


# Analyzing Risk and Shielding Personal Wealth



## Part One



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**B**ecause much has now been written on the "litigation explosion" and so many professionals and business owners have directly experienced its impact, asset-protection planning is becoming as common as wills and estate planning. A recent article in the *Wall Street Journal* cited a survey of individuals with more than \$1 million in assets. In 2003, 35% of those surveyed had some form of asset-protection plan, compared with just 17% in 2000. Of those who did not have an asset-protection plan in place, 61% were now interested in creating one. (*Wall Street Journal*, October 14, 2003). According to the article, this dramatic increase in interest in protecting assets has been spurred by the threats associated with

the "litigation explosion," including the widespread perception that professionals with any accumulated savings are easy and vulnerable targets for frivolous claims. To many outside observers, the outcome of every case appears random, with unpredictable jury verdicts and astronomical damage awards.

As would be expected, the increase in lawsuit awards and settlements is restricting the availability of liability insurance coverage for the physician, a traditional and popular "deep pocket" defendant; many malpractice insurers have simply withdrawn from the business. In some "high risk" states—those with a history of large malpractice jury awards—and for some "high risk"

specialties, such as obstetrics, neurosurgery, emergency room medicine, and orthopedic surgery, insurance may be unavailable, inadequate, or prohibitively expensive. Even doctors with good coverage now are uncertain about future availability. The "malpractice insurance crisis" is colliding with the "litigation explosion" to form the "Perfect Mess." Clearly, physicians need to plan ahead to protect themselves, which is where asset-protection planning comes into play.

Asset-protection planning is the specialty area of the law that addresses many of physicians' most important concerns, including the best ways to organize one's business and financial affairs to minimize liability and lawsuit risks, and the steps a

physician can take to insure his or her accumulated wealth and future earnings are insulated and shielded against potential loss. What else is involved in the field of asset protection? Who needs it? What are the strategies used? In future editions of this column, we will answer these and other questions

as they apply to the unique characteristics of a medical practice. In this inaugural edition, we will begin with an evaluation of the typical risks physicians might face from sources inside and outside of their practice, and then examine the role that asset-protection planning may have as an adjunct to their other business and financial planning.

### Why Doctors Are at Risk

The US legal system allows business owners, with the exception of physicians and some other professionals, to shield themselves from personal liability for business risks. Through the appropriate use of corporations, limited liability companies, and/or limited partnerships, business can be conducted without exposing the personal assets of the owner to the obligations incurred by the company. By law, the owner's risk is limited to the amount of capital invested in the business—the very definition of limited liability. The quantity of risk is known and accepted. An investment of \$100,000 in a business implies a maximum loss of \$100,000. Much asset-protection planning is devoted to organizing and reorganizing business structures and advising clients how to take full legal advantage of the limited liability protection available through these entities.

The purpose of allowing limited liability is to encourage business formation, job growth, and economic prosperity. Nobody would operate a business or make an investment if they could not quantify the potential loss. Without a fair measure of the dollars at risk, it would be impossible

to make rational business decisions. Not convinced? Ask yourself this question: Would you invest in a company for a stated percentage of the profits if you were required to provide an unlimited guaran-

their careers, with little or no savings, have the lowest level of risk. But with each passing year, savings are added and the amount at risk is increased. As assets continue to grow, prior to retirement, most

## Physicians cannot legally limit their personal liability for claims against the practice.

tee of losses, to the full extent of your net worth? Even though most people would agree this proposition doesn't sound like such a good deal, that's how your medical practice operates; you have no choice if you want to practice medicine. Physicians cannot legally limit their personal liability for claims against the practice, and there is unfortunately no business structure permitted in any state that protects a physician from the primary source of potential liability—lawsuits based on a claim of professional malpractice.

Although most businesses fail within a short time, the few owners who are smart or lucky and manage to accumulate surplus capital dramatically improve their chances for success. With a proper business structure, surplus cash can be withdrawn from the business and used to build a nest egg, make safe investments, and build wealth safe from exposure to the hazards of the business. Decision-making involves an attempt to strike a balance between the amount of capital left in the business for growth and expansion and the amount removed from danger. Starting out, many owners reinvest almost all available cash to accelerate expansion. Nearing retirement, many owners are less inclined to accept risk and seek to build up assets outside the business, free from potential jeopardy.

Unlike other business owners, each profitable year of operation does not reduce a physician's level of financial risk. In fact, the reverse is true. Every dollar saved becomes an additional investment in the practice. Young doctors just beginning

other business owners have minimized their exposure, but the risk for a physician has increased to the highest level. With every patient and procedure, they are literally betting everything they own on a successful outcome. The more they have, the larger the amount of their bet. In poker lingo, they're "all-in" on every hand.

Almost every attempt to remedy this situation has been blocked by trial lawyers and the groups influenced by their political contributions. In the last two decades, each state has passed legislation allowing the creation of Limited Liability Companies for business owners. In every case, at the behest of the trial lawyers, physicians and other professionals have been specifically excluded from the benefits of the law.

### Malpractice Insurance

Even though insurance carriers may devote substantial resources towards defending a claim, an important concern of many physicians is that a lawsuit may produce an award in excess of their level of coverage, or that coverage may not be available at some point in the necessary amount and at a price that is affordable.

In addition, there are other risks that may not be covered by insurance. Many physicians have concerns about the financial impact of litigation in the event of possible billing disputes with insurers or government agencies. In these types of cases, the first move may be an attempt to freeze all of the physician's assets. If such a freeze is granted, the case is effectively over. A defendant in such a case will have no ability to pay personal



or business obligations (or attorney's fees). Without access to funds, regardless of the merits of the case, or whether the defendant would ultimately prevail, an asset freeze virtually eliminates the possibility of conducting a defense, quickly forcing a fast and unfavorable settlement—on any terms demanded by the plaintiff (especially the government).

Other common sources of lawsuits are those faced by every business owner. The courts are overflowing with cases based on complaints by disgruntled employees, disputes with partners, liability from real estate, tax problems, and good deals that turned bad. I cover these examples in detail in my book *Asset Protection for Physicians and High Risk Business Owners* (available at no charge at [www.rjmintz.com/order.htm](http://www.rjmintz.com/order.htm)).

The most conservative business approach is to combine whatever insurance coverage is available with appropriate asset-protection planning. Asset protection closes the holes in coverage and once established, will be there in the future, regardless of the gyrations in the insurance market. For physicians without insurance coverage now, an asset-protection plan is the only realistic alternative for continuing to operate their medical practice.

The ideal benefit of an asset-protection plan is that it stops litigation before it begins. A contingent fee attorney is less likely to proceed against a physician with an asset-protection plan; in the case of assets not subject to legal collection—with no "deep pocket" to pursue—an attorney will not knowingly waste his or her time and money on the case. But, if a case does proceed, for whatever reason, asset protection provides a legal shield, protecting and insulating assets from the judgment. In my next column, we will discuss how asset protection works and the strategies that are most often employed by doctors to protect against their specific risks. **MDMG**

## The Numbers Tell the Tale

The average jury award in malpractice cases was \$3.49 million in 1999, up 79% since 1993. (Jury Verdict Research, *New York Times*, 9/10/01)

In 1997, only two malpractice verdicts topped \$20 million. In 2001, at least 12 went over \$20 million and three were over \$100 million, including a \$269 million judgment in Dallas. (*Miami Herald*, 2/3/02)

Between 1817 and 1995, Mississippi juries handed out \$1 million awards in less than 50 cases. Since 1995, they've done it more than 100 times. (*American Medical News*, 1/7/02)

From 1994-2000, the highest median award, \$4,280,000, was given in plaintiff's verdicts involving severe brain injury. (*Medical Malpractice: Verdicts, Settlements and Statistical Analysis*, 2002)

\$140 million was awarded to Samuel Desiderio, who suffered brain damage following surgery at a New York City hospital. A state court jury awarded him a hefty \$80 million for medical expenses and pain and suffering. An appeals court approved boosting the award against his doctors and the hospital.

\$94.5 million was awarded to a woman who prematurely delivered a baby with cerebral palsy. She claimed that the physicians failed to give her corticosteroids so the baby's lungs would mature faster. A Brooklyn, NY, jury decided the case, *Perez v. St. John's Episcopal Hospital*, in March 2002.

## Verdicts against obstetricians have produced some of the largest malpractice awards ever

\$91 million was awarded to a five-year-old girl with cerebral palsy; her lawyers claimed physicians delivered her via cesarean section without realizing her mother was exhibiting symptoms of a rare condition and was not even in labor. A Brooklyn, NY, jury decided the case, *Wise v. McCalla*, in December 2002.

\$80 million was awarded to a mother who delivered premature twins, one with cerebral palsy. The woman said physicians arrived late and didn't properly address her uterine cramping complaints. A Long Island, NY jury decided the case, *Brenner v. Spector*, in October 2002. (*Amednews.com, Malpractice Awards Hit the Jury Jackpot*, February 3, 2003)

The amounts of these awards are not commonplace, but they have a direct impact on physician liability in several respects. Attorneys go where the money is—large verdicts inevitably result in more attorneys filing more cases with larger settlement demands.

The same injury and the same set of facts may be worth \$100,000 to one jury and \$100 million to another. Seemingly random verdicts of \$10 million to \$100 million create greater uncertainty and risk with respect to every case. Since the plaintiff pays no legal fees or costs and has nothing to lose, highly variable and unpredictable outcomes work strongly in his or her favor. The greater a physician's risk, uncertainty, and potential liability, the higher the ultimate settlement amount will be.