

ASSET PROTECTION 101

The faltering economy has spurred significant financial pressures on businesses and individuals alike. For small business owners, these pressures are compounded by the fact that the very businesses that provide their livelihood are often seeing a decline in revenue. Such declines make it more difficult to meet the financial obligations of the business and to ensure that there are adequate remaining profits to meet the personal obligations of the owner's family. Additionally, business obligations, such as bank loans and leases, are often personally guaranteed by the owners of the business, thereby creating an added personal obligation on the owner.

THESE TOUGH ECONOMIC TIMES WILL PASS! Yes, there will be some business casualties and many business owners will find themselves having lost the enterprise they worked so hard to create. But, as resilient entrepreneurs do, they will bounce back and they will again engage in spurring economic growth.

In the meantime, however, these small business owners (and individuals, in general, as well) should be taking affirmative measures to protect what they have worked so hard to build by utilizing certain asset protection techniques. This article does not afford me the ability to share all such techniques, but the important thing to know is that there absolutely are things that business owners should be doing to minimize the potential loss of their assets.

First (and perhaps most obviously), make sure that your business is organized as a limited liability entity, such as a family limited partnership, corporation, or a limited liability company. Except in the case of personal guarantees by the business owners, this makes the business entity responsible for any of the actions on the part of the business. This simple approach will lower, and sometimes entirely eliminate, the liability of the business owner.

Second, if you are married, ensure that your personal assets, including your home and your non-qualified investments, are titled as "tenants by the entirety." This form of titling, available only to married couples, insulates assets from creditors of just one of the spouses. For example, if a husband has personally guaranteed a commercial lease for his business, in the event of a judgment against him for a default of that lease, the landlord will generally be unable to attach assets held by the husband with his wife, as tenants by the entirety.

While cash is somewhat scarce for many these days, investing as much as you can into protected retirement accounts and into 529 college savings plans can also serve to limit exposure. Certain types of retirement accounts, including 401(k) plans and most individual retirement accounts (IRA) are exempt from attachment by creditors. Additionally, contributions made into a 529 college savings account more than two years ago are also exempt from attachment; only portions of contributions made less than two years ago are similarly protected.

Another effective asset protection technique for individuals with some disposable income and/or assets is gifting. This can include the gifting of cash, stock and even real estate. While gifting assets that have a depressed current value can be extremely effective, ensuring that the gifts comport with an overall estate plan is critical.

Other more sophisticated asset protections can also be employed, including the use of certain asset protection trusts. And, finally, while often less desirable and often utilized because of the lack of proper asset protection planning, bankruptcy is another way to protect your assets from attachment by creditors. Planning ahead and trying to avoid the filing for bankruptcy, however, is paramount.

Whatever types of asset protection techniques you choose to utilize, be sure that you are protecting those assets in a legal manner. It is best to utilize asset protection techniques as a preventative measure before anything happens to cause you to potentially lose those assets. If you wait until a lawsuit is brought against you or until creditors try to get your property to use an asset protection technique, you could be committing a fraudulent transfer--something with significant legal ramifications on you and your business. Be smart about protecting your hard-earned assets and you will weather this storm successfully!

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