

Lock in Successful Asset Protection Techniques

Asset Protection Planning Guide, 3rd Edition. Barry S. Engel. Wolters Kluwer/CCH. 771 pages. \$150.

It is said that there are more lawyers in southern California than there are in the entire country of Japan. I also read that in the U.S., a lawsuit is filed every two seconds — that is about 15 million each year. It seems that as a nation we are lawsuit cowboys, and it is no wonder that more and more estate planning clients are asking us how they can protect their assets from such lawsuits.

Keeping abreast of all we need to know about estate planning is tough enough, but now we must add to that a working knowledge of asset-protection techniques, such as limited liability companies, offshore trusts, and fraudulent transfer laws. Furthermore, we are expected to know what is the exposure of retirement plan assets and life insurance policies in the face of a lawsuit or even bankruptcy. Wouldn't it be useful and convenient to have a desk-top reference that covered all such questions in a thorough, authoritative, and understandable manner? That would be Barry Engel's *Asset Protection Planning Guide, 3rd edition*.

Engel is widely known as one of the "godfathers" of asset protection planning, being one of the very first attorneys in the U.S. who promulgated and actively employed offshore trusts (even before the first domestic asset protection trust legislation was enacted in Alaska), and other asset protection techniques in his practice. The first edition of this planning book was published in 1999. The current (3rd) edition is widely expanded and covers virtually all of the latest developments in the field, but without omitting a thorough discussion of the fundamentals of asset protection planning as well, so that an advisor who decides it is time to add

this important element to his or her practice can get quickly oriented to the essential issues to consider.

For instance, when clients rush in to their attorney's office in a panic about a potential (or just filed) lawsuit, the knee-jerk reaction of such clients, and unfortunately, of many attorneys as well, is to immediately transfer assets to spouses, children, trusts, or just about anywhere else, thinking this would protect those assets from a creditor's reach. In most cases, such transfers would be considered fraudulent transfers and could not only be subject to reversal by a court, but may also expose the client and the attorney to damages and sanctions. Engel devotes an entire chapter to this important subject, analyzing what makes a transfer fraudulent, the different categories of creditors (e.g., present versus future creditors), and their respective rights.

Other chapters include limited partnerships (LPs) and limited liability companies (LLCs), and analysis of domestic asset protection trusts. The chapter on LPs and LLCs is of particular interest because the plan that Engel typically suggests as the essential asset protection plan consists of an LP or LLC, to which the client's assets are transferred, the ownership of which is held 99% by the client's offshore asset protection trust and 1% by the client, as manager. When trouble strikes, the trustee of the asset protection trust could liquidate the LPs/LLCs and move the assets (99% of them) offshore to the trust and outside the reach of the client's creditors. The chapter on LPs/LLCs is also extremely useful, as it discusses the nature and effect of the "charging order," which is the key feature of LPs/LLCs that provides the creditor protection, although it is widely misunderstood.

Of course, Engel's ultimate asset protection planning recommendation is the foreign asset protection trust and for good reasons. As he points out, the jurisdictions recommended for such trusts do not recognize U.S. judgments, so the full faith and credit doctrine (or any other court order) is a non-issue. Furthermore, the U.S. fraudulent transfer rules will not apply.

The foregoing reflects but a portion of Engel's comprehensive guide; to review every chapter might end up as another guide in itself, but there are still a couple additional points worth mentioning. For one, there is a chapter on the subject of contempt of court, which seems to get little attention in the asset protection media, despite a couple of very high profile cases where the clients ended up in jail for establishing offshore asset protection trusts. Is that truly a risk for our clients? Engel articulately points out when this might happen and when it will not.

The second point, simple as it seems, is perhaps the most salient in the book. That is Engel's concept of "Integrated Estate Planning." If I understand it correctly, he is saying that asset protection planning should not be undertaken by itself with no regard to the impact it may have on the client's overall estate plan. This is a truly vital piece of advice. As a basic example, if a debtor/client manages to transfer assets to a spouse, who subsequently dies and his or her estate plan leaves the assets back to the debtor/spouse, the protection planning was a waste of time and money and the assets exposed. Engel stresses the importance of integrating the plans for the best result in all circumstances.

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