# THE INTEGRATED ESTATE PLANNING TRUST – AN ALL-PERILS INSURANCE POLICY

***There are notable advantages of planned asset protection as an insurance against unexpected litigation. The introduction of a foreign trust into an overall integrated estate plan could be the most effective barrier***

*By Barry S Engel*

The idea of planning today in case a financial calamity strikes tomorrow is nothing new. Consider, for example, home insurance. The policy is acquired at a time when there is no expectation of a fire in the home. The premiums are paid each year hoping the policy will never be needed and, generally, this tends to be the case. Such insurance policies go hand in glove with home ownership, and are usually filled with exemptions and exclusions, ie they do not cover "all perils".

Consider also the integrated estate planning trust (IEPT). This is a trust (usually offshore) established to protect assets at a time when there is no expectation that assets will need protecting. The trust is administered each year in the hope that the policy will never be needed.

The IEPT can be described as an "all-perils" insurance policy for, if properly conceived, properly designed and properly implemented, the IEPT will protect subject assets in the event of any threat materialising, regardless of the peril involved.

The IEPT has other purposes that include those traditionally associated with estate planning trusts, eg estate or transfer tax mitigation, probate avoidance, privacy and ensuring a smooth transition of client wealth.

## Offshore trusts in context

Offshore trusts are not a new concept whereas an overall integrated estate plan (IEP) wherein lifetime estate protection is combined with the overall estate plan is. An IEP is an extension of older protective planning strategies used in the UK and Europe designed to safeguard against threats such as monetary exchange controls, the forced repatriation of assets and confiscatory tax rates.

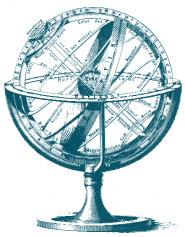
The question arises as to why a settlor would, or should, decide to establish an offshore trust as opposed to a trust under local law as part of an overall IEP.

There are a number of reasons why an offshore trust is widely regarded in wealth planning circles as more protective and more flexible than a domestic trust.

*Increased ability of settlor to retain benefit and control*: In many countries, local trust law generally restricts the benefits in, and control over, a trust that the settlor can retain following settlement. For example, in the USA there is a rule against a trust that benefits in whole or in part its settlor and that has as one of its goals the preservation of trust assets from creditors of the settlor (whether or not such creditors are currently known or identifiable, ie a "self-settled spendthrift trust").

While a trust created for the benefit of the settlor of the trust is a valid trust, it is ineffective to creditors of the settlor. Alaska, Delaware, Nevada, Rhode Island (and to a lesser extent Colorado) are somewhat notable exceptions to this rule against "self-settled spendthrift trusts." The trust laws in a number of offshore financial centers (OFCs) are even more notable as exceptions to the rule, for their provisions are more flexible and permissive with regard to the design of a self-settled trust.

*Offshore trusts are not automatic targets:* A domestic trust remains subject to the jurisdiction of the local courts and therefore can reasonably be expected to be a target in litigation against the settlor if the domestic trust holds a corpus of any significance. A plaintiff's counsel need not be particularly creative in order to craft a theory where the domestic trust could be subjected to a legal shake-down and exposed to the same hazards of litigation that the settlor may be exposed to while opposing counsel's attempts to force a settlement. An offshore trust that is properly drafted, properly



implemented and properly administered is not nearly as likely to be the same automatic defendant as a domestic trust. The reasons relate to the practical barriers described below.

*Offshore trusts erect practical barriers:* The mere presence of the foreign element of an offshore trust will have a definite impact on how far the creditor is willing to go to pursue assets, for the following reasons:

- No comity – The trust law of many OFCs provides that judgements foreign to that particular OFC are not to be given force and effect.
- Required burden of proof – In many OFCs the burden of proof in challenging asset transfers to a trust is always on the party making the allegations, and does not shift to the transferor.
- Requisite standard of proof – The standard of proof that must be met by the party making the allegations is the American criminal standard of "beyond reasonable doubt".
- Statute of limitations – In many OFCs the statute of limitations for challenging asset transfers to the trust begins to run from the date of transfer and not from the date the transfer is "discovered" by the claimant against the transferor.
- Costs and fees – Simply, it is more expensive to pursue a claim out of state, let alone in one or more foreign countries.
- Psychological barriers – The psychological barriers of dealing with foreign parties, foreign customs and foreign legal systems substantially enhance the protection that trust assets will enjoy should a threat against the settlor materialise.

*Foreign trusts are ultimately more protective:* The trust law of certain foreign jurisdictions is simply more specific and more protective and will ultimately succeed because it is legally sound, not because of smoke and mirrors or secrecy.

*Sovereign status (no pre-emption principle):* Life is very random and not as lineal as people tend to think. For example, a client may not expect a bankruptcy trustee or federal agency to be his adversary one day. This is a very real possibility and, given this, should a client rely on a body of law subject to pre-emption by federal law? In contrast, federal law does not pre-empt foreign law.

## Will the all-perils policy work?

There are many variables that exist under any IEP and prevent one from making blanket statements such as "IEPTs work" or "IEPTs do not work." These include: the facts peculiar to a given client's situation; the goals of the client; the manner and extent to which they are incorporated into the design of the IEPT; the skill with which the IEPT was crafted; the nature of the asset or assets transferred to the IEPT; the skill with which the IEPT is attacked; the skill with which the IEPT is defended; the thoroughness and protectiveness of the IEPT's applicable law; whether the opposing party is a governmental instrumentality; whether any criminal sanctions would result from the trustees, or others, exercising options they would otherwise be free to exercise if the litigants were all private parties; the law of the forum court; and any biases of the presiding judge.

> *"The mere presence of the foreign element of an offshore trust will have a definite impact on how far the creditor is willing to go to pursue assets"*

The ultimate goal of the asset protection component of an IEP can be considered realised if the client weathers a storm at least moderately better than he otherwise would have had they not engaged in the planning. With one exception, the author's clients who have been threatened, or confronted, with litigation have enjoyed a result that far surpasses this standard.◆

THE AUTHOR
*Barry S Engel*
*is Principal,*
*Engel Reiman & Lockwood,*
*Denver, Colorado, USA*
*E-mail: erl@crl-law.com*