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INSIGHTS and Developments in the Law

Federal Stimulus Package Benefits Small Business Owners

by Cynthia Brooks

The American Recovery and Reinvestment Act of 2009 was signed into law on February 17, 2009 and is commonly referred to as the stimulus package. The Recovery Act contains several provisions that are designed to assist small businesses. Some of these provisions are only expected to be funded through the end of 2009 or 2010, so the time to apply is now.

Under the Recovery Act, the SBA has temporarily eliminated some borrower fees and temporarily increased guarantees up to 90% on the 7(a) program, the SBA's most common loan program. The fee elimination makes more capital available to businesses at a lower cost. The SBA will refund qualified fees that have already been paid on those loans to lenders, who will then be required to reimburse the borrowers who paid the qualified fees. Before the Recovery Act, a 7(a) loan of \$300,000 carried a guarantee fee of between 2 and 3 percent. That same loan today, with the new 90% guarantee and the temporary fee elimination, would save a borrower about \$8,100.

The Recovery Act recognizes that these economic times have caused many small business owners to have difficulty repaying debt they normally pay on time with relative ease. As a result, the Act has implemented America's Recovery Capital Loan Program ("ARC"), which provides up to \$35,000 in short-term debt for viable small businesses that can show that they will return to viability after receipt of one ARC loan. ARC loans are interest free, carry a 100% guaranty from the SBA to the lender, and require no fees paid to the SBA. ARC loan proceeds are provided over a 6-month period and repayment of ARC principal payments are deferred for 12 months after the final disbursement of loan proceeds. Repayment of an ARC loan can be made for up to 5 years. To qualify for an ARC loan, a small business must have valid financial statements that show that it was profitable for one of the past two years, and be able to

reasonably project sufficient cash flow to meet current and future loan payments over a two-year period from the ARC loan approval date. Even existing SBA loans can be repaid with an ARC loan.

The Certified Development Company ("CDC") is a 504 SBA loan program that is a long-term financing tool that supports economic development within certain communities. Under the CDC/504 program, a growing

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November 30, 2009 Deadline for Filing for Reimbursement of Non- Residential Development Fees

The New Jersey Economic Stimulus Act, enacted July 27, 2009, gives relief from the payment of COAH 2.5% Non-Residential Development Fees (NRDF) for some but not all developers. Developers are encouraged to investigate whether they are entitled to a credit for already paid NRDFs. Municipalities, in reviewing requests for reimbursement of already paid NRDFs are advised to review when the subject project received its approvals before reimbursing the developer.

The NRDF Claim Form with instructions is available on COAH's website at www.nj.gov/dca/affiliates/coah/regulations/nrdf. If you think you may be eligible for reimbursement of part or all of the 2.5% NRDF fee you previously paid, the NRDF Moratorium FAQ (frequently asked questions) is a good reference. It can also be found on COAH's website.

If you have further questions or require advice regarding Affordable Housing regulations and law, contact Nilufer DeScherer at ndescherer@hertenburstein.com. ▲

Buying or Selling a Business: Letters of Intent

By Gianfranco A. Pietrafesa

The first article in this series discussed non-disclosure or confidentiality agreements. This article discusses letters of intent and term sheets, which set forth the basic terms of a deal. It is usually the second document signed by the parties when selling or buying a business.

There are a number of reasons to use a letter of intent. First, it allows the parties to summarize the key terms and conditions of the transaction, which reduces or even eliminates future misunderstandings during negotiations of the contract documents. A letter of intent also identifies problems (or deal-breakers) in the early stages of the negotiations, before incurring the costs of negotiating and preparing the contract documents and performing due diligence on the seller.

Second, if the period of time between the signing of the letter of intent and the closing of the transaction is significant, the letter of intent can govern the parties' relationship during this time period. The time period can be significant depending on, for example, the scope of the buyer's due diligence on the seller, and the number of consents or approvals that need to be obtained from third parties, such as landlords.

Third, a buyer can use a letter of intent to obtain financing from a lender. Fourth, a letter of intent can be used to comply with certain regulatory requirements. For example, the parties can use a letter of intent to satisfy Hart-Scott-Rodino Antitrust Improvement Act filing requirements, and perform due diligence and negotiate the contract documents during the required waiting period under the law.

Contents

A letter of intent should include the following provisions.

1. **Structure** – A description of the transaction; for example, whether it will be a stock purchase or an asset purchase.
2. **Exclusions** – A description of any assets or liabilities that will be excluded from the transaction.
3. **Price** – The purchase price or the method for determining the purchase price, and any adjustments to the same.
4. **Payment Terms** – The payment terms, such as whether the purchase price will be paid in cash, notes and/or securities.
5. **Indemnification/Escrow** – A description of any indemnification obligations of the seller and any amount of the purchase price to be held in escrow.
6. **Employment** – Identification of any employment or consulting agreements for the seller's employees and non-competition agreements for the selling shareholders.
7. **Conditions** – Any conditions that must occur before closing; for example, financing to be obtained by the buyer, satisfactory due diligence by the buyer, consents to be obtained from third parties (such as landlords), receipt of approvals from directors and shareholders, and necessary approvals to be obtained from regulatory agencies.
8. **Due Diligence** – The scope, time period and procedures for the buyer's due diligence of the seller's business.
9. **Confidentiality** – If the parties entered into a non-

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small business can obtain fixed-rate financing for purchasing, renovating or expanding major fixed assets such as land, buildings, machinery and equipment, but 504 loans are not made to businesses engaged in real estate investment. The Recovery Act allows 504 projects to include a limited amount of debt refinancing if there is a business expansion and the debt refinanced does not exceed 50% of the projected cost of the expansion. "Expansion" includes any project that involves the acquisition, construction or improvement of land, buildings or equipment for use by the small business. Under the program, a 504 loan is required to create or retain a minimum number of jobs within two years of the loan disbursement as a result of the project or to meet other defined economic development objectives. Some fees are also temporarily eliminated for both borrowers and third-party lenders on CDC/504 loans.

For more information on SBA financing, please contact Cynthia Brooks at cbrooks@hertenburstein.com. ▲

News from Herten Burstein

Herten Burstein was profiled in the "New Jersey Legal Profiles" section of *Forbes* magazine. An article, "New Jersey's 'Go-To, Stay-With' Business Law Firm," appeared in the September 7 issue. A copy of the article is enclosed in this issue of *Insights*.

In the August 31, 2009 edition of *NJ BIZ*, Herten Burstein was listed among the top 50 law firms in New Jersey; it was one of only two law firms in Bergen County to make the list.

Founding and senior member **Thomas Herten**, relying on the expertise of Labor and Employment member **Steven Harz** and associate **Daniel Ritson** with respect to the New Jersey Law Against Discrimination ("LAD"), recently prevailed in what will serve as a precedential case for private golf and country clubs operating in New Jersey, generally subject to the jurisdiction of the New Jersey Division on Civil Rights. Mr. Herten and the firm's attorneys successfully defended a private golf facility against a complaint alleging member discrimination. Contrary to the complainant's allegations, the Division ruled that the facility was not a place of public accommodation and, accordingly, was not subject to the LAD, and granted the firm's motion to dismiss the complaint. The matter was watched closely by other private clubs in North Jersey and the decision was lauded by them as well as by the client.

Litigation member **Michael Lubin** was recently appointed by the Superior Court as a Special Master in a case involving the Borough of Elmwood Park. In that case, a developer sued the borough based upon its failure to comply with statutes and regulations pertaining to the obligation of each municipality to provide a designated fair share of affordable housing units for low and moderate income persons. Michael's assignment will include: conferring with the parties and their representatives toward the end of reaching a settlement on this issue and reporting to the court on his efforts to obtain compliance. He has had considerable experience in the field of land use law, having served as a planning board attorney for over 25 years and having lectured on the subject for Rutgers University, the New Jersey Institute for Continuing Legal Education and the National Business Institute. Michael has also been appointed by the Superior Court in other matters and has previously served in the capacities of Discovery Master, Special Fiscal Agent, Receiver and Guardian.

An article by Real Estate Chair **Arnold Litt**, "Right of First Refusal to Lease Additional Space Terminates Upon the Expiration of the Lease Term," was published in the October 16 issue of the *New Jersey Law Journal*.

On October 2, Herten Burstein joined with thousands of companies around the country to support Lee National Denim Day, one of the largest single-day fundraisers to battle breast cancer. In 2008, approximately 800,000 individuals wore denim on Lee National Denim Day. More than 85% of firm personnel supported this worthy cause. ▲

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disclosure agreement, it should be referred to in the letter of intent. If not, the letter of intent should address the buyer's obligation to maintain the confidentiality of any confidential information provided by the seller.

10. **Non-Solicitation** – A buyer's prohibition of soliciting the seller's employees for a certain period of time if the deal does not close.

11. **Representations and warranties** – A description of any specific representations and warranties that will be required in the contract documents.

12. **Ordinary Course** – Obligation of the seller to conduct its business in the ordinary course and to avoid any extraordinary transactions between the time the letter of intent is signed and the time of the closing of the transaction.

13. **Exclusivity** – A buyer may want a provision requiring the seller to deal exclusively with the buyer and not to seek or entertain other offers.

14. **Miscellaneous** – Customary provisions such as governing law and jurisdiction.

Binding vs. Non-Binding

Typically, the deal terms in a letter of intent, such as the purchase price and payments terms, are non-binding. That is, the parties do not intend to be legally bound to these terms until they sign the final contract documents. However, other terms in the letter of intent are intended to be binding. For example, the obligation to maintain the confidentiality of the seller's confidential information and prohibiting the buyer from soliciting the seller's employees are legally binding.

To minimize, and ideally to prevent, disputes about whether a letter of intent is binding or non-binding, a letter of intent is frequently divided into two distinct sections, one containing the binding provisions and the other the non-binding provisions.

A buyer and a seller must ask their attorneys to negotiate and prepare a letter of intent to accurately summarize the terms of a deal and to ensure that certain terms will be binding and others non-binding.

For more information on letters of intent, or buying or selling a business, please contact Gianfranco Pietrafesa at gpietrafesa@hertenburstein.com. ▲

Dispute Resolution Clauses in Buy-Sell Agreements

By William H. Schmidt, Jr.

This is part of a series of articles on buy-sell agreements by members of the firm's Business Law group.

The purpose of this article is to briefly introduce and describe some various methods of resolving voting deadlocks and other disputes that arise between and among (a) members of a limited liability company ("LLC"); and (b) stockholders of a closely held corporation. Because dispute resolution clauses are similar in either the LLC or the corporate context, for purposes of this article, Members and Stockholders are generically referred to as "Interest Holders" and the Operating Agreement and the Stockholders' Agreement are generically referred to as an "Interest Holders' Agreement." Carefully drafted Interest Holders' Agreements detail the procedure to be followed by the Interest Holders in the event of any dispute arising between and among the Interest Holders as to any matter or thing covered by the Interest Holders' Agreement or as to the meaning of the Interest Holders' Agreement. Many Interest Holders' Agreements provide (expressly or impliedly) that parties will settle their disputes in the court system. These Interest Holders' Agreements will indicate which specific State law is to apply and will, oftentimes, obligate the parties to litigate in a specified State court or the Federal District Court located in a specified State.

There is a current view shared by a growing number of attorneys that litigation as a dispute resolution method is too expensive and time-consuming, and, often, adversely affects the continuing viability of the business enterprise. Thus, alternate dispute resolution methods have been crafted by attorneys to lower the expense of dispute resolution and generally reduce the time for such resolution. However, other attorneys argue that litigation under most circumstances will result in a fairer, less arbitrary resolution of disputes and preserves the right to appeal.

The general categories of disputes that typically arise involve (1) the breach of the terms of the Interest Holders' Agreement by one or more of the Interest Holders; (2) the interpretation of the terms of the Interest Holders' Agreement; and (3) a "deadlock." A deadlock occurs when there are neither sufficient votes of the Interest Holders (voting as Directors or Members) to approve or disapprove a matter. Following are examples of some methods of non-judicial dispute resolution that can be agreed upon by the Interest Holders and included in the Interest Holders' Agreement:

1. **Arbitration** – An arbitration "procedure" can be agreed upon by the Interest Holders and included in the Interest Holders' Agreement. Some arbitration clauses encourage the Interest Holders to settle their disputes in good faith before the intervention of an arbitrator or arbitrators by prescribing "ratcheting-up" procedures. For example, the Interest Holders' Agreement may provide that prior to the controversy being submitted to "binding" arbitration in accordance with, for example, the Commercial Arbitration Rules of the American Arbitration Association, the parties will be required to attempt in good faith to resolve the disputed

issue or issues by participating in a formal "non-binding" mediation. Another type of arbitration provision provides, for example, that the disputed matter or matters be arbitrated before a single arbitrator who is a former or retired judge who will decide the dispute pursuant to, for example, the rules of the American Arbitration Association or pursuant to some other specified arbitration rules and procedures. An arbitration provision "with teeth" may also be added that provides the arbitrator with the authority to award all counsel fees (or a percentage thereof) to the prevailing party – for example, an arbitrator may conclude that one party prevailed to 70% (either based on the number of claims or materiality of the claims) based on the allegations originally asserted by the complainant, and thereby, the arbitrator would order the non-prevailing party to pay 70% of the prevailing party's counsel fees, costs and expenses. This "with teeth" counsel fee provision acts to deter a party from bringing a claim in bad faith and may reduce the time and expenses involved in resolving the dispute.

2. **Provisional Director Provision - Day-to-Day Management Disputes**

– In the context of a corporation, if a "deadlock" occurs between, for example, two directors of the corporation on any issue involving the "day-to-day" management of the Corporation (or specified "Major Business Decisions" [i.e., important decisions out of the ordinary course of business]), the directors may elect, by unanimous written consent, a provisional director ("Provisional Director") to vote on the deadlocked issue or issues with the outcome of such deadlocked issue or issues being determined by the directors by majority vote. Another provision in this clause would include the procedure to be followed in the event that the two directors cannot agree on the Provisional Director.

3. **The "Russian Roulette" Buy-out Provision in Deadlock Situations**

– As an alternative dispute resolution in a deadlock situation, a "buy-out" may be considered. This type of provision usually deals with a deadlock of the Interest Holders concerning a Major Business Decision. A deadlock over a Major Business Decision may indicate that the Interest Holders may have irreconcilable differences as to how the enterprise is to be conducted and/or in what direction the enterprise should proceed. Consider the following: Typically, in a two-"Interest Holder" venture, a "Russian Roulette" provision may be utilized, whereby either one of the Interest Holders may begin a process which results in all of the interests in the company being owned by only one of the Interest Holders. The party initiating the process does not know whether he or she will be the buyer or the seller. Other provisions to this clause might provide that the buy-out purchase price is fair market value.

For more information on buy-sell agreements, please contact Bill Schmidt at wschmidt@hertenburstein.com.