BUSINESS BRIEFS

Legal Developments Affecting Business

Saalfeld Griggs PC

Sound counsel. Smart business.

FALL 2011

THE GLASS IS HALF FULL!

By Doug Alexander

It is amazing how much things can and, in fact, have changed over a span of only a few years. Looking back two to three years, most of us remember with some fondness the growth that we saw in our businesses and industries, enthusiasm in the marketplace, and what appeared to be a "the sky is the limit" kind of attitude among business owners. Then, seemingly without warning, the capital markets crashed, the banking industry was on the ropes, unemployment skyrocketed, and hope and enthusiasm seemed to altogether evaporate. We are here to tell you that the glass is still half full! As we have worked with our clients through this difficult period we have noticed common steps to success which, if they are followed, can help our businesses thrive and refill our glasses until they overflow.

1. **Plan to Succeed.** When the economy was running smoothly, many business owners could survive and thrive with little or no planning – success just happened. Today, business plans are critically important. They help to set a strategic direction, give us a standard by which to measure our progress, and identify problems early so mid-course corrections can be made. Carefully work on and live by budgets, business plans, and marketing plans. They will keep your business headed in the right direction when everything seems to be falling apart around you. If you plan to succeed and then follow that plan, your odds of success will be dramatically improved.

2. **Working "On" Not Just "In" the Business.** As many of us scramble to meet the daily challenges of our businesses, it is easy to get so tied up in working *in* the business that we fail to step back and work *on* the business. Long-term planning and strategic thinking is important, not only for immediate success, but to position your business for future success. Ultimately, all business owners hope to transition out of their businesses one day. That transition may take the form of a sale, transfer to a family member, or shift to key managers. If we fail to work on planning for transition, we are setting ourselves up for failure. Businesses sell, but in today's market, only those that are well run and organized sell for top dollar. Lift your head up from the daily grind long enough to work on your business from time to time.

3. **It's Gonna Take Longer and Be Harder.** In the past, routine business tasks got done quickly and often easily, whether that was negotiating a new contract, obtaining new or extended financing, finding and leasing space, or dealing with personnel issues. Today, uncertainty and fear have brought with them indecisiveness and, as a result, it seems that everything just takes longer and is harder to get completed. We need to anticipate longer lead times to accomplish our goals or we may find that we are up against deadlines that cannot be met given the inability of other parties to move quickly.

4. **Getting to "Yes" is More Difficult.** Have you noticed that getting people to agree to

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things seems to be more challenging today? Just as it takes longer to get things done, it is more difficult to get people to come to terms on matters and say, "Yes." An unwillingness or reluctance to commit is symptomatic of a lack of conviction about what the future holds. Nobody wants to make a misstep, so sometimes we just don't move at all. When people are not sure what the future will bring, they tend to hesitate and we are seeing more and more people hesitate. Anticipate this in your business dealings. Working to identify and address concerns on the front end of your business dealings will inspire confidence in others and will help you get to "yes"!

5. Opportunities Abound for the Stouthearted. To be "stouthearted" is to possess or display courage and to face and deal with danger or fear without flinching. For those with vision and confidence, there are opportunities even in this challenging business environment. The strong and innovative are surviving, as the weak fall by the wayside. There is consolidation taking place in many industries. Niche markets are being found and exploited by those willing to take some risk. This business environment is not one for the foolhardy, but for those willing to carefully analyze and act on opportunities, there are both current and future rewards. We are proud to see some of our clients making the proverbial lemonade out of lemons.

6. Capital is King. A real threat to businesses today is undercapitalization. Banks have certainly learned that lesson. Lending standards have tightened and because obtaining additional capital is so difficult the undercapitalization can often occur. Many businesses have failed early in their lifecycle as a result of underestimating the need for capital. Typically it happens as a result of being far too optimistic in initial business planning. In the past, such mistakes could have been easily remedied but today successful business owners have to carefully evaluated their capital needs, develop and live by realistic budgets, and plan well in advance to meet those needs. Avoid surprises and realize that getting capital today is a far greater challenge than it has been in the past.

7. Conflict Avoidance. Interestingly, people seem to fight more over smaller issues in tough economic times. When times are good, business owners are more willing to look beyond disputes and move on, realizing that their time is better spent building and growing their businesses rather than engaging in a fight. Today, we are seeing a real growth in legal disputes and they take many forms. Disgruntled employees are looking for a way to cash in by suing employers. Customers are failing to pay according to agreed terms. Vendors may deliver inferior goods or fail to meet critical deadlines. When it comes to conflict avoidance, a pound of prevention is worth a pound of cure. You can prepare for the growing propensity of people to engage in conflict by having well-drafted agreements, personnel policies, and credit policies in place.

8. Time Won't Stop. Every day you are one step closer to a future transition in your businesses. Have you adequately planned for this? Will your business be ready? Will you be ready? Will your successors be ready? Well, ready or not, here it comes. Burying your head in the sand will not stop the clock from ticking, the days from passing, or the future transition from coming. It can be a stellar success or an unmitigated disaster – the choice is yours and is dependent upon your willingness to plan and prepare for it regardless of all the chaos and distractions that may be occurring around you. Don't waste a minute, or you may lose the opportunity and be too late. None of us know when our time will come, and we see all too often the damage done by procrastination when it comes to these important issues.

We live in and are conducting business in volatile times. Business is no longer "business as usual." It comes with more risk and greater challenges. But remember the axiom, "The greater the risk, the greater the reward." As successful business people our strength is in seeing and seizing upon opportunities where others see disorder. We can harness our skills and experiences and take advantage of the opportunities we visualize. We can use our past experiences to help us analyze and adapt to change. Our firm is fortunate to work with so many business owners who are visionaries in their fields, and who are both surviving and thriving, even in a slow economy. They are acting proactively, continuing to be smart about how they do business, working with their advisors to manage legal and financial risks and prepare for ultimate transition, and building businesses that are growing in value and will be long-term players in the marketplace.

So, while it would be easy to look at the situation and say that the glass is half empty, we encourage you to reexamine things and recognize that it is really half full. We have all lived through many unprecedented events in the last three years and we are likely see more. However, if we learn from the past and build on our common experiences, we can succeed in helping to refill the glass to the brim.

New DOL Regulations Impose Significant Obligations on Retirement Plan Fiduciaries

By Randy Cook

The U.S. Department of Labor recently issued final regulations that impose new and significant legal obligations on fiduciaries to retirement plans that are subject to the Employee Retirement Income Security Act of 1974 ("***ERISA***"). Both of these regulations become effective in 2012.

Under the first set of regulations, fiduciaries who are responsible for selecting service providers for retirement plans (i.e., investment managers, record keepers, custodians, and certain vendors who receive indirect compensation) must consider a series of new information disclosures provided by the prospective service providers before making a selection. Those disclosures include information regarding the nature of the services to be provided, the extent to which the service provider is acting as a fiduciary, and the amount and type of compensation the service provider will receive. If a fiduciary fails to consider the new information disclosures, he or she will have engaged in a prohibited transaction under ERISA.

Under the second set of regulations, fiduciaries of individual account retirement plans, such as 401(k), 403(b), and 457(b) plans, that allow participants to direct the investment of their accounts have a new affirmative duty to disclose certain information to the plan participants. The information that must now be disclosed includes general plan information (e.g., direction as to how to provide investment instructions), information about plan expenses charged to participant accounts, and detailed information about plan investment alternatives. The new regulations require detailed disclosure on an annual basis and, in the case of plan expense information, on a quarterly basis. A fiduciary's failure to satisfy the new disclosure obligation could result in a breach of fiduciary duty under ERISA.

As a result of the new regulations, it is recommended that employers who sponsor retirement plans take the following actions to remain in compliance:

- Provide training to plan fiduciaries, including investment committee members, regarding their new fiduciary obligations

- Contact plan service providers and vendors about the information that must be provided to plan participants

- Update recordkeeping and communication systems to satisfy the annual and quarterly plan participant disclosure requirements

- Review and evaluate information disclosures provided by service providers and vendors, specifically with respect to fees charged against participant accounts, to ascertain whether fees charged are reasonable

If you would like assistance in bringing your plan into compliance with these new DOL regulations, please contact a member of the firm's Employee Benefit Practice Group.

Selling or Buying Real Property? Seller Financing Is Still a Valid Tool

By Mark Shipman

With interest rates at historic lows and credit constrained, some real estate buyers and sellers are forced to consider alternative forms of financing. Seller financing is still a valid tool for buyers and sellers to use in securing obligations and promises in the buying and selling of real property. Two commonly used instruments to secure the sale of property are land sale contracts and promissory notes with trust deeds. This article is intended to briefly highlight these two financing instruments, discuss some benefits and pitfalls to seller financing, and briefly overview the remedies that can be pursued under both instruments.

Land Sale Contracts

Essentially, a land sale contract involves a contract between a seller and a buyer where the seller is financing the purchase instead of a bank. The buyer agrees to make regular payments; the seller retains the title to the property and, upon full payment of the purchase price, will convey the (deed) title to the buyer.

The land sale contract typically consists of a single document that contains standard contract provisions and specific provisions agreed upon by the parties for that particular property sale. In addition to the contract form there are two additional documents that are generally used – a memorandum of contract and a deed. A land sale transaction can include a memorandum of contract which gives notice that the property has been sold, but keeps the terms of the sale private. The final document is a deed. Whether that is a statutory warranty deed or a bargain and sale deed can depend on the parties' preference and facts surrounding the seller's ownership of the property. The deed is not recorded until the contract is paid in full. Instead it can be held in escrow with joint instructions, signed by both parties, that upon payment of the contract the escrow company is to record the deed.

Trust Deeds

A trust deed is an instrument between the seller as "beneficiary" and the buyer as "grantor" in which the seller finances the purchase instead of a bank. The buyer agrees to make regular payments to seller as the beneficiary. Unlike with land sale contracts, with trust deeds there is an unrelated third party that serves as the trustee. This party is normally a title company.

In addition, a promissory note is used in conjunction with a trust deed. The promissory note is used as a promise from the buyer to pay the seller the loaned amount on certain terms at certain times. Similar to the land sale contract, trust deeds and promissory notes can come in all shapes and sizes. They can include standard provisions based on the location of the property and specific provisions inserted based on the unique aspects of the particular transaction (for example, a requirement that the buyer paint the house every five years). The trust deed can be recorded in whole or a memorandum of trust deed can be used if the parties determine they don't want the entire trust deed to be of record. Finally, a deed is recorded evidencing the buyer's ownership of the property.

Benefits of Seller Financing

- May allow a buyer to obtain real estate even if they would not be able to obtain financing through the normal loan process.
- Under the right circumstances it can be a good fit for seller and buyer.
- May allow a buyer to build credit and equity.
- Works best if seller has no prior security instrument (trust deed, mortgage, or land sale contract) on the property.
- Under a land sale contract, the seller remains on title.
- Under a trust deed and promissory note, the buyer obtains title.

Pitfalls of Seller Financing

- More risk to both the buyer and the seller.
- If the seller has an existing trust deed, or is buying on contract from someone else, the assignment/ assumption of that prior contract/note is not guaranteed.

- Most contracts and trust deeds have "due on sale" clauses that are triggered when the seller attempts to sell their property on contract or on a trust deed when there is a prior recorded land sale contract, mortgage, or trust deed on the property. This can put both parties at risk, particularly in this lending environment.

- If the seller stops paying on their prior contract or trust deed, the buyer is at risk, or if the seller breaches the prior contract or trust deed (i.e., files for bankruptcy or violates the law) the buyer is at risk.

- If the parties are not represented by an attorney, they could be missing important provisions and safeguards for the buyer and the seller.

- If the parties do not use a title company for closing/escrow they could be at risk for future sales if no title insurance policy is issued. Also, if they are not represented by a realtor or an attorney they could be missing important provisions and safeguards.

<u>Remedies</u>

Remedies under land sale contracts and trust deeds are different. For example, land sale contracts generally contain provisions for such remedies as statutory forfeiture, strict foreclosure, or specific performance. Remedies under trust deeds generally involve foreclosure.

There is a statutory right of forfeiture under the land sale contract. In theory, this can be "quicker" than a non-judicial foreclosure. However there is a catch. The Oregon statutory forfeiture and time to cure provisions are governed by how much equity the buyer has in the property:

- If buyer has > 75% of debt in relation to value of the property, the buyer has 60 days within which to become current on the contract;

- If buyer has > 50% but < 75% of debt in relation to value, then the buyer has 90 days; and

- If buyer has < 50% of debt in relation to value, then the buyer has 120 days.

The two most common remedies under trust deeds involve either judicial or non-judicial foreclosure. Judicial foreclosure enables the beneficiary (seller) to clear the property of inferior interests in the event of questionable or competing claims or liens. If there are no third party claims, liens or other creditors, non-judicial foreclosure is a quicker method to gain possession and ownership of the property if needed.

<u>Conclusion</u>

Picking which instrument to use in a seller financed real estate transaction depends on a number of factors. Often time there is no "perfect" instrument but, regardless of whether you use a land sale contract or a trust deed, the instrument needs to be crafted to fit the specifics of your transaction. If you are contemplating using seller financing, contacting one of the firm's Real Estate and Land Use attorneys and setting up a meeting to discuss your goals can ultimately save you money and result in a more secure transaction.

Got A SNDA? Why You May Want One

By Erich Paetsch

To date, commercial property owners, tenants, and lenders have weathered the great recession and thereby avoided the historic delinquency and foreclosure rates affecting residential property. However, the storm appears to be growing more ominous in the commercial property markets. Payment delinquencies on commercial mortgage-backed security loans hit a record high of 9.01% in July of 2011, according to Fitch Ratings. Landlords, tenants, and lenders should anticipate seeing significant turnover in the ownership of commercial properties in the coming years, particularly through commercial foreclosure actions.

Despite a recent flurry of legislation and regulatory activities, commercial foreclosure laws remain relatively unchanged. Many states, including Oregon, permit a lender to terminate a subordinate lease following the completion of a commercial foreclosure. In an environment of economic uncertainty, many lenders and commercial tenants are insisting upon the use of a Subordination, Non-Disturbance and Attornment Agreement ("*SNDA*"). By addressing the relationship between lender, landlord, and tenant in a contract, the legal uncertainty that a commercial foreclosure presents can be eliminated.

A SNDA permits the lender and tenant to confirm or shift rights and address many of concerns that a commercial foreclosure creates. Typically, a lender wants to preserve a rental income stream following foreclosure. When commercial vacancy rates increase, the value of retaining a tenant increases. A commercial tenant will want to ensure that if the landlord defaults to its lender, the tenant will not forfeit its lease. Given growing incentives and attractive leases being offered by landlords to obtain or retain commercial tenants, ensuring the lease survives foreclosure is crucial. Moreover, any commercial tenant who invests significant capital for tenant improvements has an added incentive to ensure a commercial lease survives foreclosure. Finally, landlords may wish to preserve the value of a commercial income producing property to limit any deficiency recovery the lender can obtain following a foreclosure proceeding. A carefully drafted and negotiated SNDA between the lender, landlord, and tenant can help balance these concerns.

A SNDA consists of three distinct sections: (1) an agreement by the tenant to subordinate its lease to the lender's security interest; (2) an agreement by the lender to not disturb the tenants lease interest after foreclosure; and (3) an agreement to the tenant to recognize the lender as its landlord after foreclosure. These three components together help a lender, tenant, and landlord resolve potential conflicts and challenges that can arise in a commercial foreclosure proceeding.

Subordination. For a lender, the subordination provision is critical. If the lease predates a loan, ensuring that the lease is subordinate is important if the lender wishes to terminate the lease in the future or, if the tenant and owner are related parties, ensuring that the lender can control the property without being trapped in an awkward relationship with someone they just foreclosed upon. In addition, should the lender wish to take possession of the property quickly and avoid foreclosure, having a clear subordination agreement in place may avoid the need to foreclose on a commercial tenant. However, a prudent tenant will also insist upon the inclusion of a non-disturbance provision within the SNDA to protect itself against the rights of the lender.

Non-Disturbance. The non-disturbance provision allows a tenant to ensure that its lease survives a commercial foreclosure, so long as it is not in default. Typically, a lender and tenant agree in the non-disturbance clause that, if a foreclosure occurs, the lender is bound to honor the lease. Such a provision provides certainty and stability to the tenant and can encourage the tenant to invest in greater improvements to the property or to agree to longer lease terms than might otherwise exist. As a party to the lease, the lender and tenant must also agree how the lease terms will apply to each of them following a foreclosure.

Attornment. The attornment portions of a SNDA permit a lender to assume the rights and obligations of the landlord following foreclosure. More importantly, it binds the tenant to the lease, regardless of whether the tenant is in default under the lease.

The three parts of a SNDA should work in concert with each other. Without each of the three provisions, one party or the other is in a position to dictate the outcome of a commercial foreclosure. For example, a SNDA without attornment leaves the tenant in the position to terminate the lease as the market might dictate.

The approaching storm of commercial defaults makes the use of a SNDA increasingly important for lenders, landlords, and tenants in commercial transactions. As lenders evaluate refinancing existing commercial property loans or negotiate workout agreements with past due landlords, a current SNDA for tenants is critical should a foreclosure occur in the future. A commercial tenant renewing or entering into a new commercial lease should carefully consider the terms of any SNDA and, if one is not presented, insist upon it as part of any lease transaction.

Given the growing potential for commercial foreclosure, a clear understanding of the risks as a tenant at the outset of a lease is important. Finally, a landlord can benefit by ensuring that a SNDA is in place. Should a commercial foreclosure occur, ensuring that a long-term tenant remains in the property will retain value for a property and help to avoid potential lender deficiency claims for the amount owed upon the loan in excess of the value of the property. While numerous form SNDA agreements exist on the internet, such forms are ill suited to address the specific issues and interests of a party in any given transaction.

Ensuring that a SNDA addresses your specific risks, issues, and concerns is something that the lawyers of Saalfeld Griggs are educated about and trained to accomplish.

FIRM SEMINARS AND ANNOUNCEMENTS

The Employment Practice Group will be presenting a seminar entitled "Saw You on Facebook...You're Fired - Employee Privacy in the Age of Social Media" on Tuesday, September 13, 2011 and Thursday, September 15, 2011, from 7:15 to 8:15am at our office. The seminar will focus on recent changes in the law that affects the complicated issue of employee privacy in the workplace. If you would like to attend the seminar on either day, please contact Kayla Franz at 503.399.1070 or kfranz@sglaw.com.

Erich Paetsch has joined the academic advisory council for Willamette Academy. Willamette Academy at Willamette University is a college access program committed to empowering youth who have the desire and potential to advance to higher education, targeting those who are historically under-represented at colleges and universities in the United States. Willamette Academy is a supplemental education program in which diverse students are challenged and inspired to enhance their critical thinking skills, see themselves as leaders in their community, and develop a love of learning.

We are also proud to announce that *Erich* has been selected to join the Oregon Artist Series Foundation (OASF) as a board member. The OAS exists to foster the exhibition of art in public spaces in Salem and to encourage the development and maintenance of the City of Salem's public art collection for the benefit of residents and visitors for years to come. The OASF has focused its efforts on organizing and mounting annual year-long exhibitions featuring the work of contemporary Oregon artists at the Salem Conference Center. As part of the exhibition program, the OASF also established the Mayor's Award, a purchase prize which adds to the Salem Conference Center's art collection. The catalogs that accompany each exhibition contribute to regional arts scholarship and the permanent documentation of the state's considerable artistic talent.

Andrew Naylor and *Alan Sorem* participated in the Salem Chamber of Commerce's dragon boat team. The goal of the Chamber team is to help raise money for the Oregon Paralyzed Veterans of America. In addition to helping a worthy cause, the dragon boat raises provided a great opportunity to meet with local business owners and existing clients. The hard work and long practices with their fellow teammates culminated in a series of (mostly) successfully races at the Salem World Beat Festival. Great job guys!

On June 23rd, the women attorneys of Saalfeld Griggs, *Shannon Martinez*, *Christine Moehl*, *Jennifer Paul*, and *Dorothy Ryan*, hosted the second annual "Celebrating Women In Business" event. The event was created by Saalfeld Griggs in 2010 to honor Salem's many business women for the work they do to strengthen the community and local economy. In addition, the event highlights some of Salem's women-owned downtown shops and boutiques. This year's event began with drinks and appetizers at the historic Elsinore theater and a moving address by Jane Berg, the outgoing Chamber President and local business owner. Following Jane's presentation, each attendee received a gift card to one of the evening's featured stores, which included The Arbor, Mary Lou Zeek Gallery, Gallaghers Fitness Resources, Bittersweet Boutique, and Lullu's Tutto Cucina. The attendees shopped well into the evening and enjoyed a different dessert at each shop. Saalfeld Griggs is looking forward to hosting the third annual "Celebrating Women in Business" event next year. If you are a women business owner who is interested in being featured at the event or if you are interested in attending, please contact the firm's marketing coordinator, Gabrielle James, at gjames@sglaw.com. Thank you to everyone who participated to make this a fun and worthwhile evening celebrating Salem's women in business!