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## When You're Counseling Clients, Don't Forget About Asset Protection Strategies

As investors circle their wagons in response to the economic crisis, they'll look to trusted advisers like you to help them preserve their assets. In addition to making smart investment decisions, many clients should put in place strong asset protection strategies to protect them from an additional risk—a successful lawsuit or regulatory action against them. **Daniel Rubin**, J.D., LL.M (Taxation), presented a web seminar on this topic on July 23, 2008 as part of the PFP Section's continuing web seminar series. Rubin, a partner with Moses & Singer LLP in New York, specializes in domestic and international estate and asset protection planning for high-net-worth clients, as well as counseling clients on estate administrations and tax controversies. The following article presents the central points of Rubin's seminar. (See the Resources box on page 4 for instructions on accessing the entire seminar on the PFP Section's website.)

### Asset protection planning is ...

Asset protection planning is “the process of organizing one's affairs to insulate oneself from future creditors,” Rubin said. Asset protection planning is not new but has become increasingly sophisticated in the last decade. It has developed largely as a response to what former U.S. Supreme Court Chief Justice Warren Burger described in the late 1970s as a “litigation explosion.” Domestic and foreign asset protection trusts, described later in this article, are in many cases the strongest asset protection strategy. However, there are a number of other asset protection tactics, including the following:

- Purchasing an umbrella policy for liability insurance
- Transferring assets to a spouse
- Titling a home as a tenancy by the entireties
- Moving to a state less friendly to creditors (for example, moving from New York to Florida)
- Choosing certain investments over others (for example, life insurance and annuities have some level of inherent protection from creditors)
- Placing the marital share of an estate in a QTIP trust rather than allowing it to pass outright
- Forming a business as an LLC instead of as a sole proprietorship

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Notably, Rubin commented, all of these methods have their limitations and risks, some of them quite significant.

## Asset protection planning is not ...

“Asset protection planning is *not* a means to engage in fraud of creditors or to conceal assets from creditors,” Rubin stressed. The law of fraudulent transfers prohibits transfers made with the intent “...to hinder, delay or defraud creditors.” In determining whether a transfer is fraudulent, one must distinguish between *present* creditors, *subsequent* creditors, and *potential future* creditors. A fraudulent transfer would likely be found only against a present or subsequent creditor, Rubin explained. For example, Rubin said, if you hit someone with your car, immediately knew that the person was injured, and then transferred \$1 million to your sister, the injured party would be a present creditor because you had knowledge of him when you made the transfer. If, instead, the person you ran over didn’t sue you for his injuries until six months after the accident, he would be a subsequent creditor. Because you knew that this potential creditor existed, a transfer you made after the accident would almost certainly be deemed fraudulent, noted Rubin. A potential future creditor is one of whom you are not aware when making a transfer. For instance, if a patient has made her first appointment with a doctor but has not yet seen the doctor, she is the doctor’s potential future creditor.

Juries and courts determine fraudulent transfer claims based on circumstantial evidence, called “badges of fraud,” Rubin said. Badges of fraud include the amount of consideration paid, if any; the donee’s identity; and the timing and size of the transfer. Courts also evaluate whether the transfer was within the transferor’s normal course of conduct.

## Why your clients (and perhaps you) need asset protection

There are a number of reasons why clients with various amounts of wealth may need asset protection, Rubin explained. Among them are the following:

- The legal system no longer links liability to causation. This means that juries often decide cases based on emotion and on whether the defendant has “deep pockets.” Judges can be unpredictable as well.
- Thus, reducing the assets you have available to creditors makes you a less appealing defendant. Physicians, especially, can benefit from this factor because litigants against them are usually represented by small firm contingency fee lawyers who don’t take cases that lack deep-pocket defendants, Rubin pointed out.
- Being sued is a very stressful and emotionally draining experience.

## Which of your clients need asset protection

Candidates for asset protection planning include the following, according to Rubin:

- Professionals—doctors, lawyers, accountants, architects, etc.
- Officers and directors of public companies
- Fiduciaries—trustees and executors
- Real estate owners with exposure to environmental claims
- Individuals exposed to lawsuits arising from claims alleging negligent acts, intentional torts (discrimination, harassment, or libel), or contractual claims
- Individuals who desire a prenuptial agreement alternative that doesn’t involve negotiations with the future spouse

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**About the Presenter:** Daniel S. Rubin is a partner in the Trusts and Estates and Wealth Preservation practice of Moses & Singer LLP in New York City. Rubin's practice concentrates on domestic and international estate and asset protection planning for high-net-worth individuals and their families. Additionally, he counsels clients on estate administrations and tax controversies, among many other matters.

Rubin was honored in 2007 by *Worth* magazine as one of its "Top 100 Attorneys" in the nation for private clients, and he has twice been recognized in the ranks of *Law & Politics'* "New York Super Lawyers." Rubin frequently lectures to professional groups and has written numerous articles on estate and asset protection planning matters for various scholarly publications. In addition to his work at Moses & Singer, Rubin serves as the vice chair of the International Estate Planning Committee of the Trusts and Estates Law Section of the New York State Bar Association and is on the board of directors of the New York City Estate Planning Council.

- Financial services professionals such as hedge fund and private equity fund managers
- Any wealthy person who could be sued for negligence; for instance, if her cleaning lady falls off a stepladder or her child injures another child

There's no hard and fast rule as to how wealthy a client need be in order to benefit from asset protection planning, Rubin explained. Also, the percentage of assets that a client might seek to protect by a transfer to an "asset protection" trust, for example, can vary significantly. For instance, a billionaire may transfer only \$10 million of her assets to a trust—believing this amount to be a sufficient nest egg in case of a financially disastrous judgment—but an attorney with \$5 million in assets may transfer 95% of his net worth to a trust. It's important to put these issues before clients regardless of their wealth, Rubin said.

## Domestic and foreign "asset protection" trusts—the winning strategy

A trust is "a contractual relationship between a grantor, a trustee, and a beneficiary for the trustee to hold legal title to property, formerly owned by the grantor, for the benefit of the beneficiary," Rubin said. Since an 1871 U.S. Supreme Court case, the law of the land

### Resources

You'll find a wealth of Rubin's articles on asset protection planning and related topics at his firm's website. Go to [www.mosessinger.com](http://www.mosessinger.com). Put your mouse on **Articles** across the top of the page and click on **By Attorney**. You can then select Rubin from the **Select Attorney** dropdown list.

To view his asset protection planning web seminar in its entirety, go to the PFP Section's website at <http://pfp.aicpa.org/Events/PFP+Web+Archived+Seminars.htm> and log in. If you don't know how to log in, see the Website Log In Instructions on page 2.

has been that creditors have no access to assets that a person has merely as a beneficiary of a trust. This case applies, however, only when one person (the *grantor* or *settlor*) sets up a trust for someone else. If the trust is *self-settled*—meaning that the grantor is also a beneficiary of the trust—public policy concerns are often cited as a reason to avoid the creditor protection effect.

Certain foreign jurisdictions have permitted self-settled "asset protection" trusts (APTs) since 1984—the Cook Islands, for instance. Since 1997, 10 states have enacted domestic APT legislation: Alaska, Delaware, Missouri, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. An eleventh state, Oklahoma, has enacted a variation on these laws. These state laws indicate that the public policy debate is shifting in favor of APTs, and Rubin believes that upwards of 40 states will permit APTs within the next 20 years. In the meantime, clients who set up an APT can choose which state's law governs the trust; thus, their particular state of domicile doesn't limit their planning options.

Important aspects of APTs include that the grantor can be a discretionary beneficiary, though she should not be the sole beneficiary, if possible, because the interests of the other beneficiaries in the trust may prove key to defeating future creditor claims. Also, the settlor can be the trust's *protector*, which gives her the right to change the trustee. Furthermore, the settlor can retain a limited testamentary power of appointment to change the disposition of the trust's assets upon her death, thus providing her the flexibility of a will while at the same time negating any gift tax consequences in connection with the funding of the trust.

Foreign APTs are preferable to domestic APTs for a number of reasons, Rubin pointed out. He uses U.S. APTs only when a client doesn't want to go offshore because, for instance, the client is a high-profile executive or the assets are permanently situated in the U.S. (for example, the client's manufacturing

business or real estate). Among the reasons why foreign APTs compare favorably to domestic ones are that statutes of limitation are often shorter in foreign jurisdictions; all litigation costs may be imposed on the loser; attorneys don't work for contingency fees; and courts may favor debtors over creditors. Also, while the U.S. Constitution's Full Faith and Credit Clause obliges states to enforce their sister states' judgments, foreign courts will not necessarily enforce a U.S. judgment against a foreign APT.

Foreign APTs are often the optimum form of asset protection because the grantor has continued access to the transferred assets (albeit within the trustee's discretion), without the risk that such assets might be lost to the future creditor's claims. Although the same result is possible with a domestic APT, the constitutional issue raised under the Full Faith and Credit Clause leaves open the question of the trust's ultimate effectiveness as a shield against creditors. As noted, other techniques (for instance, the transfer of assets to one's spouse) raise additional issues, which Rubin discussed in detail during the web seminar.

**Be aware:** APTs and other asset protection methods have potentially important tax implications, depending upon their structure. Although these issues are beyond the scope of this article, readers should explore them thoroughly before embarking upon any asset protection planning. ■

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