Extraterritoriality

It should also be noted that U.S. courts have engaged in an extraterritorial⁶⁰ expansion of prescriptive and enforcement jurisdiction as well.⁶¹ American courts have claimed the right to extraterritoriality when either a significant part of the illegal conduct in question takes place in the United States or the illegal activity takes place outside U.S. borders but has consequences within the United States.⁶² In the first instance, varying U.S. courts have taken differing stances regarding just how much “conduct” has to take place within the United States in order to subject a foreign person or entity to the laws of the U.S. . For instance, Judge Friendly, writing for the Second Circuit, has held that prescriptive jurisdiction can be based on the “perpetration of fraudulent acts themselves but does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries.”⁶³ In other words, Friendly takes a somewhat limited view regarding the amount of conduct that might expose a foreign entity to U.S. jurisdiction.

Other scholars, however, now express concern that the United States has embarked on a bold expansion of extraterritoriality and can now assert prescriptive and enforcement jurisdiction against a financial institution anywhere in the world simply because the institution has executed trades in U.S. currency which have to be booked in corresponding U.S. banks.⁶⁴ Most banks around the world trade to some extent in U.S. currency, however, and such a rule would bring many transactions under the jurisdiction of U.S. courts which would otherwise be excluded.⁶⁵ Such an interpretation of “conduct” is therefore dangerously broad in its assertion of extraterritorial jurisdiction and runs the danger of infringing upon the sovereignty of other nations. Nevertheless, Courts are beginning to expand their rule

60. The Case of S.S “Lotus” (France v. Turkey) P.C.I.J. Reports Ser, A, No. 10 (1927) (defining extraterritoriality as the exertion of jurisdiction outside the territory of a state and is considered allowable only by virtue of some permissive rule derived from international custom).

61. See, e.g., *In re Uranium Antitrust Litigation v. Rio Algon Ltd.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979) (defining prescriptive jurisdiction as the ability of a state to make a rule of law under international law; and enforcement jurisdiction as the ability of a state to enforce a rule of law under international law).

62. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

63. *I.T.T. v. Vencap, L.T.D.*, 519 F.2d 1001, 1018 (2d Cir. 1975).

64. Ali, *supra* note 7, at 237, (citing R. BOSWORTH-DAVIES, *THE IMPACT OF INTERNATIONAL MONEY LAUNDERING LEGISLATION* (1997)).

65. *Id.*

of what sort of conduct is enough to bring financial activities under the purview of U.S. courts and this trend is expected to continue.⁶⁶

U.S. courts have also been willing to exert prescriptive jurisdiction over foreign entities even when their illegal conduct takes place outside of the United States, so long as the conduct creates a substantial adverse effect in the United States.⁶⁷ Under this doctrine, a company does not even need to have a presence in the United States or engage in conduct within U.S. borders to fall under U.S. prescriptive jurisdiction.⁶⁸ While the “substantial effect” test is indeed an effective way of targeting the perpetrators of fraudulent international investment schemes aimed at U.S. investors, it also raises questions of the limits of U.S. laws and the dangers of asserting extraterritorial jurisdiction.

When the “conduct” and “substantial effect” tests are taken in conjunction with the pressure the United States already exerts on settlers and financial institutions, the U.S. approach to money laundering evinces a broad assertion of extraterritoriality. The PATRIOT Act, however, has even further broadened the reach of U.S. jurisdiction.

2. The USA PATRIOT Act

Although prior to September 11, 2001, attempts to expand the reporting requirements of financial institutions were met with widespread opposition and concerns about invasion of privacy,⁶⁹ the turmoil surrounding the worst terrorist attack in our nations history allowed the PATRIOT Act to pass with sparse opposition.⁷⁰ Under the guise of fighting terrorism, the PATRIOT Act has sig-

66. See, e.g., *United States v. Inco Bank and Trust Corp.*, 845 F.2d 919, 919-920 (11th Cir. 1988) (holding a Caymanian bank liable for conspiring to smuggle cash out of the U.S., in breach of U.S. reporting laws, even though they had never entered or performed any overt acts within the U.S.).

67. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

68. See, e.g., *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-262 (2d Cir. 1989) (holding a foreign corporation liable under anti-trust laws for creating a “substantial effect” within the United States).

69. Viet D. Dinh & Wendy J. Keefer, *FISA and the PATRIOT Act: A Look Back and a Look Forward*, 35 GEO. L.J. ANN. REV. CRIM. PROC. III (2006).

70. Dowling, *supra* note 12, at 287-288; see *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56; see also U.S. Senate Roll Call Votes 107th Congress – 1st Session, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313 (listing the United States Senate vote for the passage of the PATRIOT Act at ninety-eight yeas, one nay, and one abstention).

nificantly expanded the definition of what constitutes a financial institution for purposes of combating money laundering⁷¹ and has conferred on district courts 'long-arm' jurisdiction⁷² over foreign persons and financial institutions.⁷³ Specifically, this is accomplished through Title III of the PATRIOT Act, the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001⁷⁴ that amends both the 1970 Bank Secrecy Act and the 1986 Anti-Money Laundering Act.⁷⁵

For instance, the PATRIOT Act enables the Secretary of the Treasury to issue a summons or subpoena to "any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside the United States relating to the deposit of funds into the foreign bank."⁷⁶ Although such subpoenas were generally issued under 18 U.S.C.A. § 1956(a) before the passage of the PATRIOT Act, when compliance with the subpoena or summons ran afoul of foreign laws governing confidentiality, the U.S. court, for reasons of comity, would typically defer to the foreign court.⁷⁷ Now, however, U.S. courts will press forward and financial institutions will be required to submit to the jurisdiction which can exert the most pressure on the financial institution to comply with their laws.⁷⁸

Financial institutions are also now required to maintain "records of the information used to verify a person's identity, including name, address, and other identifying information."⁷⁹ While such information may seem trivial in nature, it helps U.S. investigators in tracking the source of funds in order to combat money laundering. For purposes of asset preservation trusts, this information also becomes proof that a debtor has funds in an offshore account. Financial institutions are now also more willing to provide this information to investigators because § 351 of the PATRIOT Act amends the Bank Secrecy Act (1970) by providing

71. Ali, *supra* note 7, at 236.

72. BLACK'S LAW DICTIONARY 869 (8th Ed. 2004) (defining 'long-arm jurisdiction' as jurisdiction over a non-resident defendant who has had some contact with the jurisdiction in which the petition was filed).

73. Ali, *supra* note 7, at 240.

74. 31 U.S.C.A. § 5318 (West 2006).

75. *Id.*

76. 31 U.S.C.A. § 5318(k)(3)(A)(ii) (West 2006).

77. Guyote, *supra* note 44.

78. Mackinnon v. Donaldson, Lufkin & Jenrette Secs. Corp., (1986) 1 All E.R. 653 (Ch.) (U.K.).

79. 31 U.S.C.A. § 5318(l)(2)(B) (West 2006).

financial institutions with legal immunity from liability for voluntary disclosures of suspicious transactions.⁸⁰

B. Broadening Judicial Interpretation of Anti-Money Laundering Laws

The enactment of new legislation combating money laundering has also been accompanied by broadening judicial interpretation of these statutes. Money laundering was initially outlawed in 1986 to combat the illicit drug trade.⁸¹ Since then, however, courts have interpreted 18 U.S.C.A. § 1956 to encompass concealing the “proceeds” of bankruptcy fraud in offshore accounts as well.⁸² As a result of this interpretation, § 1956 is now made applicable to a much broader number of asset preservation trusts. Other courts have also expanded the definition of “intent” under § 1956 to include “willful blindness.”⁸³ Under such an interpretation, a lawyer who establishes such a trust is now under a duty to investigate the origins of money deposited therein in order to ensure that the money was gained through legitimate means.

U.S. court decisions have also methodically targeted many of the specific aspects of offshore asset preservation trusts which make them desirable to customers. For instance, in *United States v. Bank of Nova Scotia*,⁸⁴ a landmark case, the 11th Circuit held that the interest of American citizens in the privacy of their bank records located offshore was substantially reduced when balanced with the interest of their own government in a criminal investigation.⁸⁵ As a result of this decision, banks can now look at the relative interests of the different states involved in order to come to the conclusion that America’s interest in pursuing a criminal investigation may outweigh any comparable interest a foreign state might have in enforcing bank secrecy laws.⁸⁶

U.S. courts have also turned up the heat on the settlor of the trust in order to collect more information regarding the trusts or

80. 31 U.S.C.A. § 5318(g)(3)(A) (West 2006).

81. 18 U.S.C.A. § 1956 (West 2006).

82. *United States v. Castellini*, 392 F.3d 35 (1st Cir. 2004) (holding that bankruptcy fraud can produce “proceeds” under 18 U.S.C.A. § 1956).

83. *United States v. Oberhauser*, 284 F.3d 827, 832 (8th Cir. 2002).

84. 740 F.2d 817 (11th Cir. 1984) (concerning the enforceability of a district court’s subpoena for bank records held by the Cayman Island branch of a Canadian bank). The Canadian bank protested that divulging the information would violate Cayman Island bank secrecy laws, but the court of appeals nevertheless balanced the relative interest of the States involved and required compliance. *Id.* at 828.

85. *Id.* at 827.

86. *Id.* at 829.

attach the assets. Courts have held that a settlor can be held in contempt of court and incarcerated for failing to cooperate with a court order to turn over records regarding the trust.⁸⁷ While a settlor can typically claim that they have no power to comply with such an order to produce bank records,⁸⁸ in an offshore asset preservation trust such a claim is more tenuous because the settlor retains substantial power over the trust.

In *Eulich v. United States*,⁸⁹ for instance, the district court did not buy the argument that the settlor had no control over his trust when the IRS demanded documents relating to it. The court ordered Eulich to produce documents concerning the trust by all means possible, including filing a lawsuit in the Bahamas to facilitate production of the documents.⁹⁰ In *Eulich*, the court found that to the extent that producing the documents was impossible for Eulich, it was only because of the situation which Eulich himself created by depositing between \$75-\$100 million dollars in a Bahamian asset preservation trust, and that Eulich should not be allowed to benefit from the situation he had created.⁹¹

In addition to attacking some of the specific features of offshore asset preservation trusts, U.S. courts have also expanded the scope of what sort of trusts they are willing to consider illegitimate. In *Breitenstine v. Breitenstine*,⁹² the Wyoming Supreme Court evaluated a Bahamian asset preservation trust used by a husband to shield assets from his wife before an impending divorce proceeding. The Court concluded that such a use was “reprehensible” and that the asset preservation trust was created to hinder, delay, or defraud the husband’s creditors.⁹³

Such legally ambiguous uses raise broad public policy questions concerning offshore asset preservation trusts and lead some to conclude that such trusts are fraudulent on their face.⁹⁴ Others argue, however, that they are merely another form of trust which

87. See, e.g., *F.T.C. v. Affordable Media, L.L.C.*, 179 F.3d 1228 (9th Cir. 1999); *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002).

88. *United States v. Rylander*, 460 U.S. 752, 757 (1983) (where compliance is impossible there is no need for a civil contempt order).

89. No. Civ.A.3:99CV1842-L, 2004 WL 1844821, *1 (N.D. Tex. Aug. 18, 2004).

90. *Id.*

91. *Id.* at 3.

92. 62 P.3d 587 (Wyo. 2003).

93. *Id.* at 592-593.

94. Flynn, *supra* note 9 (explaining that SunTrust and Bank of America have refused to work with asset preservation trusts because of their legally ambiguous underpinnings).

affords the settlor more control,⁹⁵ a feature that is not in itself fraudulent. However one views such accounts, the United States has led the way in pressuring offshore jurisdictions to adopt more lenient bank secrecy laws, but they have also employed the help of others along the way.

C. *The International Fight Against Money Laundering*

Of course, the United States is not alone in its attempt to stem the flow of illicit money into offshore jurisdictions. With America leading the way, the United Nations has formed the International Convention for the Suppression of the Financing of Terrorism, which recognizes the need for cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism.⁹⁶ The Convention calls upon its signatory countries to take steps to prevent and counteract the financing of terrorism through appropriate domestic measures as well as through international cooperation.⁹⁷ While an effective means of fighting money laundering in theory, certain key offshore jurisdictions, including the Bahamas, have not yet ratified the treaty.⁹⁸

The G7, led by the United States, has also undertaken the task of combating money laundering. In 1989 the G7 formed the Financial Action Task Force (hereinafter "FATF") in order to recommend measures to improve countries' money laundering laws.⁹⁹ The FATF issued forty recommendations¹⁰⁰ that provide a guide to countries in revising their legislation. In 2000, FATF issued a report in which it identified "serious systematic problems" with the anti-money laundering laws of five Caribbean nations includ-

95. *Id.*

96. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000), available at <http://www.un.org/law/cod/finterr.htm> (last visited Nov. 14, 2007).

97. Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional Yet Foreseeable Consequences of Extraterritoriality Criminalizing the Provision of Material Support to Terrorist and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313, 314 (2007).

98. Elwood Earl Sanders, Jr. & George Edward Sanders, *The Effect of the USA Patriot Act on the Money Laundering and Currency Transaction Laws*, 4 RICH. J. GLOBAL L. & BUS. 47, 57 (2004).

99. *Id.* at 58-59.

100. Financial Action Task Force, *The 40 Recommendations*, http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#40recs. (stating both the original 40 recommendations of the FATF as well as 9 supplemental recommendations concerning the funding of terrorism).

ing the Bahamas and Cayman Islands.¹⁰¹ Although the FATF's power to enforce these recommendations relies on engaging in dialogue with non-compliant nations and the embarrassment associated with being non-compliant,¹⁰² the method seems to have worked because Myanmar, the last country to be listed as non-compliant by the FATF, has been removed from the list.¹⁰³ How effective these forty recommendations are at curtailing either the legitimate or illegitimate usage of offshore asset preservation trusts remains to be seen.¹⁰⁴

IV. THE CARIBBEAN REACTION

Various Caribbean jurisdictions have responded to international and unilateral U.S. pressure to fight money laundering through a number of legislative enactments and judicial opinions. While some legislative enactments have been viewed as positive steps forward, others have had a limited effect on the operation of asset preservation trusts. In like manner, various Caribbean judiciaries have issued decisions both in an attempt to cooperate with efforts to fight money laundering and in defense of their own sovereignty.

A. Caribbean Legislative Response

The Caribbean legislative response to U.S. pressure to address money laundering has differed from country to country, but certain trends have become apparent. These trends include the erosion of banking secrecy laws and the formulation of financial intelligence units to facilitate international cooperation, but the overall preservation of the asset preservation trust's immunity from foreign judgments.

In the Cayman Islands, for instance, the legislative assembly has signed a 'Statement Regarding Drug Cooperation'¹⁰⁵ in

101. Jason Ennis, *Cleaning up the Beaches: The Caribbean Response to the FATF's Review to Identify Non-Cooperative Countries or Territories*, 8 FALL L. & BUS. REV. AM. 637, 638 (2002).

102. Financial Action Task Force, *Annual Review of Non-Cooperative Countries and Territories 2006-2007* (Oct. 12, 2007), <http://www.fatf-gafi.org/dataoecd/14/11/39552632.pdf> (last visited Nov. 12, 2007).

103. *Id.*

104. See, e.g., Todd Doyle, *Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 Hous. J. INT'L L. 279 (2002).

105. Statement Regarding Drug Cooperation Agreements and Extension Thereof with United Kingdom of Behalf of the Cayman Islands, U.S.-U.K., Mar. 26, 1990, State Dept. No. 90-121 [hereinafter Statement].

response to *Bank of Nova Scotia*¹⁰⁶ and a subsequent ‘exchange of letters’ among the United States, the Cayman Islands and United Kingdom.¹⁰⁷ This agreement allows for Caymanian courts to compel production of bank documents in specified drug cases.¹⁰⁸ The agreement, however, is not made applicable to cases of either tax evasion (which is not a crime in the Cayman Islands because there are no income taxes) or when a debtor is attempting to shield assets from a creditor.¹⁰⁹ As a result, many of the uses of the asset preservation trust in the Cayman Islands remain unaltered and creditors wishing to attack some of these more legally tenuous uses of asset preservation trusts have been required to try the case anew in the Cayman Islands.

The Cayman Islands has also formed the Cayman Island Monetary Authority, which is charged with implementing the country’s anti-money laundering laws and providing assistance to overseas regulatory authorities.¹¹⁰ The primary money laundering legislation the Monetary Authority is charged with upholding is the Proceeds of Criminal Conduct Law (2007 Revision),¹¹¹ which covers all businesses and individuals. Like the Statement Regarding Drug Cooperation, however, the Proceeds of Criminal Conduct Law is limited in scope and only made applicable to “criminal conduct,” which is defined as an indictable offense if it had occurred in the Cayman Islands or conduct committed outside the jurisdiction that would constitute an offense if it had been committed within the Cayman Islands.¹¹² The scope of the Monetary Authority therefore does not encompass U.S. laws unless those laws are also laws of the Cayman Islands.

Similar to the Cayman Islands’ Monetary Authority, the Bahamas created the Financial Intelligence Unit in 2000 pursuant to the Financial Intelligence Unit Act 2000¹¹³ in response to

106. 740 F.2d 817 (11th Cir. 1984).

107. Statement, *supra* note 105.

108. *Id.*

109. Ali, *supra* note 7, at 212.

110. Monetary Authority Law, Cayman Gazette No. 17 of 23rd, §5(1) (2004 Revision) (Cayman Is.), available at http://www.cimoney.com.ky/uploadedFiles/Regulatory_Framework/Laws_and_Regulations/MAL2004.pdf (last visited Nov. 14, 2007).

111. Proceeds of Criminal Conduct Law (2007 Revision)(Cayman Is.), available at http://www.cimoney.com.ky/uploadedFiles/Regulatory_Framework/Laws_and_Regulations/ProceedsofCriminalConductLaw2007%20Revision.pdf. (last visited Nov. 14, 2007).

112. *Id.* at § 32(10).

113. No. 39 of 2000 (Bah.), available at <http://www.bahamas.gov.bs/bahamasweb2/>

being blacklisted by the Financial Action Task Force. Also like the Cayman Island Monetary Authority, the Bahamas Financial Intelligence Unit is mandated by law to cooperate with international law enforcement agencies in order to stem the flow of money laundering¹¹⁴ and as a result has won removal from the list of countries regarded as noncompliant with the Financial Action Task Force's list of forty recommendations.¹¹⁵ Although the Bahamas have no tax treaties in force, their Financial Intelligence Unit has also entered into mutual legal assistance treaties with other nations which provide for the exchange of information and compliance with specific foreign court orders.¹¹⁶ In the calendar year 2006, the Financial Intelligence Unit received sixty-six requests for assistance from foreign financial investigatory units, eleven of which were from the United States, and was able to provide assistance or is providing assistance ninety-one percent of the time.¹¹⁷ These steps mark a positive step forward in the fight to combat illegal money laundering without interrupting the operation of legitimate offshore asset preservation trusts.

Not all recent laws, however, are being adopted for the purpose of making it easier for foreign courts to enforce judgments against assets in a foreign jurisdiction. It is relatively recently, for instance, that the Bahamas have enacted a two-year statute of limitations on the commencement of proceedings alleging a fraudulent conveyance into a trust¹¹⁸ and have placed the burden of establishing the settlor's fraudulent intent on the creditor seeking to set aside the transfer.¹¹⁹ Since the ordinary course of litigation in the United States often takes years to begin with, many credi-

home.nsf/vContentW/CC—Other—Compliance+Commission+PDFS/\$file/FinIntellUnitAct2000(ConsolidatedVersion).pdf (last visited Nov. 14, 2007).

114. No. 39 of 2000, § 4(2)(c), § 4(2)(g) (Bah.), available at [http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vContentW/CC—Other—Compliance+Commission+PDFS/\\$file/FinIntellUnitAct2000\(ConsolidatedVersion\).pdf](http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vContentW/CC—Other—Compliance+Commission+PDFS/$file/FinIntellUnitAct2000(ConsolidatedVersion).pdf), at 3 (last visited Nov. 14, 2007) (Upon request by a foreign financial intelligence unit, the Bahamas Financial Intelligence Unit may freeze a person's bank account for a period not exceeding five days, compel production of documents the Unit considers relevant to the fulfillment of its function, and provide the information to a foreign financial intelligence unit).

115. Ennis, *supra* note 101, at 650.

116. Financial Intelligence Unit, Ann. Rep. (2006), available at [http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vContentW/FIU—Welcome+Page—FIU+PDFs/\\$FILE/Annual%20Report%202006.pdf](http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vContentW/FIU—Welcome+Page—FIU+PDFs/$FILE/Annual%20Report%202006.pdf). (last visited, Nov. 14, 2007).

117. *Id.* at 28-29.

118. The two years begins to run from the time of the conveyance into the trust, not the initial court action.

119. Fraudulent Disposition Act of 1991, § 4 (Bah.), available at <http://privatetrustco.com/public/FDA.PDF> (last visited, Nov. 14, 2007).

tors may find that by the time they realize the assets they seek are in a Bahamian asset preservation trust, it is too late to file suit in the Bahamas.

The laws in St. Christopher and Nevis in like manner have established a very high burden for establishing a fraudulent conveyance into a trust. The recently enacted 'Proceeds of Crime Act'¹²⁰ stipulates that, "It shall be a defense to a charge under this section if the person satisfies the Court that he did not know or had no reasonable grounds for knowing that the property referred to in the charge was derived, directly or indirectly, from some form of serious offence."¹²¹ Nevis therefore takes a much stricter view of what constitutes a fraudulent conveyance than do most U.S. courts. For instance, the Eighth Circuit in *Oberhauser* held willful ignorance was enough to establish intent for purposes of proving a fraudulent conveyance.¹²² Therefore, while a U.S. court may establish a fraudulent conveyance upon a finding of willful ignorance and exert pressure on the settlor, a court in Nevis might hold that the burden for establishing a fraudulent conveyance has not been met and decline to enforce a U.S. court order to hand over assets in the trust.

Nevertheless, St. Christopher and Nevis have also created a Financial Intelligence Unit in order to enforce their anti-money laundering laws through cooperation with foreign financial intelligence units¹²³ and like their Caribbean compatriots, are no longer listed as noncompliant regarding FATF's forty recommendations because of their significant progress in strengthening their anti-money laundering capabilities.¹²⁴

B. The Caribbean Judicial Response

Caribbean courts have been as varied as their legislatures in responding to U.S. pressure to fight money laundering and the financing of terrorism. For instance, the U.K. Privy Council, which hears appeals from the Bahamian Supreme Court, has been

120. No. 16 of 2000 (Saint Christopher and Nevis), available at <http://www.skbfinancialservices.com/PDF%20Documents/The%20Proceeds%20of%20Crime%20Act%202000.pdf>, (last visited Nov. 14, 2007).

121. *Id.* at 10.

122. *United States v. Oberhauser*, 284 F.3d 827, 832 (8th Cir. 2002).

123. The Proceeds of Crime Act, No. 16 of 2000 (Saint Christopher and Nevis), available at <http://www.skbfinancialservices.com/PDF%20Documents/The%20Proceeds%20of%20Crime%20Act%202000.pdf>, at 25, (last visited Nov. 14, 2007).

124. Financial Action Task Force, Ann. Rep. (2006-2007), available at <http://www.fatf-gafi.org/dataoecd/46/1/39162982.pdf>, at 15 (last visited Nov. 14, 2007).

generally supportive of new anti-money laundering legislation. The Privy Council has upheld the constitutionality of newly enacted legislation to combat money laundering in the face of opposition by interest related to the trust industry in the Bahamas.¹²⁵ The Privy Council has also upheld the revocation of a trust company's license in response to suspected money laundering.¹²⁶ While this may represent only one company, it is also representative of the overall belief that the era of lax regulation is now over.

Another landmark case in asset preservation trust jurisprudence came in 1995 with the Bahamian case of *Grupo Torras S.A. v. Al Sabah*.¹²⁷ In *Grupo Torras*, it was alleged that Sheikh Fahad, a member of the Kuwaiti royal family, had defrauded investors to the tune of \$450 million dollars and then hid the assets in a series of asset preservation trusts in the Bahamas and Cayman Islands.¹²⁸ Employing the Fraudulent Dispositions Act of 1991,¹²⁹ the Bahamian Supreme Court granted a 'mareva' injunction which froze the assets of one such trust, preventing the trust from invoking a flee clause in order to move the assets to another jurisdiction.¹³⁰ In ascertaining the intent of Bahamian legislators, the court reasoned:

"It seems to me that it is one thing to ascribe to the Parliament of the Bahamas ("Parliament") an intention to make The Bahamas more attractive as a "tax haven" by encouraging the establishment in this jurisdiction of what are referred to in some commercial circles as "asset protection trusts" but it is quite a different matter to attribute to Parliament an intention of allowing the Bahamas position as a legitimate tax haven to be used as a cover for fraudulent activity which has little or nothing to do with the minimisation of taxes or the protection of honestly acquired assets from the sometimes unreasonable demands placed on those assets e.g., as a result of an award of damages against a professional person."¹³¹

It is worth noting that the court reasserted in *Grupo Torras* its belief that avoiding taxes and protecting against some forms of liability were legitimate uses of such trusts and that is such cir-

125. *Ingraham & Ors v. Gilton & Anor*, [2006] UKPC 40 (24 July 2006) (Bah.).

126. *Suisse Security Bank & Trust Ltd., v. Governor of the Central Bank of the Bahamas*, [2006] UKPC 11 (13 March 2006) (Bah.).

127. [1995] BHS No. 86 (Bah.).

128. *Id.* at § 10, 15.

129. *Id.* at § 35-36.

130. *Id.* at § 101.

131. *Id.* at § 45.

cumstances the court would not comply with a foreign court order. Crucial to the court's granting of an injunction in *Grupo Torras*, however, was the finding that the trust was a 'sham' in that Sheik Fahad, as both settlor and primary beneficiary of the trust, exerted control over the trust in a manner inconsistent with even a self-settled trust.¹³² While a settlor of a self-settled trust will typically be allowed to make investment decisions regarding the trust, Sheik Fahad withdrew money from the trust in order to pay for membership in a country club so that he could play golf, and also used trust funds to invest in property in the Bahamas which he ended up using as a residence.¹³³

Grupo Torras is significant not only because of the amount of money involved in the trust, but also because it draws a line in the sand, defining how much control a settlor can exercise over offshore asset preservation trusts. It also clearly illustrates that offshore jurisdictions such as the Bahamas are willing to identify fraudulent conveyances into an asset preservation trust going forward. While many of the more legitimate uses of asset preservation trusts remain unaffected, it is now much more difficult for a money launderer to take advantage of some of the unique features of an asset preservation trust in order to obscure the origins of funds and evade creditors.

C. *Inter-Regional Cooperation*

While Caribbean legislators and judiciaries have worked independently in response to U.S. and international pressure to combat money laundering, they have produced a collaborative effort as well. This effort is in part, due to the recognition that if uniform standards are not maintained throughout the region, some countries may seek to achieve an unfair advantage in their trust legislation, which would work to the detriment of the overall goal of fighting the illegitimate use of these offshore financial centers.¹³⁴

At the forefront of this inter-regional effort is the Caribbean Financial Action Task Force (hereinafter 'CFATF'), created as a result of a 1990 meeting held in Aruba among member-states and

132. *Id.* at § 101.

133. *Id.* at § 57.

134. Permanent Secretary of SELA, *Monterrey Consensuses: Priorities and Prospects for Latin America and the Caribbean*, 10 L. & BUS. REV. AM. 179, 181 (2004).

the Kingston Declaration on Money Laundering.¹³⁵ The CFATF has facilitated the signing of a memorandum of understanding among their member states and they issue a yearly report in which they track each other's progress in addressing money laundering. Nations requesting to become "cooperating and supporting nations" must express their commitment to the support of the CFATF and undergo a positive mutual evaluation by the FATF or a FATF-approved regional body.¹³⁶

The most recent report of the CFATF reports that the organization is "coming to grips with its role and purpose with greater ease and responsibility"¹³⁷ and notes several accomplishments. For instance, all member states are now compliant with FATF's forty recommendations and the CFATF has trained seventy-one examiners during the past year on more stringent AML/CFT¹³⁸ standards for combating money laundering and the financing of terrorism.¹³⁹ CAFTA has also proved useful in coordinating the efforts of financial intelligence units of various Caribbean countries in what is now called the Heads of Financial Intelligence Units Forum.¹⁴⁰ The 2006 Forum was attended by twenty-five heads of state and provided a means by which different countries could present the anti-money laundering approaches taken in their respective jurisdictions. It also was attended by the U.S. Department of Justice and Internal Revenue Service.¹⁴¹

Such collaboration between the Financial Intelligence Units (hereinafter 'F.I.U.'s') of different countries has also been formalized by the formulation of the Egmont Group. The Egmont group facilitates the meeting of these various Financial Intelligence

135. Nov. 5-6, 1992, available at <http://www1.worldbank.org/finance/assets/images/index.pdf>.

136. Caribbean Financial Action Task Force, *Memorandum of Understanding Among Member Governments of the Caribbean Financial Action Task Force*, § III(3) Oct. 27, 2006, available at <http://cfatf.org/eng/memo/index.pdf> (last visited Sept. 11, 2008).

137. Caribbean Financial Action Task Force, *Annual Report*, 4 Oct. 2005-Oct. 2006, available at <http://www.cfatf.org/documentation/getfile.asp?fileid=176&option=1> (last visited Nov. 14, 2007).

138. Financial Action Task Force, *Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations*, available at <http://www.fatf-gafi.org/dataoecd/14/53/38336949.pdf> (last visited Nov. 14, 2007) (espousing a method of complying with FATF's forty Recommendations and nine special recommendations regarding terrorism which are more stringent than the forty recommendations alone).

139. Caribbean Financial Action Task Force, *supra* note 137.

140. *Id.* at 20.

141. *Id.*

Units in order to foster cooperation between F.I.U.s, assist and advise F.I.U.s under development, and to cooperate with representatives of other government agencies and international organizations in order to fight both money laundering and the financing of terrorism.¹⁴² Caribbean members of the Egmont group include: Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominican Republic, Netherland Antilles, St. Kitts and Nevis and St. Vincent & the Grenadines.¹⁴³

Cooperative endeavors such as the Egmont group and CFATF facilitate not only the exchange of information, but also of standards governing asset preservation trust. Going forward, it is likely that the continuation of such cooperation, coupled with U.S. pressure, is likely to result in more uniform standards governing offshore asset preservation trusts throughout the Caribbean.

V. A LOOK INTO THE FUTURE

The Caribbean as a collective unit has clearly come a long way since the United States first sought to fight money laundering beyond its own shores. In the process, the offshore financial industry has seen both the rise of the asset preservation trust in order to meet the needs of debtors, and its modification as a means of preventing fraudulent conveyances and other forms of money laundering.

Although asset preservation trusts are still an effective means of protecting legitimately earned assets from foreign creditors, U.S. pressure has clearly led to an erosion of banking secrecy laws and any sensible lawyer should keep several things in mind before establishing and operating such trusts. First, a lawyer should be at least partially aware of the source of funds which enter an asset preservation trust. While willful ignorance is still insufficient to establish a fraudulent conveyance in most offshore jurisdictions, a lawyer in the U.S. can be held liable as facilitating the fraudulent conveyance and be deemed a co-conspirator of the fraud.¹⁴⁴ One proposed solution to this danger is to require a client who wishes to open an asset preservation trust to sign a solvency

142. Egmont Group, *Statement of Purpose of the Egmont Group of Financial Intelligence Units*, Jun. 23, 2004 available at http://www.egmontgroup.org/files/library_egmont_docs/statement_of_purpose.pdf (last visited Nov. 14, 2007).

143. Egmont Group, *Financial Intelligence Units of the World*, July 2007, available at http://www.egmontgroup.org/list_of_fius.pdf (last visited Nov. 14, 2007).

144. 284 F.3d 827 (8th Cir. 2002).

affidavit, pledging that the client has no outstanding judgments against him.¹⁴⁵ By requiring such an affidavit, a lawyer may be able to absolve himself of liability if a U.S. court later alleges that he facilitated a fraudulent conveyance into an offshore trust.

Second, although a trust that allows the settlor a greater degree of control can in many situations be beneficial, as a result of cases such as *Grupo Torras*¹⁴⁶ there is still a real danger that such trusts can nevertheless be held shams and set aside. It is therefore essential that in drafting the trust agreement, the powers of the settlor are clearly defined and that the settlor does not exceed these powers in reality.

Lastly, although determining the situs of the asset preservation trust is still an important decision, as inter-regional cooperation leads to more uniform standards, the finance industry is approaching a more standardized version of the asset preservation trust, regardless of where the trust is located. While such a trend obviously makes the job of a lawyer easier in determining the situs of a trust, it is still too early to determine whether this trend will also lead to a loss of some of the features which make asset preservation trusts so desirable in the first place.

For the time being, however, asset preservation trusts are now less likely to be used as a means of illegal money laundering because of U.S. pressure, yet they still provide both the flexibility and the protection needed in today's increasingly litigious society for assets earned through legitimate means.

145. Marks, *supra* note 1, at 3.

146. [1995] BHS No. 86 (Bah.).