Think you can't lose your home and other personal assets in a malpractice judgment? Think again.

I encounter many misconceptions about asset protection planning every day. The biggest: that this type of planning is unimportant because physicians don't really lose personal assets to medical malpractice lawsuits. Insurance will cover any losses, goes the thinking of many physicians — and, unfortunately, of their advisers — especially for physicians who have the typical $1 million to $3 million insurance coverage.

I hope to open your eyes and dispel this myth. Even more, I want to show you that the benefit of asset protection planning so far outweighs the cost that even if the risk of a financial catastrophe is extremely small, it is still well worth the time and effort to be ready.

DATA DEARTH
You may be wondering just how many physicians annually lose personal assets in malpractice lawsuits. That's a good question — but virtually impossible to answer. That's because the legal system publishes filed cases and judgments rendered, but does not publish information about the collection of those judgments. Any lawyer can consult his own local litigation reporter and see on a monthly, quarterly, or annual basis what the medical malpractice judgments in his location were. There would likely be many judgments for the defense, some small judgments for the plaintiff, and some very large judgments for the plaintiff that probably exceed the physician's coverage limits. But then what? Did the plaintiff, with a judgment in excess of coverage limits, simply settle for the amount of the medical malpractice insurance? Did he pursue the personal assets of the physician and his family to satisfy anything beyond that? There are no answers in the published materials. Therefore, it is almost impossible to find data on a local or national basis.

I practice law in New York and California. Every week I review multiple malpractice decisions in both places. Most decisions are for the physician defendant, some are small judgments for the plaintiff, and a few, every week, are very large judgments for the plaintiff. This may be the same in your location as well.

Nonetheless, we can only hypothesize about what will occur once these very large judgments are rendered. It seems that many physicians and their advisers simply assume that the plaintiffs in these cases will walk away from very large judgments and simply settle for the malpractice insurance coverage.

Let's look at a couple of reasons why this may not be so:

1. Payments, Not Evictions
   A common theme in speaking to physicians around the country on this topic seems to be, "I have never personally heard of anyone losing their home to a lawsuit," and therefore the conclusion is that it doesn't happen. And like them, I have not heard of a physician losing her home outright to a plaintiff.
   However, if one understands the goal of litigation and the plaintiffs, this certainly isn't surprising. Instead of evicting the physician from her home, the plaintiff with the judgment will file a lien on her real estate and bank accounts, and put levies or liens on all the physician's assets to the amount of the judgment owed. The goal is not to kick the physician out of her home, but to make her take a loan against the home to pay off the excess judgment. And this, I can assure you, happens with great regularity.

I am part of a national network of advisory firms to physicians called the Wealth Protection Alliance (WPA). In doing research for this article, I e-mailed all members across the country and asked them to give me anecdotes of physician clients of theirs who had been successfully sued for large judgments. I received more than 20 such stories in which a judgment had been rendered against a physician that was beyond the doctor's coverage...
limits. Did the plaintiffs go after the doctors' assets in these cases? You bet they did. In every case, the physician was forced to take loans against assets, liquidate retirement accounts, and sell various assets to pay the judgment off.

Consider this true story from my own practice. A couple came to see me in New York three years ago. He was a plastic surgeon and she an OB/GYN. They consulted with me and I made a number of recommendations for tax, estate planning, and asset protection. They implemented some of my advice, but they did not choose to do anything to protect their home, which at the time had more than $1.5 million of equity.

I received a call from the plastic surgeon nearly a year ago. He said that his wife had just been successfully sued in a "bad baby" case in which the judgment rendered against her was $4 million - $2 million more than her personal malpractice coverage. I told him at the time that there was nothing else I could do since there was already a judgment.

While I have not spoken to the client since, one can only assume that the plaintiffs and their attorney would not simply walk away from $2 million when they could put a lien on the $1.5 million of equity in the defendant's home in a matter of two hours. If you think that they would not come after the physicians' personal assets in this way, either because you don't think they would kick the doctors out of their home or because of some kind of goodwill plaintiffs have toward physicians, consider the next point.

2. The Legal Obligation of the Plaintiff Attorney: Get the Cash

As above, there seems to be an underlying assumption by attorneys who represent physicians that asset protection isn't important — that plaintiffs and their attorneys will not go after physicians' personal assets because it is "distasteful" or for some other reason. But put yourself in the shoes of the plaintiff and the attorney. A plaintiff's attorney has a professional and ethical obligation to represent his client's best interest to the fullest extent of the law. As an attorney, if I represented a plaintiff who had a $4 million judgment and only $2 million was paid by insurance, and I knew that the defendant had millions of dollars of assets that were unprotected that I could attack in order to get my client paid in full, I would have to do this. If I didn't pursue those assets, I would be guilty of malpractice against my client.

3. Why Wouldn't You Protect Your Assets?

If you have ever read my materials or heard me speak, you know that I am not someone who says the "sky is falling." There is a relatively low risk, statistically, that you will lose personal assets in a malpractice action, regardless of your specialty. But asset protection planning can actually benefit you in many ways beyond lawsuit protection. In fact, most of the asset protection we do for clients is relatively low-cost and has numerous financial, tax, and estate-planning benefits as well. Thus the question becomes, "If asset protection planning can protect you in many ways and the cost is relatively low, why wouldn't you do it when there is even a slight chance that you will lose personal assets at some time during your career?"

Doctors spend time motivating and educating patients about the importance of getting a colonoscopy. Even though the chance of cancer may be slight, we know that getting that colonoscopy is the wise thing to do. Nonetheless, many patients still fail to get colonoscopies because it is an uncomfortable procedure.

This seems to be many physicians' attitude with asset protection planning. They think it is going to be expensive and difficult, perhaps even scary and painful. However, when they realize that proper asset protection is not very complicated, not that expensive, and often benefits them in many other ways beyond lawsuit protection, they will move forward even with the knowledge that the chance of being sued is very small.

Ask yourself: how many patients would get colonoscopies done if by getting the procedure they would instantly lose 20 pounds of fat and look 10 years younger? You would have patients lining up around the block. If only physicians would realize that asset protection planning can benefit them in so many ways, they wouldn't be paralyzed by the improper assumption that asset protection isn't needed because they would never lose assets in a lawsuit.
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