

Editor's Note

The best way out is always through. – Robert Frost

Dear Clients, Colleagues, and Friends:

You don't need us to tell you that current economic conditions are, to put it mildly, difficult and challenging. Either directly or indirectly, everyone has been adversely affected. We keep hearing that part of the problem is a crisis of confidence. Yet the news, day in and day out, is seldom anything but grim. The tendency of all media to focus on the doom and gloom certainly makes it difficult to feel optimistic about the economy and about one's own personal financial situation. Nonetheless, the challenge remains for all of us to seek and to find the silver lining in these otherwise clouded times.

For over 20 years, our Firm has represented determined and motivated individuals and business owners who have demonstrated the capacity and commitment to overcome odds against them to succeed in competitive, and sometimes hostile, environments. Many of you have experienced success and have prospered, while others have struggled with and had to overcome failures and setbacks. In some respects, our Firm is a microcosm of our clients. We experience many of the same challenges and anxieties that you do in these trying times. However, because of the quality of our personnel and, more importantly, because of the quality and fiber of *you*, our clients, we remain very optimistic that as we continue to work together to weather this storm, we will all emerge stronger.

We know that the financial and business challenges you face are very likely unprecedented. There are no cookie-cutter solutions, but we remain committed to provide you with outstanding service and effective, proactive legal and business advice to help you meet your challenges head-on and help position you to survive and overcome them.

– Max J. Burbach

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Real Estate Tax Protests: This Is the Year!

by Elisa B. Davies

As many of you may have already experienced, current economic conditions have wreaked havoc on property values. Although real estate markets in the Midwest in general, and perhaps in the Omaha metropolitan area in particular, may be somewhat less volatile than on the coasts or in bigger markets, values of some properties have in fact declined, and if ever there was a year where conditions are ripe to protest your real estate tax valuations, 2009 is it. In light of declining real estate values, 2009 may be the year where a real estate tax valuation protest has a significant chance of success, which may in turn reduce your future real estate taxes.

By June 1, 2009, Nebraska's county assessors will mail notices of any increase or decrease in property valuation to all Nebraska real estate owners. If your assessed valuation does not change, you will not receive a notice, but you can still file a protest. You may protest the assessed value (whether such value is changed or remains flat) by filing the appropriate protest documents with the county assessor's office on or before June 30, 2009. Each county has different

procedures and evidentiary requirements for filing protests. If you anticipate filing any tax protests this year, we recommend starting the process as early as possible, perhaps even prior to the county assessor's completion of your property's assessment. We can assist you throughout the real estate valuation protest and appeal process, and can help you maximize your opportunity to lower your real estate taxes. If you have questions or would like assistance with your protests, please contact Elisa B. Davies or Max J. Burbach. ■

Exit Strategy: The Process of Selling Your Business – Part 1 of 4

by Michael M. Hupp and Taylor C. Dieckman

A business owner deciding whether to sell a business (“Seller”) is often confronted with a mix of emotions. The Seller may be excited to close one chapter (which may have included starting, owning, and operating the business), and turn the page to a new chapter (which may include retirement or investing in another business). Depending on the Seller's experience with business sales, the Seller may also feel a great deal of anxiety. Our Mergers & Acquisitions/Securities Practice Group focuses on alleviating that anxiety by guiding the Seller through the process of selling a business.

This article is the first of a four part series that will address this process. In this first article, we will cover the initial steps that the Seller should take to maximize the sale proceeds. In the next three editions of the *Client Adviser*, we will cover (1) finding a buyer, assuring confidentiality, and the letter of intent, (2) due diligence and the definitive agreement, and (3) closing and post-closing matters.

Part I. Circle the Wagons: Organizing the Troops and Preparing a Business For Sale

My high school football coach used to say before every game, “Boys, we're gonna circle the wagons tonight ... that's how the pioneers survived ... and that's how we're gonna survive!” With all due respect to Coach, the pioneers happened to be fighting for their lives on the frontier, while we were merely bumping chests in full pads on a 100 yard stretch of turf. But, circling the wagons worked for the pioneers and our team, and it can work for the Seller.

The point of circling the wagons is to organize the troops and prepare to present a united and organized front. The “troops” in the context of selling a business are the key employees of the business as well as outside advisors, and may include senior management, internal accountants, internal counsel, outside counsel and accountants, and consultants. The Seller's lender, and possibly a business broker or investment banker, may also be involved. At this early stage, however, a Seller should limit knowledge of the potential sale only to the individuals who are critical to the initial part of the sale process. Leaks about a potential sale to persons outside the “need to know” group could make key constituents of the business, such as employees, customers and suppliers, uneasy. Employee, customer, or supplier attrition at this time could significantly damage the value of the business.

Selecting and engaging outside advisors is a critical initial step. An investment banker or business broker might be chosen to lead the “selling” process. If the nature of the business is such that the most logical and best possible buyer is readily identifiable, an investment banker or business broker may not be necessary, as the primary advantage they typically offer is finding a buyer. They can also provide valuable advice on valuation of the business and structure of a potential transaction, and often assist in at least the early negotiations. Finally, an auction process led by an investment banker or business broker can sometimes bring the highest price. Each advisor has a “sweet spot” where it specializes, and that is where the Seller's business needs to fit for that advisor to be the best choice.

Next, the terms of the engagement should align the interests of the broker or investment banker with those of the Seller. This can be accomplished by negotiating a fee structure that keeps expenses in check and conditions payment of all or most of the broker's or investment banker's fees on completion of a transaction. However, in some cases, such as distress situations, it may be appropriate for the Seller to pay an upfront or monthly fee in addition to a contingent fee. When all or a portion of the broker's or investment banker's fee is tied to the compensation the Seller receives from the sale, the agreement should state which items of the compensation received by the Seller are included in the fee calculation and when the fee is due (this may become an issue if part of the Seller's compensation is contingent on the future performance of the business or is deferred after the

closing date). Finally, the agreement should address the circumstances under which the Seller will owe a fee to the broker or investment banker if the Seller subsequently completes the sale of the business after the engagement ends.

Other key outside advisors are the attorney and the accountant. As with the broker or the investment banker, it is critical that the attorney, in particular, has substantial prior experience “doing deals”. If the Seller’s regular counsel is experienced, that would typically be the best choice because there would be little to no learning curve associated with the business being sold or other sensitive issues (such as family employment) that might have an impact on the transaction. If the Seller’s regular counsel is not experienced, he or she can be very helpful in choosing transaction counsel, assuring both the requisite level of competence and charges that are fair and appropriate. With respect to fees, the Seller should ask for an estimate up front as to the probable legal fees and expenses so as to minimize the likelihood of any surprises. The outside accountant or accounting firm also plays a crucial role in the transaction. In most cases, the regular outside accounting firm is the best choice, again because of knowledge about the business and the Seller. If special tax or accounting expertise is needed for a particular issue, this can be outsourced to the proper expert.

After the troops have been identified and engaged, the team should begin to prepare the business for sale with the goal of maximizing the value of the business. Depending on how imminent the sale is, there may be a lot or little that can be done to maximize the business value. The Seller needs to determine what drives value in the Seller’s industry and then achieve favorable results in those metrics. It may be determined that the business is a year or two away from being properly positioned for sale. Investment bankers, business brokers, accountants, and attorneys can help the Seller identify the value drivers. Advisors can also gauge the current market and assist the Seller in preparing normalized and projected financial statements. Normalizing financial statements involves adjusting the financial statements to reflect the “normal” operating conditions of the business and to exclude extraordinary items such as accelerated depreciation, one time sales of assets, and owner compensation. Normalizing financial statements will help the Seller determine what the business is really worth. Projected financial statements would reflect the anticipated results of cost cutting and/or revenue increasing measures that have

been taken by the Seller but are not yet reflected in historical financial statements. The Seller should also make sure that the corporate minute book is current, material customer and supplier contracts are in good form and fully executed, and restrictive agreements are in place with key employees.

By circling the wagons and engaging the help of key internal personnel and qualified outside advisors, the Seller can maximize the potential for a well-organized and successful selling process. Please contact a member of our Mergers & Acquisitions/Securities Practice Group if you have any questions about this article or the purchase and sale process generally. ■

Too Much Shelter From The Storm?

by Brandon D. Hamm

If it has been more than a few years since you and your spouse updated your estate plan, it is probably time to review it with your attorney, because there have been dramatic changes in the tax laws. Depending on your circumstances, your plan may no longer meet your needs and could potentially lead to unanticipated and undesirable results for your spouse. The complications stem from the rapid increase in the “applicable exclusion amount,” commonly referred to as the “exclusion,” which is the amount that each individual can pass free of federal estate tax. Because of a law adopted in 2001, the exclusion has steadily climbed from only \$675,000 in 2000, to \$3.5 million in 2009.

When a married couple’s combined net worth exceeds the combined exclusions available to them, attorneys frequently recommend a “marital deduction plan.” Following the death of the first spouse, this plan splits the deceased spouse’s assets into two shares. The first share, comprised of assets with a value equal to the then-available exclusion, is allocated to a “family trust” (also sometimes called a “credit shelter” or “bypass” trust). The family trust is designed to shelter the assets of the family trust from estate tax, not only on the death of the first spouse, but also on the death of the survivor. The assets of the family trust are usually, but not always, held in trust for the benefit of the survivor and then divided among children following the survivor’s death.

The second share, comprised of the deceased spouse’s assets that exceed the exclusion, is allocated to a “marital trust.” The marital trust is designed

to qualify the assets for the estate tax “marital deduction.” The assets of the marital trust are either distributed outright to the survivor or held in trust for his or her exclusive benefit and, unless consumed, will be included in the survivor’s estate on his or her subsequent death. Following the death of the survivor, all of the survivor’s assets will be allocated to the survivor’s family trust and, to the extent their value exceeds the then-available exclusion, will be subject to estate tax.

In short, a marital deduction plan combines the use of a family trust and a marital trust to help ensure that no federal estate tax is incurred on the death of the first spouse (*i.e.*, by use of the decedent’s exclusion and the marital deduction), and that the tax incurred on the death of the survivor is minimized, if not eliminated entirely. This type of plan is typically coupled with the recommendation that assets at least equal to the value of the exclusion be titled in the name of each spouse. This is done to make certain that, regardless of which spouse dies first, adequate assets are owned by the decedent to fully utilize his/her exclusion and fund his/her family trust.

This strategy is sound and the technique is commonly used. However, because of the dramatic and rapid increase in the exclusion, couples for whom a marital deduction plan was advisable only a few years ago may no longer need such a plan to completely avoid federal estate tax. This is because the exclusion now available to one spouse may be adequate to shelter the couple’s entire estate. In this situation, the increased exclusion will lead to all of the first deceased spouse’s assets being allocated to the family trust and none to the marital trust. Unfortunately, the current economic crisis will amplify the problems already created by the increased exclusion, because the dramatic decline in personal net worth resulting from the market free fall will lead to an increased frequency of family trusts being funded with all of a deceased spouse’s assets.

For a simplified example of this problem, assume Bob and Jane, a married couple, had a combined net worth of \$4 million in 2001. In order to ensure that Bob and Jane both utilized their exclusions (\$675,000 each at the time) and minimized the tax that would be due on the survivor’s death, their attorney helped them to implement a marital deduction plan and to retitle assets so that \$3 million of the assets were in Bob’s name and \$1 million in Jane’s. Bob and Jane did not review their plan prior to Bob’s death in 2009, when, due to consumption and market

conditions, their combined net worth had declined to \$3 million. Of the total estate, \$2.5 million of assets were still titled in Bob’s name and \$500,000 were titled in Jane’s name. Because of the \$3.5 million exclusion available at the time of Bob’s death, all \$2.5 million of the assets in his name were allocated to his family trust and none to his marital trust. Although Jane still has access to the assets of Bob’s family trust, she only has \$500,000 of assets in her own name.

The unanticipated allocation of all of a deceased spouse’s assets to a family trust will undoubtedly be an inconvenience to the survivor. At the very least, the annual administration of an unnecessary family trust is likely to be frustrating. More importantly, however, if the survivor’s own assets are inadequate to maintain his or her standard of living, the survivor will be forced to rely on the assets of the family trust. This could present additional complications because the survivor may be dependent on someone else to make distributions to him or her (*i.e.*, if someone other than the survivor is the Trustee of the family trust) and, in any event, will experience somewhat restricted access to the assets.

Is it all doom and gloom? No, there is an easy fix. In a scenario where the exclusion available to one spouse could shelter the couple’s entire estate, it makes sense to implement a plan that simply leaves all assets outright to the survivor or, even better, gives the survivor the ability to decide if any assets should be allocated to the deceased spouse’s family trust. If you think you might be impacted by the problems described in this article, or if you have any questions, please call one of attorneys in our Estate Planning and Business Succession Department to schedule an appointment. ■

Privacy Policies and Terms of Use: Why They Matter in the Digital World

by David R. Mayer and Ryan J. Sevcik

Your company website is up and running. You are excited for prospective customers and clients to visit you on the Internet and peruse your online offerings. Perhaps you even allow visitors to your website to post information or to socially interact with other visitors, and are eager to receive the positive feedback you anticipate will be generated. Although the Internet can provide significant opportunities to businesses and other organizations in our increasingly global

economy, there are risks associated with an online presence that need to be considered. Outside of the online world, businesses often go to great lengths to protect their confidential and proprietary information by creating and implementing various trade secret and information control policies, as well as entering into contractual relationships with high-level employees. However, maintaining an online presence requires additional safeguards.

Businesses can take a few simple steps (such as developing comprehensive website terms of use and an online privacy policy) to potentially avoid online risks and to arm themselves with powerful defensive tools in the event a problem arises. An appropriately drafted online privacy policy provides a way for business owners to inform website visitors of their rights and advise them of the information collected and the intended use of such information. In fact, depending on the type of website, such a policy may be required by federal and/or state law. Although generally not statutorily required, terms of use may provide a valuable asset for businesses seeking to restrict competitive use of their website, protect client information, and reduce potential liability.

Privacy Policies

The online transfer of “personally identifiable information” such as names, addresses, email addresses, and credit card information (“PII”) is common in today’s business world. Because of the potential for significant personal exposure in the event PII is mishandled, state and federal legislators have responded by enacting laws designed to safeguard PII. Indeed, a handful of state and federal laws actually require that certain businesses draft, maintain, and post privacy policies on their websites and otherwise notify visitors of their rights with respect to the collection and use of PII. One such law, the federal Children’s Online Privacy Protection Act (“COPPA”), provides for strict disclosure of data collection practices and uses and requires explicit parental consent before PII may be collected from individuals under the age of thirteen. In general, COPPA applies to any website that is marketed or directed to individuals below the age of thirteen, as well as to any website with actual knowledge of the collection of PII from such an individual. To determine whether a website is “directed” at children, multiple factors are considered, such as the “feel,” content, and subject matter of the site. If it is determined that a website operator is subject to COPPA, the operator must obtain a verifiable

parental consent before collecting PII from underage individuals. The operator also has a duty to disclose its data collection and disclosure practices on its site. A website operator’s activity may also be subject to state law restrictions.

Terms Of Use

Although most companies that transact business or make information available over the Internet take some sort of precautionary measures to ensure the privacy and security of their information and that of their customers, these measures may still be vulnerable to a determined intruder. Unauthorized use of a website can range from using data or materials on the site without permission, to hacking into or otherwise accessing unauthorized and possibly sensitive areas of a business’s computer server. Terms of use or terms of service agreements (“Terms of Use”) are designed to provide an additional layer of protection. Although there are means to pursue violations without having Terms of Use in place, Terms of Use provide powerful tools to pursue users who make unauthorized use of a business’s website.

Terms of Use govern the manner and purpose with which visitors may use a particular website. For example, a business’s Terms of Use may provide the methods and limitations by which the public may use the website to purchase goods or services, obtain information, post information, or socially network. Terms of Use are generally presented to online visitors in one of two forms: (1) “clickwrap” agreements; and (2) “browsewrap” agreements. Clickwrap agreements require the website user to click “I agree” or some other notification prompt prior to accessing the website or conducting certain activity. Alternatively, browsewrap agreements are accessible from links contained on the website (or otherwise conspicuously posted), but do not require any affirmative action on the part of the website user. Courts have proven more receptive to the enforcement of clickwrap agreements as a matter of basic contract law because they do not have to rely on the implied assent of the website user to enforce the agreement (as is the case with browsewrap agreements).

In the event of a security breach or other access to unauthorized websites by a user, a website operator could seek redress for a violation of the Computer Fraud and Abuse Act (“CFAA”). The CFAA provides that any individual who intentionally accesses a “protected computer” without authorization and causes damages of more than \$5,000 is liable for

a violation of the CFAA. A “protected computer” is defined very broadly as any computer used in interstate commerce, which could conceivably apply to almost every computer connected to the Internet in the United States. The damages threshold of the CFAA is not generally a difficult bar to meet, as it can be satisfied by valuing the corrective action required to investigate and remedy the breach. However, demonstrating the minimum amount of damages is not itself sufficient. To impute liability under the CFAA, it must additionally be shown that a website user exceeded authorized access via his or her Internet conduct. Rather than making this determination by attempting to subjectively assess and analyze the “reasonable expectations” of the parties’ on-line interactions, courts have instead looked to a website operator’s Terms of Use as providing clear guidance with respect to what type(s) of conduct is deemed to be “unauthorized.” For example, in court cases, Terms of Use have effectively served as a protection against unauthorized use to gain a competitive advantage such as the repeated access of an organization’s website and use of technological tools to collect data from that organization.

Businesses must be aware of and consider the danger of not maintaining Terms of Use specifically tailored to their business, or worse, failing to provide any Terms of Use despite maintaining an online presence. Courts have held that the CFAA allows a website owner to explicitly state what it considers to be unauthorized access or prohibited conduct with respect to its website. Rather than exploring the “reasonable expectations” of the parties in analyzing whether “authorized access” was exceeded, courts have held that organizations should instead create and maintain specific Terms of Use that clearly indicate types of prohibited conduct. In other words, Terms of Use would establish what type(s) of conduct “exceed[ed] authorized access” for purpose of CFAA liability. These cases make clear the importance of Terms of Use. Without such Terms of Use in place, organizations run the risk of not being able to avail themselves of the civil remedies provided by the CFAA in the event of unfair competitive use or unauthorized use of customer information. Indeed, courts have routinely predicated liability under the CFAA to a business’ Terms of Use.

Conclusion

Companies should examine their online practices, target audiences, and use of information to ascertain the extent to which they are statutorily required

to implement and maintain privacy policies with respect to their online activities. Although Terms of Use are generally not statutorily required, we strongly recommend developing comprehensive Terms of Use in order to afford the company the benefits discussed above. Creating and maintaining Terms of Use requires that appropriate attention be given to several issues. First, the company must determine the type(s) of activity it wishes to prohibit and then ensure that the Terms of Use specifically and clearly prohibit such behavior. Second, it must be decided whether to use a browsewrap agreement or the more restrictive clickwrap agreement. If a browsewrap agreement is selected, it should be conspicuous and accessible throughout the various pages on the website. Finally, a program to ensure compliance with the Terms of Use should be considered. Such a program would serve to monitor and notify those who do not comply. As detailed above, Privacy Policies and Terms of Use can provide important protections. If you have questions or would like assistance developing or refining these recommended policies, please contact Ryan Sevcik, David Mayer or another member of the Koley Jessen team. ■

One Year Relief for Retirees

by Joan M. Cannon

The Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”) provides one year of relief in 2009 for retirees from taking a minimum required distribution (“MRD”) from a qualified plan, including a 401(k), 403(a), 403(b), and 457(b) governmental plan and an individual retirement account (“IRA”). An MRD is a minimum amount that is required to be distributed from a qualified plan or IRA when an individual reaches age 70½, or the April 1st following the year of retirement. If the MRD is not distributed timely, a 50% excise tax is imposed on what is not distributed. But for 2009, the amount that would normally be an MRD need not be distributed or, if distributed, may be rolled over into another qualified plan or IRA. The reason given for the one year relief is the severe economic situation that created large losses in account values and an attempt by Congress to allow individuals to regain some of those losses. The IRS is currently considering additional guidance, but for now we know that an individual who turns 70½ in 2009 and who would normally be required to take the first MRD for the 2009 year by April 1, 2010, can waive the 2009 MRD, and we know that a

beneficiary who is taking MRDs under the five-year rule due to the death of a participant, may waive the 2009 MRD and, in effect, will receive another year (a sixth year) to take the full distribution. Note this does not apply to 2008 MRDs that are required to be taken by April 1, 2009. The new law also provides that the would-be 2009 MRD amount is not subject to the mandatory 20% withholding requirement (it would be subject to 10% withholding) and the plan sponsor does not have to treat the amount as an eligible rollover amount nor give the rollover distribution notice. Although individuals can still take an MRD in 2009, the right to waive the 2009 MRD is an important benefit for those who may not need to take a distribution. Plan sponsors will need to look at procedures, participant elections, and related matters in considering this one-year relief, but plans and IRAs are not required to be amended until the 2011 Plan Year. We'll keep you informed as the IRS publishes its guidance. ■

It's a "GReAT" Time to Consider Wealth Transfer

by Alexander J. Wolf

Is there any silver lining to these challenging economic times? Yes! During periods of depressed asset values, individuals have the opportunity to transfer greater amounts of wealth to the next generation while minimizing transfer tax implications. One of the most powerful and tax efficient wealth transfer tools available is the grantor retained annuity trust or "GRAT." A GRAT is an irrevocable trust, specifically designed to leverage a client's ability to transfer wealth by passing future appreciation in an asset to younger generations with virtually no transfer tax cost.

Generally, assets with great potential for growth, such as undervalued marketable securities or certain closely-held business interests, are transferred into the GRAT. During a "fixed term" of years, the creator or "grantor" of the GRAT receives annuity payments from the GRAT, which represent a return of principal plus a government-required rate of return (2.4% in March, 2009). After the fixed term, any growth in the GRAT assets in excess of this rate of return passes to the beneficiaries of the GRAT virtually free from any transfer taxes.

It is anticipated that Congress will enact new transfer tax legislation sometime this year. Early discussions related to such legislation have included proposals that could substantially limit, or altogether eliminate,

the wealth transfer benefits provided by a GRAT. Therefore, if you are interested in learning more about wealth transfer planning, the proper use of a GRAT, and whether it might be something appropriate for you to implement as part of your planning, please contact one of the attorneys in our Estate Planning and Business Succession Department. ■

The Fair Debt Collection Practices Act – A Limitation on Debt Collection Efforts

by John M. Lingelbach

Many households are currently struggling to pay their debts, resulting in credit defaults and legal action by creditors attempting to collect outstanding debts. Both debtors and creditors need to know the limitations the law imposes on debt collection efforts.

One such limitation is the Fair Debt Collection Practices Act ("FDCPA"), which was enacted by Congress in 1977. This Act was adopted to eliminate abusive debt collection practices by debt collectors. The FDCPA applies only to "consumer debt," *i.e.*, personal, family, or household debt, and does not apply to collection efforts against business and other commercial entities. The FDCPA only applies to collection efforts by third-party debt collectors, such as collection agencies, and not to collection efforts by the creditor itself. The FDCPA identifies some of the abusive collection efforts that are illegal, such as:

- Using obscene or profane language in communicating with debtor
- Repeatedly calling the debtor with the intent to annoy, abuse, or harass
- Calling the debtor at "an unusual time or place" (before 8:00 a.m. or after 9:00 p.m. local time)
- Misrepresenting the character and amount or legal status of any debt
- Making a threat to take any action to collect the debt that may not be legally taken

Under the FDCPA, a debtor is also entitled to certain information regarding the debt, such as the amount of the debt, the name of the creditor to whom the debt is owed, and various documents that can be used to verify the debt. In sum, the FDCPA serves as a limitation on collection efforts by debt collectors.

Although the FDCPA only applies to collection efforts relating to consumer debts, there are other federal and state laws that may limit collection practices aimed at collecting debts owed by business enterprises. If you have a question regarding debt collection efforts, please contact the attorneys at Koley Jessen for further information. ■

What Happens If My Bank Fails?

by Matthew J. Speiker

“What happens if my bank fails?” Two years ago this question was largely relegated to academic circles where commentators analyzed bank failures that occurred during the Great Depression or the Savings and Loan crisis of the late 1980s and early 1990s. Given today’s tumultuous economic conditions, that question is no longer academic. From Wall Street to Main Street, consumers and businesses alike are reexamining their cash management strategies and banking relationships with a renewed focus on capital preservation rather than return optimization.

The Importance of Account Classifications

What happens when your bank fails and, more importantly, how such bank’s failure affects you, depends on the nature of your relationship with the bank. Banks are highly regulated businesses that operate under special charters granted by the federal government (*e.g.*, a national banking association) or a state government (*e.g.*, a state banking corporation, a state chartered saving bank or a state chartered credit union). Long ago, our government determined that institutions in the banking industry were essential to a successful system of commerce, and established an independent system for the organization, operation, and liquidation of banks.

When a non-banking business fails, it is typically liquidated (*e.g.*, Chapter 7) or reorganized (*e.g.*, Chapter 11) in a federal Bankruptcy Court. In contrast, when a bank fails, its liquidation is usually conducted by the Federal Deposit Insurance Corporation (“FDIC”), not a Bankruptcy Court. If a bank is insolvent or undercapitalized, the FDIC will step in as receiver and wind down the business and transfer the assets to a successor institution or liquidate the assets to pay creditors of the bank. If a bank fails, the FDIC would determine the nature of your relationship with the bank which, in turn, would determine your ability to recover the value of your deposit or investment.

With regard to insured deposits, a depositor customer is currently fully insured up to \$250,000 per account at the bank so long as such accounts are held in different classes of ownership such as single accounts, joint accounts, and retirement accounts. For example, if a customer has \$250,000 in a single ownership checking account, and \$250,000 in a joint account with his or her spouse, the entire \$500,000 would be FDIC insured. Examples of FDIC insured accounts include savings accounts, checking accounts, money market deposit accounts, and certificates of deposit. If your bank fails, the FDIC will either allow your deposits to be assumed by a successor institution or pay you for the insured amount, usually within a few business days. If your deposits are assumed by a successor institution, they are generally available the very next day following the FDIC’s receivership.

If a depositor customer has funds in any classification of account in excess of \$250,000, the excess of the customer’s deposit in that classification of account is generally deemed to be “uninsured.” In that case, if the bank fails, that customer’s claims against the assets of the failed institution would be behind the claims of secured creditors and behind the payment of administrative expenses of the receivership, but ahead of other general unsecured creditors of the failed bank. In such a case, the customer’s recovery might be limited to cents on the dollar, depending on the magnitude of the bank’s insolvency.

In addition, banks often offer products or services outside the scope of ordinary deposits. For example, a bank might: (i) hold assets on your behalf in a custodial capacity (*e.g.*, custodian of a safety deposit box, purchasing agent for investments, trustee under a trust account); or (ii) offer other investment products that are either not FDIC insured or that exceed the FDIC insurance limits (*e.g.*, collateralized repurchase transactions or brokered deposits). For these types of transactions, proper structuring, account titling, and record keeping are essential because if proper formalities and protocols are not followed, the FDIC may not recognize a customer’s ownership interest (or security interest), and the customer risks losing its entire investment in the event of a bank failure.

What’s Being Done to Protect Me?

Some temporary programs adopted by the federal government to restore confidence in the banking system and to protect customers with funds at banks include: (i) effective October 3, 2008, the standard

maximum deposit insurance amount was increased from \$100,000 to \$250,000 until December 31, 2009, at which time coverage shall again be limited to \$100,000 (except for certain retirement and other accounts), and (ii) effective November 21, 2008, the FDIC will guaranty all funds (irrespective of amount) in non-interest bearing transaction accounts at the time of a participating bank's insolvency and receivership by the FDIC through December 31, 2009.

Conclusion

As a result of recent economic events, individuals and businesses should determine how their various deposits or other investment products are classified in order to understand whether such deposits or investment products are protected by the FDIC, and whether those funds would be available in the event of their bank's failure. If you have questions about the protection afforded your accounts or investments at banking institutions or the government programs described in this article, please contact a member of our Banking, Finance and Creditors' Rights Practice Group. ■

Forcible Entry and Detainer

by Elisa B. Davies

Commercial leases customarily provide landlords certain self-help remedies in the event a tenant defaults under the lease. Such self-help provisions typically include a landlord's right to re-enter the premises, remove tenant's property, retake and relet the premises, and other similar eviction remedies. Although commercial landlords and tenants may contractually agree to such remedies, Nebraska law outlines a statutory scheme regarding commercial evictions (the "Forcible Entry and Detainer Law"). The Forcible Entry and Detainer Law outlines the steps a landlord must follow to properly bring a forcible entry proceeding against a commercial tenant.

A commercial landlord may ask: "Why follow this statutory scheme when the lease already provides landlord adequate remedies for dealing with tenants in default?" The Nebraska Supreme Court has previously held that a landlord's self-help remedies relating to repossession of its premises (*i.e.*, eviction of the tenant) is contrary to public policy because, in part, it unnecessarily disrupts the peace. The purpose of the Forcible Entry and Detainer Law is to prevent

parties from taking the law into their own hands, and to prevent "disrupting the peace" with self-help remedies. If a landlord chooses to evict a tenant under its lease terms and chooses not to follow the Forcible Entry and Detainer Law, the landlord may be liable to the tenant for damages arising out of the landlord's use of force and/or deception to regain possession of the premises and for damages arising out of resulting wrongful detainer of tenant's property.

The landlord should comply with the following steps to properly commence an action for forcible entry and detainer:

1. The landlord must notify the tenant to leave the property by filing a "Notice to Quit." The Notice to Quit must be served at least 3 days before commencing an action against the tenant and must be served by leaving a written copy of the notice with the tenant or, if the tenant cannot be found, at his usual place of abode. If the tenant or his usual place of abode cannot be found in the county where the premises are located, then the notice may be served by posting it on the premises.
2. The landlord must file a complaint in writing that particularly describes the premises and sets forth the existence of an unlawful and forceful detention after a peaceful or lawful entry of the premises.
3. A summons must be issued, together with a copy of the complaint, and must state the cause of the complaint, the time and place of trial, the answer day for other causes of action, and must notify the tenant that if he fails to appear, judgment will be entered against him. The summons must be served in accordance with prescribed procedures.

Many commercial leases contractually provide landlords the right to re-enter, retake, and relet the premises, including removing and detaining tenant's personal property in the event of a tenant default. However, Nebraska law clearly discourages such self-help remedies as against public policy, and tenants may recover damages against landlords arising out of a landlord's employment of self-help remedies. To avoid tenant countersuits for wrongful entry, detainer, and resulting damages against the landlord, landlords should follow the Nebraska Forcible Entry and Detainer Law. If you would like further information about, or assistance with, the Nebraska Forcible Entry and Detainer Law, please contact one of the attorneys in our Real Estate, Environmental, and Natural Resources Law Practice Group. ■

ANNOUNCEMENTS

Congratulations

Stacia L. Palser, a senior associate in Koley Jessen's Real Estate, Environmental, and Natural Resources Law Practice Group, has earned the designation of LEED Accredited Professional. LEED Accredited Professionals (LEED APs) have demonstrated a thorough understanding of green building techniques, the Leadership in Energy and Environmental Design (LEED) Green Building Rating System, and the certification process.

Stacia's LEED AP designation demonstrates Koley Jessen's dedication to meeting the needs of its clients, providing legal knowledge and expertise in the rapidly growing and evolving area of sustainable construction to assist clients who are developing, leasing, and managing green buildings. She currently is one of only two attorneys, and the only attorney in private practice, in Nebraska to become a LEED AP.

Community

Paul C. Jessen recently joined the Board of Trustees of the Greater Omaha Alliance for Business Ethics.

Michael M. Hupp received the Archbishop's Distinguished Board Member Award for his service to the Catholic Charities of Omaha Board of Directors. This award is given to one member of the Catholic Charities Board of Directors annually.

Leilani M. Harbeck has recently joined the Board of Directors of Joslyn Art Museum's Young Art Patrons group.

Koley Jessen was the sponsor of the Young Professionals Choice Award, which was presented to Lutz & Company on March 5, 2009, at the Young Professionals Summit. The award is an initiative of the Young Professionals Council of the Greater Omaha Chamber of Commerce. The purpose of the award is to recognize Omaha companies who have excelled at attracting and retaining young professionals. Nominated companies were rated in five different areas including opportunity, leadership, community involvement, work-life balance, and inclusiveness. **Margaret C. Hershiser**, chair of Koley Jessen's Employment, Labor, and Benefits Practice Group, presented the award to Lutz Partner Sandy Lane during the Young Professionals Summit keynote luncheon which featured keynote speaker and *New York Times* best-selling author Malcolm Gladwell.

Upcoming Events

Koley Jessen is a sponsor of the Commercial Real Estate Workshop (CREW Midwest) to be held at the Qwest Center on April 17, 2009. **Max J. Burbach** serves on the steering committee for the event and will be presenting during one of the workshop sessions with **Elisa B. Davies**.

Trademark Owners: Koley Jessen, in conjunction with the International Trademark Association, invites you to a free luncheon and roundtable discussion on the topic: "Managing a Trademark Portfolio in a Downturn Economy: Opportunities and Obstacles for Trademark Owners." This Roundtable will be moderated by **Roberta L. Christensen**, Chair of our Intellectual Property Practice Group.

Date: Thursday, April 23, 2009
 Time: 12:00 p.m. – 2:00 p.m.
 Location: Koley Jessen
 1125 S 103 Street, Suite 800
 Omaha, NE

Registration: Space is limited to 25 participants. Register by calling 402-343-3734 or by emailing your registration request and contact information to janwiebe@koleyjessen.com. The deadline for registration is April 15, 2009.

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