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JUNE 20, 2025

# Non-U.S. Creditors Can Crack Delaware's Domestic Asset Protection Trusts

**Non-U.S. creditors face long odds when their debtor's assets are stashed away in a Delaware Domestic Asset Protection Trust (DAPT), which is purposefully designed to be hard to crack. However, creditors should not be intimidated - a creative, aggressive, and multijurisdictional attack can lead to success.**

Delaware's Domestic Asset Protection Trusts (DAPTs) provide robust legal protection to individuals and entities worldwide. While international creditors may view asset recovery efforts in Delaware as daunting, it is possible to overcome these protections with a strategic, multijurisdictional approach.

Delaware's trust law allows individuals to shield assets through a DAPT, where the trust's settlor is also the trust's beneficiary. Various provisions further protect the DAPT. For example, creditors have strict requirements to succeed on claims of fraudulent transfers to the trust. Broad powers for settlers make it challenging to claim that the trusts are illusory. Delaware law also contains unique provisions that curtail attempts by courts outside of Delaware to apply non-Delaware law to matters involving Delaware DAPTs.

While attempting to access these Delaware trusts is challenging, aggressive multijurisdictional tactics can give creditors an edge:

- **Attack the validity of the trust.** There are statutory requirements to establish a DAPT, which, if violated, allow creditors to challenge it as invalid. These include requirements that the trust must be irrevocable, that specific provisions must be included in the trust instruments, and that at least one trustee, part of the trust's administration, and some of the trust's assets must be in Delaware.
- **Go through a creditor-friendly jurisdiction.** Some U.S. states do not recognize DAPTs. If there is a connection between the trust and one of those states, a creditor can persuade the state's courts to reach the assets of a Delaware DAPT based on public policy or other

grounds. For example, courts in Utah, Washington, and Illinois have pierced DAPTs to allow creditors to reach assets belonging to the trusts. This strategy can potentially overcome Delaware's attempt to restrict the reach of non-Delaware law.

- **Bring a fraudulent transfer claim.** Creditors should assess the likelihood that the trustee would be entitled to utilize the trust assets to cover the costs of defending the DAPT, considering that Delaware law grants them priority unless there is evidence that the trustee acted in bad faith.

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The attractiveness of Delaware's trusts makes the state a repository of debtor assets and, correspondingly, a potential source of high returns for creditors. They should not be intimidated by the trust's fortress – a creative, multijurisdictional, and focused attack can lead creditors straight to the treasure trove behind the walls.

### **About Kobre & Kim**

Kobre & Kim is a global, conflict-free law firm focused on disputes and investigations, often involving fraud and misconduct.

Working closely with lawyers around the world, our Delaware team:

- Consists of experienced trial litigators in the Delaware Court of Chancery and U.S. Bankruptcy Court for the District of Delaware who focus on complex commercial disputes.
- Has deep experience tracing, freezing, and recovering misappropriated assets hidden in cross-border and offshore structures.
- Acts on behalf of creditors to monetize high-value judgments and arbitration awards, with most of our matters involving awards and judgments with face values of US \$100 million+ to several billion USD.