

LEGAL EASE

CONDOMINIUM CONSIDERATION

**Are you thinking
of investing in a
condominium?
Don't make a move
until you read the
article on page 3.**

SMITH HAUGHEY
RICE & ROEGGE

Spring 2007

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ASSET PROTECTION: A NEW LOOK AT AN OLD LAW

By George Bearup, Attorney

**The key to effective asset protection may be
closer – and simpler – than you think.**

In our highly litigious society and faced with limitations on the amount of professional liability insurance, physicians and other professionals are appropriately anxious to protect their assets from judgment creditors.

A physician client recently referenced an article from a medical-economics journal that touted “cures” to this growing problem. The article suggested the use of:

- “Off-shore” trusts in foreign jurisdictions that, in theory, will not enforce United States judgments;
- Domestic asset protection trusts that have recently found their way “on shore” in nine states, that authorize self-created irrevocable trusts to shelter assets from the owner’s judgment creditors; and
- Byzantine family limited partnership to hold title to assets.

I counseled the physician that there are numerous risks, uncertainties, and expenses associated with each of these “asset-protection” strategies. Rather than exploring a foreign jurisdiction to establish an “off-shore” trust, or shopping far from home to adopt in-vogue “on-shore” domestic asset protection trusts – because Michigan does not have such a law – I suggested an alternative.

Life Insurance as a Creditor Shield

I encouraged the physician to investigate some of Michigan’s current laws that offer creditor protection to him and his family. In the end, the physician

adopted one easily overlooked Michigan statutory exemption from creditor claims: life insurance.

For over 50 years, Michigan statute has protected life insurance from creditor claims. Surprisingly, Michigan’s statute protects not only the death benefit, but also the cash surrender value of a life insurance policy from creditor claims.

Michigan’s exemption statute provides an extraordinarily broad protection for the cash surrender value that grows “inside” a life insurance policy. Under Michigan law, the entire cash surrender value of the life insurance policy is beyond the reach of any of the insured’s creditors.

In addition, the entire death benefit will be exempt from the creditors of the insured’s estate, unless the life insurance death benefit is directly paid to the insured’s estate. However, Michigan’s statutory exemption of the death benefit and cash surrender value of a life insurance policy is limited to those insurance policies that are payable to the spouse of the insured or to a child of the insured. The Michigan statute provides, in part:

...and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured, or to a Trustee for the benefit of the wife, husband or children of the insured, including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured;...



Continued on back page

PROTECTING SECRETS

Confidentiality Agreements, Trademarks and Copyrights: Protecting Your Business Secrets and Product Information

By T.J. Ackert, Attorney

Your business may not be as big as Coca-Cola® or NBC®, but your business secrets and product information deserve no less protection. Here's what you can do to safeguard them.

In this technology age, confidential business intelligence is freely being shared with consultants, vendors, suppliers, and other business partners during the course of managing financial data, developing marketing strategies, and meeting customer needs. A business should use confidentiality agreements to protect secrets from unauthorized disclosure, and use trademarks and copyrights to secure exclusive ownership of a company's distinctive product marks and descriptions.

Confidentiality agreements have typically been used to protect confidential business information during the negotiation of a sale, merger, management transition, or joint venture agreement. They should also be used when a consultant or vendor will be given access to business information. The agreement should define the:

- protected information;
- measures expected to maintain the information confidential;
- duration of the agreement;
- remedies available should the recipient disclose or use the protected information.

Business information protected by a confidentiality agreement should be defined to best protect a company's unique market position. Information relating to finances, customer lists, pricing, marketing strategies, know-how, methods and processes, formulas, drawings, specifications, and customer requirements is routinely protected.

More specific information such as technology, customer history, employee contacts, purchasing information, and other information that could provide an economic or competitive advantage may also be included. However, information that is already known to the public or has been otherwise disclosed or used by others, is not subject to protection.

Keeping Secrets

A company that identifies information as "confidential" must maintain the information as confidential – otherwise, the information will no longer be protected and anyone may use it. Therefore, a company must develop procedures to maintain confidentiality of its information. Examples include:

- limiting its use to designated employees;
- utilizing passwords or access restrictions on computers or in storage, and;
- segregating the information from general business information.

Likewise, when a business provides confidential information to a third-party recipient, the recipient also must have established security measures to maintain the information as confidential. In addition to the measures listed previously, the recipient should distribute the information only to designated employees who have agreed, in writing, to be bound by the terms of the confidentiality agreement, and the confidential information will be destroyed or returned to the owner when the agreement has been completed. If the recipient wrongfully discloses or uses the information, it may be liable for lost profits, royalties and monetary sanctions including attorney fees.

Trademarks and Copyrights

While confidentiality agreements protect proprietary business information, trademarks and copyrights protect the distinctive product information used by a company in the public sector. Trademarks protect the use of any word, name, symbol, or device adopted by a company to identify its products or services.

You may not think you have such a mark, but you might want to think again – almost any distinctive mark may be protected. Examples include the shape of the Coca Cola bottle or the three chimes NBC uses as an aural identifier. If a company has created a name, symbol, or mark that distinguishes its product, it may ensure the exclusive right to use the mark through registration of a trademark.

Likewise, a copyright will protect any original work of authorship created by a company. Descriptions of products or services – including marketing concepts, slogans, photographs, artwork, music, and even architectural designs – are all subject to copyright protection.

The hard work and creativity you have invested in your business has economic value and should be protected. Your investment can be protected through the effective and creative use of confidentiality agreements, trademarks and copyrights.

To ensure your valuable business information is protected, contact T.J. Ackert directly at 616.458.3638 or tackert@shrr.com.

Condominium Consideration

By Robert Parker, Attorney

Condominiums are becoming an increasingly popular form of real estate ownership – especially in the residential market – where purchasers are being offered both **conventional condominiums** and **site condominiums**.

Conventional condominium projects are typically multi-unit developments that appear much like an apartment complex, although the residents own their units rather than rent them. A site condominium is really a lot within a development that appears to be a traditional subdivision.

For developers, **site condominiums** have become a popular alternative to conventional platting. That's because a site condominium usually can be laid out and approved by the local municipality in a fraction of the time that it takes to develop a plat.

A condominium is a form of real property ownership that, in general, is defined airspace. Each owner owns his or her unit and, in addition, a fractional interest in the development's common elements.

Examples of common elements in a conventional condominium are stairwells, siding, the roof, parking lots, and driveways. In a site condominium, common elements may consist of roads, storm

water retention basins, and open space. In upscale developments, common elements may consist of a community center, pool, or other recreational facilities. Here are a few "tips" to consider when evaluating the purchase of a condominium unit:

- 1. Verify the amount of the annual assessments.** (This is the amount each owner is required to contribute to the association on a monthly basis.) Make sure, by contacting either the developer or the association president, that the assessments are current and that there is no arrearage. Most title insurance policies do not provide insurance for association assessments.
- 2. Review the subdivision plan for the project.** (This is usually attached to the master deed and identified as Exhibit B.) The subdivision plan should identify the project's common elements. Are they all in place? Have they been built? Are any of the items shown labeled "need not be built"? If not, has the developer established an escrow with the title company to fund completion of the incomplete common elements?
- 3. Check the disclosure statement for the project.** It should set forth the past experience of both the developer and the builder. Is this their first project? If not, what is their past experience? What is the relationship between the two?
- 4. Get a copy of the association's most recent financial statement.** (That's if the development has been up and

running for some time). Is there an adequate reserve? Is the association paying a management fee? If so, to whom? (The developer?)

- 5. Determine the percentage of value assigned to the unit you want to purchase.** Typically, all units have equal value – meaning that they pay equal assessments and have an equal vote in the affairs of the association. Sometimes, however, select units are "more equal than others." If that's the case, you should find out why.
- 6. Discover whether the developer has retained conversion, expansion or contraction rights in the master deed.** If so, what are they? If the developer elects to exercise these rights, the project could look, in the future, substantially different from the one you are considering.
- 7. Ascertain if there are restrictions on the rental of units in the master deed or the condominium by laws.** If so, you should familiarize yourself with the restrictions.
- 8. Review the condominium by-laws carefully for use restrictions.** It's not unusual to see provisions restricting pets, the number of people who can occupy a unit, or even the type of porch furniture you can put on your deck. Is your lifestyle amenable to these restrictions?

A good source for further information – in addition to your SHRR attorney – is the Condominium Buyers Handbook published by the State of Michigan. If you purchase a unit from a developer, the developer is required to provide you a copy of the Handbook along with all of the condominium documents.

If you have a change of heart, you have nine business days from the receipt of these documents in which to withdraw from the purchase agreement and get your money back.

Condominiums are here to stay. With a little self-education and some good legal advice, most buyers will find the experience of owning a condominium unit identical to owning a more traditional piece of real estate.

If you need help evaluating a condominium deal, contact Robert Parker directly at rparker@shrr.com or 231.486.4504.



Have You Heard The News?



Cindy A. Boer, William L. Henn, and Kirk W. Morgan have been named shareholders in the firm.



Karl W. Butterer, Jr., R. Jay Hardin, Craig R. Noland, and Robert W. Parker have been elected to the firm's Board of Directors.



Patrick F. Geary was re-elected as Chief Executive Officer.



Ruth Frazier was recently invited to participate in an international professional and cultural program that will take place in China in September 2007. The invitation was extended by the past chair of the American Bar Association's Law Practice Management Section.



Richard Kraus has been selected by *Michigan Lawyers' Weekly* as one of Michigan's "2006 Lawyers of the Year." Each year, the editors of this prestigious publication select 10 honorees from among the state's 37,000 attorneys. The selection is based on the contributions and commitment attorneys make to Michigan law. Richard was chosen largely for his appellate work on the *Woodward v. Custer* case.



Stephanie Neal has received a Certificate of Completion in the areas of probate and estate planning. The certificate was issued by the Institute of Continuing Legal Education and the Probate and Estate Planning Section of the State Bar of Michigan.



Craig Neckers and Matthew Wikander were recently published in the *FDCC Quarterly*. Their article is entitled, "Daubert and the Soft Sciences: Can a Forensic Economist Ever Make it Past the Gatekeeper?"



Brenda Jones Quick served as the contributing author for the recently released update of the "Constitutional Law" volume of the Michigan Law & Practice Encyclopedia. LexisNexis, the book's publisher, selected Brenda because of her vast expertise in the field of constitutional law.



Jill Quillen joined the firm in October as Human Resources Director. Also, **Nesi Richardson** joined SHRR as Human Resources Assistant.



Francine Robinson, Legal Secretary, has earned the respect of the entire SHRR staff by qualifying to run in the Boston Marathon on April 16. She has also served for three years on the all-volunteer staff of the Grand Rapids Marathon and was helpful in securing Metro Health as the title corporate sponsor for the 2007 marathon.



Bud Roegge was a judge at the National Trial Competition for law schools this past February. The event took place in the Sixth Circuit in Cincinnati, Ohio. Schools from Kentucky, Michigan, Ohio, and Tennessee participated in the competition.



Randy Velzen was elected as Chief Volunteer Officer of Easter Seals Michigan. He was also elected to the Executive Committee of the ADR section of the

Grand Rapids Bar Association. Finally, he was recently named as co-chair of the Membership Committee of the Family Law Section of the State Bar of Michigan.



Pat Wilson was recognized during halftime of the February 17th Michigan State University Men's basketball game. The halftime presentation was in recognition

of the 1957 Men's Final Four basketball team, as well as the 1959 Men's Elite Eight basketball team. Pat has the distinction of being the only Spartan to have played on a men's Final Four basketball team *and* a Rose Bowl football team.



Lisa Young, our Client Services Director, served as the chair of publicity for the annual Employer Recognition Awards, a fundraiser for the Women's Resource

Center held on March 7 in Grand Rapids. This is West Michigan's only prestigious award that publicly recognizes employer's contributions to the success of women in their workplaces. SHRR was a recipient of the award in 2005.



On February 28, the Construction Industry Team presented a legal seminar for design professionals, contractors, and sub-contractors at the Hagerty Center in Traverse City.

The board of directors of **Kindel Furniture Company** recently named SHRR as local counsel. We will be corporate counsel for all matters, including employment, corporate, benefits, and litigation.

Congratulations to our new clients **Richard C. Davis** and **Matt Davis**, leaders of **Armor Express**. They were featured on the Military Channel this past January in a segment about the history of body armor.

SHRR welcomes **Trinity Health** as a new client of the firm. Trinity Health is the fourth-largest Catholic health system in the United States, based on operating revenue.

SHRR is also proud to welcome these new clients:

Cocktailz Restaurant and Bar

Cole & Company Wealth Management, Inc.

International Master Products Corporation d/b/a/ MasterTag

Johnson & Wikander, P.C.

raisingthebar: Recent SHRR Achievements

Space does not allow publication of every success we achieve on behalf of our clients – but in each issue, we'll spotlight some of our more noteworthy accomplishments:



Chip Behler and **Matthew Wikander** represented a governmental agency and its former manager in a lawsuit brought by a recently terminated employee. The plaintiff alleged a breach of contract claim against the governmental agency, alleging that the agency had failed to complete a reciprocal transfer of the plaintiff's pension benefits. The plaintiff also alleged that the agency's former manager tortuously interfered with the plaintiff's contract, causing a breach. Finally, plaintiff alleged that the agency's former manager had openly defamed plaintiff during both public and private meetings.

With reference to targeted discovery, and a thorough application of the facts to the relevant law, the court dismissed the governmental agency from the lawsuit, stating that the agency had performed all of its obligations under the contract. The court dismissed all remaining claims against the former manager on the basis of governmental immunity and absolute privileges that the manager held while engaged in the alleged conduct.



Mark Gilchrist drafted and argued a Motion for Summary Disposition in a legal malpractice case in Ingham County arising out of a property transaction.

The court ruled there was insufficient causation between the allegations of malpractice and damages and that the defendants' conduct was protected by the attorney judgment rule.



Mark Bickel and **Rob Tubbs** received a "no cause" in a premises liability case that was in trial for three and a half weeks in Saginaw County. The plaintiff claimed she fell down the stairs at our client's location, a retail business – and that, as a result of the fall, suffered a traumatic brain injury, miscarriage, post-traumatic epilepsy, hearing loss, tinnitus, depression, anxiety, insomnia, memory loss, and blurred vision. The Court appointed case evaluation panel evaluated the case at \$425,000 before trial.



Mark Gilchrist drafted and **Craig Neckers** argued a Motion for Summary Disposition in a legal malpractice case in Wexford County arising out of a divorce representation. The court determined plaintiff was collaterally estopped from presenting her case to the jury because the claim could have been raised in a previous suit – which we also successfully dismissed.

Introductions Are in Order



Cheryl L. Chandler is a new shareholder in our Ann Arbor office, where she focuses her practice on medical malpractice. Cheryl brings 25 years of experience to Smith

Haughey. She has represented doctors and hospitals in medical malpractice actions at the law firms of Hebert, Eller & Chandler; Wulfmeier & Ottenwess; and Schureman, Frakes, Wulfmeier & Glass before joining Smith Haughey. She is admitted to practice in the state and federal courts of Michigan, is a member of the American Bar Association, and serves as a member of the of the State Bar of Michigan's Character and Fitness Committee.

Cheryl is also a case evaluator for Wayne County, a board member for the Metro Health Foundation, and a member of Smith Haughey's paralegal committee. She received her Bachelor of Science degree in secondary education from Miami University and her Juris Doctor from the University of Detroit.

A resident of Farmington Hills, Cheryl fills her spare moments with reading, traveling, sailing, skiing, hiking, gardening, and spending time with her two teenage children, Scott and Sara.

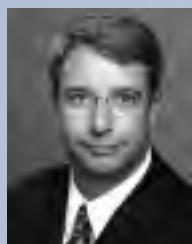


Gary S. Eller is also a new shareholder in our Ann Arbor office, where he focuses his practice on medical malpractice and employment law in the health care industry.

Prior to joining Smith Haughey, Gary was a principal with the law firm of MacArthur, Cheatham, & Acker, and a founding partner of Hebert, Eller, & Chandler, PLLC. He is admitted to practice in the state courts of Michigan and Ohio, and is a member of the Michigan Defense Trial Counsel, Defense Research Institute, and the Michigan Society of Hospital Risk Managers.

Gary received his Bachelor in Business Administration degree from the University of Michigan and his Juris Doctor from the University of Detroit.

In his spare time, Gary enjoys golfing and spending time with his family. He lives in Beverly Hills with his wife, Vikki. The couple has two daughters: Melissa, a recent graduate of Michigan State University; and Stephanie, a current student at Michigan State University.



Dale L. Hebert is another new shareholder in our Ann Arbor office. His focus is also medical malpractice, with an emphasis on catastrophic-injury cases.

Dale spent the first portion of his legal career practicing personal injury defense at Feikens, Foster, VanderMale & DeNardis, P.C. He went on to found Hebert, Eller & Chandler, where he defended medical malpractice cases for nearly 20 years prior to joining Smith Haughey.

Dale is admitted to practice in the state courts of Michigan and Ohio, and is a member of the American Bar Association, State Bar of Michigan, Washtenaw County Bar Association, Michigan Defense Trial Counsel, and the Michigan Society of Hospital Risk Managers.

He received his Bachelor of Arts degree in Economics, with honors, from Michigan State University. He graduated *magna cum laude* with a Juris Doctor from Detroit College of Law.

Dale enjoys golfing, reading, and spending time with his family when he's away from the courtroom. He lives in Beverly Hills with his wife, Mary Jo. The couple has three children: Katherine, a student at Wayne State University Medical School; Christopher, a student at the University of Michigan School of Engineering; and Jennifer, a University of Michigan student.



Maria T. Saez is the newest associate in our Ann Arbor office. She focuses her practice on medical malpractice defense and employment law.

Maria received both her Bachelor of Science degree in Anthropology/Zoology and her Master's of Social Work degree from the University of Michigan. She earned her Juris Doctor, *cum laude*, from the University of Illinois, Urbana-Champaign. There, she was a Lincoln Scholar, Women's Bar Association of Illinois Scholarship recipient, and Notes Editor for the Law Review.

Prior to joining Smith Haughey, Maria served as an associate at Neal, Gerber, & Eisenberg, LLP in Chicago, and as a Legal Advocate for Domestic Violence Project/SAFE House in Ann Arbor. She is admitted to practice in the state courts of Michigan and Illinois, and the federal courts for the Eastern District of Michigan and the Northern District of Illinois.

Maria is a member of the American Bar Association, State Bar of Michigan, and the Washtenaw County Bar Association.

A native of New York City, Maria now lives in Ypsilanti. In her spare time, she enjoys golfing, traveling, and photography.



P. David Vinocur is a returning shareholder in our Traverse City office. He focuses his practice on health law, specifically in the areas of behavior health law, Medicaid, HIPAA,

hospital law, managed care contracting, and compliance issues.

A practicing attorney for 35 years, Dave most recently served as in-house counsel for Northern Lakes Community Mental Health Authority. A member of the State Bar of Michigan, Health Care Compliance Association, and American Health Lawyers Association, he is active in his profession and industry. He also sits on the Ethics Committee for Munson Medical Center. Dave received a Bachelor of Science degree from Yale University, a teaching certificate from Northern Michigan University, and his Juris Doctor from Syracuse University College of Law.

Dave lives in Traverse City with his wife, Barbara. The couple has two adult children, Joshua and Seth. In his spare time, Dave enjoys reading and travel.

New Insurance Products Raise Questions

While life insurance cash surrender value policies are generally exempt under the Michigan statute from creditor claims, interesting questions still exist as to the scope of this creditor shield.

When Michigan's exemption statute was adopted in 1956, life insurance was a pretty simple concept. Today, it is common to find the purchase of variable life insurance products where the owner-insured invests in mutual funds "inside" the life insurance policy. Similarly, there are now *universal life* insurance policies, where the amount of the policy premium is flexible, paid within the discretion of the owner-insured.

These modern life insurance products, while clearly labeled and sold as "life insurance" or "endowment contracts," often carry the appearance of and act more like investments that are controlled by the owner-insured. But they are "wrapped" in the cloak of a life insurance policy.

Will these new life insurance products, which carry the features of investments, provide the same protection under the

exemption statute as "old-fashioned" whole life insurance policies? No one knows. Michigan courts have yet to directly answer this question. The concern is that courts will often look behind labels when they interpret an exemption statute.

Conceivably, an individual could purchase a *universal variable* life insurance contract to shelter a substantial amount of wealth. The deposited premium dollars would be held "inside" a life insurance or endowment policy, with the cash surrender value permitted to grow, yet beyond the reach of the owner-insured's creditors.

So long as the owner-insured's close family members are the named beneficiaries of the insurance policy, there is nothing in Michigan's statute that indicates the cash surrender value would be subject to the owner-insured's creditors. Such an aggressive planning step would arguably fall within the scope of Michigan's exemption statute. But limits as to the scope of the exemption will be dependent upon a judge's perception of the reason behind the purchase of the life insurance contract.

Proving Your Intention

It is common to use life insurance to provide liquidity to pay debts and/or estate taxes upon the death of the insured, or to replace income when there are still dependents.

As such, there is usually a good reason to purchase life insurance.

If non-exempt assets, e.g., cash or marketable securities, are converted into a life insurance premium payment, it is critical to document the reasons why the decision was made to purchase the life insurance.

Such documentation could be used to prove that the conversion of a non-exempt to an exempt asset was not intended to hinder, delay or defeat creditors. This is the touchstone of Michigan's Uniform Fraudulent Transfer Act, which could otherwise be used to invalidate that conversion of wealth into life insurance.

Asset protection is on the mind of lots of people these days. Sometimes it pays to stay close to home when investigating legitimate strategies to protect assets from future creditors claims.

For additional information and assistance on asset-protection strategies, contact George Bearup directly at 231.486.4510 or gbearup@shrr.com.

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