

TRENDS IN LITIGATION AND THE IMPACT OF ASSET PROTECTION

By Michael Singer

The 2005 year brings many challenges to physicians as the acrimony between the trial bar and physicians grow deeper and more fierce. The passage of Amendment 3 in the 2004 election certainly did nothing to help. The trial lawyers will soon be challenging Amendment 3 by having potential plaintiffs waive out of their right or entitlement to the "capitated" attorney fee provisions contained in Amendment 3.

Whether Amendment 3 or other legislation will actually help to lower medical malpractice insurance premiums or make same more obtainable remains to be seen. To date, this author has noticed no discernable improvement in the insurance rates from the very few financially stable carriers remaining in the state of Florida (such as ProAssurance and FPPIC). Until we completely appreciate the consequences of the November amendments, the playing field will likely become more intense and more highly contested.

Many physicians will continue to carry minimal (\$250,000.00) professional liability insurance for the most part if they carry insurance at all. Despite statistics attempting to assert otherwise, the number of bare practicing surgeons in the Dade, Broward and Palm Beach County areas is probably close to fifty percent (50%).

If a physician does not have professional malpractice insurance, he or she should at least buy legal defense insurance, as one of the primary reasons for having malpractice insurance is to pay for the cost of defense. Additionally, if a physician does not choose to carry malpractice insurance, such physician must remember that in the event a judgment is rendered against him or her that such physician must be able to come up with Two Hundred Fifty Thousand Dollars (\$250,000.00) to pay a victorious plaintiff within sixty (60) days of entry of a final judgment or that physician shall lose their license. As such, a part of a physician's professional planning should also be to maintain a license in another state in case that physician is unable or unwilling to pay the Two Hundred Fifty Thousand Dollars (\$250,000.00) to maintain their Florida license.

We will continue to look at the best way of protecting both practice and personal assets. Limited liability companies, for example, will still be advantageous in owning office buildings or interests in surgical centers. Some caution has to be taken care, however, with respect to use of limited liability companies and vehicles such as family partnerships from a documentary stamp tax perspective as transferring property into a limited liability company is potentially subject to an assessment of documentary stamp tax. Additionally, membership interests in limited liability companies currently are subject to the Florida intangible tax. Limited liability entities are creditor "protected" inasmuch as a creditor can only receive a charging lien or charging order against

a membership or partnership distributive share. However, the creditor can remain in place as long as the judgment is valid (for up to twenty (20) years if properly re-recorded). Thus, if the limited liability company or family partnership is a "family" entity where distributions do not have to be made, such vehicle may be very advantageous to use. However, great care should be given to whether or not interests in limited liability companies and family liability partnerships with non-family members should be held in a second tier limited liability company where family planning may be more appropriate.

Unlike the "protected" entities which dictate a creditor's rights, Florida still has a list of "exemptions" from creditor attachment. These assets (including annuities, life insurance, ERISA qualified retirement plans, IRAs, homestead, wages and property owned as tenants by the entirety) are theoretically unreachable by creditors in any regard except if a Court finds that the exempt asset became such by virtue of the debtor's fraudulent or inappropriate acts. However, the latter three exemptions are much less concrete than the first four exemptions in exactly what they apply to. Recall that the homestead exemption applies to property which is less than half an acre inside the city and up to one hundred and sixty acres outside the city. Further, a recent Southern District case (Chauncey) continues to demonstrate that even the homestead could be at risk in South Florida. Wages seem to be protected but additional annual steps need to be taken to try to bolster that particular exemption. Finally, tenants by the entirety continues to be the weakest exemption in this author's opinion because of the mere fact that if assets are held as tenants by the entirety and the non physician spouse dies while the physician spouse has a judgment against him or her those former tenants by the entirety assets would then be seizable by the physician's creditor. It is noteworthy that tenants by the entirety is the only non statutory exemption in the above referenced list and as such great caution should be used in employing same, although a recent decision (Musolino) has swung the pendulum back in favor of the tenants by the entirety exemption.

During the coming year the only thing that is certain is that there will be more uncertainty in asset protection. Continual communication with your advisors is essential as well as at least an annual conversation with someone who is well qualified in asset protection. Obviously, we hope that all forces will join together so that practicing medicine in the state of Florida can again become more predictable and less adverse however, the prospect of that happening in the 2005 appears bleak.

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