Protecting a Physician's Assets Takes Preparation

Forethought Could Save Personal Estate and Business

BY DAVID J. SCHILLER
Special to the Legal and PLW

Asset protection is a big part of estate planning. Physician clients often ask for advice and strategies for determining beneficiary designations and asset ownership so that they can best insulate their assets from potential creditor claims, particularly medical malpractice plaintiffs. Many clients are interested in protecting their future estate and pension plan beneficiaries and want the attorney to design an asset or estate plan considering these objectives.

There is a vast array of potential liability for physicians. For example, clients sign general partnership agreements to own real estate, active businesses or as an investment and do not appreciate that they have potential personal liability for claims against the entity. Even without signing a personal guarantee, they can be held personally liable for acts of the partnership. For example, an accident or fire could occur at a rental property and claims could exceed insurance limits. Medicare or another insurer could sue a physician's practice for excessive or inappropriate billing to determine a liability based upon reviewing only a small number of charts. In the Philadelphia area, there have been cases by the U.S. Attorney against both individuals and institutions, with some settlements exceeding $1 million.

There could be a claim based upon an auto accident of a client or his minor dependent resulting in liability to the client exceeding insurance coverage. Many clients are unfamiliar with personal umbrella policies and the additional protection they provide. These low-cost supplements are essential for physicians.

Particularly with one-person businesses, clients fail to form a corporation for new businesses with the goal of saving money and complexity, but then fail to gain the advantages of the protections offered by incorporating.

There should be a discussion with clients about holding the assets in tenants by entireties or in one's spouse's name and the potential matrimonial risks and the protection available.

When clients have substantial amounts of money or are involved with hazardous activities, including possibly environment claims against them, there should be discussion of utilizing off-shore trusts which would not be subject to the jurisdiction of U.S. courts. So long as U.S. income taxes are paid, there is nothing illegal about moving funds offshore for asset protection purposes and this will help create roadblocks for potential unknown creditors.

Many attorneys describe the fraudulent conveyance statute to their clients and discourage moving assets once a liability or potential liability has matured. Although the word "fraud" is in the title, the statutes do not involve fraud. If a plaintiff is successful in arguing a fraudulent transfer, a court might set aside the transfer or undo it allowing the plaintiff to make a claim against the assets, but there is no criminal element or downside to such transfers. Sometimes when there is a 10 percent chance of failure, the lawyer discourages the idea rather than focusing upon the 90 percent chance of success. Most plaintiff attorneys are not going to have the resources or inclination to bring litigation in another country because there is little hope that the assets exist and can be seized. Most of the offshore arrangements involve trusts where the physician client is a co-trustee. Upon claims against the client, he is automatically removed as a co-trustee, and the ability of the trust to make payment becomes quite restricted with the specific goal of protecting the targeted assets from attack.

DAVID J. SCHILLER, *is a tax attorney in the Philadelphia area. He can be reached at: djstaxman@comcast.net or (610) 277-5900.*

The most obvious line of protection is having adequate insurance, including homeowners, automobile, malpractice insurance and general liability insurance. When insurance exists, if a claim should settle, it sometimes takes the defendant's personal counsel to push the insurance carrier to offer a reasonable settlement amount up to the policy limits to avoid the potential of the defendant suffering an excess verdict. If a settlement within the limits is acceptable to the plaintiff, it is important that you document this and write to the defendant's insurance

Asset continues on M8

Asset

continued from M5

carrier to encourage them to make a reasonable offer, potentially subjecting them to additional liability if they fail to do so.

Some clients fail to appreciate the risk assumed as an officer or director of a corporation or other entity. If a physician client serves on a hospital board involving peer review, hospital privileges or other hospital matters, the physician must confirm that there is directors and officers insurance covering the physician in his capacity on the board. Physicians must recognize the potential personal responsibility for withholding and remitting payroll taxes since the IRS can pursue individuals and not just the entity.

The attorney should review with the client the most appropriate titling of assets with one goal being the protection of such assets in case of claims. Furthermore, the naming of beneficiary designations on IRAs, pension plans, annuities and insurance contracts is important since these assets are generally exempt from the claims of creditors.

In anticipation of certain types of claims, clients can be proactive. When purchasing commercial real estate, one can form a limited liability corporation or corporation protecting the physician should there be a general liability claim or a hazardous waste claim relating thereto. Physicians often buy into medical office buildings and have individual ownership of their condominium. One client, who owned a condominium, died with a lawsuit pending. The excess judgment awarded resulted in the loss of his multi-million dollar estate.

The most obvious line of protection is having adequate insurance, including homeowners, automobile, malpractice insurance and general liability insurance.

When a client or a child of a client is entering into a marriage, there should be a discussion of the appropriateness of a prenuptial agreement to protect both assets and future income. Particularly with physician clients, most states recognize the goodwill value of a medical practice and the physician may end up losing significant other assets to buy out his spouse's interest in the goodwill. A prenuptial could memorialize the non-physician spouse's waiver of any claim to goodwill or to the entire medical practice, including accounts receivable, supplies and equipment.

Clients sometimes have the opportunity to help structure their own future inheritance from their parents which could be received in trust and protected from creditors rather than receiving it outright. By utilizing at least one independent trustee, such funds could be completely exempt from creditors.

If a physician has a claim pending or is anticipating a claim that could result in the loss of personal assets and he is anticipating an inheritance, he or she still may have the ability to disclaim the inheritance so that it instead passes to the children, so long as a disclaimer is timely filed.

In discussing asset protection alternatives with clients, one must be cautious by writing a "CYA Letter," as an attorney might be concerned about his own malpractice. If the client ultimately files for bankruptcy, the trustee has the ability to review otherwise privileged attorney-client communications and this may be a roadmap for creditors.

With the current malpractice climate and the absence of a cap on non-economic damages, physicians have learned to focus on asset protection. Although it is sometimes difficult to convince physicians to establish trusts or otherwise separate them from their assets to protect the assets, there are many simple strategies that require little energy and are inexpensive that will help protect physicians from creditors. It is up to the attorney to identify potential areas of liability and recommend strategies to minimize risk to assets while attempting to still have full enjoyment of the assets. •