

QWarterly Chronicles

Spring 2008

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10 Biggest Mistakes in Asset Protection Planning

ONE

Not Understanding the Purpose of Asset Protection: Asset protection will not make you “judgment proof.” There is no way to stop someone from going to court and filing a lawsuit. However, with proper planning you can make your real estate more difficult to get to once the lawsuit is filed. The true value of asset protection lies in the compartmentalization of assets

so that if someone does sue you they can not get to all of your assets. Asset Protection specialists often discuss the difference between “inside liability” which arises directly from the asset itself and “outside liability” which is the liability that real estate investors want to protect themselves from so that their “unrelated” assets are not subject to attack from an insider creditor.

see “Ten” on page 3

New Laws for 2008

As always, when January 1st rolls around so do the new laws. Here is a sampling of the many laws that come into effect in 2008:

Ban on Smoking in Cars

Starting January 1, 2008, motorists could be hit with fines of up to \$100 for smoking in a vehicle containing anyone under age 18. The traffic stop would have to be for something else, such as speeding, before a vehicle’s occupant could be cited for smoking. The smoking ban is California’s latest attempt to shield people from the health risks associated with breathing second hand smoke. Other smoking bans already in place for California include prohibitions on smoking in enclosed workplaces, including taverns and restaurants, and prohibitions on smoking within 25 feet of a playground.

Increase in Minimum Wage

The hourly pay for California workers making minimum wage will increase by 50 cents to \$8.00 an hour on January 1, 2008. This increase is part of a two-step adjustment approved by California lawmakers in 2006. The wage jumped from \$6.75 to \$7.50 January 1, 2007.

see “Laws” on page 2

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“Laws”

Ban on the Use of Hand-Held Cell Phones While Driving

Beginning July 1, 2008, drivers 18 years and older are prohibited from driving a motor vehicle while using a wireless telephone unless a hands-free device is used. Minors or drivers under age 18 are prohibited from driving a motor vehicle while using a wireless telephone, including a hands-free device, and/or a mobile service device (pagers, texting devices, laptops, etc). The two exceptions to this law are in an emergency situation or when driving on pri-

vate property. The fines for both laws are: \$20, first offense plus administrative fees; and \$50, second or subsequent offenses plus administrative fees.

Phony Music

This law attempts to ensure that music fans who buy tickets to oldies concerts are not victims of deceptive advertising. This legislation requires performing groups to meet at least one of several standards to be able to legally use the name from the groups' recording days. As an example, the group must include at least one member who has the legal right to use the name. Bands also can avoid lawsuits by acknowledging they are a salute or tribute to the original recording group and have a name that does not confuse ticket buyers.

Gift Certificates

A law that went into effect on the first day of the year that allows shoppers to cash in gift certificates that have less than \$10 left in value. This will prevent stores from benefitting from the cash generated by unexhausted gift certificates that stores have refused to trade for cash.

Sarah A. Kirland, J.D., LL.M.

SPOTLIGHT



RICK QUINLIVAN WINS ANOTHER!

QW started off the new year with another trial victory. Rick Quinlivan successfully defended longtime client Cincinnati Incorporated. After a 5 day jury trial, the jury returned a verdict on January 11 for the defendant in a product liability matter involving a press brake machine. The plaintiff suffered a severe crushing injury to the 4 fingers of his left (minor) hand while helping form a large part on the press brake. It was contended that the machine was defectively designed due to the lack of point of operation guarding. The case was defended by establishing that the machine was designed with features that allowed the employer to eliminate the risk of injury and demonstrating the failure of the employer to utilize those available features to set up the job safely.

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as a service to clients and friends. This publication is intended for general information and should not be relied upon for any other purpose. QWLLP encourages questions, comments, and ideas for future articles. Please call us; we'd love to hear from you.

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Sign on A Plumber's Truck: "Don't sleep with a drip. Call your Plumber!"

"Ten"

TWO

Failure to Properly Title Assets: Too many real estate investors fail to understand that the title in which they take property is going to control so many different aspects of their property, not the least of which is whether a creditor will be able to attach their property. There are numerous different ways to hold property in California, including, but not limited to: Sole and Separate; Joint Tenants; Tenants in Common; Community Property; Community Property with rights of survivorship; and in a properly formed entity. For asset protection purposes holding property in an entity is far superior to any other method available.

THREE

Utilizing the Wrong Entity: Although many real estate investors understand that there is much better asset protection available by holding their assets in an entity, many do not understand all of the nuances of entity selection. As a general rule a General Partnership, while very easy to create and run, is the worst entity for providing asset protection. In addition, corporations, both "C" and "S", have limitations as well, though admittedly the

limitations have more to do with taxation issues. Asset Protection specialists will most often favor Limited Partnerships and Limited Liability Companies as the entities of choice for real estate investors.

FOUR

Paying Off Real Estate: Suzy Orman is always telling people to pay off their homes, and while good advice for certain people, it does not lend itself to good asset protection planning. Creditors love real estate that has no debt as they can take all of the equity. Debt is a very tax efficient way of making your assets less desirable in the eyes of your creditors. Asset protection is never done in a vacuum and requires the collaborative efforts of your legal, accounting and financial professionals to truly be done properly.

FIVE

Believing That It Is Too Late To Protect Assets: It's never too late to improve protection. Anything is better than doing nothing. Just because you have been sued does not mean that there is nothing that can be done to protect your assets. Of course, it is always easiest to do good asset protection planning when the waters are calm and you are not in the middle of a storm.

SIX

Confusing Estate Planning with Asset Protection Planning: A Revocable Living Trust, the cornerstone of good estate planning, is not going to protect your assets from the attack of a creditor. A Revocable Living Trust is a grantor trust which in the eyes of a judge is nothing more than a container that can be reached into for the purpose of satisfying a judgment against you. Just because real estate is held in a Revocable Living Trust does not mean that it is protected. There are certain types of trust which will, when properly structured and funded, provide very good asset protection.

SEVEN

Assuming there is something wrong or illegal with Asset Protection Planning: Asset Protection planning is not illegal when done properly. There are many potential problems related to transfers of assets if done incorrectly or done so as to defraud a creditor which may constitute a fraudulent conveyance. Think of good asset protection as stemming from good business planning and you may begin to understand the key to withstanding an attack against your assets.

see "Ten" on page 6

Sign on an Electrician's truck: "Let us remove your shorts."

Electronic Data - Should It Stay or Should It Go?

We all know that dreaded feeling that we someday will face in terms of the inevitable task of sorting the boxes of papers or electronic files, or the numerous photographs we have accumulated when moving from a long time home or job situation. In this electronic age, we often hold on to electronically stored information without making the decision of whether or not we should archive or discard that information on a regular basis. This is due in part to the fact that electronic information is easily stored on a much smaller scale.

The legal and business world transmits in excess of 90 percent of its information electronically, with no hard copies. The ability to manage, sort, locate and provide electronic information has now become vital in the litigation arena given the advent of the new legal discovery requirements, particularly the new digital evidence discovery requirements in Federal Court.

Last December, the Federal Rules of Civil Procedure, Rules 16, 26, 33, 34, 36 and 45 were amended regarding digital evidence discovery. Rule 26 (b) was revised to now in-

dicating that generally a "party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost," however, the trial court "may nonetheless order discovery from such



sources if the requesting party shows good cause. . .” Basically the new rules require an early assessment and discussion between the attorneys regarding preservation, accessibility, form of data

production and the process for handling privilege claims. Now a party is required to backup copies of all stored information to meet anticipated discovery requests for electronic documents. This requires a review and establishment of electronic retention policies, and tracing methods both for electronic and physical documents. Where litigation is anticipated, the party is expected to preserve electronic records and search for digital evidence discovery that are “reasonably accessible” to provide in the litigation within certain limitations prefaced on burden, cost, etc.

Some of the questions raised are which electronic records are available, such as: 1) what potential evidence is on all electronic systems of the employer and/or personal computer of the witnesses, 2) what must be provided and 3) who should bear that cost for locating and provided the records. (Rule 26(b)2(C)).

Sign at a Towing company: “We don’t want an arm and a leg. We want tows.”

As a practical matter, businesses track information and store records without assessing whether or not it will be of value in the future. Many times a client will hold on to information that has no future business value, use or purpose, and worse yet, is helpful to their adversary. For instance, some companies track the history, experts and past results of prior lawsuits involving their products or employees. This information is routinely sought in future litigation.

To comply with the amended Federal Discovery Rules, businesses are expected to understand their computer systems and know how to stop the routine destruction of electronically stored information and paper documents as soon as they “reasonably anticipate” litigation. This means even before a lawsuit is filed. Counsel are now obligated to identify in Federal litigation the “sources containing potentially responsive information that it is not searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.” (Committee Notes 26(b)(2))

Businesses need to also develop records management policies to cope with the voluminous and anticipated requests. Of course there is a “safe harbor” exception for litigants who take all the steps necessary to properly preserve their electronically stored information, yet inadvertently destroy relevant data. Absent exceptional circumstances, a court may not impose sanctions under the rules on parties who fail to provide information lost as a result of a good faith operation of an electronic information system. (FRCP 37(f)) The Courts

have indicated that it is not wrongful for a manager to instruct its employees to comply with a valid document retention policy under ordinary circumstances, [Arthur Andersen LLP v. U.S. (2005) 544 U.S.696] but that destroying documents on a random basis without any established records management policy may lead to a claim of intentional destruction of evidence. In *United States v. Philip Morris USA, Inc.*, (D.D.C. 2004) 327 F.Supp.2d 21, 26 a party was sanctioned \$2.75 million based on the failure of eleven employees to preserve emails.

So think about what you should keep, what information you should track and when you should routinely discard data or records that no longer has any value to your business or due to storage expense. Establish retention and electronic storage policies as well as management procedures. Finally, you must also consider what procedures need to be implemented to identify any potential data that must be preserved for anticipated litigation.

Julia A. Mouser

Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Closures:

Friday, March 21
Good Friday

Monday, May 26
Memorial Day

Friday, July 4
Independence Day

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QWLLP QUARTERLY CHRONICLES

About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Danniel “Danny” J. Wexler** bring almost 50 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Ten”

EIGHT

Failing to Adequately Insure: Too many owners of real estate fail to purchase enough property and casualty insurance to protect themselves. Insurance is the first line of defense and often the most overlooked. Creditors want to be made whole which is usually accomplished with cash or cash equivalents. If all else fails, a creditor will attempt to take property in lieu of cash. Insurance is a very cheap way to provide cash to a creditor.

NINE

Relying on Your Friend’s or Family Member’s Plan: ONE SIZE DOES NOT FIT ALL!

Asset protection is as unique as we are individuals. Every plan has to be designed to fit the individual’s needs and goals accordingly. Taking a copy of someone else’s plan and putting your name on it does not mean that you are protected – far from it. Contact your professional team and let them help you. You have spent a great deal of time and money acquiring your assets, why not pay to protect them.

TEN

Not Respecting the Formalities of your Plan or Entities: If you go through the process of actually putting a plan in place and then you ignore it, you have wasted time and effort if a creditor can “pierce the corporate veil” because you did not dot your i’s and cross your t’s. Formalities are an added cost of doing business, but if you fail to follow them you may be leaving yourself open to attack.

Danniel J. Wexler