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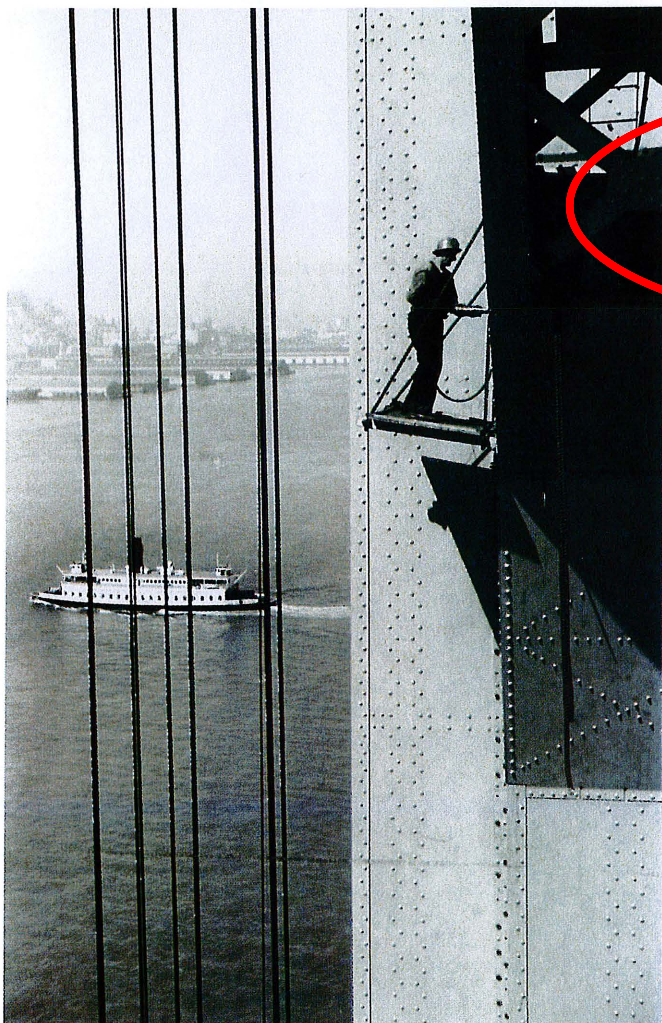

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Beware of Federal Super Creditors

Can traditional asset protection tools withstand their reach?

Is there such a thing as bulletproof asset protection against federal claims? Many estate planners say "yes" and advise their clients to use or rely on certain techniques and tools like state exemptions, tenancy-by-the-entirety property rights, limited liability company (LLC) interests or beneficial interests in trusts. But many of these same estate planners offer their advice based on two mistaken assumptions: first, that state law defines what a property interest is, and second, that all federal creditors must follow state remedies. So let's clear up how property interests are defined and the rules surrounding what federal creditors can and can't do. Then you won't make the same mistakes that many estate planners and asset protection attorneys make. The result: You'll be able to properly and effectively advise your client about how to protect his assets and achieve the best deterrent against federal creditors.

State vs. Federal Law

Before 1983, the rule was that state law determined what constituted "property." That all changed when the U.S. Supreme Court decided three cases[1] beginning with *U.S. v. Rodgers,* in which the court ruled that state law determines the *nature* of an interest or the type of rights a person has in an interest, but federal law determines *whether* that interest is considered a "property interest." If, under federal law, the nature of an interest (or what many refer to as the "bundle of sticks") is sufficient to equal "property," then federal super creditors (that is, federal creditors that have a federal collection statute) may attach the property as well as sell it—regardless of state law. State law no longer controls the classification of what is property; the only thing that state law determines is what rights a beneficiary has in something.

Given that distinction, can any traditional asset protection tool still be a deterrent to federal super creditors? We think that the common law discretionary trust[2] remains the most viable option. However, it may need to be an offshore discretionary dynasty trust, should a trustee wish to make a distribution. More on that later.

Federal Super Creditors

The status of a federal super creditor is a subtle one. At the Fourth Annual Asset Protection Planning Symposium (APPS) in Chicago in 2010, estate-planning expert John E. Sullivan, III noted that it's necessary to examine the statutory authority on why certain governmental agencies are classified as super creditors and others are not. According to Sullivan, absent a specific federal enforcement statute such as a lien statute (as in the case of the Internal Revenue Service) or a disgorgement statute[3] (as in the case of the Securities and Exchange Commission), the general rule is that the federal government is limited to collecting judgments under Federal Rules of Civil Procedure 69(a)(1). Fed. R. Civ. Pro. 69(a)(1) states that the federal government must look at state procedure and state law for collecting a judgment. For example, if an ordinary federal agency has a judgment against a debtor-partner in a partnership, the federal agency must follow the state's charging order statute to collect against the debtor's interest in the partnership. However, the IRS and the SEC have federal enforcement collection statutes, so these agencies aren't limited to state collection procedures and aren't limited by Fed. R. Civ.

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Pro. 69(a)(1). That's why they're "super creditors."

State Exemption Statutes

A state exemption statute protects property from state claims. Assuming a state has elected to use its exemptions for bankruptcy law, the state exemption statute also applies in bankruptcy.[4] Common state exemptions are homestead exemptions, cash surrender value of insurance, annuities, individual retirement accounts and possibly retirement plans.[5] But what happens when a federal super creditor seeks to attach an asset exempt by state law? The general rule is that federal law preempts state law and a federal super creditor may attach that asset.

For example, in *U.S. v. Bess,*[6] the U.S. Supreme Court held that New Jersey's statute preventing a creditor from reaching the cash surrender value of a policy owned by the debtor didn't apply to the IRS. In *SEC v. Yun,*[7] the SEC successfully reached annuities protected by a Florida state exemption statute. Likewise, in *U.S. v. Rodgers,*[8] Texas' homestead exemption didn't prevent the IRS from executing against half of a homestead owned by a debtor-spouse. And in a case in the Northern District of Ohio, the IRS was successful in levying an IRA, even though state law protected the IRA.[9]

Note that a key issue in the above cases that allowed the federal super creditors to reach the interests is the definition of such interests as "property."

Disclaimed Property

While it's easy to see that homesteads, insurance contracts, annuities and IRAs constitute property, many times a debtor has an interest in something that traditionally hasn't been classified as property. For example, most states' common laws don't classify disclaimed property as a debtor's property. In fact, Arkansas codifies this rule by statute.[10]

But when enforcing a federal tax lien, the Supreme Court has held to the contrary, stating that disclaimed property is property of a debtor. In *Drye v. U.S.,*[11] the court noted that the IRS' enforcement mechanisms are "most sensibly read to look to state law for delineation of the taxpayer's rights or interest, but to leave to federal law the determination of whether those rights or interests constitute property or rights to property within the meaning of IRC § 6321." The *Drye* court concluded that the right to control property from being received and then redirecting it through a disclaimer is sufficient to constitute "property" within the meaning of Internal Revenue Code Section 6321 (IRC Section 6321 provides that if a person owes federal taxes, the amount due becomes a lien in favor of the United States on all property and rights to property, whether real or personal). In *Drye,* the court permitted the IRS to reach the disclaimed property under federal law.

> The courts were next concerned with whether a bankruptcy trustee would be considered a federal creditor in the context of tenancy-by-the-entirety property.

Tenancy-by-the-Entirety

In 2002, the Supreme Court in *U.S. v. Craft*[12] articulated its view that federal law, not state law, determines whether tenancy-by-the-entirety rights constitute property for federal tax purposes. In *Craft,* Michigan law provided that a spouse's creditor couldn't attach tenancy-by-the-entirety rights. The court reiterated that in determining what a property interest is for federal tax purposes, the court would look to state law to see what rights a debtor has in something. But federal law would determine whether those rights constitute property for federal tax purposes.[13] The Supreme Court in *Craft* thus allowed the IRS to attach the tenancy-by-the-entirety property, regardless

of Michigan's statute preventing attachment.

One year after the Supreme Court's decision, the U.S. Court of Appeals for the Sixth Circuit expanded the doctrine of *Craft* when it held in *U.S. v. Hatchett* that not only could the IRS attach tenancy-by-the-entirety property, but also, the IRS could force the sale of that property.[14]

As the evolution of the concept of federal property continued, the courts were next concerned with whether a bankruptcy trustee would be considered a federal creditor in the context of tenancy-by-the-entirety property. If the answer was "yes," then tenancy-by-the-entirety strategies would provide no asset protection in bankruptcy. Fortunately, Michigan answered this question in the negative in *Spears v. Boyd*[15] and ruled that a bankruptcy trustee represents the interests of the creditors and since almost all creditors would be creditors under state law, the bankruptcy trustee couldn't attach or foreclose on tenancy-by-the-entirety property.

Note that some estate planners take the position that *Craft* and *Drye* only apply to IRC Section 6321 issues. This was the defendant's position in the 2010 case of *SEC v. Solow,*[16] in which the defendant argued that *Craft* stood for the proposition that while federal tax liens can encumber a taxpayer's interest in tenancy-by-the-entirety property, no other type of creditor is afforded such treatment. In *Solow,* a defendant-debtor and his wife stripped millions of dollars in equity from tenancy-by-the-entirety property and placed the proceeds in an offshore trust settled by the defendant's wife and created a few months after a $6 million judgment was rendered against the defendant-husband. The Southern District of Florida held that state exemption statutes don't protect debtors against claims by the SEC and thus allowed the SEC to reach the trust.

The *Solow* case raises another asset protection concern for estate planners: If a client encumbers a tenancy-by-the-entirety property at a time when the SEC super creditor is seeking to enforce a judgment against a client's spouse, is the client engaging in a fraudulent conveyance against the federal government? Well-known estate planners and asset protection attorneys have weighed in and commented on the court's favorable SEC outcome in *Solow,* as well as how federal crimes can piggy back on a fraudulent conveyance action against the government. Expert and author Gideon Rothschild remarked, "It remains to be seen how the Court decides in a subsequent action brought by the SEC against Mrs. Solow on fraudulent transfer grounds whether she will join Mr. Solow behind bars."[17] And esteemed asset protection planner Robert D. Gillen noted at the Fourth Annual APPS, "If a client engages in a scheme to defraud a federal creditor, he or she may be found guilty of multiple federal crimes such as mail fraud and wire fraud."[18] Because mail fraud or wire fraud are predicate offenses to money laundering charges,[19] it becomes even more critical that both asset planners and estate attorneys understand the interplay of federal laws and state exemption laws when there's a federal creditor.

Charging Orders

The family limited partnership (FLP) or LLC is another tool that many asset protection planners use. Is a federal super creditor limited to a charging order (that is, a court order granting the creditor any distributions made to the debtor-partner), particularly if the state statute prevents the judicial foreclosure sale of the debtor's interest? Remember that a charging order is a state remedy. It doesn't define a debtor's interest in property; rather, it defines what a creditor can reach under state law. At present, there doesn't seem to be any case law on this issue, but the answer appears to be "no"—a federal super creditor is not limited to a charging order.[20]

With regard to a single member LLC, the IRS takes the position that a membership interest is property under federal law, and therefore the IRS may levy (that is, attach) future distributions or sell an LLC interest.[21] The IRS makes no mention of a charging order under state law. Further, the IRS doesn't discuss any difference that might exist between single member and multi-member LLCs.[22] Rather, once the membership interest is determined to be property, the IRS may either attach future distributions or sell it.

Beneficial Interests in Trusts

The asset protection tool most dear to asset protection and estate planners' hearts are trusts. Can federal super creditors reach a beneficiary's interest in a trust? Remember that a spendthrift trust (that is, a trust that contains a provision preventing a beneficiary from alienating his interest or a creditor from attaching it) is an invention of state law, not federal law. Thus, just like in the scenarios involving state exemption statutes and

tenancy-by-the-entirety property, the IRS has been able to lien a beneficiary's interest when courts have classified such trust interests as property, regardless of the spendthrift provisions.[23] However, in instances in which courts haven't classified a beneficiary's interest as a property interest, the IRS couldn't attach it.[24] In Chief Counsel Advice 200614006, the IRS incorporated the principles of *Drye* and *Craft* and stated:

- "The question of whether a state law right constitutes property or rights to property under IRC Section 6321 is a matter of federal law."
- However, "the Codes' prescriptions are most sensibly read *to look to state law for delineation of the taxpayer's rights or interest in the property* the Government seeks to reach, but federal law determines whether those rights or interests constitute property under 6321." [emphasis added]

This leads to the question: When is a current distribution interest a property interest? Under common law, there are three main types of distribution interests:[25] 1) mandatory distribution interests; 2) support interests; and 3) discretionary interests. In general,[26] a mandatory distribution requires a trustee to distribute all the income, a formulated or a computed amount or a specific amount within one year. A support distribution interest is when mandatory language such as "shall" or "must" is combined with an ascertainable standard. A discretionary interest uses words of uncontrolled discretion (such as "sole," "absolute" or "uncontrolled discretion") and a permissive direction to the trustee (such as the trustee "may"), combined with the ability to make unequal distributions among the beneficiaries. Under common law, almost all discretionary trusts contain a standard or guidelines.[27]

Courts have classified both mandatory distribution interests[28] and support distribution interests[29] as property interests. However, courts haven't classified discretionary distribution interests as property interests. That's because there are primarily two types of asset protection under American common law: (1) discretionary trust protection, and (2) spendthrift protection. Discretionary trust protection, which originated under English common law and has nothing to do with spendthrift protection, is based on the premise that a beneficiary doesn't have an enforceable right to a distribution[30] and therefore, no creditor may stand in the beneficiary's shoes. In this respect, the beneficiary's interest isn't a property interest[31] and is nothing more than an expectancy that can't be attached by any creditor.[32]

The key reason why a common law discretionary distribution interest isn't classified as property and a mandatory or support distribution interest is classified as property is that a beneficiary doesn't have an enforceable right to a distribution in discretionary distribution interests.

The Bundle of Sticks Analysis

In *Craft*, the Supreme Court used a "bundle of sticks" analysis when it determined that a debtor had sufficient rights to constitute property for a federal tax lien under IRC Section 6321. The Supreme Court noted that tenancy-by-the-entirety property had all of the following "sticks." (See "A 'Bundle of Sticks' Approach," p. 18.) In dictum, the *Craft* court noted that the right to use property, the right to exclude third parties from property and the right to share in the income may be sufficient to constitute property for federal income tax purposes.

With regard to a beneficiary's interest in a mandatory distribution or support distribution, a beneficiary has the right to share in the income and use of the trust property. Compare this to the beneficiary of a common law discretionary distribution interest, in which the beneficiary doesn't have any enforceable right to sue the trustee for a distribution. That's because generally a court would only review a trustee's discretion if a trustee had (1) an improper motive; (2) acted dishonestly; or (3) failed to use its judgment.[33] Therefore, absent a trustee exercising its discretion, a beneficiary doesn't have the ability to use the property or a right to share in the income. To the extent the beneficiary has the right to either a mandatory distribution or a support distribution, the beneficiary can exclude others from the amount that should be distributed to the beneficiary. Conversely, the beneficiary of a common law discretionary trust doesn't have a right to sue the trustee if the trustee distributes trust property to another beneficiary or refuses to distribute trust property to the beneficiary. In this respect, both a mandatory distribution interest and a support distribution interest meet the Supreme Court's dictum test for the definition of property. However, the beneficiary of a common law discretionary trust holds none of these

"sticks." As such, common law discretionary trust interests aren't property, and as long as the property remains in the trust, it shouldn't be reachable before distribution by federal super creditors.

Discretionary Trust Distributions

Once a beneficiary has received a distribution from a trust, regardless of whether it's held in a segregated account, any creditor may reach the distribution. However, does a federal super creditor have greater rights than a beneficiary? That is, can a federal super creditor attach a beneficiary's distribution once the trustee has exercised its discretion to make a distribution, but before a beneficiary receives it? Case law seems uncertain here. The majority of cases seem to follow *Wilson v. U.S.*: "[W]here discretionary trusts are involved, the beneficiary has no right to trust income until the trustee irrevocably and unconditionally place it in the beneficiary's control."[34] Two cases seem uncertain regarding the issue,[35] and one case holds the trustee liable for failing to make discretionary distributions to the IRS once the trustee exercised his discretion to make a distribution.[36]

The Uniform Trust Code (UTC) and *Restatement (Third) of Trusts*[37] resolve this uncertainty in favor of the IRS by reversing the common law rule preventing a creditor from attaching a discretionary distribution interest.[38] UTC Section 501 provides that absent a spendthrift provision, any creditor may reach any type of trust, including a discretionary interest. Since a spendthrift provision is a creature of state law, it doesn't apply to federal super creditors. Therefore, unless a UTC jurisdiction has modified UTC Section 501 to reflect common law, federal super creditors automatically attach to UTC discretionary interests.[39]

States Weigh In

Fortunately, Florida, Michigan, Missouri, New Hampshire, Ohio and Wyoming have all modified their UTC statutes so that a creditor can't attach a discretionary distribution interest in these UTC states.

Further, many of the lead trust jurisdictions began codifying into statutes the *Restatement (Second) of Trusts'* discretionary/support trust law to insure that a beneficiary doesn't have an enforceable right in a discretionary distribution interest.[40]

The four major components to drafting a discretionary/support statute that retains the benefits of common law are:

(1) That no creditor may attach a discretionary interest;
(2) An affirmative statement that a discretionary interest is neither a property interest nor an enforceable right;
(3) A judicial review standard in *Restatement (Second) of Trusts*, Sections 187 and 128; and
(4) A definition of a discretionary interest.

While South Dakota has by far the most comprehensive discretionary/support statute,[41] Michigan is not far

A "Bundle of Sticks" Approach

Examine the nature of an interest to determine whether it constitutes "property"

The extent of the beneficiary's interest	Tenancy-by-the-Entirety	Mandatory or Support Interest	LLC or LP Interest	Discretionary Interest
Use of Property*	Yes	Yes	Yes	No
Exclude Third Parties*	Yes	Yes	Yes	No
Right to Share Income*	Yes	Yes	Yes	No
Right of Survivorship	Yes	No	No	No
Right to Mortgage With Consent of Joint Tenant	Yes	No	No	No
Right to Sell Property With Consent of Joint Tenant	Yes	No	Depends	No
Right of Unilateral Alienation	No	Yes	Depends	No

** These three criteria are sufficient to constitute property for a federal super creditor to attach.*

— *Mark Merric, Michael J. Bland, and Mark Monasky, M.D.*

behind, with New Hampshire, Missouri and Nevada following. (See "Discretionary Support Statutes," this page.) Codifying the *Restatement (Second) of Trusts* to make sure that a beneficiary doesn't have an enforceable property interest that in turn creates a property interest provides the greatest degree of protection against a federal super creditor. But even then, there's some uncertainty whether a trustee may make distributions to the beneficiary or on behalf of the beneficiary for so long as there is a federal super creditor outstanding. In a situation in which distributions are going to be made on behalf of or to a discretionary beneficiary, the safest alternative would be to use an offshore discretionary dynasty trust. That's because in many offshore jurisdictions, U.S. courts wouldn't have jurisdiction over the foreign trustee.

Discretionary Support Statutes

Which states offer the most comprehensive protection for beneficiaries to protect against a federal super creditor?

	Creditor cannot attach interest	Beneficiary does not have an enforceable right to a distribution	*Restatement (Second) of Trusts* judicial review standard	Definition of a discretionary interest
South Dakota	✓	✓	✓	✓
Michigan	✓	✓	**Probably**	✓
New Hampshire	✓	✓	**Uncertain**	✓
Missouri	✓	✓	**Uncertain**	✓
Nevada	✓		✓	
Delaware	✓		**Probably**	
Wyoming	✓		**Uncertain**	✓
Indiana	**Probably**	✓	✓	

— *Mark Merric, Michael J. Bland, and Mark Monasky, M.D.*

Endnotes

1. *United States v. Rodgers*, 461 U.S. 677 (1983); *Drye v. U.S.*, 528 U.S. 49 (1999), and *U.S. v. Craft*, 122 S. Ct. 1414 (2002). Note that the *Drye* court also implied that the principle of looking to state law for the rights to property and federal law for the consequences of property was previously discussed in *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), which cites *U.S. v. Bess*, 357 U.S. 51 (1958) (the federal tax statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law.")
2. The term "common law" is used to distinguish case law discretionary distribution interests from the new view of discretionary trusts espoused by the *Restatement (Third) of Trusts*.
3. For an excellent article by asset protection planning attorney Jeff Baskies on the disgorgement issue, *see* "*SEC v. Solow:* If the SEC is a 'Super-Creditor' Then State Law Exemptions Don't Matter, Right?" *Steve Leimberg's Asset Protection Planning Newsletter*, #154, May 3, 2010. *See also Mercantile Trust Co. v. Hoffer Bert*, 58 F. Supp. 701 (D. Ct. Md. 1944), referring to the government as "not an ordinary creditor."
4. The 2005 Bankruptcy Code did place some limits on homestead exemptions in certain situations. *See* Bankruptcy Code Section 522(p) and Section 522(o).
5. Whether a federal super creditor can reach a retirement plan is a controversial area. The Employee Retirement Income Security Act (ERISA) is a federal statute, but the IRS' lien statute is a federal statute too. In *Ameritrust Company v. Derakhshan*, 830 F. Supp. 406 (N.D. Ohio 1993), the district court allowed the IRS to reach a retirement plan, regardless of ERISA protection.
6. *U.S. v. Bess*, *supra* note 1.
7. *S.E.C. v. Yun*, 208 F. Supp.2d 1279 (M.D. Fla. 2002).
8. *U.S. v. Rodgers*, *supra* note 1.
9. *Ameritrust Company v. Derakhshan*, *supra* note 5.
10. Arkansas Code Section 28-2-107.
11. *Drye v. U.S.*, *supra* note 1.
12. *U.S. v. Craft*, *supra* note 1.
13. In the minority opinion, dissenting Justices Clarence Thomas and Antonin Scalia declared that the court's decision reversed 50 years of established law, by stating that the now-federal law was defining what a property interest was—not state law.
14. *U.S. v. Hatchett*, 330 F.3d 875 (6th Cir. 2003).
15. *In re Spears*, 313 B.R. 212 (W.D. Mich. 2004).
16. *S.E.C. v. Solow*, 2010 WL 303959 (S.D. Fla. 2010).
17. Gideon Rothschild, "Rothschild on *Solow*," *Steve Leimberg's Asset Protection Planning Newsletter*, #151, April 28, 2010.
18. Robert D. Gillen, "Asset Protection Strategies Volume II," Chapter 17, Alexander Bove (editor), *Attorney Liability for Assisting in Asset Protection*, American Bar Association 2005; Mark Merric and Robert D. Gillen, "Asset Protection For the Middle Class," *Trusts and Estates*, May 2010 at p. 24.
19. John E. Sullivan, III "Asset Protection Strategies Volume II," Chapter 18, Alexander Bove, (editor), *Money Laundering, RICO, Aiding and Abetting, and Related Due Diligence Concerns for U.S. Asset Protection Planners*, American Bar Association 2005.
20. Alan R. Bromberg and Larry E. Ribstein, *Bromberg and Ribstein on Partnership* (2009), Section 3.05(d)(3)(iv), take the position that the federal government may foreclose on the partner's interest.

21. Technical Advice Memoranda 200235023 and 200835030.
22. The cases of *In re Albright*, 291 B.R. 538 (Bkrtcy. D Colo. 2003); *In re A-Z Electronics, LLC*, 350 B.R. 886 (Bkrtcy. D. Idaho 2006); and *In re Modanlo*, 412 B.R. 715 (Bkrtcy. D.Md. 2006), take the position that a bankrupt's single member limited liability company (LLC) has no charging order protection, and the bankruptcy trustee succeeds to all rights of the bankrupt.
23. *Bank One Ohio Trust Company v. U.S.*, 80 F.3d 173 (6th Cir. 1996); *Magavern v. U.S.*, 550 F.2d 797 (2d Cir. 1977); *Lesuchner v. First Western Bank and Trust Company*, 261 F.2d 705 (9th Cir. 1958); *U.S. v. Grimm*, 865 F. Supp. 1303 (N.D. Ind. 1994); *U.S. v. Riggs*, 636 F. Supp. 172 (D.C. 1986); *First of America Trust Company*, 1993 WL 327684 (C.D. Ill. 1993) (as to the income of the trust).
24. *First Northwestern Trust Company of South Dakota v. IRS*, 622 F.2d 387 (8th Cir. 1980); *U.S. v. Shaughnessy*, 517 N.W. 2d 574 (Minn. 1994); *First of America Trust Company, ibid.* (as to the principal of the trust); *Wilson v. U.S.*, 140 B.R. 400 (N.D. Tex. 1992); *Texas Commerce National Bank v. U.S.*, 908 F. Supp. 453 (S.D. Tex. 1995); *Pulizzotto v. U.S.*, 1990 WL 120670 (D.N.J. 1990).
25. Actually, under the *Restatement (Second) of Trusts* there were two types of interests: a support interest and a discretionary interest. A mandatory interest was included in the support interest category and protected by spendthrift protection. The Uniform Trust Code (UTC) created the third category when UTC Section 506 allowed any creditor to reach an overdue mandatory distribution.
26. The definition of a support distribution interest and discretionary distribution interest has been greatly simplified for purposes of this article. For a detailed analysis of a common law discretionary and support distribution interests, *see* Mark Merric, "Drafting Discretionary Dynasty Trusts, Parts I-III," *Estate Planning Magazine*, February, March, April 2009.
27. Author Mark Merric has read over 200 of the discretionary/support cases. In all but a few of the discretionary cases in which the court held the trust to be a discretionary trust, the distribution language included a standard.
28. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit*, 191 Colo. 406, 411 (1976). *See also Bank One Ohio Trust Company, supra* note 23 and *Riggs, supra* note 23.
29. *LaSalle National Bank v. U.S.*, 636 F. Supp. 874 (Dist. Ct. Ill. 1986); *First of America Trust Company, supra* note 23; *Pulizzotto v. U.S.*, 1990 WL 120670 (Dist. N.J. 1990); *Magavern v. U.S.*, 415 F. Supp. 217 (W.D.N.Y. 1976); *U.S. v. Delano*, 182 F. Supp.2d. 1020 (D. Colo. 2001); *U.S. v. Taylor*, 254 F. Supp. 752 (D.C.Cal. 1966).
30. *Restatement (Second) of Trusts*, Section 155(1) and comment b.
31. Mark Merric, "How to Draft Distribution Standards For Discretionary Dynasty Trusts," *Estate Planning Magazine*, March 2009, endnote 42, lists cases from 16 states noting that a discretionary distribution interest is not a property interest. *See www.WealthMgmtEdu.com.*
32. *Ibid.*, endnote 43, cites 28 cases from 19 states noting discretionary interests could not be attached at common law. Note that the *Restatement (Third) of Trusts* and the UTC reverse common law in this area allowing exception creditors, as well as any creditor, to attach a discretionary interest. (However, *see* the spendthrift protection part of *ibid.*)
33. *Ibid.*, endnote 33, cites 21 cases from 14 states and two countries adopting the standard. *See also Restatement (Second) of Trusts*, Section 187 comment j and Section 122. While this is not the only discretionary distribution interest judicial review standard under common law, it was the most common.
34. *Wilson v. U.S., supra* note 24, *citing Comm'r v. Porter*, 148 F.2d 566 (5th Cir. 1945), *Hay v. U.S.*, 263 F. Supp. 813 (N.D. 1962), and *Scott on Trusts* Section 152.5 at p. 123, note that "the interest of the beneficiary in the income [from a discretionary trust] is exempt from the claims of creditors until it is actually paid over by the trustee to the beneficiary." *See also Texas Commerce, supra* note 24.
35. *See First Northernwestern Trust Company of South Dakota, supra* note 24 in which the Eighth Circuit noted that "the tax collector could reach whatever the trustee elects to distribute" but doesn't discuss whether a lien attaches after the trustee distribution decision has been made but before it was received by the beneficiary. *See also U.S. v. O'Shaughnessy, supra* note 24, in which the Minnesota Supreme Court noted that a discretionary beneficiary didn't have a right to property or property interest prior to the trustee exercising their discretionary distribution power. However, *O'Shaughnessy* is silent on whether a tax lien attached after such distribution authority was exercised and before the distribution was received by the beneficiary.
36. *U.S. v. Cohn*, 855 F. Supp 572 (D. Conn. 1994).
37. *Restatement (Third) of Trusts*, Sections 50 and 60.
38. Certain UTC proponents miscite the case of *Hamilton v. Drago*, 241 N.Y. 401 (NY. Ct. of App. 1926), for the proposition that a creditor could obtain a court order requiring the trustee to make discretionary distributions to the creditor once the creditor had decided to make a discretionary distribution. But *Hamilton* dealt with a mandatory income interest where income was required to be distributed annually, not a discretionary distribution interest. The only discretion the trustee had was when income would be distributed within the one year mandatory time period. Further, these UTC proponents don't mention that the case stated there was a New York statute that allowed garnishment of 10 percent of the trust income "where any . . . income from the trust funds . . . are due and owing to the judgment debtor." In this respect, *Hamilton* stands for the proposition that a state may pass a garnishiment statute and attach a mandatory income interest once the funds "are due and owing to the judgment debtor."
39. Jonathan E. Gopman, "C.C.A. 200614006—IRS Can Reach Out and Touch a Spendthrift Interest," *Steve Leimberg's Asset Protection Planning Newsletter*, # 82, April 26, 2006.
40. For a detailed discussion of this issue, *see* Daniel G. Worthington and Mark Merric, "Which Situs is Best," *Trusts and Estates*, January 2010 at p. 54.
41. In addition to having all of the four elements for a discretionary/support distinction under common law, South Dakota also protects against dominion and control attacks.