

What Are Your Lawsuit Risks?

Choosing the Right Asset Protection Plan for You

By Robert J. Mintz

The specific structure of the asset protection plan which is developed for you must involve a consideration of the details particular to your situation. The type of plan that works well for one person may be completely wrong for another. For example, the income tax and estate tax benefits of a plan must be efficiently tuned based on your age, income, accumulated wealth and your family dynamics. Also, the types of assets which you own can also make a big difference in the planning. If the greatest portion of your retirement nest egg is the family home, then a plan designed to protect your residence might be the most important goal for you. If your assets consist mostly of investment properties or interests in medical related businesses then the proper treatment of these assets often depends upon applying the law of your state and the terms of the investment contract itself.

Malpractice Risks

Most importantly, the type of plan that will work best for you should be designed specifically to deal with the particular source of liability risk that you have. If you are like most physicians, protection from the financial threat of a malpractice lawsuit should be one element of your legal planning. If this is your primary concern then your plan must effectively counter the legal tactics available to a plaintiff in a malpractice case. An asset protection plan should defend against the source of the most likely threats.

An example of this approach is our knowledge that the plaintiff's lawyer in a malpractice case is often focused on the settlement value rather than the trial outcome of his case, which are not necessarily related issues. Taking a case to trial always involves significant and sometimes unbearable financial risk to the plaintiff's attorney (as well as the defendant) due to the high upfront litigation costs and the uncertainty of the amount and timing of a damage award if a trial is necessary. Most cases settle before trial because the extreme unpredictability of the outcome makes the financial risk simply too great for both sides.

The Threat to Personal Assets

Based upon these economic realities, our primary goal in asset protection against malpractice liability is to enhance our bargaining power in any future settlement negotiations and to steer the plaintiff toward the available insurance coverage. If you have substantial and reachable assets, which are available to satisfy the excess uninsured liability, the plaintiff's lawyer holds the negotiating leverage. When your personal assets are "in play" in a malpractice case and you face the threat of loss, the plaintiff's bargaining position is very strong.

Protecting your personal assets from a liability claim clearly changes the relative bargaining power of each side in the litigation. When your assets are protected from a claim, the plaintiff effectively loses the “uncertainty” and risk of loss bargaining chip. The case can and should then be settled (or not) based on the true merits of the claim. If a malpractice lawsuit is at least one of the issues you would like to address, your planning might include one or more of the strategies we’ve detailed in our previous articles (See “Asset Protection Strategies” <http://www.rjmintz.com/MDNetGuideMarch2004.pdf>).

Underwater Real Estate

Even more common than malpractice concerns these days is the lawsuit risk from a potential default on a mortgage loan. This is particularly true for those who invested in Florida, the Southwest and California where many of the properties purchased, at least in the last few years, are now worth substantially less than the amount of the loan balance. As you may now know, except in limited situations (See “Protection Against Real Estate Losses” <http://www.rjmintz.com/pdf/realestate.pdf>) in the case of a mortgage default a lender generally has the right to collect from the borrower the amount of any deficiency - the amount by which the loan exceeds the foreclosure sale proceeds. Even when the lender agrees to a short sale, for an amount less than the mortgage, we have seen lenders aggressively pursue collection for the unpaid loan balance from the borrowers other remaining assets.

As opposed to a plaintiff in malpractice litigation, it seems that the banks in these cases rarely accept a negotiated settlement. Often the bank is merely the loan servicing agent (LSA) on behalf of the investors who purchased the original mortgage. As such it is entitled to add and collect servicing fees and litigation costs off the top of the defaulted property - even before the lender/investor gets paid. Similar to an hourly fee attorney, the economic incentive of the LSA is to drag these cases out for as long as possible while padding the servicing fees and costs. That fact may be one reason why we’ve rarely seen a settlement in these cases for less than the full amount owed (plus costs).

Protecting Valuable Property

The litigation strategy for actually collecting the amount of any deficiency usually depends on how much the real lender (as opposed to the LSA) wants to spend on the litigation, based upon the anticipated recovery from the borrower’s personal assets. A deficiency judgment acts as a lien on all real property standing in the name of the borrower and when the property is sold or refinanced then the judgment lien gets paid off before the borrower receives any proceeds. This lien typically lasts for 20 years or so and the lender may just sit and wait or may actively pursue a foreclosure of the property affected by the lien.

To defend against this common tactic of the lender, the appropriate asset protection strategy is used to usually avoid the potential lien of a judgment from attaching to other

valuable real estate owned by a borrower. This may be accomplished by holding and shielding these properties from judgment liens within entities such as trusts or LLCs which can be effective when properly structured.

As a note of caution, any of these planning strategies must be discussed with your local attorney who is familiar with your particular situation and after thorough consideration of the Fraudulent Transfer Laws as they apply in your state (See “When Is It Too Late For Asset Protection” <http://www.rjmintz.com/pdf/Article-MDNetGuideNovember2007-WhenIsItTooLate.pdf>).

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