HEALTH LAW

Send Lawyers, Guns and Money: Asset Protection for Providers and Urgent Care Owners

JOHN SHUFELDT, MD, JD, MBA, FACEP

Well, I started an urgent care
The way others seem to do
How was I to know
When I set it up wrong, I'd be screwed

Now I'm transferring assets to Liechtenstein
I'm a desperate man
Send lawyers, guns and money,
*The sh** has hit the fan...*

Although I am sure I have been described as an *Excitable Boy*, God knows I am no Warren Zevon. However, ol' Warren correctly described the mindset of most providers and business owners when their personal assets are attached to a judgment.

This article tackles the complex subject of asset protection.

When an acquaintance of mine (an attorney) learned that he was going to be named in a suit alleging corporate misdeeds, he immediately spent more than $50,000 setting up a complex array of offshore trusts and other asset-protection vehicles.

His actions were not merely unnecessary, they were ultimately deemed to be fraudulent by the court. He had failed to recognize the reality that a transfer made with intent to hinder, delay, or defraud a creditor is considered to be a "fraudulent transfer" and will be unraveled by the court. In some states, even if the transfer is made before the suit but after the alleged act has occurred, the court may determine the transfer fraudulent and declare it void.

John Shufeldt is the founder of the Shufeldt Law Firm, as well as the chief executive officer of NextCare, Inc., and sits on the Editorial Board of *JUCM*. He may be contacted at *JJS@shufeldtlaw.com*.

The take-home point is that once a suit has arisen, it is generally too late to protect your assets. The most effective form of protection is prevention, and the process must start before the physician and/or business owner is in a position of even *perceived* threat.

Trying to protect *all* of your assets is another defensive action that will often be viewed as fraudulent in the face of a lawsuit. The idea is to have some level of protection for some portion of your net worth. Protecting, or trying to protect, every asset often leads to the court unraveling the whole scheme.

I once had a salesperson try to sell me an extremely complex array of offshore trusts into which I could place my business, home, etc. On its face, it made sense and I could follow the logic. Next, he tried to sell me life insurance which would pay any estate tax ramifications in the event that I died. Here is where it fell apart for him. He was earning fees on setting up the trust, selling the insurance, and performing the yearly statutory requirements.

Offshore trusts are often costly to set up and administer and can be fraught with complexity. Unless you have very special circumstances, typically they are unnecessary.

The most important point is to find a reputable attorney whose entire practice is devoted to trust and estate work. Contact your state's bar association for references, speak with a number of attorneys before picking one, and check her references prior to engaging her as your counsel. Consider this homework your "ounce of prevention."

Many states have laws which apply to exemptions for certain classes of assets. For example, primary residence, annuities, and life insurance policies generally fall into the protected class of assets. This is a public policy exemption. The state does not want the debtor to fall below some minimal existence and financial well-being so as to prevent them from becoming a financial burden to the state.

However, the homestead protection in Arizona, for exam-

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ple, is only $150,000; "Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding one hundred fifty thousand dollars in value…"

In Florida, on the other hand, a debtor is afforded unlimited value for the actual protection: "The dollar value exemption is unlimited. The exemption is limited to a half acre tract within a city and one hundred and sixty contiguous acres…" (in case you ever wondered why OJ resides in Florida).

For yet another example, Massachusetts limits its homestead exemption to people over a certain age or with a disability.

One caveat is that only $1,000 dollars of the debtor's furnishing are protected. Another caveat is that if the residence is owned under a business form, other laws may override the homestead exemption rendering it inapplicable.

Understanding the laws governing transfer of assets is another important piece of the puzzle, as asset transfer is a technique often employed in an attempt to protect assets.

I knew of a physician who was so fearful of losing his personal assets that he placed them all in his wife's name. As it turns out, he lost his assets anyway—just not in the way he'd feared. His wife divorced him a year later and literally cleaned him out.

Transferring assets to or titling assets under a non-physician spouse is not an uncommon practice for physicians. The tax code allows spouses to transfer assets back and forth without tax ramifications unless the recipient-spouse is not a U.S. citizen. The flaw in this plan, however, is the assumption that the spouse will never be a debtor to anyone (credit card debt, unintentional or intentional torts) and will never decide to kick the provider to the curb.

In addition, when transferring assets the physician must assume that 1) the family member will act in accordance with the wishes of the provider, and 2) that the transferee will not die first. Both assumptions are leaps of faith.

Also vital to successful protection is a degree of knowledge about control of the trust in which the assets are protected. There is an inverse relationship between the amount of control and the level of protection the trust affords.

For example, a revocable trust (a trust controlled by the physician) offers no protection for assets because it is revocable by the maker.

An irrevocable trust should, theoretically, offer some degree of protection. However, if the physician retains excessive control over it, even an irrevocable trust is vulnerable to attack. One option for defending the trust is to appoint independent trustees and protectors. Even with this measure of protection in place, the provider should forgo the option of funding the trust with any business entities he directs.

Asset protection and the law—and exemptions surrounding it—are extremely complex inasmuch as they vary from state to state and involve bankruptcy laws, trusts, real and personal property, family law, tax planning and gift and estate expertise.

In addition, there are many fraudulent schemes involving offshore trusts into which the unsuspecting can be drawn by the unscrupulous. More than one physician has set up an offshore trust and deposited hard-earned money into it, only to find their earnings vanished. I suppose this could be considered a "win" in a perverse way—at least the creditors were unable to get at the funds. However, I do not think that this was the kind of protection the unsuspecting physicians had in mind when they established their trusts.

Asset protection is a challenging area fraught with complex and interconnecting laws and regulations. Only providers and urgent care owners who are proactive and diligent and who obtain appropriately qualified counsel will be well protected in the event of an attack on their assets by a creditor. ■

Editor's note: *JUCM* would like to congratulate Dr. Shufeldt for receiving a Bronze Award in the American Society of Healthcare Publication Editors 2008 Annual Awards Competition. The Health Law column was recognized in the category of Regular Column: Contributed, which (as the name implies) was open to columns that appear regularly in healthcare-related publications in the U.S. and that are written by non-staff authors.

We're proud of our association with Dr. Shufeldt, and that ASHPE has formally recognized his contributions to the journal. We appreciate them, as we do the contributions of all our authors.