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**2003 Annual Coach Trends Survey**  
**Museum of Bus Transportation Annual Meeting**  
**Protecting Your Assets**

# Protecting Your Assets Before It is Too Late

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If you have substantial assets in the form of coaches, garages or terminals, you may want to consider some form of asset protection. The time to take action is prior to any litigation taking place. These three coaches operated for your editor's bus company, Wisconsin Bus Stages, in the early 1980s. NBT.

**T**he average businessman, particularly those involved in any aspect of the bus tours and charters industry, will be sued at least once during his or her career and, thus, faces the possibility of incurring a ruinous judgment. Failure to plan for that possibility can result in loss of a lifetime's accumulated wealth. According to *The National Law Journal* ("TNLJ"), 2-3-03, jury verdicts in 2002 averaged "nearly three-and-a-half times greater than" 2001, and, "recent punitives are 20 times" 2001.

Those engaged in the bus tour and charter industry are subject to liability exposure from numerous areas. For example: a woman who was standing, despite repeated warnings from the driver to sit down, was

awarded \$6 million for injuries incurred when the bus made an abrupt stop. (*The National Law Journal* ("TNLJ"), 3-3-03); a driver who injured his back when a stair step on his rig broke was awarded \$3.5 million (TNLJ, 3-25-02); a man who became disabled after he tripped and fell over loose trim on a taxicab was awarded \$1,925,000 (TNLJ, 5-13-02); a man who was injured when a truck wheel locking ring dislodged was awarded \$6.3 million (TNLJ, 11-18-02); an employee injured by a faulty truck door was awarded \$3.1 million (TNLJ, 12-9-02); an employer was held liable for \$11 million when its driver struck and injured a pedestrian (TNLJ, 6-17-02); a woman who was injured from falling on ice in a parking lot was awarded \$4.2 million (TNLJ, 7-22-02); and,

\$40 million in damages was awarded against the CEO and directors of a bankrupt company (TNLJ, 7-14-03).

Other areas of liability exposure include: a building owner was found liable for \$958,500 to guests who were injured when a porch collapsed (TNLJ, 9-1-03); a cook, injured while fleeing from an owner's dog, was awarded \$6 million for economic and non-economic damages by a jury (TNLJ, 5-13-02); a jury awarded \$1,995,000 against a driver to an individual who suffered a stroke six days after an auto accident (TNLJ, 10-21-02); party hosts settled for an award of \$650,000 to a drunken guest who was injured after falling down the hosts' stairs (TNLJ, 6-17-02).

### Consider the following:

As a defendant, you are at an extreme psychological disadvantage, and plaintiff's lawyers know how to exploit this weakness. As the accused, the full weight of the American legal system can be brought to bear against you to vindicate the broad and always expanding rights of the plaintiff.

Since you are an affluent defendant, you will not be judged by a jury of your peers. The typical jury is not composed of businessmen, landlords, entrepreneurs and millionaires. The jurors may bring all of their prejudices and resentment to bear when evaluating the facts presented against you. This effect is doubled if they can identify with the plaintiff. The odds are great that the plaintiff will be more like the jurors than you.

If your insurance company is your codefendant, be assured the jurors will have even less sympathy about spending the insurance company's money than they have about spending yours.

On this tilted playing field, your only safe bet is a sound asset protection plan. However, this only works if you create it before the liability occurs. In an article in the September 2003 issue of *Trusts & Estates* magazine, a survey revealed that "wealthy clients want asset protection plans, and many lawyers... are interested in considering them. But they don't because, they admit, they don't quite know how."

Protecting your assets generally entails transferring them to an entity (e.g., Family Limited Partnership, Limited Liability Company, Asset Protection Trust) you create.

Such entities may be based domestically or overseas. How much protection you will enjoy depends in large part on how and where these entities are established.

Before you begin, it is important to realize what asset protection planning does and does not include.

#### Asset protection is not:

- Based on hiding assets. Hiding assets can be dangerous and places you in the position of choosing between protecting assets and committing perjury. Whether or not you are ever embroiled in litigation, you may face some difficult decisions each year when you file your income tax return. Full disclosure on a tax return is inconsistent with planning based on hiding assets. A properly devised plan will not rely on secrecy to be successful.

- An excuse to defraud creditors. Designing an asset protection plan is similar to the purchase of fire insurance. A very strong asset protection plan must be built before there is an existing creditor. However, once the creditor "fire" breaks out, little can be done from an asset protection perspective. In this respect, asset protection must be done in advance of a current creditor problem.

- An excuse for evading taxes. Some clients are attracted to asset protection planning by a claimed tax advantage. A properly designed asset protection plan is tax neutral and will have no particular income, gift, excise or estate tax disadvantages, either domestically or abroad.

### Family Limited Partnerships and Limited Liability Companies

Family limited partnerships ("FLPs") and LLCs are popular tools for protecting accumulated wealth. Assets that would otherwise be attractive to a creditor are rendered unattractive by transferring them to a FLP in exchange for general and limited interests. Most state partnership laws provide that one of a creditor's remedies against a limited partnership is to obtain a "charging order," which is typically a rather limited remedy.

FLPs and LLCs not only render certain assets unattractive, they also separate ownership from control. Even though substantial value can be gifted through transfers (either outright or in trust) of a limited partner's interest, control over partnership assets can be retained by the client who retains the general partner's interest, or serves as the manager of the LLC.

As useful as such FLPs or LLCs may be, they are not the panacea some believe them to be. They have a number of disadvantages:

- The client remains subject to the whims of the system of limiting planning to domestic tools. FLPs are most useful when the limited partnership interests are gifted to a domestic or foreign situs asset protection trust.

- For the most part, a client will not be able to access any of the partnership assets if a charging order is issued.

- Concern exists that in the majority of states the charging order may not be the sole

The value of coaches, even if used, amounts up quickly in a sizeable fleet. This photo was taken at the ABC facility in Winter Garden, Florida, in 1983 and shows a substantial number of used Greyhound coaches for sale. We counted more than 155 coaches in the photo. ROBERT REDDEN, REDDEN, ARCHIVES.



remedy of the creditor. Recent cases indicate that courts have held that the charged interests may be foreclosed upon and sold under court order. (See, *In re Priestly*, 93 BR 253; *Nigri v. Lotz*, 453 SE2d 780).

Thus, although a FLP offers a few asset protection benefits, a person who limits his or her planning to this approach will be compromising both the degree of protection and the number of options that otherwise would be available if a legal problem were to develop.

However, combining a FLP or LLC with a foreign trust can add the benefits of this planning tool with the benefits of the foreign trust's protection and flexibility.

### Advantages of Trusts

A domestic trust is settled by a person living in the United States and governed by state law. Foreign trusts are settled elsewhere and are governed by the laws of those countries. Choice of law principles allow a settlor who resides in one state to settle a trust to be governed by the laws of another state or country. For asset protection planning purposes, domestic trusts suffer from a number of disadvantages when compared to foreign trusts:

- Domestic law generally provides that if settlors do not place property out of their own reach, the trust assets will not be placed out of reach of their present or subsequent creditors.

A plaintiff's lawyer need not be particularly creative in order to craft a legal theory of liability against a domestic trust when the principal claim is against the settlor.

Thus, a domestic trust that is created at a time when there are absolutely no fraudulent conveyance issues may still be successfully attacked years later, if the settlor has retained either benefit or control.

Five states have enacted Domestic Asset Protection Trust ("DAPT") statutes in an attempt to minimize the asset protection problems of domestic trusts. The success, or lack thereof, has not yet been litigated.

- By comparison, the level of both benefit and control over an offshore asset protection trust ("OAPT") governed by the trust laws of certain foreign jurisdictions will represent a significant enhancement of the rights and powers that may safely be retained by settlors of domestic trusts. Properly drafted, an OAPT may result in little reduction of such attributes.

- Another advantage of foreign trusts over domestic trusts is that foreign factors affect how far the creditor is willing to go in pursuing trust assets: (1) the psychological barrier of dealing with foreigners and foreign legal systems; (2) the cost of pursuing



Terminals can also represent a substantial assets. Shown is the old Greyhound Terminal in Chicago on Randolph Street. Although it effectively had an underground entrance, its location in Chicago's loop gave it substantial value. Greyhound has since relocated south of the Loop. ROBERT REDDEN, REDDEN ARCHIVES.

litigation overseas (particularly if the matter must be litigated anew in the foreign jurisdiction in the absence of comity); (3) shortened statutes of limitation; (4) an increased burden of proof when alleging fraudulent conveyances; (5) the added uncertainty of prevailing, or the increased time factor that results. Thus, the practical hurdles obtained through the use of foreign entities can prove to be formidable barriers.

- Finally, the trust law of some foreign jurisdictions is much more protective than domestic trust law. The leader in this area is the Cook Islands in the South Pacific, followed by Nevis and St. Lucia in the Caribbean.

### A Combined Strategy

If you wish to retain control over the trust's assets and be a beneficiary of the trust, it is absolutely necessary to use an OAPT. An OAPT created under the laws of the right jurisdiction will allow the settlor to retain significant control and enjoyment of property. In a properly chosen foreign jurisdiction, the U.S. rule that allows a creditor to recover from a trust created for the settlor's own benefit will not be applicable. Further, the laws of these foreign jurisdictions prevent the application of U.S. judgments and court orders.

Under the law of these foreign jurisdictions, a settlor may freely transfer assets to a family trust of which he or she is a beneficiary. The transferred assets will be excluded from the estate for purposes of future creditor attachment.

The property to be protected need not be shipped to a foreign trustee and may be

transferred to a domestic FLP (or LLC), and may be invested in the U.S. or offshore as the general partner so elects. The transferor receives, in exchange for the contribution, a 99 percent interest as a limited partner and a one percent interest as general partner. The transferor then immediately transfers the 99 percent limited partner's interest to the OAPT. As a general partner, the transferor controls 100 percent of the assets while owning only a one percent interest. The transferor has parted with ownership of 99 percent of his or her previous interest in the transferred assets.

The OAPT/FLP structure is tax-neutral. The income of the partnership will flow to the trust, which is a grantor trust for federal income tax purposes – that is, the trust's income is taxed to the settlor as if the settlor continued to own the property free of trust. If it is properly structured, transfers to it will be deemed incomplete gifts for federal gift tax purposes. Due to the fact the settlor retains certain powers over the trust, the trust's property will be included in the settlor's estate for federal estate tax purposes.

### Practical Applications

Although the heightened anxiety that affluent businessmen feel with respect to potentially ruinous litigation is reason enough for them to consider this form of asset protection planning, a number of specific advantages also suggest consideration of these techniques:

- Asset protection planning is a major supplement to existing liability insurance.



Both coaches and garages represent substantial assets, and both can be included in an asset protection plan. This particular photo dates back to the early 1980s and the introduction of a new LAG model. NBT.

- It allows a fresh start outside of bankruptcy by allowing the creation of a separate entity through which future business may be conducted.

- A properly drafted OAPT is a viable supplement to a prenuptial agreement, and is free from the uncertainty that gives rise to questions about the ultimate enforceability of such agreements.

- A nest egg can be segregated into an OAPT to avoid the potential loss of all assets from one failed (or liable) business project, or from a successful project with a latent defect.

- The OAPT/FLP (or LLC) approach described above is also applicable to qualified retirement plans. Such plans are also trusts, and they may be amended to provide that assets may be held offshore in the custody of an offshore trustee.

While many people think that their retirement plans and IRAs are protected from claimants, recent case law changes as well as proposed bankruptcy law changes have significantly weakened asset protection for retirement assets. Further, some states do not even have statutes that provide any protection for IRAs.

**Protect Yourself Now**

An asset protection structure created under the laws of the right jurisdiction will allow you to retain control and enjoyment of your property. The time to protect yourself is now, before crippling litigation or judgments bar you from making property transfers that may be considered fraudulent.

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