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ASSET PROTECTION – A SHORT COURSE

“Asset protection” is new business seminar catch word for concerns that have long been part of standard business law advice.

While the concept of asset protection dates from the origins of business corporations, there has been a recent expansion in the number of limited liability entities. The protections offered by these entities are, practically speaking, equivalent to those provided by a corporation.

The first inquiry in reviewing asset protection needs is the degree of risk involved in the business. It makes no sense to spend substantial dollars to protect against a minimal risk. Not only does a one-person consulting business pose less risk than a bar or chemical distribution business, but the protections of a corporation or other limited liability entity may well be illusory for the owner in many situations.

While legal limitation of liability generally protects a business owner's personal assets from claims created by actions of a business' employees, it is important to understand that the individual causing harm still has personal liability for the harm. Where the owner of a business is its sole employee, the costs of incorporating may confer little or no asset protection benefits. It should, however, be kept in mind that there may be other benefits to setting up a formal business entity. These benefits include ease of transferring ownership and access to statutory rules relating to operations.

An asset protection method perhaps even more fundamental than legal liability limitation is careful use of insurance. With new types of liability constantly arising (from asbestos to PCB's to mold to ?) and with the insurance industry responding with new coverage exceptions, a program of asset protection involves much more than calling an insurance agent for a quote. The nature and known risks of each unique business must be reviewed with a business insurance agent to arrive at a comprehensive and economically feasible program of insurance coverage.

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I have increasingly been called upon to advise clients on a less recognized asset protection issue – contractual risk shifting. I have seen more and more “boilerplate” contract terms which require one party to assume liability for problems created by the other party to the contract. Often this assumed liability is not covered by insurance. Too often this language is not discovered until a claim has been made. It is now more important than ever to read all contract terms and review them with a lawyer experienced in insurance and liability issues. Your lawyer will often involve your business insurance agent to help structure the deal so that assumed risk is covered by your insurance to the fullest extent possible.

A useful asset protection program will not result from attending an evening seminar conducted by a traveling asset protection “expert”. Effective asset protection can best be initiated by consulting with lawyers, insurance agents and other professionals the business owner deals with on a regular basis. It takes a long-term understanding of a client’s business for a professional to best advise the client as to asset protection.

A small business needs to analyze tax risk, liability risk and the risk imposed by onerous government regulation among other threats to profitability and growth. By establishing stable relationships with bankers, lawyers, accountants, insurance professionals and financial/business advisors, a small business owner can maximize protection of business and personal assets as well as free up time and capital to focus upon business success.

-Dennis O'Toole