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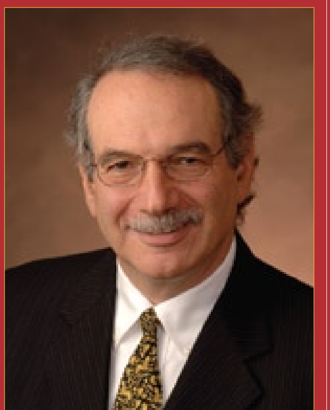
Mergers and Acquisitions - Bargains Abound, but Buyers Beware

By James A. Rubenstein



Jim Rubenstein brings a solutions-oriented approach and 35 years of experience to solve problems his clients face in finance, business workouts, bankruptcies, and commercial litigation. He may be reached at RubensteinJ@moss-barnett.com or 612.877.5363.

"Buyer's remorse" is that sinking feeling that the price you paid for an asset is too high. A different kind of buyer's remorse can occur if the price paid was too low. This remorse can come long after the sale is completed, when the buyer receives a demand to either return the property or pay more for it because the sale was a fraudulent transfer.

In today's economic climate where there are bargains aplenty for real estate, businesses, and even antiques, a potential buyer should be wary of fraudulent transfer laws that can be applied to almost any kind of sale where the seller is in financial difficulty at the time of sale or gets into difficulty shortly after the sale.

Fraudulent transfer law provides a remedy to creditors when a debtor has disposed of assets for less than their value in an attempt to delay, hinder, or defraud its creditors. The concept can be traced back to early Roman law.

The ancient concept was simple. Imagine, if you will, a medieval creditor with a judgment against a blacksmith. The sheriff is asked to seize the blacksmith's horse and sell it to satisfy the judgment. The blacksmith protests and says that it is not his horse. He produces a bill of sale showing that the horse was sold last week to his sister-in-law for a shilling. The sister-in-law has then been kind enough to loan the horse to the blacksmith, but because it does not belong to him, the sheriff cannot seize it and sell it.

The blacksmith has no other way to satisfy the judgment, and the horse was sold for a fraction of its actual value to a relative. Neither the blacksmith nor the sister-in-law are likely ever to directly admit that this was a sham transaction. The law of fraudulent transfer allows the court to conclude, based on the circumstances, that clear "badges of fraud" existed and that the horse was sold with the intent to delay, hinder, or defraud creditors. This allows the creditor to recover the horse from the sister-in-law to satisfy the judgment.

Over the centuries, the "badges of fraud" have expanded to address a wide variety of modern transactions, whether simple or complex. Fraudulent transfer claims are now made in a variety of situations, including distributions from Ponzi schemes, leveraged buyouts, the sale of business assets, and any other transaction where there is cause to believe that the seller was insolvent, or on the brink of insolvency, when the transfer occurred.

Although interpretations of the fraudulent transfer laws of individual states and the United States Bankruptcy Code may vary, there are two basic outcomes depending on the nature of the transaction. If the buyer pays for the property with cash or something of value and takes it in good faith, the buyer is liable to return the property or its value. Such a buyer is often able to keep the property by paying the difference between the price paid and the property's actual value. The buyer also may have some protection of its investment by a lien on returned property in the amount of the price it paid plus any improvements to the property after the transfer. On the other hand, if the transfer was not for value and in good faith, the buyer may lose all rights to the property without protection. "Good faith" is determined on a case-by-case basis, and largely involves an inquiry into whether the buyer knew or should have known that the sale was a fraudulent transfer.

Bargain hunters in today's market should be wary of the following red flags in any potential business or commercial real estate purchase:

1. **The seller is in some financial distress.** Usually, if the seller is solvent and has sufficient assets to satisfy all of its creditors both before and after the transaction, the question of a fraudulent transfer does not arise. On the other hand, a fraudulent transfer action can be brought many years after the transfer occurs and hindsight may be used to the buyer's disadvantage.

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In This Issue

Disclaiming an Inheritance

By Cindy J. Ackerman
and Richard J. Kelber

From time to time, we receive calls from clients who are inheriting property from their parents, either directly or from trusts their parents have created for them. Some of these clients may not need the inherited property and wish it could go to their children. A disclaimer sometimes can be used to accomplish that and can save gift and estate taxes while doing so, if done promptly and properly. This article describes that estate planning technique and a new law, the Uniform Disclaimer of Property Interests Act, which becomes effective on January 1, 2010.

What is a disclaimer?

A disclaimer is a refusal to accept property. When a beneficiary "disclaims" property, it passes as if the beneficiary predeceased the transferor. Depending on the wording of the will or trust agreement, the disclaimed assets may pass to the children of the beneficiary or a trust for their benefit.

How can disclaimers save gift and estate taxes?

If the beneficiary disclaims an inheritance **within nine months** after the transferor's death and all of the legal requirements are met, the beneficiary will be treated as if he or she had never received the disclaimed property. Depending on the wording of the will or trust, ownership of the disclaimed property may shift to the next generation without gift or estate tax consequences to the beneficiary, although generation-skipping transfer taxes may apply.

What are the requirements for a disclaimer?

Under federal law, a disclaimer is a "qualified disclaimer" and does not result in a gift if the beneficiary makes an irrevocable and unqualified refusal to accept an interest within nine months after the death of the transferor. The beneficiary should not accept the property or any income from the property prior to making the disclaimer. The beneficiary may not direct how the disclaimed property is distributed.

To be valid, disclaimers must also comply with state law. Minnesota law requires that the beneficiary be solvent. For example, a beneficiary receiving Medical Assistance may not disclaim assets.

Minnesota's recently enacted Uniform Disclaimer of Property Interests Act removes the current requirement that disclaimers be filed with the court. Under the new law, disclaimers must be delivered to the appropriate person depending on the interest disclaimed. For example, a disclaimer of an interest created by a will must be delivered to the personal representative of the decedent's estate. If the disclaimed property is real property, the disclaimer must also be recorded in the office of the county recorder in the county where the real property is situated.

Conclusion

Disclaimers can be an effective and cost-efficient tool to shift wealth to the next generation. To be valid, disclaimers of inherited property must comply with both federal and state law and be made within nine months after the death of the transferor. To determine whether a disclaimer would give the desired effect, the will or trust agreement should be reviewed. If you would like to learn more about disclaimers and how they may benefit your family, please contact your attorney at Moss & Barnett.

Cindy Ackerman represents individuals and business clients in the areas of estate planning, probate and trust administration, taxation, and non-profit organizations. She may be reached at AckermanC@moss-barnett.com or 612.877.5330.

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ALERTS:

Estate Planning Alerts

GRATs -

You may have heard of GRATs. GRATs (also known as Grantor Retained Annuity Trusts) are an IRS approved method of transferring wealth and can potentially transfer significant amounts of wealth to children and other beneficiaries with little or no gift tax consequences. The current low interest rate environment combined with depressed stock market valuations makes the wealth transfer strategy of GRATs especially powerful. Even in a worst case scenario, assuming minimal appreciation, all of the assets transferred into the GRAT will be returned to you over the term of the GRAT.

Changes in Estate Tax Exemptions

Prior to 2002, the estate tax exemption was the same for federal estate tax purposes as it was for Minnesota estate tax purposes. Beginning on January 1, 2002, the exemptions began to differ or "decouple" until 2009, when the difference between the federal and Minnesota exemptions reached their largest difference ever. The federal exemption this year is $3.5 million, while the Minnesota exemption is only $1 million. The result of this decoupling is that estate planning documents prepared prior to 2002 may now result in significant estate taxes being due to the State of Minnesota on the death of the first spouse. If you have not reviewed your estate planning documents with your attorney since 2002, we strongly recommend that you do so now to ensure you have considered the implications of these new estate tax laws.

If you would like assistance in assuring best practices in any of these areas, please contact your attorney at Moss & Barnett.

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2. **The seller is a relative or close friend.** In general, insider transactions are scrutinized more closely than arm's-length transactions between third parties in an open market.

3. **The seller wants to be part of the acquiring company.** Typically, the courts will look closely at a transfer of a business that takes on some new investors but leaves the old owners in substantial control of the assets.

4. **The new business will have the same name, location, customers, and managers as the old business.** In general, in connection with a change in ownership, a true change in the identity of the business will help to suppress the suspicion of a fraudulent transfer.

5. **The price is below a reasonable value under the circumstances.** A buyer should be satisfied that the deal is a reasonable one. When in doubt, the situation may warrant consultation with an expert on whether the price is reasonable.

As with any legal concept as old as that of fraudulent transfers, there are many variations, exceptions, conditions, and qualifications to the application of the general principles described in this article. Each fact situation should be analyzed on its own by someone who is aware of the details of the fraudulent transfer laws.

Basically, if a deal is too good to be true, it probably is!

Managing Resale – New Questions About an Old Issue

By Thomas R. Sheran

Tom Sheran counsels business clients on antitrust and competition-related matters. He has also taught and lectured on antitrust law and served as Chair of the Antitrust Section of the Minnesota State Bar Association. He may be reached at SheranT@moss-barnett.com or 612.877.5255.

A minimum resale price maintenance (MRPM) agreement is one in which a manufacturer and a downstream reseller (wholesaler or retailer) agree to fix the minimum price at which the manufacturer's products will be sold. For many years, all MRPM agreements were conclusively presumed to impose an "unreasonable" restraint on competition among the affected dealers. As a result, the formation of an MRPM agreement was, by itself, deemed to be a violation of Section 1 of the Sherman Antitrust Act.

In a controversial 2007 decision, *Leegin Creative Leather Products v. PSKS*, the Supreme Court of the United States directed lower courts to stop presuming that MRPM agreements are *per se* illegal and to begin evaluating them under a more lenient "rule of reason" standard. Under this new standard, courts must determine whether an MRPM agreement will actually have an adverse effect on competition and whether that effect is "unreasonable."

The Supreme Court's decision to abandon the rule that had made MRPM agreements *per se* illegal has generated a lively antitrust policy debate among enforcement officials and legislators at both the state and federal level. The scope and intensity of this debate reflects a lack of consensus regarding the actual competitive effects of MRPM agreements. Until a greater consensus is achieved, manufacturers will face continuing uncertainty about what they lawfully can do to implement a resale pricing policy.

The Old Rule: Avoid an Express Agreement

Even under prior Supreme Court precedent, a manufacturer has the right to *unilaterally* refuse to deal with (*i.e.*, terminate) a discounting dealer – and the manufacturer's exercise of that right will not, by itself, support an inference that the manufacturer and its dealers have formed an MRPM agreement. That means that a manufacturer can lawfully announce a minimum resale price, declare its intent to refuse to deal with price cutters, and then unilaterally terminate those who sell below the minimum price. To avoid entering into a forbidden MRPM agreement, however, the manufacturer must not threaten, intimidate, or warn the dealer or take any enforcement action other than unilaterally refusing to deal with a non-compliant dealer.

The New Rule: Proceed with Caution

Under the new rule-of-reason analysis, a manufacturer who communicates with a dealer about discount pricing still runs the risk of forming an MRPM agreement, but the existence of such an agreement is no longer automatically illegal. Does this mean that a company can freely discuss dealer discounts in an effort to avoid termination? Should companies that have eschewed resale pricing policies altogether now feel free to demand that their dealers enter into formal MRPM agreements? At least for now, the answer to both of these questions is "no" – because MRPM agreements are not *per se* legal. There are at least three reasons why firms should continue to approach MRPM agreements with extreme caution.

- ***Liability Exposure Under the Rule of Reason:*** It is not yet clear how the courts will apply the rule-of-reason to determine whether MRPM agreements violate the antitrust law. A "full blown"

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rule-of-reason analysis would require the identification of a relevant market and an evaluation of the competitive effects of the MRPM agreement within that market. In the *Leegin* decision, the Supreme Court suggested that, in appropriate MRPM cases, the lower courts could use evidentiary presumptions and proof burdens to produce a more workable "litigation structure" for the rule-of-reason analysis. Lower courts have been reluctant to act on this suggestion. In a 2008 ruling, however, the Federal Trade Commission signaled its willingness to consider a truncated rule-of-reason analysis under which the anticompetitive effects of an MRPM agreement can be found to be "unreasonable" without the elaborate economic proof needed to perform a full blown rule of reason analysis. There is good reason to believe that the recently appointed leadership of federal antitrust enforcement agencies (the Antitrust Division and the FTC) will urge courts, on a case-by-case basis, to apply an abbreviated rule-of-reason. Such an approach would be consistent with the Obama administration's charge to "reinvigorate antitrust enforcement."

- ***Potential Federal Override Legislation:*** Congress may enact legislation that restores *per se* illegality for MRPM agreements. In January 2009, Wisconsin Senator Herb Kohl, chairman of the Senate Judiciary Committee's subcommittee on antitrust, reintroduced the Discount Pricing Consumer Protection Act (S. 148), which would make MRPM agreements *per se* illegal again. This bill is attracting considerably more attention than had earlier versions. In February, the FTC began conducting a series of workshops to gather information about how MRPM agreements really work – which should provide grist for the legislative mill. FTC Commissioner Pamela Jones Harbour recently told Congress that abandoning *per se* illegality for MRPM agreements will not be good for consumers. In May, online retail giant eBay came out strongly in favor of Senator Kohl's bill, arguing that MRPM agreements adversely affect small and independent internet retailers. The possible enactment of S. 148 or other federal override legislation cannot be ignored.

- ***State Antitrust Laws:*** MRPM agreements may still be *per se* illegal under various state antitrust laws – which are allowed to co-exist with the federal law. Some states' laws are required to be interpreted in accordance with the prevailing interpretation of federal law. In April of this year, one of those states (Maryland) became the first to enact legislation to restore *per se* illegality for MRPM agreements. The Maryland law only affects retailers doing business in Maryland, but it includes transactions in which Maryland consumers make internet purchases from out-of-state retailers. If upheld, this feature of the Maryland law (and other potential state laws) could restore *per se* illegality for MRPM agreements between manufacturers and retailers across the country.

The Supreme Court took an important step when it held that MRPM agreements should no longer be deemed *per se* illegal. At least under federal antitrust law, judicial decisions about the legality of MRPM agreements must now be based on their actual competitive pros and cons. MRPM agreements, however, continue to be the object of suspicion and concern on the part of many judges, enforcement officials, and legislators. Their concerns may be resolved as the policy debate plays out. Until then, caution remains the key note when implementing a resale pricing policy.

If you are considering minimum resale price maintenance arrangements with wholesalers or retailers – or if you have been forced to accept such an arrangement – you should contact your attorney at Moss & Barnett to discuss the antitrust ramifications.

Marcy Frost Named Paul Van Valkenburg Service Award Recipient

Moss & Barnett established the Paul Van Valkenburg Service Award in 2001. It is awarded annually to a Moss & Barnett team member in recognition of his or her outstanding volunteer contributions to the community. The award is named after our retired partner, Paul Van Valkenburg, whose volunteer career defined the award and set an example of the spirit of service and dedication that we seek to promote and recognize throughout our firm.

Marcy Frost, a shareholder in our employment law practice group, is this year's recipient of the Paul Van Valkenburg Service Award. Marcy was given this award based on her work with a wide range of charitable organizations.

Marcy serves on the Board of Directors of Families Moving Forward, a faith-based organization working with more than 40 local religious congregations and thousands of volunteers to provide homeless families with emergency shelter. FMF also develops affordable rental housing for families and supports its former shelter families with continued advocacy and education.

In her own congregation, Temple Israel in Minneapolis, Marcy is one of the coordinators of Temple Israel's program to provide shelter to homeless families through FMF for four weeks each year. Marcy also serves on Temple Israel's Ritual Committee and as a docent, a daily worship reader, and an usher. Through her involvement in Temple Israel's Sisterhood, of which Marcy is a past president and currently serves on the Executive Board, Marcy has become involved with the Women of Reform Judaism. She serves as a District Vice President and as a member of the international Board of Directors.

Marcy is a volunteer ombudsman for the Employer Support of the Guard and Reserve, a program of the United States Department of Defense. As an ombudsman, Marcy serves as a liaison between Guard and Reserve members and their civilian employers. Through ESGR, Marcy also has served as a resource for Guard and Reserve members and their families at pre-deployment and reintegration events and has presented Patriot Awards to employers who have gone beyond the requirements of the law to support their employees who serve in the uniformed services.

Other past recipients of the Paul Van Valkenburg Service Award include Chuck Parsons, Tom Keller, Adrienne Summerfield, Kevin Busch and Cheryl Riggs. We are proud to recognize Marcy and our other award recipients for their willingness to be part of teams focused on improving the lives of others.

Marcy Frost, Paul Van Valkenburg Service Award recipient.

Various Accolades

The Best Lawyers in America®

Moss & Barnett is pleased to congratulate its attorneys who were selected by their peers for inclusion in *The Best Lawyers in America®* for 2009:

- **Michael J. Bradley** - Energy Law
- **Kevin M. Busch** - Banking Law and Structured Finance Law
- **William A. Haug** - Real Estate Law
- **Ben M. Henschel** - Family Law
- **Richard J. Johnson** - Energy Law
- **Richard J. Kelber** - Corporate Law and Mergers & Acquisitions
- **Charles A. Parsons, Jr.** - Real Estate Law
- **Susan C. Rhode** - Family Law and Family Law Mediation
- **James A. Rubenstein** - Bankruptcy and Creditor-Debtor Rights Law
- **Thomas J. Shroyer** - Professional Malpractice Law
- **Edward L Winer** - Family Law

Special congratulations to **Ed Winer**, who has been listed in all editions of *The Best Lawyers in America®* since its first publication in 1983 and to **Rick Johnson** and **Susan Rhode**, who have been listed for at least ten years. In addition, Moss & Barnett has been ranked #1 in Minneapolis and the State of Minnesota by *The Best Lawyers in America®* in the fields of Bankruptcy and Creditor-Debtor Rights Law, Energy Law, Family Law Mediation, Professional Malpractice Law, and Structured Finance Law.

Rising Stars

Moss & Barnett is also pleased to congratulate its attorneys who have been listed in *2009 Rising Stars*:

- **Jana Aune Deach** - Family Law
- **Timothy L. Gustin** - Real Estate
- **Kristin B. Heebner** - Business Litigation
- **Matthew P. Kostolnik** - Business Litigation
- **Christopher D. Stall** - Business/Corporate
- **James J. Vedder** - Family Law
- **Richelle Wahi Reiff** - Family Law
- **Terese A. West** - Business Litigation

In 1998, the publishers of *Law & Politics* and *Super Lawyers* launched *Rising Stars in Minnesota* to recognize the top up-and-coming attorneys in the state — those who are 40 years old or younger or have been practicing for ten years or less.

New Faces at Moss & Barnett

Sarah E. Doerr has joined our creditors remedies and bankruptcy practice group. Sarah received her law degree from the University of Michigan Law School in 2004 after graduating from Carleton College in Northfield, Minnesota. Sarah worked for two years after graduating from college in Washington, D.C., where she secured intellectual property rights for the United States Postal Service and commercial clients. Prior to joining Moss & Barnett, Sarah was a litigation associate at a large Minneapolis law firm.

Debra J. Hilstrom is a third-year law student at William Mitchell School of Law and is scheduled to graduate in January 2010. She will be working at Moss & Barnett as a part-time law clerk this summer and throughout the academic year. Debra is currently the State Representative for District 46B (Brooklyn Center and Brooklyn Park) and chairs the Minnesota House of Representatives Public Safety Policy and Oversight Committee. Before going to the legislature, Debra served on the Brooklyn Center Planning Commission and the Brooklyn Center City Council.

Patrick T. Zomer is working in Moss & Barnett's regulated entities and corporate and business law practice groups this summer as part of the firm's ongoing joint clerkship program with Xcel Energy Inc. Pat recently completed his first year of law school at the University of St. Thomas. He is a graduate of Middlebury College in Middlebury, Vermont, and spent three years after graduation as an associate in the Energy and Environment practice of CRA International, an economics and management consulting firm in Boston, Massachusetts. Pat will clerk with Xcel Energy Inc. during the 2009-2010 academic year as part of the joint program.

From left to right: Pat Zomer, Debra Hilstrom, Sarah Doerr.

PROFESSIONAL Excellence + Teamwork

MOSS & BARNETT CONGRATULATES ITS LAWYERS LISTED IN *2009 RISING STARS*

Jana Aune Deach • Timothy L. Gustin • Kristin B. Heebner • Matthew P. Kostolinik • Christopher D. Stall • James J. Vedder • Richelle Wahi Reiff • Terese A. West

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