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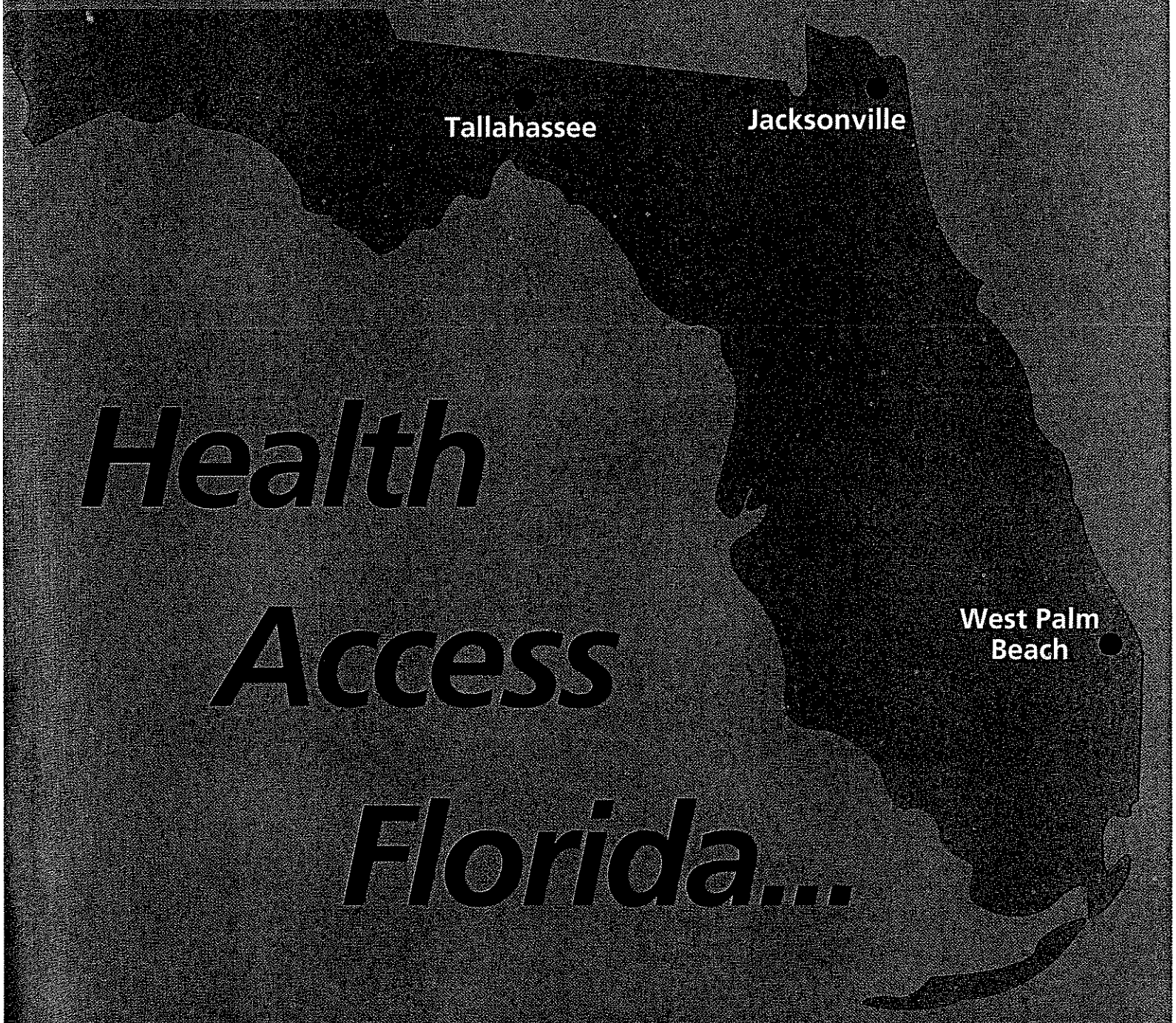

Health Access Florida...

Help Make It A Household Word

Can Physicians Protect Their Assets?

by Michael S. Singer, Esquire

In the 1991 Session, the Florida Legislature came dangerously close to passing a bill to reduce or eliminate the ability of a Florida citizen to protect assets from judgment creditors. The controversy over this bill occurred mainly in the House of Representatives which did finally pass a bill towards the end of the Session. However, the Senate companion bill was shelved for "study" until the 1992 Session. While the House and the Senate will have to start over during the 1992 Session, the possibility of this legislation returning in 1992 in some form is exceptionally good.

Some background. Presently, the State of Florida recognizes that a debtor has a right to protect certain assets from the reach of creditors. In my opinion, this is especially applicable to physicians who are often the victims of our jury system which does not provide a method of hearing malpractice cases by a jury of the physician's peers (other doctors), which often leads to a judgment against the physician that may be substantively wrong and/or offensive as to the amount. The ability of Florida citizens to protect assets from creditor attachment under State law and in bankruptcy provides, in essence, another of the checks and balances of our system. By allowing a citizen to protect certain assets, the system encourages risk taking and, although perhaps unintentionally, gives physicians a way to limit their losses. Physicians already bear substantial cost by way of inflated malpractice insurance rates.

Presently there are seven categories of exemption from creditor attachment. Six of these are prescribed by statute under Florida law and one exemption has evolved through case law handed down by the Florida Courts.

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The first exemption from forced sale is the homestead. Florida law allows its residents to exempt from creditor attachment a homestead of any value which is no more than one-half acre inside a city or municipality and no more than 160 acres outside a city or municipality. There has been some legislative movement to limit the value of the homestead exemption from forced sale to a monetary amount, but no such legislation exists presently and likely would not draw enough support to pass.

The second exemption from creditor attachment applies to wages. In Florida, wages paid to a head of the household (and each family can have just one "head of household") are exempt from creditor attachment. In 1985, the statute was extended such that this protection extends to wages in a bank account as long as such wages are clearly identifiable and not comingled with other assets. Therefore an account labeled "John Doctor, M.D., Wage Account", would probably continue to protect those wages. Caveat here, at least some of the bankruptcy judges do not see the wage account as an open-ended exemption and have stated that wages cannot stay in a wage account for an unlimited time.

The third exemption in the State of Florida is for life insurance. The cash value and death proceeds of any life insurance policy held by a resident of the State of Florida are presently exempt from creditor attachment. In estate planning and certain asset protection planning, life insurance is a very useful tool because of its exempt character in the State of Florida as well as its income tax advantages.

The fourth exemption in the State of Florida is for annuities. Annuity contracts held by residents of the State of Florida are also exempt from creditor attachment. Like life insurance, annuities provide a tax advantage in their status as a tax-deferred investment. Further, as an exempt asset, annuities are extremely useful in both income tax planning and in asset protection planning.

The last two exemptions prescribed by Florida Statutes are numbers five and six on our list. These exemptions are for retirement plans (pension and profit sharing plans) and for IRAs. A Florida statute presently states that retirement plans (pension and profit sharing plans) and IRAs are exempt from creditor attachment. The claim of this statute and the status of this exemption, apart from any legislation by the Florida Legislature, is far too complex to fully examine in this short article. However, some explanation is necessary. In 1987, the Florida Legislature passed a statute which created the exemption for pensions and IRAs. Since the Mackey decision there have been nearly 100 cases across the country in this area. The vast majority of these cases have held that pensions and IRAs at this time are not exempt from creditor attachment in bankruptcy.

Specifically, in the State of Florida, we have three bankruptcy districts. The Middle and Northern Districts (in essence from Orlando, north) have already stated that pension plans are not exempt in bankruptcy because of Mackey and the prodigy of cases that have followed. The Southern District has stated that Mackey does not work to invalidate the Florida Statute and that pension plans are still exempt in the Southern District. No decision of the Southern District has been appealed yet. Whether the Southern District's position will stand on appeal in the face of an overwhelming majority of cases decided to the contrary is certainly unclear. Depending on a pension plan alone as completely exempt is tenuous at best. However, significant planning opportunities do exist for making pension and profit sharing assets exempt from creditors.

Because the IRA exemption is contained in the same statute as the pension exemption, there has been concern that IRAs would also be treated like pensions under Mackey. The overwhelming majority of cases in states which have statutes granting exempt status to IRA's have held that IRAs are still exempt from creditor attachment in bankruptcy. Both the Southern and Middle Districts have concluded that IRAs are exempt from creditor attachment. Therefore it is probably a reasonable position that IRAs are exempt from creditor attachment in Florida.

The seventh exemption has evolved under Florida case law. This exemption is for property (real or personal) owned by a husband and wife as tenants by the entirety. This ownership is different, and under case law has and will be treated differently, than ownership as joint tenants, tenants in common or other forms of co-tenancy. The tenancy by the entirety exemption states that a creditor of one spouse cannot attach the assets owned jointly by a husband and wife as tenants by the entirety to satisfy the judgment of only one spouse. However, if there is joint debt against husband and wife, that tenancy by the entirety property can be attached to the extent of that joint debt.

The seven exemptions discussed above are the current exemptions standing under Florida law. In the last session, an attempt was made to greatly reduce or, in fact, eliminate the ability to utilize these exemptions.

Specifically, the bill put a holding period on the ownership of life insurance and annuity contracts. The wage exemption was severely reduced. The bill eventually dropped any reference to limiting retirement plan exemptions, but at first tried to set a limit of $5,000 in the aggregate of pension and IRA money to be exempt. This is not to say that this area will not be addressed at the next session. Tenants by the entirety ownership was completely eliminated as an exempt form of asset.

Under our present law, a physician can take steps which can protect most of the assets he or she owns personally, as well as the assets of the medical practice. This may not be the case for long. Further, because some of these rules may be grandfathered, it is possible that such steps taken at this time will protect assets regardless of legislation that might be passed.

As a new session approaches, the main lobbying groups against the bill are the Florida Medical Association and the life insurance industry. The main groups lobbying for the bill are the banking industry, certain trial lawyers and certain businessmen's lobbies. Early participation in voicing your opposition to this bill will enable us to either postpone or defeat the bill again.

These laws are important to physicians. These exemptions provide one of the checks and balances against a legal system which is often very anti-physician.

This article only discusses general principles. The facts of each situation are different and the applicability of any exemption to a given situation certainly varies on a case-by-case basis. Other legal considerations such as the applicability of the Uniform Fraudulent Transfer Act must also be considered. Consultation of an expert in this area is certainly recommended.

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