Risk Management & Wealth Protection Guide

An introduction to the concepts of managing your risk and protecting your wealth as a Physician-Entrepreneur

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How Risky is the Venture?
Using REM Analysis

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Asset Protection Planning
And the Use of Trusts

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Wealth Management + Asset Protection = Wealth Protection

What is Orbis 28?

Orbis 28 offers educational events, both online and location based, for those considering the risks in entrepreneurship and wealth protection.

The emphasis in this guide is specific for those in the medical/physician industry looking into starting a business and to introduce the means available for risk management and planning for the future with wealth protection options.

This guide is an introduction to some of these ideas.

For further details and specifics please contact us at:

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How risky is the venture?

By Dr. Arlen Meyers

Many physician entrepreneurs are offered opportunities to participate in new ventures, either as advisers, cofounders, investors or as part of the management team, but they don't know what to do next. We all only have 24 hrs in the day, so prioritizing your time and commitments consistent with your personal and professional goals is a priority. But, when faced with a potential business opportunity in biomedicine or bioscience, how should you evaluate and manage your personal research, development and commercialization portfolio and involvement? I'd suggest you do an initial 4 step opportunity risk evaluation and mitigation (REM) analysis before signing on the dotted line:

First, identify the key areas of risk presented by the opportunity. They include:

1. Market risks
2. Intellectual property risks
3. Business model risks
4. Execution risks
5. External environmental risks
6. Legal and Regulatory risks
7. Technical feasibility risks, including IT security risks
8. Competitive risks and threat of substitutes
9. Financial risks
10. Currency exchange risks
11. Reimbursement risks
12. Geopolitical risks
13. Supply chain management risks
14. Business model risk
15. Macroeconomic risk

Second, once you have identified the risks, then create a mitigation strategy for those that are potential deal killers. For example, is the regulatory approval pathway solid? Will you get paid by third party payers for your product or service? Is your idea patentable and do you have freedom to operate? Is there a technology out there that will put yours alongside pay phones and 8-track players? Are you at risk of being sued because your website is not ADA compliant? [1]

1. See: https://www.blankrome.com/publications/ada-website-accessibility-lawsuits-rise-companies-should-review-their-potential

Third, calculate the potential return on the opportunity using primary and secondary sources to determine the present and future market size, market growth and revenue potential.

Finally, make a determination whether the return justifies the risk and score the opportunity as 1) no, pass on the opportunity since the rewards don't justify the potential risks, 2) maybe, see whether you need to develop and deploy mitigation strategies that are realistic to justify your participation, or 3) yes, get involved and explore next steps and due

diligence. In other words, kill your ideas in the early stages understanding why, fix your idea and explain how or go forward with your idea and decide when.

Most doctors know REM as a stage of sleep where there is rapid eye movement. Physician entrepreneurs know it as risk evaluation and mitigation and never go into the process with their eyes closed.

A PRIMER ON ASSET PROTECTION PLANNING

By Jonathan A. Mintz

Introduction

Business persons have had concerns over the exposure of their personal assets to claims against their business for many decades. In fact, the corporate form of business entity with its shield of limited liability has been invoked for centuries. Certainly, protecting one's assets from the myriad of risk involved in business and personal financial planning is not a novel objective or planning idea. And since the 1970's, expanding theories of liability and the proliferation of litigation have given increased emphasis to asset protection planning to the extent that it is now a well-recognized area of law practice.

Physicians, and particularly, physician entrepreneurs, work in a litigious and risky environment. In fact, about 50% of doctors will be sued for malpractice by the time they are 50 years old. In addition, physician entrepreneurs are exposed to product liability as well as the risks of death, disability, divorce requiring protection of their wealth and assets.

Primary Goal of Asset Protection Planning

A major goal of asset protection planning is to substantially diminish and reduce your financial profile. If you can restructure your assets in such a way so as to place them beyond the reach of future potential creditors, while at the same time maintaining a beneficial interest in those assets, you have succeeded in substantially reducing your financial profile. Accordingly, you become a far less attractive target for litigation because of concerns over whether any creditor can collect on judgment against you, thereby reducing the likelihood that you will be sued; or if you are sued, increasing the likelihood of a favourable settlement.

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The Use of Trusts in Achieving the Goal of Asset Protection Planning

A trust can be an effective foundation for asset protection planning. Trusts have been utilized for centuries as a means of conserving and protecting property for the beneficiaries of the trust. However, most

common trusts do not provide protection from creditors. The typical revocable living trust, where the settlors are the lifetime beneficiaries and retain the power to revoke, amend and invade the principal of the trust, provides no protection whatsoever against the creditors of the trust settlors. Accordingly, absent specific legislation to the contrary, self-created or so-called self-settled trusts are ineffective for asset protection planning purposes.

Domestic Asset Protection Trusts (DAPTs)
As stated above, most self-settled trusts are not protected from creditors. However, recently, numerous states have provided various degrees of asset protection legislation for a self-settled-trust. The trust

legislation in currently 17 states (Alaska, Colorado, Delaware, Hawaii, Mississippi, Missouri, Ohio, Oklahoma, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming) is similar in many respects to the asset protection trust legislation found in several offshore jurisdictions. It should be noted, however, that the courts have not yet passed muster on this type of legislation because these are relatively recent statutes and cases involving DAPTs typically settle. Depending when the claim has arisen, these trusts can and should be considered in appropriate circumstances, but only by an attorney who understands all of the ramifications.

Claim by Some Commentators that DAPTS "Don't Work"

Some commentators assert that DAPTs do not work because the majority of cases (albeit only a handful) considering DAPTs have ruled against the debtor. The vast majority of opinions are Bankruptcy opinions where the court made the DAPT assets available to satisfy the claims of a judgment creditor. Under the 2005 Bankruptcy Act Section 548(d), a transfer to a DAPT is voidable if made within 10 years of the debtor filing for bankruptcy and if the debtor made the transfer with the intent to hinder or defraud current *or future* creditors. Thus, anyone who establishes a DAPT clearly should not file for voluntarily bankruptcy within 10 years of establishing a DAPT. Furthermore, a DAPT will not work if the debtor is involuntarily forced into bankruptcy within 10 years of creating a DAPT.

Outside of the bankruptcy context, we have only one case that, in the lower courts at least, considered a DAPT established under the laws of a different, DAPT jurisdiction. On January 30, 2015, the Utah Supreme Court in Dahl v. Dahl considered what appears to be a Nevada DAPT where the defendant husband

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created the trust, waited for the statute of limitations to run, and then divorced his wife and claimed that the assets were unavailable to her as part of the divorce settlement. The lower court had ruled that the trust assets were unavailable to the wife, but the Utah Supreme Court reversed. The Supreme Court ruled that the trust was revocable, and thus not a DAPT, because of the apparent mistaken inclusion of the word "any" in the sentence "Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereof." Significantly, the Supreme Court applied Utah law because it found that Utah has a very "strong public policy" in favor of equitable division of marital property in divorce – despite the fact that Utah had subsequently adopted a domestic asset protection statute.

And that is the concern; that a court in a state that does not permit self-settled trusts will apply its own state's laws, and not the law of the DAPT state because of a "strong public policy." If so, the court may very well rule that the DAPT assets are available to satisfy the claims of one or more creditors, particularly where, as in *Dahl*, the creditor is a *protected class*. Under these circumstances the judgment creditor would then take its judgment to the DAPT state and seek to enforce it, which the Full Faith and Credit Clause of the constitution says they must do. If this were to happen the DAPT itself would provide little or no protection. However, the LLCs and other entities used in conjunction with the DAPT would continue to provide some protection (e.g., charging order protection if the assets are owned by an entity governed by a state whose exclusive remedy is a charging order). Thus, even if a court voids the transfer to a DAPT it does not mean that a DAPT strategy "does not work."

Experience tells us that the reason there are so few cases, particularly outside of the bankruptcy context, is because these cases settle before trial, and generally under terms favorable to the debtor. Our experience is that DAPT structures result in settlements favorable to the debtor, certainly more favorable than if there was no such structure in place. Thus, in this author's opinion DAPTs do, in fact, "work".

Foreign Asset Protection Trusts (FAPTs)

Offshore asset protection planning normally involves the utilization of offshore trusts and other entities, similar to the structure we use domestically but with offshore entities and trusts. Offshore planning generally raises justifiable concerns with respect to asset security and tax issues. The most efficacious manner to address these concerns is to make certain that you are receiving the best advice and counsel from a qualified expert in the area. A FAPT is a trust that is set up in an offshore jurisdiction, which has enabling trust legislation providing for substantial protection against creditors of the Settlor. One of the greatest advantages of the FAPT is the fact that by its very nature any legal attacks against its assets are transferred abroad to a different legal

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system. The FAPT is generally much more expensive to set up and create than a domestic trust and requires a certain willingness on the part of the Settlor to deal with offshore jurisdictions and trust entities. The FAPT's greatest value is for asset protection planning well in advance of any potential creditor problem. Moreover, many times FAPTs are used when the individual already has some international connections and networking.

The major advantages and purposes of the FAPT

1. No Comity of Law in Foreign Jurisdictions

Most foreign jurisdictions do not recognize U.S. judgments. This may force a trial *de novo* on the merits under the laws of the foreign situs in order for the creditor to impose liability on the Settlor and reach the assets of the FAPT. Obviously, the fees and expenses of this trial *de novo* and the burden of having to select offshore counsel can be substantial. Moreover, the FAPT jurisdiction generally requires plaintiffs to employ attorneys who

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are licensed in that jurisdiction.

2. More Favorable Law

Most foreign situs jurisdictions require that the burden of proof in challenging asset transfers to a FAPT is on the creditor and does not shift to the Settlor. Moreover, a handful of foreign jurisdictions impose a higher standard of proof upon civil litigation plaintiffs such as the "beyond the reasonable doubt" standard. This is in sharp contrast to the "preponderance of the evidence" principle utilized in U.S. domestic civil cases.

3. Statute of Limitations

The FAPT legislation of many jurisdictions establishes a statute of limitations for challenging asset transfers to a FAPT that begins to run on the date of transfer. This is contrary to US law where the statute may begin to run the date the transfer is "discovered" by someone with a claim against the Settlor. Additionally, the statute of limitations of many FAPT jurisdictions is much shorter than the typical four year statute found under U.S. law.

4. Fees and Expenses of Litigating in Foreign Jurisdictions

Manifestly, it is going to be much more expensive and inconvenient to prosecute a claim offshore. Think of the inconvenience of having to pursue a claim out of state and then multiply that by two to three times the cost to pursue the matter in a foreign jurisdiction. Many foreign jurisdictions prohibit contingency fee arrangements, forcing the claimant to finance a litigation process entirely on his or her own, and some go so far as to require a significant bond when filing suit under its laws. Creditors may think twice about having to deal with a completely different legal system out of the country. This unfamiliarity, plus the additional expenses and costs, and the entire uncertainty with respect to the process,

add a substantial element of protection to the FAPT.

How the FAPT Protects Your Assets

A. Liquid Assets

The easiest way to understand how a FAPT protects cash and securities is to focus on the process by which a claimant would try to reach trust assets. A claimant must either bring his case in a court that has jurisdiction over the trustee so that the court can order the trustee to give up the assets or initiate litigation in the court that has jurisdiction over the assets themselves so that the court can attach or seize the assets. However, if the offshore planning strategy is properly structured and implemented, no domestic court can successfully attack the plan because it would not have the ability to force the offshore trustee to expatriate or return the assets, nor would it have the ability to levy on assets properly held outside of the U.S.

Protecting non-liquid assets like real estate, accounts receivable, and business equipment involves the process of equity stripping.

B. Non-Liquid Assets

Protecting non-liquid assets like real estate, accounts receivable, and business equipment involves the process of equity stripping. Although some of these assets can be put in charging order protected entities that may provide some limited protection, the most effective strategy available to protect a domestic illiquid asset is to strip that asset of its value by encumbering it as collateral for a loan and protecting the loan proceeds with your other liquid assets in the FAPT. Creditors are going to be very discouraged attempting to levy on an asset that may have substantial value, but has very little equity because of a loan encumbrance or lien.

U.S. Tax Consequences

Generally speaking, the establishment of the offshore asset protection plan will be tax neutral. The FAPT will either be a US grantor trust or a foreign grantor trust with a U.S. grantor for U.S. income tax purposes. It will be necessary to file various forms with the Internal Revenue Service in either case, but these forms simply disclose the assets to demonstrate that the taxpayer is a responsible and law-abiding citizen.

Fraudulent Transfer Laws

No discussion of asset protection planning would be complete absent at least mention of fraudulent transfers. Under the Uniform Fraudulent Transfers Act, and the renamed Uniform Voidable Transactions Act in California and a handful of other jurisdictions, a transfer may be voidable where it is made with the intent to hinder or delay a creditor. This is an area where we must be extremely vigilant. If you know *or reasonably should have known* of facts giving rise to a potential creditor claim, future transfers may trigger the state's fraudulent transfer act.

Conclusion

The proliferation of plaintiff lawsuits, and the expanding concept of liability that has become second nature in our court system, have engendered much concern

and anxiety about the preservation of wealth in the U.S. Many professionals like doctors and lawyers as well as business owners, corporate executives, real estate developers and investors, contractors and others operate in an environment of high risk. Many such people lack confidence that they will be treated fairly by the legal system and are desirous of reducing their financial profile and eliminating their liability potential. For these individuals, asset protection planning, and perhaps the offshore planning alternative, may very well be the best planning device available for maximum comfort and peace of mind.

Wealth Management + Asset Protection = Wealth Protection

By Daniel Zurbruegg CFA

Asset Protection is a multi-dimensional concept

From a legal point of view, it makes sense to protect assets allowing people to add another layer of asset protection. Given the unique risks a physician (or any other entrepreneur) is facing, it is clear that protecting the business as well as personal wealth is crucial. Legal problems such as lawsuits, malpractice claims or similar problems can put a whole business at risk and within the financial well-being of a person and their family. What why is it that so few financial advisors and planners are either ignoring this part of wealth management or simply lack the expertise to help clients? The reason is simple, financial advisors are trained to sell financial products, a trend that can be seen in many countries but especially the United States. Financial Advisors are not paid to provide a solution and advice for which they can't charge a fee, to make things even worse, they are given incentives to sell financial products and pretty much ignore anything that would give clients a real solution. That's the reason why entrepreneurs need a more sophisticated wealth management service that will include asset protection planning with a holistic approach.

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Onshore vs. Offshore Wealth Protection

While there are domestic solutions available that provide at least some level of protection, most of the time the chain breaks at its weakest link and that is usually the place of custody of assets and wealth. While it is simply not possible to move assets such as real estate, "liquid" assets, mainly money and securities can also be kept outside the client's country. This is commonly referred to as international estate planning and asset protection. This usually means that part of the assets, money or securities, is being kept in a foreign country and there in separate bank account. Once assets are transferred into such an account, it will be a lot harder for anyone to attack these accounts or for a court to freeze assets.

Selecting a banking partner in a foreign jurisdiction

This step seems to be obvious, but it cannot be stressed enough how important it is to have the right bank in a good jurisdiction. Many people underestimate the importance of this decision, but the financial strength and long-term stability of a banking partner is critical for the success/failure of asset protection. What would it help to have the best possible asset protection structure offshore and then put the assets with a bank that is financially unstable? Often people don't think that a real risk is involved, but the lessons from the past few years tell us that a bank can indeed go out of business and that it is increasingly likely that the bank's client will have to pay the bill in the event of a credit event, despite some limited protection by the Federal Deposit Insurance Corporation. International Banking regulation continues to develop, and the trend clearly shows that clients of a bank will have more exposure in the future. With many banks still having a relatively weak capitalization, these risks are real should a bank get into trouble. The key is to select a bank with high levels of core capital and a business strategy that is low risk, meaning low exposure risky business such as mortgage, derivatives or investment banking. Typically, this can be found with private banks, such as Swiss private banks, that focus only on private client business with the goal of being the most stable counterparty of custody of a client's assets.

> The key is to select a bank with high levels of core capital and a business strategy that is low risk.

Select an investment manager with global market reach

This step is maybe even harder than finding a good banking partner since the quality and performance of an investment manager determine the long-term success of an asset protection structure. What does it help to have the best structure and banking partner if an investment manager does not preserve and grow the capital in an offshore asset protection structure? Here it becomes clear that asset protection is a truly multi-dimensional concept. There are so many different investment managers/strategies to choose from that it is really hard to find the perfect solution. The key is to find an investment manager who can provide clients with a customized investment strategy that fit the needs of a client. Also, it is essential to have a money manager with the necessary experience and track record of at least five years.

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Finally, the investment manager should have global reach and provide clients with access to global investment opportunities. Very often, international markets, especially emerging markets, do provide clients with higher potential returns than

can be found at home. From this it becomes clear how important the role of the investment manager is for the long-term success of an asset protection plan.

Utilize a "turnkey" solution through a network of professionals

Once an asset protection structure is set up, a banking partner is selected and an investment manager is picked, it appears that the job is complete. This is not the case, and the most important part long-term is just beginning. It is absolutely critical that the various experts involved (lawyer, estate planner, tax advisor, banking partner, accountant and investment manager) know each other and how to work together. Very often, the client's attorney becomes a kind of a "quarterback" in this setup. He connects the various experts and coordinates the work of each. People often think that this will happen automatically and that over time, these various experts will work well with each other. The key is to constantly review the setup and the work done by each expert. How is the client helped if the investment manager constantly delivers superior performance but the accountant does not know how to deal with international investments? Also, foreign bank accounts require the filing of certain special forms (such as the FBAR Fin Cen 114) with the IRS. Just imagine if the accountant fails to do a proper job and files incorrect forms, which can result in tax penalties. It is critical to understand the importance of this multi-dimensional concept of international asset protection, realizing what role each factor is playing, and then have a turnkey solution setup with the right experts. Once this is accomplished, clients end up with a sound asset protection structure with a sound investment plan that provides them with benefits for a long time to come.

It is critical to understand the importance of this multi-dimensional concept of international asset protection, realizing what role each factor is playing, and then have a turnkey solution setup with the right experts.

If we have struck a chord or raised a question do get in touch with us at Orbis 28.

Our team of experts are here to help you.

Write to Orbis28@orbis28.com or email direct to one of our experts (see page 1 for emails).

Find out more also with our Office Hours series of online discussions: http://orbis28.com/category/peofficehours/