July 2004
Volume 4
Issue 4

BEAN KINNEY & KORMAN PC
ATTORNEYS

Business Law Newsletter

LETTERS OF INTENT

By James V. Irving

The Letter of Intent forms the critical first step in almost all sophisticated sale of business transactions. While the parties' non-binding commitment to the terms of a proposed sale is not legally required, a Letter of Intent provides important protections to both sides during the negotiation process.

In either a stock or asset sale, a properly drafted Letter of Intent includes not only a non-binding recitation of the terms of the proposed agreement, but a series of fully enforceable provisions governing the parties' conduct during – and after - the negotiation. Thus the Letter of Intent establishes agreement on the general terms of the deal, protects the parties' legitimate business interests, and creates a set of ground rules governing the negotiation.

Since there is no commitment to purchase, the Letter of Intent's recitation of the basic terms establishes only a framework and the parties' expectations. The non-binding terms in any Letter of Intent will include both an identification of the asset or assets to be sold and acquired, and the price to be paid for those assets. Usually the Letter of Intent will specify the general financial terms, such as the amount of any deposit, the amount to be paid at Closing, and the proposed terms for the pay-out of any remaining balance. The assets should be identified with as much specificity as circumstances permit, recognizing that due diligence and the development of a Schedule of Assets will often clarify or augment the general list of assets contained in the Letter of Intent.

The Letter of Intent should include closing conditions that the parties have already identified, such as, for example, the assignment of the existing business lease or financing contingencies. The Letter should state the parties' expectations as to any non-competition arrangement that will bind the Seller or its principals.

While these terms are, by definition, non-binding it is likely to be very difficult to change them during the course of further negotiation.

A Letter of Intent should also include certain binding agreements, without which the Letter has limited value. These generally include due diligence opportunities balanced by corresponding confidentiality provisions.

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"Getting It Done"

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VOLUNTEER PROTECTION ACT

By James V. Irving

The Volunteer Protection Act became a federal law in 1997. The Act limits the liability of individuals providing voluntary service to qualified non-profit organizations. In most cases, a volunteer is protected from liability arising from conduct within the scope of his or her responsibility at the nonprofit organization or government entity.

The Act also contains a number of limitations. Among them, the volunteer must be appropriately licensed or certified if the scope of the activity or practice requires or suggests it. A volunteer causing harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a "conscious, flagrant indifference to the rights or safety" of an individual is not protected. The protection does not cover acts that constitute a crime of violence or international terrorism, hate crimes, sexual offenses, civil rights laws violations, or where the volunteer was under the influence of alcohol or drugs at the time of the misconduct.

The Volunteer Protection Act preempts most inconsistent state laws. One exception permits a state to adopt a law permitting an officer of a state or local government to bring a civil action against a volunteer. The Act does not affect the liability of the non-profit organization itself, and permits states to pass laws making the organizations liable for their volunteers to the same extent employers are responsible for employee's actions.

In enacting this law, Congress recognized and bemoaned the general decline of participation in public service activities nationwide. The Volunteer Protection Act is designed to boost our national aspirational goal to increase involvement in charitable activities.

LETTERS OF INTENT

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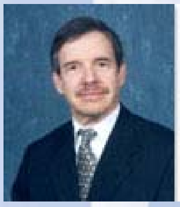
Any proposed Purchaser willing to invest time and resources in due diligence and pay a deposit is likely to insist on a "No Shop" provision, the purpose of which is to prevent the Seller from seeking other (or higher paying) Purchasers during the pendency of the negotiation. Likewise, the Purchaser will insist on an opportunity to inspect pertinent books and records of the Seller, balanced by an enforceable promise to maintain confidentiality. Typically, the Seller promises to conduct business as usual during the period until Closing to avoid the possibility of a deterioration of the asset. Both parties are likely to agree that the negotiation and any potential transaction be kept confidential, at least until ratification of a Final Agreement, if not until Closing. The Letter should also include language detailing the grounds for termination of the Letter (and the deal) by either party.

A good Letter of Intent cannot assure a complete, successful deal, but it is likely to minimize areas of conflict. Attempting to negotiate and draft a Purchase and Sale Agreement without one only increases the likelihood of misunderstandings, cross allegations and, potentially, law suits.

MEET OUR LAWYERS



James Bruce Davis

A native of Cincinnati, Ohio, Bruce Davis represents title insurance companies and financial institutions in Virginia, the District of Columbia and Maryland. His trial practice includes title insurance defense and coverage issues, lender liability defense, and bankruptcy litigation.

In addition to his trial practice, Mr. Davis represents financial institutions in a variety of lending transactions and workouts, including commercial mortgages, construction loans, and asset and real property-based finance.

Mr. Davis is a former co-chairman of the District of Columbia Bar's Section of Real Estate, Housing and Land Use and has served as President of the District of Columbia Land Title Association. His articles have appeared in a number of legal publications, including the Catholic University Law Review, the Real Estate Law Journal and the Tort and Insurance Law Journal.

Bruce is a graduate of the College of William and Mary and Harvard University, and holds a Juris Doctor degree from the University of Virginia School of Law. His academic honors include Phi Beta Kappa and Order of the Coif.

Away from the office, Mr. Davis and his wife, Evelyn Jacob, are avid photographers and enjoy hiking, bird watching and travel. They reside in Potomac, Maryland.

TENACIES IN THE ENTIRETIES

By James V. Irving

In April of 2002, The United States Supreme Court handed down a decision that, while limited in its specific application, threatens the traditional "safe harbor" of Tenancies by the Entirety real property ownership. Justice O'Connor delivered the opinion in United States v. Craft.

Real property ownership is a matter of state law. Virginia, Maryland, and the District of Columbia each recognize the Tenancy by the Entirety; a form of property ownership in which the husband and wife each own the entire parcel with the right of survivorship. It is axiomatic in Virginia that Tenancy by the Entirety real property is immune to creditors of just one spouse. The Supreme Court's decision in Craft creates a chink in that armor. Although that chink is currently limited to IRS liens attaching to property under state law, it could have dramatic implications in the future.

Sandra J. Craft brought suit when the Internal Revenue Service attempted to exercise its tax lien on her husband's property. The Crafts owned a parcel of real property as Tenants by the Entirety, and when Mr. Craft attempted to transfer his interest to his wife, the IRS levied on what they contended was his fifty percent interest.
The Crafts argued that the Tenants by the Entirety status insulated the property from attachment. The Sixth Circuit agreed, holding that Mr. Craft had "no separate interest in the entireties property under Michigan law."

A 6-3 majority of the Supreme Court disagreed, holding that the incidents of ownership extended to Mr. Craft under Michigan law – the right of survivorship and the right to exclude others from the property, for example – constituted property rights under the Internal Revenue code. Since the IRS lien extended to all of his "property rights and rights to property," Mr. Craft's share of the real property was subject to attachment.

Craft arises expressly from Michigan's interpretation of the property rights encompassed by the Entirety tenancy, and its reasoning is expressly limited to claims arising under the IRS code. State law in Virginia and elsewhere may continue to protect Tenancy by the Entirety property from the claims of a creditor of only one spouse, but as Craft points out, Tenant by the Entirety property is no longer immune to the claims of the federal government.

SELECTION OF TRADEMARKS AND SERVICE MARKS

By Scott J. Spooner

Businesses adopting trademarks or service marks frequently select a mark without consulting legal counsel or by consulting an attorney after the business already has made a significant investment in the mark. This model for selecting and adopting trademarks is inefficient and counter-productive because business persons usually lack the knowledge to select a mark entitled to strong legal protection. A business should have two (2) fundamental objectives in selecting a mark: (i) distinguishing its goods and services from that of competitors; and (ii) setting the stage for the enforcement of the entity's trademark rights by adopting a mark worthy of strong legal protection. If the business fails to adopt a "strong" mark, it may have difficulty preventing competitors or market entrants from using a similar mark. For this reason, it is critical that businesses include legal counsel in the discussions leading up to the adoption of a mark.

The degree of protection a mark receives is directly related to the mark's distinctiveness. Courts accord strong or distinctive marks the greatest protection under the Lanham Act (the federal trademark act), whereas weaker or less distinctive marks receive little, if any, legal protection. Courts have developed a five-category classification scheme to rank marks by their strength or distinctiveness. The classification scheme ranks the following categories of marks from most distinctive to least distinctive: (i) fanciful; (ii) arbitrary; (iii) suggestive; (iv) descriptive; and (v) generic.

Fanciful marks usually involve the use of a coined word or expression, whereas arbitrary marks ordinarily utilize real words in common usage that do not describe any quality or characteristic of the products with which they are associated. Suggestive marks generally connote, but do not describe, some quality or characteristic of the product. Fanciful, arbitrary, and suggestive marks are regarded as strong or distinctive marks entitled to broad legal protection.

Descriptive marks merely describe a function, use, or characteristic of the product. A descriptive mark is entitled to legal protection only if the owner of the mark can demonstrate that the mark has secondary meaning, which is a difficult legal hurdle to overcome. Finally, generic marks only involve the name of the good or product and are afforded no protection under trademark laws.

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SELECTION OF TRADEMARKS AND SERVICE MARKS

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Businesses should pay great attention to this classification system because it reveals how to select and adopt a strong or distinctive mark that is entitled to broad legal protection. It makes no sense for a business to invest thousands (and in some cases millions) of dollars in a mark just to learn that the mark is entitled to little or no legal protection. This adverse outcome can be avoided by engaging legal counsel at the earliest possible moment to contribute to the discussion concerning the selection of a new mark. An experienced trademark attorney can provide invaluable assistance in selecting a strong mark that is more likely to be enforced broadly by courts. Without input from counsel early on in the process, the likelihood increases that a business will select a weak mark that in turn hamstrings counsel at the time the client seeks to enforce its intellectual property rights in the mark. This undesirable outcome can be avoided rather easily by involving your counsel in discussions (even creative discussions) regarding the selection of the mark. This inclusive process will enable counsel to interact with the business persons and the creative team to select a mark that is both strong and distinguishable from the goods and services of competitors.

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