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SHOULD YOU BE CONCERNED ABOUT ASSET PROTECTION?

Special Interest Articles

SHOULD YOU BE CONCERNED ABOUT ASSET PROTECTION?

By: Andrew W. Holstine

WHO'S GOING TO PAY FOR MY ATTORNEY?

By: Andrew S. Johnson

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

LEGAL PRACTICE AREAS:

- *Banking and Creditors' Rights*
- *Condo-Community Association Representation*
- *Corporate and Other Business Transactions*
- *Defamation, Privacy and First Amendment*
- *Employee Benefits*
- *Employment Law*
- *Estate Planning, Probate and Trust Administration*
- *Health and Fitness Industry*
- *Independent Sales Representatives*
- *Intellectual Property Law*
- *Litigation and Alternative Dispute Resolution*
- *Mergers, Acquisitions and Business Sales*
- *Real Estate and Finance*
- *Real Estate Tax Reduction*
- *Securities, Futures and Derivatives*
- *Trade Associations*

Amidst the troubling economic signs over the past year, you may have wondered just how protected you are from creditors. Can one misstep cause you to lose everything?

We all worry about blind spots, potential problems beyond our control that can rob us of everything we have worked so hard to build. If you have these concerns, you will benefit from meeting with a qualified professional to review your asset protection strategy. There is power in engaging in the planning process, facing your vulnerabilities and then proactively minimizing your exposure.

Asset protection refers to strategically sheltering your assets from a creditor who brings claims against you. There is a very low threshold for anyone seeking to file a lawsuit. One very effective way to discourage lawsuits is to avoid becoming easy prey by maintaining limited assets subject to satisfying a judgment. Creditors have little incentive to sue a person who will never pay, leaving a potential judgment worth less than the paper it is written on.

Two important facets to protecting your assets require consideration. First, you need to understand your risks, including where they are and how much exposure you have. Second, you need to understand your assets and how they can be repositioned in order to protect them from creditors.

Understanding risks and vulnerabilities is much different from pulling your credit score, where credit factors get combined into a single number. It is necessary to review your situation and then, for each risk, consider the likelihood of a lawsuit and the potential exposure. Some threats can be easy to envision, such as negligence in an automobile crash or a teenager hosting a graduation pool party. Other threats are harder to assess, such as the risk you assume by being a director of a local bank. Understanding your level of risk, and where you are most exposed, provides direction to guide the planning.

At its core, asset protection planning is about taking assets that could be subject to creditor claims

and repositioning them as assets beyond the reach of future creditors. Even if you have not consciously planned, you already enjoy some protection. For example, state law may protect your home, while federal law shields retirement accounts up to a certain amount, from known creditors. The cash value accumulated in a life insurance policy is usually similarly protected. For many people, however, significant remaining assets are not exempt from creditors, and these assets require greater planning.

If you are unsure when to start planning, adopting the view that since you don't have any (known) issues now, you can always review this later can lead to major problems. Asset protection planning cannot begin when trouble already looms on the horizon. State laws protect creditors from asset transfers done purposefully with an intent to delay collection or defraud creditors. If you start planning after the problem is known, a court may apply close scrutiny to asset transfers, deem them to be fraudulent, and issue an order turning over the property to your creditor. Asset protection planning must begin long before a lawsuit is filed, let alone a judgment is entered.

Once you understand your risks and the nature of your assets, you can then meaningfully develop a plan to protect you. The plan need not be complex. Tools including insurance protection, corporations, and trusts, for example, enable the building of a comprehensive, layered plan that protects you and your family from outside problems. Planning allows you the comfort to know that, regardless of anything else happening, your personal financial security is not threatened.

For assistance in determining how well protected you are from creditors, or what planning tools may furnish some comforting peace of mind, contact the attorneys at Schoenberg Finkel Newman & Rosenberg, LLC, who will guide you through this process. For more information, please contact Andy Holstine (andrew.holstine@sfnr.com) or Andrew Bell (andrew.bell@sfnr.com).



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Case Success

On May 18, Partners Norm Finkel and Rich Goldwasser appeared in Lake County Circuit Court – in person – and defeated an Emergency Motion for a Temporary Restraining Order brought by an amalgam of tax and business consulting companies seeking to prevent their clients from operating a competitive venture. While litigating claims for unfair competition is normal fare for the Firm, what made this case quite remarkable is the litigation environment in which it occurred and the fact they appeared live to argue their case.

Notable Publications

- “Playing to a Tough Audience: Seizing a Principal’s Assets without Obtaining a Judgment” (*The Representative*, Spring 2020, Adam Glazer and Gerry Newman)
- “Insurance Considerations in the Age of COVID-19” (*Chicago Daily Law Bulletin*, April 20, Andrew Johnson)
- “How to Get a Nice Tax Break on Your Stock Losses” (*Forbes*, May 8, Bruce Bell)
- “The Proliferation of Class Action Lawsuits Amid the COVID-19 Pandemic” (*Chicago Daily Law Bulletin*, June 10, Bill Klein)
- “Lose Your Job? Now You Can Tap Your Retirement Kitty More Easily” (*Forbes*, June 13, Bruce Bell)
- “Exploring the Paycheck Protection Program Flexibility Act of 2020” (*Chicago Daily Law Bulletin*, June 18, Joan Berg)
- “4 Crucial Things for Estate Planning” (*Forbes*, June 20, Andy Holstine)
- “SCOTUS Decision Resolves Title VII Gap Among Federal Appeals Court” (*Chicago Daily Law Bulletin*, June 22, Matt Tyrrell)

Speaking Engagements

On April 21, Partners Dan Beederman and Bruce Bell presented a webinar entitled “Business, Legal and Tax Best Practices in a COVID-19 World” to members of the Manufacturers’ Agents National Association (MANA). The topics included information about PPP Loans, family and medical leave programs and other HR issues, borrowing from retirement plans, tax planning and other legal matters impacting businesses as a result of Covid-19.

On May 20, Partner Adam Glazer presented to the Manufacturers’ Agents for the Food Service Industry (MAFSI). “Rep Contracts and Commission Payments Pre and Post COVID-19” discussed how the pandemic is affecting contract rights and obligations.

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As counterintuitive as it may seem, even in lawsuits that you win, you may be left feeling wounded at the conclusion of the matter. The litigation process is physically, emotionally, and financially draining. And although the judge, jury, or arbitrator vindicated your position, the other side will not automatically have to pay for your attorney. Rather, in the United States, the courts apply the aptly named “American Rule” under which each side pays for its own attorney. Although there are exceptions, this is the default rule. Conversely, under the “English Rule” – which is the rule throughout much of the world – the loser pays the winner’s attorneys’ fees.

Despite the merits of your position, the expense and burden of litigation may dissuade you from seeking to enforce your rights. The salient question becomes: when will the other side have to pay for my attorney? The answer is that the other side will pay your attorneys’ fees (presuming you win) when (a) it is provided for by contract, or (b) there is an applicable statute or rule that allows a litigant to recover its attorneys’ fees. In the exceedingly rare case, you may be awarded attorneys’ fees as a sanction for unscrupulous conduct by your adversary and/or their attorney.

Contractual Fee Provisions

One way to protect yourself from the expense of litigation is to insert a “fee-shifting” provision in your contract. This provision is frequently worded along the lines of: “If either party to this Agreement institutes litigation to enforce any term of this Agreement, the prevailing party in such litigation shall be entitled to receive from the other party its reasonable attorneys’ fees and costs.” In other words, if you find yourself in a situation where you are forced to sue to make the other side comply with the terms of the contract, they will pay for the fees you incur in doing so. In addition, this language offers some protection against a deep-pocketed adversary strenuously litigating a matter simply to drive up fees and wear you down. Of course, disputes can arise as to who the “prevailing party” was in a case, but including a fee-shifting provision in a contract still offers protection.

Statutory Fee Authorization

In addition, Illinois has a litany of statutes that provide for the award of reasonable attorneys’ fees. For example, the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, which protects consumers, borrowers, and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices in

the conduct of any trade or commerce, provides that a plaintiff may recover attorneys’ fees for a successful action brought pursuant to the statute. Similarly, the Illinois Sales Representative Act, 820 ILCS 120/1, *et seq.*, provides that a principal who fails to timely pay a sales representative is liable to the sales representative for exemplary damages and “shall pay the sales representative’s reasonable attorney’s fees and court costs.” The Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.*, which applies to all employers and employees in Illinois (with certain exceptions), provides that an employee who is not timely paid wages, final compensation, or wage supplements shall be entitled to recover costs and reasonable attorneys’ fees in a civil action.

On the federal side, there are a number of federal statutes that authorize an award of fees to the prevailing party, such as the Lanham Act, 15 U.S.C. § 1051 *et seq.*, which protects trademarks, as well as 42 U.S.C. § 1983, which protects civil rights.

For any potential action that you are contemplating – or that is being threatened or instituted against you – it is essential to be aware of any statutory fee-shifting language that may apply.

Fees Awarded as a Sanction

Not surprisingly, many litigants do not view their opposition favorably. In limited, extreme cases, the court may award fees as a sanction for inappropriate conduct by the other side. Illinois Supreme Court Rule 137(a) provides that by signing a pleading, motion, or other document, an attorney or unrepresented litigant certifies that the document “is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” If a pleading or other document is filed against you in violation of Illinois Supreme Court Rule 137, the court may award you attorneys’ fees for dealing with it. Federal Rule 11 of Civil Procedure is the federal counterpart to Illinois Supreme Court Rule 137, and similarly provides that the court may award attorneys’ fees to the prevailing party in connection with a motion for sanctions.

It is important to know when you may be able to recover attorneys’ fees and whether you are potentially on the hook for an award of your opponent’s fees. For questions or additional information, please feel free to contact Andrew Johnson (andrew.johnson@sfnr.com) or Norm Finkel (norm.finkel@sfnr.com).