

SB

298

SENATE COMMITTEE REPORT

DATE: 2/27/06

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered

SENATE BILL NO. 298

SB 298 TRUSTS: CHALLENGES; CLAIMS; LIABILITIES

"An Act relating to loans from trust property; relating to a trustee's power to appoint the principal of a trust to another trust; relating to challenges to, claims against, and liabilities of trustees, beneficiaries, and creditors of trusts and of trusts and estates; relating to individual retirement accounts and plans; relating to certain trusts in divorce and dissolutions of marriage situations; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
SCS House Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>	X			
<i>[Signature]</i>			X	
<i>[Signature]</i>	X			
<i>[Signature]</i>	X			
CHAIR: <i>Ralph Hopkins</i>	✓			

ALASKA STATE SENATE



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Senator Ralph Seekins
District D

Senate Bill 298 Sponsor Statement

"An Act relating to loans from trust property; relating to a trustee's power to appoint the principal of a trust to another trust; relating to challenges to, claims against, and liabilities of trustees, beneficiaries, and creditors of trusts and of trusts and estates; relating to individual retirement accounts and plans; relating to certain trusts in divorce and dissolutions of marriage situations."

Senate Bill 298 revises Titles 13 and 34 pertaining to the administration of trust assets. Updates incorporated into Title 13 include the addition of clarifying language relating to: (1) the various powers conferred upon the trustee; (2) trustee reporting requirements, and; (3) claims made against trust assets.

Updates integrated into Title 34 include language pertaining to: (1) the exemption from transfer provisions for certain IRA trust assets; (2) technical corrections made to AS 34.40.110(b), and; (3) the handling of trust assets in cases of divorce or dissolution.

Since 1997, the Alaska State Legislature has consistently worked to update and improve laws regarding the use and administration of trusts. As a result, Alaska is considered one of the premier trust jurisdictions in the country.

But, it is a very competitive environment. In fact, at least seven other states – Delaware, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota and Utah – have enacted legislation similar to our own.

The updates proposed in this Bill are in keeping with revisions made to Alaska's Trust Laws in 1997 and 2003. They are intended to preserve Alaska's leading position within the universe of trust products and services offered nationwide.

Our laws encourage Alaskan's to keep their trust assets here in the state. Moreover, capital is *attracted* to Alaska from all over the country creating greater job and investment opportunities for residents of our state.

Senate Bill 298 clarifies prior trust legislation, makes the administration of trusts in Alaska more efficient and cost effective, and will keep Alaska as the jurisdiction of choice for trust administration.

24-LS1113\Y
Bannister
2/28/06

**SPONSOR SUBSTITUTE FOR SENATE BILL NO. 298
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION**

BY SENATOR SEEKINS

**Introduced:
Referred:**

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to loans from trust property; relating to a trustee's power to appoint
2 the principal of a trust to another trust; relating to challenges to, claims against, and
3 liabilities of trustees, beneficiaries, and creditors of trusts and of trusts and estates;
4 relating to individual retirement accounts and plans; relating to certain trusts in divorce
5 and dissolutions of marriage situations; and providing for an effective date."

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * Section 1. AS 13.36.109(21) is amended to read:

8 (21) to make loans out of trust property to an eligible [A] beneficiary
9 or an eligible third-party entity on terms and conditions the trustee considers to be
10 fair and reasonable under the circumstances and to guarantee loans to the eligible
11 beneficiary or eligible third-party entity by encumbrances on trust property; in this
12 paragraph.

13 (A) "eligible beneficiary" means a beneficiary of the trust

1 who is currently eligible for or entitled to a distribution of income or
2 principal of the trust;

3 (B) "eligible third-party entity" means a third-party entity
4 if more than 50 percent of the equity of the entity is owned by the trust or
5 by one or more beneficiaries of the trust;

6 * Sec. 2. AS 13.36.157(a) is amended to read:

7 (a) Subject to (d) of this section, unless [UNLESS] the terms of the
8 instrument expressly provide otherwise, a trustee who has authority [THE
9 ABSOLUTE DISCRETION] under the terms of an [A TESTAMENTARY]
10 instrument or irrevocable inter vivos agreement to invade the principal of a trust for
11 the benefit of a [THE] beneficiary who is eligible or entitled to the income of the trust
12 may exercise without prior court approval the trustee's authority [DISCRETION] by
13 appointing, whether or not there is a current need to invade the principal under
14 any standard stated in the governing instrument, part or all of the principal of the
15 trust in favor of a trustee of another [A] trust under an instrument other than that
16 under which the power to invade was created if the exercise of this authority
17 [DISCRETION]

18 (1) does not reduce any fixed income interest of a [AN INCOME]
19 beneficiary of the trust being invaded;

20 (2) is in favor of the beneficiary of the trust to which principal is
21 appointed; and

22 (3) does not violate the limitations on validity under AS 34.27.051 or
23 34.27.100.

24 * Sec. 3. AS 13.36.157 is amended by adding a new subsection to read:

25 (d) The governing instrument of an appointed trust may provide that, after a
26 time or an event specified in the governing instrument, the trust assets of the appointed
27 trust remaining after the time or event shall be held for the benefit of the beneficiaries
28 of the invaded trust on terms and conditions regarding the nature and extent of the
29 beneficiaries of the invaded trust that are substantially identical to the terms and
30 conditions governing the beneficial interests in the invaded trust. In this subsection,

31 (1) "appointed trust:" means the trust to which principal is appointed

1 under (a) of this section;

2 (2) "invaded trust" means the trust whose principal is invaded under
3 (a) of this section.

4 * Sec. 4. AS 13.16 is amended by adding a new section to article 8 to read:

5 Sec. 13.16.530. Application to trustees. Notwithstanding AS 13.16.450 -
6 13.16.525, the trustee of a trust may, under AS 13.36.368(b)(3), take the action a
7 personal representative may take under AS 13.16.450 - 13.16.525.

8 * Sec. 5. AS 13.36.100(a) is amended to read:

9 (a) Unless resolved or barred under (b) or (c) of this section, and
10 notwithstanding the lack of adequate disclosure, all claims against a trustee who has
11 issued a [FINAL] report received by the beneficiary and who has informed the
12 beneficiary of the location and availability of records for examination by the
13 beneficiary are barred unless a proceeding to assert the claims is commenced within
14 three years after the beneficiary's receipt of the [FINAL] report.

15 * Sec. 6. AS 13.36.100(b) is amended to read:

16 (b) If a trustee petitions a court for an order approving a report that adequately
17 discloses the existence of a potential claim, serves the report on all beneficiaries to be
18 bound by the report, [AND] gives the beneficiaries at least 60 [90] days' notice of the
19 court proceeding, and notifies the beneficiary that a claim must be begun within
20 45 days after the beneficiary is served with notice of the court proceeding, all
21 potential claims of the beneficiaries against the trustee are barred unless the claims are
22 served on the trustee and filed with the court within 45 [60] days after the beneficiaries
23 are served with notice of [RECEIVE THE REPORT, OR DURING] the court
24 proceeding.

25 * Sec. 7. AS 13.36.100(c) is amended to read:

26 (c) If a trustee serves a report on a beneficiary that adequately discloses the
27 existence of a potential claim against the trustee, the trustee informs the beneficiary
28 that a proceeding to assert any claim against the trustee must be commenced by the
29 beneficiary within [24 MONTHS AFTER RECEIPT OF THE REPORT IF IT IS AN
30 INTERIM REPORT OR WITHIN] six months after receipt of the report [IF IT IS A
31 FINAL REPORT], and the beneficiary fails to assert a claim against the trustee, all

1 claims of the beneficiary are barred.

2 * Sec. 8. AS 13.36.100 is amended by adding a new subsection to read:

3 (h) The report of a trustee under this section is considered to provide adequate
4 notice to the beneficiary that there is a time limitation for filing a claim against the
5 trustee if the cover page or top of the first page of the report contains the following
6 language in at least 14 point bold type: "BY RECEIPT OF THIS REPORT, ANY
7 ACTION YOU MAY HAVE AS A BENEFICIARY AGAINST THE TRUSTEE
8 FOR BREACH OF TRUST BASED ON ANY MATTER ADEQUATELY
9 DISCLOSED IN THIS REPORT MAY BE BARRED UNLESS THE ACTION IS
10 BEGUN WITHIN SIX MONTHS AFTER YOU RECEIVE THIS REPORT. IF YOU
11 HAVE ANY QUESTIONS, YOU MAY WISH TO OBTAIN PROFESSIONAL
12 ADVICE REGARDING THIS REPORT."

13 * Sec. 9. AS 13.36.310(a) is amended to read:

14 (a) Except as provided in AS 34.40.110(b) [AS 34.40.110], a trust that is
15 covered by AS 13.36.035(c) or that is otherwise governed by the laws of this state, or
16 a property transfer to a trust that is covered by AS 13.36.035(c) or that is otherwise
17 governed by the laws of this state, is not void, voidable, liable to be set aside,
18 defective in any fashion, or questionable as to the settlor's capacity, and the assets of
19 the trust are not subject to the claim of a creditor of the settlor or a creditor of a
20 beneficiary, on the grounds that the trust or transfer avoids or defeats a right, claim, or
21 interest conferred by law on a person by reason of a personal or business relationship
22 with the settlor or beneficiary or by way of a marital or similar right.

23 * Sec. 10. AS 13.36.310(b) is amended to read:

24 (b) If a trust or a property transfer to a trust is voided or set aside under
25 AS 34.40.110(b) [(a) OF THIS SECTION], then the trust or property transfer shall be
26 voided or set aside only to the extent necessary to satisfy the settlor's debt to the
27 creditor or other person at whose instance the trust or property transfer is voided or set
28 aside and the costs and attorney fees allowed under the rules of court.

29 * Sec. 11. AS 13.36 is amended by adding a new section to read:

30 **Sec. 13.36.368. Claims against revocable trusts.** (a) Whether or not the terms
31 of the trust contain a spendthrift restriction,

1 (1) during the lifetime of the settlor of a revocable trust, the property of
2 the trust is subject to claims of the settlor's creditors; and

3 (2) except as otherwise provided in (b) of this section, after the death
4 of the settlor of a trust that was revocable at the settlor's death, and subject to the
5 settlor's right to direct the source from which claims may be paid, the property of the
6 trust is subject to claims to the extent the settlor's estate is not adequate to satisfy the
7 claims.

8 (b) With respect to claims in connection with the settlement after the death of
9 the settlor of a trust that was revocable at the settlor's death,

10 (1) a creditor's claim that would be allowed or barred against a
11 decedent's estate under AS 13.16.450 - 13.16.525 shall be allowed or barred against
12 the trustee of the trust, the trust property, and the creditors and beneficiaries of the
13 trust;

14 (2) if the personal representative of the decedent's estate follows the
15 procedures provided by AS 13.16.450 - 13.16.525, then claims that are allowed or
16 barred against the decedent's estate shall also be allowed or barred against the assets of
17 the trust;

18 (3) if the personal representative of the decedent's estate fails to follow
19 the procedures stated by AS 13.16.450 - 13.16.525, the trustee of the trust may file a
20 petition with the superior court for a determination of claims and follow the
21 procedures established by AS 13.16.450 - 13.16.525, and claims against the trust and
22 against the decedent's estate shall be allowed or barred under those procedures.

23 (c) In (a)(2) and (b) of this section, "claim" means a claim

24 (1) of a creditor of the settlor;

25 (2) for the expenses of the administration of the settlor's estate;

26 (3) for the expenses of the settlor's funeral; and

27 (4) for the expenses of the disposal of the settlor's remains.

28 * Sec. 12. AS 34.40.110(b) is amended to read:

29 (b) If a trust contains a transfer restriction allowed under (a) of this section,
30 the transfer restriction prevents a creditor existing when the trust is created or a person
31 who subsequently becomes a creditor from satisfying a claim out of the beneficiary's

1 interest in the trust, unless the creditor is a creditor of the settlor and

2 (1) the settlor's transfer of property in trust was made with the intent to
3 defraud that creditor, and a cause of action or claim for relief with respect to the
4 fraudulent transfer complies with the requirements of (d) of this section;

5 (2) the trust, except for an eligible individual retirement account
6 trust, provides that the settlor may revoke or terminate all or part of the trust without
7 the consent of a person who has a substantial beneficial interest in the trust and the
8 interest would be adversely affected by the exercise of the power held by the settlor to
9 revoke or terminate all or part of the trust, in this paragraph, "revoke or terminate"
10 does not include a power to veto a distribution from the trust, a testamentary
11 nongeneral power of appointment or similar power, or the right to receive a
12 distribution of income, principal, or both in the discretion of a person, including a
13 trustee, other than the settlor, or a right to receive a distribution of income or principal
14 under (3)(A), (B), (C), or (D) [(3)(A) OR (B)] of this subsection;

15 (3) the trust, except for an eligible individual retirement account
16 trust, requires that all or a part of the trust's income or principal, or both, must be
17 distributed to the settlor; however, this paragraph does not apply to a settlor's right to
18 receive the following types of distributions, which remain subject to the restriction
19 provided by (a) of this section until the distributions occur:

20 (A) income or principal from a charitable remainder annuity
21 trust or charitable remainder unitrust; in this subparagraph, "charitable
22 remainder annuity trust" and "charitable remainder unitrust" have the meanings
23 given in 26 U.S.C. 664 (Internal Revenue Code) as that section reads on
24 October 8, 2003, and as it may be amended;

25 (B) a percentage of the value of the trust each year as
26 determined from time to time under the trust instrument, but not exceeding the
27 amount that may be defined as income under AS 13.38 or under 26 U.S.C.
28 643(b) (Internal Revenue Code) as that subsection reads on October 8, 2003,
29 and as it may be amended;

30 (C) the transferor's potential or actual use of real property held
31 under a qualified personal residence trust within the meaning of 26 U.S.C.

1 2702(c) (Internal Revenue Code) as that subsection reads on September 15,
2 2004, or as it may be amended in the future; or

3 (D) income or principal from a grantor retained annuity trust or
4 grantor retained unitrust that is allowed under 26 U.S.C. 2702 (Internal
5 Revenue Code) as that section reads on September 15, 2004, or as it may be
6 amended in the future; or

7 (4) at the time of the transfer, the settlor is in default by 30 or more
8 days of making a payment due under a child support judgment or order.

9 * Sec. 13. AS 34.40.110(l) is amended by adding a new paragraph to read:

10 (2) "eligible individual retirement account trust" means an individual
11 retireme: account under 26 U.S.C. 408(a) or an individual retirement plan under 26
12 U.S.C. 408A(b) (Internal Revenue Code), as those sections read on the effective date
13 of this paragraph or as they may be amended in the future, that is in the form of a trust,
14 if a trust company or bank with its principal place of business in this state is the trustee
15 or custodian.

16 * Sec. 14. AS 34.40.110 is amended by adding a new subsection to read:

17 (m) If a trust has a transfer restriction allowed under (a) of this section, in the
18 event of the divorce or dissolution of the marriage of a beneficiary of the trust, the
19 beneficiary's interest in the trust is not considered property subject to division under
20 AS 25.24.160 or 25.24.230 or a part of a property division under AS 25.24.160 or
21 25.24.230. Unless otherwise agreed to in writing by the parties to the marriage, this
22 subsection does not apply to a settlor's interest in a self-settled trust with respect to
23 assets transferred to the trust after the settlor's marriage.

24 * Sec. 15. AS 13.36.100(g)(1) is repealed.

25 * Sec. 16. The uncodified law of the State of Alaska is amended by adding a new section to
26 read:

27 TRANSITION. AS 13.36.157(a), as amended by sec. 2 of this Act, and
28 AS 13.36.157(d), as added by sec. 3 of this Act, apply to a trust that is created by a will or
29 another instrument before, on, or after the effective date of secs. 2 and 3 of this Act.

30 * Sec. 17. Sections 2 and 3 of this Act take effect immediately under AS 01.10.070(c).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM

February 24, 2006

SUBJECT: Sectional analysis of SB 298 relating to trusts and estates
(Work Order No. 24-LS1113\F)

TO: Senator Ralph Seekins
Attn: Brian

FROM: *tb*
Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Amends AS 13.36.109(21) to change that loans from trust property may be made to eligible beneficiaries and eligible third-party entities.

Section 2. Amends AS 13.36.157(a) to change the conditions under which a trustee may appoint the principal of a trust in favor of a trustee of another trust.

Section 3. Amends AS 13.36.157 to add another subsection. Provides that the governing instrument of a trust that receives principal from another trust may provide that the trust assets of the trust that receives the principal are to be held for the beneficiaries of the invaded trust on the same terms as the invaded trust.

Section 4. Adds a new section to the probate chapter to coordinate a new provision that is added in bill sec. 11 (sec. 13.36.368(b)(3)). States that a trustee may take under sec. 13.36.368(b)(3) the action a personal representative may take under certain statutes in the probate chapter.

Section 5. Amends AS 13.36.100(a) to expand the application of the subsection to more than just final reports.

Section 6. Amends AS 13.36.100(b) to change, for the purpose of barring claims against trustees, the notice period, the notification requirements, and the claim deadline.

Section 7. Amends AS 13.36.100(c) to change the claim commencement period to six months after receipt of a report.

Senator Ralph Seekins

February 24, 2006

Page 2

Section 8. Amends AS 13.36.100 to add a new subsection. Indicates what type of notice in a report is considered adequate to notify a beneficiary that there is a time limitation for filing a claim against the trustee.

Section 9. Amends AS 13.36.310(a). Adds that, except as provided in the new cross-reference, the assets of certain qualifying trusts are not subject to the claim of a creditor of the settlor or a creditor of a beneficiary on the grounds that the trust or a transfer to a trust avoids or defeats certain interests.

Section 10. Amends AS 13.36.310(b) to change a cross-reference in the section.

Section 11. Adds a new section that addresses claims against revocable trusts.

Section 12. Amends AS 34.40.110(b) to establish two exemptions (for eligible individual retirement account trusts) from the paragraphs that provide exceptions to the transfer restriction provision.

Section 13. Amends "eligible individual retirement account trust" for the previous bill section.

Section 14. Adds AS 34.40.110(m), a new subsection that provides that if a trust has a transfer restriction, the beneficiary's interest in the trust is not considered property subject to division (or part of a property division) in the event of the divorce or dissolution of the beneficiary's marriage. Limits the application of the section.

Section 15. Repeals the definition of "final report."

Section 16. States that AS 13.36.157(a) and 13.36.157(d) apply to a trust that is created by a will or another instrument before, on, or after the effective date of these subsections.

Section 17. Gives two sections of the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:ljw
06-094.ljw

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 298
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title Trusts: Challenges; Claims; Liabilities RDU Banking & Securities (536)
 Component Banking & Securities
 Sponsor Seekins
 Requester Labor & Commerce Component No. 2808

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation makes various changes to AS13.36 which covers the administration of trusts. Provisions in this legislation do not impact the operations of the division.

Prepared by: Mark Davis, Director Phone 907.465.2521
 Division: Banking and Securities Date/Time 2/22/06 5:07 PM
 Approved by: William C. Noll, Commissioner Date 2/22/2006
 Agency: Commerce, Community, and Economic Development

2/13/04

PERSONAL FINANCE

New IRA Protects Against Lawsuits, Bankruptcy

Two Delaware Trust Firms Offer Retirement Products Shielded by State's Statutes

By RACHEL EDMA STEVERMAN

A NEW TYPE of individual retirement account aims to address an increasing concern among doctors, business executives and other professionals: how to protect your IRA if you're sued or have to file for bankruptcy.

Unlike 401(k)s and other employer-sponsored retirement plans, IRAs generally aren't protected from creditors under federal law. Instead, IRA protection is covered by state laws, which vary. In recent years, a few states, such as Delaware, have also changed their trust laws to offer additional protections that may affect IRAs.

Two Wilmington, Del., trust companies, NatCity Trust Co., a unit of National City Corp. in Cleveland, and Capital Trust Co., now offer stepped-up IRAs that are structured to take advantage of the state's generous asset-protection and trust laws. These IRAs operate like typical custodial IRAs, where the money is held in a bank or investment firm, but they offer the protection of a trust, which can have special provisions to stave off creditors.

These "Delaware IRAs" are targeted at wealthy professionals who have big retirement accounts and are worried about professional liability. NatCity Trust's president, Jeffrey Getty, says the number of accounts has grown 60% since the start of the year, with the average account size at more than \$1 million. But how effective these IRAs are in keeping creditors away is still an open question.

Asset Protection

The Delaware IRAs are some of the latest offerings of the booming asset-protection industry. The growth of the industry is being driven by increasing concern among doctors, business executives and other professionals concerned about lawsuits and creditors. Financial services companies and specialized asset-protection lawyers have been rolling out sophisticated trusts, partnerships and other ve-



Limited Protection

Keeping individual retirement accounts from creditors is a growing concern, especially among doctors and other professionals worried about lawsuits and bankruptcy. IRA protection varies depending on where you live.

- Unlike employer-sponsored 401(k)s and pensions, IRAs generally aren't protected from creditors under federal law.
- IRA protection depends on state law, which varies. Most states, such as Delaware, have statutes that broadly protect IRAs from creditors, while others, such as Minnesota, have more limited exemptions.
- Delaware also allows IRAs to have "spendthrift" provisions, which are another measure that might help protect the IRA.

hicles to keep up with the demand for asset protection.

IRAs, however, are a thorny problem in asset-protection planning. Although retirement accounts make up a substantial portion of many people's wealth—there was more than \$3 trillion in IRA assets at the end of last year—the question of whether creditors can pierce IRAs is still an unsettled area of the law.

"It's a complicated area," says Edward Minto Jr., a Pittsburgh asset-protection lawyer, who has had four physician clients, all Pennsylvania residents, set up Delaware IRAs in the past year because of creditor fears.

The legal landscape for IRA creditor protection is expected to shift further next month, when the U.S. Supreme Court weighs in on the issue. The case, *Roth v. Jacoway*, involves whether funds in IRAs are subject to creditors under Chapter 7 bankruptcy proceedings.

IRAs aren't safe from creditors under the federal Employee Retirement Income Security Act which protects 401(k)s and pension plans. Many states, such as New York, Texas, Florida and Delaware, offer broad protections for IRAs. However, some states, such as California and Minnesota, provide more limited protection—attempting, for instance, only what is reasonably necessary to support IRA owners and their dependents or limiting the exemption to a specific dollar amount.

Some lawyers and financial advisers are urging clients with creditor concerns to use the Delaware IRA, which might offer stronger protection. These IRAs operate like other retirement accounts, but the trusts are in how they are structured. The IRAs are set up as trusts, rather than the typical custodial IRAs. The two vehicles are similar, but trusts are generally more complex and expensive structures to set up. Trusts also can offer greater legal protection against creditors, as well.

more estate-planning options. Individual retirement trusts are popular among the wealthy and are offered by numerous private banks and trust companies.

The Delaware IRAs stand out because they use special language called a spendthrift provision. This spendthrift provision is meant to limit the rights of creditors to reach the funds inside the account. Delaware is one of only a few states that permit these spendthrift provisions in trusts, such as IRAs, where the individual setting up the trust is also the beneficiary. Just a handful of financial-services companies, including NatCity and Capital Trust, offer IRA trusts with the spendthrift provision.

The spendthrift clause "puts extra obstacles before creditors, so it's not an easy snatch and grab," says Marc Singer, who has developed many asset-protection plans for clients as a partner at Singer Xenos, a Coral Gables, Fla., wealth-management firm.

The Cost

Fees for Delaware IRAs vary. NatCity charges roughly 1.1% of assets, which includes asset management and requires an account minimum of about \$750,000. (The fee is about half that for just an administrative trust.) Capital Trust, which sells its services through financial advisers, charges 0.2% on the first \$1 million, with a minimum fee of \$1,250. A typical Merrill Lynch custodial IRA is less expensive—0.25% of net assets, with a \$80 minimum annual fee.

But how well Delaware IRAs hold up as asset-protection vehicles is still unclear, since they haven't been tested in court yet. There is still a possibility that a court in another state could rule that the assets in a Delaware IRA are fair game to a creditor outside the state. That's because the U.S. Constitution mandates that each state should have "full faith and credit" in the legal judgments made in other states. So a plaintiff who wins a judgment in a California court might be able to grab funds in an IRA located in Delaware.

Moreover, a Delaware IRA, like all retirement accounts, is still vulnerable in divorce proceedings. Since family-court judges have wide discretion in divvying up marital assets, "In divorce, all bets are off," Mr. Singer says.

And since IRAs are already well protected in many states, setting up a Delaware IRA might not be worth the extra hassles or expense of having an out-of-state trustee for many individuals.