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WINTER 2015



PRIORITY

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Miller Johnson Proud to Participate in Grand Bargain



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A major component of the well-documented global settlement in the City of Detroit Chapter 9 proceeding has come to be known as the “Grand Bargain.” The Grand Bargain was a mediated settlement of a number of outstanding core matters in the Chapter 9 proceeding and is comprised of the Detroit Institute of Arts (DIA) Settlement, the pension and retirement settlement, and the State of Michigan Contribution Agreement.

A key to Detroit’s successful exit from bankruptcy required parties to come together in an agreement that was acceptable to all. This included several large unsecured creditors, bondholders and insurers deeply interested in enforcing their rights under applicable law. Reaching a resolution would require a plan that balanced the competing interests of:

- providing a viable plan for the future of the City of Detroit
- maximizing the value of the City’s assets in satisfaction of creditor claims
- preserving pensions at a livable level for the City’s retirees
- preserving the City’s art museum as a prized community treasure

Initially, despite painful negotiations, there simply did not appear to be a path to satisfying the needs of all the necessary constituents.

The Grand Bargain is one of the great and most unusual philanthropic gestures of our time. It was coordinated through Miller Johnson client, the Community

Grand Bargain, *continued*

Foundation for Southeast Michigan (CFSEM), along with the State of Michigan, the DIA and several large charitable foundations, including, but not limited to, the Ford Foundation, W.K. Kellogg Foundation, Kresge Foundation, and John S. and James L. Knight Foundation. In the words of Darren Walker, president of the Ford Foundation, “Philanthropy will not be in the business of bailing out cities, but the work of philanthropy is to problem solve, and this is an example of how when we push ourselves we can find solutions that philanthropy is uniquely suited to provide.”

The participating foundations agreed to make grant commitments totaling nearly \$366 million over 20 years. In the end, a total of \$816 million was secured with the addition of the commitments of the DIA of \$100 million and the State of Michigan of \$350 million.

The foundation funders and the DIA’s commitments will be paid to and administered by a newly formed supporting organization of CFSEM, the Foundation for Detroit’s Future. As part of the negotiated settlement, the Foundation for Detroit’s Future will annually collect

the payments from these sources, monitor the City of Detroit’s compliance with ongoing grant conditions, and release funds to the City for the pension funds over the next 20 years. With the closing on December 10, the City of Detroit art museum and collection has been transferred to the DIA to be held in a perpetual charitable trust for the benefit of the citizens of Detroit, Michigan and the tri-county region ensuring it remains a cultural and educational asset forever.

Miller Johnson was proud to have Firm members Wendy Parr Holtvluwer and Robert D. Brower engaged by the Community Foundation for Southeast Michigan in connection with the structure, formation and tax-exempt qualification for the Foundation for Detroit’s Future and to work to ensure organizational documents met the participating foundations’ requirements. Managing Member Craig Mutch noted, “Miller Johnson has always taken seriously our commitment to the communities in which we live and work. It is exciting to have had the opportunity for the firm to participate in a meaningful way in this process that was so critical to the future of Detroit and our State.”



Upcoming Workshops

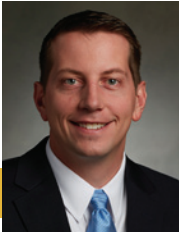
Negotiating Commercial Leases

**February 3 in Grand Rapids
February 4 in Kalamazoo**

Construction Liens

**March 3 in Grand Rapids
March 5 in Kalamazoo**

For more details about these or for our complete schedule, you may visit our website at www.millerjohnson.com or contact Amy McCaffrey at 616.831.1886 or mccaffreya@millerjohnson.com.



Keeping the Family in Family Owned Business

By: *Dustin J. Daniels; danielsd@millerjohnson.com; 616.831.1737*

Family owned businesses are a key driving force in the United States' economy contributing more than 50 percent of the gross domestic product. It's easy to name some of the prominent family owned businesses founded in West Michigan. These businesses provide founding families with opportunities for gainful employment, leadership opportunities, and a sense of pride and freedom. They—and hundreds more—impact us daily. Studies such as the one conducted in 2014 by GVSU Seidman College of Business' Family Owned Business Institute reveal the qualities of family owned businesses, such as they are less inclined to lay off employees and more likely to have structured philanthropic initiatives.

Despite their worth to the families and value to the communities, surveys show a number of family owned businesses do not have a business succession plan to ensure the success of the business for future generations. The transition of those businesses are often dictated by external, intervening events, such as the death or disability of a controlling shareholder, family disputes or divorces, and other distributive events.

To maintain the viability of the family owned business and avoid the pitfalls of a reactive transition approach, we offer some considerations for a business succession plan.

Corporate Governance

Many times the succession goal for a family owned business is simple: to transfer control from the current family shareholders to the next generation. Often this involves the transfer from one or two family members to a larger and more fragmented group of family members — which can complicate the company decision making process. In some circumstances, the younger generation may not be prepared or equipped to assume such responsibility.

The formation of a formal board of directors or advisory board may be a useful vehicle to successfully manage the family business during the transition to the younger generation. The board can be comprised solely of family members, outside directors and advisors, or a mix of both. It should be tailored to the specific purpose for which it is formed. For example, if the board is intended to facilitate a family decision making process, it may be comprised of only family members or include a minority number of independent advisors.

In determining the proper board structure, the following questions should be considered:

- What is the purpose and function of the board?
- What authority will the board possess? What company matters will be required to be approved by the board?
- Who has the right to appoint and remove board members?
- Is there a clear mechanism to resolve deadlocks or disputes?
- How often will the board meet?
- Is the board appropriately compensated and protected from liability risk?

The company's organizational documents and other legal agreements will need to be prepared to implement and support the board structure as intended.

Management

The chief executive of a family owned business is typically the founder or subsequent family member that has grown up in the business. Key to any business succession plan is identifying the next chief executive. The overwhelming preference is for the next chief

Family Owned Business, *continued*

executive to be selected from the younger family generation. However, there are cases where no one in the family is willing or equipped to be the next chief executive.

In this case, rather than pushing a family member to assume the role of chief executive and negatively affecting the family, the business and its employees, the family shareholders should choose to seek a candidate outside the family. Close attention should be made to screen and select the right candidate. Key considerations for empowering the outside chief executive are ensuring he or she has sufficient authority to obtain the desired results, establishing long term incentives to align the chief executive's interest with the family business and agreeing to appropriate protections for both the chief executive and the family business (i.e., employment agreement, non-compete, etc.).

Ownership

A business succession plan often includes a buyout or transfer of ownership interest in the business to the next generation. Otherwise, it may be difficult to transfer control and management if the current generation continues to retain a majority of the equity risk/benefit.

There are a number of interconnected factors that need to be addressed in the transfer of ownership interests in the family business, such as estate planning, tax, corporate governance and funding considerations. For example, if the exiting family shareholders already have sufficient wealth and elect to gift ownership interests to the next generation, they will need to determine the best vehicle to effectuate such gifts and the estate planning implications. Alternatively, if the ownership interests are to be purchased by the next generation, the family members will need to determine the best structure to effectuate such buyout (driven heavily by tax and funding considerations). The buyout is typically funded by the business' cash flows or debt secured by the business assets (which adds an element of risk to the viability of the business).

The transfer of a majority of the ownership interests to the younger generation may also affect any corporate governance and/or management structures that have been established, such as a formal or advisory board. In short, a succession plan involving ownership transfers has a multitude of considerations and moving parts that all must be crafted to work together appropriately.

Sale of the Business

For some family owned businesses, the best succession plan may be to sell to a third party. This is true in circumstances in which the younger generation lacks the requisite leadership capabilities and the family owners are unable to implement a corporate structure that allows for an effective decision making process. In these circumstances, selling the business and securing the sale proceeds for the family's benefit is often better than eroding business value due to ineffective leadership. Selling a business is a complicated process that is best maneuvered with a team of financial, tax and legal experts experienced in these types of transactions.

Conclusion

Family owned businesses are not only important to the families that own them but also play a vital role in their communities. The goal should be to proactively develop a succession plan rather than allowing the business transition to be dictated by external, intervening events or circumstances. Developing and implementing a succession plan is an important undertaking that, at the same time, can also be an emotional one. Many times, the ultimate effectiveness of the succession plan relies on open and honest communications and having trusted professionals experienced in structuring and implementing these succession plans.

Miller Johnson attorneys have experience working with family owned businesses and their succession plans. You can contact the author with any questions or one of our family owned business attorneys to assist with your planning needs.



Welcome New Miller Johnson Attorneys



Dustin Daniels has joined the firm's business section as a member. He will continue his practice in mergers and acquisitions, corporate finance, commercial contracting, and corporate counseling. Dustin has significant experience in negotiating, documenting and executing private merger and acquisition transactions. He graduated from Michigan State University College of Law, *summa cum laude*, in 2010 and earned his B.S. from Michigan Technological University. Dustin was a corporate attorney with a large national law firm before joining us.



Ryan Duffy is continuing his litigation practice and is a part of the firm's health care reimbursement group and litigation section. He has three years of experience working in the area of insurance law including coverage, claims and litigation. Ryan earned his bachelor's degree from the United States Naval Academy and served for 9 years in the Navy as a pilot and flight instructor. He earned his J.D. from Thomas M. Cooley Law School in 2011. He was in private practice with another firm before joining Miller Johnson.



Tim Gutwald came to Miller Johnson from a national law firm with a focus on health care clients. He joins our health care reimbursement group, health care providers group, and employment litigation practice. He is a member of the American Health Lawyers Association and Healthcare Financial Management Association. Tim was named a "Rising Star" by Michigan Super Lawyers. He graduated from Michigan State University College of Law, *magna cum laude*, in 2006 and earned his B.A. from Kalamazoo College.



Matthew O'Rourke joined the Grand Rapids office as an associate. He is beginning his practice and is a part of the firm's litigation section and employment and labor section. He received his J.D., *magna cum laude*, from the University of Notre Dame Law School in 2014 and his B.A. also from the University of Notre Dame. He is licensed to practice in Michigan.

Dealing With a Troubled Customer Relationship? Get Adequate Assurance of Future Performance



By: Robert D. Wolford; wolfordr@millerjohnson.com; 616.831.1726

Extended credit terms have become a more commonplace means of obtaining a competitive advantage in the marketplace. Although you may need to agree to these extended terms in order to get the business, this can often be a scary proposition. In these situations, the circumstances can arise where, although the customer is still paying within terms (and therefore is not in breach of its obligations), all external signs

indicate that it is going to have trouble satisfying even its short-term obligations as time goes on.

What can be done when a customer is paying timely, but you are seeing concerning signs, such as abnormal or inconsistent payment experiences, consistent downgrades in its credit rating, or rumors of bankruptcy or financial struggles? Are you stuck providing this

Continued on next page.



Best Law Firms

U.S. News Media Group and Best Lawyers released the 2015 “Best Law Firms” rankings in November. Miller Johnson received tier 1 rankings for 26 practice areas in the Grand Rapids Metro Area and 8 in Kalamazoo.

Miller Johnson achieved a tier 1 ranking for the first time in the practice areas of Closely Held Companies and Family Business Law as well as Family Law Mediation in the Grand Rapids Metro area and for Litigation – Labor and Employment in Kalamazoo. Miller Johnson is the only firm to be ranked tier 1 in Grand Rapids for Closely Held Companies and Family Business Law and the only firm in the state to be ranked tier 1 for Family Law Mediation.

For the past five consecutive years, *U.S. News & World Report* Best Law Firm rankings listed the firm with the highest ranking in these practice areas: arbitration; banking and finance; bankruptcy and creditor debtor rights/insolvency and reorganization; commercial litigation; construction; education law; employee benefits/ERISA; employment law- management; family law; labor law- management; litigation for bankruptcy, labor and employment, and trusts and estates; mergers & acquisitions; real estate; tax law; and trusts and estates.

Forty-nine Miller Johnson attorneys were recognized as Best Lawyers in America. In addition, Best Lawyers named five Miller Johnson attorneys as “Lawyers of the Year.”

Troubled Customer Relationship, *continued*

customer extended credit terms until it breaches its agreement by filing bankruptcy, potentially leaving you holding the bag on a substantial receivable that could cripple your business? Not necessarily. In situations where there are reasonable grounds for insecurity concerning a customer's ability to timely satisfy its payment obligations, the Uniform Commercial Code (UCC) can often provide a seller of goods some relief.

Section 2-609 of the UCC, which applies to all sales of goods, provides that "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party (to a contract for sale of goods) the other may in writing demand adequate assurance of due performance." One form of adequate assurance of future performance is a letter of credit or other security that ensures prompt payment; other types of assurance may also be used, depending on the situation. If it's commercially reasonable, you, the seller, may also suspend performance or demand cash-on-delivery or cash-in-advance payment terms while awaiting that

adequate assurance. Most often, the ability to shift to cash-on-delivery or cash-in-advance payment terms can provide immediate risk relief. However, if the other party does not provide adequate assurance within a reasonable time, the contracts can be considered repudiated.

This is a very strong and useful tool for creditors. The time and expense of demanding adequate assurance often pays for itself. Proactive suppliers can significantly reduce or eliminate their exposure in many cases. However, because of the UCC's general requirement that all actions (even adequate assurance demands) be commercially reasonable, you should always consult with an attorney prior to taking any action.

If you have concerns about a customer's ability to pay, or would like further information regarding making an adequate assurance demand, please contact the author or your Miller Johnson business attorney.

Best Wishes to Retiring Attorneys

It's sad to think of Miller Johnson's business section without Ron Roden and Tom Sarb. We wish them the best going forward to enjoy all the future has to offer them in retirement. Bob Wolford, section chair, says "We appreciate the contributions they have made through their successful practice, leadership, mentoring and strong personal friendships."

Ron Roden has been with Miller Johnson 35 years and received his J.D. from the University of Illinois. He had a well-established track record of consistently successful results for his corporate clients in M&A transactions as well as corporate finance. Among the honors Ron's received was being named as *Best Lawyers* Grand Rapids Banking and Finance Law Lawyer of the Year.

In retirement, he is looking forward to spending time and traveling with his wife and soul mate Deb, enjoying family time with his daughters and son, volunteering at his church and other community organizations, fishing at his Up North cottage and when in Southwest Florida, and lots of reading for enjoyment and information (instead of business contracts).

Tom Sarb has been with Miller Johnson 36 years and received his J.D. from the University of Michigan Law School. He was involved in many of the significant bankruptcy proceedings brought before the United States Bankruptcy Court for the Western District of Michigan. He was also instrumental in starting the Grand Rapids Chapter of the Turnaround Management Association. Among the honors Tom's received was being named *Best Lawyers* Grand Rapids Litigation – Bankruptcy Lawyer of the Year. In retirement, he is looking forward to spending more time with his wife Ruth Ann, traveling, and devoting more time to volunteer and charitable board work.

Buying Real Estate From a Foreigner? FIRPTA Imposes a Withholding



By: Raj A. Malviya; malviyar@millerjohnson.com; 616.831.1799, Robert D. Wolford; wolfordr@millerjohnson.com; 616.831.1726 and Eric R. Starck; starcke@millerjohnson.com; 616.831.1767

After years of charting a choppy recovery, the U.S. real estate market—both residential and commercial—has improved with impressive speed, with many markets recovering to their pre-bubble norms. While the markets are attractive to domestic buyers, they have equally appealed to foreign buyers over the years. Moreover, we are seeing foreign buyers who have held on to real estate holdings through the market crash now beginning to unload their investments. With all of this activity in the real estate market, along with increased business deals involving real estate, many domestic buyers need to be aware of an overlooked tax regime known as “FIRPTA” and consider its potential application. Failing to do so may result in unanticipated and problematic tax consequences.

What is FIRPTA?

The sale of a U.S. real property interest by a foreign person is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA was signed into law to address the potential risk of income tax not being collected when the foreign person sells or disposes of U.S. real property and returns to his/her home country without paying the tax liability. In general, FIRPTA requires 10 percent of the total amount realized from the sale (generally the sales price) to be remitted to the IRS to satisfy the foreign seller’s income tax liability. In other words, FIRPTA imposes a withholding mechanism to ensure that the government gets its tax.

Who is a Foreign Person?

A foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust or foreign estate.

What is a Disposition?

A disposition is not just limited to a sale. The definition under FIRPTA is quite broad and includes “any transfer that would constitute a disposition by the transferor for any purpose of the Internal Revenue Code and regulations thereunder”. Consequently, this definition could include transfers involving a like-kind exchange gift; corporate liquidation, redemption or reorganization; certain changes in a partnership, trust, or estate interest; foreclosure, inventory conversion, and similar transfers.

What is a Real Property Interest?

A U.S. real property interest is any direct interest, other than solely as a creditor, in real property (i.e., land, buildings, mines, wells, crops, or timber) located in the U.S. and an interest in any domestic corporation that constitutes a U.S. real property holding corporation (USRPHC). Subject to certain limitations and exceptions, a USRPHC is a corporation where the U.S. real property interest makes up at least 50 percent of the total value of its real property interests and business assets. In certain circumstances, an interest in an entity taxed as a partnership may also be considered to be a U.S. real property interest to the extent the partnership owns a U.S. real property interest.

What is the Withholding Requirement?

FIRPTA imposes a withholding mechanism to ensure that the government collects income tax due from the disposition of the U.S. real property interest. Any one U.S. person who purchases U.S. real property interests from a foreign person is required to withhold 10 percent of the amount realized on the disposition (there are special rules that apply for foreign corporations) and remit it to the IRS within 20 days of the closing. This withholding event is in lieu of paying the full amount to the foreign seller. Certain IRS forms are used for purposes of reporting and remitting the tax.

FIRPTA Withholding, *continued*

The 10 percent withholding applies to the amount realized from the sale, regardless of the foreign seller's gain, and is effectively an advance payment against the actual U.S. income tax liability of the foreign seller attributed from the transaction. If the amount withheld is greater than the foreign seller's actual tax liability, then the foreign seller can claim a refund when filing the applicable U.S. income tax return.

Who is Required To Withhold?

In general, the FIRPTA withholding requirement falls on the buyer; however, it can also fall on the buyer's agent. The tax rules say that a buyer's agent is any person who represents the buyer in any negotiation with the foreign seller or foreign seller's agent or in settling the transaction. This is a very broad definition and can include professionals such as a real estate agent, broker, title company, settlement office, fiduciary, or similar real estate professional or entity involved.

What Are the Consequences For Failing To Withhold?

If the buyer, as the withholding agent, fails to withhold and file the necessary forms, the buyer may be held liable for the income tax due. Additionally, the buyer may be subject to penalties and interest, with an open statute of limitations on IRS assessment.

Are There Any Exemptions to Withholding Requirements?

Yes. There are many situations that will eliminate the withholding requirement. However, the IRS must be given notice of the applicable exemption in many of these instances, typically through an IRS prescribed form. The more common exemptions seen in practice can be summarized as follows:

- The foreign seller gives the buyer a certification stating, under penalties of perjury, that the foreign seller is not a foreign person.
- The foreign seller or buyer obtains a withholding certificate from the IRS in advance of the closing stating that the foreign seller is entitled to a reduced or zero withholding amount, or has provided adequate security or made other arrangements for the payment of tax with the IRS.
- The buyer acquires the property for use as a residence (must be for at least half the number of days that the property is to be used during each of the first two 12-month periods following the sale) and the amount realized doesn't exceed \$300,000 USD.
- With certain exceptions, the property interest sold or transferred consists of shares of a USRPHC that are regularly traded on an established stock exchange.
- With certain exceptions, the property interest sold or transferred consists of publicly traded partnerships or trusts.
- A foreign seller that is a foreign corporation elects to be treated as a domestic corporation for tax purposes.

FIRPTA encompasses a complicated and penetrating set of rules that can be easily overlooked when purchasing a U.S. real property interest from a foreign seller. This regime is also injected into many business transactions since it is common for companies to have real estate holdings or interests in real property.

Without a doubt, FIRPTA should be carefully considered well in advance of a planned transaction in order to determine its application, the effects of the withholding and whether any exemptions to withholding apply. Taking a proactive approach will not only eliminate surprises and problematic tax consequences, but may also allow for tax planning for both parties to help improve the terms of the deal.

If you have any questions about FIRPTA or this article in general, please contact any one of the authors. Miller Johnson has experienced real estate, business and tax attorneys who can assist with these transactions.

In the News

Jeff Ammon is teaching the Business Planning course at WMU Cooley Law School during the January – April term. He will be teaching the “Contracts 101” course via webinar for Construction Financial Management Association (CFMA) on January 8 and 15 as well as the construction contracts course at CFMA’s 2015 Annual Conference & Exhibition in Chicago in late June. Jeff will also be teaching a two-part webinar for the Michigan Chamber of Commerce titled “Personal Property Tax: The New PPT Rules” on January 14 and February 11.

Mary Bauman was quoted in the article “Carrot vs. Stick: Could companies end up in court over wellness program penalties?” in the December 8 issue of *MiBiz*.

Annalise Buth recently became a member of two boards. She is on the board for the Restorative Justice Coalition of West Michigan and will serve as the secretary. In addition, she is now a board member for the Wedgwood Christian Services Next Gen Council.

Chris Edgar recently joined the Board of Directors for Opera Grand Rapids and the Board of Directors for Porter Hills Foundation.

Dave Gass moderated the judge’s panel at the Federal Bench Bar conference on Mackinac Island on September 27.

Dick Hillary presented “General Right of Direct Action” during the Service Provider Clinic at the Michigan Association for Justice (MAJ) 11th Annual No-Fault Institute on Sept. 29 in Southfield.

Rachel Hillegonds recently joined the board for the Turnaround Management Association (TMA) Detroit/Grand Rapids Chapter. She will also chair the local TMA NextGen group for young professionals.

Wendy Holtvluwer was appointed to the Board of Directors of the Western Michigan Estate Planning Council.

Craig Lubben was appointed as chair-elect by the Calvin College Board of Trustees on October 25.

Jon March presented “My Ten Biggest Mistakes as a Mediator” at the Federal Bench Bar conference on Mackinac Island September 26. He also wrote the article “My Ten Biggest Mistakes as a Mediator and What I Learned from Them” which will appear in the *ADR Quarterly* of the State Bar of Michigan. Jon also taught a class titled “Drama and the Courtroom” on November 24 and December 1 at the Osher Lifelong Learning Institute (OLLI) at Aquinas College.

Neil Marchand was featured in the article “Marchand family generosity will benefit Congress Elementary” in *Legal News* November 28 issue.

Laurie Murphy recently joined the Board of Directors for Pine Rest Foundation.

Dan Olson was appointed to the bylaws committee for Safari Club International.

Cindy Ortega was recently elected as Vice President of Housing Resources Inc. She was also elected to the Kalamazoo Symphony Orchestra Board of Directors in 2014. In addition, she was appointed to serve on the Gary Sisters Foundation Board of Directors.

John Piggins will be a presenter on “Bankruptcy Exemption Planning” at the Federal Bar Association seminar for the Debtor’s Bar of West Michigan on January 19. He was also appointed to a two-year term as President of the Board of Trustees for the Community Church of Douglas.

Andy Portinga was elected as President of the Federal Bar Association, Western District of Michigan at their fall conference.

Julie Sullivan was admitted as a Fellow in the prestigious American Academy of Matrimonial Lawyers (AAML).

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Any of the lawyers listed can also put you in contact with Miller Johnson attorneys who practice in the areas of Banking, Construction, Economic Development, Health Care, Health Professionals, Immigration, Manufacturing and Small Business.



Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.



U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2015 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.