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Conventional wisdom, urban legends, RSP news, recent announcements, and more.



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PROTECTING YOUR ASSETS BY USING A DELAWARE TRUST

Protecting and shielding personal assets from creditors is always a concern. Business owners, real estate owners and professionals involved in high risk occupations and ventures are under increased exposure to patients, customers, partners and clients who might become potential creditors. They should consider taking extra steps to protect their personal assets against possible attack.

Asset protection techniques have grown in popularity in the past decade. The U.S. Treasury Department estimates that multiple billions of dollars have been transferred to improper, illegal and abusive domestic and offshore trusts in recent years. In an effort to keep this revenue within the United States and in recognition that asset protection can be a sound and legitimate tax and business planning tool, several state legislatures (most notably Delaware) have enacted trust laws that allow asset protection without going to abusive and possibly illegal foreign sources. Currently, Illinois does not have trust laws which are as favorable as those enacted in Delaware.

The Delaware Qualified Dispositions in Trust Act allows a concerned individual to establish a domestic asset protection trust which will generally be effective against claims of creditors, even if the individual creating the trust does not live in Delaware. (Del. Code, Title XII, Sec. 3570). Alaska, Missouri, Nevada and Rhode Island have enacted similar laws, but a Delaware asset protection trust is generally regarded as the most effective.

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Delaware's court system is one of the most highly regarded state court systems in the nation and has upheld Delaware asset protection trusts in cases brought by creditors seeking to reach the assets of the creator of the trust [known as the settlor]. Delaware's courts, in most instances, have upheld its trusts in favor of the settlor and against the creditor — meaning that creditors have a difficult time reaching assets of a properly created Delaware asset protection trust.

If a Delaware asset protection trust is attacked in a Delaware court and the court rules in favor of the protections provided by the trust, the other 49 states are required by the full faith and credit clause of the U.S. Constitution to honor the Delaware court's decision. If a lawsuit attacking the Delaware trust is brought in an Illinois court, rather than in Delaware, Illinois courts should utilize Delaware's favorable law to stop a creditor's attempt to invade the trust.

Here are the basic requirements that must be met to create a valid Delaware domestic asset protection trust. The trust must be irrevocable and must provide that Delaware law governs the trust's validity, construction and administration. There must be at least one Delaware trustee. The trust must contain a so-called spendthrift clause. That is, the trust must provide that the interest of the settlor or any beneficiary of the trust may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before such interest is distributed by the trust. The spendthrift clause is important because it is instrumental in preventing creditors from reaching the assets of the trust.

Of course, nothing is absolutely foolproof, and there are several instances under which a creditor might reach the assets in a Delaware trust:

- If the creation of the trust was fraudulent.
- Court orders for alimony, child support and property division can reach the assets in a Delaware trust if the trust was created after the marriage.
- The victim of personal injury, death or property damage by the settlor may reach the trust assets.

While no spendthrift clause is iron-clad, a knowledgeable attorney should be able to minimize the effects of these three exceptions and thus limit a creditor's ability to attack the Delaware trust.

The settlor of a Delaware trust has broad powers. He may receive distributions of principal and income from the trust under broad discretion. He has the right to a testamentary power of appointment of trust assets. He may direct investment changes, veto distributions and remove and replace trustees and other trust advisors. However, the settlor may not be his own trustee. He also may not be conferred any powers beyond those allowed by the statute.

A carefully drafted Delaware trust by an Illinois attorney is a legal, safe and effective way to try to protect personal assets against the potential claims of creditors, without the concern of becoming involved in suspicious foreign trusts.

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FREE MONEY: HOW TO RECOVER YOUR ABANDONED PROPERTY FROM THE STATE

Illinois law deems personal property to be "abandoned" when it remains unclaimed for at least five years and all attempts to contact the last known owner have been unsuccessful. 765 ILCS 1025. Such property must be turned over to the State of Illinois for safekeeping until the owner (or his or her heirs) can be identified. Of course, the State promptly spends the money it receives and merely establishes an accounting entity in favor of the rightful owner.

Many types of property are considered abandoned under this law. Some are:

- inactive bank accounts
- contents of expired safe deposit boxes
- uncashed checks
- unused gift certificates
- unclaimed wages
- shares of stock

- bonds
- utility deposits
- paid-up life insurance policies
- deposits or payments for the repair or purchase of goods or services
- credit checks or memos or customer overpayments
- unidentified remittances or un-refunded overcharges
- unpaid claims, accounts payables or commissions
- credit balances and accounts receivables
- employees' profitsharing

After unsuccessful attempts have been made to contact the owner of such abandoned property, the various institutions covered by the law (including banks, insurance companies and employers) are required to report the names, last known addresses, and other identifying information of the owners to the Illinois Treasurer and send the money or other property to the Treasurer.

The big source of money for the Treasurer under this law is inactive bank accounts. If you do not do anything with your account for five years, the money will be sent to the State.

Fortunately, the Treasurer has set up an easy-to-use web site – <http://www.cashdash.net> – enabling people to search for possible abandoned property and to make a claim for recovery.

This web site is relatively easy to use. You can search by any name: yours, your relations, your friends or any stranger. If you make a search for familiar names at the

cashdash website, you just might be surprised what you find. Alternatively, you may telephone the Treasurer's office at [217-782-6692](tel:217-782-6692).

If the Treasurer has no record of assets that may be yours, and you think some account has disappeared, you should contact the institution that previously held the property. Remember that property which is dormant for less than five years has not been turned over to the Treasurer yet.

If the institution that held your property has been acquired by another institution (e.g., through a bank acquisition or merger), you can find out what happened to your bank at the Federal Reserve's national information center web site: <http://www.ffiec.gov/nic>. If you are looking for a bank or other financial institution that may have closed or been acquired by another bank, click on "Institution History" or "What Happened to an Institution" and enter the name of the institution when prompted to do so.

All of this can be done without hiring an attorney, and there is no statute of limitations for making a claim for your abandoned property being held by the Treasurer. However, if you make a claim and the Treasurer improperly turns you down, you will then need to file suit in court within the time limit prescribed by law. For that, talking to an attorney is advisable.

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ANOTHER CONGRESS, ANOTHER TAX ACT. BUT NO ESTATE TAX RELIEF

As one of its last acts, the lame-duck U.S. Congress passed the Tax Relief and Health Care Act of 2006, in December. Prior attempts to pass this legislation had failed because it was coupled with estate tax repeal, an increase in the minimum wage and numerous special interest spending provisions.

The law as passed extends retroactively various tax provisions that had expired or were about to expire. The law also bolsters other tax incentives and health savings accounts, as well as many excise tax and energy provisions. It also has a miscellaneous section which manages to sneak in quite a few of those special interest provisions. There are also extensive Medicare and Medicaid reform provisions.

Because the new law was passed well after the 2006 income tax forms and instructions were printed by the U.S. Government, anyone affected by the Act needs to use great care in preparing and filing their 2006 return. The forms and instructions may no longer be accurate.

Let's look at some of the tax extensions. There are over two hundred of them. They include two-year extensions for fifteen-year straight-line depreciation of leasehold improvements; the research credit (in 2007, an additional alternative simplified credit that does not use gross sales as a factor in the regular credit would be available); the work opportunity tax credit/welfare-to-work tax credit (for 2007 the two credits would be combined and modifications would apply); the above-the-line deduction for tuition expenses; the state and local sales tax deduction; the above-the-line deduction for teacher classroom expenses; and others for one or two years. These tax breaks had expired at the end of 2005.

The Act also extends for one year a host of energy related tax provisions scheduled to expire at the end of 2007 under current law, such as the credits for residential energy efficient property and new energy efficient homes, and the deduction for energy efficient commercial buildings.

The new law also carries a number of non-extender provisions including many changes for health savings accounts ("HSA"s). Contributions to HSAs are currently limited to the policy's annual deductible. The new law removes this limitation, allowing taxpayers to fund their HSAs up to the annual contribution limit of \$2,850 for

individual coverage and \$5,650 for family coverage in 2007, even if their deductible is less than this amount. Taxpayers may also make a one-time rollover from an IRA to fund an HSA and may make rollovers from health flexible spending accounts and health reimbursement arrangements into HSAs. There is also an expanded contribution limit for part year coverage.

Another provision helps taxpayers who wound up with alternative minimum tax problems because of their exercise of incentive stock options.

If you find tax legislation amusing, don't laugh too hard – the Act also increases penalties for filing frivolous tax returns.

What the Tax Relief and Health Care Act of 2006 does not do is repeal or reform either the alternative minimum tax or the marriage penalty. Likewise, it does not deal with the federal estate tax, which is scheduled to expire for one year only, 2010, and then return with a vengeance in 2011. Given the political composition of the new Congress, it is unlikely that the estate tax will be repealed in the next two years or that any permanent changes will be as substantial as those that were almost enacted a few months ago.

To everyone who has delayed estate planning hoping for estate tax repeal or reform, it is time to act.

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THE GREAT HEIST OF THE 21ST CENTURY: HOW TO PREVENT IDENTITY THEFT

Here are some tips on how to guard your personal information, to better protect against identity theft:

- Obtain and review your own credit report once a year from each of the three national credit reporting agencies, Equifax, Experian, and TransUnion. One copy per year is free by law. In Illinois you can obtain all three for free by calling 1-877-322-8228 or at the internet site www.annualcreditreport.com. If you see something

that seems to be suspicious on your report (such as, you live in Chicago and a loan was allegedly made to you on your house in Anchorage), it probably is. Investigate further immediately.

- Shred your discarded bills, monthly statements, credit offers, insurance forms, physician statements, checks, bank statements and expired credit cards.

- Promptly remove mail from your unlocked outdoor mailbox.
- Contact the U. S. Postal Service to place a hold on your mail at the post office if you are planning to be away from home.
- Do not give account numbers, social security numbers or other personal information to anyone on the telephone, through the mail, or on the Internet unless you initiated the contact or are sure you know with whom you are dealing.
- Never, never write your social security number on a check. Never use it as a password, and never carry your social security card in your wallet.
- Make certain that your full credit card number and expiration date do not appear on receipts.
- Do not respond to e-mails asking for personal information.
- Be cautious in responding to any promotion requesting personal information.
- Should you need to provide personal or financial information through an organization's website, look for indicators that the site is secure, like a lock on the browser's status bar or a URL for a website that begins "https" (the "s" stands for secure). Unfortunately, no indicator is foolproof. Some fraudulent sites have forged security icons.
- Update the virus protection software on your computer regularly.
- Use a firewall program, especially if you use a high speed Internet connection that leaves your computer connected 24 hours per day. The firewall program allows you to stop uninvited access to your computer.
- Look for website privacy policies, which should answer security questions, and read them. If you do not see a privacy policy or cannot understand it, consider doing business elsewhere.
- Place a fraud alert on your credit report with one of the three national credit reporting companies and review your credit report. If any one company receives a fraud alert, it is required to notify the other two. In addition to the mandatory free reports available each year, you are entitled to one free report when you have become a victim of identity theft.
- Contact your creditors, financial institutions, and telephone phone and utility companies.
- File a complaint with the Federal Trade Commission and (for Illinois residents) the Illinois Attorney General.
- Be sure to follow up in writing with all contacts you have made on the phone or in person and use certified mail, return receipt requested. Under federal law, disputes about items on your credit file must be in writing. Keep copies of all correspondence or forms you send as well as a list of everyone you speak with, what you were told, and the date of the conversation.
- Report lost or stolen ATM and debit cards immediately. Fortunately, federal law provides that if you report lost or stolen credit cards within 60 days after the first credit card bill that you received which contained inaccuracies, your liability is limited to \$50 for unauthorized charges. Federal law also affords consumer protections for transactions involving ATMs, debit cards or other electronic ways to debit or credit an account.
- File a report with your local police department. Obtain and retain a copy of the filed report. The probability of their solving the crime is near zero, but you will have documented the fact that you are a victim and not a perpetrator. You will also need the police report if you decide to request a freeze on your credit report. That stops your credit report from being released without your prior authorization.
- If you get sued by a creditor who was duped by the thief, do not assume that everything will be alright in court because you are a victim too. Contact your attorney immediately when you are served with a summons.

What if all these precautions fail and you learn that you are a victim of identity theft? What should you do? Take immediate action to repair the damage and prevent any further damage. As a starting point, as soon as possible you should:

✦ *Kimberly A. Sherman*

This is the second article in a two-part series on identity theft. The first part was published in the Quarterly in the Summer 2006 edition.



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CONVENTIONAL WISDOM

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If Thomas Jefferson thought taxation without representation was intolerable, he should see what it's like with representation.

GREAT URBAN LEGENDS OF THE LAW

We are pleased to continue our series of great urban legends of the American legal system, mostly stemming from movies and television, and answer the question whether they are... fact or fiction.

Fact or Fiction? The lawyer objecting to the opposing lawyer's question propounded to a witness on the stand.

A: Fact. Happens every day in every courtroom where there's a trial. In fact, half the fun of being a trial attorney is objecting to the opposing lawyer's question and having the judge sustain your objection. Half the frustration of being a trial lawyer is having your opponent object to your absolutely brilliant question and having the judge sustain his outrageous objection.

Fact or Fiction? The really important cases are in the federal court, not the state court.

A: Fiction. Despite the fact that "Don't make a federal case out of it" (meaning, don't inflate something's importance) is a popular cliché, the reality is that many of the cases filed in federal court are trivial and mundane. The division between federal and state jurisdiction has nothing to do with the importance of the case or the issue. It is solely the result of historical accident.

RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

Andrés Gallegos has been named the 2007-2008 diplomat for the business law section of the American Bar Association, assigned to the section's health & biotechnology committee and intellectual property committee. The health and biology committee's focus is on the business aspects of health law and biotechnology. The intellectual property committee assists business lawyers who encounter intellectual property issues in the representation of their clients.

Tracey Salinski and Nat Pomrenze recently spoke before the Illinois Society of Anesthesiologists on the topic of employment contracts for medical providers.

Larry Woodard is a guest lecturer at the John Marshall Law School's master's degree program in real estate law. He also delivers weekly lectures for the benefit of real estate brokers at the Chicago Association of Realtors.

Jeffrey Randall, who heads the firm's municipal law practice group, recently obtained concept plan approval from a suburban board of trustees for a 135 acre residential-commercial mixed use development.

Steve Patt was recently honored by the Leukemia Research Foundation for 15 years of volunteer pro bono service as its general counsel.

Alan Wolf was elected trustee of the Foundation for Amigos de las Americas, an international organization that promotes youth leadership and community health in selected Central and South American countries.

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