Asset Protection Audit Checklist

By Gideon Rothschild and Daniel S. Rubin

Many clients consider today's social and economic environment both more litigious and more hazardous to the preservation of wealth than in years past. This view is supported when one observes the ever-expanding theories of liability, rise in jury awards, increasingly result-oriented courts, and the high incidence of divorce. Because of these problems, traditional forms of protection may be inadequate. Certain classes of beneficiaries may have greater exposure to risk than do others. These classes having greater exposure include, but are not necessarily limited to, professionals subject to malpractice exposure, directors and officers of publicly held companies, and owners of real estate.

The authors have frequently exhorted estate planning advisors that one of their primary obligations is to consider the client's potential need for timely asset protection planning. In fact, some commentators have suggested that there may be significant malpractice exposure for the professional who neglects this important aspect of a client's overall planning. Although, obviously, not every client's circumstances will require asset protection planning, every estate planning professional should be prepared to advise those clients whose circumstances warrant such consultation. Toward that end, the authors have developed the following asset protection audit checklist for consideration.

Checklist

1. Determine the client's potential sources of liability.

Different planning considerations will apply, depending upon the client's potential creditor exposure. As an example, a court might find a general tort creditor's claims to be more compelling than the claims of a contract creditor who, presumably, should have done his or her due diligence prior to entering into the contract. Potential classes of creditor exposure include the following:

- Professional malpractice
- General torts
- Contract claims
- Creditor exposure
- Officer and director liability
- Environmental liability
- Divorce
- Forced heirship
- Existing lawsuits

2. Attempt to resolve the client's issues through simple and commonplace techniques before suggesting complicated and exotic planning.

Consider, as a start, whether the client's potential exposure can be negated, or at least mitigated, by having adequate insurance to protect himself or herself. Some types of insurance to consider include…

- Homeowners
- Auto
- Umbrella
- Commercial risk
- Directors and officers
- Disability
- Life

3. Prepare a solvency analysis.

Determine whether asset protection planning techniques that involve the transfer of property can be ethically undertaken. In addition, undertake appropriate due diligence in order to avoid ethical and legal pitfalls that might exist in connection with assisting a client in protecting his or her assets from creditors.

4. Maximize the creditor exemptions permitted by state statute and/or federal statute.

The courts might not interpret statutory exemptions in a literal manner if application of the statutory exemption under any particular set of circumstances does not appear to coincide with the avowed legislative purpose. Potentially significant creditor exemptions might include one or more of the following:

- Retirement plans [*See* "Protecting Retirement Plans," *Journal of Asset Protection*, March 1997 (http://www.mosessinger.com/resources/protecting.shtml).]
- Individual retirement accounts [*See* "Protecting Retirement Plans," *Journal of Asset Protection*, March 1997 (http://www.mosessinger.com/resources/protecting.shtml).]
- Life insurance [*See* "Creditor Protection for Life Insurance and Annuities," *Journal of Asset Protection*, May 1999 (http://www.mosessinger.com/resources/creditprotec.shtml).]
- Annuities [*See* "Creditor Protection for Life Insurance and Annuities," *Journal of Asset Protection*, May 1999 (http://www.mosessinger.com/resources/creditprotec.shtml).]
- Homestead exemption
    1. Ascertain how title is held.
    2. Consider the tax and nontax consequences of changing title.

- Joint ownership (tenancy by the entirety)
- Community property

5. Review the client's estate plan, business organization, and the documents relating to each with an eye toward maximizing creditor protection.

In particular, consider each of the following items:

- Anticipated inheritance:
  - Consider disclaimer if outright inheritance
  - Consider requesting expected inheritance be retained in trust
- Wills and trusts should provide for continuing spendthrift trusts:
  - QTIP trust instead of outright marital trust
  - Perpetual trusts in non-rule against perpetuity jurisdictions
  - Continuing GST nonexempt trusts for asset protection benefits
- Business activities:
  - Consider type of entity (*e.g.*, general partnership vs. LLC vs. corporation)
  - Consider reorganizing client's holdings to segregate assets
  - Consider reorganizing business to obtain "outside-in" protection

6. Consider which of the more sophisticated asset protection planning techniques might be appropriately applied to the client's circumstances.

- Domestic trusts:

  1. Non-self-settled trusts and trust techniques:
     - Qualified personal residence trust
     - Charitable remainder trust/charitable lead trust
     - *Inter vivos* QTIP trust
     - *Inter vivos* discretionary trusts
     - *Inter vivos* power of appointment trust
     - Sale to a "defective" grantor trust

  2. Self-settled trusts (Alaska, Delaware, Nevada, Rhode Island):
     - Foreign trusts
     - "Swiss" annuities
     - Offshore life insurance

Conclusion

Given the increase in litigation risk, more and more wealthy clients will come to expect their professional advisors to provide appropriate and timely advice on asset protection issues. The foregoing checklist is intended to provide a good starting point in any representation in order to identify issues and techniques that can be applied to a client's particular circumstances.

Gideon Rothschild is a partner in the New York City law firm of Moses & Singer LLP and a former chair of the Committee on Asset Protection Planning of the American Bar Association's Real Property Probate and Trust Section.

Daniel S. Rubin is a partner at Moses & Singer LLP whose practice is limited to estate and asset protection planning. ■

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