

yourLAW

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When Your Guests Drink and Drive

Understanding Dram-Shop and Social Host Liability Laws

Hosting a Super Bowl party for your friends and family can be a stressful time: What will you serve? Where will everyone sit? Is your television big enough? One of the last things you want to worry about is what happens if Uncle Stan drinks too much and then gets behind the wheel of a car. Nevertheless, you should watch Uncle Stan's alcohol consumption not only because of your concern for his safety and that of other drivers, but also because of your possible legal liability should Uncle Stan cause an accident. As a host, be aware of your state's dram-shop or social host liability laws.

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Protecting Your Nest Egg

During these uncertain financial times, many Americans are afraid to open up their 401(k) statements or are unsure of where to put their retirement savings besides under the mattress. Although the law can't guarantee you a great return or help you pick the safest stocks, it can provide some important protections when you change jobs or your employer goes out of business.

To help you better understand how the law can protect your retirement funds, *YourLaw* is offering this primer on laws and agencies that may be useful to you. The Employee Retirement Income Security Act of 1974 (ERISA) establishes many of the mandates and standards for pension plans in private industries. For example, ERISA requires that you be given a yearly summary of all your qualified retirement accounts. This requirement creates accountability for plan investors.

Another federal law, the Pension Protection Act of 2006, forces employers to shore up their plans. Under this law, plans that are not fully funded face additional

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The right to a trial by jury is a cornerstone of the individual freedoms guaranteed by the United States Constitution.



Get Ready for Jury Service

Although your friends or co-workers may complain about getting called for jury service, remember that jury service is an important civic responsibility. More than 170 years ago, Alexis de Tocqueville noted in *Democracy in America* that jury service is one of the badges of American citizenship and provides one of the few opportunities that we as citizens have to participate directly in our own government. In appreciation of this important institution and its value in modern American society, *YourLaw* is answering some of the most common questions.

Q. What is the purpose of a jury?

A. The right to a trial by jury is a cornerstone of the individual freedoms guaranteed by the United States Constitution. A jury stands between the power of the government and the rights of the accused. The government cannot take away someone's right to life, liberty, or property until it has convinced the citizens of a jury of the defendant's guilt or civil liability.

Q. Does the U.S. Constitution guarantee every defendant a right to a jury trial in every case?

A. No. In civil cases (noncriminal cases in which one individual, business, or governmental entity sues another), the Seventh Amendment guarantees the right to a jury trial only in "suits at common law." As a general rule, suits at common law are civil suits in which money is sought for an alleged injury or loss—for example, a breach of contract or a personal injury. The Seventh Amendment right to a jury trial thus does not apply if the plaintiff in a civil case is seeking something other than money—for example, defendants going to trial to oppose an order telling them to stop doing something or to turn over certain property are not entitled to a jury trial.

In criminal cases, the U.S. Supreme Court has ruled that a defendant who is facing jail time of six months or longer is entitled to a trial by jury. Congress also has provided for a jury trial in some instances in which the Federal Constitution does not require it. In both state criminal and civil cases, state constitutions may also guarantee broader rights to a jury trial.

Q. How are potential jurors selected?

A. Prospective jurors must be representative of the community in which the trial is being conducted. Courts usually obtain the names of prospective jurors from regularly maintained lists, such as lists of registered voters or licensed drivers.

When a case is set for trial by jury, the clerk of court uses these lists to provide the court with a randomly selected pool of potential jurors. The jurors who will actually hear a case are then chosen by a process, known as *voir dire* (from the French meaning "to speak" or "to see"), in which the potential jurors may be questioned.

Q. What can I expect during *voir dire*?

A. Potential jurors are questioned in open court either by the judge or by the parties' lawyers, depending on local laws and court rules. The goal is to discover any potential bias or prejudice relating to the parties or to issues in the case. If a potential juror states that he or she has a relevant bias or prejudice, or if evidence suggests that he or she does, the lawyer can ask the court to remove him or her from the pool of potential jurors.

Each lawyer can also ask the judge to remove a potential juror without any explanation. This is called a peremptory challenge. Depending on the type of case, each side is limited to a certain number of peremptory challenges. Peremptory challenges can never be used to remove potential jurors on the basis of race or gender.

Q. How many jurors sit on a jury?

A. That depends on the type of case and where it is being heard. A federal criminal trial jury usually has twelve members. In some states, there may be fewer than twelve jurors in less serious criminal cases. In more serious state cases, in which the punishment may be more than a year of imprisonment in jail, twelve jurors are often required.

Q. Must all jury verdicts be unanimous?

A. In the federal system, jury decisions must be unanimous. If the jury cannot reach a unanimous decision, it is considered a "hung jury" and a mistrial is declared, meaning the trial ends without a decision. After a mistrial, another trial may be held if the prosecution decides to try the case again. In the state court systems, requirements regarding unanimity vary. In more than a third of the states, agreement of only three-fourths or five-sixths of the jurors is needed for a verdict in civil cases.

Q. Will the court protect me and the other jurors against threats or violence?

A. The law entitles you to such protection. Occasionally, the court sequesters a jury during a trial—that is, houses it in a hotel to isolate it from outside influences. Even if you are not sequestered for the entire trial, it is not uncommon for a jury to be sequestered during deliberations. If this

PHILIPPE JECK ELECTED TREASURER FOR PALM HEALTHCARE FOUNDATION, INC.

Philippe Jeck has been elected as Treasurer and serves on the Executive Committee for the Palm Healthcare Foundation, Inc. Board of Trustees. The Foundation is an independent public health foundation primarily addressing the needs of Palm Beach County. Since 2001 the Foundation granted over \$25 million to programs at more than 90 nonprofit organizations.

A most exciting and ambitious project is the opening of the Palm Healthcare Pavilion to house programs that serve chronically ill children and children with diabetes, the greatest unmet health care needs in the area. To fund the new state-of-the-art facility, the Foundation is conducting a \$12.5 million capital campaign. The Pavilion is located at the St. Mary's Hospital campus and is the first renovated building in Florida that is a LEED certified "Green Building" designed to be hypoallergenic, hyper energy efficient and ecologically friendly. Philippe's passion for helping children, particularly the very young, has inspired him to contribute his energies to this outstanding organization.

SHORT SALES

Jeffrey Raynor

In this economy, where homes may be worth less than the balance on the homeowner's mortgage, something called a "Short Sale" is becoming more common. A Short Sale is a sale where the mortgage holder agrees to accept less than the mortgage balance. If the mortgage holder insisted on receiving 100% of the mortgage balance, the home would not sell, because the homeowner is "upside down" or "underwater", meaning the home's current value is less than what is owed. For homeowners in that situation, a Short Sale certainly would be better than a mortgage foreclosure. Although a homeowner's credit would be adversely affected by a Short Sale, a foreclosure could be far worse. While the Short Sale net proceeds go to the mortgage holder, the home gets sold even though the homeowner receives none of the proceeds. The homeowner gets out from under a burdensome mortgage and may be relieved of the obligation to repay any deficiency to the mortgage holder. If you or anybody you know is in this unfortunate situation, we can help. Our firm and affiliated title insurance company, All Florida Land Title Company, have extensive experience and continuing success with Short Sales. Please contact Jeffrey S. Raynor of our firm for a free consultation, in person or by telephone.

GOOD NEWS!

Audrey Harris

The annual gift tax exemption for 2009 has increased to \$13,000. Last year the exemption was \$12,000. You can give \$13,000 each to as many family members or friends as you would like without incurring gift taxes, and without reducing your federal estate tax exemption at death.

The federal estate tax exemption for decedents dying in 2009 increased to \$3,500,000. The current federal estate tax law sunsets for one year in 2010. For that reason, we expect Congress to enact new estate tax legislation in 2009. President Obama has indicated support for legislation to retain the \$3,500,000 federal estate tax exemption for future years.

I will let you know when such a change in the federal estate tax law occurs.

ARE MY ASSETS SAFE?

D. Bruce Kratz

What times we live in! Greed and fraud seem to dominate the headlines day after day: billions of dollars of high-risk mortgages provided without meaningful underwriting standards, then packaged and sold off as high-quality investments, have our banking system in crisis; real-estate "flippers" bought properties and obtained mortgages on speculation, then walked away when the market turned against them (an estimated 50% of the thousands of pending foreclosures in Palm Beach and Martin counties are against "flippers"); millions of dollars of bonuses for bankers and Wall Street types despite dismal and undisciplined performance; good old-fashioned fraud practiced by Bernie Madoff and now, apparently, by Stanford Financial. When will it end?

You possess unusual fortitude if these events don't make you think, at least a little bit, about protection of your assets. But what can you do?

If you are invested in the stock market it is critical that you know your advisor or manager. Don't assume that he or she is good at what they do because they have impressive credentials or a nice office. Insist on seeing three, five and ten year audited results compared to an appropriate, recognized benchmark such as the S & P 500 (the 500 US stocks with the largest market capitalization), or the Europe, Australasia and Far East (EAFE) index for foreign stocks in developed countries or an appropriate Morgan Stanley Capital Investment (MSCI) index for developing countries. A successful manager will beat these indexes a majority of the time. If your manager does not, ask yourself why you are paying a management fee.

Even more important is knowing where your investment money is held. Your stocks, bonds and cash held for investment management should be held by a reputable independent custodian, Lehman Brothers' failure and Merrill Lynch's near failure notwithstanding. A manager should be authorized to make buy and sell decisions only; no one but you should ever have the right to access your assets. The Securities Investor Protection Corporation (SIPC) insures against brokerage firm losses due to insolvency up to \$500,000 for securities and up to \$100,000 for cash held for investment, but it may reject claims if the money was never really there!

You can also take steps to shield your assets from creditors. Exactly what can be done will depend on the law of the state of your domicile. There are a number of things you can do if you are a legal resident of Florida. For example: homestead your principal residence if it qualifies by size and location (subject to certain claw-back provisions in the US Bankruptcy Code); hold bank and investment accounts in a special form of ownership if you are married; annuitize your annuities (beware of claims that so-called annuities are protected, they may not be); use life insurance as an investment; set-up a medical savings plan; maximize holdings in IRS approved pension/retirement plans. These are rights created by Federal law, the Florida Constitution and Florida state statutes and exist for your benefit.

I have been counseling clients on such matters for over thirty years and am available to help you decide what, if any, steps to take and how to implement your decisions effectively.

happens, police officers or court officials will escort you and the other jurors to and from court. After the trial, the police will continue as best they can to ensure the safety of discharged jurors, at least for a time. On rare occasions, the court can even impanel an anonymous jury.

Q. If I am called for jury duty while I have a job, will I lose my paycheck for the time I spend performing jury service?

A. That depends. Some states require that employers continue to pay employees their full salary, or at least a percentage of it. Some employers will do this voluntarily, others may not. All states provide jurors with a small daily wage ranging from \$10 to \$40.

Q. If I am impaneled as a juror, what do I need to know?

A. You should be aware that the judge will likely impose certain restrictions on you, such as

- not allowing you to read newspaper articles or watch any news stories relating to your case;

- not permitting you to talk to other jurors about the trial before deliberations; and
- not allowing you to talk about the case with any lawyers you may know.

Jury service is your chance to participate in our system of democracy.

Q. What if I am selected as an alternate juror?

A. The judge may order that more jurors be seated than are required for a verdict. These extra jurors are known as alternate jurors, and they are selected to guard against the possibility that some of the jurors will become ill or otherwise unable to complete the trial. An alternate attends the trial along with the regular jurors, but does not participate in reaching a verdict unless one of the regular jurors is unable to continue. It is important for alternate jurors to pay attention to testimony because they may be required to participate in the verdict.

Getting called for jury service is not a bad thing—this is your chance to participate in our system of democracy. If you are called and have any questions, be sure to talk to court officials to ensure that you are following all the necessary rules and procedures. And, if you think you were improperly removed from a jury pool because of race or gender, do not hesitate to talk to your lawyer. ❧



Is It Time for an Estate Plan Checkup?

Life doesn't stand still, and after you've crafted an initial estate plan, your circumstances are likely to change—you may acquire more assets, the executor you originally selected may pass away, or you may contract a serious illness. Your children will grow up, or you and your spouse

may split up. And the law may change, making some of your estate planning obsolete, or even counterproductive.

So it's a good idea to review your estate plan at least once a year to make sure any changes are accounted for. (You can pick a certain day, like your birthday or the Fourth of July or some other date that will jog your memory to do this annually.)

To get you started, *YourLaw* is including a checklist detailing those life events that may impact your estate plan. If you answer "yes" to any of the following questions, it may be time to contact your attorney.

- Have you married or divorced?
- Have your children married or divorced?
- Do your children or any other beneficiaries need protection from creditors?
- Have your relatives, other beneficiaries, or executor died, or have your relationships with any of them changed substantially?
- Has the mental or physical condition of any of your relatives, other beneficiaries, or executor changed substantially?
- Have you had more children or grandchildren, or have your children gone to college or moved out of, or back into, your home?
- Have you moved to another state?
- Have you bought, sold, or mortgaged a business or real estate?
- Have you acquired major assets (car, home, bank account)?
- Have you inherited significant property?
- Have your business or financial circumstances (estate size, pension, salary, ownership) changed significantly?
- Has your state's law (or have federal tax laws) changed in a way that might affect your tax and estate planning?
- Have you changed your ideas about what to do with any of your assets?
- Have you decided to do more (or less) charitable giving?
- Have you made gifts that should be taken into account, such as reducing bequests that were to occur under your will?

When you do update your estate plan, you should also update your will and final instructions with updated addresses and phone numbers of beneficiaries, trustees, executors, and others mentioned in the estate planning documents. This will make settling your estate much easier. Estate planning is an incredibly important part of planning for your and your family's future; but it is just as important to make sure that any estate plans that you already have are accurate and up to date. ❧

Make sure you fully understand your obligations and responsibilities before hosting that “open bar” party.



These laws identify situations in which a third party can be held liable for the actions of an intoxicated person. Such laws are meant to deter social hosts from over-serving drivers, and to find an additional source of money to help cover damages and injuries caused by drunk drivers. For example, under a traditional dram-shop law, if Uncle Stan gets drunk at Bar X and leaves and drives his car into a church van, injuring three van passengers, the passengers may be able to sue Bar X.

These laws vary broadly by state. However, they generally fall into two categories: laws that are directed only at commercial sellers of alcohol such as Bar X (usually called dram-shop laws), and laws that allow injured parties to sue private individuals who do not sell alcohol but who do serve it or make it available (usually called social host liability laws). State dram-shop laws differ on whether a plaintiff must show that the

bartender knew the customer he or she was serving was drunk and on whether the bartender must have known the customer was going to get behind the wheel. Social host liability laws vary even more. Some states don't have any such laws at all, while others have strict ones. In some states, these laws focus on underage drinking and only hold a social host responsible if the accident is caused by an individual under the legal drinking age (and in some states, there is a requirement that you are responsible for determining whether Uncle Stan is at least 21 years old before you serve him).

Other states extend social host liability to corporate parties. This could be a critical concern for you if you run a small business. Because these laws vary so much and could easily result in extensive financial liability for you or your business, make sure you fully understand your obligations and responsibilities before hosting that “open bar” party.

If you do plan to host a party and serve alcohol, regardless of where you live, there are a few steps you can take in order to avoid legal liability (and, even more importantly, to make sure that your guests get home safely!). Keep taxi information, especially phone numbers, in a public place. Identify one or two designated drivers who will be available at the end of the evening. And eat! Provide plenty of food and nonalcoholic drinks and make them a central part of any get-together. ❧

premiums and penalties. In addition, your state may have other laws in place to regulate the pension and retirement plans of employers within the state.

Various government agencies enforce these laws and provide other protections for investors such as deposit insurance. Such insurance, offered by the **Federal Deposit Insurance Corporation (FDIC)**, protects the money that you place in qualified banks up to a certain amount. This insurance is automatic and means that if the bank should fail, your money (up to a limit) will be guaranteed by the FDIC. Similar protections are available for deposits with credit unions (through the **National Credit Union Administration**) and those with brokerage firms (through the **Securities Investor Protection Corporation**). The guaranteed amount varies depending on the type and location of your investment.

Regardless of how well you protect your retirement accounts, a serious change in your employment status may still put your nest egg at risk. However, losing your job doesn't necessarily eliminate your retirement options. There is a good chance your pension is still safe. You must, however, immediately check out the employer's “vesting” policy. Your pension is said to vest when you have the right to all the earned benefits. If your pension has vested, you have a right to the benefits, even if you leave the job for any reason. By law, your pension rights must either vest completely after five years or vest partially after three years of service. Any vested pension benefits are yours, regardless of whether you leave the job.

If your employer terminates your pension plan, you still aren't totally at a loss. If your plan is considered “qualified,” your interest will vest immediately and you have the right to any contributions made by you or your employer. If the employer doesn't have enough money in its accounts, you still aren't totally on your own. “Defined-benefit plans” (plans that guarantee you a certain amount of money each month upon your retirement) are insured by the **Pension Benefit Guaranty Corporation**, up to a certain amount.

There are a variety of resources available for concerned investors. The **Garrett Planning Network** offers financial planning advice to consumers on an hourly basis (www.garrettplanningnetwork.com), as does the **National Association of Personal Financial Advisors** (www.napfa.org). For more information, check out the **Pension Benefit Guaranty Corporation** (www.pbgc.gov) or the **Pension Rights Center** (www.pensionrights.org). And of course, if you are worried that someone has committed fraud in overseeing your pension accounts, do not hesitate to contact your lawyer. ❧