

Asset Protection Planning.

(Part 2 of 3)

In last month's issue of Adler Law, we learned that asset protection planning involved the application of a series of lawful techniques that protect your assets from claims of future creditors. The techniques are designed to deter potential creditors from going after your assets and frustrate them if they do by making it difficult or impossible for them to take possession of your assets or collect judgments against you. This month, we will explore if you are an attractive target to creditors and we will learn that if you wait too long, it may already be too late to protect your assets.

Are you an attractive lawsuit target?

The first goal of a sound financial plan is to protect your personal and business assets from potential lawsuits and claims. Since the lawyer for a potential plaintiff will usually only sue you if he knows you have assets so he knows he will get paid, it is extremely unlikely that any lawyer would be willing to file a case against you if you have few assets in your name. You can successfully discourage lawsuits by holding your property in a protected manner, without revealing to the world what you own and how much you have.

How does a potential plaintiff find out whether you have enough money to make you an attractive lawsuit target? First of all, many people openly disclose their assets in the form of financial statements. Secondly, thanks to the Internet, a lawyer can find out everything he needs to know. Recent advances in computers and Internet technology allow unprecedented access to your most sensitive personal and financial information. If somebody wants to find out information about you, a single query will hunt through billions of documents stored on thousands of interconnected databases to produce a thorough profile of your life. Detailed information describing all of your real estate and business interests, the name of your bank and brokerage firm, your account balances, and your transaction history can be accessed and assembled without your knowledge or permission.

When Asset Protection Planning may already be too late:

The recent real estate bust and economic downturn have spurred an enormous interest in asset protection planning. Unfortunately, for many people their interest in asset protection may simply be too late. The primary problem is the existence of fraudulent transfer laws that will nullify gifts and transactions that are meant to put assets out of the reach of creditors.

The Statute of Limitations for fraudulent transfers in New York State is six years from the fraudulent transfer or two years from the time the fraud was discovered or could have been discovered with reasonable diligence. This means that any transfer or conversion that was made within the last six years might be targeted by a creditor to be set aside. So, if you are in financial trouble now and just starting to think about asset protection, you are probably too late.

The fraudulent transfer laws do not look at lawsuits or judgments, but instead look at when a "claim" arose. A "claim" is a circumstance or event that could give rise to liability. So, if you suspect that you might be sued for something, but you have not yet been sued or even received a demand letter from the plaintiff's attorney, you might still be too late to do asset protection planning if the "claim" has already arisen.

Similarly, it may be too late if you have personal guarantees. Basically, a personal guarantee is your pledge and commitment to back your obligations with the totality of your non-exempt worldly assets. If you have a personal guarantee and you attempt to protect your assets from the guarantee, the courts will basically view it as an attempt to take your chips off the table after you lost the hand, and will not be sympathetic.

To be most effective, asset protection planning should be done before you get into financial trouble and especially before you enter into any personal guarantees. If you engage in asset protection planning after a significant claim arises or after you have become illiquid, then not only will any transfers that you make be at risk of later being deemed to be fraudulent transfers and thus set aside by the Court, but you also may risk a denial of discharge if you later find yourself bankrupt.

Accordingly, if you want to engage in asset protection planning, you need to do so before you have any problems. For if you wait until you have problems, it will probably be too late. You can't wait until creditors are banging on the door to start asset protection planning because then the odds of it working will be very low.

In next month's issue of Adler Law, we will discuss the various tools and techniques which should be incorporated into an effective asset protection plan.