

POST 9/11 ASSET PROTECTION PLANNING

By **Randolph M. Wright**

Who needs an asset protection plan? We all do. There are millions of lawsuits filed in the United States each year. Our society is blessed with a judicial system that allows conflicts to be resolved in a civil manner. Unfortunately, imperfections in our system of jurisprudence lead many to believe that the process is too expensive and too uncertain.

Over the past ten years, asset protection planning has evolved to become a part of most mainstream estate and financial planning. Professionals no longer question the need for an asset protection plan. Instead, they focus on balancing the cost and extent of the plan with the benefits gained.

Post 9/11, it has become increasingly difficult to set up legitimate off-shore trusts and bank accounts. The US Patriot Act and other anti money-laundering legislation enacted as part of the war on terrorism has led financial institutions worldwide to become extremely bureaucratic and difficult to deal with. Although off-shore features to an asset protection plan should not

necessarily be avoided, the additional cost associated with establishing an off-shore trust or account has to be taken into consideration. A purely domestic asset protection plan may be effective if a thorough analysis and follow-through are completed.

Berry Moorman's asset protection planning analysis begins by looking at each client's exposure to the myriad of claims that are pursued against families or businesses in similar circumstances. Clearly, a physician or an owner of a business that stores and uses toxic chemicals to manufacture products has greater exposure to lawsuits than a teacher or consultant.

Most Americans protect their families and businesses by purchasing insurance. Therefore, analyzing each client's insurance policies is important to determine whether proper coverage and adequate policy limits are in place. Unfortunately, in some cases, insurance coverage is not available or is cost prohibitive.

Components of an Effective Asset Protection Plan

To be effective, a logical and user

friendly plan must be in place at the time a claim is made. If a clear and detailed plan is already in place, emotional turmoil will be minimized and the individual's professional team will be able to quickly "ramp up" a defense. An effective asset protection strategy will –

- Level the playing field by immediately slowing the claimant's momentum and delivering a clear

continued on page 3

Contents:

Asset Protection Planning1

Commercial Activity in Russia.....2

International Travel Warning ..2

Encouraging Foreign Investment.....4

Russian Trade Mission5

Firm News5

Selling to the World Market ...6



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COMMERCIAL ACTIVITY IN RUSSIA DURING THE CURRENT POLITICAL STAND-OFF

Berry Moorman attorneys, Randolph Wright and Simon Edelstein, recently traveled to Russia to participate in a trade mission (described on page 5) while both the Beijing summer Olympics and the Russian Army invasion of the Republic of Georgia were taking place. As a result, both have frequently been asked to describe the war's impact on commercial activities in Russia and whether they, as Americans, experienced any backlash as a result of the hostile political dialogue between Russia and the US.

In their view, just as American business activities worldwide continue during the war on terrorism, Russian business activities will continue during the conflict with Georgia. The many large and successful American and multinational companies doing business in Russia will press forward, expecting the diplomats to work through the political issues as quickly as possible.

The success of American companies in Russia has been a largely untold story in the US media. The American Chamber of Commerce in Russia ("AmCham") now has 850 member companies. In a recent survey of 100 companies published by Ernst & Young, half reported sales increases of 200% since establishing a presence in Russia. Overall 67% of the companies expect sales growth of over 50% in 2008.

Berry Moorman has been doing business in Russia for 15 years. Randy and Simon strongly endorse AmCham's assertion that "American companies in Russia are helping to bridge the values gap between Russia and the US by consistently and strongly communicating such key business practice values as law compliance, merit based compensation, strong business ethics and corporate social responsibility."

Because of their exposure to propaganda, the attitude of the men and women "on the street" may be negative towards Americans. Nonetheless, during the trade mission, neither Randy nor Simon experienced any instance of prejudice because they were Americans. The Ernst & Young survey reported that 75% of the Russian employees of American companies in Russia view the US positively compared to 47% of employees in Russian owned companies.

For additional information about the business climate in Russia visit www.amcham.ru, www.usrbc.org, www.moscowtimes.ru, or www.sptimes.ru.

For assistance entering the Russia, Ukraine, and NIS (newly independent states) markets contact Randy Wright or Simon Edelstein at our firm's Birmingham office 248-645-9680

INTERNATIONAL TRAVEL WARNING:

ELECTRONIC DEVICES ARE SUBJECT TO SEIZURE

US Customs and Border agents can seize your laptop, phone, and PDA when you return from international travel without probable cause or explanation. If the device is locked you will be asked to enter your password. If you do not comply, you will be detained until you do.

The agent can run a forensic analysis using software that retrieves deleted files or can keep your device to run the analysis at a later time. Your device will then be returned to you at an unspecified, later date. The US is not the only country allowing these searches – the UK has allowed them for some time.

Lawyers and other professionals have legal and ethical obligations to keep their clients' information confidential. Business owners and managers have a strong interest in protecting their confidential and proprietary business information. Therefore, international travelers must consider adopting policies to protect this confidential information.

The best defense when traveling internationally is to delete all confidential and proprietary information from your electronic devices. Travel with a blank hard drive in your laptop and access confidential information over the internet from an encrypted web site. A computer expert can advise you about software that can be used to insure the deleted files are not retrievable.

Asset Protection - from page 1

message that the claimant is facing a trench by trench defense and

- Provide incentive for the claimant to settle the claim at a fraction of the costs and attorney's fees that will be required to pursue the case in the court system.

Most importantly, the asset protection plan must be legally sound and be able to stand up to scrutiny by the claimant or the claimant's advisors if it is "laid on the table." Only legitimate and legal estate and financial asset protection planning will ultimately be effective.

Common Asset Protection Considerations Are:

Are assets properly titled? For example, a single person who owns real estate and then gets married but does not transfer the property into the names of husband and wife fails to take advantage of available protection from a creditor claiming the equity in the property. If that same real estate is retitled in the names of husband and wife as tenants by the entirety, the equity in the property is protected against most creditors' claims against either husband or wife (but not both). Also, certain personal property and bank accounts can be held by husband and wife as tenants by the entirety and be afforded the same protection against creditors. A single person can protect the equity by establishing a properly registered and independent entity like a limited liability company or subchapter S corporation.

What type of business entity will provide protection? The most vulnerable way of doing business is through a sole proprietorship and the most vulnerable entity is a general partnership. Both expose the owner or partners to

100% personal liability for creditors' claims.

For years both "C" and "S" corporations were the preferred entities to limit an owner's exposure to third party claims. Over the last decade, limited partnerships and limited liability companies have become popular. This is because, generally, a member of a limited liability company is not personally liable for the debts of the company. Similarly, a limited partner of a limited partnership is not personally liable for the debts of the partnership.

The choice of the best entity can only be made after analysis of the specific circumstances involved. Although a limited liability company has become the first choice for many professionals, there is an asset protection trap. A single member limited liability company will be considered a "disregarded entity" by the IRS for income tax purposes. As a result, it generally will be taxed as a sole proprietorship using the owner's social security number. In two recent decisions, courts have gone beyond the income tax analysis to hold the owners liable for single member limited liability company obligations.

With these developments, setting up a limited liability company with multiple members will afford better protection.

What assets were transferred, both before and after notice of a claim? Under certain circumstances a transfer will be deemed a fraudulent conveyance because it was an attempt to avoid payment to creditors. In that case, the property will be available to pay claims against the original owner of the property.

This area of the law is fraught with examples of people attempting to abuse the legal system. For example, we often hear the statement "I don't

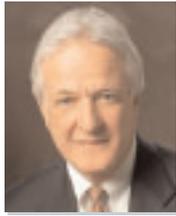
have anything; all of my assets are in my wife's name." Depending on the reason for and the timing of the transfer to the wife, a creditor may challenge this type of conveyance under the Uniform Fraudulent Conveyance Act. If the creditor prevails, the transfer will be set aside by the court and the transferred asset will be treated as the original owner's property and be available to pay his creditors.

Is an asset protection planning trust appropriate? Clients who are in a high risk business that is subject to claims that would not be covered by insurance or are potentially above policy limits should consider an asset protection planning trust as part of their estate and financial plan. For many years these trust were set up exclusively in off-shore jurisdictions. However, there now are a number of states in the United States that have adopted legislation to allow for the same or similar protection domestically.

Generally, we recommend that the trusts: (1) be tax neutral, (2) allow assets to be kept in the US, (3) provide maximum privacy (which is different from secrecy), and (4) be established in a jurisdiction with a very short statute of limitations for fraudulent conveyance claims and with laws favorable towards trusts attacked by a beneficiary's claimants.

In summary, to obtain maximum asset protection, it is important to engage in the planning process with a skilled and diverse professional team that includes your attorney and your tax and insurance advisors.

For assistance, contact Randolph M. Wright at our firm's Birmingham office 248-645-9680. Also, check Berry Moorman's website at www.berrymoorman.com for updates to this article and additional information.



ENCOURAGING FOREIGN INVESTMENT IN THE US THROUGH INVESTOR VISAS

By **Simon Edelstein and Randolph M. Wright**

The EB-5 program was created by the Immigration Act of 1990. The program provides EB-5 immigrant investor visas (“investor visas”) to alien entrepreneurs who invest in the United States. In general terms, the EB-5 program requires an alien to “invest or be actively in the process of investing” either US \$1,000,000 in urban settings or US \$500,000 in rural settings in exchange for the opportunity to obtain permanent residence (a “green card”) in the US.

In addition to the minimum investment requirements, the EB-5 program requires an alien to:

- Ensure that the investment is active or “at risk,”
- Make the investment in a “new” or “existing business enterprise,” and
- Demonstrate that the investment directly or indirectly results in the creation or preservation of ten full-time (at least 35 hours per week) jobs for a two year period.

Under the EB-5 regulations, there are three types of qualifying investments for investor visa purposes:

1. A “**new commercial enterprise**” is either the creation of an original business or the present or later restructuring of an existing business such that a new commercial enterprise results,

2. An “**expansion of an existing business**” may qualify if the required investment amount results in a 40% increase in either the net worth or number of employees of

the business, or

3. A “**troubled business**” investment may qualify if the required amount is invested in a business that has been in existence for at least two years and has lost profits equal to at least 20% of the business net worth for a period of 12 to 24 months prior to filing the immigration petition.

An alien is required to “invest or be actively in the process of investing” the required capital. The mere intent to invest does not meet this requirement. However, the US Citizenship and Immigration Service (“USCIS”) does allow investors to fulfill the requirement by demonstrating the “commitment of the required amount” at the time of filing the immigration petition. As a result, the investor may initially invest only a percentage of the required capital – in some cases, as little as US \$137,000. The difference between the initial capital investment and the US \$500,000 required total can be satisfied through a bank loan.

The regulations define capital as cash, cash equivalents, equipment, inventory, other tangible property, and indebtedness secured by assets owned by the alien entrepreneur. Debt will qualify as capital only when the alien entrepreneur is primarily and personally liable for the indebtedness or the debt is secured by the alien’s own assets.

The investor must be “active” in the management of the investment

enterprise, either through day-to-day managerial control or through policy formulation. However, the regulations specifically allow an investor to qualify if he or she is a “limited partner” as defined in the Revised Uniform Limited Partnership Act. This allows the investor to continue to engage in his or her other businesses without participating in the operations of the investment enterprise. Additionally, the investor may live where he or she pleases with the ability to enter and exit the US without an obligation to manage the investment. Most importantly, the limited partner, like the corporate shareholder, is liable to creditors of the business only to the extent of his or her investment in the enterprise.

The regulations require the investor to demonstrate that the assets invested were gained in a lawful manner such as through a legitimate business, salary, investments, property sale, inheritance, gift, or loan. Investors must reveal where and how they obtained at least US \$537,000 of the assets invested and where and how they obtained any loan.

To qualify for an immigrant investor visa, an investor must apply to the USCIS and submit a number of required documents including immigration forms, personal financial information, business plans, a legal brief on qualifications under the proposed application, geograph-

ic statistics, and other supporting evidence. Very few circumstances disqualify or exclude an applicant. However, a criminal record involving crimes of moral turpitude is disqualifying unless the crime was political in nature or occurred over 20 years prior to the application.

An investor who is approved receives a “conditional green card” (which is actually pink) which, unlike a permanent green card, must be reissued after two years. The two cards otherwise offer the same rights and privileges. After two years, the investor must demonstrate that he or she has made all required investment payments and that the requisite jobs have been created or preserved by the investment enterprise. The investor and his or her family then will be issued unconditional green cards that contain no expiration dates.

The average processing time for an EB-5 program application is six months. The EB-5 program allots 10,000 visas per year for aliens whose qualifying investments will create or preserve at least ten full-time jobs for US workers. Three thousand immigrant visas are set aside for aliens who invest in areas of high unemployment or qualifying rural areas.

For further information or inquiries regarding the EB-5 visa program, qualification as an investor, or qualification as a potential investment project seeking foreign investment capital, please contact **Simon Edelstein** (sedelstein@berrymoorman.com) or **Randolph M. Wright** (rwright@berrymoorman.com) at Berry Moorman PC.

Six Berry Moorman attorneys were recognized in *Michigan Super Lawyers 2008* as outstanding attorneys in their practice areas. **Donald F. Carney, Jr.** was listed for his accomplishments in trust and estate litigation. **Dennis M. Mitzel** and **Harvey B. Wallace II** were designated for their achievements in the practice of estate planning and probate law. **Robert W. Morgan** was recognized for his proficiency in employment and labor law. **Thomas M. Sullivan** and **Randolph M. Wright** were included for their expertise in business and corporate law.

Michigan Super Lawyers 2008 also named **Kristin A. Lusn** a “Rising Star” in the area of workers’ compensation law. **Randolph T. Barker** was also named in the area of real estate law. The designation recognizes up-and-comers with under 10 years of practice.

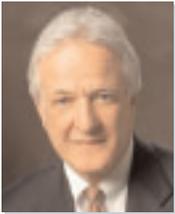
Patrice M. Ticknor attended the American Bar Association sponsored seminars, Practical Aspects of Special Needs Planning Parts 1-3. The seminars addressed available government benefits, drafting and tax issues for special needs trusts, and administration of special needs trusts.

Randolph T. Barker was reappointed to the Advisory Board of the Academy of Finance at the Golightly Career and Technical Center and will again serve on the Classroom Enrichment Committee. The Academy of Finance first began in 1982 to connect inner-city high school students with the world of financial services. Its curriculum requires students to take academically challenging courses in business, social studies, and math in preparation for post-secondary education in finance-related majors. Randy’s duties as a board and committee member include arranging in-class presentations by local business professionals and coordinating job shadowing and summer internship opportunities for the students.

Kristin A. Lusn was recently appointed as a trustee of the Detroit Historical Society. Established in 1921, the Society’s mission is to educate and inspire the community and visitors by preserving and portraying the region’s shared history through dynamic exhibits and experiences. The Society is responsible for the overall management and operations of the Detroit Historical Museum, the Dossin Great Lakes Museum, and a collection of more than 200,000 artifacts. Kristin also serves on the Marketing and Communications Committee of the Detroit Riverfront Conservancy.

BERRY MOORMAN ATTORNEYS PARTICIPATE IN FORESTRY INDUSTRY TRADE MISSION TO RUSSIA

Randolph M. Wright and **Simon Edelstein** led a trade mission to St. Petersburg, Russia in August focusing on the Russian forestry industry. The mission represented eight US based manufacturers of forestry equipment who have joined together to enter the Russian market. Randy and Simon facilitated meetings with John Deere, International Paper, the US Department of Commerce Commercial Service, the US Chamber of Commerce, and numerous dealer candidates. Follow-up meetings are scheduled at the Forestry Forum in St. Petersburg in October. If your company sells to the forestry industry and you would like information regarding how our firm can assist you in entering the Russian market call Randy or Simon at our firm’s Birmingham office 248-645-9680.



GOING GLOBAL: SELLING PRODUCTS AND SERVICES TO THE WORLD MARKET - AND GETTING PAID

By **Randolph M. Wright**

Any company, large or small, can increase its sales and diversify its customer base by exporting its products and services worldwide. Ninety five percent (95%) of the world's consumers live outside of the United States. If your company is selling only domestically, it is missing the opportunity to sell to vibrant markets during this US economic downturn.

Of course, there are risks and rewards related to exporting products or services. The most important concern from the seller's perspective is getting paid as soon as possible, preferably when the order is placed and no later than the date of shipment. In contrast, the foreign buyer wants to delay paying as long as possible and to receive the goods as soon as possible so that it can resell the goods and generate funds to pay for them.

Understanding the fundamentals of trade finance will help to minimize the risk of nonpayment. The hierarchy of risk for the US based exporter, from most secure trade finance technique to least secure is:

Most Secure

- ↑ Cash in Advance
- Cash Installment Payments
During Production
- Cash Paid in Full Before
Shipping
- Letters of Credit
- ↓ Documentary Collections
- Open Account

Least Secure

Cash in Advance

Payment of cash in advance allows the exporter to avoid credit risk. The most common forms of payment are by credit card or wire transfer. Understandably, the foreign buyer resists this form of payment because it has concerns about the seller delivering as promised, quality, and cash flow. In the free-market, however, a US company that sells for cash only will likely lose business to competitors who offer terms.

Letters of Credit

A letter of credit ("LC") is a commitment by a bank on behalf of the foreign buyer that payment will be made to the seller once certain terms and conditions are verified to the bank. The LC is the most secure instrument available to international traders. The seller is relying on the creditworthiness of the foreign bank as opposed to that of the buyer. The buyer is also protected because the bank has no payment obligation until it is presented with proof that the goods have been shipped or delivered as promised.

Documentary Collections

A documentary collection ("DC") is a transaction where the selling exporter entrusts the collection of payment to its bank, which sends documents to the buying/importer's bank. Funds are received by the seller from the buyer through the exchange of documents between their banks. The banks are acting as facilitators in this situation and there is no verification that the representa-

tions in the documents exchanged are authentic. Also, there is very limited recourse for nonpayment available to the seller/exporter.

Open Account

In open account transactions, the seller ships and delivers the goods to the buyer and waits for payment, which is usually made within 30 to 90 days. The open account is very attractive to the buyer because it can resell the goods to generate cash to pay for them. Obviously, this is the highest risk option for the seller and is only done because of the intense competition in export markets.

In an ideal world, the US exporter would sell for only cash in advance. In the real world, a seller's senior management must evaluate the risks and rewards of the terms of payment and make a business decision.

How Should Payment be Made?

Use cash in advance when:

- The foreign buyer is a new customer or has a short operating history,
- The foreign buyer has an unsatisfactory or unverifiable credit history,
- The foreign buyer's home country has high political or commercial risks – as in emerging markets, or
- The seller's product is very unique and in high demand.

Use letters of credit when:

- The foreign buyer is a new customer, has a short operating history, or has unsatisfactory or unverifiable credit while its bank is stable and creditworthy and is experienced in LC transactions and
- The added expense of the LC process does not substantially undermine the profitability of the sale.

Use documentary collections when:

- The seller and foreign buyer have a well established relationship,
- The seller is confident that the buyer's country is politically and economically stable,
- An open account sale is too risky and the LC is not acceptable to the buyer, and
- Both facilitating banks have experience in trade finance.

Because documentary collection transactions provide the seller/exporter very little recourse in the case of nonpayment by the buyer, they should only be used when all of the above conditions apply.

Use open accounts when:

- The buyer is well known and considered low risk,
- The seller will win the sale in a very competitive market,
- The trade relationship will be ongoing, and
- Trade finance techniques are available to reduce risk.

Trade Finance Techniques and Open Accounts

In order to mitigate the risk of selling on open account terms, every effort should be made to obtain support from trade finance agencies. These may include: (a) export work-

ing capital financing, (b) government guaranteed export working capital programs, (c) export credit insurance, and (d) export factoring.

Export working capital ("EWC") loans are generally made by commercial lenders. The EWC funds are commonly used by the exporter to purchase raw materials, pay for labor, and build an inventory. The funds can also be used to finance receivables or pay for letters of credit. This allows companies that are new to export sales to contract for single or multiple export transactions. The EWC loan is usually secured by assets, accounts receivable, and personal guarantees.

Government guaranteed export working capital programs are offered by the US Small Business Administration ("SBA") and the Export-Import Bank of the United States ("EXIM"). These agencies guarantee the loans made by the commercial lender to the exporter. As a rule of thumb, the SBA manages loans under \$2 million and EXIM manages loans over \$2 million.

Exporters can increase their sales by offering open account terms to their foreign customers backed by **export insurance** ("ECI"). This provides protection against both commercial losses such as nonpayment

and bankruptcy and political losses as a result of war or nationalization. ECI policies are offered by many private companies as well as EXIM. Premiums are determined on a transaction by transaction basis by evaluating various risk factors. In most cases, the cost of insurance is less than the fees charged for letters of credit.

Factoring is when the seller transfers title to its short term accounts receivable to a factor at a discount in exchange for cash. The factor handles collecting from the buyer and assumes the risk of nonpayment thus maximizing the seller's cash flow. Factoring is generally only available to established exporters selling to established markets, not developing countries. Usually, factoring is more costly than credit insurance.

Accessing foreign markets and selling to the remaining 95% of the world's consumers is a genuine opportunity for your company. Given the shifts in the global economy, exporting may be critical to your company's survival.

For support in your company's export sales, contact Randolph M. Wright at our Birmingham office 248-645-9680.

The material discussed in Law Notes is meant to provide general information and, given the limited space, is necessarily only an overview of each issue discussed. The information contained in this newsletter is not intended to provide legal advice and should not be acted upon without obtaining legal advice that is tailored to your facts and circumstances.

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