YOUNG PHYSICIAN focus

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# SPECIAL REPORT: ASSET PROTECTION PLANNING FOR DERMATOLOGISTS

Dermatologists consider themselves malpractice targets, and they are, but the average dermatologist is not likely to be successfully sued in excess of their reasonable medical malpractice insurance limits – such verdicts are actually very rare and nearly all could have been settled within the limits of their malpractice coverage.

Unfortunately, armies of promoters exist to market bad investments and asset protection schemes that simply do not work for dermatologists and other physicians. This article will briefly discuss which strategies to avoid and which should be part of an overall and holistic asset protection and estate plan.

## Strategies to Avoid

***Foreign Asset Protection Trusts** ("offshore trusts")* are trusts that you create for yourself in a foreign jurisdiction, such as The Cook Islands, that cater to such trusts. The idea here is to put assets into an offshore trust, and then, when a creditor comes along, you claim that your offshore trustee will not give you the assets back. In the meantime, you control and invest the assets.

But there are problems with offshore asset transfers. The most practical one is that although your assets may be offshore, your body will probably stay here and be subject to court orders. This means that you can be subject to what is known as a Repatriation Order essentially demanding that you "bring the money back or go sit in jail." Courts routinely grant these orders, and debtors routinely go to jail when they fail to comply.

In fact, out of over a dozen well-cited cases, the only one which worked as advertised was that of Stephen J. Lawrence, who suffered a large arbitration award after losing his shirt in the 1987 stock market crash. Mr. Lawrence was willing to spend over six years in prison to convince the judge that either he couldn't bring the money back or wasn't willing to.

In the other cases, most people decided to cough up their money soon after being sent to jail or threatened with contempt. For those not willing to spend six or more years in prison, foreign asset protection trusts are a bad idea.

Nevertheless, some asset protection planners essentially run trust mills selling cookie-cutter structures involving Cook Islands trusts (and also Family Limited Partnerships, explained below) to physicians. If this is recommended to you: run!

***Domestic Asset Protection Trusts** ("Alaska Trusts" or "Delaware Trusts")*

Several large trust companies are now pushing the domestic variant of the offshore trust, which is a trust that you create for yourself in one of the states that allow what is known as a "self-settled trust." The leading states for this type of business are Alaska, Delaware, Rhode Island, Nevada, Tennessee and Utah.

These trusts also do not work. In fact, the 2005 federal bankruptcy reforms created what amounts to a 10-year claw-back to transfers to self-settled trusts. This should have put an end to the Domestic Asset Protection Trust business, except possibly for the people living in one of those states who believe that they can keep themselves from ever being forced into bankruptcy.

***Family Limited Partnerships (FLPs) and Family Limited Liability Companies (FLLCs)***

Family Limited Partnerships (FLPs) and Family Limited Liability Companies (FLLCs) can work as effective asset protection tools – if they are used as vehicles for bona fide commercial ventures.

But don't think you can set aside purely personal assets (the family home, vacation homes or family financial assets) and think that they will be protected. In these cases, the theory of "reverse alter ego" has been successfully used to disregard the entity where no bona fide commercial venture was being facilitated and it was clear that the entity was just the personal piggy bank of the debtor.

Again, if a limited partnership or LLC is a bona fide commercial venture, then the case law largely indicates that it will stand up to creditors. Thus, the family business might be protected. But simply creating a shell LP or LLC and placing assets into it probably accomplishes nothing.

***Accounts Receivable Financing***

These programs are widely sold to physicians as a means

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to protect the practice's accounts receivable. The idea here is that you borrow against your A/Rs and use the money to buy an insurance product that is exempt from creditors in some states, such as New York, Texas or Florida.

These programs can work — but with some significant limitations. First, these programs will only protect the accounts receivables as of the date that the creditor executes upon them. Therefore, it will not protect A/Rs on a "going forward" basis. Generally, A/R financing promoters will simply omit this fact and might even tell you just the opposite.

Second, the premise behind these programs is that they can fund retirement by creating an arbitrage between the amount paid on the loan and the investment returns of the insurance product. This sounds great, so long as the arbitrage is positive. If the cost of the loan exceeds 7 percent, it is highly unlikely that the arbitrage will be significantly positive.

A/R financing is one of those programs that sounds great in theory, but usually doesn't work because neither the physician nor the promoter really understands it.

> "If it is so complicated that you can't explain it, it probably isn't going to work."

## What Works?

### *Personal Insurance*

Periodically review your liability limits to see if they are adequate. The best asset protection you can buy comes in the form of personal "umbrella" insurance. For a few hundred dollars per year, you can purchase coverage into the millions against events where the limits of your auto or homeowner's insurance have been exhausted.

You should also make sure that your disability insurance is in line with your current income and you have the proper amount of life insurance to protect your family.

### *Professional Corporations*

A professional corporation will not, by statute, shield a dermatologist from his or her malpractice act. However, the professional corporation might be useful in encapsulating within it the liability from other claims such as an employee's malpractice act, sexual harassment, wrongful termination or even certain toxic material claims. Additionally, the use of a professional corporation may later give tax planners some options if the practice is sold.

### *Exemption Planning*

Exemption planning considers the use of certain exemptions permitted by state and/or federal statutes. The goal of such planning is to maximize the use of available exemptions. Potentially, one or more of the following might provide significant asset protection: retirement plans, Individual Retirement Accounts (IRAs), life insurance, annuities and homestead exemptions.

### *Keep it simple*

Despite the many asset protection schemes thrust upon dermatologists, there are a great deal of options that have proven to be effective in protecting business and personal assets and promoting early settlements. Exemption planning still works in one form or another in many states, and all states allow people who have no current or suspected creditors to take "chips off the table" by transferring them to a trust for their children.

Whatever you do needs to be explainable to your average jury and judge. If it is so complicated that you can't explain it, it probably isn't going to work. So, keep your asset protection planning simple and explainable, but most of all, do it well in advance of problems.

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*The AAD Awards for Young Investigators in Dermatology recognizes outstanding basic and clinical research by dermatologists-in-training in the U.S. and Canada for the advancement of diagnosis and therapeutics in the practice and science of dermatology. Two outstanding young investigators are selected annually as recipients of the $5,000 award that is shared with the awardee and the mentoring research institution.*

*Nominations are accepted from the chair of a dermatology department or the nominee's faculty advisor. Eligible candidates include dermatology residents in an accredited residency program or those who have completed their residency within the previous two years.*

*Submission deadline for 2009 awards:* ***September 30, 2008***

*For award details and submission information visit the AAD website at* **http://www.aad.org/education/grants/young.html**

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