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the business of law

ASSET PROTECTION: What It Is And Why You Need It

Asset protection is the practice of safeguarding your property, whether it is personal, real estate, securities, or money, from attack by others. To one extent or another, we all engage in some form of this practice. We insure our homes or automobiles, acquire home-security systems, prepare a will to specify the disposition of our property on our death, or deposit our money in the bank. While some protection is mandated by law, in other cases the protection is elective. We choose to acquire it because we know by our own experience, and through the tragic stories of others, that without certain protections, we face a very real chance of losing our possessions, or their value, when something unexpected happens.

PROTECTION FROM WHAT?

Naturally, what we elect to protect is a function of what we know to be a threat, so we typically engage in a type of “reactive protection.” We believe that the steps we have taken to safeguard ourselves are just as good as what anyone else does, and that it’s a matter of bad luck or bad timing that results in someone else’s misfortune. We say things like, “Bad things happen to other people, not me.” Yet this false sense of reassurance leaves our assets exposed to attack when we either don’t consider the likelihood of predictable misfortune, like a business failure, happening to us; or we just don’t know to consider other, less predictable sources of trouble that can pose an even greater threat to our financial security : our creditors – those outsiders who claim a legal interest in our assets by use of a very common technique, a civil lawsuit. Certain creditors’ claims are legitimate, like those that flow from breach of a contract or loan default. Other creditors’ claims are spawned by increased activity in our already overly litigious society, like personal injury lawsuits, contentious divorce proceedings, and failed business ventures. Legislation imposes new liabilities on landowners in the area of environmental clean-up, and business owners are exposed to new liabilities stemming from the Americans with Disabilities Act, the Family Medical Leave Act, and sexual harassment claims.

What this means is that in addition to implementing reactive protections, we need to implement proactive protections in an all-encompassing plan of protections. The person best qualified to help us safeguard our hard-earned money and possessions through an asset protection plan is an attorney or law firm that specializes in the complex and ever-changing field of Asset Protection, which typically also includes a related focus in estate planning and taxation.

Of course, your first reaction is to think of who would ever sue you, and why? Surely, you are a careful, law-abiding citizen minding your own business. Nobody has any reason to go after you, you think. That may certainly be true today, but the whole concept behind asset protection is to anticipate the unexpected in the future, as far-reaching as possible. Take a moment and think about why you already have certain protections in place. What are the chances of lightning striking your house, burning it and all of your possessions to the ground? Statistically slim, yet you have homeowner’s insurance to compensate you for any loss, just in case. You may never file a claim, but you are reassured knowing that you will not lose all in the unlikely event of disaster. The same philosophy applies to automobile insurance: you don’t expect to be involved in an accident, but just in case, you take out extra coverage to ensure that you will be compensated for the cost of repairing your car, as well as for personal injuries sustained. An asset protection plan is like an all-inclusive insurance policy, protecting you from complete financial wipeout in the event that you are personally liable for business obligations or civil damages. If some or all of your assets are safeguarded, you will have what you need to start over again.

What kinds of situations can you possibly imagine will ignite a lawsuit against you? Depending on what your profession is, whether you lead a high- or low-profile life, and the liquidity of your assets, your attorney should be able to anticipate multiple scenarios, involving your potential creditors, and the legal protections you should have in place well before you might ever need them.

WHO IS AT RISK?

Everyone. In fact, because you own something of value, your creditors can seize it if they are armed with a court-ordered judgment claim or in some cases a prejudgment attachment order before the case is ever heard. Your bank accounts can be frozen, your stock accounts immobilized and your ability to sell your house restrained. And the American courts are filled with civil lawsuits seeking monetary damages for every conceivable claim of injury; plaintiffs' attorneys, working on a contingency fee basis, are all too eager to file such suits since the more they file, the greater the chances of winning. To be sure, there are certain individuals who are more often the target of such claims because they are more likely to have the financial resources to pay damages. Collectively, these individuals are known as "deep pocket" targets. The bell curve peaks on those individuals who are in relatively high-risk or litigious professions, like architects, developers, entrepreneurs, lawyers, physicians, stockbrokers, individuals who have substantial (over \$500,000) liquid assets, partners in closely held businesses, and landlords and landowners. However, even an individual of modest means is not immune from creditors' claims; in fact, he or she can suffer the catastrophe of financial ruin when forced to pay damages. The horror stories are not the substance of fiction, and they are becoming increasingly common every day. That's why, now more than ever, everyone with something to lose needs the advice and skill of a qualified attorney to assist them in creating a personally tailored asset protection plan.

Consider for example, the doctor who owns an office building and rents the space to businesses unrelated to his profession. A tenant slips and falls on an icy patch by the entranceway, and promptly sues the landlord for negligence. Because the landlord is a doctor, the tenant's skilled attorney increases the damages claim well beyond compensation, to include emotional distress and punitive damages. The landlord-doctor's property insurance may or may not cover the multi-million-dollar claim for damages, but his vacation home in the Outer Banks fits the bill. Faced with a Hobson's choice, he settles quietly for fear of the damage to his professional reputation that is certain to occur with the publicity of a trial. Had the doctor known to protect his property when he bought it, he could have saved it from this creditor's claim and achieved a much smaller settlement.

A less predictable scenario pits the government against a former landlord whose apartment building is discovered years later to be located on toxic soil. Clean-up costs exceed \$1 million. Although the landlord no longer owns the building, the government is empowered through federal CERCLA legislation to demand anyone who ever owned or substantially managed the site to pay for clean-up! What makes this legislation so effective at achieving its purpose of funding necessary clean-up, is that it is of no consequence that the landowner had no knowledge of the hidden danger; liability strictly attaches to anyone in the chain of ownership. So for individuals that buy, sell, rent or own real property, the importance of safeguarding their assets from this particularly invidious threat cannot be over-emphasized.

Anyone who has a teenage driver in the family is at considerable risk of being sued in the event of an accident. We have all heard of cases where the teenage driver's friend is seriously injured and, despite the fact that medical insurance covers the costs of care, the driver's family is sued for pain and suffering and mental distress. The defendant's family must deplete all of their savings, including money set aside for college. It's no reassurance that the families were close friends, because the victim's family had an experienced plaintiff's attorney motivated by an easy opportunity to make money.

Maybe you are getting married, and have considerable assets of your own. If so, it is essential to talk with your attorney before the wedding date to ensure that your assets remain with you. Hardly anyone contemplates divorce at the start of a marriage, but it is a well-known fact that it is statistically more likely today for a marriage to fail than endure. In many states, the once-separate assets of each spouse become pooled together and divided in the event of divorce, leaving the spouse who entered the marriage with greater assets much worse off if the marriage fails.

An individual that is a sole proprietor of a trade or business is at great risk of having his or her assets seized by creditors whether or not the lawsuit derives from the business activity. And for those claims that are trade or business related, it is often the case that insurance policies fail to cover the costs of the particular claim (such waivers are usually embedded within the fine print of the policy), rendering the fruits of the business the source to pay damages. But a business that is carefully established with asset protections in place can successfully withstand future creditors' claims.

WHAT CAN BE DONE?

In summary, everyone who owns anything of value is at risk of losing it to creditors. Nevertheless, these risks can be both identified and reduced, if not eliminated. If you own anything of value, now is the time to take the necessary steps to put asset protections in place – today. Generally, the greater time that goes by between any transfer of assets into a plan, the less likely the transfer will be attacked. The key to protecting your assets is to do it before any perceived threat might materialize, and to do it right, you should first consult with professionals experienced in asset protection, estate planning and taxation matters. A professional has the benefit of knowing the law, and what legal tools to use to safeguard your wealth. Remember, you need to try to anticipate the most likely ways your assets can be at risk or taken from you, and forge a plan that will provide you with the assurance that what you have worked hard to own, remains with you for a long time.

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