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THE LEGAL PAD

Practice of Excellence

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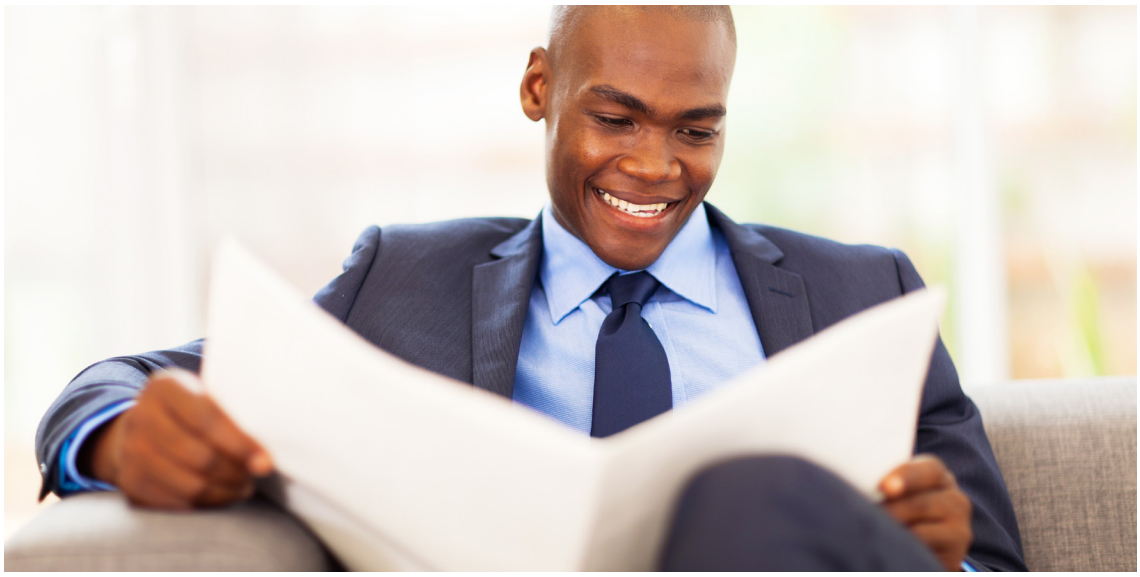
A Newsletter of Current Business and Legal Matters

In This Issue:

You've Planned For Your Business; Don't Forget About Yourself

By James A. "Jim" Beck



When you started your business, you were smart enough to create a business plan. You hired a lawyer to draft bylaws and make sure your company was correctly established. You executed agreements with your business partners clearly setting out the rights and obligations of each, and planning for various issues that may arise during the life of the business. You met with your CPA and your banker to work out any financial and tax considerations. Planning for your business is important, but planning for yourself and your family may be even more important.

Planning for the inevitabilities of life, preparing for retirement, distributing funds and assets to children, and taking care of loved ones can require the assistance of various professionals. There are numerous tools by which your lawyer can help you protect your assets, plan for disability, illness or death, and pass on assets to your children during and after your life.

Ideally, your business planning would be a part of a comprehensive legal planning process, including your estate plan and asset protection strategies. As a result, it is advisable to discuss with an attorney how some of the business planning issues will affect or could be enhanced by your personal planning efforts and strategies.

When planning for your business or more generally for yourself and your family, it is necessary to clearly define realistic goals and objectives. Your attorney should take the time to understand your goals so that he or she can suggest the appropriate course of action.

It would not be wise to go into business without first having a plan and without legal counsel. If your business deserves that attention and preparation, it follows that you and your family deserve the same. If you would like to discuss ways to protect assets, prepare for life's inevitabilities, and pass on your legacy, please contact us.

Grooming Your Business for Sale
How to Maximize Value of Your Business

By James R. Vann

Selling a business takes planning and a thorough process to maximize value. We all have seen companies sell for their perceived value. Sometimes the value seems high while other times it appears to be lower than what would be expected. Preparing your business for sale takes time and planning. How do sellers create value in their business as they prepare to sale? Here are a few tips to consider:

Prepare Early
Preparing to sell your business usually requires preparation and planning. A friend and client wanted to sale their closely held family business due to the age of the owner, a declining market in the industry and no real family succession possibility. The business was located in a small town with close proximity to the bigger cities in North Carolina. The business had a loyal customer base, strong sales and energetic ownership. However, the owner knew the timing was right to position the company for a sale. The owner went through an internal process of valuation and met with their public accountant and attorney to determine the value and what cleanup was necessary in the financials and the corporate books. The moral of this portion of the story is that the owner started preparing the business for sale before they put the business on the market. This also included having the owner mentally ready to sell.

Financial Stability
Insuring that the company had financial stability and strength is key to building value in the business. Buyers will certainly look for it. Do you have financial controls set up in the business? Are the financials reviewed by a CPA? Are the books kept in the ordinary course following sound accounting principles? Many times closely held corporations have line items in the business financials that need to be cleaned up prior to putting the business on the market. This may take a year or two depending upon how significant the items are.

Valuations in Your Industry
valuation of a business generally is the one area where most people struggle. There are hundreds of formulas to determine the value of a business. Knowing your industry and how other companies are valued in the industry is key. If your industry is accustomed to valuation which follows a general formula, it is wise to consider those formulas and how those impact your business.

Marketing the Business
Knowing what information buyers will want to see and when takes experience and patience. You may need to put together a sales packet which might include an executive summary on the business, sales history, financial overview, management structure, inventory and assets and other important components. Also, you may know of or have a good idea of who may be interested in buying your business. In the example mentioned above, the Owner had been surveying potential buyers in their area for several years. Once the Owner had cleaned up the financials the Owner and the potential Buyer were ready for discussions.

Owning, running and preparing to buy or sell a business are exciting! What a joy it is to operate a business, provide employment for employees and build value. In preparing to sell, just like in operating the business, it takes planning and planning ahead of time.
If you have any questions or need further assistance, please feel free to contact me.

The Uncertain Future of Spousal Guarantees under the Equal Credit Opportunity Act

By Joseph A. "Joe" Davies

As observant readers will remember, we have previously discussed (twice) spousal guarantees under the Equal Credit Opportunity Act ("ECOA") on our blog. Most recently, in March of 2015, we noted that the United States Supreme Court had agreed to finally determine whether the ECOA applied to personal guarantees by spouses with no affiliation with the credit applicant's business. On March 22, 2016, the Supreme Court issued its decision. Unfortunately for those of us waiting for a determinative answer, it was the first case to split the justices 4-4 since Justice Scalia's death and absence from the Court. This means that the only decision from the Supreme Court was a one-sentence order stating that the Eighth Circuit's "judgment is affirmed by an equally divided Court." Before discussing exactly what that means, a brief background on the issue itself.

ECOA is a federal law that prohibits lenders from discriminating against borrowers based on their race, religion, national origin, sex, or marital status. The federal agencies tasked with interpreting the statute previously determined that the term "applicant" applied equally to guarantors. That meant that creditors were prohibited from requiring spousal guarantees unless (1) the spouse was involved in the business; (2) the credit was to be secured with property that is held in both spouses' names; or (3) where the creditor is relying on a particular piece of property to establish creditworthiness that is held in both spouses' names. In other situations, a creditor could request, but not require, a spousal guarantee. Under North Carolina case law, violating this provision could open a creditor up to civil damages and penalties, and the guarantee itself would be unenforceable.

Federal courts, however, have come to different conclusions over whether the ECOA even applies to guarantors. The Sixth Circuit Court of Appeals concluded that the agencies' interpretation that it did was valid, while the Eighth Circuit Court of Appeals determined that the ECOA applies on to applicants for credit and that a guarantor, by definition, was not an applicant. It is under those circumstances that the Supreme Court originally agreed to hear the case. So, where does the Supreme Court's decision leave things? Well, when the Court is equally divided, the underlying decision is affirmed, but there is no national precedent set, as there would be if there were an actual decision one way or the other. Essentially, this means we are in the same position we were before – with the question of whether the ECOA applies at all to guarantors being settled one way in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee), a different way in the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), and any number of other ways in the remaining states. There is always the possibility that the Supreme Court will take this matter up again once a new member joins the Court, but until then the uncertainty will reign.

If you have any questions about the ECOA or spousal guarantees, please contact us.

What is Your Post Judgment Collection Strategy? What Options Do You Have?

By James R. Vann

Obtaining a judgment is the beginning step in collecting a debt. After the Court grants the judgment, it is normally the next steps taken by the creditor that might produce results in collecting the judgment. Doing nothing almost always guarantees nothing will happen in terms of collecting on the judgment. Before finishing law school, I truly thought once the Court determined a party won, the losing party wrote a check for the amount due. That is not how it works!

The creditor will need to petition the Clerk to issue a Writ of Execution. A Writ of Execution is a Court Order directing the Sheriff of a particular county to look for assets to satisfy the judgment. Thereafter, success of collecting on the judgment depends on the strategy and whether the debtor has assets available.

Each state has its own rules and processes for judgment recovery. These rules apply for state and federal judgments. There are several tools provided for by North Carolina law to assist creditors in their post-judgment collection efforts. These methods can be used to identify assets and even expose additional individuals and entities that can be held liable for the debt. Knowing the options available creates a solid understanding and application of the creditor-friendly statutes and how they can be used for your benefit.

North Carolina law provides for various "supplemental proceedings" to help creditors discover assets, including supplemental examinations, interrogatories, and document production of the debtor's books and records. These tools are beneficial in learning what the debtor owns, where assets are kept, where income is coming in and who owes money to the debtor. Some great advantages the law provides is it allows the creditor to question the debtor about property the debtor owns, it can provide for a court order to forbid the debtor from disposing of any assets outside of the ordinary course of business and require debtors of the judgment debtor to satisfy the debt.

Supplemental examinations and written interrogatories are similar in that various questions are asked to the debtor to explore his financial situation, identify assets, and to find out whether any assets have been sold or transferred. The benefit of the supplemental examination is that the creditor can ask follow up questions and create a dialogue with the debtor. A supplemental examination should be used in conjunction with a document production, so that the creditor can view the debtor's records and ask questions as necessary.

If a creditor learns that the debtor is owed money by another individual or business, the creditor can obtain an order requiring that individual or business to appear in court and testify about what they owe to the debtor. Then, the court can order that the funds or property must be used to pay the judgment creditor.

This is a summary of the post-judgment remedies available to creditors in North Carolina. Please feel free to give us a call if you would like to discuss the application of these remedies to your benefit.

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