BUSINESS BRIEFS

Legal Developments Affecting Business

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SUMMER 2010

A FAILURE TO PLAN IS A PLAN TO FAIL: REAL LIFE LESSONS & BLOOPERS

By Bob Saalfeld and Doug Alexander

Often life's most important lessons are not those that are learned in meetings or classes, but those that are learned from the school of hard knocks. These lessons are more personal, more immediate, and often more memorable. Planning takes time, but it is usually worth the effort. Here are some examples, both good and bad, of how planning (or the lack thereof) has impacted a few of our clients.

1. **An Ounce of Prevention vs. a Pound of Cure:** As business owners, we frequently want to move forward quickly with our business plans, sometimes at the expense of crossing the t's and dotting the i's. This can be like playing Russian Roulette. For example, a client negotiated a complex licensing agreement and we were asked to prepare the contract. This took time and added cost, but the agreement was ultimately executed by both parties. Later, when a dispute arose, key details that were negotiated and properly documented in the contract became the key to enabling our client to obtain a favorable outcome. Contrast that with the case of a client who negotiated a deal and then chose to write it up himself, without the benefit of legal counsel. Later, when a disagreement arose and we were consulted, we had to advise the client that (a) their case was not good because important components of the agreement were never adequately documented and (b) that the cost to defend the case would be prohibitive and risky because there was no right under the agreement to recover attorney fees as a prevailing party. The client was forced to settle on unfavorable terms at a much higher cost than had he properly documented the transaction at its inception.

   The Lesson: An ounce of prevention is always more efficient and less costly than the later pound of cure.

2. **Good Plans Make for Fewer Worries:** Having an effective business plan is critical. For example, a successful business owner worked with us over a period of years on developing and implementing a detailed transition plan for his business. It involved extensive estate planning work, gifting strategies, formation of new companies, shifting responsibilities within the company, and letting go of control over a period of time. This work was done with the involvement and approval of all family members. Regular meetings were held with the members of the family, other key members of their management team, and professional advisors. The plan was flexible,

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and while the group remained focused on the goal, they were also willing to adapt to changes resulting from family needs and shifts in their industry. Suddenly and without warning, the founder of the business began experiencing heart problems. On very short notice, he was admitted to the hospital and underwent open heart surgery. Fortunately, the founder's skills and knowledge had been transferred to his successors. Family members were able to focus on the health of the founder rather than worry about whether adequate plans were in place in the event of his death. The founder survived the surgery, recovered and returned to work, and the business did not skip a beat. Incidentally, if the founder had died he did have an effective estate plan in place which eliminated an additional source of concern for the family.

The Lesson: Preparation and planning enables you to effectively manage the business during times of crisis.

3. **Change Happens:** Two business owners came to our office for assistance in the formation of a new business. They had been life-long friends and wanted to form a partnership for their new venture. Any discussion regarding the possibility of a future breakup was glossed over. Nevertheless, their able CPA insisted that he would not represent them unless they followed our counsel and negotiated a suitable Buy-Sell agreement. They felt that the exercise was a waste of both time and money. Surprisingly, in less than 90 days, the friendship of over 50 years was destroyed and the same business owners came in again to discuss how they would separate. Now the Buy-Sell agreement that they thought was pointless became the solution to their dispute because the mechanisms and terms for their separation had already been agreed to.

   The Lesson: No matter how certain you are about the future, prepare for the unexpected and plan for change. More often than not it will occur and you are best to have prepared in advance.

4. **Don't Assume:** A client, after developing a very successful business, assumed that his only child would take over the business on his retirement. No discussion ever took place and no real planning for retirement was ever done. When the day came, the client was quite surprised to learn that his child had decided that he did not want the responsibility of running the business. This resulted in a complete change of plans on short notice with a less favorable outcome for the business owner. The business was eventually sold because there was no natural successor.

   The Lesson: Don't assume that others will want what you want. Open lines of communication are essential.

Remember, a failure to plan is often a plan to fail. If you would like assistance with your business planning, please give Bob or Doug a call.

Healthcare Reform: What You Want and Need to Know Now

By David Briggs

The dust is now settling on the health care reform legislation passed in March. We all know that the new law will change how health insurance companies and employers provide benefits to employees. At this point, most employers understand that the new legislation does not require employers to provide health benefits. However, employers are still confused about their obligations under the law, when their obligations kick in, and what penalties they may face.

The law itself is massive at over one thousand pages. It will take eight years to implement and will cost an estimated $938 billion over ten years. The law is incredibly complex, covering both tax and nontax issues. It provides many carrots (mostly in the form of tax incentives) and sticks (like the assessment of excise taxes to large employers and to individuals opting out of coverage) to steer employers towards providing health benefits for their employees and to ensure that all individuals are covered.

How this behemoth of a law affects your workplace in the near future depends on the size of your business. If your business has fewer than 25 employees, all of your employees have average wages of $50,000 or less, and you contribute at least 50% of the health insurance premiums for your employees, then your business will be eligible for a tax credit of up to 35% of its contribution to health insurance premiums. This credit will increase to 50% in 2014.

For organizations with 50 or more employees who provide employee health benefits, no tax credits are provided. Starting in 2014, however, organizations with 50 or more employees that don't offer health benefits will be subject to a tax penalty of $2,000 per employee, although the first 30 "non-covered" employees are excluded from the penalty calculation.

There are many other changes that will apply, regardless of the employer's size, on the date of their next plan renewal after September of this year. For most organizations, that will mean that there will be a slew of changes that occur on January 1, 2011. Here are a few of those changes:

Reporting Value of Benefits on W-2

Beginning in 2011, organizations will be required to disclose on W-2s the value of each employee's health insurance coverage.

Changes to Flexible Spending Accounts (FSAs)

Currently, if organizations set up an FSA, employees can use pre-tax dollars to pay for medical deductibles, co-pays, over-the-counter drugs, prescription medications, and a wide variety of other benefits. Under the new law, beginning in 2011, employees will not be able to use FSA funds for over-the-counter drugs. Beginning in 2013, payroll deductions to an FSA will be limited to $2,500 per calendar year. Organizations should clearly communicate the new rule changes in order to prevent employees for allocating too much money into their FSAs.

Extension of Coverage to Adult Children Under Age 27

Health plan coverage must be extended to the child of an employee until that child reaches age 27 if the plan provides coverage for dependents, and the child is not eligible to enroll in coverage under another employer's health plan. Coverage should be offered even if the child is not a dependent under the IRS definition; the child has a job (that does not offer group health benefits); is married; and/or has kids of his/her own. Organizations should coordinate with their benefit providers about who will notify employees of this change.

Pre-existing Condition Limitations Do Not Apply to Employees' Children Under Age 19

A health plan can no longer exclude a child under the age of 19 from coverage based on that child's pre-existing condition. This same exclusion will apply to all individuals beginning January 1, 2014.

No Lifetime Caps on the Value of Health Benefits

Most plans have a maximum lifetime limit on the amount that will be paid during the life of a covered individual. This limit will have to be removed for "essential benefits" such as emergency services, hospitalization, prescription drugs, rehabilitative services, preventative and wellness services, and chronic disease management.

Please call a member of our Employment Practice Group if you have any questions about the health benefits you are providing to your employees.

A Status Report on the 2010 Estate Tax

By Amy LeFore & Jeff Moore

It may be said that 2010 is a year that estate planners never thought would come. Now that it's here (and nearly half over), we remain skeptical that the federal estate tax system will keep its current form for the remainder of 2010. In order to understand our skepticism, you need to know a little of the history behind the current estate tax system.

In 2001, Congress passed a law that established an estate tax system that gradually increased the amount that could pass to the next generation estate tax free. This law also included provisions that ultimately repealed the estate tax in its entirety as of 2010. However, the legislation did not receive enough votes to make the 2010 repeal permanent. The end result is that the federal estate tax was repealed for the year 2010 only. To add to the confusion, there are also significant changes in how basis is determined for inherited assets in 2010.

However, because the repeal is not permanent, starting January 2011 the estate tax law returns to its pre-2001 form. In other words, we return to a $1 million estate tax exemption for 2011 and all subsequent years. This level of exemption varies greatly from the estate tax exemption amount in 2009, which was $3.5 million. Because the federal estate tax percentage was a flat rate of 45% in 2009, the concept of returning to a $1 million exemption amount with a marginal estate tax rate of 41% to 60% is concerning to many.

In the years preceding 2010, most estate planners were confident that Congress would vote to modify the system and would not permit the 2010 repeal to occur. But, as we've learned, it's risky business to predict what will happen in Washington, D.C. So, before anyone gets too excited about the reprieve from estate tax in 2010 (remember, one has to die this year to take advantage of the repeal), Congress may have another surprise in store for 2010: retroactive reinstatement. Many experts and commentators close to the action in Washington, D.C. have issued warnings that estate planners should not rely upon the 2010 estate tax repeal. In fact, they are predicting that Congress will vote to reinstate the estate tax at some level and make any changes retroactive to the beginning of 2010.

So what does this mean for your own personal estate plan? In order to determine this, you should consider dusting it off and reviewing its provisions. If the design of your plan specifically mentions that a certain beneficiary will receive "all funds that can pass free of federal estate tax" then be aware that in 2010 this would mean that this particular beneficiary would receive your entire estate. This may not be the outcome you had anticipated.

Furthermore, if your plan uses a marital funding formula to address estate tax concerns when either you or your spouse passes away, the formula should be reviewed by your estate planning attorney because most formulas anticipated some level of federal estate tax. Your plan should also be structured to address the fact that the Oregon estate tax exemption, an entirely separate death tax from the federal system, is fixed at $1 million for 2010 and all subsequent years (with no anticipated changes on the horizon).

Although we cannot tell you what the future will bring, our advice is to pay close attention to the actions of Congress as the second half of the year unfolds. Also, you should become familiar with the terms of your own estate plan so that, if the unexpected should occur, there will not be any unintended results. Finally, let us remind you that flexible planning is important – now more than ever.

If you have questions regarding this article or would like assistance with your estate plan, please give Jeff or Amy a call.

Lien Times: Understanding the Limits of PACA and Other Liens Protecting Against Unpaid Agricultural Debts

By Erich Paetsch and Ryan Orr

In times of economic uncertainty, business owners commonly explore tools to help decrease economic risk. An agriculture lien is one such tool used by many agricultural businesses. Many different types of agricultural liens exist under both state and federal law and these liens are generally not well understood. In particular, knowing when a lien applies and who it impacts can greatly affect whether a farmer is timely paid. This article briefly explores the Perishable Agricultural Commodities Act and how the reach of Oregon's agriculture lien statues is affected by a recent court opinion.

The Perishable Agricultural Commodities Act

The Perishable Agricultural Commodities Act ("***PACA***") is a federal tool that can help protect farmers throughout the United States. PACA creates a statutory trust for sellers of perishable agricultural commodities. The trust protects farmers against the competing claims of creditors with security interests in inventory and accounts receivable. All brokers, dealers, and commission merchants who purchase perishable agricultural produce must hold the produce, all receivables from the sale of the produce, and any other proceeds from the produce in trust for the benefit of these unpaid farmers. All unpaid farmers who have an interest in this trust are paid equal shares of the trust – up to their unpaid amount – before the other creditors of the broker, wholesaler, or commission merchant are paid.

PACA's chief benefit is that an interest in the trust has priority over statutory agricultural liens and secured creditors. Therefore, if a lien holder or secured creditor wishes to foreclose on, or assert its priority in bankruptcy over, the assets of a broker, wholesaler, or commission merchant, the creditor will be paid only after all unpaid farmers with a PACA interest are paid.

This priority does, however, come with its own set of disadvantages. First, PACA does not apply to as many transactions as do statutory agricultural liens. Second, any seller of produce must jump over a few hurdles to ensure that it properly maintains its interest in the PACA trust.

Does PACA Apply to My Produce?

If you are thinking about taking advantage of PACA's protections, the first question to ask is whether PACA applies to your produce. Generally, PACA will apply if:

1) You are a seller of fresh or frozen fruit or vegetables, or cherries in brine;

2) You sell your goods across state lines;

3) You sell to one of the following:

    a. A ***commission merchant*** who sells your produce on your behalf and you pay the merchant a commission for doing so;
    b. A ***dealer*** who buys 2,000 pounds of produce on any given day of the year *or* a retailer who purchases over $230,000 in produce each year;
    c. A ***broker*** who negotiates the sale of your produce to a vendor or supplier who purchases over $230,000 in produce each year;

4) Your payment terms are in writing and payment is not due more than 30 days from the date of receipt and acceptance of the produce; and

5) If you are a member of a cooperative, your transaction is not between other members of your cooperative.

PACA's Hurdles – The Terms of Your Invoice

If you fit the above criteria, your transaction will create a PACA trust interest in the produce and receivables of the broker, dealer, or commission merchant to whom you sold the produce. However, to make use of the benefits of PACA, you must comply with a few more requirements. How you go about meeting these requirements depends on whether you are registered with the United States Department of Agriculture ("***USDA***") as a PACA seller. The USDA requires that any person who buys or sells more than 2,000 pounds of produce on any given day of the year must obtain a PACA license to become a registered PACA seller.

If you are a registered PACA seller, you can preserve your PACA rights by including the following language on your invoices:

> *The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 USC 499E(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.*

If you are not a registered PACA seller, you can still preserve your PACA rights by giving written notice of your intent to preserve your PACA trust interest no more than 30 days after the date that payment was due or a payment instrument was dishonored. This notice must include:

1) your name and address;

2) the buyer's name and address;

3) the goods, date, and terms of the transaction;

4) if applicable, the date that you received notice that the buyer's payment instrument has been dishonored; and

(5) the amount past due and unpaid.

Finally, although PACA does not explicitly provide for an award of attorney fees to unpaid farmers, the 9th Circuit of the U.S. Court of Appeals (of which Oregon is a part) allows for the recovery of attorney fees from the PACA trust <u>only if</u> the underlying contract between the seller and buyer awarded attorney fees to a prevailing party in an action to enforce the contact. Accordingly, make sure your invoices include an attorney fee provision.

Oregon Agricultural Liens

The Oregon legislature created an extensive series of liens that can apply either in addition to PACA or when PACA does not apply. While the requirements for successfully maintaining these liens are beyond the scope of this article, one important difference exists between PACA and Oregon state liens. Under PACA, the goods must cross state lines to obtain protection of a PACA lien. By contrast, a recent U.S. Bankruptcy court decision out of the Western District of Washington State, <u>*In re Symons Frozen Foods, Inc.*</u>, implied that Oregon liens literally jump off the truck as it crosses state lines. In other words, an Oregon Seller cannot impose its lien rights on parties located in other states.

The potential implication of the judge's decision in *In re Symons* is far reaching. Given the national and international nature of agriculture today, limiting the benefits and protections of Oregon's agricultural lien laws ignores the practical realities of business today. A prudent farmer will explore not only the application of PACA but whether state lien laws exist in the states where the agricultural goods are being transported or processed as well. By seeking the benefits and protections under that state's laws in addition to Oregon, the risk of losing any lien rights that might exist when PACA does not apply or in addition to PACA may be moderated. Unless or until additional national legislation is created to ensure lien rights beyond those provided by PACA, this may be the only recourse for farmers who are seeking protection from economic insecurity in the current market.

Conclusion

It is unknown whether future judicial decisions will arrive at similar conclusions about the scope of Oregon state liens. However, in the meantime, if used properly PACA can provide some protections for the benefit of unpaid sellers of perishable agricultural produce. In addition, knowing who the purchaser of the produce is and perfecting lien rights in states beyond Oregon may also provide additional protection to sellers.

If you would like additional information regarding this article, please do not hesitate to contact Erich or Ryan.

FIRM SEMINARS AND ANNOUNCEMENTS

On June 25th, ***Jeff Moore*** will present at a Basic Estate Planning and Administration seminar cosponsored by the Estate Planning and Administration Sections of the Oregon State Bar. Jeff's presentation is entitled "Gifting in Today's Tax World: Loophole or Noose?" and will cover the pros, cons and formulas relating to gifting issues, as well as a variety of other gifting-related topics. The seminar will be held at the Oregon Convention Center in Portland.

Randy Sutton and ***David Briggs*** of the Saalfeld Griggs Employment and Litigation Practice Groups announce the following events:

Employment Legislative Update – On June 22nd and 23rd, Randy Sutton and David Briggs will present a breakfast seminar on recent employment law legislation. The seminar will be held at Saalfeld Griggs. If you wish to register for this event, please contact Katie Axell at 503-399-1070.

Marion County Bar Association CLE – A CLE entitled "Employment Law for Non-Employment Lawyers" will be presented by Randy Sutton and David Briggs on June 15th. This interactive CLE is designed to help lawyers spot red flags and navigate more safely through the employment law minefield. This brownbag CLE will last one hour and take place at 12pm in Courtroom 4A of the Marion County Courthouse. The cost is $10 for MCBA members and $15 for non-MCBA members. Please contact Natasha Bachelu at 503-399-1070 to register in advance. If room space allows, you may also register the day of the CLE.

HR Basics – On June 4th, Randy Sutton and David Briggs presented a full day program on the basics of employment law, along with Cascade Employers Association. This seminar was held at Willamette University and attended by both novice and experienced HR professionals and administrative staff. HR Basics is an annual event, so if you missed this session, please check back with us in 2011 to register for the next HR Basics course.

Shannon Raye Martinez recently made a presentation to the Salem Association of Realtors entitled "Foreclosure – Fair Housing Impacts on Tenants and Loan Modifications." She will also be presenting the same topic to the Women's Counsel of Realtors on June 17th. This presentation explains how recent federal and state legislation regarding foreclosures and the Fair Housing Act impacts homeowners and tenants.

We are proud to announce that ***Caleb Williams*** was recently awarded with the Clara Barton Honor Award for Meritorious Volunteer Leadership at the annual banquet for the Willamette Chapter of the American Red Cross. This award is the highest honor given at the local level of the American Red Cross. Caleb has served on the board of the Willamette Chapter for the past six years and has served as chairman for the past two. In addition to leading the board, Caleb is also a member of the chapter's Governance and Nominating Committee, Finance Committee, Philanthropy Committee, and Diversity Committee. Saalfeld Griggs is proud of Caleb's service to our community. Congratulations, Caleb!

Please continue to check our website for new announcements and upcoming seminars.