

THE REPORT

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★ ARTICLES FEATURED IN THIS ISSUE ★

DO YOU NEED A LAWYER WHEN SEEKING COMMERCIAL FINANCING?

Commercial lenders have expertise that not every business person is privy to. Find out how your attorney can assist you in considering the pros and cons of various financing vehicles.

Page 1



SOME FREE ADVICE ABOUT COSTLY ADVICE

Contingent fees, hourly fees, value billing. Find out how attorneys charge for the services they render, and how to establish the relationship up front.

Page 2



GOING GREEN CAN GET YOU SOME GREEN

It's all well and good to be environmentally conscious, but here are some additional ways that being eco-friendly could translate to more green for your bottom line.

Page 3



IS OHIO HEALTHY FAMILIES ACT MAKING OHIO SICK?

Petitioners are proposing a new measure that sounds generous on its face, but who is footing the bill for seven paid sick days? Find out how proposed legislation may result in more headaches for employers.

Page 3



IN THE NEWS Page 4

DO YOU NEED A LAWYER WHEN SEEKING COMMERCIAL FINANCING?

By John Wilkerson

You have decided that you need a commercial loan either to fund the working capital needs of your company or to acquire or refinance debt on a fixed asset like equipment or real estate. The basic terms of the financing have been worked out with your banker. Even though this is a significant undertaking, you wonder if you need to have your corporate counsel involved. After all the cost of the financing has increased due to interest rate spreads; bank liquidity requirements have reduced the funds available and you assume the bank will use its "standard" documentation. Should you also bear the cost of counsel?

While all of the above is true, experienced counsel can add a great deal of value to your loan transaction. Even though commercial loan documentation is generally consistent among institutional lenders, there are a number of areas that deserve attention. You must select an interest rate. Will it be a fixed rate or variable? If a variable rate is chosen what index will be used; prime or LIBOR? What is the spread (i.e. the difference between the index and the rate you are actually required to pay)? Should you consider hedging your interest rate exposure on your variable rate loan with an interest rate swap? How will interest be calculated? Will your lender calculate interest on a 360/360 basis or on a 365/360 basis. Each of these decisions will impact the total cost and risk of your financing.

It is possible that you have loaned money to your company. The lender tells you that the insider debt must be subordinated to the lender's senior indebtedness. But what does it mean to subordinate? Generally, the lender will require complete subordination as to payment and any lien which is given to collateralize the subordinate debt. The lender may also require a "standstill" provision which will restrict your ability to collect on the subordinate debt even in the event of a default. Knowledge of these various facets of subordination will allow you to carve out needed flexibility.

Commercial loan documents also generally restrict the ability of the beneficial owners of the borrowing entity to transfer beneficial interests, be they membership interests, shares of stock or partnership interests, during the course of the financing. For future estate planning reasons you will need to retain the flexibility to transfer these beneficial interests

Continued next page

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to family members, family limited partnerships or other affiliated entities. Experienced counsel can guide you through these requirements so that you are not prohibited from making decisions that will be important to the continuity of your business or for tax purposes.

Commercial loan documents also generally prohibit subordinate financing. You may in the future need to add additional leverage through subordinate liens, mezzanine financing or purchase money security interests for equipment purchases. Negotiating the parameters of additional leverage at the time of the senior financing will provide great benefits as your company grows or market conditions cause changes in your operating requirements. It is much better to have a properly structured senior loan in place than to go to your lender later and ask for additional considerations.

Most commercial loans will require the guaranty of the principals of the borrowing entity. But what exactly are your guaranteeing? Guaranties come in a variety of forms. A continuing guaranty will relate to all indebtedness of the borrowing entity, whether now existing or hereafter incurred. A much better alternate for the borrower is a transactional guaranty whereby the guarantor only guarantees a specific loan.

The guarantor can also attempt to limit his or her exposure by use of a limited guaranty. Even with limited guaranties you have the question of exactly what are you being asked to guaranty. Assume your commitment letter states the guarantor must guarantee 50% of the loan. Does that mean 50% of the original loan amount or 50% of the outstanding principal balance of the loan at the time of the default by the borrower? Does the limitation relate to the principal balance or does it also include accrued interest, fees and costs?

Once the guaranty is in place the guarantor may assume that his or her liability is dependent upon a default by the borrower and the failure of the lender to be able to collect sums it is due from the borrower. However, that is generally not how commercial guaranties are structured. Most commercial guaranties are called "payment" guarantees not "collection" guarantees. This means, if the borrower misses a payment recourse can immediately be had against the guarantor. You may have limited ability to negotiate these provisions. However, without the knowledge and counsel of his or her lawyer a guarantor may miss the opportunity to limit their exposure.

Maybe your company is financially strong enough that it can borrow money on a non-recourse basis. Even in such instances a typical lender will require the personal guaranty of non-recourse carve-outs. These carve-outs are usually limited to fraudulent actions or environmental matters. Although, it is not uncommon for such guaranties to be broadly written so as to essentially emasculate the non-recourse nature of the debt. Knowledge of the intricacies of such provisions can avoid severe consequences in an event of default by the borrower.

With any commercial loan there are also numerous due diligence requirements of the lender. It is important to know and anticipate these requirements. First, failure to

anticipate the lender's due diligence requirements may lead to delays in your financing. Second, you must realize that you will generally be required to pay the lender's lawyer's fees. Proper presentation and timing of the delivery of the due diligence to the lender's counsel can minimize such costs. What about the cost of the actual due diligence items? Your lawyer should be familiar with and able to minimize such costs. While you may not be familiar with UCC searches, Phase I Environmental Reports, surveys or title insurance your lawyer will have extensive knowledge in each of these areas and have experience in providing the lender only the level of due diligence which the particular transaction requires. Also, with items like title insurance your lawyer should be familiar with all the credits to which you are entitled to reduce the ultimate cost.

Commercial loans cross a number of legal disciplines. While the issues enumerated above can be anticipated, there are a significant number of related issues upon which we do not have time to elaborate in the limited space of this article. It will cost money to engage your lawyer in any commercial financing. However, if you choose a lawyer with knowledge and experience, the decision to engage him or her will result in overall cost savings and a loan facility that will provide you the risk avoidance and flexible that you will need in the future.

Carlile Patchen & Murphy LLP has a number of lawyers skilled in the review and negotiation of commercial loan transactions. Give your contact attorney at the firm a call and receive the value and benefit of our years of experience in your commercial or commercial real estate financing transaction.

SOME FREE ADVICE ABOUT COSTLY ADVICE

By Joseph M. Patchen

The Necessary Evil. How do lawyers make a living charging for advice by the fraction of an hour? They make it up in volume. When the business owner or decision maker has a legal "problem" they may not be interested in cultivating a long-term and beautiful relationship with a lawyer. They want to make sure that the hourly fee lawyer is not building the Taj Mahal when a shed will do. Most of these issues can be resolved through good up-front selection of a sensible attorney who provides the client with a written game plan and a detailed budget.

Into the Lion's Mouth. It gets more interesting when a business has ongoing need for legal counsel in numerous areas. It is not always possible nor is it even appropriate to negotiate a new engagement agreement every time a client needs some quick advice on a transaction, a point of regulatory complexity or any one of the 101 twists and turns that confront a business on any given day. Now, we are entering the area where the lawyer is extending credit, and the client is extending his head further into the lion's mouth. What makes this phase of the relationship work? Trust. Or, perhaps better said, hope.

The Outside General Counsel. The wise lawyer is in it for the long run. Over time, the lawyer becomes more valuable with knowledge of the client's business objectives and long-term goals, decision-making style, employees, frequently-used agreements, and frequently-encountered problems. The mature attorney-client relationship is earned through good practical and timely advice, fee estimates adhered to, crises averted, and growth opportunities proactively embraced.

"Discourage litigation... there will be business enough." So said Abraham Lincoln. Abe counseled with his clients' long-term interests in mind. It seemed to work for him and his biggest client, the Illinois Central Railroad. You may benefit from seeking a shift from the "necessary evil" to the "outside general counsel" for your lawyer-client relationship.

For information or questions please contact Joseph M. Patchen, at 614-628-0779 at Carlile Patchen & Murphy LLP.

GOING GREEN CAN GET YOU SOME GREEN

By Dan Rohletter

Leadership in Energy and Environmental Design (LEED) is a voluntary national rating system developed by the U.S. Green Building Council for developing high performance, sustainable buildings. LEED emphasizes state of the art green strategies in five particular areas: sustainable site development, water savings, energy efficiency, materials and resources selection, and indoor environmental quality.

The mission statement of the LEED program encourages and accelerates global adoption of sustainable green building and development practices through the creation and implementation of universally understood and accepted standards and performance criteria. LEED standards contain three principal types of requirements. Prerequisites, which are required elements, all of which must be met before a project can be considered for LEED Certification. Second, are Core Credits which are specific actions a project may take in the five areas described above. All Core Credits are voluntary, but each level of LEED certification (i.e., Certified, Silver, Gold and Platinum) requires that certain thresholds be met. Third, are innovation credits. Extra credit may be given for exemplary performance beyond Core Credit performance levels or implementation of innovative actions that confer significant environmental benefits not covered in the ratings system.

"Green" buildings provide a host of financial and other benefits to its owners, the environment and the community at large. They typically reduce operating costs and enhance asset value and profits.

But don't take just my word for this. Two recently released studies have validated that third party certified buildings outperform their conventional counterparts across a wide variety of measurements, including occupancy rates, sale price and rental rates. According to one study, LEED buildings command rent premiums of \$11.24 per square foot

over their non-LEED peers and have 3.8% higher occupancy rates. For a 10,000 square foot building, this alone translates into an extra \$112,400 of annual rental income. In the sale of LEED buildings, it was found that they commanded \$171 more per square foot. For further information, contact the author or visit www.usgbc.org.

IS OHIO HEALTHY FAMILIES ACT MAKING OHIO SICK?

By Marie-Joëlle Khouzam

Currently, only employers with 50 or more employees who are subject to the federal Family & Medical Leave Act must give time off, and unless the employer's policies provide otherwise, FMLA time is not required to be paid time off.

If labor has its way, a new measure may appear on the November ballot in Ohio, requiring employers with 25 or more employees to pay full-time employees for seven (7) sick days and to pay part-timers a pro-rated number. The Act would permit leave for physical or mental illness, injury, or medical condition, to obtain a medical diagnosis, a related treatment, or preventive care, for the employee or the employee's child, parent (including in-laws), or spouse. It permits visits to any licensed health care professional – including nurses, chiropractors, or optometrists.

Although the Ohio Healthy Families Act ballot initiative appears to be a well-meaning effort to give employees time off to care for a sick child or attend medical appointments, it has raised considerable concern in the employer community at a time when businesses are leaving the state to avoid excessive regulation and the costs of doing business here.

The key problems with the OHFA, originally proposed by labor in 2007, are that:

- It expands coverage to businesses half the size of those covered by the FMLA, covering many businesses less able to afford the fiscal impact.
- It makes the paid sick days available to any employee who has worked 90 days. In contrast, FMLA leave rights are available to those who have worked for one year.
- It requires accrued sick leave to be carried over from year to year (it is unclear as to whether an employee can maintain a 7-day or a 14-day balance).
- It does not require the employee or the family member to be suffering from any "serious health condition". Thus, employees can use leave for almost any reason for up to 3 days, even in small increments, without medical certification.
- It allows employees to take leave upon written or oral request to the employer. When the need leave is foreseeable, at least 7 days' notice is required (compared to 30 days under the FMLA); otherwise, notice should be given as soon as practicable. Employees could, without notice, leave work early or come in late if they had a headache or other unforeseeable condition, so long as they make the request.

Once the paid sick leave extends beyond 3 consecutive work days, the employer can request certification by a health care professional, which the employee must provide within 30 days; however, leave takes effect at the time of the request, not upon receipt of the certification.

The Act also contains notice and record-keeping requirements, with monitoring done by the Director of the Ohio Department of Commerce and enforcement by the Ohio Attorney General. Employees could institute anti-retaliation claims if employers rely on paid sick leave as a negative factor in an employment action (hiring, promotion, or a disciplinary action). In addition, the OHFA days cannot be counted against an employee in a no-fault attendance policy.

While many are fighting the OHFA www.ohiobusinessvotes.org/Mandates08/Home.htm, other business groups who feel that the measure could be passed by voters are working toward a compromise with the governor's office. The proposed compromise includes exploring a smaller number of paid days off, using the time off in larger increments, and including some medical certification requirement. Employers are encouraged to contact the governor's office at 614.728.7342 or policy@governor.ohio.gov. If no resolution is reached by September 5, the measure will go to the voters.

IRS Increases Mileage Rates through Dec. 31, 2008. The Internal Revenue Service today announced an increase in the optional standard mileage rates for the balance of 2008. Taxpayers may use the optional standard rates to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes. The rate will increase to 58.5 cents a mile for business miles driven from July 1, 2008, through Dec. 31, 2008, up from 50.5 cents a mile.

The new six-month rate for computing deductible medical or moving expenses will also increase by eight cents to 27 cents a mile. The rate for providing services for charitable organizations is set by statute, not by the IRS, and remains at 14 cents a mile. Taxpayers have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates.

IN THE NEWS

Joëlle Khouzam was honored by the *Upper Arlington Rotary Club* with a "Northwest Woman of the Year" award at a luncheon at Scioto Country Club on May 20. Joëlle was also recently reappointed by Grandview Heights City Council to continue serving as City Attorney.

Leon Friedberg is President of the *Greater Columbus Chapter of BNI*, an international business referral organization with more than 100,000 members worldwide.

Daniel G. Rohletter became President of the *Discovery District Development Corporation* in January, 2008.

The Discovery District is home to the new Seneca, a downtown apartment complex with retail businesses on the lower level in the site of the former Seneca Hotel.

H. Ritchey Hollenbaugh has been elected vice president of the Ohio Legal Assistance Foundation Board, and has also been appointed by the Franklin County Commissioners to the Central Ohio Workforce Investment Board of Directors. The Ohio Legal Assistance Foundation provides legal assistance in the critical areas of safety, shelter and medical care to those most affected by a lack of legal services, including domestic violence victims, families forced into homelessness, children caught in custody battles and senior citizens whose medical benefits may be mistakenly terminated. The Central Ohio Workforce Investment Corporation is responsible for creating policy on a variety of workforce issues, recommending certification of training program providers and overseeing the establishment of the JobSight office centers for workforce development. Its goal is to ensure that central Ohio's labor supply is prepared to meet the needs of local employers now and in the future.

Carlile Patchen & Murphy LLP is a full service law firm in Columbus, Ohio with practice groups in all areas of the law. The firm has consistently provided skilled legal services to business entities, corporations, and families from Columbus and the surrounding areas since 1967.

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- Non-Profit Organizations
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- Litigation
- Public and Municipal Law

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- Construction Law
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- Zoning

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- Retail Collections
- Bankruptcy Claims
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