BUSINESS BRIEFS

Legal Developments Affecting Business

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WHAT IS IN A NAME? TRANSITIONING TO PERFECTION UNDER THE UCC

By Erich M. Paetsch

It is a challenge faced by many. As a parent, you pour through books and review family history to find the perfect name for a child. As a business owner, you try to identify a name for your company that will stand out among the crowd. The result is often a unique and clever combination of personal and/or marketing considerations. This uniqueness poses many challenges when creating a uniform set of laws using these same names.

Article 9 of the Uniform Commercial Code ("Article 9") provides the rules on how a creditor can secure a debt using the personal property of another. If a default occurs in the repayment of the debt, Article 9 also creates rules on how the creditor's interest (called a "security interest") in the property of another (the "collateral") can be enforced. To have a valid security interest, it must be perfected. The most common method of perfection is the filing of a financing statement.

In the last decade, Article 9 was completely revised in Oregon. As revised, a creditor must use the exact name of the person pledging the security interest in the financing statement to perfect the security interest. After a decade of experience, it is clear that the uniqueness of names creates significant challenges to perfection. In some circumstances, a creditor that thought they were perfected is not, all because of the name used in the financing statement. Without perfection, a creditor may be unsecured and experience significant losses.

To respond to these challenges, Oregon has joined other states in adopting technical amendments to Article 9. While the changes are not effective until July 1, 2013, a prudent creditor must be aware of the changes and adopt practices during the transition period to maintain perfection.

The Importance of a Name to Perfection

To perfect a security interest, Article 9 requires that the exact name of the person or entity pledging collateral appear in the financing statement. If a search of the public record does not find the financing statement using the exact name, then the security interest is not perfected even if a financing statement was filed.

For example, assume a financing statement was filed in Oregon identifying the debtor as Grey Purcell, Inc., an Oregon Corporation. However, the debtor's name as filed with the Oregon Secretary of State's office is actually Gray Purcell, Inc. A search using Oregon's standard search logic would not find the financing statement and a creditor would lack a perfected security interest in the collateral.

Because of the important emphasis put upon names in Article 9, the past decade has revealed the need to further clarify what names should be used to perfect a security interest in collateral.

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Public Organic Records

One change made to Article 9 tries to resolves perfection questions when differences in public records for the name of an entity exist. For example, what happens when an entity's name on file with the organizing state and the records that created the entity differ? Which name should be used to perfect a security interest in the collateral of that entity?

Assume that Grey Purcell, Inc. is the name for the entity recorded with the Oregon Secretary of State. However, the Articles of Incorporation identify the entity as Gray Purcell, Inc. Clearly the use of Grey instead of Gray is an error. Until now, it was unclear which name should be used. The new law makes it clear that the public organic records for the entity should be used. A public organic record is defined in the new law. Typical examples of public organic records include articles of incorporation and bylaws of a corporation.

A prudent creditor should review entity financing statements and verify that they have the most current public organic records. An online check of the records of the Oregon Secretary of State is insufficient because they are not the public organic records of the debtor. At the same time, debtors should ensure that they have current corporate records to provide to a creditor to avoid unintended problems.

The Safe Harbor

The unique variety of individual names presents even greater perfection challenges. The challenge is so significant that two alternatives have been adopted throughout the country. Both options rely upon using a state issued driver's license as the source for the exact name of the individual. The so-called "only if" option relies upon the driver's license almost exclusively as the name to be used for perfection. The second alternative, commonly known as the "safe harbor", was adopted in Oregon.

Under the safe harbor alternative, the law continues to require that a financing statement use the exact name of the person pledging the collateral. The exact name of the debtor consists of either: the name as indicated on a valid state issued driver's license or the name of the individual using the surname and first personal name. A creditor can now perfect a security interest using either the driver's license or the individuals surname and first personal.

While one might assume that the driver's license and individual surname would be the same, there are numerous situations where this is not the case. For example, think of how common marriage and divorce occurs and a name change follows. Or, think of how many people use a common name in lieu of their formal name, like Tom for Thomas or Beth for Elizabeth. Which name or names should be used?

With adoption of the safe harbor, creditors in Oregon who wish to identify if an individual has already pledged a security interest face significant challenges. For example, assume that Gray Purcell is an individual. Mr. Purcell has an Oregon driver's license showing the name Grey Purcell. Which name should be used to search for existing security interests? Under the safe harbor rules, a financing statement filed under both Grey Purcell and Gray Purcell is likely perfected. A search using both names is required to avoid the nasty surprise of an intervening creditor claim.

A prudent creditor should use a current driver's license when choosing the name to be used for filing a financing statement for individuals. This creditor will also want to verify that no other alternative names exist or to also search for intervening creditor liens using such alternative names.

Conclusion

The revisions to Article 9 of the UCC in Oregon should remind every creditor about the need for attention to detail. The numerous technical challenges and traps that await the unwary creditor highlight the importance of retaining experienced counsel to ensure that a financing statement is perfected. The alternative is an unperfected loan that can be far more costly when a default occurs.

YEAR-END TAX PLANNING ESPECIALLY IMPORTANT IN 2012

By David Myers

Under current law, some major changes to the tax code are set to take effect at year-end. Perhaps most significantly, tax rates for interest, dividends, capital gains, and ordinary income are set to increase, the payroll tax cuts are set to expire, and a new Medicare tax will be imposed. These changes will be implemented automatically on January 1, 2013, absent any action by Congress and the President. The following table shows the tax rates for 2012, for 2013 absent Congressional action, and the tax rates proposed by President Obama:

	2012	2013	Obama
Top Dividend Rate	15%	43.4%	43.4%
Top Capital Gains Rate	15%	23.8%	30%
Top Ordinary Income Rate	35%	43.4%	43.4%
Top Corporate Rate	35%	35%	28%

Predicting what the tax landscape will look like on January 1 would require a crystal ball, but one thing seems clear, change is coming. The Bush era tax cuts resulted in rates lower than they have been in over fifty years. In 1945, the top marginal tax rate was 94%, and prior to 1965 the capital gains tax rate was 25%. In light of this, and the fact that the United States is teetering on the edge of a "fiscal cliff," it seems more likely that taxes, if not tax rates, will be increasing rather than decreasing in the foreseeable future, especially with the re-election of President Obama and continued control of the Senate by Democrats. This sentiment may be reflected, at least in part, by the fact that there has been a significant selloff of assets in the financial markets following President Obama's re-election.

Some taxpayers' strategy in this unsure tax climate is to take the "wait-and-see" approach, i.e. don't do anything and hope Congress comes up with a last minute tax deal like last year. Inaction as a plan-of-action may be a beneficial strategy in some cases, but most taxpayers should seriously evaluate their current situation to determine whether they can take action in 2012 to minimize tax costs. This requires sitting down with tax advisors for some year-end planning. In addition to addressing questions such as "Should I sell capital assets in 2012 to avoid higher taxes?" or "Should I have my corporation declare a one-time special dividend in 2012?" taxpayers and their advisors should consider implementing the following strategies, to the extent they make sound business sense.

Consider accelerating (or decelerating) equipment buying plans.

Under current tax laws, an election can be made to expense, rather than depreciate, up to $139,000 of the cost of tangible personal property placed in service during 2012. The amount that can be expensed is reduced to the extent the cost of the property exceeds $560,000. In 2013 the expensing limit is set to become $25,000 and the investment ceiling $200,000. This expensing is only available to the extent of a taxpayer's income from the active conduct of a trade or business, but may be carried forward. Some additional planning points to consider in making this election include:

- The taxable income limit is not restricted to income from the business in which the property is used, so business owners or employees who run a side business may benefit by buying equipment in 2012;
- If possible, businesses should avoid buying and placing in service more than the ceiling amount of expensing-eligible property during 2012, i.e. consider decelerating equipment buying to avoid exceeding $560,000;
- Make the election for property with the longest recovery period; and
- The amount expensed is the same regardless of when the property is acquired during the year, so property acquired/placed in service in the last days of 2012 can still result in a full expense deduction.

Consider buying eligible depreciable property and placing it in service in 2012.

Only certain types of property qualify for bonus depreciation, which is set to expire after 2012: (i)

qualified leasehold improvement property (i.e., certain interior improvements to nonresidential buildings); (ii) certain water utility property; (iii) certain computer software; and (iv) property to which the Modified-Accelerated-Cost Recovery-System ("MACRS") rules apply with a recovery period of 20 years or less, which encompasses many types of property. The property must be placed in service before January 1, 2013, and it must be new, not used, property.

Also, the first-year depreciation deduction for qualifying new vehicles is increased in 2012 by $8,000 to $11,160 for autos and $11,360 for light trucks or vans. Heavy SUVs do not qualify, but they do qualify for the 50% first-year bonus depreciation, a $25,000 expensing limit under section 179, and regular first-year depreciation.

Ultimately, sound business strategy must prevail and tax considerations should not force what would otherwise be a poor business decision. Nonetheless, taxpayers should work with their advisors to make sure that they are not shouldering a higher than necessary tax burden due to poor, or no, planning.

A Look Ahead to 2013

By Nate Boderman

As the election season comes to a close, we turn our focus towards the upcoming legislative session. The following is a brief summary of three things that the Land Use and Real Estate group will be watching during the next legislative session and calendar year.

Salem's Unified Development Code (UDC)

While revisions to Salem's development code are commonplace, years of piecemeal amendment have led to a code that can be, at best, confusing, and at worst, inconsistent. It has been nearly 30 years since the last time the City of Salem made a coordinated attempt to update its code. And so, for the first time since "Dallas" was ruling the TV airwaves, and the introduction of the compact disc, Salem is undertaking a wholesale reorganization of its development code.

The code update process was supposed to be confined to those changes that eliminate inconsistencies or clarify the existing requirements. While the UDC should ultimately be easier to use, it will also operate very differently. The most significant policy change will be a shift to use classifications. Instead of long lists of defined uses, as listed in the Standard Industrial Classification (SIC) system, the UDC will employ use classifications. This approach uses descriptive characteristics which help define permissible uses, as compared to the rigid SIC lists. This approach should allow for more flexibility when determining what uses are appropriate in the various zones throughout the city.

Currently, the Planning Commission is holding public hearings on the final sections of the UDC, and should be prepared to give a formal recommendation to the City Council within the next few months. We are preparing for the UDC to be fully implemented by the middle of 2013. If you would like more information on the progress of this project, or would like the most up to date status, visit www.salemcodecleanup.org.

Events at Wineries

We do not expect much activity related to land use laws in the upcoming legislative session with the exception of refinements to rules related to events at wineries. The rapidly expanding wine industry, along with inconsistent application of the rules between different counties has caused this to be an active area of concern at the state level.

Legislation passed in 2011 (HB 3280) expanded and attempted to clarify the permissible uses associated with wineries. These revisions confirmed that wineries were permitted to have tasting rooms, wine tours, and similar activities directly related to the marketing of the product; allowed up to 25 days of private events directly related to the promotion of wine for larger wineries; and created the opportunity for certain facilities to apply for restaurants on-site.

Barely a year after HB 3280 became law, it appears there will be an attempt to again refine the rules. In particular, further defining those activities that are permitted and directly related to the marketing of wine from activities where the

promotion of the wine is secondary, and where additional approval from the county may be warranted.

Other concepts which may be considered include expanding the pool of wineries that may be eligible to serve food and establish kitchens, and creating a streamlined licensing or permitting mechanism for wineries wishing to hold events that fall within a standard set of criteria.

Reforming Urban Growth Concepts

Oregon's land use program has been regarded as both an innovative policy scheme and an inefficient and complex mechanism. Recently, reforms have been proposed that could aid Oregon cities in managing growth. While full implementation of the final reforms is likely years away, the initial concepts that will dictate the process moving forward are being developed today.

Reforms will target the efficient adoption of population forecasts, which are the foundations of growth management decisions. A distinction will be proposed between large and small cities planning for future growth. Cities with a population of under 10,000 could utilize an expedited process provided their growth plans fall within predetermined criteria. Larger cities could benefit from a similar system provided anticipated growth is within "normal" ranges and the cities submit to predetermined criteria in allocating new land relative to growth. For other large cities, approaches may be developed which better respond to the varying growth and absorption rates of cities and which create tools to respond efficiently to land needs for certain kinds of uses, and in certain locations.

Interestingly, in October Oregon's Chief Operating Officer remarked to the Salem Area Chamber of Commerce that as part of the state's internal audit process, Oregon's land use process was identified repeatedly as a program that needed to be streamlined. This may indicate that we see the results of the urban growth policy reforms, as well as an evolution towards simplicity in the land use system sooner than expected.

Over the next 12 months, we will continue to monitor this as well as the other matters discussed above, to ensure we can continue to effectively advise on matters affecting your property, and the procedures that govern land use processes in Oregon.

Bankruptcy: A Debtor's Attempt to Undermine Court- Appointed Receivers

By Dorothy R. Bean

A "receivership" is the process by which a "receiver" is appointed by a court to take charge of a business, certain aspects of a business, or other income-producing property that is facing insolvency or has serious cash flow problems. A receiver manages, operates, and sometimes liquidates a business or property, with the goal of maximizing the total value of the property for creditors. It can be a useful tool for creditors, and can help avoid the costs and complications of bankruptcy.

The use of receiverships continues to increase. Receiverships will likely continue to be a popular option for creditors as the economy slowly recovers. For creditors faced with collecting from a struggling business, a receivership is certainly worth exploring as it may provide a beneficial solution for both the creditor and struggling business.

Notwithstanding the potential benefits, a prudent creditor should also consider the ways a debtor can challenge or undermine a court's decision to appoint a receiver, or the authority of a receiver in performing its duties. This article addresses one of those tactics—the filing of a bankruptcy petition. While this tactic should not necessarily deter a creditor from seeking the appointment of a receiver, it is one factor that should be considered.

The Receiver is Appointed

A receiver is appointed either pursuant to a private agreement between the creditor and debtor, or through the court system if the debtor is uncooperative. Privately appointed receivers generally face fewer challenges, but the appointment of a receiver by a court is often met with resistance by the debtor, and sometimes by

the court system. This resistance is often due to the fact that a receivership is considered an "extraordinary remedy" in Oregon.

For court-appointed receivers, a judge usually requires a creditor to establish one of the following: (1) the debtor is in default, and the loan or security agreement gives the creditor the right to request the appointment of a receiver upon default; (2) the creditor is likely to end up with the property after the dust from the lawsuit settles, and the debtor's actions are likely to materially injure or impair the value of the property or the revenue that it produces in the interim; or (3) the appointment of a receiver would be "equitable," i.e. fair. Because a receivership is an extraordinary remedy, the creditor bears a heavy burden in establishing the existence of one or more of the above circumstances. Even after a creditor meets this heavy burden and a court agrees to the appointment of a receiver, a debtor can quickly undo all of that work by taking advantage of that debt-relief process that has become all too common in today's times—bankruptcy.

Bankruptcy After a Receiver is Appointed

A bankruptcy court has extensive power to "undo" certain transactions that impact the debtor's assets, even if the transaction occurred before the bankruptcy petition was filed, including the appointment of a receiver. In certain bankruptcy cases, the Bankruptcy Code actually *presumes* that the court-appointed receivership should be undone. This presumption is flawed, particularly when considering the heavy burden that a creditor must meet to establish that the appointment of a receiver is warranted in the first place. Fortunately, there are a few exceptions to this general presumption.

First, if the receiver has been appointed to operate and manage all of the assets of a business debtor, as opposed to only certain assets, the debtor may not be able to use a bankruptcy filing as a tactic to oust the receiver. Second, a receiver may obtain bankruptcy court approval to retain possession and control of the assets if, after notice and a hearing, the receiver can establish that the creditors would be "better served" by retaining the receiver.

The bankruptcy-filing tactic is only one of many challenges that a creditor may face in appointing and administering a receivership. However, with the right expertise and forethought, a creditor can anticipate such challenges and plan accordingly.

Conclusion

For creditors dealing with struggling business debtors, a receivership may provide a practical way to preserve the value of a debtor's property, thereby maximizing a creditor's return. However, in analyzing the advantages of a receivership, a creditor should also be aware of the potential risks and challenges involved to ensure that it is the best course of action under the circumstances.

If you have additional questions regarding this article or would like assistance seeking appointment of a receiver, please do not hesitate to contact Dorothy or another member of the Creditor's Rights Practice Group.

Retirement Plan Contribution Limits

By Christine Moehl

The Internal Revenue Service recently announced its 2013 cost-of-living adjustments to retirement plan contribution limits. In general, most of the limits increased for 2013.

	2012 Limits	2013 Limits
401(k) Salary Deferrals	$17,000	$17,500
Catch-Up Salary Deferrals	$5,500	$5,500
Compensation Limit	$250,000	$255,000
Maximum Annual Contribution to a Defined Contribution Plan	$50,000	$51,000
Highly Compensated Employee Threshold	$115,000	$115,000
FICA Wage Base	$110,100	$113,700

FIRM SEMINARS AND ANNOUNCEMENTS

Christine Moehl will be speaking on Healthcare Reform at Silverton Health on **November 13**. Also speaking at the presentation will be Stephanie Dreyfuss, Regional Director of Network Development for Providence Health Plans, and Rob Johnson, VP of Operations for Silverton Hospital.

Saalfeld Griggs PC is pleased to host an evening with Craig Hanneman on **November 29,** at Illahe Hills Country Club. Craig is an Oregon mountain climber who recently summited Mt. Everest. His presentation will include his slides and the story of his achievement.

Shannon Martinez and **David Briggs** will be speaking at the annual BOLI conference on N**ovember 30**, at the Oregon Convention Center. David and Shannon's presentation "Dealing with Garnishments" will focus on employer responsibilities when a wage garnishment is received.

Randy Sutton, **David Briggs** and **Jennifer Paul** will be presenting three sessions on VIVA LOST WAGES. The first session is **November 29**, from 7:15 to 8:15 a.m. at the **Saalfeld Griggs Office**. The second session is **December 4**, from 7:15 to 8:15 a.m, and the third session is **December 6**, also from 7:15 to 8:15 a.m. Many employers play BOLI roulette with their pay practices. What these laws lack in common sense is made up for in complexity. Small technical violations can lead to big awards. Even worse, the laws are strictly enforced, reward employees who conceal potential claims, and offer no sympathy for the employer's good intentions. Don't let your employees hit the wage claim jackpot. If you would like to attend, please email kfranz@sglaw.com

Christine Moehl recently spoke at a special seminar entitled "Preparing Your Business for Health Care Reform" hosted by the Salem Area Chamber of Commerce. The seminar helped local businesses learn how to adapt to health care reform and find options for their human resources departments.

Erich Paetsch recently presented at a seminar hosted by the Salem Association of Realtors on October 25. Erich's presentation addressed the topic "The MERS Mess" regarding recent issues related to the Mortgage Electronic Registration Systems.

Nate Boderman and **Dorothy Bean** recently spoke at the Willamette Valley Commercial Builder Expo on October 26 regarding Construction Contracts. The expo served as a Commercial Construction round up for Salem and the Willamette Valley.