

Report From Counsel

Insights and Developments in the Law

Summer 2009

Borrowing in Troubled Times!!!

By Jeffrey M. Schlossberg, Esq.

Based upon the recent news that we have been receiving from clients, many of you would ask, "why write an article about the impossible?" Contrary to what you have heard or seen, "borrowing" is still very much alive, but is taking place on a new playing field.

On one hand, we have seen that certain banks today are more willing to work with their clients and have a greater reluctance to foreclose, as opposed to the trend of the 90's. However, on the other hand, there is also reluctance by the banks to get in any deeper by advancing additional funds to those clients who may be in trouble.

If you are riding out the storm, and surviving, there are still many lenders out there looking to grant new loans. Banks always look for the best candidates to loan money to; however, their criteria lately, has moved up a notch or two. So, for "good" candidates, there are plenty of lenders willing to offer loans at attractive rates. We recently had a client looking to purchase a new building for its expanding operations. They were not only courted by their existing lender, but by several other banks as well. They eventually went with a new lender who offered them a "swap" in order to guaranty them a very attractive low long-term mortgage rate. Unrelated, they purchased their new facility using a "like kind" exchange, and thus had no immediate tax consequences from the purchase of

a new facility and the sale of their existing facility.

We have another client who required additional capital. Their existing lender balked, however, they were able to secure a loan from Massachusetts Community Development Finance Corporation (CDFC), a quasi-public agency established to provide financing to small businesses to which private capital is not readily available, and with the purpose of creating job expansion or preservation. The CDFC provides lines of credit, term loans and surety bond financing support to its customers. They make loans behind the existing lender, taking a second position.

Another helpful agency is Mass Development. Traditionally, our clients have used them in bond financings. Again, job growth is its main purpose. They have several programs, such as the Community Development Program, Brownfields (environmental assessment and remediation funding), New Markets Loan Program, Equipment Loan Program, and Export Loan Guaranty. We recently used the Export Loan Guaranty program to assist a machine shop. These programs will often work in conjunction with the local Economic Development Councils. Again, offering attractive rates and terms for those who qualify. Every business is trying to maintain, if not increase, jobs.

Additional funding is available

through the United States Small Business Administration (SBA). Many of you may be familiar with the guaranty program in which the Banks take less risk. These loans are usually longer term in order to keep the rates lower. The most common is the Basic 7(a) Loan Program. It requires that the borrower find a lender who is willing to work within the program. It is administered by the Bank, however, in the event of default, the SBA will reimburse the Bank (50%-75% of the loan). Loans under \$150,000 can be 85% guaranteed, and Export Working Capital loans can be 90% guaranteed. There are, of course, specific eligibility requirements. Not only can you utilize this program for traditional working capital needs, but the loan program can also be used for acquisitions. The specific terms and fees of the loan are negotiated with the Bank, not with the SBA. However, those terms and fees are subject to SBA standards. The maximum SBA guaranty exposure for any one business is \$1.5 Million. The loan guaranty fee, which varies based on the size of the loan, is borne by the borrower. Owners of 20% or more must personally guaranty the debt. Through the 2009 Recovery & Reinvestment Act, the Government has increased the percentage of guaranty up to 90% and eliminated fees until the end of the year. Because of this, more

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New Identity Theft Rules Affect Businesses

Faced with the reality that identity theft continues to cause billions of dollars in losses for individuals and businesses each year, the Federal Trade Commission (FTC) has issued “Red Flag Rules” that are intended to fight the problem by requiring businesses to implement procedures designed to detect and respond to identity theft.

Covered Accounts

The rules apply to financial institutions and creditors with “covered accounts.” The category of financial in-

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stitutions includes entities such as banks, savings and loans, and credit unions holding “transactional accounts,” meaning a deposit or other account from which the owner makes payments or transfers.

The creditor category has raised some eyebrows because it embraces some businesses that in everyday parlance may not have been considered to be creditors. Basically, a “creditor” is broadly defined as any entity that regularly extends, renews, or continues credit. For example, this means finance companies, automobile dealers, mortgage brokers, and utilities, but it also means nonprofits and governmental entities that defer payment for goods or services.

An account is a “covered account” for purposes of coverage of the new rules if it is used mostly for personal, family, or household purposes, or if it is an account for which there is a foreseeable risk of identity theft, such as small business and sole proprietorship

accounts.

Entities subject to the rules must develop a written policy to identify and detect the warning signs—the “red flags” of identity theft. Detection should involve the regular review of accounts, at a minimum. The plan must describe appropriate responses to prevent or mitigate the effects of the crime. There also must be training for staff members, oversight for any service providers, and overarching management of the plan by the board of directors or senior employees of the financial institution or creditor. How extensive a plan must be will vary depending on the size of the entity and

the kind of credit accounts it maintains. The new rules also mandate an annual update of the plan.

Red Flags

So just what are those red flags for possible identity theft? An exhaustive list may not be possible, but a supplement to the Red Flag Rules identifies and describes 26 separate red flags. They fall into five broader categories: (1) alerts, notifications, or warnings from a consumer reporting agency; (2) suspicious documents, including any that have signs of having been altered

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Religious Land-Use Lawsuits

The land-use portion of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) was enacted to prevent discrimination by the government against the use of real property by religious organizations. On its face, the wording of the statute may appear to apply to circumstances that arise infrequently, but many churches and other religious institutions have used the RLUIPA to get their way in zoning standoffs with local governments.

The RLUIPA prohibits the government from imposing or implementing a land-use regulation in a manner that imposes a “substantial” burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Thus, a complaining party has the considerable initial burden of showing that the land-use regulation substantially bur-

dens the exercise of religion, and is not merely expensive or inconvenient. If that hurdle is crossed, however, the government may well have a difficult time showing both the “compelling” governmental interest and that it has selected the least restrictive means to advance that interest.

In one RLUIPA case, a village zoning board violated the RLUIPA when it denied an application for a special-use permit allowing a private religious day school to construct a classroom building on its campus. The expansion project was a building on, and conversion of, real property for the purpose of a religious exercise, within the meaning of the RLUIPA, given that the rooms that were planned and the facilities to be renovated would all be used, at least in part, for religious education and practices.

Even while ignoring a substantial burden imposed on the school’s religious exercise, the zoning board did not act to further any compelling state in-

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Cold Feet Cost Groom \$150,000

Sometimes even the best laid marital plans go astray. Usually when that happens, litigation does not ensue, but there are precedents for a cause of action for breach of a contract to marry. In one such recent case, a jilted bride-to-be recovered a substantial jury verdict from her fiancé after he called off the planned wedding. It was the second time that the same man had balked at marrying the same woman. This time, he had asked her to pull up stakes in Florida, where she then lived and worked, and move to live with him in Georgia. He also offered her a diamond ring and agreed to pay off about \$40,000 in debt that she had accumulated. Only two weeks into the new arrangement, the man called off the wedding, citing his poor health and apologizing for making promises he would not be keeping.

Despite the canceled wedding, the couple stayed together for a few more months. Then the last straw came for the former bride-to-be when she found her boyfriend with another woman. He claimed that he had started his romance with the second woman only after the wedding was canceled, but this claim was belied by evidence that he had given that woman \$500 just before his ill-fated marriage proposal to the plaintiff.

The plaintiff sued for breach of contract, seeking damages for financial and emotional harm. While it may seem that the most obvious injury in such cases is emotional in nature, in this case all but a small amount of the jury verdict was attributable to the value of the employment package that the plaintiff had given up to be with her fiancé. After coming to Georgia, she had struggled to find work and ultimately settled for a much less attractive job after the breakup.

No doubt it did not make a good impression on the jury that the boyfriend had broken the news that there would be no wedding by leaving his fiancée a note in the bathroom. This fact dovetailed nicely with the woman's attorney's closing argument, which could be summed up as "He's a cad."

ID Theft

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or forged; (3) suspicious personal identifying information, such as personal information that does not match information from external sources; (4) unusual use of, or suspicious activity relating to, a covered account, such as the use of an account that has been inactive for a long time or, more generally, any sudden and unexplained change in the patterns of activity for an account; and (5) notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts.

The consequences for not complying with the Red Flag Rules are significant. The FTC itself has provided for the potential imposition of monetary sanctions and an FTC enforcement proceeding. An even more far-reaching incentive for compliance is not to be found in the fine print of the rules but is no less real: The Red Flag Rules are likely to become the prevailing standard of care for what preventive measures companies are expected to take if they hope to be able to defend themselves successfully in civil lawsuits arising out of identity theft.

RLUIPA

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terest, as was shown by the lack of evidence for its stated reasons for denying the permit. Instead, the board had acted with undue deference to the opposition of a small group of neighbors. Even if some compelling state interest was involved, the board refused to consider approving the application subject to conditions, and thus had not used the least restrictive means available to it.

Of course, religious organizations have not batted a thousand when they have invoked the RLUIPA. Sometimes even similar cases have had opposite outcomes, making any predictions difficult. In another case of a growing church that had plans to expand the church facilities, including a school on its property, a federal appellate court upheld a township's decision to deny the church's application for a special-use permit. The court found that the township's denial of the church's application to build a structure in excess of 25,000 square feet on its property did not impose a substantial burden on the church's religious exercise, so as to violate the RLUIPA.

The denial would require the church to incur increased expense to accomplish its goal of building a significantly larger church and school, and to endure increased inconvenience if it were not able to build a facility of the desired size, but, in the court's view, nothing the township had done required the church to violate, modify, or forgo its religious beliefs or precepts, or to choose between those beliefs and a benefit to which the church was entitled. That the church was still free to carry out all of its missions and ministries, just not on the scale it desired, foreclosed any finding of a "substantial" burden.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Borrowing

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lenders will now be interested as their exposure has decreased; and, from the borrower's perspective, this will allow for more choices and less fees associated with the loan. It also expanded the eligibility requirements of the types of business now eligible.

The CDC/504 Loan Program, is a long term fixed rate financing program, also offered by the SBA. This Program typically assists certified development entities. It requires a 10% equity injection by the borrower and is also job based.

Typically, Bank's lend 50% for a senior position; and, a certified development council lends 40% (the SBA guarantees 100% of the 40%) with a 10% contribution made by the business owner. The maximum debenture is \$1.5 Million. Generally, a business must create or "retain" one job for every \$50,000 guaranteed by the SBA. This financing is used for asset needs and cannot be used for working capital or inventory. The bonds are tied to the United States Treasury market; and, therefore have much lower interest rates than traditional mortgage rates. A small portion of the debenture can be used for fees.

Through the 2009 Recovery & Reinvestment Act, the Government, via the SBA, funded several new programs which are now readily available in order to help stimulate the economy.

The SBA's America's Recovery Capital Loan Program (ARC) exists for businesses in stress. You can borrow money from the SBA and use it to repay lenders for up to 6 months. These loans are interest free and no fee to the SBA. These loans will be made by those banks that are SBA participants. These loans may amount to \$35,000 and do not need to be repaid for a year, and then must be repaid in a 5 year period. These loans are available as of June 15, 2009.

SBA Dealer Floor Plan Financing Programs (DFP) will be available be-

ginning July 1, 2009 and allow dealerships (cars, RVs, boats, manufactured homes) to borrow against inventory. These programs exist through the Basic 7(a) loan programs described above. The maximum repayment term will be 5 years; \$2 Million maximum; and, 75% Government guaranty.

SBA Patriot Express Pilot Loan program has been established for Veterans and members of the military community wanting to establish or expand a small business. Reservists and National Guard members are eligible for these types of loans.

SBA Surety Bond programs exist for contractors who need surety bonds for jobs. The Act increased the maximum amount available from \$2 Million to \$5 Million, which makes it more attractive.

In all of these programs, we must first go back to the basics. You must begin with a viable business plan,

which plan must demonstrate that you are able to pay back the borrowings. You need to be able to exhibit concise projections which demonstrate the ability to repay, and they must make sense. These are not "give-away" programs, but are programs designed to provide alternatives in these troubling times. You must apply to be eligible, and that may translate to speaking with various lenders and organizations to see if they will help. Again, these are just some examples of loan programs. There are many others.

In conclusion, loans continue to be made every day. It simply requires more effort to put the package together. Nothing comes easy.

If you require assistance, or have questions regarding any of the Programs discussed above, please do not hesitate to contact us.

Religious Icon Removed from Condo

A condominium association adopted a rule forbidding the placement of any signs or symbols on doors or in hallways outside condominium units. When a Jewish resident placed a religious symbol on the doorpost of her unit, the association had it removed without her consent. The resident sued the association under the federal Fair Housing Act (FHA), claiming religious discrimination, since she maintained that her religion required that she place the symbol outside the entrance to her residence.

The tenant's claim under the FHA failed. That statute does prohibit discrimination based on religion, but, in contrast to disability discrimination, it does not require a "reasonable accommodation" of religious beliefs and practices. The challenged association rule did not target any particular religion, but instead was a religiously neutral, exception-free regulation adopted for reasons unrelated to religion. Under pertinent precedents of the United States Supreme Court, that neutrality made the rule valid as nondiscriminatory and consistent with preserving the constitutional right to exercise one's religion freely. Under similar reasoning, the rule also withstood the challenge brought under the FHA.